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CONNECTION TO LAND AND SEA AT ERUB, TORRES STRAIT

Stream: Aboriginal Territory and Management Rights

Disciplines: Anthropology, Geography

Introduction

In this paper we examine the relationship of indigenous, ethnological, and legal discourses in the definition of rights to land and sea among Torres Strait Islanders in northern Australia. In Australia, to a greater extent than in Canada or any other settler state, the rules and customs of indigenous tenure systems are legally regarded as the source and test for state recognition of native title. The native claims process routinely depends on a combination of indigenous and anthropological documentation and testimony to formulate jurisprudence on the validity of claims. Hence, a three-cornered discourse – indigenous, ethnological and legal – is shaping the emergent realities of property, boundaries and territories in contemporary Australia.

We take as axiomatic that property is the product of social practices and processes; that it is about *relationships among people* in regard to objects owned. The social contestation of property definitions and demarcations is ongoing, so any attempt to represent or codify property rights in a fixed and formal fashion involves a certain abstraction and reification. This is as true within customary tenure systems as it is for current jurisprudence and legislative actions to define native title, and by corollary to redefine contiguous rights in the wider society. In the legacy of Marx, the ideology of property as object (e.g. the myth of absolute possession of 'things' as capitalist commodities) is distinguished from actual property as a social process. Anthropologically, we know that property as object is naturalized, reified, and taken-for-granted in a variety of cultural ways, according to distinctive ontologies and social practices.

In some systems the status of property as the outcome of social politics of negotiation or subordination may be relatively transparent. To an extent, this seems true of local property relations at Torres Strait; and it is patently true of contemporary efforts to reconcile the property and jurisdictional rights and claims of indigenous people in Australia with private and Crown claims in the wider context of the state. Euro-Australians may profess bewilderment at the profusion and elasticity of indigenous claims and counter-claims, according to conflicting and competing rules and histories that we address later on. But this situation appears to be the ordinary and indeed primary reality of property, if we first debunk our own European-derived sense of property as precise, discrete and unproblematic objects and delimited spaces. Post-*Mabo* Australia, like post-*Delgamuukw* Canada, has been shaken in its naive self-assurance that written deeds in court house records are as primal and perpetual as the stars.

A second axiom: In embracing cultural relativist perspectives, the discourse of enlarged recognition of native title is an intersystemic negotiation of meanings. On the one hand, the Australian state expects native title claimants to demonstrate "continuous connection" to country in their own cultural terms. On the other hand, the power conferred by such a demonstration is made meaningful by comparing native title to other forms of title in the encapsulating Australian system. In regard to legal force, the High Court asserts that indigenous property rights shall not enjoy lesser protection than Euro-Australian private property, pursuant to the Racial Discrimination Act (1975; see Brennan, 1995:13, 17). In regard to legal form, native title, though a right *sui generis*, has become a collective freehold analogue of title in fee simple -- conventionally the most "complete" form of private property in Euro-Australia. A generalizeable and universalist notion of "equality," together with more specific Euro-Australian approaches to bundling rights, anchors the analogy. Inevitably, the discourse on indigenous rights tacks back and forth between two poles: the culturally relative or particularistic, and the comparative or universalistic.

This groundwork laid, we want to explore two themes. The first is the highly selective nature of the state's acceptance of cultural relativist arguments for reconfiguring the distribution of rights and power relations. The state remains deeply ethnocentric in defending its own authority. It may be willing to "relativize" *private property* in order to protect a culture-based form of inalienable collective ownership; but territorial *jurisdiction* (i.e. collective rights in the political capacity of self-government) has been less amenable to legal recognition. Henry Reynolds (1996:3) observes that in the Mabo case, "...while the court demolished the concept of *terra nullius* in respect of property, it preserved it in relation to sovereignty" (see also Brennan 1993:25-27; Pearson, 1993:82-83). In other cases too, the Australian High Court has consistently declared aboriginal sovereignty claims not to be justiciable, and conflict between juridical and executive arms of state on so fundamental a matter as sovereignty to be untenable.

Such a position is hardly inevitable. In Canada, for instance, Supreme Court jurisprudence is prescriptive of quite substantial self-government rights in regard to the use and management of natural resources. While the ultimate authority of the relevant federal or provincial government "Minister" is preserved, it is also significantly proscribed, to the point that the sharing of jurisdictional powers through a variety of co-management institutions is required (Usher, 1997, offers an excellent overview). Nettheim (1994:55) finds some grounds for optimism that there are "some aspects of the *Mabo* judgment on land rights which are capable of supporting judicial recognition of a subordinate level of sovereignty or an inherent right of self-government within Australia."

