The Semantics of *Mabo*: An Essay in Law, Language and Interpretation

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INTRODUCTION

This article is directed to a critical review of the High Court's decision in *Mabo v State of Queensland (No. 2)* (henceforth '*Mabo No. 2*')[1] in the context of some philosophical assumptions on the relationship of law, language and interpretation. The critique is concerned only with the theme of the common law as a justification for the High Court's decision. The conclusions of the High Court in *Mabo No. 2*, predicated on the common law, are identified as deficient when counterpoised against a public law framework. This deficiency merits serious corrective attention because it projects misleading assumptions and indeterminate conclusions on the political and moral dimensions of law and justice.

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1 (1992) 175 CLR 1.

Instead of a common law framework, the High Court, in *Mabo No. 2*, should have relied on principles, standards and values of the public law,[2] including the international law of human rights. Such reliance could have offered the High Court premises which were more rational and realistic to address the complex political, moral, cultural and legal questions posed by the issues in *Mabo No. 2*. The approach to legal reasoning advocated is that, in so far as legal analysis and choice are concerned, the exercise of judicial decision-making should be directed to explain unity and coherence in legal terms by relating the issues and context of adjudication, and the conclusion reached, to certain factors.[3] These include institutional support (rules and principles of the relevant body of law), historical context (past and present propositions and assumptions of law and legal method, applicability or otherwise of the doctrine of precedent), and standards of political and social morality.[4]

The prose of *Mabo No. 2* and the suggested premises on which the High Court could have based its decision can be explained in terms of varying combinations of semantics and pragmatics.[5] Much of what flows from the decision are implications. But in so far as those implications are drawn from pre-existing beliefs and values of the common law, those implications are contextually deficient. The alternate basis of decision-making in *Mabo No. 2*, suggested in this article, is that of explicit assumptions and rational explanation. This is grounded in public law sources —

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[2] Throughout the analysis in this article, the comment will recur that the common law operates as a private law system. By characterising the common law in this way, and advocating an alternative public law framework, the objective is to emphasise the distinctive nature of a public law discourse, derived principally from a written constitution which guarantees citizens' rights and articulates limitations on the exercise of State power. The dynamics of the public law transcend the issues, controversies, and resolution of disputes of such branches of law as, for example, contracts, torts and property where the focus is on competing entitlements of private parties. These areas have historically been the predominant concern of the common law. The manner in which the common law proceeded to adjudicate on controversies in these areas of law was wholly procedural, and substantive principles played no real part in it. This overwhelming reliance on procedure identifies the common law as a private law system.

[3] In legal theory, unity and coherence are directed to achieve an integrated interconnection of politics, morality and legality. This is discussed more fully *infra*, n. 6.

[4] Morality is an intrinsic part not only of political and social interaction, but also of law. Some theories of law, however, assert that morality is not a content of law. Generally, positivist theories of law contend that law and morals are separate, while natural law theories of law insist that morality is an intrinsic dimension of law. Modern writers of the positivist tradition accept that '[t]he law is indeed not hermetically sealed from morals and politics', N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 236.

In describing the instrinsic union of law and morals, Fuller, for example, projects eight 'principles of legality', compliance with which imbues law with a moral content, an 'inner morality': L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 41–94. A more rigorous portrayal of the moral content of law is presented by R. Dworkin, *Taking Rights Seriously* (London: Duckworth & Co., 1977), 184–205 and 240–58.

[5] For the purposes of this article, the term 'semantics' is used to refer to dictionary meanings of words; the term 'pragmatics' is used to refer to the use of context to make inferences about the meanings of words.

the Commonwealth Constitution, legislation defining public rights and government responsibilities like the *Racial Discrimination Act 1975* (Cth), and the international law of human rights.

The High Court's interpretive approach in *Mabo No. 2*, and the suggested alternative, can be compared to two pieces of literary compositions on the same theme, the same setting and the same set of characters. Each literary piece could find varying degrees of support to establish its unity and coherence by appeal to artistic merits, and thereby present preferable choices. In this respect, legal analysis and choice is similar to that pursued by a literary critic.[6] The acceptance of this similarity of literary and legal interpretation, and the role of language in each enterprise, is helpful in critically assessing the impact of *Mabo No. 2* on society, politics and the legal system.

THE DISCOURSE OF THE COMMON LAW AND THE CONCLUSIONS IN *MABO No. 2*

In *Mabo No. 2*, the High Court decided that, under certain conditions, Aboriginal people were entitled to possession, occupation and use of lands through customary land title, previously denied to them. The decision was predicated on the conclusion 'that the common law leaves space for, and provides protection to, pre-existing interests in relation to land which are, otherwise, extrinsic to the common law'.[7] The resort to the framework of the common law was to maintain legal continuity and preserve the internal consistency of the legal system.

