Cultural Difference on Trial

The Nature and Limits of Judicial Understanding

Anthony J. Connolly

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Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom Campbell
Series Editor
Centre for Applied Philosophy and Public Ethics
Charles Sturt University, Canberra

Acknowledgements

The distant origins of this book lie, on the one hand, in the lecture halls, seminar rooms and academic offices of the philosophy faculties of the University of Western Australia and the University of Melbourne which I frequented far too often as an undergraduate student, and, on the other hand, in the courtrooms and community halls and shores and hillsides I attended later as a native title lawyer representing a number of the indigenous peoples of the south of Western Australia. Its origins are at once philosophical and legal, theoretical and practical. It is essentially a work of applied legal philosophy and I am grateful to Tom Campbell and Alison Kirk at Ashgate for including it in this series.

In light of its dual origins, my initial thanks go to those who provided support and friendship back then. Firstly, those philosophers at my undergraduate alma maters who provoked and cultivated my interest in philosophy – notably, Val Kerruish, Uwe Petersen, Chris Cordner, Michael Tooley, Julius Kovesi, Graham Priest and Bob Ewin. Then, my colleagues at the Aboriginal Legal Service of Western Australia in those early exciting years of native title practice in Australia – Greg Benn, David Hyams, Harriet Ketley, Marcus Holmes, Anne De Soyza, Anne Sheehan, Tony Shelley, Catherine Crawford, Margaret Jordan, Greg McIntyre and Rob Riley – and the wise and passionate indigenous people I represented who taught me more about cultural difference, intercultural understanding and indigenous rights than any text could.

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Contents

Chapter 1
Introduction

The Problematic

It has been asserted by various critical and postmodern theorists over a number of years that the agents of the dominant legal systems of liberal democratic nation states such as the United States, Canada, the United Kingdom and Australia are, to some degree, unable to understand the thought and practice of the members of culturally different minority groups inhabiting those states.[1] With reference to indigenous minorities, for example, the Australian indigenous writer and lawyer, Kado Muir, has claimed that, 'legal institutions do not understand Indigenous society, [they] do not understand their relationship with their land, their belief systems, their history'.[2] In relation to Canada's indigenous peoples, the Canadian lawyer and academic, Mary Ellen Turpel, has similarly stated that 'cultural differences are not such that they can be managed within the dominant legal conceptual-framework'.[3] Likewise, the legal theorist Penelope Pether has asserted that, 'it is a commonplace of accounts of indigenous culture ... that connection with the land is at its heart, in a way radically incommensurable with the non-indigenous ... legal consciousness'.[4]

One way of making sense of assertions such as these is to construe them as involving the claim that the legal agents of such jurisdictions – including, most notably, judges – are unable to adequately conceptualize the thought and practice (and associated material artefacts) of the members of different cultures. Such agents do not and cannot possess an adequate concept of culturally different phenomena. As a result, they cannot maintain true beliefs about these things – they cannot know them and respond appropriately to them – in any significant sense. This is what their lack of understanding consists of. Given the nature of the problematic under discussion in this book, we may assume (as the theorists just mentioned assume) that the members of culturally different minorities may be identified as such, independently of knowing the contents of their conceptual

1 See, for example, Foucault (1980), Young (1990), Connolly (1991), Douzinas and Warrington (1991), Derrida (1992), Cornell (1992), Nunn (1997). It is assumed in these claims, as it will be in the discussion to follow, that the agents of dominant legal systems are not members of the culturally different minority groups they encounter in the course of their official duties.

