

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

Editor: Grace Koch

October 2002

Volume 2

Issues paper no. 18

Abstract

In this paper, Dr Weiner inspects some of the appeals made to tradition and continuity of tradition in the High Court appeal of the Yorta Yorta native title case. He suggests that certain common notions of tradition call forth conflicting anthropological accounts of cultural articulation, and that this conflict is not properly acknowledged within the anthropology that concerns itself with native title issues strictly speaking. He contrasts two ideal-types of indigeneity in the post-colonial world of settler society and then attempts to conflate the resulting contrast by an appeal to a more sophisticated and contemporary materialist theory.

Dr James F. Weiner is a consultant anthropologist and a Visiting Fellow in Resource Management in the Asia Pacific Program, Research School of Pacific and Asian Studies, Australian National University.

DIASPORA, MATERIALISM, TRADITION: ANTHROPOLOGICAL ISSUES IN THE RECENT HIGH COURT APPEAL OF THE YORTA YORTA¹

Dr James F. Weiner

The appeal hearing *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors*² (the *Yorta Yorta* appeal) represents an important moment in both the progress of native title in Australia, and in the elucidation of the anthropologist's role in it. Whichever way the appeal goes, there will be profound implications for the conduct of native title particularly in settled Australia. However, because the arguments are being made by legal experts and not anthropologists, the anthropologist is likely to become frustrated by the narrow and superficial way in which some important and complex concepts in the anthropological repertoire are defined and argued in the course of appeals such as this. There is a need to place some of these arguments in a wider context, both culturally and historically, than is possible given the limits of the judicial process. In this brief set of notes I will attempt to connect some of the issues that have arisen in the *Yorta Yorta* appeal comparatively and cross-culturally. I write as an anthropologist who still considers the comparative method to be at the heart of anthropological analysis of culture and social formations.

A brief history of the Yorta Yorta native title claim

The Yorta Yorta Aboriginal community resides in northern Victoria and southern New South Wales. They identify their traditional and historical attachment to country in the middle-Murray and Goulburn River areas including the Barmah Forest, Moira Forest and Ulupna regions, and forest regions in and around Echuca, Shepparton and Mooroopna. Cumberagunja, formerly an Aboriginal settlement, but now a community living area, lies at the heart of the region, and is located on the banks of the Murray River between Echuca and Barmah.

On 21 February 1994, the Yorta Yorta applied for a determination of native title in relation to areas of public land in northern Victoria and southern New South Wales, on either side of the Murray River. On 18 December 1998, Olney J determined that native title did not exist in relation to the areas of land and waters that were claimed by the Yorta Yorta.³ He found that:

by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim.⁴

Olney J interpreted the *Native Title Act 1993* (Cth) ('Native Title Act' or 'NTA') as specifying that the system of law and custom upon which the demonstration of native title depended had to be that system of law and custom possessed by the ancestors of the native title claim group prior to 1788, and this system had to be demonstrated to be still recognizable in the law and custom of the claimant group at the time of application. As the Yorta Yorta submission to the High Court points out:

[Olney] relied on the written observations of Curr concerning practices such as tooth avulsion, burial methods, ornamental scarring, profligacy with food and gender subservience to infer that these were "*aspects of traditional lifestyle*" observed prior to sovereignty. Secondly, he noted that there was no written record of these practices in the 1870s: "*the evidence is silent concerning the continued observance in Matthew's time of those aspects of traditional lifestyle to which reference is made in the passages quoted from Curr*". Thirdly, he chose the date of 1881 because in that year 42 men, as "*Aboriginal natives*", "*residents on the Murray River*", and "*members of the Moira and Ulupna tribes*" had signed a petition to the Governor of the Colony.⁵

This petition avowed that the ancestors of the Yorta Yorta had willingly abandoned their traditional Indigenous practices and desired to become farmers on their traditional land. Placing decisive importance on these events, Olney J made only brief mention "of the evidence concerning the current beliefs and practices of the claimant group". As the Yorta Yorta High Court submission pointed out:

Notwithstanding the terms of s.223(1)(a) and (b) of the NTA, [Olney J] made no findings concerning acknowledgment and observance of traditional laws and customs by the appellants.⁶

There were three points made by the Yorta Yorta when they appealed Olney J's decision to the Full Federal Court. They argued that:

1. Olney J had erred in attempting to determine the nature and content of the laws and customs of the ancestors of the Yorta Yorta at the time of sovereignty then inquiring whether such laws and customs had been continuously acknowledged and observed. They argued that s.223(1) of the NTA does not

demand this of the current system of acknowledged laws and customs in relation to rights and interests in land.

2. Olney J maintained that by 1881 the ancestors of the appellants had ceased to observe traditional laws and customs. The Yorta Yorta countered that this ignored the oral testimony of senior Aboriginal witnesses. They also claimed that Olney J misinterpreted the petition sent to the Governor of the Colony.
3. Olney J failed to understand the content and meaning of customary laws and practices as they are now found in contemporary Indigenous communities such as the Yorta Yorta.⁷

The two days of the High Court appeal in late May 2002 focussed heavily on the issue of how to assess the degree of continuity of a customary system of law and practice – of a culture, if you will. The *Yorta Yorta* appeal demands that anthropologists and legal scholars consider what they both mean by (1) continuity of connection to country; and (2) continuity of tradition and/or a system of law and custom; as well as a number of possible relations between them (from which the ‘causal’ should not be automatically excluded). I turn to these issues now.

