No Ordinary Case: Reflections Upon Mabo (No 2)

NONIE SHARP*

"If you want to be a real Murray Islander you follow Malo's Law."
Sam Passi, Meriam witness

1. *Unbroken Chains of Title ...*

The High Court judgment in the *Mabo v Queensland*[1] (hereafter *Mabo (No 2)*) of 3 June 1992 has been seen as some kind of watershed by very diverse interests in Australia. The Meriam people of the Murray Islands (recently renamed Mer) greeted the judgment with great rejoicing, beginning to divide their history into "before" and "after" land rights. The mining industry has moved from the cautious hope that the decision referred only to nine square kilometres of land on Murray Island[2] to the view that it provides "a recipe for continued uncertainty with respect to land held by the Crown throughout Australia".[3] Spokespeople for some Aboriginal groups have seen it as a new beginning; others have seen it as "a most cautious and belated recognition",[4] or as "giving an inch but taking another mile".[5]

The High Court did not intend its judgment to be corralled within the Murray Islands, but to reverse the position of Australia as *terra nullius*. This is how Aboriginal groups have interpreted it.[6] On Cape York Peninsula, the Aboriginal neighbourhood of the Torres Strait Islands for instance, Aboriginal communities have spent the past six months showing the continuity of their links with customary land in their daily practices — by requests for assistance in establishing outstations, by negotiations on public, park and (formerly) reserved land, and in at least two cases, by court actions.

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1 (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1 (hereafter all page references will be to 66 ALJR 408).

2 *Sydney Morning Herald*, 3 June 1992.

3 Ewing, G, "The Likely Impact of the Mabo Case on Aboriginal Land Rights Claims" (1992) 5 *Mining Rev* at 12.

4 See Pearson, N, "204 Years of Invisible Title — From the most Vehement Denial of a People's Rights to Land to a most Cautious and Belated Recognition" in Stephen, M A and Ratnapala, S (eds), *Mabo: A Judicial Revolution* (1993) at 75.

5 Mansell, M, "The Court gives an Inch but takes another Mile" (1992) 57 *Aboriginal L Bull* 4

6 For a succinct legal interpretation of the implications of the judgment for various categoreis of land, see Keon-Cohen, B, "*Eddie Mabo and Ors v The State of Queensland*" (1992) 56 *Aboriginal L Bull* 22.

As Deane and Gaudron JJ make very clear in their joint judgment,[7] the circumstances of *Mabo (No 2)* were unique and it was this uniqueness that provided a significant impetus to the process of questioning and rethinking the legal assumptions underlying the (whole) dispossession of the Aboriginal peoples of their lands.

> If this were any ordinary case, the Court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than 150 years.[8]

They do not actually specify these unique circumstances. Yet it is clear from their argument that they are referring to the finding by Moynihan J in the Supreme Court of Queensland,[9] to which the hearing of the facts and the examination of witnesses was remitted, of an unbroken line of Meriam succession to private plots of land at Mer extending to a time before annexation of the Torres Strait Islands in 1879, when Meriam lands became subject to the sovereignty of the British Crown.

For two of the three plaintiffs — Rev Dave Passi and James Rice — the chain of title set out in relevant tables was uncontroversial: they could show a line of succession through patrilineal inheritance of specified lands from pre-annexation times until today. For example, Moynihan J concluded that the table setting out claims, submitted by Rev Dave Passi to Passi land at Giar on Dauar island through at least five generations covering a period prior to annexation to the current one, was not subject to any dispute (see Figure 1).[10] Like that of most Meriam witnesses, Passi land tenure was relatively undisturbed.

This is just what the Yolngu plaintiffs were unable to prove to Blackburn J's satisfaction in the case of *Milirrpum v Nabalco Pty and the Commonwealth of Australia*[11] (hereafter *Milirrpum*), brought by Yolngu plaintiffs from Yirrkala on Gove Peninsula in East Arnhem Land in 1970 and heard in the Supreme Court of the Northern Territory. As Deane and Gaudron JJ observe, the main reason for Blackburn J's rejection of the Yolngu claim was that the plaintiffs were unable to show, to his satisfaction, that their predecessors had had the same links as themselves to the land they were claiming at the time when British sovereignty was established in the colony of New South Wales.[12]

The Supreme Court of Queensland heard evidence from Islanders, expert witnesses and the defendants over 66 days in Brisbane late in 1986, at Mer and Thursday Island in 1989 and again in Brisbane in 1989. The three volume Determination of 227 pages which was delivered on 16 November 1990, was

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7 Above n1 at 437-456.

8 Id at 451.

9 Determination of Issues of Fact, 16 November 1990.

10 Figure 1, with the year of annexation inserted, is a facsimile of ibid at 213B.

11 (1971) 17 FLR 141.

