BEYOND ANTHROPOLOGICAL EXPERT WITNESSING: TOWARD AN INTEGRATED DEFINITION OF CULTURAL EXPERTISE

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ABSTRACT

This chapter explores expert witnessing in anthropology and the raison d'être of cultural expertise as an integrated socio-legal concept that accounts for the contribution of social sciences to the resolution of disputes and the protection of human rights. The first section of this chapter provides a short historical outline of the occurrence and reception of anthropological expertise as expert witnessing. The second section surveys the theoretical reflections on anthropologists' engagement with law. The third section explores the potential for anthropological expertise as a broader socio-legal notion in the common law and civil law legal systems. The chapter concludes with the opportunity and raison d'être of cultural expertise grounded on a skeptical approach to culture. It suggests that expert witnessing has been viewed mainly from a technical perspective of applied social sciences, which was necessary to set the legal framework of cultural experts' engagement with law, but had the consequence of entrenching the impossibility of a comprehensive study of anthropological expert witnessing. While this chapter adopts a skeptical approach to culture, it also argues the advantages of an interdisciplinary approach that leads to an integrated definition of cultural expertise.

Keywords: Cultural expertise; expert witnessing; common law and civil law; international private law; engaged anthropology; law and culture

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INTRODUCTION

Political agendas and governmental policies in post-war America, Europe, and Australia have frequently featured social diversity as a goal whose accomplishment has time and again proved difficult. Yet, social sciences and applied social sciences have been deeply involved with the notion of social diversity. Socio-legal scholarship has developed articulated reflections on the accommodation of ethnic and religious minorities. Experts with a variety of backgrounds have been instructed in legal proceedings involving members of ethnic minorities and diasporic communities. Anthropologists have acted as experts for a range of cases, which have consistently expanded, ranging from indigenous rights to asylum rights, including migration laws and many other subfields in both public and private law. Anthropological expertise, mainly in the form of expert witnessing, has even acquired a role in those legal systems, that do not specifically provide for it or are reluctant to consider non-Western laws as bearing any kind of extra-territorial impact. However, cultural expertise as a socio-legal concept that defines the contribution of cultural anthropology as expertise beyond the legal institution of expert witnessing has not yet been fully theorized.

ANTHROPOLOGICAL EXPERT WITNESSING

Anthropological expertise in the form of expert witnessing and consultancies for providing an expert opinion, or expert information, has been one of the activities, if not *the* activity par excellence, of applied anthropology. In fact, the use of anthropological knowledge for dispute resolution, law making, and governance, for good or bad, has been frequent throughout the history of anthropology. Yet, as we will see, whilst actual records of an extended engagement of anthropologists with law are few and sparse, the criticism against it has been unwavering. Grillo (1985), Grillo and Stirrat (1997) and Sillitoe (2006) have all remarked that applied anthropology has been a source of trouble more than anything else. In fact, anthropologists, and anthropology have been the object of criticism on the one hand for unethical collaborationism with colonialism and dictatorial regimes, and on the other for radical relativism that would condone unacceptable practices (Gellner, 1985; Sandall, 2001). This chapter will evoke some of the most well-known cases of expert witnessing including also the policy-related use of anthropological knowledge. For limitations linked to the paucity of sources this excursus is patchy. Since historians of anthropology have usually focused on either the United States or Britain, and sometimes on France, the factual variety of anthropologists' involvement with law across the world has not been recorded systematically. Other contributions in this same issue provide good examples of the various extents and modalities of anthropologists' engagement with law but to date no systematic attempt has been made to review it beyond specific cases. This section will nevertheless attempt to devise a timeline, which relies mainly on the history of British and American anthropology with the inclusion of Australian and Continental European sources. It intends to position the practice of expert witnessing and related activities, within

a broader framework that exceeds the legal approach. This extended framework will constitute the grounds on which to articulate the notion of cultural expertise.

From "Anthropology before Anthropology" to Colonial Anthropology

The engagement of travelers, missionaries, and sometimes colonial administrators, in activities that today would be considered as "cultural" mediation, dates back to the so-called "anthropology before anthropology" (Kuklick, 2008). Yet, it was only in the mid-nineteenth century that the American Bureau of Ethnology and the London Ethnological Society were established with government facilitations. American applied anthropology evolved quite early into "savage ethnology," that is, the documentation and record of First Nations' cultures that were perceived as heading toward extinction. The use of anthropological expertise in Indian tribal claims was recorded as early as 1895 with *Choctaws v. United States* in the United States (Gormley, 1955). In the mid-nineteenth century, British anthropology also started to play an official role in the formulation of social policies in England (Kuklick, 2008).

At the end of the nineteenth century both the British colonial administration and the US government consolidated the practice to fund applied research. Thus, social scientists and anthropologists in particular, shifted toward applied anthropology and became consciously involved with policy making and colonial ruling. Kuklick (2008) dates the beginning of the twentieth century, as the time when the first use of anthropologists as expert witnesses for policy making in England took place. Since 40% of volunteers for military service were rejected on health grounds, the Inter-departmental Committee on Physical Deterioration called on anthropologists for advice. The subsequent report that was published in 1904 argued for social welfare policies because "apparent signs of decline of the population's collective hereditary potential were transient, circumstantial phenomena – functions of deficient diets, housing, and exercise" and in particular, D.J. Cunningham emphasized that "enlarged opportunities for women did not lead to a decline in reproductive capacity; liberated women, freed from restrictive corsets and encouraged to exercise, were healthier." (Kuklick, 2008, p. 58).

