



UNIVERSITY
OF WOLLONGONG
AUSTRALIA

2007

Rites of passage?

F. McAllan

Macquarie University

Follow this and additional works at: <http://ro.uow.edu.au/ltc>

Recommended Citation

McAllan, F., Rites of passage?, *Law Text Culture*, 11, 2007.

Available at: <http://ro.uow.edu.au/ltc/vol11/iss1/12>

Rites of passage?

Abstract

As legal discourse and legislation in Australia remains solidly weighted with representations of Indigenous subordination, I want to look closely at how the binary of recogniser/recognisee continues to operate using homogenous notions of national sovereignty and indigeneity. The assumption of a fixed foundation for the nation of Australia was grounded with sovereign legislation, ensuring its continuance with British law. In *The Sovereign Event in a Nation's Law*, Motha (2003) points to the doctrine of tenure operating in the form of a 'skeletal principle' that enables the sovereign body to extend its expanding laws over a differing topography in order to preserve its sovereignty. Motha argues that the sovereign event is not unitary but split from the outset.

Rites of passage?

Fiona McAllan¹

Assumed foundations

As legal discourse and legislation in Australia remains solidly weighted with representations of Indigenous subordination, I want to look closely at how the binary of recogniser/recognisee continues to operate using homogenous notions of national sovereignty and indigeneity.

The assumption of a fixed foundation for the nation of Australia was grounded with sovereign legislation, ensuring its continuance with British law. In *The Sovereign Event in a Nation's Law*, Motha (2003) points to the doctrine of tenure operating in the form of a 'skeletal principle' that enables the sovereign body to extend its expanding laws over a differing topography in order to preserve its sovereignty. Motha argues that the sovereign event is not unitary but split from the outset.

Following post-structural ethics, this irruption is due to an originary relation of ethos that precedes and exceeds all relations. The originary relation is constitutively iterative, that is, structured through a relation of *différance*. This ongoing relation is irreducible. This means that each individual's relation with law is constitutionally different and is therefore fundamentally incommensurable. Jean Luc Nancy sketched this relation with law as 'partage', meaning both a partition and a partaking. The structure of iteration implies both identity and difference. A community is constitutionally founded in its fundamental divisions.

Rites of passage?

Collectively, this engenders responsibility to allow for the fundamental differences that paradoxically divide and join individuals. It is through the relational differences that lives are shared meaningfully. Meaning is a sharing of limits, where sense opens iteratively (Nancy 1997: 54-5).

From Australia's colonial foundation, a claim of 'equality for all' determines that rights can only be recognised as the 'same' under one over-arching sovereign law. The particularity of Indigenous difference threatens this conception and so reinforces the binary of dominant recogniser to subordinate recognisee. While the landmark *Mabo* case revealed the indeterminacy of the colonial sovereign foundation, with the recognition that the Indigenous peoples had their own relation to law prior to settlement, cases on native title have nonetheless continued to determine Indigenous law as subordinate in relation to Australian common law.

I want to sketch now these common law legislations as illustrations of Hegelian dialectical resolutions, which continue to recognise the Indigenous as subordinated 'other' in the presumption of an Australian sovereignty. The consolidation of Hegelian sovereignty relies upon binarised difference, which is either denied, and covered over, or recognised as subordinately 'other'. My aim in sketching these sovereign/slave binaries within Australian sovereign legislation is not to normalise the theory of oppressed indigenous object versus active sovereign subject, and so reinforce this Hegelian economy of recognition, but to draw attention to how these assumptions of fixed and binarised identities, be they national or individual, continue to have purchase regarding material effects and lived consequences through Australian law.

In *Writing and Difference* Derrida (1998) describes the Hegelian sovereign's determinations as caught in a closed circularity of self-reference. Meaning and value circulates in a restricted economy as *the naïve consciousness*, so in the passage of one self-referential determination to the next, the Hegelian sovereign remains a prisoner of this consciousness.

