Imperatives of Extinguishment: *Kartinyeri v The Commonwealth of Australia*

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Abstract. Via an analysis of the reasons for judgement in *Kartinyeri v The Commonwealth of Australia* this paper contends that an imperative of extinguishment of Aboriginal sovereignty continuously informs Australian law. With attention to the different, albeit interactive, practices of justification and legitimation in the reasons given, the imperative mood or modality of a doctrinal assumption of extinguishment that is made in the ruling system of Australian law is located in the official voice or internal point of view of that law.

1. Introduction: Toward a Concept of the Wrong of Law

This paper is a case study focused on the reasons for judgement given by the Australian High Court in *Kartinyeri v The Commonwealth of Australia*.[1] It is part of a broader endeavour to conceptualise what for some years I have called 'the wrong of law'. One of the difficulties of this endeavour is to remove the sense of 'wrong' in that phrase from the tyranny of moral points of view. Part and parcel of the justificatory dimension of jurisprudential and philosophical discourse on modern law, that tyranny is deeply embedded in narrative and conceptual thought about law. As much as the form of modern law differs from that of the law of Athens to which Plato directed his *Crito* and as much as changing forms of law bring with them new justificatory techniques and legitimative strategies, a moral obligation to obey, respect or even love the law that is in force in a political community is continuously reaffirmed.

[1] (1998) 152 ALR 540. I would like to thank participants in the workshop 'Law Violence and Colonialism II' held at the Altonaer Stiftung für philosophische Grundlagenforschung on 9th–11th May, 2008 for a diversity of responses to another version of this study. Those responses have continuously informed this re-writing.

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Kartinyeri decided that racially discriminatory legislation was constitutionally valid. To bring the difficulty to a point I shall step right into it by characterising the decision as a legal expression of the racism in Australian society. The characterisation takes a short way with a troublesome term, 'racism' and with the issue of beneficial and detrimental departures from law's norm of formal equality. At least in the context of social relations between Aboriginal and non-Aboriginal Australians the 'race' part of 'racism' is clearly enough marked. It is the 'ism', working its indiscriminate bundling of uncountable and diverse phenomena — acts, attitudes, events, structures — and, attached to race, packing moral value, that is troublesome. To write or talk of 'indiscriminate bundling' suggests a need to discriminate in concept formation. If that theoretical necessity, confronted by modern law's norm of formal equality, is pursued by distinguishing beneficial and detrimental departures from the norm, the moral force of 'racism' is only strengthened. It might be too much to say that moral values repel theoretical intentions, but they take them hostage. The characterisation and the phrase 'legal expression of racism' is meant to raise this as a political problem which requires theoretical address.

The address is made to readers who locate themselves on the political left and I place my work in a general genre of critical legal theory. It differs from most other work being done in that genre in that, taking up Hegel's idea of replacing the old metaphysics by a formal, dialectical logic, it supposes thought's logical foundation.[2] Further, against Hegel it is my persuasion that the method and logic appropriate to this task is mathematical not philosophical and this opens a further difference regarding the disciplines that are included in an interdisciplinary legal theory.[3] The motivating point here goes to the difficulty of the previous paragraph. How is

[2] [Kerruish and Petersen 2006].

[3] It would suit me well if, at this foundational level, I could invoke the work of a philosopher who is currently read by at least some legal theorists. Unfortunately that is not the case. Alain Badiou does indeed propose a mathematical theory, ZFC (Zermelo Fraenkel with the axiom of choice) set theory, in the place of ontology, but his enterprise is to give a philosophical interpretation to that theory. Rather than *replacing* metaphysics by a mathematical theory that seems to me to be a *reconstruction* of metaphysics, indeed on the basis of an axiom (extensionality) which is constitutive of set theory but is inconsistent with the dialectical higher order logic at the foundation of my approach ([Petersen 2007] at 128f). In these circumstances the best I can do is refer readers to J.N. Findlay's perception of Cantor's generation of transfinite numbers

the 'wrong' of the wrong of law to be thought free of the sense with which law imbues notions of 'wrong'? One might say morally or ethically but I don't see that these notions of 'wrong' have the independence required, even if certain 'ethical turns' do provide a distinctively distanced theoretical approach. Let me just say, given that this case study is part and parcel of finding an answer to that very question, that the sense aimed at is certainly *not* that which inhabits notions of 'theoretical' divorced from 'practical' reason; not then the sense of 'wrong' that is tied to mistake. Here at least is a point of rapprochement: the sense is tied to the claim that something is rotten at the foundations of legal thought.

That said, and said with intent to raise a foundational issue that bears on the 'wrong' of the wrong of law, this paper proceeds from an assumption regarding the form of modern law that is phenomenal rather than (formally) logical/conceptual. Modern law has its institutional embodiments and its social practices. It creates a world of its own, legal thought, and in and by so doing catches thought in the dilemma that Marx encountered in the chapter on economic value with which he began *Capital*.[4] This world of doctrines and their validity or of interpretive practices and their values is removed from what are lamely termed its 'material conditions', but even so, law's business is that of regulating, ruling and ordering social life. Historically, the secret of the common law's success has been to fashion its doctrines from habitual and customary practices and the relations of power and position within which they take place and return them as products of its genius for justice or good order: reasonableness classically; in contemporary theory, fairness.

One should give credit where it is due and this exchange is ingenious. That might serve as an apology for the pages of analysis of the reasons for judgement in one Australian case that follow. But I direct it here to one particular aspect of this ingenious exchange: the way in which the particularist case by case approach of judicial praxis works together with the universalising tendency of formalisation to doubly isolate the decision reached and justified.[5] The meaning of the litigation for the plaintiffs

and Gödel's incompleteness theorems as "excellent and beautiful examples of Hegelian dialectic" ([Findlay 1976] at 6f, cited in [Kerruish and Petersen 2006] at 78–9).

[4] [Kerruish 2007] for critical exegesis and analysis.

[5] That in its modern form, law involves formalisation and formalism and that these are practices which enable the shift from a logic immersed in particular cases to one

is replaced by the legal meaning of the dispute through formalisation.[6] The social and political context of the litigation, both as such contextual considerations may influence the outcome and as the decision may alter the context are excluded by attention to the particular case. I will fill out these general comments in their application to *Kartinyeri* in the following section. The general point here, going back to the ingenious exchange which is my topic, is simply the effectiveness of this praxis as the stuff and matter of social life is spun into the gold of doctrine; into a kind of universal equivalent of persons who as bearers of rights and duties are at once equal and unequal.

2. Precis

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.[7]

The plaintiffs in *Kartinyeri*, Doreen Kartinyeri and Neville Gollan, sought a declaration from the High Court that an Act of the Commonwealth Parliament, the Hindmarsh Island Bridge Act 1997, was constitutionally invalid. The Act excluded specified places, Hindmarsh Island and an adjoining bank of the river in which it lies, from the scope of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. Its operative provisions withdrew powers to protect culturally significant Aboriginal sites from damage or destruction vested in the Commonwealth government by the 1984 Act in respect to these areas. Its effect was to withdraw from the plaintiffs and their community procedural rights for the protection of sites created by the 1984 Act.

Facts agreed in the pleadings were bare: that the plaintiffs were members of the Ngarrindjeri people who are of the Aboriginal race; that they had applied for and been granted, a declaration made by the responsible Minister under the Heritage Protection Act which protected the sites in question for a period of 25 years; that this declaration was invalidated on procedural grounds by the High Court in earlier proceedings and that

which as independent of them, aspires to universality is Bourdieu's astute sociological observation ([Bourdieu 1987] at 83).

