Cultural Expertise and Litigation

Patterns, Conflicts, Narratives

Edited by
Livia Holden

a GlassHouse Book

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Cultural Expertise and Litigation

Cultural Expertise and Litigation addresses the role of social scientists as a source of expert evidence, and is a product of their experiences and observations of cases involving litigants of South Asian origin. What is meant in court by 'culture', 'custom' and 'law'? How are these concepts understood by witnesses, advocates, judges and litigants? How far are cross-cultural understandings facilitated – or obscured – in the process? What strategies are adopted? And which ones turn out to be successful in court? How is cultural understanding – and misunderstanding – produced in these circumstances? And how, moreover, do the decisions in these cases not only reflect, but impact, upon the law and the legal procedure? *Cultural Expertise and Litigation* addresses these questions, as it elicits the patterns, conflicts and narratives that characterize the legal role of social scientists in a variety of de facto plural settings – including immigration and asylum law, family law, citizenship law and criminal law.

Livia Holden is Associate Professor in Anthropology at LUMS (Lahore) and Research Associate at the French Institute (Pondicherry). She is the author of *Hindu Divorce: A Legal Anthropology* (Ashgate 2008). Most of her research is based on ethnographic fieldwork carried out in South Asia and in the areas of South Asian diasporas. She leads four international research teams focusing on non-state law and governance (ANR), judicial accountability (IFP and DPRC), and the management of multiculturalism (ANR).

To my children, wishing them to see the dawn
of multiculturalism

List of figures and tables

Figures

Tables

Table of cases

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Foreword

Cultural Expertise and Litigation: Patterns, Conflicts, Narratives comes at a time when the academic community is showing a deeper interest in the study of law and culture. It also corresponds to new developments in the anthropology of law that aim at diversifying and recombining methodological approaches and the location of 'fieldwork'. Moreover, within this general context, there have been recent initiatives in South Asian scholarship for increased confrontation of the social sciences with law studies.

Indeed, the focus on the role of experts in trying to bridge the gap between 'the law' in some countries of 'the North', and the 'culture' of people whose origin is in 'the South', here South Asia, presents extraordinary opportunities for highlighting the challenge that the current process of globalization and intensified circulation of people entails as courts try to cope with more or less reified notions of perceived exotic cultures. The nine chapters of this book offer a remarkably diverse and eloquent picture in this perspective by providing a wide array of first-hand experiences in different legal systems, in the US and in different countries of Europe. Dealing with civil cases as well as with criminal cases, the essays develop an in-depth analysis of the interactions taking place between the legal practitioners, the people involved in the case and the expert or cultural mediator. Specific importance is given to the study of the epistemologies involved by processes of both the expert 'translating culture' and of the court deciding on legal 'evidence': the two processes follow rather incommensurable logics and their negotiation by the law court is precisely the reason why an expert is called upon. However, this responsibility often entails crucial ethical difficulties, for which the authors in the volume propose reflections based on their own personal experience.

This collection of essays was developed and coordinated by Livia Holden as the outcome of the international workshop that she convened in Paris in November 2009 within the framework of the research project *Governance and Justice in Contemporary India and South Asia (Just-India)*. This project that we are coordinating is being funded for a period of four years (2009–2012) by the Agence Nationale de la Recherche (ANR), with additional funding from the Fondation Maison des Sciences de l'Homme (FMSH), Paris, and the Council of South Asian Studies at Yale; it is sponsored by the Centre National de la Recherche Scientifique (CNRS)

and is run by the Centre for Himalayan Studies, part of the latter research institute. The programme has an international membership and many of the contributors to the volume are either participating members or associated with it.

Livia Holden is the scientific coordinator of one of the five thematic sections of the programme entitled 'Conflict of Law in Transnational Cases', which is concerned with the legal impact of the circulation of people from South Asia. The other four sections deal with legal cases in South Asia and concern the study of criminal cases, natural resources management and environmental policies, religion and the courts, and fundamental and constitutional rights.

The general idea behind the project is to study governance and the administration of justice by focusing on the analysis of court cases related to various issues. Some of these issues are partly the outcome of the commitments that South Asian countries have made both at national and international level – such as in the field of the legal protection of 'underprivileged' groups, of environmental policies, of narcotics control, of human rights, of the secularism issue, and so on. These commitments have created a number of 'new' situations where the state and local society, along with many different actors at various levels, find themselves interacting in a more or less antagonist way whenever state commitment goes against local forms of relationships or local economic or political interests; or they can create reciprocal adjustments and adaptations whenever the state or society tries to seek alternative solutions or negotiations.