The separation of native title-as-property from native title-as-territorial jurisdiction obviously imposes sharp limits on the autonomy of indigenous societies. Fundamental aspects of resource management and development are defined as the exclusive constitutional mandate of central governments. Yet Native title, as communal tenure, is intrinsically as much about self-governance as about property. This implication of communal tenure is recognized in a statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dodson, 1995:17):

> In determining a claim by an Indigenous group (on the basis of exclusive connection) the issue is the existence of the system of laws and customs. Given a system exists, it will determine the existence of an identifiable group and it will also determine the nature of the group's connection to the territory. Once the authority of the system is established, the common law draws a circle around the territory in which it operates and declares that the capacity to determine land allocation within that jurisdiction vests in the landholding group alone. The group is the owner and ***its*** system of law the authority about the allocation of rights in the whole area (emphasis in the original).

The collective character and cultural definition of native title confound the facile distinction between jurisdiction and private property. As Rigsby (1998:24) observes, following Sutton's (1996) discussion of "underlying" versus "proximate" title, "...members of a polity hold beneficial or proximate titles...in land and other objects of property. The polity itself, however, exercises dominion internally, that is, it sets the parameters of tenure and title." Indigenous owners are not merely private interest; they constitute in themselves a "public," charged in political reality and in their own law, if not in State law, with balancing more general against more particular interests.

Our second theme is the irony inherent in the High Court's "anthropological" appreciation of culture. The Court makes the success of native claims conditional on qualities of cultural integrity and continuity -- at a moment when much social theory currently in vogue regards claims of cultural integrity and continuity with deep skepticism. How then may we perform honest, accurate, and publicly credible scholarly analyses of cultural continuity and innovation in indigenous tenure systems (see Edmunds, 1995, and Sutton, 1995, for useful discussions of this problem)? Positions on this issue in any sector, native or non-native, are obviously deeply politicized when rights to land, sea and resources are at stake.

Our presentation takes us first through a consideration of general perspectives that have been applied in recent years to understanding the connection of people -- and peoples -- to their lands and seas. Next, we turn to a brief ethnography of customary tenure at Erub (Darnley Island), in the eastern Torres Strait, and some aspects of the colonial legacy. Finally, we discuss the post-*Mabo* legal-political setting and consider the interaction of state "law" and Islander "custom."

Connection to Country

A multiplicity of concepts are resonant in the way we think these days about indigenous "connection to country." Literature on place, space, and scapes (both land- and sea-) has provided new contexts for thinking about old issues of property and territory. Anthropologists (e.g. Appadurai, 1988; Bender, 1993; Myers, 1991 (1986); Rodman, 1992), cultural geographers (e.g. Tuan, 1991), and philosophers (e.g. Lefebre, 1991; Casey, 1996) have led this development. A remarkable proportion of the ethnography is located in indigenous Australia, Melanesia, and North America (Basso, 1988, 1996; Cruikshank, 1990; M. Jackson, 1995; Kahn, 1990; Küchler, 1993; Layton, 1995; Morphy, 1993, 1995; Munn, 1996; Myers, *supra*; Povanelli, 1993; Rose,

1992; Thorton, 1997; to mention only some of the more prominent).

A second body of literature, that on local ecological knowledge, has also come actively into play, emphasizing the cognitive, symbolic, and discursive construction of knowledge-based relations to land and sea (e.g. Goodenough, 1996; Ingold, 1996; Scott, 1996; Wilkins, 1993; Willems-Braun, 1997). Certain work (e.g. Rose, 1992; 1996) have bridged the two bodies of literature, to explore the connections between ecological knowledge, social identity, and the meanings of country. Other work has explicitly advocated enhanced indigenous ownership and control, on grounds that local knowledge is a superior route to achieving environmentally and socially beneficial resource use and management (e.g. Berkes, 1993; Bielawski, 1996; Brooke, 1993; Young and Ross, 1991).

Even when these literatures have not spoken directly to issues of aboriginal title, they have contributed substantially to our understanding of the hermeneutics and cultural construction of indigenous property and territory. The contribution is not trivial in a context of state jurisprudence that takes indigenous definitions as criterial, for as Stanner (1969:2, in Rigsby, 1998:34) observed several years ago, land in indigenous Australia "was much more than property in our sense; ownership was more intrinsic; title, right and possession were embedded in different doctrines; and use and occupation were articulated into a highly distinctive body of social habits..."

Normally, constructions of property and territory are intimately and dynamically involved in broader constructions of place and -scape. ***Territories***, as Neitschmann (1989:60) tells us, are not-just bounded ***spaces***, but "areas named, known, used, claimed and sometimes defended." Sea territories at Torres Strait are not just resource and subsistence spaces but are culturalized and socialized; comprised of knowledge of the "location, pattern and interaction of marine things and processes (ibid);" of places named and storied; and by social ***identities*** who partake in this knowledge, these names and stories. There is a focal emphasis on ***knowledge***: seascapes and sea territories "are created from knowledge and contain resources, history and identity (ibid)."

