

Anthropologists Engaged with the Law (and Lawyers)

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Abstract. The official review of research carried out in British universities in 2014 required departments to present case studies documenting the “impact” (“reach and significance”) of their research beyond the academy. Despite misgivings, anthropology departments presented detailed studies across a range of sub-fields of the discipline which were judged to have demonstrated “productive engagement with publics, users and policy makers”. Some of the studies illustrated a contribution to one field, what Bourdieu called the “judicial field”, which has become increasingly significant for anthropologists across Europe and North America, especially where ethnic, cultural and religious minorities are concerned. The paper examines a number of situations of this kind (including interventions in tribunals assessing the claims of asylum seekers) where anthropologists acting as cultural interpreters or mediators have had to interact with the law and with lawyers and others whose disciplinary mindsets may be very different from their own. While this may be very productive, it also poses numerous dilemmas, not least of which is whether those whom anthropologists seek to address (the powers-that-be) actually listen to what they have to say.

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Introduction

This article is based on a plenary lecture delivered at the 3° Convegno Nazionale della SIAA (*Società Italiana di Antropologia Applicata*), held in Prato, 17 December 2015. I sincerely thank the President of the *Società* (Bruno Riccio), and organisers of the conference (Massimo Bressan and Roberta Bonetti) for doing me the honour of the invitation to present the lecture, and their kind hospitality. Prof. Antonino Colajanni (2015) gave a detailed and thought-provoking commentary as discussant.

The lecture provided an opportunity to think about the British experience of applying anthropology, something that pre-occupied me for many years, mainly with respect to the anthropology of development and development anthropology (i.e. anthropologists working directly on policy and practice). The lengthy history of that engagement, and the debate it provoked in mainstream anthropology, is now well-documented, and in the present paper I reflect on more recent events, including the outcome of the latest

official assessment of research in British universities which for the first time incorporated an evaluation of the “reach and significance” (the “impact”) of research, including anthropological research, beyond the academy, on economy, society, and culture. The main part of the paper, however, focuses on a field of research and practice, what Pierre Bourdieu (1986) called the “judicial field”, which a number of anthropologists across Europe have entered in recent years, interacting with the law and with academic and practicing lawyers, principally in the guise of cultural interpreters, mediators, and perhaps “brokers” (Holden 2011a: 2). This is a large topic, and I can only provide an overview, principally in relation to anthropologists intervening where legal issues affect immigrants and asylum seekers and settled minority populations of migrant background. *Inter alia*, this enables me to address the principal theme of the 2015 conference, applied anthropology and interdisciplinary approaches¹.

Engagement

First, briefly, what do we mean by “engaged”? As we learned long ago, and has been repeated more recently, engagement is not a single thing (*inter alia* Colajanni 2014, Low, Merry 2010, Palmisano 2014, and previously Grillo 1985). It encompasses the following, and more besides, which may be thought of as lying along a sort of spectrum of commitment: contributing to public knowledge and understanding of matters of contemporary social or political concern; researching issues known to be of interest to policy makers or users while keeping a distance from policy making; problem-oriented research undertaken on a customer-contractor basis; researching and participating in policy formation; acting as expert witness; mediating, brokering, or speaking on behalf of a particular community or interest; advocacy; committed activism.

One of the characteristics of anthropologists engaged with application, perhaps especially in the middle of the spectrum, is diffidence and defensiveness in the face of other (allegedly) more scientific disciplines such as economics. Partly in consequence, we become protective of our core methodologies (ethnography, extended participant observation, a focus on culture and social relations at the micro-level) with our specific contribution sometimes reduced to a simple *tekne*, as Palmisano (2014) puts it. At the same time, however, most anthropologists (applied or not) see themselves on the side of the marginalised, sceptical of the aims and practices of the powers-that-be, devoted to bottom-up solutions and mechanisms of empowerment, perhaps favouring so-called “participatory” approaches, and varieties of “action” anthropology or “participatory action research”.

Despite, however, sharing that general orientation, applied anthropology has throughout its the history experienced a difficult relationship with the mainstream (see *inter alia* Colajanni 2014). That difficult relationship was manifested at the time of the latest assessment of research in British university departments in 2014. The review, which

¹ In preparing the paper I have drawn extensively on the work of many anthropologists and lawyers, but must thank the following for their especially helpful comments and suggestions: Samia Bano, Michael Banton, Jan Blommaert, Dominic Bryan, John Campbell, Natasha Carver, Katharine Charsley, Hastings Donnan, Gillian Douglas, Anthony Good, Livia Holden, Neil Jarman, Melissa Leach, Maleiha Malik, Werner Menski, Jon Mitchell, Federica Sona, Barbara Sorgoni, Gordon Woodman, Helena Wray, and over many years Roger Ballard, Prakash Shah, and Marie-Claire Foblets.

has major implications for the level of government funding each department receives, now includes an evaluation of “impact”, with panels required to assess the “reach and significance” of the submitted research outside the academy. There was strong criticism of this requirement by many anthropologists, not least in the journal *etnografica* (Knowles, Burros 2014, Mitchell 2014), and subsequently in *Anthropology in Action* (Simpson 2015). Nonetheless, anthropology departments buckled down to the task and each submitted a number of detailed case studies (all accessible online²), and an assessment of the outcome for anthropology concluded:

The impact case studies were themselves of extremely high quality overall, and provided strong evidence of productive engagement with publics, users and policy makers from all sub-fields of anthropology and development studies [They] included very strong examples from a range of sub-fields, including visual anthropology and material culture, political and legal anthropology, anthropology of development, environmental anthropology and biological anthropology (Manville *et al.* 2015: 99).

