Metaphoric Sovereignty and the Australian Settler Colonial State

Shane Chalmers[1]

1 Introduction

There is a pronounced anxiety within Australian jurisprudence at the use of metaphor in the creation of the law. Whether it manifests in an outright prohibition against such legal reasoning (by the Chief Justice of the High Court in 1937), or a warning of its 'dangers' and a refusal to engage in it (by a majority of the High Court in 2001), judicial uneasiness at the idea of metaphors as a source of law has been consistent. This might be understood in terms of a more general post-Enlightenment distrust of 'figurative language', because of its 'deceptive' appeal to the imagination rather than to logic (Davies 2017: 130). While few inheritors of that tradition would still deny the productive, even inescapable role that metaphor plays in reasoning (Lakoff & Johnson 1980), Anglo-European jurisprudence has been more reluctant to let go of the fantasy of a purified rationality (in Hans Kelsen's terms, this would be a jurisprudence 'free of all foreign elements' (see Davies 2017: 27)). Whatever that might look like, within prevailing Common Law jurisprudence it means at the very least a mode of reasoning that uses only recognised sources to determine the law (Hart 1961), above all the *rationes decidendi* of previous judicial decisions, provisions legislated by parliament, along with a range of interpretive aids such as the maxims of equity. Given that metaphor is

not one of the recognised sources, a judge's anxiety at basing the law on a metaphor could be no more than a judicious fear of transgressing the boundary of legitimate legal reasoning. And yet, while that is probably true to an extent, I think it misses something specifically Australian about this anxiety. As an account that focuses on an Anglo-European preoccupation with the properties and proprieties of legal reasoning, it misses the historical and material particularities of the High Court's disavowal of this mode of law creation. That is the focus of this essay.

My argument, in short, is that the Australian judiciary's anxiety at engaging in metaphorical legal reasoning is symptomatic of the fact that metaphor is not only *the* source of Australian law, but the source of this law's very (il)legitimacy in the country. This has nothing to do with the illegitimacy of metaphor as a mode of legal reasoning, and everything to do with the illegitimacy of a law that has violently dispossessed First Nations based on a metaphorical claim to sovereignty over their country.

I develop this argument in the first part of the essay through a reading of Australian High Court cases that have explicitly addressed the use of metaphor in the creation of the law (all happen to be land law cases, which in itself is suggestive). My reading draws out two observations. The first is the Court's jurisprudential position on the use of metaphor in the creation of the law, which is to prohibit it, or at least to refuse to engage in it because of the 'dangers' of doing so. The second is that metaphor is nonetheless *the* source of Australian law. This is not my argument so much as Justice Kirby's observation, that British law was extended over this country based on a claim to 'occupy' and 'possess' a continent upon which the British had barely set foot, which is to say, based on a metaphorical claim. My contribution in this part of the essay is to suggest that these two observations are connected: the Court's repudiation of metaphorical legal reasoning cannot be understood separately from the role that metaphor played in the violent foundation of Australian law. In this context – in which the country was 'taken away from the original possessors' (as the colonial magistrate Edward John Eyre wrote) 'without laying claim to this

country by right of conquest, without pleading even the mockery of cession, or the cheatery of sale' – in this historical, and very material context, metaphor as a mode of legal reasoning carries the shame of a law that cannot escape the dispossessive violence of its establishment. This leads me to the point: that it is impossible for an Australian judge to engage in metaphorical legal reasoning without recalling the law's foundational violence, and thereby calling into question its legitimacy as the law of this country. The anxiety is the anxiety at having to address that question.

The second part of the essay is an attempt to think more carefully about the metaphorical nature of Australian sovereignty – about how metaphor, and the metaphor of the body in particular, has shaped and substantiated colonial sovereignty in Australia, and how this contrasts and interacts with First Nations' sovereignty. To do that the essay shifts registers from the jurisprudence of the High Court to an historical event. The event is a public festival held in Melbourne and Geelong over a week in 1850 to inaugurate the creation of the Colony of Victoria. I focus on this particular festival for two reasons. To begin with, it involved a collective performance in which the colonists gave expression to their fantasy of being the rightful sovereign of the land – a performance which, I argue, helped to make it real for them. This picks up on Michael Walzer's (1967) argument, that the modern European state form depends upon its representation for its reality. In itself such a state 'is invisible', Walzer writes; 'it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived' (Walzer 1967: 194). That, I argue, is what the colonial festival did. It involved a metaphorical performance of sovereignty – a very serious kind of play acting in which the several thousand pale-skinned invaders paraded around town in their official costumes as if they were Queen Victoria incarnate. And in doing so – by representing themselves to themselves, through the festival, as a duly constituted body politic – the colonists' transformed the claim to sovereignty that was set out in the *Australian Constitutions Act 1850* (UK) into a reality that they could sense, love, and truly conceive.