We have to consider, then, the 'intimate and dynamic connection' between ***culturalized*** places and -scapes, on the one hand, and ***politicized*** property and territory on the other. The Western categories ***'property'*** and ***'territory'*** focus attention on the political and legalistic dimensions of spatially located rights. The conventional western distinction between property and territory may be analyzed as a state-level mode of balancing private (or more particular) against collective (or more socially inclusive) rights and interests, ostensibly in the interest of the 'nation-state' collectivity at large. It is critical to remember that there is no inherent or natural separation between jurisdiction over territory and ownership of property. The culturally relative nature of the distinction raises the question of how societies historically without state organization balance the rights of individual or smaller kin-based groupings against those of more inclusive indigenous group identities.

Further, we must address the issue of how such orders have endured, changed and adapted through more than a century of colonial interaction with the British and Australian state systems; and how they continue to do so. Indigenous polities at Torres Strait have never fully acquiesced in the denial and suppression by colonizers of Islander authority, but in recent years expectations for jurisdictional recognition have become increasingly overt (Lui, 1994; Mulrennan & Hanssen, 1994). The jurisdictional right to regulate their own land and sea territories, in the interest of their own public, is very clearly a component in Islanders' conceptions of indigenous entitlement.

Customary tenure at Erub

At Erub, ownership and custodial responsibility for defined areas are associated with social identities at various scales: – in order of ascending inclusivity – households, patronymic groups, clans, island communities, five sub-regional island groups (e.g. the eastern Islander Miriam people); and a Torres Strait Islander region-wide national identity. Social identities at each level are anchored in networks of named places that recall societal charter myths, community and personal histories, attachments of sentiment, and knowledge of geophysical, ecological and biological patterns and processes.

Places at sea are no less important than places on land. To understand property on Erub, let alone the concept and practice of resource use and management, one must discard the European bias to perceive a definite boundary between land and sea. In gross physical terms, the area of regular use of intertidal reef alone is many times the surface area of home islands. Islanders regard themselves as a maritime people, skilled navigators, fishermen and marine hunters, though many are no less proud of their ability as gardeners. But gardening has declined in economic importance in recent decades, whereas harvesting from reef and sea remains the central economic pursuit, both for local use and for the market. Ownership and control of reef and deeper water resources is certainly no less important culturally than ownership and control of dry land, and is more important to future development prospects of people in the Strait. As one traditional owner told us, "Our feet are on the land, but our hands are in the sea."

Sea and land aspects of Torres Strait tenure are, as Cordell (1993:163), Sharp (1996b:114) and Rigsby (1998:23) observe, "indivisible." The unity of sea and land space at Erub is evident in a series of creation myths that connect outlying reefs and cays with the home island. A large hollow on the estate of a certain clan is recounted as the place from which earth was taken by ancestors from the home island to form an outlying cay, traditionally owned by the same clan. A freshwater spring on a second clan's estate was created with water brought by ancestors, also from a cay some distance away. Sites on land and at sea that are thus identified with one another sometimes also share placenames in common.

Historically, on the scale of the Strait as a whole, boundaries between island communities and clusters of island communities have been permeable and shifting, as trading, marriage and military alliances have formed and dissolved, friendships and hostilities waxed and waned, etc. Yet an awareness of regional relationship has existed for a very long time, via narratives about the journeys of mythical ancestors from coastal Irian Jaya to the northwest, through Torres Strait, to the Lockhart River region of Queensland, far to the southeast; and from the tip of Cape York Peninsula in the south, northward across Torres Strait, to what is today the coastal section of Western Province in Papua New Guinea. These 'Beforetime' mythical journeys are analogous to the songlines of the Dreamtime ancestors of continental Aborigines, and indeed are linked to the Dreamtime narratives of mainland Aborigines in the Lockhart River region. They provide a mythico-spatial setting to which the identities of several Melanesian and Aborigine language groups and regional political affiliations can be articulated, according to shifting political goals and circumstances.

The case of *Maizab Kaur* (Bramble Cay) nicely illustrates some of the cultural dynamics at play in the definition of territory at an island community level. 'Beforetime' ancestors used their magic to initiate the creation of *Maizab Kaur* because nesting seabirds and turtles had been victims of overexploitation by Erubam of the day. In response, leaders of the Peidu and Meauram clans took ground from Erub to create *Maizab Kaur* at a considerable distance, far enough to

serve as a place where essential resources would be generally unmolested, and clan elders could monitor the comings and goings of visitors to the Cay. The narrative sets rational-empirical understanding of ecological dynamics within a framework of supernatural power and ancestral sacrifice. In their attempt to turn back to Erub from *Maizab Kaur*, against the trade wind, the creators Rebes, Burwak, and his child were turned to stone, where they remain as reminders to this day. Others who directed the project from high on Erub turned simultaneously to stone, their power spent. Meauram clan informants who today are middle-aged remember that as young hunters they would always inform an elder woman of the Meauram clan of their intention to visit *Maizab Kaur* for turtles and seabird and turtle eggs; she would always say "why are you asking my permission? It belongs to you (as Meauram descendants) — " but they would nevertheless always ask.

