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CULTURAL EXPERTISE AND EXTREME SPEECH

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LEARNING OBJECTIVES

This chapter allows you to learn (1) why extreme speech cases benefit from cultural expertise and yet why it may be particularly challenging for experts to be involved in them, (2) what strategies can be employed by different stakeholders, including courts, the media and the experts themselves to mitigate the risks stemming from expert witnessing in extreme speech cases and (3) what socio-legal methods can help to analyse expert involvement in extreme speech cases. After reading this chapter you will have learnt to identify the challenges and mitigating strategies associated with expert witnessing in extreme speech cases.

Introduction

The regulation of speech has become widespread to fight against ideologies advocating the restrictions of the political rights of minorities or spreading anti-minority sentiments (Molnár 2014; Steuer 2019). This chapter explains why cultural expertise (Holden 2019; see also Holden, Chapter 1 in this volume) in extreme speech cases is particularly challenging in court and highlights several mitigation strategies available in response to these challenges. The Irving case in the UK and the Kotleba case in Slovakia illustrate the importance of cultural expertise to generate an interdisciplinary discourse as well as the usage of risk

mitigation strategies and the ways how such strategies can be tailored through analysing expert involvement.

Theory and Concepts

FORMS OF EXTREME SPEECH

Extreme speech may take a wide variety of forms and contain symbolic or visual expressions as well as challenging historical or other facts through selective reporting and analysis. Extreme speech has been defined as presenting a “clear and present danger” to societal values and hence potentially justifying the use of coercive power of the state to suppress it (Weinstein and Hare 2009, 2).

Evidence of extreme speech is difficult to pin down because of the inherent evaluative dimension of determining when speech acts meet the threshold of extreme speech (Boromisza-Habashi 2013; Pohjonen and Udupa 2017).

Challenges to Cultural Expertise in Extreme Speech

Experts are accused of bias. In extreme speech cases, experts are frequently asked to *interpret* whether and how speech acts qualify as extreme in the specific context. Such interpretation then fuels charges of bias and lack of qualification that might undermine trust in interpretive social science and cultural expertise.

Involuntary boost of media presence. The experts’ involvement in extreme speech trials may further boost the media presence of the extreme speakers who are also prominent actors in public life (see also Jacobs and van Spanje 2020). Experts themselves may be targeted by denigratory claims and thereby discouraged from offering their expertise in future cases (Mareš 2015). By challenging or generating controversies about the personality of the expert and their alleged bias, the extreme speaker may gain media attention beneficial for their voter support.

The supply of experts. An interdisciplinary treatment of the case may require multiple experts. Small countries might face a shortage of experts with globally acknowledged qualifications and willingness to testify. Local experts may lack interdisciplinary qualifications if the education system does not encourage interdisciplinarity. Depending on regulations, experts’ appointments in court might be limited to nationals.

The “factual” versus the “legal” perspective. Extreme speech cases evade a neat distinction between questions of law and questions of fact (Baker 1992). If experts are asked to assess the potential of the speech to incite hatred or violence, their response may question the boundary between the assessment of the facts and the facts themselves (see Cole, Chapter 2 in this volume). Legal training

of cultural experts may help to appreciate the relationship between the assessment and the facts (see Planeix, Chapter 13 in this volume). For example, in Slovakia, one of the registered expert witnesses on political extremism with over 40 expert testimonies has a primarily legal background and used to work at a court.

Expert failures. High-profile litigants in extreme speech cases may be aided by their sympathizers with formal qualifications to provide expert reports or testimonies, using pseudoscientific practices to support the speaker.

Methods such as contextual analysis (Tilly and Goodin 2008), thick description (Ponterotto 2006), content analysis (Schreier 2012) and narrative analysis (Patterson and Monroe 1998) help identify the challenges in specific jurisdictions.

Mitigating the Challenges

A broad coalition of actors, including the state, media and experts themselves, is needed to mitigate the aforementioned challenges.

Legislation should protect the independence of experts, such that cultural expertise is recognized as essential in securing justice in the proceeding and its outcome, provide assurances of a balanced workload with some control over how many cases the expert is asked to address and provide the expert with feedback about the case outcome.

The appointment of experts should be done according to a transparent procedure that identifies competent experts and provides adequate institutional support to them. Multiple experts, or institutions where experts can collaborate on their testimony, should be instructed in politically most salient cases.