But what makes this event especially interesting, and instructive, is not only how it deployed the metaphor of the body in a way that represented, and thereby reinforced, the Colony's sovereign claim over this part of the country. What is unique about the festival is how First Nations were included in it, as part of the colonial body politic. Focusing on this inclusion helps to see how the metaphor of the body gave shape and substance not only to the lawful authority of the colonists but also to the colonial legal subjectivity of Aboriginal peoples. At the same time, the festival shows the conceit of the inclusion, that is, the failure of the colonial effort to extinguish First Nation sovereignty. Quite simply, while colonial sovereignty is metaphorical, First Nations' sovereignty is 'ontological' (Moreton-Robinson 2007: 2). Ultimately that is what the festival shows: how Aboriginal and Torres Strait Islander peoples have been included as constitutive parts of the Australian body politic, while remaining 'occupied' and 'possessed' by this country in ways that ground their sovereignty in an embodied relationship with it (see further Moreton-Robinson 2006).

In conclusion I suggest that this points to the kind of state that 'Australia' is, and could be – the kind of state that is articulated in the *Uluru Statement from the Heart*, in which Aboriginal and Torres Strait Islander Peoples are *both* a constitutive part of the Australian body politic *and* sovereign First Nations. For non-Indigenous Australians this is no doubt a difficult state to imagine, not only because of its apparent contradictoriness, but more importantly because of its radical difference to the prevailing imagery of Australian sovereignty as a 'unified supreme authority' (Moreton-Robinson, 2007: 2), a Leviathan-like sovereignty in which all individual bodies are a subordinate part of the one national body. For non-Indigenous Australians to conceive of the state otherwise – to see it, to love it, in a decolonial form – what is needed is a different set of founding metaphors. It is not for me to say what that might be, but the metaphor of the 'gift' used by Galarrwuy Yunupingu in his essay '*Rom Watangu*: The Law of the Land' (Yunupingu 2016: 28) is surely a good start:

> Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.

2 A skeleton in every house

What does it mean for metaphor to be a source of law? To begin with, from the standpoint of the jurisprudence of the courts of Common Law, that question begs another: *can* metaphor be a source of law? A former Chief Justice of Australia's highest court left little doubt about his answer to that second question. In a 1937 case studied by most Australian property law students, Chief Justice Latham rejected the notion that a metaphor can be the basis of a legal principle. When asked to decide whether the Common Law protects rights to 'property in a spectacle', Chief Justice Latham's conclusion was that 'a "spectacle" cannot be "owned" in any ordinary sense of that word' (*Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*: 496) (hereafter *Victoria Park Racing*). Such rights 'could be described as property only in a metaphorical sense' (*Victoria Park Racing*: 497). And metaphors, according to the Chief Justice, cannot be the foundation of law. 'Any appropriateness in the metaphor would depend upon the existence of the legal principle. The principle itself cannot depend upon such a metaphor' (*Victoria Park Racing*: 497). In this jurisprudence, the value, and power, of metaphors only extends as far as illumination. Metaphors cannot be the source of law, although once the law is said to exist they can help to see it.

