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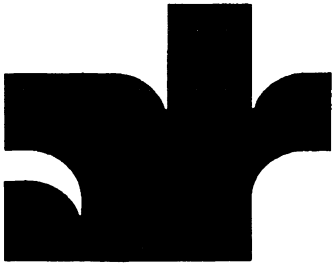

ARTICLES

*Justin Malbon**

NATURAL AND POSITIVE LAW INFLUENCES ON THE LAW AFFECTING AUSTRALIA'S INDIGENOUS PEOPLE

> As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. Brennan J[1]

INTRODUCTION

OF the multitude of philosophical influences on Anglo-Australian law, the natural law and positive law influences are probably the most enduring. They inform the present debate about the law affecting indigenous people and are evident in the decision of *Mabo v Queensland (No 2)* ("*Mabo*").[2] This article traces the influences of the two philosophies on the historical development of Australia's law

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1 *Mabo v Queensland (No 2)* (hereafter "*Mabo*") (1992) 175 CLR 1 at 40.

2 As above.

with regard to indigenous people. Their influences in *Mabo* will be considered in the argument of this paper that positivism dominated the development of the law to an extent which repressed adequate legal debate about the morality of the law affecting indigenous people. The legacy is a legal discourse which struggles to articulate the way in which indigenous legal systems relate to the dominant non-indigenous system.

The failure of the courts to apply adequate moral reasoning during the latter part of the nineteenth century and for much of the twentieth has arguably had a profoundly detrimental effect on indigenous people. The law stood mute while serious injustices were inflicted on indigenous people. It is one matter for the courts to inadequately or erroneously apply moral dimensions to the development and interpretation of the law. It is another, and more serious, matter simply to abandon moral value. Another outcome of the positivist influence was the total denial of the entitlement of indigenous people to be respected as a distinct people with their own system of laws. Benthamite and Austinian positivism, which so greatly influenced Anglo-Australian law at critical stages of its development, claimed and continues to claim that there can only be a singular source of ultimate law-making authority, suggesting intolerance of alternative legal systems within the dominant system. This claim does not adequately account for the complex nature of 'sovereignty' with regard to the law-making process. Positivism does, however, offer a convenient basis for denying indigenous people any form of self-government or 'sub-sovereign' status of the kind recognised by the United States Supreme Court in 1831 when it ruled that American Indians were members of a "domestic dependent nation".[3]

Reconsidering the historical development of the law regarding indigenous people in the light of positive and natural law influences offers a way of better articulating the relationship between the dominant and indigenous legal systems in Australia. This article attempts to offer some insights into the nature and effect of these philosophical influences.

DEGREE OF INFLUENCE

It is important in this discussion to keep the degree of the influence of the positive law and natural law philosophies on the legal system in perspective. Their influence on the courts was often not an explicit or dominant factor in shaping judgments. More often than not, these philosophies acted as the backdrop, or provided the harmony, to other

3 *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1 at 17.

more potent forces, including pragmatism and politics, in the broader sense. It is also erroneous to assume that during the early decades of colonisation the law developed in a systematic way or that the law and administration were the kind of distinct institutions they are today. This can be illustrated by the law and administrative practices with respect to the categorisation of conquered, ceded and settled colonies. These were well known at the time of the acquisition of New South Wales.[4] But it is wrong to assume that a colony was categorised and administered according to the systematic application of logic and legal principle. Indeed one of the (valid) positivist criticisms of the common law was its lack of internal discipline and systematic development and form. The British acquired some peopled lands and considered them to be settled and acquired others which they considered conquered. The reasons for the distinctions are best explained by the dictates of policy and administrative convenience rather than those of reason or logic.[5] As an example, the North Island of New Zealand was treated as:

> a conquest following its purported cession by Maori chieftains in the Treaty of Waitangi of 1840. On the other hand, the South Island was proclaimed to be part of Britain's dominions as though it was unoccupied, partly it would seem because of the threat of a possible French move for settlement on the South Island which might take place before similar treaties could be made with other Maoris.[6]

To add further colour and dimension to our modern perception of eighteenth century law, it is worth recalling that many legal developments concerning the acquisition of colonial territory related to the feuds between the monarch and parliament about who was entitled to the exercise of various powers.[7] Thus few, if any, of the significant British cases about the acquisition of colonial territory involved an indigenous litigant. The question whether a colony was conquered or settled usually determined whether the monarchy or the British Parliament had authority over the colony.[8] Over time, even this fundamental question became

4 See McNeil, *Common Law Aboriginal Title* (Clarendon Press, Oxford 1989) pp110-116.

5 See Castles, *An Australian Legal History* (Law Book Co, Sydney 1982) p15 and McNeil, *Common Law Aboriginal Title* pp117-132.

6 Castles, *An Australian Legal History* p15.

7 As above, pp3-17.

8 See *Mabo* at 82-83 per Deane and Gaudron JJ and McNeil, *Common Law Aboriginal Title* p113 fn 23.

increasingly obscured. With shifts in the power balance between the sovereign and parliament came subtle shifts of emphasis in the relevant legal decisions. This shift of power was not explicitly acknowledged in the courts. The monarch notionally maintained more or less the same powers over conquered and ceded territory as existed in the Middle Ages. The courts, meanwhile, maintained the fiction of colonial acquisition by medieval means, that is, on the fields of battle, despite the reality that most colonies were acquired by far more complex means. In Australia, for example, territory was acquired in some parts of the country after protracted guerilla warfare with the Aboriginal people of the region. In other regions the Aborigines moved on to avoid conflict or were slaughtered. And yet in other places the Aborigines and pastoralists co-existed, and indeed the Aborigines became essential to the economic development of the region.[9] British administrative practice, then, tended not to categorise colonies for the purpose of applying British law in any logically consistent way although the categorisation may have informed administrative practice in some way.

The development of the law regarding the acquisition of territory was not distinct from administrative practice. In reality the law developed as much from administrative and legal practices of the times as from statutes and case law.[10] Consequently, laws and administrative practices tended to develop upon the basis of pragmatism, expediency and political opportunism rather than upon obedience to doctrine or legal or other principle. During the eighteenth century, Britain did not have the strict delineation of judicial, administrative and legislative procedures that exists today. According to RK Webb, a "key concept in eighteenth century culture - whether in theology, morals, architecture, poetry, or physics - was balance".[11] Despite pragmatism, expediency and opportunism, both the law and administrative practice were significantly shaped by a view of

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9 See generally Reynolds (ed), *Aborigines and Settlers: The Australian Experience, 1788-1939* (Cassell Australia, Melbourne 1972).

10 See Slattery, "Understanding Aboriginal Rights" (1987) 66 *Can Bar Rev* 727 at 736-737:

> The Crown's historical dealings with Indian peoples were based on legal principles suggested by the actual circumstances of life in North America, the attitudes and practices of Indian societies, broad rules of equity and convenience, and imperial policy. These principles gradually crystallised as part of the special branch of British law that governed the crown's relations with its overseas dominions, commonly termed "colonial law", or more accurately "imperial constitutional law".

11 Webb, *Modern England* (Harper Collins, New York, 2nd ed 1980) p47.

the world that was influenced by natural law and positive law philosophies, as will be illustrated in this article.

DEFINING TERMS: NATURAL LAW / POSITIVISM

"Natural law" and "positive law" philosophies are so rich in history that they have attained a complexity that eludes easy definition. Sadurski, for instance, has noted that "[a]ny attempt at defining 'legal positivism' appears a hopeless enterprise. There are no two legal theorists who would agree about an understanding of the term."[12] Much the same can be said of defining natural law. A working definition is none the less required to understand the way these important philosophical movements have affected the Anglo-Australian law affecting indigenous people.

"Natural law"

Natural law has a long antecedence, dating at least to the Greek and Roman empires. Justinian's Digest (or Pandects) of 533 recognised three main types of law, the *ius civile,* the *ius gentium* and the *ius naturale.* The *ius civile* being the legislation or customary law of a state. The distinction between the *ius gentium* and the *ius naturale* was not altogether clear, but they were distinguished on the issue of slavery. Under the *ius naturale* "all men are born free and equal, but slavery is permitted according to the *ius gentium*".[13] It was not doubted that there is a higher law than the law of the state.[14] From the Roman period until about the eighteenth century it was assumed that the positive law gave effect to the natural law. That is, the positive law simply made the terms of the natural law explicit and enforceable.

Freeman offers a useful definition of natural law:

> what has remained constant [in the long history of the natural law] is an assertion ... that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles constitute the natural law. This is valid of necessity because the rules governing correct human conduct are

12 Sadurski, "Marxism and Legal Positivism: A Case Study on the Impact of Ideology upon Legal Theory" in Galligan (ed), *Essays in Legal Theory* (Melbourne Uni Press, Melbourne 1984) p193.

