THE HIGH COURT OF AUSTRALIA RECOGNISES NATIVE TITLE

THE MABO DECISION: RESTATING COMMON LAW

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"This country was not originally desert ... but was a country having a population which had manners and customs of their own, and we have come to reside among them": per counsel for the defendant in *R* v *Murrell* (1836)[1]

"It stands not with his [the King's] honour to grant that which belongs to another": Coke's rule in *Bewley's Case* (1612) as cited in *Case of Carlisle* (1647)[2]

"The honour of the Crown is at stake in dealings with aboriginal peoples": per Dickson CJC and La Forest J in *R* v *Sparrow* (1990)[3]

I OVERTURNING PRIOR LAW

1. Introduction

In 1071, Aegelric, Bishop of Chichester - "a man of great age and very wise in the law of the land" - was brought to the King's central court, then sitting at Pinnenden Heath, to give evidence on the customary land tenure of the Anglo-Saxons.[4] His presence in the court was on the instruction[5] of William I, "the Conqueror", who had sworn to preserve England's prior laws "in land and other matters".[6] The Anglo-Saxons were not the indigenous inhabitants of England, but in 1066, when William acquired the Crown, they were "there, organised in societies and occupying the land as their forefathers had for centuries".[7] As the Canadian Supreme Court has stated, this is what Aboriginal, native or Indian title means.[8]

In the acquisition of Empire, the English Crown has recognised the prior rights of the Welsh, the Irish and the Manx,[9] the Dutch in New York and the French in Quebec,[10] the Five Nations of the Iroquois and the Mohicans,[11] the Ashanti,[12] the Nigerians,[13] the Banabans of Ocean Island,[14] the Maoris[15] and the Papuans.[16] In *Mabo* v *Queensland* (No 2),[17] the High Court determined whether the common law of Australia recognises the rights of the Australian Aborigines and the Torres Strait Islanders to their traditional lands.[18]

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In *Mabo*, the plaintiffs sought the High Court's declaration on the rights of the Meriam people, but all members of the Court[19] agreed that the decision was to be reached on the basis of fundamental principles of common law of universal application to the Aboriginal peoples of mainland Australia.[20] The majority agreed[21] that the common law of Australia "recognises a form of native title" which reflects the traditional entitlement of the indigenous inhabitants to their lands; provided however, the title had not already been extinguished and a traditional connexion with the land was still maintained.[22]

The declaration given was for the Meriam people; but as Brennan J observed, there may be other areas of Australia where Aboriginal people are entitled to claim native title.[23] He also acknowledged the rights, now lost, of a third group - the dispossessed and the dead, and considered that "even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia".[24] The joint judgment of Deane and Gaudron JJ[25] addresses a fourth group of people. The dispossession of the Australian Aborigines constitutes 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 a retreat from, those past injustices".[26]

2. Criticism of the Decision[27]

Almost immediately, it was argued that the decision was to be restricted to its facts on the ground that no representation from other States had been heard.[28] Yet the litigation had begun in 1982 and all other States had been aware of the case and of its probable significance.[29]

It was said that in reaching their decision the majority Justices had invented new law that was contrary to existing authority.[30] The Court had engaged in political, not judicial, policy making.[31] The former Chief Justice, Sir Harry Gibbs, considered that the Court had carried judicial activism "too far" and overruled cases on the basis of its members' personal perceptions.[32] It was said that one hundred and fifty years of settled legal understanding had been "overthrown".[33]

The purpose of this paper is to address the proposition that the Mabo decision invented new law, without precedent and contrary to settled legal thinking. It is submitted that the decision was solidly based on several lines of respected authority of a direct relevance to the Australian context.

It is further submitted that the argument that the High Court has "overthrown" one hundred and fifty years of settled opinion is an exercise in jurisprudential sleight of hand. While the decision did alter one and one half centuries of authorities, the Court did so on the basis that they were a misapplication of common law and a source of continuing injustice. Moreover, the Court began its retreat from injustice with caution, carefully examining prior decisions to examine their soundness in precedent, quite apart from their acceptability on broader notions of justice. In describing *Mabo* as overthrowing prior law, attention is drawn away from this

careful process, to imply that the decision is an unwarranted and personal innovation that should itself be overturned.

With respect to Sir Harry Gibbs, it is submitted that in his criticism he has focused on particular aspects of the judgments - their reference to international law and fundamental concepts of justice - rather than the precedents cited in support. While the judgments make wide references to fundamental values of justice and human rights, such reference is made within the framework of the common law and in accord with the weight of authority.[34]

Part I of this paper identifies the law and opinion underpinning a denial of Aboriginal interests. Parts II and III discuss the High Court's overruling of this "settled" legal thinking as a restatement of the common law. A brief comment is also offered as to precedents for future recognition of a fiduciary duty.

3. Prior Law

While the first case to directly litigate an Aboriginal land claim in an Australian court was not heard until 1971,[35] a formidable[36] line of authorities had accumulated articulating the rights of the Crown. In the nineteenth century, the Supreme Court of New South Wales consistently stated that upon first British settlement, title to all land had vested fully in the Crown.[37] The Court was prepared to treat the matter as closed.[38] No proof of it was required, nor was other evidence admissible.[39]

In the twentieth century, the High Court restated this position. In 1913, in *Williams* v *Attorney General (NSW),*[40] Isaacs J identified a starting point for any discussion of land ownership in Australia in the "unquestionable" proposition that in 1786 all land was already the property of the sovereign.[41] In *Randwick Corporation* v *Ruthledge* (1959)[42] the Court affirmed the understanding that all land in the colony had vested, by law, in the Crown.[43]

Bound by these decisions, Blackburn J in *Milirrpum* v *Nabalco Pty Ltd* considered that upon the British acquisition of eastern Australia, "every square inch" of land in the territory was owned by the Crown.[44] Yet as noted in *Mabo*, the propositions consisted of bare assertion made in the absence of any consideration of an Aboriginal entitlement.[45] Nor was account taken of a growing jurisprudence from New Zealand and the United States and a strong line of Privy Council decisions dealing with the question of native land rights.[46]

4. The Settled Colony Debate[47]

In *Milirrpum*, Blackburn J stated that the doctrine of communal native title formed no part of the law of Australia and that there was no Aboriginal title consistent with the Crown's.[48] While taking note of the presumption in favour of the survival of prior property rights upon the acquisition of territory as articulated by the Privy

Council,[49] he considered that it was not applied in favour of the inhabitants of a "settled" colony in the absence of express recognition by the Crown.[50]

That New South Wales had the status of a "settled" colony had been stated by the Privy Council in *Cooper* v *Stuart*.[51] As a consequence, by "silent operation" of the law, the colony received the common law.[52] In their decision, the Judicial Committee further observed that when Australia had been "peacefully" annexed, it was "practically unoccupied" and "without settled inhabitants or settled laws".[53] Blackburn J considered that the classification of New South Wales as a settled colony was a question of law, and that once authoritatively decided could not be reconsidered in the light of new evidence.[54]

By the logic of the *Milirrpum* decision, the Aborigines of Australia had less rights than those accorded a conquered people.[55] As Blackburn J noted, the rules governing the establishment of British colonies were well settled in the latter half of the eighteenth century.[56] In territories gained through conquest, while the law was "what the King pleases",[57] there was a presumption that prior laws and pre-existing private rights would continue.[58] As Lord Mansfield held in *Campbell* v *Hall* (1774),[59] once the prior inhabitants were received into the Crown's allegiance, they were entitled to equal protection under law.[60]

In the first half of the nineteenth century, Aboriginal peoples were denied this status. In 1833, the Supreme Court of New South Wales considered them "wandering tribes" being "without certain habitation and without laws", concluding that they "were never in the situation of a conquered people".[61] In *R* v *Murrell*, the defendant claimed the right to be judged by Aboriginal law, as he could not be bound by laws which gave him no protection.[62] The Court rejected the submission, but one hundred and thirty years later, it was revived.

In *Coe* v *The Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland,*[63] the plaintiff claimed rights to land and rights of sovereignty of behalf of the Aboriginal nation. The question actually before the court was a request for leave to amend the statement of claim.[64] This was refused, but the members of the Court provided observations on the issue of the establishment of the colony. Gibbs J insisted that it is "fundamental to our legal system that New South Wales had become a British possession by settlement".[65] Murphy J considered that the plaintiff was entitled to argue that Australia had not been a terra nullius and to refute this "convenient falsehood".[66] As Jacobs J observed, the question - one of fundamental importance - had never actually been decided.[67]

While Gibbs J had insisted that New South Wales' "settled" status was fundamental, he also stated that its domestic purpose was to determine the reception of English law into the colony.[68] He acknowledged that it may not be appropriate to use it as a general description or for other purposes at a domestic level.[69]

Cooper v *Stuart* had been on appeal to the Privy Council[70] to determine questions of law. While a classification of New South Wales as a settled colony is a conclusion of law, further statements by the Judicial Committee as to Australia's prior inhabitants, their society and their laws were (mistaken) observations of fact (and which do not constitute a precedent).[71] Yet these two conclusions - one, of a settled colony at law; the other, of a "practically unoccupied" continent in (mistaken) fact - were erroneously merged into a single proposition of law which, it was thought, could not now be challenged. That the two are separate - one fundamental to our legal system, the other unnecessary and a cause of injustice - was addressed by the High Court in *Mabo*.

