Concepts, Culture and Experience

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My response to this work is informed by my experiences as an anthropologist who has worked on litigated native title claims,[1] and as an anthropologist interested in psychological processes. Most of what I have to say is directed towards Connolly's approach to culture, although I discuss native title litigation briefly towards the end of my response.

Connolly says he commits to a 'theory-theory approach to the interpretation of action... to explore the role played in judicial interpretation by the judge's (largely) folk-psychological theory of agency, theory of mind and theory of testimonial agent'.[2] A 'theory theory' approach emphasises the 'essentially cognitively mediated processing of other's observed behaviour by means of implicit folk-theoretical knowledge,' and contrasts with a 'simulation theory' approach, 'the embodied ability to experientially simulate the experience of another'.[3] Part of my response to this book, which I elaborate below, is that this emphasis on the cognitive at the expense of the experiential has the effect of rendering culture and cultural difference as some kind of disembodied 'thing' that can be acquired in abstract form. On the basis of his physicalist approach, for example, Connolly is able to say that 'to the extent that the phenomena posited by dualistic cultural incommensurabilists in their account of understanding and difference are not physically realized, then their account is an illegitimate one'.[4] Once a disembodied 'thing', culture and cultural difference (in the physicalist account) cease to have 'legitimacy'. I am going to argue that it is the emphasis on cognition in contrast to experience that appears to be responsible for an understanding of culture's embodied dimensions apparently vanishing here. Cultural difference becomes, instead,

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1 Most particularly on the case that finally resulted in the Full Federal Court decision *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26.

2 Connolly, AJ *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010) 8.

3 Hollan, D & Throop, CJ 'Whatever happened to empathy?: Introduction' (2008) 36 *Ethos* 4, 388.

4 Connolly, *Cultural Difference on Trial*, 13.

'conceptual difference', contingent upon 'the environmental-intentional trajectories... [that] agents take over the course of their lives'.[5]

Connolly is concerned to argue against what he calls the 'radical cultural incommensurability thesis', the '(admittedly) extreme but heuristically valuable construal of the cultural incommensurabilist position'.[6] This is the idea that in some cases (at least) it is impossible for someone of one culture to really understand (or 'acquire') the 'concepts' held by someone of another culture.[7] Cultural incommensurability or its 'extreme' relative, 'radical cultural incommensurability', can, then, appear as a kind of cultural relativism which insists that culture can only be understood within its own terms (not through the terms of another). Through a theoretical application of a physicalist theory and method, Connolly concludes that the cultural incommensurability thesis cannot be sustained; that judges (innately) possess the 'acquisition-adequate sub-conceptual content'[8] that allows them to acquire culturally different concepts where the 'epistemic conditions' are favourable to them acquiring that concept. It is significant that in this book, 'culture' tends to morph into 'concepts'; 'cultural difference' into 'conceptual difference'.[9]

At the heart of Connolly's concern about cultural incommensurability is what can be seen as a tension between universalism and cultural relativism, or perhaps more precisely a tension between the universality of a common human biology, which underpins our ontogenetic development and shared species existence, and the idea of cultural constructionism, the view that important aspects of human existence are created and maintained within specific cultural contexts. Needless to say, this reflects the old 'nature'/'nurture' debate. Connolly comes out of this debate, it seems, with a leaning towards universalism. He argues that humans share 'innate categorical concepts'[10] (and these are made evident through, for example, human developmental stages). These 'innate categorical concepts' are the foundation upon which all other concepts are acquired and mean that it is possible – at least in theory – for any human to acquire the concepts of another, if they are sufficiently broken down (sub-concept by sub-concept); and if favourable epistemic conditions obtain. Connolly's reference to 'favourable epistemic conditions' is, I think, a significant caveat in this formulation, for it points importantly towards the direction of

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5 Ibid 180.

6 Ibid 8.

7 Id.

8 Ibid 191.

9 Ibid 177, where the 'radical cultural incommensurability thesis' has become the 'radical conceptual difference thesis'.

10 Ibid 174-6.

environmental and other factors that might affect the acquisition of 'concepts', including culture and experience: what Connolly refers to as the 'individuating environmental or intentional inputs which typically cause each of the background states'.[11] He is careful to note that 'favourable epistemic conditions' include 'the internal capacities of the judge or the external circumstances surrounding the judge'.[12]

Notwithstanding the important dimensions of the 'favourable epistemic conditions' that Connolly identifies – and which ultimately go to the possible reforms that he proposes at the end of this book – the basis on which his argument proceeds is that 'innate categorical concepts' (a universal biology) allows concept acquisition to take place under the right conditions. From the outset, then, Connolly claims a universal truth for the world, one in which all things are 'indeed, in a sense, *reducible to* – the theories and claims of science and, ultimately, physics'.[13] What this might mean for cultural difference is signalled early on, where Connolly introduces readers to his views concerning physicalism, the 'brand' of naturalism that he draws on in this book.[14] According to Connolly, physicalism says that:

> Everything is either part of the physical base or is ontologically related to that base in the requisite sense as a more complex, so-called higher order phenomenon. There is nothing which exists in the world that is not physical in this sense. The world is ontologically closed. *There are no ghosts, supernatural substances or properties, or immaterial minds or meanings or cultural differences,* as many religious, philosophical and commonsense accounts of the world... have maintained over the years.[15]

Although I first read this as Connolly saying that there are *no cultural differences* (amongst other things), he has clarified that what he meant by this is 'there are no immaterial minds or immaterial meanings or immaterial cultural differences'.[16] Connolly does argue, then, 'for the existence of materially based minds, meanings and cultural differences'[17] – it is the 'immaterial' ones that do not exist – and this is a formulation which would appear to recognise the embodied dimensions of culture. Despite this, I

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11 Ibid 95.
12 Ibid 100.
13 Id (original emphasis).
14 Ibid 11.
15 Ibid 12 (my emphasis).
16 This communication by email to author, 2/8/2011.
17 Ibid.

remain concerned that culture, as presented here, has become 'concept', and that regardless of the *intention* involved in rendering it thus, its *effect* is to render culture as largely cognitive, and as strangely disembodied. To respond to this, I draw on Hallowell's account of the relationship between social interaction, self-awareness and culture.[18]

An anthropologist interested in the psychological dimensions of human experience, Hallowell illuminates in important ways that cultural difference might indeed be understood as having a physical basis. Our experiences, our perceptions of these experiences, our memory of these experiences and the learning that occurs through them rely on the fact that we have physical bodies – sensory perceptions, neural processing, and so on. We fundamentally experience the world and indeed our 'selves' as a consequence of our physical embodiment. Thus far, then, there is no significant disagreement with the physicalist argument. Yet it is important to also consider where culture sits within developmental processes. As Hallowell says, these developments occur in a 'social milieu', in which 'intimate and continuing contacts with other human beings are the major sources which mediate the influences that mold [sic] the development of the child'.[19] He describes the 'basic orientations provided by culture' as including 'self-orientation';[20] 'object orientation' (cosmological or metaphysical understandings, such as those concerning the existence of ghosts, fall into this category);[21] 'spatiotemporal orientation',[22] motivational orientation,[23] and a normative orientation: 'values, ideals, standards', which are 'intrinsic components of all cultures'.[24]

Connolly too speaks about the 'basic categorical concepts which, arguably, structure our very perception of the world'.[25] He specifically refers to 'the single agency concept of causation' as involving 'metaphysical concepts – those of object, time, relation, change and so on'[26] – the kinds of concepts that Hallowell argues are among the basic orientations that culture provides the self. Just how our socialisation and enculturation really affects our perceptions and indeed accounts for the acquisition of 'concepts', is barely visible, though, in Connolly's account. An example: Connolly does speak of socialisation, noting that 'whilst there

18 Hallowell, AI *Culture and Experience* (1967 [1955]).
19 Ibid 81.
20 Ibid 89.
21 Ibid 91.
22 Ibid 93.
23 Ibid 100.
24 Ibid 105.
25 Connolly, *Cultural Difference on Trial,* 172.
26 Ibid 173.

is an innate interpretive capacity whose developmental staging is the same across cultures, it is surrounded by a variable body of cultural accretions and concepts'.[27] But this is quickly followed by discussion of 'a universally endured process of learning and socialization', connected with 'a single theory of agency' which he concludes 'is possessed by all interpretive agents – including culturally different ones' – this being 'consistent with 'all we know about the way the world is as physicalists'.[28] 'Cultural accretions and concepts' here are downplayed, their capacity to affect our perception of 'what is', muted. Just how encultured 'assumptions about the nature of the universe become, as it were, a priori constituents in the perceptual process itself'[29] become ghostly vestiges of the physicalist paradigm. Culture and cultural difference are largely dealt with at a cognitive level, not a perceptual or experiential level: as comprised of 'concepts' that can be broken down into disembodied sub-concepts.[30] Yet if there is a physical basis to all of our experience, as neuroscientists Solms and Turnbull argue, then there is a physical basis to 'culture' too:

> The brain comes into the world with innumerable *potential* patterns of detailed organization, as reflected in the infinite combinations through which its cells *could* connect up with each other. The precise way they do connect up, in each and every one of us, is largely determined by the idiosyncratic environment in which the brain finds itself. In other words, the way our neurons connect up with each other depends on what *happens* to us. Modern neuroscience is becomingly increasingly aware of the role played in brain development by experience, learning, and the quality of the facilitating environment – and not only during childhood.[31]

Throughout this book, the example that Connolly uses for the acquisition of a culturally different concept is the acquisition of the concept of ochre, which is broken down into its sub-concepts: ochre is yellow (in fact much of the ochre that is of ceremonial significance to Indigenous Australians is

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27 Ibid 128.