13 Sabine, *A History of Political Theory* (Harrap & Co, London 1937) p169.

14 As above.

> logically connected with immanent truths concerning human nature. Natural law is believed to be a rational foundation for moral judgment.[15]

Finnis defines natural law as a set of general moral standards, which require, more particularly, that the rule of law be obeyed and that human rights be respected.[16] He admits that the term "moral" has uncertain connotation and so offers the term "practical reasonableness" as a reference point for judging the features of legal order.[17] So, in its broadest sense, natural law is "the set of principles of practical reasonableness in ordering human life and human community".[18] It is natural law that explains the obligatory force of positive laws (rather than any sociological explanation), and why some (alleged positive laws) are defective (ie non-laws) because they fail to conform to the natural law.[19]

In case we are tempted to dismiss natural law as vague religiosity, Fuller informs us that:

> These natural laws have nothing to do with any 'brooding omnipresence in the skies'. Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. They remain entirely terrestrial in origin and application. They are not 'higher' laws; if any metaphor of elevation is appropriate they should be called 'lower' laws ... Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women.[20]

Fuller is, of course, wrong on the last point. Given its long and complex history, natural law has been applied to justify principles and conduct we would consider wrong and immoral today. The Greeks and Romans, for example, saw no natural law objection to slavery and natural law principles were relied on to justify slavery in the United States. Thomas

15 Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, London, 6th ed 1994) p80.
16 Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) p23.
17 At p15.
18 At p280.
19 At pp23-24.
20 Fuller, *The Morality of Law* (Yale Uni Press, New Haven 1964) p96.

Hobbes could be plausibly categorised as a member of the natural law school, but his philosophy has been used to justify despotism.[21]

"Positivism"

Hart defined positivism as used in contemporary Anglo-American literature as designating: "(1) the contention that laws are commands of human beings; (2) the contention that there is no necessary connection between law and morals, or law as it is and law as it ought to be".[22] Of interest here is the minor role assigned to the law regarding the application of moral judgement. This clearly distinguishes positivists from natural lawyers. Sadurski elaborates that:

> The second aspect of legal positivism is the separation of law and morals in the sense that there is no necessary connection between law as it is and law as it ought to be. More precisely, our assertions about law as it is (that is, when we determine what is the valid law of the country) are in no way affected by our value-judgments about law as it ought to be. The existence and validity of law is independent of its goodness; the content of law is not a relevant criterion of identification of a set of valid legal rules.[23]

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21 Hobbes (1588-1679) assisted the positivist cause by arguing the need to disregard explicit moral concern on the basis of his bleak view of human morality. The state of nature, which the natural law imagined as some kind of garden of Eden before the apple was bitten, was for Hobbes "solitary, poore, nasty, brutish, and short": *Leviathan* (1651) Tuck (ed) (CUP, Cambridge 1991) p89. See also Anaya, *Indigenous Peoples in International Law* (Oxford Uni Press, New York 1996) pp13-15. Hobbes argued for the need to surrender our original chaotic state of freedom to a leader who was obliged to deliver social order. Because of the paramount social benefit attained through the imposition of social order, the leader was not constrained in the exercise of power by explicit moral limits.

22 Hart, "Positivism and the Separation of Law and Morals" reprinted in Dworkin (ed) *The Philosophy of Law* (Clarendon Press, Oxford 1961) p18. Hart mentions another three criteria in his definition, but Sadurski ("Marxism and Legal Positivism: A Case Study on the Impact of Ideology upon Legal Theory" in Galligan (ed), *Essays in Legal Theory* (Melbourne Uni Press, Melbourne 1984) pp193-194) argues that they are contentious and not accepted by some significant positivists, and therefore have been excluded.

23 Sadurski, as above, p194. According to Austin, *The Province of Jurisprudence Determined* Hart (ed) (George Weidenfeld & Nicolson Ltd, London 1955) p126:

Hart clarifies, however, that this does not mean that the law is hostile to morality, indeed the "law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals", it is just that morality is not relevant to deciding legal validity.[24]

The second aspect is related to the first (that laws are commands of human beings). John Austin (1790-1859) claimed that law is a species of command which proceeds from a sovereign. Hart agreed, stating that the sovereign "makes law for his subjects and makes it from a position outside any law. There are, and can be, no legal limits on his law-creating power."[25] He believed the limits on sovereign power, to the extent they exist at all, derive not from the law but from deferring to popular opinion or moral conviction.[26] A point on which Hart differs from Austin is that the latter believed that a command requires a sanction (punishment), whereas Hart believed that many people will comply with a command regardless of the sanction. Most consider, for example, that a road law stating which side of the road vehicles must travel provides necessary order to what would otherwise be dangerous chaos, and therefore obey it whether or not a sanction exists.

Hart properly maintains that positivism is concerned with rule validity, and so if parliamentary sovereignty is the master rule, then it must be applied to determine legal validity. The problem with this is that it offers an internal closed system method of analysis of validity. That is, the master rule is stated (parliamentary sovereignty), but positivism does not offer an adequate external mechanism for judging whether the asserted rule is itself valid. Who says that parliament is supreme? The positivists simply offer evidence of general compliance with the rule by the courts and the community to prove its validity. This incapacitates adequate inquiry into the reasons for the master rule and external questioning of its validity and purpose.

Another problem raised by positivist analysis is that it offers a rather simplistic concept of the source of law-making authority. A positivist searches for a supreme person or body that creates laws. Austin defined

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> The *science of jurisprudence* (or, simply and briefly *jurisprudence*) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.

Emphasis original.

24 Hart, *The Concept of Law* (Clarendon Press, Oxford 1981) p199.

25 At pp64-65.

26 At p65.

the positive law as the commands of "persons exercising supreme and subordinate government, in independent nations, or independent political societies".[27] An elaborated positivist analysis would allow that laws are made by a number of bodies, namely parliament and (with parliamentary authority) local government authorities, and may even accept the limited law-making power of courts in developing the common law. But the emphasis would be upon locating the supreme law-making authority, which in Australia would be parliament(s). It is that body which can ultimately withdraw law-making authority from other lesser bodies (like local government) or overturn judicially made laws by enacting contrary statutes. Hence the doctrine of parliamentary supremacy, with all its oversimplified majesty, relies heavily upon the positive law doctrine. The reality is that the English doctrine of parliamentary sovereignty is in the long history of English law a relative novelty. As McIlwain recalls for the reader:

> To those who believed in a fundamental law immutable, the present-day doctrine of legislative sovereignty seemed new and contrary to the spirit of English institutions [in the seventeenth century]. In the constitutional struggle of Charles I's reign the doctrine of parliamentary sovereignty came to men ... 'with all the force of a discovery'. It lent itself to the view of the more extreme on both the parliamentary and the royalist side, and its influence over men's minds since the days of Milton and Hobbes has become so complete that historians have well-nigh forgotten that any other theory ever existed.[28]

The High Court has recently declared parliamentary supremacy dead. In *Lange v Australian Broadcasting Corporation*[29] the Court in a single judgment stated that:

> The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding

27 Austin, *The Province of Jurisprudence Determined* Hart (ed) p9.
28 McIlwain, *The High Court of Parliament and its Supremacy* (Yale Uni Press, New Haven 1910) p109.
29 (1997) 71 ALJR 818.

> the limits of the respective powers of State and Commonwealth governments.[30]

While a positivist response to this statement would be that it is tangential whether or not it is fair, they might nevertheless criticise the High Court for having the temerity to overrule the master rule. The supreme judicial body, the High Court, has said that the master rule does not apply. Therefore, if another master rule declares that *Marbury v Madison*[31] style judicial review is correct and the supreme judicial body is the ultimate body for determining constitutional validity, and the question of whether the master rule of parliamentary supremacy applies is a constitutional question, then the High Court must be correct. But this analysis essentially involves, in a practical sense, a conflict of master rules. If the constitution is paramount, and the supreme judicial body is the ultimate arbiter of what the constitution allows, then this must in practical terms confer a degree of ultimate law-making (political) power to the supreme judicial body. The positivist analysis would either not recognise this reality or provide an inadequate means of resolving the conflict of master rules.

Yet a further problem with positivism is its requirement of verifiable 'commands' which relegate the less verifiable 'morality' to the fringes, on much the same basis that an economist may rely on verifiable measures of value by using, for example, money as the measure. Although economists admit that many things of value exist that cannot be measured with money, the trap is that the verifiable is assumed to account for the full scope of 'reality'. The only things that are seen or included are the verifiable. Thus, the impression of greater reliability and objectiveness can be achieved, when in fact it is a distorted and proscribed view of reality.

