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WHAT IS CULTURAL EXPERTISE?

Livia Holden

LEARNING OBJECTIVES

After reading this chapter, you will understand cultural expertise as an umbrella concept and will have learned about the fields in which cultural expertise plays a role. You will also understand how cultural expertise relates to but is also distinct from cultural defence and culturally oriented crimes; the ethical principles that should inform cultural expertise; how the positionality of experts impacts the provision of cultural expertise; and the conditions for the engagement of social scientists with cultural expertise.

Theory and Concepts

The concept of cultural expertise, from which its current formulation comes, dates back to 2009 and responds to the need to acknowledge and scrutinise the contribution of socio-anthro-legal scientists, experts in laws and cultures, to the resolution of disputes and the ascertainment of rights. This chapter positions the concept of cultural expertise vis-à-vis cultural defence and culturally oriented crimes, identifies the danger of bias in cultural expertise, offers ways to minimise this, and proposes three cases that highlight the conditions for the ethical engagement of anthropologists as experts.

CULTURAL EXPERTISE DEFINITION

Cultural expertise is the special knowledge deployed by the experts of laws and cultures for assisting decision-making authorities in the assessment of evidence with information on the socio-legal backgrounds of facts and persons involved. Cultural experts must be independent and afford a position of critical affirmation which translates into the possibility to counter the position of the institutions and to affirm the priority of the voice of the beneficiaries of cultural expertise.

The Genesis of Cultural Expertise

Cultural expertise offers a theoretical framework for all types of engagement of social scientists with law in court and out of court for the resolution of disputes and the ascertainment of rights. Cultural expertise inspires theoretically from the trends of multiculturalism and interculturalism because of the assumption that cultural diversity is a positive feature of human societies (see Grillo, Chapter 7 in this volume) but has been significantly informed by new legal pluralism, critical studies, gender studies, and the decolonial approach for what concerns the engagement against discrimination and structural inequalities (see Srinivasan, Chapter 3 in this volume).

Culturally Oriented Crimes and Cultural Defence

Cultural expertise offers a comprehensive theoretical framework which includes also the concepts of culturally oriented crime and cultural defence, but is supported by a strengthened ethical framework to overcome the limitations of the early multiculturalism.

Strijbosch (1991) pointed out the potential conflict between the principles of the majority groups and the principles of minority groups. Van Broek (2001) defined culturally motivated crime as an act by a member of a minority group or culture, which is considered an offence by the legal system of the dominant culture. That same act is, nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.

Cultural defence has been developed alongside the concept of culturally oriented crime but in the broader context of First Nations and minorities' claims in America, whose laws and courts have made room for cultural evidence since the 19th century (Holden 2019a; Rodriguez 2021; see also Álvarez San Martín, Chapter 26 in this volume). In the late 1990s, cultural defence developed theoretically in connection with the concept of culturally oriented crime and has made itself known especially in adversarial jurisdictions.

CULTURAL DEFENCE

Initially, cultural defence was conceived as the use of cultural arguments for the purpose of mitigation of sentences in criminal cases that would necessitate cultural considerations (Renteln 2004) but it was afterwards reformulated as information provided to the courts on the cultural background of people and facts in criminal law (Foblets and Renteln 2009). Cultural defence is therefore interpreted here as a specific form of cultural expertise which applies primarily to criminal law but, by extension, can be used also in other fields of law, mainly in adversarial jurisdictions.

The Ethics of Cultural Expertise

Whilst cultural expertise, as a conceptual framework for all those tools and methods that value cultural diversity, has the potential to pursue substantial equality and systematic inclusivity, it is also fraught with potential biases and risks, which can be minimised by critical approaches and a sound ethical positioning (see Cole, Chapter 2 in this volume).

