

# Prefatory Comments: Anthropological expertise and legal practice: about false dichotomies, the difficulties of handling objectivity and unique opportunities for the future of a discipline

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The essays assembled in this themed section all focus on the use of anthropological expertise in legal settings. All of the papers in one way or another were generated through the activities of the Department of Law & Anthropology at the Max Planck Institute for Social Anthropology in Halle, Germany. They have all been substantially reworked for this themed section with a particular focus on the synergies among them. Jonas Bens was a visiting scholar with us for three months in 2014, during which time he conducted much of the research on which his contribution is based. The paper by Larissa Vettters and Marie-Claire Foblets has its genesis in a survey of judges from fourteen European countries conducted in 2014 by Marie-Claire Foblets in close collaboration with the European Council of the Judiciary. Larissa Vettters was granted a three-month fellowship at the Department of Law & Anthropology to analyse the findings of this survey. The contributions by Markus Hoehne and Olaf Zenker were originally presentations made at the Joint Institutes' Colloquium – a lecture series organised in winter 2014–15 jointly by the Max Planck Institute for Social Anthropology and the Institute of Social and Cultural Anthropology, Martin Luther University Halle-Wittenberg. Not coincidentally, both Hoehne and Zenker received their doctorates in Social Anthropology from these two institutions, and have since moved on to professional positions at other universities.

The contributions come from different methodological perspectives, rely on different types of sources, and are written in distinctly different styles. Bens focuses on scholarship that specifically addresses the use of social science expertise in the courtroom in order to provide valuable historical background to the use of social science expertise in court cases in the US, which also provides important background information for the other three settings.

Hoehne and Zenker both look at specific cases of the use of anthropological expertise in legal settings, and both to some degree refer to their own experiences in such cases. But, whereas Hoehne provides a 'thicker' description of cases and expertise, Zenker uses them as a springboard to launch into what he terms a 'think-piece' – a more philosophical and theoretical excursus into an approach he dubs 'recursive anthropology', which he asserts offers a way out of the 'strategic essentialism' conundrum faced by expert witnesses.

Finally, Vettters and Foblets rely on survey material that draws on legal practice within the framework of contemporary European societies to offer a perspective not from the point of view

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of those providing expertise, but from that of the judges who require it and the dilemmas they face in deciding whether to call on expert witnesses or not and how to handle 'cultural' information.

As different as the four pieces may be in the genre of analysis they offer, they are also highly complementary in the way they address, more or less extensively, three facets of the recourse to anthropological knowledge for the sake of legal practice: *first*, the presumed incompatibility between anthropological and legal thinking; *second*, the question of how to objectify anthropological 'expert' knowledge without lapsing into essentialism; and *third*, albeit indirectly, the need to prepare future generations of anthropologists for consultancy work.

*First*, in one way or another and more or less explicitly, all contributions address the commonly voiced suggestion that anthropological thinking and legal thinking are incommensurable, and question, each in its own way, the epistemological divide between normative thinking (in the context of litigation) and the anthropologist's critical, reflexive approach to knowledge based on empirical ethnographic findings.

Bens points out that representatives of the two disciplines have not *always* viewed them as incommensurable; rather, this perspective is the result of the history of anthropology, in large part the history of US anthropology in the period between World War II and the Vietnam War protests. For those who wonder to what extent previously held discussions among scholars on issues of applied anthropological knowledge remain relevant when transposed to today's context, Bens's paper should prove extremely useful. He reminds us of debates about 'mechanical objectivity' vs. 'critical objectivity', about reflexivity and anthropological self-critique. He reviews the literature on expert witnessing in the US and recalls how what is known as the reflexive turn entrenched even more deeply the conviction in the abovementioned epistemological divide. The paradigm shifted from mechanical objectivity to some form of critical objectivity and this, along with the reflexive turn, meant that 'objectivity' could no longer be taken for granted. In this shift from mechanical to critical objectivity, the whole concept of the role of the expert witness changed, leading to the idea of anthropologists self-consciously 'playing' the objective expert while always having in the back of their minds the impossibility of 'objectivity'. 'In the critical objectivity paradigm,' Bens summarises, 'one cannot uncritically and unquestioningly simply *be* an expert, despite the courts' demand for it; one must therefore manage to *act* like one.' Drawing on Kalmuss and her criticism of the 'fixed differences model' as a 'straw man critique', Bens gives a clear preference to 'a more "dynamic model" to conceive of the relationship between law and the social sciences' and concludes with a plea to frame the recurring problems between anthropological experts and legal practitioners as 'role conflicts' – an approach that 'has the advantage of not overstating existing differences between anthropology and law as if they were irreconcilable'.

What applies to a critical assessment of the concept of 'objectivity', as is the case in Bens's paper, is also true of issues related to evidence (rules of evidence), proof, factuality, and the assessment of the validity and authority of an expert's testimony. A *second* issue vividly discussed in three of the four papers (Bens, Hoehne and Zenker) is the question of how anthropologists, in practice, can present their 'expert knowledge' in legal settings without being forced into the trap of essentialism. How, for example, can they address issues of 'sovereignty', 'property', 'ethnic identity' and, perhaps most problematic of all, 'culture' without mention of essentialising notions such as 'race', 'tradition', 'civilisation' and even, in the case Hoehne presents, 'skin colour'? Both Hoehne and Zenker have, in their own experiences acting as anthropological experts, struggled with the conundrum presented by the felt need to make 'strategic use of positivist essentialism in a scrupulously visible political interest' (Spivak, 1988, p. 205, quoted in Zenker, this issue and also referred to by Hoehne, this issue).