[6] On this point, differently worked cf. [Barthes 1973a].

[7] *Mabo and Others v The State of Queensland* (No.2) (1992) 107 ALR 1 per Brennan J. at 28.

subsequently the Bridge Act withdrew from the Minister the authority to act in relation to these specific sites.

The question of law before the Court was whether the Bridge Act was invalid in falling outside any of the heads of Commonwealth legislative power specified in the Constitution.[8] It was agreed between the parties that the only relevant head of power was the 'race power' contained in s.51(xxvi). Originally (1901) formulated with an exclusion of Aboriginal peoples from its ambit, this placitum was amended following a Constitutional amendment in 1967. The text of the provision (as given in the cited copy of those judgements which include it) is:

> The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> ...
>
> (xxvi) The people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws.

Argument for the plaintiffs contended first, that any such laws must extend to all members of a given race, second that the section authorises only laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. The alternative within the second argument drew on the common understanding that the intention of the Commonwealth Parliament and the Australian electorate in framing and supporting the 1967 Constitutional amendment was benevolent: to alter the Constitution by ending the exclusion of Aboriginal peoples from the census[9] and to empower the Commonwealth Parliament to pass country wide laws furthering Aboriginal welfare.[10] The Human Rights and Equal Opportunity Commission as interveners in the case, pressed obligations of a legal character on members of the United Nations to protect human rights and argued for Constitutional construction

[8] Within the federal structure of State and Commonwealth governments established by the Australian Constitution the Commonwealth has only those legislative powers specified in the Constitution. These are plenary powers embodying parliamentary sovereignty within a federal system of representative democracy.

[9] Effected by a repeal of s.127 of the Constitution.

[10] The Heritage Protection Act is an example of such a law. In the reason of the law, until the passage of the Bridge Act the power had only been used to pass legislation intended to benefit Aboriginal and Torres Strait Islander peoples. The Native Title Act 1993 already makes that reason dubious in my view.

appropriate to such obligations. The plaintiffs argued more narrowly that the 1967 Constitution Amendment Act, if capable of a construction that would make it consistent with Australia's international legal obligations, should be so construed.

The Bridge Act was declared valid. If the question decided by *Kartinyeri* is whether the Australian Constitution authorises the Commonwealth to pass racially discriminatory legislation the answer, by five to one, is yes. But the grounds for and circumstances, beyond those of this case, in which it may do so remain undecided. On the question of the interpretation of the race power, the judgements present a three-way division. Two judges (Kirby and Gaudron) interpreted it as in effect confined to beneficial discrimination, two judges (Gummow and Hayne) thought it authorised both adverse and beneficial discrimination, and two judges (Brennan and McHugh) thought it improper to address that issue. In their view the case was not about the race power. It was about the nature of plenary legislative power, specifically, about the idea that what parliament may enact it may amend or repeal. In their opinion the nature of the power in the common law conception of it worked to prevent an issue on the meaning of the race power coming before the Court. It was therefore not only unnecessary but indeed mistaken to address the interpretation of the race power at all.

On this issue the judgements form different groups again: a three to three split. Gaudron agreed with Brennan and McHugh that the Bridge Act was valid due to the plenary character of Commonwealth legislative power, giving her opinion on the interpretation of the race power, *obiter*. Performatively, she is ambivalent on what the case is 'about'. She does not think it improper to address the issue, but joins Brennan and McHugh in taking the nature of plenary legislative power to dispose of this particular case. Gummow, Hayne and Kirby reject the view that the plenary character of the Commonwealth's legislative power disposed the case. For them the case is about the race power which must be interpreted in order to determine the validity of the Bridge Act.

The issues before the Court in *Kartinyeri* were consequent on a change of government at federal level (March, 1996) and the new government's passage of the Bridge Act. It brought to a bitter end a confrontation of many years duration. A small business couple wished to develop a marina and other facilities on Hindmarsh Island. Permissions

sought and gained were conditional on a bridge being built from the mainland and this was objected to by local Aboriginal people on the ground of the cultural significance of the site. A reader unfamiliar with Australian society and politics might apprehend a ghost of that confrontation in a comment by Gummow and Hayne.

> There is an issue on the pleadings (so the matter cannot be assumed by the Full Court) whether the areas to which the Bridge Act applies are of a high spiritual importance to the Ngarrindjeri people and whether the building of a bridge would desecrate their traditions, beliefs and cultures (561).

The spiritual significance alluded to was for Ngarrindjeri women.[11] It had called out scandal at the very idea of law and government being asked to accommodate gender specific knowledge and in circumstances of internal conflict within the Aboriginal community, a Royal Commission of the State of South Australia aimed at establishing the 'truth' of the objecting women's spiritual beliefs had run its sorry if farcical course.[12] The women concerned took no part in it and I do wonder whether anyone seriously thought they would. But perhaps I underestimate the way in which belief in the cultural superiority of Europe corrodes the very reason of that culture. In any case, the record of protection of Aboriginal heritage afforded by Federal and State legislation claiming that purpose does not speak well for the capacity of the Australian legal system to realise its stated purposes.[13] And here again, one must wonder whether it was ever seriously intended that it do so. The Act confers procedural but no proprietary rights: rights of a kind which do not activate the common law's concern for its traditionally favoured subjects, the men and women of property. This aspect of the case is just below the surface of the judgements of Gummow and Hayne. Brennan and McHugh seem to have difficulty in recognising deprivation of rights other than proprietary rights as amounting to discrimination at all.

This absence of the meaning of the litigation for the plaintiffs goes to the formalisation of modern law referred to in the Introduction. The

[11] For a history of the region see [Watson 2002] and on this issue, [Watson 1997] esp at 49f; [Watson 1998] at 30f; for an anthropological study see [Bell 1998]. A chronology of the dispute is given by Bell at 641–646.

[12] See [Harris 1996].

[13] [Goldflam 1997]; more generally, [Finlayson and Jackson-Nakano 1996].

effect of the case by case aspect of common law praxis concerns issues which, according to the texts of the judgements were *not* before the Court. *Kartinyeri* was decided as legislation to amend the Native Title Act 1993 was in process of passage through the Commonwealth parliament. It became law later in the year as the Native Title Amendment Act 1998. 'Native title', a form of property in land, peculiar to Aboriginal people — not *of* the common law, since its source is said to be in the traditional laws and customs of the claimant Aboriginal group, but recognised *by* the common law — had become part of the common law of Australia in 1992 via the decision of the High Court in *Mabo and Others v The State of Queensland* (No.2).[14] Thereafter a regulatory regime was established by legislation, the Native Title Act 1993 (CW).

This Act had survived a constitutional challenge from the right brought by the State of Western Australia. Remarkably for those who had objected to the process of negotiating the passage of the legislation[15] and many of its provisions, the High Court held that the Act fell within the ambit of the race power as a "special law" that was beneficial to Aboriginal people.[16] That left open the issue of whether legislation deemed detrimental to Aboriginal people was authorised by the Constitution: the issue which was or was not before the Court in *Kartinyeri*. If it was and if the second argument on the race power in *Kartinyeri* were to succeed, there could not be much doubt that proposed amendments to the Native Title Act would be challenged. It had been openly said that the amendments would deliver 'buckets of extinguishment' of native title rights particularly over pastoral leases.[17]

[14] Above n.7; subsequently referred to as '*Mabo*'. There is a large literature covering a range of responses: from enthusiastic endorsement, e.g. [Bartlett 1993]; to outrage, see [Attwood 1996a] for analysis of these responses in terms of affront to white Australian identity; to more or less deeply sceptical analyses, e.g. [Mansell 1992]; [Kerruish and Purdy 1998]. [Motha and Perrin 2002] contains critical essays on the land/sovereignty nexus in the case. [Strelein 2006] covers native title cases since *Mabo*.. A concise and pertinent summary of *Mabo* is given in [Motha 2007] at 72f.

