



HAL
open science

Cultural Expertise in Europe

Livia Holden

► **To cite this version:**

Livia Holden. Cultural Expertise in Europe. Livia Holden. Cultural Expertise, Law, and Rights: A Comprehensive Guide, Routledge, pp.231 - 243, 2023, 9781032498607. 10.4324/9781003167075-25 . hal-04216219

HAL Id: hal-04216219

<https://hal.science/hal-04216219>

Submitted on 23 Sep 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

20

CULTURAL EXPERTISE IN EUROPE

Livia Holden

LEARNING OBJECTIVES

This chapter gives an overview of the perceived usefulness of cultural expertise, including the types of expertise and the ways in which experts are identified and appointed in Europe. Three case studies illustrate the three main typologies of cultural expertise in Europe: independent country experts, experts attached to the judiciary, and informal experts, including also cultural expertise without experts. After reading this chapter, you will have acquired a set of analytical skills that emphasise the independence of experts as a paramount requirement of cultural expertise.

Introduction

This chapter surveys the understanding and perception of cultural expertise as well as the main features of cultural expertise in Europe: usefulness; typology of experts and ways of identifying them; instructions to experts; areas of law; and cultural expertise without experts. The three case studies offer a sample of the use of expert evidence in immigration, family, and criminal courts in the United Kingdom, France and Italy.

Theory and Concepts

Cultural Expertise in Europe: What Is it Useful for?

The 2022 EURO-EXPERT map (see Figure 20.1), which gives a visual representation of the perception of the usefulness of cultural expertise in court, shows

