Riccardo Mazzola

Indigenous Intellectual Property

A Conceptual Analysis

Sociologia del diritto

FrancoAngeli

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Sociologia del diritto

I mutamenti economici, politici e sociali, che si sono verificati in questi ultimi anni dopo la fine della guerra nei più diversi paesi, hanno fatto sentire sempre più viva l'esigenza di conoscere e valutare le divergenze tra le strutture giuridiche, statiche e spesso inadeguate, e la realtà sociale in continua e rapida trasformazione.

La sociologia del diritto è la disciplina che ha il compito specifico di soddisfare questa esigenza. E, a tale scopo, da parecchio tempo ormai, svolge ricerche sulle cause che determinano la produzione delle norme giuridiche, sugli effetti che le norme stesse provocano nel contesto sociale, sui ruoli degli operatori del diritto e sulle opinioni del pubblico e degli specialisti nei confronti delle norme e dell'apparato operativo.

In questa collana intendiamo pubblicare ricerche su tali argomenti e analisi delle stesse compiute in diversi paesi, ma soprattutto nel nostro, al fine di meglio conoscere il diritto nella sua «realtà effettuale» e di contribuire anche allo studio di problemi pratici relativi alla politica del diritto, alla pubblica amministrazione e all'attività giurisprudenziale.

Poiché le ricerche empiriche non possono prescindere dalla teoria, pubblicheremo anche studi di sociologia teorica del diritto che illustrino la sua storia e analizzino i suoi problemi che, come tali, sono connessi, da un lato, alla teoria generale del diritto e alla teoria generale della società e, dall'altro, alla teoria delle ideologie, alla sociologia della conoscenza e alla filosofia dei valori.

La collana accoglie lavori che seguono diverse correnti di pensiero e si ispirano a diverse ideologie, purché essi siano aperti alla discussione e al dialogo e siano sostenuti da quello spirito critico e non dogmatico, che è indispensabile in ogni lavoro degno di essere qualificato come scientifico.

Tutti i volumi pubblicati sono stati sottoposti a un processo di *peer review* che ne attesta la qualità scientifica.

Questa collana, «Sociologia del diritto», idealmente legata alla rivista omonima, venne fondata nel 1979-80 da Renato Treves, che l'ha diretta per dodici anni, sino alla sua scomparsa nel 1992. I volumi raccolti in questo lungo arco di tempo hanno affrontato una gran varietà di tematiche, coprendo largamente il campo della disciplina sociologico-giuridica. Sono lavori teorici e ricerche empiriche, opere collettive e monografie: un materiale imponente che ha certamente influito sul dibattito culturale fra i sociologi del diritto e, non dimentichiamolo, i cultori di discipline affini, dalla storia del diritto all'antropologia giuridica, dal binomio economia-diritto alla filosofia giuridica e politica. Sarebbe qui fuor di luogo soffermarsi sui singoli volumi. Due però vogliamo ricordarli, Il diritto come struttura del conflitto *di Vincenzo Tomeo (1981) e* Sociologia e socialismo. Ricordi e incontri *di Renato Treves (1990), tanto espressivi delle personalità umane e scientifiche dei due indimenticabili amici e maestri, dunque particolarmente cari alla memoria di tutti noi.*

Come si legge nella presentazione editoriale della collana, l'idea di Treves fu quella di raccogliervi lavori di varia ispirazione e provenienza, purché aperti e sostenuti da spirito critico. Manterremo intatte non soltanto quella presentazione, ma anche e soprattutto quel messaggio, che è sempre stato il "manifesto" della scuola di Treves, il cemento invisibile ma solidissimo che univa i suoi allievi. Crediamo che l'insistenza sullo spirito critico, sul dialogo, sul confronto fra posizioni e prospettive, sia oggi anzi quanto mai opportuna. Il vento di intolleranza che sembra dominare la lotta politica in molte parti del mondo, Italia compresa, potrebbe diffondersi nel mondo della scienza e della cultura. Come discorso "esterno" sulle istituzioni giuridiche, la sociologia del diritto è critica per sua natura. Dunque il suo contributo ad una visione aperta e tollerante della realtà e dei valori può non essere affatto secondario.