5. The Establishment of New South Wales

Under the rules of international law in the second half of the eighteenth century, title to territory could be acquired by conquest, cession, or the effective occupation of a terra nullius.[72] As Brennan J observed, terra nullius were considered to be two kinds - inhabited and uninhabited.[73] The original concept of a terra nullius had been enlarged to include territories inhabited by a "backward people" whose independence was discounted as they were perceived as having failed to "unite permanently for political action".[74] In these territories the "res" that belonged to no one was the sovereignty over the territorial unit and its inhabitants; the no one was a European sovereign.[75] As the Solicitor-General for Queensland admitted in *Mabo* it was then very much a matter of might making right.[76]

Yet the acquisition of Empires, while resourced in an unequal confrontation of power, found ideological mooring in the confrontation of what was understood as "civilisation".[77] As was said in the International Court of Justice in the *Advisory Opinion on Western Sahara*, this enlarged notion of terra nullius was premised on the "thingification" of peoples dismissed as "backward".[78] The Court condemned the doctrine,[79] and in *Mabo,* the High Court rejected the convenient falsehood that Australia had been terra nullius.[80]

As Brennan J noted, common law followed international law, and in the accumulation of Empire, British acquisitions were categorised as having a constitutional status as ceded, conquered or settled colonies.[81] The concept of the settled colony was articulated during the seventeenth century[82] to meet the needs of British settlers in new territories. It allowed them to carry the common law - their "birthright and inheritance" - with them and to protect them against arbitrary rule by Crown prerogative.[83] The doctrine later received its classic formulation by Blackstone.[84]

In his discussion, Blackstone did not incorporate the two forms of terra nullius - the inhabited and the uninhabited. While he referred to desert and uncultivated lands, he considered territories inhabited by hunter-gatherer societies as conquered.[85] It came to be accepted that the rule relating to the settled colony could be extended, and that the common law could be received by British settlements in territories

already inhabited by "barbarian" people[86] or where the legal system was "unsuitable"[87] for the British.

The doctrines of the terra nullius and the settled colony enlarged in this manner deprived a territory's indigenous inhabitants of their independence and their laws.[88] But in the development of New South Wales as a colony, the territory came to be treated as unoccupied for other legal purposes and allowed Aboriginal peoples to be further deprived of their land.[89] Yet as noted, the purpose of the settled colony rule was to protect the interests of the subject, not to promote those of the Crown.[90] As Coke said in *Bewley's Case,*[91] the King should prefer his honour to his profit. And as the Supreme Court of Canada has observed, that honour is particularly at stake when dealing with the Crown's Aboriginal subjects.[92]

II. MABO: A RESTATEMENT OF THE COMMON LAW

1. The Acquisition of Sovereignty: Title to Territory

In *Mabo* the High Court affirmed the rule that the acquisition of territory is an act of state which "cannot be challenged, controlled or interfered with by the courts of that state".[93] In the United States Supreme Court, Marshall CJ observed that "power and conquest" give "a title which the courts of the conqueror cannot deny whatever the private and speculative opinions of individuals may be respecting the original justice of this claim".[94] The extension of sovereignty by the Crown remains an exercise of its prerogative, as does the Crown's claim of such extension.[95] The fact that in 1788 the British Crown, having only established a settlement at Sydney Cove, asserted sovereignty over the entire eastern part of the continent[96] cannot be the concern of the Australian High Court.[97] The question remains not justiciable, and the Court will not engage in a contest with the executive on the matter.[98]

Yet the Court did claim the jurisdiction to determine the consequences of that act of state as well as what properly falls within its boundaries.[99] As Lord Atkin noted, the doctrine of act of state is often misunderstood; the plea can give no immunity to executive action against a subject to preclude the court's inquiry into its legitimacy.[100] In A*dministration of Papua and New Guinea* v *Daera Guba*, Gibbs J demonstrated that the High Court was prepared to refuse a wrongful plea of act of state.[101]

The Acquisition of Sovereignty: Title to Land

In *Mabo*, the judgments stress the distinction between the Crown's title to sovereignty over a territory and the beneficial ownership of land - in "square inches" - within it.[102] In his landmark study on Imperial constitutional law, Roberts-Wray describes the two as "radically different" matters.[103] In the House of Lords, Lord Reid acknowledged that the acquisition of one does not entail the other.[104]

The rights of a territory's prior inhabitants will be determined by the incoming sovereign.[105] The Privy Council has identified a strong presumption of the common law that the British Crown will respect those prior rights when extending its sovereignty over new territory.[106] The source of these presumptive rights is the common law itself.[107]

The Supreme Courts of Canada and the United States have stressed that this principle is not dependent on any executive order, legislative enactment or other explicit act of recognition by the Crown.[108] Its rationale lies in the respect accorded by the common law to prior occupancy. Nor is it contingent on the constitutional status of a colony.[109] Roberts-Wray concludes that there is no justification to confine the presumption to territories acquired through conquest or cession while applying "less liberal" principals to the prior inhabitants of settled colonies.[110]

In *Adeyingka Oyekan* v *Musendiku Adele,*[111] the Privy Council, referring to the pervasive "recognition doctrine" of *Vajesingji Joravarsingji* v *Secretary of State for India,*[112] stated that in ascertaining what prior rights the Crown intends to recognise there is "one guiding principle".[113] That is that the Crown intends that the pre-existing rights of property of inhabitants will be fully respected.[114] In *Mabo* the High Court also acknowledged the rule to be of general application.[115]

2. The Fallacy of Equating Sovereignty with Ownership of Land

While the Crown's assertion of sovereignty is not justiciable in a domestic court, the Privy Council in *Nireaha Tamaki* v *Baker*[116] insisted that the assertion of the Crown's title to land can be a matter of "pleading only".[117] The Judicial Committee declared that the argument equating the acquisition of sovereignty with the beneficial ownership of land constituted a fallacy.[118] The Committee were conscious that their decision related to "questions of great moment affecting the status and civil rights of the Aboriginal subjects of the Crown".[119]

In *Mabo*, the case for the State of Queensland was that by the acquisition of sovereignty the Crown also acquired the beneficial ownership of all land.[120] As members of the Court each observed, by the Solicitor-General's logic, the Aboriginal peoples of Australia and the Torres Strait Islanders thus became intruders in their own homes.[121] It was suggested that they could be said to still enjoy a form of permissive occupancy albeit subject to the Crown's pleasure, and thus not enforceable in the courts.[122] With respect, reference can again be made to the Privy Council's decision in *Nireaha Tamaki*, where the Committee commented that it was (in 1901) "rather late in the day" for such a submission.[123]

It can be noted that when *Williams*, *Rutledge* and *Milirrpum* were decided, the decisions of the Privy Council were binding on Australian courts. In *Williams*, the High Court had identified a starting point for discussion as was identified above[124] ie the unquestionable proposition that on the British acquisition of Australia all its

land vested in the Crown. Roberts-Wray considered this proposition to be far from unquestionable, but in fact incredible.[125]

In *Mabo*, the Court also acknowledged that a starting point for consideration of the issue lay in the notional or legal "moment" of acquisition.[126] But the Court instead identified the distinction between the acquisition of sovereignty and ownership of land together with the strong assumption of the Crown's recognition of the rights of prior occupants.[127]

The distinction was identified by the Privy Council and was consistently recognised in decisions during this century.[128] It occurs within the framework of the common law which recognises a division between the radical title of the Crown and the beneficial ownership of land.

3. The Radical Title of the Crown

The act of acquisition of territory vests in the Crown an ultimate title to that territory. This title vests in the Crown as an aspect of the assumption of new sovereignty.[129] It supports its ability to administer the territory and carries the power to create and extinguish interests in land.[130]

Under the doctrine of tenure - introduced by the common law - the Crown gains the ultimate or radical title to the land itself.[131] Brennan J described the title as a postulate of the doctrine of tenure and a concomitant of sovereignty.[132] The Crown enjoys an underlying or ultimate title to the land, and all the land is held of the sovereign.[133]

To support the assertion of this title, the fiction had developed that the Crown was not only the ultimate lord, but also the original owner of all land in a territory under its sovereignty, and that all interests in land must be derived from Crown grant.[134] Blackstone admitted the fictional basis of this notion,[135] while AWB Simpson has identified its falsity and unnecessary introduction.[136] Simpson argues that the doctrine of tenure does not require the Crown's original ownership of land, only that all land is held, ultimately, "of" the Crown.[137]

The proposition of original Crown ownership of all land lingered as a residue of medieval thinking which translated a right into a concrete "thing" and treated jurisdiction and sovereignty as rights of property.[138] In proof of title to land, courts never required - either in England or its territories - that title be based on Crown grant.[139] But in colonial New South Wales, the Supreme Court held that the fiction had become "a reality" as there was "no other proprietor".[140]

4. The Radical Title and Prior Interests

In the acquisition of territory, the sovereign assumes an "exclusive competence" in jurisdiction over the territorial unit.[141] But title to the land may be split between the radical title and its beneficial ownership. As the Privy Council stated in *Amodu*

Tijani v *Secretary, Southern Nigeria,*[142] the Crown's radical title may not carry the beneficial interest.[143] While the sovereign's ultimate title carries the power to extinguish interests in land,[144] absent proof of such extinguishment, the courts will presume that the British Crown as new sovereign, intends to respect the existing interests of prior occupants.[145]

The Crown has a bare[146] or pure[147] legal estate in the land. The radical title is thus not fixed in its content other than in this basic capacity.[148] In any case its content will be determined by the existence of prior interests and their extent. Where such interests are practically equivalent to full ownership,[149] the radical title will be reduced to rights of "administrative interference".[150] Where there are no prior interests (or where any prior interests are extinguished, surrendered or lost) the Crown's radical title expands to include full beneficial ownership.[151] This division between the radical title and the beneficial ownership occurs within the existing framework of the common law; it is not an added dimension lately affixed by the High Court.

