

OUT OF CONTEXT: THE LIBERALISATION AND APPROPRIATION OF 'CUSTOMARY' LAW AS ASSIMILATORY PRACTICE

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Abstract

When white people came, they brought a culture, set of values and ontology that deemed Country and her people as *terra nullius* and Aboriginal Law¹ non-existent. They used their reasoning to justify invasion, dispossession and genocide. Today, *terra nullius* continues, cloaked in 'post-colonial' rhetoric: that Australian society resides in an enlightened era, temporally distant from policies of protection-segregation and assimilation. Ironically, the liberal, democratic values that rooted government policies of the past continue to inform the policies of the present, securing a *contemporary enmeshment* of Aboriginal people and Law, at sites of bureaucratic and legislative intervention and control. The liberal discourse of equality is also employed to coerce Aboriginal people into seeking remedy/justice from the common law. Hegemony is furthered by the 'incorporation' of Aboriginal Law into common law legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and through bureaucratic protocols such as the Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (1986). However, 'recognition' or 'non-recognition' of Aboriginal People and Law in the discourse of equality amounts either to *incorporation* or *erasure* and grants legitimacy and power to common law jurisdictions. Whenever Aboriginal context and ontology is removed, our Law is *appropriated* and assimilated. Without Aboriginal knowing and seeing,

it is no longer Aboriginal Law. The claim that Aboriginal Law has informed or been 'recognised' in certain pieces of legislation is therefore erroneous. Dialogue between Aboriginal Law and the common law is prevented and white hegemony is reiterated: it is therefore a 'conversation' white, democratic liberalism has with itself.

Introduction

To begin this article, I observe the Aboriginal cultural protocol of identification (Moreton-Robinson 2000). I live on Turrbal ancestral homelands, Meeanjiin, now known as Brisbane, and I acknowledge the Turrbal people for allowing me to call this place home. I do not know to which Country my people belong and this is a source of sadness. Not much is known of my grandfather's ancestry; my lightness of skin has allowed me to escape reasonably undetected from white's apprehending stare. Yet, I 'go proper way' on Country and I thank the Elders I have met over the years, who have taken the time to share and teach Law, including Elders and Aboriginal academics who teach through their written stories. It is within this standpoint—as an Aboriginal woman learning and journeying back to her culture, place and identity—that I write: I feel I have to talk up and talk strong to counter the dominant ideology and the daily outrages it perpetuates. It is, as it has always been, through our culture and knowing, that we remain strong and grounded.

When they come here, they come the wrong way (Uncle Kevin Buzzacott 1988 in Watson 1998: 36).

Since invasion, Aboriginal Law has been disregarded through murder, vilification and defilement of People and Land. The coloniser's doctrine of *terra nullius* meant that the Land not only *belonged* to no-one but had no law, no presence, no being. This assessment of Land was/is based in the *values* of the incoming 'culture': Land was/is an economic possession, to be taken or lost according to military might, but was/is without spirit or intrinsic value of its own. Under the gaze of white people, the Land became what they wanted it to be: vacant, exploitable, alien, harsh, yet vulnerable to their dominance. Its people were hunted and almost destroyed—this land was 'made' 'terra nullius', its 'blank' canvas to be painted in the hues of white people's 'values'.

The colonisers' social practice and common law also brought and imposed 'self-evident' and 'natural' liberal values (Leach 1988: 81): the ideals of *individualism*, 'the moral, political and legal claims of the individual over and against those of the collective'; *equality* as 'the recognition of a common moral standing, no matter individual differences' and the *universality* of these principles in their application to humanity, transcending history, society and culture, but located primarily in the capacity to exercise *reason* (Goldberg 1993: 5). The 'universal subject' of these values, however, denied/denies that *race* is a fundamental cultural motivator of human beings, while simultaneously declaring *race* as something that impaired/impairs people's capacity to exercise reason and therefore their common humanity and 'right' to equality (Goldberg 1993: 4). Paradoxically, while declaring a *tolerance* of others and the 'irrelevance of race', liberal notions of universality

presumed/presume a *sameness of identity*: to be equal, one needs to be *white* (Goldberg 1993: 6-7). Thus the common law practices of assimilation–integration, *rid* individuals of their differences, so that citizens could/can be governed equally by the *state* (Goldberg 1993: 7; Leach 1988: 82). In effect, then, liberalism targets Aboriginal Law through enmeshment, incorporation and 'recognition' while attempting to extinguish its jurisdiction, ontology and legitimacy.

Yet, a core ideal of *Aboriginal* culture is that this is an Aboriginal continent, even if our people no longer exist, and the Law *cannot* be extinguished, regardless of the claims of white law to do so (Lila Watson 2006; Irene Watson 2000).