[15] See e.g. [Watson 1998] esp. at 39f.

[16] *Western Australia* v *Commonwealth ('The Native Title Act Case')* (1995) CLR 373. A summary of an admittedly complex case is found at `http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings/br20.htm`.

[17] In December, 1996 in *Wik Peoples v Queensland* (1996) 120 ALR 129, the High Court by a narrow majority cautiously extended the common law principles of native title to envisage shared rights over land subject to pastoral leases. The decision

It cannot be said with textual warrant that the politics of native title determined or even shaped the decision in *Kartinyeri*. It is extremely hard to believe that it did not. The effect of the decision on the political context however is not in dispute. The decision affected the timing and micro-politics of getting the amending Bill through the Parliament.[18] The more reason then for taking a close look at the reasons for judgement in the case.

3. Analysis of the Judgements in *Kartinyeri*

For Brennan and McHugh interpretation of the race power was not before the Court. As I have said, the principle working their judgements and the dispositive part of Gaudron's judgement is that a plenary power to enact a law carries with it the power to amend or repeal that law. A general rule is cited from a textbook on British constitutional law.

> One thing no parliament can do: the omnipotence of parliament is available to change, but cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future so as to bind the same parliament on a future day, or a future parliament.[19]

Paradoxes of omnipotence with their theological accompaniment are famous,[20] but I don't want to rush into that just yet. What makes sense of this 'present power' is that it can be exercised with reference to and on the Acts of its past exercise but not with reference to itself. It thus remains 'available to change'. Given a written Constitution in Australia the question on which the judges divide, three to three, is how this present power stands in relation to it. Even so, a decision is reached, five to one: the Bridge Act is valid. Closure of the system so that it finds this answer from within itself (reflexivity or legal self-reference) must occur at some point. The disagreement is on where, in the chain of authorisation thought

triggered unprecedented attacks on the High Court in the media, the profession, the universities, the mining, pastoral and tourist industries and the governing coalition parties. See generally [Brennan 1998]; [Hiley 1997].

[18] [Brennan 1998] at 76f.

[19] Anson, *Law and Custom of the Constitution* vol.1 at 7 cited by Brennan and McHugh at 550.

[20] See e.g. [Frankfurt 1964].

to confer validity on laws, that point is. But the means of closure is the same technical operation in two of the judgements, that of Brennan and McHugh and of Gummow and Hayne: an assertion that an amending Act has one and one only consequence, which is to say that it has *no other effect* but to amend another law. This assertion takes the amendment purpose as determinative. The consequences of the amendment don't count.

Brennan and McHugh's argument is nicely represented by Kirsty Margarey as "a classic syllogism'.

a: the Commonwealth Parliament had the power to enact the Heritage Protection Act; and
b: the Bridge Act was an 'indirect express amendment' of the Heritage Protection Act effecting a partial repeal of the Heritage Protection Act; so
c: the Commonwealth must have power to pass the Bridge Act.[21]

For Gummow and Hayne the assumption in b) that the Bridge Act effects a partial repeal of the Heritage Protection Act is question begging. Considerations of amendment and repeal in their view, bear upon but cannot be determinative of the question because, the Bridge Act, if invalid, effects nothing at all.[22] They in no way set aside, the 'rule' that what parliament may enact it may amend or repeal. It is accepted and set out as a basic proposition of law relevant to the case. In agreement with Brennan and McHugh, they recognise that, contrary to the plaintiff's submissions, the effect of invalidating the Bridge Act would be a form of entrenchment. It would

> deny to the parliament the competence to limit the scope of a special law by a subsequent legislative determination that something less than the original measure was necessary (568).

But unlike Brennan and McHugh they admit the possibility that in the particular circumstances of the Australian Constitution, including the 1967 Constitution Amendment Act, it could turn out that the Bridge Act fell outside the race power. Indeed it was this possibility that called for interpretation of that power.

[21] Parliament of Australia, Research Note 41 at 1: `http://www.aph.gov.au/library/pubs/rn/1997-98/98rn41.htm` (accessed 24/04/2008).

[22] "If the Bridge Act be invalid, the operation of the Heritage Protection Act has continued unaffected by it" (561); and "If it be invalid, then there is no scope for the process of conflation [of Act and amending Act]" (565).

If it is not the nature of plenary parliamentary power from which the disagreement stems, nor is it the legal test for determining the constitutional validity of an Act. An authoritative formulation of the test is agreed and cited in both judgements from the same source. It is to determine the constitutional character of a disputed Act in terms of its "operation and effect, if valid", and this requires identification of "the nature of the "rights, duties, powers and privileges" which the statute under challenge "changes, regulates or abolishes"".[23] And while, to this formulation Brennan and McHugh add, that in order to ascertain these rights, duties etc., an Act's "application to the circumstances in which it operates must be examined" (547), the addendum is not controversial. Even so, whereas Gummow and Hayne consider the effect of the Bridge Act on the rights, duties, etc. of the parties to the dispute, and conclude that it discriminates adversely against the plaintiffs, Brennan and McHugh preclude such considerations.

> Once it is accepted that s 51(xxvi) is the power that supports Pt II of the Heritage Protection Act, an examination of the nature of the power conferred by s 51(xxvi) for the purpose of determining the validity of the Bridge Act is, in our respectful opinion, not only unnecessary but misleading. It is misleading because such an examination must proceed on either of two false assumptions: first, that a power to make a law under s 51 does not extend to the repeal of the law and, secondly, that a law which does no more than repeal a law may not possess the same character as the law repealed. It is not possible, in our opinion, to state the nature of the power conferred by s 51(xxvi) with judicial authority in a case where such a statement can be made only on an assumption that is false (551).

Disagreement here is phrased in terms of the requirements of judicial duty, related back to grounds of decision. A political disagreement within the court on legitimation strategies sits alongside those grounds, implicating the articulation of the political to the juridical. Where, as in these two judgements, the approach plays up formal aspects of legal discourse, the disagreement appears as a classification issue.

Thus, Brennan and McHugh, via a classification of the Bridge Act as an 'indirect express amendment' of the Heritage Protection Act place it

[23] Gummow and Hayne at 562; Brennan and McHugh at 546-7 citing Kitto J in *Fairfax* v *FCT* (1965) 114 CLR 1 at 7.

within a class of Acts which refer to and effect only other Acts. What the Bridge Act *does*, (another formulation of its 'operation and effect') *and all that it does*, is limit the scope of the Heritage Protection Act. It effects a partial repeal of the Heritage Protection Act and that is its "only effect" (548; 550). Gummow and Hayne, in contrast, remove it from that class.

> The Bridge Act is not within that class of statutes which makes textual changes to the principal statute, so that it is "exhausted" upon its commencement and the incorporation of textual changes (565).