And yet, if all that metaphors do is create the literary conditions to appreciate existing law, then why would a judge contemplate overturning one? In another Australian High Court case, this time dealing with native title, Justice Kirby considered the famous metaphor used by Justice Brennan in *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1 (hereafter *Mabo*) – that the Australian legal system has a 'skeleton of principle which gives the body of our law its shape and internal consistency', and which the courts must not 'fracture' (*Fejo*

v Northern Territory: 150n242) (hereafter *Fejo*). In his judgment in *Fejo*, Justice Kirby expressed disapproval of this 'metaphor which suggests both a morbidity and fragility in the foundational principles of the Australian legal system which I do not detect' (*Fejo*: 150n242). The remark might be understood as simply extending Chief Justice Latham's point. If metaphors can illuminate existing law, then they can also obscure it – hence the need for appropriate images, to ensure that one can see the law clearly. But the way Justice Kirby expressed his disapproval suggests he was not merely concerned that the skeleton metaphor had cast the Australian legal system in a misleading light. His concern was that it *added* something to the law, which he otherwise did not 'detect' (*Fejo*: 150n242).

What Justice Kirby seems to have sensed in 1998 is something that scholars in the field of law and humanities have become familiar with over the past two decades. To cite a recent article by Ben Golder, which draws on Robert Cover's work, we now know that metaphors have the potential to be 'jurisgenerative' (Golder 2019; on the relationship between law and metaphor, see also Hanne & Weisberg 2018, del Mar 2017, del Mar 2020, and the special issue of the *Journal of Law and Society* 2016). What Golder means by this, and what he shows through his examination of human rights, is that metaphors have the potential to shape the *nomos*, or normative order, that gives a legal system its meaning and effect. In Golder's words, metaphors can work 'to compose and construct particular realities of law – with material effects for the way we think and practise law' (Golder 2019: 304; on the material effects of metaphor see also the special issue of *Theory & Event* 2021). It is this potential of metaphors to shape, and not just illuminate, the law that Justice Kirby seems to have sensed in 1998. This is even more evident in the case of *Yarmirr v Northern Territory* (hereafter *Yarmirr*), decided three years later.

On one hand, *Yarmirr* confirmed that the dominant view of the Australian High Court in the twenty first century is still the one articulated by Chief Justice Latham in 1937. When confronted with the question of 'what principles of the legal system are, or are not,

part of its "skeleton"', the majority of the Court demurred (*Yarmirr*: 68). 'Much of the debate' in the case, they observed, had 'proceeded by reference to the metaphor of "fractur[ing] a skeletal principle of our legal system" used by Brennan J in *Mabo [No 2]* (280). The use of the metaphor cannot, however, be allowed to obscure the underlying principles that are in issue' (*Yarmirr*: 68). The majority then cautioned against engaging in metaphorical legal reasoning. 'There are obvious dangers in attempting to argue from the several elements of the metaphor to an understanding of the principles that lead to the result that is expressed by the metaphor' (*Yarmirr*: 68). Chief Justice Latham would have approved. Metaphors can illuminate as much as they can obscure, but they must not provide the basis of legal reasoning.

Justice Kirby took a different view. One of the questions for the Court was whether the First Nation claimants – the Mandilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngayndjagar and Mayorram peoples – had native title rights to the sea based on 'occupation' and 'possession'. The judge at first instance had found this to be an absurd proposition. 'The very nature of the sea', the primary judge wrote, 'renders it inappropriate to attempt to strictly apply concepts such as possession and occupation which are readily capable of being understood in relation to land' (*Yarmirr*: 135). Justice Kirby agreed that these concepts are 'ill-suited to a description of a relationship between persons and the sea', which 'of its nature' is not capable of being literally 'occupied' or 'physically possessed', at least not in the way that land is thought by an English mind to be capable of occupation and possession (*Yarmirr*: 135). Justice Kirby also understood that these concepts failed to capture the claimants' own lawful relationship with the sea. Whereas the Mandilarri-Ildugij people speak of 'Mandilarri-Ildugij country', Common Law judges can only speak of 'occupation' and 'possession', or 'use and enjoyment' (*Yarmirr*: 135). However, in Justice Kirby's view, for the Court to conclude that the claimants do not have native title rights based on 'occupation' and 'possession', because of a lack of literal correspondence between these concepts and the claimants' relationship with the sea, would be to misunderstand both law and language. While the claimants might not physically possess or occupy the sea, it is the

responsibility of the Court to 'give flesh to these concepts' based on the claimants' 'own understandings of occupation, possession, use and enjoyment of their sea country' (*Yarmirr*: 136). That might require the Court to extend the Common Law metaphorically, but, Justice Kirby observed, this would not be the first time that the Common Law had been extended based on a metaphor.

