The Artist as an Expert Witness

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The audio documentary *The Freedom of Speech Itself* (2012) created by artist Lawrence Abu Hamdan was submitted as evidence to a UK asylum tribunal in 2013. Following this, the artist was called to testify on his findings regarding the use of language analysis for the determination of origin (LADO). In his testimony, published in the current issue of *OnCurating*, Abu Hamdan was requested to state his opinion on the case of asylum seeker Mohammad Barakat whom he met during the process of making the documentary.

During the testimony it is revealed to us how a method of screening executed from afar determines the application of an asylum seeker. Following a voice analysis procedure conducted in the form of a twelve-minute phone interview, Barakat's claim to be identified as Palestinian was rejected, and he was declared to be of Northern African origin. Conducted with minimal human contact by the Swedish company of Sprakab, and paid by the UK government, LADO is able to revoke one's identity solely on the ground of voice or accent. Abu Hamdan's testimony attests against the very basic notion of the nation-state as it relies on fictitious borders and regulations to assert pertinence. According to him, unlike state-made borders, "Dialects don't stop at a border, [...] dialects are much more porous than borders." This statement, as innocent as it might appear at first, calls upon our imagination as it brings to mind a different era when movement in the world was more fluid.

We tend to assume that we are enjoying now a freedom of movement like no time before. But in fact, border controls have never been stricter than they are nowadays. "In the last decades before the Great War, most travelers entered and left the countries of their choosing without a passport. All of this ended during World War I, as European governments sought to reinforce security and control the emigration of citizens with useful skills. Such controls stayed in place after the war and became enshrined in international agreements".[1] As border fences are currently being built by countries such as Hungary, and the EU is implementing extreme measures of border control through external agencies such as Frontex, Abu Hamdan's statement demands us to imagine a different future embedded in a different past.

In the region known as the Middle East up until the end of the nineteenth century, movement has been much freer than most of us can possibly imagine. An appropriate description of movement and exchange in the region can be found, for example, in a conversation between Artur Zmijewsk, artist and curator of the 7th Berlin Biennale, and curator Galit Eilat as she states that, "Before the British came to the Middle East [...] people would travel to Damascus in Syria to study, go back to Jaffa, and visit Beirut for vacation."[2] Similarly to Abu Hamdan's testimony, Eilat wishes for us to be able to imagine a world where nation-states are obsolete. According to Eilat, the re-writing of reality as we know it can be achieved through artistic imagination when it is working in partnership "with academics, lawyers,

psychologists, sociologists, and so on."[3] This method of collaboration with practitioners from other fields is far from being new to the contemporary art world. Abu Hamdan has also testified how his work is developed through collaboration with linguists just as with lawyers. It is due to this that Abu Hamdan was able to find a way to erode a seemingly objective-based method. LADO, according to Abu Hamdan, is far from being an innocent, quick, and reliable mechanism deciding on the origin of the asylum seeker. When it is put into operation by governments, it is not only because an applicant does not hold valid identification, but is often times based on a political motivation to discredit the applicant in question.

The testimony of Abu Hamdan, just like the conversation between Eilat and Zmijewski, brings to mind the amount of knowledge and tools of imagination accumulated by artists and curators alike throughout their work and research. Their insights, deriving also from collaboration with scholars and practitioners from other fields, intrigue me to further investigate the notion of artists and curators as experts. More specifically, I am interested in exploring the sort of training and expertise curators and artists possess that could also be of interest in the legal sphere when called upon to testify as an expert witness, just as in the case of Abu Hamdan.

We might be accustomed to think that the definition of the expert witness serving the courts has been certain since the dawn of time. We might also believe that artists or curators must be far from reaching a point in which they might hold a decisive role in the legal system. Yet, a closer look into the evolution of the role of the expert witness shows much to the contrary. Only as late as 1975 have the *Federal Rules of Evidence (FDE)* been codified in the USA. Even with these rules in hand, the definition of who is an expert remains open to interpretation: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise."[4] Therefore, I wish now to provide a short history of the development of the concept of the expert witness in the English legal system (Common Law). By doing so, I shall expose the ever-changing definition and reaction to the expert witness and to evidence as it has been debated by courts, scientists, and the general public. At the end of this overview, I will return once again to Abu Hamdan's testimony as I aspire to further introduce the possibility of integrating artists (and curators) as expert witnesses in the legal system.

