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Culture all around? Contextualising anthropological expertise in European courtroom settings

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Abstract

This paper contributes to the debate on the role of anthropological expertise in the legal sphere by broadening the analytical field of vision. Rather than focusing on the anthropologist, his or her positionality, the epistemic status of anthropological knowledge or the ensuing ethical questions – as the other contributions to this themed section do – we turn the question around. Based on empirical data from a survey conducted among European judges on judiciary practice and sociocultural diversity, our focus here is on the question of how judges perceive, assess and accommodate sociocultural diversity in their daily decision-making. We furthermore investigate the conditions under which external expertise is called upon in specific legal settings and situations. We develop a conceptual argument for rethinking the role of anthropological knowledge and research in legal practice and argue for the need to pursue new forms of collaborative ethnography with judges that go beyond participant observation of their courtroom interactions. Working together with the judges who give decisions on cases, we claim, can provide scope for both critical reflection and applied problem-solving.

I. Introduction

This paper presents initial findings from ongoing research on sociocultural diversity and judicial decision-making in Europe currently being carried out in the Department of Law and Anthropology at the Max Planck Institute for Social Anthropology (Halle, Germany), in cooperation with the European Network of Councils for the Judiciary (ENCJ) and the European Judicial Training Network (EJTN). Empirical data stem from an exploratory survey conducted in the summer and fall of 2014 and a collaborative workshop held in January 2015.[1] The survey data include responses from 105 judges from fourteen European countries. Among the participants were judges from civil, criminal and administrative courts, some of whom preside over lower courts, while others sit on courts of appeal or on the supreme courts of their countries. The survey questions revolved around five fundamental aspects of judges' experience with cultural diversity: (1) the areas of law in which they experience cultural diversity to be a difficult issue; (2) the techniques and tools they make use of in their daily practice to address this diversity; (3) their perception of the underlying causes of conflict and of the parties' knowledge of applicable law; (4) the role case-law plays in this field; and (5) what kind of additional tools might be helpful in

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creating the conditions necessary to take account of cultural diversity in the search for justice. The questions were put in an open way with a view to leaving the necessary space for the judges to decide how best to address them and to flag those issues that they consider to be most relevant, contentious or problematic in their practice.[2]

A workshop held in Brussels on 26–27 January 2015 brought together some thirty-five judges, lawyers and legal scholars from eleven European countries and provided the opportunity to follow up on the preliminary analysis of survey responses and to engage in in-depth discussions of judiciary practices and the accommodation of sociocultural diversity. Taken together, the survey and the collaborative workshop do not offer enough material for us to come up with conclusive empirical findings – the data consist of statements and assessments made by judicial decision-makers themselves and have not yet been corroborated by the observation of actual practices. Our argument, therefore, remains necessarily somewhat limited and in need of further testing, and should be understood as the result of a preliminary investigation in an ongoing process of research and collaboration. Nevertheless, we believe that it raises important questions that can significantly advance the debate on anthropological expertise in the sphere of legal and in particular judicial practice; we have therefore decided to use the empirical evidence gathered so far and complement it with secondary data culled from other studies as well as scholarly commentaries in order to build a conceptual argument for rethinking the role of sociocultural anthropological expertise in the legal sphere.[3] In what follows, we argue in favour of a critical revision of two bodies of scholarly work that have hitherto remained largely separate. These are, first, the highly topical debate about the treatment of immigrants from 'cultures' perceived as foreign to legal systems of the West and, second, the concept of 'legal culture' as discussed within comparative law, socio-legal studies and legal anthropology.

Our argument proceeds as follows: first, we revisit some of the literature on the 'cultural defence' in the legal sphere and contrast it with more nuanced understandings of 'culture' that emerged from the testimonies of survey participants. In particular, we draw attention to an understanding of culture among judges that is not so much built on a clear-cut distinction between 'our' and 'their' culture, but rather focuses on notions of culture more directly related to the legal and organisational context within which the judges operate. We identify three such operationalised notions or dimensions: 'culture as communication', 'culture as context' and 'culture as norms'.

In the next step, we reread the practices and attitudes emerging from judges' testimonies in light of the notion of legal culture. A brief discussion of this fairly widespread but nevertheless contested analytical concept in socio-legal research reveals concerns regarding the use of 'culture' as an analytical term similar to the reservations about the way it is used in, for example, the 'cultural defence'. However, compared to the debate on the cultural defence, there appears to be a greater degree of sophistication in the analysis of legal culture, giving the concept a multidimensional nature.

For the aims of our own analysis of the empirical data collected thus far, we have developed a concept of professional legal culture consisting of three distinct analytical levels: a macro-

2 The judges who participated in the survey were approached through national contact persons within the ENCJ. They were given the option of responding in their mother tongue, thus some of the quotes in this text are translations; the responsibility for any error in translation lies with us. We received a total of 105 responses covering the following countries: Austria (ten responses), Belgium (seven), Bulgaria (eight plus one collectively filled out), France (six), Germany (ten), Ireland (ten), Italy (twelve), Lithuania (six), The Netherlands (eight), Poland (seven), Romania (twelve), Slovenia (two), Spain (five) and the UK (one).

3 Based on this conceptual framework, further research and practical collaboration with the European Network of Councils for the Judiciary (ENCJ) and the European Judicial Training Network (EJTN) are being planned, in the form of both collaborative learning (within the framework of training and thematic workshops) and publications.

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perspective (diverging legal traditions), a meso-perspective (field-specific rules and procedural norms) and a micro-perspective (actual practices of presenting, admitting and evaluating evidence). We make use of the comparative potential of the survey to underscore the particularities of professional legal cultures along these analytical levels in different European countries. We then move to a more detailed comparison of the role of expert evidence in asylum-appellate procedures in Germany, the UK and Belgium. In this section, we demonstrate how our initial finding of an operationalised concept of culture among judges (as communication, as context and as norms) is best understood when put in the context of particular professional legal cultures (each with its own characteristics). We indicate how and why a concept of culture that clearly distinguishes between culture as communication, as context and as norm can facilitate a better understanding of particular legal settings and accompanying professional cultures. Our comparative and ethnographic approach shows that the practical scope that judges have for enlisting or rejecting anthropological expertise varies with the requirements and the constraints of the professional legal culture within which they operate. This insight considerably moderates the perception of legal practitioners as positivists, highlighting instead a less visible but concomitant professional–pragmatist dimension.

The paper's title –'Culture all around?' – captures this broadening of the analytical field of vision from a one-sided focus on how best to represent and handle immigrant cultures[4] in the legal sphere to a more nuanced analysis of the procedural and structural parameters, internalised professional ideals, attitudes and expectations, and actual practices of decision-makers in this sphere. In the concluding section of the paper – 'From "culture" to "collaboration"' – we sketch out how recent theoretical and methodological developments in (legal) anthropology and socio-legal studies can be enlisted to attend systematically to the broader analytical perspective we have developed.