The methodology chosen tries to occupy the ground between two perspectives that have already provided for remarkable scholarship – the study of the history and cultural components of the legal system and the cultural use of the courts. In between these, the study of the judiciary system in place in relation to the social and cultural characteristics of the people involved appears to have developed to a lesser extent, and the *Just-India* programme aims at developing new research in this direction.

We welcome this volume on *Cultural Expertise and Litigation* as a landmark publication in this overall perspective, with the conviction that it should become a reference volume for further study of the interactions between conceptions of culture and legal systems, and for a general reflection on the contribution of the social sciences to shaping these interactions, with the ethical issues it entails.

Daniela Berti & Gilles Tarabout
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Preface

It is a pleasure to write a preface for this book. As well as appealing to my general interest in interactions between law and exogenous forms of knowledge, the essays in this volume resonate directly with my own experiences. One of these, in a rather modest way, affirms the tenor of many of the accounts detailed in the following pages. It concerns my own encounters with the Department of Immigration and Multicultural Affairs in relation to my wife's immigration to Australia. Another, probably of more interest to anthropologists engaged, albeit occasionally and sometimes unwittingly, with the law, introduces recent and alarming developments in the forensic sciences. These developments provide an interesting comparison (or extension) to some of the themes and ideas explored in this collection around anthropological evidence and the treatment of non-legal forms of expertise. The emerging crisis in the forensic sciences provides insight into the need to theorize anthropological encounters with legal and quasi-legal systems, as well as the difficulty of effecting legal change.

The trials (of Dr K)

I was born in Australia and have always been an Australian citizen. I lived in Australia until I left to undertake graduate research in England. How I come to be at the University of New South Wales, after brief sojourns at the University of Adelaide and the Australian National University, is in large part as a result of my interactions with the Australian state and its immigration bureaucracy.

In early 1998, during my first year in England, I formed what has been a continuing relationship with K, a South African geneticist, also enrolled in a PhD programme. Having almost completed my doctorate, at the beginning of 2000, I returned to Australia where I had accepted a continuing lectureship in the School of Law at the University of Adelaide. K, who at that time was my de facto partner, although still immersed in laboratory work, took a further year to complete her thesis. Upon submission, she came to Australia to join me. In the intervening year we spent several months together during reciprocal visits to the UK and Australia. Before moving to Australia we applied for a spousal visa, for K, in London. Naïvely, in retrospect, we accepted the advice of consular officials and bureaucrats

at face value. Originally, we were not in a position to retain lawyers and did not believe we would need them. We did not anticipate that our application and the evidence we had assembled would be treated suspiciously. As it turned out, our original application was rejected. We had been apart for just over a year and this created an apparently insuperable evidentiary hurdle for the decision-maker. Hundreds of emails, telephone calls and sustained international visits, numerous statutory declarations, and even the long-anticipated reunion in Australia, could not overcome the apparent rupture created by the physical separation and our failure, as students on modest scholarships, to open a joint bank account or have a telephone connected in both our names.

The rejection of our application had immediate practical consequences. Officially, our relationship became inauthentic. Dr K could only obtain a temporary entry visa, would be unable to work during her short visits to Australia and became something of an immigration 'risk'. At this point we took the advice of an immigration lawyer. She suggested that our best option was for Dr K to find an Australian employer to sponsor her on a work visa. This would enable her to live and work in Australia and we could reapply for government recognition at some later point in time. We were advised against an appeal. Although likely to succeed, the process would be lengthy, expensive and would not relieve the immediate need to be able to stay and work in Australia.

As a highly skilled graduate Dr K obtained and accepted a position with the peak government scientific research organization (CSIRO) in Canberra and our immediate residency problems receded. To the dismay of my colleagues, but having spent more than a year living mostly apart and reluctant to perpetuate that arrangement, I resigned my position at the University of Adelaide and followed Dr K to Canberra.

We were married just over a year later, at the beginning of 2003. Then, after our marriage was duly notarized and registered – by that stage we were conscious of the need for official pieces of paper – we again sought permanent residency for Dr K. In an effort to expedite Dr K's Australian citizenship we needed to prove that our relationship predated our original application. I sought to revisit the evidence – which included more than a dozen statutory declarations from fellow graduate students, professors and even a nosy college cleaner – submitted with that application, with our new immigration officer. However, the real problem was the original determination. Rather than reinforce the existence of an ongoing relationship, the previous application became a stumbling block. For, even though the department could accept that our relationship was now genuine, it was unwilling to concede its decision in 2001 might have been mistaken.

In a frank exchange, I explained that it was unlikely that our by now real relationship had grown out of a relationship contrived for immigration purposes and that this contention was reinforced by the continuity of our relationship and our evidence, much of which predated the unsuccessful application. When I raised the many solemn declarations attesting to our public life as a couple prior to the previous determination, the officer responded that she did not attach much weight to

signed declarations. I remember asking, rhetorically, as it turned out: Which is easier, suborning reputable people, including lawyers, or going down to the bank and obtaining a joint bank account, or having a phone installed in both our names? Our reasoned decision not to contest the original rejection was presented to us as acquiescence in the correctness of the department's original assessment.

