

# The Judge and the Anthropologist: Cultural Expertise in Dutch Courts

*Hermine C. Wiersinga*<sup>1</sup>

## Abstract

As a judge, I have the feeling that culture is related with anything and everything – and with nothing at all. In most criminal cases, it hides underground, not visible, not recognized and is rarely, if ever, brought up as an argument by the participants. In my experience, even though an anthropologist can see remarkable cultural features given the way proceedings are organized, the judge, in managing the proceedings, will try to keep such features out of sight. As such, in my view, anthropologists offer an outsider's view whilst the judge, as part of the legal system, is an insider. This paper starts from a sceptical standpoint about cultural knowledge, in which I argue that the judge, as a legal professional, does not need to take into consideration that law and procedures are embedded in a dominant culture because they are more interested in a case-by-case approach, trying individuals for their concrete deeds. This paper elaborates on the potential common ground between anthropological and legal methods and concludes with my first-hand experience on the so-called Context case in which an anthropologist was appointed as expert for a well-known terrorism case in the Netherlands. This case epitomizes, in my view, the challenges and the potential benefits of integrating cultural expertise in court.

## Introduction

In my experience, culture and criminal law are hardly companions. In some rare cases, culture is unmistakably at the surface (i.e., so-called honour cases); however, culture is largely hidden in micro- or macro-narratives, in a more contextual way. This paper asks what Dutch judges are confronted with, and how they make decisions, especially

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1 Hermine C Wiersinga worked from 1990 to 2005 at the Department of Criminal Law, at the Faculty of Law at Leiden University, as an Assistant Professor. In 2005, she decided to practice law as a judge. Since 2010, she has been a judge in the Criminal Court of Appeal at the Hague, and from 2015 onward, Hermine has participated in a team of specialists who deal with large, international cases in relation to jihadism, terrorism and international criminal law.

concerning cultural factors? This paper offers my reflections as a judge working at the Criminal Court of Appeal that sits in The Hague.

I will start with some short remarks about my experience of cultural expertise and the potential fields of its application in the Dutch legal system. For the sake of comparison between the ways of thinking of anthropologists and judges, I will formulate some generalisations. These are based on my own research and observations over the last 15 years, during which I worked as a judge in criminal law. From this perspective, I will focus on the way judges decide, our mindset, the way we approach a case and solve 'culture-informed' problems in order to make a decision. Our approach is different, perhaps even the opposite, to the approach of cultural experts. Judges, when meeting issues in court, focus on the individual case, and narrow their view to the relevant elements in those specific cases; meanwhile, cultural experts connect the case with culture, from the individual story to common narratives. Yet, judges and anthropologists still work in some common areas that I call in this paper "common grounds", of which I have identified three: culture on the surface, casus looking for context, and group responsibilities. These common grounds that judges and anthropologists share show both similarities and differences in our ways of thinking. The last section of my paper focuses on a case in which I was involved as Appellate Judge known as the Context case. This case illustrates the point I want to make regarding the potential danger of the meeting between the judge and the expert due to the opposite ways of our reasoning. These reflections are not conclusive, but I do hope that they bring some insights in the clashes that can be the result of using cultural expertise in court.

Before delving into the content of this paper, I wish to make two preliminary remarks. First of all, I am addressing the domain of criminal law and I ask whether there is any room for the judge to 'colour' our decisions? Criminal law is regarded as a closed field. As noted by Hoekema and Van Rossum, when making 'cultural' judicial decisions in Dutch civil law: "(...) we feel that in some legal domains, like criminal law, not many pluralizing developments are to be noted apart from hot public debates. Judges, commentators and practitioners feel that matters of criminal law mostly reflect fundamental elements of Dutch legal culture and do not offer much space for distinct views (save for serious problems in understanding the behavior of an accused from a distinct culture and deciding on the appropriate punishment)" (Hoekema *et al*, 2010, p. 863). The case that I will outline in this paper provides an example of what can happen in criminal cases where cultural expertise is used. Since the case concerned

terrorism, one can discuss the typical features of terrorist cases and trials. Some see terrorist cases as completely different from other cases. The claim of this particularity is familiar for judges and it similarly made for cases regarding human trafficking, sexual offences, offences against authorities, money laundering, and cybercrime. Judges, however, seem to prefer bringing such terrorist cases under the scope of ordinary criminal law and criminal procedures. De Graaf argued how 9/11 changed the law, calling this the ‘precautionary turn in criminal law’. But at least as far as she is referring to the concept of a criminal organization, this was already punishable in the previous century; and also in the 20th century there was no need to have formally defined roles for members of an organization or a developed structure in order for such an organization to qualify as a criminal organization (De Graaf, 2019, p. 98). The intention of a terrorist, which connects the belonging to a criminal organization with a harsher sentence, is an extension of an already existing criminal provision, and thus not a completely new penal provision (De Hullu, 2018, p. 426).