1. What part of culture and continuity is made visible?

Anthropologists usually make a distinction between the overt, conscious and publicly elaborated symbols of community, and those habits, practices, sensibilities and general modes of coping that are passed on from generation to generation, from person to person, without their foundations or principles rising to the level of consciousness or discourse. The late French sociologist Bourdieu⁸ referred to this aspect of reproduced culture as the *habitus*. The anthropologist, because s/he comes from a culture with a different *habitus*, can see these differences, while the members of the community often cannot.⁹ Under this category are included the minutiae of everyday existence – table manners, ways of moving and comporting the body, recognized appropriate gender behaviours, almost all of language learning itself, and in general, all the patterned behaviours that are not explicitly taught at the verbal level.

Very few early anthropologists were in a position to witness these components of transmitted Aboriginal ‘culture’ at first hand, much less had a sophisticated enough theory of culture and observational methodology to systematize them into an account of a total way of life reproduced. The necessity of long-term fieldwork in anthropology is largely explained by the length of time needed for the anthropologist to systematize and describe such un verbalized, unarticulated, unconscious patterns of behaviour.¹⁰ This is one reason why anthropologists repeatedly deplore the short amounts of time they are given to complete native title research. And yet evidence of the survival of the *habitus* would go a long way to demonstrating the continuity of transmission of distinctly Aboriginal modes of being-in-the-world.¹¹

All human behaviour is a product of the intersection of such conscious and unconscious patterns. For social analytic purposes, we can draw a contrast between what is consciously avowed as a principle of membership, self-identification or prescription for behaviour in a community (for example “share with your kinsmen”; “honour your mother and father”; “don’t go near the men when they are talking business”), and what is passed on below the level of consciousness and cannot be expressed from within the community as a ‘principle’. Discussions of ‘tradition’ that have so far been proffered by legalists and other experts who are not anthropologists in regard to Aboriginal societies have concerned themselves exclusively with the first ‘principle’. Discussions of ‘tradition’ that have so far been proffered by legalists and other experts who are not anthropologists in regard to Aboriginal societies have concerned themselves exclusively with the first register of culture. Gummow J, however, indicates that the contrast is now receiving attention when he asks, “...Australians always talk about traditions when they mean habits... They are always talking about tradition; they just mean habits. When does it become a tradition in this expression, ‘traditional law’?”¹²

2. On what is not passed on, and on what is lost

It is common in Queensland for an anthropologist to hear from native title claimants something like the following: “My parents had a very bad experience as Aboriginal people. They didn’t tell us what this bad experience consisted of. They told us they would not pass on any of their lore to us because it would just make us vulnerable to the same unhappy experiences at the hands of white society.” But this statement could only refer to the overt, conscious lore that people know – the language, the stories, the names, and songs. It cannot affect in the same way the transmission of the whole repertoire of unspoken, tacit cultural conventions described above. In this register of cultural reproduction, what the older generation *did* pass on was nevertheless quite a lot. Its objectification and description again would have depended upon early long-term and close participant observation of a community of the kind usually lacking in the history of most native title claimant groups.¹³

Let me now turn to my first cross-cultural comparison. The Baktaman of western Papua New Guinea have a very small population. Along with this they have an elaborate system of ritual initiation grades that are underpinned by large amounts of secret lore passed on from one elder senior adept to another. Given the small population size, large amounts of this lore, upon which rested the cosmological foundations of the Baktaman world, were often held by only a few elder men. In some cases, only one man would have the requisite knowledge of secret ritual formulae to allow the public performance of these initiation rituals at all. The ethnographer, Barth, while not making an issue about fidelity of transmission or loss of detail, nevertheless maintains that the adept has the challenge of re-presenting the public initiatory rituals in a way that will be acceptable to the community.¹⁴ In the terms with which the issue is discussed in Aboriginal Australia, for the Baktaman, it appears as if tradition can be ‘lost’ or ‘forgotten’ for perfectly valid endogenous reasons. Further, while the transmission of arcane and highly-restricted items of religious knowledge are vulnerable to loss and alteration by their very definition, we should assume that the reproduction of a more communal, public cultural-interpretative framework by which such arcane lore is assessed is far more resilient and functionally appropriate to such a task of assessment.

In response to the dilemma of the Baktaman ritual adept, who must reproduce ancestral secret knowledge despite the long durations of its non-performance and non-transmission, we can pose the dilemmas of contemporary Indigenous Australians living in settled Australia such as the Yorta Yorta, who face the challenge of recovering their pre-colonial traditions after a long period of dispossession and forced forgetting of them, in order that they may reclaim native title rights to their ancestral lands. The Australian State and Federal governments have been inclined to readily accept that such traditions have been washed away by the tide of history as Olney J opined in his original *Yorta Yorta* judgement, and that consequently, contemporary Aborigines living in settled Australia have ‘lost their traditions’.

