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PETER FITZPATRICK

**‘NO HIGHER DUTY’: *MABO* AND THE FAILURE OF LEGAL
FOUNDATION***

ABSTRACT. The first half of the paper shows how the imperial quality of the common law putatively accommodates the demand for legal foundation. The second half takes the *Mabo* decision as a test of this supposed ability and finds it foundationally wanting. The continuing insistence of the indigenous presence provides the key.

KEY WORDS. *Mabo*, failure, legal, foundation

[R]esponsibility is rooted where there is no foundation.

Maurice Blanchot¹

FOUNDATION

The seemingly imperative but elusive concern with law's foundation in *Mabo*² can be matched with Kant's injunction against enquiry into such matters:

The origin of the supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. ... Whether in fact an actual contract originally preceded their submission to the state's authority (*pactum subiectionis civilis*), whether the power came first and the law only appeared after it, or whether they ought to have followed this order – these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.³

The immediate puzzle is why we have to be stopped seeking what is not discoverable, and why arguments about foundation are so completely futile. The further puzzle has to be why such vacuous pursuits would 'constitute a menace to the state'.

Kant does provide the lineaments of an answer, and these come by way of yet another puzzle: how can this compulsory quiescence be reconciled with the Enlightenment demand that we must dare know – 'resolutely pursuing' any enquiry to

* Crucial thanks to the Socio-Legal Studies Association for a Small Research Award which funded enterprising research by Stewart Motha, much of which has been drawn on in this paper.

¹ M. Blanchot, *The Writing of the Disaster* trans. A. Smock (Lincoln: University of Nebraska Press, 1986), 26.

² *Mabo v The State of Queensland* (No. 2) (1992) 175 C.L.R. 1.

³ I. Kant, *Kant's Political Writings (The Metaphysics and Morals)*, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1970), 147 – his emphasis.

its end?⁴ It must be an inquisitive, even resistant, being of this kind which Kant observes as quite capable of ‘delv[ing] out the ultimate origin’ of a supreme authority.⁵ Such enterprise would, however, reveal the partial and contingent nature of this authority, reveal the poverty of its constituent claim to sovereign completeness – a completeness which a modernist Kant would see as necessary for effective rule.⁶ Supreme authority is inevitably delimited in its finitude, yet its sovereign capacity must be elevated beyond limit. This classic conundrum of sovereign power was once solved, after a fashion, through a transcendental reference which joined determinate rule to deific scope. In sum:

A law which is so sacred (i.e. inviolable) that it is practically a crime even to cast doubt upon it and thus to suspend its effectiveness for even an instant, cannot be thought of as coming from human beings, but from some infallible supreme legislator. That is what is meant by the saying that ‘all authority comes from God’, which is not a *historical derivation* of the civil constitution, but an idea expressed as a practical principle of reason...⁷

Or, as Rousseau put it more succinctly when dealing with a somewhat similar situation, ‘[g]ods would be needed to give men laws.’⁸ To seek, then, the ultimate origin of such complete and surpassing authority would be to seek the undiscoverable, and hence would be futile. Yet the origin, the historical derivation, of this authority as emplaced can be discovered, and that authority is thence revealed as partial and contingent.

⁴ E. Cassirer, *The Philosophy of the Enlightenment* trans. F.C. A. Koelln and J. P. Pettegrove (Boston: Beacon Press, 1955), 65.

⁵ Kant, *supra* n.3, at 147.

⁶ This is an unadventurous gloss on *ibid.*, at 143-144.

⁷ *Ibid.*, at 143 – his emphasis.

⁸ J-J. Rousseau, *The Social Contract*, trans. Maurice Cranston (London, Penguin, 1968).

Mabo has already been burdened with too much virtue, but adding a little to its store, the case does take us to a point where this ‘original’ dissonance in sovereign authority is revealed, even if the revelation is then dimmed in a conventionally modernist elevation of law. This is a reified and a reifying law which takes into itself the partial and the contingent, rendering them in its own terms as ordinary and as operatively complete and surpassing. The type of this law prominent in *Mabo* was the common law, so-called; and the conjoined avatars it produced or reproduced in this transformation were property and the nation. That this transformation was effected in the rejection of others, of indigenous peoples, could be seen as an instance of what the legal decision does ‘in any case’.⁹ Like any existential affirmation, the legal decision must not only relate but also deny relation. The dissolution which would result from only relating and the solitary stasis of only denying relation are both existentially impossible. The legal decision subsists in-between these conditions. It is a deciding of how far to relate, and how far to deny relation. As such, it entails a primal responsibility. And the revelation that *this* is what is involved in the legal decision is what the insistent presence of indigenous peoples in *Mabo*, and in other cases, adds to what the decision does ‘in any case’. With that revelation, it should not now be possible to dissimulate responsibility in the inexorability of property, nation, and the invariant law. It should not.

⁹ For an acute extension of the idea of dispossession in this vein, see W. MacNeil, “‘It’s the vibe!’: The Common Law Imaginary Down Under”, in L. Moran *et al.* eds., *Law’s Moving Image* (London: Cavendish, in press).

Before coming to *Mabo* proper, I will outline the mythic, not to say mystic, properties of the common law which enable it putatively to subsume responsibility in ‘the heaven of juristic conceptions’.¹⁰

THE COMMON LAW

Adroitly, the common law would avoid foundational complexity by casting its origin in a time immemorial, in ‘the age of indefinite time’.¹¹ This claim was attended by a convenient indistinction when it occasionally flirted with actuality, whence the origin was found, to take only two of many locations, in crepuscular Germanic forests, or in an England that was pre-Roman and Saxon.¹² As a time of origins, however, the immemorial is ambivalent, if aptly so. It is most often taken as in itself importing fixity, constancy, continuity. It is a ‘time whereof the memory of man runneth not to the contrary’.¹³ And with its notoriously unchanging quality, it has

¹⁰ To borrow the phrase from von Ihering – see J. Stone, *Legal System and Lawyers’ Reasonings* (London: Stevens & Sons, 1964), 226. My point, of course, is that the hold of such concepts is not confined to Ihering’s other-worldly legal theorist.

