1 Kinds of rights in country[1]

INTRODUCTION

NATIVE TITLE RIGHTS are rights recognised by Australian law, not customary law rights *per se*. They are attempts to recognise customary rights by translating them into legal terms. Native title is in this sense a 'recognition space'.[2] The terms of this recognition are those of the *Native Title Act* of 1993. Native title rights are products of a process in which evidence about indigenous cultural understandings and practices comes under legal scrutiny and is tested, usually by non-indigenous professionals. It is common for that body of information to be presented in the form of written and oral anthropological evidence, or anthropological evidence combined with that obtained directly from those whose native title application is being determined.

This chapter discusses from an anthropological perspective the kinds of rights and interests in country which people hold under Aboriginal traditions. In doing this it is also necessary to address the problem of terminology, as we are confronted with at least the following distinctions in the literature on Aboriginal rights in country:

- local individual or family rights versus tribal overrights and rights granted through intertribal territorial comity;
- rights versus privileges;
- primary versus secondary rights;
- unmediated versus mediated rights;
- presumptive versus subsidiary rights;
- actual versus inchoate versus potential rights;
- generic versus specific rights; and, more recently,
- core versus contingent rights.

In his review of much of the existing literature on tribes and intertribal relations in 1910, Gerald Wheeler found that Aboriginal tribal territory was subdivided generally among undivided families, but there was some evidence also of private or

personal ownership of land, especially in areas where fishing rights were important. There was some evidence of a 'tribal overright' such that rights of local groups, families or individuals over smaller areas were not entirely exclusive, as certain products of the country may be free of access to members of the same tribe generally. While Wheeler had described such privileges of vicinage as widely held rights to which those of individuals and local groups were subject, he was lacking 'clear information' on this point. 'Absolute rights' were acknowledged and maintained over 'the tribal' territory and all its products, but this 'territorial sovereignty' was qualified by 'certain customs of intertribal comity' whereby members of other tribes were invited or permitted to share in the benefits of a tribe's country at certain times and under certain conditions.[3] That is, the capacity to exercise 'overrights', if not their abstract formulation, could depend critically on the state of relationships.

Mervyn Meggitt, who worked with the Warlpiri and others in the Tanami Desert area in the 1950s, distinguished between 'rights' to country and 'privileges' in it, the former being held basically as of birth, the latter being held as a consequence of marriage and co-residence.

> Apparently, residence in itself gave only economic and ritual privileges (rather than rights) to immigrants, including spouses of existing [i.e. natal] members. These people were free to share in the available food and to participate in many ceremonies, but they had no real authority in these situations – they could not legitimately command the actions of true members of the community.[4]

It is common to hear life-long and even second and third generation Aboriginal 'immigrants', including incoming spouses, deferring to the local landowners even when exercising a perfectly customary right to use the 'host' country which has long been their home. Christopher Anderson records that at Wujalwujal in Cape York Peninsula

> [o]ne man … who was on the settlement council, and who was having trouble making any decisions go his way, said to me with a resigned sigh: 'No one listen to me. I'm only stranger here' (despite 35 years' residence in the area). What he meant was that he had no real right to speak. It was not his country. This is one of the most powerful principles governing politics in Aboriginal settlements across much of Australia.[5]

It is not so much 'immigrant' status as 'non-core rights-holder' status that more broadly underlies this kind of deference, as it can also apply between people with contiguous countries and a history of close co-residence, when one defers to the other on the other's land. In such cases nobody is an 'immigrant' in the ordinary sense because they are both just continuing the ancient practice of owners of neighbouring estates making relatively free use of each other's countries. But it is possible for those who lack core rights over an area where they live to describe themselves as 'only tourists' while staying there. The joke has a serious undertow. The same kind of deference can even apply where a person's relationship to a

country is based on indirect descent rather than a contractual relationship such as marriage, or a history of long association, or the fact of holding a neighbouring estate. Such people will usually defer to those with more direct links to the country, at least in contexts where primary proprietary kinds of relationships are the focus of discussion.