Among the most relevant risks that all experts should assess are the reification of cultures, the disregard of power relationships both within minority groups and among diverse social groups, and the risk of stigmatisation of minority groups. The reification of cultures is the risk of attributing simplistic cultural components to all members of a certain social group without considering variations over time and space, and other variables such as class, gender, and sexuality. The disregard of power relationships both within a certain social group and among diverse social groups concerns the variation of cultural references and interpretations which depend on the authority and social acknowledgement that specific groups have within a certain society. The risk of stigmatising minority groups in a process of cultural determinism occurs if the expertise connects certain behaviors with certain social groups.

ETHICAL MATTERS

Paramount ethics for social scientists are the “do no harm” principle and engagement in support of vulnerable groups, minorities, and First Nations/Indigenous Peoples/Aborigines as a service to the communities. The following non-exhaustive list of approaches, developed by feminist studies, engaged anthropology and the anthropology of human rights, help cultural experts to deploy cultural expertise responsibly: strategic essentialism, problem-solving, social watchdog activity, and decoloniality. However, all these approaches should be complementary to the “do no harm” principle. Additionally, procedural neutrality in combination with critical affirmation is proposed as the specific positioning of cultural experts in court to ensure their independence.

Strategic essentialism has been formulated as a political strategy that allows simplistic descriptions of social groups for the sake of achieving political goals of equality and resisting oppression (Spivak 2003).

Anthropologists have increasingly engaged in social problem solving, and anthropology associations have endorsed the engagement of anthropologists as social watchdogs to identify and denounce inequalities (Goodale 2009; Sillitoe 2015).

Decoloniality as an encompassing and intersectoral approach is a reference for cultural experts to fight against the explicit and implicit privileges that have affected social institutions including universities and the production of knowledge, and make space to the voices of the beneficiaries of cultural expertise (see Srinivasan, Chapter 3 in this volume). In the contexts of Indigenous rights, cultural expertise has been considered as a prerogative of Indigenous people and separated from anthropological expertise (see Trigger, Chapter 21 in this volume). The stress on the primacy of the voices of the beneficiaries of cultural expertise is proposed here as integral part of the theoretical framework of cultural expertise, to re-affirm and extend the priority of the perspectives and roles of those for whom cultural expertise is provided in all types of use of cultural knowledge for dispute resolution and the ascertainment of rights (see also Higgings, Chapter 18; Bishay, Chapter 16; Dominic, Chapter 27; Haddad, Chapter 28; and Nurlaelawati and Witriani, Chapter 29 in this volume).

PROCEDURAL NEUTRALITY AND CRITICAL AFFIRMATION

Procedural neutrality combined with critical affirmation is formulated as the position of the expert witnesses who abide by the procedural requirement of legal neutrality and secure for themselves a legitimate role in court to dissent and provide knowledge-based evidence that can contribute to correcting the structural unbalances that are inherent in legal systems (Holden 2022).

Case Studies

Although cultural expertise as a theoretical framework is new, research shows that with or without the appointment of experts, cultural expertise, as special knowledge, is routinely used in Europe, America and Australia for an increasing range of cases from criminal to civil law, including also labour law, banking law, immigration law and many others: asylum, entry permits, family reunions, adoptions, business disputes, citizenship, child custody, extradition, deportation, validity of marriage and divorce, customary financial transactions, insurance, employer–employee relationships and many others (Holden 2019a, 2019b). Cultural expertise plays a role not only in migration and asylum laws but also for matters concerning First Nations and linguistic minorities that enjoy semi-autonomous rights sanctioned

by treaties and constitutions. New fields of application of cultural expertise are constantly discovered. Three case studies highlight the need for experts to clearly position themselves ethically before engaging with cultural expertise.