> The very claims to sovereignty in the Crown, made respectively by Captains Cook and Phillip, over the land mass of a huge continent, had a similar metaphorical quality, excluding all other claims to sovereignty. But they had undoubted legal consequences which our courts uphold. (*Yarmirr*: 136)

The majority in *Yarmirr* effectively upheld the prohibition against metaphorical legal reasoning, due to its 'obvious dangers' (*Yarmirr*: 68). They did not say what those are, but one obvious danger is that it draws attention to exactly what Justice Kirby observed: Australian law is born of metaphor. The claim that the British 'occupied' and 'possessed' Indigenous country that no British person had ever seen, let alone set foot upon, was clearly metaphorical, and yet it was upon this basis that the Common Law was said to extend across Australia – with 'undoubted legal consequences which our courts uphold' (*Yarmirr*: 136). The prohibition against metaphorical legal reasoning is, in other words, a prohibition against the very act that founded the Australian legal system (as the High Court observed in *Mabo*, the question of 'the validity of the Crown's acquisition of sovereignty' is a question that the judiciary must never 'canvass') (*Mabo*: 33). It is as if the illegitimacy of that act of creation now taints the method of creation, so that to engage in metaphorical legal reasoning is to recall 'the violent structure of the founding act', to use Derrida's phrase (Derrida 1989-1990: 943). Indeed, if metaphor forms the 'mystical foundation of authority' of Australian law (Derrida 1989-1990: 943), then this would explain the danger of engaging in metaphorical legal reasoning. As Derrida noted, citing Montaigne/Pascal: 'whoever traces it' – the mystical foundation of authority – 'to its source annihilates it' (Derrida 1989-1990: 939). At least that is the fear, and, for Derrida, the

promise. Because what would be annihilated would be the image of a law that draws its authority from a solid claim to Right, or Justice, or Truth. Metaphors are quintessentially representational; to cite Louis Marin's definition of representation, they 'present something in the place of something else' and 'authorise the substituted thing as if it were the same as the thing being represented' (Marin 1988: 5-6). To trace the authority of a law to this source – to acknowledge that Australian sovereignty ultimately rests on a metaphorical claim, on an 'as if' colonial imaginary – would be to acknowledge that the law's 'ultimate foundation is by definition unfounded' (Derrida 1989-1990: 943; see also Fitzpatrick 2002, Motha 2015, 2018; on the relationship between law and representation, and how this is as a matter of the 'representation of power and the power of representation', to use another of Marin's phrases, see Manderson 2019, 2018, 2000).

If metaphor forms the mystical foundation of Australian law, then this would also help to understand why, at the moment the High Court was confronted with the question of 'the validity of the Crown's acquisition of sovereignty' in *Mabo* – which is the question of Australian law's metaphorical origins – Justice Brennan's reflex was to turn to metaphor to explain that there are certain questions the judiciary cannot ask (without risk of 'fracturing' the 'skeleton of principle which gives the body of our law its shape and internal consistency') (*Mabo*: 29-30; see also at 43, 45). How did William Thackeray put it? 'There is a skeleton in every house' (Thackeray 1886: 112). For the Australian judiciary, metaphor carries the shame of a law that cannot escape the dispossessive history of its establishment any more than it can escape the mystical foundation of its authority. As Justices Gaudron and Deane wrote in *Mabo*, the extreme violence of colonisation, which 'spread across the continent to dispossess, degrade and devastate the Aboriginal peoples', has left 'a national legacy of unutterable shame' (*Mabo*: 104; see also Manderson 1998). To recite Derrida, 'a silence is walled up in the violent structure of the founding act' (Derrida 1989-1990: 943), which makes it impossible for the Court to speak metaphorically without recalling the metaphorical origins of its authority, but which also makes it impossible for the Court to *not*

speak metaphorically, especially when its authority is in question. Just as 'silence is not exterior to language' (Derrida 1989-1990: 943), so too is metaphor a constitutive part of Australian law.