About half the 60 or so anthropology case studies were concerned with international development, with medical anthropology a strong second. Unsurprisingly, Africa and Asia predominated, with about a fifth dealing with the UK. The case studies were thus fairly conventional and in areas which have become traditional strengths of British applied anthropology. But they also illustrated the inter-disciplinary engagement of those involved, as the extracts from these selected examples show.

- *Dress, Identity and Religious Expression*: Enhancement of public understanding and awareness of Muslim perspectives; Interfaith dialogue and understanding. Impacts in education, religious communities, fashion and design.
- *Anthropological research influencing clinical practice in the US, Europe, Bhutan and Myanmar*: Led to significant changes in how patients are treated and to a culture change in psychiatry and clinical practice in Europe and the United States; contribution to the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders, of the American Psychiatric Association. Disseminated into clinical practice through training and publication of key texts.
- *Management of pastoralism in Inner Asia* : Benefited supranational agencies and national policymakers in Inner Asia responsible for pastoral management and reform, and NGOs providing direct aid to pastoralists.
- *The Use of Expert Evidence in Asylum Procedures* : Impact on individual cases in the immigration and asylum process; contributed to the professional practice, knowledge and skills of decision-makers and those people representing asylum seekers; provided training and guidance for lawyers and decision-makers; contributed to public debates on torture.
- *Facilitating the Right to Freedom of Peaceful Assembly* : International Governance Impact (standing Expert Panel on Freedom of Peaceful Assembly); Impacts upon Human Rights’ Law (Guidelines of Freedom of Peaceful Assembly); Expert advice to Armenian government re human rights; international research and training programme

² Available via <http://impact.ref.ac.uk/CaseStudies/>. Search under “Unit of Assessment”, “Anthropology & Development Studies”, last accessed 09/12/2016.

on monitoring freedom of assembly; work with civil society groups in Moldova and Kyrgyzstan.

As will be apparent from last two examples, they and some other case studies illustrated in various ways an engagement with the law, broadly defined. To this I now turn, focusing principally on anthropological research and practice relating to legal issues facing ethnic, cultural and religious minorities of migrant background, in which anthropologists across Europe and North America, and in countries such as Australia and South Africa, have become increasingly involved.

Anthropology and the Law: Background and Context

Applied anthropology by its very nature requires the anthropologist to interact with other disciplines. By that I do not mean simply other academic subjects, most obviously, for example, economics in the case of international development. “Discipline” and interdisciplinary engagement must be interpreted very broadly to include not just academics but the great range of occupations and professions that the applied anthropologist will encounter and perhaps work with.

Those professions are likely to have their own way of doing things and thinking about the world, their own mindsets, or if one prefers, cultures, which give rise to or are embedded in various practices and procedures, rules and rituals, and manifested in particular institutions or institutional settings. In writing about lawyers, for example, the British anthropologist Roger Ballard has observed that their practices are «grounded in a set of parochial conventions into which they themselves have been socialised [or acculturated] during the course of their professional training» (Ballard 2010: 19, see also Woodman 2017). He adds: there are «few spheres where that process of acculturation is more elaborate, or as closely guarded, than at the English bar» (Ballard 2010: 19). The “bar” is not of course a “pub”, but one of the sacred institutions of the English legal system, whose practitioners are termed “barristers”, and they along with solicitors, magistrates and judges are at the core of the judicial field. However, that field is a complex terrain which also encompasses individuals and institutions directly and indirectly operating within the law or in its shadow, for example, the statutory services (police, social workers etc.), and NGOs.

Especially significant in the current conjuncture are the legal situations which involve ethnic, cultural, and religious minorities of migrant background. Firstly, immigration brings individuals, families, sometimes whole communities, within the purview of the law, especially if they try to live transnationally; the world of migrants, refugees, and settled minorities is often multi-jurisdictional and trans-jurisdictional, for example where marriage is concerned. Secondly, some people may seek to maintain some practices potentially at odds with those of the societies in which they have settled and therefore seemingly “problematic” so far as the law and public policy are concerned. I emphasise “some”, and add that legal problems may arise from what is happening within migrant and minority families (in their internal dynamics) as much as from what is happening between minorities and majorities. Thirdly, internationally people are turning to religion to guide their conduct and seek advice on how to comport themselves in societies which may be seen as individualistic and immoral. While adherence to the historic Christian

churches has declined, we are in a post-secular world (Habermas 2008), where new forms of Christian religiosity have emerged, and non-Christian faiths, not least Islam, are increasingly visible. Fourthly, there has been a proliferation of international conventions of human, cultural, religious and gender rights.

In Western societies there is in consequence a multiplicity of culturally differentiated and often conflicting norms, a super-diversity of moral universes (conceptions of the good life and how to live it) which poses many challenges in the legal sphere. Anthropologists come into it because this is the terrain many of us are researching, and because what is at stake, namely other cultures and what to do about them, touches on matters at the core of the anthropological project. Anthropologists thus find themselves drawn into various situations where the civil or criminal law and culture are at issue. The following edited volumes (plus other references cited) indicate the range of contexts where anthropologists have engaged with lawyers on the judicial field: Berti *et al.* 2015; Foblets, Renteln 2009; Holden 2011; Kandel 1992; La Fontaine 2009; Lawrance, Ruffer 2015. These contexts have included:

- Providing expert advice on accommodating “other” cultural practices.
- Responding to government consultations on proposed legislation affecting minorities.
- Asylum and immigration cases (especially where people from South Asia are concerned).
- Family law matters (marriage, divorce, custody of children, inheritance).
- Commercial matters, e.g. unravelling the complex arrangements of Asian family businesses or the *Hawala* money transfer system. (On *Hawala* see Ballard 2013³).
- Criminal cases, often involving domestic violence and abuse.
- Advising/training other disciplines in cultural awareness. For example, British anthropologists were involved (with others) in the development of the Judicial Studies Board’s *Equal Treatment Benchbook* (2010 and earlier editions) intended for judges; see Banton 1998.

