

1998

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V. Kerruish
Macquarie University

J. Purdy

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Recommended Citation

Kerruish, V. and Purdy, J., He "look" honest - big white thief, *Law Text Culture*, 4, 1998, 146-171.
Available at: <https://ro.uow.edu.au/ltc/vol4/iss1/9>

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Abstract

Our title is taken from a poem, 'Chained', by the Aboriginal author and activist Kevin Gilbert (1990: 38). The poem gives expression to a contradiction of 'white man law' in Australia:

Pinchim wimmen, pinchim land

Kill the Blackmen, whiteman grand

Him make law for whiteman good

Him steal land and Blackman food

'He "Look" Honest - Big White Thief'

Valerie Kerruish and Jeannine Purdy

Introduction

Our title is taken from a poem, 'Chained', by the Aboriginal author and activist Kevin Gilbert (1990: 38). The poem gives expression to a contradiction of 'white man law' in Australia:

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Gilbert's work often focused on the differences between white appearances and Aboriginal realities. He was far too astute, however, to regard such dichotomies as either simple, or simply overcome. This dimension is brought out in his poem, 'True' (1990: 112):

Yet you *believe* and you can't be wrong
For each man's truth is another's wrong

The relevance of Gilbert's poetry here lies not only in its power to evoke perspectives of which non-Aboriginal peoples are often unaware, but as an introduction to this paper and its analysis of the Australian case of *Mabo v The State of Queensland (No.2)* (1992) (hereafter '*Mabo (No 2)*').¹

Much has been written on *Mabo (No 2)*, but in our view, if the pen is to be mightier than the holy dollar, there is more yet to be said. It is well enough recognised that 'native title', as this form of entitlement is now called, is a belated and minimal acknowledgment of indigenous ownership of the

Australian continent and contiguous islands prior to British colonisation. More recently the limited character of the abrogation of terra nullius - the setting aside of the doctrine for the purposes of land ownership but not of either sovereignty or jurisdiction - has been noticed (Ritter 1996). In so far as terra nullius (or more precisely its companion doctrine in common law) was set aside, as well as with respect to such economic and cultural benefits as may flow to Aboriginal and Torres Strait Islander peoples from it, the *Mabo (No.2)* decision, in our view, is welcome.

It is also our view that, in the non-recognition of aboriginal sovereignty and jurisdiction, the context of social relations between aboriginal and non-aboriginal Australians continues to be colonial. Anglo-Australian law does not escape this context. On the contrary, in its application to indigenous peoples, even as an intended retreat from earlier phases of colonisation, it repeats the denial of self-determination for aboriginal peoples.

Aboriginal and Torres Strait Islander responses to this decision and its aftermath are diverse and it is not to our point to write on their behalf. We write on our own behalf. The observation that humans make their history in circumstances that are not of their choice (after Marx 1973a: 146) applies to us as well as to others more obviously constrained by circumstances not of their choosing. The process of making, and being constrained by, history generalises across dynamics of interaction between peoples. Cultural identities and locations within the political economy of nation states are formed within that process, 'ours' as well as 'theirs'.

International deployment of capital, restructuring of markets and movement of people only underlines the continuing relevance and specificity of struggles of indigenous peoples. They have survived the European belief that they are 'peoples without history' and its various determinations in the Australian context: the doctrine of terra nullius, the policies of 'smoothing the dying pillow' and assimilation, the administrative practice of classifying Aboriginal people with flora and fauna, and the 'White Australia' immigration policy. We write about the Anglo-Australian

law's part in this process from the perspective that our own cultural and personal identity is implicated in the dynamic referred to.

Legal Thought

The concept of nation and national identity is virtually unquestioned in legal thought. The idea of a national law ('Australian common law') presupposes it as that which the law belongs to and serves, binds together, heals of its history, secures in its future. At the level of policy, 'White Australia' has become 'multicultural Australia'. Aboriginal Australia is, according to present national policy of reconciliation, no longer to be exterminated, integrated or assimilated. A new accommodation, a new Australian national identity, it is said, is being forged with *Mabo (No.2)* as its impetus.

We do not disagree. But because the concept of nation is presupposed by legal thought, and therefore presupposed by *Mabo (No.2)*, we regard this impetus as dubious. It is important to remember that from a perspective to which Aboriginal and Torres Strait Islander people may adhere we are colonisers. This perspective calls into question the history of the formation of the Australian nation. To begin with then, this question must be reinserted into thought about Anglo-Australian law and *Mabo (No.2)* in particular.

