

Waltzing Matilda: A Semiotic Reading of Wik

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Down came a Squatter a-riding his thoroughbred; Down came Troopers -- one, two three (Paterson, 1992).

Introduction

Analysis of the High Court's decision in Wik Peoples v Queensland (1996) can become swamped by the tumultuous political controversy of the native title debate. Accusations of judicial activism on the one side and racism on the other are of more interest in the real politics of election-eering than ploughing through judgments (Rush, 1998). At least on the surface, the judges themselves appear to have resisted the temptation of involvement. When asked by law students to defend himself from ex-Queensland Premier Rob Borbidge's insult that he was 'loopy' (Lehmann, 1997: 2; Keon-Cohen, 1997: 518), Justice Michael Kirby relied on the judicial tradition of restraint (Kirby, 1997: 524-5). He concluded that 'for the justices of the High Court we simply get on with our work. The institution goes on. It will continue to do so (Kirby, 1997: 524-5).

This article is concerned with the ongoing of the institution. In Wik the institution was the common law. What does it mean that the common law is ongoing in this country? Drawing upon the work of Peter Goodrich, this article undertakes a semiotic reading of Kirby's judgment in Wik. It attempts to read the judgment from within the common law tradition. What is revealed is a way of travelling and a symbolic order removed from the established symbols of Australian colonialism. The common law declares itself sovereign. In exploring a way across the post-Mabo legal landscape it institutes a new colonialism, mapping and subjugating the old colonial order.

Therefore, the principal theme of this article is exploration. Journeys of discovery are not accidents, they are institutionally embedded narratives where the promises of fame, reward and the whispers of inland seas becken explorers on (Ryan, 1996: 21-31). The direction of travel in this

article is towards an understanding of Australian common law. However, this promised sea is illusionary: all that is visible is a small pool of water, a billabong, where not only the swagman but also the squatter and the troopers, the various images of Australian colonialism, have drowned. There emerges the possibility that the common law has reached the postmodern threshold: has it become haunted and fragmented law? The journey to this destination involves five staging points.

First, the institutional starting point will be marked: how is Wik to be understood? The convenient political analyses will be rejected. In liberating legal study from the preoccupation with the political, Peter Goodrich's semiotics of common law will be shown to offer a way of understanding law from within the tradition. Goodrich gives back to law its symbolic content. Second, the elements of a semiotic reading of Wik will be outlined. Wik is concerned with mapping the legal history of two parcels of land in North Queensland. The judgments document a search for the correct law to govern this cartography. At a semiotic level this journey involves the painting and arranging of legal icons. Third, a semiotic reading of Kirby's judgment is undertaken. This involves charting how Kirby paints and arranges the icons so as to annunciate a law which judges and declares itself sovereign over both aboriginality and the established colonial order. Fourth, the challenge of Kirby's judgment in Wik to Australian colonialism will be assessed. This will be undertaken through a brief comparison with Chief Justice Brennan's judgment, a juxtaposing of Kirby's iconism with Brennan's skeletons.

Finally, the destination is reached. Kirby presents a common law seemingly haunted by the very active ghost of Australian colonialism. He also seems to herald a fragmentation of the common law tradition. It is tempting to declare that Kirby in Wik announces a postmodern common law. However, Kirby's common law retains its rationality: it rationally deals with its own history and it parodies the quintessential rational project, the scientific method. Ultimately the fragmentations are illusionary as the common law is reaffirmed as modernist law. However, if we have culturally stumbled into the postmodern condition, how relevant is a modern map?

Ways to Wik: The Journalists, the Critics and Peter Goodrich

It is, of course, possible to structure an account of *Wik* without recourse to semiotics. Indeed, the discovery of the continual existence of native title has provided a fertile ground for scholarly comment. Surprisingly, this literature has very little to say about the law; it offers a unidimensional law, a dead text which only has effects in the 'real world' of politics.²

Scott's political account of *Mabo* suggests that *Mabo*'s success as a mechanism of political change, lies in the strategic use by the majority judges of 'legalist' reasoning (1996: 385). The court was able to

couch its decision in legal terms, appear logical and presented in accordance with a pertinent judgment of the International Court of Justice. The fact that ... [the court] ... recognised the political, social and moral imperative for new law does not detract from the fact that the decision was supported by reasoning presented solely in terms of law (Scott, 1996: 386).

Scott's analytical foundation is easily revealed. The dilemma she poses, of manipulative judges camouflaged behind a seemingly objective method of judgment, is a central concern for liberal theory (Unger, 1989: 25-8). Within liberal theory the law is portrayed as an 'internally coherent and unified body of rules' while the real drama is the effect these have within the realm of politics (Sugarman, 1991: 35; and Unger, 1975: 75). As legal scholarship, this theory of law translates into a form of legal journalism — three-page summaries for the professional audience. One example of this scholarship is the article on Wik by Hunter (1997). He begins with an introduction, documents the procedural history of the case, summarises the facts, presents an overview of the different judgments, and concludes that '1997 poses substantial challenges for native title claimants, Federal and State Governments, pastoralists and the mining industry' (Hunter, 1997-98: 6).

What is remarkable about both these forms of scholarship is that they say very little about the law. Their focus is on a uni-dimensional law, a law compressed into a few bullet points. It is also dead law because there is no space for interpretation.³ There is merely an authoritarian written law: 'the majority judgment concluded that none of the grants ... authorised activities which necessarily were inconsistent with the continual existence of native title' (Hunter, 1997-98: 5).