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which

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[6] Unity and coherence can be considered in both literary and legal contexts. In adopting literary interpretation as a model for the central method of legal analysis, Ronald Dworkin, for example, likens the role of a judge in deciding hard cases to the work of a group of writers writing a chain novel. This group effort is directed at producing a single unified novel displaying unity and coherence, rather than a series of independent short stories. In Dworkin's model, a judge deciding hard cases accords unity and coherence to a decision by regarding herself or himself as a partner in a complex chain enterprise. In this enterprise, past decisions, structures, practices and conventions are the history on which a new decision must be based so as to continue that history: R. Dworkin, 'How Law is Like Literature', in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 146–77; R. Dworkin, *Law's Empire* (London: Fontana Press, 1986), 228–38; cf Georg Lukács's concept of the novel explained in his *The Theory of the Novel* (written 1914; translated by A. Bostock; London: Merlin Press, 1971).

Dworkin's explanation of unity and coherence has been criticised by, amongst others, writers of the Critical Legal Studies persuasion as 'causal dogmatism'. See R. Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 563, 578.

[7] G. Nettheim, 'Judicial Revolution or Cautious Correction? *Mabo v Queensland*' (1993) 16 *University of New South Wales Law Journal* 1, 11.

> gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England.[8]

Within these parameters, the common law was to accord recognition to customary land. For Brennan J:

> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.[9]

Customary land title — that is, the Aboriginal people's right to land[10] — which the High Court sanctioned as being recognised by the common law did not have the character of a right based on political or moral grounds. Rather, it was determined by evidence.

> ... [N]ative title being recognized by the common law ... may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual.[11]

These evidentiary laws and customs of the indigenous people must, however, conform to the common law principles of justice, equity and good conscience. Quoting a colonial precedent, Brennan J explained:

> The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions ... must be withheld...[12]

This limited recognition, by the common law, of customary land title was further made subject to the Crown's alienation, and appropriation of lands of the indigenous people.

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[8] (1992) 175 CLR 1, 29, per Brennan J; emphasis added.

[9] *Id.* 60. Brennan J, however, entered the caveat that 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared'.

[10] For the purposes of this article, the distinction between common law Aboriginal title and native title is semantic. For a discussion on that distinction, see (1992) 175 CLR 1, 206–14, per Toohey J.

[11] (1992) 175 CLR 1, 61, per Brennan J. The evidentiary requirements include continuity of traditional connection with the land. The question of this kind of evidence would not arise 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs'. *Id.* 60.

[12] *Id.* 61. The decision relied on was *Idewu Inasa v Oshodi* [1934] AC 99.

> ... Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency...
>
> ... Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.[13]

These modes of extinguishment of native title, sanctioned by Brennan J, do not give rise to compensation. This is explained as an imposition of the common law for certain overarching interests:

> At common law confiscation of property is presumed to require the payment of compensation. Native title is not protected by such a presumption. Native title is *not* accorded the 'full respect' which Brennan J asserts as the rationale of his judgment. Native title is subject to extinguishment at common law without the consent of the Aboriginal people or the payment of compensation. This limitation upon native title is a fundamental aspect of the compromise of the Aboriginal interest which the common law imposes in order to give paramountcy and validity to the interests of the settler society.[14]

In basing his conclusions regarding the availability and extinguishment of native land titles on the common law, Brennan J acknowledged the necessity to 'trump history with justice'. He observed:

> It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.[15]

However, having acknowledged the inadequacies of the common law of the previous era, to ensure justice in present-day circumstances, Brennan

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[13] *Id.* 69–70, per Brennan J. Also, in addition to the common law extinguishment of native title, Brennan J pointed out instances of valid extinguishment by legislation. *Id.* 64–65.

[14] R. Bartlett, *The Mabo Decision* (Sydney: Butterworths, 1993), xx; emphasis in original. In Brennan J's judgment, the issue of compensation is not substantially addressed. His position on this issue is clarified in the joint judgment of Mason CJ and McHugh J, who concurred with his decision:

> '[N]either of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages': (1992) 175 CLR 1, 15–16.

[15] (1992) 175 CLR 1, 57–58. In this context, note the great caution advocated by Brennan J in departing from precedents: *Id.* 29–30.

J simultaneously felt the need 'to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land'.[16]

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This brief review of the decision in *Mabo No. 2* shows that the High Court's interpretive method and its conclusions are heavily weighed down by the semantics of the common law. In highlighting this, it is necessary to explain what common law is and what its dimensions are.