For them, all that we have, at this point, is a law which certainly refers to the Heritage Protection Act "but which does not identify the text it amends" (656). In the result there is an *interpretive* need to conflate the two texts in order to arrive at their combined meaning, but the Bridge Act has the character of a law effecting rights, duties etc. of persons and its constitutional character must be determined by examination of these effects.

The conundrum of conceptualisation can be put as follows. Does the plenary character of the legislative power conferred by the Constitution on the Commonwealth parliament condition the various heads of power or are these heads of power a condition of plenary legislative power vesting in the Commonwealth? Alternatively: are the various heads of power conditioned by or conditions of plenary legislative power conferred by the Constitution on the Commonwealth parliament? If the former, then given the power to amend or repeal inhering in plenary legislative power, each head of power is in effect a power to legislate in respect to (subject matter) X *and* to amend or repeal a law made with respect to X even if the latter is not itself a law with respect to X. This is Brennan and McHugh's view to which Gaudron would add the further clause: provided that as amended the principal Act remains a law with respect to X. For Gummow and Hayne the latter alternative holds so that the conjoined power of enactment and repeal is not yet operative.

They therefore consider that it is necessary to interpret the race power. This they do in a way that allows adversely discriminatory laws albeit within limits. Extreme examples, imaginable from "the lessons of history (including that of this country)", cannot be permitted to control the meaning to be given to federal legislative power in accordance with received doctrine. However, the need for clear and unambiguous language

to effect an abrogation of fundamental common law rights, the power of judicial review vested in the court under the doctrine of *Marbury v Madison* and the assumption that the rule of law forms part of the Constitution as stated by Dixon J. in *Australian Communist Party v Commonwealth* (1951)[24] set limits which may, some day, have to be considered (568–9).

What remains now for Gummow and Hayne is the arguments based on international law and it is here, at a point where possibilities of an interpretive opening to cosmopolitan law flicker, that they use the technique of closure identified and extinguish them. The arguments as mentioned went to construction of the Constitution and the Constitution Amendment Act of 1967. The argument put by the Human Rights and Equal Opportunity Commission (for obligations of a legal character on members of the United Nations to protect human rights and a Constitutional construction appropriate to such obligations) fell to the ground that the Constitution is the supreme law of an "autonomous government" conferring on it plenary legislative power. Dixon is cited in support:

> Within the matters placed under its authority, the power of the parliament was intended to be supreme and to construe it [a section of the Constitution] down by reference to the presumption is to apply to the establishment of the legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution (572).[25]

The problem now is that the plaintiffs' argument on the 1967 Constitution Amendment Act might seem to have support from the passage cited. Earlier in their reasons, Gummow and Hayne admit the existence of conflicting views as regards the effect of the 1967 amendment on the interpretation of the race power. And they have accepted

> that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (571).

[24] Legislation proscribing the Australian Communist Party declared invalid because unauthorised by the defence power under which it was made.

[25] Dixon in *Polites v The Commonwealth* (1945) 70 CLR 60 at 78.

Do not then the admittedly conflicting views on the effect of the 1967 Act on s 51(xxvi) indicate that its language does indeed permit the rule of construction to be applied? No. That equivocation concerns s 51(xxvi) as amended and not the Act which amended it.

> A proposed law for the alteration of the Constitution passed in accordance with the special manner and form provisions of s 128 differs in character and quality from laws passed under the heads of power in ss 51 and 52. Upon the satisfaction of the requirements of s 128 . . . , the proposed law is spent and by force of s 128 the Constitution itself is altered. "*Its only operative effect* [was] to alter the Constitution, that and no more" (my italics: 572).

Gaudron's *obiter* opinion on the race power fastens on the political judgement that Parliament must make in 'deeming it necessary to make special laws' and affirms the court's supervisory jurisdiction over the exercise of that power in order to prevent its manifest abuse. The principle for the exercise of this jurisdiction — there must, in the circumstances of the time, be some relevant difference between the people subject to the legislation and other races to which the special law is reasonably adapted and appropriate — is however not operative in this case. In substantial agreement with Brennan and McHugh, she finds that the Bridge Act merely limits the field of operation of a beneficial law and remains, as an exercise of plenary power, within the constitution.

Kirby joins Gummow and Hayne in saying that the case *is* about the race power. What for Brennan and McHugh is an established rule, for Gaudron is in the nature of Commonwealth plenary legislative power and for Gummow and Hayne is a 'basic proposition' — that what parliament enacts it may repeal — becomes in Kirby's judgement first a 'maxim' and then an 'aphorism'.

> The aphorism that "what parliament may enact it may repeal" must give way to the principle that every law made by the parliament under the Constitution must be clothed in the rainments of constitutional validity (602).

Kirby J's reasoning takes the form of confessing the force of the arguments for holding the Bridge Act valid ("for a time they held me") and avoiding them by a string of reasons that moved him to conclude to invalidity of the Bridge Act (summarised at 593). I don't pursue his dissenting judgement

much further here. Dworkinian in its jurisprudence and style it raises questions of the perpetuation of law's liberal promise and the function of dissenting judgements in the common law tradition. I do however remark one particular passage in relation to such questions.

One of Kirby's string of avoiding reasons is the unworkability of a 'manifest abuse' test, proposed by counsel for the Commonwealth. Using Nazi Germany and apartheid South Africa as illustrative cases of 'wicked regimes', he argues the inherent instability of the test: that beginnings of gradually escalating discrimination may fail such a test while termini may exceed a complicit judiciary's capacity to influence matters. A beneficial construction of the race power, he reasons, is mandated by these lessons of history, as also by "the experience of *other places* where adverse racial discrimination has been achieved with the help of the law" (598, my italics). It could be that the italicised words do not have an exclusionary intent. In the following paragraph, he writes:

> The laws of Germany and South Africa to which I have referred provide *part of the context* in which para (xxvi) is now understood by Australians and should be construed by this court. I do not accept that in late twentieth century Australia that paragraph supports detrimental and adversely discriminatory laws when the provision is read against the history of racism during this century and the 1967 referendum in Australia intended to address that history. When they voted in that referendum, the electors of this country were generally aware of that history. They knew the defects of past Australian laws and policies. And they would have known that the offensive legal regimes in Germany and South Africa under apartheid were not the laws of uncivilised countries (ibid, my italics).

The suspicion remains that for Kirby racial discrimination was not achieved 'with the help of the law'. There were defective laws then but not a record of *the* law's complicity in structuring Australian race relations. One point here is the distinction between 'civilised' and 'uncivilised' countries with all the unhappy and contested history of the distinction. But secondly, to stay just short of raising the history of modern European and in particular British colonialism as counterweight, there is the role assigned in this reasoning to the 1967 Constitution Amendment. It might be said that it *could have been* the kind of event in the nation's constitutional

history that Kirby is saying it was. Alternatively it might be asked *could it ever have been* such an event? “Revolutions” Marx commented, “are not made with laws.”[26] That might be thought to be too short, but if one does stop short of the history of British colonialism and the nation states that emerged from it, then these questions must stand unanswered. Thirdly, this text has its jurisprudential context. Nazi Germany and apartheid South Africa as ‘wicked regimes’ figure prominently in a jurisprudential debate of the last century on the relation between law and morality which pitted positivist against natural law theorists in argument about the concept of law.[27] Recycled here, it continues that debate.