[Our Laws] were not created by humans and they cannot be extinguished by them, through whatever processes they devise ... The old people know the law and its onerous obligations. Obligations which hundreds of Aboriginal peoples still carry today (Watson 2000: 1).

This article aims to show how current debates, legislation and case law attempt to appropriate and assimilate Aboriginal Law. This has been done, first, by transplanting liberal Western, democratic values and *creating* white jurisdictions 'over the top' of Aboriginal ones. Secondly, liberalism has *created* historical, 'inferior' and 'deviant' Aboriginal subjects, through racialised science and government policy, to legitimise white jurisdictions, establishing a *contemporary* template of enmeshment of Aboriginal people within the criminal justice system, state bureaucracies and legislation. Thirdly, the claim that we live in 'post-colonial' Australia implies that the time of racism, dispossession, genocide and assimilation has ended and enlightenment has

prevailed due to the 'triumph' of white, liberal democratic values.

To demonstrate the effect of these liberal discourses of equality and the 'recognition' of Law and Aboriginality, I examine the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('Land Rights Act') and *Mabo v Queensland [No 2] (1992)* ('Mabo decision'), which both rest on the presumption that the common law is settled and 'legitimised' in its power structures and that Aboriginal people are 'citizens' of the 'common-wealth'. We must now turn to the common law instead of our own law to 'supply' us with our Land, our 'rights', our business, even *who we are*. However, as I further demonstrate through my analysis of the Hindmarsh Island affair, 'non-recognition' of Aboriginal Law is in 'false opposition' to recognition: *both* terms demonstrate incorporation/assimilation, or the disregard of Aboriginal Law, and ultimately, both end in *erasure* (Murphy 2000).

The underlying theme of this discussion is that liberal terms and values are *imposed*, even if incorporated by Aboriginal people, and that this discourse is a monologue. It is a monologue because it is a 'conversation' that white, democratic liberalism has with itself, without Aboriginal input. We are talked about, talked at, talked to but never *spoken with*. As I explain, reports such as *The Recognition of Aboriginal Customary Laws* (Australian Law Reform Commission 1986), try to address the recognition of Aboriginal Law within a common law context but always within white terms of reference, white frameworks and ontology: the ways that *they* 'know' us, not the ways we know/knew ourselves.

Ultimately, the narratives operating within these common law discourses

demonstrate that whenever we sit at a table of 'negotiation' or seek 'remedy', we have to leave our Aboriginality, our values, at the door (Harris 1996; Murphy 2000; Alfred 1999). We must always journey into their liberal world, using their language, their rules and mores, their ways of thinking and being. The central tenet of my argument is that without our knowing and cultural grounding, our stories and perspectives, dialogue is prevented and white hegemony is reiterated and anchored. *Whenever* Aboriginal context and ontology is removed, our Law without that which makes it what it is, is *liberalised, appropriated and assimilated*.

Creating Aborigine

The liberalisation of Aboriginal Law began with the creation of *Aborigine*. *Terra nullius* survives as colonising principle because *Aborigine* bore/bears value-laden cultural judgement, applied by white people to justify the colonial project of 'civilising' erasure. Goldberg (1993: 149) argues that white people saw and 'knew' Aboriginal people—by applying the racial knowledge of their sciences, they furnished themselves with a definition of what was Aboriginal. This *monologue* of the coloniser's own cultural understanding in effect *produced* an Aboriginal subject.

Once produced, the terms of articulation set their users' outlooks. The categories that now fashion content of the known constrain how people in the social order at hand think about things. Epistemological 'foundations', then, are at the heart of the constitution of social power (Goldberg 1993: 149).

Goldberg (1993: 149) argues further that these foundations to anthropology and biology, criminology and sociology provide/d the basis for the white gaze, in turn assuming and theorising not just the

inferiority of *Aborigine*, but more importantly, the *superiority of whiteness*. The Other is named, brought into very existence; not only is this a denial of the Other's right to *know itself*, but a pronouncement of whiteness to *know what is best*, to ascertain the limits of knowledge, and extend 'power, control, authority and domination over them [the other]'" (Goldberg 1993: 150). This knowing is predicated on the apparent neutrality of whiteness: the neutrality of its patriarchal, liberal, democratic values (Moreton-Robinson 2004; Murphy 2000). White man is 'everyman': he claims universality and commonality of existence and experience, while ironically erasing difference in the declaration of human unity and equality (Goldberg 1993: 5).

The universal claims of Western knowledge, then, colonial or postcolonial, turn necessarily upon the deafening suppression of its various racialized Others into silence (Goldberg 1993: 151).

