CONCEPTUALISING PROPERTY RIGHTS RESEARCH

JOHN SHEEHAN
University of Technology, Sydney

ABSTRACT

Traditional legal research can be distinguished from the research approach used for property rights, which of necessity is at a jurisprudential level indistinguishable as a part of broader social sciences. Economic rights can be contrasted from legal rights permitting the identification of flawed property rights, which are a legacy of colonial history. Property rights in many post colonial common law countries evidence cultural blindness with fundamental flaws in property relationships.This extraordinary depth of research required to comprehend the complex matrix of embedded property rights requires an inter-disciplinary appreciation of colonial history, international law and the pragmatic responses of post-colonial legal regimes.

Keywords: Natural resources, post-colonial legacy, property law; property rights, research

INTRODUCTION

Legal research traditionally focuses upon the identification of either broad principles or specific *ratio decidendi*[1] through interpretation of statutes, common law, case law, legal commentary or refereed articles in law journals, and unsurprisingly this positivist[2] research approach is used for the legal specificity of property. Alternatively, property rights[3] research is at a broader jurisprudential level indistinguishably part of the social sciences, and seeks to contrast economic rights from legal rights in a particular legal regime.

Hence, the conceptualisation of such property rights research is markedly different from traditional legal research, notably because positivism provides only a partial understanding of property rights. Arguably, the flawed nature of property rights can be more adequately canvassed through an interrogation of issues such as the source of property related laws, their purpose and operation. Furthermore, the epistemology of the authority behind specific laws must be uncovered, and in particular the reasoning behind

[1] *Reason for the decision.*
[2] *Positivism is described as a "school or theory of jurisprudence which defined law as rules or commands laid down or posited by the State" cf. Enright (1991: 3).*
[3] *Property rights, or more correctly a right to property can be described as the right to "particular concentrations of power over things and resources" cf Gray & Gray (1998: 15).*

the choice of a particular approach over another. Private property rights are ordinarily protected in modern nation states from arbitrary interference and in particular compulsory acquisition, except by statutory fiat coupled with compulsory payment of compensation.

The interrogation of law in this manner invariably uncovers shortcomings and unforeseen consequences sometimes decades after the enactment of a particular law. Nevertheless, whether the intent of a specific property related law is just, or alternatively unjust and hence wrong, raises broader definitional issues, which are as stated earlier can be indistinguishable from broad moral issues of the social sciences. The recognition of native title by the High Court in 1992[4] is one example of how common law, Indigenous customary law, and statute law have coalesced outside of positivism, incorporating notions of kinship which are more familiar to anthropologists than lawyers (Enright 1991:4). Issues of what modern Australian society expected of their law was clearly a driver in the recognition of native title.

Emerging property rights such as native title are slowly transforming statute law, and in turn being more clearly defined or arguably transformed through partial codification. The significance of the *Native Title Act 1993* (Cth.) as the pivotal framework for resolving native title issues has been emphasised in recent decisions by the High Court, which has stressed the primacy of legislation, stating that common law decisions gain relevance due to the extent that they can cast light on legislation.[5]

With legislation as the starting point for the definition of emerging property rights such as native title, the scope of the rights and interests that are capable of recognition at law is also circumscribed.[6] As a result of such limitations, when native title is extinguished or impaired the compensable interest is also defined, arguably to the disadvantage of the dispossessed traditional owners. Ordinarily, property rights are the expression of a relationship between an individual or group and the property (land) in terms of rights and interests. Unsurprisingly, the *Native Title Act 1993* (Cth.) requires that Indigenous communities or groups express their relationship with the land in terms of rights and interests, and it is this requirement that has presented significant difficulties for the High Court recognising relationships, observing that:

...the spiritual or religious is translated into the legal[7]

There are certain aspects of Indigenous cultural heritage which will not be recognised as native title rights and interests, and it is important to note that intellectual Indigenous

[4] *Mabo & Ors v The State of Queensland (No 2)(Mabo) (1992) 175 CLR 1*
[5] *Western Australia v Ward (2002) 1901 ALR 1 per majority at [16], [25].*
[6] *In Australia the definition of "native title" is set out in s.223 Native Title Act 1993 (Cth.) in turn limiting the scope for legal recognition.*
[7] *Western Australia v Ward at [14].*

property has been distinguished from native title by the High Court,[8] and similarly Indigenous mineral property rights have not been recognised as a component of native title.[9] Clearly what is and what is not native title, and when it suffers extinguishment, and what might or might not be compensable, are all issues being slowly resolved by the High Court. Arguably, the inexorable incorporation of native title into Australian property law is a process whereby Anglo-Australian common law is encompassing Indigenous custom and kinship.

Importantly, the historic roots of property rights in other common law countries is the legacy of a historical colonial process which has resulted in the issue of flawed property rights. Research to ascertain how these legal property rights were created in the colonial (settler) milieu reveals that these rights have either been reinforced or modified by subsequent post-colonial statutes and case law. Furthermore, property rights in many common law countries have been created with cultural blindness resulting in a hiatus of sometimes bizarre fundamentally flawed property relationships between modern sovereign nations.