II. Culture in the courtroom

2.1 'Immigrant culture' in the courtroom: the academic debate

Notwithstanding the wide variety of legal contexts in which anthropological expertise has been called upon so far (see the other contributions in this themed section), much of the more recent debate around the uses of anthropological expertise in court proceedings has focused on immigrants who have settled in the West and their reception by the host countries (Grillo *et al.*, 2009; Foblets *et al.*, 2010; Foblets and Yassari, 2013). Against the background of broader public and academic debates about multiculturalism and the accommodation of sociocultural diversity, the

4 We have chosen to use this formulation instead of the broader 'minority cultures' for two reasons. First, the cultural defence debate and other legal and court-based discussions addressing cultural diversity (e.g. issues of reasonable accommodation) often revolve around the recent immigrant who is presumed to come from a different 'culture'. Second, the testimonies were collected among European judges who, when dealing with cultural diversity in their daily practice, are often faced with disputes or cases involving litigants or parties of immigrant origin; therefore, the term 'immigrant cultures' seems most appropriate. It is important to distinguish this setting from the large literature on native land claims and indigenous claims in general (especially in the US and Canada, but also in Australia, New Zealand and South Africa). This latter body of literature has a longer history of debate and scholarship regarding some of the topics we address here related to the use of expertise in legal disputes that involve immigrants, so there seems to be greater awareness of the fact that two (or more) legal cultures and ways of reasoning are involved (for examples of this latter literature, see Edmond, 2004; Thuen, 2004; Bens, this issue). For lack of space, we do not delve into possible reasons for the differences in these strands of literature, but restrict our argument to the uses of the 'culture' concept in contexts of immigration.

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more specialised academic discussion about the uses of anthropological knowledge in legal proceedings has taken the notion of 'culture' as its focal point.[5] Emblematic of this focus on immigrant societies and the central role attributed to 'culture' in the legal field is the concept of the 'cultural defence'. Denoting the idea that a defendant (in most cases a recent immigrant) has acted under the influence of his or her culture and that this cultural background should therefore be taken into account, the concept has been both strongly supported and vigorously attacked. Alison Dundes Renteln, a pioneering advocate for the recognition of the cultural defence as an official policy beyond the confines of criminal law,[6] proposes a test that would allow judges to determine the authenticity of a cultural defence claim. Judges and juries should ask three questions: 'Is the litigant a member of the ethnic group? Does the group have such a tradition? Was the litigant influenced by the tradition when he or she acted?' (Renteln, 2005, pp. 49–50). Renteln sees a need for expert anthropological testimony to provide answers to these three questions (Renteln, 2002; 2005, p. 50). Her test has been taken up by other legal scholars – Ilenia Ruggiu, for example, moved a step further, developing a model of the 'judge–anthropologist' who is able to integrate this test into his or her judicial reasoning (Ruggiu, 2012).[7]

Critical voices, on the other hand, warn that attempts to accommodate cultural diversity in judicial decision-making with the help of anthropological expertise rest on 'the flawed conception … that recent immigrants have a "culture" while U.S. law does not' (Volpp, 1994, p. 62). Such a conception limits recourse to the concept of culture – and the question of the extent to which a judge is bound to take account of it – to cases involving (immigrant) minorities, and perceives the relationship between the court and immigrant litigants/defendants as one that may require the testimony of an anthropologist 'expert', who is called upon to present and explain to the court the cultural characteristics of the community of which the defendant is a member. In addition to making mainstream culture (including its legal culture) invisible,[8] such a move is, according to Volpp, also problematic because it locates expertise not within the immigrant community in question, but with the anthropologist (Volpp, 1994, p. 62). She therefore advises against the promotion of a formal legal standard of cultural defence and against a prominent role for anthropologists as experts. Instead, she proposes a form of case-by-case strategic essentialism and emphasises the need to give voice to witnesses and/or experts from the respective immigrant communities (Volpp, 1994, p. 95). Volpp's concerns are shared by a number of legal scholars writing on different jurisdictions, mostly from a critical feminist perspective (see e.g. Lawrence, 2001, on Canada; Phillips, 2003, on the UK). These authors note that the cultural defence figures prominently in cases where violence against women is at stake and seems to be strategically employed in defence of male offenders. Some, such as Sonia Lawrence (2001), suggest that representations of patriarchy and violent male behaviour as integral elements of the pre-modern culture of 'others' set against 'our' (unspecified but presumably modern) culture amounts to a racialisation of culture.

5 For multiculturalism and criminal law, see Kymlicka *et al.* (2014); for anthropological expertise, culture and law, see Holden (2011).

6 In criminal law, where it has received the most attention from scholars and the general public, the 'cultural defence' emerged as a technique to determine potentially mitigating circumstances in the penalty phase of a trial (see Renteln, 2005, p. 49; Kymlicka *et al.*, 2014).

7 Renteln herself has both given practical advice to lawyers on how to raise a cultural defence (2010) and engaged in conceptual debates with political and legal theorists sceptical of the legitimacy of the cultural defence as a formal mechanism (2014).

8 In a similar vein, Werner Menski speaks of the 'culture-blindness of legal positivism' (2006, p. 452).

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2.2 Notions of 'culture' among European judges: survey data

The various understandings of culture and positions taken by legal scholars on whether or not 'culture' should be an element in judicial decision-making are also reflected in our survey of practising judges across Europe. We find that judges active in the fields of criminal, family, labour and public law are equally divided among themselves on the question of whether culture should be taken into consideration as an explanatory factor and, if so, to what degree.[9] Some judges subscribe to a strongly deterministic notion of culture and equate culture with tradition, whereas others take a more relativistic stance, pointing to alternative causal factors such as social class, gender and age or a combination thereof. Here again we find a pronounced difference of opinion with regard to the topic of domestic violence. While some judges refer to traditional norms and moral values regarding the role of women as an underlying cause of higher levels of domestic violence among immigrant communities, others hold that domestic violence is, in their experience, not restricted to certain minority groups and is not caused by their particular cultural norms, but happens across all social and cultural milieus. Others yet point to the fact that cultural roots may be strategically employed as a basis for contending that certain forms of behaviour (e.g. domestic violence) are acceptable. Several judges among those who participated in the survey acknowledge the risks that come along with essentialising culture and falling back too easily on cultural explanations. Thus, just as legal scholars base their propositions for or against the inclusion of anthropological expertise on divergent understandings of 'culture', on a first reading, the judges' testimonies can be placed along a continuum ranging from essentialised notions of culture to more flexible and context-dependent understandings.

However, a closer inspection of the body of testimonies in its entirety and subsequent discussions with judges reveals a more nuanced notion of culture and how to assess it that is strikingly absent from the way judges tend to be portrayed in the academic debate. Judges distinguish between at least three dimensions of culture, with the distinctions being directly related to the organisation of the judicial decision-making process and thus to the legal and organisational culture within which they operate. The first dimension relates to communication – judges see cultural diversity coming into play when there is a need for direct exchange in the courtroom with claimants/defendants from a different sociocultural background. In such contexts, communication is identified as a central aspect of culture. The second dimension is related to the difficulties of gathering empirical evidence in situations that require knowledge of the sociocultural context of the parties involved. Culture here becomes context, including a wide variety of elements about which information is required (ranging from linguistic characteristics to political events, religious practices and kinship systems). Only the third dimension is directly related to 'culture as norms' (i.e. those norms that either a judge or the parties involved considered to be culturally binding). This becomes relevant when judges need to decide legal questions involving foreign law and/or foreign customary or religious norms.