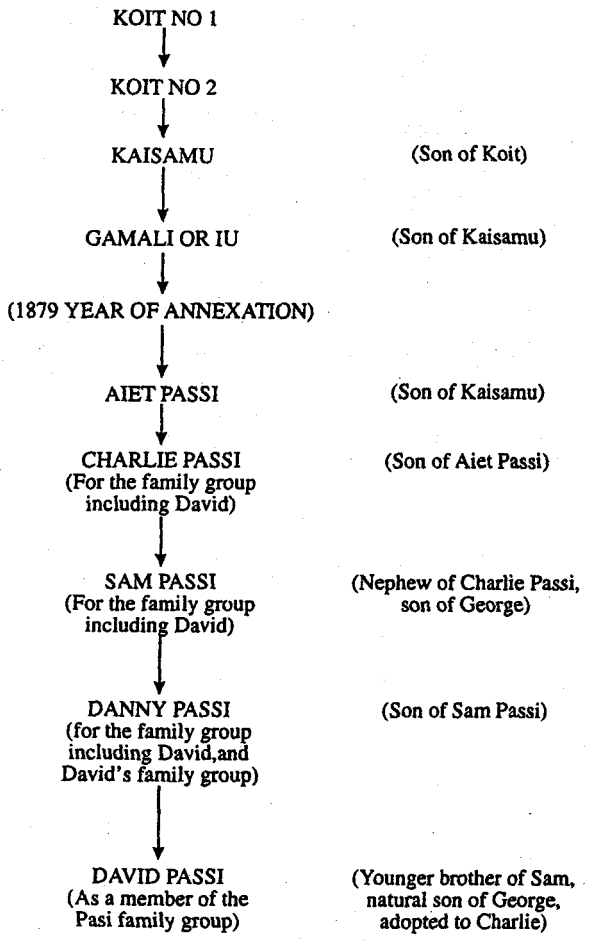
12 Above n1 at 448, see above n11 at 198. A particular difficulty related to the establishment by the plaintiffs of the succession by one particular clan from another clan to the land claimed (above n11 at 185-90). More generally, the Court examined practical usage of land "as a system of ownership and possession" (Williams, N M, *The Yolngu and their Land* (1986) at 202).

based upon 3,464 pages of transcript. Even though less than 15 pages of a total of 218 pages of the High Court's final judgment referred directly to the findings of fact in the remitter court, there is no doubt that in their relation to the claims, submission and argument, they were an essential component of the High Court's reasoning in its reversal of the established position of *terra nullius*.

I shall attempt to show this by some detailed recapitulation of the historical situation, as seen through the eyes of Deane and Gaudron JJ, whose 46-page judgment conveys a sense of their disquietude which, as I shall illustrate shortly, combines the sharp and painful, with the inspiring.

Figure 1

D Passi's Claim to Giar (38)
Chain of Title



In a series of bold and economical steps, the judgment isolates two propositions which underlie earlier Australian cases: the first is the doctrine of *terra nullius* ("that New South Wales had been unoccupied for practical purposes");[13] the second is "that the unqualified legal and beneficial ownership of all land in the Colony had vested in the Crown".[14] Before *Mabo (No 2)* these two propositions had been challenged in only one case brought by Aboriginal people: that of *Milirrpum* (like *Mabo* the case bears the name of the first plaintiff). Two "general reasons of principle" formed the basis of Blackburn J's rejection of the Yolngu claims to traditional land: that the doctrine of communal native title never formed part of the law of any part of Australia, and that the plaintiffs had failed to establish any pre-existing interest in the land which could be termed "rights of property".[15]

Unfortunately for the Yolngu (and hence all other indigenous Aboriginal people in Australia), as Deane and Gaudron JJ explain, Blackburn J's statements of general principle rested upon "some general statements of great authority"[16] in at least four earlier Australian cases which did not directly involve Aboriginal entitlement to land. In relation to the way in which Aboriginal dispossession occurred, in one or both of the two propositions discussed above — which together assumed total British ownership of formerly unoccupied land — the reasoning in each of the four cases relied upon consisted "of little more than bare assertion".[17] Deane and Gaudron JJ then go on to lay a burden of responsibility upon the two propositions as "a legal basis for and justification of the dispossession" of Aborigines and as part of "the environment in which Aboriginal people ... came to be treated as a different and lower form of life" than the settlers and "whose very existence could be ignored..."[18]

They illustrate "past injustices" graphically with respect to one "flash point" on the lower reaches of the fertile flats of the Hawkesbury River in 1804, an early stage "of the conflagration of oppression and conflict which was ... to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame".[19] The "unusually emotive" and "unrestrained language" used in their depiction of Aboriginal dispossession,[20] carries a poignancy perhaps springing from a terrible realisation of the historical association of deeply embedded and accepted legal propositions and brutal and self-righteous dispossession. There is an unmistakable sense of moral outrage at the implications of a shameful history which has a resonance with some of the writings of those associated with the Aboriginal Treaty Committee.[21]

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13 Above n1 at 449.
14 Ibid.
15 Id at 448.
16 Ibid.
17 Id at 449.
18 Id at 451.
19 Id at 449.
20 Id at 456.
21 Coombs, H C, said in 1981: "The British achieved control of this continent by a series of acts of aggression; sometimes by the most shameful means ... This must be a source of shame to white Australians...", "The Case for a Treaty" in Olbrei, E (ed), *Black Australians: The Prospects for Change* (1982) at 57-8.