2 Muir (1999) pp. 3–4.

3 Turpel (1990) p. 24.

4 Pether (1998) p. 118.

scheme – for example, by reference to shared genetic properties, historical origins or experience, geographic location, or to language type or other behavioural features. This approach is not inconsistent with that adopted by many anthropologists and social scientists.[5]

Because possessing a concept of an element of thought or practice involves possessing some set of the concepts actually informing that thought and practice,[6] what this claim amounts to is that in their relations with culturally different groups, legal agents do not possess and are unable to adequately acquire some – perhaps, even any – of the concepts which inform the thought and practice of the members of those groups. They do not possess and cannot acquire what I will term, 'culturally different concepts'. Culturally different concepts are those concepts which, from the point of view of a given agent or group, are possessed by the members of a culturally different group.[7] A situation of conceptual difference exists, analysable in terms of an interpretively significant – and again, perhaps even a global – difference in the contents of the respective conceptual schemes of the legal agents and culturally different minorities in question. Further, some degree of *necessity* obtains in relation to this difference. It cannot be adequately resolved or overcome by the acquisition by legal agents of the concepts they lack – no matter what circumstances they find themselves in, *qua* legal agents. We might conceive of this irresolvable difference between the conceptual schemes of the agents in question in terms of an untranslatability or *incommensurability* between those schemes.[8] On this construal, the abovementioned theorists maintain that a significant degree of conceptual incommensurability obtains in the legal sphere as far as culturally different minorities are concerned, comprising both a difference in conceptual schemes and a cognitive-cum-interpretive incapacity as far as overcoming that difference is concerned.

The truth or falsity of the cultural incommensurabilist view is not merely of academic interest. A great deal of concrete, political, social and economic import hinges on it for the millions of people who constitute the culturally different minorities in question here. For if the incommensurabilists are correct, there is little reason to believe that the legal systems of liberal democratic states are able to provide what they purport to provide culturally different minorities by way of minority rights and the like – namely, the meaningful recognition of their ways of life and their effective protection from interference by members of the dominant culture. It would appear that judges, for example, are not able to appropriately recognize, protect or otherwise formally respond to any culturally different thought

5 See Gamst and Norbeck (1976) and Kuper (1999) on this.

6 I will be demonstrating this in Chapter 4.

7 I will also be using the term conceptually different concepts to refer to those concepts which are not, at a given point in time, possessed by the agents of the legal system.

8 Dorit Bar-on (1994) p. 145 defines what he terms cultural incommensurabilism as the view that 'different cultures view the world through conceptual schemes that cannot be reconciled'.

and practice which might come before them at hearing – except, perhaps, by error or accident. If they are right, it would appear that all legal attempts to address the ongoing disruption of distinctive minority cultures by way of minority rights and the like are futile wastes of effort and resources, doomed to failure. Even more problematically, if the cultural incommensurabilists are correct it would follow that by holding out the *hope* of recognition of culturally different thought and practice through a rights regime, the legal systems in question actually obscure the true situation regarding such recognition, distracting minority groups and their supporters from potentially more effective non-legal means of recognition and protection (assuming, of course, that even these were a viable option). This is because, as will be demonstrated in Chapter 4, any such recognition and protection requires a degree of understanding of the culturally different way of life on the part of those legal agents charged with putting into action that recognition and protection. One cannot properly recognize and protect a set of beliefs or practices which one does not understand – to some sufficient degree, at least.

Few would argue that if a legal system is fundamentally disabled from performing its recognitional and protective role because of an inherent conceptual incapacity on the part of its agents, then that incapacity should be understood and appropriately responded to. And if it turns out that that incapacity is not remediable, then those aspects of the legal system which are grounded on the assumption of a conceptual capacity should be abandoned.[9] Nothing is to be gained by maintaining a public institution whose key professed aims are impossible. Likewise, however, if the cultural incommensurabilists are *wrong* in their diagnosis of the conceptual, epistemic and recognitional potential of the liberal democratic legal system, then, given the influence of their thesis within both the academy and broader community, it is important that their error be investigated, diagnosed and publicized. It is important that their own purportedly demystifying thesis be itself demystified. This is particularly so, given the pessimistic and, potentially, quietistic ethical and political outlook such a thesis is liable to engender in regard to cross-cultural relations within those jurisdictions in which culturally different minorities reside.[10] A legal system which is capable of providing at least *some* degree of recognition and protection to culturally different peoples (and potentially a significant degree) should not be subject to a false and destructive criticism, the effect of which might be that system's disempowerment or dismantlement (at least, as far as that recognition and protection is concerned), together with the loss of those benefits it might have been able to provide minorities – limited though those benefits might be. This is quite apart from any theoretical benefits which might be had from debunking a popular but false account of how the world relevantly is.