McAllan

Mastery, for Hegel, is the structural repression and mediation of other, perceived as a threat to self. Following Derrida, this mastery remains a servile dissymmetry. He writes:

For history — that is meaning — to form a continuous chain, to be woven, the master must experience his truth ... and when servility becomes lordship, it keeps within it a trace of its repressed origin, being consciousness within itself ... it will enter into itself and change around into real and true independence (Derrida 1998: 251-77).

In repressing the other, the sovereign privileges itself to ‘master’ independence, a privileging, or self-exception, that is, a dissymmetry. This dissymmetry is a guise that assumes equivalence in relations that remain asymmetric and incommensurable. What becomes repressed is the trace of the other that fissures all relations. It is the paradoxical and constituting movement of *différance* that radically differentiates and yet communicatively joins all inter-subjective relations.

Yet in Hegelian resolutions, at the very moment of facing finitude, at the very moment the sovereign has opportunity to discern its inter-subjective relation with the other, the sovereign *mediates* this relation, thinking to conserve its negation, in what Derrida, after Hegel, calls a ruse of Reason (Derrida 1998: 107).

Hegel sees this epistemic limit and the opportunity to see beyond the self arises, yet he utilises a form of power to counter the perceived threat of otherness. In Hegel’s words:

Man’s individuality *has also its beyond* within it, can go beyond itself and destroy itself. To counter this, Reason is for him a useful instrument for keeping excess within bounds, or rather for preserving himself when he oversteps his limit; for this is the *power of consciousness* (Hegel 1964: 342).

So, through a ‘power of consciousness’, the sovereign continues to repress any threat to this idea of consolidated identity. This repression is what Derrida, after Bataille, refers to as Hegel’s blind spot. It is this blind spot, I argue, that appears to repeatedly operate in the self-referential legislations that shore up a homogenous Australian

Rites of passage?

sovereignty against the presumed threat of Indigenous difference. The rite of passage ensured through Hegelian self-referential privilege, is a power relation of dominance that represses difference and overlooks inter-subjective relations. Australian legislation, with its liberal claim of equality for all, assumes a unified body of Australians within one overarching sovereign law, yet, in its generalised application, paradoxically produces a homogenous identity of subordinate indigeneity, that is perpetually 'other' to this unity.

In *Writing and Difference* Derrida sketches the figure of Bataille's 'sovereign of nothing' that brings Hegel's sovereign of self-conscious mastery into question. In the place of the 'blind spot' of Hegelian self-conscious determinations, he offers Bataille's image of the 'excoriated eye' that deconstructs the inner perception of the disembodied and enlightened sovereign. Instead of the egoistic eye that seeks to know and only sees its own illuminations while blocking the rest, Bataille's eye has spewed out its contents to uncover the absence at its core, in the hollow where every vision originates. It is a revealing of the irreducibility of meaning, and the irreducibility of vision at this fissure. The fixed self transgresses its borders, rupturing the naïve and closed circularity of self-consciousness. At this aporetic structure this *seeing* doesn't disconnect from dialectics but relates the restricted self to its irrupted borders beyond sense. This relating is a movement intolerant of the distinction between sovereign/slave, self/other. Bataille's 'sovereign of nothing' transgresses determined meaning in this way, causing a disjunction in the logic of the restricted passage of the same.

Assured legislations

The sketch of the skeletal body of law in the *Mabo* case reveals the logic of Australian law. The doctrine of tenure can be understood as a dissymmetrical circulation of common law assumptions, which, through the 'power of consciousness', mediate any threat to the sovereign unified body, thereby grounding and controlling a widening topology. Using a binarised system of sovereign nation versus indigenous other, the

McAllan

doctrine of tenure continues to operate with subordinating determinism. This dissymmetry of assumptions began at the foundation of Australian sovereignty.

The *Mabo* judges found that Australian sovereignty was acquired through occupation and settlement as the land was presumed to consist of 'a tract of territory *practically unoccupied*, without settled inhabitants or settled law at the time when it was peacefully annexed to the British dominions' (*Mabo v Queensland (No 2)*: 34-8). Colonial legislation was influenced by the assumption in international law that nomadic people, through their assumed failure to productively cultivate land, demonstrated an incivility that justified European settlement by occupancy (Castles 1982: Ch 1). In keeping with contemporary international standards for the adequate accommodation of human rights, the *Mabo* case rejected these assumptions and legally acknowledged the Indigenous peoples' pre-existing laws and relationship with the land. The recognition of their pre-existing tenancy at the foundation of sovereignty opened up the possibility for responsible relations. In using tenancy here I mean to connote a belonging rather than a possessing.

