

Law and Difference: Reflections on Mabo's Case

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Some reactions to *Mabo v the State of Queensland*¹ offered the view that its recognition of Aboriginal title made a rupture in the Australian community. The foundation of this view is a univocal conception of law — there is just the law (in this case Australian law) which is held out as applying equally to all, constituting therefore a single category of citizens under it. It may even be that some exponents of the univocal conception are possessed of a certain generosity of spirit; one that really is willing to offer a full share of Australian citizenship to the descendants of the indigenous inhabitants of the continent. It is, nevertheless, a false view of law and community, which in truth actually require the recognition of difference, not its suppression in a univocal citizenship. Related to the univocal view is another view under which the recognition of difference, such as the High Court undertook in *Mabo (No 2)*, is seen as an illegitimate value judgment on its part. According to this view, its position under the Constitution requires that it stick to univocal law (sometimes called black-letter law), and it lacks constitutional authority when it seeks to impose extraneous value judgments upon citizens.

I agree in part with the second view. The High Court is a court of law and nothing else. But the view is based upon a mistaken understanding of law. It is the essential nature of law to recognise difference. And it is the failure to recognise difference which constitutes an illegitimate (unlawful) value judgment. I shall deal with the two views in turn.

Community (and therefore law) is a function of difference. Let us take a single and simple issue of community among humans, one of colour perception. Suppose I see only green and you see only red. Do we have community in this simple matter of our example? No, because I live in a green world and you live in a red one — two worlds, not a common (communal) world. But when we recognise each other's difference then and only then is there a common world as the foundation of a community between us. That world is one which I continue to see as green, but I no longer confuse my perception of the world with the world itself: there is a common (communal) world which I see as green and you see as red. That requirement for community is obvious enough when there is a difference between us. For one of us to impose their view on the other (in our example, one of us insisting that it is the other who is colour-blind) is a denial of respect for the other, and therefore a denial of our community. But my claim is a much stronger one than this.

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¹ (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1, hereafter *Mabo (No 2)* with all page references to (1992) 175 CLR 1.

It is that community, and law, actually requires difference. So what if we both see green? Is there no community in the case where there is no difference between us and we both see green? There is not, because there is nothing for there to be a community upon. If we wish to say anything about this state it could only be that there are two organisms constructed or programmed to run parallel courses into perpetuity. This latter point is somewhat misunderstood in the literature of totalitarianism, for example in George Orwell's *1984*, where it often seems that what is wrong is the forcing of people to sameness. That is wrong, of course, but only because difference is assumed. If people were the same it would not be wrong to force them to sameness, nor would it mean anything. The fundamental point is that a totalitarian state is not a community not because it is forced (it might not be) but because it lacks the difference upon which a community might function.

I have required a considerable effort of imagination of the reader. The world of redness and greenness is both too little and too big for comfortable acceptance of the argument.

It is too little, and must be expanded to encompass not just the perception of colour but all perception. It has perhaps occurred to the reader that in the case where we both see green we would still have community because we would see every green thing from a different shape perspective (since we do not occupy the same viewing point). This is true; but the case is still one of difference, and one of the fundamental ones of community. If I regarded you as having no view or no other sensory perspective, as perhaps I do actually think of a tree, then there would be no community between us: I would be a tyrant in the matter, thinking my perspective was the world's perspective (or God's perspective), and my tyranny would have to be brought down to lawful equality of perspective before we could have community. These two things, colour perception and shape perspective, are only a very small part of our actual communities. The requirement of difference for community applies to all perception, all the sciences, all the myths and religious experiences — everything that constitutes the way we see the world. And it must encompass all desires as well, though I should not want to be thought committed to a sharp distinction between perception and desire. To take the issue of *Mabo (No 2)* itself, the indigenous inhabitants desired land and the European settlers did as well. But it would be far too simplistic to say there was a conflict of desires and leave it at that. At the bottom of the desires there was a vast difference of perception of what the land was and what it was to desire it; these differing perceptions reflect more immediately in the differing conceptions of legal title than desire itself does, and constitute a much greater problem of lawful reconciliation. When this issue is expanded to embrace all aspects of the relations of humans in community the size of the problem of law and difference is encompassed: it is nothing less than the whole of our cultures which constitute our communities of difference.