Inevitably, following any such insertion, tensions with the *legal* method of dealing with the judgments of courts, such as *Mabo (No.2)*, and conventional legal thought result. Two points have particular relevance to our analysis. First, 'law' is distinguished from 'fact' in both legal and non-legal thought. In the institutional context of legal practice, however, methods of fact finding or proof are tied in to practices and procedures of litigation and regulated by the law of evidence. Furthermore which facts are *relevant* is determined by rules or propositions of law. Practically then law

takes control of fact, or to put that another way, in legal thought, law takes priority over fact.² The law/fact relation will still be an interactive one, but the relation is lop-sided, weighted on the side of law. This practical and institutional shaping of ideas gets a particular cultural gloss in the idea of 'rational' practices and procedures of fact finding in modern Western law that contrast with 'irrational' methods of ordeal, swearing, or divination characteristic of primitive forms of law. If this weight of law over fact sheds some light on how a populated country can be terra nullius for legal purposes, the rationality involved has its own peculiarities. It is not, evidently and despite its claim, the reason of being factually correct. But nor is it, quite, the reason of an imperialist or nation state. It is important, in re-inserting the formation of the Australian nation into legal thought, not to miss the specificity of the reason of law in too quick a reduction.

The second point focuses on that reason via the practices of legal argument and reasoning. The law/fact distinction is observed in these practices with the result that they are conducted in terms of the idea that legal judgment is a matter of applying general rules to particular cases.³ Most legal theorists, particularly within common law systems, recognise that this is not a strictly deductive exercise. Interpretation of the rules is always involved and rules are interpreted and reinterpreted to accommodate changing social, economic and political conditions. Furthermore, while there is political controversy about what judges *ought* to do, they have the power to take interpretation to the point of invention and create new rules or doctrines. When this power is exercised it will be very carefully justified in terms of more abstract principles or ideals to which, it is said, the law is committed.

Mabo (No.2) was a case of this latter kind⁴ and one of the principles seen as vindicated by it is that of equality or non-discrimination. The law, it is said, treats individuals who come before it in the same way - equally and impartially: 'without fear, favour or affection'. It treats like cases alike and

different cases differently. But it has its own criteria of like and unlike cases, criteria that are written in known or at least knowable rules or doctrines.

It is a truism that the idea of equality before the law is legitimative, that is, it provides apparent legitimacy to outcomes which can in effect embed inequality. But the well rehearsed critiques of legal equality are not to our point. Just as a legitimative idea or principle of modern Western law, legal equality is an important component of that law's peculiar rationality. In particular it is vital to grasping the concept of the legal person and the place of that concept in legal thought. The sense in which, in legal thought, all parties are treated alike is that they are treated as 'persons', as free and equal subjects of the law's address. They are 'free' in the double sense. First they are free (in the sense of stripped) of *all* their actual characteristics (from names to locations within basic social relations). Second they are supposed to have capacity for choice or free will. Equality at law inheres in this dual freedom; that is, all those who come to the law are *equally* stripped of their actual characteristics and *equally* presumed to be responsible for their own actions.

Who, or for that matter what, is to be treated as a person, or as having 'legal personality' is a question that is differently answered in different times and places. The idea is a curious one. On the one hand to deny human beings legal personality is, in the limit case, slavery. On the other as persons, as 'free and equal subjects of the law's address', actual human beings (or corporations or institutions) become objects, the bearers of rights, powers and duties which are determined by law. The subjectivity of the legal subject, as it turns out, is confined to being responsible for whatever those determinations are. Thus by being given status as legal person, the parties to litigation are re-clothed with a more determined legal identity or *persona*. They become mortgagors and mortgagees, landlords and tenants, husbands and wives. They are placed back into relations which are now legal relations. Sometimes legal *personae* are conditioned by social relations of sex and race: 'husband' and 'wife' for example, or victims of

sexual and racial discrimination. Usually they are linked to some action or transaction which has been done or entered into. How willingly, with what understanding and in what circumstances - all questions which count in saying what the action or transaction actually meant in its social context - are taken up into a context of doctrinal determination. In the result the legal *personae* can have a great deal or very little to do with who the parties think they are, what they thought they were doing and what they wanted to accomplish.