For positivists, then, laws are not legally invalid for being harsh, immoral or unfair because those are issues of value, and value judgements lack sufficient objectivity.[32] But what does 'morality' mean in this context? The term is not used in this article to refer to any specific form of morality. Rather, it is used to differentiate between a theory that makes overt reference to *some form of morality* (the natural law) as opposed to a theory that makes no such overt claim (the positive law). Consequently, it is not possible, or necessary, in this context to compare or evaluate one

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30 At 828.

31 (1803) 5 US (1 Cranch) 137.

32 Freeman, *Lloyd's Introduction to Jurisprudence* pp205-206; Anaya, *Indigenous Peoples in International Law* pp22-23.

overt claim of morality against another. Despite the fact that the positive law claims that morality not to be a matter of legal inquiry, it cannot avoid some implicit sense that there are moral boundaries to the unbridled exercise of power. Indeed, without the boundaries the rule of law would be indistinguishable from the rule of force. In reality, of course, relations between Aborigines and non-Aborigines were often governed by the rule of force.[33]

Although positive law does not explicitly offer a concept of morality that challenges the natural law's, there is nevertheless a need to have some sense of the natural law's understanding of morality. It understands that morality, in the legal context, acts as a constraint on the otherwise unfettered exercise of law-making power. Early natural lawyers saw that there were fundamental naturalistic laws of God or nature common to all legal systems that constrained the unbridled exercise of law-making power. Murder and the forceful and unjustified taking of a person's property are examples.[34] A law would not, for instance, legalise murder because doing so would breach a more fundamental law. The natural law is, of course, a European conception which assumes that all peoples share its fundamental ideas of morality. The claim is clearly unsustainable, particularly if notions of property entitlements of various peoples throughout the world are considered. Despite its hegemonic quality, the natural law offers a rationale for constraining the despotic exercise of power.[35] In the context of colonial acquisition, it maintains that

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33 See Neal, *Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (CUP, Cambridge 1991) pp78-79. See generally Reynolds, *Frontier* (Allen and Unwin, Sydney 1987) and Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Penguin, Melbourne 1982). See also Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in Crawford (ed), *The Rights of Peoples* (Clarendon Press, Oxford 1992) p19, where he said:

> The jurisprudential starting-point of the rights of peoples is a direct assault upon positivist and neo-positivist views of international law as dependent upon State practice and acknowledgment. In this regard, the rights of peoples can be associated with pre-positivist conceptions of natural law which at the very birth of international law were invoked by Vitoria and others on behalf of Indians being cruelly victimized by Spanish *conquistadores*.

34 See Finnis, *Natural Law and Natural Rights* pp281-290. For critics see Hart, *The Concept of Law* (Clarendon Press, Oxford 1981) ch8, 9; Kelsen "The Function of a Constitution" Stewart (trans) in Tur & Twining (eds), *Essays on Kelsen* (Clarendon Press, Oxford 1986) pp112-115.

35 Parkinson, *Tradition and Change in Australian Law* (Law Book Co, Sydney 1994) pp43-46, 57-59, 114-119.

indigenous people are to be respected as a people equal in status to non-indigenous people. The early natural law's hegemonic ambitions have now to some extent been realised. The international community now accepts that certain fundamental and universal standards of moral behaviour apply, regardless of national laws. Specifically, crimes against humanity are defined and recognised as unlawful, and domestic laws that claim to legitimise them are of no effect.

Positivism's separation of laws from morality weakened the capacity of the courts to decide the law within the context of moral criteria. In a more general sense, the lack of an explicit moral foundation deprived positivists of the capacity to judge as unlawful the actions of the fascist states before the Second World War. Consequently it fell from favour in the eyes of the international community after the war.[36] The international community then created international covenants and other instruments which made conspicuous claims to morality: the use of force was unlawful except in self defence, colonialism was wrongful and laws could not validly undermine fundamental human rights. Although the new concerns for morality revived the natural law's influence, the natural law has changed during the years of positivist domination, for one thing it has lost all its religion.[37] It now appeals to universal humanist values that require equal respect to be given to fellow human beings regardless of their race, sex and creed.

NATURAL LAW INFLUENCES AT TIME OF COLONIAL ACQUISITION

When Britain acquired Australian territory, the law had the capacity to recognise Aborigines as a distinct people. Caution needs to be exercised, however, in drawing distinct principles about the law applying to Aborigines at the time of colonial acquisition, for reasons explained earlier in the section dealing with the degree of influence of the natural and positive laws. However, natural law influences are discernible in the early colonial law which offered the possibility of legal protection to Aborigines

36 Hart's attempt at answering this criticism appears in *The Concept of Law* pp203-207.

37 See Kamenka, "Human Rights, Peoples' Rights" in Crawford (ed), *The Rights of Peoples* p128 where he notes in the case of human rights:

> The concept of human rights is no longer tied to belief in God or natural law in its classical sense. But it still seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities.

without necessarily depriving them of recognition and respect as a distinct people or continuing rights to possession of their lands.[38] How was it, then, that the law could countenance the continuance of Aboriginal law-making authority and respect their entitlement to remain in possession of their lands? The answer is found in the (natural law influenced) development of international law. The common law of the time could also countenance the same recognition, partly because of Blackstone's influence. There is in any event an interrelationship between international law and common law on the application of British laws to a colony, as the majority confirmed in *Mabo*.[39]

Natural Law Influences on the Development of International Law

International law was in its formative stages of development at the time of the acquisition of eastern Australia. Hugo Grotius (1583-1645), the person often credited with being the father of international law,[40] had published his major work *De Jeure Belli ac Pacis* (1625) less than 170 years before, and the concept of nationhood itself was barely 140 years old.[41] By modern reckoning, these are considerable periods of time, but if the slow pace of communication, travel and spread of ideas is allowed for, it constituted a relatively short period. In addition, international institutions did not exist for the codification or monitoring of international laws.

Despite the formative stage of the international law, the question of acquisition of colonial territories was a matter of legal, political and moral concern. The Spanish scholars Franscisco de Vitoria (1486-1546),

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38 Admittedly the promise of legal protection was often not provided in practice. See Neal, *Rule of Law in a Penal Colony: Law and Power in Early New South Wales* pp78-79.

39 *Mabo* at 44 per Brennan J. See also Deane and Gaudron JJ at 78 who stated that:

> the assertion by the Crown of an exercise of that prerogative to establish a new Colony by 'settlement' was an act of State whose primary operation lay not in the municipal arena but in international politics or law.

40 See Anaya, *Indigenous Peoples in International Law* (Oxford Uni Press, New York 1996) p10 and Freeman, *Lloyd's Introduction to Jurisprudence* pp99-100.

41 The modern concept of nationhood can be dated to the Peace of Westphalia Treaty 1648 which ended the Thirty Years' War in Europe. Political leaders had problems exercising powers within their territory. The Treaty established that a state has the authority to exercise power within national borders free of external interference. See Goodman, "Democracy, Sovereignty and Intervention" (1993) 9 *Am U J Int'l L & Pol'y* 27.

Francisco Suarez (1548-1617) and Bartolome de Las Casas (1474-1566), who preceded Grotius, were a major influence on the developing law. The Swiss jurist Emerich de Vattel (1714-1769) and the English academic Sir William Blackstone, whose *Commentaries on the Laws of England* included sections dealing with the acquisition of colonial territories, were also highly influential. These writers would today be described as falling within the natural law school. But it is a label that should be treated with caution because, at least as far as Vitoria and Las Casas were concerned, the natural and positive law were not considered as oppositional categories.[42] Grotius, Blackstone and others did not distinguish between the natural law and positive law, principally because they considered that the natural law had positive binding force over law makers (monarchs) and law subjects.[43] Thus the natural law was considered to be "as real and binding as positive law",[44] but simply had a different source of authority to the positive law. Thus, for example, the law rendering murder a crime would be seen to have positive force by way of statute or common law rule but gains its moral (legal) force from the natural law.[45]

Although the natural law scholars had a profound influence on the emerging international law, it would be wrong to suggest that their influence was uncontested. This can be illustrated by the debate at Vallodolid, Spain in 1550-51 which was convened by Charles V and held before a Council of fourteen jurists and theologians to resolve questions about the legal and moral validity of Spain's claim to the Americas. Arguments were put by two of Spain's leading lawyers, de Sepulveda and Las Casas. De Sepulveda argued that Spain had an unqualified right to the

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42 Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" (1990) 13 *AYBIL* 1 at 19-20.

43 Marks cautions against relying on the authority of the Spanish School to add weight to indigenous claims because its proponents did not "share the same assumptions and conceptual framework as modern scholars": as above pp16. See also Davidson, "The Rights of Indigenous Peoples in Early International Law" (1994) 5 *Canterbury LR* 391 at 392 where he says:

> The Spanish publicists were first and foremost theologians whose juridical premises were based upon a mixture of Roman law, positive domestic law and Aristotelian philosophy. The whole, however, was subordinated to the doctrine of natural law as elaborated by Saint Thomas Aquinas. The task of the early writers was therefore to declare what was just or unjust by reference to the higher principles of natural law.