Though there is no sharp distinction between perception and desire we need to be especially clear about difference of desires. Suppose you and I desire the same apple. Is this not sameness of desire? No, it is difference. I desire that I eat the apple and you desire that you do — a difference so great that it has often led humans to war. It is only when I recognise your difference (in this case your desire for the apple) and you reciprocate that there is the possibility of community between us. Here the reader might reflect upon a lack of difference, and see the strong version of my claim about community

and difference — the case of a world arranged against difference so that you and I could never desire the same apple or anything in common would be one where we run our lives in parallel but not in community.

But would this not be a rather happy state? One where a common source of conflict was removed, allowing us to get on with the other parts of our communal lives? But there are no other parts. Or if there are I should wish to make my point in respect of each and every one of them. If it were the case that every desire and every perception was the same for each of us, our lives would be parallel not communal. Or, to vary the metaphor, they would be in enclosed boxes ("little boxes, little boxes" to use Pete Seeger's words). More than this they would not be lives. There would be no conception at all of other and therefore no conception at all of self — no lives, just a complex organism (the world) arranged in the stated parallel lines.

The world is not arranged like that, but there are many tyrannies where the other's difference is obliterated by human action and the equivalent state of non-community is produced. *Mabo (No 2)* deals with one of these tyrannies.

To pick out desires and perceptions one by one produces a world that is too small, but also one that is too big. It is this because it presents our issue in too stark a relief. If the world had just one issue, colour perception, and there were just the two of us, how ever would we get even to know of the other's perception, let alone accept it? But the starkness does not distort the issue. We overlook this problem and think colour perception commonplace only because our attention is dispersed, such that when we focus upon one recognition of otherness there are a hundred others in a commonplace background corroborating and tending to explain it. But the whole does not explain itself any more than a part does. With two issues or a hundred, or a whole culture, the wonder is that there is any recognition of otherness at all. This wonder leads me to think that the law of love, our name for the recognition of (different) otherness, is a natural law of the world. But that is not an issue for this essay — there is in the structure of any community a recognition of otherness or difference, and I will leave it at that and pass on to the High Court's attempt to recognise difference in *Mabo (No 2)*.

Rejecting *terra nullius*, they rejected the most fundamental denial of difference — the denial of the very existence of the other. This has not been well understood. There is a trivial sense of existence. The settlers were well aware of the existence of the indigenous people in that they were there in the land as there were trees and hills and animals in the land. Of course that was never denied. But this is not a recognition of difference. If I look at a tree what I see is what I see (just as in our earlier example I saw with my own green perception, not your red one). And so for the settlers looking at the inhabitants of the land; they saw with their own conceptions and perceptions, not with those of the (different) other. To see difference (and have community) it is necessary to see the other as other conceiver and perceiver. This was expressed by Kant as the recognition of the other as end in itself. The term is entirely apt. If I recognise the other and its relation to myself, I recognise a second and different end-point of perception and desire. It was precisely the point of *terra nullius* to deny this otherness: the land was not fixed with another's set of perceptions and desires (including, as a subset, their law). And this the High Court (happily) has rejected.

The other had a different law. From the recognition of the existence of the indigenous inhabitants there followed the recognition of the possibility

that their law was a different law. There is also in the various High Court judgments a recognition and acceptance of the fact that the indigenous property conceptions were different and that the common law needed to be modified accordingly. But that (unhappily) is as far as it goes.

Extinguishment of title is not treated by the High Court in the same way as title. Extinguishment may be effected, according to the majority by Crown or Parliament, and according to the minority at least by Parliament. However it is obvious that according to Aboriginal law (the law of the other) it could not be effected at all, or at least not in these ways. There is no justification for such a radical distinction between title and extinguishment of title. Certainly, Brennan J distinguished between skeletal and non-skeletal principles of the common law,² but on what ground is extinguishment of title skeletal but title not? And, anyway, even if that distinction can be sustained, the recognition of (different) otherness is reduced to a token acceptance of non-fundamental (non-skeletal) things, and we might better (more honestly) be back with *terra nullius*.