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.[22]

These may have already been the private thoughts of the judges when a group of horticulturalists and fisherfolk, a sedentary people claiming uninterrupted possession of private plots of visibly boundaried customary lands rather than communally-held title, brought their claim to the High Court in May 1982. These were the Meriam plaintiffs. When the Supreme Court of Queensland released its Determination of the facts in dispute on 16 November 1990 Moynihan J referred the question of whether a Meriam "system of law" conferring rights to land exists the Murray Islands to the High Court.[23] He concluded: "I have little difficulty in accepting that the people of the Murray Islands perceive themselves as having an enduring relationship with land on the [Murray] Islands and the seas and reefs surrounding them".[24] Referring to "deeply ingrained social and cultural attitudes" of respect for others' land and for land boundaries among Murray Islanders, Moynihan J noted that these attitudes were part of the personal make-up of Murray Islanders. They are like "our concept of good manners", he remarked. He noted how "a strong sense of the observation of propriety in respect of land" and "of the appropriateness of being in your place or locality" rather than in somebody else's were reflected in such words as "shame and trespass".[25]

The remitter Court's findings were sufficient for six of the seven members of the High Court to conclude that a system of law relating to land tenure existed and continues to exist at the Murray Islands, although Brennan J concluded that "[t]he findings show that Meriam society was regulated more by custom than by law".[26] Toohey J noted and summarised the defendant's argument that although the Meriam were present on the Murray Islands before and at the time of annexation and that "the Crown in right of Queensland had not attempted since then to dispossess them, ... there was no ordered system of land tenure before annexation" ("an argument of uncertainty"), and that since annexation, land disputes were settled by an "Island Court which owed little to the pre-contact situation".[27] Toohey J goes on to reject the uncertainty argument: its applicability would rest upon evidence of purely capricious rules or practices, applied so inconsistently as to suggest the Meriam presence to be "coincidental and random", a conclusion inconsistent with Moynihan J's findings.[28] Deane and Gaudron JJ are even more forthright and unequivocal in their conclusion. Accepting the defendant's argument "that it is impossible to identify any precise rules of inheritance or any precise method of alienation", and, like Toohey J, noting the unavoidable "areas of uncertainty and elements of speculation" in the detailed findings on issues of fact,[29] they nevertheless feel able to arrive at a position of certainty:

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22 Above n1 at 451.
23 Above n9 at 223.
24 Id at 157.
25 Ibid.
26 Above n1 at 411.
27 Id at 487.
28 Id at 488.
29 Id at 454.

> Nonetheless, there was undoubtedly a local native system under which the established familial or individual rights of occupation and use were of a kind which far exceed the minimum requirements necessary to form a presumptive common law native title.[30]

They go on to argue further that annexation preserved "the traditional entitlements of the Meriam" and that notwithstanding the fact that the Crown acquired radical title, the latter's proprietorship was "reduced, qualified or burdened by the common law native title of the Islanders which was thereafter recognised and protected by the law of Queensland".[31]

On the other hand, the one dissenting opinion, that of Dawson J, was that Moynihan J had "formed the view" that it would be merely speculative "to conclude that there was any particular system controlling the use of land on the Murray Islands before European contact".[32]

2. *Meriam Self Perceptions: the Uniqueness of Malo's Law*

The Meriam would agree wholeheartedly with Deane and Gaudron JJ that their circumstances and their case are unique. They see their inheritance as carrying a distinctiveness associated, above all, with the Meriam god Malo and Malo ra Gelar, Malo's Law. However, this was not mentioned in court by all the Meriam witnesses. Those who did mention it so included members of what I call the Meriam intelligentsia — the late Sam Passi, the late Eddie Koiki Mabo and Rev Dave Passi. Marou Mimi, a man of renowned intellectual and moral stature, who died in 1967, was recognised in the court hearings for his role in bringing Malo's Law from a lived, taken for granted, practice into a written form.[33]

A recognition of the distinctiveness of Meriam inheritance led Eddie Koiki Mabo to realise the total inapplicability to the Meriam of the arguments brought by Blackburn J to reject the Yolngu claim during a private conversation at the offices of the Black Community School in Townsville in 1980. Meriam uniqueness was apparent to Flo Kennedy, the Torres Strait Islander who made a public call for a land case at a meeting at Tamwoy Town, Thursday Island, in August 1981.[34]

Meriam "national" distinctiveness was apparent long ago. Dr A C Haddon, leader of the Cambridge Anthropological Expedition to the Torres Strait Islands, observed in 1898: "a feeling of nationality" had been created among some seven to eight hundred inhabitants of Mer, Dauar and Waier, the three Murray Islands, through the sacred order of Malo-Bomai, mythical heroes who brought together the eight clans of the Murray Islands as one people.[35] Buttressing and re-creating that group identity in social practice is Malo's Law, which begins: "*Malo tag mauki mauki, Teter mauki mauki*, keep your

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30 Ibid.
31 Ibid.
32 Id at 473.
33 Lawrie, M, *Myths and Legends of the Torres Strait* (1970) at 337-8.
34 For a consideration of the beginnings of the *Mabo* case, see Sharp, N, "Contrasting Cultural Perspectives in the Murray Island Land Case" (1990) 8 *Law in Context* 1 at 3-4.
35 Haddon, A C, *Reports of the Cambridge Anthropological Expedition to the Torres Straits* (1935) Vol I at 183.

hands and feet off other people's land ... *Malo wali aritarit, sem aritarit,* Malo plants everywhere."