By the end of the eighteenth century, the adversarial legal system–in which a judge moderates the contest between two differing parties–has taken full form. Alongside this development and changes in litigation, there has been a need to newly understand the expert witness role. As the role of judges in the courtrooms changed to be more passive and neutral while lawyers became more powerful and active in examining their witnesses, a new place had to be found for the expert who previously had appeared either as court advisor or as a member of the jury. Tal Golan in his book *Laws of Men and Laws of Nature* offers a detailed historical view of the expert witness–a figure known to the courts from as early as the fourteenth century. Golan, however, suggests that it has taken many years for the legal system to find and define the categories on which to base the expert's role. From a state of exception to the rule of law, the role of the expert grew in its influence to become an important fixture in all legal procedures. Based on Golan's book, I will emphasize in the following how from being considered during the 18th century as not much different from any lay witness, the position of the expert has gone through several

phases until being recognized by the courts as holding a significant level of knowledge and expertise.

It is generally agreed upon by legal researchers that up until the case of *Folkes v. Chadd* (1782), the expert witness was far from being accepted as a definite legal entity. Lord Mansfield, who ruled in this case in favour of accepting as proper evidence the judgment of an expert, is regarded as "the onset of judicial recognition in the modern practice of party-called expertise."[5] Nevertheless, it is not to be overlooked that since 1782 the court's understanding of the expert has gone through significant turmoil. Also in the public eye, the expert enjoyed times of approval as well as times of increasing amounts of doubt and mistrust. For instance, by the middle of the nineteenth century, we notice a sustainable shift in the acceptance of the expert witness both by the public and the courts. If at times the court has recognized the value of the expert as "the most decisive and convincing of them all," doubts erupted regarding the true value of the expert. As many of the experts during that time did not yet hold a university degree to prove their scientific knowledge, and "Their expertise was not based on any regulated training but rather was self-thought," the courts "classified them as 'men of skills', a broad legal category that included all other traditional experts–mechanics, navigators, and so forth."[6]

While courts of those days were reluctant to define expert witnesses as professional men of science and pay them accordingly, it turned out that this was not the case for "the soaring technical industries of the nineteenth century, which were more than happy to pay men of science extravagant amounts to represent them in court in their brawls over patent rights."[7] The drawback of this development has been the growing decline in trust towards the expert witness, as they were seen as willing to defend any side as long as they were well compensated. "Judges found it therefore exceedingly difficult to accept the fact that similar experiments were constantly producing antithetical results when conducted by opposed experts. Such conflicting experimental results, they believed, reflected the partisanship of the scientific experts who produced them, and since these experts were highly paid for their services, their conduct was perceived as the prostitution of science, of selling its credibility to the higher bidder."[8]

The flourishing condemnation towards expert witnesses could not be ignored by the scientific community, as it undermined "the epistemological, ethical, and social conventions of the Victorian scientific community."[9] As a result, a special committee was formed in 1860 by the British Association of the Advancement of Science, and following two years of investigation it published its findings. Its main recommendations were "getting rid of the jury in civil cases of technical character" and "to create [...] a court, where the bench would only consist of a judge and up to three skilled assessors [...] also be allowed to call on witness independently of the parties."[10] However, not being able to implement the committee's resolutions, or to arrive to a clear definition of who is an expert and what sort of training an expert should hold, has left both legal and science practitioners in a state of bafflement.