In the silence created by *terra nullius*, *Aborigine* is created as uncivilised, lawless and deviant, incapable of governing or controlling itself. Broadhurst (2002: 263) calls this 'Aboriginalism': the reduction of Aboriginal culture and constitution into simplified biological generalisations or myths that persist in the sciences and that are 'embodied in all the discourses and practices ... between Aborigines and the dominant non-Aborigines'; of course, this includes Aboriginal Law. To govern such a subject requires intensive information, surveillance and control: the enmeshment of *Aborigine* into white jurisdiction.

Government policies of protection-segregation and assimilation, while serving genocidal intents, instead claimed intervention was 'liberation'.² However, after these policies were

'abandoned' because of international obligations and pressure, their effect was continued by *criminalising Aborigine*.

Criminal definitions [laws] describe behaviour that conflicts with the interests of the segment of society that have the power to shape public policy ... [and] are applied by ... [those] that have the power to shape the enforcement and administration of criminal law (Quinney 1970 in Akers 2000: 170).

Accordingly, the institutionalisation of Aboriginal people was/is maintained through the criminal justice system. The common law has traded one institution for the next, one genocidal policy for another. What was once the mission is now the prison, foster care or juvenile remand; what was assimilation policy is the Native Title Act; the Protection Acts—though officially abolished—continue to reappear in contemporary forms (Haebich 1988; Broadhurst 2002: 268), most recently the Northern Territory intervention). Informed by their liberal, democratic 'values', white society has imposed its cultural rules and mores on Aboriginal people. The institutions of common law, the police and courts, reinforce these mono-cultural values, criminalising behaviours such as public drunkenness and offensive language, which 'intensifies the criminalisation of the Aboriginal domain' (Broadhurst 2002: 276). The infraction of rules constitutes deviance and renders Aboriginal people criminal outsiders. This serves to cement the identity and unity of liberal democratic society, while creating an imagining of Aboriginality that has become a self-fulfilling prophecy (Akers 2000: 124-5; Moreton-Robinson 1999). The system of law that perpetrated/perpetrates acts of violence, dispossession and murder sits in 'judgement' of *our* people, while disregarding its own legacy of

dispossession (Atkinson 1996). Its template of enforced institutionalisation and removal from Land *results* in the deprivation of social control *perpetuating* what liberalism perceives to be 'lawlessness' which justifies interventions and criminalisation. In this way, Aboriginal people and their Law are enmeshed into common law 'jurisdiction'. 'Family responsibility commissions', increasing Aboriginal arrest rates and deaths in custody, compulsory quarantining of welfare payments and 'shared responsibility agreements', all point to the continuance of racially-based perceptions and the psychological *terra nullius* rooted in liberal doctrine. All these policies aim to break resistance by coercing Aboriginal people into surrendering their Law, culture and ontology, to assimilate to homogenous, 'free', Australian citizenry.

However, these racialised assumptions of lawlessness are a denial of the Law of the Land, in operation since time immemorial, and of a people autonomous and inherently morally responsible (Graham 2006). Aboriginal 'jurisdiction' encompasses land, sea, sky, animal, human, mineral, rock and tree and is complex, inter-related and *in existence*: if the Land is here, the Law is here (Watson 1998; Kwaymullina 2005). Aboriginal Law is the Law that governs all human relations through mutual responsibility, love and respect, not only to each other but to Country, the spirits and the Ancestors. This shapes how Aboriginal people see their world and their position in it, as well as the ordering of that world: if we are a part of Country as all other creatures, then the responsibility to conduct and maintain those interrelationships is powerful and organic. Unlike common law, which is derived from white cultural mores and customs and the *perceptions* of morality of the day, Aboriginal customs,

traditions, ceremonies and moral behaviour *come from* Law, which derives its power from Country and Time itself.³ To say that Aboriginal Law is customary (like the common law), negates not only its source, Creation, but relegates the Law into something that can be discounted, and its keepers 'stone-age primitives' acting in irrelevant, archaic superstition. Non-Aboriginal Australians fail to realise however that to live on this land means that they too are subject to its Laws, regardless of the imported law.

When Aboriginal Law is included/integrated into common law, liberal common law bases its presumption of understanding within the limits of its own law. This begs the question: how can there even be a *comparison* between these bodies of law? They are incomparable as to their power, strength and longevity. The discussion therefore, is *entirely* located in liberal notions of primacy, 'relevance' and hegemony.

Of course, we as a people do not have to accept the terms of definition.

The task remains for the other to refuse to position itself in the subject's dialectical and discourse of difference and to reposition itself outside this discourse and to define itself as subject (Murphy 2000: 35).