Colonial Justice: *Rex v. Kumwaka s/o of Mulumbi and 69 Others*

EXPERT WITNESSES IN REX V. KUMWAKA S/O OF MUMBAI AND 69 OTHERS

Rex v. Kumwaka s/o of Mulumbi and 69 Others was decided in 1932 in Kenya, which between 1920 and 1963 was part of the British East Africa Protectorate. A group of 60 men was sentenced to death for murdering a woman believed to be a witch who had cast a spell on one of the men's wives, rendering her mute. The colonisers of the early 20th century asked themselves the following questions: should customary law apply in cases such as the murder of a witch and therefore should leniency be afforded; or should state law, in this case the law of England, remain sovereign in matters of penal law? Two experts were appointed: the Deputy and Provincial Commissioner in Kenya, Frederick Lugard, a British soldier and colonial administrator, and Bronisław Malinowski, the anthropologist. The experts argued, respectively, against and for the application of customary law. The reaction at the time of the public and the media in Africa and in England was in favour of a lenient sentence, which was eventually adopted.

Whilst anthropology has officially distanced itself from its colonial heritage and actively engaged with decolonial approaches, this case is useful to scrutinise the role of the anthropologists who engage with government policies. Was Malinowski's engagement with law dictated by colonial policies? Should anthropologists engage in a situation where they cannot secure a position of independence? Did Malinowski have any room to fight against colonialism "from the inside"? Whilst we assume that today anthropologists can and must be afforded independence vis-à-vis state authorities, the analysis of Malinowski's stance is important to highlight the role of governance as a component of the position of anthropologists engaging with the law.

Embedded Anthropologists

USE OF CULTURAL EXPERTS FOR ARMIES AND GOVERNMENTS

The use of cultural expertise for armies and governments is not only against the ethical principles of the social sciences but defeats its very purpose of being special knowledge from an independent and neutral source.

There is a long history of armies and governments co-opting social scientists both in France and in the United States. All have been met with the disapproval of scientific communities and professional associations.

In the first half of the 19th century, the French administration attached three substantial scientific missions to military operations in Greece, Algeria and Mexico (Broc 1981). In 1844, ethnopolitical expertise was developed to separate the Arab population from the Kabyles (Lacoste-Dujardin 1986). More than a century later in Opération Oiseau Bleu, anthropological expertise was applied by the French Army against Algerian insurgents (Lacoste-Dujardin 1986).

Toward the end of WWII, the United States invited Ruth Benedict to write a book that could provide an understanding of Japanese culture, with the intention of predicting Japanese behaviour. *The Chrysanthemum and the Sword* (Benedict 1946) was published, and although to date there are no records of its actual role in US–Japan relations, the question is whether such an engagement is ethical.

In 1964 the United States conceived Project Camelot which would use anthropological knowledge and hire anthropologists with the aim of facilitating specific political changes in developing countries. Chilean scientists reacted indignantly, and the project was cancelled.

Shortly after the US occupation of Afghanistan in 2001, the anthropologist Montgomery McFate voluntarily proposed the Human Terrain System (HTS), which engaged social scientists and in particular anthropologists with the purported intention of reducing the loss of human lives on both sides through anthropological knowledge (McFate 2005). The HTS was immediately questioned by the American Anthropology Association (AAA) for the ethical issues that it raised and was eventually condemned (CEAUSSIC 2009).

Anthropologists as Expert Witnesses and Anthropological Knowledge in Court

The appointment of anthropologists as expert witnesses has developed widely throughout North America, the United Kingdom and Australia in connection with First Nations/Aboriginal land titles and treaties since the 19th century. It further extended to continental Europe in the second half of the 20th century in connection with migration fluxes. European jurisdictions have been increasingly confronted with the necessity of evaluating legal facts arising in the countries of the Global South but generating new rights in the Global North (Holden 2015). Sometimes, anthropological expertise has been incorporated at the pre-judicial stage in counselling services or incorporated into mediation aiming to prevent litigation. At other times, it has been reformulated to provide new fora for alternative dispute resolution in the hands of lawyers inspired by intercultural law (Ricca 2018).

Jurists have designed new tools and methods, such as the cultural test in the format of a questionnaire that judges self-administer to treat the facts and the litigants in a culturally sensitive manner or to identify the need to appoint an expert (Ruggiu 2018, 2019). The legal professions have experimented with ethnopsychological expertise and mediation in criminal law and juvenile justice (De Maximy 2021; see Holden, Chapter 20 in this volume). In many European countries, cultural mediators and translators have been called to respond to questions that very often go beyond their own areas of competence, touching on the socio-cultural background of facts and people involved in the case.