¹¹ See P. Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995), 26. Even more adroitly, Goodrich sets the antinomy impelling my account in terms of ‘a mythology of origins or of the “origins” of common law which are mystical precisely because the human source of law can never be directly represented’, yet, quoting Cixous, ‘the definition of law can unfold only in relation to the question of the origin of law’: *ibid.*, at 149.

¹² G. Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (University Park, PA: The Pennsylvania State University Press, 1992), 58-78.

¹³ W. Blackstone, *Commentaries on the Laws of England*, 16th edn, (London: T. Cadell and J. Butterworth & Son, 1825), 67 – I.

often been that the rigidities of the common law have had to be corrected by legislation.

Yet being immemorial also projects the origin of the common law in the contrary direction. The belief ‘that the common law, and with it the [English] constitution, had always been exactly what they were now, that they were immemorial’ is a belief that, strictly, speaks only of what the common law is now.¹⁴ The origin is always the origin of what is now. It assures the integrity of present identity. In coming to and being at where it is now, the common law will have been responsive to historical change, or to the needs of the nation, or to the development of society, or it will have accommodated changing facts, all coming from beyond it – and to take some typical formulas.¹⁵ ‘All laws were but *leges temporis*’.¹⁶ Not only in the history of the common law is the epiphanic conspicuous, but there is also more calculated invention. The great ‘original’ and paragon of law’s consolidated certainties, Sir Edward Coke – the same Coke who asserted that a solution to any case already lay in the ‘multitude and *farrago* of authorities in all succession of ages, in our books and bookcases’ – ‘did not hesitate to invent or bend precedent and maxim to his purpose’.¹⁷ So evanescent is the common law when seen in this dimension that it quite lacks ‘any authentic form of words’.¹⁸ Indeed, it is the ‘unwritten’ quality of

¹⁴ J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York: Norton, 1967), 36.

¹⁵ See e.g. *Wik Peoples v Queensland* (1996) 187 C.L.R., 1, at 179-180, *per* Gummow J..

¹⁶ See G. Burgess *supra* n.12, at 23.

¹⁷ J. Stone *supra* n.10, at 237; C.D. Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Boston: Little, Brown and Company, 1956), 293.

¹⁸ See A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law*, (London: Hambleton, 1978), 370-1, quoting and elaborating on Pollock.

the common law which in the opinions of its apologists makes it more efficacious than ‘written’ statute law, and it is this freedom from lapidary constraint which enables the common law to proceed with a nuanced empiricism on a case-by-case basis.¹⁹ What in a less empathic view – the view is Bentham’s – is ‘the dark Chaos of the Common Law’ makes possible a supremely enlightened responsiveness.²⁰

These ostensibly disparate dimensions of the common law are recognizably combined in a variety of ways. As for the formulaic, there are ways which would orient the dimension of responsiveness towards that of the already determinant, such as Coke’s emphasis on ‘renovation’ rather than ‘innovation’ or Blackstone’s espousal of ‘improvement’.²¹ More recent formulas would stress the ‘evolutionary’ character of the common law or its ‘organic development’, perhaps echoing earlier reifications of the common law or of its processes in naturalist terms.²² Other modes would subsume law’s dimensions in those processes of the common law through their being characterized by ‘reason’ – an old attribution but one still insinuated in the ever elusive genre of ‘judicial reasoning’ – or in their use of broad ‘standards’ of reasonableness, public policy, and such.²³ And there is of late a more robust recognition that the common law entails combining ‘change with continuity’.²⁴

¹⁹ G. Burgess, *supra* n.12, at 21-2; D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-century Britain*, (Cambridge: Cambridge University Press, 1989), 90-91.

²⁰ D. Lieberman, *supra* n.19, at 239.

²¹ J. Stone, *supra* n.10, at 238; D. Lieberman, *supra* n.19, at 44.

²² See L. Godden, “Wik: Legal Memory and History”, *Griffith Law Review* 6 (1997), 122-143, 130 and 132 for examples of these and Goodrich, *supra* n.11, at 26 and 80 for the natural and its connection to the immemorial.

²³ The subsuming ability of reason here was not always as straightforward as this may suggest: cf. G. Burgess, *supra* n.12, at 29-48.

All of which is to leave the quality of this combining quite vacant. In *Mabo* itself and its successor cases, there has been something of a reversal from the ‘old’ unbending common law to its becoming abjectly responsive to ‘history’ and changing ‘facts’.²⁵ More pointedly, the predominant division in these cases has been between those judges who would adhere to supposedly set contents of the common law and those who would respond to historical revision or to the facts of social change.²⁶ As that division should indicate, even if history and the facts could speak for themselves (which they cannot), their voices are lost in the law. With its giving determinant force to some social relations, and with its extracting some determinate effect from the infinite possibility of social relations, law must proceed by way of the decision, a decision which singularly and inextricably combines the dimensions of determination and responsiveness, and a decision which cannot be reduced to either. Responsibility in the legal decision is, then, unavoidable. It cannot be avoided either by a resolving reference to what already is ‘in’ the law or by calling on what imperatively comes from ‘outside’ of it – a calling on fact, history, society, and such.

This, in a sense, only refines the vacancy of this combining of the two dimensions, the already determinate and the responsive, and the vacancy of the resultant law. Something of this vacancy can be avoided by a legal mode’s inclining more towards one dimension than another. So, a modern occidental legality will take on an intensity of orientation towards a putative fixity or stability. It will ‘be’ more acquisitive than receptive. That orientation culminates in the claim to a unified, self-subsistent, self-originating law, a law required not just by the arid dictates of a legal

²⁴ J. Stone, *supra* n.10, at 210.

²⁵ See the invaluable account by L. Godden, *supra* n.22, especially at 126, 131, 133.