This talking back and *taking* back of our authority is intrinsic to asserting ourselves on our own Country, and to practising our Law. As Uncle Kevin Buzzacott (2001) says, 'they have no jurisdiction': when we take on the primacy (and legitimacy) of the common law, we participate in our own colonisation and assimilate *ourselves*. Yet, it is not surprising that we give credence to the common law considering its systematic control and violation of our people and Law, since invasion. However, our Law's

longevity and survival demonstrates its quality and strength: its existence cannot be denied, either by Aboriginal peoples or non-Aboriginal peoples. But in many ways we have become distanced from our Law via hegemonic reiteration and genocidal government policy and we have been excluded from the common law through the 'denial of ... political rights' (Murphy 2000: 28). Why then engage with the liberal, democratic articulations of equality espoused in case law and legislation to 'gain' our rights? Have things really changed for our people since we 'got the vote' in 1962, or since the referendum of 1967 when we were counted, in a numerical sense, as human beings?

Common Law 'Recognition'

White political discourse counts the Land Rights Act, the *Mabo* decision and the Australian Law Reform Commission's report on customary law, as milestones in the *recognition* or partial recognition of our Law and 'rights' to Country. Yet this is misleading, as liberal democracy will only 'include' elements of our Law to *the extent that they can be made similar to itself*. To claim the 'rights' that liberal democracy offers, we have to be like whites and we have to 'sell out' our Law.

Only through the *scientific and Western gaze of the experts* could customs and traditions be fathomed by the *legal discourses of the state*. Indigenous self-governance was vulgarised and de-legitimised by reference to oriental and exotic forms of despotism (Broadhurst 2002: 263; emphasis added).

In the Land Rights Act and the *Mabo* decision, Aboriginal Law—particularly that regarding 'rights to Land' and 'ownership' of Country—is studied, reinterpreted and regurgitated in an

appropriated form and, so, robbed of its *context* and *meaning*. The following is not an intensive legal analysis of legislation or judicial decisions. I do not need to add to what has been done many times before and further legitimise the monologue of the coloniser.⁴ What is examined is the cultural values and discourses that underpin these Acts and decisions; the ontology and reasoning that furnishes and therefore perpetuates what Watson describes as the '*muldarbi*' (1998).

This illusion of the recognition of indigenous rights has created a potency that allows victims to be more easily drained of their lifeblood as they are caught unaware ... it is a deception (Watson 1998: 42).

The Woodward Commission, established in 1973, was to investigate the:

appropriate means to recognise and establish the traditional rights and interests of the Aborigines in relation to land, and to satisfy ... the reasonable aspirations of the Aborigines to rights in or in relation to land (in Neate 1989: 8; emphasis added).

It was set up to investigate how to 'further' the land claims of Aboriginal people particularly as a result of the Federal Court's failure to recognise any 'land rights' in *Millirrpum v Nabalco Pty Ltd* (1971). In this regard the aim was to vest title in land to Aboriginal people in the Northern Territory through changes in legislation and via 'suitable procedures for the examination of claims to Aboriginal traditional rights and interests' while honouring existing 'Government contracts, mining rights or otherwise' (Letters Patent in Neate 1989: 8-9). According to Commissioner Woodward, the motivation to produce legislative change was 'the doing of simple justice to a people who have been deprived of the land without their consent and

without compensation', the provision of land as an economic base to achieve 'a normal Australian standard of living', the 'preservation ... of the spiritual link with his [sic] own land' and the 'improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority' (Woodward, in Neate 1989: 9). But, could the same system and culture that dispossessed us for its economic gain now *preserve* our spirituality and do us *justice*? How far would the Commission, and therefore the Act it recommended, go in enabling this process?

The clues are in the mechanisms Justice Woodward proposed to achieve these aims and it is important to note that these were the basis of the legislative framework later implemented by the Fraser government. These 'rights in land' were not to be eroded, unless 'the national interest positively demands it' (Woodward, in Neate 1989: 9). If the 'Traditional Owners' vetoed a mining lease on Country, the government could override this decision for the nation's economy. This is called 'balancing competing interest' (Neate 1989: 14). It is evident that title grants were 'given' within a liberal value-set of land as possession, as land provision was to remain limited by that 'which the wider community can afford ... where it will do most good, particularly in economic terms, to the largest number of Aborigines' (Woodward, in Neate 1989: 10).