2.3 From 'immigrant culture' in the courtroom to professional legal cultures: broadening the analytical field of vision

To put it succinctly, judges seem to operationalise what they perceive as 'foreign' culture along the three dimensions of 'culture as communication', 'culture as context' and 'culture as norms' so that they can then process it in their 'own' legal culture. This survey finding is important because it draws our attention to an understanding of culture that builds not so much on a clear-cut distinction between 'our' and 'their' culture (be it foreign, minority or immigrant), but rather

9 Both the scholarly and the practitioners' discourses in turn mirror long-standing debates within sociocultural anthropology on whether or not to employ culture as an analytical concept (Clifford and Marcus, 1986; Abu-Lughod, 1991; Brumann, 1999; for a recent concise overview, see Karagiannis and Randeria, 2016).

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focuses on notions of culture more directly interrelated with the legal and organisational context within which judges operate.

Such an operationalised concept of culture has, in our opinion, not yet fully been captured by the existing literature on anthropological expertise in legal disputes that involve immigrants. To date, as we have been suggesting, the 'cultural defence' debate largely focuses on one dimension, namely 'culture as norms', and has been developed for the most part with Anglo-American legal settings in mind. Moreover, the majority of these works take only one (in some cases two) very specific judicial settings as the background against which to zoom in on the 'culture' debate. While much thought is given to particular understandings of immigrant and/or minority cultures and the role of cultural experts therein, there is relatively little contextualisation of the legal settings that provide the backdrop to these discussions.[10]

To give an example, Sonia Lawrence (2001) warns of the dangers of a simplistic approach to culture in the courtroom, taking Canadian criminal cases involving immigrants as her starting point. Although she begins by stating that 'courtrooms are critical sites in the production of our understanding of culture' (Lawrence, 2001, p. 111) and holds that 'cultural information ... tends to be considered only against the unarticulated, unexamined norm of North American mainstream culture' (p. 108), a detailed investigation of Canadian courtroom culture is missing from her analysis. Her suggestion to postpone the question of how to address culture in the courtroom in favour of first asking 'How do we know what we "know" about culture?' (Lawrence, 2001, p. 111) shifts the focus towards a critical discussion of the notion of culture. Substantiating her claim that what goes on in courtrooms under the disguise of culture amounts to a modern project of racialisation (Lawrence, 2001, p. 112) would, however, require a detailed analysis of concrete legal procedures and mechanisms of reasoning by which this racialisation is effected (minimally in the field of Canadian criminal law from which she takes her cases). By failing to provide such an analysis, she misses the chance to examine the production of mainstream Canadian legal culture and reproduces what she criticises: a focus on the construction of 'the other' while neglecting how the 'self' is simultaneously coproduced. Based on our reading of judges' testimonies and discussions of this finding with survey participants, we suggest that a more thoroughly comparative and contextualised approach that takes into account judges' perceptions and the legal cultures in which they are embedded is necessary.[11]

For such a (more) contextualised and comparative framework for the analysis of our data, we turn to the concept of legal culture. Introduced in the late 1960s by Lawrence S. Friedman, legal culture was principally taken to comprise the ideas, attitudes, opinions and expectations related to a given legal system (Friedman, 1975, pp. 15–16; 1997; 2006, p. 189; see also Nelken, 2006, p. 203). Roger Cotterrell (1997) pointed out that there was a considerable margin of interpretation in the use of the term by Friedman himself as well as by others. More often than not, legal culture referred to some or all of the following: clusters of ideas, patterns of behaviour, institutional and structural factors, as well as the manifold and complex mutual implications among these elements. Subsequently, authors using the term legal culture spent much effort analytically separating out specific components of legal culture, defining their use of the term more precisely or suggesting

10 Rosen (1977) is an early exception, providing a historical contextualisation of the role of experts in the jury system of US adjudication. At a more general level, see also the comparison of rules for the admission of expert evidence in common and civil-law systems in Renteln and Foblets (2015).

11 Such a contextualised analysis of anthropological expertise in the legal sphere seems to be better developed with regard to indigenous claims. An excellent example is Edmond's (2004) analysis of the Hindmarsh Island litigation in New Zealand. He demonstrates that judges 'are capable of producing and rationalizing a range of findings' through strategically emphasising various elements such as understandings of the discipline, the nature of expertise and professionalism, substantive legal doctrine and the relevant procedural standards for admissibility of evidence (Edmond, 2004, p. 209).

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more narrow concepts as viable alternatives (Cotterrell, 1997; Friedman, 1997; 2006; Nelken, 2006). How much differentiation among individual components of legal culture was deemed necessary appears to some extent to depend on the disciplinary perspective of the respective author and on different theoretical genealogies (Merry, 2010, p. 45). Whereas comparative law scholars seem comfortable working with broad notions of legal families and/or legal culture that suit their macro-oriented and functionalist research questions, many socio-legal scholars break the term down into mid-range explanatory concepts (see the references to Friedman, Cotterrell and Nelken cited above). Legal anthropologists such as Sally Engle Merry (2010) use it with caution only after grounding it in an anthropological, micro-level, practice-oriented and processual understanding of culture.

Another analytical line of distinction can be drawn on the basis of where a scholar's primary focus of analysis lies: some are more interested in the ideas and attitudes that laypeople hold with regard to their legal systems (Silbey, 2012), others primarily investigate the production and maintenance of an internal professional legal culture (Bourdieu, 1987), while a third group includes both dimensions but distinguishes between an internal and an external legal culture (Friedman, 1975; Merry, 2010).

If we assume that judges' practical application of an operationalised working concept of culture is – at least to some degree – shaped by the characteristics of their own professional culture and that this in turn influences how and when anthropological expertise is sought, we need to pay closer attention to this aspect of internal professional legal culture. Thus, we are interested in that field of ideology and practice that Merry sees as a first dimension of legal culture, that Friedman terms 'internal legal culture' and that roughly coincides with Cotterrell's 'legal ideology' or Bourdieu's 'juridical field'. Mirroring the different uses of the term 'legal culture' described above, we use 'professional legal culture' in three different ways: first, as a marker for general context in the broad sense; second, as a mid-range explanatory concept encompassing structural as well as ideational and processual components; and, third, in an ethnographic sense as a concept to grasp micro-level practices, interactions and meanings. At this level, we understand culture – to use Merry's words – 'as a repertoire of actions, practices and beliefs that are relatively flexible and open to change' (2010, p. 42). Culture is not taken to be a clearly demarcated entity, but as

> 'porous, with ideas and practices that are constantly shifting. Changes are not random, however, but take place in terms of existing cultural ideas and practices. Culture provides the lens through which new institutions and practices are adopted and transformed.' (Merry, 2010, p. 42)

What Merry writes about culture in general is just as applicable to professional legal culture, where the 'new institutions and practices' that Merry refers to could include employing anthropological expertise in order to better understand and accommodate sociocultural diversity.

