SCHOOL *of* SOCIAL *and* POLITICAL SCIENCE
The University of Edinburgh
Chrystal Macmillan Building
15a George Square
Edinburgh EH8 9LD
United Kingdom

# FOLK MODELS AND THE LAW

**Anthony Good**

Presented at the Conference on

*Folk Knowledge: Models and Concepts*
Institute of Ethnology
Slovak Academy of Sciences
Bratislava
26 March 2013

First of all, I would like to thank the Institute of Ethnology of the Slovak Academy of Sciences for inviting me to speak at this conference on 'Folk Knowledge: Models and Concepts', and for honouring me by asking me to start off the proceedings of what I am sure will be an exciting and important meeting.

While preparing this lecture I was shocked to learn about the sudden, unexpected death in January of Franz von Benda-Beckmann, one of the leading scholars on the anthropology of law, who had retired only a few months earlier from his post at the Max Planck Institute in Halle, Germany. Franz was someone I liked and respected a great deal, and he was of course especially noted for his work on legal pluralism, one of the topics I shall discuss today. Moreover, another part of my presentation today is based on my contribution to a seminar in Halle last September, which was the last occasion I met Franz and discussed these issues with him. I would therefore like to dedicate this lecture to him, to acknowledge his great contribution to the subject.

My second framing comment goes back more than 30 years. I began work as a lecturer in Social Anthropology at Edinburgh University in October 1980. A few months before that, the annual conference of the Association of Social Anthropologists, the ASA, had taken place, also in Edinburgh, on the theme of folk models. At the time I was a junior lecturer at Manchester, and my efforts were focused on finding a job or research grant to keep me employed for the following year. So I did not attend the conference, although it would have made a better story today if I had done! I mention it, though, because the theme was proposed, the conference organised, and the resulting monograph edited by two anthropologists at Queen's University, Belfast, who had earlier been colleagues at Charles University in Prague, Ladislav Holy and Milan Stuchlik.

I never met Stuchlik, who died suddenly a few years afterwards at an early age. However I believe – though some of you probably know far more about this than I do – that he was born just outside Bratislava. Ladislav Holy, on the other hand, I knew extremely well, because he was appointed head of the new Social Anthropology department in our neighbour university St Andrews, about 60 miles away. So he was our nearest anthropological neighbour, so to speak, and in the early years, when his department was very small, Ladislav and his colleagues drove down to Edinburgh almost every Friday to attend our research seminars.

To complete my introduction, let me summarise my own autobiography as an anthropologist of law, because this may help explain the issues I raise and the positions I take up towards them.

Very briefly, my own dealings with law began during my fieldwork in a large Hindu temple in South India. Temples are highly litigious places; nearly all of them are involved in long-running court cases – for example my temple in Kalugumalai has been fighting one case against the Tamil Nadu state government since the 1950s – and my interest was mainly in legal documents as sources of ethnographic evidence about 19th century temple history. This did however first bring to my notice some of the curious and distinctive aspects of legal reasoning as I shall discuss them later.

It is worth noting, too, that Indian courts – whose procedures are otherwise largely European in origin – have to take account of distinctly Indian cultural features, for example, that Hindu temples are actually owned by their presiding deities. The plaintiffs or defendants in court cases involving temples are therefore the gods and goddesses themselves. Of course gods cannot testify in court (at least, not by conventional means!), so Indian law treats the deities as minors – as children, from a legal point of view – and grants the temple trustee, who manages the temple on the god's behalf, a legal status as the deity's guardian, who can then represent the god and the temple in court. In then deciding the extent to which these trustees have authority over hereditary temple priests, who are above all devotees of the god rather than temple employees, the Indian Supreme Court has had to engage in theological debates on the correct interpretation of scripture.

Much later, my engagement with law has been a participatory one, giving evidence in, as well as studying, immigration and asylum appeals in several common-law countries. I shall say more about that later.

**The Gluckman-Bohannan debate**

The monograph edited by Holy & Stuchlik, after the ASA conference, was titled *The structure of folk models* (1981), and it seems very appropriate to take it as the starting point for my presentation today.