Cultural expertise in court

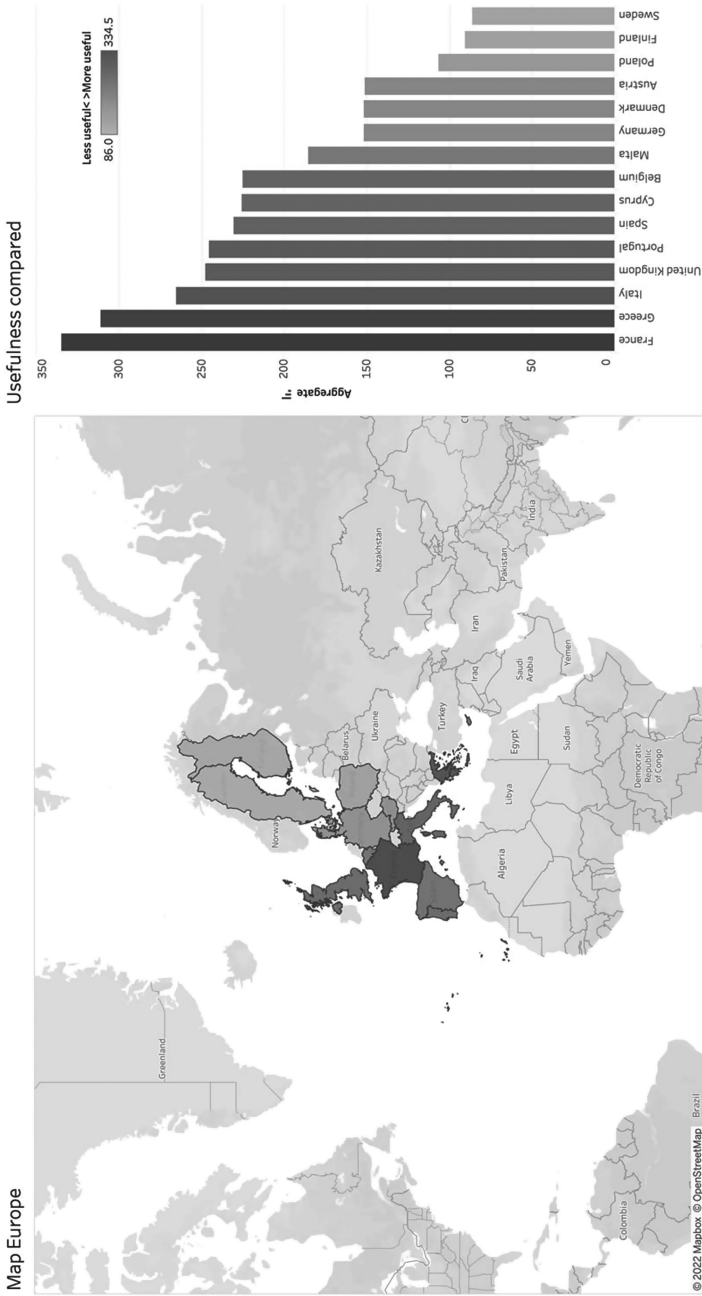


FIGURE 20.1 Cultural expertise: perceived usefulness in European courts. (Data-visualisation by Marius Holden)

four macro-areas ranging from the countries where the respondents indicated that cultural expertise is extremely useful (France and Greece), countries where cultural expertise is considered not useful at all (Poland, Finland and Sweden), countries where cultural expertise is considered to be very useful (Italy, the United Kingdom, Portugal, Spain, Cyprus and Belgium) and countries where cultural expertise is considered to be of moderate or little usefulness (Malta, Germany, Denmark and Austria). This map is not an objective measurement of the usefulness of cultural expertise; rather, it proposes an indication of trends in the perception of cultural expertise among country datasets that are considered to be reasonably comparable.

The perception of cultural expertise in Europe must be seen in combination with the disaggregated components of cultural expertise such as access, frequency, modalities and usefulness and impact (<https://culturalexpertise.net/visualisation/>). Qualitative data complements this by showing that many people in the legal and para-legal professions in Europe have a broad idea of what cultural expertise could be, even if they are not always familiar with the specific academic conceptualisation of cultural expertise (see Holden, Chapter 1 in this volume).

TYPES OF EXPERTS

Cultural expertise, as an umbrella concept, allows for great flexibility in the categorisation of cultural experts. Native language speakers including translators, legal professionals, sociolinguists, cultural mediators, country experts, academicians, community leaders and religious leaders can all be appointed as or act as experts under specific regulations and contexts. In addition, NGOs, ethnopsychologists, ethnopsychiatrists and ombudspersons can also play the role of cultural experts or *amici curiae* in court. This is not an exhaustive categorisation of types of cultural experts, and some roles overlap: for instance, an Imam may be both a religious leader and a community leader, a professor may be a native language speaker and a translator may occasionally serve as a country expert.

Suitable cultural experts can be identified in the following ways: (1) open-access registries of experts which list the details of experts and their experience, and which are organised on the basis of their regional skills and experience (United Kingdom); (2) restricted-access lists of experts who are registered in specific jurisdictions and police stations (Italy, Germany, Greece and Portugal); (3) experts embedded within the Home Office either as “freelancers” or integrated

into state bodies, for example experts at the public prosecutor's office for terrorism cases (France); (4) the reputations, by word of mouth, of particular experts who are routinely called by particular legal professionals or courts. All surveyed jurisdictions have regulations for the appointment of experts, but many members of the legal professions are uncertain about the possibility of appointing social scientists as experts. The style of instructions to the expert varies significantly between countries, jurisdictions, and specific legal professionals, ranging from lengthy and detailed instructions to open-ended questions.

EXPERTS' APPOINTMENT AND INSTRUCTIONS

Most countries in Europe have legislation and regulation on the appointment of experts as well as procedural rules for the assessment of expert evidence. Usually, experts can be appointed by the court or by the parties, but the appointment of experts by the parties is more frequent in common law legal systems while the appointment of experts by the court is more frequent in civil law legal systems. Cultural experts are rarely mentioned in regulations and guidelines for the appointment of experts, but nothing expressly prevents their appointment and remuneration. In most countries, while there are professional registries of experts, the court can also appoint any person of their choice to give an expert opinion. Procedurally, cultural expertise is no different from any other form of expertise in court.