Many of these involve what have become highly politicised sites of contestation, notably with respect to Muslim families, as may be observed in speeches by politicians and religious leaders, on Internet discussion groups, in academic papers, and in everyday conversations. They raise questions about meaning and practice, and crucially about rights and duties (who may or should do what, where and when). But voices are unequal, and when it comes to representing alternative perspectives within the institutional system where policies are formulated and implemented, who has the power and authority to speak and name is central. Anthropologists therefore enter a contested terrain on which law and culture intersect and on which their principal roles are frequently those of cultural

³ The text of Ballard 2013 is also available at <http://www.casas.org.uk/papers/pdfpapers/moneylifeline.pdf>, last accessed 09/12/2016. Ballard presented expert evidence in *Azam v Iqbal* and another [(2007) EWHC 2025 (Admin)] – the text of this judgment may be found at <http://www.casas.org.uk/papers/pdfpapers/madinajudgement.pdf>, last accessed 01/01/2017.

interpreter and cultural mediator. The following section examines various examples which illustrate this.

Cultural Interpretation and Mediation

Accommodating “Other” Cultural and Religious Practices: Sikhs and Hindus

First, two cases involving Sikhs. One goes back to the 1970s and debates about racial discrimination which led to the passing of the 1976 Race Relations Act, though its implications are still highly relevant. Shortly after the Act came into force, a Sikh family, advised by what was then the Commission for Racial Equality, and by independent anthropological experts, sought to establish that when a school refused to permit their son to attend wearing a turban (which the family argued his culture and religion required him to do), an offence had been committed under the 1976 Act.

The court of first instance rejected this on the grounds that Sikhs were not a “racial group” as defined by the Act. An appeal court agreed, the senior judge, Lord Denning, contending that while Sikhs are «a fine community upholding the highest standards, they are not a ‘racial group’». So it is not unlawful to discriminate against them. Even though the discrimination may be unfair or unreasonable, there is nothing unlawful in it»⁴. There followed a lengthy legal-cum-anthropological debate about whether Sikhs did indeed constitute such a group, and when the case eventually went to what was then the UK’s highest court, the House of Lords, their claim was supported. This landmark case opened up the application of the discrimination legislation, going beyond the somewhat narrow and increasingly outdated notion of “racial” to encompass a group such as the Sikhs which, in the leading judge’s words were a «a distinctive and self-conscious community [and thus] a group defined by a reference to ethnic origins for the purpose of the 1976 Act»⁵.

In a more recent case a young female student claimed the right to wear a *kara*, a distinctive bracelet required by Sikh tradition, despite her school’s regulation against wearing jewellery. The court, taking cognisance of anthropological and other evidence, found in the girl’s favour on the grounds that: «there would be a particular disadvantage or detriment if a pupil were forbidden from wearing an item when that person genuinely believed... that wearing was [exceptionally] important to her racial identity or religious belief».⁶

Now a Hindu example⁷. A certain Mr. Ghai asked Newcastle city council to allow him to have an open air cremation when he dies. The council rejected this as contrary to the

⁴ In [1982] 3 All ER 1108; the text of the judgment is available at http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm, last accessed 01/01/2017. An outline of the case may also be found at http://www.sikhiwiki.org/index.php/National_Protest_by_UK_Sikhs, last accessed 09/12/2016.

⁵ In *Mandla v Dowell-Lee* [1983] 1 All ER 1062, http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm, last accessed 01/01/2017.

⁶ R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls’ High School [2008] EWHC 1865 (Admin); see http://www.lcor.com/1315/?form_1155.replyids=1167, last accessed 01/01/2017.

⁷ R (Ghai v Newcastle City Council & Others) [2010] EWCA Civ 59, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/59.html>, last accessed 01/01/2017. Subsequent quotations relating to the case are taken from that source.

1902 Cremations Act. Mr. Ghai appealed on the grounds that by refusing him permission to have such a cremation the council denied him his rights under Article 9 (1) of the European Convention of Human Rights (ECHR):

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

At first sight the case seemed to turn on whether an open air cremation was a requirement of the Hindu faith, and several experts were called by the various parties involved to testify whether or not an actual open air cremation was indeed such a requirement. The experts disagreed. The judge himself took on board their various opinions and indeed read a key anthropological text on the subject (Parry 1994). He concluded as follows.

The Cremation Act only allows the burning of human remains in a crematorium. Hindus dispute whether their religious beliefs necessitate an open air pyre. However, «the claimant’s belief in open air funeral pyres is central to his strand of orthodox Hinduism. It is beside the point that typically Hindus [in the UK] do not share that belief». Therefore he did have a right to «manifest his religious belief in open air funeral», according to Article 9 (1) of the ECHR. Nonetheless, the refusal to grant Mr. Ghai his wish was justified on the grounds that «others in the community would be upset and offended by [it], and would find it abhorrent that human remains were being burned in this way», according to Article 9 (2), which reads:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Mr. Ghai again appealed, and a higher court sought ways in which Mr. Ghai’s wishes could be accommodated within the current law. He conceded that the ceremony could take place within a structure «provided that the cremation was by traditional fire, [and] sunlight could shine directly on his body while it was being cremated», and his lawyers found an example of such a structure, which would allow this, in Spanish Morocco. Now, the Cremation Act specifies that a crematorium is a certain kind of building, and whether the structure in Spanish Morocco satisfied the Act hinged on the interpretation of the word “building”. Does a building have to have a roof? The judges agreed that it did not, so Mr. Ghai won, through what was described as a typically British compromise.