While indirect links such as shared distant ancestry, or the sharing of totemic identities, may offer people more solid life-long presumptive rights in others' countries than links based on a history of co-residence, at least in non-Western Desert regions, it is people who commonly reside together who tend to share use rights over each other's countries most readily. People with direct traditional links to a country but little or no history of a social relationship with those who live on or near it may find it difficult to put into action the rights they hold in principle, especially where their descent link, for example, is rather oblique. Thus there are times when people with ancient 'rights' may defer to the knowledge and authority of those with more recently entrenched 'privileges', yet without blurring the principle of the distinction between the kinds of rights involved. There is often a disjunction between authoritative knowledge of country and the holding of primary proprietary interests in it. Thus the right to speak *for* a country will usually rest on somewhat different criteria from the right to speak *about* a country, although in the Western Desert region the blurring of this distinction, where it occurs, seems to be at its greatest.

The character of a right over a country or its resources cannot be determined in any depth merely by observing behaviour. In 1974, at Bathurst Heads in Cape York Peninsula, Johnny Flinders, whose clan estate was nearby at the other end of the same bay, was taking and eating rock oysters. The site which had the oysters was in his mother's mother's clan estate, not his own. At one point he turned to me and said, in his own language: 'I'm eating my mother's mother's oysters'.[6] His was a non-primary relationship to the country and its resources, given that his genealogical tie to it was non-patrifilial, but the link rested on a specific and quite close family connection. Johnny Flinders's right to eat the Bathurst Heads oysters was in an important way contingent on his mother's mother's own core proprietary rights over the clan estate (*Alpirr*) into which the oyster site fell. At the level of clan groups, the relationship between Johnny Flinders's estate and that of his mother's mother was one of relative proximity in space, relative unity of language, and participation in overlapping networks of marriage alliances and other connections. It is generally the case that ordinary kinds of mundane use-rights over each other's countries are shared among owners of neighbouring countries, even in the absence of a close genealogical connection, so long as the relevant neighbours remain on reasonable terms.[7] But from an individual's point of view, factors like estate proximity are generally of less significance than genealogical ties in conferring a sense of rightfulness about entering and using adjacent estates, unless genealogical ties are absent.

It is perhaps somewhat misleading to speak of 'use rights over countries' when traditional patterns of occupational use of land and waters were not aligned at all neatly with the geographic extent of such countries. Countries, in the sense of clan

estates, Dreaming track segments or language group areas, are units of tenure, not units of economic use. There is no evidence that a classical band's range – a camping group's normal area of dwelling and resource exploitation – was the same area as a single clan estate, and it is usually described as much larger. Nor is there any evidence that a band's range was confined to a particular clan estate, or that it was a very fixed kind of constant as compared with the relative stability and definability of the geographic scope of estates. Use rights are usually rights in the use of regions that include a variety of estates or parts of them. There are often parts of estates which are not open to use by all-comers. For that reason alone it is not helpful to speak of 'use rights' being over estates *per se*. Rights based on spiritual or other deeper forms of identification are usually rights in estates as wholes, which are specific sets of sites usually considered to be relatively stable in composition.

DEGREES OF CONNECTION VERSUS KINDS OF RIGHTS

Primary and secondary rights; unmediated and mediated rights

A distinction between 'primary' and 'secondary' rights in countries has been around in the anthropological literature on Aboriginal land rights for many years. In an important early paper on the question of succession to Aboriginal countries, Peterson, Keen and Sansom said:

> A traditional owner of a clan estate gains primary rights in his territory by patrilineal descent. Secondary rights are a product of recognised social relationship(s) that link non-members of a clan, either to an estate owned by members of another clan or to one or more members of such a clan. Primary rights are thus direct rights while secondary rights are mediated rights. Six kinds of secondary rights can be distinguished …[8]