What exactly its stakes are from the perspective of its participants I do not venture to say. From mine it looks like a thoroughly collegial discussion which sets up parameters of justification and legitimation. Its collegiality — not always amicable — is its institutional aspect. It delimits the range of relevant considerations, arguments, feints and guises that may be brought to the debate. ‘Wicked regimes’ it would seem are a sustaining feature of it. And it is nothing if not ‘reflexive’, meaning that if it encounters serious challenge, it revises its determination of relevance to include the challenge.

4. Justification and Legitimation

> Here [language] has for its content the form itself, the form which language itself is and is authoritative as *language*. It is the power of speech, as that which performs what has to be performed.[28]

Consider a fancy. What would have resulted from Gummow’s and Hayne’s approach in *Kartinyeri* had they interpreted the race power to permit only beneficial legislation? The plaintiffs would have succeeded (by virtue of the interpretation) and, further, given that the written text of the Constitution conditions or controls Commonwealth legislative power, ‘special laws’ would gain a form of entrenchment. Repeal or amendment of laws passed under the race power ‘for the benefit’ of Aboriginal peoples would be liable to challenge. Aboriginal people would thus gain a participatory

[26] [Marx 1976] at 915.
[27] See e.g. [Hart 1961] at 195f; [Fuller 1969] at 159f.
[28] [Hegel 1977] at 308; [Hegel 1807] at 390.

power, exercisable through a politics of intervention, in the determination of which laws *are* for their benefit and for the maintenance of beneficial laws. That would have given them, minimally, a special place in the Constitution: a place not of being "done to" in Kevin Gilbert's memorable phrase,[29] but for exercising a supervisory power over legislation passed under the race power 'for their benefit'.

I do not want to take this fancy as revealing yet another potentiality within law to respond somewhat more graciously to its subjects. I would wish too that its difference from imagining Kirby's dissent as a majority decision be observed. The fancy is an artifice. It imagines an outcome which *none* of the judges were willing or able to reach, by the unlikely combination of Gummow's and Hayne's deferred application of the closure operation identified together with the beneficial interpretation preferred by Kirby and Gaudron. Call it a 'thought experiment' if you will. It is a device for exploring how and why this outcome although imaginable, is *in some way* specific to the Australian Constitution not constitutionally imaginable.

I think it uncontentious that the practice of giving reasons for judgement is both justificatory and legitimative; that although presented as if working their way to a conclusion (the decision: the Bridge Act is valid/invalid), the decision has been reached beforehand. In this section I go back over the judgements as exemplars of judicial praxis and its techniques — exercises of *tēchné*, that skilful doing that can deceive the eye and is part of the practice of a craft[30] — examining first the intentions of the decisions justified[31] and then the legitimation strategies deployed, all the while aiming at specifying that 'some way' in which the fancied outcome is constitutionally impossible.

It should go without saying that the outcome of my fancy was never an open possibility for Gummow and Hayne: never lay within their intentions. They cite authority (in the sense of decided cases) of their own court, to make the "general conception of English law that what Parliament may enact it may repeal" a 'basic proposition' of Australian

[29] [Gilbert 1994] at 13.

[30] [Kerruish 2002]; and for a brief account of episteme and techne in Greek antiquity which informs my use, see [Russo 2004] at 185f.

[31] Meaning here to distinguish intentions from motivations: so 'intentions' as evidenced by the decision and its justification.

constitutional law (562). Their deferred use of the closure operation defeats and was always intended to defeat, an argument from international law which on their own admission is part of Australian law. Brennan and McHugh use the same technique[32] at an earlier point to further their intention of deciding against the plaintiffs without interpreting the race power. And likewise, despite differences in jurisprudence and decision, for Kirby: the form of entrenchment in the imagined outcome never lay within his intentions. It is, on the contrary, explicitly denied.

If disagreement here appears quite variously — as a disagreement on what the case is about; as a classification issue; as a disagreement concerning judicial duty; as a disagreement on consequences — that is unsurprising. It concerns the exceedingly subtle question of how a unified and anterior common law informs a written Constitution (Australian) deriving its force from a statute of a parliament (United Kingdom) the unlimited sovereignty of which is a creature of English common law.[33] In other terms, the disagreement is located in the misty, not to say mystical or magical,[34] regions of the authority and force of the Constitution.

As regards its force Gummow and Hayne take their stand from Dixon.

> It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution.[35]

What the Imperial authorisation is nothing to the point of is the distinction Dixon has just made between the establishment of legislative power and the exercise of that power. It is a slight variation on the distinction that diverts common law notions of parliamentary omnipotence from the

[32] A distinction creates or supposes two classes of rules (principal and amending) and selects the latter as a domain for application of a strict rule: a Constitution amending act/amending act has one and only one effect.

[33] I take this formulation from a reading of [Dixon 1965]; see also [Veitch et al. 2007] at 10f. If the issue is so subtle as to be called undecidable so be it, but I would not wish to assert an analogy here with undecidability in formal mathematical logic: a parallel rather and a gap, conventional and continuously reiterated, between mathematics and both philosophy and the other sciences ([Harris 2008]). I am aiming at a notion of the wrong of law that draws on undecidability in its formal mathematical context and my point here would be to portray any analogy more specifically.

[34] The references are on the one hand to [Derrida 1989] and on the other to [Ross 1969].

[35] Above n.25.

old paradox of divine omnipotence, maintaining the former as a 'present power'.[36] Authority comes from the common law. Brennan and McHugh occupy the very same ground, but position themselves otherwise, so that the force of the Constitution needs no separate mention. They call up the veritable divinitude of a power "so transcendent and absolute, as it cannot be confined whether for causes or persons within any bounds" (548).[37] Invoking this "sovereign and uncontrollable authority..."(549)[38] and bound to the observance of such a mighty power, judicial power is represented as being exercised in straitened circumstances. Their intention can be redescribed as being to dispose of the plaintiff's complaint as economically as is possible. Substantive considerations are what is to be economised on. The guise of a logic of correct legal reasoning comes in aid. The decision is, in effect (and in likely motivation[39]) that the complaint has no substance. As logically necessitated the reasons for judgement can be given the form of a classical syllogism.

Recalling the rhetorical ease of Kirby's invocation of principle to free Australian law from an inappropriate maxim and noting that the historical appropriateness of its rules is a criterion of the authority of the common law in classical common law theory,[40] brings his stance on this subtle question into the picture. He might take the stance that legal reasons "are best understood as asserting moral claims",[41] or, more likely as it seems to me, that because his decision does sustain law's liberal legal promise it is the right answer in this case.[42] I will not further explore the recessive spaces of this question. I have said enough I hope to show how accommodating they are.

[36] Above at 9.

[37] Citing Blackstone as adopting the views of Coke.

[38] Citing Blackstone's further commentary.

[39] Whereas Gummow and Hayne admit the removal of procedural rights from the plaintiffs, Brennan and McHugh observe that no proprietary rights are at stake (545).

[40] [Postema 1986] at 4–14.

[41] See [Coleman 2007] at 14, n.4.

[42] Closer then to Dworkin's idea of law as integrity than to so called 'inclusive legal positivism'. Morality here becomes political morality, law is an 'interpretive concept' and closure, interpretive rather than classificatory, comes to rest on the assertion that "[a]ny political theory is entitled—indeed obliged—to claim truth for itself, and so to exempt itself from any skepticism it endorses" ([Dworkin 1985a] at 350; [Dworkin 1986] at 108f.