From one point of view, the comparison between the Baktaman and Aborigines in settled Australia is only structural. After all, the perception of loss among the Baktaman is an endogenously-engendered one, while many Indigenous Australians were prevented through various oppressive actions by settler society from successfully reproducing many dimensions of their pre-contact language, religion, myth and so forth. But as was told to me by an Aboriginal Australian whose native title claim I have been researching, and is clear from the Baktaman example I have just described, any given generation knows exactly what it knows at any given time. I interpret this as a confirmation that a full repertoire of ‘culture’ comprising both conscious and unconscious knowledge is always passed on from generation to generation. If Indigenous knowledge of country became mediated through Aboriginal employment on white-owned pastoral stations in the late 19th and 20th centuries, or residence on a mission or reserve, it is Indigenous knowledge of country nevertheless. Its continuity with a previous regime of knowledge of country in a landscape devoid of settlers is nevertheless patent. Further, with respect to the *habitus*, the collection of tendencies, behaviour patterns, attitudes, and so forth that are reproduced within the community without having been crystallised as overt laws, regulations or values; if these were reproduced without alteration in the face of relocation and dispossession of Aboriginal

families in the latter half of the 19th century, then the case for complete abandonment of 'law and custom' becomes more difficult to countenance.

3. The issue of revival, resuscitation, re-culturation

The Native Title Act states that native title, once abandoned or extinguished, cannot be revived for the purposes of recognition at common law. Hayne J posed this:

Hypothesise a case in which it can be said of a group of Aboriginal people that at some point in history, they ceased entirely to acknowledge or observe traditional law and custom. Let it be assumed that after that cessation, a group of Aboriginal persons who would have been the successors to those who ceased to acknowledge and observe began again to acknowledge and observe. Can it be said that by their acknowledgement and observance they thereby become possessed of the rights and interests which traditional law and custom would give them?¹⁵

If, however, we can make no sense of a concept of complete abandonment of 'a culture', neither can we make a case that the re-creation of activities now taken to be versions of an earlier Indigenous set of tradition and practices is not in keeping with the practical evolution of the culture-bearing community. I agree with Maddock¹⁶ that in most cases to interpret this literally as the revival of truly traditional activities that never really 'disappeared' or were 'washed away' but which maintained some hidden subterranean existence during the Dark Ages of Indigenous deprivation is far-fetched. But in the absence of such survival, practices imagined or inferred to be distinctive, proper and appropriate to a community could be legitimately re-imposed within a contemporary community. An example is the revival of the Hebrew language as the vernacular tongue of the modern state of Israel. Another example I will discuss below concerns the Ethiopian Jews whose ancestors converted to Christianity many generations ago.

If we accept the dynamic role of the Native Title Act as a source of social and cultural impetus and stimulus, then a certain amount of re-culturation has to be accepted. The problem of course is not whether we are witnessing the appearance or re-appearance of reinstated custom and tradition; it is that we will not be able to assess the future social success and salience of these efforts until some time in the future. As anthropologists, we will still be called upon to distinguish between re-culturation in support of already demonstrable but not complete continuities in culture, and outright fabrication. As I have argued with respect to the Hindmarsh Island case,¹⁷ this is a matter for anthropological assessment. The approach I advocated in those papers was a Quinean¹⁸ one: that in the absence of compelling evidence to the contrary, a homely, widely-accepted and widely-understood 'interpretation' of the past and past practises is to be preferred over recondite, arcane, overly-restricted, and hard to understand interpretations. As is the case with the point made concerning *Mason v Tritton*¹⁹ and the Baktaman case introduced above, what is critical, perhaps more so than the substantive nature or origin of the activities themselves, is (1) the *context* of such re-culturative activities, and (2) their general acceptance among a community.²⁰

4. Is Tradition in the past or the present?

There is a strict interpretation of 'Tradition', as in the phrase 'the Tradition', which would apply to authoritative texts, such as the body of rules and observances set down in Deuteronomy and Leviticus in the Old Testament. The acceptability or deviance of practice can readily be compared with what the authoritative text defines as proper and orthodox behaviour. We must remind ourselves that the laws of the Old Testament have been continuously interpreted right from their inception. The six books of the Mishnah, equally a part of Jewish liturgical tradition, are accumulated interpretations and commentaries on the Pentateuch.

The other more socially-analytic concept of tradition is the *assessment* or *interpretation* of a practice in terms of its connection with past practice, its relative changelessness from the perspective of someone

assessing the practice in question in the present, and the value that the society in question places on the retention of the practice in a more or less intact and changeless form. The perception that a tradition is being maintained is not the same thing as assessing the continuity of a total cultural world. Evidently, different activities take different amounts of time to achieve status as ‘traditional’ – think of the variation in amount of time practised in the following undisputed traditions: Anzac Day, the Jewish ‘Holocaust Day’ (*Yom Ha’Shoah*), and the State of Origin match. How long will it take for the anticipated memorial service that will be held this September 11 in New York to become ‘traditional’?