If the law is dead, where is life? Both Scott and Hunter point to the 'real world' of parliamentary politics, economic development or race relations as the lived realm. Therefore, it is towards these areas, the 'political', which this literature makes its way.

This emphasis on the law as flat and dead is reflected within some strands of the critical legal studies movement. In their search for an alternative voice, the critics do not challenge the form of 'mainstream' legal scholarship (Goodrich, 1996: 191-7). Instead, in searching for critical distance, they offer alternative narratives of law's politics. As Hunt explains:

[C]ritical legal theory ... [is] ... reactive against orthodoxy and subsequently, as being engaged in exploring the creation of an alternative theory ... the search for alternative starting points, different boundaries and conceptualisation of the object(s) of inquiry (Hunt, 1987: 13).

Implicit liberalism is to be consciously replaced by alternative theory: Marxism, feminism, or cultural studies (Goodrich et al, 1994: 205-7). However, the dilemma for the critics is that if the law is a tool of suppression, then it must be completely plastic. It must just be the molten metal from which the hammers are cast. The critics offer a challenge to the politics of law, but have very little to say about the law as an institution, a tradition or a life.

This 'jaded pedagogy of theory' is Goodrich's starting point (1990: 1). Goodrich accepts the postmodern present; he proclaims the eclipse of the modernist contract and a loss of meaning (1990: 11). Morbidly he declares that all meaning and substance have been reduced to an accelerating circulation of signs within a relay of accumulation and consumption (1990: 300).

Within this cultural context 'government is a matter of moving signs, of controlling the circulation of images' (Goodrich, 1990: 11). For Goodrich this offers a way back to jurisprudence. He argues that the common law has always been a law of images and icons, of practices time out of mind (Goodrich, 1990: 7-8). That the texts of the common law tradition have always been mnemonic aids in the recollection of a law irreducible to writing (Goodrich, 1996: 72-94,105-6). This realisation that the common law is an historical tradition of images and signs paves the way for a 'return to the study of the art of law' (Goodrich, 1990: 11). Therefore, Goodrich delineates a critical space within the law. The law is not flat or dead, but has a symbolic content which offers the possibility of

life. The law can be read 'as an institution, a system of images and it is through its symbolism of authority and through signs of power that the law dwells within the subject' (Goodrich, 1990: 210).

It is this awareness of the common law as a tradition of images that allows Goodrich to present a semiotics of the common law. In doing so he escapes the preoccupation with the political and offers a way of reading the tradition against itself (Goodrich, 1990: 239). Therefore, it is though this focus on 'all the different means by which the law is communicated' (Goodrich, 1990: 207) that Kirby's judgment in Wik will be read.

Elements of a Semiotics Reading of Wik

Goodrich presents his semiotics of the common law as a complex, technical matrix designed to separate out the elements of a judgment 'according to a semiotic schema of the forms of transmission that are used in a case' (Goodrich, 1990: 239). Much of the technicality of the matrix is derived from the specific requirements of the case which Goodrich then proceeds to analyse. A semiotic analysis of Wik does not require the detail Goodrich's full analysis demands. Goodrich's case, Masterson v Holden, concerned whether overt homosexual conduct at a bus stop 'breached the peace'. It was a decision of a single judge on the King's Bench Division where most of the judgment represented an attempt to 'capture' the circumstance surrounding the incident.

Wik is not about judicial reconstruction of an event. The judgment is not focused on a specific incident within the lives of a few actors. The people who inhabit Wik perform only bit parts — Smith, Simpson and Woodhouse are the notable lessees of the Mitchelton Pastoral Lease Holding who never took possession (at 169), Dr Fry tells of 'the extraordinary complexity of tenures in colonial Australia' (at 172, 225-6), and Earl Grey is heard to imperially declare that pastoral leases were not to exclude Aborigines (at 267). Instead, Wik concerns the legal history of two parcels of land in North Queensland. It charts the impact of successive leases onto the pre-assumed rights of the traditional owners (at 189-90). This mapping of legal intervention is clearly summarised in the headnote:

Aboriginals and Torres Strait Islanders – Native Title – Whether pastoral leases extinguish native title – Grant of pastoral leases pursuant to *Land Act* 1910 (Qld) and *Land Act* 1962 (Qld) – Whether leases conferred rights of exclusive possession . . . (at 129).

Therefore, Wik is about legal mapping. Cartography is a process, predicated on other processes of exploration, naming and surveying (Ryan, 1996: 4-8). All these processes have rules and norms which determine whether the product is acceptable to the institutions of science or government. A trusted map conforms with the expectation of what a map is, what it looks like and how the information is expressed. Having understood Wik as judicial mapping, the judgments take the form of a search. To map the legal history of the two holdings each judge undertakes a search for the correct rules to govern the mapping. As texts they document a quest; they evidence a search across the law for the correct cartographic rule.