Land as interpreted by white, liberal, democratic values was/is a tool of reward, belonging to no-one, to be given and taken away at whim, for the greater good, defined by white law. There was to be 'as much autonomy as possible ... but there must be some accountability by Aborigines [sic] for their use of lands, natural resources and

public monies' (Woodward, in Neate 1989: 10). This demonstrates that, to 'get Land back' the old people must trade their independence as bosses on Country, for white man's system of accountability: enmeshment and bureaucratic dependence. How different is this from policies of protection and assimilation? How can Aboriginal people be 'fully consulted' and 'negotiate with government for changes' when they are forced to operate within frameworks that historically rendered them politically powerless? How is land, or even autonomy, 'given back', when you still must answer to someone?

To 'negotiate' we have to trade/abandon the values and ontology that make us Aboriginal. In this way the Commission's fundamental purpose to 'remedy' the decision handed down in *Millirrpum v Nabalco Pty Ltd* (1971) was merely its reiteration.

According to Neate (1989), the Land Rights Act introduced to the common law notions 'drawn and interpreted from traditional Aboriginal law', such as 'traditional owners'.⁵ Yet 'Traditional Owners' in Aboriginal Law (whilst acknowledging my limits in cultural knowledge), are those who speak for Country, who have a duty of care and responsibility for the observance of Law for that Country. They are the supreme authority in human embodiment on Country, deriving their 'power'/ 'legitimacy' from the Law/Land and their Ancestors. The idea that 'Traditional Owners' would claim their land from an 'Aboriginal Land Commissioner' who 'considers Aboriginal tradition' and then grants it to an Aboriginal Land Trust (Neate 1989: 16) not only disrespects Aboriginal Law but actively *undermines* it. The assumption that white governments can interpret and adapt a miniscule portion of Law and somehow

claim to be boss of Country would be laughable, if it were not for the serious ramifications on Aboriginal Law and Country (Watson 1998: 41). It demonstrates that the legislated delivery of 'justice' further ensnares Aboriginal people in colonising processes despite declaring adherence to Aboriginal cultural values.

An illustration of the subtleties of this 'recognition' monologue, re-inscribing and appropriating Aboriginal Law, is evident in the Bird-Rose article 'Land rights and deep-colonising: the erasure of women' (1996). Bird-Rose's central argument is that:

Land claim legislation ... on the one hand *reverses conquest* by returning land to indigenous people. On the other hand, the marginalisation of women ... perpetuates the colonising practices of conquest and appropriation ... Deep colonising is ... conquest embedded within *institutions and practices which are aimed toward reversing the effects of colonisation* (1996: 6; emphasis added).

Bird-Rose argues that land claims are biased toward Aboriginal men, due to the patriarchal nature of common law and court processes, and that within these processes are embedded the erasure of Aboriginal women (1996: 7). But Bird-Rose is mistaken in her belief that land claim legislation, in this case the Land Rights Act, returns land to Aboriginal people. As demonstrated, land rights legislation perpetuates colonising practice *because* it comes from a liberal, democratic institution. The legislation cannot reverse these practices because its *foundation* is set within colonising values. *Therefore*, Aboriginal women are negated and their secret/sacred business/Law is not recognised because the land grant process does not have its origin or content in Aboriginal Law. Simply put,

Aboriginal Law is delineated/balanced between Men's and Women's Law: Land/Law depends on the complementarities and embodiment of masculine and feminine energies. If the common law could truly see Aboriginal Law, it would understand that there cannot be *just* Men's Law, because how can there be Men's Law without Women's Law?

By claiming the common law is a vehicle for 'reversing conquest', Bird-Rose (1996: 6) assumes it has neutrality, both of agenda and historical culpability. She mistakes 'recognition' for the project of liberalisation. 'Granting' land within the framework constraints of common law enmeshes Aboriginal men and women in a value process that undermines the Laws of Land custodianship.

Unfortunately Bird-Rose reinforces that which she tries to dismantle by granting *legitimacy* to common law processes. By claiming that 'institutions and practices' attempt to 'reverse the effects of colonisation', Bird-Rose reiterates liberalism's claim of equality and remedy under all-encompassing white law. 'Deep colonising' is the perpetuation of the idea that we can find remedy to colonisation even as the common law co-opts, appropriates and conceptualises our Law—*while claiming otherwise* (Albert 1999: 73; Murphy 2000: 6).

Recognition—Jurisprudence

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 (Justice Gibbs, cited in *Mabo v Queensland [No 2]* 1992: [31]).

The *Mabo* decision is a further example of the liberalising effect of common law, this time through the form of

jurisprudence incorporating Aboriginal people into common law jurisdiction. The lie of *Mabo* is that it proclaimed 'recognition' of rights to Land by the common law.⁶ In reality, it was a declaration of an act of state and a reiteration of common law supremacy, *not* an abandonment of *terra nullius*, or 'recognition' of 'native title', itself a white term (Watson 1998: 41).