Yet Maaka and Fleras (Iverson Patton and Sanders 2000) argue that, legislatively, Indigenous Australians have still not been afforded proper accommodation of their own relations with law, and their relations with the land remain derivative to colonialism. Irene Watson (2006) and Judith Grbich (2001: 128) have highlighted that native title has engaged a process of non-entitlement in Indigenous land relations. While the *Mabo* case recognised the pre-existence of Indigenous laws at the founding event, which revealed the indeterminacy of the fixed foundation of Australian sovereign law, there has not been subsequent unbinarised negotiations acknowledging responsible and co-existent relations with Indigenous peoples. Rather, they have continued to be binarised as subordinate recognisee in *Mabo* and subsequent native title cases with classic dialectical mediation.

As Motha points out in the *Mabo* case regarding Indigenous title of the Murray Islands, it was the separation of juridical and legislative

Rites of passage?

power — that is, beneficial and radical title — into things-in-themselves, that enabled the prerogative power of the Crown to take the outside of law, in a mastering of otherness, without being checked by common law. With the fiction of a fixed foundation in sovereign law revealed, the common law ‘masterfully’ placed the unjustifiable sovereign event outside law. The unified and settled territory of Australia was re-assumed in a future anterior movement ensuring continuance with British colonial sovereignty was re-established as juridical foundation, with common law recognising Indigenous title only where it wasn’t extinguished by the doctrine of tenure. The prerogative power of the Crown — resonating with the Hegelian sovereign’s ‘power of consciousness’ — was able to counter the threat of Indigenous title, in a resilient and teleologically progressive determination that enabled the skeletal form of the sovereign body of law to stay intact.

Despite the elaborate denunciatory lengths Michael Connor has recently gone to in his attempt to display the term *terra nullius* as a modern legal contrivance, it seems clear his concern is this indeterminacy at the foundation of Australian sovereignty. Whether the *Mabo* judges decided that it was *terra nullius* or annexation that was to be overturned, what appears to remain unacceptable to Connor at base is any recognition of Indigenous systems as evidence of pre-existing law relations and pre-existing tenure. It would appear he argues for a continuation of a colonial ruling that will maintain this assumption of a settled and unified Australia and only allow Indigenous peoples subordinate recognition at best (Connor 2005: 202-7).

In the *Wik* case, as native title was in existence where common law had not extinguished it, the threat native title presented to pastoral leases and the productive future of sovereignty, was again dealt with through Hegelian mediation. A new legislative binary was established that opposed ‘real’ traditional lands to those that were ‘wash[ed] away by “the tide of history”’ (*Wik v Queensland*: 183).

Povinelli notes the High Court was once again ‘at pains to clarify the legal foundation of the modern settler nation in the emergent doctrine between common law and Native title’ (1998: 18). Ensuring the passage

McAllan

through one self-referential legislation to the next, the court once again agreed that when the common law and traditional law collided, the British law ‘took seed in colonial soil, adapted to new material and social conditions’ and became Australian law (Povinelli 1998: 19). The court in *Wik* found:

[It] was not that the native title of Indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so (*Wik v Queensland*: 237-8).

This ‘said so’ power, paradigmatic for Hegel’s ‘power of consciousness’, was utilised to mediate the threat of Indigenous title to the pastoral territories of Australian sovereignty.

Again the separation of juridical and legislative law animated this ‘said so’ power to take both the inside and outside of the law in order to determine the acceptable histories of authentic traditions from those that sovereignty considered repugnant or dying out. In the *Mabo* case it was determined:

When the tide of history has washed away any real acknowledgement of traditional law ... the foundation of native title has disappeared. A native title which has ceased ... cannot be revived for contemporary recognition (*Mabo v Queensland (No 2)*: 43).