Il Comitato di direzione

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to my parents, Amalia and Lorenzo

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Foreword

by *Ignasi Terradas Saborit*[*]

Riccardo Mazzola's book represents a prominent contribution to Legal Anthropology and efficiently relates this discipline to Legal Philosophy and Sociolinguistics. In my opinion, its major input is an effective explanation of the way in which human cultural complexes may *stand in front of* and *defend from* property law. Such "defense", as this research shows, is not a mere opposition to "property" of a similar (or "translatable") notion, but rather an *overcoming* and *transcendence* of property so that the formal reductionism of the latter is left with no meaning whatsoever. The book describes how the Indigenous relationship to land, history, art and spirituality *exceeds* the formal reduction typical of the Western archetype of property, according to which "property" is an essentially "hollow" legal fiction or conventional bundle of rights (well-explained in the book through Ross and Olivecrona's classic philosophies of legal concepts). Mazzola's investigation shows that the notion of "intellectual/immaterial/incorporeal property" cannot "translate" the link between "society" and "places", the forms that such bond may acquire, and its constant re-creation or (ritual) reenactment. The main reason is that, as Mazzola concludes, Indigenous relationship to land transforms the territory into a *physical*, *living* and *remembered* place, in accordance to native cosmology and cosmogony.

Mazzola's book is an organized, detailed and well-supported investigation based on the most important ethnographic contributions to the anthropological and ethnological theory on Yolngu of Arnhem Land. The research systematizes the different conceptualizations emerged from classic Yolngu ethnographies such as Lloyd Warner, Elkin, Stanner, Morphy (Frances and Howard), Keen, Berndt (Roland and Christine). The book succeeds in making what is commonly known as *alcheringa* (or Dreaming) complex – along with its different instrumental (*ma<u>d</u>ayin, rangga*) and

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physical (landscapes as geographical, mythological and historical "monuments") expressions – clearly understandable.

Mazzola's investigation can be partitioned into three major segments. The first part is a full-comprehensive analysis of the Indigenous relation to land and all its expressions ("territorial cosmos"). The second part decodes the meanings of property in the realm of Western legal theories ("the Western property archetype"). The third part analyzes the interrelation between the two ways of relating human beings to land and cultural objects.

The *first* part of the book proposes a complete semantic analysis of the Yolngu phenomenology surrounding the link between people, society and land. Such bond, as the book shows, *construes* places, landscapes and mythological "monuments". In this section, Mazzola makes use of classic Yolngu ethnographies specifically highlighting the colonial approaches to the Indigenous realities.

The *second* part of the book determines the cultural specificity of the "property" notion – and especially its liberal and utilitarian definitions – also investigating its historical-etymological meanings. Mazzola's description of the nature-culture dichotomy and the theory of property enlightens the legal (and externalist) fiction of "property" as "*thing*" and the historical meaning of "property" as "*alienable* thing". Of particular interest is the description of the transaction from a conception of land as "power" to land as "capital" This part of the book also discusses the emergence of a notion of "property" as a relationship *between people* (as anticipated – in anthropology – by Maine) as the focal point in the analysis of the epistemological conflict between Western and Indigenous (such as Yolngu) societies. The discussion – especially the analysis of Ross and Olivecrona's influence in conceptualizing the "emptiness" of property – effectively shows the limits of the Western understanding of Indigenous relation to land. A relationship, indeed, engraved into the social and personal life of each individual and creating a bond unrelated to the alienable quality typical of the capitalist notion of "property". Mazzola's effort achieves the result of acknowledging how certain Western land rights-entitlements commonly ascribed to society and individuals are inherently unsuitable to recognize normative phenomena transcending the "property" realm. The book makes indeed extremely clear that "property" loses its meaning when it is overcome by ideas and attitudes transcending its traditional constructs both from a "physical" and a "spiritual" standpoint (according to the intelligibility and perception of other kinds of human worldviews). In dealing with ethical, epistemological and aesthetical (in a Hegelian sense) obstacles to the commensuration between different cultures, Mazzola exposes a series of *values* speaking about inherently different worldviews. The Western meaning of "property" re-

sults ultimately nonsense with respect to the "territorial cosmos" complex that Mazzola sum up in § 5.2, *fig. 1*.

Eventually, Mazzola's investigation takes on the issue of the possession of *ma<u>d</u>ayin* and *rangga* (exhibited as Yolngu "title deeds" in Courts). Relying upon Howard Morphy, Ian Keen and Lloyd Warner's ethnographies, Mazzola explains the inner nature of those objects – transcending their conception as "evidences" – as "sacred objects" or *relics*. The issue prominently examined in the book arises here once for all: what is needed to prove the existence of an Indigenous "property" in land and cultural objects is ultimately *incommensurable* to the property construct, precisely because Yolngu possession of *ma<u>d</u>ayin transcends* the legal reductionism of "property" (and not for it being something "less" than property). Through the comparison of culturally different relationships to land and cultural objects, "translation" attempts almost ridiculously insist on judging and attributing legal and moral value to the relationship between Yolngu collective conscience and the territorial cosmos. Mazzola concludes that Yolngu "law" is *embedded within the landscape*, its living nature and its historical and mythical knowledge, both natural and social, and not in its alienable "reduced" version.

