Holden, L. (2011) 'Introduction: Reflexivity, Culture and Ethics', in Cultural Expertise and Litigation. 1st edition. Routledge. pp. 1–10.

Introduction

Reflexivity, culture and ethics

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The use of anthropological knowledge in court and various kinds of cultural translations for legal purposes have influenced the history of anthropology, although this is not extensively acknowledged. In fact, anthropological knowledge has been largely used both to make (il)legitimate the claims of indigenous groups in North America as well as in Australasia, and to rule overseas territories during colonization (Pinkoski 2008). Cultural expertise, broadly defined, has been the potential provider of legitimacy and consent vis-à-vis neighbours (First Nations) in America and vis-à-vis people far away from home (colonized countries) in Europe. Some have seen there two distinguishing characteristics that had an impact on the way anthropology itself has developed in America and in Europe: whereas anthropologists in America have been more interested in differences, anthropologists in Europe have been more interested in similarities (Nader 2008: 107–10).

By now, however, the divergence between anthropologists talking about neighbours or about people far away has been blurred. Far away 'natives' have become neighbours, and neighbours have become the far away 'other'. As a consequence, many practices of law that are travelling within the various kinds of diasporas and migration are increasingly scrutinized by the decision-making authorities in Western countries who are formally invested with the prerogative to evaluate the legality and often the morality of migrants' actions and the genuineness of their accounts. Thus, at the official level, considerations about the role of practices and customs of the 'South' are integrating a specific kind of transcultural or transnational case. At the same time those practices of the 'South' that have travelled to the 'North' are also adjusted and accommodated into the new legal setting at the level of non-state law (see Menski in this volume). Similar to the colonial period,[1] today Western jurisdictions settle litigation involving practices that are unfamiliar to Western lawyers and, like their predecessors, they are therefore in constant need of assistance by experts. Nowadays, however, Western authorities do not need to go to far away countries as they once did. They decide in their own legal setting with the help of Western or Western educated experts and sometimes with the help of community leaders.

However, without too much of a hiatus from the time of colonization, Western law and governmentality – the latter intended, from a Foucauldian perspective,

as all those practices which are best suited to fulfil the government's policies (Foucault 2009 Chapter 4 and Sullivan 2002) – inform proceedings beyond the geographic boundaries of their own legal regimes. Marriages, divorces, adoptions and other legal facts whose legitimacy is uncontested in the countries of the 'South' can be declared invalid in a transnational context. Crimes such as murder, manslaughter and terrorism are evaluated in terms of the ethnicity and cultural background of the perpetrator or victim. Although some experts feel that the parallel with cultural brokers is misleading or derogatory (and we did not reach a consensus among the co-authors of this volume), it is useful to refer to this conceptual image for the role played factually by cultural experts – irrespective of whether this is suitable or not. As liminal actors of the law experts fulfil their role of cultural brokers by 'bridging, linking or mediating between groups or persons of differing cultural backgrounds' (Jezewski 1990).[2] The expert, broadly viewed as the person who fulfils a mediation role to a variety of ways, does not per se belong to the formal setting of the law but is nevertheless bound to it, and allows for the transformation of 'culture' into law. Thus, not only an accumulation of proceedings is created and orchestrated by European or North American jurisdiction, but also confusion reigns, no less so now, on the kind of support needed by Western authorities to reach a decision. And, quite similar to colonial times, the expertise becomes the place of the frequent disagreements between the discourse of law and the discourse of 'culture'.

What is cultural expertise?

Before addressing the 'culture' of cultural expertise, a few words are in order to enumerate what is commonly understood as cultural expertise. Cultural expertise is the special knowledge that enables socio-legal scholars, anthropologists, 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, litigants or the accused person(s), and in some cases of the victim(s). There is a close link between cultural expertise and cultural defence, and so one can say cultural expertise constitutes the nuts and bolts of cultural defence because it provides the defence for the arguments that are likely to influence the legal outcome of a case. However, cultural expertise differs epistemologically from the typical cultural defence.[3] It not only precedes cultural defence, necessarily, but it also exceeds cultural defence, by which I mean 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 criminal law. In fact, whereas cultural defence and cultural expertise are both likely to be controversial, it is the former that makes the headlines of newspapers by entailing cases where the conflict between majority and minority values becomes most easily apparent (see in this volume Ballard on honour killings and Madsen on terrorism). Cultural expertise, we will see, applies also beyond the typical infringements of criminal and civil law to include less extreme situations such as entry permits, family reunions, adoptions, citizenship, children custody and the validity of marriage and divorce. Most contributions to

this volume focus on these kinds of less controversial cases. Not that the law in these domains does not affect the lives of the individuals and their relations with society at large (see especially Menski, Holden and Sbriccoli and Jacoviello in this volume), but it is less likely to involve the extreme features of life and death which are typical of cultural defence. As a consequence, cultural expertise is also less likely to be the object of mediatic discourses, and it is less known to the general public.