44 Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" (1990) 13 *AYBIL* 1 at 20.

45 See Finnis, *Natural Law and Natural Rights* pp281-283.

territory because the Indians barely rated as human[46] and Las Casas argued strongly for the Indians.[47]

The natural law proponent Grotius is partly (and rather ironically) responsible for furthering the positivist cause. Although essentially a natural law proponent, he secularised the law, which undermined God's ultimate (natural) law-making authority. Once secularised, the positivists were able to claim that the only limits on law-making powers were those imposed by mortals. Another major international law theorist before the British acquisition of Australia, apart from Grotius, was Vattel. He published his highly influential *Droit des Gens ou Principles de la Loi naturelle appliques aux affaires des Nations et des Souverains* in 1758. According to Koskenniemi, the book was largely a natural law treatise which was "by far the most influential book on international law in the nineteenth century".[48] Vattel is often credited with formulating the culturally imperialistic distinction between "cultivated" and "uncultivated" territories.[49] He insisted that the native people in the newly claimed territories were not "conquered" as they were wandering tribes roaming over land and therefore had no legal possession of the land. This view found its way into the Australian jurisprudence prompting Blackburn J to find in *Milirripum v Nabalco* that the Aborigines had no proprietary interest in their land and thus could gain no legal remedy for its taking.[50] Interestingly Blackstone refuted Vattel's conclusions on this point. He acknowledged that Locke, Titius and Barbeyrac amongst others considered that title to land could only be gained by possession of land combined with bodily labour in the land.[51] But he believed that this amounted to a "dispute that favours too much of nice and scholastic refinement"[52] and concluded that,

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46 See Davidson, "The Rights of Indigenous Peoples in Early International Law" (1994) 5 *Canterbury LR* 391 at 413.

47 Las Casas was a cleric and publicist who had first hand experience of the life of Indians. He provided a written version of his defence at Vallodolid in *In Defence of the Indians* (1552) Poole (trans) (Northern Illinois University Press, De Kalb 1974). See also Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" (1990) 13 *AYBIL* 1 at 22-25 and Davidson, "The Rights of Indigenous Peoples in Early International Law" (1994) 5 *Canterbury LR* 391 at 410-420.

48 Koskenniemi, *International Law* (Dartmouth, Aldershot 1992) pxii.

49 See Gumbert, *Neither Justice Nor Reason* (Uni of Queensland Press, St Lucia 1984) p27.

50 (1971) 17 FLR 141 at 262-274.

51 Blackstone, *Commentaries on the Laws of England* Bk II (Clarendon Press, Oxford, 2nd ed 1767) p8.

52 As above.

> occupancy is the thing by which the title was in fact originally gained; every man seising to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.[53]

Given the swirl of influences upon the developing international law, what can be generalised about its state at the time of acquisition? The answer probably loses accuracy if it is pushed beyond a certain level of generalisation. It is clear, however, that the Spanish had closely considered the issue and developed a lode of jurisprudential and theological thought that insisted that the Indians were to be respected as a people. Vitoria refuted the proposition that Spain was entitled to take Indian lands in the Americas because the Indians were not Christians. This was the basis used for taking lands during the crusades and was often argued to be the basis for taking Indian lands.[54] Vitoria's writings predate Grotius, and therefore do not contain the modern perspectives and assumptions about sovereignty. But Grotius, in developing the concept of national sovereignty, is consistent with Vitoria about giving equal respect to Indian entitlement to their lands. He considered that European powers claiming territory on the basis that the indigenous government was different from the Roman form (a practice developed from the Romans) was impermissible.[55] Grotius also rejected the argument that title by discovery was permissible for occupied territories "even though the occupant may be wicked, may hold wrong views about God or may be dull of wit. For discovery applies to those things which belongs to no one."[56]

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53 At pp8, 9.

54 A similar basis existed in English law. See *Calvin's case* (1608) 77 ER 377 in which the court stated at 398, that:

> if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue.

Lord Mansfield in *Campbell v Hall* (1774) 98 ER 1045 appeared to disapprove of this statement holding that this was "the absurd exception as to pagans" and he observed that the principle "in all probability arose from the mad enthusiasm of the Croisades": at 1047-1048.

55 Grotius, *The Law of War and Peace* Kelsey (trans) (1925) p120, referred to by Clinebell & Thomson, "Sovereignty and Self-determination: The Rights of Native Americans under International Law" (1978) 27 *Buffalo Law Rev* 669 at 680.

56 Grotius, *The Law of War and Peace* p550. This view was consistent with the earlier papal Bull issued by Pope Paul III in 1537 which said in part that the

Vitoria concluded that the Indians "had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners".[57] One of the implications of this was that Spanish discovery did not provide Spain with jurisdiction over the Indians, but the Indians could voluntarily subject themselves to Spanish jurisdiction and share the spoils of any wars with other Indian tribes.[58] He also rejected the proposition that Spanish jurisdiction and possessory title to America was gained by "right of discovery".[59] He argued that discovery only applied to deserted lands and that America was not without owners.[60] But he did provide some grounds for Spanish occupation. The Spanish had the right to peaceful trade and commerce with the Indians, which they could forcibly protect, and to propagate Christianity. They could also protect converts to Christianity and the innocent victims of breaches of the natural law, including for example the victims of ritual sacrifice. Vitoria's principles are, therefore, premised on the assumption that Indian laws and entitlements to land continue after colonisation and to a greater or lesser extent co-exist with those of the coloniser.

An Analysis of Blackstone's Influence

The Spanish jurisprudence and the writings of Grotius obviously informed Blackstone's writings. His *Commentaries* proved popular when first published in 1765 and would have been known to the British authorities

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Indians "are by no means to be deprived of their liberty or the possession of their property". See Gibson, *The Spanish Tradition in America* (Harper & Row, New York 1968) p105. This edict was more honoured by its breach by the Spanish Catholic colonisers in the Americas. This may in part have been due to the highly discredited state of the Vatican at that time. Pope Paul III, formerly Cardinal Alessandro Farnese, the brother of Pope Alexander VI's (the Borgia Pope) mistress, attempted reformation of the church after the scandalous excesses of the church which had endured for centuries. Both the papacy and the clergy were held in extremely low regard even by members of the church. The Lutheran Protestant movement began their break from the Catholic Church some fifteen years before the Bull was issued. See Tuchman, *The March of Folly: From Troy to Vietnam* (Joseph, London 1984) pp59-154.

57 Vitoria, *De Indis et de Ivre Belli Relectiones* Nys (ed), Bate (trans) in Scott *The Classics of International Law* (Oceana, New York 1964) p120.

58 See Marks, "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" (1990) 13 *AYBIL* 1 at 43-46.

59 Vitoria, *De Indis et de Jure Belli Reflectiones* (1st ed 1557, 1696) reprinted in Scott (ed), *Classics of International Law* Bate (trans) p139. See also Marks, as above, at 41.

60 See Marks, as above at 41

when writing the instructions to Cook and Phillip.[61] The *Commentaries* were particularly popular in North America despite his views on natural rights being castigated by Bentham as "nonsense upon stilts".[62] Blackstone has, nevertheless, often been quoted in the case law and has played a major role in influencing the common law regarding the acquisition of colonial territories.

That is not to say that his application of natural law principles to the law of colonial acquisition was unproblematic. In fact his analysis was contradictory. In Book II of his *Commentaries* he infers that the seising of peopled lands and driving out the natives is unlawful,[63] but a few pages earlier he refers to biblical authority as justification for colonising peopled territories through conquest.[64] His justification for conquest does not square with his principles regarding the acquisition of property which were based on the natural law. In Book II he stated that:

> Property, both in lands and moveables, being thus originally acquired by the first taker, which amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it.[65]

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61 Blackstone, *Commentaries on the Laws of England.* The first volume of the first edition of the *Commentaries* was published in 1765 and ultimately attempted to summarise the laws of England in four volumes.