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9 See, for example, Muir (1999), Pether (1998), Motha (1998), Kerruish and Purdy (1998).

10 On the politically and ethically quietistic dynamic of certain postmodern strands of incommensurabilist thought, see Habermas (1987c), Harvey (1989) p. 117, White (1991) pp. 16–18, Norris (1993) p. 287 and Bauman (1993).

Aim and Structure of the Book

So, are the cultural incommensurabilists right or wrong? Can legal agents come to understand culturally different thought and practice in the course of their duties? If not, why not? And if they can, how does such understanding proceed and what factors at play within the legal system affect their ability to do so? Which conditions governing the engagement of legal agents with culturally different thought and practice are conducive to that understanding and which are obstructive of it? These are the questions this book is concerned with – all provoked by the claims of cultural incommensurabilists such as those mentioned above.

This book's aim, then, is to explore – partly by means of a philosophically and legally informed engagement with the cultural incommensurabilist viewpoint, but more substantively by a sustained positive theorizing of the very nature of thought and practice – the capacity of the modern liberal legal system, through its agents, to understand or conceptualize the thought and practice of culturally different people. More specifically, I want to explore the capacity of what is arguably the key agent within that system, the judge adjudicating a legal hearing in which culturally different thought and practice play a significant role. One common and important kind of such hearing is that involving the adjudication of a formal claim on the part of a culturally different minority for the recognition and protection of some aspect of their culture – for example, a land title claim by indigenous group or a claim for religious rights by an immigrant group. Much of this book is concerned with determining whether, to what extent and (importantly) how a judge in such a case might understand those aspects of the culturally different way of life which are the subject of such a claim and which come before her by way of evidence and argument over the course of a hearing. Despite this focus, though, and by virtue of the structural similarities between such a judicial encounter and the institutionalized encounter of any legal agent – indeed, any public official – with a member of a culturally different minority, this book implicates a more general reflection on and explication of the cross-cultural potential of the state and its agents at large.

As I shall argue in Chapter 2, the thought and practice of a group or a person may be analysed in terms of action and its mental – and, specifically, intentional – content. Thus, a more narrowly formulated aim of this book is to inquire into the capacity of a judge acting within the context of a legal hearing to understand culturally different *actions* – that is, actions performed by the members of other cultures whose intentional content is (necessarily) informed by culturally different concepts. Even more precisely, the focus of much of the discussion to follow will be on those culturally different actions which are informed by concepts which are not, at the commencement of the hearing, possessed by that judge – that is, actions which are both culturally and *conceptually* different as far as the judge is

concerned.[11] These pose a particular challenge for a theoretical project such as this and constitute the kind of actions which cultural incommensurabilists are most concerned with. I will argue in Chapter 4 that in order to understand a culturally and conceptually different action a judge must acquire some epistemically sufficient set of the concepts informing that action. Given that the only means by which she can do this over the course of a hearing is by means of her interpreting or otherwise cognitively appropriating relevant and admissible evidence about the action and its conceptual content, this book comprises not merely an inquiry into the judicial understanding of such actions but also an inquiry into the capacity of a judge to acquire culturally different concepts and to interpret evidence about those concepts and the actions they inform. It comprises an integrated inquiry into the epistemic, conceptual and interpretive capacities of judges under conditions of cultural and conceptual difference. As such, it is concerned to outline the epistemic, conceptual and interpretive conditions which prevail within the legal hearing process – its epistemic, conceptual and interpretive architecture, if you like. Its ambitions are that broad.