Traditions can also be retained in the midst of quite radical changes elsewhere in the social fabric (again an example from Judaic culture, where the Passover meal is carried out in the same form by families with otherwise markedly varying degrees of adherence to *halachic* law and other religious injunctions). So when Neil Young, one of the counsel for the Yorta Yorta claimants, proposes to ask, “Address it by going to the present and establishing whether the laws and customs are truly traditional,” he is appealing to this sense of tradition.²¹

5. Reclaiming materialist explanations in native title anthropology

The question of whether such traditions are accepted and practised seriously, and are viewed as the *sine qua non* of the community as a culture-bearing entity is, again, an empirical one that can only be answered after a period of anthropological fieldwork. We return to the topic of ‘loss of culture’. I turn to my next comparative example, a famous anthropological case, the Nuer of the southern Sudan.²² In the 1930s when the anthropologist Evans-Pritchard lived with them, their entire communal life revolved around the keeping of cattle – the cow and bull are metaphors for everything important, desirable, and beautiful in the world, and in human society. The Nuer compose songs about their cattle, decorate them, decorate themselves like cattle, fight over them, dispute ownership of them, marry by exchanging them for wives, survive physically off them. If the Nuer lost their cattle, would something essential be lost to Nuer ‘culture’? No one would doubt it. They would perhaps become like the Mountain People, the Ik of East Africa, who were moved off their hunting grounds and forced to become farmers. In a short while, the society became dysfunctional, according to Colin Turnbull.²³

Now ask the same question about Nuer cattle songs. Would Nuer culture be the same without it? Would their cattle complex be the same without it? Would the cows be the same? How much of the ‘aesthetic’ activity I mentioned above that surrounds Nuer cattle-raising would you say could be acceptably lost without the whole central nexus of Nuer culture dissolving? Of course, if you still had the cows, you would not lose anything else, would you? The songs, decorations, bovine metaphors and so forth are as much a part of the Nuer relation to cattle as the number of pounds of meat eaten per capita per week, or the number of gallons of milk consumed, or the number of cattle that are given as brideprice. I do not think such questions are answerable in the quantitative terms that dominated discussion of tradition and custom in the hearing of the *Yorta Yorta* appeal (and in other native title cases). Within that entire complex are things that the legal practitioners would label ‘rights and interests’, ‘customs’, ‘traditions’, and ‘possessory rights’. The question is raised, however, when Young says, “His Honour [Olney J] never identified what bearing or what particular aspects of lifestyle were considered to be important”.²⁴

But Young has opened up a line of questioning which can work both for and against the interests of the Yorta Yorta native title claimants. The ‘dilemma’ he creates and which I have just identified above is a function of the unfashionableness of cultural materialist explanations of human culture and social behaviour these days. There was a time when ‘cultural ecology’, as for example, adumbrated by Julian Steward, was an important plank in the constellation of social analytic procedures. Cultural ecology involved, among other things, an appreciation of the long-term developments of social, economic and cultural formations out of specific local ecological conditions of existence. It put modes of subsistence at the centre of communal life, an approach that has informed some Australian Aboriginalist anthropology (for example, in some of the work of Nic

Peterson, Peter Sutton, Chris Anderson, Athol Chase and Jon Altman). Under such reasoning, ecological and economic adaptations to a place by a community were the *independent* variables. Non-economic aspects of social life – for example religion and symbolism – were *dependent* variables; they grew out of the conditions created by the former.

This approach was contrasted with all the varieties of symbolic anthropology that co-existed with it: the premise of these anthropological theories was that human perception, imagination and aesthetic refashioning were the central components of human ‘culture’, and that material adaptations and subsistence strategies devolved from this initial perceptual and cognitive construction of the world.

A more useful ecological anthropology these days, however, is advocated by Tim Ingold.²⁵ He dissolves the unhelpful dichotomy between materialism and idealism that dominated anthropological debate for a long time. He maintains that: “A properly ecological account of hunting and gathering requires” that we show “how people develop their skills and sensitivities through histories of continuing involvement with human and non-human constituents of their environments”.²⁶ This version of ecological anthropology will help us reconcile what appear as incommensurate accounts of Indigenous attachment to country in Australia – a task that the Native Title Act and the courts have so far been unable to accomplish from a purely legal perspective.

6. Diaspora culture

My third comparison concerns the successful maintenance of tradition in exile: the Jewish Diaspora. Yet the irony is that diaspora culture came to have more appeal than the opportunity to return to Israel at a very early stage. When Cyrus conquered Babylonia in 539 BCE, less than 50 years after the destruction of the First Temple, he granted the Jews the option to return to Israel, rebuild the Temple and reoccupy their land. But only a minority of Jews then living in Babylonia actually went back at that time:

Contrary to popular belief, very few Jews were forced into exile after the exile that followed the destruction of the first Temple [in 586 BCE]. This means that, by and large, Jews chose to live in the lands of diaspora rather than the Land of Israel.²⁷

Moreover, a specific set of customs developed to remind Diaspora Jews of their still-legitimate connection to the land of Israel:

Traditions, both domestic and communal would be developed to confront the Jew with constant reminders of the unnatural situation. Glasses would be broken at weddings, walls would be left unplastered and songs would be sung-- all to remind the Jew of the Land left behind. On each festival, ritual elements were added to remind the Jews of the Land and the Temple that had been lost-- but would be theirs again. Rituals formerly observed at the site of the Temple in the previous era were now relocated and woven into home and community life around the world.²⁸

Perhaps more to the point with respect to native title in Australia, the Zionist movement which originated in the 19th century, and the establishment of the State of Israel, were opposed by many orthodox Jews – they claimed that the manufacture of a Jewish State by human efforts was contrary to the scriptural promise of the re-establishment of the Jewish nation by Divine intervention, in the form of the Messiah. In this case, it was *strict adherence to the tradition* that forced many observant orthodox Jews into rejecting the opportunity to re-attach to their traditional ‘sacred’ land. Thus, there were both secular and religious reasons why many Jews resisted the *aliyah* – the Hebrew word for repatriation to the land of Israel.