They then discussed the six ways by which the acquisition of secondary rights were mediated: place of conception; place of birth; place of death/burial of an important relative; kinship ties, especially the relationship through the mother's mother; company for ceremony (sharing totemic and ceremonial links to other estates); and being the child of a female 'clan owner'.[9]

With the advantage of current knowledge such a statement would have to be revised in several ways, but these are not our concern here.[10] The relevant point is that regional Aboriginal land tenure systems tend to recognise that these ongoing 'secondary' forms of connection to an estate may become activated as acceptable bases for claims of succession to estates whose owners have died out. Those who succeed in this way, a process which often takes many years or even decades, convert their interest in the relevant estate from a secondary one to a primary one, or at least ensure that the interests of certain of their descendants in that estate are

recognised as primary ones in due course. That is, in the terms of Peterson *et al.*, a person with 'mediated' rights to an estate and who succeeds to core rights in it, once they become the relevant primary predecessor in title for certain of their own descendants, will retrospectively be seen to have passed on those rights in a 'direct' or unmediated way. It may be said, then, that the full process of succession in such cases is not complete until a 'normal' situation has been restored whereby at least some people again enjoy unmediated rights in the country, and their precise origin is forgotten.

Many of these processes of succession are driven by one person or by just a close-knit set of siblings, for example, who hope to succeed to the estate concerned. These are cases of individual succession, but they normally have implications for the re-establishment of a group with interests in the country. In other cases it is apparent that the elders of an area 'appoint' an individual successor, who may be a newborn child, but again the succession starts with an individual who newly instantiates the group.[11] In time, such acts of individual succession would usually become the basis of the emergence of a replacement group holding the country. It is because of this, and because of the way the individual's relationship to the country is conceptualised, that it is usual to recognise that the tenure of an Aboriginal group over its country remains communal even when the group lacks more than a single member, or even any members, for a time.

Group succession: from neighbourly interests to insider rights?

Group succession occurs when, for example, the territories of extinct groups are subsumed by one or more extant groups. This is said to have been the case when people of the Ganggalida language group subsumed country of the defunct Min.ginda in the Burketown area, the Waanyi subsumed the country of the erstwhile Injilarija in the Lawn Hill region, and the Pangkala subsumed at least part of the territory of the much depleted Nauo (Nyawu) of Eyre Peninsula.[12] There are other cases where physical and cultural occupation of lands whose former occupants had shifted elsewhere, and/or became locally depleted, have turned into controversial bases for legal claims by members of the historically incoming groups. These are not readily categorisable as cases of succession, nor can they be likened to conquest, since they involve the assertion or assumption of rights which in some cases are recognised by descendants of the original inhabitants and in others are not, but there is no conclusive evidence of a formal handover of title nor of forcible occupation. These include the situations which form the backgrounds to the Northern Territory claims of *Finniss River*, *Lake Amadeus* and *Kenbi,* and native title claims by Yankunytjatjara, Pitjantjatjara, Ngaliya and Kukatha people in the *Far West Coast* region of South Australia, for example.[13]

These are cases of sudden population collapse due to colonisation, combined with the assumption of new rights or extension of old rights by groups moving into depopulated areas, with or without any recorded processes of the ceding of

rights or the handing over of sacra from the former inhabitants. While such cases may in the long-term past have led to a relatively fast replacement of rights-holding groups for a particular area, over perhaps only three generations, under modern conditions the persistence of records plays a powerful role in preventing the ready extinguishment of consciousness of how things were before.

