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► **To cite this version:**

Aurélien Bouayad. Cultural Expertise and Indigenous Ecologies: w. Livia Holden (ed.). Cultural Expertise, Law, and Rights, 1, Routledge, pp.275-287, 2023, 9781003167075. 10.4324/9781003167075-29 . hal-04224254

HAL Id: hal-04224254

<https://sciencespo.hal.science/hal-04224254>

Submitted on 1 Oct 2023

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CULTURAL EXPERTISE AND INDIGENOUS ECOLOGIES

Aurélien Bouayad

LEARNING OBJECTIVES

This chapter focuses on the role of cultural expertise in ecological controversies related to the legal status of ecological traditions and practices of Indigenous communities. It questions the cultural and historical biases embedded in Eurocentric legal systems and the complexities and tensions that characterize the involvement of cultural experts in these conflicts. This chapter analyses three case studies: the legal debates over the ceremonial use of peyote by Native American communities; the protection of the rights of Indigenous communities to their ancestral lands in Latin America in the *Awás Tingni* case before the Inter-American Court of Human Rights; and the efforts of the Makah Tribe to obtain a quota in order to resume traditional whaling. After reading this chapter you will have learnt about the intermediation of anthropologists, religious scholars and historians in order to assist legal institutions to understand Indigenous ecologies, which often lie at the heart of the material and cultural life of these communities.

Introduction

Ground-breaking research in the field of environmental anthropology and philosophy has resulted in the radical questioning of some of the most fundamental concepts of Western epistemology, including the supposedly universal concept of nature. The dualistic model of a *Grand Partage* (a Great Divide) between nature and culture as a predetermined standpoint being called into question, the study

of the specific ideas, histories, values and beliefs involved in the relationships and interactions that link humans and non-humans in any particular community has proven a crucial contribution of these academic fields (Latour 1993; Descola 2014; Viveiros de Castro 2015). The notion of ecologies in its plural form hence highlights that, within each society, a broad diversity of practical and symbolic relationships with the environment coexist and can produce conflictual situations.

Alongside the concerns provoked by the global climate crisis, the decline of biodiversity and the threats to ecosystems as a consequence of human activities, recent decades have witnessed an increasing awareness of the importance of ecological practices and traditions for many of the world's Indigenous communities, whose material and cultural survival is often inextricably tied to their traditional land and natural resources (Martínez-Alier 2002; Schlosberg 2005). Socio-historical perspectives, however, reveal that the significance of Indigenous ecologies has long been, and still largely remains, unrecognized by modern legal systems, which have tended to silence or even criminalize ecological traditions that are seen as conflicting with legal regulations (see Srinivasan, Chapter 3 in this volume).

Theory and Concepts

ECOLOGICAL CONTROVERSIES

The notion of ecological controversies relates to a large variety of legal conflicts that result from the confrontation of non-dominant (in this chapter, Indigenous) ecological practices with mainstream laws and policies. These controversies include cases over subsistence or ritual hunting practices involving endangered species, ceremonial or medicinal uses of psychoactive plants, lack of legal protection for sacred natural sites, traditions of animal slaughtering or sacrifice, patenting of sacred natural resources or eviction from, and denial of access to, protected areas.

Called upon to arbitrate in these conflicts, legal institutions (courts, legislative bodies, regulatory agencies) often rely upon cultural experts in order to elucidate the historical, cultural and/or religious context which constitutes the background of Indigenous communities' ecological claims. The modalities of the intervention of these experts (which originate from a variety of fields of social sciences, although predominantly anthropology) take a plurality of forms that can all fall under the integrated definition of cultural expertise by Holden (2011). Various types of cultural expertise include but are not limited to the production

of written testimonies and cultural affidavits for judicial purposes, participation in hearings by committees and the preparation of reports for administrative application processes (Grillo 2016; Holden 2011; Holden 2019; Rodriguez 2018).

The case studies explored in this chapter will provide illustrations of the multifaceted role played by cultural experts in the legal perception and eventual arbitration of Indigenous ecological claims. Particular attention will be given to the role of cultural expertise in the mediation and legitimization of these claims, and the extent to which these operations are circumscribed within dominant legal argumentative frameworks. The discussion will additionally underscore the risks associated with the implicit encouragement of producing overly-stereotyped representations of Indigenous identities (Povinelli 2002; Engle 2010), as well as the ethical and deontological dilemmas often experienced by cultural experts, torn between expectations of impartiality and suspicion of bias towards Indigenous communities (Hale 2006; Low and Merry 2010).