3 The mystical body of the commonweal

One way to approach the relationship between law and metaphor is through the concept of jurisgenesis. For Cover, jurisgenesis offered a way of understanding how legal meaning is realised through a process that is social, or intersubjective, and that 'takes place always through an essentially cultural medium' (Cover 1983: 11). Cover was especially interested in judicial interpretation as one such process, and how the interpretive act of deciding on a meaning of the law from amongst the multiplicity of meanings that exist under conditions of legal plurality has the 'jurispathic' consequence of denying the legality of those other understandings of the law (Cover 1983: 40). However, that is a different concern to the one raised by the High Court's prohibition against metaphorical legal reasoning. The question here is not how metaphor is a source of legal meaning, but how it is a source of legislative power. In the language of Shaunnagh Dorsett and Shaun McVeigh, this is about metaphor as a mode of formation of lawful authority, which is a question of 'jurisdiction' rather than 'jurisgenesis' (Dorsett & McVeigh 2012).

For Dorsett and McVeigh, jurisdiction is the 'first question of law', in that it directs attention to how lawful authority is shaped by the activity or process of giving expression to the law (Dorsett & McVeigh 2012: 5). This is jurisdiction as legal diction, which is a matter of who is 'speaking' the law as much as the mode of speech (see also Rush 1997). Consider, for example, that originary act of 1770, when Captain James Cook 'hoisted English Coulers' from the summit of Possession Island at the northern tip of Australia, 'and in the Name of His Majesty King George the Third took possession of the whole Eastern Coast' of the continent (Cook 1770). Or consider the follow-up act of 1788, when Captain Arthur Phillip again raised the flag, this time in the place the British called Sydney Cove, in

a ceremony to establish the Colony of New South Wales (covering country beyond even Captain Cook's wildest imagination) (Dorsett & McVeigh 2012: 64). These acts of raising the flag were, in Dorsett and McVeigh's terms, acts of jurisdiction – acts of giving expression to British law – which had the effect of conferring sovereignty on the colonists over half the continent, while 'excluding all other claims to sovereignty' (*Yarmirr*: 136). Thinking jurisdictionally about these acts draws attention to two things in particular. One: 'sovereignty followed in jurisdiction's wake' (Dorsett & McVeigh 2012: 64). And two: the mode of legal diction, or the language of this law, was metaphor. The Crown acquired sovereignty the moment it was said, in the process of raising the flag, that the British occupied and possessed country which no British person literally occupied or physically possessed.

It is in this sense that jurisdiction can be understood to have shaped lawful authority in Australia: by giving the legislative power of the colonisers a metaphorical foundation. I write this in the past tense, but of course foundations are constantly being re-set (Derrida 1989-1990: 941). Just as settler colonialism is a dynamic structure and not a one-off event (Nichols 2020: 87-91; Wolfe 2006: 390), so too is jurisdiction, and the lawful authority, subjectivity, and relations that it shapes. It is therefore instructive to turn to another foundational moment in the colonial history of Australia to consider how sovereignty was being refounded, or reinstituted, some seventy-five years after the flag-raising ceremonies of 1770 and 1788. The occasion was a festival held in 1850 to celebrate the inauguration of the Colony of Victoria (see also Chalmers 2021). The colonists of Port Phillip District had received the 'glorious news' that their Imperial Parliament in London had passed the Bill that would grant them independence from New South Wales (*Melbourne Morning Herald* 11 November 1850). As one of their newspapers announced: 'The long oppressed, long buffetted Port Phillip, is at length an independent colony, gifted with the Royal name of Victoria' (*Melbourne Morning Herald* 11 November 1850). Under the *Australian Constitutions Act*, the 'new-born colony' (*Melbourne Morning Herald* 11 November 1850) would have a Governor and Legislative Council, with 'Authority to make Laws for the Peace, Welfare, and

good Government' of the Colony, as well as its own judicial apparatus, including a Supreme Court (*Australian Constitutions Act 1850* (UK): ss 14, 28, 29).

In anticipation of their sovereign status within the British Empire, the Port Phillip colonists organised a week-long festival. The main event was a parade, or rather two parades, staged in the cities of Melbourne and Geelong, which drew together in a single marching mass the District's 'constituted authorities' and 'associated bodies' (*The Argus* 28 September 1850: 2). In Melbourne this included a Native Mounted Police unit, which rode at the head of the parade behind the Chief Constable (*The Argus* 19 November 1850: 1). The police unit had been established shortly after colonisation of the District in the 1830s, with the objective of 'civilising' the Aboriginal peoples of the region by 'forming a body of Aboriginal Blacks under European Superintendence' (regulations establishing the Native Police Corps cited in Fels 1986: 17-18). The members of the Native Police Corps no doubt had their own motives for joining it, and were able to use it to their advantage while maintaining a connection to country as First Nations (Fels 1986). But from a colonial perspective, the image of the 'Black Troopers' riding erect at the head of the parade, dressed in the Queen's uniform as one of the colony's own 'constituted authorities', represented the achievement of their Civilisation (see Figure 1).