As Renteln puts it:

> The purpose of a cultural defense is to allow defendants to introduce evidence concerning their culture and its relevance to the totality of circumstances surrounding their case. A successful cultural defense would permit the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment. The rationale behind such a claim is that an individual's behavior is influenced to such a large extent by his culture that either (1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled to act the way he did. In both cases the individual's culpability is lessened.
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> (Renteln, 2004: 187)

As with any other expertise in court, the purpose of cultural expertise is to apply a specialized knowledge to a definite set of circumstances submitted to the expert whose considerations must be elaborated irrespective of the legal outcome of the case. And also, similar to any other kind of legal expertise but different from cultural defence, cultural expertise does not take sides – it is irrelevant whether the experts are hired by the court or by the parties.

As trivial as it may appear, the neutral aspect of cultural expertise is also its crux. Although social scientists have developed articulated methodologies regarding the 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 else than hired guns, saying whatever their lawyers want them to say.

The growing popularity of migration and multiculturalism as an object of cultural consumption has meant that cultural expertise is also fictionalized. *Crossing Over*, a film by Wayne Kramer (2009), would not really have any reason to be mentioned here if it was not for the scene of a rabbi in the film covering for a young Israeli wanting to relocate to the US permanently by pretending he is a teacher of Judaism. The friendly but authoritatively and intellectively limited attitude of the American immigration setting that satisfies itself with cursory enactments of multicultural stereotypes is realistically reproduced. The scene gives an idea of how the image of cultural expertise is tainted by some degree of clever manipulation of the law, either at the hands of bleeding hearts self-appointed as defenders of the weak or at the hands of unscrupulous fraudsters and entrepreneurial minorities using specialized knowledge for their own gains. And we will see

in this volume that the credibility of the litigants, asylum applicants and perpetrators often overlaps with the credibility of the cultural expert (see Bouillier, Good, Menski, Ballard and Sbriccoli and Jacoviello in this volume).

For more than a century, social scientists have been providing expertise in the law courts on a variety of cases related to minority groups and migration, but academic scholarship has only scantly reflected on the reasons of the difficult accommodation of anthropological knowledge within legal proceedings.[4] Disagreements about cultural expertise characterize the discourse of the law vis-à-vis minorities. Social scientists have pointed out the imbalance of power in the context of cultural expertise (Haviland 2003), which manifests itself through concrete modalities such as hectic rhythms and a forced pace that put the discourse of social science at a disadvantage (Ramos 1999 and, see Holden in this volume). Widespread attention was given to the procedural requisites of cultural expertise and its limitations (Mertz 1994, Rummery 1995, Trigger 1998 and 2004). Dilemmas revolving around ethics, truth and authority have also occupied the minds of social scientists involved in what has been perceived as a somewhat awkward business for the difficult commensurability of anthropological knowledge with the law and legal proceedings.[5] Although social scientists have written about these and other issues related to cultural expertise, no scholarly debate has credibly ensued.

Talking expert

This volume is the outcome of a scholarly interaction that started in 2000 with Professor Werner Menski when I was a PhD student intrigued by his consultancies as a socio-legal expert for South Asia. I met Professor David Trigger in 2004 at the bi-annual conference of the Commission for Legal Pluralism held in Fredericton, and it was then that I came to know about the normative framework developed for anthropological expertise in Australia. As Australian scholarship attests, the debate is very articulated and at this time highly politicized in Australia (Edmond 2004b). Notwithstanding some scholarly reluctance to widen the debate beyond the specificities of local socio-legal settings, it was quite clear to me that many of the issues faced in Australia would be relevant to the management of multiculturalism in Europe and in America as well. As Edmond (2004a: 4) states:

> [M]any experts are entrepreneurial: able to deftly traverse a variety of settings and perform in a variety of capacities. To designate experts with positions in international organizations responsible for negotiating health standards, such as the World Health Organization, *and* who hold professional consultancies to large corporations or trade groups, *and* undertake research, *and* possess considerable experience as advisers and witnesses – including some legal qualifications – simply as 'experts' is to eliminate some of the complexity associated with, and stimulated by, modern legal and regulatory practice. It excludes – or suggests the possibility of excluding – the disciplinary

constraints, social character, institutional dimensions and valences of what is presented and recognized as expertise.