The state and other institutions should encourage interdisciplinary education and rhetorical and legal training for experts. Courts should foster capacity building to assess the qualification of expert witnesses, offsetting attempts to recognize individuals with a history of pseudoscientific claims (see Winiiecki 2008). Courts should also recognize the complexity of scientific discourse, which often precludes clear-cut responses that are often in high demand by the attorneys (see also Grillo, Chapter 7 in this volume).

Media are vital in countering unwarranted charges of bias by emphasizing the content and context of the expert appearance. This might be accompanied by disseminating publishable materials or testimonies by the expert (see also Lisowska-Magdziarz, Chapter 9 in this volume).

Experts themselves can engage with the media while being mindful of local regulations that may require them to decline media engagement before they complete their testimony. They should participate in specialized training, if accessible, especially if they appear in high-profile cases.

Case Studies

Two case studies illustrate the aforementioned challenges and mitigation measures: the UK libel suit of the self-proclaimed historian David Irving against

Deborah Lipstadt's book and the criminal prosecution of the leader of an extreme right parliamentary party in Slovakia, Marian Kotleba. Both cases demanded expertise in interpretive social science and encompassed public figures. In such cases, experts have been particularly vulnerable to charges of bias.

The Irving Case

In *Irving*, Deborah Lipstadt identified David Irving as a Holocaust denier in her book *Denying the Holocaust* (Lipstadt 1993). Irving sued Lipstadt in 1996 in a civil suit, aiming to limit the circulation of Lipstadt's book. A struggle for history and the profession of historians ensued, with Irving claiming that Lipstadt has undermined his reputation and spread false accusations (Johnson and Clifford 2011, 44). The judge had to engage with historical reasoning. Expert witnesses played a key role in this process (Hasian 2002).

The suit was initiated by Irving, and so the expert witnesses' work identifying Irving as a Holocaust denier could be read as supporting a commitment to free speech. Multiple expert witnesses with international reputations were instructed, including Cambridge historian Richard Evans, who "placed special emphasis on historiography" (Lipstadt 2006, 199; see also Holden, Chapter 20 in this volume). The international coverage and the high complexity of the Irving case given the scope and sheer amount of Irving's writing were challenging for expert witness participation and public portrayal thereof. Evans recounts how even mainstream media often provided factually inaccurate or misleading reporting (Evans 2002, Chapter 6(I)). Evans' own media engagement contributed to providing an authentic picture of the trial, which ended with a dismissal of Irving's suit (*Irving v. Penguin Books Limited*, Deborah E. Lipstadt 2000).

EXPERT TESTIMONIES AND THE MEDIA

The media coverage of expert testimonies is an important avenue for educating and engaging with the broader public in complicated trials. However, given the complexity of the cases, some media might opt for presenting only brief, superficial information about the expert testimonies, with the risk of negatively affecting the public perception of cultural expertise.

The Kotleba Case

Kotleba addresses the Slovak authorities' response to an extreme-right parliamentary party leader. This criminal law case was initiated by the Slovak prosecution in 2017, prompted by Marian Kotleba issuing cheques in the value of 1,488 euros

at a charitable event. Cultural expertise became indispensable in order to evaluate the use of the neo-Nazi symbols of 14 and 88 (e.g. Croft 2011) in the context of Kotleba's broader profile and statements. In addition to historians, specialists on contemporary extremism, a political scientist and a cultural anthropologist were instructed (see the 'Talking to Expert Witnesses' box). Three historians in *Kotleba* were called to the case via their institution, which allowed them to collaborate on the expert report. In October 2020, Kotleba was convicted with a prison sentence of four years and four months (*Kotleba v. Slovakia* 2020). The appeal was pending before the Slovak Supreme Court at the time of writing.

Unlike in *Irving*, Kotleba's case required awareness of the Slovak realities, which limited the pool of available experts. Experts from abroad with awareness of these realities were not instructed. Kotleba's trial boosted his media presence, providing some validity to the risk of such trials amplifying extreme actors' voices.