This tension and conflict between ‘Holy Land’ Judaism and ‘Diaspora’ Judaism obviously enriched the tradition of Judaism, it did not detract from it. It is accepted that Diasporic Jews are more consciously and reflectively observant of religious customs than are Jews in Israel, where one’s identity, and one’s actions as a

Jew, can be taken more for granted. How long did it take for Diasporic Judaism to qualify as a legitimate 'tradition' in its own right? Less than 50 years certainly (this was the time between the destruction of the First Temple and Cyrus' conquest of Babylonia).

In other words, there are precedents within the cultural history of other landed people where the desire to maintain physical attachment to country came into conflict with the maintenance of tradition. Therefore, a case can be made in contemporary Aboriginal Australia that, at best, the relation between these two dimensions of 'culture' is more complex than the profiles proffered in the *Yorta Yorta* appeal would lead us to believe. Not all contemporary native title claimants either wish to or are in a position to physically move onto their traditional lands. The question of whether this literal repatriation should be a prerequisite for an application for native title remains to be debated. If diasporic Indigenous culture in contemporary Australia is not to be seen only as a debased and incomplete version of something more 'authentic' which preceded it historically, then, whether it is recognised by the Native Title Act or not, diasporic native title claim groups' understandings of their connection to traditional land must be considered as a variety of the contemporary exercise of Indigenous rights in country.²⁹

The relation between continuity of law and custom and continuity of occupation thus continues to tax the legal establishment. Starting at line 285 of the High Court Transcript, 23 May 2002, Young refers to the Full Federal Court decision. There it was averred that, "Dispossession will not inevitably lead to a community ceasing to acknowledge its traditional laws and observe its traditional customs and thereby losing its connection with the land". But he points out at line 295 that the Full Federal Court also said that, "A loss of connection with the land or waters by the relevant community... will be the necessary result of the disappearance of the community as a traditional Indigenous community". In other words, the connection to land is a function of the survival of the laws and customs of the community, not the other way around. Again, at line 3090, Young says, "... we say the presumption of continuity attaches to the native title right or interest, not necessarily the particular laws or customs within the body". This indicates that there is a three-fold distinction – a very Anglo-Saxon distinction, by the way – in kinds of continuity recognised within Aboriginal native title – of occupation, of rights and interests, and of law and custom. I am not sure which of these Young means to be dependent variables and which ones the independent variables, as social scientists term them. If Aboriginal people did not make the same kinds of distinction within the nature of their attachment to land, then all of these continuities would implicate the others, support the others, and help define the particular Aboriginal nature of each seen in its analytical separateness.

However, here is where Aboriginal Australian culture differs from ancient Judaic culture. Many Aboriginal people would say that the land contains the law; that it itself is inscribed with the law, and that the land is the custodian of the people and their customs as much, or perhaps more than, the people are custodians of the land. "The land owns us, we do not own the land" is an often cited summation of this principle. Hence, from this Aboriginal point of view, loss of connection to land is tantamount to loss of law and tradition.³⁰ The sentiment expressed above surely must co-exist with the equally important assertion that Aboriginal culture and tradition have been maintained by Indigenous people who are not resident on their land. Perhaps the rhetorical dimensions of this credo, particularly in settled Australia, need to be drawn out in more detail.³¹

Another case study from within the cultural history of Diasporic Judaism is that of the so-called Falashas of Ethiopia (they refer to themselves as Beta Israel; "*falasha*" is the Amharic term for 'stranger'). According to the 'tradition', the Falashas were the descendants of Solomon and the Queen of Sheba, whose son was Menelik. The Jewish population of early Abyssinia was augmented when the tribe of Dan migrated there in the 9th century. The Falashas are considered unique because they remained completely cut off from the mainstream Middle Eastern Jewish population from that time until the 19th century. Although there were periods where the Falashas enjoyed freedom and tolerance in what is now Ethiopia, there were other periods

where they were harshly persecuted and, in common with other Jewish communities in North Africa, were subject to forced conversion to Christianity.

It is these Christian Falashas whose fate is particularly interesting – and instructive with respect to the *Yorta Yorta* appeal. During the Ethiopian famine of the late 1980s, Israel air-lifted the entire Falasha population to Israel. However, at one point in June 1991, 3,000 Falashas were stranded at Addis Ababa airport while at the same time between 14,000 and 18,000 other Ethiopian Jews were embarked onto the emergency flights to Israel. This led the British Catholic Tablet to inquire as to the criteria behind their exclusion:

The rejects, it was discovered, though of immemorial Jewish ancestry, were Christian in faith either by birth or conversion.