Figure 1. William Strutt, *Aboriginal Black Troopers, Melbourne police with English Corporal* (Strutt 2018)

To a British colonial mind, the Aboriginal members of this unit had become part of that *corpus fictum*, *corpus imaginatum*, or *corpus representatum*, known historically as the *corpus reipublicae mysticum* – the 'mystical body of the commonweal' (Kantorowicz 1957: 208-9). And not just any part: they were of the part that wears the Crown, of the head, which sits atop the body politic as its executive organ (for 'just as men are joined together spiritually in the spiritual body, the head of which is Christ..., so are men joined together morally and politically in the *respublica*, which is a body the head of which is the Prince') (Lucas de Penna cited in Kantorowicz 1957: 217).

Although there was nothing especially new about this. At the time it was already common for the colonists to seek to include Aboriginal people in this way, through the institution of the Native Police Corps, and so as an act of jurisdiction the Melbourne parade did little more than represent existing forms of lawful authority and subjectivity. The

parade in Geelong was different. At 'an early hour', the newspapers reported, 'the town began to fill with people from the surrounding villages – all the shops were closed, and the inhabitants congregated in the Market Square, in order to swell the public procession' (*Geelong Advertiser* 20 November 1850: 2). At the head of the parade marched the Chief Constable and a Police Corps made up of white colonists, followed by 'the Blacks', a group of Wadawurrung people who had been invited to join the festival (*Geelong Advertiser* 20 November 1850: 2). 'To the delight of thousands' the Wadawurrung people marched, appearing 'as dignified and as important as if they *de facto* possessed that soil which they proudly walked over' (*The Argus* 22 November 1850: 2). Carrying 'spears, and boomerangs, and liangles', 'un-terrified by the thousands that surrounded them, and un-heedful of the shouts that greeted them' (*The Argus* 22 November 1850: 2), they proceeded through the streets of Geelong, 'the observed of all observers' (*Geelong Advertiser* 21 November 1850: 2). The most striking detail was the banner under which they walked. A journalist described what he saw: 'They walked, aye, and a gay flag flaunting over them'; how they 'gaze[d] upon it as if it contained the charter of their deliverance. Let us see the design and motto – a war spear, crossed by a boomerang, supporting a shield, with the following inscription: DE INDEPENANT ORDER OF BLACK FELLOWS' (*The Argus* 22 November 1850: 2).

Unlike in Melbourne, the Wadawurrung people were not included at the head of this parade, as members of the Native Police Corps. Instead they had been invited to participate as a 'friendly society'. At the time, friendly societies were one of the most important types of mutual aid organisation. Under the *Act to Regulate Friendly Societies in the Colony of New South Wales*, 7 Vict 10 (1843), 'any number of persons' were authorised 'to form themselves into, and to establish a society, for the purpose of raising [...] a stock, or fund, for the mutual relief or maintenance of all'. Major friendly societies included the Melbourne Union Benefit Society, as well as the groups that marched in the Geelong parade behind the Independent Order of Black Fellows: the Independent Order of Rechabites, the Grand United Order of Odd Fellows, and the Independent Order of Odd Fellows. The pun, in

naming the Independent Order of Black Fellows after this last group, was not lost on the colonial audience (as a journalist noted, 'could one forget the burlesque of the thing we could forgive the harmless innocence of the inscription') (*The Argus* 22 November 1850: 2). But behind the apparently parodic movement was another very serious move: a new way for the colonists to incorporate Aboriginal people within the Queen's body politic, not at the head but in the governed part, alongside other civil society organisations (to use a more contemporary term). Whether or not the Wadawurrung people 'gazed upon' their banner as if it 'contained the charter of their deliverance' (*The Argus* 22 November 1850: 2), from a colonial perspective that was the banner's effect. To be included in the parade – to be a representative of the new-born colony – one had to march as part of a 'constituted authority' or an 'associated body' (*The Argus* 28 September 1850: 2). By signifying the charter of a friendly society, the Wadawurrung people's banner authorised their inclusion as one of the Colony's associated bodies, formed under the *Act to Regulate Friendly Societies in the Colony*.