The judges’ approach might suggest the irrelevance of expert anthropological evidence. No matter what experts said, Mr. Ghai was entitled to his interpretation of his beliefs. This subjective, “Pirandellian” interpretation of doctrine (*Cosi è (se vi pare)*) recognises the right of someone to believe what they like, though it does not mean that she or he can actually practice what they believe. There is in fact a chain of decisions connecting a Hindu in England (Mr. Ghai), another Hindu in South Africa⁸, a Jew in Canada⁹, and a Jehovah’s Witness in the United States¹⁰, all accepting an individual’s

⁸ MEC for Education, Kwazulu-Natal and others v Pillay, judgment available via <http://www.saflii.org/za/cases/ZACC/2007/21.html>, last accessed 01/01/2017.

⁹ Syndicat Northcrest v Amselem [2004] 2 S.C.R. 551, judgment available via <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2161/index.do>, last accessed 01/01/2017.

subjective understanding of their religion. Although these suggest that judges can dispense with anthropological expertise, another interpretation might be that acceptance of a “subjective” approach in fact reveals a turn towards a more flexible, postmodern, definition of culture of the kind which pervades contemporary anthropology. Indeed, in the South African case it appears that the judges were directly influenced by such a contemporary anthropological take arguing : “While cultures are associative, they are not monolithic. The practices and beliefs that make up an individual’s cultural identity will differ from person to person within a culture”¹¹. What judges, juries and lawyers make of “culture” in the courtroom may, however, create especial difficulties for anthropologists, as later discussion shows.

Forced Marriages

Although religious beliefs and practices figure prominently in cases where anthropologists are engaged as cultural interpreters, their services are required in many other contexts. For example, when the Uruguayan footballer, Luis Suarez, then playing for Liverpool, was charged with using racist language, two linguistic anthropologists advised the Football Association on the meaning of certain Spanish terms and how they might be interpreted in various contexts in Latin America, Spain, and the UK (in Football Association 2011). Not surprisingly, however, family matters are the focus of much legal and anthropological attention.

There has, for instance, been a long-running debate across Europe about arranged and forced marriages, which in the UK came to a head in 2014 with the passing of the Anti-Social Behaviour, Crime and Policing Act. This contained clauses criminalising attempts to force a woman or man into an unwanted marriage. The debate included parliamentarians, lawyers, NGO activists, feminists, the media, and not least academics, including anthropologists, covered such matters as the meaning of family life and marriage, relations between genders and generations, especially among people from South Asia, the distinction between forced and arranged marriages, the nature of consent, coercion, and female agency, and whether or not criminalisation is the answer.

There were numerous interventions by anthropologists and other social scientists as well as by the NGO community. Two anthropologists, one of whom had previously worked in the Home Office’s Forced Marriage Unit, submitted a response to the government consultation which sought advice on criminalisation (Ballard, Shariff 2012), situating arranged and forced marriages in the context of the dynamics of South Asian families. There are many reasons why parents (and extended kin) might seek to arrange and perhaps impose a marriage: developing or strengthening community ties or financial or economic commitments, here or in the country of origin (perhaps by facilitating someone’s migration), maintaining endogamy, and controlling or restricting sexual behaviour, and enforcing norms of propriety. Ideologies of honour, masculinity and femininity may come into it, and marriages may be caught up in complex social relations involving property, debt, business deals, inheritance, religion, child custody, sexual orientation, and

¹⁰ Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), judgment available via <https://www.oyez.org/cases/1980/79-952>, last accessed 01/01/2017.

¹¹ In MEC for Education, Kwazulu-Natal and others v Pillay, at para. 54, judgment available via <http://www.saflii.org/za/cases/ZACC/2007/21.html>, last accessed 01/01/2017.

how families are embedded in networks of inter- and intra-generational ties of mutual reciprocity, largely ordered within the priority given to ties of patrilineal descent. Such arrangements might also reflect a withdrawal into an enclave, to protect families and maintain ethnic and religious boundaries in a hostile (often racist) environment. Most forced marriages, they maintained, are marriages which have been “exceedingly badly arranged by anxious and myopic parents, rather than [] instances of cruel and deliberate enforcement”. One source of myopia is the fear that sons/daughters are “running off the rails” in a context of “intense concern about choice of marital partner and about extra/pre-marital pregnancies”. Forced marriages thus occur in “exceptional circumstances”, when parents feel themselves to be “at their wits end”, and mistakenly believe that “instant marriage to an alternative partner is the only available means of holding impending disaster at bay”. Criminalisation, they concluded, would shatter the family.

These arguments cut no ice with legislators, and when journalists read the submission, the authors were pilloried. One comment was: «the contempt [they] display towards the idea that there are or should be universal values ... represents a strand of apologism that can also be seen in our universities today» (Aaronovitch 2013). And another described their conception of “myopically arranged marriages” as “chillingly Orwellian”, adding: «we should profoundly object to [their] moral relativism... In the case of Euro-American attitudes towards forced marriage there is no need for quotation marks around “superior”: they most certainly are» (McKie 2014).