Underlying Malo's Law and giving to it a sacred endowment is the myth of Malo and Bomai (Malo's maternal uncle) and the narrative of their long sea journey from West New Guinea across the western and central islands to Mer in the east. The origins of Malo's Law within the sacred charter of the myth was not explained to the Court by the expert witnesses. No doubt this contributed to Moynihan J finding the origins of Malo's Law "diffuse and obscure".[36] Further, the meanings of the narrative sequences of the myth in marking out the named landscape of the Meriam, and the consequent drawing of that sacred track into their social orbit were not made clear to him. Through the myth, enemies of the other side (the non-reciprocal "other") were drawn into a two-way reciprocal relationship of giving and returning through what were known as wauri voyages.[37] Moreover, it was Bomai (Malo's secret and very sacred name) who appeared in the shape of an octopus at the village of Las on Mer, who symbolised a new unity of the eight patriclans of the Meriam and made possible the dangerous liaisons with wauri partners in far away islands.

Moynihan J was aware that the Malo myth "is a matter of enormous complexity and significance" for "understanding the culture and the [Meriam] people"; he was sensitive to a quality of "deep mystery"; and there is a tone of humility in his admission that "my understanding of it is inadequate in the extreme".[38] The "story", as he repeatedly calls the myth's narrative sequences, was presented to the Court from Margaret Lawrie's book, Myths and Legends of the Torres Strait.[39]

The version there is a retranslated version of the myth as written by Aiet Passi and shown by him to the linguist Sidney Ray in 1898.[40] Lawrie, who appeared as a witness for the defendant (although the plaintiffs saw her evidence as favouring them), saw her work as recording, but not interpreting the narratives.[41] Neither Moynihan J nor the High Court became conversant with the character of myth as a sacred charter which laid down the foundation of a moral order among the Meriam; with the fact that like poetry, myth uses the language of metaphor to identify the truth of underlying relationships; that the fabric of life is made-up of paired opposites (in the language of structuralism); and that the corporeal and the spiritual are tied together indivisibly through the intervention of mythical beings. In the Malo myth

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36 Above n9 at 137.

37 Wauri was the Meriam name for the sea voyages for gift exchange and trade. See Haddon, A C, "Sociology, Magic and Religion of the Eastern Islanders" *Reports of the Cambridge Anthropological Expedition to the Torres Straits* (Vol 1, 1908) at 186-7. See Sharp, N, *Stars of Tagai: The Torres Strait Islanders* (1993) at 29-9, 63-7, for a discussion of the connection between wauri voyages and the sacred order of Malo-Bomai. *Wauri* is the cone shell (*conus litteratis*).

38 Above n9 at 132.

39 Supreme Court of Queensland, Exhibit 255.

40 Above n33 at 325-36. For the original by Aiet Passi [Pasi], Sam Passi's and Rev Dave Passi's grandfather, see Ray, S H, "Reports of the Cambridge Anthropological Expedition to Torres Strait Islands" *Linguistics* (1907) Vol III at 233-9.

41 Above n9 at 45. However on one occassion she writes: "If the tales may be taken as evidence, there was little gaiety or fun in the Islander's life", above n33 at xxii, 19.

Bomai undergoes many metamorphoses, arriving at the village of Las in the form of an octopus, which carries a heavy load of symbolic meaning as a religious mediator, bringing together in one body the eight landowning clans (*nosik*) of the Murray Islands, each of which has an independent identity demarcated and reinforced by separate lubabat or totem, clan territory and wind or season, and all of which in pre-missionary times, had a marked propensity for feuding. Integral with its sanctification in the myth (and certainly the Law pre-dates Malo) is the fact that the words of Malo ra Gelar form one of the five sacred chants or ikok sung during Malo religious ceremonies, its instruction, Malo wali aritarit, sem aritarit containing words not in the ordinary Meriam language but in a language of devotion used on religious occasions.[42]

Notwithstanding the destruction of the Malo-Bomai sacred order as an institution, to a greater or lesser degree, Malo's Law continues to carry the force of a religious commandment. Meriam who have special knowledge of their cultural inheritance say that Malo's laws are like those of the Christian religion, so in this respect their conversion to Christianity makes no fundamental difference. Either religion tells us how to live together: these are the rules we Meriam must follow.[43] The late Sam Passi, a former Chairman of the Murray Island Council, eldest son and therefore the nameholder for Passi land, a man of special knowledge in the tradition of his grandfather, a Zogo le or priest of Malo, and an exemplar in the Malo tradition as a champion gardener (Malo wali aritarit), was described by Moynihan J as "an old, influential, impressive traditional Murray Islander".[44]

Between 1982 and 1984 Sam Passi recorded with me his ideas about Malo and Christianity. His grandfather (Aiet Passi, Figure 1 above) taught him Malo's Law as a very young man:

> ... the rules of Malo-Bomai are very similar to those of the Ten Commandments and so forth. Thou shalt not ...; don't do that; you should do this, you do that, eh; not this way. Keep out of this! Well, Malo-Bomai was something like the Old Testament ...
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> On Murray Island Christianity was accepted so quickly because of Malo-Bomai. I appreciate having such rules and so forth from Malo-Bomai. Once you learnt that you can just manage to do something that is written in the New Testament.[45]

His younger brother, Anglican priest Rev Dave Passi, had also developed his own interpretation of the two traditions in which he came to "see Christianity as the fulfilment, the extension of Malo":

> The missionaries attempted to destroy Malo. They introduced new things and somehow government food tasted better. But at Murray, to destroy Malo, even if you were a Christian priest, is not possible. The missionaries didn't destroy the Malo tradition. But it wasn't just that they didn't succeed.

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42 See Haddon, above n37 at 243.

