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A rejoinder to Lawrence Rosen article on free will

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Rosen's invitation to think about free will in the context of the engagement of anthropologists as expert witnesses is a welcome challenge that touches at the potential of anthropologists' contribution to justice in diverse societies. Rosen argues that anthropologists acting as expert witnesses in criminal law should provide not only an opinion on whether the accused was constrained by a specific set of cultural references, which would be different from and conflicting with the ones of the majority society; but also, on whether the accused could have done differently. Rosen suggests that anthropologists acting as experts in court must evaluate the degree of free will that the accused have exercised or could have exercised when enacting a criminal behaviour, and therefore provide an opinion on whether "individuals are essentially limited in their choices by their culture or forced to choose between cultural attachment and cultural alienation." Rosen's interrogation rests on two assumptions that deserve further scrutiny: cultural defence and the criminal concept of causation.

Cultural defence, which I argue is a particular type of cultural expertise, connects the use of anthropological knowledge with the mitigation of the sentence. The anthropological scholarship on cultural defence, which has developed mainly in America, has started as an effort to foster a better access to justice for the members of minority groups and First Nations. Anthropologists acting as expert witnesses for First Nations and members of minority groups have often engaged with cultural defence with the intent to redress the social inequalities that are inherent in state institutions. Cultural defence has had, however, a very mixed reception in the courts of law on the one hand because the language of anthropology has struggled to meaningfully translate for the judges, and on the other hand because cultural defence tends to establish a deterministic connection between certain behaviours and specific social groups. As a result, cultural defence has been reformulated and its connection with the mitigation of the sentence was downplayed to stress instead its role of information on the context. Nonetheless, I suggest that the concept of cultural defence creates the potential of a problematic interference of the cultural expert on the judgement, which is the realm of the judge. If cultural experts participate in some way in the judgement there is a real risk to establish a deterministic nexus between culture and social behaviour, and even more concerning between a certain social group and the likelihood of a criminal action. Cultural determinism is not only incorrect in anthropology as we have already understood that it is never culture alone but a combination of factors such as gender, age, finances, ethnicity and much more, that explain social practices; but it is also incorrect in law because it rests on the overevaluation of the role of cultural experts in the legal process and the misunderstanding of the legal concept of causation.

I suggest that the notion of cultural expertise explains better the role, the limitations, and the potential strength of the engagement of anthropologists but more in general of social scientists, in the legal process. Cultural expertise is the special knowledge deployed by experts of law and cultures, to assist the decision-making authorities in the assessment of evidence and the description of the context of facts and people involved. Cultural experts must be independent and afford a position of critical affirmation. I have elsewhere stressed the ethical framework of this definition which revolves around the primacy of the voices of the beneficiaries of cultural expertise, especially when the beneficiaries are Indigenous Peoples and First Nations. This definition should contribute to answer Rosen's dilemma for what concerns the role of anthropologists engaging as experts. Cultural experts do not participate into the decision-making process but assist the decision-making authorities in the assessment of evidence.

Further, I suggest that the concept of causation in the legal process is better understood from the perspective of the legal studies that have generated it. Legal causation has been formulated in various ways following the variety of the legal systems and fields of law. However, for the purpose of our discussion, I suggest that there is a fundamental difference between legal causation and scientific causation. Legal causation establishes a link between facts and individuals but is a fiction established by the need of the certainty of law. It would be misleading to give legal causation a value that exceeds the law and its requirements. The law requires the establishment of a direct link between a certain action and a certain outcome for determining criminal or civil responsibility. Unlike legal causation, scientific causation establishes links between facts and people and strives to be proved as true. Legal causation and scientific causation furthermore differ because legal causation supports the finality of the judgement of the highest jurisdiction, whereas scientific causation is never final and remains open to refutation and self-correction.

If we accept that the role of anthropologists acting as experts in court is the one of cultural experts, who do not to participate in the decision-making process, we should conclude that there is no reason for the anthropologists to express themselves on the legal causation; and if we agree on the peculiar features that differentiate legal causation and scientific causation, equating the two might be misleading. The interrogation on the role of free-will, although intellectually stimulating and deserving inquiry, is extraneous to the role of expert witnesses as much as to the one of the legal processes in general, which rests instead on legal causation. Free will, as mentioned by Rosen, was elaborated in a western context that still debates on the very existence of freedom from a philosophical perspective. If, as anthropologists, we value the diversity of thoughts and practices, free will, certainly relevant for compelling intellectual pursuits, is nonetheless unlikely to act as a universal category that is independent from the ontologies in which it was elaborated.