Immigration and Asylum Cases

A major field in which anthropologists have been engaged concerns immigration and asylum claims and appeals, and there is now a large literature reflecting on their experience of hundreds if not thousands of such cases (e.g. in chapters contributed to Holden 2011, and Lawrance, Ruffer 2015). Nowadays, procedures and policies across Europe are broadly similar, though there are some important differences: in the UK, for example, unlike Italy, expert witnesses may appear in person in court and be cross-examined. But generally, there is widespread demand, on the part of claimants and tribunals, for anthropological and other socio-scientific expertise.

Anthropological engagement has involved among other things: the provision of expert knowledge of the countries from which claimants come, i.e. country expertise; the provision of cultural and social translation or interpretation to assist tribunals in understanding what has happened to individual claimants and how they voice the experiences which they have endured (often this means helping tribunals read between the lines); critiques of the procedures through which claimants cases evolve and their narratives constructed; and some involvement in training of immigration and asylum practitioners.

A crucial role of tribunals is to verify the “credibility” of a claimant’s story, and whether their claims to asylum are false or inadequate and should be rejected (*inter alia* Berti, Good, Tarabout (eds) 2015, Blommaert 2001, Campbell 2013, Gibb, Good 2014, Good 2004, 2007, 2011, Holden (ed) 2011, Sorgoni 2011, 2012, etc). In the UK, while the expert’s primary duty is to the court, not the parties involved, the sympathies of the anthropologist tend to be with the claimant, but they frequently report serious difficulties in persuading tribunals to accept their evidence as to the credibility of

a claimant's account, which may be rejected as "unsourced", "pure speculation" or "personal opinion"¹². Regarding information about the situation in the claimant's country of origin, for example, a tribunal may prefer to rely on official reports or indeed their own "commonsense" knowledge. (For a critique of official UK country guidelines see Yeo 2005). One Italian anthropologist records (personal communication¹³) that she and others raised the question of country reports with the president of the tribunal in her region¹⁴. The reply was: «We presume to know about the countries from which asylum seekers come» – there is no need of need further expertise (see also Sagiv 2015). Likewise, when an African asylum seeker claimed that she had been accused of witchcraft by her relatives and consequently feared for her life, the explanatory material supplied by the anthropologist (included in the appeal documents) was simply ignored. Indeed, a judge of the Appeal Tribunal, which reviewed the rejection of the claimant's case asked her: «Was it one of your colleagues who wrote the paragraph on witchcraft? Because you'd better tell him that that is not the kind of information we need».

One aspect of the asylum-seeking procedure which anthropologists have observed, and in which they have sometimes themselves participated, concerns the production of claimants' narratives. Cristiana Giordano (2014), for example, describes cultural mediators assisting claimants in making a "denunciation", as it is called, by translating their often-halting and inconsistent stories and organising them into an account "digestible", as Giordano puts it, by the official bureaucracy. Good (2011) has likewise observed advisors "converting" personal narratives into "legal-speak" in the UK. Such practices are widespread: see, for examples, Sbriccoli and Jacoviello's discursive analysis of asylum proceedings in Italy (2011), Blommaert's account of a Belgian case (2001), and Campbell's critique (2013) of the organisations to whom the work of interpretation has been outsourced in Britain.

Another issue concerns the often simplistic assumptions about the social, cultural and linguistic contexts from which asylum seekers arrive. In a detailed essay, based on a report he provided to the British Home Office, Blommaert (2009), describes and analyses the exceedingly complex background of an asylum seeker from the Great Lakes region of Eastern Africa which he then contrasts with the naive outlook of officials, wedded to a what he calls "homogeneism", the assumption of one language, one culture, one people. This "modernist reaction" to "postmodern reality", as he dubs it, has special relevance in the major cities of Western Europe where there is an «increasing diversification in language choices, forms of communicative behaviour, new varieties of vernacular languages such as English, and new forms of locality and translocality that create new speech communities and networks» (Blommaert 2008: 426). To which must be added increasing diversification of literacies, including those based on electronic communication. Indeed, Blommaert has shown how in asylum seeker interviews or police interrogations speakers from different linguistic and cultural background with "other"

¹² e.g. in *R (on the application of Sayyad) v Secretary of State for the Home Department* [2014] EWHC 1660 (Admin), text available via <http://lexisweb.co.uk/cases/2014/may/r-on-the-application-of-sayyad-v-secretary-of-state-for-the-home-department>, last accessed 03/01/17.

¹³ Interviews with the anthropologist concerned, who also provided the quotations from the judges, took place via email in December 2015.

¹⁴ President of the *Commissione Territoriale*, the first instance Commission; if the application is rejected, the claimant can ask for a review (*ricorso*) at the Tribunal; if there is again a rejection the claimant can go to the Appeal Court for a *secondo appello*.

oral and literary competencies may appear deficient, even incomprehensible to their interlocutors. For example, they may construct a narrative, recounting the circumstances through which they came to be asylum seekers, in ways which are different from those expected by educated Westerners. This may undermine their credibility, and lead to their case being rejected out of hand. (In fact Blommaert's intervention in the East African case actually helped the claimant achieve his goal).

I asked several anthropologists engaged in this type of analysis whether they had drawn their conclusions to the attention of the agencies concerned. One replied¹⁵:

No, acting on the basis of research conclusions is not exactly [the Agency's] forte! They did set up an internal seminar series a few years back, and I was invited to speak. Dates were arranged, etc, and then – typically – at the very last minute the entire series was cancelled. There have been individuals who have taken an interest in my work, such as the former head of their Country of Origin Information Service, but they quickly transfer off somewhere else and no continuity is maintained.