²⁶ See *ibid.*, at 134, 141.

positivism but by the elevation of ‘the rule of law’. Although such imperative completeness of modern occidental law was more confidently insisted on in its formative stages, its force persists.²⁷ Even those vaguely corrective theories which would relate law to society and such still posit a law that is integral and pre-existent and which only *then* relates. The imperative of completeness extends distinctly to the common law in an attenuated way. Even though it could be seen as one law among other types, such as legislation, the common law ‘was an entirely self-contained entity’ because of the constitutional or foundational character attributed to it in and after the English Revolution.²⁸ Then, as now, it was recognized readily enough that legislation could override the common law in any particular, but still the common law retains the quality of being a source of legal authority that is whole and independent. Indeed, in a persistent tradition, statutory superiority applies only to distinct and particular instances, reserving wholeness to a common law which retains a constituent force and always ‘works itself pure’.²⁹ If such a paltry confinement is going to be placed on the written law, it is difficult to see how it could entirely and definitively displace the unwritten.

To operatively elevate law’s determinant dimension over the responsive is not, and could not be, to create an enveloped and settled domain, but it is to orient the movement of law imperially. That is, occidental law responds so as to appropriate, and to do so exclusively. So long as that process is ‘held’ as primary, then other and different legal modes can be ‘recognized’. Thus the common law extended to and

²⁷ See e.g. D. R. Kelley, *Historians and the Law in Postrevolutionary France* (Princeton: Princeton University Press, 1984), 42-43

²⁸ See G. Burgess, *supra* n.12, at 86 for the quotation.

²⁹ See D. Lieberman, *supra* n.19, at 91.

occupied colonized places yet could recognize indigenous laws, but always in a filtering and qualifying process of its own. Much the same story could be told of the civilizing mission undertaken by a ravaging law throughout the national territories of Europe – by a law which was ‘a flexible, indefinitely extensible, and modifiable instrument’ of rule.³⁰

All of which still leaves law as little more than a vacuity, as a field of movement and contending forces, yet one devoid of perceptible content. If law gives determinant force and determinate effect to something of social relations, it still must draw those relations into itself. Inevitably, then, it takes content from them. And of these relations, there is an affinitive tying of law to those which most potently combine the dimensions inhabiting law. *Mabo* itself dramatically instances two such sets of relations, and as a prelude to the part they play in that case they can be introduced here.

PROPERTY AND NATION

The nation endowing, and endowed by, modern occidental law is the nation of modern nationalism. The constituent assumptions built into nationalism are deftly compacted by Prakash for India: this is nation as ‘an undivided subject...possessed of a unitary self and a singular will that arose from its essence and...capable of autonomy and sovereignty’.³¹ This seeming solidity of modern nation is set in the identification of it with a determinate territory, an identification which law thence

³⁰ G. Poggi, *The Development of the Modern State: A Sociological Introduction* (London: Hutchinson, 1978), 73-74.

³¹ G. Prakash, “Writing Post-Orientalist Histories of the Third World: Perspectives from Indian Historiography”, *Comparative Studies in Society and History*, 32 (2), (1990), 383-408, 389.

intimately shares: '[t]he body of law was very explicitly the body of the nation'.³² Or, as Sir John Davies had it, the common law 'is so framed and fitted to the nature and disposition of this [English] people, as we may properly say is connatural to the Nation, so that it cannot possibly be ruled by any other Law'.³³ Yet this same nation of modern nationalism is also oriented in a labile, and incipiently acquisitive, responsiveness beyond any fixity, territorial or otherwise.³⁴ Notoriously, the common law, that law common to the entire community or nation, was advanced and consolidated in opposition to or absorption of what was deemed local and particular. The expansive impulse of the common law did not stop at national borders. Like other systems of occidental rule, it found itself capable of 'indefinite elaboration, definition, and expansion'.³⁵ More precisely, with its combining of already determinant affirmation and rapacious expansion, the common law became, to borrow the phrase, 'the perfect instrument of empire'.³⁶

The core connection here was that between nation and property. The centralizing of rule in the European nation-state was set against a supposed diversity of the supposedly particular and local. Such rule claimed to be uniform and exclusive.

³² P. Goodrich, "Rhetoric and Somatics: Training the Body to do the Work of Law", *Law.Text.Culture* 5/2 (2001), 241-270, 261.

³³ See G. Burgess *supra* n.12, 52.

³⁴ See P. Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), Part II.

³⁵ G. Poggi, *supra* n.30, 111. For a typically extravagant statement of the case see Lord Denning, *Freedom Under the Law* (London: Stevens & Sons, 1949), 32.

³⁶ R. A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 59. There he uses the phrase to describe 'the colonizing discourse of Renaissance Spain'.

In this, it was affirmed and effected to a considerable extent, through ‘general’ laws. All of which involved the replacement or surpassing of prior ‘local’ or ‘particular’ systems of law and authority attached to varieties of congenital status, office or estate: the ‘unified legal system...allows alternative juridical traditions to maintain validity only in peripheral areas and for limited purposes’.³⁷ Indicatively, this new legal system, including the common law, was most pointedly concerned to replace or surpass competing territorial assertions.³⁸ This system was itself integrated with a specific territory, yet it claimed an exclusive or, in Kant’s terms, a supreme authority, ‘general’ and ‘depersonalized’ authority that would transcend the attachment of person to the local and the particular through the equality of all its subjects, an ‘equality before the law’.³⁹ That equality imports a situation in which all are included on the same terms. And even though this ‘equality principle is “the *universalistic* component in patterns of normative order”’, it is nonetheless tied to the particular primordium of territory.⁴⁰ Law thence becomes the law of the land.

Thus the long occidental romance with the land, particularly of the cultivated variety, is inveterately set within an overweening modernity, not only in the joint emergence of agriculture and the civilized legal polity, but also in the formative relation of occidental law to the marking out, the ordering, the colonizing of the

³⁷ G. Poggi, *supra* n.30, 93.

³⁸ N. K. Blomley, *Law, Space and the Geographies of Power* (New York: The Guildford Press, 1994).

³⁹ G. Poggi, *supra* n.30, 101, 107.

