No Ordinary Judgment: Mabo, The Murray Islanders’ Land Case
by Nonie Sharp
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Reviewed by Maureen Fuaty

Nonie Sharp’s critical evaluation and analysis of the
major twists and turns of the Murray Island Land
Case (which culminated with Mabo v Queensland
[No. 2] (1992) 175 CLR 1 in the High Court) is an im-
portant contribution to the burgeoning literature on
native title in Australia. As an anthropologist who has
been involved in this case from its inception, Sharp is uniquely
placed to give us a particular view and reading of the
ways in which the Murray Island plaintiffs and their coun-
sel put their case for having traditional ownership of land
recognised. The courtroom drama is the central context
within which Sharp explores the major moments and
turning points in the case, as it moved between the High
Court and the Supreme Court of Queensland over a peri-
do of 10 years.

Sharp frames her analysis of the Murray Island Land
Case both in terms of the case itself, and in its relation to
international and national debates concerning Indigenous
land tenure. Nancy Williams’ 1986 book, The Yolgnu and
Their Land: A System of Land Tenure and the Fight for Its
Recognition, an anthropological analysis of Justice
Blackburn’s 1971 judgment on Yolgnu ownership of land
(Milirrpum v Nabalco Pty Ltd & The Commonwealth (1971) 17
FLR 141) is particularly important to Sharp’s approach:
‘[Williams’] experience of courtroom misunder-
standings and her historical study of European concepts
of property are distilled in this seminal study, which has
a link with this book’ (p xxi).

The interpretation of evidence
In this ‘native title era’ or ‘post-Mabo era’ which all
Australians now inhabit and are continuing to construct,
Sharp’s critique of the ways in which the concepts of
Meriam law and ownership have been consistently misun-
derstood and misrepresented in the Supreme and High
Courts is especially pertinent. Her detailed exploration
of the findings of Justice Moynihan in the Supreme Court of
Queensland on 16 November 1990 and the roll-on effects
of those findings on the subsequent interpretations of
ownership by the seven High Court judges, reminds us
that notwithstanding their historic finding in favour of
Murray Islanders’ native title, the real meaning and prac-
tice of Meriam ownership has yet to be grasped by the
judiciary, governments, and Australians as a whole.
Paradoxically, while the High Court was able to overturn
the doctrine of terra nullius by recognising the operation of
more than one law in relation to land in Australia, this
finding was predicated on the reduction of Meriam
relations to the land to essentially economic and material
relations. In the process of squeezing and diminishing
Meriam land-people relationships into a singular approxi-
mation of common law understandings of property,
allowing it to become ‘known to English law’, the signifi-
cance and the greater meanings of Meriam relationships to
the land have been minimalised and diffused, both during
the case itself and in subsequent renderings of native title.

‘While most people are aware that the Meriam people
won recognition of “native title” to their land, the
principles of that Meriam land tenure have had little
airing outside the Murray Islands. A difficulty is that
few non–Aboriginal people have had the chance to listen
to Meriam voices saying that there are two cate-
gories of law, more than one way of relating to land,
more than one culture. Their declarations of their local
principles are rarely heard because they were hidden, both
in court and the Determination of the Issues of Fact,
beyond narrow definitions of law and ownership. In the pub-
lic arena they were diffused within the pervasive and
taken-for-granted sense of one law and the exigencies of prac-
tical politics’ (p 214; my italics).

Central to Sharp’s analysis is the problematic way in
which evidence is heard and misinterpreted, particularly
in the adversarial context of the Supreme Court. It is start-
lingly evident in No Ordinary Judgment that this constitu-
ted particularly difficult terrain for Torres Strait Islander
people, and non–Torres Strait Islander witnesses alike to negoti-
ante; none of course were trained in law.

As an anthropologist working with Aboriginal and
Torres Strait Islander people, it struck me how crucial it is
for all of us to become as familiar with the culture of
courtroom interrogation and the construal of meaning and
argument, as we are with the societies within which we
usually conduct our research. This is no easy task, but
what is perfectly clear from Sharp’s book is that what
many witnesses were saying and meaning in the Supreme
Court, was not necessarily understood by the judiciary.

Making the courts understand
Because of the way in which Justice Moynihan
narrowly interpreted the ‘facts’ of the case, the subsequent
exploration of matters of law pertaining to the case in the
High Court was necessarily constrained. Customary
ownership of land (and sea), obligation and right, inclu-
sion and exclusion, the reciprocal relationships between
people and place which are economic and spiritual, are
yet to be properly understood by the judiciary. The sim-
plistic renderings and translations of Meriam law and
ownership is particularly disturbing given the debates
about traditional ownership which have proliferated
since Milirrpum v Nabalco Pty Ltd & The Commonwealth.
While this case did help to clarify many points of law for
several of the judges, enabling a positive outcome for the Meriam plaintiffs, nevertheless, within both of these landmark judgments there remains a tenacious need for traditional systems of law and land ownership to be recast, and thus misrepresented, in order to make them known to English law.

As anthropologists trained in exploring the experience of humans as cultural and creative beings, we implicitly understand that the everyday slippage between on-the-ground, observable cultural practice and the normative statements which inform culture, is in essence the *sine qua non* of culture. It would seem from reading Sharp's book that this is where she and Jeremy Beckett are at odds (see 'The Murray Island land case and the problem of cultural continuity' by Jeremy Beckett in *Mabo and Native Title: Origins and Institutional Implications* by W Sanders (ed)). Sharp iterates normative statements about Malo's Law regularly throughout her book, whereas when she examines snippets of Beckett's work, it is clear that he is concerned with on-the-ground behaviour, and flexibility.

As a professional group, we need to learn the language of lawyers. It is critically important that the judiciary properly comprehend and grasp the flexibility and adaptability of culture. Until we successfully communicate this crucial dynamic of all cultures to the legal fraternity, such dynamism will continue to run the risk of being misconstrued and simplistically rendered as indicative of irreversible change and cultural demise, rather than signifying cultural continuity. It is not until we skillfully bridge the cultural gap between anthropology and the law that such cultural 'truths' will cease to appear confusing in the courtroom, and instead become illuminating.