It is always difficult to undertake the full recognition of otherness (far easier for me to continue to live in my green world). But there are misconceptions here. From that recognition in *Mabo (No 2)* it would follow that all (European) property holding is unlawful, and no doubt this is alarming. Are all the lands and the buildings, virtually everything, simply to be returned? This thought is entirely misconceived. There is no more justification for applying Aboriginal law to the European invaders than there was for applying European law to the Aborigines. The recognition of otherness and difference in the structure of community goes both ways. And it goes both ways in time, too — there is no Aboriginal temporal priority, for time is just another difference upon which the issue of community arises both ways. Then were the Europeans not invaders? They were in an entirely ongoing sense. Any failure to recognise difference, forwards or backwards in time, or contemporaneously, is an invasion of the other because it is an obliteration of the other's difference and therefore of its very existence.

If neither European nor Aboriginal law can apply to the issues of *Mabo (No 2)*, is it then the fact that there is no law of property between Aboriginal and European Australians? Of course there is. Law is the structure of community and it lies therefore in the difference between the two legal systems. I shall return to this problem shortly.

The minority went closer to the recognition of difference when it conceded that compensation was payable for unlawful extinguishment by the Crown. The reason that Brennan J (for the majority) gave for denying the unlawfulness of extinguishment by the Crown was distinctly weak. It was that since native title was not granted in the first place by the Crown, there was no presumption against subsequent derogation by the Crown, as there is in the case of non-native subjects.³ But the title of non-native subjects (European Australians) against the Crown does not depend now upon the intricacies of the old property law and its presumptions against derogation. It depends upon the victory of Parliament in the English civil war. Thenceforward the liberty

2 Above n2 at 30.

3 Above n2 at 64.

of the subject, including the subject's property, resided in Parliament not in the royal councils.

This was an important difference between majority and minority. First, a Parliament is more a forum of difference than the Crown is. And, second, under the minority view extinguishment by the Crown was unlawful leading to action and compensation. Compensation is exchange, and is therefore calculated towards difference (in the simple way that money is). But still, even for the minority, the recognition of difference cuts out. It cuts out at Parliament — if Parliament extinguishes title without compensation that is accepted, notwithstanding that Aboriginal law draws no distinction between Crown and Parliament. The reason for this is equality. Exactly the same constitutional position whereby property rights are subject to the power of Parliament obtains for European Australians, so by this holding European and Aboriginal are equal before the law. At this point it is apparent that the reasoning has led back to the univocal conception of law and the simple denial of difference. Now, the victory of Parliament in the civil war was a genuine historical advance in the cause of freedom (the recognition of difference). But revolutions for freedom immediately become tyrannies when they are taken to be set in a univocal end-point of thought. The reason for the minority thinking Parliament an end-point was, as I have said, a conception of equality. Though the idea of equality before the law is a very common thought in modern jurisprudence, it is an entirely spurious one.

Aboriginal and European are treated equally except in the matter of the *law before which* they are treated equally. It is no more justifiable to make Aborigines equal before European law than it is to make Europeans equal before Aboriginal law. Where is equality before Australian law? It cannot at this point of the argument simply be assumed that the law in question is Australian law (fudging its Europeanness). That would brush away the actual issue of law in the European settlement, and would be a return to a form of *terra nullius* — a land with no issue of law to be confronted in the matter of its settlement is really just a land with no prior legal claim fixed upon it. Now, the constitution of Australian law is a good project, and one the High Court is at this moment keenly pursuing. But Australian law and Australian community is not European law and European community. Because of the nature of community it can only lie in the difference between European and Aborigine (and, I should add, in all the other differences that obtain between the humans of this continent, of which it is particularly apposite to mention that between men and women, where feminism has clearly established that women do not find their freedom in equality before men's law). Equality is important. It is equality before the law that is the false idea. Equality is important as the equality of difference: the fundamental recognition of difference is that your difference is of equal status to my own. And your difference (the difference of any other) goes right through to your very existence.