[T]his court is not free to adopt rules that accord with contemporary notions of justice ... if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency ... Although this court is free to depart from English precedent ... it cannot do so where the departure would fracture what I have called the skeleton of principle (*Mabo v Queensland [No 2]* (1992), in Bartlett 1993: 18-19).

In the 'courts of the conqueror' (Strelein 2000: 1) the common law is based in notions of *terra nullius* that justify dispossession and legitimise its existence and claims of sovereignty. The common law's 'skeletal foundation' is an ongoing act of dispossession of Land, Law and culture. While 'recognising' that the continent belonged to Aboriginal people, the common law has no 'shape' or 'consistency' *without* the *terra nullius* principle: extinguishment is its only goal (Bartlett 1993: xviii):

Native title is subject to extinguishment ... without the consent of the Aboriginal people or the payment of compensation ... [it] is a fundamental aspect of the compromise of the Aboriginal interest ... to give paramountcy and validity to the interests of the settler society (Bartlett 1993: xx).

In 'recognising' Aboriginal Law, the common law concept of 'native title' enunciated in the *Mabo* decision makes Aboriginal Law *its* business, re-defining in

the process Aboriginal Law's context, its application and parameters and its ontology. This negates and ignores that which gives content and form, authority and power to Aboriginal Law: the Land and its People. This is the assimilatory practice of the common law: to appropriate Aboriginal Law within its 'jurisdiction'. This appropriation is done in the name of 'equality', so that Aboriginal people may have 'land tenure'. However, our 'land tenure' is not the same. Liberal principle demands us all to be the same before the law and therefore 'served' by this one law, the common law. It is Murphy's (1999: 12; 2000: 6) 'all Australian context': the law fails to see 'Aboriginal people as Aboriginal people'.

According to Watson (1998: 29), we and our Law are threatened by the *muldarbi*, which in the language of her grandmothers, is a demon spirit of dominance and power that rapes and murders 'law, land and people'. It is the coloniser and his values that threaten the very existence of the Mother by destroying the ability of the people to practice their Law and therefore counter the *muldarbi*'s impact. Watson sees the *muldarbi* in its positioning of Aboriginal people as inferior, lawless and deviant—in case law, statute book and by-law, via institutions such as schools, the judiciary, police and government departments. The *muldarbi* has forgotten its own law of care, love and responsibility to the Mother and when we engage with, or leave our Aboriginal centre or Law, we:

participate in a process that works to erase or extinguish who we are ... and lead[s] us along a path to become one of them. A path we know leads to the death of all things (Watson 1998: 39).

Land 'rights' Acts and 'native title' Acts and their amendments, centre the

discourse in that of the *muldarbi*: Land as property, Land as economic entity. As Watson (1998: 39) says, the:

construction of Native Title by the Australian state is a *muldarbi*, it is a smokescreen that has taken us away from the important business of taking care of country.

Its narrative is furthered by Aboriginal engagement and acquiescence to its ontology and value system. Murphy (2000: 26) describes this as the 'discourse of authenticity'. When 'Aboriginal leadership' negotiated the Native Title Act, they did Law business the *muldarbi* way without the Land custodians (Watson 1998). This granted authenticity to liberal common law 'business' while undermining the way we do ours. Our subsequent support of the *Mabo* decision and the Native Title Act as a way to 'regain' our lands was the legitimising of our extinguishment.⁷ We will always be co-opted when we practise 'pragmatic expediency': when we make choices based in the value system of the coloniser because there are no other 'Aboriginal choices' valued or offered (Murphy 2000: 39). How else could this transported law ever attain jurisdiction over the 'very law of creation ... and our relationship to it' (Watson 1998: 41)?

The 'Terms of Reference' of Recognition

The Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (1986), the Northern Territory Law Reform Committee's *International Law, Human Rights and Aboriginal Customary Law: Background Paper 4* (2003) and the Law Reform Commission of Western Australia's *Aboriginal Customary Laws: Discussion Paper* (2005), are reports that attempted to address the 'recognition' of

Aboriginal Law, within common law jurisdiction. However all share the same 'terms of reference': the need for uniformity of laws between states; the need to ensure basic human rights; the problematic application of the criminal justice system to Aboriginal people; 'the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community' and, in later documents, (such as the Northern Territory's Law Reform Committee's *Background Paper 4* (2003)), international law.