⁴⁰ J. Stone, *Social Dimensions of Law and Justice* (London, Stevens, 1966), 609, quoting Parsons, the emphasis being in the quotation.

land.⁴¹ The common law has been advanced, by Carl Schmitt, as a peculiarly apt carrier of this monumental consequence with its empathy for ‘the nomos of the earth’ since it sustains ‘the essential spatial boundedness of law’, embodying, as it is also said, ‘concrete order’ as against the ‘abstract normativism’ of the legal code.⁴² What occidental law is also sustaining is the combining of this claimed concreteness with an expansively assertive and selectively acquisitive involvement with whatever may relate to it. This entails the very ‘holding’ of the land, the preserving of its pure and irenic condition, of its reified being and assumed naturalness, against anything that would contest the terms of that holding and thence reveal it as one set of contingent social relations ceaselessly separated from and ‘held’ against innumerable others. When it coevally joins Kant’s inviolate and supreme ‘national’ authority, the land fuses with the sovereign’s illimitable power, whence the sovereign becomes ‘the supreme proprietor of the land’ and all rights to it ‘must be derived from the sovereign as *lord of the land*, or rather as the supreme proprietor (*dominus territorii*)’.⁴³ In short, the sovereign’s illimitable power fuses with the placed and delimited in the mystic figure of the land. The very casting of the modern holding of the land in terms of the

⁴¹ C. Vismann, “Starting from Scratch: Concepts of Order in No Man’s Land”, in B. Hüppauf, ed., *War, Violence and the Modern Condition*, (Berlin: Walter de Gruyter, 1997); C. Vismann, ‘Formeln des Rechts - Befehle des Krieges. Notiz zu Kantorowicz’ Aufsatz “Pro patria mori”’, in W. Ernst, and C. Vismann, eds., *Geschichtskörper: Zur Aktualität von Ernst H. Kantorowicz* (Munich: Wilhelm Fink Verlag, 1998); P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), Chapter 3; Fitzpatrick, *supra* n.34, 91-107, 152-182.

⁴² See Vismann 1997 *supra* n.41, 48.

⁴³ Kant, *supra* n.3, 147 – his emphasis. This is susceptible of some refinement in that he does draw a distinction which can be related to that between ‘radical’ and ‘beneficial’ title in *Mabo* considered later: *ibid.*, 147-148.

feudal accentuates the difference between them. Whilst ultimate feudal *dominium* inextricably combined sovereign rule with a proprietorial holding of the land, this holding was legally delimited in its relation to other holdings or, more accurately, to other statuses integrally tied to these other holdings.⁴⁴ At this point of farthest remove from its ethos, I will now turn to *Mabo*.

NO HIGHER DUTY

The disparate dimensions of the law are aptly reflected in responses to *Mabo* as foundational. Bartlett hails *Mabo* as ‘another triumph for the common law’, for a common law which provides a firm constitutional foundation.⁴⁵ The challenge to that foundation posed by an impertinent indigenous title to land was in *Mabo* met in the ‘only possible’ way.⁴⁶ In stark contrast, Grbich detects in *Mabo* not only the panic-tinged scent of the phantasm in legal foundation but also the arbitrary sacrifice of indigenous peoples shoring up that foundation.⁴⁷ Gummow J. would moderate such views: ‘[t]o the extent that the common law is to be understood as the ultimate

⁴⁴ The point could be encapsulated in what was once an indistinction between ‘own’ and ‘owe’: see *The New Shorter Oxford English Dictionary*, *Owe* I. I am grateful to Hans Mohr for alerting me to the point. Also, according to the same dictionary, there is a similar source for ‘own’, to hold as one’s own, and ‘own’ as to acknowledge or grant that something is the case – see *own* verb. Skeat, however, derives the two senses somewhat differently: W. W. Skeat, *A Concise Etymological Dictionary of the English Language* (New York: Capricorn, 1963), 364.

⁴⁵ R. Bartlett, “Mabo: Another Triumph for the Common Law”, *Sydney Law Review* 15, (1993), 178-186.

⁴⁶ *Ibid.*, at 182.

⁴⁷ J. Grbich, “The Scent of Colonialism: Mabo, Eucalyptus and Excursions within Legal Racism”, *Australian Feminist Law Journal* 15 (2001), 119-146 at 123-124.

constitutional foundation in Australia, there was a perceptible shift in that foundation away from what had been understood at federation'.⁴⁸ He goes on to place such moderation, and to place what is an adroit mode of limiting law's responsive dimension, in the method of the common law – in the circumscribing of issues by the adversarial process and the law's steady progression from case to case. And Lord Wilberforce is invoked to the effect that '[t]he task of the court is to do, and be seen to be doing, justice between the parties... There is no higher or additional duty to ascertain some independent truth'.⁴⁹ In this way, an insistent truth can have inarticulate effect through a constrained formation of issues seemingly indifferent to it.

This is the initial and signal service which the common law in *Mabo* offers a beleaguered foundation – the denial of the relevance of foundational truth combined with an opaque but effective adoption of a colonial claim to that truth. In this case the plaintiffs sought declarations as against the State of Queensland that they had certain rights in their ancestral lands. Advisedly, given existing authority, they did not seek to question the truth of the colonists' claim to a sovereign appropriation of the relevant territory, an appropriation which purported to bring the common law with it.⁵⁰ Thus contained, the issue between the parties could be considered as one of a proprietary entitlement to land and the issue of legal foundation avoided, ostensibly. The two issues proved inextricable, however. So, whilst purporting not to put foundation in question, this very putting in question was the Court's pervasive and impelling

⁴⁸ *Wik supra* n.15 at 182.

⁴⁹ See *ibid.*, 183-184 quoting Lord Wilberforce in *Air Canada v Secretary of State for Trade* 1983 2 AC 394 at 438.