After our second application was apparently accepted, on the issue of whether Dr K would obtain citizenship immediately, we were told that if we were willing simply to accept the department's latest assessment and 'wait out' a two-year probation then it was 'a done deal'. If, on the other hand, we wanted to have this decision reviewed internally, in the hope that the full duration of our relationship might now be accepted, so that there would be no delay in Dr K's ability to obtain citizenship, then once again everything would be up for grabs. In the end we took the bird in the hand.

I often reflect on how, even as an educated, relatively affluent, English-speaking man of European descent and steeped in the Anglo-American legal tradition, I (really we) felt relatively powerless against the immigration bureaucracy and its internal logic. These experiences, although incredibly frustrating, inconvenient and expensive, are trivial when compared with most of the episodes in this book. We were not tortured or sexually assaulted; we did not suffer from racism or racist attitudes (overtly or unwittingly); there were no problems with language – it was only our immigration officer for whom English was a second language – we had plenty of documentary evidence supporting each and every claim; our experience and circumstances were not particularly unusual and at every stage we had options.

One of the roles of this book is to document the hardship and suffering perpetuated by law and legal processes. I commend the contributors and the many individuals described on the pages that follow who laboured, often *pro bono*, to assist vulnerable persons who, often through no fault of their own, were discriminated against or prejudiced. There is, it would seem, no place for complacency when it comes to law and legal processes.

Forensic trials

Anthropological interest in law and involvement in legal practice is long-standing (eg Malinowski, Gluckman, Bohannan, Rosen, Nader, Moore, Silbey and Good). In Australia, anthropologists have played an important role in the recognition of customary law and native title and their institutional and statutory manifestations. These experiences have analogies in many former colonies – and states where minorities have been displaced – and often include sustained, and sometimes coordinated, efforts with archaeologists, historians, linguists and ethnomusicologists and broader social movements. The value of these contributions and the roles of anthropologists in the practice and legitimacy of legal regimes and institutions has not, however, been without controversy (Edmond 2004; Strathern 2006).

This book represents a timely contribution to our understanding of a broad range of issues at the intersections of (representations of) culture and cultural practices, expertise and law. Thematically focused on South Asian diasporas, the reader is taken through a range of legal encounters that repeatedly illustrate how distracted, myopic and parochial (Western) legal systems can be and how ideological commitments and institutional traditions often conspire to eviscerate the lofty potential of rights discourses, humanitarian commitments and sometimes even concerns with factual accuracy and substantial fairness. An alternative way to conceptualize this state of affairs, as a keen observer of American criminal procedure once explained, in a way that seamlessly integrated policy goals with actual practice, is that 'the process is the punishment' (Feeley 1979). The contributors to this book repeatedly identify legal limitations and failures, and even when the particular system produced what appeared to be an appropriate – in the sense of fair, accurate and principled – outcome, that result often seems to have been painstakingly slow, prohibitively expensive and to impose greater personal suffering than we might expect, or require, of our legal institutions and democratic systems of government.

Together, the contributions illustrate how insensitive, suspicious and occasionally hostile the law and legal practitioners – including personal legal representatives – can be to applicants, defendants and appellants. They also portray a mixed, although not particularly sympathetic or accommodating, response to other ways of knowing: that is, to exogenous forms of practice, experience and (specialized) knowledge. Legal and quasi-legal institutions, and their middle class (and scientifically illiterate, more below) personnel, are not particularly well positioned to deal with knowledge, experience and traditions beyond 'the familiar', even when they regularly come into contact with them. Historically, legal institutions have been reluctant to engage with empirical evidence, as opposed to the experience of judges and tribunal members, on their performance and processes (Allen and Leiter 2001).

These essays provide another set of resources documenting legal limitations and the extraordinary difficulty legal institutions seem to have responding to, let alone accommodating, exogenous knowledge and experience (Jasanoff 1996). Of course, these experiences are not unique to South Asian diasporas and, interestingly, are common beyond anthropology. Indeed, recent developments in response to emerging problems with the forensic sciences provide some indication of the very formidable challenges facing not only lay lawyers and judges but also those who hope to influence individual decisions and reform legal institutions and practice.

Over the course of the last two decades serious problems with many forensic sciences have emerged. These problems surfaced as legal scholars and research psychologists openly challenged several marginal forensic sciences such as handwriting comparisons, forensic voice identification and the analysis of bite marks (Risinger 2007). These early encounters convinced a handful of methodologically sophisticated lawyers and social scientists (and a few scientists) that there were