Cultural Expertise and Socio-Legal Studies

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This special issue is the outcome of the *Cultural Expertise in Socio-legal Studies and History* conference held on December 15–16, 2016, in Oxford, at the Centre for Socio-legal Studies and Maison Française. It was the inaugural conference for the project titled "Cultural Expertise in Europe: What is it useful for?" (EURO-EXPERT) funded by the European Research Council. This special issue includes contributions by scholars specializing in law and culture in civil and common law traditions both in and outside of Europe. Although the stress of EURO-EXPERT is on the European context, the inclusion of contributions from non-European contexts suggests the necessity for a global understanding of cultural expertise. The aim of this special issue is to explore in-country socio-legal approaches revolving around the use of cultural expertise whose threshold definition was formulated as follows: "the special knowledge that enables socio-legal scholars, or, more generally speaking, cultural mediators – the so-called cultural brokers, to locate and describe relevant facts in light of the particular background of the claimants and litigants and for the use of the court" (Holden, 2011, p. 2). This definition is scrutinized in this special issue against a variety of contexts and socio-legal approaches in view of fine-tuning, updating and a recontextualization within legal theories, and legal precedents in all those contexts where areas of cultural studies and socio-legal studies are used to solve conflicts or support claims. The authors have explored the applicability of the definition of cultural expertise in a variety of legal systems. All chapters of this special issue adopt a socio-legal approach for the focus on the relationship between law and society. However, depending on the academic background of the authors, different components of socio-legal

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approaches have been chosen. The reason for such a purposeful variety is to foster a debate that is diverse, inclusive, constructive, and innovative in order to lay the basis for evaluating the use and impact of cultural expertise in modern litigation both in and out of court. In this introduction, I will shortly recall the genesis of the conceptualization of the notion of cultural expertise and its relationship with the well-known concept of cultural defense; I will then briefly outline the positioning of EURO-EXPERT regarding notions of power and culture to which most of the authors in this special issue refer as variables in the social phenomena dealt with by cultural expertise; and eventually, I will introduce the contributions to this special issue.

CULTURAL EXPERTISE AND CULTURAL DEFENSE

The first formulation of the concept of cultural expertise, reported above, was generated in 2009 from the need to better understand an activity that anthropologists have been engaged with since the very beginning of their academic discipline, especially in North America and in Australia, but increasingly during decolonization processes and big migration flows in Europe (Holden, 2011). This is nothing but a threshold definition and the result of a compromise among the different perspectives of the contributors to the collected volume titled *Cultural Expertise and Litigation* (Holden, 2011). As a socio-legal definition that exceeds legal technicalities, the term "cultural expertise" is designed to account for the specific but complex contribution that anthropology, and by extension social sciences, can provide to the construction of legal truth in the legal process, policy-making, and out-of-court dispute resolution.

Cultural expertise does not aim to directly impact legal outcomes. Importantly, and also in light of the scholarship on cultural expert witnessing, the concept of cultural expertise allows for a necessary distinction to be made with regard to cultural defense. Not differently from any other form of expertise in court, the purpose of cultural expertise is to apply special knowledge to a definite set of circumstances submitted to the expert whose considerations must be elaborated irrespectively from the legal outcome of the case. Similar to any other kind of legal expertise but different from cultural defense, cultural expertise ought to be neutral, no matter whether it is requested by the court or by the parties. Cultural defense, instead, is the use of cultural arguments by the defense lawyer, even though cultural defense has also the scope to provide the judge with supposedly neutral information on culture (Renteln, 2004). Although cultural expertise and cultural defense are often linked and in some cases overlap, it is important to see that cultural expertise differs epistemologically from cultural defense: It precedes it temporally within the proceeding and exceeds it in scope, because it can be requested for a wider range of cases than those of the typical cultural defense which plays a role mainly in criminal law. Very often, cultural defense develops with the assistance of a cultural expert, who can even provide the defense with arguments that will integrate the cultural defense and as such influence the legal outcome of a case. But, as this special issue demonstrates, cultural expertise – be it adequate or not is another matter – does not depend on