III. Professional legal cultures and the uses of anthropological expertise in the courtroom: comparison and contextualisation

In this section, we begin our comparison and contextualisation of professional legal cultures by pointing out some of the more general distinctions familiar from comparative law. We then present some elements that characterise the way the judiciary is organised in particular countries, as well as some differences in procedural norms that vary with the fields of law at stake – in particular those regarding rules of evidence. The following section aims to get a grip on some of the intricacies of professional legal cultures in different European legal settings in the micro-level ethnographic sense outlined above. Here we narrow down the focus to procedural rules regarding the admission of evidence in asylum appeal procedures and the way evidence is taken into

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consideration. We flesh out this micro-level, practice-oriented perspective with a comparative study of the conditions for anthropological expertise in asylum cases in the UK, Belgium and Germany.[12]

3.1 The influence of legal traditions, doctrinal characteristics and procedural rules on professional legal culture

Starting with a macro-level perspective well known from comparative law, we note the difference between common-law and civil-law traditions and the different weight these traditions attach to case-law and fact-finding. This distinction is also evident in the collected testimonies, particularly in the importance that judges from different jurisdictions attach to case-law as a source of guidance when dealing with the accommodation of cultural diversity. Another feature by which judicial settings can be distinguished is the degree to which a national legal system and the particular branches or tiers of the judiciary within that system are adversarial or inquisitorial in nature. This feature has direct consequences for the opportunity to have recourse to anthropologists as experts in court. In adversarial settings, expert witnesses are usually brought forward by the parties, and the fact-finding process operates by means of cross-examination. In inquisitorial settings, the judge takes a more active role in the truth-finding process and has extended powers to appoint and hear experts him- or herself. Depending on the degree and depth of judicial review historically established in a country, appellate courts might only have limited fact-finding powers and (new) expert evidence cannot be introduced at this stage.

The survey responses also clearly reveal another particularity: namely that legal subfields are often structured according to core principles specific to the subfield. Thus, across different European countries, judges in the field of family law embrace the principle of granting personal autonomy to the extent possible, while judges in the field of criminal law argue for the necessity of upholding public order and judges in the field of labour law profess the goal of mediating between the interests of employers and employees. In accordance with these core principles, judges across national jurisdictions refer to the same field-specific legal mechanisms (such as the best interests of the child as an open legal standard in family law, the notion of reasonable accommodation in labour law or the principle of non-intrusion in religious affairs on the part of state authorities). These mechanisms and legal concepts in turn leave more or less scope for discretion and therefore might be more or less conducive to allowing or excluding expert evidence by anthropologists in a particular field of law.

Lastly, considerable variance also exists with regard to rules of evidence, such as the admissibility of evidence, the weight it is given and the standard of proof that is required.[13] A comparison of the Anglo-American and continental legal traditions illustrates this: Edmond and Hamer (2012) speak of

12 An acknowledgement of our own legal socialisation in continental legal traditions (Belgium and Germany) is in order here. Readers may notice that the essay is written from a continental civil-law perspective rather than an Anglo-American common-law one. Given that the bulk of existing literature on anthropological expertise in courtrooms has come from common-law contexts, we hope that our perspective will lead to further discussion and reflection on the underlying assumptions about what constitutes a country's 'mainstream' legal culture.

13 Some authors argue that the adversarial or inquisitorial nature of a legal setting is linked to underlying differences in the degree of importance attached to either procedural or substantial rules, and that this in turn significantly affects how a legal evidentiary regime is conceptualised and shaped. In the field of administrative law, to give a much discussed example, common-law systems are held to emphasise procedural rights (due process); continental-law systems on the other hand are said to be more inclined towards safeguarding substantial rights (i.e. fundamental rights) (Nolte, 1994). Notions such as 'objectivity' and 'standard of proof' thus play out differently or are conceptualised as legally relevant standards to different degrees in accordance with the overall legal system in which they are embedded (for an extensive debate on standards of proof in American and continental law, see Clermont and Sherwin, 2002; Taruffo, 2003; Engel, 2009).

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US 'evidence law' as a legal subfield in its own right, comprising a well-developed and coherent body of evidence rules. They attribute its existence to the Anglo-American adversarial tradition (Edmond and Hamer, 2012, p. 652). With regard to continental civil-law systems, on the other hand, they are unable to identify such a body of coherent norms, but rather point to particular rules of evidence associated with specialised fields of substantive law and join other authors who speak of continental evidence rules as 'labyrinthine' (Edmond and Hamer, 2012, p. 653).

The observation that rules of evidence in Europe vary in their degree of specificity – providing more or less guidance regarding what kind of expertise can be enlisted and by whom – seems to be confirmed by the results of our survey. From the survey responses, it appears that, in practice, a wide spectrum of persons are called upon or expected by prosecutors, courts or the litigants to provide 'expertise'. Leaving aside the obvious field-specific differences, considerable confusion exists with regard to their role, whether actual or potential. Judges report that they rely on translators not only to help with communication problems, but also to provide cultural background knowledge or explain foreign traditions that might be relevant for issues of evidence and proof.[14] Some judges proactively seek out representatives of minority communities, police or probation officers and social service employees to provide additional information.[15] Other judges reported calling on cultural or religious experts or mediators, though it is not always clearly spelled out what the difference between a translator, a mediator and an expert is.[16]

Judges active in the field of asylum law voiced a particularly high degree of concern with questions of evidence and an accompanying uncertainty about what kind of expertise would be required and whether or not to enlist additional expert knowledge. Summing up many of these concerns, an Italian judge in our survey described the situation in asylum cases as a 'weakened regime of evidence and an intensified discretionary power of the judge'. Assessing asylum claims indeed poses several problems: not only is there a high degree of uncertainty regarding the circumstances in the country of origin of the asylum seeker, but the decision to grant asylum also contains a prognostic element. Both of these aspects have an impact on the legal regime of evidence (i.e. the kinds of facts that are admitted as evidence of persecution and the manner in which they are weighed). Moreover, with documentary evidence often missing, the oral testimony of the asylum seeker is frequently the most important piece of evidence that the claimant him or herself can produce. Supplementary 'objective' evidence produced by medical, linguistic or country experts gains importance in this situation. Lastly, evidentiary rules for asylum-adjudication procedures also take into account the high stakes involved and the asymmetrical power relations between state authorities and refugees, typically by making concessions in the standard of proof that is required, but also with regard to the standards for and types of evidence

14 This is voiced most clearly by an Austrian lower-court judge who in criminal cases enlists translators not only to provide information on relevant foreign traditions, but also to explain the applicable law to the parties. Another Austrian lower-court judge in the field of family law holds that translators are a good source of information for cultural background factors and customs, while an Austrian prosecutor states that translators can provide information on cultural background and on the motivation for the offence.

15 An Austrian judge at a regional court dealing with family and commercial law cases seeks out representatives of minority groups; a Belgian judge active in the field of criminal law at a court of first instance refers to a probation officer; a German judge mentions specially trained police officers who conduct the initial investigation in juvenile criminal cases and can be heard in court; lastly, an Italian judge at a criminal court writes that he depends on the assistance of social workers and cultural mediators who can interpret the social and psychological context surrounding the crime.