So where the common law presumes resilience to any teleological threat to its existence, Indigenous traditional law is deemed extinguishable. Not only does this ruling cover over the power mechanisms within sovereignty that effected the dispossession of the Indigenous from their traditional lands in the first place, it represents the Indigenous as self-evidently inferior and dying out. This representation of Indigenous peoples becomes bound with museum-like ossification within the passage of the progressive narrative of sovereign history. Yet this denies the co-existent and ongoing constitutive relations between the Indigenous peoples and the rest of the population. The ongoing lived-experience of the Indigenous peoples can’t be represented as one ancient and congealed nation, as they have

Rites of passage?

multiple lineages with different constituting circumstances, just as the non-Indigenous have not constituted as one perpetually occidental nation. Constituting circumstances of all individuals requires vigilant reflection in order to discern situated historicity and ongoing power relations that are negotiated inter-subjectively. The immense disaffection from colonial interpenetration cannot be dismissed regarding present constitutive circumstances. Neither should the privilege and power of those enabled through dynamics of access be overlooked, along with consideration of the institutions that consolidate and ensure political and economic influence in the Australian situation.

I have argued that a homogenous identity of the sovereign nation consolidates through a closed circle of self-privileging determinations, while at the same time binding a congealed subordinate Indigenous identity as sublated 'other'. Bound as visible markers of cultural difference, rendered subordinately other, Indigenous difference is contradictorily profited from and required in decisions that consolidate a unitary sovereignty. The naivety in this self-referential narrative is the twofold blindness and silencing it produces in self and other, through its reliance on visual objectification. The interdependence and co-constitution of inter-subjective relations is repeatedly overlooked.

In the practices of objectification, where the 'power of consciousness' animates, recognition is contrived as primary cognition — the spontaneous effect of the evidence of the visible (Bhabha 1994). Yet visual perception can be a narrow and reductive cognisance that harnesses instrumental reason in the attempt to assume a form of preservation from alienating threats to the self. Kelly Oliver writes:

The phrase seeing is believing takes on new meaning if what we see is influenced by what we believe. And experiencing what is eye-opening is not necessarily a result of opening or closing our eyelids. What we recognise and what we see are the result of much more than opening our eyes and looking (Oliver 2001: 147).

McAllan

Seeing the difference

In *Border Dialogues*, Chambers (1990) writes of the revealed limits of meaning in the post-colonial frame. If we look behind the repressive masks of colonialism, we may see the arbitrariness of what can be expressed at any one time, and how representation always blocks the excess of its meaning. Language is the ever-present matrix from which we draw out meanings to engage with, not objectively, as it is impossible to fully comprehend the world, and impossible to fully comprehend our subject-to-subject relations. Our social relations involve not a goal but a conversation, tracing an endless passage. In engaging of our differences and mobile relations we are drawing a limit across the diverse possibilities of the world. The lack of a fixed referent or stable foundation is what produces meaning. Our interpretations attempt to confer sense, not to discover it.

For Oliver (2001), this aporetic passage that opens as the dialogic space of meaning, is sketched in the inter-subjective relation of witnessing. The sharing of meaning is produced in the space of tension between the doubled relation of the positioning of the subject as eyewitness, and the inter-subjective relation that bears witness to what cannot be seen. The aporia becomes the third space of the inner witness, breaking the binary between recogniser and recognisee. Oliver finds that psychic survival depends on an addressable other, the inner witness.

If one's subject position is the sociohistorical position which one finds oneself, and one's subjectivity is the structure of witnessing as infinite responsibility, then the inner witness is where subject position and subjectivity meet (Oliver 2001: 87).

The inner witness makes it possible to internalise meanings as our sense of meaning comes through our relationships with others, beyond and within. The inner witness is produced and sustained by dialogic and non-linguistic communication with others. It must be in place for a sense of agency, and makes experience meaningful as a sharing of unique differences and related meaning, constituted through encounters with otherness. So subjects are formed and sustained by address-ability and response-ability.

Rites of passage?