In fact, cultural expertise even more than other kinds of legal expertise suffers from being compartmentalized and sidelined as applied science (Rylko-Bauer et al. 2006). And as applied science in the public sector mainly, cultural expertise and its related issues are not as appealing as private consultancies; nor do they appear to be dignified enough for a larger scholarly debate. The reasons for this gap are multiple, and not all have been investigated, but field-work on expert witnessing appears daunting. The preoccupation with fitting the requirements of the legal procedures seems to produce 'keep out' signals to all scholars who are easily perceived as 'curious strangers'. Field-workers are often dismissed by defensive clichés such as 'everything goes according to the book' (Buskens 2008: 143ff). Other pressing issues, such as consultancy fees and professional allegiances, have been relegated instead to personal communication among experts. It was therefore necessarily out of personal curiosity rather than systematic and institutionalized research that my interest in cultural expertise grew and developed at first.

In the UK an established tradition of country-expert consultancies for asylum case law has filled the archives of immigration courts. However, although most authors contributing to this volume, especially Good and Ballard, have published extensively on specific aspects of cultural expertise – no scholarly debate has been raised around the modalities, the conflicts and the formulation of cultural expertise from an involved perspective that, although it might establish an empirical ground for action, is primarily developing from an academic perspective. The first occasion for our informal interactions and exchange of views to find a venue for further elaboration was offered by the international research project, Law and Governance in South Asia, which is led by Daniela Berti and Gilles Tarabout. Conflicts of Law in Transnational Cases, one of the four sections of the project, is constituted by Prakash Shah, Véronique Bouillier and I. Significantly enough, one of the contributions was approved only after removing the re-enactment of an actual case of expertise, which would have made the presentation fall into the realm of applied sciences. Most contributors to this volume met in Paris in November 2009.

Clearly we had different approaches, some owing to the different contexts of our research, others because of our multidisciplinary professional backgrounds. We could not avoid some quarrels touching on the quality and experience of each other as anthropologists or as lawyers, on professionalism and on the very qualification of our individual experience as cultural experts. Some degree of competition was also stimulated by a degree of identification on the part of each of us with the legal system we were studying. It was immediately evident, for example, that cultural expertise in the UK asylum proceedings has reached a level of legal sophistication that is probably unmatched in Europe. Nevertheless, it was surprising to realize that in France and in Italy, in spite of the reluctance toward legal pluralism and the stress on the universalism of the law as equally applying to all

citizens (see Bouillier in this volume),[6] cultural mediation plays a de facto role in legal proceedings.

Differences in the treatment of our data was also influenced by our different experience; some of us had had only episodically acted as experts or as mediators. Most had a significant number of reports and court appearances under their belts. However, through the course of the workshop some crucial issues stood out as being similarly relevant in the different contexts. These revolved around the terms of the collaboration (or in some cases non-collaboration) between the lawyers and socio-legal scholars, the fuzzy boundaries with advocacy, the commensurability of anthropological and/or socio-legal knowledge with the legal procedure and the uncertainty regarding the reception of cultural expertise by the court. There was a spontaneous agreement that those themes should be pressing issues addressed by this volume. However, as a multidisciplinary team composed of socio-legal scholars with different degrees of specialization and experience in law, anthropology and sociology, we needed to agree on more general threads of analysis and on a common epistemological approach. We decided to adopt a pragmatic and reflexive approach to cultural expertise in law courts with particular attention paid to ethics, wherever this was relevant to our data.

Reflexivity

Although (and because) each contributor to the present volume would provide a different definition of the notion of reflexivity, we agreed on a pragmatic approach that would be reflexive in accounting for the gaps left by cultural expertise as it is described by law books. We wanted to make evident the links between the legal proceedings in which cultural expertise is accommodated and the lesser known sequences that constitute cultural expertise in its becoming. In so doing, we have all accounted for cultural expertise beyond what is written and done 'according to the book', but again, I must add, in slightly different ways. Most of us write in first person, but our styles vary. Some are more subjective (Holden, Ballard, Menski) and some more impersonal (Vatuk, Shah, Madsen, Good and Sbriccoli and Jacoviello). Some contributions deal with a greater quantity of data (Good, Shah and Vatuk); some others engage in the analysis of a small number of cases (Ballard, Bouillier, Madsen and Menski) and two concentrate on a single case (Holden and Sbriccoli and Jacoviello).

The first three chapters (Vatuk, Shah and Bouiller) collect the most observational contributions in this volume. They outline the patterns of litigation involving members of South Asian diasporas in the USA, the UK and France. Although reflexivity may be more difficult to achieve within a conventional observational framework, the fact that we all have privileged on one side the praxis or the *habitus* as our focus for inquiry, and on the other the discourse on the praxis, allows us all always to include some degree of reflexivity.