Although extensive, 'comprehensive multifaceted [studies] proposing changes to laws, policies, programs and processes in many policy areas' (Hands 2006: 12), they are *fundamentally flawed*. Following the discussion above, it is clear that these liberal, democratic terms of reference assimilate Aboriginal Law because of their frameworks, context and ontology. Indeed, all these reports (and the tax dollars they represent) use liberal terms of reference in their consideration of Aboriginal Law, thereby removing Aboriginal context; they aim only to take 'customary law into 'account' (Clark 2002: 9) or to 'recognise' Aboriginal people's 'views, aspirations and welfare' (; Blagg et al 2002: 13), and thus assume the epistemological legitimacy of the common law in the decision making process. As Murphy (2000: 12) explains:

Current evaluation and problem identification practices consider Australian political culture an irrelevant influence in the methods used to identify problems, propose solutions and evaluate policy outcomes in Aboriginal Affairs.

If the *common law*, not Aboriginal Law, is the cause of poor life/health outcomes, the breakdown of Aboriginal communities, high incarceration rates etc, how will incorporation, and

therefore enmeshment, of Aboriginal Law bring solution?

Non-Recognition

If we examine the Hindmarsh Island affair, it demonstrates that the common law also practices *non-recognition*. The principles of psychological *terra nullius*, shown above to operate in the Land Rights Act and the *Mabo* decision, are also evident in this much-publicised tragedy. Non-indigenous authority, lawyers and anthropologists ran the case, while Aboriginal people were obliged to prove their current and ongoing links to Land, and were obliged to do so via common law concepts that violated Aboriginal Law (Harris 1996: 119). However, Harris (1996) argues that there are deeper narratives embedded in the Hindmarsh Island affair; factors already mentioned in this article. These are: 'Aboriginalism', the way the majority culture has constructed and known us; the assimilation and incorporation of Aboriginal Law into liberal discourse, particularly Women's Business of a secret/sacred nature; and the erasure and exclusion of Aboriginal Law due to it being outside common law conceptualisation, and political expediency.

The treatment of the Ngarrindjeri women ... is illustrative of the manner in which a narrative of community and society seeks either to incorporate Aboriginal people within the framework of Australian society or to deny their existence completely (Harris 1996: 118).

As Harris points out, Aboriginal Women's Law was taken out of context. Due to racist beliefs, Ngarrindjeri Women's Business to protect Kumarangk was 'transformed' by cultural heritage legislation, lawyers, 'experts' and the media, into discourses of the veracity and disclosure of knowledge, 'truth' and

ultimately, hegemonic *control* (Harris 1996: 119, 121):

It is the legal processes, moreover, that shape the testimony of the 'experts' to produce a narrative, which is validated by the courts as 'true' (Harris 1996: 121).

Aboriginal women who were paid to support the bridge development were portrayed by the white media as the 'genuine' Ngarrindjeri, because they contradicted those women who were entitled under Aboriginal Law to speak for Country, and who opposed the development (Harris 1996: 126-7). Media opinion 'recognised' these women as 'genuine' because 'those who have been assimilated to white values and standards of behaviour ... are also worthy of being treated as "equals"' (Harris 1996: 127). These women were expedient to 'the discourse of authenticity' (Murphy 2000: 26). They upheld values and beliefs that were not Aboriginal, and undermined the validity of Women's Law.

In the Hindmarsh Island case, we can see liberal democracy's desire for 'popularity' through creating 'for the mainstream an illusion that there is general well being in the lands of the colonised, all is equal and fair' (Watson 1998: 41). Four inquiries, a royal commission and a report came out of the Hindmarsh Island case (*Indigenous Law Bulletin*, 1999: 1). Liberal democratic values can always be marshalled in the form of an inquiry or royal commission to exemplify neutrality and the ability of the common law to rectify its 'errors', the 'essentially just nature' 'of the state legal structures and practices' (Burton & Carlen 1979, in Harris 1996: 209). This 'reiterative practice' bolsters the legitimacy of the common law by re-inscribing and re-fortifying its monologue, and as in the Hindmarsh Island affair, undermines the veracity

and jurisdiction of Aboriginal Law. It invalidates and vilifies Aboriginal people while claiming that everything is being done in the name of justice—yet justice is not being done.

The 'Gifting' Of Justice and Equality

Derrida's socio-ethical treatment of justice, law, hospitality and community suggests that the majority bestows a gift (ostensible socio-political empowerment); however, the ruse of this gift is that the giver affirms an economy of narcissism and reifies the hegemony and power of the majority (Arrigo & Williams 2000: 321).