Witnessing becomes a powerful alternative to recognition, as subjectivity can be re-conceived as infinitely open to a system of responding. It is also a matter of understanding the limits of recognition, as it is impossible to fully recognise the truth of other, as well as the truth for oneself. The aporetic relation of ethos offers the recognition that we are responsible for the other, while also a responsibility of the other. Prising open the blind spot of Hegelian denial, Bataille's excoriated eye exposes the limits of determined meaning, along with (in)finite responsibility in our relations with others.

Psuedo-transgression

Considering the relations of address-ability and respons-ability in the ongoing production of meaning, sovereign practices of objectification continue to utilise representations of subordinate 'other' and deny negotiating relations with Indigenous peoples. This dominating structuration compromises ongoing address-ability and response-ability. Crucial to this argument, though I don't have space to elaborate on this here, is the impact colonialism has had on the ensured vitality and access to the Indigenous people's own languages. Aside from being cut off from their own culturally invigorating languages, the opportunity for the Stolen Generations to give testimonies was clearly a painful process of witnessing to what was impossible to articulate. To suffering that is beyond any adequate expression. The truth of suffering cannot be reduced to historical facts. Explaining anguish is impossible. It cannot be described. It must be experienced. Oliver alerts us to the fact that subject positions and subjectivity emerge in our responsive relations with each other and when we relate to subjects we relate to their situated historicity and socio/political positioning.

I want to distinguish this impossibility for fully recognising suffering from an 'unrecognition' that emerges with the repression of denial, as in the blind spot of Australian legislation. Trish Luker (2005), in an insightful paper on collective amnesia in postcolonial Australia writes of a 'willed' forgetting at the level of national selfhood that

McAllan

emerges with the denial of facing collective responsibility to the Stolen Generations. She states:

[T]he trauma which has characterised the response to the testimonies of the Stolen Generations eclipses the pain of the Indigenous other, appropriating the discourse of trauma and inducing the comfort of selective amnesia (Luker 2005: 76).

So Hegelian sovereignty in Australian common law continues to turn against responsibility, through what can be termed pseudo-transgression. In the Hegelian passage, determinations stay in a closed circle of self-reference, where the responsibility to the other is denied. Bhabha calls this a 'dangerous reduction of the spiral of *différance*'. Racial and cultural otherness does not complete the circle, but circulates and proliferates in the world in this spiral of *différance* (Bhabha 1994). To be irresponsible is what Lévinas describes as a defacing of the other 'like any other plastic form, eliminating the signification of the responsibility with which its strangeness encumbers me' (Lévinas 2001: 48-9). Remaining paternalistic and constraining Indigenous communities into a bound and inferior identity sustains the naïve and servile passage of self-referential determinations, harnessing relations through instrumental Reason.

The bridge

If modelled within a binary of subordinate recognisee to dominant recogniser, acknowledging Indigenous difference will remain derivative at best, perpetually congealed in hierarchies and oppositions. To retain stereotyped images of subordinate indigeneity, based on prior norms of primitive other, with legislation that maintains this oppression, is a dismissing, not an opportunity to recognise our inter-subjective relatedness and the impossibility of fully recognising difference. It does not allow for negotiative relations with cultural difference in the shared creation of meaning.

Michael Dodson writes:

Rites of passage?

When we talk about an Aboriginality based on the past of our peoples, we are not talking about fabricating an identity based on a past we have rediscovered or dug up; rather, we, the Aboriginal peoples, are already retelling our past. Our memories are not chemicals in our heads, but our flesh and our voices and our ways of seeing ... we re-create Aboriginality in the context of all our experiences, including our pre-colonial practices, our oppression and our political struggles. It is only a narrowness of vision, or a misconception of culture as a frozen state, which leads people to limit expressions of essential Aboriginality to the stereotyped (Dodson 2003: 40).

Responsiveness to each other and our differences requires a dispersal of the logic of otherness as merely counterpoint to homogenous identity. It is where poststructuralists propose to deconstruct the subject/object dichotomy. The third space of intervention in this binary is the enunciative emergence of translation, where a sharing of meaning takes place. The 'disruptive temporality of enunciation displaces the narrative' of entrenched colonialism (Bhabha 1994: 37).