Is such strategic essentialism simply a tactic in the 'game' of 'playing the expert' that Bens refers to? Taking such a strategic position can be a highly pragmatic solution, but it comes with great risks.

Both Hoehne and Zenker detail cases in which the anthropological experts were discredited because the more nuanced and reflexive positions they advocated in their scholarly publications were seen to contradict their testimonies. While Hoehne and Zenker have had similar experiences and ultimately agree on a theoretical level that it would be better if anthropological experts did not have to resort to strategic essentialism, their individual experiences have led them to somewhat contrasting conclusions. Hoehne suggests that the power differentials between judges and expert witnesses that are inherent in the UK asylum procedure in effect leave experts little choice but to engage in strategic essentialism. Zenker, on the other hand, reflects on his own experiences in a South African land restitution case and develops a concept of ‘recursive anthropology’, which he presents as a way to avoid essentialism and yet still manage to be an effective expert in court cases.

Obviously, not everybody will subscribe to one or the other of these positions nor even recognise the problem with strategic essentialism or the need to critically reassess the taken-for-granted divide between anthropology and law within the context of concrete legal practice. One likely reason for this is the way students and future researchers are trained in, on the one hand, law and, on the other hand, social and cultural anthropology. I will focus on students of social and cultural anthropology here, as I am more sanguine about the potential for change in a reflexive, philosophically oriented social science than in a more professionally oriented, practice-focused discipline such as law.

University curricula in anthropology tend to predispose students to take on almost automatically a critical approach, suspicious of anything that could have the least relationship to the world of law, political institutions and the authorities in place. This is surely the case in Europe. Be that as it may, this attitude of critical distance vis-à-vis anything to do with recourse to anthropological knowledge for more practical ends such as dispute settlement or, more generally, decision-making processes by state authorities and/or institutional power, could itself be the object of criticism. This brings me to a *third* question addressed, albeit indirectly, in this introduction: the need to prepare anthropologists for various forms of engaged public anthropology, whether it be consultancy work or serving as expert witnesses in court cases.

In recent decades, anthropological investigations have in fact begun to increasingly attract the attention of governments, investigative agencies, judiciaries, etc., whenever these bodies seek to gain reliable insight into cultural worlds unknown to them (Clark, 1953; Byrne, 2007; Barbier de la Serre and Siboni, 2008; Hamilton, 2009). Foblets and Veters have been looking more concretely at the needs of the judiciary in the context of contemporary Europe. But it speaks for itself that the kind of decision-makers, broadly speaking, who could gain from having recourse to plausible expert findings and opinions that disclose relevant anthropological information is not limited to the judiciary: not only courts and legal practitioners more generally, but also municipalities, legislative bodies competent at regional and national levels, businesses and non-governmental organisations (NGOs) concerned with development, migration, minority issues and social change in general, to name just a few, can profit from being given access to ‘first-hand’ studies and reports on the practices and worldviews of particular groups as they are delivered by professional anthropologists. Their observations yield insights into people’s social and cultural logics that cannot be gained in any other way. Anthropological fieldwork provides privileged access to the underlying normative framework within which a group (small or large) organises its social life (Donovan, 2008), whether it be with regard to the distribution of resources, the care of elderly group members, the maximisation of security, etc. – all tasks related to concrete policies and at times pressing situations. In the contemporary era, there is no shortage of burning issues that could benefit from anthropological consultancy work: access to scarce resources, immigration, gender and citizenship, the nature of legal and social personality, reconciliation and restitution following civil conflict, the relevance of religious identity within the context of plural societies (Scolnicov, 2012), the use of the cultural defence in criminal cases (Renteln, 2011) and so forth.

Consultancy emerges in this context as a new role for anthropologists (Donovan, 2008). It is very likely that the array of (potential) roles that basic ethnographic research, with its involvement in diverse settings, can play in government, international development programmes and community-based organisations (to name but a few) will expand in the years to come. Under these circumstances, one would indeed hope that anthropologists will be able to provide a valuable angle of observation and interpretation for engaging with concrete societal problems (Barbier de la Serre and Siboni, 2008).

All this makes a strong case for adequate preparation of anthropology students to take a role that can not only supplement, but also complement, the roles of researcher and teacher, namely that of the expert adviser who places his or her knowledge at the service of decision-makers in order to inform them of the ethnographic realities that they understand better than anyone else (Morris and Bastin, 2004). While such preparation will require that more energy and resources are invested in teaching future anthropologists how to reflect on the intricate questions, ethical dilemmas and crucial epistemological and methodological difficulties that are raised in Hoehne's and Zenker's contributions to this themed section, the discipline should readily accept this challenge so as not to miss out on the unique opportunity that today's circumstances present.

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