The style of questions put to the experts varies significantly between countries, jurisdictions and legal professionals, ranging from lengthy, detailed instructions to open-ended questions. Recurrent questions to experts are as follows: is a certain customary practice deemed valid under the law and practices of a certain country or geographic area? Are the accounts of the litigants consistent with updated and first-hand information on a certain country? Does external evidence (updated published information and first-hand expert information) support the applicant's belonging to a persecuted social group? Is the possession of certain objects consistent with external information and expert opinion about a certain neighbourhood? Does the adoption of legislation for the protection of certain social groups, in a certain geographic area, mean that certain vulnerable social groups are effectively protected or can effectively seek protection from the state? How can one assess belonging, ethnicity and tribal ancestry, especially for individuals and social groups that do not speak minority languages and do not reside in certain areas that are traditionally inhabited by those ethnic and linguistic minorities? How can

one assess if certain language or certain behaviour is offensive, and to whom? How can one distinguish the boundaries between the intellectual provocation of art and the conditions under which such an intellectual provocation becomes an offence to a certain social group?

Cultural Expertise without Experts

Often in the presence of financial and logistic constraints that hinder the appointment of experts, courts and lawyers themselves collect information about culture, hence acting in a sense as cultural experts in interpreting the facts and applying the law. Cultural expertise is present even when an expert is not appointed or when culture is not explicitly invoked or discussed but information that falls broadly in the field of culture is collected and discussed for the resolution of the case.

Areas of Law

The following is a non-exhaustive list of areas in which cultural expertise has been recorded in Europe. In refugee, asylum and immigration law, experts may be instructed to assess whether applicants belong to persecuted or discriminated groups; the level of protection offered by state authorities in the applicants' countries of origin; the danger of returning to the applicants' countries of origin; the reasons for the request of residence permits; the requirements for family reunification and citizenship; the authenticity of personal documents; and the accounts of unaccompanied minors and political dissidents. In family law, experts may be instructed to assess the components of the best interests of the children; their security in case of a holiday planned with one of the parents who wishes to take the children to their country of origin; and the validity of polygamous marriages, arranged marriages, divorce practices, and adoption. In criminal law, experts may be instructed to explain how human trafficking works when this overlaps with customary practices; ethnic and racial discrimination; the offensive nature of certain sentences or speech; or the interpretation of honour in so-called honour killings. In human rights law, experts may be instructed to provide context for discrimination based on gender, sexuality, age, race, language or religion. In property and inheritance law, experts may be instructed to provide information on the principles and implementation of laws that discriminate against certain social groups or to describe the ancestral rights of Indigenous people to natural resources.

Case Studies

The United Kingdom, France and Italy serve here as examples of the broad application and typology of cultural expertise across Europe.

*The United Kingdom***USE OF CULTURAL EXPERTISE IN THE UK COURTROOMS**

In the United Kingdom, the appointment of experts on the request of the applicants has most frequently been recorded in immigration courts, where the contribution of independent experts has been affirmed as almost always useful (see *R (Es-Eldin) v. Immigration Appeal Tribunal*). Courts also appoint experts, especially in family and criminal law. Experts are selected from the various registries of country experts or by word-of-mouth recommendations vouching for the reputation of specific experts. Experts usually submit a written report and, depending on the jurisdiction and the case, experts can be cross-examined. Funding for expert evidence is available from the Legal Aid Agency (LAA), based on an hourly rate.

Experts are discouraged from communicating directly with the beneficiaries of their expertise. If experts need to ask questions to the beneficiaries, they are advised to do so in the presence of the beneficiaries' legal representatives. Irrespective of who appoints the expert, the duty of the expert is always to the court. Expert reports usually list the qualification and experience of the experts, which should include recent first-hand experience in the relevant country or the area of expertise, set out the expert's response to the instructions of the legal representative, and contain a statement of truth which might be worded as follows but changed slightly depending on the jurisdiction:

I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

The decisions of UK immigration courts, many of which are available in open access, almost always, when experts are appointed, include comments by the immigration judges on the weight that was attached to the expert report as evidence, and often also include an assessment of the capacity of the expert to provide expert opinions.