They are accommodating enough to enable *all* the judges, despite their disagreements, to stay within formal limits (or bounds) of judicial competence. As *judicial* competence it is distinguished from legislative competence (separation of powers), while as competence or power it is constituted by its limits. By convention and as conventionally described these limits permit the exercise of a supervisory jurisdiction in accordance with the *Marbury* v *Madison* doctrine of judicial review.[43] Practically it is mind-numbingly predictable that the judges will present their reasons as being within the limits of their competence. So far as individual judges are concerned they have made their way to the top and are masters of their craft. So far as law and the constitution are concerned the limits are just those of the authority and force of law discussed in the previous two paragraphs. But there are two rather less obvious points to be made here.

First, Gummow's and Hayne's reasoning *like* Kirby's and *unlike* Brennan's and McHugh's (and Gaudron's in effect) *expands* judicial competence by holding that Commonwealth plenary power is subject to the written Constitution. The powers are enumerated, the realm (of Commonwealth legislative power) is finite and it falls to the judicial power to keep the legislature within the limits set by interpreting the text of the Constitution. Thus for both it is right and proper to interpret the race power. True enough, Gummow and Hayne would likely say that this formulation leaves out what is critical in their reasoning: this power is finite but it is supreme. Interpretation should not transgress this 'basic proposition' since that would be an 'error of law'. Let me leave that run. The second point is that 'staying within' formal limits of judicial competence is exercising a full gamut of powers constituted as 'judicial competence' by the constitution (not just the written Constitution) as 'foundation' of a polity. This is a loaded point at which the device of my fancy comes in aid. The fancied outcome has the *effect* of giving over to Aboriginal people a supervisory power over legislation passed 'for their benefit'. None of the judges do this. Were it appropriate to speak of the will of the Court as a whole — a seemingly fictitious notion — it could be said to be set against the imagined outcome. The judges however would say, with every

[43] It was assumed from the beginning (i.e. the Constitutional Convention debates) that the High Court, like the US Supreme Court, would as interpreters of the Constitution, have the power to invalidate Commonwealth and State legislative and executive action ([Hanks 1991] at 22).

right, that they *can* not do it; that they *must* stay within the limits of judicial competence. Which, I suggest is also to say that they must decide the case in such a way that no modicum of power over their own lives is returned to Aboriginal people.

We should look then to the sense in which they *can* not do it. The judges might say, in a Kantian idiom, that they were 'entitled and indeed obliged' to decide as they did.[44] It is the latter aspect, the appeal to necessity, *qua* obligation, that the 'can not' speaks out. I do not want to leave this jurisprudential sense out of account. It is part of what is going on in this case; in any case in so far as the necessity averred is a way of saying what counts as legal reasoning. The distance taken by looking at the judgements as exemplars of a practice cannot avoid this if, as seems to me to be hermeneutically required, the understandings of participants in the practice is to be taken into account. Yet if the outcome of the fancy is excluded for all the judges, they have differing ideas as to what, concretely, is required of them. To get at that, I suggest, account should be taken of the sense in which, in addition to being justificatory (of the decision), legal reasoning is legitimative of the law on which the decision is grounded.

The legitimation function in the practice articulates law to legitimate political power. In one way of looking at it it works by selecting and plugging in various 'arguments' — narratives — which will return a determinate 'positive' value (responsible government, representative democracy, equal enjoyment of rights e.g.). In another it gives occasion to pursue various legitimation strategies.[45] Either way, looked at from the perspective of legitimation, judicial disagreement goes to which argument or which strategy will best serve the needs of the moment as perceived by the judges.[46] In circumstances in which the authority and efficiency of the

[44] Kant applies this idiom (*berechtigt, ja verbunden ist*) to formal logic's having, as the condition of its success, to abstract from all objects of knowledge and their differences ([Kant 1929] at 18; [Kant 1781/87] at 15.

[45] Bert van Roermund develops a theory of law as "a kind of self-questioning conceptual discourse" from a logical and epistemological analysis of the intersection of conceptual and narrative discourse at various levels of law's social and institutional *Dasein* ([van Roermund 1997] at 16). While my aims and approach are different and probably incompatible with his, I am indebted to his work for aiding my understanding of conceptual and narrative components of legal discourse.

[46] I have used a formulation which leaves open what or whose needs are thus served. That will depend on the narrative chosen, the strategy pursued.

Court had been questioned Brennan and McHugh opt for legitimacy conferred 'time out of mind' on their authority or the authority of the court by the narrative of the common law itself.[47] Thus it is Coke and Blackstone who stalk their pages. And thus too they represent themselves as duty bound not to go beyond premises of common law origin. Gummow and Hayne, on the other hand, are pursuing that side of the colonial experience which emerges, gradually or tumultuously, as the colonist asserts autonomous national identity against the colonial/Imperial power. Perhaps they could be said to be making good for a declaration of independence that did not take place in revolutionary style.[48] Their legitimative strategy has the guise of neutral, distanced description of 'the law as it is'. In the narrative appropriate to their approach, Coke and Blackstone slip into the recesses of distant memory, their place taken by the acts and decisions of Australian parliaments and courts and the words of its celebrated jurists, in particular Sir Owen Dixon. A justice of the Court from 1929–1952 and its Chief Justice from 1952–1963, he defended a "strict and complete legalism" as the only "safe guide to judicial decisions in great conflicts".[49] Certainly they are not looking the gift horse of the older common law narrative in the mouth. But there is an ongoing task of its patriation.[50]

Abstractly considered, Gummow and Hayne could, like Kirby, have opted for a different, but still national post-colonial narrative with the 1967 Constitution Amendment Act and its accompanying referendum at

[47] [Kerruish 1998] at 72f, drawing on Postema's text on the classical common law tradition ([Postema 1986] c.1.

[48] Cf. [Motha 2002] interrogating judicial pronouncements of the non-justiciability of sovereignty in *Mabo* and locating ambivalence, after Derrida, in the undecidability of constative and performative aspects of declarations of independence.

[49] [Dixon 1952] at 247; and see [Hanks 1991] at 21–26 for brief discussion.

[50] 'Patriation' is more commonly applied to constitutions which, as enactments of an imperial legislature, are to be brought home to the newly autonomous state. I am using it here to refer to the conversion of English to British to Australian common law. In contrast to the United States of America (*Erie Railroad Co. v Tompkins* (1938) 304 US 64), the common law is not doctrinally scripted to form a separate system of jurisprudence in each of the Australian states. The prevailing view, stemming from Dixon, is "that the common law is one entity" ([Sykes and Pryles 1991] at 332; [Dixon 1957]. It is cogently questioned by [Purdy 2000–2001] at 70. It seems to me to be a second line of defence of that 'unity' of sovereignty that works against recognition of Aboriginal law.

its centre. But that is an option appropriate to legitimation in terms of substantive liberal principles (Kirby), not to re-establishing the authority of the High Court via notions of judicial objectivity and political neutrality afforded by the "technique of the common law" and "the use of the logical faculties".[51]

This is the occasion for returning to the question left run regarding the difference between Gummow and Hayne and Kirby. They are agreed that Commonwealth plenary legislative power is subject to the Constitution. But on Gummow's and Hayne's reasoning Kirby erred in accepting counsel for the plaintiffs' submission that their position did not entail judicial limitation of parliamentary competence. Kirby's counter argument, the necessity that 'laws be clothed in the rainments of constitutional validity' is as undoubted in a constitutional democracy as it is vacuous given argument about what these rainments are or should be. It may sound somewhat more 'literary', more 'extravagant' or 'metaphorical' than the necessity of determining meaning "in accordance with received doctrine"(569), which is Gummow and Hayne's ground for rejecting Kirby's view, but there is room for scepticism there too. Is there a received doctrine of constitutional interpretation? A received doctrine for deciphering the effect of Aboriginal people being, in the cited text of the race power, written under erasure? Or is 'received doctrine' a figure of speech signifying Gummow's and Hayne's view on methods of or approaches to constitutional interpretation given that their legitimation strategy is return to an earlier era of legalism? I do not wish to suggest with this questioning that received doctrine is no part of legal reasoning. I think it is. That gives all the more occasion for passing off disagreement as doctrinal error: justification and legitimation rub up against, intrigue with each other.