In their introduction, Holy and Stuchlik address in quite a combative and forceful way a number of issues causing controversy in anthropology at the time, many of which are still current today even though the terms of the discussion have of course moved on in the intervening thirty years. I think it is fair to say that their perspective was very different from that generally taken in British anthropology at the time, and I remember

being somewhat puzzled by the introduction when I first read it back in 1981. In one section they briefly discuss folk models in the field of law, in relation to the well-known debate between Max Gluckman and Paul Bohannan, whose books on the Barotse (1955) and the Tiv (1957) appeared successively in the mid-1950s.

The Bohannan-Gluckman debate was the legal counterpart to the formalist-substantivist debate going on in economic anthropology at the same time, with Bohannan, in both cases, taking the substantivist position that, as he himself neatly put it: 'The Tiv have "laws" but do not have "law"' (1957: 57). This indeed is why he focused on what he termed the 'folk model' or 'folk legal system' of the Tiv rather than employing western legal concepts. Their disagreement is thus conventionally seen as based upon the validity of using western legal categories in the ethnographic study of non-western legal systems. Gluckman thought that this was a legitimate strategy, whereas Bohannan thought that the analysis should be constrained to working within the indigenous categories of Tiv or Barotse themselves. Holy and Stuchlik's own sympathies clearly lie on the Bohannan side. Indeed, they see Gluckman's approach as exemplifying one of the approaches to folk models that they criticise. The error, as they see it, lies in

> treating people's notions about their world... as if they were poorer, simpler or false versions of the analyst's explanatory models, and not a part of the reality he is supposed to study (Holy & Stuchlik 1981: 9)[1]

I must say that I disagree with that assessment, not with the sentiments expressed but because I think it misrepresents Gluckman's position. The Bohannan-Gluckman debate was not as straightforward as it is often portrayed, not least because it went on for such a long time; by the late 1960s the two protagonists seemed not only to be taking positions rather different from those they had taken – or accused each other of taking – at the start, and were actually rather closer to one another than at first seemed (Bohannan 1996; Gluckman 1996).

As I see it, Gluckman was entirely in agreement with Bohannan over the need to take Tiv or Barotse legal categories seriously and study them in their own terms, but his approach differed in three key respects. Firstly, he did not see this as the end of the analysis, but the beginning. To most British-trained social anthropologists the seeming

[1] Their actual example is drawn from the critique of Bohannan by Gluckman's Manchester colleague Emrys Peters: 'Bohannan's viewpoint is made clearer, perhaps, in his discussion on the arrangement of facts relating to Tiv law. Here he considers what he should do once he has elicited all the facts, and he argues against setting them out as an arrangement of the procedural law of Tiv courts because, 'The error would be that the arrangement is not part of the Tiv way of looking at it, and hence would be false'" (Bohannan, 1957, p. 69). Why? The Tiv are not the social anthropologists. Is the test of an analytical model its consistency with a folk comprehension? (Peters 1967: 279).

fetishisation of indigenous categories in certain branches of post-Boasian American anthropology, whether it be Ward Goodenough's componential analysis (1956), William Sturtevant's ethnoscience (1964), Steven Tyler's cognitive anthropology (1969), or McKim Marriott's ethnosociology (1990), risked turning social anthropology into a solipsistic discipline in which comparison was rendered impossible. Secondly, and paradoxically, although these analyses started from the premise that the indigenous categories, the folk models, were the essence of anthropology, they often morphed very rapidly into amazingly formal and abstract means of representing those models. Bohannan's approach to legal anthropology exemplifies both these points, not only because he explicitly linked his approach to the 'folk system' of law among the Tiv with developments in componential analysis and ethnoscience (1996: 403) but also through what now seem very quaint comments about the imminent possibility of simulating socio-cultural systems using a computer language such as Fortran (1996: 415)!