⁵⁰ *Coe v The Commonwealth of Australia et al.* (1979) 53 A.L.J.R. 403.

concern. Since this concern was unavowable, it is understandable that the judges in the High Court offer some diversity of reasonings. Here, I will engage mainly with the judgement taken overwhelmingly by commentators and later cases to be the most significant, that of Brennan J.. Since that judgement is somewhat anfractuous, it may help at the outset to indicate that its overall trajectory coincides with the Kantian stratagem summarized by Connolly in this way: ‘the claim of an upstart to occupy the authoritative place of a teetering authority succeeds best if the upstart plays up the arbitrariness and divisiveness of the resources its predecessor drew upon while sanctifying and purifying the source from which it draws’, all the while, it could be added, ignoring the arbitrariness and divisiveness of the replacement source.⁵¹

GROUNDS

With ample warrant in the method of the common law, the ‘chief question in this case’ for Brennan J. was whether ‘absolute ownership’ and ‘legal possession’ of the relevant land had vested in the Crown thereby excluding any rights of the indigenous inhabitants (p.25).⁵² He then resorts summarily to the three grounds provided by the common law for colonial acquisition, only one of which is found to be relevant. Having rejected the grounds of conquest and cession, he engages with the aptly tendentious colonial ‘acquisition by settlement’ (p.26). Some refined regard for historical truth impels Brennan J. to question this third ground, although such regard is not extended to the considerable claims of conquest. The uncharitable may think that Australian judges peremptorily reject conquest as a ground of acquisition because

⁵¹ W. E. Connolly, *Why I am Not a Secularist* (Minneapolis: University of Minnesota Press, 1999), 30.

⁵² Pages numbers in the text, without more, refer to *Mabo supra* n.2.

its acceptance could import the persistence of an effective indigenous law.⁵³ It is this law which, nonetheless, proves to be persistently troubling in *Mabo*. With the common law, settlement was a valid ground for acquiring ‘desert uninhabited countries’ – the ‘doctrine’ of *terra nullius*.⁵⁴ The law of the settler could apply unreservedly here because it was entering a place where there were no people and hence no law. For Brennan J., *terra nullius* was the ground heretofore taken as justifying a completeness of acquisition together with the unimpeded entry of the law of the colonist.⁵⁵ This ground he roundly rejects as contrary to historical fact. With such an incautious entry of unmediated and ever-contingent fact into law’s cosseted realm, Brennan J. was drawn to a multitude and farrago of alternatives to the adoption of *terra nullius*.

It is the common law’s protean absorption of the facts of historical development that enables Brennan J. not only to oppose the arbitrariness and divisiveness of *terra nullius*, but also to sanctify and purify an alternative source. The common law can and must (subject to a ‘skeletal’ qualification to be considered shortly) take into itself ‘contemporary’ standards of civilization and human rights and reject discrimination (e.g. pp.29-30). That may seem plainly well and good until it is remembered that the ‘universal’ standards of occidental civilization and human rights were constituted through the utter rejection and repression of indigenous peoples ‘in

⁵³ See e.g. Barwick C.J. in *New South Wales v The Commonwealth* (1975) 135 C.L.R. 337 at 368, and Gibbs J. in *Coe supra* n.50 at 408.

⁵⁴ The phrase comes from Blackstone: see *Mabo supra* n.2 at 33.

⁵⁵ For an incisive analysis of the invocation of *terra nullius* in *Mabo* as chimera see D. Ritter, ‘The “Rejection of Terra Nullius”, in ‘*Mabo: A Critical Analysis*’, *Sydney Law Review* 18 (1996), 5-33.

the first place'.⁵⁶ When such peoples are also bidden to enter the universalist fold of civilization and human rights, the completeness of their coexistent exclusion means either that they are not allowed to bring anything of their own or that what they bring has to be rendered in the terms of the 'universal' inclusion. Although these imperatives shape the rest of the judgement of Brennan J., as we will soon see, 'standards' of civilization and human rights could hardly in themselves serve to ground a rapacious colonial acquisition. These standards serve, for Brennan J., to displace the prior ground justifying acquisition and to indicate the need for a new ground. There is mystery as to what the new ground turns out to be.

Only one ground is considered as such and commentators are divided over whether Brennan J. rejects or adopts it.⁵⁷ He would seem to do both. This ground is the oxymoronic 'enlarged concept of terra nullius' (pp.32-3). Something like this was invented by Vattel in the eighteenth century in justifying imperial arrogations and it meant that if the indigenous peoples were inhabiting the land inadequately, especially

⁵⁶ C. Perrin, 'Approaching Anxiety: The Insistence of the Postcolonial in the Declaration on the Rights of Indigenous Peoples', in E. Darian-Smith and P. Fitzpatrick, eds., *Laws of the Postcolonial*. (Ann Arbor: Michigan University Press, 1999), 19-38; P. Grimshaw, R. Reynolds and S. Swain, 'The Paradox of "Ultra-Democratic" Government: Indigenous Civil Rights in Nineteenth-Century New Zealand, Canada and Australia', in D. Kirby and C. Coleborne, eds., *Law, History, Colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001), 78-90; G. W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984).

⁵⁷See e.g. Ritter *supra* n.55 at 23 and G. Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence', *Melbourne University Law Review* 19 (1993), 195-210 at 207.

by not cultivating it, it could be taken from them.⁵⁸ The law of the settler would still flood in because such a lacking people could not have law – and neither, for that matter, could they have property. Brennan J. firmly rejects this ‘notion’ and rejects the acquisitive ‘doctrines of the common law which depend on’ or are ‘founded on’ it (p.41). Yet he also avers, in what seems to be an entirely retrospective attribution, that it was through this enlarged *terra nullius* that ‘the common law thus became the common law of all subjects within the colony’, including the indigenous inhabitants (p.38). In a note to this passage, Brennan J. argues that, since subjects of conquered and ceded territory became British subjects, ‘a fortiori the subjects of a settled territory must have acquired that status’ (p.38 n.93). Since the law of the subjects of conquered and, subject to the terms of cession, ceded territory remained the law of that territory, *a fortiori*, one would have thought, the law of those who had neither been conquered nor ceded their territory would have likewise persisted. So, although Brennan J. would seek to marginalize this denial of law to indigenous peoples in Australia by calling this denial a ‘fiction’ (p.42), it remains an operative and potent fiction, as we shall see. There is as well a specific operance to the ambivalence of Brennan J. over the notion of an enlarged *terra nullius*, as we shall also see.