THE COMMON LAW AND ITS PRESUMPTIONS

In terms of concept and application, the expression 'common law' is ambiguous and pejorative. It can mean a system of law different from the civil law tradition,[17] or a system of law based on English law,[18] or rules and principles of law created by the courts rather than by the legislature,[19] or the rules and principles of the common law as distinct from those of equity.[20] The term 'common law' is also used to describe a

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[16] *Id.* 69.

[17] Historically, one of the most important distinctive features of the common law which sets it apart from the civil law tradition of continental Europe is its reliance on judicial case-method directed at resolving specific disputes through procedural rules, rather than articulating broad principles of substantive law. Civil law has pursued a different technique and philosophy. Its method is deductive, proceeding from general principles of substantive law to specific cases. On the philosophical and practical distinctions between the common law and the civil law, see for example, B. Schwartz (ed.), *The Code Napolean and the Common Law World* (New York: New York University Press, 1956); F. Lawson, *A Common Lawyer Looks at the Civil Law* (Ann Arbor: University of Michigan Press, 1955); and H. De Vries, *Civil Law and the Anglo-American Lawyer* (New York: Oceana Publications, 1976).

[18] The following comments, for example, highlight this meaning:

> 'English law occupies in effect a pre-eminent place within the family of the Common Law. This is so not only because it was in England that the Common Law was historically developed; today as well English law continues to be, for many countries, a model law which may not, of course, on different points and in all respects, be actually followed but which nonetheless is generally respected and taken into consideration.' R. David and J. Brierley, *Major Legal Systems in the World Today* (3rd ed., London: Stevens & Sons, 1985), 308.

[19] Originally, of course, the term 'common law' referred to judge-made law, and its justification lay in the creation, by the royal Courts of Justice, of a regime of English law truly common to the whole of England. By the 19th century, however, the judicial case-by-case method, characteristic of the original development of the common law, was no longer able to keep pace with political and social transition. This brought about increased legislation and statutory consolidation. Since then, statutes and regulations have come to occupy a far more important place than they had done in the past. Within this framework of statutes and regulations, the dispute adjudicative processes use methods that are not exclusively those of the traditional common law.

[20] Historically, remedies at equity were evolved and applied by the Court of Chancery in order to correct the deficiencies of the common law. Despite the later 'fusion' of equity and common law at the level of judicial organisation, the distinction is still fundamental to English law.

distinct body of rules and techniques of interpretation,[21] as well as certain doctrines, such as the doctrine of precedent.[22] This article is concerned with this latter description of the common law.

It has been claimed that the rules and principles embodied in the common law have been instrumental in guaranteeing human rights. Portraying the High Court's decision in *Mabo No. 2* as 'another triumph of the common law', one commentator has explained common law and its efficacy in the following terms:

> The common law is founded on human experience. It is judge-made law that responds and seeks to resolve particular disputes and fact patterns that come before the courts. Its *wisdom* has always been derived from the need to provide a solution in practice and not in the abstract. It is essentially pragmatic in nature.
>
> In its *development over the millennium* the common law has entrenched certain propositions which form the basic minimum standard of *human rights*. The entrenchment takes effect as a presupposition against legislative interference with fundamental rights to the person and property... Such entrenchment arises from the *role of the common law as 'an ultimate constitutional foundation'*... That role is a tribute to the virtues of the common law.[23]

Taking, for example, the issue of the common law being the guarantor of human rights 'over the millennium', Brennan J's lament that the common law of the previous era perpetuated injustice has already been noted.[24] The Australian Constitutional Commission has also noted the failure of the common law to protect human rights.

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[21] For example, the literal rule, the golden rule, the mischief rule, *ejusdem generis* and *noscitur a sociis*.

[22] Although judicial precedent has some persuasive effect in most jurisdictions, the peculiar feature of the common law doctrine of precedent is its coercive nature.

[23] R. Bartlett, 'Mabo: Another Triumph for the Common Law', in *Essays on the Mabo Decision* (Sydney: Law Book Co. Ltd, 1993), 59–60; emphasis added.

It appears that describing common law in terms of wisdom and continuity are merely rhetorical. It has been pointed out, in the comparative context of European continental legal systems, that wisdom and continuity are not unique to the English common law: See, for example, David and Brierley, *supra* n. 18 at 309.

The preoccupation of the common law with the semantics of rights appears to be rooted in English legal history, and not with the substantive dimensions of the public law character of citizens' rights against the State. An examination of English legal history reveals that, at earlier periods, law and right were synonymous. See the comments in this regard in A. Kiralfy, 'Law and Right in English Legal History', in C. Varga (ed.), *Comparative Legal Cultures* (Aldershot: Dartmouth Publishing Co. Ltd, 1992), 79.