Like the Melbourne parade, the parade in Geelong involved an act of jurisdiction that helped to give shape and substance to the lawful authority of the Colony as well as to the colonial legal subjectivity of Aboriginal peoples. And in both, metaphor was the mode of legal diction. Those several thousand European invaders of Aboriginal country were able to show and see themselves as a 'unified supreme authority' (Moreton-Robinson 2007: 2), while feeling it in their bones. The parade was a medium through which they could give expression to their fantasy – of being the rightful sovereign of this land – through a collective performance that made it even more real for them. But what occurred in Geelong was also unique. Like the parade in Melbourne, the Geelong parade used the metaphor of the body in a way that represented and reinforced the Colony's sovereign status, and that included Aboriginal people while excluding their sovereignty as First Nations. But it did so in a way that also prefigured a legal institution that has come to govern relations between Aboriginal peoples and the colonial state in the twenty-first century. The parade in Geelong was one of the earliest instances of Aboriginal peoples being included

within the colonial body politic, not in the form of a police corps, but as a kind of civil corporation – a form that Aboriginal peoples are still required to take in order to be visible and audible to the colonial state today (see, eg, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and *Native Title Act 1993* (Cth); on the rise of the Indigenous corporation see Rowse 2015, 2012: ch 6).

4 Conclusion

A 'state is invisible', Walzer wrote in his 1967 essay 'on the role of symbolism in political thought'; 'it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived' (Walzer 1967: 194). To comprehend the constitution of a 'state' therefore requires attention to the modes of representation that give it shape and substance. In jurisprudential terms, one must consider how 'sovereignty followed in jurisdiction's wake' (Dorsett & McVeigh: 64). The result is a plural formation that obtains its shape and substance through the organisation and representation of 'an eminently contested and heterogeneous set of practices and ideas' (Matthews 2021b: 50; see also Matthews 2021a). At the same time, in the dominant tradition coming out of Europe, the resulting sovereign formations have tended to have something in common. Neill Walker summarises this commonality as an image of 'ultimate authority that supplies unity and order to a political community' (Walker 2020: 372; the notion of 'sovereign formations' comes from Buchanan, Motha & Pahuja 2012; see also Joyce 2012, Olson 2016). There is a passage from Proust which captures the dynamic of this formation. 'I was not one man only', Proust's narrator tells us,

> but the steady advance hour after hour of an army in close formation, in which there appeared, according to the moment, impassioned men, indifferent men, jealous men… In a composite mass, these elements may, one by one, *without our noticing it*, be replaced by others, which others again eliminate or reinforce, until in the end a change has been brought about which it would be impossible to conceive if we were a single person. (Cited in Spivak 1997: xi; italics in original)

In short, sovereignty is understood in this European tradition as a kind of superstructural formation (in the sense of Williams 1973), which governs and regulates the bodies of individuals as much as it is shaped and substantiated by them. This differs radically from an Aboriginal understanding of sovereignty. As Aileen Moreton-Robinson explains, Aboriginal sovereignty 'is embodied, it is ontological (our being) and epistemological (our way of knowing), and it is grounded within complex relations derived from the intersubstantiation of ancestral beings, humans and land' (Moreton-Robinson 2007: 2; see also Moreton-Robinson 2006). One difference can be seen in how the corporeal body features in these broadly defined traditions. In the European tradition, the body is split between the 'body natural' and the 'body politic', with the latter drawing its authority from its metaphorical connection to the former. In the Aboriginal tradition that Moreton-Robinson describes, the body is not divided and doubled along this Christian political-theological axis. Rather, it is a site of connection with ancestral beings and country, which is what makes the corporeal body itself 'lawful', and sovereignty 'embodied' as a corpo-reality. The difference, to put it crudely, is between the body as a (metaphorical) source of sovereignty, and the body as (literally) sovereign.