Rights discourse positions Aboriginal people as passive recipients of the 'gifts' of equality and democracy 'operating through processes that reduce the right to a right that is bestowed to Aboriginal people' (Murphy 2000: 31). The 'rights' that were destroyed/taken are not the 'rights' that we receive now. We are given 'empowerment', we are given 'choices'; we are given the 'gift' of an apology. But these are only the gifts that *they* want for us, in their 'currency' and only what they are *prepared* to give (Murphy 2000: 39). These 'gifts' are legislated title grants in land, 'equality', 'recognition' or validity, *bestowed* on Aboriginal people to demonstrate common law/liberalism's power and to keep us indebted. Whatever the gifts proffered, however, they do not challenge white, liberal ideas or frameworks of power, cannot interrupt their prosperity—the prosperity that was secured and obtained by our dispossession. And so they cease to be gifts and are instead, a Trojan horse—they are a demonstration and re-inscription of hegemonic power.

As I have shown, there is remarkable consistency between the Land Rights Act, the *Mabo* decision, the terms of

reference of inquiries into the 'recognition' of Aboriginal Law, and the Hindmarsh Island affair, although the latter exemplifies *non-recognition* rather than recognition by the common law. What then is the difference between recognition and non-recognition by the common law if Aboriginal Law is taken out of context, liberalised and appropriated, *by both*? How can Aboriginal people/culture/land be 'recognised' if it is liberal, democratic principles that discern what form recognition will take? The maintenance of the common law's jurisdiction validates the ongoing colonising project of dispossession and genocide, thereby undermining Aboriginal Law. The discourse that underscores these projects is a monologue, 'predicated on assumptions and fictions of an Aboriginal subject' (Murphy 2000: 6) and our absorption and incorporation into liberal/common law frameworks—institutional and internal assimilation. When we look to white law to provide values, justice and our understanding of our own Law, our Law is taken 'out of context' because it is 'judged' against notions of liberalism and democracy.

There is a climate of racism, blinkered vision and incessant monologue that tries to make us strangers in our own land. There can be no freedom, no justice or equality if these values are terms of imposition that do not bear the weight of historical truth. However, what is needed is not just to be 'included' in 'your' world, but, simply, to be unimpeded in the expression of ours. Until then, liberalism, the common law and the state will remain tools of oppression.

Author Note

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Notes

¹ References to 'Aboriginal Law' refer also to the Law held by the Torres Strait Mob: their Law was in fact used as the 'test' case in the *Mabo* (No 2) decision. However, out of respect, I only claim to speak as an Aboriginal person and not as a person of Torres Strait Island descent.

² I acknowledge that the common law and international genocide covenants fail to consider the invasion and subsequent settlement of Australia as genocidal (and ongoing genocide at that) (see Watson 2000). Liberal principles of governance and bureaucracy have significance within the functioning of the domestic state as well as the United Nations, demonstrating an alliance that reinforces the arguments of this essay. Historical records and our Old People, tell of systematic extermination, government policies of biological absorption and cultural disruption (see Kidd 1997; Reynolds 1999; Haebich 2000; and Richards 2008). There is an inability to accept 'genocidal' as a description of government policy toward Aboriginal people and a refusal to acknowledge it as a founding principle of Australian society. However this denial betrays a guilt and complicity that maintains

the trauma for our people, burdens society as a whole and prevents its healing.

³ I acknowledge here that my understanding of Aboriginal Law barely scratches its surface: there is much I have not been taught about this multi-dimensional, non-linear and spiritually all encompassing, sacred Law. I am also constrained by expressing its concepts in a language that I am sure has little capacity to communicate them adequately, deprived as it is by the benefits of Aboriginal ontological and emotional experience.

⁴ By using the terms of reference of the coloniser—their law, language and viewpoint—it is easy to become incorporated into an argument that legitimises the coloniser's law. However, *dismantling* the ontology of the common law reveals the discourses and narratives of liberalism—equality, universalism and individuality—that continue to be employed to oppress our people.

⁵ 'Traditional owners' is a bureaucratic/legal term that has permeated the Australian lexicon. It is a short-hand, non-Aboriginal term, that implies a Mob's connection, love of and responsibility to Country, but fails woefully to convey the Aboriginal context of this relationship. W.E. Stanner wrote: 'No English words are good enough to give a sense of the links between an Aboriginal group and its homeland ... A different tradition leaves us tongueless and earless towards this other world of meaning and experience' (Stanner 1979, in Harkins 1994: 153).

⁶ I mean no disrespect to that Old Man who lived and died for his Country. The *Mabo* case demonstrates the duplicity of the state and the courts and how 'land rights' and the 'abolition' of the *terra nullius* principle can be harnessed to support liberal ideology.

⁷ Although this is my belief, I mean no disrespect to Mobs who have engaged with the 'native title' process. I have observed however, the heartbreak, impossible financial demands and physical and familial toll that this process exacts on our people and I question it.