The observation relating to the role of the common law as 'an ultimate constitutional foundation' is referenced to O. Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240. This kind of portrayal of the relationship between the common law and the Commonwealth Constitution belongs to an earlier era of constitutional interpretation in Australia when, it seems, the dynamics of constitutional law were not fully appreciated. See, for example, the comments in this regard in G. Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society', in D. Hambly and J. Goldring (eds), *Australian Lawyers and Social Change* (Sydney: Law Book Co. Ltd, 1976), 38–42.

[24] *Supra*, n. 15.

> Inevitably the common law is made up of a wilderness of single instances from which general principles are extracted. The common law has thus not developed and enforced a set of protections of the individual against governments.[25]

The failure of the common law in specific areas of human rights has been highlighted in the following way:

> The common law has a patchy civil liberties record. In America, under the common law, slavery flourished. It was terminated only by a constitutional amendment in 1865. In Britain and Australia, as well as in America, the common law deprived married women of the right to hold property separately from their husbands. Women could not vote. These injustices were terminated, not by decisions of courts developing common law rights, but by legislation or constitutional amendment. As recently as 1981, the Supreme Court of Canada dismissed an action for damages for racial discrimination on the basis that such a claim was unknown to the common law...[26]

More specifically, as late as 1985, Deane J candidly acknowledged the continuing inadequacy of the common law in Australia to protect traditional land titles. Speaking on a comparative note, Deane J observed: '[T]he common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823...'.[27]

The claim that the common law encompasses human rights standards which were applied to decide land rights questions in *Mabo No. 2* is therefore not borne out by evidence.

Human rights — that is, rights of individuals and groups against the community and the State, including land rights — are issues of public law. These issues cannot be adequately addressed by the common law because, in its underlying assumptions and rationalisations, the common law is characteristically a private law system.

> [T]he common law has remained fundamentally and overwhelmingly a private law system... The common law does not have a concept of public law, still less a philosophical or conceptual system within which more detailed but self-consistent development can take place.[28]

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[25] Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution* (Canberra: AGPS, 1987), 15. The basic presumption of the common law is that private individuals have the liberty to do anything they please unless it is prohibited by the law.

[26] M. Wilcox, *An Australian Charter of Rights?* (Sydney: Law Book Co. Ltd, 1993), 219–20. The Canadian decision referred here is *Seneca College v Bhadauria* [1981] 2 SCR 181.

[27] *Gerhady v Brown* (1985) 159 CLR 70, 149, quoted by Brennan J in *Mabo No. 2* (1992) 175 CLR 1, 43.

[28] C. Howard, 'Public Law and Common Law', in D. Galligan (ed.), *Essays in Legal Theory* (Melbourne: Melbourne University Press, 1984), 1. The distinction between private law and public law, for purposes of this article, has been explained at *supra* n. 9.

Part of the failure of the common law to adequately accept new realities of society and politics is its technical adherence to the doctrine of precedent, a peculiarly common law institution. Administration of justice presupposes that like cases should be decided alike. In this sense, the judicial precedent has a persuasive effect in almost every jurisdiction. However:

> [t]he peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so... The strongly coercive nature of the English doctrine of precedent is due to rules of practice, called rules of precedent, which are designed to give effect to the far more fundamental rule that English law is to a large extent based on case-law.[29]

This compulsion to follow precedents can be self-defeating and inhibitive of legal development.

> [T]he common law compulsion, when in need of a rule for a new situation, to argue by analogy from something already within itself, however remote ... [can produce] absurdities...[30]

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The presumptions of the common law analysed here expose critical shortcomings in its capacity to address the complex issues raised in *Mabo No. 2*. Notwithstanding these shortcomings, the High Court has relied on the common law to justify its decision. *Mabo No. 2* has also been described as 'another triumph of the common law'.[31] From the perspective of the audience of the *Mabo No. 2* decision, the High Court's semantics of the common law can therefore present misleading assumptions and project conclusions on indeterminate grounds.

This problem of misplaced assumptions and indeterminate conclusions is relevant not only to legal discourse but to the larger field of language, law and interpretation in general. In terms of the philosophy of language,[32] the issue of a realistic legal discourse is important because legal language,

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[29] R. Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1977), 4.

[30] Howard, *supra* n. 28 at 7–8; cf J. Stone, 'The Ratio of the Ratio Decidendi' (1959) 22 *Modern Law Review* 597, where he asserts that the emphasis on the past is essentially the vehicle for legal development.

[31] *Supra*, n. 23.