While refugee and asylum lawyers have a clear appreciation of the role of cultural experts, and frequently seek to instruct one, the Home Office often disputes the evidence provided by the experts. Tensions in the courtroom arise from a specific format of cross-examination which submits the experts – most of whom are not trained to be familiar with cross-examination techniques – to pressing questions regarding their standing and experience as experts, the exact opinions that experts intend to give at trial, the basis for those opinions and

the assumptions made in connection with those opinions (Good 2007). Experts often lament that in the United Kingdom, immigration judges tend to rely on the Home Office's submissions and the information provided by the Country-of-Origin Information, whilst giving less weight to the evidence provided before them by the experts (see Campbell, Chapter 12 in this volume).

Privately managed registries of experts are available in open access, but to date, there have been no training or mentorship programmes in this regard either for cultural experts or for the members of the legal professions who seek to appoint a cultural expert in the UK. Academics from various disciplines of the social sciences are nonetheless frequently approached by the legal professions to provide expertise in court, mainly as country experts. Their training is often done on the spot or is provided thanks to the benevolence of some senior expert. Good and Kelly's 2013 *Expert Country Evidence in Asylum and Immigration Cases in the United Kingdom* remains to date the most valuable resource for social scientists who engage with cultural expertise in the UK.

France

USE OF CULTURAL EXPERTISE IN THE FRENCH COURTROOMS

In France, there are at least three approaches that fall under the umbrella concept of cultural expertise: the use of in-house experts by the Cour Nationale du Droit d'Asile (CNDA); cultural intermediation and ethnopsychological assessments; and use of *ad hoc* cultural experts at the Office of the Public Prosecution for terrorism cases. In France, either the parties or the judge may request the appointment of experts. Experts that are appointed for the investigations work under the supervision of the investigating judge or other judge designated by the court. Unless exceptional circumstances apply, experts are appointed from amongst those on the court registries and must demonstrate some knowledge of the legal procedure. In principle, experts are paid a standard hourly rate by courts.

International protection at the Cour Nationale du Droit d'Asile (CNDA) in France is the result of a process that started with the protection of refugees after World War II and then became progressively streamlined within the court itself during several revisions of its procedure. The greatest sources of information for the judges of the CNDA are the Country-of-Origin Information and the assessment provided by the French Office for the Protection of Refugees and Stateless (OFPRA), as well as reports by NGOs and international organisations. However, in some cases, *ad hoc* research is conducted, and in-house reports are produced. CNDA decisions are usually unpublished but include detailed comments on the assessment of vulnerability and sometimes also mention the experts.

Immigration lawyers in France lament that independent experts are almost never appointed for asylum proceedings. Many lawyers attempt themselves to acquire the required knowledge on the socio-legal background of their clients. However, the role of immigration lawyers is affected by a lack of funds and the impact of restrictive immigration policies on the institutional authority of the CNDA, whose judges are often temporarily appointed and do not have enough experience in the field of immigration and asylum (Gill and Good 2019).

In the 1990s, a specific type of cultural expertise, called cultural intermediation, developed from the intersectoral collaboration of juvenile court judges such as Martine De Maximy and Thierry Baranger with the ethnopsychiatrist Tobie Nathan, under the aegis of the academic framework of the Laboratoire d'Anthropologie Juridique (LAJP), headed by Etienne Le Roy at Panthéon Sorbonne university (De Maximy 2021). Cultural intermediation was conceived as a process whereby the children and, whenever possible, their parents might play an active role with the help of the cultural intermediary, who not only had training as a mediator but also shared a similar cultural background and, ideally, spoke their native language. The pool of cultural intermediators was provided mainly by the doctoral students at the LAJP. Cultural intermediation took place over several sessions during which the children were made more aware of their own cultural background and personal history and of milestones and turning points in their family lives, such as the role that their family members had in their countries of origin. The aim of these sessions was to help the judge to understand the cultural background of the children and their families as well as help them to position themselves regarding the set of rights and obligations of French society. Intercultural mediators identified themselves as different from mediators for their position of neutrality vis-à-vis the parties and the court.