This paper demonstrates the extraordinary depth of research required to comprehend the complex matrix of embedded property rights in many post colonial common law nations requiring a inter-disciplinary appreciation of colonial history, international law, and the seemingly pragmatic response of post colonial societies through their legal systems and local polity to specific property issues.

THE POST COLONIAL MILIEU

Whilst economic and social systems across the world continue to flex to the demands of globalisation, the legacies of previously dominant models similarly impinge upon existing systems of land tenure. Whilst some may consider the primary legacy of British colonisation to be the common law, a less generous interpretation of that legacy could be a pervasive, but flawed, paradigm of property rights in natural resources. Research of property rights in former colonies in both the developed and developing world increasingly evidence fundamental structural flaws from the standpoint of property theory.

Previously settled property rights such as land and minerals are now being deconstructed into an emerging crystallisation of property rights such as water, biota (flora and fauna), carbon and saline credits in the developed world. In many post colonial countries, such deconstruction is also exposing the presence of flawed property rights which are inhibiting the development of regimes of titling, management and trading to the detriment of the sustainable use of various natural resources. This aftermath of colonialism is starkly revealed in countries such as Ethiopia, Namibia, South Africa and

[8] *Western Australia v Ward at [57] – [64].*
[9] *Western Australia v Ward at [376] – [385].*

to a lesser extent in Australia and New Zealand. Ironically, the impact of international business investment in non-common law countries such as Thailand and China is now revealing similar property rights issues ordinarily rooted in post-colonial legacies.

At the outset property rights appear to be a homogenous legal notion in both the developed and developing world. However, this apparent homogeneity as a legacy of colonialism is grossly misleading, in much the same way as the world is currently entranced by the chimera of a homogenous economic and legal framework for international business investment.

Investment beyond national frontiers has paradoxically been supported by the massive growth in international reserves of the developing world, rather than the developed world, and current accounts of developing countries have:

…swung from a deficit of $88 billion in 1996 to a surplus of $336 billion last year- a $424 billion change that has covered some four-fifths of the increase in the deficit of the United States. (*International Herald Tribune,* 2005: 11)

*C*onventional economics suggests that capital should flow from the developed to the developing world, however confounding this view international reserves of the developing world grew by almost $400 billion in 2004 (*International Herald Tribune,* 2005:11). It is also important to recognise that Asia holds 64% of international reserves, with Japan and China each having over ten times that of the USA (Pollard and Pollard, 2005).

Similarly, the conventional view of unlocking "dead capital" (de Soto 2000: 15). in the developing world as proposed by de Soto urges the creation of homogenous "formal property." (de Soto, 2000: 231) However, this view has been criticised as too simplistic and grossly overestimating the cadastral and bureaucratic capacity of developing countries according to Molebatsi & ors. (2004: 151).

Property rights in the developing world are "paperised" (Molebatsi & ors, 2004: 149) in ways suggesting significant misunderstanding of the needs of emerging economies, highlighting deeply embedded flaws in notions of property rooted in colonial legacies. However, Forman and Kedar (2004) observe that there was no misunderstanding by the colonisers that dispossession hinged on the use of law to create or negate property rights observing that:

[o]ne relatively constant element of dispossession has been the use of law in effecting and/or normalizing the outcome. The central role of legislation in such situations derives from the fact that the provision, or, alternatively, the transformation or negation of property rights, is invariably institutionalized by some type of law. It is surprising, then, that the role of legislation in the dispossession of displaced ethnic and national groups has not received greater academic attention. (Foreman and Kedar, 2004: 810)

The negation of Indigenous property rights and the transfer of control to colonisers not only confirms the imported property rights regime, but as Kedar notes:

...[s]ettlers' law and courts attribute to the new land system an aura of necessity and naturalness that protects the new status quo and prevents future redistribution. Formalistic legal tools play a meaningful role in such legitimization. Courts apply 'linguistic semantics, rhetorical strategies and other devises' to disenfranchise Indigenous peoples. (Kedar, 2003:415)

More importantly, Kedar points out that the property of the conquered is often regarded as "public land" (Kedar, 2003:414), which can be dealt with by the State without referral to the traditional owners. Such action continues today with ethnocratic Israel disregarding traditional Palestinian owners in Netzarim during the recent withdrawal from the 365 square kilometre annexed Gaza Strip, one owner observing that:

... the [Israeli] *settlers lived here for 35 years and they were compensated when they left and it's not even their land. Our ancestors have been planting this land for hundreds of years. Who will compensate us for the houses and land that the Israelis destroyed?"* (*The Sydney Morning Herald,* 2005:18)

However, the colonial legacy of flawed property rights is nowhere more apparent than in East Africa where developing countries struggle to overcome this legacy in the most critical rights area of all, water. The following section of this paper discusses the issue of flawed property rights in that part of Africa.