[32] The philosophy of language studies the principles and rules of interpretation and construction. This field of study was originally identified as 'hermeneutics'. For the traditional parameters of hermeneutics, see, for example, F. Lieber, *Legal and Political Hermeneutics or Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities* (reprinted 1970; Buffalo, New York: W. Hein & Co. Inc., 1839). Recently there has been a revival of interest in this field of inquiry. See *infra* n. 47.

among other things, facilitates the determination of the rights of citizens and the responsibilities of the state. Any deficiency or indeterminacy of language and expression in legal discourse can mean vastly different conceptions, applications and outcomes of controversies between state and citizens. In the next section, an alternative public law framework, within which the High Court's decision in *Mabo No. 2* could have been substantially based, is briefly explored.

A PUBLIC LAW FRAMEWORK

Public law is directed to an inquiry as to what the state can and cannot do. It is about the institutions of government, the boundaries of their powers, the relationships between them, and the rights and entitlements of individuals and groups in their interaction with the state. The underlying assumptions, concepts, techniques, and conclusions of the public law are premised on the recognition of the rights of individuals, and the responsibilities of the state in assuring these. In Australia, the broad parameters of this interaction are provided by the Commonwealth Constitution. Terms of reference are also provided, in so far as citizens' rights are concerned, in certain statutory instruments. These include the *Racial Discrimination Act 1975* (Cth), and the *Sex Discrimination Act 1984* (Cth). These Acts have been enacted in Australia in reliance on instruments which form part of the international law of human rights.[33] The High Court's decision in *Mabo No. 2* should have been grounded within a public law framework provided by these sources. In particular, reliance could have been founded on:

(a) international human rights documents and judicial translation of these standards into domestic guarantees;
(b) s. 51(xxxi) of the Commonwealth Constitution; and
(c) the *Racial Discrimination Act 1975* (Cth).

International Standards of Human Rights

Reliance was placed by Brennan J on international human rights documents, like the *International Covenant on Civil and Political Rights 1966* (ICCPR),[34] as providing standards for domestic safeguards of rights. There was, however, no explicit reliance on such international charters like the

[33] *The International Covenant on the Elimination of All Forms of Racial Discrimination 1965* (ICERD), UN GA Res. 2106(xx) of 21 December 1965; *Convention on the Elimination of All Forms of Discrimination against Women 1979* (CEDAW), UN GA Res. 34/180 of 18 December 1979, respectively.

[34] UN GA Res. 2200A(XXI) of 16 December 1966.

ICCPR in *Mabo No. 2*. The observations of Brennan J in this regard are therefore *obiter* remarks. Even these *obiter* remarks do not detract from the overwhelming discourse of the common law in *Mabo No. 2*. This is so because the reference to international instruments like the ICCPR is not for the purpose of defining a domestic public law paradigm for resolving the issues, but rather for informing the common law. Brennan J made the following observations in this regard:

> The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, *but international law is a legitimate and important influence on the development of the common law*, especially when international law declares the existence of universal human rights.[35]

The influence of international law on the common law, however, was permissible only to the extent that it did not 'fracture a skeletal principle' of Australia's common law system.[36]

It was open to the High Court in *Mabo No. 2* to transcend the technical assumptions of the common law and rely more explicitly and substantively on international human rights documents like the ICCPR, the *International Covenant on Economic, Social and Rights 1966* (ICESCR)[37] and the *International Covenant on the Elimination of All Forms of Racial Discrimination 1965* (ICERD). This would have enabled the Court to arrive at a more rational and consistent decision concerning land rights for indigenous peoples of Australia.

Constitutional Framework for Acquisition of Property

Section 51(xxxi) of the Commonwealth Constitution enables the federal Parliament to legislate for the acquisition of property on just terms.[38] The requirement of just terms characterises s. 51(xxxi) as an important guarantee of a property right.[39] Since issues in *Mabo No. 2* related to the right to land or property, this constitutional provision is of fundamental

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[35] (1992) 175 CLR 1, 42; emphasis added.

[36] *Id.* 43.

[37] UN GA Res. 2200A(XXI) of 16 December 1966.