Thirdly, and this is the point that has always interested me the most, these approaches – some more than others, of course – risked misrepresenting the status of indigenous models, which generally do not serve as would-be consistent, monolithic philosophical world views, and are not intended to be comparative in the way anthropological models must always be. As I have argued previously in relation to ethnosociology, substantivist approaches tend to operate with an inadequate sociology of knowledge, that fails to bridge the gap between the allegedly general characteristics of, say, 'the Tiv folk model' and the idiosyncratic views of particular Tiv individuals; and an inadequate theory of practice, that fails to address, and often seems uninterested in, the relationship between ideology and behaviour (Good 2000). Briefly and over-simply, I see folk models as resources that people can use to justify their own behaviour or criticise that of others, rather than as indigenous counterparts to social theory. This aspect of the Bohannan–Gluckman debate has been nicely summarised by Sally Falk Moore, an American legal anthropologist, of course, but one who seems to favour Gluckman's approach rather more than Bohannan's. She puts it like this:

> the basic disagreement between Bohannan and Gluckman is one over the *significance* of legal categories. They both agree that such categories should be accurately and fully reported [but] Gluckman sees the concepts and principles of law as *part* of legal systems, whereas Bohannan is most interested in studying the concepts *themselves*, because he considers them a reflection of the whole organization of the legal system. To Gluckman, these concepts and principles are manipulable tools within legal systems, part of their equipment, not reflections of their organization (1978: 145-6, 143).

As I already mentioned, Bohannon's own view on the status of 'folk systems' changed markedly over time. In *Justice and Judgment* he defined folk systems as 'what the people think and say' (Bohannan 1996: 406). By 1969, however, his view had changed radically; as he then put it:

> *a folk system is what an ethnographer thinks and says* that allows him to interact successfully with the people he is studying... [I]f the anthropologist can get the ideas so straight that he can discuss them in detail with informants in their own language... then I think he has something that can reasonably be called a folk system (Bohannan 1996: 406; my italics).

This is what Holy and Stuchlik called 'test by praxis' (1981: 24), and the importance of that for fieldworking anthropologists is something I have stressed to my own students ever since (Barnard & Good 1984: 165), by referring them to another Holy and Stuchlik joint publication (*Actions, norms and representations*, 1983). So I am fully in agreement with Holy & Stuchlik, and also with Bohannon, over the importance of 'test of praxis' as an aspiration for the ethnographer. But does it make sense to call this a 'folk system'? It seems wholly counter-intuitive to locate the 'folk system' in the mind of the analyst, rather than in the minds of the 'folk' themselves! How, if at all, does this differ from Gluckman's attempt to make sense of Barotse jurisprudence in terms of western legal categories? At the very least, the stark contrast between their respective positions, as I caricatured it at the start, has become far less apparent, and the notion of a 'folk model' has become distinctly more complex and confusing.

**Legal pluralism**

Another strand in the anthropological study of law in which the notion of folk models has played an important role is the vast field of legal pluralism. As Franz von Benda-Beckmann wrote in a 2002 review article, there is a clear link between studies of legal pluralism and an interest in 'folk models':

> the reasons for trying to develop... comparative analytical frameworks have been explicated rather clearly as a result of what has been called the Bohannan-Gluckman controversy... [O]ne needs an analytical framework that can encompass a variety of empirical legal phenomena, different legal folk (or emic) systems and/or folk-theories about these folksystems (2002: 42).

He goes on to suggest that the term 'folk law' is appropriate in situations where 'knowledge of law and procedures is largely shared by most people and not entrusted to specialised experts', in contrast to situations where 'knowledge, interpretation and application of law have been differentiated from every day knowledge' as a result of professionalisation (2002: 49).

Clearly this approach works well in the colonial and post-colonial contexts within which the notion of 'legal pluralism' was first developed, by Dutch scholars working on Indonesia (e.g., Van Vollenhoven 1909). As von Benda-Beckmann puts it, studies of legal pluralism focused initially on 'asymmetrical power (and race) relationships between the white minority and the indigenous majority' (2002: 60). The plural legal systems were seen as complementary, though unequal. Gradually, however, scholars came to put more emphasis on the fact that the different systems existed in parallel with one another, and duplicated many of each other's functions. In any given situation people may have more than one legal model and more than one legal mechanism at their disposal. These parallel systems – one associated with state power, the others with 'folk law' – may offer quite different understandings of and solutions for particular situations. He gives the example of marriage in Indonesia, which is institutionalised in three legal systems, adat law, Islamic law and state law, which all define marriage differently and have different procedures for establishing legitimate marriages and dissolving them (2002: 62).