However, the kind of reflexivity that we all had in mind is not the confessional one of conventional social science. Rather it is, in Lynch's words, the effort to

extend 'the hermeneutic circle that encompasses acts-in-context to include the act of describing that very relationship' (Lynch 1993: 36). Hence we have privileged the analysis of the language and the setting that legitimizes cultural expertise (see Madsen in this volume) and in which cultural misunderstandings arise not only because of conflicts of meanings, but also because of the particular context of the proceedings vis-à-vis a variety of variables: gender (Vatuk and Holden); class and age of the parties (Holden); wording, tone and sequence of questions (Bouiller, Good, Madsen and Sbriccoli and Jacoviello); ethnic belonging of cultural mediator and judge (Bouiller); and kinship (Ballard). All these variables, by contributing to the narrative of cultural expertise highlight also the interface between law and life: the requisites of the law impact on the everyday lives of the social actors involved and on the ways they make sense of it. Thus, a specific narrative is elaborated to serve the purpose of the law (Holden, Menski, Shah and Sbriccoli and Jacoviello). Our reflexivity strives to catch the modalities of the elaboration of those legal narratives that by transforming everyday life into legal proceedings are implementing governance.

Hence, although we appeal to constructivism and move against objectivism, we do not trespass over the thin line that separates us from absolute subjectivism. We have not shied away from catching those details that do not have an immediately evident role in the legal proceeding and yet contribute to set the context: Bouiller's irony on the French judiciary that a loss of understanding South Asian narratives establishes misleading parallels between South Asian and North African practices (p. 85); my own loss of patience for Savitri's reticence (p. 200), as well as my dilemmas revolving around the difficult adjustment with professional ethics and collegiality (p. 219 and 232); Sbriccoli and Jacoviello's poetic narratives (p. 172–94); Ballard's alternation between colloquial and high pitched narrative and his deeply moving plea against culture blindness; and Menski's irritation about the inadequacies of the British legal system in the management of ethnic diversity (p. 162). Our reflexivity is itself part of the context that we have analysed. For most contributors of this volume, it is at the same time method and object, because it was the only possible way to throw light on those steps of 'talking expert' that go unnoticed because they are not part of the formal procedure 'according to the book'.

Culture

Along with reflexivity came culture, which is another unsteady ground in the social sciences. Some of us feel ourselves to be less culturalists than others, and some of us feel untouched by the debates about culture in the social sciences, but we all agreed to look at culture for its use as a legal argument, instead of as a set of concepts that would apply to all the members of a given group irrespective of the legal proceedings. Although the premise seemed clear, its realization was not, and this was in itself significant to the complexity of the culture debate. Without dismissing the Geertzian notion of culture as webs of meanings (Geertz 1980),

this volume focuses on culture as legal argument, whether closely connected with the notion of truth in court (see Good 2007 and Bouillier, Vatuk and Holden in this volume), or as an integrant part of the legal narrative (see Good, Menski, Holden and Sbriccoli and Jacoviello in this volume), culture is rather apprehended as actant, in Bruno Latour's terminology, of the legal discourse. By investigating the commensurability of South Asian legal practices within the proceedings of the so-called 'host countries', culture is scrutinized as a term of the legal discourse uttered in the legal settings – at times as a socio-legal object susceptible to produce legal outcomes – and not as a system of thoughts susceptible per se to legitimize or delegitimize the law practices of ethnic minorities.

Ethics

Our pragmatic approach informed also the scrutiny of our professional allegiances and ethical commitment within the process of providing cultural expertise. Although the duty of the expert to the court is of paramount importance to set the framework of cultural expertise vis-à-vis legal outcomes, our contributions show that this is not unequivocally understood. Notwithstanding the self-evident fact that socio-legal scientists are called increasingly to provide expertise and that cultural homogeneity is not ensuing from globalization (see Ballard and Menski in this volume), social scientist very speciality, which is the ability to understand and relate to cultural differences, is likely to undermine our own credibility in court. In other words, the reason why socio-legal experts are called is also why they are criticized.

Furthermore: our selection of truths, our sequence of arguments within the narrative of our clients and our decisions are likely, even if not directly, to influence the legal outcomes and the life of the individuals involved. To what extent do we, as social scientists, act ethically when purely abiding by the law? Is there any risk of being ethical for the wrong reasons when we defend the mere observation of legal procedure? Can we pragmatically pinpoint the difference between advocacy and cultural expertise? Is it ethnic membership or rather specialization that constitutes the authority of the expert? These questions are addressed by most contributions from the perspective of the ones who can point to the 'missing what' because of their close involvement with the praxis (cf Garfinkel 1992 and Lynch 1993: 274).