On the other hand there is a not quite symmetrical obverse of the claim that Kirby's judgement is wrong in law, namely that it is the best or the right answer in the case *because* it shows Australian law in its best possible light or *because* it affirms modern law's commitment to equal rights. The justificatory argument on the entrenchment issue is that the risk of irresponsible exercises of parliamentary power outweighs the maxim that what parliament enacts it may repeal (602). Justification and legitimation work together to suppose a morally (or politico-morally) ideal realm

[51] [Dixon 1955] at 165.

within which the legalistic argument that the 5:1 division shows Gummow and Hayne to have been right on the entrenchment issue and Kirby wrong is inverted. Yet Kirby, in agreement with the other judges, will not or cannot admit to returning any modicum of power over their own lives to Aboriginal people. Judicial competence is expanded. The written text of the Constitution is supreme. But the denial of entrenchment in Kirby's judgement is, performatively, a refusal to confer political power on Aboriginal people. The judge holding up the beacon of dissent takes the powers to and for himself as judge, as law-sayer, so that the justice of equal rights may be 'done to' Aboriginal people.

Where does this leave us? Immersed, I would say, in jurisprudential controversies. It looks as if, if one is to take account of what is going on in the case, it is not possible to get out; not possible to think the necessity that translates into the constitutional impossibility of my fancy in any terms other than these various views on and performances of judicial duty. It looks like that. To a degree it is like that. Within contemporary jurisprudence in its conventional shape it is probably right to say that what makes my fancy a fancy is the combination of techniques, approaches and styles which do not go together, that compete in their conceptions of law (and consequently of judicial duty) albeit from a shared concept of law.[52] We come back here to points touched on previously: most generally at the end of my Introduction as the effectiveness of judicial praxis in spinning the stuff and matter of social life into the gold of doctrine; again at the end of Section 3 as the collegiality of jurisprudential argument on law and morality; and, as a matter of method, in my comment in this section on the limitations of a practice perspective.[53] What I would now add is that it is more the legitimative aspect in the guise of judicial duty or obligation than the justificatory aspect of the practice which leads to this impasse, although given the ways in which justification and legitimation intrigue this point is difficult to recover. Still, I would say that while, in a doctrinal discourse, justification as principled is conceptual, learnable and deconstructible, legitimation 'performs what has to be performed'.

[52] [Dworkin 1986] at 70f.
[53] Above at pp. 4, 16, 21 resp.

5. Imperatives of Extinguishment

In this context that is to legitimise a take-over: to substitute the common sense of the common law for the cosmological sense of being in place and time that informs or is Aboriginal law. To my mind, what is happening here is that the *work* of extinguishing Aboriginal law is being promoted by belief in and arguments for the necessity of the official voice stemming from the official voice. To this, writing from within the culture which has promoted the take-over, my objection is that this form of legal self-reference trades the actuality and presence in modern law of the official voice for various stories, all re-played from classical English common law theory, of the legitimate authority of law. If we go back here to the centre point of Gummow and Hayne's legitimative argument,[54] and to the assertion that "the occasion has yet to arise for consideration of all that may follow" from Dixon's affirmation that the Constitution assumes the rule of law (569) then, bearing in mind the many and diverse occasions on which Aboriginal people have sought recompense for harms done to to them and failed, it becomes apparent the such harms do not count, present no such occasion to this law and its legitimising notion of fairness. A fair English skin would seem to be the effective criterion although one knows that that too is a joke.

Veitch's thesis of how law works to disappear responsibility for massive harms, and specifically, his analysis of Brennan's absolution of the common law's responsibility for the dispossession of Aboriginal people is pertinent here.[55] Without doubting that modern law can and does distribute responsibility for harms done and suffered, he directs his inquiry to "the ways in which legality *can* and *does* allow the production of suffering" and against "the 'common sense' assumption" that the infliction

[54] Above at p.12.

[55] [Veitch 2007a] at 106f; [Veitch 2007b]. Brennan wrote: "Aboriginal rights and interests were not stripped away by the operation of the common law on first settlement by British colonists, but by the exercise of sovereign authority over land exercised recurrently by governments.. . . Aboriginals were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. . . . Even if their be no such areas [where native title has survived extinguishment.VK] it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the actions of governments which made many of the indigenous people of this country trespassers on their own land" (*Mabo*, above n.7 at 50). See also [Purdy 2000–2001].

of massive harm is exceptional or excessive to the "rational and reasonable normality" of the rule of law.[56] I am placing that which, as regards Brennan's absolution of the common law, Veitch terms an "inability to have the question of responsibility raised at all"[57] and relates to the constitution and shaping of sovereignty through colonialism, into the trade mentioned. The difference, as far as I can see, is largely a matter of approach. Beginning as I do with the form of modern law, we are looking at the process and product of a discursive logic which endows law with the form of an ideally, abstractly equal exchange: a universal equivalent of persons.[58]

If the ingenious character of that trade or exchange is admitted; if the effectiveness of judicial praxis in spinning the stuff and matter of social life into the gold of doctrine is acknowledged then, curiously perhaps, the *content* of legal doctrines now standing in the place of the vanished materiality of social life is the counter to the jurisprudential representation of the constitutional impossibility of my fancy.

Concretely, my hypothesis is that the impossibility of this outcome is vested in the twinned doctrines of the extinguishment of Aboriginal sovereignty on colonisation and the non-justiciability of this act of state in the courts of that state. The extinguishment doctrine is expressed in the proposition that

> the contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is impossible in law to maintain.[59]

The non-justiciability doctrine, while older than *Mabo*, is repeated there.

> "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."

[56] [Veitch 2007a] at 10 and 19.

[57] Ibid at 107.

[58] Pashukanis' commodity form theory of law ([Pashukanis 1978] is not quite the theory endorsed here, but I think his perception of the significance of the form of law and of the close analogy of modern law with the 'logic of capital' as portrayed by Marx in his chapter on value is an insight. China Miéville's study of international law ([Miéville 2005]) has reminded me of the necessity to hold on to that insight if not to hold it bound to the premises of Marxist thought.

[59] *Coe* v *The Commonwealth (The Wiradjuri Claim)* (1993) 118 ALR 193 per Mason CJ citing Gibbs J in *Coe* v *The Commonwealth* (1979) 24 ALR 118.