The *third* part of the book, according to my partition, presents a series of judicial cases explicating the difficult encounter between cultures. Mazzola enlightens here the cognitive and ethical opposition between the Indigenous ritual and the State judgment. Yolngu have to defend their relationship to land and cultural objects mostly through the law of the State. Accordingly, they make use of constructs close to those of intellectual property law, at the same time (paradoxically) *refusing* them since they risk to erase Yolngu collective responsibilities and identity. Those are precisely social constructs expressed in Yolngu ritual language celebrating the creation and shaping of the land by sacred ancestors as a *living processes* (and not as mere "title deeds"). The legal "understanding" of Indigenous normative regimes results then ultimately either in an *erosion* (with no compensation whatsoever) of those systems or in an eternal *misunderstanding*. In both cases, property obtains the only result of humiliating and offending different values that transcend it as *lived* in a different manner. That, precisely, is something that the *ius in re* conception is unable to understand.

I think that Mazzola's book has an unquestionable value and represents a first-class theoretical contribution. It consolidates an anthropological theory surrounding the meaning and non-meaning of property, and contributes to better collocate property law within the realm of legal theory.

Introduction

> *So the land* […] *must first exist as a concept in the mind? Then it must be sung? Only then can it be said to exist?*
>
> Chatwin 1988: 14

In 1971, the so-called "Gove case"[1] first tested the soundness of Indigenous land claims in Australia[2]. In 1968, the Government of Commonwealth had approved a Mining Ordinance stating the excision of a large area of Gove Peninsula (Northern Territory) in favor of the mining company Nabalco. In 1969, representatives of Yolngu community[3] inhabiting the Methodist mission of Yirkkala had subsequently sued both Nabalco and the Government complaining about the unconstitutionality of the lease. According to Yolngu, the agreement had indeed violated the constitutional principle of fair compensation and the right of the Indigenous community to be previously informed and consulted in case of potentially detrimental

[1] *Millirpum v Nabalco Pty Ltd*.

[2] This study conforms to the current naming convention of "Indigenous Australians" as the native population of Australia. Two caveats: *first*, it should be noted that while a number of commonalities between all Indigenous Australians exists, there is also a great diversity among different communities and societies, each with its own mixture of cultures, customs and languages. In present-day Australia these groups are further divided into local communities. *Second*, as is known, there is some arguments over whether the notion of "Indigenous people" is capable of an inclusive definition that can be applied to all regions of the world. "Indigenous" and "Indigenous peoples" will be used throughout this book without any intention to comment on this debate.

[3] This work follows the current practice of naming "Yolngu" ("person", in the Yolngu language) the Indigenous population of North-East Arnhem Land. In fact, an agreement among anthropologists over an appropriate collective name for this people came only as of late. The name "Murngin" (literally: "fire sparks") had become famous after its use in W. Lloyd Warner's classic ethnography *A Black Civilization* (1937) to refer to the population around Milingimbi, a Methodist mission in Central Arnhem Land. Other names indicating Arnhem Land people were "Miwuyt", "Wulamba", "Malag", and "Miwoidj" (Shore 1996: 231-2). As H. Morphy (1991: 40-1) points out, not all those referred as "Yolngu" by linguists and ethnographers identify themselves in that way, since even today they most frequently refer to themselves by more specific names that identify more narrowly defined groups of peoples.

decisions to the Gove Peninsula territory[4]. Yolngu were particularly concerned about the disruptive impact of mining activities to the environment, and to be limited or even forbidden to access sacred places fundamentally bound to Indigenous cultural identity.

In 1970, Australian anthropologists William Stanner and Roland Berndt got involved in the preliminary proceedings as "expert witnesses" and were asked to present the Court a survey on the Indigenous "land tenure" system[5]. Stanner travelled to Yirkkala and interacted with the native population, later reporting a peculiar episode:

> [w]e were then taken by the hand and led towards the singing. As we walked we were asked to look only at the ground and not to raise our heads until told to do so. We went into a patch of jungle, and then we were given a sudden command to look. At our feet were the holy *rangga* or emblems of the clan, effigies of the ancestral beings, twined together by long strings of coloured features. I could but look: it was not the time or place to start an inquisition into these symbols. A group of dancers, painted - as far as I could see - with similar or cognate design, then went through a set of mimetic dances […] One of the men said to me: "now you understand". He meant that I had seen the holy *rangga* which, in a sense, are the clan's title-deeds to its land, and had heard what they stood for: so I could not but 'understand' (Stanner 1979: 278)[6].