Another said,

Yes, we did have a bit of influence a decade ago or so, and we did train and advise the interviewers, and for a time I chaired an advisory committee on language in legal settings. So yes, a bit of what we did must have seeped through. Having said that, we have seen that certainly since 2010, all over the EU (and worldwide) outspoken anti-immigration policies have taken over again, and procedures for dealing with testimonies from asylum seekers have been “flattened” once more: standard routines of questioning leading to a uniform computer template, designed so as to reject a maximum number of applicants (while maintaining the appearance of impartiality...) So the news is not good ... and the current “refugee crisis” provides plenty of bad omens too. There is no reason to be optimistic.

The Dilemmas and Perils of Engagement

These short case studies obviously do not provide a comprehensive view of the ways in which anthropologists engage with the law and lawyers, or with other disciplines (in the broad sense) who are working in the shadow of the law. But they do give us some pointers as to the dilemmas and perils of such engagement. Of these I briefly mention five.

The Fear of Co-optation

The fear of co-optation by the powers-that-be is by no means a dilemma only for those in the legal field; it was a major concern of British anthropologists in the colonial period, and American anthropologists were seriously worried about their work being taken up in counter-insurgency programmes in Latin America and South East Asia, and later Afghanistan. Recently, in the UK, anthropologists and other social scientists have had disturbing experiences of being drawn into proposed research on (Muslim) “radicalisation” (Spencer 2010), or involved in counter-terrorism initiatives, or naive programmes intended to combat Islamophobia (Allen 2012, 2013). The fear of co-optation is one reason why many anthropologists seek alternative modes of applying their discipline including participatory and action research, with the emphasis on working

¹⁵ The following quotations are from email exchanges in December 2015.

with and through the grass roots, though this carries with it another danger, of the anthropologist becoming a missionary.

What to do about “Culture”

If co-optation is one problem, then recuperation is another, i.e. how anthropological concepts and approaches are adopted and adapted, often in a simplistic form. This poses a dilemma for anthropologists working in the legal sphere who offer themselves as “experts on culture”. As anthropologists we want to explain the social and cultural nature of Muslim marriage, for example, with implications for their legal treatment. But we are also aware of the dangers of essentialising and stereotyping.

There is an obvious benefit in having an expert anthropological and regional perspective through which to interpret events and motives, so that the court at least has a better understanding of the background to what occurred and why. It is then up to the court to decide whether such accounts illuminate degrees of culpability or innocence, with implications for verdicts or sentencing, always on the understanding that “culture” as such is no defence. (On the so-called “cultural defence” see *inter alia* D’hondt 2009, 2010, Foblets, Renteln 2009, Livia 2011b, Renteln 2004, Volpp 1994, 2000). Of course, not only “culture” may come into it. A famous film of the late 1940s, *Knock on Any Door*¹⁶, had Humphrey Bogart, as defence attorney, seeking to save his young Italian-American client from the death penalty by emphasising his origins and upbringing in a poverty-stricken slum environment.

But if culture (or social background) come into the courtroom, whose account is the court to accept? Culture constitutes, among other things, a moral order indicating sets of rights and duties, but it is a contested moral order; there is almost always an internal cultural debate, and a multiplicity of actors’ views, and the right of experts external to a culture to speak authoritatively about it may well be questioned (D’hondt 2010, Good 2008, Schwandner-Sievers 2006, among others). Equally significant are social scientific disputes about the ontological status of “culture”. For example, contrast the traditional, widely accepted, common sense view of culture as an identifiable, undifferentiated, “collective” phenomenon, with that which sees it as a more individualistic, subjective, personal construct.

I suggested earlier that some judges are in effect sympathetic to that latter view. Yet by and large the legal profession, including many judges, prefer what might be called a “black letter” view of culture, corresponding to their “black letter” view of law, that the law (or culture) is an established, commonly held and agreed, set of principles and practices. One of the reasons that many lawyers reject the application of Muslim law in Britain, for instance, is because, they say, “we do not know what Shari’a law is and no one can beyond controversion define it” (McGoldrick 2013: 43). While lawyers are content with this black letter view, and indeed may need it to make their client’s case, it poses a dilemma for the anthropologist who abjures cultural essentialism and is very uncomfortable when required to give a “yes” or “no” answer to a cultural question (Good 2008). Some years ago, at a conference in London on bilingualism, the then head of

¹⁶ See https://en.wikipedia.org/wiki/Knock_on_Any_Door, last accessed 09/12/2016.

education for London pressed us: «You social scientists have a theory every year. Can you tell me now, yes or no, is bilingualism good or bad?» What were we to say?

Other Mindsets

“Anthropology and law are two worlds of intellectual endeavour which are far apart from each other. The differences between them, in both subject-matter and the methods of their practitioners, is considerable. The two professions currently do not understand each other well. It seems likely that it will be difficult to change this state of affairs” (Woodman 2017)

This brings me to the mind-sets of those with whom anthropologists engage: solicitors, barristers, magistrates, judges, and other experts and professionals operating in a legal context¹⁷.

There have been various attempts by both anthropologists and lawyers to describe and account for differences (e.g. Holden 2011b: 204). William Twining (1973), a noted British professor of jurisprudence, stressed the ethnocentricity of legal practitioners, compared with the cross-cultural, indeed cosmopolitan orientation of anthropologists. Another legal expert, Gordon Woodman, suggests that anthropologists and lawyers differ on the very concept of “law” which anthropologists and lawyers think they are studying or with which they are dealing. For lawyers, it is state law, for anthropologists the concept ranges much more widely, to include, as Woodman puts it, “normative orders outside the scope of state law” (2017; see also Kandel 1992, below).