This is what Sally Engle Merry termed 'classic legal pluralism'. It is concerned above all with 'the intersections of indigenous and European law' (1988: 872). She contrasts this with what she terms 'new legal pluralism' which arose in the 1970s, especially among anthropologists working in the USA. Classic legal pluralism focused on parallel legal systems that impinged upon people in different ways and between which they could choose – up to a point anyway, bearing in mind that the state-sponsored system tends to claim hegemony for itself. The new legal pluralism, by contrast, focuses on what Merry later called 'legal consciousness' (1990: 5), that is, on different folk understandings of the same legal system, usually the state system.

For example, John Conley and William O'Barr (1990) have carried out detailed ethnographic studies of language use in small claims courts and magistrates' courts in the United States, in which litigants generally present their own cases rather than hiring lawyers. Their key finding was that the ways in which lay persons analyse issues, and present these to the court, lie along a continuum. At one extreme, some adopt a rule-oriented approach, whereby they present their problems to the court by referring to specific laws, local bye-laws, rules or regulations that have allegedly been violated. This is likely to be quite a successful strategy because their perspective chimes with that of legal professionals themselves. There is thus a good chance that people who present their problems in this way will be fully understood.

At the other extreme, the relational orientation is characterised by a 'fuzzier' definition of issues whereby rights and responsibilities are predicated on 'a broad notion of social interdependence rather than on the application of rules' (1990: 61); their testimony 'contains frequent references to ... items which are significant to her social situation but are irrelevant to the court's more limited and rule-centered agenda'. Lawyers tend to view the testimonies of relationally-oriented litigants as illogical and unstructured. In reality, the problem is that the folk model underlying their arguments conforms to a logic so different from that of the legal system as to be largely incomprehensible to those trained in formal legal analysis. Consequently, the courts 'often fail to understand their cases, regardless of their legal merits' (1990: 61).

**Anthropology and law as separate yet related disciplines**

I turn now to look at the distinctive features of western legal systems, at what Laura Nader has called 'the Western folk term "law"' (2002: 26). As some of you already know, this is my second academic visit to Bratislava. In 2008, I was invited to give several seminars on my research in the British asylum system at Comenius University under the European Social Fund's 'Excellent University' programme. One of the most memorable incidents during my stay here came when I gave a public lecture, attended by officials from the Immigration Department and an Immigration Judge. The paper was largely a critique of credibility assessments as carried out by immigration officials and judges deciding asylum claims in the UK.

In the discussion at the end, the judge challenged me directly: was I claiming that in light of my own expertise and the research I had been describing, I would be able to make better asylum decisions that he could? This is a fair question, which also contains an implied scepticism, an unspoken suggestion that of course, not being a judge, I could not do so. I was not fully satisfied with the answer I gave him at the time, but since then I have often thought about his question, and I am now – almost five years later! – clearer in my own mind how to answer him.

Indeed, the judge's scepticism, if I am right in so interpreting it, was justified. My knowledge of the legal system is different in a number of respects from that of a practitioner, whether a judge or a legal representative. First of all, its purpose is different; my own efforts to understand the asylum process have the aim of critically describing, deconstructing, and analysing it, whereas lawyers and judges need to understand it in order to operate the system 'properly', that is, in accordance with the law, so as to reach

the ‘right’ decision, where ‘rightness’ is defined not in terms of arriving at the truth of the situation in any absolute sense, but in terms of reaching a decision that successfully survives appeals against it in higher courts.

A second difference concerns time scale. A researcher, such as myself, has the luxury of coming back to Bratislava and explaining to anyone who remembers what I said before, how my thinking on various topics has evolved, or even changed radically, in the intervening five years. Scholars may spend entire careers refining their understanding in this way. Now, there is a very broad sense in which the work of judges may be said to display the same features, at least in common law systems though far less clearly in code-based systems found in continental Europe. After all, the decisions of senior judges in the Appeal Courts and Supreme Courts in the USA and the UK, create new interpretations of the law which then become more or less binding precedents which must be followed by junior judges in later cases involving the same issues. In this sense, at least, *interpretive* understandings of the law evolve over time just as scholarly interpretations in general do.