According to Stanner, *rangga* were sacred objects – carrying ancestral designs – that identified Yolngu *title deeds* proving their ownership of the land.

While the Court ultimately dismissed Stanner's analogy between *rangga* and title deeds stating the non-proprietary nature of the relation between Yolngu and the land they inhabited[7], the Gove case still inspires significant reflections surrounding the connection between land and sacred designs in

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[4] In 1963, a Selected Committee of the Australian House of Representatives had recommended the institution of a preliminary consultation system to involve the Indigenous community in the decision-making process surrounding the exploitation of North-East Arnhem Land territory. The Committee also supported the enactment of a compensatory mechanism in case of enforced excision. The 1968 Mining Ordinance then explicitly contradicted the Committee's recommendations.

[5] The *Milirrpum* case involved for the first time (Williams 2008: 199) professional anthropologists as expert witnesses. For a historical background of this practice see Burke (2011).

[6] The exhibition of Yolngu sacred *rangga* in the *Milirrpum* case is portrayed in Werner Herzog's 1984 movie *Where the Green Ants Dream* (*Wo die grünen Ameisen träumen*). On the discrepancies between the historical events and the movie narrative see Hurley (2006).

[7] "[T]here is so little resemblance between property, as our law, or what I know of any other law, understands the term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests" (J. Blackburn in *Milirrpum v Nabalco* 1971: 273).

the realm of an Indigenous culture. It may be asked indeed whether a foundation in Yolngu worldview justifying the analogy between *rangga* and title deeds exists. As a matter of fact, Stanner's lexicon[8] linking elements of Indigenous culture (in this case: *rangga*) to formal common law institutes (title deeds) was not unprecedented to Australian ethnography[9]. Mervyn Meggit (1962: 288) indeed already described Warlpiri (Northern Territory) sacred objects as "a part of community's title deeds on its land", while John von Sturmer referred that Aranda (Central Australia) used "as a matter of course" the English expression "title deeds": for example, they used to define the repository cave for sacred objects as the "vault in which title deeds are preserved"[10].

This study investigates the connection between Yolngu land and cultural objects and performances[11]. Its focal premise is that a full understanding of this link may be of some use in addressing the contemporary international debate on the protection of so-called Traditional Knowledge (from here: TK) held by Indigenous communities. The following chapters explain that a conceptualization of Indigenous knowledge and culture (and their material expressions) as "intellectual property" (from here: IP) is essentially inaccurate. The main purpose of this research is however to discuss *why* Western "property-ownership"[12] constructs and categories do not fit Yolngu cul-

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[8] In contrast to other reconstructions often proposed (see for instance Mohr 2002: 4), Stanner proposed the analogy between *rangga* and title deeds, while Yolngu simply endorsed it. Such analogy was indeed "new" (N. M. Williams 1987: 187) to the Indigenous community involved in the *Milirrpum* case.

[9] Throughout this research, "ethnography" will be used to refer to the study of *particular groups* as opposed to "anthropology" (or "anthropological theory"), implying rather a comparison of cultural particularities that fits into a general scheme. On the "ethnography-theory divide", see Burke (2011: 8). Lévi-Strauss (1963: 356-9) famously proposed a more articulate partition according to which "ethnography" identifies the first of three different "moments in time" along "the same line of investigation": the observation and description of *specific groups* ("ethnography"), a *comparative* study of ethnographic materials ("ethnology"), and broader concerns about the *general knowledge of man* ("anthropology"). On the limited effectiveness and the spurious nature of this partition see (among others) Lewis (1992: 37) and Seymour-Smith (1986: 99).

[10] Private communication reported in N. M. Williams (1987: 91).

[11] Definitions of "cultural object" and "cultural performance" will be introduced in § 1.4.

[12] As is known, the English language includes both words 'property' and 'ownership'. Generally speaking, "property" seem to have a wider application than "ownership". As Honoré (1961: 128) notes, 'property' can be used both to refer to a "bundle of legal rights" and also to the "thing" that is the object of the legal rights. However, in the ordinary language, 'property' and 'ownership' are thought to be *interchangeable*: as Snare (1972: 9) points out, for example, the statement "I own the car" and "the car is my property" seem to convey the same information. More broadly on this terminological distinction, see S. Pugliese (1991) and Gambaro (1992: 16-20).

tural objects and performances[13]. What this book ultimately argues is that the notion of "property" is unable to conceptualize the tangled web of "cosmological connections" that pervades Yolngu worldview and culture.