16 Note that one of our respondents, an Irish district court judge, distinguished between translators and trained cultural mediators, but the terms are also used less precisely. For example, one Italian prosecutor writes that 'it is essential to make use of cultural mediators' and then continues to state 'that the use of an unqualified interpreter often does not allow us to understand the context', indicating that he conflates the roles of interpreters and cultural mediators in the provision of information on cultural context.

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that are admitted (Staffans, 2012, pp. 42–46). Academic observers therefore point to the refugee and asylum-adjudication process as one of the most complex adjudication functions in Western societies, and describe it as a site of innovation for the production of expert knowledge within the judiciary setting (Lawrance and Ruffer, 2015, pp. 2, 19). Hence we take a closer look at this particular legal setting. We limit our comparison to appellate asylum procedures in Germany, the UK and Belgium, paying particular attention to procedural rules under which individual judges, tribunals or parties to the case attempt to enlist expert knowledge.

3.2 Contextualising the uses of expertise in asylum-appellate procedures in Germany, the UK and Belgium

The appellate asylum procedures in Germany, the UK and Belgium are part of larger national legal systems that have developed out of different procedural traditions. Within the common-law system, the UK refugee-determination process adheres to an adversarial procedure, whereas the German one is an example of an inquisitorial procedure (Staffans, 2012, p. 235). The Belgian asylum-appellate procedure only provides for an administrative judicial review and is therefore restricted to questions of proceeding. However, in each country, asylum-specific legislation determines the degree to which the adjudication procedure diverges from the general administrative – or, in the case of the UK, civil-justice – procedures.[17] Accordingly, the institutional framework for processing asylum claims also differs. In Germany, appeals in asylum cases are the competence of the general administrative courts, and the general rules for administrative justice procedures apply (with some modifications). Belgium and the UK have installed specialised asylum-adjudication bodies (in Belgium, the Conseil du Contentieux des Etrangers (Council of Aliens Law Litigation) and, in the UK, the Asylum and Immigration Tribunal).

These structural factors in turn lead to distinct procedural regimes of evidence: who among the parties to the case (claimant, immigration authority, judge/tribunal) carries the burden of proof? How is the responsibility to establish the facts to a satisfactory level of 'robust evidence' distributed among the parties? How does the judge weigh evidence and what standard of proof is required?[18] Only after these questions have been answered are we in a position to consider how much room is left in each setting and at each stage of the decision-making process for a pragmatic–professional approach to enlisting experts on issues of culture – whether it be understood as communication, as context or as norms.

17 In the UK, the Immigration Act of 2014 is the most recent regulation. For an overview of changes in the legal framework and the organisational set-up of UK asylum adjudication, see Staffans (2012, pp. 174–181, covering the period up to 2011), Care (2013, pp. 1–107, up to 2010) and Thomas (2011). In Germany, the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*) and the Rules of Administrative Court Proceedings (*Verwaltungsgerichtsordnung*) apply. Additional asylum-specific regulations are laid down in the Asylum Act (*Asylgesetz*) and its later amendments (see Staffans, 2012, pp. 112–115 for an overview up to 2011 and Tiedemann, 2015). In Belgium, the law of 15 December 1980 on the access to the territory, residence, establishment and removal of foreigners (the 'Aliens Act') is still in force, although it has undergone numerous modifications. One of the major modifications has been the law of 15 September 2006 and the Arrêté royal fixant la procédure devant le Conseil du Contentieux des Etrangers (21 December 2006) containing procedural regulations for the Conseil. A comprehensive study of the frequent changes in asylum legislation in these three countries is beyond the scope of this paper. Therefore, a word of caution is in order: as we draw on secondary data published at various points in time, the legal context referred to in each case varies and does not necessarily take into account the most recent legislative and institutional changes.

18 Undeniably, international and European refugee law doctrine has had a harmonising effect on this policy field. Nevertheless, as Ida Staffans (2012) shows, even if there is a convergence, European standards (such as the lower standard of proof to establish 'well-founded fear of persecution' in asylum cases) are locally interpreted in light of the existing administrative law doctrine and the accompanying legal culture.

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3.2.1 Professional legal culture and judicial professional pragmatism in the German appellate asylum procedure

Although the asylum seeker initially carries the burden of proof,[19] in the German setting, it is the judge who – according to the inquisitorial tradition – has the duty to engage in fact-finding and to establish evidence to a satisfactory level (*Amtsermittlungsgrundsatz*). A judge thus might decide to enlist external expertise. Parties – this is mostly done by claimants' lawyers – can submit formal proposals to introduce new evidence (*Beweisantrag*), which can include expert opinions. Thus, theoretically, both the judge and the litigants can call on experts (*Sachverständige*). However, judges can refuse proposals for the admission of new evidence put forward by claimants by arguing that they contain no substantial new information. This extends to proposals to admit experts. If an expert is called to testify in person, his or her hearing takes place as part of the so-called judicial dialogue (*Rechtsgespräch*), which is a central element of the administrative justice procedure. It is conducted by the judge, who – as the master of procedure – grants the parties the opportunity to ask additional questions after his need for information is satisfied (Ortloff, 2015). Commentary by legal scholars has indicated that the applicable legal act is vague with regard to procedural rules for fact-finding and therefore creates a considerable degree of ambiguity. Academic observers see some of this ambiguity being addressed by case-law, but point out that judges often have to resort to justifying their procedural decisions (to admit or deny evidence) by analogy to more detailed procedural rules in the Civil Code which might, however, not be entirely suitable to the aims of the asylum-adjudication process (Gärditz, 2011).

Moreover, being in charge of the fact-finding process, German judges are at the same time also responsible for the efficient and economic processing of cases. Reforms of internal court organisation and case management since the 1990s have emphasised measures to increase efficiency and reduce costs (Berkemann, 1998; Pitschas, 1999). Thus, it can be expected that judges will weigh the need to enlist the help of an expert, either commissioned by the court or proposed by the claimant, against the need for procedural efficiency (see Gärditz, 2011; Staffans, 2012, p. 134).[20]

The following example of how to face such competing constraints and ambiguities when it comes to the need for cultural knowledge was given by a German administrative judge during our workshop discussions:

> 'I had to decide on an asylum case of a young Eritrean man. The German immigration authorities did not even believe he was an Eritrean citizen. In the hearing he was very quiet. He said only the essential words, spoke very slowly and made long breaks. I didn't hear a coherent story of his life in Eritrea, his experience during the war and his escape. Just single words slowly spoken. I could not recognise – when he was silent – if he just was inventing a new story or if he was having difficulties remembering. After fifteen minutes I asked the court interpreter, who was native speaker of the translated language and born in a village in what is today Eritrea, if he could imagine what was wrong with this young plaintiff. He said, "There's nothing wrong with him. I'm pretty sure he belongs to a specific ethnic group in Eritrea. In his ethnic group nobody talks a lot. The people are a bit slow in their behaviour. In Eritrea", he said, "there are many jokes about this ethnic group just like about the people from Ostfriesland in Germany." I

19 If persecution in the past can be proven, however, the burden of proof shifts to the decision-maker, who now has to prove that there is no danger of future persecution (Staffans, 2012, pp. 59, 126).

20 One of the judges in the German sample of our survey explicitly referred to this need to weigh costs and benefits before employing external experts.