It is the common law itself which provides the terminal site of this ambivalence, of this indefinite combining of what is accepted and what is rejected. The common law is the holding in a putative encompassing and enduring stillness of what cannot be encompassed or stilled. This is a self-founding common law which can accommodate its own origin, which can be unified and complete in itself yet originate from something beyond itself. For Brennan J. there is some recognition that

⁵⁸E. de Vattel, ‘Emer de Vattel on the Occupation of Territory’, in P.D. Curtin, ed., *Imperialism* (London: Macmillan, 1971) pp. 44-45.

this 'original' divide is straddled by the common law in that the common law is seen as coming from beyond, from England, and yet is independent and 'entirely free' of that imperial endowment (p.29). More generally, if inexplicitly, Brennan J. would see the common law having a determinate and enduring content yet being 'in' itself ever responsive to what comes from beyond it. With mantra-like assurance, the judgement of Brennan J. repeatedly observes that, with the Court's declaring 'the common law of Australia', there is 'a skeleton of principle' which cannot be 'fractured' by responding to change contrary to it (pp.29, 30, 43, 45). Yet an illimitable responsiveness also seems assured because '[i]t is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not' (p.30). In particular, if an earlier expression of the common law offended 'the values of justice and human rights (especially equality before the law)' the clash would have to be resolved by a utilitarian balancing (p.30) – yet another ground perhaps. The skeleton's final, and by now vertiginous, apparition comes in the affirmation that 'the doctrine of tenure...could not be overturned without fracturing the skeleton which gives our land law its shape and consistency' (p.45) – a propitious affirmation, which we return to shortly.

NOLI ME TANGERE

The ultimate shielding of colonial acquisition is that judges are not to question it. In this light, or lack of light, the acquisition could be legally valid or invalid or anything, or nothing, at all.⁵⁹ The pall of its impelling imperial source has to be left undisturbed and the possibilities inherent in a juridical decolonisation never grasped.

⁵⁹See P. Rush, 'An Altered Jurisdiction: Corporeal Traces of Law', *Griffith Law Review* 6 (1997), 144-168, at p. 165.

What is more, the rule of law has to be quite denied its constituent ability to extend to anything. This injunction against enquiry into the prerogative power of acquisition is often expressed in terms provided by Gibbs J., terms which Brennan J. borrows (p.31): '[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state'.⁶⁰ Such self-denying ordinances are usually offered as manifestly ungainsayable, but there is also (coming even closer to Kant's injunction) the almost disarming acknowledgement that such assiduous enquiry would be 'embarrassing and cannot be allowed'.⁶¹ Layered ironies and abjections are entailed here. Coke's battle to contain the prerogative power within the common law may be almost, and belatedly, won in the courts of the metropolitan power, but that seems at best a distant prospect in one of its former colonies.⁶² The irony intensifies when it is recalled that some of the most significant cases in which the prerogative power of the metropolitan executive was subordinated to the rule of law involved colonial acquisition.⁶³ More particularly, the doctrine of 'act of state', which in Australia so securely shields

⁶⁰In *New South Wales supra* n.52 at 388.

⁶¹ See *Coe supra* n.50 at 410 per Jacobs J.

⁶² For the almost winning see *Council of Civil Service Unions v Minister for the Civil Services* 1985 A.C. 374. The seminal, and yet to be realized, decision here is of course the *Case of Proclamations* (1611) 12 Co Rep 74. Placing this in the particular setting, there is Stephen J. in *New South Wales supra* n.53 at 438: 'The prerogatives of the Crown were a part of the common law which the settlers brought with them on settlement'. Furthermore, and in the same setting, 'the crown had no prerogative right to override the common law by executive act': *Commonwealth of Australia v Yarmirr and Others* (2001) 184 A.L.R. 113 at 128 per Gleeson C.J. *et al.*.

⁶³ E.g. *Campbell v Hall* 1774 98 E.R. 1045; *Mostyn v Fabrigas* 1774 98 E.R. 1021.

imperial acquisition from embarrassing enquiry, assumes now a tattered mien in its metropolitan source.⁶⁴

On such unstable, not to say vacant, foundations is the 'law of the land' erected (p.37). In such miasma, not to say vacuity, is the settler's law accorded the impenetrable solidity that would secure its completeness and exclusiveness and utterly subordinate any competing indigenous legality.⁶⁵ How can this surpassing, this sovereign diapason be accorded some finite force, some palpable purchase, that will not compromise its distanced grandeur? Quite simply, and very simply, by distinguishing between its constituent act and the effects or 'consequences' of that act. According to Brennan J., '[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law' (p.32). He immediately adds that 'the law in force in a newly-acquired territory depends on the manner of its acquisition by the crown' (p.32). The alluring ineffability of how a finite act (of acquisition) is to be cleaved from its manner and consequences must be disregarded for what is imported by the distinction. What is so imported is an expedient introduction and enabling of the end-point of the judge's imperative discourse – the according of some guarded recognition to 'native title'.

ENTITLING THE NATIVE

It is when Brennan J. turns to the question of property title to land that his rejection of the enlarged notion of *terra nullius* becomes most pointed and most

⁶⁴See A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (12th edition) (London: Longman, 1997), 356-359.

⁶⁵*R v Wedge* 1976 1 N.S.W.L.R. 581; *Yarmirr supra* n.62 at 129 per Gleeson C.J. *et al.*.

forceful. The ‘absence of law’ characterizing indigenous peoples is now rendered as an inconsiderable ‘theory’, an insubstantial ‘fiction’ (pp.39-40, 42). Such emphatic revisionism is now focused on a consequence of the theory, on the denial to indigenous peoples of a ‘proprietary interest in the land’ (p.40). That denial ‘depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs’ (p.40). The designation is summarily found to be ‘false in fact and unacceptable in our society’ (p.40). That this gross unacceptability will soon be found significantly acceptable is intimated by the accompanying *legato* in which Brennan J. again affirms that the ‘theory...was advanced to support the introduction of the common law of England’ (p.38). Although ‘contemporary law’ would not accept the theory, the common law riding on it was, somehow and nonetheless, successfully introduced (p.38).