The myth provides opportunity for contestation between clans as to whose responsibility and authority for *Maizab Kaur* is primary. Burwak and his child were Meauram, but Rebes was Peidu. A Peidu man and custodian for his extended family's lands told us that the Cay was "his," through descent from Rebes. A Meauram informant, asked about this claim, retorted that Rebes stands some distance to sea on the return trajectory from the Cay (Rebes made it further than Burwak before petrifying), while the rocks that are Burwak and his child in their canoe stand at the Cay. This closer proximity is argued by Burwak's clan descendants to favour their claims to the Cay.

Although one clan or another claims primary authority, *Maizab Kaur* is very definitely seen as Erub patrimony by all Erubam. When the international boundary was fixed between Australia and New Guinea in the 1970s, it was Erubam possession of the creation myth for *Maizab Kaur*, according to local reports, that determined its inclusion in Australian territorial waters. Although the Parem community on the PNG coast is closer to *Maizab Kaur* than is Erub, spokesmen for the former were apparently unaware of Beforetime narrative identifying them as decisively with the Cay.

Customary ownership of certain reef and sea areas transcends boundaries between individual island communities. Certain reefs between Mer and Erub are owned by two clans whose members reside both at Erub and at Mer. Such associations confound attempts to represent the boundaries between island community territories as mutually exclusive lines on water – even though, in general, hunters and fishermen from adjacent communities avoid using each other's territory without invitation.

Exclusionary practice, of the kind described by Peterson and Rigsby (1998:3), is one aspect of sea tenure. But the emphasis at Erub is as much on the right to share as the right to exclude (the two are not necessarily contradictory; a decision to share implies that one could also decide not to share, or at least under certain circumstances decide not to share). Property in land and sea resources is a specific instance of ownership-cum-custodianship, one of those "total social phenomena" that organize extensive domains of experience. Custodianship extends beyond claims to ownership of economic resources, to the rights to tell the stories and utter the songs relating to particular winds, constellations of stars, etc. Similarly, "senior" and "junior" fish, bird, animal, and plant totems belong to specific clans. This ensures that whenever one navigates by the stars, dives for seafood, or consumes wild fruit, one participates in the essences of other social identities – in short, all material interaction is part of a vast cycle of social exchange.

Nonetheless, boundaries can be exclusionary, and this is especially the case in regard to house and garden land, and the extension of this property seaward on the home reef. The joint

owners of a lineage estate are the *ged kem le*; and the senior landholder on behalf of the group is the *lu kem le*. A frequent practice in the past quarter century, when rapid population growth and large-scale out-migration led to more than three-quarters of Islanders working and living far from home on the Australian continent, has been the appointment of *asesered*, or caretakers, on behalf of absentee senior landholders.

Nener refers to a family boundary marker; while *au nener* is a clan ("tribal") boundary marker. Traditional clan boundaries transect the coast at Erub as follows: from the *kaper* tree at Tor Pit (at Greenhill between Ina and Mogor) to Bikar is Meuram; from Bikar to *pit* at Karedog (marked by rock) is Peidu; from *pit* at Karedog to *kaper* tree at Wau Pit is Saisereb; from *kaper* tree at Wau Pit to Tor Pit is Samsep. Today, few people can plot the location of clan *au nener* for the interior of the island, though all older and competent individuals can describe in complete detail the *nener* of their own patronymic lineages. Even before gardening declined in importance, the emphasis on clan boundaries had declined with missionization and a residential pattern that saw all island residents settled on the southern and western sides of the island. Although clan totems and identities continue to be inherited, the formerly contiguous land/sea territories of clans have dissolved into the constituent estates of multiple surname-identified lineages – many of which for a variety of historical and political reasons claim a distribution of properties no longer fully within the former territory of their clan.

The Meriam testimony given in the *Mabo* case identified as key to Meriam property conceptions the central law of the indigenous God Malo (a figure that some contemporary Islander theologians are at pains to reconcile with Christian deity): *tag mauki mauki, teter mauki mauki*. It translates, effectively, as (Malo) "keeps his hands and his feet off others' land." In former times, to disregard this law was to invite spearing or death. The sanction has grown less severe today, but the sentiment remains strong, though middle-aged and elder Erubam frequently criticize younger people for neglecting this aspect of *debe tonar* (in pidgin, "good *passin*" – literally good fashion, good custom, respectful etiquette).