This narrows the aspects of Goodrich's semiotics which are relevant to Wik. Within Goodrich's analysis the judicial search for the correct law within the common law tradition involves the painting and arranging of legal icons (Goodrich, 1990: 239). For Goodrich 'an icon separates licit and illicit modes of representation ... of the permitted forms of figuration of an absent God, and so also of a law in abeyance' (Goodrich, 1990: 248). The law is recognised within common law texts through iconic representation (Goodrich, 1990: 232). Icons are the 'imagery, visible tropes and figures' (Goodrich, 1996: 98), which declare and make the reader aware that encapsulated within the text is the law. Goodrich proposes that interrogation of the iconic dimensions of a common law judgment involves a three-level reading. First, the icons are noted and arranged so that the law becomes annunciated. Second, there is judgment, for it is claimed that the annunciated law can resolve the matter. Third, in judging, in claiming the power to resolve the matter, the law affirms its sovereignty (Goodrich, 1990: 249-50).

The Iconic Content of Wik: A Semiotic Reading of Kirby's Judgment

The text of Kirby's judgment begins on page 248 of volume 141 of the Australian Law Reports. The text claims to map itself. It opens with a table of contents which summarises the movement of the judgment from the introduction to the proposed orders. At an iconic level the text proceeds in a different order. Most of the text is concerned with annunciation. In terms of judgment there is little to say. Once the law is annunciated judgment, becomes the technical process of application — the drafting of the actual maps of legal intervention. Finally, in drawing

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the map the sovereignty of the common law is affirmed for it declares ascendancy over both aboriginality and the established colonial order.

Annunciation

In Christian theology to annunciate is to announce a spirit made flesh (Goodrich, 1990: 249). For Goodrich this term, when related to the common law, refers 'to the aura of authority, the mode of presence that has to be brought to the law for it to be law' (Goodrich, 1990: note 1). At a methodical level annunciation involves how tracers of other texts are used to invoke the sanctity of law, to imbue a profane text with the presence of law. This is the painting and arranging of icons. For Kirby in Wik, the central icon is Mabo.

At the most obvious level Mabo is deployed as an emblem for how Kirby should travel. Mabo is introduced in a section titled 'The Mabo decision and its aftermath' (Wik at 249). The use of 'aftermath' is instructive. 'Aftermath' conjures up images of a sudden unexpected violence, a natural disaster or atomic bomb which leaves destruction and fallout in its wake; 'into this settled world of legal theory and practicality, the decision in Mabo (No 2) intruded' (at 251). This characterisation of Mabo as a dramatic break with the past is a theme Kirby continues to repeat; Mabo is a challenge for a legal system 'which for two hundred years had developed in great detail on the basis of a completely contradictory assumption' (at 256). This evidences a way of travelling. The legal landscape has been disturbed, destroyed and rearranged by Cyclone Mabo:

[A] new ingredient has been injected into the previously settled land-law of Australia by the decision in *Mabo (No 2)*. Settled principles and assumptions must be re-examined to accord with the decision (at 260).

Also:

The decision of the court in that case [Mabo] introduced a new and radical notion. It disturbed the previous attempts of the Australian legal system to explain all estates and interests in land ... by reference to the English legal doctrine (at 273).

This is a new and uncertain landscape. However, it is a land that cannot be avoided. Kirby must make his way into this unsettled world in his quest for the correct cartographic rule. At this point he propounds how he proposes to travel. *Mabo* becomes the icon of authority in an uncertain world.

The icon of *Mabo* surfaces throughout Kirby's judgment. First, *Mabo*'s iconic qualities are reinforced. We are told that none of the parties challenged *Mabo*, that it was 'common ground' (at 255), and that Kirby dare not disturb its legality: 'I forbear, of my own motion, to reagitate the wisdom of the step taken in *Mabo* (No 2)' (at 285). *Mabo* is raised upon high as a sacred symbol, a source of authority. When faced with the prospect of uncertainty of tenure, *Mabo* is invoked: 'this is no more than a result of the working out of the rules adopted in *Mabo* (No 2)' (at 285). Any uncertainty is not Kirby's subjective doing, it is the simply the effect of the law as stated in *Mabo*: 'no new doctrine is adopted which alters the course set by the decision of this court in *Mabo* (No 2)' (at 284).

However, at the level of authority Mabo looms as an obstacle. At first instance and in the Full Federal Court case of North Ganalanja Aboriginal Corp v Queensland (1995), it was held that Brennan J's observation in Mabo (at 68), that 'if a lease be granted, the lessee acquires possession and the Crown acquires reversion expectant on the expiry of the term', had conclusively determined that pastoral leases extinguish native title. Importantly, it is this 'hard view' which Chief Justice Brennan himself follows in Wik. The iconic depiction of Mabo as symbolising a legal presence is central to Kirby's avoidance of the hard view. Understood as a 'fundamental rule' (at 285) or more precisely as a fundamental rationality, Mabo can be invoked to avoid specific inscriptions: 'the reasoning offered by the court in Mabo (No 2) does not uniformly sustain this thesis [and] the orders of the court are inconsistent with it' (at 263); and the reasoning of Justice Brennan 'in so far as it concerns the effect of pastoral leases on native title, is not part of the binding rule established in Mabo (No 2)' (at 265).

The snippet of text that six other judges found to have expressed the law is relegated to merely some remarks (at 284). Again Kirby can absent himself from the decision; this is not a matter of Justice Kirby against Chief Justice Brennan, but the simple fact that the spirit of the law in Mabo does not dwell within those words. Therefore, in traversing the post-Mabo landscape a judge is primarily guided by Mabo (at 255). However, Mabo is not Kirby's sole inspiration. His journey is also determined and structured by two other lesser icons.

