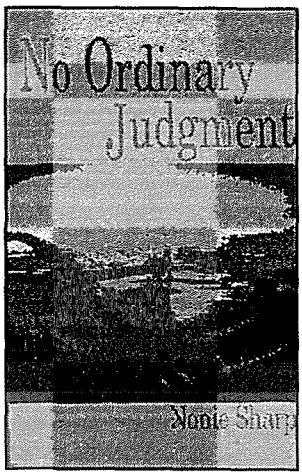

review

No Ordinary Judgment: Mabo, The Murray Islanders' Land Case

by Nonie Sharp

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Reviewed by Maureen Fuary

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 important 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 counsel 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 period 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 misunderstandings 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 misunderstood 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 practice 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 approximation of common law understandings of property, enabling it to become 'known to English law', the significance 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:

> '[W]hile 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 categories 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, *behind narrow definitions of law and ownership*. In the public arena *they were diffused within the pervasive and taken-for-granted sense of one law and the exigencies of practical 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 startlingly evident in *No Ordinary Judgment* that this constituted particularly difficult terrain for Torres Strait Islander and non-Torres Strait Islander witnesses alike to negotiate; 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, inclusion and exclusion, the reciprocal relationships between people and place which are economic and spiritual, are yet to be properly understood by the judiciary. The simplistic 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.