62 Quoted by Parkinson, *Tradition and Change in Australian Law* (Law Book Co, Sydney 1994) p54.

63 He observed that the territory was acquired either by treaties or by "conquest and driving out the natives (with what natural justice I shall not at present enquire)": Blackstone, *Commentaries on the Laws of England* Bk I (Clarendon Press, Oxford, 2nd ed 1766) p107. See also Bk II p7 where he made the following concession in the section dealing with the rights of things:

> But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

64 At pp5-6.

65 At p9.

This is a classic statement of possessory rights which has a long natural law heritage, and was supported, for instance, by the Roman jurists.[66] They regarded continuous use and occupation as constituting possession under the natural law which was immune from challenge.[67] Feudalism departed from the principle by imposing the royal grant, which superseded simple possession as the root of title in many jurisdictions.[68] However, the common law, although ultimately grounded in feudal tenures, maintained consistency with the natural law principle by retaining possession as the essential basis for the proof of ownership.[69]

Blackstone added, consistent with natural law principles, that when property was obtained through possession it could only be transferred with the possessor's consent and legal transfer.[70] Any other system of laws, he claimed, would be "productive of endless disturbances" and would be contrary to the "universal law of almost every nation (which is a kind of secondary law of nature)".[71]

How could it be that the law of nature prohibited the violent and forceful acquisition of domestic property when it condoned the forceful acquisition of overseas property? Blackstone recognised that the overseas possessions in America were "already peopled" and the people were "innocent and defenceless".[72] Their difference in "language, in religion, in customs, in government or in colour" gave no justification for the use of force.[73] So what justification was there for the forceful taking of their land? In providing a rationale, Blackstone at first attempted to remain faithful to the natural law by confining his discussion to unpeopled lands:

> Upon the same principle was founded the right of migration, or sending colonies to find out new habitations; when the mother-country was overcharged with inhabitants; which was practised as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and

66 Bennett, "Aboriginal Title in the Common Law: A Stony Path through Feudal Doctrine" (1978) 27 *Buffalo Law Rev* 617 at 619.
67 As above.
68 As above.
69 Bradbrook, MacCallum & Moore, *Australian Real Property Law* (Law Book Co, Sydney 1991) pp48-49.
70 Blackstone, *Commentaries on the Laws of England* Bk II pp9-11.
71 Blackstone, *Commentaries on the Laws of England* Bk II p10.
72 Blackstone, *Commentaries on the Laws of England* Bk II p7.
73 To this extent Blackstone was consistent with Grotius.

> cultivation of *desart uninhabited countries*, it kept strictly within the limits of the law of nature.[74]

The justification for taking peopled lands required Blackstone to depart from the natural law and make positivist assertions. He justified the taking on the basis that the right is "founded upon the law of nature, *or at least upon that of nations*".[75] He also referred, as we have seen, to biblical authority as a basis for entitling European powers to acquire territory, which in the case of peopled lands would be by conquest.[76]

Blackstone's account of the law, for all its contradictory appeals to natural law and biblical authority, does at least seek moral foundations, and to that extent allows recognition of the possessory titles of indigenous people and legal recognition of their distinctive character as a people. It enables legal debate about the property and other entitlements of the indigenous people, which offers greater potential for the just development of the law than does simply disregarding their moral and legal claim. It took natural law influences, for example, to lead the United States Supreme Court to recognise in 1831 the American Indians as "domestic dependent nations".[77]

Natural Law Influences during Early Australian Colonisation

The early colonial law and administrative practice regarding Australian Aborigines occasionally recognised and debated the entitlements of Aborigines to live by their own laws, subject to the English law. The attention given to the legal status of Aboriginal laws was sporadic, but with regard to their interests in land it was non-existent. This latter point was noted by Deane and Gaudron JJ in *Mabo* who speculated that:

> the most likely explanation of the absence of specific reference to native interests in land is that it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any existing interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which

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74 Blackstone, *Commentaries on the Laws of England* Bk II p7. Emphasis added.
75 Blackstone, *Commentaries on the Laws of England* Bk I pp106-107. Emphasis added.
76 Blackstone, *Commentaries on the Laws of England* Bk II pp5-6.
77 *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1 at 17.

> did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals.[78]

The British seemed more focused on establishing a penal outpost to deal with the surging population of incarcerated Britons than on establishing a colony that could grow to a nation. Consequently the coherent application of legal rules and principles to the colony seemed to be considered unnecessary or inappropriate. As Neal observes:

> New South Wales was a peculiar society. As the nineteenth-century colonial officer and scholar Merivale wrote in 1861, '[t]he penal colonies [ie New South Wales and Tasmania] provide the first instance (a very necessary one, no doubt) of settlements founded by Englishmen without any constitution whatsoever ... This is a remarkable novelty in British policy' ... In New South Wales there was a governor, but no legislature, no trial by jury and a bastardised court structure. The governor had more power than any other colonial governor, and more power in New South Wales than any king in England since at least the time of James I. This was a framework consistent with England's major purpose for the colony, the punishment of prisoners.[79]

Despite the cursory attention given to the legal status of Aborigines, early administrative practice does indicate a concern to protect them and respect their prior rights of occupancy. Governor Phillip's instructions on establishing the first British colony in Australian are of interest on this point:

> You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all *our subjects* to live in amity and kindness with *them*. And if any of *our subjects* shall wantonly destroy *them*, or give them any unnecessary

78 *Mabo* at 98.

79 Neal, *Rule of Law in a Penal Colony: Law and Power in Early New South Wales* p32. See also *Mabo* at 99 per Deane and Gaudron JJ where they said:

> In any event, while those subsequent acts [of the Crown] were increasingly inconsistent with the existence of any valid Aboriginal claims to land within the Colony, they cannot properly be seen as evincing an intention to extinguish any Aboriginal interest of any kind presumptively recognised by the common law.

> interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.[80]

Rath J noted in *R v Wedge*[81] the distinction made between "our subjects" and "the natives", but regarded it as insignificant because "there may well have been both uncertainty and ambivalence in the official attitude" towards the Aborigines.[82] He asserted, nonetheless, that "in law the 'natives' were in the King's territory, and under his sovereignty".[83] But dismissing the plain words of the instructions as merely resulting from uncertainty and ambivalence is unconvincing given the substantial experience of the British in colonisation and dealing with native people. In any event, even if the Aborigines were subject to the sovereignty of the King, that still begs the question as to its legal consequence for Aboriginal people.

British authorities intended providing Aborigines with the protection of British law.[84] That is, they were to be availed of access to British justice if they were injured by the settlers - this was so in theory, but often not in practice.[85] If an Aborigine offended the British law, for example by harming a settler, the Aborigine would be prosecuted under British law and if a settler harmed an Aborigine, he or she would be prosecuted.[86] It

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80 Governor Phillip's *Instructions* 25 April, 1787 reprinted in *Historical Records of Australia* Series 1, Vol 1 (Library Committee of Commonwealth Parliament, Sydney 1914) pp13-14 cited in *R v Wedge* (1976) 1 NSWLR 581 at 585 per Rath J. Emphasis added.

81 (1976) 1 NSWLR 581.

82 At 585.

83 As above.

84 See Hughes, *The Fatal Shore* (Collins Harvill, London 1987) p273 where he said the

> Royal Instructions to every governor of Australia, from Arthur Phillip in 1788 to Thomas Brisbane in 1822, always repeated the same themes. The Aborigines must not be molested. Anyone who 'wontonly' killed them, or gave them 'any necessary interruption in the exercise of their several occupations', must be punished.

85 Castles, *An Australian Legal History* pp520-521.

86 British administrative practice is consistent with the view that British laws operated to protect Aborigines and regulate their conduct if they interfered with the settlers without obliterating Aboriginal laws and customs. An example is the following civil instructions given by Colonial Secretary Lord Glenelg to William Lonsdale, the Police Magistrate for the Port Phillip District, in September 1836:

> Should the conduct of the natives be violent or dishonest, you will endeavour to restrain them by the gentlest means, informing them that

is sometimes assumed that providing Aborigines the protection of the English law, and punishing them for breaching it, of itself denied them the continuing operation of their own laws. Certainly under a positivist analysis this would be so, unless the sovereign (the Imperial Parliament) expressly permitted the operation of indigenous laws. But if we assume that positivism had not pervaded the legal discourse during the first few decades of colonisation, it is possible to see that providing them the protection of the English law did not deny them the continued operation of Aboriginal laws *inter se*. This is confirmed by an 1829 case in which an Aborigine killed another Aborigine near the Domain in Sydney. The New South Wales Supreme Court held that applying English law would be unjust.[87] In 1841 Willis J formed the opinion in *R v Bon Jon*[88] that Aborigines were not British subjects in the unqualified condition, so that disputes between them were not to be dealt with by the British courts.[89] Again the case involved an Aborigine charged with killing another Aborigine.

The *Bon Jon* and Domain case decisions were made when there was vigorous debate in the colony about whether colonial laws applied to Aborigines. Even the 1836 case of *R v Murrell,*[90] which is cited as authority for the non-recognition of Aboriginal laws, does not assert that the British claim of sovereignty of itself invalidated Aboriginal laws. The court did rule that the Aborigines had no sovereignty, but it claimed this

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> they must consider themselves subject to the Laws of England, *which being put in force for their protection*, must equally operate for their restraint or punishment *if they offend the whites.*

Historical Records of Victoria, Foundation series Vol 1 (Vic Govt Printing Office, Melbourne 1981)p53. Emphasis added.