the actual appointment of a cultural expert. Several chapters in this special issue show that lawyers and judges themselves engage in an activity that can be defined as cultural expertise when they use socio-legal instruments that imply an assessment of culture: The most evident cases in North America are the culture test (Eisenberg, 2006) and cultural defense (Renteln, 2004). Eventually, I suggest that whilst various forms of cultural expertise have been studied in-depth, cultural expertise has remained undetected so far because of the lack of an adequate conceptual formulation.

POWER AND CULTURE

In order to proceed toward an assessment of cultural expertise as a theoretical formulation that applies to a variety of contexts, it is important to position our approach with regard to notions of power and culture in anthropology, even though both concepts evidently elude an adequate treatment here. The history of human rights shows quite clearly that discrimination and abuse have been justified both by egalitarian and discriminatory agendas. Regrettably, anthropology has known both these phenomena and has thus been associated with both. However, it is hoped here, that the initial interest in similarities – intended as subjection and assimilation – which characterized some anthropological and socio-legal scholarship of colonial Europe, should have been abandoned by now. This is how I interpret the widespread reluctance of anthropologists to become involved with applied sciences. This absence is, however, particularly painful to the ones who genuinely engage today in societal problem-solving. In my chapter, I hint at the fact that anthropology and anthropologists have sometimes been on the wrong side of history but have seldom been powerful. More than 20 years ago, Lucas (1996) and more recently Colajanni (2014) and Grillo (2016) have pointed at a widespread pessimism within the discipline itself regarding the ability of anthropology to influence institutional decision-making and to set the agenda in the public domain.

Yet, there is increasing scope for social sciences to contribute to the resolution of conflicts in multicultural settings. Practices of law that travel alongside various kinds of diasporas and mass migration are now routinely scrutinized by the decision-making authorities in Western countries. Euro-American authorities are formally invested in the prerogative to evaluate the legality of migrants' actions and the authenticity of their accounts. The validity of informal or polygamous marriages can become relevant in migration procedures when people travel to Europe and, after their deaths, inheritance and taxes may need to be decided upon. Through the development of private international laws and international and bilateral treaties, European countries have each found different ways to deal with cross-border litigation and the legal statuses of migrants both inside and outside the European Union. Some jurisdictions deal with these new situations thanks to the assistance of country experts, translators, mediators, and academicians; other jurisdictions engage directly in argumentations revolving around culture. The treatment of culture in a legal setting is nevertheless elusive regarding its role in litigation and impact on justice. It is unclear, in

particular, if cultural expert witnessing can contribute to a better application of human rights and for that matter to redress power imbalances. In this vein, I argue that the notion of cultural expertise could be of help to further scrutinize the discourse of human rights in terms of engagement with substantial inclusion and substantial equality. Accordingly, one thread of this special issue, albeit differently developed in each chapter, is the consideration of power as a significant component of the discourse on cultural expertise.

The second positioning of this special issue concerns the notion of culture that promises to be crucial to the integrated definition of cultural expertise. In North America, at the start of the twentieth century, anthropological studies focused on the notion of culture based on general patterns of behavior, distinct from biological determinations and associated with diffusionist theories taking into account contact and history. In England, the dominant paradigm, influenced by Emile Durkheim (1919), was rather one of social structure, studied with long fieldwork immersions and according to a synchronic perspective. The two schools developed almost independently and several generations of researchers reasserted and emphasized the importance of culture on both sides of the Atlantic. British anthropology has tended to see culture as a marginal and contingent by-product of society while American anthropology has stressed the uniqueness and diversity of societies. The second half of the twenty-first century witnessed an increased influence of American anthropology leading to a consolidation of the concept of culture. With Clifford Geertz (1973) the focus of anthropology shifted from the social sciences, which objectively described measurable aspects, to the humanities, which rather subjectively and interpretatively accounted for social phenomena. The wave of criticism produced by the postmodern schools of thoughts to the cultural determinism of Geertz brought a reflexive stance where no objective account of culture is deemed to be possible anymore.