Under similar catastrophic conditions members of the surviving subgroups of a single language group or other wider regional identity group have at times jointly assumed responsibility for all the untenanted estates of their wider group as well as maintaining or amalgamating their own local estate interests. Details of these processes are not often available but the cases of *Malak Malak*, *Jawoyn*, *Cape Melville* and *Lakefield* provide a range of relevant examples.[14] These are clearly not cases where existing 'normal' succession pathways are engaged in by one or two individuals or a small genealogical subgroup. Whole language groups or similar-sized regional groups may be involved. For this reason I refer to such processes as instances of conjoint succession. These cases do not involve the extinguishment of pre-colonial rights of surviving groups so much as their transformation – usually involving considerable simplification – and their generalisation to wider 'tribal' areas. One cannot exclude the possibility that similar catastrophic population losses may have occurred before the colonial era, where epidemics could have wiped out large numbers of people from time to time.

It is often the case that a person has a primary relationship to one parent's estate and a range of other ties to, for example, their other parent's estate, their mother's mother's estate, the site or country on which they were born, neighbouring estates on the same main Dreaming track as their own, the country where their mother was buried, and so on, depending on region. People may rank their connections to these various estates in terms of importance. In a succession context this kind of ranking is an attribute of an individual rather than of a group *per se*, even though some of the secondary interests may also be those shared among classes of kin standing in common ritual or genealogical relationships to the country; for example the *jungkayi* (who include people whose mothers are in a primary relationship to the country) and *dalnyin* (who include people whose mothers' mothers are in a primary relationship to the country) of the Roper River region.[15]

Group succession in a strict sense seems to rely on territorial proximity and pre-existing systemic grounds for territorial amalgamation. Such systemic grounds include commonality of language, shared rights in Dreamings, geographic unity (e.g. 'We all one river'), and shared kin-class standing, rather than specific genealogical links. In many regions a group or person succeeding to an estate should ideally be of the same kin-class membership as the defining sites and Dreamings of the estate concerned. This may include being of the same subsection patricouple, the same patrimoiety, or the same semimoiety, as the country and its original (or rather erstwhile) owners. This is another reflection of the principle that, while rights may in some senses be 'achieved', the classical Aboriginal systems were very much geared to corralling such achievements within structural constraints which worked counter to a strongly meritocratic approach. In Nancy

Williams's terms (see below), it seems that group succession may be based on potential rights, the setting for which is various proximities and commonalities between erstwhile neighbours, while individual succession is usually based on already existent but inchoate rights which become upgraded or augmented.

People whose countries are contiguous or which intersect or overlap in a number of 'company' areas may express a higher-order unity at any time, not just in situations of potential succession, by saying 'We are from one valley', or 'We are the same mob, same country, but we've got our own areas'. The current state of relations between two such groups may determine whether or not they prefer to present themselves as one group with common rights over a single larger country, or as two groups with a high degree of shared rights in each other's distinct countries. At times there may not be unanimity on this very question itself. During such times of negotiation or conflict it would be misleading to assert either that there is one group with one country or two groups with reciprocal rights in each other's countries. The anthropologist's job in such a case is to describe the group dynamics as far as necessary for the purpose at hand, not to stress a collectivist or atomist reading for the purpose of neatening the case to suit the demands of litigation.[16]

A group's members may have a strong secondary relationship to an adjacent country based on the paths taken by particular Dreaming tracks through both countries, and on their active ceremonial knowledge of both sets of sites. A group whose Dreaming track responsibilities run up close to another group's major site, but do not extend right into the site, can say of the place and its surrounds: 'We come in there too', or 'We go halfway to there'. These expressions are typically oblique references to the placement of song verse handover points at particular stages in the recounting of the progression of a Dreaming through a set of sites. The next group 'picks up' the authoritative relationship to the singing of verses from a certain geographical point onwards. This is the kind of ethnographic fine grain which gives substance to generalisations, still at least partly true for many areas, to the effect that land tenure 'depends on' ceremony.