Martine De Maximy, who from juvenile courts pursued her career up to the Presidency of the Assize Court, introduced the appointment of ethnopsychologists at various stages of the criminal proceedings, including appeal hearings. Cultural intermediation in criminal proceedings eventually came to consider every individual as sharing sets of cultural references with a certain social group, thus overcoming the initial risk of essentialism of the cultures of those perceived as foreigners in France.

Since the 2015 terrorism attacks in Paris, historians, anthropologists, and geopolitical scientists have been appointed at the prosecutor's office to produce expert reports that are communicated to prosecutors and judges on their instructions. This type of expert appointment raises questions regarding the independence of these experts, their capacity to abide by the "do no harm" principle, and the fulfilment of their ethical duties of support and protection of the involved social groups. The appointed experts argue that their appointment, despite being through the public prosecutor's office, provides for the necessary independence of the expert's role, and allows for adequate identification and treatment of the matters that relate to culture in terrorism investigation (see Planeix, Chapter 13 in this volume). According to these experts, their appointment in terrorism

investigations provides the investigative judges with a more nuanced knowledge of the context and prevents an essentialised approach to culture.

France stands out in Europe for including various types of cultural expertise in the training curriculum of judges. However, notwithstanding the widespread interest of the legal professions, the need to find and appoint experts on short notice and their cost are perceived as obstacles to consistent use of cultural expertise by way of the appointment of independent experts.

Italy

USE OF CULTURAL EXPERTISE IN THE ITALIAN COURTROOMS

In Italy, the court can appoint experts, either of its own motion (Consulente Tecnico d'Ufficio, CTU), or upon request by the parties (Consulente Tecnico di Parte, CTP). In civil proceedings, the experts appointed by the parties are chosen, preferentially, from the Albo dei Periti, a registry which is divided into categories for specific professionals and technical skills. While procedural rules provide for the appointment of experts in Italy, formal appointments are not commonplace and even when cultural experts are appointed, their role often remains informal and unrecorded in the court proceedings, leaving little or no trace of their involvement and impact. Cultural mediators – usually native language speakers – are often expected to play a role which exceeds their competence in basic mediation.

The biggest obstacle to the appointment of cultural experts by the parties in Italy is that while free legal assistance is provided by law under certain circumstances, expert evidence, which is categorised as technical assistance, is only reluctantly covered by legal aid. The institutional hesitation to remunerate cultural expertise in Italy is partially balanced by a flourishing civil society initiative. Centres for migrants usually provide some linguistic support and, if they have the capacity, also assist the migrants with the preparation of the application for the permit to stay and international protection.

Research officers from the European Asylum Support Office (EASO) have played a significant role in the implementation of immigration and international protection law in Italy. EASO research officers have assisted legal professionals with the information and knowledge which is usually provided by country experts in other jurisdictions, especially the UK, but they are not usually appointed as experts in proceedings and their mandate is time sensitive. Various legislative initiatives have fostered the professionalisation of cultural experts for immigration-related cases, but the selection criteria so far stress the legal background of applicants and not their training as social scientists.

The appointment of experts at the Territorial Commission and Appeal Courts, which decides immigration and asylum cases in Italy, is informal and uneven, depending on the availability of experts as well as the awareness and the social commitment of the courts and the legal representatives of the applicants. Experts often work *pro bono* and are free to focus on the issues that they deem relevant for the court, without explicit constraints concerning the format and the admissibility of evidence.