The requirement of a stopping-point short of existence (such as Parliament in the present matter, or act of State, or the *Grundnorm* in a well-known larger system of legal thought) reveals a fundamental failure to understand law. Any such stopping-point will impose a stipulation and obliterate difference. And this will always obliterate law. What can law be except that which constitutes the structure of community? And since there is no community without difference, there is no law without difference. So the stopping-points obliterate law. The judges in *Mabo (No 2)* all had stopping-points — they

differed only in which European law they imposed upon Aborigines. They failed therefore in the matter of law.

The pity of it is that the common law is the law of difference. Perhaps the reader has been wondering about our earlier assertion that the Australian law of property could only lie in the difference between the Aboriginal and European legal systems. Well, they are simply wondering about the fundamental common law problem (called with deceptive simplicity, *ratio decidendi*) of how the law moves from one case (one difference) to another. This is a big problem, and the issue between Aboriginal and European law is a big case of this big problem, but no-one understands the common law at all who does not understand that precisely this problem is the fundamental problem of the nature of law. The process of distinguishing (the recognition of difference) is the common law's (and law's) essence. No common law statement is ever final, never a (univocal) stopping-point; but is always available for reconsideration by virtue of a difference in the next case. Nor is it ever right to think of a series of common law cases as a series of absolute stopping-points. The process is a process of difference, and lies (rather, moves) between the points.⁴ If there is a chance of getting these matters right, of actually understanding law, it is in the common law.

The nature of the common law in this matter is related to our second issue, the legitimacy of judicial value judgments. I take it as obviously true that courts, which are not democratically elected and are appointed with tenure, have no authority to impose value judgments upon citizens. Were they to do so they would be simple dictators.⁵ Our constitutional and legal understanding at this moment is such that theorists (including judges) often say that value judgments are acceptable if made only occasionally. But an occasional dictator is still a dictator (and an efficient one does not have to do very much dictating). And a value judgment is still a subjective judgment — the opposite of objective law. Anyway, for this essay I shall take the illegitimacy of judicial value judgments as axiomatic. And my point now is to show how the common law's operation between difference excludes any necessity of such value judgments on its part.

Any expression of difference is the expression of a subjective value judgment. To go back to our simple example of colour perception, when I see the world as green (and say it) I express the world subjectively as green, and when you do likewise for red we have two different subjective perceptions. It is only when there is community between us (by the mutual recognition of our difference) that we can say there is an objective world (which we of course, by our very natures, continue to see subjectively). It is perhaps unusual to use the expression, value judgment, for a matter of physical perception. But the essence of the point is the account of the difference between subjective and objective judgment — the word "value" could be dropped. Further, as we remarked earlier, the difference between perception and desire (what we value) is a very uncertain one.

⁴ For a fuller, though only partially correct, analysis of this process, see Detmold, M J, *The Unity of Law and Morality* (1984) at 188-196.

⁵ For an elaboration of this point see Detmold, M J, *The Australian Commonwealth* (1986) in ch 13.

For what anyone would call a desire (and therefore the expression of a value judgment) my point is seen most clearly in the law of contract. Suppose you sell me a book for a dollar. The difference between us here is that I desire the book and you desire a dollar (with of course a large element of perception tied into the desires — as to the book, which book and what is a book? And as to the dollar, what is a currency system?). Now, it is perhaps the most fundamental principle of the common law of contract that the contract is the thing, not any subsequent recalculation of it. A judge who said that the book I contracted for was in fact worth two dollars, not one, and gave judgment accordingly would have failed to understand the law of contract. And of course would have made a value judgment — the judgment that the book was worth two dollars, not one. Under the law of contract it is necessary simply to enforce the contract, *and no value judgment is required for this*. It is not even the case that a value judgment, “enforce the contract”, is required as a matter of legal analysis. There are certainly personal value judgments required on the part of the judge of which the most fundamental is: continue to work as a judge. But these are not part of the law of contract. So far as that law is concerned, the parties have already willed the contract's enforcement (to use that rather old-fashioned idea, the willing of value judgments) — if they have not so willed they have not yet made the contract — and, having willed, *their value judgments rather than the judge's* therefore carry the whole legal process.