87 See Castles, *An Australian Legal History* p526. He also refers to a case in 1826 in which the Supreme Court ruled that an Aborigine charged with attempted murder could not be tried under English law: p526. See also *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5 where it was held that there could be special circumstances when local conditions in a colony seemed to dictate that variations should be made in the normally accepted pattern of applying English law to a colony.

88 Supreme Court of New South Wales, per Willis J, *Port Phillip Gazette*, 18 September 1841.

89 Note the comments of Chief Justice Pedder in Van Dieman's Land who discussed in detail whether the Aborigines were to be treated as British felons or warring enemies. He apparently favoured the latter view: Castles, *An Australian Legal History* p520. See also Reynolds, *Frontier* p136 where he quotes Governor King's memo to his successor Bligh that King had "ever considered them [the Aborigines] the real proprietors of the soil".

90 (1836) 1 Legge 72.

was because the Aborigines "were not in such a position with regard to strength as to be considered free and independent tribes".[91] Harring notes that the language in this context

> does not prove that Aborigines are entitled to recognition of their sovereignty through a reinterpretation of the *Murrell* case. Rather, it proves that the issue of Aboriginal sovereignty and the recognition of Aboriginal law were a part of the discourse of Aboriginal status of 1830s and 1840s Australia.[92]

This discourse had natural law foundations which were extinguished by the rise of positive law influences.

The early debates also involved questioning whether English law applied to Aborigines outside the effective limits of a colony. Not that the debates were necessarily motivated by a concern for the interests of the Aborigines. For example, after the Coorong massacre of 1840 in which Aborigines killed 26 survivors of a shipwreck in South Australia, Cooper J advised that English law could not be applied to the Aborigines because they were on land that had not been settled and had never submitted themselves to English dominion.[93] Consequently the Commissioner of Police was directed to bring summary justice upon the Aborigines. After a rudimentary trial two Aborigines were executed.[94] Officials in Britain understandably objected to this because it subjected the Aborigines to a legal process foreign to their own which failed to follow its own requirements for due process.[95]

What is clear then is that it was intended from the start that British laws would apply for the protection of Aborigines and to punish them if they offended non-Aborigines. But there is no clear evidence in the first few decades of settlement that the British considered that Aboriginal laws were nullified by the claim of sovereignty. Freed of the notion that the British claim of sovereignty itself extinguished Aboriginal laws, it is possible to perceive the principle that "[a]t the moment of its settlement the colonists

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91 At 73.
92 Harring, "The Killing Time: A History of Aboriginal Resistance in Colonial Australia" (1994) 26 *Ottawa LR* 385 at 403.
93 Castles, *An Australian Legal History* pp524-525.
94 At p525.
95 As above.

brought the common law of England with them"[96] as a flexible principle for applying English law for the benefit and protection of the settlers, and not as one that necessarily implies that the laws of the indigenous people were nullified by the mere fact of its introduction to a colony.[97]

The Rise of the Positivist Influence

Within a few decades of British acquisition, the natural law's influence waned as Anglo-Australian jurisprudence became entranced by the positive law and its claim to dispassionate scientism and objectivity. David Hume (1711-1776) led an early attack on natural law by claiming that a theory of moral obligation could not be derived from empirical fact. Jeremy Bentham (1748-1832) followed up by castigating the English common law system for its lack of a coherent system, which he argued invited judicial arbitrariness leading to uncertainty and insecurity.[98] He advocated the science of legislation which would involve the creation of a complete legal code that made the law clear, explicit and predictable. Austin agreed that the law required scientific rigour. He separated law from morality in a project designed to reject the mystic qualities of the law to ensure the creation and enforcement of objectively verifiable laws.[99] The consequence of this was to denude the law in Australia of a moral language for more than a century. Removing ethical considerations from

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96 Per Stephen CJ in *Attorney-General v Brown* (1847) 1 Legge 312 at 318; McNeil, *Common Law Aboriginal Title* pp114-115. See also Blackstone, *Commentaries on the Laws of England* Bk I (Clarendon Press, Oxford, 2nd ed 1766) pp106-108 where he said at 107:

> For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of the infant colony.

97 For a Canadian perspective on this issue, see *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 568 per Wallace JA where he said that:

> the acquisition of sovereignty by the British Crown did not, in itself, extinguish the right of the aboriginal people to continue their traditional customs, practices and use of the tribal land in a manner integral to that indigenous way of life. Rather, it recognized the historical aboriginal presence and title and served to protect aboriginal customs and practices and the traditional relationship the aboriginal people had with the lands they occupied and used.

98 Rumble, "John Austin, Judicial Legislation and Legal Positivism" (1977) 13 *UWALR* 77 at 96-97. See also Parkinson, *Tradition and Change in Australian Law* pp52-53.

99 See generally Anaya, *Indigenous Peoples in International Law* pp19-23.

the law may not, however, have been Austin's ultimate intention. Harris notes that it was "intrinsic to Austin's design to show the relation of positive law to definite moral norms", but he lacked the means to achieve it.[100]

The common law did, however, benefit from the project to have it systemised. It was due in part to the influences of Bentham and Austin that legal academics attempted during the nineteenth century to order the law along coherent lines through text books on contract, trusts and so on.[101] The text books offered not only a means for providing a degree of coherence to the law, they also provided an effective means for spreading the positivist gospel, thereby profoundly affecting the development of the common law in Australia and other places until present times. Austin's influence is not without irony. By 1832 he had produced a penetrating analysis of "judiciary law"[102] which still has a profound impact on the Australian legal system, yet his lectures at University College, London, where he held the Chair in Jurisprudence from 1827-1832, were so impenetrable that he was left to lecture to an empty room.[103] This was a matter of financial concern to him because he was paid on the basis of student numbers.

Austin's separation of legal and moral judgment had a significant impact on the jurisprudence which related to the law affecting Australia's indigenous people. That is not to say that the law prior to Austin was necessarily beneficial to indigenous interests, but at least it offered the basis for challenging the devastating impact of "protectionist" policies and laws from around the mid-nineteenth to the mid-twentieth centuries. The positive law offered an intellectual basis, or justification, for the failure to concern itself with the injustices perpetrated on the indigenous people. In *Attorney-General v Brown,* [104]for example, the court, when discussing whether the British claim of sovereignty provided the Crown with possessory title simply ignored the possibility of Aboriginal possessory title. It flatly asserted that "there is no *other* proprietor" of the Crown

100 Harris, "Review of Two Books on John (and Sarah) Austin" (1989) 48 *Cambridge LJ* 340 at 342.

101 Parkinson, *Tradition and Change in Australian Law* pp209-210.

102 Rumble, "John Austin, Judicial Legislation and Legal Positivism" (1977) 13 *UWALR* 77 at 78.

103 Harris, "Review of Two Books on John (and Sarah) Austin" (1989) 48 *Cambridge LJ* 340 at 340.

104 (1847) 2 SCR (NSW) - Appendix at 30.

"waste lands".[105] Indeed, it was made clear that any moral questions about the acquisition of colonies were for the Crown alone:

> But, in a newly discovered country, settled by British subjects, the occupancy of the Crown, with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation; the 'moral personality' by whom the nation acts, and in whom for such purposes its power resides.[106]

Limiting the capacity of the courts to question the moral (and hence legal) validity of the forceful taking of indigenous lands and imposing upon them a foreign legal system without recognising the validity of their systems of laws well suited the squatters and land claimants. The natural law would have been considered by them to be a nagging inconvenience. Respecting the rights of indigenous landholders retarded impulses quickened by avarice. The concerns of the courts in *Bon Jon* and the Domain case and Alfred Stephen, the defence counsel in *Murrell* who attacked the *terra nullius* theory, were rarely heard in courtrooms after 1841. The law proceeded to dismiss any notion that indigenous laws had survived colonisation or that indigenous people had any legitimate claim to their lands. The fact that the rule of law had been replaced with the rule of force was either unnoticed or by inference denied by the courts. After all, if Aborigines had no recognisable laws or rights to land, how could it be said they were forcefully deprived of what they did not own. This neat logic found its way much later into cases like *Milirripum v Nabalco*[107] and *Coe v The Commonwealth.*[108]

The 1847 decision of *Attorney-General v Brown* was followed by *Cooper v Stuart*,[109] a case dealing with the rule against perpetuities, which held that Australia was an uninhabited country before settlement and therefore all the laws of England relevant to the colony were in force. The consequence of this for Aborigines was presumably considered irrelevant. In *R v Cobby*[110] the question of the legality of Aboriginal marriages was considered. The New South Wales Court of Appeal ruled that:

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105 At 35.
106 As above.
107 (1971) 17 FLR 141.
108 (1979) 53 AJLR 403.
109 (1889) 10 NSWLR 172 (Cases in Equity).
110 (1883) 4 NSWLR 355.