NILE RIPARIAN STATES

The Nile River at 6650 kilometres stretches from its source in equatorial Africa to the Mediterranean Sea providing a watershed for 10 countries: Burundi, Congo, Egypt, Ethiopia, Eritrea, Kenya, Rwanda, Sudan, Tanzania and Uganda. The Nile basin occupies 3.35 million square kilometres and represents around one tenth of the surface of the African Continent (Klare, 2001:148).

On 7 November 1929 Great Britain representing its East African colonies of Uganda, Kenya, Tanganyika[10] and Sudan signed the *Nile Waters Agreement* (*NWA)* with Egypt, which was only nominally independent from Britain. An Egyptian monarchy had been installed by the British Protectorate in 1917, however real control over Egypt still resided with the British High Commissioner when the *NWA* was signed in 1929. It was not until 23 July 1952 when the last monarch King Faruk was overthrown, that Egypt became an independent republic. (*The World Guide*, 2005: 225)

[10] *Tanganyika gained independence in 1961 becoming Tanzania.*

Klare (2001:148 et al) records that the *NWA* enabled Egypt (and Britain) to assert rights over the whole Nile waters securing in the *Agreement*:

…a promise that no works would be constructed on the upper Nile or its tributaries (insofar as they were under British jurisdiction) without Cairo's prior approval. The resulting Nile Waters Agreement of 1929 – the first of its kind in the region – thus served to discourage the development of a basinwide management system. (Klare, 2001: 152)

The *NWA* allocated 48 billion cubic metres of water annually for Egypt and 4 billion cubic metres of water annually for Sudan, however these allocations were increased to 55.5 billion cubic metres and 18 billion cubic metres respectively in 1959 in an Egyptian/Sudanese bilateral agreement (Raphaeli, 2004:2). Remarkably, apart from the requirement in the *NWA* that no works could be undertaken on the Nile, or its tributaries without Egyptian approval, the *NWA* also created a right for Egypt to:

…"inspect and investigate" the whole length of the Nile to the remote sources of its tributaries in the Basin.

The right "to inspect and investigate," which was tantamount to a veto power over any water or power project, has in recent years become moot, as all the former colonies on the Nile Basin have become independent nations and are not likely to readily agree to such encroachment on their sovereignty by Egypt. Indeed, some of them have begun to nibble on the NWA by initiating water projects that threaten to reduce the volume of water available to Egypt. (Raphaeli, 2004:2)

The coercive elements of the *NWA* have been increasingly objected to by the Nile riparian countries (except Egypt) who view the "inspect and investigate" right as an encroachment on their sovereignty as independent nations (Raphaeli 2004:2). In April 2004 the Ugandan President Yoweri Museveni, stated that the "colonial era treaty" should be reviewed, especially since it gave Egypt the ability to:

…veto any use of water it feels threatens the levels of the Nile…[T]he treaty should be reformed. This was with the British, not with ourselves. We should sit down with Egypt and negotiate another treaty…(*The Ethiopian Herald,* 2004: 6).

Similarly, Ethiopia, Uganda, Kenya and Sudan are currently experiencing very high rates of population growth (Klare, 2001:156), and have argued for changes to the *NWA* given an increasing need for water (Klare, 2001:156). However, irrigation schemes to increase food production around Lake Tana in western Ethiopia raise prospects of dispossessing the Indigenous W*eyto* people, the traditional owners of the shoreline wetlands. The *Weyto* are being unsympathetically displaced by the needs of the adjoining city of Bahir

Dar, despised by the majority *Amharic*[11] speaking population and viewed as a low caste similar to the Indian "untouchables".[12]

Interestingly, at the 12th Regular Consultative Meeting of the Council of Ministers of Nile Riparian States held in Nairobi on 18-20 March 2004, a raft of irrigation projects which are part of the Nile Basin Initiative (NBI) were reviewed. However, schism between the upper Nile countries of Ethiopia, Sudan and Egypt and the remaining sub Saharan countries is increasingly likely with the Eastern Nile Subsidiary Action Programme (ENSAP) showing remarkable unity between the three upper Nile countries, the Ethiopian Minister of Water Resources Shiferaw Jarsso stating that:

…Ethiopia, Sudan and Egypt believe in[a] legal and institutional framework that leads to sustainable cooperation.

The Eastern Nile Subsidiary Action Programme (ENSAP), bringing together Egypt, Ethiopia and Sudan has agreed on projects which were under preparation. (*The Ethiopian Herald,* 2004: 1)

Notwithstanding, Egypt still maintains its right to preserve the "river's unimpeded flow" (Klare, 2001:158) and to use force if necessary on other nations to maintain its privileged position under the *NWA*. It has also been argued by Egyptian academic Al-Mousa that international law recognises the validity of the *NWA*:

…the Nile water agreement should be treated the same way as the boundaries of most Nile Basin countries which were established by colonial powers, and are recognized under international law. (Raphaeli, 2004: 2)

This Egyptian standpoint would not be unexpected by Kedar who argues that the imposition of inappropriate colonial property regimes (such as the *NWA*) freeze "initial" flawed paradigms of property rights in natural resources (Kedar, 2003:413) The prospect of armed confrontation between the Nile riparian States could be the worst legacy of all.