The second icon is the common law itself. For Kirby the post-Mabo landscape does not render the methodology of the common law

inappropriate. Instead, the uncertain terrain demands that a judge apply the 'techniques of judicial decision-making, viz reasoning by analogy from established legal authority illuminated by relevant legal history and informed by applicable considerations of legal principle and policy' (at 260).

For a journey across the uncertain post-Mabo landscape the common law tradition is an icon of authority par excellence. In naming the tradition Kirby invokes an aura of permanence, continuity and respectability. First, the name of the tradition can be invoked to dispel problematic assertions; 'the common law tends to abhor unreality, even when it is presented as legal doctrine' (at 271). Second, the icon of the common law counters the unfamiliarity of Kirby's quest by affirming the tried and tested tools of judicial exploration. He might be venturing into an unknown land but fortunately the tools in the judicial swag retain their ability to chart a direction and show the way. He is making a claim for the way he will travel, that his journey will be legitimate and the map he will draw will be acceptable, because he is within the common law.

The final icon of authority is not directly painted on the text. Instead, it emerges from how Kirby structures his judgment. This icon is the scientific method. In response to the unexplored post-Mabo terrain, Kirby invokes traces of the scientific method and the Popperian logic of falsification.9 Kirby propounds three 'doctrinal solutions' (262) or 'theories'10 to the dilemma of whether pastoral leases extinguish native title. He then proceeds to gather evidence so as to determine which theory he should adopt. The image conjured up is that of the scientist articulating possible explanations for phenomena and then determining the more convincing explanation through experimentation. Kirby's 'experiment' is an exercise in artistic appreciation. A theory is rejected if it fails to display the icons of Mabo and the common law: '[the first hypothesis] is not consistent with the analysis of the reasoning of any of the justices in Mabo (No 2) nor with the court's holding in that case. Nor is it consistent with earlier analyses of the Privy Council' (at 272). In similar vein, in rejecting the third hypothesis, Kirby states that '[t]he theory accepted by this court in Mabo (No 2) was not that native title was enforceable of its own power ... [but that] such title was enforceable in Australian courts because the common law said so' (at 275).

In proceeding by way of hypotheses, evidence gathering and falsification the text attracts an aura of rationality. However, this is not science. Judicial methodology has not been replaced by observation, experimentation and repetition. Instead, Kirby invokes sufficient traces of science to attract the glow of reason. While he might be on a journey into the unknown, it is not the crazed flight of a refugee or the irrational wanderings of the insane, but a cool, measured and ultimately rational exploration.

Through painting and arranging the icons of *Mabo*, the common law and the scientific method, Kirby's annunciates the law: 'I therefore return to the second theory ... which is the one I take *Mabo* (No 2) to have established and which I will apply in this case' (at 275). At this point Kirby's journey solidifies, he has found a path. To map the survival of native title depends on analysing each successive estate or interest granted to determine whether the grant was inconsistent with the pre-existing native title. For the two North Queensland pastoral leases all that is required is the determination of whether a 'lease' granted under the Queensland Land Acts could grant an interest in law incompatible with native title. The rationalism of falsification is reiterated. Three hypotheses are raised:

at the highest level of abstraction ... assertion of plenum dominium converting the Crown's radical title to a reversion expectant. At a lower level of abstraction ... the language of the Land Acts and the relevant pastoral lease afforded the legal right of exclusive possession to the entirety of the land. At the lowest level of abstraction by reference to the detailed provisions of the Land Acts, it was argued that the rights conferred by the pastoral leases were incompatible with continuance of native title (at 277).

Again each theory is considered and rejected (at 279-85). The way is easier, because in rejecting each theory Kirby invokes the 'ordinary rules of statutory interpretation' (at 282); he refers to parliamentary intention, ¹² and to established precedent 'by this court and by other courts of highest authority' (at 281). Therefore, even in the uncertain post-*Mabo* landscape, Kirby still found his way back to established paths.

In the end it is Kirby's own journey which is annunciated as law. *Mabo* circulates as an icon. It represents a genealogy of authority, it presents a spirit, gives a material representation to a law that is in excess of its text. It is not Justice Kirby who decides the fate of native title interests in pastoral leases, but the law encapsulated by *Mabo*.

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Mabo also represents a way of travelling. As an historical event, Mabo disturbed legal order; there was pre-Mabo order and post-Mabo disorder. To travel across this new uncertain landscape involves a close reading of the text of Mabo, the logic of falsification and the established tools of common law adjudication. If the law is ultimately a 'route across a landscape' (Goodrich, 1990: 213), then it is Kirby's way of travelling, his method, which is annunciated as law.

Judgment

All journeys have an end. For Kirby's it is the 'simple and correct' conclusion that the grant of pastoral leases over the Holroyd River Holding and the Mitchelton Holding did not extinguish the native title of the Wik and Thayorre peoples (at 279). Kirby has mapped the legal intervention on the two Holdings and declared that the leases were insufficient to entirely undermine the pre-existing native title. 'In iconic terms, the court has heard the case and resumes to state the law as conclusive; an itinerant law stops to mark a place' (Goodrich, 1990: 250).