[38] Section 51(xxxi) provides:

> 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ...
> The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'

[39] Cf the 5th amendment of the US Constitution: '... nor shall private property be taken for public use, without just compensation.' Although there are differences between s. 51(xxxi) and the US provision as to the nature and scope of acquisition and compensation, the principles of, for example, fairness, justice and equality are common to both.

importance. However, three of the majority Justices in *Mabo No. 2* denied any recourse to compensation for extinguishment of native title to land.[40] Deane and Gaudron JJ considered the implications of s. 51(xxxi) in acts which extinguish native title. They observed:

> In so far as the Commonwealth is concerned, there is the requirement of s. 51(xxxi) of the Constitution that a law with respect to the acquisition of property provide just terms. Our conclusion that rights under common law native title are true legal rights which are recognized and protected by the law would, we think, have the consequence that any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s. 51(xxxi).[41]

The views offered by Deane and Gaudron JJ on the application of s. 51(xxxi) of the Constitution to issues of extinguishment of native title rights are correct, and ought to have been adopted by the majority in *Mabo No. 2*. The co-relation of native land titles to s. 51(xxxi) in this manner would have elevated the land rights comprehended by those titles to a constitutional status.

Procedural and Substantive Dimensions of the *Racial Discrimination Act 1975* (Cth)

In *Mabo No. 2*, Brennan, Deane, Gaudron and Toohey JJ recognised that extinguishment of native title must not contravene the *Racial Discrimination Act*.[42] These Justices, however, at the same time explain native title as being derived from the common law. The predicament of this position is that as long as native title is derived from the common law, the protection of native title rights could be extinguished by amendment or supersession of the *Racial Discrimination Act*. It is true that if native title were to be based on legislation instead of the common law, extinguishment could be accomplished by the terms of such legislation. The important distinction in these two situations is that in the former case, the procedure for extinguishment would be common law rules of interpretation, partaking the nature of private law. In the latter case, any governmental claim of extinguishment would have to address the requirements of s. 51(xxxi) as well as other relevant provisions of the Constitution, and the principles, policies and standards of the *Racial Discrimination Act*.

Rather than basing native title rights on the common law, it was open to the High Court, in *Mabo No. 2*, to extrapolate conceptions of substantive

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[40] (1992) 175 CLR 1, 15–16. Toohey J's views on this issue are unclear.

[41] (1992) 175 CLR 1, 111.

[42] *Id.* 67, per Brennan J; 112, per Deane and Gaudron JJ; and 216, per Toohey J. The *Racial Discrimination Act 1975* (Cth) was passed by the Commonwealth Parliament to give effect to Australia's obligations under the ICERD.

rights such as equality and other civil liberties from the provisions of the *Racial Discrimination Act*. The *Racial Discrimination Act* may well be described as a statutory charter of procedural human rights and civil liberties directed to overcoming racial discrimination. However, since the Constitution does not incorporate a bill of rights, conceptions of substantive rights with regard to equality and non-discrimination must have to be based on the *Racial Discrimination Act*. In this regard, it should be noted that even constitutional charters encompassing substantive dimensions of individual rights can be explained as procedural guarantees. Such an explanation is pursued, for example, by John Ely in *Democracy and Distrust*.[43] Ely interprets the provisions in the United States' Constitution concerning rights as being procedural because the Constitution does not provide:

> ... a set of substantive rights entitled to protection. The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself — by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.[44]

Although Ely's arguments are admirable, constitutional rights cannot be explained in procedural terms only. Ely's process-based technique of explaining rights has been criticised on the ground that '[t]he process theme by itself determines nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values'.[45]

Under the *Racial Discrimination Act*, the procedural human rights and civil liberties guaranteed can only operate on the basis of a core of substantive values constituting those rights and liberties. Since no constitutional or statutory charter of rights is operative in Australia, the provisions of the *Racial Discrimination Act* guaranteeing equality and non-discrimination must be explained as incorporating the substantive contents of those rights. This explanation can be facilitated, in part, by s. 9(2) of the *Racial Discrimination Act* which explains the rights guaranteed to include those in the ICERD.[46]

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[43] Cambridge, Mass.: Harvard University Press, 1980. Ely's endeavour here is to construct a framework for a 'process-based' theory of judicial review.

[44] *Id.* 100–1.

[45] L. Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063, 1064.

[46] Article 5 of the ICERD enumerates an impressive set of civil, political, economic, social and cultural rights.

By explaining native title as originating from the common law and vulnerable to extinguishment, subject only to the procedural safeguards of the *Racial Discrimination Act*, the majority in *Mabo No. 2* failed to realise the public law dimensions of state–citizen interaction. The dimensions of this interaction presuppose that citizens have certain well-defined rights against the state. These rights of citizens incorporate both substantive and procedural guarantees. In the absence of any statutory or constitutional charter of rights in Australia, the land rights of Aboriginal people, the subject of the *Mabo No. 2* decision, ought to have been derived, both in substance and in form, from the *Racial Discrimination Act*.