Secondly, culture is incidentally — and not in a very foreseeable way — popping up in judicial practices. As far as my experience goes, there is nothing whatsoever like an operational formal, legal, or clearly defined concept of culture. The use of the concept is very much dependent on the interpretation of individuals. I will not try to produce a definition myself (Hoekema *et al*, 2010, pp. 860-863). However, Geertz gives an inspiring orientation, and a feeding reflection: “Believing (...) that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical”. He positioned culture as related to context, interpretation, and giving meaning to words and deeds of perceived others. The anthropologist gives meaning to the meaning others give to words and deeds. The word ‘give’ underlines the fact that the meaning is given by a particular someone; there is reciprocity. It means that interpreting another culture may reveal — and sometimes inevitably does — something about the culture of the interpreter. Even leaving things as unsaid or undone is telling. Interpretation is the code word in earlier research, and that runs in alignment with Geertz’s use of the concept of culture, investigating it through ‘thick description’ (Geertz, 1973, Ch. 1).

## Judges, cultural expertise and culture: limitations

In most criminal cases, culture is neither recognized nor raised as an argument by any of the participants. Where an anthropologist - from a perspective which is external to the legal process - may see remarkable cultural features in the way legal proceedings are organized in the Dutch legal culture, or astonishing components in the behaviour of the defendant, insiders like the judge, being so familiar with the setting, may fail to give meaning to these cultural features in an individual case. Perhaps, there is some knowledge about the cultural content also in the roots of the Dutch criminal procedure (see for example medieval Spanish inquisitorial methods), or concepts of so-called honour and the meaning of apologies and regret for one's own wrongdoing. But how important are those factors in the daily routine of justice? And why stir up these components when every party seems content with the current procedure, even if the defendants themselves are not fully understood? Most of the time, from the insider's point of view, there is no need to focus on cultural assumptions. And since judges are interested in a case-by-case approach, namely trying and sentencing individuals for their concrete deeds, many do not reflect on the context as long as there is no need. And there is no need, if the perception of all parties in court is that context and background are more or less shared. If there is no cultural gap addressed, there is hardly a need to give culture any further consideration. In this respect, urgency is only occasionally felt.

Now, I make some remarks about the Dutch context in general. Decisions about the kind of information needed during a trial, about what is required to reach a final decision, are in the hands of professional judges. For instance, judges can decide whether or not there is any need for cultural expertise. Judges are bound by codes, the rules of the procedure, the jurisprudence of the supreme court and, in a broad sense, the law. The prosecutor is the *dominus litis* during the first phase of the trial and decides which cases are brought to court, and in which way, pressing charges that are decisive, making explicit and formal what the accusation is. Meanwhile, the prosecutor is processing the case. In fact, the police, lawyers and their clients, forensic experts and probation officers are highly interdependent. But everybody is sensitive to what the judge decides.

With regards to final decisions, sections 348 and 350 of the Dutch Code of Criminal Procedure present the judge a decision tree, where previous decisions influence sentencing. The victim's input is also of direct importance in sentencing by the exercise of their rights. It is a mandatory and decisive system. On the other hand, sentencing is

sometimes highly influenced by the facts grounded on earlier decisions. Judges in the Netherlands have pretty much discretion according to the law. Making final decisions about competence, guilt, justification, qualification and sentencing is what judges do. Also, relevant for the Dutch practice, is the way in which Legislator of 1886 rewrote the Criminal Code, in order to facilitate short, pragmatic and sober decisions, and f.e. described capital crimes without specification. Taking the life of another person is manslaughter or murder. In this regard, motives can be important, but it is more or less up to the judge to fill in. This is completely different from the German Criminal Code, that specifies — besides maximum penalties — the minimum penalties and relates manslaughter to murderousness, greed, lust or other deficient motives. So, decisions about the behaviour of an accused from a distinct culture and deciding on the appropriate punishment have a wider ‘free’ scope in the Netherlands, since the judge can relate the crime and the appropriate punishment to any sort of motive. On the other hand, a German judge has to investigate and discuss the motives of the defendant in general.