Judgment merely declares that the annunciated law can resolve the disputes between the parties. This is a sovereign act. It means that the Wik and Thayorre people are able to ask the common law to recognised their native title. It also means that the common law tells the State of Queensland that it can no longer govern this area of land as it had previously.

Sovereignty

According to classical jurisprudence, to be sovereign is to have ultimate legal authority (Hart, 1961: 24-5). According to Goodrich 'what is manifest in the ruling ... is a spirit, the spirit of law, taking flesh in a sovereign act. The judgment recreates a frame of reference, a frame of reason as *universitas*, as the only reason, the only law' (1990: 250).

Therefore, the simple act of judging, at an iconic level, is an affirmation of the common law's sovereignty. To judge is to stand over, to impose from the outside. The sovereignty declared by the common law in judging Wik is sovereignty over two competing legal orders: indigenous and colonial. That the common law claims sovereignty over indigenous people is unsurprising. The common law has a long history in delineating aboriginality (Kercher, 1995: 4). At the beginning of the colony the second Judge Advocate was of the opinion 'that the only mode at present,

when they deserve it, is to pursue and inflict such punishment as they may merit' (cited in Whitfield, 1971: 11).

From these early statements, the genesis of the future binary treatment of Aborigines is discernible (Wolfe, 1994). By the 1880s Highland can observe that the more integrated an Aborigine was into white society, the greater protection the common law offered (1994: 123). The imagery of the frontier, always more a mentality than a cadastral line, became a legal reality (Wolfe, 1994: 96-8). Those Aborigines over the frontier, outside white society, were still the other; they were dangerous and noble, and in the late 20th century were to be afforded protection (Wolfe, 1994: 112). However, inside the frontier Aborigines were to be treated and judged along with the rest of white society (Wolfe, 1994: 112). It is this binary distinction, popularised in mass culture as the authentic Aborigine and the lazy drunk which is reiterated in Wik (Wolfe, 1994: 112; Rowse, 1988: 174-5, Rowse, 1993: 106-7; Sackett, 1991: 236). Native title is recognised because 'the common law said so' (at 275). The common law determines which Aborigines are outside the frontier and retain native title and those who have nothing and are within (Wolfe, 1994: 112). That the common law can construct aboriginality is reinforced in Wik by the sheer absence of the Wik and Thayorre people. In the final orders of the majority written by Justice Toohey (with the concurrence of Justices Gaudron, Gummow and Kirby), this absence is starkly revealed (Rush, 1998: 145-6). Having annunciated the law and mapped the legal intervention the Court stops (at 190). It does not consider any of the Wik or Thayorre claims of attachment or ownership. Instead, the text is left to declare that native title exists as an excess, that it inhabits the margins on the outside of law: '[w]hether there was extinguishment can only be determined by reference to such particular rights and interests that may be asserted and established' (at 190, emphasis added). So understood Wik is a reiteration that it is white law which has sovereignty over the black/white divide; it is the law which constructs and patrols the frontiers of aboriginality.

In affirming colonial control over aboriginality Wik also challenges the colonial order at its most fundamental level. It challenges the symbolic association of Crown and land. As a definition 'colonialism ... entails the establishment and maintenance of dominance over a separate group of people ... and their territories, which are presumed available for exploitation' (Jacobs, 1996: 16).

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To be colonial is to control the land of others. This involves dispossession, a failure to recognise the prior order – 'they have no particular spots which can be regarded as their haunts' – and establishing new spatial images (Carter, 1987: 46). In Australia it was the twin process of exploration and surveying which, through naming and mapping, projected colonialism onto the landscape. ¹⁴

The pastoral lease is a classic representation of Australian colonialism (Godden, 1997). As a pragmatic policy response to the squatter movement it gave a legal foundation for the emerging pastoral economy while preventing squatters gaining freehold title through adverse possession (Reynolds and Daliel, 1996: 317). The desire was to prevent the central government from being locked out of land management. It is this close and direct relationship between the colonial administration and the land which is a particularly characteristic and lasting feature of Australian colonialism. The Crown has mineral rights (Mineral Resources Act 1989 (Qld) s 8(1)), water rights (Water Resources Act 1989 (Qld) Part 2), and it guarantees title to land (Land Title Act 1994 (Qld) ss 173-175). The Crown owned the infrastructure of the pastoral economy — banks, railways, shiplines, airlines and telecommunication services (Finn, 1987: 163). Therefore, the central image of Australian colonialism has been the Crown's ascendancy over land.

The power of this image is reflected in the 'sacredness' of the doctrine of tenures and estates to Australian lawyers (Devereux and Dorsett, 1996). Operating as a fundamental 'rule of recognition', absolute Crown ownership formed a pragmatic, uncomplicated basis for the colonial project. Property was owned if title could be traced to an antecedent unitary title possessed by the Crown (Devereux and Dorsett, 1996: 36-37) and the Crown had this title because it was sovereign (Godden, 1997: 169-170; Stuckey, 1994: 102). In claiming sovereignty over the colonial order the common law fragments the image. While the Crown might retain radical title, this seems ghostly and insubstantial in comparison to the concreteness of absolute ownership. In Wik the common law expresses a desire for participation. It complicates the simple image of the Crown land complex by declaring itself arbiter of the relationship. This desire is manifested as common law cartography. The emerging image is that of a paramount common law patrolling the borders, setting the frontiers, declaring legitimate occupation and prescribing the appropriate modes of governance.