43 Radin, P, *Primitive Man as Philosopher* (2nd edn, 1957) at 231-6, 277 identifies the "speculative philosophers" among the Winnebago. See Sharp, above n37, ch 3 on speculative thought and "persons of originality".

44 Above n11 at 192.

45 Sharp, N,"Book of Islander" *Springs of Originality among the Torres Strait Islanders* (1984) PhD thesis, Vol II, La Trobe University at B61.

> It's interesting because their failure shows the greatness of Malo. I'm seeing it this way: Malo came to prepare the world for a bigger truth. Jesus Christ is where Malo was pointing. The truth is not easy to cross out as every Christian understands.[46]

He went on to ground his understanding and practice of Malo's Law within the Malo tradition, joining together the meaning of the Law as a set of rights and obligations with the Law as a way of following in the footsteps of his forebears.[47]

Counsel for the defendant argued that even if the Malo-Bomai cult had regulated dealings in land in the past, that the Meriam had failed to produce "anything that replaced the [Malo] cult as the regulator of land".[48] Noting the way "every witness" referred to "a set of rules of conduct which they felt was obligatory upon them",[49] the plaintiffs' Counsel argued that it does not matter whether these rules are called Malo's laws or a set of common principles, or whether they are precisely the same as before annexation: "what matters is that here is a continuity" today with laws that operated in the past.[50] In the context of the argument, Counsel was correct and prudent in side-stepping the issue of the reasons for the unanimity among witnesses on the obligatory character of following a common set of rules (which some of them specified as Malo's Law). Why they felt themselves to be obliged in this way was not pursued.[51]

3. *The Spiritual-Religious versus the Economic*

Moynihan J was impressed primarily by what he saw as the cultural difference between the Meriam and the Yolngu Aboriginal people. Reflecting upon the "considerable debt" he owed to Blackburn J's judgment in *Milirrpum* for the light it cast upon his own work,[52] he nevertheless concluded:

> I am however dealing with a very different society and very different relationships with and attitudes towards land to those with which he was contending.[53]

In contrast with the Yolngu, the Meriam's tie to land "was and is not a religious or spiritual relationship of the kind which emerged, for example, in *Milirrpum v Nabalco...*"[54]

In making this contrast, Moynihan J focused exclusively upon the social regulation of a competition for scarce resources — an economic preoccupation — on the Murray Islands. Thus the maintenance of "social order", the quest for "social harmony", not concern for "the intrinsic value of the land",

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46 Id at B125. On Rev Dave Passi's interpretation of the relationship of Malo and Christianity as a "new theology", see Sharp, above n37 at 121-5.

47 See Kebi Bala (Rev Dave Passi) in Sharp, abvove n37 at 67-9; see also 69-77.

48 Supreme Court of Queensland, Transcript at 3486.

49 Id at 3467.

50 Id at 3474.

51 The changing expressions and the religious grounding of this continuing obligation are considered in Sharp, above n37.

52 Above n11 at 11-12.

53 Id at 12.

54 Id at 155.

give definition to the character of the Meriam relationship to their land: the Meriam "need to control access in the terms of distribution or sharing life-sustaining or socially advantageous resources in a potentially volatile social environment".[55] This view reflects very closely that of Jeremy Beckett, an anthropologist called by the plaintiffs, whose association with the Meriam began in 1958. He drew attention to "the volatile social environment created by a struggle for scarce resources: Malo's Law provided the overall framework manifest in certain precepts which so regulated people's behaviour that they could live in harmony with one another",[56] a position consistent with his writings.[57]

Embedded in these findings is a legally cogent half truth about the Meriam. In the context of the Meriam land case that half may have had special instrumental value. The other half remained shrouded for Moynihan J in "deep mystery". Yet divested of its spiritual-religious core the depth and richness of Meriam cultural life evaporates. There is a certain poignancy in this reduction of the Meriam sense of existence for to blot out the spiritual connection with land is to cut the Meriam off from what Stanner referred to among Aboriginal people as the "body of patent truth about the universe that no one in his right mind would have thought of bringing to the bar of proof". This, he describes as the "inherent and imperishable bonds" between the ancestors and the living through land and totems.[58]

An important complexity in the hearing of the facts arose at least partially from the way in which conversion of the Meriam to Christianity within a generation of the arrival of the missionaries on Mer in 1872 was used by the defendant to drive witnesses into a contradiction between following Malo's Law and worshipping God not Malo. In his affidavit of 16 August 1982, P J Killoran, a former director of the Department of Aboriginal and Islanders Advancement, claimed that the conversion of the Meriam to Christianity following the arrival of the missionaries on Mer had destroyed their former way of life and customs.[59] Counsel for the plaintiffs had argued for an essential continuity between the Meriam today and their pre-Christian forebears in belief, custom and law. Given this argument, the defendant's cross-examination of witnesses was directed at forcing them into making a choice between Malo and Christianity. For example, in cross-examination by the defendant's counsel a witness said at one point he worshipped the

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55 Id at 170.

56 Above n48 at 2232.

57 As Moynihan J concluded, given "the primary focus" of Beckett's work, "his particular concern" was with "the development of responses and transformations" among the Meriam in the process of "contract with the modern world", not so much with pre-contact Meriam society and culture. It is useful in "showing that Murray Island society is resilient and adaptive to change", and "less useful in founding conclusions" before that society was transformed. See Beckett, J R, *Torres Strait Islanders: Custom and Colonisation* (1987) tendered as Exhibit 213. See also Sharp above n37 at xii. Moynihan J comments further on the generral absence "of contemporary expert evidence directed to drawing a picture of Murray Island society" before missionary and other influences effected major change, above n9 at 44.