Beside its pragmatic outcomes, the issue of IP law transplantation to Indigenous realities also attains to the more theoretical framework of anthropological metalanguage borrowings from legal theory, possibly conveying false representations of non-Western societies. Discussions on the point dates back at least to the well-known Bohannan-Gluckman controversy[14] on the opportunity to discuss "customary law" through the concepts of Western jurisprudence.

This work proceeds first to prove first the existence of a "connection" between people, land and cultural objects in Yolngu culture. Then, it explains why such a connection prevents the application of both "land property" and "IP" notions to Yolngu view of land and cultural objects respectively. More precisely, the book conforms to the following structure.

The *first* part of the book identifies land, according to Yolngu view, as a "territorial cosmos": namely, a "physical-cosmological continuum" where ancestral subjectivity resides into the landscape and shapes a web of cosmological connections. Within such interrelated dimension, people, land and cultural objects have come to *correspond* to each other and to be *inseparable* from an ontological standpoint. In order to understand the connection between Yolngu land and cultural objects, this part of the book particularly draws from William Lloyd Warner (1937), Nancy Williams (1987), Howard Morphy (1991), Ian Keen (1994) and Fiona Magowan's (1997) ethnographies. The proposed analysis takes as a starting point Yolngu words and expressions referring to land and cultural objects, and particularly the Yolngu notion of "*l̲ikan*" (§ 3.1)[15].

The *second* part of the book enlightens the inability of Western "property" archetype to conceptualize Yolngu "territorial cosmos". The main intellectual debt is here to Nicole Graham's theory of "lawscape" (2011). The

[13] This research focuses particularly on Yolngu people of North-East Arnhem Land, mainly due to the high quality of ethnographic researches available on Yolngu culture and the large number of interactions between Yolngu normative structures and Australian IP law. The strength of this work lies then in its specificity, and in no way the following chapters are suggesting that Yolngu experience shall be adopted as a model to describe the generality of Indigenous cultures across the world.

[14] See particularly Bohannan (1957) and Gluckman (1962). On the possible universal application of Western legal concepts see (in Italy) Negri (1983) and De Francisci & Betti (1997). See also, for a reflection about the interpretation of "promise" as a universal legal notion, Di Lucia (1997).

[15] Yolngu languages are written using special characters. The present work makes use of Yolngu orthography with the exception of the word '*yolŋu*', written in its English equivalent 'yolngu'.

basic assumption of N. Graham's theory is that Western property law adopts an essential narrative of abstraction of land from the physicality and particularism of places, as well as of (ontological) separation between "subjects" (people) and "objects" (land). This conception of "property", however, appears as a *culturally specific* one and maladapted to Indigenous realities, where the relation between "people" and "land" is more one of *subjectivity* or *identification* unifying (rather than separating) the two poles. Accordingly, the Western "property" conceptual apparatus, applied to Yolngu conception of "land", has the effect to *partition* the territory from the cosmological aggregate of territorial cosmos.

The *third* and last part of the book is aimed to build a bridge between N. Graham's "lawscape" theory and the so-called "unfitness" thesis of IP law, according to which IP cannot adequately conceptualize Indigenous cultural objects and performances[16]. More precisely, the final segment of the research argues that the "propertization" of Yolngu cultural objects and performances (their inscription within the categories of Western "property law") produces a fundamental shift in their nature precisely because of the Western "property" notion inability to conceptualize the physicality and particularism of land. To conceive those objects as "properties" implies indeed their detachment from the territorial cosmos-complex and the severance of cosmological connections linking them to humans and land. This book ultimately proposes an alternative conceptualization of Yolngu cultural objects and performances (with respect to the "proprietary" one) as "inalienable possessions", relying upon Annette Weiner (1992) notion and ethnography.

The book articulates the explained pattern throughout five chapters.

Chapter 1 offers a brief excursus on the topic of the protection of TK through IP constructs. This chapter identifies the historical roots and the modern development of this legal and social issue, enumerating the relevant legislative provisions and policies, and specifically addressing the Australian legal framework. Also, the chapter explains how most commentators argue today in favor of the "unfitness" thesis, underlining the inability of IP law to adequately conceptualize Indigenous cultural objects and performances. Ultimately, the chapter proposes the use of a "neutral" terminology (as opposed to the "official" one maintaining the most inter-

[16] This concern was explicitly expressed by the Four Direction Council, a Canadian Indigenous organization, in the 1996 report *Forests, Indigenous Peoples and Biodiversity: Contribution of the Four Directions Council* (quoted in Dutfield 2004: 127). Within IP sphere, the "unfitness" thesis contrasts the "one size fits all" philosophy, extending beyond the Indigenous discourse and referring generally to the collapse of existing IP systems into a single IP law. See on this point Dinwoodie (2011: 4-9).