Introduction to the 'Law and Anthropology' workshop
to be held at the Mercure Hotel, Alice Springs, 14-15 March 2019
organised by the CNTA

Law, Anthropology and Policy

Nicolas Peterson
Australian National University
Director CNTA

Lawyers, courts and legal systems have been powerful instruments in helping indigenous peoples achieve recognition and social justice worldwide. They overshadow any contribution by anthropologists, despite anthropologists' long-term commitment to these same goals. The legal achievements have been largely based on universalist principles, natural justice, human rights, and international conventions, rather than cross-cultural understanding.

In Australia, law and anthropology have now, however, been thrown together in the implementation of social justice policy through the land and native title claims process raising the issue of how the anthropological cross-cultural perspective should fit in.

The role of anthropology in the claims process has mainly been seen as a technical one of helping lawyers meet the legal requirements as to who are the right people to be dealing with in respect of any area, where that area is and what are the rights and interests various categories of Aboriginal people have in it.

Such is the perception of the anthropologists' purely technical, not to say clerical, role in the eyes of some legal practioners, that some practioners can feel anthropologists are really redundant, although there are many others who hold an opposite view.

The dismissive view is reflected by a respondent party barrister addressing the court during final submissions in Harrington-Smith v State of Western Australia (Wongatha) (information and quote from Glaskin 2017:84):

> [The applicants' lawyer] places anthropological evidence on too high a pedestal: anthropology is not a technical science it's a social science – to suggest that the court cannot make a decision about this [case] unaided by anthropological expert evidence is ludicrous. The best evidence is the applicant evidence and the court and we [legal personnel] are quite capable of understanding that and the historical evidence.

This points to a real issue. An anthropologist who writes a clear and well analysed report for a native title claim, or indeed any other matter, is in danger of having their understandings and analysis naturalised and treated as common sense because everything people hear falls into place, even where it may be contradictory, imprecise or expressed in regionally specific non-standard English. But common sense is dangerous as it brings ideology into everyday discourse unrecognised and is certainly not useful in thinking about policy for the future in a time of change.

A not unrelated legal view of anthropology that also sees it as unimportant is from legal practioners who have enormous faith in the workings of the legal system. In their view such is the power of the rational thinking and inquiry that judges and legal practioners bring to the court, and of the adversary system, that the process will produce the right results with or without anthropological intervention.

But what are the right results? And are there any consequences flowing from down-playing both the day-to-day and the long-term contribution anthropologists can make?

One could argue about specific cases and whether the anthropological contribution was essential or not. The Mabo case would be an interesting example as Paul Burke has shown. Mr Justice Monynihan's dismissal of the Indigenous evidence on the general grounds that people were telling him what they thought he wanted to know and that most of it had been learnt from books, rather than as part of a long standing oral tradition, placed a huge responsibility

on the anthropologist, Jeremy Beckett. It is not too strong to say that he helped save the day.

However, as important as his contribution was, and any others like it have been for Indigenous people, this kind of reporting on the workings of the traditional system, explaining the intricacies of kinship structures and translating the meanings and significances of esoteric practices, should not be seen as the sole contribution of anthropology.

It is important not to overlook the broader perspective anthropological understanding can bring to policy formation because of its holistic cross-cultural concerns especially when married to how things actually work out on the ground, or the fact that anthropologists are one of the main group of people in contact with Aboriginal people helping them to understand land related policy as well as implementing it and working with them to solve problems. Anthropologists employed by organisations are one of the main conduits keeping organisations up to date on local community developments as well as emerging trends, which is especially important in contexts where there is intensive change both in Aboriginal communities as well as the policy world.

How useful is it, then, to approach the way we recognise and institutionalise Aboriginal relations to land in remote Australia simply on the basis of conventional economic reasoning and its legal correlates when all the evidence is that they do not apply in any simply way or regardless of how they articulate with desired social outcomes? Is this the best we can do in helping Aboriginal people deal with their encapsulation? Does it make for good social policy and the best outcomes? And what, indeed, is good social policy or the best outcomes?

These latter issues lead into problematic territory where it is difficult to have reasonable public debate because the debate almost immediately becomes politicised, partly because of differing ideas about the nature of a good life, about the extent of the state's responsibilities and about what constitutes social justice in any context. Discussing alternative ways to organise the recognition of Aboriginal tenure or ways to articulate it with the mainstream also means considering the aims and end-game of policy and how to get there. These are also contentious issues.

There could be several reasons for policy makers conservatism and ignoring of anthropological input. By following the conservative path, it is easier to avoid accusations of treating Aboriginal people differently, of being discriminatory, or of paternalism. It is the path that flows from the dominance of economic thinking in policy formation and is the cautious way to proceed.

A more pragmatic reason for this choice could be the assumption that it is inevitable in the longer run that Indigenous people in remote Australia will become better integrated into the wider society over several generations and be dependent on selling their labour like other Australians if they are to reach statistical equality, not just economically but in terms of health and relations with the legal system. In this view treating Aboriginal people now little differently from the population at large will speed up this inevitable process.