As McNeil notes, the system of tenures is traditionally able to accommodate several interests in respect of the same parcel of land.[152] In the assumption of sovereignty the Crown's radical title comes in over the prior interests.[153] Pollock and Maitland describe it as "hovering" in notional terms over the beneficial interest.[154] The reception of the common law transforms the character of the prior interest without - at least in theory - diminishing its extent.[155] The prior interest is now tenurial in nature; it continues to be enjoyed, but is now held "of" the Crown and is consistent with the Crown's ultimate title.[156] No new grant or confirmation of the prior interest is necessary as the common law presumes the Crown's respect.[157]

5. The Strong Presumption

In *Mabo*, the High Court identified the fallacy that equates sovereignty with ownership of land[158] and the strong assumption[159] of the common law that the private rights of a territory's prior occupants survive the Crown's acquisition of territory. This assumption arises at common law and is not dependent on any express act of recognition by the incoming sovereign. While it accords with the basic values of human rights and international law,[160] it is based in the common law itself.[161]

The presumption has a long tradition and is supported by strong precedents. In *Mabo*, the cases cited by the court include decisions dating from the seventeenth century.[162] But the rule reaches back even further. The Crown's respect for the rights of a territory's prior inhabitants is found in William's court at Pinneden Heath in 1071,[163] although this recognition can be argued to stem from a prior undertaking (and, perhaps, consideration of prudence). But as the Crown begins its history of territorial acquisition, both in the British Isles and overseas, this presumption of the survival of prior rights in land is acknowledged.

During the seventeenth century, Coke[164] and Hale[165] each discussed the Statute of Wales of 1284 as illustrating that as early as the thirteenth century, the law officers of the Crown recognised that the extension of sovereignty over a territory did not carry the full ownership of land. Only by an additional step, a documentary entitlement or a formal "taking",[166] does the Crown become entirely "seised"[167] of the land. Such a step is required to complete, or perfect, the Crown's title.[168] In the thirteenth century, the Statute of Wales was such a step entitling the Crown to territory. In the twentieth century, an example of the Crown seeking to entitle itself to land is the Queensland Coast Islands Declaratory Act (Qld) (1985) - although in *Mabo* v *State of Queensland (No 1),*[169] the Act was declared invalid as it contravened the Federal Racial Discrimination Act (1975) (Cth).

The presumption of the survival of prior rights was consistently acknowledged by the courts as the Crown extended its sovereignty within the British Isles. It is found in cases emanating from Jersey,[170] the Orkneys,[171] the Isle of Man, (Earl of Derby's Case [1598]),[172] Ireland (Case of Tanistry [1608])[173] and Wales (Witrong and Blany [1674]).[174]

In *Witrong and Blany*, the court held that it was unnecessary for a prior occupant to obtain a new grant from the Crown, as possessions itself gave a sufficient title.[175] The assumption is based on the respect of the common law for prior possession as opposed to Crown grant. As the Court stated in *Mabo (No 1)*,[176] it is not the source or history of legal rights which is material, but their existence.[177]

The First British Empire

In the accumulation of Empire overseas, the presumption continues. In *Calvin's Case* (1608), Coke had declared that the rule did not extend to the benefit of non-Christians.[178] Yet reliance on the disqualification was not sought, and was dismissed by Lord Mansfield in *Campbell* v *Hall* (1774) as absurd.[179] The idea of disqualification of rights re-emerged later in the century and in the nineteenth century to impose a disability no longer grounded on religion but on levels of civilization and modes of land use.[180]

In 1704, the Attorney-General, Lord Northey gave his advice that in establishing colonies in North America and claiming sovereignty over a wide territory, the Crown did not, at law, acquire the beneficial ownership of land already occupied by an Indian people (in this case, his advice concerned the Mohicans).[181] In the Treaty of Utrecht of 1713, signed by Britain and France, the prior rights of the Five Nations of the Iroquois were acknowledged.[182] And in the Royal Proclamation of 1763 the Crown undertook to honour the rights of the Indian peoples of North America.[183] The Canadian Supreme Court has maintained that the Proclamation is not the source of Indian rights but affirms rights at common law together with the Crown's obligations of honour.[184]

In the Supreme Court of the independent United States it was stated that the native title of the Indians was consistent with the ultimate title of the sovereign.[185] In the

landmark case of *Johnson* v *McIntosh,*[186] Marshall CJ acknowledged that the title of the Indian peoples was not only a just claim, but one grounded in law.[187] The Indians' loss of independence did not extinguish their prior rights of occupancy,[188] which were enforceable in the courts of the new sovereign.[189] The Marshall Court considered that the Indian title, though an impaired right,[190] was "as sacred as the fee simple".[191]

The Second British Empire

The Supreme Court of New Zealand made reference to American law in the 1847 case of *R* v *Symonds.*[192] The Court held that it was a principle of universal application regarding the Aboriginal subjects of the Crown that their rights were entitled to be respected by the courts.[193] The Court made no reference to a basis for the rule in circumstances of cession or conquest.[194] The Court considered that the principle was not "anything new and unsettled" nor the recent invention of a colonial court.[195] It was a rule of at least (in 1847) two centuries standing, although it was one that had recently been "lost sight of".[196] In *Nireaha Tamaki* v *Baker,*[197] the Privy Council approved *Symonds,*[198] and acknowledged that the decisions of Marshall CJ were to be accorded the greatest respect.[199]

In the twentieth century, a further line of Privy Council decisions continued to articulate this presumption of the survival of rights. In *In Re Southern Rhodesia* (1919),[200] the Judicial Committee stated that absent contrary evidence, it was to be presumed that the Crown will respect prior rights.[201] The landmark decision of *Amodu Tijani*[202] declared that "a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners".[203] As John Hookey has remarked of these cases, almost a century had passed since the decisions of the Marshall Court, but the common law principles remained the same.[204]

The Recognition Requirement

Notwithstanding these decisions, doubt remained as to application of the presumption in favour of the rights of the prior inhabitants of "settled colonies".[205] But in *Vajesingji Joravarsingji,*[206] the formulation of the "recognition requirement" is wider, and is stated as applying to the prior inhabitants of all territories acquired by the Crown, irrespective of their mode of acquisition.[207] And yet the recognition doctrine is advanced as decisive in determining the rights of inhabitants of settled colonies, not those of conquered peoples.[208] It is suggested that this application is based on a pervasive way of thinking that regards the rights of indigenous peoples as less substantial, and that they are something to be conceded or granted, rather than claimed. This, in turn, is premised on the proposition that their society constitutes a "lower form of life".[209]

In *Sakariyawo Oshodi* v *Moriamo Dakolo,*[210] the Privy Council affirmed that *Amodu Tijani* had laid down the principle of the presumptive title of a territory's prior inhabitants.[211] In *Bakare Ajakaiye* v *Lieutenant-Governor, Southern Provinces,*[212] the Judicial Committee stated that following acquisition, the prior

occupants required no further confirmation of their rights.[213] In 1957, the Committee again addressed itself to the question, and, as noted above,[214] in *Adeyinka Oyekan* v *Musendiku Adele* declared that in ascertaining what rights the Crown intends to recognise there is that "one guiding principle": that it is to be presumed that the Crown intends that the rights of prior inhabitants will be "fully respected".[215]

The Supreme Court of Canada has maintained in *Calder* v *Attorney General of British Columbia,*[216] *Guerin* v *R,*[217] *R* v *Sparrow*[218] that Indian title is a pre-existing right and not based on any executive order or legislative enactment. As the Federal Court of Canada stated in Hamlet of *Baker Lake* v *Minister of Indian Affairs,*[219] to the extent that it was possible to survive on the land under the Court's consideration, "the Inuit were there".[220] It was this presence which the courts recognised (once proved), and that the common law respected.

But in *Milirrpum*, the concept of native title was found to form no part of the common law of Australia.[221] The following year in the High Court, Barwick CJ spoke of the "traditional result" of a presumed protection of rights of prior occupancy.[222] But the case concerned a Papuan claim. The presumption was yet to be applied in favour of Australia's Aboriginal peoples. In *Gerhardy* v *Brown,*[223] Deane J considered that if that statement of the law was correct, the common law of Australia had not yet reached that stage of "retreat from injustice" reached by the Marshall Court one hundred and sixty years before.[224]

In *Mabo (No 1),*[225] the High Court held that the Meriam people were to enjoy the same human rights as other Australian citizens - including the right to be free from the unjust and arbitrary deprivation of their property.[226] In *Mabo (No2)* the Court found that their property included the rights of native title.[227]

6. The Compromise of Native Title

But the concept of native title is admitted to be one of compromise.[228] While it recognises the rights of prior occupancy as legal and enforceable claims, and entitled to be respected by the courts, those rights are, as Marshall CJ observed "necessarily impaired".[229] In *Johnson* v *McIntosh*, the Court found a justification was found in the "actual state of things",[230] and a pragmatic attempt to accommodate the claims of the original inhabitants and the "discovering sovereign".[231] First, the title is limited by the rule that it is inalienable outside the native system other than to the Crown. Secondly, it is vulnerable to extinguishment by the Crown.