My inquiry into these things proceeds on the basis of a philosophically naturalistic – and, more precisely, physicalistic – metaphysics and methodology. According to this approach, all of the phenomena invoked in the judicial understanding of culturally different actions – concepts, intentional states, actions, cultural difference and the very process of understanding these – are an integral and ordinary part of the natural world, metaphysically continuous with all of the other things in the world. There is nothing supernatural – that is, metaphysically distinct in the traditional dualist, as well as contemporary postmodern sense – about these things, contrary to what many cultural incommensurabilist theorists seem to believe.[12] They are not (fundamentally, at least) of a different nature from the other things existing in the world – things like tables and chairs, judges and courtrooms. They coexist in the world alongside and in the same way as these other things. Like these other things, they may be usefully theorized as 'higher-order' phenomena, ultimately comprised of and made real (realized) by the basic physical stuff of the universe, and individuated as the specific kind of phenomena they are by their functional relations or causal interaction with other things in the world.

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11 Actions which are engaged in by agents from a different culture to that of the judge and which are informed by concepts which the judge does not possess at the commencement of the legal hearing.

12 Historically influential incommensurabilists of a dualist stripe include Sapir (1949), Whorf (1956), Levy-Bruhl (1979), Levinas (1969 and 1985), Foucault (1971 and 1980), Derrida (1976, 1978, 1992 and 1998) and Lyotard (1988). See Norris (1993) and Foley (1997) on the influence on these theorists of the dualist metaphysics of Kant. Of the theorists quoted in the early part of this chapter, both Pether and Motha rely explicitly on the dualistic metaphysics of Derrida.

As natural phenomena, we can gain valuable insights into all of the various things implicated in the judicial understanding of cultural difference by means of our best theories and methodologies to do with the natural world – those of the natural sciences and related social sciences, including neurophysiology, developmental psychology, linguistics and sociology. As a result of its metaphysical and methodological articulation with these sciences, the naturalistic approach adopted in this book is not only able to provide a philosophical understanding of things that is more coherent and consistent with the phenomena than that offered by its dualistic and non-naturalistic rivals, but it is able, over the course of its inquiries, to productively exploit the best findings of our current science about human thought and practice. This is not an insignificant theoretical advantage and I will strive to exploit it as best I can in the discussion to follow. I will have more to say later in this chapter on those aspects of the naturalistic metaphysics and methodology which most importantly inform my later analysis.[13]

That analysis proceeds as follows. In Chapter 2, I provide a naturalistic account of the object of judicial understanding – namely, culturally different action and its associated intentionality. The chapter commences with a simple theory of action informed by certain widely held ideas within contemporary analytic philosophy. On this account, actions – including culturally different actions – comprise an interrelated 'psycho-physical' complex of mental and behavioural events. I go on to analyse the philosophically problematic mental aspect of action in terms of behaviourally causal sets of intentional states – sets of beliefs and desires possessing propositional and conceptual content – governed by law-like regularities we traditionally refer to as rationality. Following this, I pursue a sustained theoretical inquiry into the nature of intentionality with a view to defending both the ontological status of intentional states (together with their conceptual content) within a naturalistic ontology, and the epistemological status of our various expert and folk discourses about such states within a scientifically sound system of knowledge. The substance of my analysis of intentional states here is that they are higher-order, physically realized and behaviourally causal states, individuated by their causal-functional role within a broader 'system' of things comprising the behavioural interaction of an agent with her external environment. This is to say that I elaborate what is known in the philosophy of mind as a functionalist account of intentionality and its conceptual constituents. I close Chapter 2 by supplementing the rather individualistic and atomistic account of actions developed in its early stages with a working model of those collective and more complex culturally different sets of actions most likely to come before a judge as the subject matter of a legal claim – for example, religious and other

13 Some might query why I place so much emphasis on metaphysical matters in a book such as this. My response, simply, is that *metaphysics matters* – both to the quality of our understanding of things and to the nature and effectiveness of our interventions in relation to those things.

cultural practices such as rituals, ceremonies, economic practices and the like. These can only be properly understood in their complex entirety.