A more important reason for this as a default position is because the futures and issues for which Aboriginal people in remote communities have the passion and energy to drive change *of their own accord* are generally quite obscure. This makes any move away from the mainstream particularly fraught, even if the downside is that from time to time some policies are labelled assimilationist. The last time that the kind of futures and life projects widely envisaged by Aboriginal people in remote Australia were evident, was with the outstation movement. Without passion and energy for change and development coming from within the Aboriginal population, *ambitions held for people* will always be problematic and unlikely to ever be self-sustaining beyond the support given to them by outsiders. This, then, may be the case for simply muddling along, trying various policies to change things to meet national standards in a piecemeal way, and seeing what works. But that seems weak when there is so much evidence about the flaws in such an approach and concern about the ineffectiveness of policies like closing the gap.

Where do the conventional views of the positive effects of individualised property ownership leave policy makers when it is clear that some of the consequences of hanging on to these views in remote communities are having negative effects and running into cross-cultural realities? Take the issue of entification (e.g. see Jagger 2011).

The recognition of Aboriginal property rights by the Australian legal system inevitably introduces changes to the Indigenous systems. The Aboriginal systems and the mainstream system are related to quite different economic circumstances, have quite different characteristics and very different purposes. The Indigenous systems give recognition to the social relations around property through ritual in small-scale networks, with considerable flexibility, ambiguity, levels of contestation, and ideas of inalienability. Our system by contrast creates defined objects owned by defined persons for the purposes of alienation which requires clear definitions and certainty. The consequence is entification.

Entification is a neologism meaning simply the creation of entities such as a royalty association or other corporate bodies or entities. Entification creates silos, which seemingly have a reasonable fit with the idea of unilineal descent groups. Classically unilineal descent groups are important in Aboriginal ritual life and relations to land, but in most regions, there are also complex interdependency of people in the descent group with people outside the descent group, most clearly with people often referred to as managers/kurtungurlu, but in a number of other ways as well.

Entification has created numerous entities; indeed, we know that there are over 4000 such Aboriginal entities across the nation. Marcia Langton (2015) and others have emphasised the burdensome reporting involved, but there is a more general issue. How well does the splitting created by entification work with development and community development in remote Australia?

The negative effect of this entification on regional development in most situations will become increasingly evident with the proliferation of un-supported PBCs even if it does serve a purpose. Encouraging entfication is a manifestation of conventional ideas about property ownership as the engine for development, and self-sufficiency and a long-held strategy of government to depoliticise the Aboriginal constituency as reflected in the recurrent threat to split up the Territory land councils (e.g. see Reeves 1998; Thorburn 2017: 94).

Yet the case for professionally run regional Aboriginal resource organisations is compelling even though there are plenty of Aboriginal people to speak for themselves. The articulation of their desires with the many policies, needs the on-going socio-cultural facilitation provided by anthropologists and others as in

respect of land. Even the mining industry eventually accepted that they benefitted from well-funded and staffed regional organisations given the very complex social, cultural, political and economic environment of remote Australia.

If this is true of land rights, the question is why would the need for anthropological and other facilitators be any different in respect of native title in remote Australia. As Mr Justice North has asked, how much sense does it make to invest enormous sums of money in establishing whether native title can be recognised while neglecting how those rights could be managed or utilised once gained (in Thorburn 2017: 90).

So, we can ask what does it take to make high quality professional regional organisations work and what does the level of support tell us about the complexities of the cross-cultural environment in remote area? One measure of what it takes to make it work is the amount the land councils cost to run. The combined annual budget of the NLC and the CLC budget is $87million which between them have 453 staff. With an estimated 64,000 Aboriginal people in the Territory that works out at $1360 per head

Accepting that there are some significant differences between the Kimberley region and the Territory it is of interest to apply these Territory figures to that area in respect of native title. Working with ballpark figures there are c.18,000 Aboriginal people there, which at $1360 a head would be $24.48 million. I do not know what is actually being spent or proposed to be spent on native title implementation at present but if one takes the $70,000 being offered to PBCs, knowing that there will shortly be 18 in the region, and double by the time the claims are over, it seems that the government thinks that between 1.26 million and 2.52 million is all that is required to make native title work as the engine of development.

These figures make the dismembering of the Representative Bodies despite all the effort that went into creating them and launching them and a host of mainly asset free PBCs into the world of market forces to drive development, a triumph of ideology over evidence.

We know the thinking behind this view: it was reiterated yet again this time by John Eleferink in the Centralian Advocate 1 Feb 2019. Because Aboriginal title is not individualised and alienable (see Terrill 2015; 2018; Yarrow 2015) it is holding development back. As a widely held common sense position it does not need evidencing to be accepted, and yet flies in the face of the anthropological and other evidence for why social change and development is slower than government would like. It has very little to do with inalienability and collective ownership and a lot more to do with the realities of the cross-cultural environment.