Whilst the role of the cultural expert witness appears as consolidated in American socio-legal studies (Sarat & Rodriguez, 2018), this special issue shows that European scholarship is cautious but highly interested. Several studies on law and culture re-evaluate the importance of social anthropology in dispute resolution especially if combined with other approaches that emphasize the role of ethnicity, immigration, and political debates. Scandinavian scholarship argues the need for a renewed engagement of social sciences with society, precisely through cultural expert witnessing in a great variety of contexts and situations ranging from international tribunals to civil litigation and including war (Bringa & Synnøve, 2016). By reviving the attention to the link between law and culture, this special issue also takes up the challenge launched by Ulf Hannerz in *Diversity is Our Business* (2010) where he argues that in spite of all the pessimistic predictions, anthropology is alive and well thanks to its consistent emphasis on diversity. I suggest that an integrated definition of cultural expertise is possible with the help of an ethnomethodological perspective in which culture is not defined ontologically but rather pragmatically in a mundane framework (Pollner, 1987) and that theories such as the actor-network theory (Latour, 2005, 2010) might be particularly appropriate to grasp the role of culture in the

legal process seen as being connected or associated with everyday life. Rosen shows in *The Judgement of Culture* (2017) that law is, after all, not as certain as it is supposed to be and that such an uncertainty is connected with its dependence on cultural contexts. This is the challenge that this special issue takes up when engaging in an interdisciplinary dialogue between lawyers and social scientists.

THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

This special issue is organized into five sections: Cultural Expertise With(out) Cultural Experts, the Sites of Cultural Expertise, Comparative Perspectives on Cultural Expertise, Cultural Expertise in Non-European Contexts, and Conclusions for a Way Forward.

The first section titled *Cultural Expertise With(out) Cultural Experts* takes us to Finland and Italy to explore cultural expertise irrespective of cultural experts and to scrutinize the ambiguous role and status of cultural experts in a legal praxis that rarely acknowledge their existence. Both chapters of this section adopt an anthropological approach to note that cultural arguments in court risk undermining claims and recommend a certain level of professionalization in cultural expertise. These chapters include mention of the legislative framework allowing or disallowing cultural expertise but also analyze the gaps and silences in which de facto cultural expertise develops in spite of institutional disregard. This section opens with "From Invisible to Visible: Locating 'Cultural Expertise' in the Law Courts of Two Finnish Cities" by Taina Cooke. Here, she unravels an informal typology of cultural expertise in a process that she defines as a trajectory going "from invisible to visible." Cooke shows that although Finnish courts do not appoint cultural experts systematically, interpreters and eyewitnesses can be used as cultural experts informally. Her data collected through ethnographic fieldwork in court indicate that social actors involved in litigation are often aware of the unfavorable impact of culture and tend to conceal it. Cooke argues that such an informal treatment of culture, instead of ensuring justice in the name of equality, carries the risk of perpetuating social stereotypes. Cooke concludes that cultural expertise is a challenge that not all social scientists are ready to confront. She maintains that being more open to talk about culture and cultural expertise in Finnish courts would have the advantage of addressing dangerous oversimplifications by non-experts.