At first, rigorous advancements in science and technology of the end of the nineteenth century did not make matters any easier. The introduction of photography and x-ray images brought about further bewilderment and perplexity within the legal system. A system based on words rather than on images, and already in doubt regarding the role and qualification of experts of science, found itself in further disarray. Invented in 1895, x-ray technology was initially received by the legal system with scepticism. Yet, as photography has already been much debated and finally accepted by the courts as illustrative evidence, by 1901 several Supreme

Courts in the USA ruled that x-ray images should be regarded as a form of photography, and hence admitted as evidence. Now the debate was left once again to the threshold of the expert, as it was not clear whether a jury could alone interpret the images, or whether an expert would be needed. A great commotion arose within the scientific community, only to subside with the introduction of the field of radiology. With the help of radiology, x-ray images "ceased to be a part of the layman's universe,"[11] and the medical specialist was beginning to be gradually perceived by the courts as an established and reliable source of authority on the subject.

Hence, initially new means of evidence such as photography and x-ray images were seen as deepening the confusion regarding applicable evidence and the role of the expert. Yet, once accepted by the courts, another shift occurred as the interpretation of evidence was entrusted to the expert witness. Instead of providing judges and juries a direct and easy access to understanding evidence, a new role and position was passed on to the expert witness. It turned out to be that new technology, along with progress in the medical field, "was turning into exclusive domain, accessible to experts alone."[12]

As the above review suggests, the evolution of the role of the expert witness has not been a linear one, but one steeped in debate and criticism by courts and scientists, and by mass media and the general public alike. Against this backdrop, bringing back into the discussion the work of Lawrence Abu Hamdan, I wish to examine from a contemporary perspective the positioning of an artist as an expert witness. The testimony of Abu Hamdan deals, as discussed earlier on, with language analysis as evidence in claims of asylum seekers. For the last fifteen years, Sprakab has been conducting phone interviews with asylum-seeking applicants on the request of different governments worldwide. The use of Sprakab analysis has peaked since the 1990s, to include not only Scandinavian countries, but also other European countries, as well as Canada, Australia, and New Zealand–this in face of growing criticism towards the reliability and the justification of the company's analysis. Similarly to the high degree of uncertainty and doubt towards expert witnesses and evidence such as photography and x-ray images, in 2015 it was published in the press that the Swedish company Sprakab "misled the Home Office about the reliability of one of its analysts."[13]

The invitation of an artist to serve as an expert witness in an asylum tribunal offers a possibility to further dismantle the expertise of companies such as Sprakab, while also posing the crucial question of who is an expert. The artist's evident expertise does not only underline the politically biased use of language analysis, but also opens up new paths for artists (and curators) to gain an active role in policy making and legal matters as they engage the courts with artistic and curatorial forms of imagination. Throughout his work, Abu Hamdan has gained extensive expertise on the matters of sound and voice recognition, and his criticism towards language analysis as it is used in the case of asylum seekers is also shared by linguistic scholars.[14] New forms of evidence and witnessing, as in the matter of sound research in the work of Abu Hamdan, will require the courts to re-examine their own legal methods and practices. At a time when Europe is facing one of the most significant surges of migrants and refugees since World War II, his work is ever more vital for our understanding of the problematic mechanism of language analysis, just as of the role artists can and should have in the legal system.

Notes

1 Marcus Walker and Jon Sindreu. "Passports, 100 Years, 100 Legacies." *The Wall Street Journal*. http://online.wsj.com/ww1/passports

2 Artur Zmijewski Joanna Warsza, eds., *7th Berlin Biennale for Contemporary Art: Forget Fear*, Walther König, Köln, 2012.

3 Artur Zmijewski, Joanna Warsza, eds., op. cit.

4 Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America,* Harvard University Press, 2007, p. 261.

5 Ibid., p. 41.

6 Ibid., p. 69.

7 Ibid., p. 81.

8 Ibid., p. 89.

9 Ibid., p. 106.

10 Ibid., p. 122.

11 Ibid., p. 205.

12 Ibid., p. 205.

13 Chris Green. 2015. "Sprakab Agency misled Home Office over checks on asylum-seekers." *The Independent*, March 5.

14 Tim McNamara, Carolien Van Den Hazelkamp, and Maaike Verrips, *LADO as a Language Test: Issues of Validity*, Oxford University Press, 2014.

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