In *Symonds*, it was considered that the restriction of inalienability was imposed to protect the Crown's Aboriginal subjects from exploitation by European settlers.[232] Brennan J observed that the restriction was in accord with Aboriginal law.[233] Deane and Gaudron JJ acknowledged McNeil's scholarly critique of the rule, but considered that the principle was well established.[234] The Canadian Supreme Court has stated that Indian title is best characterised by acknowledging a certain "sui

generis" interest in the land which is inalienable except by surrender to the Crown.[235]

In *Mabo*, the Court agreed that sovereignty carried the power to extinguish interests in land.[236] The rights of native title are not entrenched against the exercise of legislative power, although the title is protected by the requirement of a clear and plain intention to effect extinguishment.[237] But the majority considered that the presumption that a legislative conferral of power on the executive does not authorise an impairment of interests in land is confined to titles granted by, or derived from, the Crown.[238]

In contrast, Deane and Gaudron JJ opined that this presumption against an intention to impair existing interests in land extends also to native title.[239] And while the power of the Crown to extinguish native title by an inconsistent dealing remains, the extinguishment is wrongful and gives rise to a claim for compensation.[240] The fact that the native interest is not based on Crown grant does not affect the Crown's liability.[241]

With respect this finding by the majority is not in keeping with the approach of the Canadian Supreme Court that "when a taking is in fact authorised by the statute it is presumed that compensation will be paid. This, like the presumption against taking must apply with additional force to the taking of Indian lands, because this affects the honour and good faith of the Crown".[242] It is also not in keeping with the prior statements of the High Court in *Mabo (No 1)* where the majority stated that it was the existence of rights that excites protection, not their source or history.[243] And in *Gerhardy* v *Brown*, Brennan J observed that the enjoyment of rights on an equal footing was the "birthright of all Australian citizens".[244]

7. A Fiduciary Duty

Toohey J considered that this "extraordinary" power of the Crown and the corresponding vulnerability of the Aboriginal interest was sufficient to impose a fiduciary duty on the Crown.[245] That obligation arose from the opportunity to use that power to the detriment of Aboriginal interests rather than in its actual exercise.[246] A further, and distinct, source of the duty was identified in the Crown's course of dealings with Aboriginal and Torres Strait Islander peoples and a long stated policy of protection.[257]

In the Canadian Supreme Court, a fiduciary duty has also been found in the Crown's historic responsibility to North America's First Nations.[248] In *Guerin* v *R*, the Court identified a fiduciary obligation as based on a certain "sui generis" Indian interest coupled with its inalienability except upon surrender to the Crown.[249] In *R* v *Sparrow*, the Court held that the Crown was restrained by a fiduciary duty owed to Indian peoples in all dealings with their lands, and not merely when accepting a surrender.[250]

In the United States, the Marshall Court in the famous case of *Cherokee Nation* v *Georgia* acknowledged the status of the "domestic dependent nation" and the duties of guardianship of the United States.[251] In *United States* v *Kagama*, the Supreme Court acknowledged the Indian peoples' state of "weakness and helplessness largely due to the course of dealings of the government".[252] In the recent case of *United States* v *Mitchell*, a broad fiduciary relationship was detailed as owed to Indian peoples.[253]

On an international level, there is the recent *Case Concerning Certain Phosphate Lands in Nauru*.[254] The Republic of Nauru brought an action in the International Court of Justice against Australia alleging breach of its trust obligations and seeking reparations to rehabilitate the island after prolonged mining. Australia had, together with the United Kingdom and New Zealand, undertaken a "sacred trust" under mandate from the League of Nations. From 1945, a trusteeship was accepted.[255]

Australia lodged preliminary objections with the International Court primarily based on the fact that an adverse finding against Australia would necessarily impose a responsibility on absent parties.[256] The Court rejected the objections, and the case was listed for hearing on its merits.[257] Argument of the issues was precluded by the signing of a settlement agreement between the parties.[258]

While an argument for recognition of a fiduciary duty is not the focus of this paper, it is submitted that future High Court decisions may parallel recent developments in the Canadian Supreme Court, and follow Tooheys J's lead.

In *Mabo*, possible recourse to legal and equitable remedies "as are appropriate" was admitted. A telling admission in Brennan J's judgment is that: "it can be acknowledged that the nation obtained its patrimony by sales and dedications of land which disposed its indigenous citizens and that, to the extent that the patrimony has been realised, the rights and interests of the indigenous citizens in land have been extinguished".[259]

In *Mabo*, the members of the Court acknowledged that they were hearing no ordinary case.[260] Its circumstances were unique.[261] Two hundred years after British settlement began on the continent, the High Court was asked to determine the Aboriginal entitlement to land. To now adjudicate the issues would be to face uncomfortable truths, and would require re-opening past authorities. But the injustice of the proposition that Aborigines and Torres Strait Islanders were intruders in their home warranted such re-examination.[262]

But the decision did not invent new law. *Mabo* demonstrates that the invention lay first, in the "convenient falsehood" that in 1788 Australia had "no other proprietor"; and secondly, in the "unquestionable" position that upon the acquisition of territory, by "silent operation" of the law, the Crown now owned all the land.[263] While necessarily "overturning" one hundred and fifty years of formidable authority, the decision in fact represents a restatement of common law. This status has already been recognised. In 1993, in *Delgamuukw* v *R* the British Columbia Court of

Appeal referred to the decision as one of the four cornerstones to an understanding of Aboriginal title and Aboriginal rights.[264]

III MABO: ADVANCING HUMAN RIGHTS

1. Terra Australia: Terra Nullius aut Terra Aboriginum[265]

In *Mabo*, the High Court addressed the fiction that in 1788 Australia had been a continent practically unoccupied, devoid of settled society or law, and thus, "belonging" to no one. Sir Harry Gibbs has criticised the Court for considering the matter, as he maintains that the concept of terra nullius is a rule of international law, and is not a question asked at a domestic level.[266] Yet with respect, his analysis does not take account of the way that the doctrine has entered the common law of Australia and fastened onto basic principles of our legal system. Wrongly attached to fundamental legal propositions regarding reception and sovereignty, the fiction has enjoyed an unnecessary protection from challenge, while continuing to underpin a denial of Aboriginal rights.

In the fifteenth and sixteenth centuries, the belligerent acquisition of territory could be justified as "recovered from the infidel". But by the second half of the eighteenth century the focus of Europe's ideology had shifted. The language of improvement had replaced the dogma of religion. Territory was now to be recovered from "waste". As a sustaining mission, the "sacred trust" of civilisation had replaced the quest of conversion.

The enlarged concept of the terra nullius posited a "backward" people, "incapable of performing the duties, and thus of assuming the rights, of a civilised society".[267] Their territory was thus open to acquisition by the Imperial powers of Europe. This conclusion was premised on the notion of the inequality of peoples coupled with the further proposition that the "superior" power could enrich itself to the detriment of the weaker.

Following annexation, this disability at an international level was extended in to the domestic sphere and applied to the "backward" people in groups or individually. Their prior occupancy was disregarded by a specious combination of law and ideology, and the proposition that as "mere wandering tribes",[268] they were not in true possession of the land - for which the settlers had better use. As Gerrit Gong observed, protection of the law extended to protect European life, liberty and property.[269]

In New South Wales, the fact of Aboriginal presence was minimised; and where necessarily admitted, denied a legal relevance. Yet as Toohey J stated, it is inconceivable that indigenous inhabitants in occupation of land is not a presence further to a functioning system. It is their original presence that the law protects, and is to be understood from the point of view of the members of that society.[270] Further inquiry into the nature of the society is irrelevant, and predicated on an

evaluative scale of societies which the High Court rejected.[271] In the *Advisory Opinion on Western Sahara*, Judge Ammoun considered that it was the original inhabitants of a land who defined ownership of that land and their original sovereignty. He condemned the denigration of that definition of the self by an external standard.[272]

In New South Wales, it was early decided that the land had no proprietor. This was a conclusion of fact, though one that carried legal consequences. That the proposition is known to be false is "beyond real doubt or intelligent dispute".[273] Unacceptable to our society, it is not essential to our legal system. *Mabo's* rejection of it removes the fictional impediment to recognition of the rights of Australia's original inhabitants.

2. Advancing Human Rights

In *Mabo*, Brennan J acknowledged the "ultimate responsibility of declaring the law of the nation" that lay with the Court.[274] In this process, he identified the influence of international law through Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights.[275]

He stated that the Court is not free to adopt rules of human rights and international law if their introduction would fracture what he identifies as the "skeleton of principle" that gives our law, and legal system, its shape and internal consistency.[276] But if a current rule or prior authority seriously offends the values of justice and human rights, the Court is warranted in a reconsideration of the rule and in asking whether it should be maintained or applied in a particular case.

The Court will ask two questions; first, whether the rule under scrutiny is an essential, or "skeletal", principle of the Australian legal system; and secondly, whether the benefits of its rejection would outweigh the disadvantage of disturbing a settled rule. Both thresholds must be met. An inconsistency with international law will not, of itself, justify the Court's changing of law; it merely grounds the Court's re-examination.[277].