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> decided to swear the interpreter in as a cultural expert [*Sachverständiger*][21] – not only as an interpreter – and asked him to repeat his assessment for the record.'

Questioned on the feasibility of using a court interpreter as a cultural expert, the judge readily explained:

> 'In those asylum cases I dealt with at the time, I could normally get cultural information from country of origin reports, from anthropological studies or something like that but in almost 30–40 per cent of the cases I needed additional information, which I could easily get from an interpreter. And yes, I am sure it is true that we have to distinguish between social science information – complex ethnological or anthropological information – which I cannot get from a normal interpreter. And surely, there are some interpreters who cannot deliver an expert analysis for a specific ethnic group somewhere. But for an advanced understanding of translation, like in my example [see above], I think this must be the best practice of translation. I wanted to point out that we should have a broader meaning of translation in procedural law. But I think … from the standard of professions, we have to clearly separate the roles. As the UNHCR handbook points out, it is not the interpreter's role to determine what is evidence and what is not evidence.'

This quote nicely demonstrates how, in this particular inquisitorial court setting, culture easily becomes equated with the communication process. From the perspective of the judge as the master of proceedings, a clear distinction is made between culture as communication (where the interpreter is seen as capable of offering valuable insight) and culture as context, for which more complex ethnographic or anthropological information is deemed appropriate.

Taking into consideration the double responsibility of the judge to honour the principle of *ex officio* investigation of facts and to conduct his cases in an efficient manner, we can see a pragmatic professionalism at work here. The judge pragmatically makes use of the interpreter by putting him under oath as an expert, thus fulfilling the strict requirements of procedural law and guarding himself against future grounds for appeal while also falling back on a flexible solution that is time- and cost-efficient. The decision of when to enlist what kind of expertise and where to draw the line between culture as communication and culture as context is one that the judge can make relatively spontaneously, depending on the situation at hand.

3.2.2 Professional legal culture and judicial professional pragmatism in the UK appellate asylum procedure

Now turning to the asylum-adjudication process in the UK, the effects of the adversarial character of the court procedure become more visible. Here as well, the asylum seeker carries the burden of proof, but all evidence needs to be brought forward by the parties. It is not the tribunal's task to engage in fact-finding of its own, but rather to decide which pieces of evidence to take into account, how to weigh them and whether they satisfy the required standard of proof. Accordingly, there is an elaborate body of evidentiary norms providing the framework of the judicial procedure (Staffans, 2012, p. 204). To give just one example of the comprehensiveness of evidentiary norms: enlisting the help of a translator to serve as an expert, as was done in the German case cited above, would here be a breach of evidentiary rules. There is recent case-law that translators 'should not be in the

21 It is important to note that there is a difference in the German system between 'expert' (*Sachverständiger*) and 'expert witness' (*Sachverständiger Zeuge*), as this distinction has procedural consequences.

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position of giving, or being asked to give, evidence on a contested issue [such as language or dialect]'.[22]

Expert reports or witnesses are commissioned by the litigants.[23] When a claimant's legal representation enlists an expert, he or she is generally asked to prepare a written report and only seldom appears in court. When an expert does appear in court, the hearing is conducted according to civil procedure rules for oral evidence, with a main hearing, cross-examination and a limited possibility for the judge to pose additional questions.[24] According to Ida Staffans (2012, p. 197), in comparison with other countries, in the UK 'expert evidence presented by the parties forms an important part of the basis for decisions either directly in the matter before the tribunal or indirectly through references to prior decisions'. As she points out, however, in this scenario, 'the choice of presenting expert evidence and the theme for these testimonies are always subjectively made by the parties' (Staffans, 2012, p. 197). If, by nature, the decision to enlist an expert is made in advance of the actual hearing in the courtroom, what is the tribunal's scope for professional pragmatism during the court procedure?

As no detailed first-hand data on tribunals' or judges' practical strategies for dealing with questions of cultural evidence emerged from the survey responses or our discussions during the workshop, we draw on Anthony Good's participant-observation-based ethnography of the use of expertise in UK asylum courts (Good, 2007). While Good emphasises the difference between judges' and social scientists' reasoning, positing a basic epistemological gulf with a prescriptive legal positivism on the one hand and a descriptive post-modern social constructivism on the other, we believe that parts of his ethnographic data can also be subjected to a slightly different reading.[25] Good presents two cases of Sri Lankan asylum seekers (represented by the same barrister and solicitor), for both of which he wrote an expert country report containing a large amount of the same kind of background information on the political situation in the country (Good, 2007, pp. 217–220). In one case, the tribunal 'was unable to place very much weight on Dr Good's report' (Good, 2007, p. 219) and dismissed the appeal. In the other case, the tribunal found Dr Good to be 'eminently qualified to express opinions' (Good, 2007, p. 220) on the situation in Sri

22 *Tribunal Determination AA v. Secretary of State for the Home Department* (Language diagnosis, use of interpreters) Somalia [2008] UKAIT 00029; see also Gibb and Good (2014) for a more detailed discussion of this issue.

23 As of recently, according to s. 35 of the Ministry of Justice's 2015 *Practice Directions for the Civil Procedure Rules* (see ‹www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35›, accessed 30 March 2016), judges can also commission an expert. This power, however, is almost never used, possibly due to budgetary restrictions.

24 It is important to remember that first-instance appeals in asylum cases are heard by a tribunal rather than an administrative court. Tribunal justice structures exist for a variety of conflicts between public bodies and citizens and were originally seen as a cost- and time-efficient alternative to judicial review for dealing with mass claims. Supposedly low-threshold institutions, their procedural rules are less adversarial and hearings less formal. It is unclear, however, to what degree this applies to the Asylum and Immigration Tribunal, which has undergone a process of professionalisation and judicialisation in recent years (Thomas, 2011; 2016; Mullen, 2016). For a testimony by the former leading immigration judge Geoffrey Care on these reforms and procedural constraints, see Care (2013). Care (2013, pp. 93–105) traces the prolonged arguments for or against an active role of the judge in the fact-finding process in successive court decisions and guidelines in great detail and concludes with a relatively clear plea for granting the judge more scope to intervene as an active party.

25 Good's position is somewhat ambivalent. In his initial discussion of the knowledge practices of law and anthropology, he acknowledges that epistemological boundaries become blurred in actual practice, but he then reaffirms the dichotomy between legal and anthropological reasoning when he writes: 'Above all, it is important to remember that lawyers take matters which have been established to the appropriate standard of proof to be "facts", and see their subsequent task as deciding how the law should properly be applied to those facts, whereas for anthropologists "facts" are always products of a particular theoretical approach, and "truth" is at best provisional and contested' (Good, 2007, p. 34). When it comes to presentation of his own case material later on, this tendency is even stronger and in line with his interpretation of a struggle for professional hegemony between lawyers and anthropologists (see e.g. Good, 2007, pp. 208–209).