58 Stanner, W E H, "Some Aspects of Aboriginal Religion" (1976) 9 *Colloquium* 1 at 19, as cited in Williams, above n12 at 17.

59 Affidavit, Brisbane (1982), Eighth Sheet, para 14.

traditional Meriam god, Bomai. In further cross-examination the following exchange took place:[60]

Q Do you agree when you started your evidence you took an oath on the Bible?

A Yes, I believe that.

Q Do you see the Bible as part of your Christian faith ...?

A Yes.

Q Do you believe it is possible to worship Bomai Malo as well as the Christian God?

A Well, ... I go back to worship our God, I meant the way ... they used to practise among my grandfather, the same way I have to practice (sic) to direct me on the right path. That's the way I meant to go back to my traditional God of the land.

Q So what you said earlier about worshipping Bomai is not right? Is that it?[61]

When it came to Sam Passi's turn for cross-examination, the tactic was unsuccessful; the defendant desisted from further questioning along these lines. In reply to questions from the plaintiffs' counsel, Mr Passi said: "Yes, certainly I follow them" [Malo's laws];[62] as a Christian he found them "as good as Christianity".[63] In cross-examination he went on to make a highly affirmative statement about the substance of Meriam identity:[64]

Q Is the Bomai Malo religion still a religion for the people on this island, as far as you can say? I use the word "religion" very carefully, Mr Passi?

A I don't worship Malo any more, but the rules are there — very good.

Q That is about land and good behaviour?

A Good behaviour and we still practice (sic) this. If you want to be a real Murray Islander you follow Malo's law.

Counsel for the plaintiffs summed up the relevant aspects of the situation neatly. Putting aside the realm of speculation about the Malo and the Christian traditions, he focussed the Court's attention on the main question: whether "a set of rules of conduct felt as obligatory upon them by the members of a definable group" — the Meriam — continues to exist.[65] Here he is using the words of Blackburn J when the latter posed for himself the question of what definition of law he should adopt.[66] All witnesses (including those who

60 Above n48 at 1279.

61 Ibid. Jack Wailu was speaking in his third language, English.

62 Id at 1102-03.

63 Id at 1103. Counsel for the plaintiffs tendered a document in evidence written by Sam Passi on Malo's Law in Meriam and English (Exhibit 131), above at 149. Plaintiff Hames Rice stated in a written document that there were 24 laws of Malo and listed seven of them. In his examiniation-in-chief he emphasised how the laws are still strong because they "are similar" to Christian laws, id at 1614: not stealing and not trespassing in Malo's Law correspond with the rules of the church, id at 1615. The plaintiff also stated that Malo's laws are connected with spiritual-religious things, id at 1616.

64 Id at 1115.

65 Id at 3467.

66 Above n9 at 266.

appeared for the defendant) had demonstrated that they followed a specified set of rules of conduct regarding land matters, even though "[t]he underlying reasons" or the concepts used to convey those precepts to them may have changed.[67]

Moynihan J accepted the plaintiffs' claim that their system of land tenure "is a continuing and enduring one"; that notwithstanding changes of circumstance, "the underlying basis had not changed".[68] He saw Malo's Laws as "a manifestation of social attitudes deeply imbued in the culture of Murray Islanders"[69] which have the character of a "general framework" laying down "general precepts of conduct".[70] The changes of circumstance, he notes, are the absence of the Malo grouping as a regulator of social order. These conclusions of the remitter court clearly gave the High Court sufficient grounds for acknowledging the existence of an ongoing system of law among the Meriam and to go on to revoke the doctrine of *terra nullius* in Australia.

Important implications of mistaken characterisations of subject peoples flow from this case and from that of the Yolngu. As we have seen, Blackburn J perceived the Yolngu's relationship with their land as an exclusively spiritual one. Reversing that perception for the Meriam, Moynihan J saw their relationship to land as a purely utilitarian one. Neither depiction is more than half of the truth; the one contributing to the failure of a land case, the other instrumental in making Meriam land tenure more accessible to the Western mind. Both descriptions, I suggest, are part of a culture-bound and specifically social evolutionist perception: the Yolngu, traditionally huntersgatherers are less like European societies and therefore seen as "primitive"; the horticultural Meriam, whose relationship to land is more like that of the English are seen as more "advanced". Comparative examination of the hearing of the facts in the *Mabo (No 2)* case in relation to the Yolngu and their claims in the *Milirrpum* hearings points towards this conclusion. Nancy Williams has suggested that, in the *Milirrpum* case, emphasis on the religious dimension of the Yolngu's relationship with their land tended to exclude the social and the economic. She goes on to show the connection between the presumed absence of an economic conception of land as "the substance of proprietary interests"[71] and Blackburn J's rejection of the plaintiff's claim:

> Because it lacked concepts of property that existed in contemporary common law, Yolngu ownership by right of title was found to be a matter of religious belief and not of economic significance. It was therefore not law.[72]

The Meriam's land tenure system has qualities — in particular private rights to land — which bear a recognisable resemblance to Western property rights. This fact probably helped the Meriam immeasurably. Severed from their source in sacred endowment and religious certitude, their land tenure looked qualitatively different to the Court's perception of Aboriginal interests in land which Blackburn J had rejected twenty years earlier.