The *Mabo* decision neither invented new law nor did it "overthrow" old. The Court's careful reconsideration of past law and assumption was undertaken within the framework of common law authority and with especial care to the integrity of the "skeleton" of Australian legal principle. As Toohey J observed, while the proposition that the Meriam people had been made intruders in their own homes is unacceptable, it is not one required by law.[278]

The principle of equality before the law is, writes Hersch Lauterpacht, "in a substantial sense the most fundamental of the rights of man. It is the starting point of all other liberties".[279] Our commitment to this principle is tested when individuals or groups seek its assistance in the courts. Such claims are often brought by groups who are, as Justice Kirby observes, on the margin of society.[280] It is on such occasions that charges of judicial activism and emotivism arise. Yet as

Justice Kirby comments, our rights "matter most" when they concern unpopular minorities.[281] As the Court stated in *Mabo*, to maintain past authority that denied Aboriginal rights "destroys the equality of all Australians before the law".[282]

The High Court's recognition of native title is predicated on this fundamental principle of equality. It asserts that when the British first came to Australia, Aboriginal peoples were already "there". It recognises the basic fact of prior occupancy, and is premised on a claim to equality that inheres in any person on account of their humanness. This claim is of particular importance in regard to the rights of Aboriginal peoples for in the past they have been treated as a "different and lower form of life",[283] whose existence and mere presence could be either ignored or dismissed as irrelevant. As discussed in Part II of this paper, the Crown has long recognised the rights of prior occupancy. The demands of the principle of equality preclude the withholding of that right from Australia's Aboriginal peoples. But as Julius Stone[284] and Ian Brownlie[285] observe, the principle of equality extends not only to persons, but to peoples. It is submitted that the equality of "all Australians" as individuals is not possible until there is also a recognition of a prior, and equal, people. A constitutional statement as to the prior Aboriginal possession of Australia together with a constitutionally entrenched protection of all human rights would demonstrate and promote our society's commitments to those values.

In his rejection of Coke's distinction between Christians and non-Christians, Lord Mansfield noted that it probably arose as a product of the "mad enthusiasm" of the Crusades.[286] In his own rejection of the distinction between inhabited and uninhabited terra nullius, Brennan J could have suggested that the distinction arose in the quest for Empire and the desire for land. In this second expansion of Europe, the Europeans stayed. In his History of Europe, HAL Fisher wrote that "We Europeans are the children of Hellas".[287] This statement, made in the ominous year of 1936, is inadequate on two grounds. Since 1945, we have been made the heirs of Auschwitz and Hiroshima. The advancement of the principles of human rights is argued to be the central issue of modern Anglo-American constitutional theory.[288] But further, non-Aboriginal Australia (it is no longer adequate to define that community as European) is the heir of a special obligation to the Aboriginal peoples who were "there". As counsel submitted in *Murrell's Case*, "we have come to reside among them",[289] but they have been forced to the margin of a society that has established itself in their own home.

NOTES

1 S Stephen, counsel for Jack Congo Murrell (1836) 1 Legge 72.

2 Historical Folios, Oxford, Bodleian Library, Rawlinson MSS c 94, "Carlisle's Case", quoted in GS Lester, *The Territorial Rights of the Inuit of the Canadian Northwestern Territories, A Legal Argument* (1981) York University p 324.

3 (1990) 70 DLR (4th) 385 at 413.

4 DC Douglas and GW Greenaway (eds), *English Historical Documents* Vol II, 2nd ed, 1981 at pp 482-3, quoted in J Oxley-Oxland & B Stein, *Understanding Land Law* (Sydney, 1985) p 8.

5 Id.

6 Lester op cit p 299.

7 *Calder* v *Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 at 156 per Judson J.

8 Note 7 supra at 152, 156 per Judson J: *Guerin* v *R* (1984) 13 DLR (4th) 321 at 334 per Dickson J.

9 *Witrong and Blany* (1674) 3 Keb 401, 84 ER 780 (Wales); *Case of Tanistry* (1608) Davis 28, 80 ER 516 (Ireland); *Earl of Derby's Case* (1598) 2 And 115, 128 ER 518 (Isle of Man).

10 Lester, op cit p 20 (Dutch rights); B Slattery, *Ancestral Lands, Alien Laws* (University of Saskatchewan Native Law Centre, 1985) p 13 (French rights).

11 Slattery, op cit p 18 (Five Nations of the Iroquois); Lester, op cit pp 534, 559 (Iroquois, Mohicans).

12 K. McNeil, *Common Law Aboriginal Title*, Oxford, 1989, pp 129-32.

13 *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399.

14 *Tito* v *Waddell* (No 2) [1977] Ch 106.

15 *R* v *Symonds* (1847) [1840-1932] NZPCC 387; *Nireaha Tamaki* v *Baker* [1901] AC 561.

16 *Geita Sebea* v *Territory of Papua* (1941) 67 CLR 544; *Administration of Papua New Guinea* v *Daera Guba* (1973) 130 CLR 353.

17 (1992) 175 CLR 1 hereafter *Mabo*; cited as *Mabo (No 2)* if context requires distinction form *Mabo* v *State of Queensland* (1988) 166 CLR 186 *(Mabo (No 1).*

18 Two questions were in fact addressed. First, whether the common law of Australia recognises the concept of native title; and secondly, whether the right of a particular group (in *Mabo (No 2)*, the Meriam people) have survived. Until 1971, the first of these questions is, as Barbara Hocking observes, unique to Australia. In all other former British colonies, the concept of native title has been recognised, and it is only the second question that arises for litigation: B Hocking (ed), *International Law and Aboriginal Human Rights,* Law Book Co, Sydney, 1988, p 5.

19 Note 17 supra at 26 per Brennan J in whose judgment Mason CJ and McHugh J concurred at 15; at 77, 82 per Deane and Gaudron JJ; at 178 per Toohey J.

20 It was acknowledged that the system of land tenure on the Murray Islands was significantly different from the systems of the mainland peoples. But any argument to distinguish entitlement on this basis would be perceived by the Court as premised on propositions of racial discrimination, and thus unacceptable: note 17 supra at 26 per Brennan J.

21 Mason CJ, McHugh, Brennan, Deane, Gaudron, Toohey JJ; Dawson J dissenting; in a brief joint judgment at 15 per Mason CJ, McHugh J given with the authority of all members of the Court; the judgments use different terms to describe the title; Mason CJ and McHugh J at 15: "native title"; Brennan J at 54: "native title"; Deane and Gaudron JJ at 86: "common law native title"; Toohey J at 182: "traditional title"; at 206 Toohey J also discusses the concept of "common law aboriginal title" as detailed by K McNeil in *Common Law Aboriginal Title,* Oxford 1989. In *Guerin* v *R* (1984) 13 DLR (4th) 321 at 334, Dickson J refers to "Aboriginal, native or Indian title".

22 That this title which Aboriginal peoples should have been entitled to claim is now largely extinguished is detailed by N Pearson, *204 Years of Invisible Title,* "Mabo, A Judicial Revolution", MA Stephenson and S Ratnapala (eds), St Lucia, 1993, p 75.

23 Note 17 supra at 69-70.

24 Id.

25 Note 17 supra at 77.

26 Id.

27 The focus of this paper is the suggestion that the Mabo decision constituted judicial invention; the broad criticism, unrestrained and often personal in nature, is detailed in R Bartlett, *Mabo: Another Triumph for the Common Law* (1993) 15 Syd L Rev 178: G Nettheim, *Mabo: Judicial Revolution or Cautious Correction?* (1993) 16 UNSWLJ 1.

28 RD Lumb, *Mabo - Public Law Aspects,* "Mabo, A Judicial Revolution", note 22 supra, p 4.

29 G Nettheim, note 27 supra, p 19; The Commonwealth, originally one of the defendants, was no longer a party to the action, and no other State had been joined.

30 Justice Meagher of the New South Wales Court of Appeal, quoted in B Hocking, *Aboriginal Law Does Now Run in Australia* (1993) 15 Syd L Rev 196.