Looked at in this way, legal reasoning is a process of determining the identities of the parties to a case to which the concept of the legal person is basic. It is a process that begins with the parties to a case being characterised as persons - dis-located (or atomistic), free of all social, historical and cultural determination, and thus equally *tabula rasa* on which the law can write. This approach is the one we take to our analysis of *Mabo (No.2)*. Analogously with Marx's judgment that the commodity is the elementary form of the wealth of societies and that a critique of the production process of capital must (as a matter of dialectical method) begin with analysis of the commodity (Marx 1938, 1973a),⁵ we take the person to be the elementary concept of modern Western law.⁶ This enables the specificity of legal reason to be maintained against too quick a reduction of the legal to the political. It refers back to our previous comment with respect to not too simplistically reducing legal reasoning to the reasoning of an imperialist or nation state. To do so is to underestimate the legitimated power of legal reasoning, a power against which perhaps many colonised peoples are immune, but which was recognised by Gilbert: 'Yet you believe and you can't be wrong'. Legal reasoning may further the interests of imperialism, but we need to deconstruct its legitimacy for believers if we are to challenge its power. With the specificity of the legal anchored to the person, the confusion engendered by the fact that this very specificity is a social and political phenomenon is more easily tackled.

The concept of nation as presupposed in legal thought is a foundation of that thought. In legal thought the Australian nation's existence is unquestionable and this unquestionability finds expression in terms of sovereignty. Onto this an idea of a sovereign-subject relation as a vertical power relation has been overlaid. Within legal thought this relation is seen, in the first place as a political relation - one that is not of the law's making because it is about the making of modern Western law, as legislation and as the conferring on the courts of the authority to decide cases (jurisdiction). Second, although the sovereign-subject relation is not of the law's making, it can, in limited cases, fall within the law's jurisdiction. In these cases, the law can address both sovereign and subject, but as in other matters, can address them only as persons. The sovereign as a legal person is 'the Crown'. The subject will have whatever *persona* is pinned on him or her.

Mabo (No.2)

We have already referred to various manifestations of the doctrine of terra nullius and to the point that, as a legal doctrine, it relates to sovereignty, jurisdiction and property. In the area of property law, prior to *Mabo (No.2)*, terra nullius meant that Aboriginal people, relating to land in accordance with their customs and law, did not have the identity of property owners. Aboriginal people were never classified, at law, as slaves. Nonetheless in an early court decision dealing with 'fundamental principles' of ownership of land in New South Wales which was argued out between the Crown or British sovereign and colonists, aboriginal ownership did not cross the threshold of the court's perceptions. So far as the common law of property was concerned they were neither slaves nor persons. They were inhabitants of terra nullius.⁷

In its partial rejection of the terra nullius doctrine the *Mabo (No.2)* decision made a legal identity - 'native title claimant/holder' - available to

Aboriginal peoples within Anglo-Australian property law. This identity, like that of the individual owner of private property in land, is constituted in legal thought within a broader political relation of sovereign and subject that is outside or foundational to legal thought: the sovereignty side, so to speak, of terra nullius.

According to the majority judges in *Mabo (No.2)*, the common law *recognises* a set of rights coming from aboriginal law. Anglo-Australian law does not however recognise aboriginal law as law but as fact - to be proved as to its existence and content by evidence. This looks, on its face, like the recognition of foreign law in cases in which one or both parties have such significant contacts with another country as to make that country's law relevant (private international law). There too foreign law is admitted as fact not law. 'Law' is that which makes this concession and admits the evidence. It is assumed that there is one supreme law within a territory or nation. It is the law of a sovereign or sovereign power who or which confers authority to decide cases (jurisdiction) on the courts. But there is a salient difference between private international law and the law of native title. In private international law, foreign law is - indeed must be - the law of an internationally recognised sovereign. Aboriginal sovereignty, however, is not acknowledged by the Australian state and cannot therefore be recognised by the courts of that state as foreign law.

In this particular interplay of national (and international) sovereignty, jurisdiction and property law, the doctrine that is being maintained is one of English common law according to which the various Australian colonies are classified as 'settled', rather than conquered or ceded. The consequence is the reception of the common law of England as *the* law and *the only* law of the land. At some point in time this becomes Australian common law. When and precisely how is a juridical puzzle that is less arid than it seems, though we cannot pursue that here. Our point is that the coloniser remains, according to first English and then British and now Australian common law, a settler of terra nullius and the law that confers

and protects his or her property rights rules on the same basis, that is, that the coloniser is a settler.

According to English philosophers and jurists who witnessed the transformation of a feudal to a modern common law, the relation between sovereign and subject has for one of its chief ends, the recognition (for Locke, 1960: 395ff) or constitution (for Hobbes 1651: 202, 294ff, and Bentham 1802: 41ff) of rights of private property. Changes in the character of property effected by capitalist production have been expressed in modification of these classical theories (Schumpeter 1942: 139ff; Vandervelde 1980). In the course of the nineteenth and twentieth centuries property has increasingly assumed the commodity form and commercial imperatives linked to marketing for mass consumption, have brought into the law a limited but significant concern for issues of distribution. While this concern, already apparent in the writing of J.S. Mill (1848: 231ff) has found expression in principles of fairness (Rawls 1972: 11ff) it remains the case that government is constrained, both politically and legally, where it acts against private property rights in land to which it, in the shape of the Crown, has given title. Moreover, because the Crown was seen to be the source of all title to land in Australia, the constraints on government were severe.