Closely related to these notions is the concept of *gelar*, a "taboo, prohibition, rule, law, commandment" (Sharp 1996a:261) that takes the form of physical markers signalling to 'keep your hands to yourself.' Trees at the entrance to a garden area would have coconut leaf weaving around the bottom 2-3 feet of the trunk. When these *gelar* have been put up, in the words of one informant, "you don't touch, you don't ask; when they take them off, you may ask." These apply to members of the family or to others... if fruit isn't ripe for one person, it isn't ripe for anybody. The owner would take only enough to keep his family going. "If a father and child walk past property with those markings, and the child cries for a fruit, the father says 'you can't go there;' but the owner comes and picks it up, offers it to the child... that's *gelar*... Good *passin* was that when you took those *gelar* markers off, then everybody could share in the bounty." *Gelar* markers were also erected as poles on the *sai*, at either end where rock ended. "We had this zogo business that intruding would somehow affect the qualities of the fish that come in." They were also used to keep intruders out from certain sacred sites belonging to a family or a clan... "everything, every means, there's always *gelar* there." (S.T. 11/11/97)

The unity of sea and land property is most evident in the expression "*gedira gur*, 'the sea that belongs to the land,' where land (*ged*) means homeland or place (Sharp 1996a:114)." Fish weirs (or *sai*) that a family has rights in are often contiguous with their land; that is, the *teter pim* of *sai* could line up with the *nener* that go on up the land property; but not necessarily so. More than one family can be owners of a *sai*, even from separate clans, through blood relations; the

father's line is dominant, but people may inherit rights through the mother's line as well. As one custodian commented, "you do not use one thing (principle, rule) to apply right across..." (S.T., G.M. 11/11/97).

In fact, as Beckett (1994, 1995) also documents at nearby Mer, the principles whereby one inherits, claims, and exercizes rights, are variable – as are attendant strategies of contestation and competition over rights. Perhaps the most common dispute at Erub is between descendants who claim that a mother or grandmother inherited equally with her brother, against descendants of the brother who cite the rule of patrilineal inheritance. This sort of conflict is often intensified by a circumstance in which a boy was adopted to provide for a male inheritor, so that land would not pass out of the patronymic family or clan, as was sometimes feared with the marriage of an inheriting daughter. Adoptions traditionally were subject to exceedingly strict taboos of secrecy – an adopted child was supposed never to learn of their true biological identity; elders close to tears have explained to us that lack of respect for this rule is one of the major reasons for "growling" about property and the perceived erosion of customary property transmission. To further complicate matters, there are two categories of adoption – one roughly equivalent to legal adoption in European practice, with full attendant rights of the family; the other roughly equivalent to fostering, which carries no special rights. Two or three generations hence, arguments persist over whether one's ancestor was truly adopted, hence qualified to inherit, or only fostered.

Daughterly inheritances were sometimes bestowed on the condition that the land would ultimately revert to members of her brothers' family, or if she had no brothers, to others in her patrilineage when she could no longer make personal use of it. In theory, her children inherit from their own father's clan, so her land should revert to her male agnates when she no longer needs it. But daughterly descendants sometimes prove less than cooperative when reminded of this condition. The children of Native women who married Pacific Islanders or other outsiders had no such inheritance through their fathers, and were therefore frequently adopted by their mothers' parents or brothers as a means of securing clan rights, identity and property.

The use of ancestral names, in this context, emerges as a particularly controversial index of claims made. By consensus, ambiguity may be allowed to persist for a generation or more over who is the true inheritor of *lu kem le*, or senior custodial authority, for the lands of a lineage group. When economic or political advantage dictate, however, a senior member of one segment or another of the lineage begins to use the name of a prestigious ancestor and senior custodian, offending another who presumed equally to enjoy the status.

In short, identification with country is routinely subject to a variety of claims and counterclaims, as Myers (1991) has remarked for central Australian Pintupi. Claims of identification are transformed into rights only when accepted by others; the ability to possess land and sea space is the product of negotiation. The elusiveness of ownership, of custodial authority, "mysterious" from the perspective of western ideologies of property, might be considered "part of the system itself" (ibid:129); "ownership is not a given, but an accomplishment" (ibid.). Myers remarks further that "although rights over sacred sites are acquired only through political activity, this historicity is disguised by the fact that the cultural basis of claims lies in the ontological priority of The Dreaming (ibid)." While there are major differences between Pintupi and Erubam conceptions of country, the ideological maneuver is similar; "Beforetime" ancestral acts and places, the privileged right of inheriting clans to recount and revisit, underwrite a claim of immutable identity, ownership and authority.

Some Aspects of the Colonial Legacy

Colonization precipitated institutions of racial division and hierarchy between "superior" Islanders and "inferior" Aborigines and Papuans; and also between these groups and the high-status Pacific Islander, Filipino, Malaysian, Japanese, Caribbean, and European immigrants. The immigrants worked a succession of marine industries in the Strait from the mid-19th century onward, or brought the gospel, and routinely married into native Islander society (see Singe, 1979; Shnukal, 1983; Beckett, 1987; Ganter, 1994; Mullins, 1995). For decades, having non-Islander ancestry from beyond indigenous Australia and New Guinea conferred enhanced status. But in an era of Native title, Manilan, Rotuman, or Samoan ancestry can be worrisome, especially when traced through the male line that, grossly speaking, is the privileged path of inheritance and might therefore imply a threat to would-be Native claimants whose great-grandfathers hail from elsewhere. In this context, Islanders who can do so (and there are virtually none in current generations who cannot) are vigorously reiterating their genealogical connections to Native Islanders – and reiterating also their property claims according to a variety of locally plausible, if not uncontroversial, arguments.