The Jewish Agency, which initiated and executed the dramatic airlift, it seems, was bound by the basic Israeli laws of “Nationality” and “Return” which withhold otherwise automatic economic, political and territorial advantages from Jews who have embraced another faith-- and their descendants. Any possible ambiguity in this case had been removed by the *Christmas Day, 1989, High Court* ruling that any Jew who believes in Jesus, even without baptism or church membership, forfeits those privileges.

Apparently aware of this built-in obstacle, tens of thousands of now-Christian Falashas did not even apply for inclusion in the exodus.³²

This case is germane because of the inextricable link between biological descent from founding Yorta Yorta ancestors originally resident in the claimant area, and the transmission of traditional law and custom that Olney J drew in his Federal Court *Yorta Yorta* decision. How then did the Israeli religious establishment finally deal with these descendants of converted Falashas?

Chief Rabbi of Tel Aviv Haim David HaLevy specifically held that since the descendants of Ethiopian Jews who had converted fell into the lenient *halachic* category of *tinok ha'nishbah*, a child taken in captivity, they should be brought to Israel and returned to Judaism. Most of these authorities have required ritual immersion; the Falas Mura have willingly complied. Even when Chief Rabbi Bakshi Doron, based on information (actually misinformation furnished by opponents of the community) obligated the community to undergo the full conversion required of non-Jews, there was no opposition. Over 7,500 Falas Mura have fulfilled the requirements of Israeli rabbinical courts and possess papers from the Interior Ministry certifying them as Jews.³³

If some of the Beta Israel, while still acknowledging their Jewish ancestry, nevertheless were also identifying as Christians and perhaps even practicing both religions, which tradition is most relevant to describing their identity? Or is this somehow the wrong type of question to ask? And if it is the wrong question to ask in this case, is it so in the case of the contemporary Yorta Yorta?

7. (Once again) The question of belief

In the *Yorta Yorta* appeal, Young says, “...Aboriginal law and custom, to quote *Yanner* or to quote Gummow J in *Wik*, is not necessarily to be perceived as a set of normative rules. It may well be perceived as a set of beliefs as well”.³⁴ At line 2338 of the transcript, he says, “If the only traditions established, for instance, are certain beliefs about the people’s country, they are not usufructory rights. These are rights to land. There is an ongoing belief that you can establish by evidence back to 1900...” In a recent article, I have pointed out the dangers of resting too much of the substance of cultural analysis on what people believe to be the case.³⁵ I would only ask Young, what is added to his claim by phrasing it in terms of belief that is not adequately encompassed by merely assessing the evidence of present and past occupation and use of land?

What people 'believe' to be the case, what they are willing to swear to and testify to, is so subject to the play of power at the time as to render such subjective assessments of little value in constructing a case for native title. We must construct that case on a foundation of empirical evidence, an opinion I share with Bagshaw and Rigsby³⁶ among (hopefully) many others. A major portion of that empirical evidence is a record of how people have *acted* – not what they say they believe now – in relation to the land in question over a period of time. Have they occupied the land? Have they sought to gain access to it? Have they tried to resist encroachments and inappropriate activities taking place on it? Have they successfully asserted the right to give permission to enter to other Aboriginal people? Have they been acknowledged as custodians by neighbouring Aboriginal groups? And so on and so forth. There is enough evidence that even in the earlier part of the 20th century, before 1967, in settled Australia, when Aboriginal people were maximally disempowered, most subject to removal and reserve life, and least likely to assert themselves, many Aboriginal people did what they could to maintain identification with their country. Attempts to assert these rights, even if unsuccessful, were actions taken in respect to understood rights in country nevertheless.

In many recent native title claim groups, these personal histories are only being recovered since native title began. To repeat, I would agree with Maddock³⁷ and stop short of concluding that what is being recovered is something that in effect was never really 'lost' but had somehow survived intact all along. Neither the Native Title Act nor any kind of meaningful theory of social and cultural transformation requires this degree of immortality and immutability of practice. The Native Title Act itself and in quite particular forms undoubtedly has stimulated attempts to reconstruct these histories and these practices and to adduce evidence in support of continuities of various kinds. Only a *naïf* would think that this was an adventitious and unpredictable effect of the Native Title Act and its procedural and bureaucratic architecture – the land councils, ATSIC, the Indigenous Land Corporation and so forth.

Conclusions

In this paper I have tried to carry on an argument with myself concerning two contrasting and conflicting ways of defining what Indigenous 'continuity with country' is today. Legally and anthropologically, the issue of *continuity* is subject to great subjective variation and the Native Title Act does not, unfortunately, define 'continuity' adequately for either legal or social science purposes, although the concept is receiving more nuanced treatment as a result of recent court judgements, such as *Ward*.³⁸ There is the continuity of a system of economic and adaptational relations to a particularly territory, out of which grows the intimate knowledge of place and its symbolic elaborations in the form of religion, myth, song, art (as the Nuer example above was intended to demonstrate). If one is inclined to take seriously the notion that the material bases of human life are central to that life, then one is inclined to view less harshly the judgements of contemporary Indigenous relations to land made, for example, by Olney J in the Federal Court *Yorta Yorta* decision.