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Lanka and admitted the appeal. In his analysis of these two cases, Good highlights the procedural step of weighing evidence as the decisive moment at which the tribunal has discretionary power to make expert evidence relevant to the case or not. Although we follow his insightful analysis, we do not share his predominantly negative assessment of this crucial procedural phase:

> '[it] allow[s] judicial decision makers to evade the difficulties posed when pesky expert findings stand in the way of conclusions reached on other grounds. Any potential restriction on judicial freedom created by the need to defer to uncontroverted medical or country expertise can thus be emasculated by recourse to the notion of "weight".' (Good, 2007, p. 237)

Knowing that ignoring expert evidence without giving reason would be an error of law and provide grounds for further appeal, Good reads the recourse to the notion of 'weight' as a possibility to evade such difficulties. We suggest an alternative interpretation whereby this procedural phase is recognised as a moment in which professional pragmatism can be exercised – as is demonstrated by the different outcomes of the cases described above. While we are likely to share with Good an understanding that sees written reasons such as those given above perhaps as more of an *ex post* justification than a documentation of the actual weighing of evidence in the decision-making process, we emphasise the discretional moment this procedural step accords to judges.

A comparison with the German setting sheds light on the interplay between judicial discretion and structural and procedural constraints. In the German professional legal culture, the judge bears full responsibility for fact-finding and has greater authority to determine what kind of evidence is admitted and heard in the first place. Accordingly, communication with the parties involved is of utmost importance, and it is with regard to issues of communication that the German judge quoted above saw scope for resorting to cultural expertise. As he is the master of procedure when it comes to establishing facts, he can freely decide even on the occasion of the oral hearing whether additional external help is needed with regard to issues of culture. And once evidence has been admitted, the principle of free consideration of evidence (*freie Beweiswürdigung*) on the part of the judge applies, and there is no explicit expectation that he should have to justify weighing the facts presented as evidence at the later stage of reasoning. In contrast, in the professional legal culture of the UK, evidence is selectively presented by the opposing parties in support of their own claims, and the judicial decision-maker must carefully evaluate the validity of the evidence, determine how much weight to give it and justify that decision. He has little influence on the choice of external experts and only limited possibilities to 'co-produce' knowledge in direct interaction with experts. From the perspective of the tribunal or leading judge, communication matters, but needs to be considered separately from the later phase in the proceedings, when the moment comes for the judge to carefully address issues of evidence and decide on the credibility of an asylum claim. Hence, unlike in the German setting, the stage of communication does not represent a crucial moment for a judge's practical scope for employing (or discounting) cultural expertise; that moment comes at the later stage of weighing evidence. The fact that these moments of professional pragmatism – be they with regard to the hearing of the claimant or with regard to weighing evidence – are accompanied by practical efforts to safeguard against grounds for appeal can in itself be read as an acknowledgement that judicial discretion is at stake here.

It is perhaps also not surprising that, for a judge or tribunal in an adversarial setting, culture takes on meaning as a component of context more strongly than it does, for example, in Germany.[26] In the

26 Note that questions of language do figure in British judges' discussion of the asylum-adjudication process, but precisely as a matter of contextual information that is assessed as part of the evidence and not as a matter of communication in the courtroom. The immigration authorities' reliance on a commercial service provider for

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UK, country reports prepared in advance and submitted by experts who have been commissioned by the claimants' legal representation to bolster the refugee's oral testimony figure as central elements that need to be accepted or dismissed by judges.

Rather than understanding judges' exercise of weighing evidence as resorting to an allegedly rigid form of positivist legal reasoning that excludes expert evidence in the form of country reports, as Good seems to imply, it might do more to advance our understanding of judicial decision-making if we were to try to identify those discursive practices by which a tribunal (or its leading judge) seeks to justify how much weight to give to anthropological expertise in individual cases.[27] Good himself concedes that '[i]t is important to remind ourselves … that such behaviour … is more a pragmatic response to professional imperatives than an expression of philosophical naivety. … [Judges] are ultimately required to decide one way or the other' (Good, 2007, p. 237). Thus, instead of reiterating the image of judicial decision-makers as unreflexive implementers of an abstract idea of legal positivism, it might be more accurate to locate judges' practices of pragmatic professionalism within the framework of the specificities of their professional legal culture.

3.2.3 Professional legal culture and judicial professional pragmatism in the Belgian appellate asylum procedure

Let us now turn our attention to Belgium, where ongoing debates about the lack of fact-finding competences of judges charged with the examination of appeals in asylum claims illustrate precisely this simultaneously structuring and constraining character of professional legal cultures, as well as their potential for practical transformation and accommodation.

In Belgium, investigative powers in matters of asylum lie with the central asylum authority, the Office of the Commissioner General for Refugees and Stateless Persons (Commissariat-Général aux Réfugiés et aux Apatrides/Commissariaat-generaal voor Vluchtelingen en Apatriden, CGRS). An appeal against a decision by the CGRS can be lodged at the Council for Alien Law Litigation (Conseil du Contentieux des Etranger/Raad voor Vreemdelingenbetwistingen, CALL). The CALL, however, has no legal means to 'investigate' the facts or elements of proof that are provided by the claimant. Only evidence that has been introduced as part of the initial application and, in case of appeal, in the written submission to the CALL can be admitted and examined in the appeal hearing. Hence, the judge him- or herself cannot hear or interrogate expert witnesses (Fransen and Maes, 2014). If he or she determines that essential (empirical) information is lacking, he or she can return the case to the CGRS and require that the CGRS conduct further investigation.

During our workshop in January 2015, a lively debate emerged among judges and legal scholars on the function and constraints of judicial review in administrative law in different European countries. Whereas the previously mentioned German judge pointed to the traditionally comprehensive standard of judicial review in Germany – encompassing both questions of fact and questions of law – a Lithuanian judge drew attention to a notion of administrative judicial review that is similar to the situation in Belgium in that it is limited to questions of law.[28] The Lithuania judge likewise noted that the asylum-adjudication process in Lithuania falls within this narrower notion of judicial control of administrative action, and he thus took it for granted that appeal

expert linguistic assessments of the validity of asylum seekers' country-of-origin claims was at the heart of a series of High Court decisions and a Supreme Court decision (see Supreme Court decision of 6 March 2014: *Secretary of State for Home Department v. MN and KY* (Scotland) [2014] UKSC 30). This was also mentioned in one of our surveys with a judge from the UK.

27 Some indications of such discursive arguments can be found in the decisions and guidelines that Care (2013) consults when pleading for a more interventionist role for the judge.

28 All of the statements here and in the following paragraph derive from the 15 January 2015 meeting in Brussels in which both authors participated and which was recorded and transcribed.

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judges could and should not look into questions of fact. In the course of the discussion, he was, however, challenged by a Belgian legal scholar, who reported on an ongoing legal debate in her country about the necessity of extending judicial control to questions of fact, in particular with regard to asylum appeals. As an example, she presented the situation of a refugee's claim for family reunification. In such a case, she argued, the judge might well be forced to look into the legal nature of a customary or religious marriage or to examine the validity of a foreign birth certificate. This would then be a matter no longer of fact-finding, but of judging the case as a whole (*pleine juridiction*). Questions of law might in such cases become intrinsically linked to factual questions, and the admission of external expert knowledge at the stage of appeal might therefore be required as a matter of law. She recounted that such constellations have induced heated debates among Belgian legal scholars and practitioners on the core role of administrative courts and civil courts (Vogelaar, 2013; 2015).