Dare I say that being explicit about culture, that of others, or of one’s own, is not part of the culture of judging in the Netherlands. There might be more specific reasons for this. Perhaps culture is seen — and I am simplifying Geertz’s thick description — as ‘drama’, that is, comparable with a piece of theatre, a dynamic, interactive course of events, where bodies, gestures, practices, words, roles, rituals, beliefs within a meaningful context are acted out and understood by actors (performers) and the audience (also performing their role - as in an old Greek *choros*) Geertz (1983). ‘Understanding’ is much more than ‘knowing’. Ascribing words to create meaning can be a distortion — or at least a reduction — of some ‘truth’. Truth is not an independent category. As Geertz says (1973, p. 20): “Cultural analysis is (or should be) guessing at meanings, assessing the guesses, and drawing explanatory conclusions from the better guesses, not discovering the Continent of Meaning and mapping out its bodiless landscape”. In this perception of culture, there are limitations for a judge: practicing law is practicing the language of law, ‘playing with words’, and the correct, precise, and concise use of language is an important tool for the judge. For a judge, it becomes difficult if things are unsaid, not outspoken, implicit, not conscious, or ‘theatrical’, added with gestures. The judge uses words to constitute a ‘truth’. That ‘truth’ is perception, of course; every jurist knows that, but nevertheless it is something that must materialize in a decision which in the Dutch term conveys a meaning or finality. The judge decides about what is relevant and needs to be accepted as ‘true’. The significance of this may also make a

judge unresponsive to cultural arguments. Judges may not be willing to judge culture. Needless to say, formulating cultural arguments in the Netherlands can be very hard for the defendant, for other obvious reasons. Defendants will miss the *choros*, any reciprocity about their feelings and emotions brought up. This is illustrated by the research of Yesilgöz (1995) according to whom Turkish defendants have a different timing of expressing their emotions during trial.

Another issue is the *a priori* look of the professional participants involved in a legal procedure. Realities come to the judge not as such, but always in a kind of presentation and related to something else, at least if you want the judges' attention. Information or knowledge has to be proceeded, that is processed in the 'narrative mill' of law. This means that a connection must be made between the facts and the law. During the procedure, people watch realities through these converging lenses, or concepts of law. If they are not relevant, their content will be lost during the action processing the narratives into the files.

To create a *narratio*, a plot is needed. In the words of a judge, and also a professor in law and literature: "Judges are themselves narrators in the active, authorial act of comprehending the facts and circumstances of the case, and deciding in any presented succession of events what is and what is not relevant for the legal plot. This plotting in the form of a selection is always done with the aim of arriving at a decision (...) the judicial configurational act has as its ultimate goal the (re)structuring of reality; like drama, it is aimed at a (...) solution of the problem". In doing this, the judge is not just listing the facts, but is telling us a story about those facts, putting them together in a meaningful way. And therefore, she needs "narrative, situational knowledge" (Gaakeer, 2019, p. 144 and p. 140). In fact, Gaakeer, focusing on law and literature, pleads for the knowledge that literature can help provide. My interpretation is, that when legal plotting is difficult, due to a lack of 'satisfying narrativity', the judge may cross the line explicitly and let cultural expertise come into their decisions. The *casus* is looking for (more) context, yet still within the frame of 'legal realities'.

The observations of the anthropologist, on the other hand, are not at all limited *a priori* (Barley, 2011). On the contrary, it is a 'reverse look'. Anthropologists try to open up, to broaden their lenses so to speak. Their goal is to pick up all kinds of information. Small pieces of 'realities' can be obtained, which are potentially relevant in the future, when — as late as possible — interpretations are given. Maybe some small detail

will be important in unravelling a whole new web of meaning. Discussions between anthropologists can touch on ways to avoid selective observation, and to forget the usual frames of interpretation. The anthropologist's vision is just the opposite to the ordinary view of the judge: limitless, pointed at the future instead of 'finalising' the past.