To 'come in' to a place is not the same as to 'belong to' it in the fuller sense. People may often express such non-primary connections by the use of the terms 'just' or 'only'. For example: 'We are not traditional owners, we are just custodians', or: 'That's not main place for us, we only half owner'. By contrast, I have never heard anyone say: 'We are only the traditional owners of that area'. As a vernacular English expression, often constituting a not completely happy translation of some indigenous expressions, 'traditional owner' is a term of first rank when specifying who has rights and interests in country. On the other hand, many people with some traditional rights in a country, even some very strong rights, will normally deny that they are 'traditional owners' of it if they lack a primary connection to it based on identity.

A person or group or kin class would never have both a primary and a secondary relationship to the same country, except perhaps in the rare case of someone with parents who were both from the same country, in which case they

could trace a primary connection to it through one parent and a secondary connection to it through the other. In terms of small land-owning groups, estate group exogamy (out-marriage) was the predominant classical pattern. In terms of language groups, linguistic endogamy (in-marriage) varied widely, from predominant to partial to rare. In recent times and in rural and urban regions one occasionally comes across the view that language group endogamy is to be avoided on the grounds that those marrying would be 'too close'. For various reasons, including post-colonial mobility and the decline of arranged marriages, more Aboriginal people than ever come from parentage of diverse and widely separated country origins. Someone from near Darwin may marry someone from near Adelaide, for example, and they bring up their children in Darwin. In such cases long residence in or near one parent's country rather than the other's can mean that the other's country is one in which one only has rather inchoate secondary rights unless they are activated by visitation.

In the classical systems, a man who came from a distant area and who had no ancestral connections to the country of his wife would not, for that reason, be in a 'secondary' (or 'tertiary', etc.) relationship to the country in the sense usually understood, but would still have every right, and typically also an obligation under bride-service traditions, to make normal day-to-day economic use of the land and its products as a hunter and forager.[17] Today he may be more likely to have some obligation to take up employment in his wife's residential community and enjoy (and share) the fruits of local wages. This is a thought based on anecdotal evidence rather than systematic research, but it could be explored in the first place using community employment statistics.

These usufructuary rights are rights contingent on those of having a spouse's standing, and they could be removed in the event of a separation. They would also, potentially at least, be the same rights whether the individual was on country to which his wife had primary claims or on country to which her claims were of a secondary kind. That is, she would be just as free to live on her primary (e.g. father's) country, as on her secondary (e.g. mother's) country, and it is improbable that her spouse's freedom to make ordinary use of the two areas would be any different.

When we speak of primary and secondary connections to countries, we are usually speaking of ties which belong to individuals or to sets of close siblings, for example, rather than referring to features of groups such as clans or ritual groupings. It can sometimes be the case, however, that an entire group such as a clan does have a range of formal connections to one or more estates other than its own. An example is North East Arnhem Land where sets of clans with estates connected by ancestral Dreaming travels are linked in what anthropologists have at different times called 'phratries', sets of 'sister clans', or 'strings' of patrifilial groups.[18] The focus of anthropological analyses has been on the composition of such sets as units made up of sub-units, or as egocentric 'strings' whose composition varies considerably depending on context, but the relevant ethnography at least suggests that a patrifilial group or clan might be said to have differentially ranked connections with a set of several different estates in something like the way persons do.

Presumptive and subsidiary rights; potential, actual and inchoate rights

Nancy Williams prefers to avoid the implications of 'an automatic or fixed hierarchy of rights in land that numeric terms may convey' and thus prefers 'presumptive rights' to 'primary rights' and prefers 'subsidiary rights' to 'secondary rights'. In the *Yolngu* case,

> [i]ndividuals acquire certain rights in a direct way determined by patrifiliation; that is, each one succeeds to certain rights by virtue of membership in a patrilineal clan. Some subsidiary rights are inchoate rights[19] and some are potential rights. Inchoate rights exist and need only to be activated in a specific way. Potential rights are rights that may or may not come into existence.[20]

Inchoate rights would include, for example, a Western Desert person's rights in the countries of that person's father, the person's mother, and the person's birthplace, all of which would be established at birth:

> Thus a child may belong to two or even three estates. He does so actually, not potentially. But the rights are inchoate; more is required before they can be exercised in respect of any one estate.[21]

Here we have an operational distinction between actual rights, inchoate rights, and potential rights. A major practical difficulty in any one case, in a native title context, is that of carrying out 'ethnography' on who holds what kinds of rights, and therefore of writing a report which will be used to decide whose case for the assertion of native title rights is likely to be sustainable. Such anthropological investigations are often carried out in an already charged atmosphere, especially if there is a financial agreement in the offing, and cannot be represented as some kind of context-free scientific pursuit of 'the facts'.

Although it is one fraught with difficulties, this situation is one in which I suggest that the anthropologist should present as clear an account as possible as to who holds what kinds of rights and in the eyes of whom, and avoid intermingling the ethnographic process with that of negotiations as to whose names will be on what lists for whatever purposes. It may be that people associated unambiguously with a particular area will seek to limit the dimensions of the claimant or beneficiary group to those with activated rights, and may seek to exclude from the legal process those with inchoate and merely potential rights. Those with inchoate rights may seek to activate them in the native title context, thus distinguishing themselves from people who have merely potential rights or no rights, and may compete with core people for standing. They may have arguably valid reasons as to how their inchoate rights would have been actualised were it not for the intervention of forces beyond their control, such as the removal of themselves or their antecedents to mission dormitories.

In such a situation, from whom do the lawyers take their instructions? This may not be such an issue when the core of people with primary connections is large and

the active penumbra of those with lesser rights is small or politically weak, but if the reverse applies then the pressures from people with non-primary interests may be great. And who decides who will give instructions? A short answer to this is that such things are usually hammered out in meetings. But some organisation usually calls the meetings and funds aspects of attendance, which must have an effect on who is present to give instructions or to decide who the instruction-givers should be. Furthermore, those with weaker cases for traditional connection to the area in question may attend a meeting under the auspices, or at least with the support, of kin who have strong cases. Such kin are normally under a customary obligation to provide that kind of support, especially in a public context. They may seek the inclusion of their own distant kin while rejecting the distant kin of others, or may support their distant kin in public, while privately denying them.

In examining the question of who holds strong traditional connections and the rights that flow from them, one will often observe a tug of war between collectivist and atomist forces. These forces are likely to exist in the relevant Aboriginal community as well as among anthropologists, lawyers and administrators. In the Aboriginal community, it may be those with potential, inchoate or contingent rights only who are most active in pressing for a minimal definition of who is a holder of native title rights. The people with strong rights and primary connections may seek a more substantial definition so as to reflect their values and also contain the number of claimants or beneficiaries. Within indigenous organisations there can be a struggle between those who want to maximise the manageability of a group by keeping it small and tightly defined, and those who want to do the greatest good for the greatest number, perhaps reflecting a communalist and egalitarian ideology.

As Williams has said, 'primary' and 'secondary' are perhaps over-neat and restrictive as a way of classifying interests in country, even if we restrict their application to kinds of connection rather than kinds of rights. 'Primary' is also a legal term in at least one other relevant jurisdiction. The *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)* in Section 3(1) in part defines 'traditional Aboriginal owners' as 'a local descent group of Aboriginals who … have common spiritual affiliations to a site on the land, being affiliations that place the group under a *primary* spiritual responsibility for that site and for the land' (emphasis added). This has usually been taken to mean that the group's enjoyment of spiritual responsibility for the land is first among others, rather than merely basic or fundamental, although the point is arguable.

It may be better to distinguish 'primary' connections simply from 'non-primary' ones, given that the latter may present a range of variation from substantial to quite insubstantial links to countries, and there may be times when the same links are ranked differently, depending on the demands of context.

Ranking of connections and rights

Although the term 'primary' is in this instance a part of anthropologists' usage, the concept has common equivalents in Aboriginal English and Aboriginal languages.