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67 Above n48 at 3467.
68 Above n9 at 11.
69 Id at 137.
70 Id at 134.
71 Id at 272.
72 Williams, above n12 at 202.

The Western concept of property is, as Williams observes, "fundamentally an economic concept" based upon exclusive individual rights. Its corollary is that the economic conception of property embodied in a system of law is the fully developed or perfect system by which all other systems of law or practices or custom can be measured.[73] Moynihan J states explicitly his recognition of the difficulty of applying the concepts of one culture to judge another.[74] On the culturally specific question of the inseparability of the religious from the economic and the social in Meriam ontology, his perception appears to be limited by a framework which operates within the binary, that is, either-or categories characteristic of Western thought.

As we have seen, given the High Court's historic judgment, the *Milirrpum* decision has been overruled. In stating the propositions embedded in Blackburn J's reasons for judgment, Deane and Gaudron JJ make explicit their disagreement "with each of the ... conclusions of general principle reached by Blackburn J".[75] Moynihan J's limited descriptions of the Meriam were sufficient for the High Court to recognise the operation of an ongoing land tenure system.

Yet the full reality of Meriam existence is inconceivable without religious mediation. The Meriam relationship with land is a spiritual one, and whether one speaks at a clan or an inter-clan level, religious mediation — through ancestral succession (lubabat or clan totems), through Malo symbolised as an octopus, and/or Jesus Christ as universal mediator, or all of these — remains central. Certainly there are secular agencies such as the elected Murray Island (now Mer) Council which regulate social behaviour. However notwithstanding Moynihan J's conclusion that magic and sorcery, along with Malo beliefs and rituals have no active presence in preserving social order in Meriam life today,[76] it remains true that hostile magic (maid and puripuri) is a continuing and active regulating force in Meriam social behaviour.

Moynihan J saw Rev Dave Passi's views on Christianity as "the fulfilment of Malo" as idiosyncratic, although held honestly.[77] In their integration of the Malo religion with the Christian tradition, both Eddie Mabo and Father Passi where seen to ignore "some of the darker aspects of the [Malo] cult".[78]

For the Meriam plaintiffs the Court's lack of acknowledgement of the authenticity of their creative syntheses was underlined by the difficulty of proving a connection between their Christianity, Malo and Malo's Law. As soon as the Court had completed its hearings of the facts, the Meriam proceeded to talk about their land in their local idiom. Freed of the constraints placed on witnesses by hearsay rules,[79] by the need to be steered away from issues which carried apparent contradiction, by the problem of the translatability of Meriam concepts into a language accessible to an English-Aus-

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73 Id at 201.

74 Above n9 at 14, 57-72. At an earlier hearing of the case on questions of admissibility of oral evidence, Moynihan J reflected upon an impasse created by "two parallel systems of law and their effect on each other" (as quoted in Plaintiffs' Affidavit 1987, para 14 at 7).

75 Above n1 at 92.

76 Above n9 at 128-9, 158.

77 Above n6.

78 Id at 132.

79 Above n34 at 16-21.

tralian court (for instance, the concept of each Meriam group and person "having" or "owning" or "belonging to" a particular wind),[80] and the manifestations of this problem of explaining culturally specific and complex concepts in what for many witnesses is their third language, they spoke about their "body of patent truth", about themselves, about their land and their ancestors, and about God and Malo. Sitting on his land, James Rice elaborated on what he had said in a sanitised form in Court:

> This area, this land is ours. Our ancestors were living here. There were no white people here ... I know my boundaries; I know my areas. I can name them where the ancestors been naming all these places. These are not any white people's names ... I say Bazmet — this is my ancestor's name. And this land belongs to my ancestors.[81]

The Rev Dave Passi said in similar vein: "It's my father's land, it's my grandfather's land, it's my grandmother's land. I'm related to it, which also gives me my identity."[82] Flo Kennedy, a Torres Strait Islander with a special affinity with the Meriam through her family, went on to explain the meaning behind the naming of lands by ancestors: "To us they are still alive. Their spirits still live ... We still have a responsibility to them. Now they told us that the land is ours. And their fathers before them".[83]

Meriam identity is real. As Williams' work has revealed in relation to the complexities and authenticity of their land tenure, so too is Yolngu identity. Each has its own distinctiveness. Meriam identity is also set within a broad context in which their relationship to the land is founded upon broadly similar general principles to those of the Yolngu. Again, as Williams has noted for the Yolngu, ontology and cosmology (the nature of being and ideas about the universe) "are embedded in a single matrix",[84] so that the economic and the spiritual are inseparable within "a system in which economic ends are as explicitly served as religious belief is experienced".[85] For the Meriam as for the Yolngu the "'religious', 'historic', and 'economic' are not mutually exclusive categories; they are complementary and indivisible".[86]

4. *Interests Partly Known to English Law*

There are three main areas of danger in the reduction of the Meriam interrelationships with the land to the economic dimension. First, as I have said, it thins out and trivialises the Meriam's sense of existence; in so doing it cuts off those who hold to this perception from appreciation of the strength the Meriam brought to the case.