On the other hand, if one is inclined to think that the world that people construct for themselves determines all the other realities of their lives, including the material ones, then Indigenous people are unchained from the obligation to maintain a literal or physical presence on, occupation of, and use of their traditional country. The *idea* or *image* of a homeland, such as has sustained diasporic populations throughout the world in countless examples through the centuries, would be sufficient to maintain something that the legal profession would have to call proprietary rights to country. 'Dwelling on the land' could have the essentially discursive and memorial qualities that were so pronounced for example, in Diane Bell's account of Ngarrindjeri 'proponent' women's account of their 'relation to country'.³⁹

Somewhere between these two poles – as imaginary as they are unrealistic in Australian terms – lie *all* of the native title claims in Australia. In fact, the contributions to the volume *Emplaced Myth*,⁴⁰ as has Ingold's volume cited above, endeavoured to collapse this simplistic dichotomy between the material and the ideational appropriation of land, space and territory. Connection to country in all native title claim applications in

Australia – whether in ‘settled’ or ‘remote’ Australia – has both material and discursive dimensions, though in variable proportions. The discursive construction of connection to land illuminates and historicizes the material occupation of it, and the material use of land in turn embodies its discursive manifestation. The challenge of the Native Title Act is to reflect this underlying reality of Indigenous life today rather than maintain an artificial dichotomy between two idealized versions of continuity of connection to country.

¹ Acknowledgements: My thanks to Francesca Merlan for discussion on the topic of tradition, and to Andrew Preston, Geoff Bagshaw, Bruce Rigsby, Mike Wood and the anonymous reviewers for the *Land, Rights, Laws: Issues in Native Title* series of the NTRU, AIATSIS for commenting on this paper and its earlier drafts. This paper was first presented at the ASSA-sponsored workshop, *Custom: The Fate of non-Western Law and Indigenous Governance in the 21st Century*, organized by myself, Francesca Merlan, Katie Glaskin and Andrew McWilliam to be held in Canberra, October 1-2, 2002.

² M128/2001 (23 May 2002).

³ *Yorta Yorta Aboriginal Community v the State of Victoria and Ors* [1998 unreported] (*Yorta Yorta* decision).

⁴ *Yorta Yorta* decision at 121.

⁵ *Yorta Yorta* submission to the HCA, 23 May 2002, at para. 10.

⁶ *Yorta Yorta* submission to the HCA, 23 May 2002, at para. 11.

⁷ Olney J, *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (8 February 2001).

⁸ For example, Bourdieu, P. 1977. *Outline of a Theory of Practice*. London and Cambridge: Cambridge University Press.

⁹ A corollary of this, as I have discussed recently (2001. *Tree Leaf Talk: A Heideggerian Anthropology*. Oxford: Berg Press.) is that the anthropologist’s ‘knowledge’ of a culture may not be considered inferior or less comprehensive in comparison to that of a ‘native’.

¹⁰ Rigsby also discusses the unique character of anthropological fieldwork and the problems of length of research in relation to native title research (‘Representations of Culture and the expert Knowledge and Opinions of Anthropologists’. *Native Title Conference*. Australian Anthropological Society, Adelaide, July 2001.)

¹¹ This point was made as long ago as 1961, at the research conference in Canberra which led to the foundation of the Australian Institute of Aboriginal Studies. In the volume resulting from the conference, J. W. Warburton was reported in Sheils H. 1963. *Australian Aboriginal Studies: A Symposium of Papers Presented at the 1961 Research Conference*. Melbourne: Oxford University Press:437-8 as making:

...a distinction between the traditional life that is consciously understood to be part of a tribal tradition, and the habits, values and beliefs that persist even though the people are unconscious of their origins. In groups known to him living in and around some New South Wales country towns, conscious links with their tribal past seemed to have disappeared completely, but there remained an undoubted linkage between certain of their habits and beliefs and their tribal past. Nevertheless, in the case of itinerant shearers and station workers of whom this seemed often to be true, the sort of life they led was almost the same in most obvious ways as the lives of itinerant white workers... A careful comparative study of the two...could be a valuable contribution to understanding more about part-Aboriginal communities.

¹² *Yorta Yorta* appeal, HCA transcript (23 May 2002), lines 1226-1229. The actor’s perception of the nature of these learned behaviours, however, is important. A short while after Gummow’s observation on habit and tradition, and at other points in the appeal, reference was made to *Mason v Tritton* (1994) 34 NSWLR 572. One of the anthropological implications of that case was that an observer cannot tell the difference by inspecting the activity itself between an Aboriginal person engaged in recreational fishing which appears no different to that engaged in by whitefellas, and an Aboriginal person fishing because he is exercising his traditional right to do so in his country. The *context* of the activity is what is at stake, not the manner in which it is pursued – as the court itself decided subsequently in the case *Yanner v Eaton* (1999) 166 ALR 258.