> This principle, stated by Gibbs J in the *Seas and Submerged Lands* case, precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown's Dominions.[60]

In respect to the extinguishment doctrine, Australian history and jurisprudence is different from that of Canada, New Zealand and the United States of America. One might place that difference — an absolute non-recognition of indigenous inhabitants of a territory *as peoples* — into the context of a "national legacy of unutterable shame"[61] were it not for the brutal fact that it is not only uttered, it is *doctrine*. It is written and re-written into Australian law as the High Court reiterates, again and again, both the extinguishment and its jurisdictional inability to call into question the act of state from which its own authority derives. From *Mabo* on native title cases have been the occasion for this reiteration.[62] Revisiting and revising the consequences of the take-over, Australian law recognises native title rights on that basis. They too are vulnerable to extinguishment by acts of government (the political sovereign). Protected by anti-discrimination laws, they become commodifiable: liable to compulsory acquisition on payment of 'just compensation'.[63]

The question that I am asking and have been asking throughout this paper is where is the imperative mood or modality of the legal assumption of the extinguishment of Aboriginal sovereignty and law hiding? In the course of hearing argument in *Griffiths*, the case just noted, Gummow in an exchange with counsel drily acknowledges the 'paradox' of property rights under native title and under common law being both juridically different and, by virtue of the human rights considerations of the *Race*

[60] *Mabo* above n.7 at 20 per Brennan. For a collection of essays interrogating this assumption of Australian law and its place in *Mabo* see [Motha and Perrin 2002].

[61] *Mabo* above n.7 at 79 per Gaudron and Deane; and see for commentary [Purdy 2000–2001].

[62] Most recently, to my knowledge, in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 per Gleeson, Gummow and Hayne at [39]f, where the issue is euphemistically cast in terms of 'An intersection of two normative systems'.

[63] In *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, the High Court of Australia decided that, conditional on payment of 'just compensation', Crown land subject to native title could be compulsorily acquired by the Government of the Northern Territory for the purpose of selling or leasing the land to a private corporation.

Discrimination Act, equivalent.[64] The exchange is illustrative. The answer to my question is too well known. It hides in 'paradox': of justice, of authority, of sovereignty, of equal and unequal rights. And as the paradoxicality of it all settles into common sense (and there are many other terms that do the same work: 'irony', 'complexity' e.g.) yet another mechanism of legitimation is activated.

That raises further issues, but combining analysis and hypothesis, I am suggesting that the legal assumption of the extinguishment of Aboriginal sovereignty and law directs judges away from the outcome fancied. Hiding within the very notion of what counts as 'legal' reasoning, the imperative modality can be located in an 'internal point of view' or an 'interpretive attitude' or a 'realistic description of what judges do' and moved into epistemic or interpretive or pragmatic theories of the nature of law with this, that or the other degree of scepticism toward the authority of law: a nice issue for collegial discussion. Aiming at a concept of the wrong of law these designations appear as covers under which an assumption — an exceptional and for Aboriginal people still living in their law, false assumption — is constantly working to realise itself.

6. Concluding comments: on 'foundations'

My hypothesis then is that the 'some way specific to the Australian constitution' in which the outcome of my fancy is imaginable but not constitutionally imaginable is its inconsistency with the doctrines mentioned.

The constitution as legal foundation is written over thought's logical foundation, excluding the surprises that happen when thought in its being as being at odds with itself, trips over its own feet: that is, when it falls into logical paradox or antinomy. So far then from the idea of thought's logical foundation having an instantiation in constitutions as legal foundations, dialectical and speculative logical foundations are to my mind incompatible with them.[65] This thought runs toward distinguishing

[64] *Griffiths v Minister for Lands, Planning and Environment* [2007] 207 HCATrans 685.

[65] Since I take the idea of thought's logical foundation from Hegel it seems proper to note that as I read him, he perceives this incompatibility. In his *Elements of the Philosophy of Right* he resolves it by placing world history as judge of the nation state and, in his *Encyclopedia* by placing art, religion and philosophy, as manifestations of

different notions of 'foundation' in logically and epistemologically foundationalist theories. In particular, it sees a difference between a notion of (formal) 'logical foundation' as substrate that guarantees the certainty of established knowledge (say 'Kantian') and a notion of 'foundation' that inquires after dependencies (say 'Hegelian'), risking its own assumptions in that inquiry.

And the constitution as legal foundation is written over the historical, material circumstances and conditions of its own coming into being. It is, as a foundation, the foundation of a realm of thought, of ideas: ideas that are coercively enforced and insinuated certainly, but with a sufficient degree of autonomy to impose fictions — such as an Act having one and only one effect — in support of the order it maintains *without* dissolving into incoherence; *without* touching the official voice with doubt; *without* unseating it, so to speak. This thought of a double inscription, and again this is perhaps curious, runs toward enabling thought about law's foundations to affirm both somewhat Hegelian and somewhat Marxist — classically idealist and materialist notions of 'foundation'.

The force of law as the force of form allows force in the sense of physical and psychic violence to be exercised under a guise. In Bourdieu's terms, that guise disguises its "true nature" as force, gaining "recognition, approval and acceptance" by presenting itself "under the appearance of universality — that of reason or morality".[66] I agree regarding the force of form but differ from Bourdieu in so far as the rationalist passion of my foundationalist approach, differently to his (Pascalian) anti-foundationalist commitments,[67] sees reason as hollowed out, almost ruined — lamed in the face of fetish phenomena which it cannot handle and consoled by worshipping the shape they take as moral or legal values or validity — but still a force that can be set against physical and psychic violence.[68] Reason is lamed in and by its very *own* failure to break with 'the old wardrobe' of logical and epistemological ideas which cannot handle fetish phenomena. I do not follow Marx in his naming and analogy of these phenomena. I

absolute spirit above the constitution of the nation state, a manifestation of objective spirit. The labour of the concept is in time and history is not at an end.

[66] [Bourdieu 1987] at 85.

[67] Elaborated in [Bourdieu 2000].

[68] Under quite some conditions of which, as in [Kochi 2007], attention in ethical theory, to the relationship between thinking and action, negativity, positing and violence of creative-destructive and thoroughly material subjects, is one.

have argued that elsewhere.[69] But I think that his encounter with them in the context of political economy is an apprehension of thought's excess of the material, habitual, time-bound world of everyday life which presents theory with a task of logical investigation. It faces a barrier in a continuing hegemony of Aristotelian and Kantian ideas of formal logic as contentless, although it has been remarkably filled, from the turn of the last century, with surprisingly paradoxical results.[70] The 'irony', 'the paradoxicality of it all', phrases indeed empty of content, delivers reason from that investigative task to the service of common sense already formed by the law in force.

Reason is not ruined by thought's excess. It is freed from the enclosures it itself creates in its work of concept formation. It is ruined by belief in narratives of the cultural superiority of Europe. It is ruined by despising the material, habitual, time-bound, place-bound world of everyday life: despising its own conditions of being. It is ruined when justification ends its critical task in ideology or dogmatism: when for example, a rationalist passion claims for 'rationalism' (whatever that may be) an intellectual virtue over, say 'empiricism' or 'pragmatism'. It is not ruined by law. It has no one and nothing to 'blame' but itself for it is ruined in abdicating the task proper to its critical exercise, in self-celebration or diffidence or in crying impotence in the face of what it has been party to producing.

I have suggested that legitimation is more potent than justification in its arrest of thought about legal institutions, practices and their techniques, doctrines and categories and further that justification in moral or politico-moral terms only strengthens that potency. I have not written of how it is that a political will or conjunction of political wills directed to setting these Australian doctrines of sovereignty and jurisdiction aside does *not* gain the strength needed to remove the basis on which the legitimation strategies of *Kartinyeri* work. That is however a question which appears on the horizon of this study.

[69] [Kerruish 2007].

[70] [Kerruish and Petersen 2006]; [Petersen 2007].

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