If one moves from this holistic level to the level of deciding an individual case, however, the task of the judge is very different from that of the scholar. Judges cannot enjoy the luxury of refining their views of a particular case over entire careers, or even from one annual conference to the next. They are required to reach decisions tomorrow, perhaps even today. At some point, therefore, pragmatism is bound to take over from intellectual rigour and consistency. This must be so, because a judge’s inability to reach a decision would be far more damaging to the rule of law in general, than would be a ‘wrong’ decision that can, in principle at least, be corrected later by the higher courts.

There is also a third difference, which is the most relevant one as far as the theme of this conference is concerned. This difference relates in part to the two differences already discussed, but actually transcends and helps explain them. Put simply, this third difference arises from the fact that lawyers, such as the Bratislava immigration judge, and anthropologists of law, such as myself, are trained to view the world in radically different ways. While these may not be ‘folk models’ as that term has often been applied in the past, they are certainly models characteristic of distinct groups of professional ‘folk’, for whom mastery of these models is actually a pre-condition for professional advancement.

Awareness of and allowance for these differences is important for several reasons: (i) when anthropologists study law, they should treat lawyers as they would any other exotic group, by not assuming any *a priori* intellectual common ground but instead trying to understand their distinctive modes of thought – their professional ‘folk models’, one

might say, following Laura Nader as quoted earlier; (ii) when anthropologists give evidence in court or provide written socio-legal reports, as I often do myself, *both sides* need to understand the other's distinctive notions of evidence and proof.

Where law and anthropology are concerned, surely it should not be too difficult? After all, the disciplines have common origins. Many early anthropologists were lawyers by profession – Lewis Henry Morgan, Henry Maine, etc. – and there is an obvious link between the practice and study of law and anthropology's interest in 'custom'. Legal anthropology is often dated from Maine's *Ancient Law* (1861), in which he distinguished two kinds of law based on 'status' and 'contract'. Sally Falk Moore points out that Maine initiated one major theoretical strand in the anthropology of law, which views law against the background of a transition from simple to complex societies. One might put legal pluralism in its initial form in the same category.

Another parallel strand focused on 'law as process'. Llewellyn and Hoebel (1941) were the first to study actual cases as raw material, but these were cases from the past remembered by elderly Cheyenne informants. The first anthropological study based on observation of actual cases was one we have already discussed, Max Gluckman's (1955) study of the Barotse, an African state society with specialised judiciary.

A further approach studies *spoken* forms of legal discourse, as used by judges and lawyers themselves but also by lay and expert witnesses who give evidence before them. Atkinson & Drew (1979) showed how the formal question and answer format of cross-examination constrained communication in all sorts of ways, while Conley & O'Barr (1990), as we have just seen, focused on the variable discourses lay people use when they present their cases directly in small claims courts. My own work has focused on the role of the expert witness and the particular linguistic discourses required by that role (Good 2007). Use of interpreters further complicates matters as Helena will discuss later.

**How lawyers and anthropologists think**

It seems generally agreed that there are basic differences between how lawyers and social scientists think, and although different writers on the topic have all developed their own vocabularies for expressing these, the general implications are strikingly similar in each case. For example, Kandel (1992: 1–4) highlights somewhat schematically six ways in which lawyers and social scientists think differently. I shall mention five of these.

First, both are concerned with issues of responsibility, but whereas lawyers are concerned with locating liability, attributing blame or responsibility in order to punish or

compensate, social scientists seek to explain events in general terms which transcend the faults of particular individuals. Second, actions and their consequences are assessed normatively by lawyers, whereas the prime concern of social scientists is to describe and explain them as aspects of local culture and practice. One can summarise these first two points by saying that law is *pre*scriptive, while social science is *de*scriptive.

Thirdly, lawyers apply abstract principles in order to resolve specific cases, whereas social scientists study specific cases in order to construct abstract models. Thus, Conley and O'Barr (1998) contrast deductive legal reasoning with inductive reasoning characteristic of anthropologists. This is of course a matter of broad contrast rather than absolute difference. Social science and law are founded on these opposed styles of reasoning but not wholly subsumed by them, so while deductive reasoning is 'central' to legal reasoning but the latter cannot be reduced to the former (MacCormick 1994: ix).