When both professions meet, it is important to respect those differences; misunderstandings happen easily. When judges and anthropologists meet in court, and they sometimes do, it is important to see how they differ in methods and how they perceive things differently. Their 'reverse look' can easily lead to misinterpretations. Only if they both realize this can damage be controlled, more or less.

### Common ground I: Culture on the surface

Sometimes culture can appear on the surface. Participants in court (prosecutors, judges, lawyers, defendants, expert witnesses) may want or have to give meaning to a situation or argument that indicates or refers to a cultural gap. If one cannot sharpen their focus and find any 'truth', or any substantial legal plotting, it might be because one has not been able to pinpoint certain cultural factors. Realizing this might make a case participant feel a certain urgency to know more about the culture of the defendant. For example, if the Albanian *Kanun* is the guidance in life for a defendant, or at least a reference point, judges will probably need some expertise to see what 'really' happened and to weigh the *mens rea*. The written *Kanun* has played a role in some European cases. In cases of honour or blood revenge, the cultural background of the case might bring forward proof of premeditation (with the highest maximum penalty: a life sentence). If judges want to understand the mental predispositions of religiously inspired deeds, they might try to understand something about the religion of those on trial. If the mental state is important for how to ground our conclusions about the punishment or measures justified, we might be interested in the cultural background of the subject examined by psychologists or psychiatrists.

In court cases like the above example, cultural background can come to the forefront, that is if it is noticed when the case bundle is prepared. Timing is important, too. Once a case arrives at a court of appeal, standpoints and arguments about all factors, including cultural ones, are often already crystallized. There are not many options for judges to change their mindsets about these. In the beginning of the process, police work is relevant. I think that the police are particularly sensitive to cultural details

that may make things like an interrogation more effective; they know that an accused will respond better if their interrogation is clear on specific details thus matching the concrete situation and mindset of the accused. Even when a so-called cultural crime or cultural defence is explicitly in question, specific knowledge is not always produced by an anthropologist. Judges may believe that there is no need because the defendants and their lawyers, or the prosecutor, can come forward with cultural arguments whether or not they are successful. On the other hand, there is the possibility that a judge will invoke a cultural expert, because of their official capacity to do so. Therefore, they need cultural sensitivity — and the understanding that their own expertise is potentially not enough. Since they might feel a bit like an anthropologist — at least they may pretend to know about the thoughts of ‘the man on the Clapham omnibus’ - and especially since the use of the language can be misleading, it is a balancing act.

## Common ground II: Casus looking for context

Relevant, a bit confusing, and also a bit of an explanation for the aforementioned sloppiness of decisions about cultural arguments in daily practice, is the fact that judges and anthropologists are working partly in the same field also in cases where culture is not perceived immediately. Judges often focus on the specific acts of individuals and concrete evidence and proof, but have to do so using certain frameworks — common knowledge and narratives — in order to reach their judgments, i.e., the conceptual framework of the man on the Clapham omnibus. Here is common ground. Anthropologists are trying to find out those stories told within a group: the narratives that are binding or dividing people and shared within a culture. Abstractions — group knowledge, collective memories, shared cultural perceptions and assumptions become visible, come to life, through sharing, by stories that people tell one another, in scenarios of the drama involved in society, within the narratives. These may be big narratives (f.e. religious) or small ones (f.e. about remorse and regrets). When we put it like this, judges share something in common with anthropologists. Admittedly, judges do not look at narratives the way anthropologists do. A judge’s way of using narratives is most of the time almost subconscious: they categorize people in those micro-narratives hardly knowing how or why, as revealed by the research of Van Oorschot (2018a and 2018b). In her PhD research about how judges make decisions, she mentions a case concerning discrimination by judges. Van Oorschot investigated the controversy of ethnic discrimination by judges and argued about the way social scientists had organized their research: identifying all kind of factors and measuring the weight and influence of those

factors on the custody decision made by the judge. Van Oorschot discovered that judges made their decisions in a more holistic way: looking at the whole picture and using standard blueprints when doing so. And so, for example, a drug addict's remorse might be perceived as completely irrelevant whilst in other situations and in another format, it may be a major factor. Weighing those factors using a single scale, as the social scientists did, mistook the nature of judicial decision-making, and more specifically the micro-narratives used by judges.