28 Ibid 129-130.

29 Hallowell, AI *Culture and Experience* (1967 [1955]), 84.

30 While time and word constraints preclude me exploring this in detail here, there is some ambiguity in Connolly's treatment of this, too, for 'environment' is sometimes juxtaposed against 'reasoning' as a means through which an agent may acquire a concept. Eg see Connolly, *Cultural Difference on Trial,* 191.

31 Solms, M & Turnbull, O. *The Brain and the Inner World: An Introduction to the Neuroscience of Subjective Experience* (2002) 11 (original emphasis).

red), ochre is a powder, and so forth.[32] This cognitively-based approach to the acquisition of a concept and its sub-concepts would, I suggest, be more difficult to sustain if matters such as the complex interplay of orientations that culture provides the self – self-orientation, object-orientation, spatiotemporal orientation, motivation, and values, ideals and standards – were considered. I should make it clear that I am not subscribing to a cultural incommensurability thesis by arguing this, but I am arguing for the recognition of significant cultural differences – where they exist – which may reflect many of the basic orientations that culture provides the self.

Much of what Connolly speaks about here in terms of concept acquisition can be explained through schema theory, in which 'culture' is seen as 'shared schemas... [and] the shared world of acts and artefacts that people holding common schemas collectively produce'.[33] As D'Andrade explains, schemas are 'mental patterns of abstract representations of environmental regularities', patterns of neurons activated by external stimuli and developing as a person interacts with their social, cultural and physical environment.'[34] Developed schema fill in missing data; are self-reinforcing, and create expectations that shape our experience of the world. While schemas are learned, they can change with experience, and include the consciously articulable as well as cultural orientations that exist at an unconscious level (and which are thus far more difficult to consciously render). Schema theory then is not fundamentally at odds with a physicalist approach: as Connolly describes this, the idea that 'everything is either part of the physical base or is ontologically related to that base'.[35] Notwithstanding that its basis is also physical and neurological, a schema theory approach accounts for cultural difference, rather than rendering it ultimately as concept.

I finally turn now to part of this book that is specifically concerned with the limits of judicial understanding. In his very last chapter, Connolly makes some suggestions for law reform, and in doing so, provides the reader with a sense of some of the structural issues that might affect the giving and receipt of applicant evidence in litigated native title cases. I would have liked to have seen the kinds of issues highlighted in this chapter taken up much earlier in this book, because much of the preceding discussion occurs within a highly theoretical space in which the very real impediments to judicial understanding that occur in litigated contexts, while noted, are almost backgrounded within the overall text. It would have been

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32 Eg, Connolly, *Cultural Difference on Trial,* 98-9,159.

33 Quinn, N 'Universals of child rearing' (2005) 5 *Anthropological Theory,* 478-9.

34 D'Andrade, RG *The Development of Cognitive Anthropology* (1995) 136.

35 Connolly, *Cultural Difference on Trial,* 12.

interesting to look at the kinds of issues that judges are asked to adjudicate in relation to the evidence in such cases (some of these issues are extraordinarily complex, for example, in the native title context, they include the issue of cultural continuity, cultural change and the concept of 'society').[36] Of course, judicial determinations are not simply based on applicant evidence either, although judges have consistently said that this is what is given the greatest weight. In adversarial legal contexts, it is common for lawyers acting for respondent parties to seek to influence judicial understanding by isolating small portions of applicant evidence (and indeed expert evidence) from the overall context which provides that evidence with its full meaning, in order to argue that the evidence actually means something else. In other words, I would argue that coming to understand a concept alone is not sufficient for judicial understanding: what is required is the ability to contextualise and understand those concepts within the overall body of evidence.

Anthropologists have long made the point that no culture is hermetically sealed from any other and that the life-worlds that indigenous claimants of land rights and native title inhabit are in fact intercultural contexts, in which 'culture' and 'cultural difference' are relationally constituted, at times elicited, interactively through engagements with the state and others.[37] One of the problems motivating Connolly early in this book is a claim to cultural incommensurability. Had Connolly subjected the claim to an analysis that took into account such factors as history, power, structural inequality, and global movements for indigenous rights, then the claim, I think, becomes more comprehensible.

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36 Eg, *Yorta Yorta v the State of Victoria* [2002] HCA 58; and see Glaskin, K & Dousset, L 'The asymmetry of recognition: law, society, and customary land tenure in Australia', (2011) 34 *Journal of Pacific Studies* 2/3.

37 Eg, see Merlan, F *Caging the Rainbow* (1998); Weiner, J F & Glaskin, K (eds) *Customary Land Tenure and Registration in Indigenous Australia and Papua New Guinea: Anthropological Perspectives* (2007).