A fourth contrast is between discrete and multiple notions of causality. For lawyers causality involves the identification of responsibility. Every civil injury is presumed to have a human agent as its prime cause. Social scientists, by contrast, see causality as multiple. While individual actions may be immediate causes of particular outcomes, ultimate causes tend to be seen as systemic.

The fifth difference relates to contrasting notions of 'facts' and 'truth'. Lawyers speak of 'facts' to distinguish them from 'laws' rather than to make claims about their ontological status. The distinction is procedurally important because matters of law are for judges to decide, whereas juries (if present) decide matters of fact. Legally speaking, therefore, a fact is something that can be decided by a lay person without knowledge of the law, such as the reasonableness of an action or the meaning of an everyday word. For lawyers, moreover, truth ultimately lies in the stories told by credible human witnesses, whereas anthropologists are generally less interested in finding out what happened in any absolute scientific or legal sense, than in finding out what their informants *think* and *think about* what happened (O'Barr 2001: 321).

Peter Rigby and Peter Sevareid (1992) discuss the different responses evoked when, as teachers, they show Robert Gardner's famous ethnographic film *Dead Birds*, a study of warfare in Papua New Guinea, to groups of law and anthropology students. Law students accept the scenes in the film as 'facts', and use them to illustrate general principles such as the need for codified laws and strong government, whereas anthropology students start by questioning the 'facts' themselves. Is this true indigenous behaviour or a by-product of colonialism? Is the director imposing his own western

analytic categories? For Rigby and Sevareid, these responses illustrate a general contrast. For lawyers the notion of 'fact' is philosophically unproblematic; they are concerned with determining which general principles these facts call into play. Anthropologists are more conscious – through fieldwork – of the problems of obtaining and using data, and less inclined to speak of 'facts' without hedging qualifications. James Clifford (1988: 321) relates these differences to the adversarial nature of legal proceedings, which require yes/no answers, not the 'it all depends' equivocations favoured by anthropologists.

These contrasts in forms of reasoning go beyond the deductive-inductive dichotomy. Lawyers reason syllogistically whereas anthropologists reason analogically and dialectically. Rigby and Sevareid (1992) juxtapose a classic syllogism and an example of legal reasoning, to demonstrate their congruence.

| **Classical Syllogism** | **Legal Syllogism** |
|---|---|
| *Major premise* | *Law* |
| All men are mortal | Cycling in the park is prohibited |
| *Minor premise* | *Finding of Fact* |
| Socrates is a man | For paraplegics, wheelchairs are the equivalent of feet for able-bodied persons |
| *Conclusion* | *Verdict* |
| Socrates is mortal | Wheelchairs can be used in the park |

Here, the major premise states the law, the minor premise states the facts found to be true, and the decision is reached by syllogistic reasoning. Syllogisms are themselves forms of deductive reasoning. Thus the form of legal reasoning is: (i) in general, if p then q; (ii) in the present case, p; (iii) therefore, q (MacCormick 1994: 21–32).

By contrast, anthropologists typically use analogies to explain a poorly understood phenomenon in terms of phenomena that are better understood (as with the pervasive analogy that culture is like language). Moreover, anthropologists routinely deal with situations where different writers take different theoretical perspectives, and work out their own theoretical approach to particular data by means of dialectical reasoning. Rather than major premise, minor premise, conclusion, anthropological writing moves from thesis, to antithesis, to synthesis.

Finally, Driessen (1983) points to one further difference between legal and social scientific thinking, namely in handling doubt and uncertainty. Through its convention that matters established to the requisite standard of proof become 'facts', most legal decision-making 'collapses' probabilities into certainties and then proceeds 'as though uncertainty does not exist' (Fienberg 1989: 78).

Although these contrasts are all helpful, they must of course not be overstated. It is certainly true that anthropological reasoning is frequently analogic and dialectical, but lawyers too use such forms of reasoning, though their analogies are often drawn, characteristically, from within the legal field itself (MacCormick 1994: 155). It is equally common for judicial decisions to balance rival precedents dialectically, a tendency which becomes even more evident in higher courts.