Organization of this volume

The volume is organized into three sections following a trajectory from the macro- to the micro-, but always ground on first-hand data. Patterns, the first section, revolves around the question of what the recurrent arguments and mediations involve in transnational litigation. It includes three contributions (Sylvia Vatuk, Prakash Shah and Veronique Bouiller) that investigate 'cultural' arguments, 'cultural' misunderstandings and proceedings in litigation involving members of South Asian diasporas with a specific emphasis on family law litigation in the US,

UK and France. The next section, Conflicts, focuses on the context and ingredients of cultural expertise. What are the incongruences, the misunderstandings and the paradoxes of cultural expertise? This section includes three contributions (Stig Toft Madsen, Anthony Good and Roger Ballard) that, on the basis of long-term personal experience as experts, examine the incongruences of cultural expertise – as setting (Madsen) and as discourse that awkwardly translates in law courts (Good and Ballard). The final section, Narratives, focuses on the exportable features of South Asian law practices into the Euro-American legal narrative. It includes three contributions (Werner Menski, Tommaso Sbriccoli and Stefano Jacoviello and Holden) that investigate the elaboration of legal narratives from the micro-perspective of specific cases, thereby illustrating the risk of social scientists becoming mere instruments of governmentality.

This book affords a broad spectrum with a pragmatic approach that includes a variety of legal and semi-legal settings (immigration and asylum, family law, nationality and citizenship law and criminal law) and jurisdictions in the UK, Italy, US and France, on the specialized topic of patterns of litigation and expert witnessing. The leading feature of this book is that the authors scrutinize themselves being a talking expert in a variety of settings involving a variety of legal arguments within transnational litigation regarding South Asian diasporas. All authors make the unprecedented effort to reflect critically on the authority of the law and on their own role within the legal procedure in order to investigate the constraints informing and shaping the legal discourse. This book attempts to provide answers grounded on first-hand data and on the contextual conditions of the successful legal narrative from the perspectives of the parties involved: the claimants/litigants; the socio-legal expert/translator/mediator; and the decision-making authorities (judge or immigration officer/adjudicators/case officer etc).

As a conclusion to this introduction a few words should be added as to why this volume focuses largely on South Asian cultural expertise if its scope is larger than the typical one of area studies. This is partly owing to the institutional framework that has supported our scholarship but also, and more significantly, to the need for us as co-authors to share from the start a satisfactory depth of similarity of research contexts. However, even though we were all acquainted with the context of South Asian litigation abroad, we could not refrain from being engrossed in the comparison of procedural details following the different legal settings, the different branches of the law and the reciprocal socio-legal expectations in relation to the kinds of Foucauldian governmentality that informs the interactions between the law and its subjects. It was this specific depth of inquiry that allowed us to overcome the comparative perspective of the law in the books and to account for local variations, while at the same time maintaining the focus on the modalities of cultural expertise and its relation to the legal outcome. In all contexts scrutinized by our contributions, the expert embodies the struggle between the individuals' instances and the establishment's expectation that assures governmentality through a set of technicalities implemented and perpetuated in everyday life. Although justice seems to be increasingly dominated by the so-called artificial

'persons', either corporation or governmental bodies, as Galanter says: '[i]t will also depend on the inventiveness of lawyers [and of social scientists] in coming up with new formats and devices for making public policy and effectively controlling APs [artificial persons]' (Galanter 2006: 1417). Our hope is to have shown the possibility and the potential for a larger scholarly debate on the 'talking expert' that respects legal requirements but does not forfeit the specific contribution of the social sciences that resides in the ability to understand difference as opposed to imposing conformity.

Notes

1 For expertise on South Asian laws at the time of colonization see Kolsky (2010: Chapter 3), Larivière 1989 and 1994; Menski 2003: 150–2; Michaels 2001a and 2001b.
2 On the concept of cultural broker see also Messick 1993, Darnton 1991 and Szaatz 2001. The contributors to this volume disagree to different extents on the notion of expert as cultural broker. This notion has been nevertheless used here for its iconic value, some sort of fictional common ground from which to engage in deeper analysis.
3 On the need for cultural defence to be extended to a wider range of legal domains see Renteln 2004.
4 For a history of expert witnesses in court see Ballard 2007b, Good 2007, Gormley 1954 and Rosen 1977.
5 See Angel-Ajani 2004, Clifford 1988, Ramos 1999 and Rosen 1977.
6 See also Renteln (2004: 187, 199).