The research by Van Oorschot described the discrimination as cutting across law and social sciences — but this was not very successful, or at least not fruitful, since the misunderstanding was hindering a satisfactory explanation of the discrimination factor. My point here is that it is true that there is a shared field of interest for both anthropologists and judges. In individual cases, both the micro-narratives used by the defendants and the micro-narratives that the judges perceive, are informed by the culture of the judges and the culture of the defendants. It could be clarifying to rethink those matters, and to realize — for example — how we weigh utterances of remorse. Are there different cultural narratives? And how are these received in court?

The input of anthropologists on the subject can be significant. Some critical reflections by judges about their own narratives might also be recommended. In certain individual cases — when narratives do not fit at all — the input of an anthropologist is required. Again, the judge can walk alone on those common grounds, or choose to invite cultural expertise. Common ground is the starting point for the involvement of an anthropological extra.

### **Common ground III: Group responsibilities and again: Casus looking for context**

Another correspondence between judicial and anthropological knowledge can be found in the development of new legislation. Since 1995 in the Netherlands, belonging to a criminal organization can be punished, even in the absence of specific criminal acts by the accused. Not only in the Netherlands, but also in other European countries, collective responsibilities are constituted. For instance, motorcycle gangs (e.g., Hells Angels) are forbidden, as well as a paedophilic interest group. There is a debate in the Netherlands about forbidding so-called Salafi groups, sponsored by Saudi Arabia, because of their antidemocratic rhetoric and the possible indoctrination of children.

Here judges and anthropologists are again on common grounds. What does it mean, to belong to a group? And when is a group an organization? These cannot be answered by looking simply at membership linked to an annual contribution, and remains the subject of research for anthropologists. Who belongs to what? How free or bound are the members of the group? What and where are their loyalties? And what about the culture of the group? Are the Salafists really antidemocratic? How do they think and talk about democracy? What does it mean, when someone is cast as a *murtadd* (an apostate) or a *kuffar* (non-believer)? Interpretation and the search for meaning are inextricably bound up with narratives. The use of words and language might require expertise on this specific culture or group and anthropological evidence might be essential, to avoid naïveté or unjustified mistrust.

### Casus looking for context: a meeting in court

The opposite methods of judges and anthropologists appeared evident in an important criminal case, known as the Context case in Dutch jurisprudence.<sup>2</sup> The case concerned jihadis, travelling to Syria to fight with terrorist groups, or staying at home, and encouraging others to go. A central theme was about being members of a criminal organization.<sup>3</sup> And whether the organization existed at all? The case was brought to the Court of Appeal in The Hague in 2018 which later became irrevocable after the final judgements of the Dutch Supreme Court. I cite only from parts of the procedure in the first instance as far as the procedure was accessible to the press and public. In 2014 (the year the ‘Caliphate’ was announced by Abu Bakr al Baghdadi) De Koning and other anthropologists published their research in an IMES report, which was the result of many years of fieldwork concerning activist jihadis in Belgium, Germany and the Netherlands. These results happened to form important information for everybody in the court. What kind of shared ideology, shared struggle in Syria, and what kind of jihadi organization was at stake? What does jihadi mean? How — and about what — could be communicated to these assertive defendants? And — something I focus on — is this a criminal organization, as understood by the criminal law? The court accepted the defence’s request of appointing De Koning as expert witness; in the files are the

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2 This year, the Dutch Supreme Court gave final decisions in ECLI:NL:HR:2020: 447, 448, 449, 450; see for the unofficial translation of ECLI:NL:RBDHA:2015:14365 : ECLI: NL:RBDHA:2015:16102 verdict in first instance).

3 Dutch Criminal Code, art. 140 (a).

official IMES report, a written explanation of De Koning (answering specific questions asked by the lawyers) and reports of hearings by the judge. The judges relied heavily on his testimony in their verdicts<sup>4</sup>. The Court of Appeal differs in some respects. I will pay attention only to this first verdict and information that has been related and shared publicly during the trial in first instance. Nine suspects have been convicted and issued prison sentences for up to six years.