So the differences just identified are matters of emphasis rather than absolute contrasts. Moreover, by limiting themselves to discourse they risk presenting idealisations of lawyers and anthropologists, which might or might not be borne out in their actual practice. These simple binary oppositions are further eroded by features that the two professional groups have in common: both conceive of their subject matter primarily in terms of 'cases' or 'case studies'; both are concerned with the reliability and credibility of informants/witnesses, and both claim 'an authoritative capacity to sift evidence and derive rational and persuasive conclusions from it' (Jasanoff 1995: 8).

Yet lawyers and anthropologists of law are nonetheless *trained* to argue in radically different ways, and this raises the question of the link between particular forms of pedagogy and distinctive occupational practices and discourses. As Conley & O'Barr put it, the 'official legal discourse' into which law students are initiated is 'far removed from the language of ordinary people' and 'tends to transform or simply to ignore' the discourses of litigants themselves; moreover, its professional discourse is 'predominantly about purportedly neutral principles whose application is believed to transcend human variation' (1990: 9). Law students' primary sources of information are written appeal court decisions (Conley & O'Barr 1988: 468–70). These are overwhelmingly concerned with legal agument. Typically, in common law jurisdictions, written legal judgments devote one paragraph each at the start to the appellant's life history, and the prior litigation in the lower courts. Such brevity has the practical advantage of keeping written judgments within manageable proportions, but is also seen as necessary in principle, to 'facilitate the application of the decisive legal principles' (Conley & O'Barr 1990: 11). One consequence, though, is that the appellant's story is divested of specific details, and the contexts within which it occurred are mostly lost. These raw materials are thus made to appear transparent, and divested of their complexity.

The dominant schools of legal theory acknowledge the central role of discourse, because the process of law is one of interpretation, but see that interpretation as solely the business of judges, who 'decide what the law is by interpreting the practice of other

judges deciding what the law is' (Dworkin 1986: 410). Their interests lie in discourses of professional lawyers, not those of lay litigants or experts. This is clearly a fundamental difference between legal scholars and anthropologists, though even among the former that view is not wholly unchallenged – by the critical legal studies approach, for example.

The Socratic dialogue is a core teaching method in many law schools. Moreover, law students are taught a thought process – the 'folk system' of legal folk – that involves finding 'facts', selecting appropriate legal rules, and applying these rules to the facts to produce a legally correct result. The focus in legal training upon the discussion of written judicial decisions implies that this 'apparently straightforward process' is the means whereby specific cases are actually decided. Consequently, 'the dominant view in both the teaching and practice of law [is] that most cases are decided by a value-neutral process of rule selection and application' (Conley & O'Barr 1990: 60). Lawyers internalise during their training 'both a way of talking about problems and the logic that lies behind that way of talking' (Conley & O'Barr 1998: 135), and their mastery of this professional discourse is the means whereby they can succeed in their legal career.

Of course anthropologists too internalise particular logics and ways of thinking, such as their obsession with dialectical critique, meaning that no concept, however fundamental, can remain un-deconstructed for long. And this leads to the final, perhaps most intractable difference between the two disciplines, which applied legal anthropology must somehow overcome. I hope you will forgive me for ending by quoting myself. I do so because this statement, which I first presented at a seminar on expert evidence, organised by a professional group of immigration lawyers and involving papers by a judge and an expert on medico-legal reports as well as myself, to an audience of lawyers and senior judges, was the part of my paper which caused most consternation among the judges. The reasons are obvious, given what was said earlier about the necessary differences in approach between practising judges and social science researchers:

> 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 2004: 380).

**Bibliography**

Atkinson, J.M. and Drew, P. (1979) *Order in court: the organisation of verbal interaction in court settings*. London: Macmillan.

Barnard, Alan & Good, Anthony (1984). *Research practices in the study of kinship.* (ASA Research Methods in Social Anthropology, 2). London: Academic Press.

Benda-Beckmann, Franz von (1988). 'Comment on Merry.' *Law & Society Review* 22(5): 897-901.

———— (2002). 'Who's afraid of legal pluralism?' *Journal of Legal Pluralism and Unofficial Law* 47: 37-83.

Bohannan, Paul (1957). *Justice and judgment among the Tiv of Nigeria.* London: Oxford University Press.

———— (1996[1969]). 'Ethnography and comparison in legal anthropology.' Pp. 401-18 in Laura Nader (ed.), *op. cit*.