Whilst the involvement of social scientists for policy making in Britain has remained overall poorly scrutinized, British anthropology has been criticized for its unreserved collaboration with colonial administration. The Colonial Social Sciences Research Council, founded in 1944, was done so in order to allocate funds to anthropological research connected with colonial administration. Yet, Malinowski (1926, 1929, 1930) at least initially maintained that anthropologists should use their expertise in defense of "subject" peoples. Additionally, Kulick says that despising applied anthropology, senior committee members served the academic discipline more than colonial government officials (Kulick, 2008). Concomitantly, Evans-Pritchard and Firth (1949) lamented that the British administrators either did not ask for anthropologists' assistance or, eventually would not use their findings. We will see that this curious ambivalence is still

present today regarding the current reluctance of some anthropologists toward applied anthropology.

Anthropologists and Foreign Politics

Toward the end of WWII the United States Office of War invited Ruth Benedict to write a book that could provide an understanding of Japanese culture, with the intent to predict Japanese behavior. *The Chrysanthemum and the Sword* was published in 1946, and to date, there are no records of its actual role in US–Japan relations. Criticism was, however, almost immediate, but not necessarily from an ethical perspective. Rather, Benedict was reproached to offer a monolithic perspective of Japanese society that would undermine its complexity, especially for what concerns the intertwined relationships between tradition and modernity (Stoetzel, 1959; Watsuji, 2016).

Almost at the same time, the very capacity of anthropology to provide expert knowledge was refuted by Hogbin (1957, p. 245) who argued that to the difference of civil engineers and plants breeders the anthropologist is not qualified more than the average citizen for advising on the solutions to social problems. Such was the conundrum between political pressures, social engagement, and ethics: the appropriateness of anthropology for a meaningful contribution to society on the one hand and on the other, the incapacity of anthropologists to scientifically and ethically engage in the resolution of social problems. Far from being discouraged, in 1964 the United States conceived the project Camelot as a more explicit way to use anthropological knowledge and hire anthropologists with the aim to facilitate specific political changes in developing countries. Project Camelot was prepared by a committee of social scientists as a feasibility project aiming to envision models of social systems that would predict and influence social change in the developing world. This time, the response was a neat refusal by the scientific community. In Chile, scientists reacted indignantly and the matter was brought to international attention with the result of the project being canceled for fear of diplomatic embarrassment (Solovey, 2001; Wakin, 1992).

Anthropologists as Expert Witnesses in First Nations Litigation

Since the 1950s, anthropologists started to appear as expert witnesses in the United States with increasing frequency for cases concerning racial segregation, miscegenation laws, child custody, paternity, religious communities, and the cultural background of the defendants. Particularly remarkable was the intervention of socio-linguists in the so-called Ann Arbor trial which was initiated by members of the black community following discrimination suffered by their children at a local school. Labov (1982) described how linguists, who are notorious for academic disagreement, engaged in the defense of black children against those who argued that black children's poor achievement was connected to the supposed inferiority of their language skills. Yet, the case of anthropological expert witnessing that has attracted most attention in the United States, and was

meticulously recorded by anthropologists, is the *Mashpee Tribe v. New Seabury Corp*, regarding the possession of about 16,000 acres of land. The possession of the land depended on the Mashpee identity being regarded as a tribe, hence the entire trial sought to ascertain whether or not the Mashpee were indeed an Indian tribe. Clifford (1988) presents verbatim the 41 days of testimony, detects the arguments that were developed and the kinds of witnesses that were instructed, and compares the concluding evidence of the trial with his own opinion. Clifford argues that identity has two meanings: one linked to how each single individual imagines oneself and the other which is linked to the group and pertains to a social and collective meaning. While the defense (New Seabury Corp) availed the support of historians as expert witnesses, the plaintiffs (Mashpee) depended on anthropologists. Hence, the trial is also seen as a disciplinary struggle between history and anthropology (Clifford, 1988, p. 317). With hindsight it appears clear why anthropologists found their role difficult under the circumstances. The discipline seemed not to have rigorous or even commonly accepted definitions, its conclusions appeared to be historically limited and politically enmeshed, and eventually loose concepts of culture were applied to the very category of tribe on which rested the land rights on trial (Clifford, 1988, p. 317 and f.). The verdict concluded that the people living in Mashpee did not continuously exist as a tribe or a nation and they were thus denied the right to the contended land. The same verdict was confirmed in the 1975 appeal and proceedings came to a conclusion only in 2007 when the tribe and the town of Mashpee reached an agreement. In *Bingham v. Massachusetts,* the Mashpee were designated as a federally recognized tribe and received a portion of the claimed land in exchange for waiving all other claims on Mashpee town.

Post-colonial Criticism against British Anthropology and Applied Anthropology

Since the 1960s and especially from the 1970s onward, trends from inside and outside anthropology consolidated a denunciation against the discipline for providing the conceptual and theoretical models that justified colonial powers (Diamond, 1964; Maquet, 1964) and racism (Jordan, 1968; Memmi, 1969; Memmi & Greenfeld, 1967). Equally important was the criticism developed against the anthropologists who were perceived as working in the applied field and therefore not contributing to anthropological theories. Anthropologists were criticized both for providing theories that justified colonialism and, when in the field, for not engaging against colonial powers. Asad (1973, 1979) argued that colonialism allowed the anthropological study of non-European cultures and peoples by providing safe physical access to other parts of the world; and that while anthropologists have helped record and document different cultural traditions, they have also reinforced the unbalance of power introduced by colonialism.

Adam Kuper (2014) in *Anthropology and Anthropologists: The British School in the Twentieth Century* shows how the connection between anthropology and colonialism has been often subtle, nuanced, and sometimes ineffective

irrespective from the intellectual honesty of the anthropologists, or the lack thereof. Applied anthropology in particular was attacked for being suspected of unethical alliances with regard underlying financial gains (Lewis, 1988). As a consequence, the discipline as a whole suffered from poor credibility. Lewis (1973) alerted that anthropologists' reluctance to ethically engage with people might also be imputed to the general low regard held for applied anthropology. Diamond (1966); Foster (1969) and Memmi and Greenfeld (1967) have argued that anthropologists, who, generally speaking, seem to have a lower status in the countries of their origins, tend to develop romanticized views of the "primitive" with a self-serving purpose of career advancement and personal revenge against their own societies. Lewis (1973) writes:

> When the anthropologist combines the idealization of primitive culture with the notion of cultural determinism, the result is an attitude that is both paternalist and hypocritical. The very qualities of primitive life which the anthropologist romanticizes and wants to see preserved are attributes which he finds unacceptable in his own culture. The personal freedom and self-determination he insists upon for himself he withholds from the "primitive" on the basis of cultural conditioning and the need for accommodation of the individual within the community. He writes enthusiastically of the highly integrated life of the "primitive," of the lack of stress experienced when there is little freedom of choice and few alternatives from which to choose; yet he defends for himself the right to make his own decision and his own choices.