As well as lawyers, anthropologists working on the legal terrain are likely to encounter experts from other disciplines, with their own mindsets. In 2011, for example, in a case before Leicester Crown Court, a young woman (“L”), originally from Zimbabwe, was charged with attempted murder. Briefly, her mother woke one night to find her daughter standing over her with a knife. When the police were called, L was found to be in a trance-like state but subsequently claimed that her dead grandmother had come to her and told her to attack her mother, whom the grandmother had held responsible for L’s father’s earlier death in Zimbabwe. The court was offered three explanations by expert witnesses: an anthropologist described the cultural background of African beliefs in the supernatural; a psychiatrist suggested L suffered from a “psychological disorder of consciousness”; and another psychiatrist concluded that L had concocted the story, and that was the prosecution’s case, with which the jury apparently agreed. Nonetheless, the judge discharged L into the care of her mother, which may suggest some sympathy with the anthropological evidence¹⁸.

To what extent do these contrasting mind-sets affect the practical relationship between anthropologists, lawyers, and other professionals? From what I have read, and discussions I have had, it seems that experience is very varied, and it is easy to over-emphasise differences. Indeed, one anthropologist, working in the human rights field, confessed that he had not really thought about such barriers since he had not encountered any. Another, however, with great experience of working with the courts as expert witness in criminal and other cases has encountered numerous difficulties, for instance finding that

¹⁷ I will leave aside the issue of cultural incommensurability, i.e. whether the gap between the mind-set of a judge, for example, from one culture, and someone from another culture coming before them, is (un)bridgeable, theoretically or practically; see Connolly (2010).

¹⁸ Summary based on newspaper reports and discussions with the anthropologists concerned in June 2011.

when anthropological reports were presented to a court their objectivity and scientific credentials were routinely questioned.

Roger Ballard (2010) has analysed at some length the unconscious or hidden assumptions of a cultural character which typically permeate the mind-set of lawyers and others versed in the Enlightenment tradition. These sometimes amount to what might be called an “invincible ethnocentrism”. Another researcher, however, has found that lawyers in asylum cases in which she participated were constantly aware of the dangers of ethnocentrism and of their own and others’ cultural assumptions (Carver 2014). Both may be right, since they may be observing lawyers in different contexts, for example in criminal cases (including those involving so-called “honour killings”), on the one hand, and on the other claims by asylum seekers where legal representatives are may feel obliged to understand what their clients have experienced to assist their case. In any event such contrasting perceptions need further investigation.

Anthropologists, however, are not the only professionals who experience problems when meeting with lawyers on the legal terrain. In an important and farsighted study of the family justice system from the early 1990s, Murch and Hooper argued that in family matters «legal, social, psychological, and medical factors are interacting together in family breakdown and disintegration, and are often difficult to disentangle, because in actual life situations the professional categories do not apply» (1992: 118). One difficulty is that those involved (lawyers on the one hand, social workers on the other; they do not mention anthropologists) inhabit their own professional ghettos with different “assumptive worlds”. The law, they suggest, operates on the basis of methodological individualism, and the training of lawyers gives them little understanding of holistic social science and of the social context of family life and family dynamics. Social workers and others such as child psychiatrists (or anthropologists) have little understanding of the law, its assumptions and procedures.

Murch and Hopper emphasised the need for a cross-disciplinary approach, and indeed whatever the difficulties anthropologists and others meeting on the legal terrain may well find that they have to work together. Under those circumstances, where practitioners are engaged in a common enterprise, there will be a need for inter-disciplinary cultural translation, as two colleagues, one an anthropologist, the other an academic lawyer, discovered when formulating their evidence in a case which eventually went on appeal to the UK’s Supreme Court¹⁹. The experts commented (personal communications²⁰):

Anthropologist: «What I have found particularly useful in the process has been having [the lawyer] as a sort of “translator” of the legal side. With this judgement, for example, her ability to read and know the context for the judgement has been invaluable in my understanding of the potential impact of the report. So I can really see the benefit of “bilingual” lawyer-social scientists not just as scholars themselves, but as providing a kind of translation service for the rest of us».

Lawyer: «I am interested in what [the anthropologist] says about having a legal translator as I think it was useful to have someone who understood what the applicants would have to prove

¹⁹ [2015] UKSC 68, R (on the application of Bibi) (Appellant) v Secretary of State for the Home Department (Respondent), 18 November, 2015. Text available via <https://www.supremecourt.uk/cases/uksc-2013-0270.html>, last accessed 03/01/17. The appellant sought to argue that a 2010 Immigration Rule obliging a foreign spouse to pass an English language test before coming to live in the UK infringed the right to family life under ECHR Article 8 etc.

²⁰ In email exchanges in February 2016.

legally and therefore which evidence would matter most but I could not have engaged on a subject such as integration with her authority. My overall experience of working with social scientists has been very rewarding – skills and perspectives are different but complementary. I find it very useful to have someone who appreciates methodological and other issues from a social science perspective and who can help to orient me in the literature and theories».

They gave credit to the Supreme Court for its «very nuanced approach in which they gave weight to our evidence, engaged with it and used it to make a half way favourable judgment when it could have downplayed this evidence in order to reject the claim totally»²¹.

Fear of Normativity

A further issue which typically comes between lawyers and anthropologists concerns normative judgments. Kandel (1992), writing from a North American perspective, emphasises the way the law has to determine responsibility and give judgment, while anthropologists on the whole tend to be non-judgmental. Woodman concurs: «Whereas anthropology is, or aims to be, scientific and largely value-free, lawyers, even quite strict positivists, tend to have some commitment to the moral quality, as they see it, of their own law, and to the notion of the rule of law» (2017). As the anthropologist Tony Good pithily summarises: «law is prescriptive, social science descriptive» (Good 2013: 11).