It is clear how in contract, difference comes together in lawful reconciliation. The coming together of Aboriginal and European on the continent of Australia in 1788 was not in any obvious sense contractual. Of course it might have been — there might have been a treaty — but political philosophy has long seen that the contractual basis of community is more often implicit than explicit (and the law relating to colonial expansion follows this insight by not distinguishing between cession [by treaty] and conquest). Some thought is required here concerning the so-called social contract. It is not that the social contract at the bottom of a modern democratic society actually was implicit in the society's origins — those origins are usually tyrannical — so it is not that there was actually an implicit treaty establishing the relation between Aboriginal and European. It is simply that when a society becomes minded to lawfulness (the opposite of tyranny) it is able to look back at the coming-together and reconstruct it so as to treat the parties with that lawful equality of difference of which contract is a paradigm. That time of course for Australia arrived in *Mabo (No 2)*.

We are now in a position to go beyond contract as a single paradigm for the political reconciliation attempted in *Mabo (No 2)*. The abolition of the forms of action⁶ reveals a law beneath the forms, as much beneath contract as any other. To see this law let us think for the moment of tort as the paradigm form and make comparison. European and Aboriginal came together in a clash of difference and we are wondering (for *Mabo (No 2)*) what the tortious resolution of that clash is. Lord Atkin's answer (and Jesus' of more ancient precedent) is: take that care for the other that you would take for yourself⁷ which I will here interpret as: take the other's difference as

6 See Detmold, M J, “Australian Law: Freedom and Identity” (1990) *Syd LR* 482.

equal to your own. In an ordinary torts case the differences can often be expressed fairly simply — your car and mine on different converging paths. In *Mabo (No 2)* they are much more complex. But the point is the same. I can (univocally) ignore your difference — drive right through you in the one case, pursue the settled colony doctrine in the other — or I can give equal status to your difference under Lord Atkin's law (which we call the law of love); but it is only in the latter case that there is law and community.

It is I think obvious (but in case it is not I shall say it) that there are only two possible cases, lawfulness and tyranny. Either I treat your difference equally (lawfulness) or I ignore it (tyranny). If I judge it, say, to be worth half my own then I have by my value judgment made it my own — to be your difference it must be your choice not mine. This is because at the bottom of all your differences from me the fundamental one is that you are you and I am I (each ends in self or choosers in self). Contract is an important paradigm here because it states perfectly the equality of difference of choice. What you want in the contract and what I want is exactly equal — not a little bit more or a little bit less on this side or that. But the deeper expression of this is Lord Atkin's law — self and other absolutely equal. The whole of our law of contract can be thus expressed — in our contract for the book let me take the same care to see that you get your dollar as I take to see that I get the book. And now compare the case of the approaching cars: let me take the same care to see that you proceed safely past as I do for myself. In each case, contract or tort, we each want some (different) thing that relates to the other and the issue is the lawful reconciliation of those wants. The forms of action now make quite absurd constrictions of thought. Our two cars are approaching each other on opposite sides of the same road. Suddenly I stop, jump out of my car and run forward waving frantically to you to stop. You do, and we meet in no man's land (so to speak). We are faced, I say, with the problem of moving safely past each other, and I add that it is a matter of grave seriousness since either or both of us could be killed, a matter therefore requiring careful negotiation and agreement. So we make a contract as to how we are going to do it, what care we are going to exercise, and so on, shake hands, go back to our cars and proceed safely past each other. What could contract possibly add to the ordinary (tortious) requirements of care on the road? (absent some special information that either of us might have concerning the matter — the only point now of the traditional conception of contract). It is necessary to say here not that the contract is absurd, but that the contract lies in the absolutely ordinary event of our passing on the road. It is only our idea of contract as a discrete form of action that is absurd.

The coming together of European and Aborigine is merely a more complex case of the coming together of our two motor cars, and the lawful essence of each case is the equal recognition of difference. The High Court in *Mabo (No 2)* failed in this regard. Whilst they recognised aboriginal difference in the matter of a different conception of title, they imposed the European valuation of it in the matter of the conditions of its extinguishment.

⁷ *Donoghue v Stevenson* [1932] AC 562 at 580.