During the process, the appointed witness and expert De Koning was forced to talk about individuals, mentioning names. The official report (the IMES report) was anonymized for good and valid reasons. De Koning, however, was held to answer specific questions: he had no right to refuse to testify. In the public hearing, he was asked about individuals. We can read this in the files of the public hearing:<sup>5</sup>

[Court: *“U heeft gezegd dat u de participanten aan uw onderzoek niet wil de-anonimiseren, terwijl u, met name bij de rechter-commissaris, wel veel over de verdachten hebt verteld. Kunt u ons niet gewoon zeggen wie welke participant is?”*

De Koning: *Ik wil dat met name niet doen, omdat daarmee ook de overige personen met wie ik heb gewerkt bekend kunnen worden.*

Court: *U heeft geen verschoningsrecht*

De Koning: *Dat heb ik ook begrepen. Dat wist ik niet toen ik met het onderzoek begon. Het gaat meer over mijn eigen ethische normen. Ik heb er goed over nagedacht, maar ik ga de namen van de participanten niet bekend maken. Ik heb er ook met collega's over gesproken. Ik blijft het onwenselijk vinden en ik doe het niet ter bescherming van de mensen die niet terecht*

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- 4 Quite interesting is de Koning, M. (2020) reflecting in detail about his role in the Context trial and (p. 220) “how academic knowledge about Salafism and militant activism is used in a process of racialised categorisation and closure”. His article is, in my opinion, illustrative for the above mentioned ‘reverse looks’. Also about the Context case: de Graaf, B. (2019), see p. 109-111, she stated “the testimony of expert Martijn de Koning (..) was *appropriated* (curs. HW) by the prosecution and the judges (...)”.
- 5 Rechtbank Den Haag, Proces-verbaal van het horen van getuige-deskundige De Koning ter terechtzitting op 7 en 8 september 2015, p.5 (testimony in court) ; answers De Koning in italics, translation HW).

*staan. Ik denk ook dat het voor de beantwoording van uw vragen niet noodzakelijk is.*

Court: *Bent u wel bereid vragen per verdachte te beantwoorden?*

De Koning: *Voor zover het gaat over hun publieke rol en de indruk die ik van hen heb gekregen, kan ik op uw vragen antwoorden?.*]

Translation:

[Court: You said you did not want to disclose the names of the participants in your research, though you have said – especially in front of the examining judge – a lot about the defendants. Can't you just tell us who the participants are?

De Koning: I don't want to do that, because by doing so also other persons I worked with might be known.

Court: You don't have a right to refuse to testify.

De Koning: Understand. I did not know that when I started the research. It is more about my own ethical norms. I did think it over, but I am not willing to make public the names of the participants.

I also discussed it with my colleagues. I still think it is undesirable and I won't give their names because I want to protect the people who are not on trial. And I don't think it is necessary for answering your questions.

Court: Are you willing to answer questions per the defendant?

De Koning: *As far as it is about their public role and my perception of them, I am prepared to answer your questions.*]

It seemed a rear-guard action to me; that possible harm was already done at the pre-trial stage before the examining judge. I have no doubts about this expert's integrity — f.e.

before his testimony, he asked permission from the defendants — but the point seemed to be not really under discussion.

A second point was about the trustworthiness of the expert. It was brought up by the parties, regarding the presumed partiality of the anthropologist. During the hearings, the judge asked De Koning about sympathy syndrome, an understatement meaning something like Stockholm syndrome. The lawyers had explicitly made up their minds about how trustworthy the cultural expert really was, and — as it seems — depending on strategic goals and insights (that is: related to their own interests in court, which is — for lawyers — understandable since their partiality is given). Their problem, *in nuce*, was what to expect from the judge? Would disbelief work to their advantage? Hence, the minutes of the public session of the hearing report the judge asking De Koning: “The defence has announced that the public prosecutor will reproach you for not keeping enough distance to the suspects. With hindsight, do you agree?” De Koning did not agree and explained that the position of the anthropologist during fieldwork is subject to an ongoing debate between anthropologists; namely that everybody in the field is aware of the danger of going native and that he himself had to justify his conduct and actions for his colleagues.<sup>6</sup> Reading the verdict, it becomes clear that the judge saw De Koning as very trustworthy and as a matter of fact, as a sort of super witness:<sup>7</sup>

“The Court regards De Koning as an exceptionally valuable expert witness. Because of his profession he is a professional observer, has an extensive knowledge of denominations within Islam, more particularly Salafism, and has been in close contact with many of the accused for a prolonged period of time (...) The court has no cause whatsoever to doubt his expertise, reliability and credibility. More particularly, the court finds that there is no evidence that a lack of distance would have compromised the value of his observations and statements. As a witness he answered all questions about the accused (...)”.