Mabo (No.2) was indeed a hard case. It not only raised issues of how to 'balance' classical liberalism, in which private property rights are seen to guarantee individual autonomy against the state, with a redistributive principle of fairness, which is somewhat more alive to discrimination on grounds of race and sex (if not class). The further difficulty was that the overriding context remained one in which private property rights in land can only exist at all in Australia on the basis of the non-existence of native title. We should expect then to find quite some pragmatism in *Mabo (No.2)*.

The sovereignty of the British/Australian crown was not challenged in *Mabo (No.2)*. But that sovereignty entered the case in the two ways

sketched above. First, it is affirmed as the unquestionable source of the court's authority to decide the case, that is, it confers jurisdiction. Second the sovereignty of the British/Australian crown is affirmed as the source of all non-native titles to land and therefore, in order to legitimise these titles, as having the power to extinguish native titles. The exercise of this power, extinguishment of native title, is an act. But what acts suffice and by what or whose agency is this sovereign power exercised? Brennan J. writes that

the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action is taken by the Legislature or by the Executive (*Mabo (No 2)*: 64).

Again, he writes of the Crown's grant of land revealing 'a clear and plain intention to extinguish native title' (*Mabo (No 2)*: 68). To legal readers it is clear that Brennan J. is not referring here to any actual intention, any determined state of the will of an actual individual at all, but to a fictional intention which is constructed by the court from 'the effect which the grant has on the right to enjoy native title' (*Mabo (No 2)*: 68). Later indeed when Brennan J. summarises his understanding of the common law, he no longer writes of intention at all, but of inconsistency (*Mabo (No 2)*: 69).

Such a redefining from intentionality to inconsistency is essential. There is an actual individual whose subjective intentions *could* be being talked about, namely the monarch - King George or Queen Victoria etc. But while aboriginal peoples might take this quite seriously, the law does not. Principles of the rule of law, articulated by the Australian High Court in terms of responsible government and representative democracy, entail that the intention in question is the fictional intention of an institution - the Legislature or Executive standing for 'the Crown in the right of the Commonwealth or State' depending on which entity has constitutional power over the land in question.

This has an awkward consequence. If the starting point is that historically - and albeit wrongly - Australia was considered to be a terra nullius, there can not have been any recognition of native title. It would follow that there

could not have been any intention to extinguish it. But if native title could not have been extinguished because there had been no intention to do so, native title claims could potentially affect all sorts of Anglo-Australian land holdings. Predictably enough, the High Court avoided this conclusion, and avoided it precisely by use of the device of a putative intention ascertained through inconsistency.

Why does the Court sail so close to this dangerous wind? Why does it talk in terms of intention at all? The question is in no way fanciful. In a later case, in which the High Court had to consider the validity of legislation passed by the state of Western Australia to extinguish native title (*State of Western Australia v The Commonwealth* 1995), elaboration of the law concerning the effects of British sovereignty over Western Australia is almost purely in terms of the 'manifest intention' of the Crown to extinguish native title in Western Australia. The majority judgment concedes that the inquiry is 'somewhat artificial'. The courts at the time of colonisation treated the country as if it were 'desert and uninhabited', and the 'true inference to be drawn - if not the certain fact' was that Aboriginal title to land had been ignored (1995: at 432). There is a genuine puzzle here. Why insist on a standard of extinguishment which involves positing a clear and plain intention to extinguish something that was known not to exist? Why this leap into counterfactuality if not sheer incoherence?

The short answer is that the Court is struggling to maintain three basic legal principles - the principles of individual responsibility and equality before the law that inhere in the concept of the legal person, and the property principle. The actual root of all property in land for non-aboriginal Australians was acts of dispossession of aboriginal people - acts of theft, if that prior possession constituted property - for whom no person has ever been held responsible. This was the problem faced by the High Court in *Mabo (No.2)*. From the standpoint of Aboriginal and Torres Strait Islander people, the characterisation of these acts as theft was never in doubt. As they kept on drawing attention both nationally and internationally to this

point,⁸ and given legislative enactment in Australia of race discrimination legislation, what was once convenient, the legal denial of the existence of recognisable Aboriginal property in land,⁹ became an embarrassment. This 'solution' could not be re-cycled without casting doubt on the veracity of the Australian common law's commitment to equality and on the Australian state's commitment to international treaties to which it is signatory. Moreover, high profile examples of Aboriginal activism, which attracted the support of elements of the trade unions and broader community, such as Noonkanbah (see Hawke and Gallagher 1989), and recurrent debate about land rights legislation since the 1970's, were creating a climate of uncertainty, particularly for mining and other 'resource development' projects. In this context the clarification of indigenous peoples' rights in Australia was never going to be solely for their benefit.