In the end a semiotic reading of *Wik* finishes with discord. At an iconic level, to annunciate the law and to judge is a sovereign act. Kirby in *Wik* declares the common law's sovereignty over both aboriginality and the colonial order. Both are reinstituted, they are born again in the text. In being reborn in *Wik* the central image of Australian colonialism – the Crown land complex – is broken.

Acts of Betrayal: Brennan, Kirby and Australian Colonialism

In disrupting the central image of Australian colonialism it is unsurprising that Wik has become embroiled in political controversy. But it replaces one colonialism with another. In spatial terms it compels the established colonial centre to re-evaluate how to control the periphery (Wallerstein, 1984; Barnes, 1992). Wik does not destroy colonialism. It directly reaffirms the colonialisation by white law of the question of aboriginality. Also it does not preclude the invigoration of alternative avenues of colonial control by the administration. However, the act of betrayal often burns deeper than the actual betrayal. What the semiotic reading of Kirby's judgment does reveal is a way of travelling and a symbolic content removed from colonial expectations.

In charting two hundred years of interaction between the Australian colonialism and the common law, it is impossible to proclaim a coherent vision. Legal historians often produce an understanding of the Australian judiciary 'tenacious in their adherence to the common law', as institutionally bound and ideologically committed to the imperial importation of the common law into Australia (Kercher, 1995: 162-3; Finn, 1987: 167). The general argument is that, by strictly adhering to English law, Australian colonialism has been principally shaped by the central administration with its departments and statutory schemes (Finn, 1987: 165). However, the Australian judiciary's constant gaze towards the mother country reinforced the symbols of colonialism. It legalised England as the legitimate source of all authority and so perpetuated the central image of colonialism, the Crown land complex.

Therefore, although not often directly involved in actively pursuing colonialist policies and despite the challenge that importing the English common law sometimes presented to the colonial authorities, the judiciary was complicit in the colonial project. This is revealed in a brief

semiotic reading of Chief Justice Brennan's judgment in Wik. Mabo does not resonate as the central source of authority in his judgment or as a justification for a way of travelling. Instead, direct text is invoked as binding authority (at 151-2). The annunciated law turns out to be concerned with whether the word 'lease' in the Land Act 1910 (Qld) denotes all the incidents of a common law lease (144-51). The way travelled is classic common law. Most precedent cited is from or before the turn of the century: for example, 'this is a long-established and hitherto accepted approach to the operation of Crown Lands legislation in Australia. In Attorney-General (Vic) v Ettershank (1875) LR 6 PC 354, the opinion of the Privy Council' (at 145).

None of the cases referred to in Brennan's judgment is of direct relevance; they are concerned with other jurisdictions' Land Acts or with statutory schemes for the regulation of rent (at 144 and 146). They are metaphors. Brennan is slipping across the surface of the texts, invoking them as icons for the sagacity of the law (Goodrich, 1990: 249). Ultimately the concern is with skeletons. In returning to the image he first deployed in Mabo, ¹⁷ Brennan justifies his decision thus:

It is only by treating the Crown ... as having the full reversionary interest that the fundamental doctrines of tenure and estates can operate. On those doctrines the land law of this country is constructed. It is too late now to develop a new theory of land law that would throw the whole structure ... into confusion (at 158).

Consequently, the imperial skeleton has set and it cannot be changed just because it produces 'a significant moral shortcoming' (at 161). Brennan's judgment is an example of the role of the common law within Australian colonialism par excellence. The imperial splendour of the common law leads to a conclusion resonant with the colonial project—dispossession and entrenchment of the Crown-land complex. The outcome is that the meandering through feudal land theory and common law leases affirms the ideological and practical manifestations of the colonialism. The Crown remains secure and the cattle can graze undisturbed.

In contradistinction, Kirby's judgment can be seen as an act of betrayal. Kirby is still within the common law tradition. His iconic representations of a law in excess of its text are fundamental to the idea of law as irreducible to writing, but his methods of analogy and statutory interpretation are purely of the common law. At the level of

annunciation, in arranging the icons, Kirby and Brennan are clearly involved in the same project - their voices are heard from the same institution. However, Kirby's way of travelling and symbolic content are removed from colonial expectations. He is aware that Mabo has had a profound impact on the legal landscape and thus demands new ways of travelling. Unlike Brennan, the concern is not with causing uncertainty but finding paths across a new and unstable legal landscape. Judgment is not the rhetorical listing of old precedent from superior tribunals but a mirror of the scientific method of falsification. If the decision creates difficulties for the colonial administration than this is not because of the strict application of English law, but because of the working through of Mabo. The practical effect of Kirby's judgment is the possibility that mainland Aborigines can have their claims of occupation heard by the common law. In declaring sovereignty over the colonial administration, the common law encapsulated in Kirby's judgment claims a transcendence over the established colonial order. At the level of formalist legal theory it is possible to join with Justice Gummow in Wik in declaring that 'the common law is the ultimate constitutional foundation in Australia' (at 230). However, within Kirby's judgment the theory becomes reality. It betrays the system in which it has been an essential element. It breaches the colonial contract.