31 G Moens, *Mabo and Political Policy Making by the High Court*, "Mabo, A Judicial Revolution", note 22 supra p 49.
32 H Gibbs, *Foreword* in "Mabo, A Judicial Revolution" note 22 supra p xliii.
33 Lumb, note 28 supra p 21.
34 Discussed infra, in Part III, 2 Advancing Human Rights.
35 *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141 in the Northern Territory Supreme Court, before Blackburn J; a representative action brought on behalf of clans of the Gove Peninsula, Arnhem Land, seeking relief to protect the occupation and enjoyment of their traditional lands.
36 Acknowledged as such by Brennan J in *Mabo (No 2)*, note 17 supra at 27.
37 *R.* v *Steel* (1834) 1 Legge 65; *Hatfield* v *Alford* (1846) 1 Legge 320; *Attorney-General* v *Brown* (1847) 1 Legge 312; *Doe d Wilson* v *Terry* (1849) 1 Legge 505.
38 *Hatfield* v *Alford* (1846) 1 Legge 505 at 509 per Stephen CJ.
39 *Doe d Wilson* v *Terry* (1849) 1 Legge 505 at 509 per Stephen C J.
40 (1913) 16 CLR 404.
41 Id at 439.
42 (1959) 102 CLR 54 at 71 per Windeyer J.
43 Id. Dixon CJ, Kitto, Fullagar JJ concurring; also *New South Wales* v *The Commonwealth (the Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 438 per Stephen J.
44 Note 35 supra at 245.
45 Note 17 supra at 103 per Deane and Gaudron JJ.
46 Detailed infra Part II, The Strong Presumption.
47 Cf Australian Law Reform Commission: *The Recognition of Aboriginal Customary Law* - Report No 31, AGPS, Canberra, 1986, Ch 5.
48 Note 35 supra at 243-4, 262.
49 Id at 242-4, 262-4 citing *In Re Southern Rhodesia* [1919] AC 211, *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399.
50 Id.
51 (1889) 14 App Cas 286 at 291 per Lord Watson.
52 Id at 292.
53 Id at 291.
54 Note 35 supra at 202; however in *Calder* note 7 supra at 169, in deprecating a similar approach taken (in the judgment under appeal; 13 DLR (3d) 64 at 74) Hall J stated that a correct approach to interpretation must be "in the light of present day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original peoples was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species".
55 H McQueen, *A New Britannia*, Ringwood, Penguin, 1976, p 56.
56 Note 35 supra at 243.
57 *Smith* v *Brown and Cooper* (1705) 2 Salk 666; 91 ER 566, per Holt CJ.
58 *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377; *Privy Council Memorandum* 1722, 2 P Wms 75.
59 (1774) 1 Cowp 204, 98 ER 1043 (KB).
60 Id at 1047-8.
61 *MacDonald* v *Levy* (1833) 1 Legge 39 at 45 per Forbes CJ.
62 (1836) 1 Legge 72 at 73.
63 (1979) 53 ALJR 403.
64 Murphy J criticised the "frivolous, and even irresponsible" drafting of the claim at 412.
65 Id at 408-9.
66 Id at 410, 412.
67 Id at 411.
68 Id at 408.
69 Id.
70 From the New South Wales Supreme Court in Equity (1886) 7 NSWR (Eq) 1.
71 *Halsbury's Laws of England*, 4th ed, 1979, vol xxvi para 575, *Cross Precedent in English Law*, 3rd ed, 1977, p 221.

72 E Evatt, "The Acquisition of Territory in Australia and New Zealand", CH Alexandrowicz (ed), "Grotian Society Papers", 1968, The Hague, p 16, quoted by Brennan J note 17 supra at 32.

73 Note 17 supra at 33.

74 MF Lindley, *The Acquisition and Government of Backward Territory in International Law*, London, 1926, Ch I, pp 27, 45; quoted by Brennan J note 17 supra at 32.

75 *Advisory Opinion on Western Sahara* [1975] ICJR 1 at 39; R Balkin, *"International Law and Sovereign Rights of Indigenous Peoples"*, B Hocking (ed), *International Law and Aboriginal Human Rights*, note 18 supra p 19.

76 G McIntyre, "The High Court Hearing" in G Nettheim (ed), *The Mabo Case Special Briefing Paper*, Aboriginal Law Bulletin, University of NSW, 1993, p 15.

77 G Gong, *The Standard of 'Civilisation' in International Society*, Oxford, 1984, pp 3, 4.

78 *Advisory Opinion on Western Sahara* [1975] ICJR 1 Pleadings CR 75/18 p 29, quoted in M Shaw, *The Western Sahara Case* (1978) BYIL 129.

79 *Advisory Opinion on Western Sahara* [1975] ICJR 1 at 86 per Ammoun J.

80 Id; cited by Brennan J note 17 supra at 41; at 103, 106 per Deane and Gaudron JJ; at 182 per Toohey J.

81 Note 17 supra at 32 per Brennan J.

82 *Craw* v *Ramsay* (1669) Vaughan 279, 124 ER 1072; *Blankard* v *Galdy* (1693) 2 Salk 411, 91 ER 356 per Holt CJ; *Dutton* v *Howell* (1693); Show P Cases 24, 1 ER 17; AC Castles notes the settlement rule grew out of the struggle between Crown and Parliament in 1688, *An Introduction to Australian Legal History*, Sydney, Law Book Co, 1971, p 6.

83 Privy Council Memorandum [1722] Note 58 supra; cf V Windeyer, *A Birthright and Inheritance*. The Establishment of the Rule of Law in Australia (1958-63) 1 Tas L Rev 635.

84 Blackstone, *Commentaries on the Laws of England* (1765) Bk 1 ch 4 pp 106-8; quoted by Brennan J, note 17 supra at 33-4.

85 Id.

86 *Advocate General of Bengal* v *Ranee Surnomoye Dossee* (1863) 2 Moo NS 22 at 59, 15 ER 811 at 824 per Lord Kingsdown, cited by Brennan J, note 17 supra at 36.

87 *Freeman* v *Fairlie* (1828) 1 Moo Ind App 306 at 323, 18 ER 117 at 127 per Stephen, Master in Chancery; cited by Brennan J, note 17 supra at 35.

88 Sovereignty and legislative power vests in the Crown upon acquisition of territory: *R* v *Sparrow* (1990) 70 DLR (4th) 385 at 404 per Dickson CJ; Max Huber's principle of the "exclusive competence of the state in regard to its own territory" in *Island of Las Palmas Arbitration Case*, (1928) 2 UNRIAA 829 at 838 (cited by Balkin op cit p 21); but there may be some flexibility to these rules; the Privy Council considered in *Hineiti Riverire Arani* v *Public Trustee of New Zealand* (1919) that "some internal power of self government" may continue [1840-1932] NZPCC 1 at 6 per Lord Davey; also, Ian Brownlie acknowledged that inherent in the concepts of equality and human rights is the idea that groups as such have rights and that federation is a system providing a "special capacity and flexibility" in this respect and could provide group freedoms within a wider system: I Brownlie, *The Right of Peoples in Modern International Law*, "The Rights of Peoples", J Crawford (ed), Oxford,1988, pp 2, 4; and in *Mabo (No 2)* the judgment of Deane and Gaudron JJ acknowledges the reception of common law was adjusted to "leave room" for local customary law: note 17 supra at 79; a colony by settlement receives English law "apart from any relevant customary law": *Tito* v *Waddell* (No 2) [1977] Ch 106 at 132 per Megarry VC.

89 Note 17 supra at 103, 106 per Deane and Gaudron JJ; as "vacant" at 182 per Toohey J; as a land "with no other proprietors" at 31 per Brennan J; cf *Attorney General* v *Brown* (1847) 1 Legge 312 at 316-18 per Stephen CJ.

90 Notes 82, 83 supra.

91 (1612) 9 Co R 1306, 77 ER 918 (KB).

92 Note 3 supra 1. In 1837 the House of Commons approved the report of the Select Committee on Aborigines of the British Empire which stated that all Aboriginal peoples of the Empire were to be considered as British subjects and entitled to the full protection of the law in the enjoyment of their civil and political rights. ALRC Aboriginal Customary Law, note 47 supra p 36.
In *Mabo*, the Court considered that as the subjects of a conquered territory (*Calvin's Case* (1608) 7 Co Rep 1a at 6a, 77 ER 377; *Campbell* v *Hall* (1774) Lofft at 741, 98 ER 848 at 895) became

British subjects, then a fortiori the subjects of a settled territory must have acquired that status: note 17 supra at 38 per Brennan J. Brennan and Toohey JJ at 182 consider the status was immediate; Deane and Gaudron JJ refer to the Crown's "old and new" subjects and their theoretical status, although noting s 127 of the Constitution, repealed 1967, which stated that Aborigines were not to be "counted". In *Black Australia: A Survey of Native Policy in Western Australia,* Melbourne, 1970, 2nd ed, Paul Hasluck remarks the treatment of Aboriginal peoples made a "mockery" of this status: p 143.

93 *New South Wales* v *The Commonwealth (the Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 388 per Gibbs J cited by Brennan J note 17 supra at 31; at 15 per Mason CJ, McHugh J concurring in Brennan J's judgment and his reasons.

94 *Johnson* v *McIntosh* 21 US (8 Wheat) 543 at 588 (1823).

95 *Post Office* v *Estuary Radio Ltd* [1968] 2 QB 740 at 753 per Diplock LJ; cited by Brennan J note 17 supra at 31, Deane and Gaudron JJ at 78.

96 Westwards to longitude 135° east; HRA 1914 Series 1 vol 1, p 2, quoted by Deane and Gaudron JJ note 17 supra at 78.

97 Note 17 supra per Deane and Gaudron JJ.

98 Id at 31 per Brennan J. Where a question is raised as to the sovereignty of a body claiming to be government of a sovereign state the court cannot take evidence or express a finding; the only course is to enquire what the Crown's "attitude is pleased to be": *The Arantzazu Mendi* [1939] P 37 at 54 per Goddard LJ; cited by Macrossan CJ in *Van Heyningen* v *Netherlands-Indies Govt* [1949] St R Qd 54 at 60 (FC).

99 Note 17 supra per Brennan J at 32.

100 *Eshugbayi, Eleko* v *Government of Nigeria* [1931] AC 662 at 673; also *Nissan* v *Attorney General* [1970] AC 179 at 227 per Lord Pearce; DP O'Connell *International Law,* 2nd ed, 1970, pp 377-78, quoted by Brennan J at 44.

101 (1973) 130 CLR 353 at 436-7.

102 Note 17 supra at 43 per Brennan J, at 180 per Toohey J.

103 K Roberts-Wray, *Commonwealth and Colonial Law,* London, 1966, pp 99, 625, quoted by Brennan J, note 17 supra at 43.

104 *Nissan* v *Attorney-General* [1970] AC 179 at 210.