Our analysis of the history of the tenure system at Erub is still in progress. Some preliminary impressions can, however, be stated. The various strategies of adoption and daughterly inheritance used to accommodate and incorporate a relatively high ratio of Pacific Islanders and other outsiders into the indigenous system may have resulted in an elevated frequency of disputes. Nonetheless, it is remarkable the degree to which these disputes are articulated via the cultural idiom also present at other islands, such as Mer (Murray Island), where the ratio of outsiders to "natives" was significantly lower. An even more striking case is that of the small island of Ugar (Stephen Island), whose native males had all perished at a certain stage in colonial history. Yet the tenure system today, rebuilt from the estates of a handful of surviving native females who married Europeans, Filipinos, and men from other Torres Strait Islands, strongly resembles that in operation elsewhere in the islands of eastern Torres Strait.

Some Islanders find it difficult to argue strong lineage- or clan-based customary rights on islands where they now reside (there has been considerable intra-regional migration, partly by choice and partly through forced relocation). These people tend to advocate a formulation of collective rights at the level of whole island communities, sub-regional and regional national identities – levels at which Native and immigrant identities have become irretrievably blended. The practical value of claims on these scales is also evident to those "traditional owners" who are more secure in patronymic and clan-based rights, since it is only at more inclusive scales that funding and processing of claims is readily undertaken by central governments. At the same time, traditional owners are suspicious of approaches that would see their particular ownership rights eclipsed by the authority of community or regional political bodies, as occurred under policies of the colonial Protectorate and subsequent state of Queensland legislation.

In this regard, the colonial legacy has been destructive of the authority of indigenous institutions in mediating between public good and private interest. It is somewhat habitual to regard local councils as instruments of decisions "from above," on such matters as the location of a school, a community water supply, or a fishery freezer. Such facilities may be in the broader community interest, but because there are no "public lands" in the indigenous system, they must be located on the property of a particular lineage. Too frequently, this has been done without the consent of owners. Some of these owners now see Native title as an opportunity to demand compensation where community council or state-sponsored projects have for some decades

infringed on their property. Failing this, traditional owners have (in some cases successfully) ordered public facilities removed from their property. A further complication is that absentee owners (mostly living on the mainland) who resist public works on their estates can do so without sharing in the inconvenience endured by island residents. As Islanders progressively take possession of local and regional self-government institutions, locally legitimate, more autonomous procedures for resolving such disputes will need to be elaborated.

The post-*Mabo* legal/political setting

The Australian High Court *Mabo* decision in 1992 overturned the doctrine of *terra nullius*, recognizing the existence of aboriginal title as predating European arrival and, in the absence of explicit acts by the sovereign to extinguish it, the persistence of aboriginal title to the present (for accounts of the judgment and its aftermath see Bartlett, 1993; Stephenson and Ratnapala, 1993; Brennan, 1995; Sharp, 1996a). The decision was rendered on the claim of the Mer Islanders, some twenty-seven kilometers from Erub. But that decision covered only land, not sea. Mer and Erub in the last two years have lodged their sea claims, as have all the other island communities in Torres Strait, in addition to several Aborigine groups in northern Queensland and the Northern Territory.

There has been consternation in conservative Australia over the *Mabo* decision, among State governments, and mining and ranching leasehold interests (the major stakeholders in so-called public lands which were now up for grabs after *Mabo* -- on other lands, freehold title is considered to have extinguished native title). Partly to apply damage control, and partly to provide an orderly and politically achievable process for managing native claims, Keating's federal Labour government in 1993 passed the Native Title Act (NTA). The Act outlines processes for the recognition of native title, upon application by the indigenous group concerned and acceptance by a Tribunal. The NTA conception of native title specifies no outright ownership of key natural resources (minerals, petroleum, waterways, etc.); no right of veto over development projects proposed for native title areas; no indigenous participation and control in environmental management; no capital or other requirements for economic development; and no basis for self-government (the focus is on a limited form of title, not jurisdiction).

What NTA land rights DO provide for are a native right to enter into agreements “on a regional or local basis” with the Commonwealth or State (agreements that could include the surrender or abridgement of native title in exchange for benefits); and a process for negotiation with non-native interests who want to develop land/sea areas under native claim or title. There is Tribunal mediation in cases where native title holders and outside developers cannot come to an agreement. The State or Commonwealth (federal) minister may overrule the Tribunal’s finding “in the State or National interest;” and the Tribunal may, even if Aborigine or Islander consent cannot be achieved, permit development that is deemed “not to involve major disturbance” of indigenous land or life.