Experts are appointed also in fields of law which pertain to liability for damage and various fields of criminal law. A landmark case on the appointment and role of experts is the *L'Aquila Earthquake* trial, in which Antonello Ciccozzi, an anthropologist who originates from the area where the 2009 earthquake occurred, was appointed as expert. Ciccozzi argued that earthquake scientists predicting a sequence of minor earthquakes led the local people to mistrust their instincts and stay at home, with fatal consequences. Although the final judgement did not give much weight to Ciccozzi's expertise, it included a statement on the value and assessment of expertise as evidence in court, finding that experts are responsible regarding the accuracy of their statements (Ciccozzi and Decarli 2019).

Inspired by an example from Canada, a cultural test for judges was proposed in Italy as a tool to identify the need for cultural expertise, but its usefulness is widely debated (Ruggiu 2019). The widespread lack of awareness of the possibility of instructing an expert, both among the legal professions and among the beneficiaries of cultural expertise, is often balanced by a strong social commitment on the part of immigration lawyers and immigration judges who strive to acquire the socio-anthropological knowledge that experts could bring to the case (Civinini 2021). Voluntary and charity organisations that provide *pro bono* assistance to migrants often act as informal experts, and their reports are included in applications for international protection. Among the voluntary initiatives, the Centro Franz Fanon in Turin has been one of the first to use ethnopsychological expertise to assist the migrant population in Italy, but many other centres of assistance to migrants and asylum seekers have been established in Italy. These are often partially funded by the government and use some tools and methods of cultural intermediation that fall under the broad definition of cultural expertise.

Experts lament that cultural arguments in court have a mixed reception. The widespread level of informality of cultural expertise has allowed for a high degree of experimentation by cultural experts (Ciccozzi and Decarli 2019). This has not only led to a significant reluctance of anthropologists to engage with law in Italy (Colajanni 2014), but also a very varied range of experimentation through grass-roots initiatives which have encouraged the engagement of anthropologists and the development of a great variation in the styles of cultural expertise.

Conclusion

The apparent discrepancy between the perception of usefulness of cultural expertise and the lower rate of appointments of experts in Italy and France compared

with the UK must be read together with the following factors: (1) the increasing adoption of training modules to raise awareness about culture in the legal professions which leads to an appreciation of cultural expertise in principle; (2) a great variety of types of cultural expertise which do not always fall into the conventional typology of appointment of experts; and (3) the uneven authority of the various social sciences sub-disciplines in comparison with more authoritative disciplines such as psychiatry and psychology.

While the frequency of use of cultural expertise indicates that the courts aim for more inclusivity and recognition of diversity, the potential benefit is closely connected with the ethics of cultural experts. If cultural experts can afford independence and neutrality, cultural expertise has the potential to foster inclusion and enhance access to justice (see Holden, Chapter 1 in this volume). Cultural expertise can also, in the long-term, strengthen the trust of users toward the justice system, allowing for a more effective dialogue between state- and non-state jurisdictions and contribute to social cohesion.

The UK system for the appointment of experts recognises the value of independent expert evidence in court and provides funding for the instruction of experts whenever legal aid provisions apply. The legal framework is, however, largely undermined by UK anti-immigration policies that offer the ideological foundation for immigration courts to give lower weight to the evidence of cultural experts.

France occupies the first place on the EURO-EXPERT map which ranks the perceived usefulness of cultural expertise. Experts who are attached to the decision-making authority are preferred in France. The CNDA's model for the provision of cultural expertise by in-house experts is perceived as authoritative and sustainable because it relies on the state infrastructure and fits in with the inquisitorial legal system which concentrates the collection of evidence in the office of the instructing magistrate. Additionally, the dialogue between legal practitioners and universities has fostered forms of joint experimentation, such as intercultural mediation in juvenile and criminal courts. The institutional support given to various forms of cultural expertise in France has allowed its development and a favourable perception among the legal professions. As a general principle, experts who are an integral part of the decision-making authorities may be unduly impacted by government policies without much opportunity for criticism from the public or concern about their ethical position. However, cultural experts who have been permanently attached to the judiciary in France have developed a process of critical self-reflection on their own position which they argue is independent (see Planeix, Chapter 13 in this volume).