Further south, Namibia and South Africa have also struggled with legacies of pervasive but flawed paradigms of property rights in natural resources. The following section of this paper discusses the issue of land property rights in southern Africa, with a focus on these two countries.

[11] *A Semitic language, Amharic is the principal language of modern Ethiopia.*
[12] *Personal communication on 29 March 2004 in Bahir Dar between the author and Assistant Professor Yohannes Aberra, Lake Tana Resource Management Research Centre, Bahir Dar University.*

SOUTHERN AFRICA

The recent report by the Commission for Africa confirms that influences from colonial history "disordered" (Commission for Africa, 2005:125) the continent's traditional societies, wherein:

...demarcation of new colonial boundaries disrupted many existing clan, ethnic and religious boundaries. Land ownership was caught between customary and new statutory legal systems. The new systems were more often than not designed with a colonial wish in mind to 'divide and rule' local communities. This created both artificial divisions and new hierarchies within groups and sowed seeds for conflicts after the colonial leaders departed. The consequences of some of these divisions are very much alive today...(Commission for Africa, 2005:125).

Such divisions are evident in Namibia, where the gaining of independence in 1990 failed to disturb the legacy of property rights in natural resources which remain very strongly ethnocratic, evocative of the persistent impact of the east African NWA. Kedar forcefully observes that the core colonial legacy in countries such as Namibia is the land regime created by the initial settler society, where:

...the founders control most land resources. Immigrants usually receive only a small part; while Indigenous and alien groups, who often serve as the main contributors of land, are generally denied a fair share of its allocation. By freezing this 'initial' spatial arrangement, the new property system facilitates the perpetuation over generations of the ethnocratic power structure. (Kedar, 2003: 413)

In April 2004, the Namibian Agriculture Minister Hifikepunye Pohamba observed that at independence:

...white farmers made up about 5% of the population, yet owned nearly 95.6% (18.8m hectares) of agricultural land. Between then and now... that proportion has dropped to only 95.4% (African Business, 2004: 28).

The Namibian Government has attempted to redistribute the ownership of agricultural land through a voluntary "willing seller, willing buyer" (*African Business,* 2004:28), land reform policy, however the slow rate of transfers has lead to the reported abandonment of this policy. The Namibian Prime Minister Theo-Ben Gurirab announced in April 2004 that the Government would begin expropriating "white-owned land" to resettle landless black Namibians, stating that:

[t]he process has become slow because of arbitrarily inflated land prices and the lack of availability of productive land. More than 240,000 people are currently awaiting resettlement (*African Business,* 2004: 28).

Interestingly, the 192 farms to be expropriated by the Namibian Government are owned primarily by foreign interests from Germany and South Africa, (*African Business* 2004: 28). These foreign owned agricultural lands reflect Namibia's colonial history wherein it was annexed in 1884 as the German colony of South West Africa, and subsequently annexed in 1947 by the apartheid government of South Africa (*The World Guide*, 2005:399). Notwithstanding, the Namibian Prime Minister Theo-Ben Gurirab has stated that:

…farmers will be fully compensated adding there is no possibility of Namibia's land reform programme descending into the chaos that characterised the Zimbabwe farmland exercise (*African Business,* 2004:28).

A different situation however exists in post apartheid South Africa where conflict has emerged over "extraordinary powers" (*African Business*, 2004:29) conferred on traditional male leaders in 2004, when the *Communal Land Rights Bill* was passed. The legislation has been broadly criticised as:

…it will effectively place land in the hands of traditional leaders, sideline ordinary land-hungry citizens and have severe gender implications.

The bill seeks to rectify the inequities of the 1913 Land Act but, say its many challengers, it will merely entrench them, The groundswell of opposition to the bill ranges from state institutions, non-government organisations, trades unions, academics, lawyers and women's rights movements. (*African Business*, 2004: 29)

The gender implications of the *Communal Land Rights Bill* are not unexpected, given the continuing parlous state of pan-African women's land rights, which according to Wanyeki have been aggravated by land reform, where:

…without exception, customary law is accommodated by statutory law,… to women's detriment. Within statutory law itself, there are unresolved tensions with implications for women's land rights. Implicit in all statutory land regulation and reform efforts examined is the attempt to balance the civil rights of the landed (through which land is viewed as private property) with the economic and social rights of the landless (through which land is viewed as a communal source of livelihood). The lack of resolution on this issue- the private versus the public – is especially critical now in the context of population expansion, land scarcity, liberalisation and privatisation. For even the nominal land rights customarily or religiously enjoyed by women are diminishing within this context. (Wanyeki, 2003:2)

Furthermore, Wanyeki concludes that endemic gender disadvantage across the African continent requires:

[r]eform in inheritance laws, access to the administration regarding land economics and access to legal mechanisms are also important.