Interestingly, Brennan J. also used *Mabo (No.2)* to benefit the common law. His judgment is insistent upon absolving the common law from any blame for the dispossession of Aboriginal peoples. It is a revealing curiosity.¹⁰ Brennan states that even if no Aboriginal people were to 'enjoy their native title' as a result of the *Mabo (No.2)* decision,

it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land (at 69).

It would seem that admitting the law's complicity in acts of theft is analogous to holding the Christian God responsible for human sin or suffering. In both cases it is the ascription of free will or choice to individual humans that avoids the unwanted conclusion. For Australian jurisprudence, the ambiguous figure of the Sovereign is an additional blessing. For he, she or it can be blamed, can apologise, can take the moral and political weight of the wrong done so that there is no reason to doubt the integrity of the common law in its adherence to its own principles of

individual responsibility and equality before the law. Suddenly here, the common law is not as in positivist legal thought¹¹ the command or posited rules of the sovereign. An older idea of the common law, as the law of the (English) land and the principle of the ancient constitution¹² comes into play.

Unfortunately, however, as the furious reaction to *Mabo (No.2)*¹³ of the New Right and the old (and declining: Markus 1994: 217-9) Anglo-Australian elites attest, this leaves out of account the law's role in the constitution and protection of the private property rights of all non-aboriginal Australians. The law can blame as it will. It can proclaim its concern for justice and regret its subjugation to a mightier sovereign power as it might. It cannot escape the strength of its own private property principle. Here Brennan's judgment suggests a covert hope: that apart from this particular case, it will turn out that the 'tides of history' that swept British sovereignty over the Australian continent, extinguished native title. Brennan J.'s voice is dolorous:

...when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs the foundation of native title has disappeared (at 69).

And if hope and history seem too fragile a vehicle to assure the inviolability of private property rights in land stemming from Crown grant, there is comfort to be had, consistently with common law theory, in a time-honoured doctrine which could be used in future cases to justify a decision in favour of those to whose benefit the sovereign dispossessed Aboriginal peoples: the doctrine of tenure.¹⁴

Tenure is one of the earliest doctrines of the common law. It is a doctrine of feudal land law according to which property rights in land stem from and are held 'of the Crown' (*Mabo (No 2)*: 43). In *Mabo (No.2)*, Brennan cites this now transformed doctrine as the principle which constitutes that skeleton of the common law that cannot be fractured even at the cost of the injustice of racial discrimination.

The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principal and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are the aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained or applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning (*Mabo (No 2)*: 30).

The compromise is embodied in a new 'logical postulate' (*Mabo (No 2)*: 50) of the Australian commonwealth - radical title as a power over land that is less than ownership but which enables the Sovereign to extinguish native title when it wants to.¹⁵

The compromise that Brennan's judgment represents has been hailed as a virtuoso display of the pragmatic genius of the common law (Bartlett 1993). Yet what it amounts to is that the judgment, in the very act of belatedly recognising aboriginal property in the Australian continent and the Torres Strait Islands, has crafted the legal means and justification for its extinguishment by a sovereign power, that is (in substance) and is not (in form) above the law.

The sovereign power may or may not be exercised with solicitude for the welfare of the indigenous inhabitants but, in the case of the common law countries, *the courts cannot review the merit, as distinct from the legality*, of the exercise of sovereign power...(*Mabo (No 2)*: 63, our emphasis).

Sovereignty shifts about. It might be located in the body of the monarch or in the government or in 'the Crown'. Outside of that configuration sovereignty may be in the nation. What the courts cannot do is represented in terms of a merits (substance) - legality (form) dichotomy: a distinction which is, of course, a creature of legal thought. The sovereign power is, at such moments, not the nation. It is more like 'the State' against which the common law, infused by liberal ideology, guards 'the individual'. The merits-legality distinction is both means and product of the common law's vigilance on behalf of individual rights. The Australian nation is the political community that is constituted in this not quite even balance of law and politics within time that is truly out of joint. In the result, the common law is not implicated in the past (the law is innocent, it was the sovereign who/which did it); but nor is it excluded from the future (the law maintains peace and order by overseeing the form but not the substance of relations between the sovereign and individual subjects); and, in the present, its skeleton of principle is not 'fractured' (the law protects individuals' rights to private property). The tortured idea of a plain and clear intention to extinguish that which was known not to exist and the idea of radical title of the sovereign, however, reveal the tensions in play.¹⁶