While judgment of right and wrong (“normativity”) is integral to the work of lawyers, and indeed in disciplines such as political philosophy – it is after all what they do – it is frequently a problem for anthropologists who eschew judgment; indeed this has often been stated as a fundamental objection to applied anthropology. For instance, Hastrup and Elsass, writing about advocacy, argued that «To be advocates anthropologists have to step outside their profession, because no “cause” can be legitimated in anthropological terms» (1990: 301).

I certainly felt constrained by this when researching and writing about cultural diversity and the law, and concluded that my primary role was that of an observer analysing what is happening and why it is happening, rather than that of an advocate for what should happen; indeed, normative discourse is part of what I study. Although the accommodation of “other” beliefs and practices raises difficult questions (of gender relations and human rights), evaluation of the arguments for or against legislation such as that concerning forced marriages is not, I contended, professionally my primary concern, a stance which might well lead to accusations of cultural or moral relativism (see above). Yet, while recognising the importance of trying to comprehend all mindsets, as a citizen I am conscious that there are limits to what a society such as Britain can and should tolerate. Indeed, as a citizen, ethical (and political) judgments, for example regarding female genital mutilation (FGM), cannot be evaded. But I also fear for the future of a multicultural Britain where there is an increasing tendency to criminalise alterity (Ballard 2011). Caught between these conflicting demands, I escape by associating with those who seek a *modus vivendi* through compromise and negotiation (see Grillo 2015, Chapters 12 and 13).

²¹ In email exchanges in February 2016. The resulting judgement is summarised at <https://www.supremecourt.uk/cases/docs/uksc-2013-0266-press-summary.pdf>, last accessed 09/12/2016.

But Will They Listen?

Finally, the problem of getting others, especially the powers-that-be, to listen to what we have to say. Remember the Italian judges who declined to learn about witchcraft or who were satisfied that they knew what they knew about a particular country, or the British politicians and journalists content with their understanding of forced marriages or Islamophobia. The refusal is by no means universal; there is certainly evidence of a willingness on the part of at least some judges to listen to anthropological evidence, as in some of the cases described above²².

An anecdote. In 2014 I met with a politician who was pushing for legislation to restrict, indeed criminalise, the activities of Shari'a councils in the UK – these are Muslim bodies which are primarily concerned with matters related to religious marriage and divorce. Over tea in the House of Lords I asked her if she was familiar with the extensive anthropological and legal research on the councils. She was not, but instead relied on her own personal experience and in-house case studies (which in my view would not bear social-scientific scrutiny). I sent her a reading list. Did this have any effect? No, she herself came back with yet further proposals which were debated in the House of Lords in October 2015-January 2016, and at the time of writing have been passed to the House of Commons for consideration. I later sent a similar reading list to a Home Office official working on the government's new extremism strategy which included a proposal for a review of the councils, on the grounds that "Shari'a is being misused and applied in a way which is incompatible with the law" (Home Office Counter Extremism Directorate. 2015: 12). When the review is established there will perhaps be an opportunity for anthropologists to collaborate with lawyers and influence public debate. But will they listen?

Concluding Remarks

This paper has focused on anthropologists engaged with the law and with lawyers. There is, of course, another side to this story, concerning the viewpoint of lawyers engaged with anthropologists. I have begun to do some work on that, and acknowledge the valuable contribution of Gordon Woodman, an academic lawyer with much experience of working and teaching law in Africa.

There is a further general topic into which this all fits: what happens, has happened, is happening to "other" cultures or better, perhaps, "cultural otherness", generally in what is said and done in cases before the courts, or in debates about legislation, across Europe and beyond, including North America²³. Such an investigation of what might be called the "career of culture in the courts and in legislatures", would, as Colajanni has noted (2015), require close attention to the different legal frameworks and philosophies of law, in the UK, continental Europe, or the United States, which offer specific conditions for anthropological engagement. But that would be for another occasion. (See *inter alia* Ruggio 2012; Sagiv 2015 interestingly compares US and Israeli practice.) Likewise, an

²² In TG and others (Afghan Sikhs persecuted), for example, the detailed reports by the anthropological experts were clearly taken on board by the judges. See <https://tribunalsdecisions.service.gov.uk/utiac/2015-ukut-595>, last accessed 09/12/2016.

²³ And indeed elsewhere. What, for example, did Barotse judges make of cultural difference?

extended account of how the issues discussed here relate to legal anthropology in general and to the long-term engagement of anthropology with the law (as Colajanni points out many of the significant figures in 19th century anthropology were in fact also lawyers) is beyond the scope of this paper.

To return to my more limited theme. I do not want to be wholly pessimistic. There have been successes in legal and other spheres, as the Impact case studies illustrate, and the work of anthropologists offering cultural expertise in support of asylum applications is very important for the individuals concerned. But it is clear that anthropology's public presence in the legal field is largely marginal. In general we lack the ability to influence institutional decision-making, which Colajanni has identified as one of the necessary conditions for engagement in applied anthropology (2014). We may be good at setting out the cultural background to controversial issues in the public domain, but we are rarely able to set the agenda. This is frustrating, but we have to be sanguine about what we can do, recognise our limitations, but never give up. «Pessimism of the intellect, optimism of the will»; or as another sage of the 20th century, Samuel Beckett, put it: «Try, Fail, Try Again; Fail Again; Fail Better!» (Beckett 1989).

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