The second chapter of the first section, "Cultural Expertise in Italian Courts: Contexts, Cases and Issues," continues the reflection on the informal role of cultural expertise. Ciccozzi and Decarli describe the paradoxical situation in which Italian cultural experts provide various types of assistance to courts but, regrettably, without or only marginal institutional acknowledgment. Their chapter is divided into two parts: the first part is a survey of the extraordinary variety of cases in which social scientists provide cultural expertise in Italy, while the second focuses on the controversial case of the 2009 earthquake in L'Aquila. In the first part, Decarli laments the absence of anthropologists in the registers of experts in Italy, which is contradictory to their informal assistance as mediators,

interpreters, social workers, and witnesses in family law and criminal law cases. In the second part, Ciccozzi tells of his own experience of acting as a cultural expert when he argued that natural scientists by specifically predicting only a mild seismic activity in 2009 hindered the capacity of local inhabitants to perceive the risk and to act sensibly as a consequence. Both authors describe a situation of extraordinary informality, which has the merit to allow for interdisciplinary experimentation, even though it virtually annihilates the credibility of cultural anthropologists.

The second section entitled the *Sites of Cultural Expertise* highlights the variety of sites of cultural expertise within state and non-state jurisdiction, NGOs, and other sites of conflict resolution, that is, mediation, adjudication, and alternative dispute resolution. The first chapter of this section is "Assessing Cultural Expertise in Portugal: Challenges and Opportunities" by João Teixeira Lopes, Anabela Costa Leão, and Lígia Ferro who take us to Portugal. The authors of this chapter argue for a broader definition of cultural expertise that includes cultural arguments in legal reasoning pointing at the fact that state law is not culturally neutral per se. They refer to academic controversies concerning the definition of culture and, as all the other authors of this special issue, express preoccupations regarding the risk to perpetuate essentialized concepts of culture. However, they also argue that it is the duty of the state to respect and protect cultural identity and lament the low level of professionalization of cultural mediators. This chapter connects with both Cooke, and Ciccozzi and Decarli whose papers show that certain experts provide their assistance outside the typical sites of dispute resolution. However, Lopes, Leão, and Ferro go further to suggest a typology of cultural expertise whose sites are surprisingly varied in spite of the overall lack of institutional recognition of cultural expertise in Portugal.

The second chapter of this section is "Cultural Expertise in Asylum Granting Procedure in Greece: Evaluating the Experiences and the Prospects" by Helen Rethimiotaki. This chapter also suggests a broader definition of cultural expertise and includes several sites of cultural expertise whilst focusing in particular on mediation processes out of court. Helen Rethimiotaki reminds us that cultural mediators were introduced in Greece and other European countries by the European Fund for the Integration of Third-country Nationals with the aim to facilitate communication between Third-country Nationals and the Greek administration, in respect of minorities' rights and their integration in the long term. This chapter provides compelling information about how legal professionals deal with notions of culture on an everyday basis and how they would like to be assisted in order to deliver better justice. Rethimiotaki's conclusions are clearly favorable to an extended use of cultural expertise whose definition might include not only court but also out-of-court settings in order to help the Greek state to implement a multiethnic political community and a cosmopolitan legal order.

The third section of this special issue entitled *Comparative Perspectives on Cultural Expertise* draws from the comparative methodology that has historically developed almost as an inherent ingredient of anthropology. Whilst comparative law has conventionally involved the comparison of legal systems, the

comparison in anthropology has been used to compare different elements within the same culture as well as different social groups across different periods of time. This section opens with "Court Cases, Cultural Expertise, and 'Female Genital Mutilation' in Europe" by Ruth Mestre and Sara Johnsdotter, whose comparative approach is closer to conventional comparisons among legal systems, and which tackles the controversial topic of female genital mutilations (FGMs) in Europe. On the basis of data collected in 11 European countries, the authors show that it is not the lack of cultural knowledge that damages the individuals involved in FGM; but rather, it is the assumption that cultural expertise, in the form of cultural defense, should necessarily condone cultural practices even when, as in the case of FGM, these constitute violence against women. The authors conclude that much remains to be investigated regarding the prevention of violence against women whose circumstances may be better addressed by culture-focused approaches.