Although both customary and religious law can be used to guarantee limited land rights for women, their independent land rights with respect to both ownership and control are the ultimate goal. (Wanyeki, 2003: 28)

However, even basic land reform in South Africa now appears stalled. The Land Claims Commission is purportedly committed to the redistribution of a third of "white-owned land" by 2015, yet abysmally funded with only $US210 million [13] allocated in the 2004 South African budget, and also compromised by the *Communal Land Rights Bill* which has been described as:

…fundamentally and constitutionally flawed…(*African Business*, 2004: 29)

Sibanda (2000: 306) observes that tenure reform is mandated in the *Constitution of the Republic of South Africa* and it is our view that the questionable constitutionality of the *Communal Land Rights Bill* can be discerned in the constitutional protection of property at *s.25(6)*:

A person whose tenure is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.[14]

However, Greenberg posits that any land reform has been compromised by a combination of factors, in particular the strength of the commercial farming sector, the absence of agricultural restructuring alternatives, and "the rise of liberal democracy in the national liberation movement"(Greenberg, 2004:116). He concludes that:

[p]ost-apartheid laws to secure tenure in communal and commercial farming areas alike have maintained the status quo, rather than transforming social relations. (Greenberg, 2004:116)

In support, May questions whether the South African land reform programme is capable of resolving the twin questions of rural poverty and livelihood through agrarian reform and whether the programme:

…as currently implemented has the potential to contribute towards this goal. (May, 2000:32)

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[13] *Of the $US210 million allocated by South African Finance Minister Trevor Manuel in his budget, $US71.4 million is for land distribution and tenure reform, and $US140.5 million to restitution, (African Business, 2004:29).*

[14] *s.25(6), Chapter 2 Bill of Rights, Constitution of the Republic of South Africa 1996,(Act 108 of 1996).*

The following section of this paper addresses the issue of flawed property rights and the colonial legacy in Oceania, specifically Australia and New Zealand.

OCEANIA

Arguably, the nations in the South Pacific Ocean have been the most consistent recipients of colonial legacies of flawed property rights, producing some of the worst unsustainable use of natural resources, especially of land, timber and fisheries. The European vision of the South Pacific was both romantic but also resource driven, with Smith pointing out that:

...so well known did the islands of the South Seas become following the publicity given to Cook's voyages that the natural productions and native peoples of the Pacific became better known to European scientists than the natural productions and peoples of many less distant regions. (Smith, 1988:2)

Further, Smith points out that in contrast to continental areas elsewhere:

...the archipelagos of the Pacific yielded information of value to the ocean-going scientist far more readily than did the continental masses of Asia, Africa, and America to their land-travelling colleagues. (Smith, 1988:2)

The natural fecundity of the South Pacific was quickly recognised by the early European explorers, and it is instructive that traditional owners occupying the various islands such as Australia, Papua New Guinea and New Zealand were rapidly dispossessed by the settler societies. Again, we see the thesis of Forman and Kedar (2004: 810) being revealed with settler law ensuring that the outcome would benefit the colonisers, and not the indigenes. Australia, adjacent Papua New Guinea and New Zealand all share a history of European colonisation, the Australian and New Zealand legacy being wholly British, while Papua New Guinea was variously annexed by Britain, Germany and subsequently Australia.[15]

Australia became an independent nation on 1 January 1901, being a federation of six former British colonies situated on the Australian continent, with an Anglo-Australian framework of property rights conveniently constructed by the settler society in the absence of any recognisable pre-existing Indigenous legal system. Purblindness to any ordered Indigenous management regime of natural resources was opportune, especially when the land west of the mountains hemming in the Sydney colony was found in 1814 by surveyor George Evans to be so fertile, Smith observing that:

[15] *In 1904 Britain transferred the Territory of Papua to Australia, and following World War 1 Australia was granted a mandate over German controlled territory. After World War II, both former German and British areas were renamed the Territory of Papua New Guinea, and were ruled by Australia until independence in 1975: cf. The World Guide (2005:440).*

…it was the rich pastoral country beyond the mountains that excited the imaginations of the first explorers as it did those of many settlers who came after them. (Smith, 1988:229)

When on 22 August 1770 (Haugh, 1995:190) Captain James Cook took possession of the east coast of the continent as New South Wales, English common law and statutes were imported in their entirety to the new colony. There was no restraint upon this importation of law and its development proceeded unfettered by any pre-existing legal system until the High Court decision in 1992 in *Mabo.*[16]

In the ensuing fourteen years since *Mabo*, the Anglo-Australian legal system has attempted to accommodate the alien legal regime of the Indigenous peoples of the Australian continent with varying success. At the joint Law Forum of the Metropolitan Local Aboriginal Land Council and the Northern Sydney Region Reconciliation Network held in Sydney on 15 June 2005, the collective views of the Indigenous and non-Indigenous lawyers were summarised as follows:

…[t]he Australian legal system has failed the Aboriginal People because it was designed exclusively to serve the interests of the British invaders who created it. Discriminatory laws continue to protect and benefit those who have inherited their 'rights' at the expense of Aboriginal people who suggest ongoing injustices, particularly in relation to land rights. (Ellimatta, 2005:10)

Furthermore, the views of Indigenous lawyer Norman Laing were summarised as follows:

Aboriginal land rights within a dominant white legal system… requires Aboriginal people to prove why they have an unbroken traditional association with the land they were dispossessed of and why their pre-European rights should be recognised under our law. This 'proof' must be given in a court environment, full of British tradition of wigs, gowns and officialdom, presented in an English legal tongue within its legal framework, with men and women in black suits who represent the government and large law firms. (*Ellimatta*, 2005:10)

Laing alludes to the flawed property rights that Australian Indigenes might obtain from the settler society, confirming yet again the thesis of Forman and Kedar that law continues to be used by such societies in "effecting and/or normalizing the outcome." (Foreman & Kedar, 2004:810)

Arguably, the 1998 amendments[17] to the *Native Title Act 1993*(Cth.) reveal that the use of settler law against traditional owners continues apace, with the threshold for

[16] *See note 5.*
[17] *Native Title Amendment Act, 1998 (Cth.).*

successful land claims registration now set so high that prospective claimants are understandably disheartened. The hopes of Indigenous peoples that the decision in *Mabo* would result in a new era of recognition of their property rights and interests have clearly not been fully realised. Jim South an *Ungari* man from southern Queensland offers a prosaic contemporary illustration of the flawed property rights that are offered to Indigenous people, stating that:

[t]his native title will get a whole lot of people saying they are traditional owners of the land. Wherever it is they will lay claims all through the area. Sometimes the only connection they have with the land is that they were born there, on that country. Few of the people that are descendants of that traditional land have any say whatsoever in that land claim. Native title now means money and power. (South, 2004:47)

In the case of New Zealand, the very recent recognition of carbon as a property right has demonstrated how tenuous the position of Indigenous rights and values in a contemporary settler society can be. The value of carbon credit property rights in March 2005 at € 9.50 per ton, represented a significant increase above the January 2005 price of €7 per ton (*The Sydney Morning Herald,* 2005:13), starkly demonstrating the growing value of this resource. Yet even the conceiving of an exotic property right such as carbon has had unexpected impacts upon customary holders of rights and interests in rights and interest in natural resources (such as water).

For example, in the Waitahuna River in Otago in the New Zealand South Island, 114,258 carbon credits worth around $A2 million have resulted from hydro electric generation, however to sustain these carbon credits, the New Zealand energy company needed to pump Waitahuna River headwaters to a distant hydroelectric station in another valley. Apart from the obvious reduction in downstream flows, the removal of water also has unintended repercussions for Maori spiritual and cultural values, as it:

...violates the Maori belief in "mauri", the vital essence of water, which holds that waters from different valleys should not be mixed…
(The Sydney Morning Herald, 2005:13)
The possible resolution of this new conflict between Indigenous and settler society in New Zealand is awaited with interest, and further highlights the untidy nature of *Tiriti o Waitangi* (The Treaty of Waitangi),[18] the central document legitimising the settler society. Brookfield pungently comments on this legitimation as follows:

...[t]he British Crown's revolutionary seizure of power in Aotearoa New Zealand, legitimated only in part by the Treaty of Waitangi, was otherwise an 'immense intrusion

[18] *The Treaty of Waitangi was initially signed by Maori representatives at the Bay of Islands on 6 February 1840 and is regarded as the primary document for the North Island of New Zealand, wherein British sovereignty was ceded to. Sovereignty over the South Island and Stewart Island was on the grounds of discovery, not cession.*

into other people's business' – or indeed a large-scale robbery. It had that in common not only with other such ventures of Western imperialist states but with conquests and seizures of territory generally...(Brookfield, 1999:181)

The unfinished business of the rights created through the *Treaty* have yet to be "completely legitimated by prescription" (Brookfield, 1999:182), perhaps because of the short time span since the official arrival of settler society on 30 January 1840 at Kororareka[19] in the Bay of Islands. Brookfield considers that this situation is not unexpected, similar to other former colonies emerging from the European "colonist polities" (Brookfield, 1999:182), observing that the flawed property rights of the Maori are a product of this unfinished legitimation:

...Maori claims and expectations, based on the Treaty of Waitangi or on the revived common law of aboriginal rights, remain outstanding. That, in the case of the Treaty, is despite a degree of effect given to its principles by Parliament and by courts and tribunals.

The settler societies of Australia and New Zealand have in varying degrees expressed regret and even repentance for the British colonisation of their Indigenous peoples, however such extirpations have not resolved the flawed property rights held by Indigenes which need to be redressed. It is also a truism that any resolution will necessitate the minimisation of "internal dissent within" (Price, 1996:46) the Indigenous constituency negotiating with the two settler societies.

The following section of this paper describes how similar property right's issues ordinarily rooted in post colonial legacies are now being revealed in non-common law countries such as Thailand and China due to the impact of international business investment.