Case Studies

The Peyote Controversy

Since the earliest recognition of its use on Native American reservations in the late 1880s, peyote has lain at the heart of a series of legal battles over religious rights and Indigenous self-determination in the United States. Yet, in spite of the persistent assaults aiming at outlawing the medicinal and sacramental uses of peyote by Indigenous communities, this ecological practice



FIGURE 24.1 “Peyote Ceremony” by James Mooney, 1893 (Courtesy of the National Anthropological Archives, Smithsonian Institution; gelatin glass negative BAE GN 01778a 06305400).

has been able to survive both the Prohibition era and the war on drugs era and eventually become a reference point in the legal debate over non-recreational use of psychoactive substances (Maroukis 2012; Dawson 2018).

INDIGENOUS USES OF PEYOTE

Peyote (*Lophophora williamsii*) is a small, spineless cactus with psychoactive properties, which grows in a limited area situated at the junction of southern Texas and northern Mexico. Recent archaeological studies suggest that for thousands of years before the “discovery” of America, populations living in the area of peyote growth were familiar with the plant and its psychoactive properties (Dawson 2018; Terry et al. 2006). When the Spanish encountered peyote a couple of decades after their conquest of the Aztecs, they vigorously opposed this ecological practice: the Inquisition in New Spain issued an edict of faith banning the use of peyote in June 1620 (Chuchiak 2012).

Although its medicinal and sacramental uses had been historically limited to Indigenous peoples located in the territory of Mexico, the dynamics of colonial expansion in North America have resulted in the progressive diffusion of these practices outside their traditional territory, all the way from Western Central Mexico to Canada – to such an extent that Peyotism eventually became the first pan-tribal religion in the United States, claiming today over 300,000 members (Anderson 1996; Stewart 1993).

In several respects, the ecological controversy over the use of peyote provides an eloquent illustration of the multifaceted roles that cultural experts can play in such situations. From the late 19th century to the end of the 20th century, two generations of anthropologists have proven to be strategic allies for Native American Peyotists. The analysis reveals in particular that the historical evolution of the conflict, which first played out in the legislative arena before migrating to judicial settings, imposed a transformation and a diversification of the ways these experts were involved.

The first generation was led by James Mooney, who provided the first ethnographic description of a peyote ceremony in the late 19th century (Mooney 1892; see Figure 24.1). Together with Francis La Flesche, Truman Michelson and Alfred Kroeber, he testified in legislative hearings on several occasions to counterbalance the arguments of prohibitionists lobbying for a national ban. These academics played a pivotal role during the extensive Congressional hearings on a federal prohibition bill that took place in the spring of 1918; contributing at length, they provided scientific legitimation for the claims brought forward by the ten Native American representatives who tried to convince the subcommittee of the innocuousness and religious sincerity of their use of peyote. Although

the bill passed the House in October 1919, it was eventually rejected in the Senate (US Congress 1918; Bouayad 2019).

Following this episode, Mooney encouraged the movement's leaders to organize an established church during the summer of 1918. His involvement in the incorporation of the Native American Church (NAC), assisting the leaders of the movement in their strategic adaptation to, and recapture of, legal rationality, certainly constitutes a unique example of anthropologists' involvement in such legal controversies: by helping to consolidate the religious character of the movement, he significantly complicated the legal crusade of anti-Peyotists, who were, from now on, forced to quarrel with the stringent constitutional protections afforded to religious freedom in the American legal tradition (Ahdar and Leigh 2005; Nussbaum 2010). For this reason, Mooney subsequently suffered from institutional retaliation, as he was recalled by the Bureau of American Ethnology and never again allowed to return to Oklahoma to continue his study (Moses 1978).

The reconfiguration of the controversy in the decades following the Second World War, which led the NAC to challenge the constitutionality of state prohibition laws before the courts, similarly saw the active involvement of a second generation of dedicated anthropologists (Omer Stewart, Weston La Barre, James Slotkin, Richard Schultes and Vincenzo Petruccio). Stewart was appointed as an expert witness in eight court cases from 1960 to 1982, providing detailed historical and ethnographic evidence supporting the religious claims brought forward by Native American Peyotists (e.g. *People v. Woody* and *People v. Mana Pardeahtan*).