Waltzing Matildas: (Post)Modernity and Common Law

Finally, an understanding of the common law in Australia can be reached. It appears as a haunted and fragmented picture of law. Nationalistic legal historians have argued that *Mabo* represents 'the end of the British empire ... the rewriting of Australian history to include the perspectives of people who were conquered and of a mature ... legal system' (Kercher, 1995a: 202). Therefore, *Wik* can be seen as a further phase of maturity, a further transformation into post-imperial law. From this perspective the old colonial order personified by the likes of Borbidge becomes a ghost, the voices of a past legal order haunting the present. Hence, Brennan's skeleton image acquires a different meaning; it marks the remains, the whitened bones of a departed colonialism. Waltzing Matilda has come full course. The swagman, squatter and troopers, three essential characters from Australian colonialism all drown in Kirby's judgment. While their ghosts may be heard, the physical reminder of their demise is the billabong itself, Kirby's text.

The imagery of the billabong is important. Carter writing on Australia's spatial history suggests that European naming of landmarks was not a random, flippant process. Instead, often the names used were metaphors, desires for good pastoral land or permanent water projected onto the landscape. Hence, patchy pools and intermittent streams acquired the majestic title of river (Carter, 1987: 46-7). The enthusiastic pronouncements by legal historians of the death of colonialism and an 'Australian' common law seems to repeat this process. Kirby's judgment is one text within a vast tradition. It is a spring-fed billabong. While *Mabo* is the source, it is uncertain whether it will flow on to be a mighty river, or whether it is just a minor water hole in a colonial desert.

新疆的时间,不是不是的特殊的时间,是自己的时间的时间,

What Wik does tell is of the fragmentation within the common law. Dissenting judgments are de rigeur for senior appellate courts. However, what is distinctive about Wik is the distance between Brennan and Kirby. Brennan follows an established map across a stable legal landscape, while Kirby undertakes a post-apocalyptic journey informed by the rationality of the scientific method. The common law is waltzing. An allegedly monolithic tradition is in flux, improvising new steps across the legal landscape. For some this waltz can be regarded as symptomatic of law in the postmodern condition (Wickham, 1989: 41). The decline of the meta-narrative could be celebrated through a joyous welcoming of fragmented, marginal, suppressed or transitory laws. However, it would be just as unwise to parade Wik as postmodern as it would be to parade it as post-colonial.

For Swain and Clarke, Mabo is not postmodern law but

sustains the status of law as the site of the encoding, authorisation and historical production of 'nation' and of 'the West' as an imperial power. It is when the continued role of the law in 'writing the nation' becomes apparent ... that the politics of difference is seen to be taken place in a late modern rather then a postmodern social and political context (Swain and Clarke, 1995: 251).

When faced with the Wik people's claims, based on their fundamental difference from other citizens, Kirby does not abandon the common law tradition, he does not surrender the law's sovereignty in regulating heterogeneity. Nevertheless Kirby propounds a changed common law, a common law aware of how its decisions have influenced political life, and embraces Popperian rationality as a structure of judgment. In so doing Kirby does not turn his back on the project of modernity. He articulates a

rational and sovereign law; his common law is within modernity. The common law in Wik is not the fragmented law of postmodernity.

However, from this realisation a warning sounds. In cultural terms postmodernity is the successor to a decaying and terminal modernity. Postmodernity heralds the post-industrial wasteland where the factory has been renovated into a high technology theme-park for wealthy tourists (Stanley, 1996: 27-30). If we are to believe the academics and prophets (of whom Goodrich is one – McCahery, 1993: 397), then the modernity of the law annunciated in *Wik* renders it inapposite for the postmodern age. Is the billabong itself just a mirage? Is the ghost which is heard actually a dead law from a past era? How appropriate is a modern map to the postmodern landscape?

The ballad of Waltzing Matilda is a narrative of resistance: to retain freedom the swagman drowned, and in death he became part of the water-hole, for his ghost can still be heard. He cheats death and remains to influence, scare or console future travellers. Postmodernism, is just that – post modernity. It describes a future where modernity is still the central reference point (Douzinas et al, 1991: 14). For postmodern geographers the division is spatial; the epochs tumble over each other, and pre-modern, modern and postmodern vie for ascendancy within decentred global space (Shields, 1991: 276-8; Jacobs, 1996: 229-36). This provides a crude taxonomy of space, allowing the labelling of regions as modern or postmodern. What is important is that modernity and postmodernity are co-existent. So understood postmodernity becomes an aspiration; modernity has not departed, so much as some aspects of it are metamorphosing, others regressing. The narratives of modernity are being challenged but remain highly persuasive:

[T]he fact that aboriginal people find they must attempt consensus with state law as the only way of making both their difference and their rights 'real' ... casts postmodern culture as utopian rather then descriptive (Swain and Clarke, 1995: 237).

In approaching the common law, in speaking its language, ²⁰ the Wik and Thayorre people seek the authority, the universality of modern law. Therefore, while postmodernism pronounces the death of law as a unifying universal, the common law seemingly haunted and fragmented, still remains a powerful voice. If culturally it is a ghost, it is a ghost which is heard and obeyed. It offers a desirable map within the contested space of postmodernity.