The English jurist, H.L.A.Hart, has quite properly said that when it comes to the most knotty problem of positivist jurisprudence, the problem of what will be seen as 'law', 'all that succeeds is success' (Hart 1961: 149). In so far as native title is said by the Court to be based on and derive its content from aboriginal law, this is just such a problem. Aboriginal law is not foreign law, it is not common law. It does not fit the Englishness of the ancient constitution. Nor will it fit the idea of law given by a sovereign to a subject unless Aboriginal and Torres Strait Islander sovereignty is conceded. But the Court will not make this concession. Still it is law in some sense: a sense that can be 'washed away by the tides of history' even though aboriginal peoples remain.

But if this success, this pragmatic genius of the *Mabo (No.2)* solution, is predicated on shifting sovereignty and disjointed time, a similar ambiguity affects the identity of this nation's indigenous subjects. With the abandoning of the doctrine of terra nullius as a doctrine of property law, Aboriginal people may now be accorded some rights over their (sic) land and acquire a legal *persona* as 'native'. In this character of 'native' at law, the only characteristics which are recognised are those allowed by law. Everything else is expunged on the basis of the conditioning 'free and equal' legal person. Re-clothed by the law, 'native' peoples are only those Aboriginal and Torres Strait Island peoples who are able to display a continuing connection with their land, only those whose law has not been 'washed away'. Because focus is limited to the issue of 'continuing connection', and not the context in which connection was maintained - or not - a great deal of the particular history of aboriginal groups is excluded from the history of this nation. The variety of histories which have been visited upon aboriginal peoples since white occupation, and in particular the more invasive and destructive interventions that are the history of many urban Aboriginal groups, are whited out.

While this might appear unjust, a legal writing of the history of the nation by the coloniser, it is similar to the construction of other legal *personae*. Freed from our particularities, our history, our class, sex and race/ethnicity, we are equal.

But now there is another oddness. As 'connected to land' the native is *not* free of all determination. On the other hand, as not-'connected to land' the Aboriginal or Torres Strait Islander individual is not-native. Indigenous people then, are now officially and legally divided: by property, by class. Curiously and perversely, the recognition of native title in Australia has the consequence that those aboriginal peoples who do not satisfy the requirements of being 'native' continue to be unidentified inhabitants of a terra nullius. Indeed, Eddie Mabo, the man whose name now signifies the recognition of native title in Australia, is himself an illustration of its curious

and perverse character. His native title claim was disallowed. Had he lived, he would have remained an inhabitant of terra nullius. Perhaps he may have found some consolation in that, in being denied identity as native, in non-recognition of their claims to land, aboriginal people such as himself, are 'freed' from their cultural identity and become 'equal' to all other Australians. Perhaps he may not.

This is Australian racism, historically grounded in the dispossession, slaughter and neglect of Aboriginal people and a 'White Australia' immigration policy. Brennan's tortured attempt to declare the common law innocent of acts of dispossession of Aboriginal peoples is so far from succeeding that the legal foundation of that racism is revealed.

It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in its Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands (*Mabo (No 2)*: 39).

Mabo (No.2) might be termed its second fruits: the Australian common law has now managed to strip those Aboriginal people whose connection with their pre-colonial land has been broken of the identity at law of native inhabitants of Australia. It is a further act of colonisation that compounds dispossession by non-recognition of Aboriginal identity.

Reflections

There are several objections that will be urged to this analysis. The one that most concerns us is that this is too harsh a characterisation of *Mabo (No.2)*. After all, for at least the Meriam people, and probably, at some time in the future, for some mainland Aboriginal peoples, there is the benefit of the successful native title land claim.¹⁷ These are gains but they are not a recognition of Aboriginal and Torres Strait Islander peoples' relationship with land. Nor are they a recognition of their law.¹⁸ They are, within the

logic of Western thought and language and the dynamics of capitalist production, a subsumption of Aboriginal and Torres Strait Islander being under the commodity form of Anglo-Australian property law. They cannot be anything else until the *full* doctrine of terra nullius, its application to questions of sovereignty and jurisdiction as well as to property, is abolished. Even then, and so long as the wealth of the Australian nation is generated through a capitalist mode of production, the subsumption referred to will continue.