105 *Johnson* v *McIntosh* 21 US (8 Wheat) (1823) 543 at 573 per Marshall CJ.

106 Cases cited infra 5. The Strong Presumption.

107 *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 at 542-5 per Mahoney J, cited by Toohey J, note 17 supra at 187-89.

108 *Calder* v *Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 at 152, 200; *Guerin* v *R.* (1984) 13 DLR (4th) 321 at 335-37; *R* v *Sparrow* (1990) 70 DLR (4th) 385 at 413; *County of Oneida* v *Oneida Indian Nation* (1985) 470 US 226 at 235-36.

109 Slattery op cit pp 30-35.

110 Note 103 supra at pp 631-2.

111 [1957] 2 All ER 785 at 788 per Lord Denning.

112 (1924) LR 51 Ind App 357 at 360-61 per Lord Dunedin, hereafter *Vajesingji Joravarsingji.*

113 Note 111 supra at 788 per Lord Denning.

114 Id.

115 Note 17 supra at 57 per Brennan J; at 83, 85 per Deane and Gaudron JJ.

116 [1901] AC 561.

117 Id at 576 per Lord Davey.

118 Id at 575.

119 Id at 566.

120 Note 17 supra at 25, 29 per Brennan J; note his disapproval of the proposition that the "common law itself took": id at 29.

121 Id at 29 per Brennan J; at 182-84 per Toohey J; Deane and Gaudron JJ quoted in G McIntyre op cit p 15.

122 Per Dawson J in G McIntyre op cit p 15.

123 Note 116 supra at 577.

124 Note 40 supra at 439.

125 K Roberts-Wray op cit p 632.
126 Note 17 supra at 37 per Brennan J; at 79-80 per Deane and Gaudron JJ; at 181-2 per Toohey J.
127 Id.
128 See cases cited in discussion in "3. The Radical Title" supra.
129 Note 17 supra at 48 per Brennan J.
130 Id at 63 per Brennan J; at 110-11 per Deane and Gaudron JJ.
131 The Court agreed that the doctrine of tenure was not necessarily appropriate to the circumstances of the colony; however to jettison the system at this stage would "fracture the skeleton of principle". Id at 48 per Brennan J; at 81 per Deane and Gaudron JJ.
132 Id at 48 per Brennan J.
133 *St Catherine's Milling Company* v *R* (1888) 14 App Cas 46 at 54-5 per Lord Watson - an "underlying" title; *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399 at 407 per Viscount Haldane - a "radical or ultimate title".
134 *Attorney-General* v *Brown* (1847) 1 Legge 312 at 317-18 per Stephen CJ.
135 *Commentaries,* 17th ed, 1830, Bk II, Ch 4, pp 50-51, cited by Brennan J in note 17 supra at 47-48.
136 AWB Simpson, *A History of Land Law,* 2nd ed, Oxford, 1986, pp 47, 48, quoted by Brennan J note 17 supra at 45.
137 Id.
138 Id.
139 Simpson op cit p 46.
140 Note 134 supra; cited by Brennan J, note 17 supra at 26-29.
141 Max Huber, Arbitrator in *Island of Las Palmas Case* (1928) 2 UNRIAA 829 at p 838; cited by Balkin op cit p 21.
142 [1921] 2 AC 399, hereafter *Amodu Tijani.*
143 Id at 407-09 per Viscount Haldane.
144 Id. note 111 supra; note 17 supra at 63 per Brennan J; at 111 per Deane and Gaudron JJ.
145 *In Re Southern Rhodesia* [1919] AC 211 at 233 per Lord Sumner; *Amodu Tijani* v *Secretary, Southern Nigeria*, note 142 supra at 407-10 per Viscount Haldane; *Adeyinka Oyekan* v *Musendiku Adele* note 111 supra at 788 per Lord Denning.
146 *Amodu Tijani*, note 142 supra at 403.
147 *St Catherine's Milling Company*; note 133 supra at 55.
148 *Amodu Tijani* note 142 supra 409-10.
149 *Geita Sebea* v *Territory of Papua* (1941) 67 CLR 544 at 557 per Williams J.
150 *Amodu Tijani* note 142 supra at 407, 410.
151 *Amodu Tijani* note 142 supra at 410; *St. Catherines Milling Company* note 133 supra p 55; *Mabo* note 17 supra at 60 per Brennan J.
152 K McNeil, *Common Law Aboriginal Title,* Oxford, 1989, Ch 7.
153 Id p 219-20.
154 F Pollock and FW Maitland, *The History of English Law before the Time of Edward I,* 2nd ed, 1898, Vol II, pp 3-4, quoted in McNeil op cit p 220.
155 McNeil op cit pp 217-220; Simpson op cit pp 46-48.
156 Id.
157 *Witrong and Blany* (1674) 3 Keb 401, 84 ER 789; *Bakare Ajakaiye* v *Lieutenant-Governor, Southern Provinces* (1929) AC 679.
158 Note 17 supra at 50 per Brennan J.
159 Id at 82 per Deane and Gaudron JJ.
160 From Francisco de Vittoria, *De Indis et de Jure Belli Reflectiones*, writing in the sixteenth century, that Indian peoples should retain their property rights, quoted in Balkin op cit p 22, to DP O'Connell in the twentieth century, that private rights survive a change in sovereignty: *State Succession in Municipal Law and International Law,* Cambridge, 1967, Vol 1 at 104-5.
161 *Hamlet of Baker Lake* note 107 supra at 544-5, cited by Toohey J at 191-3.
162 *Case of Tanistry* (1608), *Witrong and Blany* (1674), note 9 supra.
163 Note 2 supra.
164 *Calvin's Case* (1608) 7 Co Rep 1a at 21b, 77 ER 377.

165 D Hale (ed), *Prerogatives of the King*, London, Seldon Society, 1976, Vol 92, p 23; quoted by Lester op cit p 319.
166 *Case of Tanistry* (1608) note 9 supra.
167 *Calvin's Case* (1608) at 2lb note 164 supra.
168 *Bristow* v *Cormican* (1878) 3 App Case 641 at 667 per Lord Blackburn.
169 Note 17 supra. *Mabo* v *State of Queensland* (1988) 166 CLR 186, *Mabo (No 1)*; cf note 17 supra.
170 *In the Matter of Representation of the State of the Island of Jersey, in the matter of an Order in Council, dated the 23rd day of June 1891, Appendix.* Privy Council, Judicial Committee; cited in Lester op cit p 320.
171 Cf Udal law of the Orkneys: Drever "Udal Law", 16 Juridical Rev 189; *Lord Advocate* v *Balfour* (1907) SC 1360 at 1368.
172 Note 9 supra.
173 Id.
174 Id.
175 *Witrong and Blany* (1674) note 9, 157 supra.
176 Note 169 supra.
177 Id at 218 per Brennan, Toohey, Gaudron JJ.
178 Note 164 supra.
179 *Campbell* v *Hall* note 92 supra.
180 Discussed infra, Part III: Terra Nullius aut Terra Aboriginum.
181 Lester op cit p 559
182 Slattery op cit pp 18-19
183 In *Mabo* note 17 supra at 98 Deane and Gaudron JJ acknowledged the argument that the Royal Proclamation is considered to "follow the flag" throughout the Empire with a status analogous to the status of Magna Carta (the argument was not approved, although not rejected).
184 *Guerin* v *R*; *R* v *Sparrow* note 108 supra.
185 *Fletcher* v *Peck* 10 US (6 Cranch) 87 (1810) at 142-43 per Marshall CJ.
186 *Johnson* v *McIntosh* 21 US (8 Wheat) 543 (1823).
187 Id at 573-74.
188 *Worcester* v *Georgia* 31 US (6 Peters) 515 (1832) at 544 per Marshall CJ.
189 Note 186 supra at 573-74.
190 Id at 588-90.
191 Id at 574, 588-90; *Mitchel* v *United States* 34 US (9 Peters) 711 (1835) at 746 per Baldwin J.
192 (1847) [1840-1932] NZPCC 387; *J Kent's Commentaries on American Law* cited by Chapman J at 388.
193 Id at 388-90 per Chapman J.
194 Id.
195 Id at 388 per Chapman J.
196 Id.
197 Note 116 supra at 579.
198 Note 192 supra.
199 Note 116 supra at 580-81.
200 [1919] AC 211.
201 Id at 233 per Lord Sumner.
202 [1921] 2 AC 399.
203 Id at 407 per Viscount Haldane.
204 J Hookey, *"The Gove Land Rights Case. A Judicial Dispensation for the Taking of Aboriginal Lands in Australia"* (1972) 5 Fed L Rev 85.
205 Cf discussion in The Settled Colony Debate, *Recognition of Aboriginal Customary Laws* op cit Ch 5.
206 (1924) LR 51 Ind App 357.
207 Id at 360-61 per Lord Dunedin.
208 Note 205 supra.
209 Note 17 supra at 108 per Deane and Gaudron JJ.
210 [1930] AC 667.