Sovereign determinations have been made within an appropriative subject/object binary that renders the Indigenous as perpetually 'other'. Yet the sovereign is not one. As Motha argues, iterating with Nancy in *The Failure in Postcolonial Sovereignty in Australia* (Motha 2005: 113-19), the impossibility of an individual being alone does not result in the impossibility of a singular being, rather singularity implies the plurality of singular beings. As finite subjects the 'I' cannot reveal its own finitude, it cannot say 'I am finite'. 'Being with' is the community that experiences the finitude of its members, alongside one another, sharing the recognition that there is nothing recognisable. 'Being with' is neither the assertion of a limit between communities nor an absolute community. In sharing the knowledge of the limit, finitude can only take place as community. Being finite is always already being in common. To follow Nancy, the full articulation of the co-appearance of community is the unrepresentable 'par excellence'. This calls into question the assumed fixity of identity and sovereignty.

McAllan

Heidegger's irreducible concept of 'coming into the clearing' suggests the movement through meaning as it precedes and exceeds us. Dialogically, at the enunciative borders, where the ensured relation to Reason becomes disrupted beyond sense, the inter-subjective relation of ethos emerges. I hope to finish iteratively with Bhabha, who iterates with Heidegger,

It is in this sense that the boundary becomes the place from which something begins its presencing in a movement not dissimilar to ambivalent articulation of the beyond ... Always and ever differently the bridge escorts the lingering and hastening ways of men [and women] to and fro, so that they may get to other banks ... The bridge that gathers as a passage that crosses (Bhabha 1994: 5).

Note

- 1 I am indebted to my anonymous referees and Dr John Lechte and Dr Stewart Motha for their insightful comments on this article.

References

- Bhabha H K 1994 *The Location of Culture* Routledge London
- Botting F and S Wilson eds 1998 *Bataillle: A Critical Reader* Blackwell Publishers Oxford
- Chambers I 1990 *Border dialogues : journeys in postmodernity* Routledge London New York
- Connor M 2005 *The Invention of Terra Nullius* Macleay Press Sydney
- Derrida J 1998 *Writing and Difference* in Botting et al 1998: 251-77
- Dodson M 2003 *The end in the beginning: re(de)finding Aboriginality* in Grossman 2003: 25-42
- Grbich J 2001 'The Scent of Colonialism: *Mabo*, Eucalyptus and Excursions within Legal Racism' *Australian Feminist Law Journal* 15: 121-48
- Grossman M ed 2003 *Blacklines: Contemporary Critical Writing by Indigenous Australians* Melbourne University Press Melbourne

Rites of passage?

- Hegel G W F 1964 *The Truth of Enlightenment: Phenomenology of Mind* Trans J B Baillie Allen and Unwin London
- Iverson D, Patton P and Sanders W eds 2000 *Political theory and the rights of indigenous peoples* Cambridge University Press Cambridge Melbourne
- Lévinas E 2001 *Is it Righteous to Be?* Stanford University Press US
- Luker T 2005 "'Postcolonising' Amnesia in the Discourse of Reconciliation: The Void in the Law's Response to the Stolen Generations' *Australian Feminist Law Journal* 22: 67-88
- Motha S 2002 'The Sovereign Event in a Nation's Law' *Law and Critique* 13: 311-38
- 2005 'The Failure of Postcolonial Sovereignty in Australia' *Australian Feminist Law Journal* 22: 107-25
- Nancy J L 1997 *The Sense of the World* Trans J Librett University of Minnesota Press Minneapolis
- Oliver K 2001 *Witnessing beyond recognition* University of Minnesota Press Minnesota London
- Povinelli E 1998 'The Cunning of Recognition: Real Being and Aboriginal Recognition in Settler Australia' *Australian Feminist Law Journal* 11: 3-27
- Watson I 2006 'Aboriginal Law and the Sovereignty of Terra Nullius' *Borderlands ejournal* www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html

Cases

- Mabo v Queensland (No 2)* (1992) 175 CLR 1
- Wik v Queensland* (1996) 187 CLR 1