> We may recognise a marriage in a civilized country, but we can hardly do the same in the case of the marriages of these aborigines, who have no laws of which we can take cognizance.[111]

A refreshing exception to these cases is *ex parte West*[112] which dealt with a writ of habeas corpus requiring a squatter to produce in court an Aboriginal boy, Tommy, who was stolen from his tribe. The judge charged that

> It was a moral wrong - an outrage - an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation ... These people were British subjects, and if held responsible for crime on the one hand, should be protected from outrage on the other.[113]

Positivist Influences on the Concept of Sovereignty

International law's capacity to recognise the indigenous people as having prior and continuing rights to their land was, as we have seen, not accepted by the positivist influenced common law. The reason for this relates to positivist conceptions of law-making authority. The case for recognition of indigenous laws faces two serious difficulties under the positivist analysis. First, positive laws derive from a sovereign. According to Austin, a sovereign has the following characteristic:

> The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons.[114]

Because indigenous people in Australia form a minority they fall outside of the bulk of society and therefore their habits of obedience are irrelevant in determining the sovereign.

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111 At 356.
112 (1861) 2 Legge 1475.
113 At 1476.
114 Austin, *The Province of Jurisprudence Determined* Hart (ed) pp193-194. Emphasis original.

The second difficulty, under Austinian analysis, is that the indigenous people were categorised as living in "a state of nature" and as such "cannot impose the law in the character of sovereign, and cannot impose the law in pursuance of a legal right".[115] Consequently, as their "laws" lack "a sovereign author proximate or remote, it is not a positive law but a rule of positive morality".[116]

This line of analysis has proven remarkably resilient over time, as can be seen from Gibbs CJ's comments in the 1979 decision of *Coe v Commonwealth* where he concluded that "there is no aboriginal nation, if by that expression is meant a people organized as a separate State or exercising *any* degree of sovereignty".[117] This conclusion was drawn, presumably, from his analysis earlier in the judgment which suggested that Aborigines had failed the European standard of civilisation or having settled laws:

> For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony established by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class.[118]

Judicial intolerance of any form of indigenous "sovereignty" is also evident in the High Court cases of *Coe v Commonwealth (No 2)*[119] and *Walker v New South Wales,*[120] although it should be noted that both these cases were heard by a single judge dealing with procedural matters. According to Mason CJ in the former:

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115 At p139.

116 As above.

117 (1979) 53 ALJR 403 at 409. Emphasis added.

118 At 408. Note Murphy J contra in the same case at 412:

> Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully; they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.

119 (1993) 68 ALJR 110.

120 (1994) 69 ALJR 111.

> *Mabo [No 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced with the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.[121]

He repeated his view in *Walker.*[122] The apparent consequence of Mason CJ's assertions is that sovereignty denies the possibility of any form of Aboriginal government other than that provided for by statute. The clear implication is that parliamentary sovereignty, consistent with the positivist analysis, is absolute and intolerant of non-parliamentary forms of government except that provided for by statute, for example local government. He refuted any notion of relative sovereignty including a limited kind of sovereignty embraced by the notion that Aborigines are entitled to some form of self-government. The question these rulings raise is whether it is possible for Australian jurisprudence, freed of positivist constraints, to recognise forms of relative sovereignty, and, more particularly, relative forms which accommodate forms of indigenous self-government? In answering this we need to consider the (positivist) logic of singular or absolute sovereignty.

Under the standard positivist analysis laws derive from a sovereign with absolute law-making authority. Consistent with this analysis, the "Crown" in Australia is regarded as a single, but somehow internally divisible, entity. Thus the Crown can be referred to as the Crown in the right of the Commonwealth or in the right of Western Australia so as to maintain the fiction of a singular sovereign entity. A further proposition is that parliament is the supreme law-making authority, and as such cannot limit its future law-making capacity.[123] This latter proposition is, however,

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121 (1993) 68 ALJR 110 at 115.

122 (1994) 69 ALJR 111 at 112.

123 See Austin, *The Province of Jurisprudence Determined* p253 where he said "the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation ... Supreme power limited by positive law is a flat contradiction in terms." Emphasis original.

ameliorated by the debatable proposition that parliament can entrench some provisions in legislation. The theory does, however, recognise that parliament is not the only law making authority as the courts can make laws, subject to parliamentary override, and bodies granted law-making authority by parliament (for example, local government) can make laws.

There are a number of problems with these simple propositions. The first is that the singular omnipotent Crown has a surreal quality that fails to adequately explain Australia's existence as an independent nation. As a theory it is contradictory because on the one hand parliament is omnipotent and thus has unlimited law-making authority. But on the other hand proponents of the theory are forced to concede that it is constrained by certain conventions and political forces. This concession is ultimately fatal to the claim of omnipotence. The contradiction can be illustrated by the following example. Under the theory, the State and Federal parliaments have gained their law-making authority from the British "Crown" - which is the Queen and her (Imperial) Parliament. The Queen, by convention, will always act on the advice of her Ministers who in turn are answerable to Parliament. So, effectively, the grant of law-making authority derives from the Imperial Parliament, which cannot bind its future law making authority. Thus, the law-making authority granted to the State and Federal governments can be revoked, despite the passage of the *Australia Act* 1986 (Cth). So legally Australia is not (and presumably can never be, without a revolution) an independent nation, because it is subject to the superior law-making body - the British Parliament. The political fact that Australia is independent does not make the legal claim that it is not any less plausible.

It might be argued that since the *Australia Act*, Australian law-making authority is no longer sourced in Britain. Against this it may be noted that the High Court unanimously held as recently as 1988 (and after the *Australia Act*) that "within the limits of the grant [from the Imperial Parliament], a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself".[124] That is, it is expressly acknowledged that the law-making authority of Australian parliaments derives from the Imperial Parliament. This theoretical position, therefore, fails to recognise that Australia is an independent nation that does not rely on the permission

124 *Union Steamship v King* (1988) 166 CLR 1 at 10. But see Brennan J in *Mabo* who said at 29 that "since the *Australia Act* 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control". This, of course, is a more realistic statement of the law.

or good will of the Imperial Parliament to continue as such. Thus the omnipotent Imperial Parliament which has granted law-making power to the Australian parliaments is not really omnipotent because it cannot revoke its grant of power. But the theory consciously refuses to acknowledge this by failing to translate any political, moral and other constraints on the plenary law-making power of Parliament into a legal constraint.

The absolute sovereignty theory also maintains that Parliament's power is plenary,[125] meaning "full; complete; entire; absolute; unqualified".[126] Again, this proposition recognises no moral limits on Parliament's power. The "doctrine of the omnipotence of Parliament should be recognised for what it was: the child of a marriage of convenience between parliamentary self-aggrandisement and imperial ambition, sanctified by legal positivism".[127]

The implausibility of the notion of absolute parliamentary sovereignty is heightened when considered in the context of national sovereignty. It is tempting to believe, on a positivist analysis, that national sovereignty is absolute. The reality is that, under international law, nations governed by a single parliament, let alone federations, have only relative sovereignty. The idea of national sovereignty developed in the Middle Ages to oppose the claims for temporal power by the Emperors of the Holy Roman Empire which were resented by local rulers.[128] Local rulers asserted absolute dominion over their territories, recognising no other power as affecting their right to rule.[129] However when a ruler entered into relations with other rulers, he or she agreed to be governed by mutually agreed rules regulating the relationship. As Seidl-Hohenveldern reasons:

> If a State was to be allowed to disregard these rules of international law, in view of its claim to be the master of its own destiny, there would no longer be any reliable basis for

125 *Union Steamship v King* (1988) 166 CLR 1 at 10.

126 *Concise Macquarie Dictionary* (Doubleday, Sydney 1986).

127 Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 *Can Bar Rev* 261 at 278.

128 Historically the meaning of sovereignty has oscillated: see Steinberger, "Sovereignty" in Bernhardt (ed), *Max Planck Institute for Comparative Public Law and International Law Encyclopedia for Public International Law* Vol 10 (North Holland, Amsterdam 1987) p408.

129 Seidl-Hohenveldern, *International Economic Law* (Martinus Nijhoff Publishers, Dordrecht 1989) p21.

> the inter-State relations required by the fact of the interdependence of the several sovereign States.[130]

Just as a nation is not the absolute master of its destiny in the international community, an Australian parliament is not the absolute master of its destiny in the domestic community.