The second chapter of this comparative section entitled "Between Norms, Facts, and Stereotypes: The Place of Culture and Ethnicity in Belgian and French Family Justice" by Caroline Simon, Barbara Truffin, and Anne Wyvekens focuses on similarities between French and Belgian family litigation which both feature an unsatisfactory treatment of cultural arguments. The authors uncover the paradoxical coexistence of the statutory refusal of cultural arguments in the name of equality before the law with a de facto recurrence of cultural components in the everyday discourse of judges, lawyers, and litigants. Simon, Truffin, and Wyvekens argue that a praxeological approach to law is necessary to understand the relationship between law and culture without falling into the widespread stereotypes propagated by the virtual absence of satisfactory cultural expertise. Similar to Cooke, the authors' findings are that cultural arguments are likely to disadvantage litigants mainly in connection with the reification of culture used for undermining ethnic minorities. Hence, the authors express a wish toward a more fluid and dispassionate formulation of cultural diversity. The chapter's conclusions flag up the need for training in cultural expertise that may facilitate the communication between judges and litigants in multicultural settings.

The last section of this special issue entitled *Cultural Expertise in Non-European Contexts* engages with cultural expertise in Australia and in South Africa. The reason for this section in a special issue whose primary focus is Europe is a theoretical one with concrete ramifications regarding the applied outputs of EURO-EXPERT. I argue, in fact, that cultural expertise in Europe can hardly be discussed in isolation and that Europe would benefit from greater academic contamination. The first chapter of this section is "Cultural Expertise in Australia: Colonial Laws, Customs, and Emergent Legal Pluralism" by Ann Black, who traces the contribution of social sciences in redressing the dispossession of First Nations' land rights and connects cultural expertise with legal pluralism. She argues that although de facto legal pluralism has been increasingly recognized in Australia, cultural expertise is necessary to ensure the passage toward de jure legal recognition. Black also tackles more recent cultural expertise in Australia, which is used for settling family law litigation among non-European diasporas. Evidently, much of her discussion resonates with

many of the issues and concerns that are also felt as pressing in the European context: the relationship between cultural expertise and cultural defense, or the use of social sciences for the claim of mitigating circumstances in criminal law; and the requisites that an expert should fulfill.

The second chapter of this section is "Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?" by Christa Rautenbach. Her chapter deals with the flexibility of the South African legal system, which skillfully navigates common and customary law, broadly designating both local and imported customary laws. Rautenbach focuses, in particular, on the processes of ascertainment of customs which are treated as foreign law by the legal system. Hence, according to the law of evidence, experts are appointed to assist the judges when special knowledge is needed. This chapter provides a fascinating typology of experts ranging from formal to more informal appointments. The author has no qualms in attesting to the usefulness of cultural expertise that does not need minimal requirements and professionalism and warns Europe that "one shoe does not fit all." Her chapter concludes with an explicit offer for collaboration with multicultural Europe in order to look at cultural diversity from a global perspective in which the case of South Africa can be of help.

The last section of this special issue *Suggestions for a Way Forward* includes a chapter authored by myself and titled "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." It seems to me that the widely shared skepticism toward reified notions of culture and the danger of its perpetuation through damaging stereotypes might be productively addressed by a scrutiny of what I propose to call "cultural expertise." In the first part of my article, I propose a synthetic historical overview of cultural expert witnessing and its reception. The second part of my chapter outlines the theoretical approaches that have characterized the scholarly treatment of cultural expert witnessing, and in the third part of the chapter, I look at the different positioning of systems of common and civil law vis-à-vis cultural expert witnessing. I argue that, notwithstanding the limitation of the binary and broad opposition between civil and common law legal systems, the insistence on facts within the common law system makes it easier for judges to rely on the assistance of experts who are not legal professionals. Yet, from a socio-legal perspective, it should be possible to reformulate a definition of cultural expertise that accounts for its many variants that occur also in civil law legal systems and out of court. The chapter concludes by suggesting that an integrated definition of cultural expertise, although challenging, would serve the purpose of assessing its usefulness in de facto multicultural Europe.

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