In Italy, anthropologists are often informally appointed as experts and their roles remain unacknowledged and mostly unpaid. Anthropologists suffer from a lack of acknowledgement by society which is also connected with disciplinary divides. Civil society initiatives have helped the development and experimentation with various formats of cultural expertise, inspired both by French ethnopsychology

and the British system of country experts, as well as by Canada's cultural test for judges. The widespread experimentation with cultural expertise and the civic commitment of many immigration judges and lawyers in Italy do something to counterbalance the rigid anti-immigration policies of the Italian government.

Further Reading

Brandmayr, Federico. 2020. "When Boundary Organisations Fail: Identifying Scientists and Civil Servants in L'Aquila Earthquake Trial." *Science as Culture* 30, no. 2: 237–60. This paper illustrates the power relationships that affected cultural expertise in the *L'Aquila* trial and suggests that the credibility of the experts is often manipulated by competing politics.

Gill, Nick, and Anthony Good, eds. 2019. *Asylum Determination in Europe: Ethnographic Perspectives*. Cham, Switzerland: Palgrave Socio-legal Studies.

This book provides an ethnographic overview of asylum procedures in ten European countries to show how legal decisions are impacted by a series of factors that are sometimes very context-dependent and subjective.

Q&A

1. How is cultural expertise perceived in Europe?

Key: Students should start from the EURO-EXPERT map that ranks the perceived usefulness of cultural expertise as a basis for discussing the ideological divide about cultural diversity in Europe, which is mirrored in the hesitation regarding cultural expertise.

2. Where is cultural expertise frequently used in Europe?

Key: Students should survey the various areas of law and highlight the fact that cultural expertise is not only found in asylum and immigration cases.

3. What are the main types of cultural expertise in Europe?

Key: Italy, France and the United Kingdom offer three examples in which cultural expertise has evolved respectively at the level of voluntary initiative, within the judiciary and with independent consultants.

References

- Ciccozzi, Antonello, and Giorgia Decarli. 2019. "Cultural Expertise in Italian Courts: Contexts, Cases, and Issues." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 35–54. Bingley: Emerald.
- Civinini, Maria Giuliana. 2021. "Cultural Expertise in Civil Proceedings in Italy." *NAVEIN REET: Nordic Journal of Law and Social Research* 11: 107–22.
- Colajanni, Antonino. 2014. "'Pure' and 'Applied' Research: Theoretical and Applied Anthropology a Decade after the Beginning of the Third Millennium." *DADA Rivista di Antropologia Post-Globale* 2: 25–40.

- De Maximy, Martine. 2021. "Intercultural Justice in France: Origins and Evolution." *NAVEIN REET: Nordic Journal of Law and Social Research* 11: 43–62.
- Gill, Nick, and Anthony Good. 2019. *Asylum Determination in Europe: Ethnographic Perspectives*. Basingstoke: Springer Nature.
- Good, Anthony. 2007. *Anthropology and Expertise in the Asylum Courts*. Abingdon: Routledge Cavendish.
- Good, Anthony, and Tobias Kelly. 2013. *Expert Country Evidence in Asylum and Immigration Cases in the United Kingdom: Best Practice Guide*. The University of Edinburgh, July 2013. <https://www.ein.org.uk/sites/default/files/Expert%20Country%20Evidence%20BPG.pdf>
- Ruggiu, Ilenia. 2019. "The 'Cultural Test' as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges." *Laws* 8, no. 3: 15.

Case Cited

- R (Es-Eldin) v. Immigration Appeal Tribunal, Ex parte Shah*. Unreported (Court of Appeal (England and Wales) 1997).