It is a subsumption within *Western* thought and language. These are not universal. We do not say that successful native title claimants will necessarily be assimilated and decultured. We make no judgment about what aboriginal people ought to do. It is to say that the admittance of aboriginal land claims into the framework of an Anglo-Australian law that has not yet recognised the implications of its own doctrines is a further act of colonisation. In that sense non-aboriginal Australians remain colonisers and Australian racism turns out not to be the prerogative of 'the right' and 'the rednecks'. It is also to say that by recognising native title but, affirming a still imperial Crown's radical title in the Australian continent, what the High Court has done is to authorise not only the past but also the future extinguishment of that title. The effect of the Commonwealth *Race Discrimination Act* 1975 and now the *Native Title Act* 1993, is that Anglo-Australian law requires payment of compensation on extinguishment. Aboriginal land, brought within the Australian common law, becomes exchangeable with money, a commodity: 'he look "honest" - big white thief'.

In terms of the debate that *Mabo (No.2)* has provoked, the poverty of actually existing politics has been reflected in the reduction of positions to a pro-*Mabo*, pro-judicial intervention position and an anti-*Mabo*, anti-judicial activism one. It is not possible, in our view to disentangle the concept of race from the practice of European colonisation over the past five hundred years. If racism in Australia is to be addressed the continuity

of these practices in the 'successes' of legal reason must also be addressed. This is the dubious impetus of *Mabo (No.2)* in the current national policy of reconciliation, and one which cannot be recognised by the reductive dichotomies available within existing politics.

It is Australian racism, and not our analysis of *Mabo (No.2)*, that is too harsh: too harsh to be tolerable or tolerated when it, inevitably, frustrates the good intentions of reforming initiatives. Our point is not to say that such initiatives ought not to be taken or participated in, but to say that what is intolerable, for us, is to be continuously constructed as colonisers. That is not an identity we want: not a political relationship to indigenous people we want.

Nor is our analysis too harsh in lacking a standpoint from which decolonisation can be furthered. It is not, to put that another way, only negative, or only critical. Sovereignty shifts from here to there in Brennan's judgment, but his idea that 'sovereignty imports supreme internal legal authority' into a territory (*Mabo (No 2)*: 36) is revealing. To challenge sovereignty is to challenge the court's authority and this is to question the law's monopoly over legitimised force to make people conform with the identities it imposes upon them. It is not only Aboriginal and Torres Strait Islander people whom the law robs of the capacity for self-determination. It is, indeed, the law's true universality to rob us all of that capacity.¹⁹

This commonality gives the standpoint referred to. It is abstract and it is attenuated by differences of wealth and power which depend on the value of the rights which we get back in our more determined legal *personae*. To this question of the value of rights, legal thought is endemically hostile. It will not take account of class relations, not only because they raise the issue of the unequal value of legal rights so bluntly, but because class relations are private property relations. And the protection of private property has been identified as one of the fundamental functions of the Australian courts. But for us, the issue of private property is an important one in trying to resist the constant attenuation of the standpoint from which

decolonisation can be furthered. For while that standpoint is now abstract and attenuated, it is one from which we can understand that we, as well as those we colonise, have much to gain from self-determination.

Notes

- ¹ There are continuing difficulties in referring to peoples whose identity was so disregarded as to have deprived them of their names. We refer to all indigenous peoples in Australia as 'indigenous' or 'aboriginal', reserving 'Aboriginal' for Australia's mainland indigenous peoples as distinct from Torres Strait Islander people.
- ² This is a generalisation which is differentially true of decisions made within the common law and equitable jurisdictions of the courts. Equity, as a distinct body of legal doctrine, gradually formed from the practices of the Court of Chancery from about the fourteenth century in England. It glossed the older common law with decisions better adapted to the practices of landowners in a society that was in a process of transformation from feudalism to capitalism. Perhaps the main impetus here were equitable procedures which enabled more minute inquiry into the facts of particular cases (Baker 1978: 37ff). While common law and equitable jurisdictions are now fused in England and Australia, differences in reasoning remain perceptible and it remains the case that in the application of originally equitable doctrines, there is a closer examination of the facts. It is not however so close as to undo the priority of law over fact.
- ³ A case may involve a dispute over the facts or over the law or both. The litigation in *Mabo (No.2)* was handled (under directions from the High Court) in such a way that argument before it was confined to questions of law - broadly, did the Australian common law have a doctrine of native title under which its indigenous peoples could claim some form of property in land in Australia?
- ⁴ This characterisation of *Mabo (No.2)* is rejected by Gummow J. in the most recent High Court case dealing with native title *Wik Peoples v The State of Queensland and Others* (1996) (hereafter *Wik*). In his view 'the gist of *Mabo*

(No 2) lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title rested upon past assumptions of historical fact now shown to have been false' (*Wik*: 229). Gummow's view reflects the orientations of equitable thought in common law systems in that historically, and as a consequence of different procedures, courts exercising equitable jurisdiction made closer inquiries into the facts of the cases before them than did the common law courts. It is also an attempt to deflect political criticism of the High Court for 'changing the law'. The problem with this characterisation is that historically it was known within the first decades of British occupation that Australia was generously populated by Aboriginal peoples and that assumptions made by Cook and Banks to the contrary were false (Reynolds 1987: 31ff).