Clifford, James (1988). *The predicament of culture*. Cambridge MA: Harvard Univ Press.

Conley, John M. & O'Barr, William M. (1988). 'Fundamentals of jurisprudence: an ethnography of judicial decision-making in informal courts.' *North Carolina Law Review* 66: 467–507.

———— (1990.) *Rules versus relationships: the ethnography of legal discourse*. Chicago: University Press.

———— (1998). *Just words: law, language and power*. Chicago: University Press.

Driessen, Patrick A. (1983). 'The wedding of social science and the courts: is the marriage working?', *Social Science Quarterly* 64: 476–93.

Dworkin, Ronald (1986). *Law's empire*. Cambridge MA: Harvard University Press.

Fienberg, Stephen E. (ed.) (1989). *The evolving role of statistical assessments as evidence in the courts*. New York: Springer-Verlag.

Good, Anthony (2000). 'Power and fertility: divine kinship in South India.' Pp. 323-53 in Monika Boeck & Aparna Rao (eds.), *Culture, creation, and procreation: concepts of kinship in South Asian practice*. Oxford: Berghahn.

———— (2004). 'Expert evidence in asylum and human rights appeals: an expert's view.' *International Journal of Refugee Law* 16: 358–80.

———— (2007). *Anthropology and expertise in the asylum courts*. London: Routledge-Cavendish.

Goodenough, Ward H. (1956). 'Componential analysis and the study of meaning.' *Language* 32: 195-216.

Gluckman, Max (1955). *The judicial process among the Barotse of Northern Rhodesia*. Manchester: University Press.

———— (1996[1969]). 'Concepts in the comparative study of tribal law.' Pp. 349-73 in Laura Nader (ed.), *op. cit*.

Holy, Ladislav & Stuchlik, Milan (eds.) (1981). *The structure of folk models*. (ASA Monographs, 20). London: Academic Press.

———— (1983). Actions, norms and representations: foundations of anthropological inquiry. Cambridge: University Press.

Jasanoff, Sheila (1995). Science at the bar: law, science and technology in America, Cambridge MA: Harvard University Press.

Kandel, Randy Frances (1992). 'How lawyers and anthropologists think differently.'Pp. 1–4 in Kandel (ed.), *Double vision: anthropologists at law*. (NAPA Bulletin, No 11) Washington: American Anthropological Association.

Llewellyn, Karl N. & Hoebel, E. Adamson (1941). *The Cheyenne way: conflict and case law in primitive jurisprudence*. Norman: University of Oklahoma Press

MacCormick, Neil (1994). *Legal reasoning and legal theory*. (rev. edn.) Oxford: University Press.

Maine, Henry S. (1861). *Ancient law*. London: John Murray.

Marriott, McKim (ed.) (1990). *India through Hindu categories*. New Delhi: Sage.

Merry, Sally Engle (1988). 'Legal pluralism.' *Law & Society Review* 22(5): 869-96.

Moore, Sally Falk (1978). *Law as process: an anthropological approach*. Oxford: University Press.

Nader, Laura (ed.) (1996[1969]). *Law in culture and society*. (First paperback edition). Berkeley & Los Angeles: Univ. of California Press.

———— (2002). *The life of the law: anthropological projects*. Berkeley & Los Angeles: University of California Press.

O'Barr, William M. (2001). 'Culture and causality: non-western systems of explanation.' *Law and Contemporary Problems* 64(4): 317–23.

Peters, Emrys L. (1967). 'Some structural aspects of the feud among the camel-herding Bedouin of Cyrenaica.' *Africa* 37: 261-82.

Rigby, Peter & Sevareid, Peter (1992). 'Lawyers, anthropologists, and the knowledge of fact.' Pp. 5–21 in Kandel, Randy Frances (ed.), *Double vision: anthropologists at law*. (NAPA Bulletin, No 11) Washington DC: Amer Anthropological Association.

Sturtevant, William C. 1964. 'Studies in ethnoscience.' *American Anthropologist* 66(3): 99-131.

Tyler, Steven A. (1969). *Cognitive anthropology*. New York, Holt, Rinehart, and Winston.

Vollenhoven, C. van (1909). *Miskenningen van het adatrecht*. Leiden: E.J. Brill.