Although the precise impact of the anthropologists' mediation role in the judicial successes secured by the NAC is difficult to assess, their recurrent presence undoubtedly constituted a unique and remarkable feature of the NAC legal strategy (Bouayad 2019). Yet this case also illustrates the enduring and problematic dual position experienced by anthropologists involved in this type of controversy, navigating between a supposedly impartial position as expert witnesses and an arguably biased involvement as advocates for Native American religious rights – a tension that had dire professional consequences for James Mooney. Furthermore, the central and critical role played by cultural expertise arguably reveals how enduring the prejudices against Native American rights claims are, as Peyotists seem to have constantly felt the need to have a “legitimate” intermediary (at least in the eyes of the legal institutions, as demonstrated by the 1918 hearings) to give weight to the authenticity of their claims for exemption (see Higgins, Chapter 18 in this volume).

The Awas Tingni Case

The issue of the recognition and effective legal protection of the right of Indigenous peoples to the lands they have traditionally occupied has long been and remains a pivotal issue as a consequence of the crucial relationship that many of these communities entertain with their territories, reflecting a cultural identity often inextricably linked to an extended history of engagement with particular places and landscapes (Black 2010; Johnson 2016). Historically undermined

by a variety of legal instruments that have accompanied colonization processes, Indigenous modes and conceptions of land tenure associated with alternative systems of ecological uses of territories have been largely overlooked by legal institutions and superseded by the regimes of private property and commodification. Yet, starting in the 1990s, increasing awareness of Indigenous issues paved the way for progressive advancements in the recognition of land rights throughout the world, often as a result of hard-fought legal battles (Medina 2016; see also Trigger, Chapter 21 in this volume).

In this respect, since the turn of the century, the Inter-American Court of Human Rights (IACHR) has initiated significant steps towards better legal recognition of Indigenous rights to ancestral lands. In a series of decisions concerning Nicaragua, Ecuador, Paraguay and Suriname (e.g. *Yakye Axa Indigenous Community v. Paraguay* and *Saramaka People v. Suriname*), the Court has developed an innovative and progressive canon of legal interpretation for the adjudication of these Indigenous ecological claims. Integrating a rich body of ethnographic testimonies and evidence, and extensively analysing spiritual and cultural arguments, the IACHR has acknowledged the role of ancestral lands as a fundamental element of Indigenous identities (Tramontana 2010; see also Arajärvi, Chapter 17 in this volume).

The IACHR landmark decision was *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), which both marked the first occasion on which an international tribunal with legally binding authority found a government in violation of the collective land rights of an Indigenous people and played a fundamental role in the establishment of anthropological testimonies as common procedural practice within Inter-American court hearings pertaining to Indigenous rights (Anaya and Grossman 2002).

THE AWAS TINGNI STRUGGLE TO RECLAIM THEIR TERRITORY

The Awas Tingni is an Indigenous Mayagna community of approximately 2,400 members which has occupied land rich in timber and other natural resources on the Atlantic coast of Nicaragua for generations. Since the 1950s, the community has requested that the Nicaraguan government demarcate their territory. Yet in 1996 Nicaragua granted a 30-year timber-cutting license to a Korean company, permitting the exploitation of nearly 160,000 acres of tropical forest belonging to the Awas Tingni.

The community, which was not consulted prior to the negotiation of the timber contract, vehemently opposed the intervention in their land. Having unsuccessfully attempted to solve the problem through direct negotiation with the government, the Awas Tingni resorted to the national judiciary. After a series of unfavourable decisions there, the case was taken to the Inter-American Commission on Human Rights before reaching the IACHR (Anaya and Crider 1996).

Besides the testimonies of members of Indigenous communities, conservation and rural titling experts and local attorneys, the Court relied upon the expert opinion and testimony of four anthropologists to conclude that Nicaragua had violated the right to property and judicial protection of the Awas Tingni community by failing to demarcate communal land and by attempting to grant concessions to third parties for commercial development. Discussing the community's connections with the sacred hills and the areas dedicated to specific funeral and hunting rituals, the concurring opinion in *Awas Tingni*, for instance, relied on the testimony of Harvard anthropologist Theodore McDonald Jr to affirm:

[This communal conception] has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come.