211 Id at 668; affirming *Amodu Tijani* had "laid down" the rule that a change of sovereignty "did not affect the character of the private native rights". Viscount Dunedin who had delivered the judgment in *Vajesingji Joravasingji* sat on the Judicial Committee in this case.
212 [1929] AC 679.
213 Id at 682, 686-6.
214 Note 111 supra, [1957] 2 All ER 785.
215 Id at 788.
216 (1973) 34 DLR (3d) 145 at 152, 156, 200-02.
217 (1984) 13 DLR (4th) 321 at 335-6.
218 (1990) 70 DLR (4th) 385 at 413.
219 (1979) 107 DLR (3d) 513.
220 Id at 542, 544-45.
221 Note 35 supra (1971) 17 FLR 141 at 244-45, 262.
222 *Administration of Papua and New Guinea* v *Daera Guba* (1973) 130 CLR at 436-37. The case was heard in 1972; judgment was handed down in 1973.
223 (1985) 159 CLR 70.
224 Id at 149.
225 Note 17 supra, (1988) 166 CLR 186.
226 Id at 218-19 per Brennan, Toohey, Gaudron JJ; the right was the right to own and inherit property as identified in Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*. Reference was made to Article 5 of the *Universal Declaration of Human Rights* 1948 adopted 10 Dec 1948, General Assembly Resolution 217 a (III) UN Doc A/810, at 71 (1948) which states that no one shall be arbitrarily deprived of their property. Under international law, arbitrarily means "unjustly" as well as illegally: J Meron (ed), *Human Rights in International Law: Legal and Policy Issues,* 1984, Vol I, p 122.
227 Note 17 supra at 15-16 joint statement delivered by Mason CJ and McHugh J with approval of all members.
228 O Newtown, *At the Whim of the Sovereign* (1980) 31 Hastings LJ 1215 at 1223; RH Bartlett, *The Mabo Decisio*n, Butterworths, 1993, p xi.
229 *Johnson* v *McIntosh* 21 US (8 Wheat) 543 (1823) at 574, 588-90.
230 Id at 591.
231 Id; *Worcester* v *Georgia* 31 US (6 Peters) 515 (1832) at 544 per Marshall CJ.
232 Note 192 supra at 391 per Chapman J; at 393 per Martin CJ.
233 Note 17 supra at 51.
234 Id at 880.
235 *Guerin* v *R* (1984) 13 DLR (4th) 321 at 335, 339 per Dickson J. The issue of alienability revives he question of proprietary status which Blackburn J in *Milirrpum* considered decisive (note 35 supra at 240-2). The stumbling block is obviated by Dickson J who insists on the "sui generis" nature of native title. In *Mabo* Brennan J said if it was necessary to ascribe native title with a proprietary status to protect it, that would be an appropriate step (note 17 supra at 61); Toohey J maintained that it was the existence of the right that attracted protection, further inquiry into its nature or the society was irrelevant and misleading (at 182, 187).
236 Note 17 supra at 64 per Brennan J.
237 Id at 111 per Deane and Gaudron JJ.
238 Id at 64-5.
239 Id at 111.
240 Id at 111-12.
241 Id.
242 *Paul* v *Canadian Pacific* (1983) 2 DLR (4th) 22 at 34 per La Forrest J affirmed: *R* v *Sparrow* 1990) 70 DLR 385 at 413 per Dickson CJ and La Forest J.
243 Note 17 supra 186 CLR 186 at 217-18.
244 Note 223 supra (1985) 159 CLR 70 at 136.
245 Note 17 supra at 201.
246 Id at 200.
247 Id at 201.

248 *Guerin* v *R* (1984) 13 DLR (4th) 321 at 332-36 per Dickson J.
249 Id at 334; cf text to note 235 supra.
250 *R* v Sparrow (1990) 70 DLR (4th) 385 at 408 per Dickson CJ and La Forest J.
251 (1831) 30 US (5 Pet) 1 at 16-17.
252 (1886) 118 US 375.
253 (1983) 103 S Ct 2961.
254 IA Shearer, *Australia and the International Court of Justice* (1993) ALJ 301; I Scobbie, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) Preliminary Objections Judgment* (1993) 42 ICLQ 711.
255 Id; C Weeramantry, *Nauru Environmental Damage Under International Trusteeship,* Oxford, 1992, Chs 1, 6.
256 Shearer op cit p 303.
257 Id.
258 *Agreement between Australia and the Republic of Nauru for the Settlement of the Case - the International Court of Justice concerning Phosphate Lands in Nauru.* (Nauru, 10 Aug 1993).
259 Note 17 supra at 52; in *Northern Land Council* v *The Commonwealth (No 2)* (1987) 61 ALJR 616 at 619-20 the High Court acknowledged the question of a fiduciary obligation to be one of fundamental importance. The 1978 Privy Council decision in *The Corporation of the Director of Aboriginal Islanders Advance* v *Peinkinna and Others* (1978) 52 ALJR 286 concerned the construction of a specific statutory trust and consideration of a broader fiduciary duty was unnecessary.
260 Id at 109 per Deane and Gaudron JJ.
261 Id; also, in *Fernandez* v *Wilkinson* (505) F Supp 787 (1980) (affirmed in Court of Appeal *Rodriguez-Fernandez* v *Wilkinson* 654 F 2d 1 382 (1981) at 798 per Rogers J: where there is a "unique" set of circumstances in a case on a matter of international concern and there is a "gap" in domestic law, international law may be relied on to fill the gap; cf *Filartiga* v *Pena-Irala* 630 F 2d 876 (2d Cir 1980): citing the judgment of Marshall CJ in *The Nereide* 13 US (9 Cranch.) 388, 422 (1815) and *the Paquete Habana* 175 US 677 (1900).
262 Note 17 supra at 29 per Brennan J; at 182-84 per Toohey J.
263 Cf *Cooper* v *Stuart* (1889) 14 App Cas 286 at 292, Lord Watson's description of the "silent operation" of law; it was Brennan J's concern that it was the common law itself that denied Aboriginal interests.
264 (1993) 104 DLR (4th) 470 at 640 per Lambert JA. It can be noted that the decision under appeal was *Delgamuukw* v *British Columbia* (1991) 79 DLR (4th) 185, an authority on which Dawson J relied for his dissenting judgment in *Mabo.* The other three cases cited were *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399; *Guerin* v *R* (1984) 13 DLR (4th) 321 and *R* v *Sparrow* (1990) 70 DLR (4th) 385.
265 Cf title of RJ King's article (1986) 72 J Royal Australian Historical Soc 75.
266 Gibbs, Foreword, *Mabo A Judicial Revolution* op cit pp xi-xiii.
267 *Wi Parata* v *Bishop of New Zealand* (1877) 3 NZ Jur (NS) 72 at 77 per Prendergast JA.
268 *MacDonald* v *Levy* (1833) 1 Legge 39 at 45 per Forbes CJ.
269 Gong op cit p 15.
270 Note 17 supra at 187-188; Toohey J cites the statement of Mahoney J in *Hamlet of Baker Lake* v *Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 542: "The nature, extent or degree of the Aborigines' physical presence on the land they occupied, required by the law as an essential element of their Aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them".
271 Id at 187 per Toohey J; at 39-40 per Brennan J; in *In Re Southern Rhodesia* [1919] AC 211, Lord Sumner at 233-34 posited a "scale of social organisations". If a society was "so low" in that scale, they were placed beyond an "unbridgeable gulf" from which rights could not be recognised. Brennan J rejects such a scale at 39-40; *in Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399, Viscount Haldane at 403 disapproved of the tendency to conceptualise native systems "in terms which are appropriate only to systems which have grown up under English law". He

concluded that this tendency "has to be held in check closely"; cited by Deane and Gaudron JJ at 82.

272 *Advisory Opinion on Western Sahara* [1975] ICJR 1 at 85-86 per Judge Ammoun, cited by Brennan J at 41.

273 Note 17 supra at 99 per Deane and Gaudron JJ; see H Reynolds, *The Law of the Land* (Penguin, 1992), describing how Aboriginal land interests were in fact well understood in the colonial period; also see article by King op cit, detailing plans to purchase land for the establishment of penal colonies at various locations and the assumption that in "Terra Australia" such purchase was unnecessary; noted by Deane and Gaudron JJ at 98.

274 Id at 29.

275 Id at 42; International Covenant on Civil and Political Rights; opened for signature: 19 Dec 1966; entered into force 23 Mar 1976; GA Res 2200 (xxi) 21 UN GAOR Supp (No 16) 52 UN Doc A/6316 (1967); cf 6 ILM 168 (1967). Australia's Accession to Optional Protocol: Communication 78/1980, Selected Decisions of the Human Rights Committee under the Optional Protocol Vol 2, p 23.

276 Supra note 17 at 30, 43.

277 Id. Deane and Gaudron JJ also refer to "fundamental notions of justice and the common law. Yet in their analysis, reference is also made to the control of the weight or authority". While their judgment had a self-acknowledged emotive character, the decision was strongly anchored in sound procedure.

278 Note 17 supra at 184.

279 An International Bill of the Rights of Man (1945) p 115, quoted in *Gerhardy* v *Brown* (1985) 159 CLR 70 at 125 per Brennan J.

280 Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norm* (1988) 62 ALJ 514 at 528.

281 Id.

282 Supra note 17 at 58 per Brennan J (emphasis added).

283 Note 17 supra at 108 per Deane and Gaudron JJ.

284 J Stone, *Equality and the Search for Justice,* 1980 Australian J Forensic Sc 151.

285 Brownlie op cit pp 2, 6.

286 *Campbell* v *Hall* (1774) Lofft 655, 98 ER 848.

287 HAL Fisher, *A History of Europe,* London, 1936, p 1.

288 Kirby op cit at 514, quoting TRS Allen, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism* (1985) Cambridge L J 111.

289 Cf *R* v *Murrell* (1836) 1 Legge 72.