The physicalist and functionalist account of action and intentionality offered in Chapter 2 provides a philosophical basis for the analysis of the judicial understanding of culturally different action, the judicial acquisition of culturally different concepts and the judicial interpretation of evidence about such action and concepts which follows in Chapters 4 and 5.[14] Prior, though, to the substantively philosophical discussion of those chapters, Chapter 3 provides a degree of concrete legal context for that discussion by presenting an overview of an area of law within which the judicial understanding of culturally different action is commonly pursued in a number of common law jurisdictions – that of indigenous land title law. By virtue of their relatively standard legal form and content, indigenous land title cases embody the theoretically significant aspects of most kinds of legal matters involving cultural difference. In this chapter the concept of indigenous land title is analysed with a view to clarifying the various properties which a set of culturally different indigenous actions must possess in order to obtain the recognition and protection offered by a positive determination of indigenous land title. The fundamental role played by this concept within the epistemic and interpretive practices of judges is clarified in some detail. Following this, those stages of the indigenous land title determination hearing process in which a judge is called upon to interpret evidence about culturally different concepts and actions (and on that basis, potentially acquire those concepts and understand those actions) are identified. With information in hand about the nature of a paradigm procedural and conceptual context within which a judge is called upon to interpret evidence of culturally different concepts and actions, acquire such concepts, and understand such actions, the legal and practical relevance of the substantially philosophical chapters to do with concept acquisition, cross-cultural understanding and conceptual incommensurability which follow may be better appreciated.

In Chapter 4, I return to a more substantive philosophical discussion by establishing and elaborating on the connection between judicial understanding and concept possession which was mentioned earlier in this chapter. This discussion points to the fact that where a judge does not possess culturally different concepts at the commencement of the determination hearing, she must acquire them over the course of that hearing. That is, under conditions of relevant conceptual difference, judicial understanding necessitates the judicial *acquisition* of culturally different concepts. In order to make sense of the nature and possibilities of any such acquisition, I proceed in the second part of Chapter 4 to outline a general definitionalist account of the nature of concepts. This, in turn, provides the basis for a detailed general account of the possession and acquisition of concepts by agents, including judges, which follows. The discussion throughout this part draws on (and is, I argue, the account most compatible with) the physicalist-functionalist

14 In Chapter 4 I address the first two of these and in Chapter 5, the last.

theory of action and intentionality articulated in Chapter 2. It sets the scene for the account of conceptual difference – its nature and its origins – which follows in the latter part of Chapter 4. I conclude the chapter with some preliminary comments, arising out of the discussion there, about the possible limits of such difference, flagging later detailed discussion in Chapter 6.

In Chapter 4, I argue that where a judge does not possess culturally different concepts at the commencement of the legal hearing, she must acquire them over the course of that hearing. In Chapter 5, I follow this up with an argument that the key *means* by which a judge acquires culturally different concepts over the course of a hearing is by interpreting testimonial evidence about those concepts and the culturally different actions those concepts implicate. Much of that chapter is concerned with presenting a physicalist and functionalist account of the nature of such interpretation. Reflecting the methodologically monist tendencies of physicalist naturalism at large, in Chapter 5 I adopt and defend a methodologically monist view of interpretation according to which it constitutes a mode of the naturalistic explanation of higher-order phenomena – in this case, the explanation of testimonial behaviour with reference to that behaviour's intentional cause – which is in no significant respects different from any other kind of explanation offered in the natural or social sciences. Committing to a theory-theory approach to the interpretation of action which has been highly influential in contemporary analytic philosophy, as well as psychology and linguistics, I explore the role played in judicial interpretation by the judge's (largely) folk-psychological theory of agency, theory of mind and theory of the testimonial agent, noting how these theories are applied by the judge in response to and in interpretation of evidence led at hearing. I explore briefly the role of the notorious 'principle of charity' within the interpretive process and distinguish my views of that role from those of noted interpretation theorists such as Donald Davidson and Daniel Dennett.