Following this decision, the development of anthropological testimony as a usual evidentiary resource in cases related to Indigenous rights to territories within the Inter-American system has prompted critical reactions from within the anthropological field in relation to the ethical, deontological and epistemological tensions that emerge from this mode of engagement (Hale 2006). Noting that rights have become contingent on notions of an “authentic” cultural subject, which must be verified and included as evidence in Court, anthropologist Christopher Loperena (who was involved as an expert witness in *Garifuna Punta Piedra Community v. Honduras*) lays stress on the epistemological tensions and discursive strategies that characterize the transformation of anthropological conceptualizations of culture into the legalistic framing of culture in order for expert evidence to be heard in courts of law (Loperena 2020). Specializing in Australian Indigenous struggles for territorial rights, anthropologist Elizabeth Povinelli further questions the necessity for Indigenous peoples to articulate their legal claims on the basis of cultural difference and an intrinsic relationship to the land, highlighting the risks inherent in a mode of recognition that encourages members of these communities to silence internal conflict, deny the dynamic nature of cultural and ecological practices and identify with essentialized representations of identity in order to attain rights (Povinelli 2002).

The Makah Whaling Controversy

The international regulation of whaling has proven a contentious issue for more than a century as a consequence of the dramatic depletion of whale populations caused by commercial whaling and of the complex symbolism associated with one of the largest and most emblematic animal species on Earth. However, since the early efforts of international conservation in the 1930s, the recognition that the impact of subsistence whaling was substantially different from commercial impacts and that the groups engaged in these practices had a certain right to

these resources, which took precedence over other rights to access, allowed for Indigenous whaling activities to be accommodated differently from large-scale commercial whaling operations. Established in 1946, the International Whaling Commission (IWC) introduced a system of “aboriginal subsistence whaling” quotas determined by an assessment of the cultural and nutritional factors associated with Indigenous communities’ whaling practices (Gambell 1993; Harrop 2003).

Amongst the many debates generated by this exemption system, an intense ecological controversy was triggered in the United States, opposing fervent conservationists to Indigenous rights advocates when, in 1995, the Makah Tribe announced its wish to restart its traditional whaling activities. Following the removal of the Eastern Pacific stock of grey whales from the List of Endangered and Threatened Wildlife, this Native American community located in the area of Neah Bay in the Olympic Peninsula (Washington State) began preparations to apply for a quota before the IWC, in consultation with the National Marine Fisheries Service (NMFS).

THE MAKAH WHALING TRADITION

The Makah have inhabited the area of Neah Bay in the Olympic Peninsula (Washington State) for more than 3,000 years, acquiring much of their food from the ocean. Reflecting the importance of whaling and sealing in its cultural and economic practices, the Makah Tribe is the only Indigenous group in the United States with a treaty that specifically reserves the right to hunt whales (Reid 2015).

Although the Makah were forced to discontinue whale hunting in the 1920s in response to the devastating effects of European and American commercial whaling operations, many cultural attributes associated with whaling, such as songs and dances, traditional stories, jewellery and art, training practices and spiritual values remained active, while whale meat and oil from other sources was still consumed by some families on the Neah Bay reservation through at least the 1940s (Sepez 2008).

As the tribe’s request for up to five grey whales per year was estimated to have no measurable impact on the population growth (National Marine Fisheries Service 1997), much of the debate focused on whether the Makah had a legitimate cultural and nutritional claim to resume whale hunting. The arguments in favour of the tribe’s request were assembled in the Needs Statement that was produced by the United States to the IWC in 1997. The document (of particular interest to our discussion, as it investigates and translates into legally acceptable terms the ecological significance of Makah whaling traditions) was prepared by Ann

Renker, an anthropologist who has been conducting research on the community's culture and language for more than 30 years and has been living on the reservation since 1986 (Renker 1997).

The Needs Statement describes the tribe's whaling history, the cultural significance of whaling, the role of the whale for food and ceremonial purposes, and the means of whale harvesting and distribution. In order to demonstrate that “[the] Makah whale hunt is essential to meet the continuing subsistence and cultural needs of the Makah community”, the document relies on an eclectic set of data, including oral history produced by tribe members, anthropological research, archaeological reports, sociological surveys and “nutrigenomic” studies. But because the Makah had to stop their whaling activities in the 1920s, there had been no direct observation of Makah whaling practices on which Renker could rely. Therefore, she had to put a particular emphasis on the only “existing” and “visible” evidence of the historic reliance of the Makah on whaling, namely archaeological records.