However, the criticism was not only directed against unholy alliances between anthropologists and British colonizers. The use of anthropological knowledge in the French colonies did not lead to any less criticism even though this was directed at the quality of knowledge more than at its political stance. Wooten (1993) describes the corpus of legal ethnographies that colonial administrators felt to be of particular assistance to colonial power. These were compilations of "native" customs, mainly family law, by the so-called administrators-ethnographers, or evolutionary thinkers who thought that the Africans would evolve in the same way as the Europeans. Wooten (1993) and Rodet (2007) reported that the application of "native" law in French Colonial Africa through the use of ethnographic experts contributed to nothing but the "invention of tradition." Hobsbawm and Ranger (1983) and Vanderlinden (1996) have shown, respectively, in the fields of history and law that anthropologists have most often than not contributed together with other scholars to the construction of imperial grandeurs in Africa and Asia. As a notable exception, Luc De Heusch, a Belgian anthropologist and filmmaker, denounced colonialism and the perverse effects of nationalism and in particular exposed the role of Belgians in the exacerbation of ethnic rivalries that led to the Rwandan genocide (De Heusch, 1995). Around the same time neo-Marxist anthropology stressed the connection between inequality and access to resources but its arguments developed essentially on a theoretical level.

Anthropologists as Expert Witnesses in Aborigines Litigation

Toward the end of the twentieth century, while in Europe and in North America positioning regarding colonialism and anthropology became pivotal in the academic scrutiny that led to the reflexive turn of the discipline, in Australia

anthropologists consolidated the practice of expert witnesses without attracting much attention from the broader scholarship. The bulk of litigation for which anthropologists were instructed as expert witnesses had started in the 1970s following the land rights legislation in the Northern Territory. The admissibility of anthropologists' testimony in Australia was sanctioned in *Milirrpum v Nabalco* by Justice Blackburn who discussed whether the evidence presented by the anthropologist was hearsay because it was based on what the anthropologist had been told by other people, specifically in this case indigenous informants. Justice Blackburn concluded that "[t]he anthropologist should be able to give his opinion based on his investigation by processes normal to his field of study, just as any other expert does."

Expectedly, anthropological expert witnessing in Australia has also been fraught with a sentiment of failure and uneasiness the epitome of which was the *Hindmarsh Island* case. In 1994 a group of Aboriginal women who were opposing the construction of a bridge on the basis of the religious and cultural significance of the area, were accused of fabrication. Anthropologists were appointed as expert witnesses and submitted their representations. Deane Fergie, the anthropologist who submitted an appendix report which was marked as "Confidential Appendices 2 and 3: To be read by women only" was also sued for fabrication. The Hindmarsh Island Royal Commission refused the women's claims and the bridge was completed in 2001. Additionally, the confidentiality of Fergie's report was not taken seriously and to the adverse conclusion of the trial added the shame of disclosure of sensitive information for the proponents. This case made newspaper headlines, and also disclosed professional rivalries and gender perceptions in academia. Philiph Jones who had been appointed as expert by the Royal Commission argued that Fergie was acting for self-serving purposes linked to her feminist and anarchist agenda, and that she was not an expert (Lucas, 1996). The *Hindmarsh Island* case was declared as the failure of anthropology for not conveying the nature of anthropological fieldwork and the specificity of the knowledge that it produces (Lucas, 1996, p. 51). Positions on this particular case remain polarized but one thing seems clear: the difficulty, and in this case, the impossibility to translate anthropological data into evidence in court.

Criticism against Colonial Attitudes of Applied Anthropology in North America

Pinkoski (2007) argues that while much has been written regarding the link between British colonialism and anthropology, there has been a gap in the literature concerning colonialism and anthropology in North America. Pinkoski examines Julian Steward's theory and the role that Steward played in helping the US government in legal cases before the Indian Claims Commissions. Pinkoski concludes that Steward – by acting as the expert witness and advisor for the US government – played an important role in the US colonial strategy to deny land rights to Native Americans. Furthermore, as expert witness before the Indian Claims Commission, Steward portrayed the Indians of the Great

Basin as being at the lowest rung in social evolution, which was further used to deny Native Americans their land rights. Pinkoski uses the example of Steward to highlight the connection between anthropology and colonialism in the US and the role that anthropology continues to play in North America concerning the issue of land rights of indigenous peoples. Pinkoski calls on anthropologists in the US and Canada to reconsider the role that their discipline has played and continues to play in the struggle between colonial authorities and indigenous communities regarding issues of land rights. Gough (1968), Lewis (1973), George Stocking (1991), and Peter Pels (1997) have deconstructed the intimate connection between colonialism and anthropology by stressing the need for a new method of self-reflection in anthropology to recognize and address the imbalance of power between the anthropologist and their subjects.