THAILAND AND CHINA

Thailand and China have neither a common law or C*ivil Law* heritage as do other Asian nations,[20] and yet are now dealing with expanded private property rights in not only land and minerals, but also water.

Lohmann reports that the increasing commodification of Thai natural resources has resulted in a decline in biological diversity (Lohmann, 1995:78), especially in genetic

[19] Now known as Russell, however the actual place of assumption by Hobson of his duties as Lieutenant Governor in the Bay of Island was Okiato; for a discussion on this period cf. Orange (1987:34).

[20] Singapore, Malaysia, India, Pakistan, Bangladesh, Sri Lanka, the Philippines, and the former Crown colony of Hong Kong share a common law heritage, while a Civil Law (Roman) heritage is shared by nations such as Indonesia (Dutch), Vietnam (French), Cambodia (French), Laos (French), East Timor (Portuguese) and the former Portuguese colony of Macau.

agricultural stock and in the structure and life of soil. Water which has been a traditional part of village life in many Asian nation states has been subject to the impact of damming and large scale irrigation schemes (Lohmann, 1995:82). Forest clearance to permit these developments has also resulted in alternate flooding and droughts, with increasing siltation sometimes quite distant from a particular project resulting in the displacement of traditional village communities (Lohmann, 1995:79). In addition, the introduction of monocultures such as commercial tiger-prawn ponds has had a deleterious effect on local traditional fisheries given that it has been estimated by Lohmann that one half of the Thai mangroves have been removed for commercial aquaculture in ten years (Lohmann, 1995:80).

In northern Thailand, traditional wooden dam structures as part of *muang faai*[21] *are* being replaced by "modern" cement dams leading to not only increased siltation but have also:

…torn apart the complex forest/stream/rice field/labour relationships which local villagers have maintained for centuries as an ecological guarantee of subsistence. This has sometimes led to abandonment of the system…(Lohmann, 1995:83)

All of the above suggests that commodification of traditional rights and interests in water has occurred in Thailand at a significant cost to traditional owners, Muanpawong observing that:

[s]imilar to other nation states, Thailand has gradually transformed the local and possibly collectively-managed natural resources, primarily the forests, into government property. This restricted the access of the previous users and frequently turned their rights of customary law into privileges and concessions granted by the state. (Muanpawong, 2001:1)

Traditional Asian commons have thus been subject to a creeping commodification, a product of the joint impact of local and international business investment, and an increasing focus by state bureaucracies on natural resources for the broader national benefit. The International Work Group for Indigenous Affairs (IWGIA) (Molbech, 2001: 22) reported that the total estimated Indigenous population of Asia was 148 million, comprising in East Asia 67 million, South Asia 51 million, and South East Asia 30 million. However, the remaining population in Asia far exceeds this total Indigenous population, with estimates of the combined population of China and India alone exceeding 2.4 billion persons. (*The World Guide,* 2005-2006: 177-289)

Given this huge non-Indigenous Asian population, arguably Indigenous and customary rights and interests in natural resources are of little consequence to nation states. However, as Kristof points out:

[21] *Traditional Thai irrigation systems*

…the cost of Asia's industrial revolution are etched in little hamlets…(Kristof, 2000:291)

He observes that the industrialisation of Asian nations such as China has been at a huge environmental and human health cost, with nearly three million people each year perishing due to the catastrophic impact of polluted air and water which is "some of the filthiest" in "human history" (Kristof, 2000: 295). Further, Kristof asserts that this deterioration in environmental quality is "one of the structural flaws in Asia's economic architecture." (Kristof, 2000: 295)

As commodification of the commons continues apace in Asia, it is pertinent to note that it has not been without discord, Bruun and Kalland noting that:

…conflicts over control of natural resources have intensified in the industrializing society: between industry and agriculture, between large- and small-scale economies, between centre and periphery, and between ethnic groups. (Bruun & Kalland, 1995:7)

This is not surprising because there has been an historic close association between territoriality and ethno-nationality, Engerman and Metzer pointing out that disputation involving control of territory and rights and interests in land (and other natural resources):

…have characterized human societies from ancient days to the contemporary world…(Engerman & Metzer, 2004:1)

Furthermore, the recent *Millennium Ecosystem Assessment* reveals globally the traditional commons are unsustainably strained by the multitude of users and that:

[w]ater withdrawn from rivers and lakes for industry and agriculture has doubled since 1960 and there is now between three and six times as much water held in manmade reservoirs as there is flowing naturally in rivers…

…farm fertilisers have doubled in the same period…and has triggered massive blooms of algae in the freshwater and marine environments. This is identified as a potential "tipping point" that can suddenly destroy entire ecosystems.
(The New Zealand Herald, 2005:A16)

"The Millennium Assessment finds that excessive nutrient loading is one of the major problems today and will grow significantly worse in the coming decades unless action is taken". (The New Zealand Herald, 2005:A16)