That is why Aboriginal sovereignty continues regardless of the incorporation of Aboriginal peoples within the colonial body politic. This could be seen at the 1850 festival. One of the colonists who witnessed the parade in Geelong noted how the 'white blankets' which the Independent Order of Black Fellows wore 'contrasted strongly with the black faces', which contributed to their appearance as 'resuscitated denizens of the graveyard' – as skeletons, in the flesh (*Geelong Advertiser* 21 November 1850: 2). Once noticed, the colonist could not unsee it. In the evening after the parade the Wadawurrung people staged their own event in Market Square. As 'the sun went down', the colonist reported, a 'fearful looking pageant' emerged from out of the crowd:

> the blacks have cast aside their blankets, see! they have completed a strange toilet, – some have their bodies spotted in white circles, others streaked in long lines of red from the waist downwards, and

> again across the ribs, giving them the appearance of a 'raw skeleton'. (*Geelong Advertiser* 21 November 1850: 2)

As a mode of legal diction, metaphor, and the metaphor of the skeletal body in particular, has worked jurisdictionally in Australia to give shape and substance to a colonial sovereignty that includes Aboriginal and Torres Strait Islander peoples while extinguishing their sovereignty. But the sovereignty of Aboriginal and Torres Strait Islander peoples is not metaphorical – it cannot be 'extinguished' by colonial jurisdiction. 'Our sovereignty is carried by the body', Moreton-Robinson writes (Moreton-Robinson 2007: 2). Perhaps that is why the pun, in naming the Wadawurrung group the Independent Order of Black Fellows, was so unsettling to the colonists ('could one forget the burlesque of the thing we could forgive the harmless innocence of the inscription') (*The Argus* 22 November 1850: 2). It named the fact that while the Wadawurrung people marched as a constitutive part of the colonial body politic, they did so as sovereign bodies – as a truly Independent Order of Black Fellows.

The skeleton metaphor has been critiqued for the way it puts beyond question the most fundamental questions of Australian law. However it seems to me that, as a description of the legal system that was brought to this country upon its invasion in the eighteenth and nineteenth centuries, it is the perfect metaphor. Not only does it draw attention to the metaphorical origins of Australian law, but it also helps to imagine this law's mortality. Australian law more often figures as a disembodied omnipresence, more spirit than skeleton. This law is supposed to be god-like, while skeletons are the stuff of mortal bodies, prone to disease, decay, death. Skeletons *can* be fractured; and they *will* be buried, cremated, discarded. Although they are also capable of change, of forming new relationships, of giving birth to new bodies.

In the first part of the essay I argued that metaphor forms the 'mystical foundation of authority' of Australian law; that to acknowledge this is to acknowledge that the law's 'ultimate foundation is by definition unfounded' (Derrida 1989-1990: 943); and that the 'danger' of such an acknowledgement is the 'annihilation' of this law's

authority. And yet, as I have tried to show through the second part of the essay, this would not be a nihilistic annihilation and instead a regenerative one. The image of a law that draws its authority from a solid claim to Right or Justice based on an original 'occupation' and 'possession' of this country might be annihilated, but this would enable the state to be refounded on a new metaphor or set of metaphors – ones which can help non-Indigenous peoples to imagine Aboriginal and Torres Strait Islander peoples as a constitutive part of the Australian body politic *and* as sovereign First Nations. 'Decolonisation' might not be a metaphor (Tuck & Yang 2012, Garba & Sorentino 2020), but the colonisation of Australia *is* metaphorical as a matter of law (see also Veracini 2022), and new metaphors for the twenty first century can be part of the decolonial process. At the very least this would be one 'meaningful' way to respond to Yunupingu's call, to 'Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.' (Yunupingu 2016: 28)

Endnotes

1 Senior Lecturer, Adelaide Law School, The University of Adelaide, Australia. Warm thanks to the editors, Lorenzo Veracini and Desmond Manderson, for the invitation to contribute to this project, from its inception as the 2020 pandemic seminar series, *The Bubble: Metaphors We Survive By*, to its realisation as this volume of *LTC*. Also special thanks to the anonymous reviewers of my article, for engaging in such a careful and generous reading of the manuscript – and to the editors at *Law Text Culture* for opening their journal to this collection.

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