Conclusion

In offering a semiotic analysis of a single judgment in Wik (with some side-references to other judgments in that case) this article reached an understanding of the common law in Australia as haunted and fragmented. Through an analysis of the iconic, of annunciation, judgment and sovereignty, a changed common law is revealed. While still within the common law tradition, Justice Kirby presents a way of travelling and a symbolic content removed from historical colonialism. In declaring sovereignty over the colonial order and undermining the central colonial image of the Crown's ascendancy over land, it is not surprising that the colonial establishment (represented by Mr Borbidge) declared Kirby insane. While Borbidge plays psychiatrist, the common law annunciated by Kirby is not mad. It claims both sovereignty and rationality. Therefore, even within the contested space of postmodernity, it still offers a coherent map, it still evidences a way of travelling.

Notes

- * Lecturer, University of Notre Dame Australia. The author would like to thank Shaun McVeigh, Shaunnagh Dorsett and an anonymous referee for their comments on earlier drafts of this article. Naturally any errors or omissions are entirely the fault of the author.
- There have already been several journal issues and books devoted to Wik. See Abrahams, 1997; Hiley, 1997. As of the 30 September 1998 the Attorney General's Information Service on Austrom contained 608 entries on native title. At the same date the Australian Public Affairs Information Service on Austrom contained 745 entries.
- 2. There are some exceptions: see Rush, 1998; Godden, 1998.
- 3. To remove the space of interpretation is to abolish all possibility of dialogue and to bleed dry the idea of a lived law while leaving its form in place' (Goodrich, 1990: 296).
- 4. For an overview of the history of the critical legal studies movement, see Goodrich, Douzinas and Hachamovitch, 1994: 8. This article adopts a narrow definition of the critical legal studies as the first two 'phases' documented by Goodrich, Douzinas and Hachamovitch: the Marxist inspired 'global critique of law which preached the rejection and the future end of law' and the second phase which 'was to make the legal political in a sense very close to the feminist representations of the personal as political' (10 and 12).
- 5. In so doing Goodrich neatly sidesteps the 'big fear', the awareness of being sucked into the epistemological void of nihilism which plagues many legal scholars attempting to reconcile legal theory and postmodernism: McCahery, 1993. See also Hunt, 1990; Katz, 1986; and Wickham, 1989.
- 6. (1996) 141 ALR 129 per Brennan CJ at 154. This is the 'hard view' because it reveals a significant moral shortcoming in the law, as most of the land where indigenous people might be able to evidence existing native title is covered by

pastoral leases. Hence Brennan's view reduces native title to a largely academic exercise

- Hill J (with Jenkinson J agreeing) in North Ganalanja Aboriginal Corp v Queensland (1995); Drummond J in Wik Peoples v Queensland (1996); and Brennan CJ (with Dawson and McHugh JJ concurring) in Wik Peoples v Queensland (1996).
- 8. On the properties generally invoked by the common law, or the properties the common law projects, see Murphy, 1991: 198-202.
- 9. Popperian logic of falsification is a way of travelling principally for the natural

A scientist, whether theorists or experimenter puts forward statements, or systems of statements, and tests them step by step. In the field of empirical sciences, more particularly, he constructs hypotheses, or systems of theories, and tests them against experience by observation and experiment (Popper, 1959: 27).

There are two key elements: the articulation of simple hypothesis and falsification of hypothesis. It is progress by elimination, for no hypothesis is ever approved of, and all acceptance is provisional: 'this is the best because nothing else works'. Popper's influence in scientific method is considerable: most entry level texts on scientific method set forth Popper's logic as *the* scientific method (Chalmers, 1981: 38-49).

- 10. Throughout the judgment Kirby refers to the three possible solutions as 'theories' (at 264, 271, 273 and 275).
- 11. The epistemic and methodical distance between science and law is clearly charted in Murphy, 1991.
- 12. Pastoral leases covered huge areas as extensive as many counties in England and bigger than some nation. In theses circumstances, it seems distinctly unlikely that there can be attributed to the Queensland Parliament an implied purpose of granting a legal right of exclusive possession (per Kirby J at 280).
- John Hunt, the second Governor of Western Australia, quoted in Wik (1996) per Gummow J at 231.
- Hence, the cadastral map is often parodied and (re)colonialised by indigenous people as a discursive strategy of resistance. See Blomley, 1994: 223-6; and Jacobs, 1996: 142-56.
- 15. See the Prime Minister's 'Ten Point Plan' (Department of PM & C, 1997) for avenues for re-establishing control. Suggestions on offer are: allowing states to legislatively confirm exclusive tenures (Point 2), extinguishing native title in relation to the provision of government services (Point 3), legislatively giving pastoralists exclusive control of land under a pastoral lease for primary production (Point 4), limiting the time for indigenous people to make native title claims (Point 9).
- 16. The oldest case cited is the Privy Council case of Falkland Island Co v R (1863), the most recent is the New South Wales Court of Appeal case of Minister for Lands and Forests v McPherson (1991), where Kirby P is cited as having approved the 'established and hitherto accepted approach' (per Brennan CJ at 149 and 148).
- 17. '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' (per Brennan J at 417).
- 18. This is the view presented in a variety of entry level texts on Australian law. See Parkinson, 1994: 130.

- 19. Or maybe the pre-modern focus of the common law as judgment is given a new strength in postmodernity? See generally Murphy, 1991.
- 20. This is in contrast to the Haida Indians who, in refusing to consent to the language games of the common law, presented their own myths to the law. Their failure to speak meant simply that the common law failed to hear (Goodrich, 1990: 179-185).

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