Scrutiny of Anthropologists' Involvement in the Development Industry

As a new turning point, French anthropologists of law Le Roy (2004) and Kuyu (2001) overcame, to some extent, the criticism against anthropologists' involvement with colonial power. As such, they argue for an increased use of ethnography in Africa in order to fight against the oversimplification of development studies that adapt the legal systems inherited from Europe to traditional legal realities in Africa. Similarly, British and American anthropology have developed a criticism toward development aid without completely undermining its benefits. By critically looking at the ways in which international aid operates, this scholarship indicates that the action of development aid is informed by the need to support certain formats of economy more than actually reaching development goals (Escobar, 1995; Grillo & Stirrat, 1997; Mosse & Lewis, 2005). Interestingly, two opposite approaches which had an impact on the way anthropology itself has expanded in America and in Europe have been detected: whereas anthropologists in America have been more interested in differences, anthropologists in Europe have been more interested in similarities (Mattei & Nader, 2008, pp. 107–110). This is also due to a long-standing tension within Europe's own colonial venture between autonomy, subjection and assimilation (Lechat, 1994). As such, its evolution toward assimilation in the late stages of colonialism (Betts, 2005) can explain the anthropological trend consisting of finding similarities within the European tradition and forcing specific stages of development.

Anthropology of Human Rights

The relatively recent involvement of anthropologists in social causes has largely concerned international human rights, and overall, it was received positively both within and outside academia. Even though this kind of involvement is better identified with advocacy and to a great extent exceeds the scope of this chapter, it is necessary to survey it briefly in view of the integrated definition of cultural expertise that this chapter will suggest in its conclusions.

Until 1987 there were no anthropological publication published that contained the term "human rights" in their title. Yet anthropologists have been involved in the development of new categories of collective rights and many also engaged with human rights activism. Anthropologists contributed to UN formulations of genocide and discrimination against women. It was also thanks to the contribution of anthropology that the principle of the interdependence and indivisibility of civil-political and economic social–cultural rights gained significance. The collection of essays edited by MacClancy (2002) entitled *Exotic no more*, suggests that anthropologists' engagement with human rights make a strong argument against the misleading or at least outdated stereotype of the anthropologist in search of exoticism. Anthropologists Clay and Holcomb (1986) have spoken out against the human rights abuses of political dictators in Africa and Latin America but also about the complicity of US and European aid. Anthropologists Diskin (1991) and Smith (1996) have elucidated the ideologies and the dynamics of elite culture that marginalize and abuse indigenous people for what concerns the right to self-determination. To a great extent it seems that anthropologists have definitively confronted the limits of cultural relativism without shying away from adopting a critical approach on their own discipline. Goodale (2006) and Goodale and Merry (2017) have successfully re-claimed the important role of anthropology both scrutinizing the ways in which international human rights should be framed in order to serve their original purpose, and the part it plays in law making and expert witnessing.

The Human Terrain System: The Embedded Anthropologist

Unfortunately, neither the failures of anthropologists' engagement with colonial and imperialist enterprise or the widespread self-reflection that characterized the discipline were an effective deterrent for the Human Terrain System (HTS) involving the engagement of anthropologists in counterinsurgency operations in Iraq and Afghanistan. The anthropologist Montgomery McFate was the initiator of the HTS program pleading for the need of the military to know the "adversary culture" and for anthropologists to abandon the ivory tower of academia (McFate, 2005). The HTS came almost immediately under criticism from a host of anthropologists (Forte, 2011). In 2009, the Commission on the Engagement of Anthropology with the US Security and Intelligence entrusted by the American Anthropology Association for formulating an official position on the members' participation in the HTS program issued a statement of firm condemnation (CEAUSSIC, 2009).

Summary of Key Themes

As we have seen through this short excursus, there is no consistent history of expert witnessing in anthropology even though there have been many such cases, which date back to the second half of the nineteenth century, and perhaps even earlier in America. The engagement of anthropologists with applied

anthropology, even though not always inappropriate, has nevertheless generated two main reproaches regarding the close relationship between British anthropology and colonialism and the unethical co-option of American anthropologists into counterinsurgency programs in Latin America and Southeast Asia. From a wider perspective, critics who have deconstructed the role of anthropologists as experts, in general, have gone as far as to suggest the inadequacy of anthropology vis-à-vis other disciplines and appear to have a general disregard for applied anthropology. A lack of professional cohesion as well as a vulnerability to political and financial pressure also transpires from the debates that have developed internally within the discipline of anthropology. This is particularly true in those countries where anthropology as a discipline is still affected by a lack of credibility (Colajanni, 2014). This chapter argues that the lack of systematic records on anthropological expert witnessing, in combination with the absence of specific socio-legal tools to appraise its impact, renders any position in favor or against anthropological expertise unsupported by evidence. However, before outlining the possibility of a research that investigates expert witnessing beyond its narrow legal definition, this chapter will now delve more into the scholarship that has recorded anthropological expertise and reflected on its best practices.

EXPERT WITNESSING AND THE LAW

Deontology of Expert Witnessing

The most important contributions of anthropological and socio-legal scholarship to expert witnessing have focused on what I call as the deontology of expert witnessing: both the procedural requisites of expert witnessing and their limitations for an effective use of anthropological knowledge. Rosen (1977) with his seminal article "The anthropologist as expert witness" is among the first scholars to have recorded expert witnessing as a professional contribution to the implementation of self-determination and land rights claims by indigenous groups. Adopting the same auto-critical approach that has featured in much of the anthropology of the second half of the twentieth century, Rosen spelled out the central factors affecting cultural expertise: the appropriateness of anthropological knowledge to legal proceedings and the concomitant ethical issues of expert witnessing. Rosen's arguments unfold on a pragmatic level and his reflection heavily relies on North American history. Rosen traces the use of expert witnesses in the Anglo-American legal system to argue that its use developed alongside the appearance of the jury system. While between the twelfth and the fourteenth century, the jury functioned as a group of neighbors who already had knowledge of the facts surrounding the case, this changed in the sixteenth century when the jury became a group of arbiters who were not aware of the facts. It was then that experts began to play a greater role in the legal system as they presented and explained to the jury the facts that were relevant to the case. Rosen signals that the use of social science in court is a fairly recent development and that courts increasingly cite social scientists in support of their decisions. Rosen describes vastly different cases, mainly touching

on the management of ethnic diversity, in which anthropologists have been called upon to act as expert witnesses and identifies three main sets of issues. The first set of issues scrutinizes the findings that the anthropologist can submit to the court; the second delves into the reciprocal influence between lawyers and anthropologists, while the third set concerns how the anthropologists themselves view their role as expert witnesses in legal cases. While the first encompassing question concerning the adequacy of anthropological knowledge to legal proceedings have resonated with European anthropology, the three sets of questions which concern the practice of expert witnessing have remained crucial preoccupations of anthropologists acting as expert witnesses in the Anglo-Saxon legal systems.