The IWC eventually granted the Makah a quota in 1997. Although no hunt took place in 1998, after several unsuccessful tries, a Makah whaling crew eventually struck a grey whale on 17 May 1999. However, the hunt occurred amid great controversy and intense media coverage; convinced of the unsustainability and illegitimacy of the quota, several animal rights and environmental organizations consequently prepared to challenge the legality of the hunt. In a series of contentious decisions (*Metcalf v. Daley*, *Anderson v. Evans*), American courts concluded that the environmental assessment produced by federal regulatory agencies did not adequately address the impact of whaling on the local ecosystem, thereby requiring more thorough environmental evaluation (Tomlinson 2003; Roberts 2010). Despite continuing efforts by the Makah and the NMFS to secure the necessary waivers and the requested assessments, it remains unclear as of today whether the Makahs will be authorized to re-establish their long-customary and treaty-reserved practice of whaling (Stevens 2017). It consequently appears that, by favouring the application of the radical conservation rationale promoted by animal rights organizations (which, in this case, found little or no support within the scientific community) over the recognition of tribal sovereignty and cultural identity, American courts have so far tended to ignore the wealth of evidence provided by Ann Renker in her cultural expert witness report; the Needs Statement, which insisted in particular on the devastating consequences that the absence of whaling would have on the whole community, was indeed only cited once in the two judicial proceedings that followed the successful hunt of 1999.

Conclusion

These three case studies demonstrate the central and multifaceted role of cultural expertise in ecological controversies. As the vast diversity and critical importance of the ways in which human communities relate to and interact with their environment have only recently emerged in academic discussions, thanks to the advent of

comparative inquiries into Indigenous and other non-Eurocentric ecological traditions, the need for intermediaries able to translate into legally receivable terms the claims of Indigenous communities has proven critical. Far from limiting themselves to acting as expert witnesses in judicial settings, anthropologists and other cultural experts have become strategic allies for Indigenous communities engaged in the defence of their ecological practices, providing testimonies before legislative and intergovernmental bodies, and even counselling them in their interactions with national, regional and international legal systems. Yet, as revealed by the analysis of the three case studies, the intervention of cultural experts in ecological practices is not devoid of limits and tensions. Despite their detailed and convincing nature, these types of evidence may sometimes be insufficient to help Indigenous claims supersede other competing interests (as in the case of Makah whaling) or may confront anthropologists and other scientists with problematic deontological, ethical or epistemological challenges.

Further Reading

Cruikshank, Julie. 1992. "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*" *BC Studies – A Quarterly Journal of the Humanities and Social Sciences* 95: 25–42.

The article examines the judicial treatment of anthropological expertise in the context of the landmark *Delgamuukw* decision over the protection of ancestral lands in Canada, analysing the arguments put forward by the Supreme Court of British Columbia to question the scientificity and legitimacy of the expert testimonies produced by anthropologists about aboriginal oral tradition in the context of the case.

Burke, Paul. 2011. *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*. Canberra: ANU Press.

The book explores the construction and judicial reception of anthropological expertise in Native title claims in Australia; examining four cases in detail, the author reflects in particular upon the role played by legal rationality in the reconstruction of ethnographic data for judicial purposes and questions the increasing scepticism displayed by judges when confronted to expert evidence.

Bouayad, Aurelien. 2020. "Wild Rice Protectors: An Ojibwe Odyssey." *Environmental Law Review* 22, no. 1: 25–42.

The article discusses the long-standing legal struggle that the Ojibwe community had to endure in the defence of its ecology, exploring in particular the involvement of historians and anthropologists in court cases over off-reservation usufructuary rights and the role of advocacy groups in the elaboration of innovative legal strategies aiming at furthering the legal protection of wild rice in the United States.

Q&A

1. What are the reasons behind the involvement of cultural experts in legal controversies over the protection of Indigenous ecologies?

Key: Students should reflect on legal institutions' demand for specialized knowledge in order to locate and translate into legally acceptable terms

the cultural facts that are relevant for the adequate understanding of ecological claims and, eventually, for decision-making. The sources of and potential issues associated with the reliance of law-makers, judges and lawyers upon scientific rationality could also be examined.

2. What are the principal challenges associated with the increasing involvement of anthropologists as cultural experts in the mediation of Indigenous communities' ecological claims?

Key: Students should discuss the ethical and deontological issues faced by anthropologists, the difficulties of adapting to the special environment of legal discussion and argument, and the occasional suspicion towards the expert evidence they produce (in particular because of their alleged biases towards Indigenous communities).

3. What are the main obstacles to the inclusion of Indigenous ecologies into legal systems?

Key: Students should reflect on how the historical patterns of discrimination suffered by Indigenous communities, as well as the law's striving for uniformity, have tended to produce a lack of legal inclusion of Indigenous ecologies. By way of contrast, the possibilities of such inclusion should be examined, using the cases discussed in the chapter.

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