These realities pose a fundamental concern for policy makers intent on development. Does giving some recognition to these realities and heeding anthropological views simply lead to the reproduction of the very beliefs and practices that stand in the way of policy goals and thus make some policy wallahs suspicious of anthropologists? On the other-hand does completely ignoring the cross-cultural realities work?

The issue of the relationship of individual to collective benefit in outcomes for social policy which is central to these different policy views and is being aired again in the town leasing inquiry documents, which is overwhelmed by conventional thinking. Given that all members of remote communities are living in more or less the same poor material circumstances and that those material circumstances are recognised as a legitimate cause of complaint, helping to substantially improve the circumstances of just one or two groups because of accidents of geology or history through entification and rigid economistic thinking, does not seem helpful. Do the policy makers know that probably less than 10% of remote dwelling Aboriginal people live on their own land? If they do why are they ignoring it?

Conclusion

I began by asking why more value has not been placed on the work of anthropologists in the formulation and day to day implementation of social policy in relation to land when law and anthropology came together to implement these policies. Apart from the risk aversive nature of legal thinking, I see the real problem to be the economistic thinking of policy makers who cannot breakout of the views about privately held land as a key development

driver in every contexts and the view that cross-cultural complexities are an obstacle to this realisation. Of course, in one way they are right: if Aboriginal people in remote communities were just like us there would be no problem. Accepting that there are different realities out there and that other people are as wedded to their way of being in the world as economists are to theirs, is very difficult for most policy makers. That is where anthropologists come in, not speaking for Aboriginal people, but in the crucial inter-cultural facilitation role of where policy meet Aboriginal socio-cultural realities.

Without better and more realistic analyses of the socio-cultural situations in remote Australia the expectations that the property rights that come with exclusive possession or strong native title will contribute to the realisation of policies like closing the gap, and economic transformation are likely to be frustrated in most places. Anthropology certainly does not have all the answers about what to do, but nor does ignoring socio-cultural features of life in the region and simply treating native title holders like any other property holders. It is a major challenge for social policy makers and Aboriginal organisations that it is so often unclear as to what widely shared passion and energy for change Aboriginal people have, even if it is easy enough to list their complaints and dissatisfactions.

That makes it all the more important that native title holders, especially those without any resources, can get good advice and the help they need from their own professionally run organisation that involve both lawyers and anthropologists in the formulation and the implementation of policies that take account of the enduring significance of the cross-cultural.

Acknowledgements

Many thanks to Julie Finlayson for a critical reading of a previous draft. Thanks to Bill Kruse for a speedy reply for a request for information.

References

Austin-Broos, D. 2006. ‘Working for’ and ‘working’ among the western Arrernte in central Australia. Oceania 76(1):1-15.

Burke, P. 2011. Law's anthropology. Canberra: ANU Press.

Glaskin, K. 2017. Crosscurrents: law and society in a native title claim to land and sea. Perth: UWA Press.

Jagger, D. 2011. The capacity for community development to improve conditions in Australian Aboriginal communities. Unpublished MPhil, Australian National University.

Langton, M. 2015. Maximising the potential for empowerment: the sustainability of Indigenous native title corporations. In Native title from Mabo to Akiba: a vehicle for change and empowerment (eds.) S. Brennan, M. Davis, B. Edgeworth and L. Terrill. Sydney: The Federation Press. Pp.171-183.

Peterson, N. nd. Culture, development and the future of remote Aboriginal communities. In A contrarian life: biographical and anthropological essays in honour of Peter Sutton (eds.) Julie D. Finlayson and Frances Morphy. Adelaide: Westfield Press.

Reeves, J. 1998. *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*. Canberra: Australian Government Publishing Service.

Staines, Z. and Moran, M. 2019. Complexity and hybrid effects in the delivery and evaluation of youth programmes in a remote Indigenous community. Australian Journal of Public Administration. Pp 1-23.

Terrill, L. 2015. Hernando de Soto and empowerment through land tenure reform. In Native title from Mabo to Akiba: a vehicle for change and empowerment (eds.) S. Brennan, M. Davis, B. Edgeworth and L. Terrill. Sydney: The Federation Press. Pp. 213-228.

Terrill, L. 2016. Beyond communal and individual ownership: indigenous land reform in Australia. New York: Routledge.

Terrill, L. 2018. Township leases and economic development in Northern Territory Aboriginal communities. Monash University Law Review 43(2):463-491.

Thorburn, K. 2017. A regional governance structure for the Kimberley? Twenty-five years on from Crocodile Hole. Australian Aboriginal Studies 17 (1): 86-98.

Yarrow, D. 2015. The inalienability of native title in Australia: a conclusion in search of a rationale. In Native title from Mabo to Akiba: a vehicle for change and empowerment (eds.) S. Brennan, M. Davis, B. Edgeworth and L. Terrill. Sydney: The Federation Press. Pp. 60-74.