SEMANTICS, PRAGMATICS AND THE COMMON LAW CONCLUSIONS OF *MABO No. 2*

Support for the alternative public law framework surveyed here is strengthened when the conclusions in *Mabo No. 2* are seen in a context where language, law and interpretation are interrelated. Meanings of words, concepts and statements are context-dependent. Consequently, there is a difference between what is stated and what is communicated. The semantic approach to interpretation considers only the conventional dimensions of what is stated. The pragmatic approach takes into account not only what is stated, but also what is communicated — that is, the conversational implicatures of the statement.[47] Applying this explanation of the relationship between semantics and pragmatics to *Mabo No. 2*, the following conclusions are inescapable:

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[47] See, for example, P. Grice, *Studies in the Way of Words* (Cambridge, Mass.: Harvard University Press, 1989). 'In the Gricean framework, conversational implicatures are textual of the utterance act — they are the assumptions that follow from the speaker's saying what he says together with the presumption that he is following the maxims of conversation': Francois Recanati, 'The Pragmatics of What is Said' (1989) 4 *Mind and Language* 295.

Besides Grice, contemporary writings in the field of philosophy of language include J. Habermas, *Theory and Practice* (translated by J. Viertel; Boston: Beacon Press, 1973) (see also his other works); H.G. Gadamer, *Truth and Method* (London: Sheed & Ward, 1975) (see also his other works); J. Searle, F. Kiefer and M. Bierwisch (eds), *Speech Act Theory and Pragmatics* (Dordrecht: D. Reidel, 1980); J. Rosenburg and C. Travis (eds), *Readings in the Philosophy of Language* (Englewood Cliffs, NJ: Prentice-Hall Inc., 1971); J. Katz, *Semantic Theory* (New York: Harper & Row, 1972); and N. Chomsky, *Studies on Semantics in Generative Grammar* (The Hague: Mouton, 1972) (see also his other works).

Recent literature on approaches to legal and constitutional interpretation based on textual and contextual inquiries include F. Schauer, 'An Essay on Constitutional Language' (1982) 34 *University of California Law Review* 797; S. Levinson, 'Law as Literature' (1982) 60 *Texas Law Review* 373; D. Hoy, 'Interpretating the Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 *Southern California Law Review* 136; and M. Tushnet, 'Following the Rules Laid Down' (1983) 96 *Harvard Law Review* 781.

(a) The common law has at last found a solution to the long-standing problem of negation of land titles to the indigenous people in Australia.
(b) The common law incorporates certain inherent and basic concepts like justice, equality and fair play.
(c) The common law can reach within itself to produce procedures for attaining these moral goals.
(d) The common law embodies efficacious rights and freedoms of citizens.
(e) Only common law can effectively address the issues of land rights of the Aboriginal people.
(f) The Commonwealth Constitution did not assist, or is somehow irrelevant, in adjudicating the controversies of native title.
(g) The standards of the common law, rather than international human rights law, were sufficient for the purposes of the decision.

None of these conclusions are consistent with the nature and content of the common law or its presumptions. It is an admitted fact that the common law perpetuated injustice in the pre-*Mabo No. 2* era, and it was considered appropriate to overrule the earlier presuppositions of the common law.[48] In so far as pragmatics are concerned, the insistence that, notwithstanding its earlier incapacity, the common law is now able to address these concerns is contradictory. *Mabo No. 2* is an attempt to re-orient claims of native title to the changed political, social and moral values in Australia and in the international context. In one sense of the term 'common law', this attempted re-orientation is taking place in a judicial forum, and therefore is a matter of the common law. However, the substance of these re-oriented values cannot be identified as common law values.

The common law recognises a conception of rights of citizens, conventionally referred to as liberties, which is negative in character. At common law, these liberties operate in a context after all the exceptions and limitations to them have been dealt with by the law. The Constitutional Commission, for example, described this situation in the following way: 'A basic principle of the common law is that private individuals are at liberty to do anything they please unless it is prohibited by law.'[49]

In view of this formulation of citizens' liberties at common law, the implicit and explicit assertions, in *Mabo No. 2*, of the common law's capacity to safeguard substantive dimensions of justice, equality or fair play conveys an impression which is inconsistent with contemporary formulations of the rights of citizens against the state. These rights of citizens

[48] See, for example, the observations of Brennan J (1992) 175 CLR 1, 29–30.
[49] Constitutional Commission, *Final Report of the Constitutional Commission* Vol. 1 (Canberra: AGPS, 1988), 447.

are positive rights, not gifts or bequests of the Constitution or of the law, so that they can be encroached upon at will or pleasure by the state.[50]

The procedures of the common law suggested and upheld in *Mabo No. 2* for the assertion, survival, and extinguishment of native titles similarly conveys an idea of achieving substantive justice through a process-based inquiry.[51] Indeed, a process-based inquiry has been a fundamental characteristic of the common law. Until the 19th century:

> [t]he principal concern of English jurists ... was directed to the various formalistic procedures put into operation by the writs, rather than to the elaboration of those principles upon which just solutions to disputes would be based... The Common law did not appear to be so much a system attempting to bring justice as a conglomeration of procedures designed, in more and more cases, to achieve solutions to disputes.[52]

Although there have been subsequent developments in the common law, the theme of procedure remains dominant. The following conclusion, therefore, holds true today as it did previously:

> The common law believes that justice consists in the peaceful resolution of disputes and is not particularly interested in who wins. In this respect its philosophy contrasts with the attitude of the man in the street, who is apt to be more interested in getting what he believes are his rights than in precisely how he gets them.[53]

The semantics of *Mabo No. 2* can thus be characterised as removed from the dynamics of legal discourse, and the political and social dimensions of law. It is also inconsistent with the broad propositions that citizens have certain inherent rights against the State which are positive, and not negative in character. The decision therefore has the propensity to evoke, in the minds of its audience, misleading assumptions and indeterminate conceptions of the issues involved in the controversy over native title, and its attempted resolution through the medium of the common law.

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[50] See, for example, the conception of rights advanced by Dworkin: '[A] man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so': Dworkin, *supra* n. 4 at 139.

On the question of transgression of citizens' rights by the state, Dworkin claims that since rights cannot be explained as a 'gift', there cannot be general sanction of state encroachment of these:

> 'The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport... Anyone who professes to take rights seriously ... must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity... The second is the powerful idea of political equality.' *Id.* 198.

[51] See (1992) 175 CLR 1, 61, per Brennan J; cf the explanation of a process-based technique of defining constitutional rights, *supra* n. 44.

[52] David and Brierley, *supra* n. 18 at 319.

[53] Howard, *supra* n. 28 at 3.

CONCLUSION

Notwithstanding its cautious overtures,[54] *Mabo No. 2* is a remarkable piece of judicial accomplishment. This article's critique of its common law conclusions is not an endeavour to detract from that achievement. Nor is it suggested that the common law is wrong. Rather, the purpose has been to project the fact that the semantics of the common law relied upon in *Mabo No. 2* have the propensity to convey a wrong impression of the institution, presuppositions, assumptions, methods, and limitations of the common law.

In so far as *Mabo No. 2* reflects the view that it is wrong for the state or the community to dispossess a group of people, or that it is wrong for the state to treat people unequally, or that it is wrong for the state to permit inequality of treatment to two or more groups of people, the decision is impressive. By the same token, demands of substantive equality or rights against the state are best portrayed not in terms of the common law but as conceptions of public law. In addition to the projected inaccuracies of its semantics, the reliance on the common law to formulate these rights precluded the High Court from articulating any substantive parameters of native title — its existence, nature and extent, and the relationship of native title to other rights and entitlements. The reliance on the common law similarly enabled the High Court to sanction extinguishment of native title without compensation.

The semantics of *Mabo No. 2* are self-limiting, and inadequate to address the moral dimensions of liberty and equality of the indigenous peoples of Australia. In order to be able to meaningfully repudiate the prior dispossession, and recognise the land rights and other rights of the indigenous people of Australia, the High Court should have gone beyond the barriers of the private law assumptions of the common law, and addressed those concerns in the context of public law — both national and international.

Reliance by the High Court on the suggested public law paradigm would have ensured that *Mabo No. 2* conformed closely to the realities of the issues involved. In turn, that could have induced a pragmatic awareness,[55] on the part of the larger audience of the decision, of the political, social and moral dimensions of law and justice, and the capacity of the common law to address those concerns. As one commentator, speaking of a similar context of choices open to judicial decision-making, has observed:

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[54] Nettheim, *supra* n. 27 at 2, has suggested that *Mabo No. 2* 'represents a cautious correction to Australian law'.

[55] See *supra* n. 47 and the discussion on the relationship between semantics and pragmatics.

Just as two readings of a poem may find sufficient support in the text to show its unity and coherence, two principles [of legal interpretation] may each find enough support in the various decisions of the past to satisfy any plausible theory of fit. In that case substantive political theory (like substantive considerations of artistic merit) will play a decisive role.[56]

[56] R. Dworkin, 'How Law is Like Literature', *supra* n. 6 at 161. Unity and coherence are explained in *supra* n. 13. On the similarity between artistic and literary interpretation, see also Dworkin, *Law's Empire*, *supra* n. 6 at 239:

> 'Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation's success on one type of standard against its failure on another.'