What serves to neutralize the opposition between the false and the operatively true, between the unacceptable and the inexorably accepted, is the skeletal doctrine of tenure and, in particular, a distinction which the majority in *Mabo* found to be crucial. Invoking the ‘feudal origins’ of the doctrine, Brennan J. discerns in it a divide between a ‘radical’ title to territory which underpins sovereign rule and a ‘beneficial’ title to proprietary rights in land (pp.43-50). As a majority in the High Court later and aptly acknowledged, the distinction in its putative origins is at best tenuous.⁶⁶ Yet this realization has not been allowed to disturb the enduring achievement of *Mabo* – the confining of the issue of the false and unacceptable basis of colonial acquisition to questions of beneficial title. This, after all, is what the case was about – recalling here the hermetic formation of issues within the method of the common law. With the false and unacceptable basis disposed of, there could belatedly be that ‘recognition’ of

‘native title’ to the land which it had previously denied (p.49). For good measure, Brennan J. reduced radical title to being ‘merely radical title – no more than a postulate to support the exercise of sovereign power’.⁶⁷

This, however, is the most potent of postulates, one which posits the mystic fusion of land and transcendent authority, and one which can no more be divorced from the presence of beneficial title than it could in feudal times, common law method notwithstanding. Radical title, furthermore, is a title which carries with it the effective truth and unavoidable acceptability of what was found false and unacceptable in relation to beneficial title, carries with it ‘the “absence of law” or “barbarian” theory underpinning the colonial reception of the common law of England’ (p.39). Beneficial title itself is not only fused with the radical but also utterly subordinated and thoroughly complected by it. The indicia of this are abundant and obvious and will, in what follows, only be touched on here.

So, in a compacted contradiction, Brennan J. goes on to ‘hold’ that ‘the rights and privileges conferred by native title were unaffected by the Crown’s acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title...’ (p.69). Native title is thence ‘precarious’ and ‘inherently fragile’.⁶⁸ In the oft-quoted phrase, native title may be a ‘burden on the radical title’ of the crown, but it is a burden that can be lightly borne since native title effectively depends on the

⁶⁶ *Yarmirr supra* n.62 at 132 per Gleeson C.J. *et al.*.

⁶⁷ *Mabo supra* n.2 at 54, and see also 50. By the time of *Yarmirr supra* n.62, it has become ‘no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land’: at 132 per Gleeson C.J. *et al.*.

⁶⁸ See *Western Australia v Ward* (2000) 170 A.L.R. 159 at 179-180.

‘good will of the Sovereign’.⁶⁹ No more quiddity could be extracted from what is ‘primarily a spiritual affair’.⁷⁰ Yet it is in its very materiality that native title is fragile and precarious. In stark contrast to ‘abstract’ and enduring legal right, native title subsists factually in the community’s continuing to occupy the land, in its sustained coherence as a traditional community, in its still observing its traditional customs and in its still acknowledging its traditional laws (pp.58-61). All of which ‘factual’ matter has to be established by those who would claim native title if its ‘extinguishment’ is to be avoided.⁷¹

Such claims have to be made, and made out, under the rubric of the common law’s ‘recognizing’ an existent native title. Native title, however, is something created within the processes of its supposed recognition.⁷² To be recognized, native title has to be straitened and filtered through evidentiary and determinative processes which not only go to constitute it but which may do so in ways that are degrading and absurd.⁷³ The introduced law so sweeps indigenous peoples into its encompassing disregard that it can fragment their existence by separating the inseparable, by

⁶⁹See *Yarmirr supra* n.62 at 130-131 per Gleeson C.J. *et al.*.

⁷⁰*R. v Toohey; ex parte Meneling station Pty Ltd* (1982) 158 C.L.R. 327 at 358 per Brennan J..

⁷¹ *Ward supra* n.68 at 191.

⁷² There is some judicial division between what is now a predominant view seeing native title as being ‘recognized’ and those who would see native title as created by the common law itself: see *Ward supra* n.68 at 186-187.

⁷³As to such ways see e.g. *Yorta Yorta v Victoria* (2001) 180 A.L.R. 655; and for the point generally see S. Motha, ‘Mabo: Encountering the Epistemic Limit of the Recognition of “Difference”’, *Griffith Law Review* 7/1 (1998), 79-96, and P. Sutton, *Aboriginal Country Groups and the ‘Community of Native Title Holders’* (Perth WA: National Native Title Tribunal Occasional Papers Series, No.1/2001), especially Parts 1 and 5.

marking apart and ‘recognizing’ so much of traditional law and custom as goes to make up native title and not recognizing the ‘absent’ rest.⁷⁴ The incoherence of this deadening divide is heightened in the requirement that people be shown to adhere to traditional customs and laws, now given *some* recognition, if a claim to native title is to be made out. If it is not made out, if ‘the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, [then] the foundation of native title has disappeared’, and what follows is that the mere postulate of ‘the Crown’s radical title expands to a full beneficial title, for then there is no other proprietor than the Crown’ (p.60). The laws of some peoples are ever contained and contingent, the laws of others ever expansionary and surpassing.

A COMMON TRIUMPH

The most characteristic, and aptly culminating, service proffered by the common law lies in its abundant supply of ‘categories of illusory reference’.⁷⁵ The incantatory ‘authority’ of what has been decided in other cases, and at times in other places, compensates or substitutes for the inevitable inadequacy of present decision. So, the determination reached in *Mabo* is sustained in frequent reference to cases from Canada and the United States said to arrive at a similar outcome.⁷⁶ Summarily, it can

⁷⁴ Fragmentation can go further with some ‘rights’ involved in native title being recognized but not others. As to the ‘absence of law’ attributed to indigenous peoples, and considered earlier, see *Mabo supra* n.2 at 36-42 per Brennan J..