The relative nature of sovereignty provides it the capacity to accommodate and co-exist with indigenous laws and law making. Thus, if sovereignty is not perceived as absolute, it loses its 'all or nothing' character.[131] That is, it becomes possible to accommodate some relative form of indigenous sovereignty without damaging the existing legal and constitutional system. Putting the same proposition more directly, it is possible for constitutional space to exist to enable the operation of co-existent indigenous laws and law making powers.[132]

The idea of relative sovereignty placing restraints on absolute parliamentary law-making powers to enable the operation of indigenous law-making authority is not a novel common law concept. The Canadian Supreme Court observed in *R v Sparrow*[133] that aboriginal rights are "not absolute"[134] and are to be considered in the context of a "society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated".[135] The Court also acknowledged that just as aboriginal rights are not absolute, the government's obligation to aboriginals imports "some restraint on the exercise of sovereign power".[136]

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130 At p22.

131 See *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 546 per Macfarlane JA where he said:

> During the course of these proceedings it became apparent that there are two schools of thought. The first is an "all or nothing approach", which says that the Indian nations were here first, that they have exclusive ownership and control of all the land and resources and may deal with them as they see fit. The second is a co-existence approach, which says that the Indian interest and other interests can co-exist to a large extent, and that consultation and reconciliation is the process by which the Indian culture can be preserved and by which other Canadians may be assured that their interests, developed over 125 years of nationhood, can also be respected ... I favour the second approach.

132 McNeil, "Envisaging Constitutional Space for Aboriginal Governments" 19 *Queen's LJ* 95.

133 (1990) 70 DLR (4th) 385.

134 At 409.

135 At 410.

136 At 409.

The positivist orthodoxy that sovereignty is absolute and therefore inimical to any form of indigenous law-making authority is, it is argued, no longer sustainable. The positivist claim admits to no legal limitation on the exercise of sovereign power. Thus, in theory at least, this permits the exercise of arbitrary and immoral laws. This contention contrasts with the international community's view, expressed in international conventions and other instruments, that law-making power is subject to moral, and consequently legal, limits.

Positivist and Natural Law Influences in *Mabo*

The majority in *Mabo* held that indigenous peoples' title to land ("native title") survived the British claim to Australian territory. The approach and assumptions made by the majority in recognising native title was consistent with natural law principles. That is, it was argued or assumed that indigenous people were entitled to respect as a people, and that they were not to be taken to be inferior in character or race. Consequently their prior and continued occupation of their land was recognisable by the common law as a form of land title. This approach, although not articulated in this way by the Court, was consistent with the universal natural law principle articulated by Blackstone that those first in possession of chattels or land are entitled to maintain peaceful possession of their chattels or land until they voluntarily transfer or surrender it to another party. The majority reasoning, however, became confused and inconsistent on the issue of extinguishment, as will be shown below.

The influence of natural law principles, by way of international law, is most evident in the judgment of Brennan J:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[137]

He added that:

> no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human

137 *Mabo* at 42.

> rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[138]

Deane and Gaudron JJ applied a moral perspective to the law regarding the acquisition of Australian territory when they observed that:

> The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[139]

Brennan J specifically overruled the reasoning of earlier cases, including *Cooper v Stuart*, which had effectively refuted the existence of native title on the basis that indigenous people had either an "absence of law" or "barbarian" laws.[140] Thus he refused to accept the reasoning of prior cases that relied on the belief that indigenous people were inferior. More specifically he rejected those cases because:

> The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aborigines whose claims were "utterly disregarded" by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.[141]

Brennan J's rejection of a theory which assumes the indigenous people to be inferior marks an outcome of the debate at Vallodolid, Spain in 1550-

138 At 30.
139 At 109.
140 As above at 39.
141 At 40.

51 which favours the arguments of Las Casas, as opposed to those of de Sepulveda: a case of justice delayed and denied for over four centuries!

In terms of the legal outcome of those sentiments, the majority found that native title survived British acquisition. The Court also found, subject to the *Racial Discrimination Act* 1975 (Cth), that the Crown can extinguish title. Brennan J begins his analysis of the extinguishment of native title with the broad statement that:

> Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power. The sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants but, in the case of common law countries, the courts cannot review the merits, as distinct from the legality, of the exercise of sovereign power.[142]

The statement that the common law courts cannot review the merits (read in this context "morality") of the exercise of power as distinct from the legality, is one positivists would approve.[143] The majority judgments all agree that the Federal Government validly enacted the *Racial Discrimination Act* and that it prevents (and has prevented since its enactment in 1975) State and Territory governments from extinguishing native title in a racially discriminatory manner.

The majority reasoning about the power to extinguish native title in the absence of the *Racial Discrimination Act* is, however, confused and contradictory. The majority all agree that the "Crown" has the power to extinguish the title, and that the common law presumes the legislature does not intend to extinguish the title unless it exhibits a clear and plain intention to do so. The majority differ on the rationale and implications of this presumption. Brennan J states that the common law presumption in

142 At 63.

143 Brennan J does qualify this broad statement in the following way at 63:

> However, under the constitutional law of this country, the legality (and hence the validity) of an exercise of a sovereign power depends on the authority vested in the organ of government purporting to exercise it: municipal constitutional law determines the scope of authority to exercise a sovereign power over matters governed by municipal law, including rights and interests in land.

relation to Crown grants is that it will only be rebutted by an express *statutory* intention to impair the grant. He then proceeds to argue that, as a native title is not a Crown grant, the usual presumption does not apply.[144] He adds, however, that a separate presumption applies for native title because of the "seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land".[145] The presumption requires a clear and plain intention to extinguish the native interest by "the Legislature or by the Executive".[146] On this reasoning the presumption favouring Crown grants is stronger than the presumption for native title. For Crown grants it requires a clear and plain intention by statute only to extinguish the granted title, but for native title it requires a clear and plain intention by *either* a statute or an administrative instrument.[147] The hidden assumption is that native title is more vulnerable to extinguishment because it is inferior to the Crown grant.

Deane and Gaudron JJ also apply an analysis which suggests native title is inferior to the non-indigenous fee simple title. Their analysis begins with a statement of the common law, as follows:

> The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation. Thus, general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title.[148]

They do not distinguish between native title holders and other title holders for the application of the presumption, suggesting that clear and plain administrative instruments designed to extinguish native title are insufficient to do so, unless supported by clear and plain legislation. But they then proceed to describe native title as "personal rights susceptible to

144 At 64.
145 As above.
146 As above.
147 For a comprehensive analysis of the power of the executive to extinguish and a critique of the judgments in *Mabo* on this point, see McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Aust Indig Law Report* 181.
148 *Mabo* at 111.

extinguishment by inconsistent grant by the Crown".[149] It is unclear whether the inconsistent grant must derive from clear and plain legislation authorising the grant of title which will extinguish native title, but they mention the "vulnerability" of native title to extinguishment, suggesting that it is weaker than, for example, fee simple title: "The vulnerability [of native title] persists to the extent that it flows from the nature of the rights as personal."[150] Again the effect of the analysis is to treat native title as different and effectively weaker than the fee simple. This is not an inevitable way of analysing the law regarding extinguishment. There is US authority which describes native title as being by analogy as "sacred" as the fee simple title.[151]

Natural law principles, then, inform and influence the majority judgments in finding that the British acquisition of Australian territory was not of itself sufficient to extinguish native title, and that the common law had the capacity to recognise the traditional interests in land of the indigenous people. This is essentially because of two natural law assumptions: the first, that native people are to be respected as a people and second, their right of prior possession and occupation provides them a prior right to their land and possessions. The application of these natural law assumptions, however, is not clearly and consistently applied by Brennan, Deane and Gaudron JJ in their analysis of extinguishment. Their analysis effectively treats native title as being inferior to non-indigenous title. The reason for this, when there was common law authority available which would have allowed for equal treatment, is unclear.

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149 At 112.

150 As above.

151 See *Mitchel v US* (1835) 9 US (Pet) 711 at 746 per Baldwin J who said "it is enough to consider it as a settled principle that their [the Indians'] right of occupancy is considered as sacred as the fee-simple of the whites". See also *US v Santa Fe Railroad* (1941) 314 US 339 at 345, *US v Alcea Band of Tillamooks* (1946) 329 US 40 at 45. See also Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen*" (1985) 30 *McGill LJ* 559 at 575 where he says that "Both by practice and by its legislation ... the British Crown recognized Indian title was a property interest in land identical to a fee simple in all respects save that, by virtue of the doctrine of Crown pre-emption, such title could only be alienated to the Crown. See also Cumming & Mickenberg, *Native Rights in Canada* (Indian Eskimo Assn of Canada, Toronto, 2nd ed 1972) p41 where it is said that "Indian title should be viewed as having all the incidents of a fee simple estate". But see contra Lysyk who states in "The Indian Title Question in Canada" (1973) 51 *Can Bar Rev* 450 at 473 that the US decisions "pertain to the policy of recognizing and vindicating the Indian title, not to its content".