If significantly improved rights in landed property are now recognized, rights of self-government are not. The state is not prepared to permit aboriginal owners to decide for themselves on what terms to engage the mainstream system. The state protects itself and mainstream economic interests, in the final instance, against the possibility of Native title holders withholding resources from development processes that are defined as crucial to the “national interest”.

Reconciling Islander custom with State law

It is, of course, highly problematic to speak of "reconciling" systems that may, in conception and in historical practice, prove incommensurable. We noted earlier the stratagem of the state, via the High Court and Native Title Act legislation, to neatly separate the question of Native title 'qua' property from title 'qua' jurisdiction. Underlying this separation is the liberal conviction that Australian indigenous people should be subject to the overarching governmental and constitutional authority common to all Australian citizens; but that state recognition and protection of aboriginal rights in property must not, in a civilized and non-racist society, be inferior to the situation applying to non-aboriginal property-holders. What is refused, in this formulation, is recognition of indigenous peoples' collective institutions of territorial and civil authority as in any sense "equal" to those of the Euro-Australian state.

The separation poses a tremendous contradiction for systems that do not divide the economic from the political; systems for which, in Sharp's (1996b:114) words, "the economic and the religious, the material and the spiritual, are embedded within the one whole." Indeed, the custodial authority of the senior landholder, in the case of Islanders, cannot be separated from the responsibility to land and sea, to the use and nurturance of resources thereon and therein, and to co-owners in the family line. In grudging acknowledgment of this particularity, the state has concluded that aboriginal title is evidently collective and inalienable in nature – while resisting the sovereign implications of such a conclusion.

The test for legal recognition of Native title is whether the claimant has rights under "traditional law and custom," so virtually no case can be assembled without an anthropological interpretation of territory and tenure as culturally constructed. Groups making the claim must demonstrate the existence of: 1. a system of laws and customs allocating rights in land and sea; and 2. rules which define the group that is making the claim. The group has to be biologically descended from indigenous people, and had to have a connection to the area before assertion of British sovereignty **or** have taken that connection from a previous group according to Indigenous law and customs (Dodson, 1995:15-20; Bartlett, 1993:xvii-xvix). The connection must have been maintained to the present.

While the High Court held that indigenous laws and customs can change without undermining native title, the justices expressed divided opinions on the effect of radical rupture or loss of laws and customs. Although two justices suggested that continued physical presence alone could be sufficient to sustain native title (Dodson, 1995:37), presiding Judge Brennan (High Court of Australia, 1992:43) declared:

> When the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so).

This criterion raises profoundly important issues for anthropological conceptions of cultural continuity and (dis)continuity, tradition, and identity, some retrospective, and some prospective. Retrospectively, for more than a century of anthropology, Erub has been the regional symbol of an Islander community heavily afflicted by a history of massacre, disease, cultural dislocation,

dilution, and loss. Erubam today, biologically, all have indigenous ancestors; but they have as many ancestors who were Pacific Islander men who were brought here by the pearshellers, beche-de-mer (trepang), and trochus fisheries last century; or as "teachers" by the London Missionary Society. The Pacific Islanders (Fijians, Samoans, Solomon Islanders, New Caledonians, Loyalty Islanders, etc.) and a handful of Europeans became a political elite in the Torres Strait under the Queensland Protectorate, even as they married native women, acquired the native language in addition to the regional pidgin, learned native mythology while promoting Christianity, and acquired house-lot and garden land for themselves and their children through their native wives, brothers- or fathers-in-law, or through donations by native landholders.

Numerous ethnographic texts, going right back to the 1898 Haddon Expedition to Torres Strait, represent traditional Erubam culture as already more memory than practice. One of our colleagues writes, in a book published in 1993, that she chose to work at Mer because culturally it had retained a cohesive, integral quality, "in contrast with Darnley Island, for instance, where a dwindling native population became subsidiary to immigrant South Sea Islanders as early as the 1870's..." (Sharp 1993:43). These perceptions have also shaped outlooks on the relative legal potential of their claims. Erub leadership was distressed to learn that a leading Australian lawyer had advised the Torres Strait Regional Authority (TSRA) to run a test case on sea claims at an island whose indigenous identity was ostensibly more secure, and to steer clear of Erub. Lawyers for the Crown, it was apparently feared, might exploit "non-indigenous" biological and cultural content; and argue that sufficient discontinuities in customary tenure arrangements occurred during the colonial period to render Brennan's criteria untenable.