De Koning had given them insider knowledge about the behaviour and mindset of the defendants. They used this knowledge in the verdict, and they used it to communicate with the defendants during the trial.

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6 ECLI: NL:RBDHA:2015:16102, 4.15.

7 Rechtbank Den Haag, Proces-verbaal van het horen van getuige-deskundige De Koning ter terechtzitting op 7 en 8 september 2015, p.5 (testimony in court De Koning) p. 3-5.

The third point — which was very problematic at least for the expert himself — was the fact, that the court used his explanation to give reasons to their judicial statement that an organization — in terms of the law — did exist and that the defendants had been members of that criminal organization. In the official IMES report, the word ‘group’ for the defendants has been used in a more or less common sense meaning. The formulation of the problem and methodology are in terms of ‘activist networks’, identities and subjectivity, and the research is about specific events, about the world of the individual who is not acting in an evident structure with hierarchical features. The report did not use any definition concerning a clear-cut, well-defined group.

We now know about the issues that De Koning had with the use of his testimony by the court because a highly-regarded Dutch magazine published an interview with De Koning after the trial. The paper described that he was in the courtroom, hearing the verdict, and was completely overwhelmed by the fact that the judge had used his own words to condemn the defendants as an organization. “I did not think of them as an organization. In my opinion, it was just a bunch of friends”, he said. He did not agree at all. His other remarks were about his supposed partiality and about the above-mentioned supposed lack of distance between him and the jihadis. “As an anthropologist you hang around as much as possible with the people you are doing research on. Were it been Papua’s, nobody would have thought it was a problem. But playing soccer with jihadis – no way. Actually, what they are blaming me for is being an anthropologist”, said De Koning Kamerman and Kouwenhoven (Kamerman and Kouwenhoven, 2015).

## Some afterthoughts and conclusion

Was this a constructive meeting or a cultural clash between judge and anthropologist? On the one hand, there is a solid, reasoned and grounded conviction. On the other hand, there had been damage done to the anthropologist himself, no doubt, but also for anthropologists trying to work in this field. In Germany, the suspicion within *jihadi* groups against *all* outsiders made real, participating fieldwork already impossible. At least during the period of research of colleagues of De Koning before 2014 in Germany, they did not get access to activists or jihadist preachers. In other words, the *jihadis* in Germany did not communicate with interested outsiders. And when there is no open communication with interested outsiders (like anthropologists), information might come from other sources, like undercover agents. We will be more dependent

on information, given by intelligence, which means from a completely different perspective. I see some damage to anthropology, but also on a higher level. I was myself struck by something De Koning did not complain about in the interview - the overruling of academic ethics and the breaking of the code of anonymous publication of research, by forcing the anthropologist to give information about individuals (even if he himself sort of 'waivered'). This was perhaps inevitable, I do not know. But was it possible to at least prevent damage? Was there a third way? This is hard to tell. Even complete awareness of the different ways in which professionals view realities and give meaning and interpretation to them, will not always lead us to constructive options. On the other hand, I would plea for an attempt to come to more insight and more interest in both the judicial and the anthropological view and more reflection and evaluation. It is the only thing we, that is judges and anthropologists, can do. A good thing for myself as an appellate judge, was that I felt very informed - after reading all the minutes of the sessions in the bundle and especially the IMES Report – a must for anyone interested in jihadi cases. The damage mentioned above regarding privacy was already done, but I am not blind to the benefits, at least concerning the enriched understanding of the mindset of the defendants. 'Verstehen' is not only the mission for the anthropologist within this type of fieldwork, but also – at least, a challenge - for a judge. I do not know myself what the best way is, in general, to profit from anthropological views, and what to advise judges. It is hard to overcome my perspective as a judge in criminal cases; the framing of trials by De Graaf and De Koning was out of our ordinary routine. On the other hand, I found it useful to be informed about existing research, views based upon, and sustained by, evidence and thoroughness, and the discussions raised in society. Judges should not live in cages or ivory towers. Serious interest in what is going on in society and more specifically in different approaches of law is fundamental for fairness and the integrity of the application of law in court since justice has to be seen to be done.

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