Conclusion

Cultural expertise as an umbrella concept proposes a strengthened ethical framework that enhances the ethical references of socio-anthro-legal scientists appointed as experts in court, as well as acknowledging the variety of tools and methods that fall within the broad domain of cultural expertise.

Rex v. Kumwaka s/o of Mulumbi and 69 Others spotlights not only the former acceptance by certain anthropologists of colonialism, which has been explicitly condemned by anthropology, but also the need to scrutinise one's own engagement today vis-à-vis government policies and assess the risk of explicitly or implicitly endorsing political agendas that are contrary to the ethical principles of anthropology.

All the attempts to use anthropological knowledge to the benefit of armies failed because of the ideological incommensurability between the anthropological and the military projects: the fundamental contradiction between the aims of anthropology as a discipline which is governed by the "do no harm" principle and the aims of governments willing to occupy and colonise (Price 2011).

The variety of tools and methods that fall under the umbrella concept of cultural expertise attests to an increasing awareness on the part of the legal professions of notions of culture which have encouraged a creativity in the legal practices to which the theoretical framework of cultural expertise can now respond. The independence of anthropologists in court is supported by procedural neutrality. The anthropologists who work for governments, or with the defence, or with the investigation teams, can hardly claim neutrality and, if they so chose, must explicitly adopt adequate measures that ensure their independence (see Cole, Chapter 2 and Plainex, Chapter 13 in this volume). The anthropologists acting as independent experts should not advocate for any specific result of the legal process. However, for anthropologists to express an independent expert opinion truly and fully, they must be in the position to disagree with the legal authorities and be allowed to contradict, if necessary, institutional reports such as the Country of Origin Information or other evidence on which the court or the public prosecutor and the parties rely.

Further Reading

Holden, Livia. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

This paper traces the history of the relationship between law and culture and proposes a reformulation of the concept of cultural expertise as an umbrella concept that encompasses the existing array of socio-legal tools and methods that use cultural knowledge for conflict resolution.

Holden, Livia, ed. 2021. *Cultural Expertise and the Legal Professions*. Special Issue in *NAVEINREET: Nordic Journal of Law and Social Research* 11.

This special issue offers a selected sample of first-hand experiences about the use and usefulness of cultural expertise by a pool of legal professionals and expert witnesses in various jurisdictions ranging from immigration and asylum to Indigenous rights and spanning family law, international human rights and criminal law, including also the opinions of a criminal law judge, with a rejoinder by the expert in the well-known "context case" in the Netherlands.

Holden, Livia. 2022. "Anthropologists as Experts: Cultural Expertise, Colonialism, and Positionality." *Law & Social Inquiry* 47, no. 2: 669–90.

This article argues that the concept of procedural neutrality and its reformulation in the form of critical affirmation help anthropologists to carve out an independent role for themselves in the legal process.

Q&A

1. What is cultural expertise and where does cultural expertise apply?

Key: Students should articulate the definition of cultural expertise and list the most common fields of application.

2. How do the concepts of cultural defence and culturally oriented crime connect with the definition of cultural expertise?

Key: Students should explain that the concept of cultural expertise is recent but connects with other concepts such as cultural defence and culturally oriented crime and analyse how cultural expertise differs from these concepts and is an umbrella concept that includes several tools and methods deployed by socio-anthro-legal scholars for assisting in the resolution of disputes.

3. What kinds of potential biases and risks should be considered when engaging with cultural expertise? Use real cases to formulate the ethical questions and potential biases to overcome.

Key: Students should outline the potential biases and risks such as the reification of culture and stigmatisation of minority groups and centre their analysis on the potential solutions such as social and political engagement, and specific tools or methods proposed by socio-anthro-legal scientists. Some cases chosen from this textbook could be used to outline the ethical considerations and individual stances to be adopted if acting as an expert.

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