An awareness of major historical changes at Murray Island was certainly not absent in the *Mabo* case. Although, as Beckett (1995:23) observes, the original statement of claim emphasized cultural continuity and the traditional nature of contemporary Mer society, “at a later stage counsel for the plaintiffs spoke of these rights ‘flowing along a continuum of a dynamic and flexible culture’.” Anthropologically, the historical dialectic of cultural convention and invention, continuity and change, needs to be handled in such a way as to challenge stereotypes of massive cultural rupture and loss; without succumbing to an anachronistic discourse on unchanging cultural essence. Our impression is that at Erub one may be dealing with limited differences of degree, but certainly not of kind, when comparing colonial discontinuities and adjustments at that island with what has been observed for other islands in the Strait. On Erub as elsewhere, the politics and rhetoric of Pacific Islander incorporation into the native tenure system, cosmology, etc. partake heavily of indigenous ideologies and practices. This fact is evidenced not only by the stories told by Erubam today about themselves and their history, but also by the relative convergence of contemporary cultural forms in the Strait. Cultural hybridization, after all, is not the peculiar circumstance of Erubam; it is the circumstance of all contemporary indigenous societies resistant to assimilation in an era of globalization and frequent displacement, yet engaged in processes of creative compromise and renewal.

Prospectively, once the legal criterion of traditional law and custom has served the purpose of gaining such recognition of title as may be won, traditionalism may fade in importance. Islander society will have enlarged the space within which its customary systems may evolve without interference or apology. Major challenges will remain. The population that resides in its home land and sea territory is a minority of the Islander diaspora spread throughout the Australian continent and sprinkled overseas. Even if legal success is met with in securing claims to reef and sea (the real fight) and to islands (a much easier proposition), it will be a major challenge to

balance the claims of expatriate Islanders with those who remain resident in the Strait. It will be an even greater challenge to restore a sense of functional interface between the particular rights of lineage and clan groups, and the wider collective rights of island communities, sub-regional and regional Islander nations. Currently, an association of traditional owners is vying with a nascent Islander regional government for control of the land and sea claims process.

Meanwhile, Islanders struggle to negotiate greater autonomy for a regional self-government whose jurisdictional rights, while not recognized as an aboriginal right, may be achievable via legislative delegation. Advances have occurred in this direction, and opportunities for further progress are taking shape (Sanders, 1994; Altman, Arthur and Sanders, 1996; Arthur, 1997; Commonwealth of Australia, 1997). There is notably little progress, however, on real power or autonomy in regard to marine jurisdiction and resource allocation decisions. Instead, frustrated eastern Islanders have unilaterally declared an exclusive economic zone, and in recent years have undertaken direct action to expel non-Islander commercial fishermen. Recently, the state has retaliated by laying criminal charges. In defence of the Islanders arrested, Mer Chairman Ron Day (Anon., 1998) declared that "the government must recognise that we are prior occupiers of our area – not only of the land but the sea also – and it's time we had total control and management of this area so that fishing can be a sustainable industry."

Pending the outcome of the High Court decision on the Croker Island sea rights test case, significant changes in state policy are unlikely. If Islanders fail to get sea space recognized as property, it will be all the more imperative that they negotiate an enlarged share of self-government jurisdiction for sea territory and resources. But the state's separation of property from jurisdiction poses a situation of double jeopardy for indigenous sea rights claimants. Not only are they to be denied self-governmental jurisdiction over sea territory, but they must fight the European cultural bias that sea space is not the proper object of private ownership (see Sharp 1996b, 1996c, 1998), and should be subject to weaker forms of Native title (if any) than land.

Concluding Remarks

Our analysis suggests a redefinition of institutional loci for balancing more public versus more private rights and interests, in overcoming the centralist hegemonies of state power. The territorial sovereign monopoly of the state is no less a reification than the myth of property as natural object. The state stubbornly denies its position as only one in a series -- nested like Russian dolls -- of institutional balances between more particular and more collective rights and interests. Families, lineages, clans, nations, states and global communities, each at their own level, negotiate this balance. Even at the micro corporate level of the nuclear family, parents in some sense are custodians, not just individual title holders, of real estate on behalf of their children and each other. At the opposite extreme, international political structures are defining and regulating global human interests, to the point that even the high seas and space beyond the atmospheric limits of conventional aircraft are no longer truly "open access" commons. In this perspective, states defend the more particular corporate territorial rights of their citizenries, but are increasingly constrained in their "sovereign" decisions by the global collectivity of corporate humanity.

The question to central governments, in relation to the collective property and self-governmental rights and aspirations of indigenous clans, nations, federations -- however they may choose to configure themselves -- is: why not relax? Heterogeneous nestings of property and political responsibility, involving a plurality of cultural forms, indigenous and non-indigenous, are

not only desirable but sociologically inevitable. Efforts by central state authorities to enforce constitutional monopolies of power, as Hooker (1975) and Moore (1978) observed several years ago, are only *ever* realizeable to a relative degree. In settler states like Canada and Australia such efforts can be sustained only at the cost of perpetuating colonial violence toward indigenous property and authority.

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