TALKING TO EXPERT WITNESSES

In support of preparing this chapter, several interviews with Slovak expert witnesses in extreme speech cases were conducted. Due to the absence of publicly available information about the proceedings, talking to the expert witnesses directly may often be the only way to learn more about their involvement, as well as to appreciate their perspective. The time and availability of the interviewees deserves appropriate recognition and appreciation, even if they do not agree to disclose their identities.

Conclusion

Expert witnesses in extreme speech cases stand at the core of clashes between extreme political actors demanding unrestricted rights to express their ideas and defenders of restrictions advocating duties and responsibilities associated with democratic life. The complexity of extreme speech amplifies the significance of cultural expertise whenever their assessment is necessary. The specific context of extreme speech, however, makes it easier to challenge expert testimonies and accuse experts of biased reporting. If the cases involve public figures, the motivation to undermine expert authority may go beyond the courtroom and reach the public. In addition, a neat distinction between facts and value judgments is impossible to make.

There are several strategies available that can help experts on extreme speech cases navigate this terrain. Developing the combination of approaches best tailored to the concrete case requires a jurisdiction-specific understanding of how cultural expertise works.

Expert training in court communication, careful engagement with the media in high-profile cases, accurate media reports and joint interdisciplinary testimonies can all help mitigate these challenges.

Further Reading

Belavusau, Uladzislau. 2014. “Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strasbourg?” In *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, edited by Lukasz Gruszczynski and Wouter Werner, 254–71. Oxford: Oxford University Press.

Belavusau examines the reliance on cultural expertise in cases by the European Court of Human Rights (see also Arajärvi, Chapter 17 in this volume). He identifies three models of the use of expertise in these cases, helping readers understand the variety of ways in which cultural expertise is essential for the adjudication of extreme speech.

Brandmayr, Federico. 2018. “Order and Conflict Theories of Science as Competing Ideologies.” *Social Epistemology* 32, no. 3: 175–95.

Brandmayr highlights how expert witnessing correlates with the “order theory of science”, which builds on scientific authority but can be undermined by “conflict theorists” claiming that all truths can be challenged. This dialectic is particularly significant for extreme speech cases, given the high degree of contextuality they entail.

Evans, Richard J. 2002. *Lying About Hitler: History, Holocaust, and the David Irving Trial*. New York: Basic Books.

A first-hand account of the role of the historian as an expert witness in the Irving trial, Evans’ book provides the historical and political context for the trial and includes a focus on the role and significance of media reporting about his and other expert witnesses’ involvement.

Q&A

1. What are the risks associated with cultural expertise in extreme speech cases?

Key: Risks include (1) portraying the practice of cultural expertise as unscientific and partisan via accusing individual experts as biased without credible evidence, (2) using the expert involvement as means for campaigns of extreme political actors, (3) questioning the “scientific nature” of the social sciences as such, particularly when it comes to interdisciplinary specializations and (4) presenting expert involvement via the parties’ positions only without established media providing evidence-based reporting.

2. What strategies are available to various actors in order to mitigate the risk of the expert’s position being undermined in extreme speech cases?

Key: Expert witnesses can engage in communication with each other, exchanging experience and building networks. The domestic environment can encourage interdisciplinary qualifications. The media can report on expert involvement, but they should be attentive to the content and context of the testimony and prioritize it over the personality of the expert. The judges can

recognize that expert discourse is rarely straightforward and support more nuanced analyses over simplified “yes–no” positions.

3. Which risks for cultural expertise and strategies to overcome those risks can you identify in the jurisdiction(s) you are familiar with?

Key: The risks of various forms of backlash against the experts differ depending on factors such as (a) the procedural framework (guaranteeing publicity for the trial including independent media reporting), (b) signs of genuine interest in social scientific expertise by some or all actors in the process and (c) possibilities to consult with other experts if the issue turns out to be more complicated and in need of more examination.

4. You are called in as an expert in a publicly controversial extreme speech case. The court asks a set of narrowly framed “yes–no” questions. Furthermore, concerns have been raised over the independence of the judiciary in the country. Do you testify?

Key: In such cases, there is a risk of legitimization of the deficits in the judiciary or the speech in question by the expert witness involvement. If the questions prevent a more robust analysis, the value of the expert testimony might decrease regardless of the qualification and efforts of the expert. Such risks need to be weighed against the benefits of expert involvement, such as providing social scientific evidence to improve the parties’ knowledge and public discourse.

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