¹³ Writers such as Tennant-Kelly (1935. ‘Tribes on the Cherburg Settlement’. *Oceania* 4: 461-73) and some of the contributors to the volume edited by M. Reay (1964. *Aborigines Now: New Perspectives in the Study of Aboriginal Communities*. Sydney: Angus and Robertson), however, have provided accounts of the reproduction of an Indigenous *habitus* on missions earlier in the 20th century.

¹⁴ Barth, F. 2001. ‘An Anthropology of Knowledge’. *Current Anthropology* 43(1): 1-18.

¹⁵ *Yorta Yorta* appeal, HCA transcript (23 May 2002), between lines 582-591.

¹⁶ Maddock, K. ‘Revival, Renaissance, and the Meaning of Modern Constructions in Australia’. in E. Kölig and H. Mückler, eds., *Politics of Indigeneity in the South Pacific*. LIT Verlag: Münster-Hamburg-London.

¹⁷ Weiner, J. 1999. ‘Culture in a sealed envelope: The concealment of Australian Aboriginal heritage and tradition in the Hindmarsh Island Bridge affair’. *Journal of the Royal Anthropological Institute* 5(2): 193-210; Weiner (2002). ‘Religion, Belief and Action: The Case of Ngarrindjeri ‘Women’s Business’ on Hindmarsh Island, South Australia, 1994-1996’. *The Australian Journal of Anthropology* 13(1): 51-71.

¹⁸ W.V.O. Quine was a well-known philosopher at Harvard University who, among other accomplishments, extended upon the work of the American pragmatist philosopher John Dewey by advocating the theory that “there is nothing in meaning that is not in behaviour”. See Quine’s famous work *Word and Object* (1960. Cambridge, Mass.: MIT Press).

¹⁹ (1994) 34 NSWLR 572.

-
- ²⁰ Morphy 1991 notes that ‘secret’ or ‘restricted’ knowledge among the Yolngu must nevertheless be recognisable in its public form by the wider community. (*Ancestral Connections*. Chicago: University of Chicago Press).
- ²¹ *Yorta Yorta* appeal, HCA transcript (23 May 2002), at line 625.
- ²² Evans-Pritchard, E. 1940. *The Nuer*. Oxford: The Clarendon Press.
- ²³ Turnbull, C. 1987[1972]. *The Mountain People*. Touchstone Books.
- ²⁴ *Yorta Yorta* appeal, HCA transcript (23 May 2002), line 2188.
- ²⁵ Ingold, T. 2000. *The Perception of the Environment: Essays in livelihood, dwelling and skill*. London and New York: Routledge.
- ²⁶ *Ibid*, page 10.
- ²⁷ Department of Jewish Zionist Education (n.d.). “Israel-Diaspora Relations”. <http://www.jajz-ed.org.il/100/concepts/gola2.html>
- ²⁸ *Ibid*.
- ²⁹ See also Rigsby 1995. ‘Tribes, Diaspora people and the vitality of law and custom: Some comments’ in J. Fingleton and J. Finlayson, eds. *Anthropology in the Native Title Era*. Canberra: AIATSIS.
- ³⁰ Some of the recent rhetoric of attachment of sacred land employed by Israeli settlers in the occupied territories, however, seems to converge more closely with Indigenous Australian theories of the primacy of land.
- ³¹ See Rigsby 1999. ‘Aboriginal People, Spirituality and the Traditional Ownership of Land’. *International Journal of Social Economics* 26:7/8/9: 963-973.
- ³² Neff, D. 1996. ‘May 1991: Jews from Ethiopia Face Discrimination on Arrival in Israel’. *Washington Report on Middle East Affairs* May-June 1996: 36-40. <http://www.washington-report.org/backissues/0596/9605036.htm>
- ³³ Feit, J. (n.d.). ‘Are the Falas Mura Jews?’ Reprinted from the newsletter *Sh’ma* at: <http://www.nacoej.org/falas.htm>.
- ³⁴ *Yorta Yorta* appeal, HCA transcript (23 May 2002), between lines 1680-1685. *Yanner v Eaton* (1999) 166 ALR 258; *Wik v Queensland* (1996) 187 CLR 1.
- ³⁵ Weiner, J. 2001 op cit.
- ³⁶ Bagshaw, G. 2001. ‘Anthropology and Objectivity in Native Title Proceedings’. *Native Title Conference*. Australian Anthropological Society, Adelaide, July; and Rigsby, B. 2001 op cit.
- ³⁷ Maddock, K. op cit.
- ³⁸ *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).
- ³⁹ Bell, D. 1998. *Ngarrindjeri Wurrawarrin*. Melbourne: Spinifex Press.
- ⁴⁰ Rumsey, A. and Weiner, J. eds. 2001. *Emplaced Myth: The Spatial and Narrative Dimensions of Knowledge in Australian Aboriginal and Papua New Guinea Societies*. Honolulu: University of Hawai’i Press.

I SSN 1326 - 0316
 I SBN 0 85575 435 4

Native Title Research Unit
 Australian Institute of Aboriginal and Torres Strait Islander Studies
 Lawson Cres, Acton Peninsula, ACT
 GPO Box 553 Canberra ACT 2601
 Telephone 02 6246 1161 Facsimile 02 6249 7714
 Email ntru@aiatsis.gov.au, website www.aiatsis.gov.au

Views expressed in this series are not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.
--