⁷⁵ Combining two phrases from Stone *supra* n.10 at 339.

⁷⁶ In *Mabo supra* n.2 itself there is a creative engagement with the Canadian situation in the judgement of Toohey J.. The resort to apt US authority is frequent all through the judgements of the majority even if this is not greatly elaborated on. For a more extended but compact comparative account see R.H.

be shown that what these cases also share with *Mabo* is a broadly similar line of ‘reasoning’, one exhibiting a broadly similar incoherence. Such similarities have been drawn out elsewhere and will not be pursued here.⁷⁷ What will be pursued briefly, by way of a conclusion, is a matter of difference from *Mabo* found in the ur-decision in this field of *Johnson v M’Intosh* decided by the Supreme Court of the United States in 1823.⁷⁸

This case, according to a prominent commentator on *Mabo* has ‘been recognized throughout the common law world’ as the origin of a native title which provides ‘the only possible accommodation of the rights of settlers and Aboriginal people’.⁷⁹ Chief Justice Marshall’s historic, and histrionic, judgement for the court was hailed by another commentator on *Mabo* as providing ‘a brilliant and little understood resolution’ in an account which confirmed the latter designation, if not the former.⁸⁰ Perhaps, however, the High Court in *Mabo* and the commentators could have been a little more attentive to difference. Perhaps *Mabo* as a corrective retrospection endowing indigenous peoples does not accord well with *Johnson v*

Bartlett, “Aboriginal Land Claims at Common Law”, *University of Western Australia Law Review* 15 (1983), 293-346.

⁷⁷ See J. Borrows, ‘Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*’, *Osgoode Hall Law Journal* 37/3 (1999), 537-596; Fitzpatrick, *Modernism supra* n.34 at 166-175.

⁷⁸ *Johnson v M’Intosh* (1823) 21 U.S. (8 Wheat.) 543.

⁷⁹ Bartlett *supra* n.45 at 182-183. Bartlett also sees the case as one of the common law – see generally *ibid.*. All of which is somewhat strange when it is realized that there was no explicit reliance on the common law in the judgement. There the common law is mentioned once only in describing a source which is then rejected – *Johnson supra* n.78 at 600.

⁸⁰ B. Hocking, “Aboriginal Law Does Now Run In Australia”, *Sydney Law Review* 15 (1993), 187-205 at 195.

M'Intosh as a motor of dispossession and of what could now be called ethnic cleansing. Perhaps *Mabo* as a determination that indigenous peoples have rights previously denied them does not correspond exactly with *Johnson v M'Intosh* as a determination that indigenous peoples do not have rights previously allowed them. Perhaps then attention would have been more sharply focused on what is similar in the cases. That similarity will now serve as a conclusion in what it reveals about law.

Typifying that bad faith which sets the combining of an occidental modernity and its law, Marshall found that the Court was powerless to help an indigenous people whom he saw, prematurely, as conquered. The force impelling conquest was transcendent and the rights flowing from conquest 'can never be controverted by those on whom they descend'; such rights cannot even 'be drawn into question'.⁸¹ Also beyond the range of effective regard were 'those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man', the principles of natural law.⁸² Or, as Justice Johnson put it more succinctly in another Indian case, so-called, the situation of indigenous peoples was apt only for an 'appeal...to the sword and to Almighty justice, and not to courts of law or equity'.⁸³ So, although these are verities of surpassing import, they would seem to be incidental, almost a distraction, from the matter in hand. Yet the recording of them was but a palimpsest for the matter in hand. Their place is taken, in Marshall's judgement, by an imperial law.

⁸¹ *Johnson supra* n.78 at 572; also, another 'Indian case', *Worcester v Georgia* (1832) 31 U.S. (6 Pet.) 515 at 543 per Marshall C.J..

⁸² *Johnson supra* n.78 at 572.

⁸³ *Cherokee Nation v Georgia* (1831) 30 U.S. (5Pet.) 1 at 52.

Evoking the hierophantic elevation and opacity befitting a myth of origin, Marshall's formative power ranged over the terraqueous globe with a leavening force hardly less than that of the Creator of *Genesis*, summoning forth a commensurate life for some and its denial to others. This fractured world and its inhabitants are thence encompassed by an imperial dominion in which the settler's generative grasp on the land is rendered in the bathetic solidity of 'a proprietary interest' leaving others to the fragile and 'diminutive' occupation allowed them by 'the law of nature'.⁸⁴ *Imperium* surpasses nature also in a related and distinctly modern divide where natural right is separated from and subordinated to the law. The revolutionary attribution of an equal and natural right of property to all 'men' is now denied 'the Indian'.⁸⁵ The new, purely and immanently positive law brought forth by Marshall can have nothing before it or, with a more operative accuracy, what is before it can only be what the law places and iteratively sustains before itself. This law now occupies the supremely solitary place of the deity and the sword. With the encased completeness of its self-founding, it would deny any imperative responsibility before itself. It may well position before itself some 'supreme' authority or it may accept there congruities of reified conceptions, but as the restless Coke could still remind us, it can never be contained or itself founded in such things. There is before the law no abiding city. There is before the law nothing but evanescence. That from which Kant would shield us is the abyssal realization of the vacuity of ruling claims asserted before the law. In the absence of any anterior assurance, we are all 'bare' before this law.⁸⁶ Hence

⁸⁴ *Johnson supra* n.78 at 569.

⁸⁵ *Ibid.*, at 590-591.

⁸⁶ Cf. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).

‘some of the widespread commentary that the decision [in *Mabo*] has generated has bordered on hysteria and even paranoia’.⁸⁷ We are all native now.

School of Law

Birkbeck

Malet Street

London WC1E 7HX

UK

Email: peter.fitzpatrick@clickvision.co.uk

⁸⁷ G. Nettheim, ‘Judicial Revolution or Cautious Correction? *Mabo v Queensland*’ *UNSW Law Journal* 16/1 (1993), 1-26 at 2.