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Legal culture

Nicolas Peterson
Director of the Centre for Native Title Anthropology
Australian National University

> Between the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them (to my mind the defining feature of legal process) and the schematization of social action so that its meaning can be construed in cultural terms (the defining feature, also to my mind, of ethnographic analysis) there is more than a passing family resemblance … they are alike absorbed with the artisan task of seeing broad principles in parochial facts (Geertz 1983:170, ibid).

Going to court is expensive in Australia and generally people only go to court when they cannot solve difficult problems or disputes themselves. This raises the obvious question: why are the courts expected to be able to solve disputes if the parties themselves cannot do it? What are the techniques that lawyers, judges and courts use in these difficult situations. Understanding legal culture helps explain how courts can do what the individuals themselves cannot.

In what follows I draw on my experience as an anthropologist working with lawyers and the legal system, principally in land and native title claim contexts, but also in philanthropic contexts, and from some limited reading on the history of the English legal system. I have no legal training. However, this legal culture is fundamental to our western bourgeois culture with its emphasis on fairness, equality, human rights, due process, democracy and the rule of law.

I will begin with a brief discussion of how the common law came about, the distinction between criminal and civil law, before turning to how lawyers think and the working of judges and their courts.

The common law and precedent

The watershed in the history of English law came with the conquest of England in 1066 by the French speaking William the Conqueror. It is from the French that we get many of the words associated with the law such as plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury.

Prior to 1066 there were local and county courts held by feudal rulers of different rank, at a time when the country was divided among a number of kingdoms. The right to hold a court and to profit from it was an essential hallmark of a feudal ruler. With William's arrival, all land became vested in the King and the administration became more bureaucratic. In the 12th century four itinerant 'judges in eyre' (travelling judges), as they were called, were created to represent the King, to oversee the activities of the local and county courts, and to ensure the King received his share of the funds from the courts such as licence fees and fines. As these itinerant judges settled cases they established precedents to be followed in similar cases and thus began the emergence of the application of standardised laws and procedures, so that there was some predictability with people committing similar offences being treated in a similar way across the kingdom. This marked the emergence of the common law based on the precedents of settled cases, that can also be referred to as legal doctrine.

Precedent means that judges are bound to treat as binding the essential legal grounds of decisions adopted in similar cases previously determined in courts of equal or higher status. The other ways in which judges are bound are by acts of Parliament (statutory law) and the constitution. Generally speaking, constitutional rules trump statutory laws, and statutory laws trump common law rules. Thus, legal decision making is decision making in the circumscribed circumstances of defined precedents or provisions of Acts in specific contexts. This is why the conventions of legal interpretation and logical thinking are so

important. The fact that judges have always had a role in developing the common law has been an often unacknowledged and contentious issue (see Wooton 1995).

Criminal law versus civil law

We can assume that when our forebears were hunter-gatherers the basic rule was an eye for an eye and a tooth for a tooth, that is the individuals who suffered had to secure their own justice, as say in the case of the murder of a close relative. Today, of course, murder is an offence against the Queens's (originally King's) peace because to allow individuals to seek their own revenge is a threat against public order, so the crown or government takes on the responsibility for prosecution. While the King's peace emerged in Anglo-Saxon times it was entrenched nationally by the reign of Henry II (1154-1189). Nevertheless, the right of private prosecution in the criminal justice system remains despite a professional police force and public prosecutors as for instance in cases where the police will not prosecute. In the vast majority of criminal cases it is the 'state/government/crown (Rex/Regina)' against the alleged offender. In civil cases, however, it is person/'person' versus person/'person' (where 'person' may be a legal person such as a corporation, and nowadays even a river).

How lawyers think

The core of legal thinking is being careful, precise, unemotional, and using logical deductive and inductive thinking. Importantly it involves the ability to be able to look at and to argue an issue from all sides without stating a position, and to be sensitive to ambiguity. Legal thinking also emphasises the ability to think defensively about the worst outcomes. While this is obviously important, the downside is that many lawyers are better at negative analytical thinking, pulling an argument or evidence apart, than they are at creative thinking. Lawyers are also characteristically deferential to legally constituted authority.

Of course, a lawyer appearing as an advocate will be reasoning differently from a judge. They will be seeking to be persuasive, as much as logical, and as such they may be inclined to conceal facts and to play on people's emotions. So

while the anthropologist as expert witness has a primary duty to the court and to the truth, regardless of who hired them, the lawyer advocate is likely to be conducting themselves quite differently.

The working of judges and their courts

Courts are location in which conflict is engaged in through words over concrete issues. This makes words, their meanings, and how they are to be interpreted, given the semantic complexity of most words, a central issue in the highly formalised form of engagement in adversarial proceedings.