Lawyers and Anthropologists

Anthropological scholarship has often argued for a collaboration between lawyers and anthropologists whilst also pointing at the intrinsic differences between lawyers' and anthropologists' thinking (Frances, Rigby, Sevareid, Davidson, Wright, Alvarez, and Loucky 1992). Some legal scholarship has also fostered interdisciplinary collaboration by providing support to anthropologists involved in expert witnessing (Twining, 1973). Mertz (1994), in a talk during the Annual Conference of the Alaska Anthropological Association examined the reciprocal expectations between anthropologists and lawyers in the legal process and was particularly concerned by the potential misuse of anthropological expertise in court. His chapter entitled "The Role of the Anthropologist as Expert Witness in Litigation" remains of actuality in that it addresses another recurrent concern among anthropologists: the requisite of neutrality which to some extent contradicts the duty of anthropologists to be close to the participants in their research (Vatuk, 2011). Mertz offers advice on how anthropologists may interpret the legal requirement of neutrality and how they should ensure that it is respected. Mertz's position is explicitly liberal in that it analyzes expert witnessing as a component of the industry of litigation: while good lawyers will ask experts for their honest evaluation, others feel that experts can be paid to support a particular position under the veneer of scientific rationality. There are also experts who will agree to be paid to support a particular position. Mertz's views may be a bit too clear cut for the debates that animate today's anthropology in relation to the rights of vulnerable groups. Nevertheless, this author values the integrity of the expert witness in the legal process and offers useful advice for anthropologists in this regard. Yet, whilst for Mertz, the use of anthropological expertise for advocacy constitutes a misuse of the anthropologist's expertise, more recent scholarship attracts also the attention to the social duty of social scientists to employ all in their power to ensure substantial protection to subaltern and vulnerable groups. Scholars have also pointed out the imbalance of power in the context of anthropological expertise, where anthropologists need to cope not only with hectic rhythms and a forced pace but also politics and bureaucracies that put the language of social science at a disadvantage (Bell, 1998; Campbell, 2017; Haviland, 2003; Holden, 2011; Lucas, 1996; Ramos, 1999).

Anthropologists and Aboriginal Land Rights

Australian scholarship on native titles has demonstrated the importance for the anthropologist to become acquainted with the legal requirements of expert witnessing and shows that long-term cooperation between lawyers and anthropologists, albeit difficult, can generate a tangible impact. Rummery (1995) alerts that in spite of Blackburn's precedent on the admissibility of anthropological evidence and the principle according to which the rules of evidence do not apply with legal force in the context of the Native Title Act of 1993, the hearsay rule and the rule regarding the use of opinion remain troublesome for anthropologists. According to the law of evidence in Australia, hearsay and opinions are in principle inadmissible as evidence. Hence, the court might not admit as evidence written or oral statements made by someone who is not called in as a witness as well as evidence that constitutes inferences drawn from facts. While acknowledging that in most litigation regarding native titles, the rules of evidence are relaxed to a considerable extent, Rummery argues that, from an anthropological perspective, the line between inferences drawn from facts and facts themselves is not always obvious. Rummery signals also that if the rules of evidence are strictly enforced, these will ensure that indigenous witnesses cannot give their opinion regarding their native customs and laws, no matter how knowledgeable they are about them.

Trigger (2004) reflects on the legal requisites of anthropological expertise from the point of view of social sciences. He maintains that, whereas lawyers are *instructed* by their clients, anthropologists are *appointed* by the litigants or defendants or by the court. This means to stress on the neutral position of the anthropologist acting as an expert witness. Trigger acknowledges that political engagement is felt by some as an integrant component of the academic profession, but sees political involvement and expert witnessing as incompatible activities. Trigger's contribution that best responds to the general questions asked by Rosen in 1977 regarding the adequacy of anthropological knowledge in court is an in-depth analysis of the difference between hearsay and expert opinion. Triggers (2004) cites *Daniel v. Western Australia* where the judge considered whether key data used by an anthropologist, that is, talk among the informants or subjects of the research, could be used as part of an expert report. The court was uncomfortable with anthropological first-hand data because these would lead to conclude that the anthropologist's conclusions are hearsay. Trigger also signals that Australian precedents have evolved to specifically consider evidence from anthropological expertise according to two types: anthropological theory and admissible hearsay because the ordinary law of evidence does not apply in hearings of statutory land claims. Australian precedents have remained somewhat ambiguous on the admissibility of hearsay in anthropological expertise. As Trigger notes, this is a potential pitfall of the use of anthropological knowledge in court.

As far as my own experience goes as an expert witness in the UK, I can attest to the fact that courts in the UK may engage in similar ambiguity by rejecting the anthropologist's conclusions if these are based on first-hand data, that is,

hearsay according to the legal doctrine. This principle is, however, often mitigated by the application of a lower standard of evidence in certain proceedings such as those regarding asylum and, sometimes, a surprising capacity of law courts to appreciate anthropological methods.