Several issues are noteworthy in this report by the Belgian participant to the workshop in Brussels. First, the case she discussed shows that the fact-finding process may at times extend to culture understood as norms (in this case regarding marriage). At stake is the requirement that adequate knowledge of foreign personal status laws and the recognition of customary norms be made available to the judge. Second, since the Belgian administrative law does not allow for individual fact-finding by the judge in asylum cases under appeal, a larger discussion is taking place among legal scholars and practitioners (mainly Belgian) on the need to change the rules governing administrative review, in particular in the field of asylum (Vogelaar, 2013; 2015). From an outsider's point of view, there seems to be a need for judges to be given the possibility of examining sociocultural diversity (in this case, culture perceived as foreign norms). But, for this to happen, changes in the procedural norms that form part of the Belgian professional legal culture would be required. The claim for such changes comes from legal practitioners who are well aware of the impact of procedural rules on the resulting substantial decisions. In other words, these changes are advocated from *within*.

3.3 The influence of professional legal culture on operationalised concepts of culture among judges

When comparing the asylum-appellate procedures in Germany, the UK and Belgium, the notion of professional legal culture helps us unravel the complex interplay between historical traditions, institutional structures, procedural rules and the ideas, attitudes and practices of actual decision-makers. The comparison, moreover, provides nuance to our finding that judges conceptualise 'immigrant culture' in an operationalised manner closely related to their working environment, distinguishing between the different dimensions of culture as communication, culture as context and culture as norm. We found that judicial decision-makers in all three countries act within the framework of existing state law and with recourse to the legal techniques at their disposal, but that the particularities of the different professional legal cultures within which they operate shape their individual practices and lead to particular forms of professional pragmatism. In an inquisitorial setting such as Germany, being pragmatic frequently means ensuring that obstacles to communication are removed and relevant information can be exchanged. Treating questions of cultural diversity as questions of contextualisation in each individual case is another pragmatic move that appears most likely to happen under circumstances as they occur in the UK, where the provision of contextual knowledge by external experts is highly regulated and structured according to an adversarial logic. In such a case, the weighing of evidence becomes a crucial moment for professional discretion by allowing more or less information on the context to be considered by the court. Lastly, as demonstrated by the discussion among administrative judges during our workshop, there is also an internal professional awareness and reflexive examination of the procedural conditions for taking into account culture as foreign norms. There are signs of

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such internal debates on procedural reform in all of the three countries we looked at. The German judge who articulated a reinterpretation of the procedural rules for translators did so in the context of a reform proposal by organisations of legal professionals.[29] In the UK, Geoffrey Care's plea for a more interventionist role for judges (see above, note 24) is a similar contribution to a public debate among legal practitioners and scholars. The prominent place of such a discussion in Belgium, where the admission of new evidence in appeal is severely restricted, particularly in asylum cases, draws our attention to the potential for internal reflection and critique from *within* particular professional legal cultures (i.e. coming from the professionals and practitioners themselves).

IV. From 'culture' to 'collaboration'?

Given the preliminary nature of our research, we could only provide initial and inevitably cursory observations on the nature of judicial professional pragmatism as a dimension of legal practice. Clearly, this field warrants further in-depth investigation. Accordingly, we end this paper not with a conclusion, but with an outlook. In light of our findings, we believe that anthropologists warning of the dangers of cultural essentialism in the courtroom are well advised to be particularly careful not to portray judges as 'cultural dopes' who unreflexively apply a logic of legal positivism within the specific traditions of their own legal system. While it might be justified to advocate a stance of 'strategic essentialism' for anthropologists acting as experts in the legal sphere (for discussions of strategic essentialism/strategic positivism, see Hoehne and Zenker, both in this issue), in our view, a complementary understanding of the actual practices of judges as an expression of a 'professional pragmatism' is at least as helpful.

Anthropologists have much to contribute to a more nuanced understanding of professional legal culture and how it plays out in the courtroom when questions of accommodating sociocultural diversity are at stake. John Conley and William O'Barr (1993) predicted the homecoming of legal anthropology more than twenty years ago. While early studies by legal anthropologists of Western legal systems tended to focus on lay understandings of justice and the judicial system, we have come a long way since then. Ethnomethodologists in particular have provided detailed insights into professional legal practice and the production of legal knowledge in courtroom interactions in Western legal settings – initially based on observations in the courtroom and later in the form of participant observation in the lifeworlds of involved professional actors (e.g. Lynch, 1997; Scheffer *et al.*, 2009; Scheffer, 2010). We now also possess a large body of ethnographic studies of disputing in post-colonial settings characterised by legal pluralism. These investigate how diverging norms are negotiated and accommodated not only in state courts, but across a variety of state and non-state fora for dispute resolution. Authors such as Melissa Demian have begun to think about 'how one might use the anthropology of legally pluralistic societies to reflect on the law of societies that see themselves as multicultural but monolegal' (Demian, 2008, p. 434). In this endeavour, participant observation is complemented by comparison as a central technique. Lastly, we are witnessing an intense debate about new forms of collaborative ethnography coproduced by anthropologists and the expert or professional subjects they research in contemporary field settings. Holmes and Marcus (2005) coined the term 'para-ethnography' to describe reflexive practices of cultural analysis undertaken by professional experts – in their case, central bankers – within their professional worlds. They suggest rethinking these professionals not as traditional informants of ethnography, but as intellectual partners in inquiry (Holmes and Marcus, 2005, p. 236; see also Islam, 2015). We propose to transfer this plea for collaboration to

29 See the 2011 Bad Boll Declaration on Intercultural Competence in the German Judiciary (*Bad Boller Erklärung zur interkulturellen Kompetenz in der deutschen Justiz*, available at ‹www.neuerichter.de/fileadmin/user_upload/fg_interkulturelle_kommunikation/FG-IK-2011-09-19_Bad_Boll.pdf›, accessed 15 April 2016).

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the world of judicial decision-makers and see collaborative ethnography as a third pillar complementing traditional participant observation and comparison. Doing so would allow us to perceive judicial decision-makers as professional experts who employ practices of pragmatic professionalism that entail modes of cultural analysis embedded within their own professional culture, but who are nevertheless geared towards dealing with situations that cannot be easily handled by means of formal, positivistic legal analysis. The benefit of a collaborative exchange between judicial decision-makers and anthropologists would lie in making judicial decision-makers' practical cultural analysis and reflection visible. This in turn might provide new grounds for considering the conditions of anthropological expertise in the legal sphere. Such a dialogic and collaborative effort will – in all probability – not be without its own theoretical, methodological and ethical challenges.[30] It will, however, have the benefit of going beyond the current stalemate in which judicial and anthropological expertise are regarded as competing and incompatible forms of knowledge production, ultimately providing a common space for exploring the scope for both critical reflection and applied problem-solving.

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30 For some of these challenges, see in particular Riles's (2006) reflection on her engagement and collaboration with human rights lawyers and Holmes and Marcus's (2012) collaboration with the corporate lawyer and legal scholar David Westbrook. For this latter collaboration, see also Rees (2010).

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