One of the principal factors guiding the working of the courts are the rules of statutory interpretation, that is how the courts are to implement the Acts of Parliament and the Constitution. There are four basic rules of statutory interpretation (but a lot of complexity if one goes into the details):

> The Literal rule: as the name implies a statute is to be interpreted according to the literal meaning of the words. We have an excellent example of this at work in the Aboriginal Land Rights (Northern Territory) Act 1976 when the word 'local' in the phrase defining a traditional owner, 'local descent group' was initially understood to actually mean patrilineal, following the Radcliffe-Brown land ownership model. After only two land claims cases it was argued that taken literally 'local' meant that it could apply equally to descent links to a locality through women as well as to links through males.
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> The Golden rule: this is where the application of the literal rule goes against the Parliament's intentions, or it is necessary to avoid absurdity and inconsistency. Thus, if bigamy is defined as being married to two people at the same time, that makes no sense as one can only be legally married to one person, so this is where their Golden Rule would come in.
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> The Mischief rule: this relates to bearing in mind what mischief or defect the law is trying to remedy.
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> The Purpose rule: from the long titles of Acts, their preambles, their definitions but also the debates in Hansard on the bill leading up to it becoming an Act, the intention of Parliament in passing the Act should be clear. Thus, in the case of land rights legislation such as the Aboriginal

> Land Rights (Northern Territory) Act 1976 it is clear that this is beneficial legislation. The government did not have to enact this legislation but chose to do so to achieve a range of beneficial purposes which are relevant to how a judge should interprets the wording and sections of the Act and their general attitude in any matter coming before them under this Act. I should emphasise in passing that it is not just meant to be beneficial to Aboriginal people but for the population at large because it is hoped it will go some way to ameliorating some of the justified grievance in relation to land issues.

The principal task for the trial (initial) court is to establish the evidence, that is to create the facts on which the case is to be decided with the aid of witnesses, and lawyers. In the conduct of any hearing the Judge is highly dependent on the barristers who have the carriage of the case because they decide how it will be organised and the evidence and witnesses to be presented. This is done in an adversarial context in which there are strict rules about the admissibility of evidence, which can be tested by all parties. Admissibility covers, relevance, privilege, testimony (oral evidence given under oath), expert opinion, and hearsay among other things. Cross-examination is designed to damage a witnesses' expert evidence and or credibility. In this context one of the specific professional skills judges are assumed to develop is the ability to assess the reliability of witnesses and hence the weight that is to be given to their evidence.

This emphasis on evidence and admissibility underlines the central function of the court hearing. To create the body of evidence on which either the judge, or a jury if the case is one with a jury, are to make their finding. This will be mainly the transcript of proceeding but also any documents or other material admitted in to evidence. Knowing that it is getting particular evidence or information on the transcript helps one understand what the barristers are doing in their questioning and why at times the less skilled, stop quite suddenly and switch to another topic, often to the confusion of Aboriginal witnesses. The barrister has got what they want on the transcript and they do not want the matter complicated by further discussion. The link between evidence and accountability rests on the requirement that the judge must

publish their reasons for judgement, and that the case can be appealed. Should a native title case go on appeal the single Federal court trial judge will be replaced with three Federal Court judges (the so-called 'full bench') who will assess the due process and reasons for judgement. Any further appeal goes to the final arbiter, the High Court. This full sequence can take up to ten years in native title cases.

The formality of this summary belies, as Paul Burke has shown so well in his book, 'Law's Anthropology' (2011: Chapter 1), the extent of the scope and leeway for judges to influence what the facts are, and how the levels of ambiguity inherent in language generally, open up ample scope for influences from outside logical reasoning to come into play, even if the nature of the style in which reasons for judgement are written, tends to conceal this. As the anthropologist Max Gluckman observed: 'the certainty of law depends on the uncertainty of its basic concepts' (in Rosen 2006: 92).

Conclusion

To return to the original question of how it is that the courts can resolve disputes when the individuals involved cannot do it themselves. They can do it because they simplify the issues by focusing the field of discourse within the context of the relevant statutory and common law, the strict rules about evidence and logical argument. Further the legal system offers an authoritative finality, with the full backing of the state, once avenues of appeal have been exhausted. This does not mean that the character of those involved, matters of ideology, informal exchanges of everyday professional life, and possibly even domestic life, do not influence decisions. This is self-evident, for instance, in the way legal pundits can often pick how the High Court will split on a decision.

I have not addressed how all this relates specifically to native title nor the practical matter of how you, as a writer or an expert witness can effectively engage with the court, as we will be dealing with this issue over the next two days but it is important to remember that native title cases are not primarily exercises in anthropology. They are exercises in applying public policy, as reflected in legislation and precedent, to achieve outcomes where clarity and certainty are central (see David Martin (2000) on the recognition space).

The foregoing sketch of legal culture underlines the importance of having a good grasp of the system one is involved with as people working in the area of native title – a topic I have by no means exhausted here. But even if we are caught up in it, it is important not to surrender our role as ethnographers of legal practice and culture, but we should keep our lens firmly turned on to it, outside of our native title work. We should continue to develop our understanding of the limits of legal culture, practice and thinking, especially as it is one of the principal modes of organisation by which Aboriginal individuals, groups and communities are articulated with the encapsulating society. While the legal process is vital to the recognition of Indigenous rights we need to work to ensure that there is a stronger social science sensibility, above and beyond the legal, in thinking about the organising of this articulation if we wish to help maximise the benefits native title can have for Aboriginal people.

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