Super-diversity Scholarship

A rather specialized but multidisciplinary branch of scholarship which has been in favor of applying socio-legal/anthropological expertise in Britain has based its considerations on the fact that globalization has led to a shrinking of the world, migration across the globe is becoming common, and countries are becoming more and more culturally pluralistic. This scholarship draws from Vertovec's notion of super-diversity to argue for an academic engagement in substantial respect for British minorities. Ballard (2007) Menski (2011) and Shah (2007) have all maintained that European countries can no longer look at ethnic communities as foreign since they form an intrinsic part of European society. They argue that while these ethnic communities have learned to adapt to the culture of the majority they have retained many of their own traditions, customs, and values. Menski maintains that these ethnic groups tend to cluster together and form their own communities partly in order to adapt to the exclusion and hostility from the dominant culture and partly because they possess distinctive religious and cultural traditions. Ballard suggests that law is itself a social construct, which reflects the social realities of society and subsequently the law changes as society and culture undergo changes. In this sense, law cannot be applied universally. Shah (2007; 2009) goes further in describing how non-British laws recognize private arrangements and customs that are not listed among state-sanctioned sources of law. In so doing, he has greatly contributed to relativize monolithic interpretations of law that tend to favor by default state law in the litigation of private international law.

Non-state Law and Legal Pluralism

At the end of the twentieth century, talk about law beyond the state was still linked with criticism regarding social inequalities and power asymmetries (Griffiths, 1997). Yet, the conceptualization of the plurality of laws had already started to gain consensus (Baxi, 1986; Chiba, 1986). Notwithstanding, both notions of legal pluralism characterized as being in opposition to legal centralism and legal pluralism as multiple rather than a unique sovereign system have been challenged on several accounts. Such criticism revolves around the fear that equal acknowledgment of the diverse practices of law would irremediably inflate the notion of state law (Tamanaha, 1993) because of the inclusion of forms of resistance to it (Fuller, 1994) thus further blurring the supposedly necessary boundaries between state and non-state law (Tamanaha, Sage, & Woolcock, 2012). While Woodman (1998) and de Sousa Santos (2002) have responded by questioning the ontological nature of the opposition between state and non-state law, others have taken forward conceptualizations revolving around the plurality of

law and the examples of integration of counter-hegemonic instances within the state (Benda-Beckmann & Benda-Beckmann, 2006).

Anthony Good (2007) does not address the debate on legal pluralism but does provide a partial response focusing on the struggle between anthropologists and lawyers. His study is grounded on first-hand data on expert witnessing within the process of asylum and is still to date the only systematic analysis of the praxis of anthropological expertise in the United Kingdom. The originality of Good's work lies also in his reflection regarding the peculiar contribution of anthropology to conflict resolution thanks to a set of knowledge that has its roots outside state law. Good pragmatically sees his own involvement as an anthropologist in the legal process in terms of the "lesser evil" (2007, p. 259) and in view of ensuring vital support to the victims of violations of human rights (2007, p. 265). His views reinforce the point that anthropologists and lawyers think differently and that such differences might also be related to competition between the two professional orders (2007, p. 12).

Anthropological Expertise in Continental Europe

While anthropological expertise developed widely throughout Anglo-Saxon countries, it further extended to Continental Europe in the second half of the twentieth century with the recent migration flux. European jurisdictions have been increasingly confronted with the necessity to evaluate legal facts originated in the countries of the global South but generating new rights in the global North (Holden, 2008; 2013). Sometimes, anthropological expertise has been incorporated at the pre-judicial stage in counselling services or incorporated into mediation aiming to prevent judicialization. At other times, it has been reformulated in order to provide new fora for alternative dispute resolution in the hands of lawyers and notaries inspired by intercultural law (Ricca, 2014). In a similar vein, some jurists have designed new instruments, such as questionnaires that the judge self-administers to the case in order to treat the facts and the litigants in a culturally sensitive manner (Ruggiu, 2012). In France, cultural mediators and translators are called to provide assistance to the courts that very often exceeds their own competences (Bouillier, 2011) but attests to an increasing awareness of the judiciary toward the notions of culture (Barranger and De Maximy, 2000; Garapon, 1997).

Summary of Key Themes

This survey shows that major concerns regarding the use of anthropological expert witnessing have been prescriptive. On the one hand, experts have tended to reshape their knowledge into the language of the law while on the other members of the legal profession have incorporated some notions of culture without much reflection of any potential epistemological clash. As an example of the above mentioned point, a scholarly statement regarding the non-existence of divorce among certain social groups is likely to be interpreted more cogently in a court of law than in academia. In other words, the epistemological weight of

anthropological discourse varies owing to the different kinds of inferences in anthropological and legal reasoning. Whilst the legal profession has increasingly showed an interest in understanding non-state law and foreign laws, the epistemological difference between anthropological and legal discourse seems to rarely figure among the current preoccupations regarding anthropological expert witnessing. As Riles (2005) argues the danger of using ethnographic texts in court lies in their unsuitability to be transformed into legal instruments. Rosen (2017, p. 82) again stands out for signaling how science is itself part of culture, saying that "So long as the legal system itself is based on the proposition that truth emerges from adversity, and that science is about truth and not workable interpretations, the value of experts and the structuring of their role in court will doubtless remain as ambivalent as is our contemporary attitude toward the many kinds of experts who populate our lives."

In a nutshell, the existing scholarship on anthropological expertise, as scattered as it is, but points at four alarming aspects:

(1) Neutrality as a crux. Although social scientists have developed articulated methodologies regarding relationships with informants in the field and are constantly preoccupied with professional deontology, in court they have often been accused either of not being ideologically disengaged from the parties or, of being nothing other than hired guns, saying whatever their lawyers want them to say.
(2) Lack of predictability of how expert witnessing is used or assessed by courts in the UK. While it is not clear what the role of anthropological expertise is in the legal outcomes of asylum proceedings, expertise is seen as the lesser evil in view of ensuring vital support to the victims of violations of human rights.
(3) Potential epistemological clashes regarding the interpretation of ethnographic data by anthropologists and lawyers.
(4) An expectation of an increasing tension between the ever-greater regulation of mass migration and the unrecorded adjudication of cases through expert witnessing.