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80 James Rice had explained to the court in cross-examination how "Everybody on the island have their own winds" (Above n48 at 1644). Quoting Lawrie above n33 at xxiii on the way in which "Everything is owned, land, reefs, rocks, stones, stars, winds, tracts of seas...", Moynihan J noted the difference in "concept of cosmology and ownership" between the Meriam and his own culture (Above n6 at 57).

81 "Land Bilong Islanders" (1990), 50-minute documentary, Yarra Bank Films, Melbourne.

82 Ibid.

83 Ibid.

84 Williams above n12 at 22.

85 Id at 18.

86 Ibid.

Second, it is the sacred endowment of the Meriam which binds together in an indissoluble whole, the "entities" of ownership and sovereignty which were separated for the purposes of the case.[87] This distinction within English law is not sustainable within the ambit of Meriam law and social life.[88] Given the spiritual base of Meriam relationships with their land any attempt to carry this procedural separation into the social relationships of everyday life will create and foster misunderstandings with the Meriam which, I suggest, will be manifest at least in strained relations and at most in situations of confrontation.

Third, this depiction of the Meriam may help to keep alive the social theoretical foundation of social evolutionist assumptions about the superiority of horticultural people like the Meriam in contrast to hunter-gatherer Aboriginal people. The findings of fact in the *Milirrpum* and *Mabo (No 2)* cases each characterised the respective people in a partial, incomplete way; the former, consistent with Western evolutionist ideas of a lesser humanity without a system of proprietorship of land, the latter couched in a form known better to the industrious English. The practical consequences are highly dangerous and potentially explosive: on the one hand it may drive in further a wedge between Aboriginal and Islander people; on the other it may perpetuate the long-standing discriminatory policies and practices towards the two indigenous peoples.

Unlike the Yolngu plaintiffs, the Meriam were able to demonstrate to the satisfaction of the Court the continuity of chains of title to specified plots of clearly bounded land handed down by patrilineal inheritance, from a time before annexation until today, to nameholders for clan and family groups. They were able to establish the ongoing regulation of a traditional land tenure system through "the survival" of rules they had internalised as obligatory to them. Winning their land case was of inestimable value for the Meriam, for Aboriginal people, and for non-indigenous Australia. However, if the "factual basis" of this victory should carry the perception of too great an affinity of their title with that embodied in British law then "racial discrimination" in its old form may simply be displaced by an inter-cultural distortion which continues to work within social evolutionist categories.

5. *Conclusion*

Meriam distinctiveness is not only real; it is also historically active. Half a century ago the Meriam played a leading part in initiating and sustaining an inter-island strike against Protection demanding full home rule and the same "citizen rights" as other Australians.[89] In the decade leading up to the *Mabo*

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87 The plaintiffs challenged successfully the proposition that the Crown acquired "absolute beneficial ownership of the land in the Murray Islands" (Above n1 at 429, per Brennan J). They did not challenge the sovereignty of the British Crown acquired on 1 August 1879. On the two meanings of *terra nullius* ("a country without a sovereign" and "a land belonging to no-one" and the implications of their former conflation, see Reynolds, H R, *The Law of the Land* (1987) at 12 and 176.

88 The Meriam relationship to land as an expression of a sacred endowment, presupposes sovereignty in the broad sense used by Schaffer: "...the capacity for independent and autonomous action" (Schaffer, R, "International Law and Sovereign Right of Indigenous Peoples", in Hocking, B (ed), *International Law and Aboriginal Human Rights* (1988) at 20.

case in 1982, they had undergone a cultural revival, developing a heightened awareness of themselves as a people with a religiously inspired cultural tradition which gave them the confidence to appreciate their "uniqueness" as something to offer to others. So the case began.

Over the ten years of the case the Meriam have been undergoing a process of rediscovery and consolidation of their identity as a distinctive "national" entity. The judgment had given a significant impetus to that process, increasing their self-confidence and awareness of themselves as a people with a unique history, a history at the heart of which lie the Malo tradition and Malo's Law.[90] The Meriam see themselves as a material force in helping the Court judges to see certain truths about them which were previously not visible to them.[91]

Showing the flag has often been a means of deepening and giving expression to Meriam self-awareness. In the months since the final judgment the Meriam have pursued a course which brings together the home community and Meriam emigrés on Thursday Island and the Australian mainland; which affirms and strengthens Meriam cultural traditions (through a newly-formed Council of Elders); and which consolidates the Meriam jurisdiction by means of moves for autonomy and self-determination.

In the process of the case, the High Court followed the approach of the Privy Council judgment in *Adeyinka Oyekan v Musendiku Adele*[92] and that of Hall J in the Canadian case, *Calder v Attorney-General of British Columbia*[93] of respecting the traditional interests of the native inhabitants despite the fact that those interests were of a kind unknown to English law.[94] Certainly the High Court has taken an important step towards beginning to know the previously unknown interests in land of the Meriam.

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89 Sharp, above n37, Chapter 7.

90 This process is discussed in Sharp, N, "A Landmark: The Murray Island Case" (1991) 94 *Arena* 78.

91 See Shapr, N, "Scales from the Eyes of Justice" (1992) 99/100 *Arena* 55.

92 [1957] 2 All E/R 788.

93 (1973) 34 DLR 3d 145.

94 *Mabo v Queensland* (1988) 166 CLR 186; (1989) 63 ALJR 84; (1988) 83 ALR 14.