⁵ Marx's discussion of his dialectical method is in *Grundrisse* (1973b: 100-108). The analogy made does not entail acceptance of the idea that dialectical thought is reducible to method. Cf. Rose 1981: 24ff.

⁶ As does Hegel, who takes the legal person as an objectification within legal thought of the will, and Pashukanis who takes it as the most general expression of the freedom of the owner of property to dispose of that property on the market. Hegel 1991: 67-72; Pashukanis 1978: 109-10

⁷ *Attorney-General of New South Wales v Brown* (1947) 1 Legge's Reports 313.

⁸ The best account of the land rights movement in Australia, in our view, is Gilbert 1973.

⁹ This was spelled out and justified as late as 1971 in *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971).

¹⁰ It could be dismissed as an idiosyncratic view of one judge, and later legal scholars, judges and practitioners who want to make the best of *Mabo (No.2)* in terms of the common law's reforming capacities may well do just that. They are justified in so doing by the conventions of legal analysis. But these conventions and their use to justify the dismissal of legal embarrassments are not going to reveal the *dubious* impetus of *Mabo (No.2)* referred to in our

introduction. Belief in the common law's reforming capacity, in the end, is not so very different from Brennan J's belief in its innocence. Conventions of legal analysis used to justify either belief - for clearly enough Brennan J would regard his belief as true - only take us back to Gilbert's reflections on belief and truth, right and wrong in circumstances of colonialism

- ¹¹ Popularised by Austin 1832; revised and adapted to mid-twentieth century ideology by Hart 1961.
- ¹² These ideas are articulated in the sixteenth and seventeenth centuries by judges of the English common law courts, in particular Coke and Hale. Blackstone, whose *Commentaries on the Law's of England* (c.1765) acquired great authority as a source of legal knowledge drew inconsistently both on common law theory and positivist ideas of parliamentary sovereignty. Christopher Hill has persuasively located common law theory in pre-revolutionary English politics, arguing that common law theory was an attempt by common lawyers to manufacture a constitutional settlement of the impending civil war (Hill 1980). For a more jurisprudential general account of common law theory see Postema 1986. Common law theory enjoys something of a revival in the context of native title jurisprudence (McNeil 1989).
- ¹³ For an account of this reaction see Cowlshaw 1995.
- ¹⁴ In *Wik*, Brennan C.J., this time in the minority, used this doctrine in the way suggested in our text. A narrow majority of a High Court with two new members, refused to do so although they do not go so far as to say that the doctrine of tenure is no part of Australian property law.
- ¹⁵ Radical title has no effect on its own (hence a logical postulate) but only when it turns into something else - absolute ownership - if there is no other proprietor. Another aspect of radical title is that it allows the Crown to extinguish pre-existing title in its acquired territory - so that it can 'dissolve' the pre-existing proprietary relation and assume absolute ownership for itself or grant it to someone else.

- ¹⁶ These tensions are within Australian society. We should note here that it is quite possible that Australia would have returned to the murderous violence against aboriginal people that has been its history had existing titles not been confirmed. Even *Mabo*'s pragmatic compromise drew out depths of racism in Australia that some non-aboriginal people have found shocking. The brunt of verbal and physical abuse is borne by aboriginal people across the continent though it may be sharper in rural areas where the very limited rights available to Aboriginal people under *Mabo (No.2)* are likely to have the greatest possibility of success, as recently confirmed by the *Wik* decision.
- ¹⁷ There has been one other land claim accepted as native title since the *Mabo (No.2)* decision of July 1992. Significantly that claim, on behalf of the Dughutti people, resulted in the payment of compensation rather than an actual title to land.
- ¹⁸ For an extended, if overly conciliatory, account of the 'difficulties' of recognition of the Meriam people's relationship to land and of their law at the hearing of evidence prior to the High Court decision, see Sharpe 1996.
- ¹⁹ It may be the case that identities are manipulated through other exercises of bureaucratic and professional power more or more directly than by law. We do not make the mistake of dismissing valuable work done within broadly Foucauldian ways of thought on this question. See for example the work of Dean 1995 on welfare law, an area which belongs within the field of property law, if only because such trouble is taken to keep it out. But attention to other ways in which power is exercised should not exclude its legal deployment and the broader contours of race and class within that exercise.

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