The population of Asia is currently characterised by a raft of major urban centres which occupy nine of the fifteen positions in the UN list of the world's largest metropolitan areas as at 1995 (Kristof, 2000:306). More recent data will almost certainly displace some of the remaining six non-Asian centres in the list due to the increasing population

of other major Asian urban centres over the past decade. Indeed, by 2003 the population of Tokyo had grown to 35 million an increase of 8.2 million since the 1995 UN ranking, while Mumbai had grown to 17.4 million, an increase of 2.3 million since 1995. (United Nations Environmental Program 2004:2)

Arguably, viewing Asia as a homogenous urbanised entity is misleading when considering the issue of commodification of natural resources. The rapid large-scale industrialisation of many Asian nations distorts perceptions of Asian societies which are still undergoing a process of change. Confounding the conventional view of modern Asian societies, Bruun and Kalland point out that Asian nations are "embracing the extremes", where:

[h]uge world financial centres with highly sophisticated life styles are often surrounded by simple peasant economies, and the growing number of Asian cities with a million-plus inhabitants are often geographically close to vast areas occupied by tribal societies. (Brunn & Kalland, 1995:7)

The displacement of traditional Thai village communities by water projects referred to by Lohmann (2000:7) illustrates the nexus between these extremes in Asian societies. The dichotomy of Asian nations as they attempt to straddle both modernity and tradition underscores the clear and imminent need to establish an understanding of how emerging property rights in natural resources should be constructed to permit legislatures to ensure that economic rights are also legal rights. As Kristof (2000:295) has pointed out, the mismanagement of natural resources is a structural flaw in Asian economies, and is an issue of the greatest importance if nations such as Thailand and China are to be environmentally sustainable, a critical precursor to sustainable economic development.

The final section of this paper will address some fundamental issues arising from the aftermath of colonialism, the legacy of flawed property rights in not only common law countries but also non-common law countries such as Thailand and China.

CONCLUSIONS

At the outset of this paper it was noted that while economic and social systems world-wide continue to flex to accommodate the demands of globalisation, the legacy of previously dominant colonial tenure models similarly impinge upon post colonial common law nations, and even those that do not have a colonial legacy such as Thailand and China. It is often asserted that the primary legacy of British colonisation was transplanting of the common law, however a less generous interpretation is a pervasive paradigm of flawed property rights in natural resources to the continuing disadvantage of Indigenous peoples.

Property rights in former colonies such as Ethiopia, Namibia and South Africa evidence fundamental structural flaws which are being exploited to accommodate the demands of manifest national self-interest. Similarly, in Thailand and China the peremptory imposition of systems of tenure for natural resources is substituting for traditional settled property rights, to meet the demands of international business investment.

In Australia and New Zealand, the alien legal regimes of the Indigenous peoples of both countries have been marginalised with traditional rights and values effectively proscribed except when the settler societies deem otherwise. The use of law by such societies in "effecting and /or normalizing" (Foreman and Kedar, 2004:810) the dispossession of Indigenous peoples continues apace in Oceania, albeit more subtly.

All of the above is the undeniable aftermath of colonialism, and candidly no amount of *émigré boosterism* will transform post-colonial property rights into a simulacrum of English land law. The legacy of previously dominant colonial tenure models only has relevance and worth if it can provide overall utility *ex pede Herculem,*[22] and this paper demonstrates such property rights are now so broadly problematic that they should be dispensed with. Such relinquishment appears overdue.
These flawed rights whilst a legacy of colonisation and arguably Western hegemony, also expose a cultural and value divide between settler and Indigenous societies, especially in the developed world. Settler society places great emphasis on "fixity, absoluteness and systematicy" (Borsboom, 1999:217) while traditional tenurial regimes appear to defy translation into "terms intelligible" (Borsboom, 1999:217) to the legal system of the settler. In the northern Australian context, Borsboom provides a useful emphatic description of this cultural and value divide as follows:

...the emphasis is on certain key sites rather than on fixed boundaries between various clan or even moiety estates. In my situation there was no uncertainty whatsoever about the moiety and clan affiliation of a number of key sites: they were well-defined as either Dua or Jiridja and Sugar Bag or Djelaworwor, but no one seemed to bother about the exact boundary in the open, more or less undifferentiated country in between. (Borsboom, 1999:221)

In antiquity, the Greek philosopher Diogenes sought amongst the faces of the Athenians evidence of honesty, and similarly the settled traditional land tenures now being displaced worldwide exhibit arguably more honesty than those flawed property rights that are the legacy of colonialism. The maintenance of flawed tenurial regimes in former common law colonies in both the developed and developing world and in non-common law countries is clearly an apocryphal endeavour. It will be seen that the complex matrix of embedded property rights in many post colonial common law nations simply will not be uncovered through the traditional legal research approach of positivism.

[22] *From a part we can divine the whole.*

Nevertheless, the complexity of post-colonial tenures can be identified and interpreted utilising the emerging tool of property rights research, and it has been the aim of this paper to demonstrate such benefits.

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