Chapter 6 relies heavily on the discussion in Chapters 4 and 5. In it I turn my attention to the important question of the limits of conceptual incommensurability within the legal sphere – that is, the extent to which a judge might be incapacitated from understanding culturally different actions. I do so by critically engaging as a physicalist and functionalist with an (admittedly) extreme but heuristically valuable construal of the cultural incommensurabilist position mentioned earlier. This construal, which I term the radical cultural incommensurability thesis, maintains that as a matter of theoretical necessity no judge possesses or is able to acquire any culturally different concept. Over the course of Chapter 6, I rely on various findings in recent neuroscience and developmental psychology, as well as on certain lines of thought in contemporary analytic philosophy, in mounting a series of arguments rebutting the two limbs of this thesis – that asserting the necessity of a radical conceptual *difference* obtaining between judges and culturally different agents, and that asserting the necessity of a radical conceptual-acquisitive *incapacity* afflicting judges in relation to culturally different concepts. In the course of this discussion, I identify and elaborate on the nature and interrelationship of those factors which affect the judicial understanding of culturally different actions.

It is important to note here that the critique of the radical cultural incommensurability thesis in Chapter 6 is pursued not in order to engage with or rebut the views of any particular incommensurabilist theorist but to provide a strategic and heuristic means by which I might inquire into and provide a positive and naturalistically sound account of the nature and limits of (as well as the factors affecting) judicial understanding under conditions of cultural and conceptual difference. In critically engaging with the thesis I do not mean to imply that it represents the views of any actual theorist, including any of the cultural incommensurabilists mentioned earlier in this chapter. It need not represent any actual theorist's views in order to effectively perform the role I am assigning it in this book. Consequently, no charge can be maintained that in utilizing the thesis in the manner I do I am misrepresenting or distorting the views of any theorist or group of theorists. This is not to say, of course, that the outcome of my inquiries will not be of relevance to the views of any actual incommensurabilists, including more moderate ones. By identifying the naturalistic limits of incommensurability, it certainly will.[15]

The upshot of my critique of the radical cultural incommensurability thesis in Chapter 6 is that a significant (though not a global) degree of conceptual difference between a judge and a culturally different agent or group is contingently possible, but not necessary. The degree of difference which obtains in relation to a given judge and a given set of culturally different concepts at a given point in time depends for the most part on certain contingent facts to do with the judge's prior conceptual development, the nature and relevance of which I describe in Chapter 6. Likewise, it is contingently possible (but again, not necessarily the case) that a judge not be able to acquire a culturally different concept or set of concepts over the course of a legal hearing. Again, whether she can or cannot depends on two contingent factors – the concepts already possessed by the judge at the commencement of the hearing and what I term the epistemic conditions which obtain over the course of the hearing.[16] A failure of judicial understanding – even a widespread failure across the whole of the judiciary in relation to all culturally different actions which might be subject to claim – is entirely possible within the legal sphere. But, equally, a successful exercise in judicial understanding is possible, for any and all judges and for any and all culturally different actions. Everything here depends on the content of the judge's conceptual scheme at the

15 I might add here that the *prima facie* implausibility of the radical cultural incommensurability thesis also provides no grounds for not utilizing it in the manner I intend. The very nature of and reasons for its implausibility are of prime importance to the project I have set myself in this book.

16 These conditions include the sensory and cognitive capacities of the presiding judge, the availability of evidence about the culturally different concept or action in question, the legal norms regulating the use of any such evidence, and the quality of the hearing environment.