ANTHROPOLOGICAL EXPERTISE IN COMMON LAW AND CIVIL LAW TRADITIONS

More research should be carried out on anthropological expert witnessing in Continental Europe. However, from the most recent involvement of anthropologists in connection with the management of big migrations fluxes of the twenty-first century expert witnessing does not emerge as frequent in Continental Europe. The essays in this special issue show, on the one hand, a significant concern from the European legal profession with matters that could be qualified as "cultural" together with the emergent role of anthropologists but also a widespread reticence toward their acknowledgment. Instead, in Australasia, North America, and the UK, anthropological expertise has become highly formalized as an instrument that, at least formally, should contribute to a better protection

of minorities' rights and self- determination. This should facilitate the study of expert witnessing beyond its legal technicalities and toward the understanding of the practice from a socio-legal perspective. However, the exclusive focus on common law countries would eventually undermine the scope of cultural expertise in civil law countries and carry the risk of a reading of similar phenomena through common law lenses. Hence, before proposing a way to systematically scrutinize anthropological expertise, this chapter needs to delve into the features of the legal traditions that may impact on the use of anthropological expertise.

Due to the higher systematization of anthropological expert witnessing in Anglo-Saxon countries, I suggest that the analysis of the characteristics of common law and civil law legal traditions may be of help. The difference between common law and civil law dates back to the Middles Ages and has been scrutinized in depth, reformulated, and criticized by jurists. Here, it should not be interpreted strictly but can serve as an analytical reference from an interdisciplinary perspective. Common law is generally uncodified and relies on precedents, whilst civil law rests on written law and codes. Thus, the common law tradition has kept its practical grounding whereby despite the recent influx of statutes, legal principles, statutory interpretations, and cases, decisions tend to be made on a factual basis; on the other hand, the French legal system and to a larger extent European civil law systems remain closer to an overarching theoretical construct within which each case fits into a specific legal logic beyond its factual implications.

The tension between common law and civil law, which should not be interpreted in terms of being in opposition to one another, has been aptly represented as the difference between the hedgehog and the fox (Berlin, 1953). European countries vary widely with regard to the acknowledgment of foreign laws (i.e., statuses, precedents, religious laws, customs) and especially the extent to which non-European legal rules and customs apply in European courts. Hence, the use of the concept *ordre public* in European private international law, acts as an implicit refusal of the recognition of foreign legal statuses, or the application of foreign legal rules, which are deemed to be in conflict with majority norms (see for example the controversies regarding Sharia law and Islamic banking). As Bruno Latour observed in his ethnography of the French Conseil d'État regarding the non-social character of the French legal discourse: "[l]earn the entire *Lebon* [French law report] by heart and you will know nothing more about France. You will have learned only law, occasionally punctuated by more or less moving complaint of a few actors with colourful names" (Latour, 2010, p. 268).

Perhaps resonating with the civil law tradition, the social sciences scholarship of Continental Europe tends to point at a body of literature, mostly authored by legal scholars and lawyers, which is expected to assist with the management of foreign law, especially Islamic cultural concepts, in European law and law courts (Hoekema, van Rossum, Foblets, Gaudreault-Desbiens, & Dundes Renteln, 2010; Rutten, 1988, 1999, 2011, 2012; van der Velden, 2001). Most of this literature focuses on how European judges deal with – or should deal with – non-European legal concepts, and culture-based legal claims. Often taking a legal pluralist perspective, this body of literature stresses concepts of inclusion and

argues that migrants and other minorities may wish to have their "own" customs and culture recognized or accommodated by European laws. These studies include empirical data, socio-legal analysis, and case law of various European courts as well as the European Court of Human Rights. However, while these studies may mention the impact of migrant minorities on European legal systems, attention is not directed at anthropological expertise, which nevertheless exits, although inconsistently, both in the legislation and in case law. Rather, the focus is on the decision-making process in which judges would use or expand their own knowledge to include non-European laws (Ruggiu, 2012). Hence, important projects of translation have been funded to make authoritative precedents from non-European law available to European judges[1] Yet, some other studies have also shown how lawyers, embassies, translators, NGOs and private offices provide legal aid and lobby for legal change to protect the rights of minorities in Europe (Bouillier, 2011; Ricca, 2014; Sportel, 2014; Sbriccoli & Jacoviello, 2011).

If common law seems much more permeable to social and cultural evidence and civil law much more resistant to it then international private law appears to be the only site for the resolution of conflicts in a multicultural setting. The contributions to this special issue confirm on the one hand the divide between common law and civil law systems for what concerns the different consideration of cultural evidence, and on the other suggests also the existence of cultural evidence in ways other than formal expert witnessing (see in this issue Ciccozzi and Decarli, Cooke, Rethimiotaki, and Teixeira Lopes, Leão and Ferro). In both common law and civil law traditions, however, it is evident that written laws and for that matter private international law, do not exhaust the domain in which socio-anthropological studies contribute to the resolution of conflicts. This chapter argues that in order to assess the contribution of social sciences, in particular anthropology, to conflict resolution in multicultural settings, it is crucial to include all those interactions that revolve around the relationship between culture and law. Hence, the potential formulation of cultural expertise for grasping law beyond the written text will form the conclusion of this chapter.

CONCLUSION: THE *RAISON D'ÊTRE* OF CULTURAL EXPERTISE

Clifford and Rosen have provided crucial inputs in the history of expert witnessing and both highlight, from different angles, the difficulty to talk authoritatively on complex concepts such as identity and belonging, which are also part of lay people's conception of self. The historical excursus of expert witnessing shows that if anthropological expertise has, with time, become acknowledged beyond its specialized circuits, disbelief, however, has developed quickly around its merit. This long-standing polarization is revived today in the gap between the discourse of human rights and sudden acts of violence, disclosing large-scale tensions and structural differences that have gone unnoticed so far. To complicate the picture, legal pluralism, the accommodation of non-western laws and customs, and measures of protection of minorities have all been criticized, because they tend to be associated with condoning abhorrent customs and justifying

inequalities. Among the most controversial examples is female genital mutilation/female genital circumcision where the practice is criminalized and generating international protection (see Mestre i Mestre and Johndotter in this special issue). To this also adds the image's drawback accused by minority groups whenever law courts adopt international measures of protection for individuals who are victims of culture-related discrimination and violence, as in the case of so-called honor killing (Abu-Lughod, 2012; Visweswaran, 2010). Another potential drawback lies in the disregard of power relationships within the social group itself which may cause the perpetuation of power-based discrimination (Dequen, 2013; Sportel, 2014). For these reasons, feminist and Marxist scholarships have greatly contributed by signaling the potential downsides of accommodating non-European laws and customs (Okin et al., 1999; Parashar, 2013, 2015; Saharso & Prins, 2008).

The second section of this chapter has shown the prevalent preoccupation of socio-legal scholarship with the legal conformity of anthropological expert witnessing. The focus on the legal requisites of expert witnessing has been often accompanied by ethical and deontological considerations. Whilst many anthropologists have doubted the very adequacy of anthropological knowledge to legal proceedings, some urge law courts to strive for a better knowledge of cultural contexts in order to provide better justice for minorities if necessary by challenging decision-making authorities (Campbell, 2017). However, continental scholarship appears at this time inclined to re-interpret non-European laws in light of the European legal system and without the involvement of social scientists or, ideally to seek solutions that prevent judicialization. Interestingly, it is a jurist and not an anthropologist who formulates an alert on the legal colonization of which anthropology is the object (Edmond, 2004). Yet, so far it was not possible to take a position from within the discipline of anthropology because attention was directed mainly to the conformity of anthropological expertise within the black letter law. A critical assessment of anthropological expertise was never carried out systematically because of the tendency of the anthropologists engaged with law to overestimate the need for compliance to legal technicalities. Hence, the reluctance of some anthropologists toward an engagement in court and the conundrum between the anthropologists who are critical of applied anthropology and the ones who complain that lawyers do not take anthropologists seriously that lawyers do not take anthropologists seriously. The few scholars who have tried to overcome this dilemma have argued not only for collaboration but also for interdisciplinarity. These scholars have focused on the language of expert witnessing and on the production of evidence, ethics, truth, and authority but have struggled to reach out beyond the applied sciences.

The third section of this chapter has shown that in common law countries the role of the expert witness has been expanded to systematically use cultural expertise when the litigants belong to minorities while, in countries of civil law, the judge remains reluctant to depart from the principle of being the only one cognizant of the law. Notwithstanding this tension, Anglo-Saxon scholarship that has focused on the conformity of expert witnessing with procedural requisites, and Continental Europe scholarship that has focused on the translation of non-

European laws have at least one point in common: both have ignored the potential contribution of anthropological expertise to a better understanding of "inter-legalities" beyond the black letter law (Santos, 2002, p. 437). This ignorance, I argue, leads to a dangerous misunderstanding in particular when using sources of law and legal concepts, with which the deciding authority is not familiar with. The most frequent misunderstanding in this regard is the prescriptive interpretation of the anthropological description of customs which, depending on the audience conveys different meanings (Holden & Chaudhary, 2013). Closely linked to the misunderstanding between prescription and description is also the danger of cultural essentialism according to which social groups are labeled and very often stigmatised with simplistic generalisations ((Grillo, 2003). Eventually, the urgent need for an in-depth research on cultural expertise is supported by the use of cultural knowledge in litigation which increases by the day and ranges from civil law to penal law including banking law, migration and asylum law, family law, and business law. Furthermore, there is also a growing array of out-of-courts dispute resolution systems that use cultural knowledge, especially in the countries of civil law. As preliminary data from the field show the typology of cultural experts is extremely varied, ranging from independent experts to cultural mediators, and including witnesses, interpreters, assistants to the prosecution, educationists, and security agents.

Although the definition of cultural expertise is new, and I argue, already in need of scrutiny for an integrated formulation, the engagement of anthropologists as expert witnesses is not a new phenomenon but needs to be accounted for systematically. The conceptualisation of cultural expertise was hindered so far by the overvaluation of the legal requisites of cultural expert witnessing on one hand, and on the other by the prevailing interest of academic institutions to have a short term impact on policy making. It should now be possible to reformulate the notion of cultural expert witnessing from a broader socio-legal perspective to stress the connection between culture as it is mundanely perceived by social actors (Pollner, 1987) and law within and outside state jurisdiction in order to acknowledge and assess the contribution of social sciences within and outside state law both in common law and civil law countries. This approach would not only apply what Rosen (2017) says about scientific – and legal – truths as being themselves part of culture but also confirm what Hannerz (2010) says about diversity as being the "business" of anthropologists. Yet, this chapter suggests, that in light of the uncertain history of anthropological expert witnessing, a skeptical approach that combines with social responsibility is crucial to the assessment of the occurrence and significance of cultural expertise. If cultural expertise has a sense today it should be within a de-colonizing approach that re-engages with people and addresses power unbalance (Bringa & Synnøve, 2016; Sillitoe, 2015; Uddin, 2011). An integrated definition of cultural expertise that includes in-court and out-of-court settings in both common law and civil law traditions requires a shift from an ontological to a pragmatic approach. Hence, the threshold definition of cultural expertise could be used as a stepping stone with a double purpose: to systematically appraise the use and impact of all the diverse activities in which social scientists have engaged in connection with

expert witnessing; as well as to re-acknowledge, scrutinize, and reformulate the engagement of social sciences to the understanding of law and the resolution of conflicts. Therein lies the raison d'être of a reformulation of cultural expertise.

NOTE

1. See The Moroccan Family Code – an analysis of the application of the provisions of the Code that relate in particular to transnational family situations and/or Moroccan nationals residing abroad (hereafter MNAs) under the direction of Marie-Claire Foblets (https://www.eth.mpg.de/3413882/current-project).

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