Feudalism and Australian Land Law: 'A Shadowy, Ghostlike Survival'?

MICHAEL STUCKEY*

Until the decision of the High Court of Australia in *Mabo* v *Queensland (No 2)*[1] it had always been understood that Australian land law was fixed firmly in the feudal mould comprised of the doctrines of tenures and estates. This 'understanding' has now been questioned and to a certain degree redefined. The reappearance of the feudal notion in *Mabo* exposes an opportunity to contemplate how a historical attitude towards the law in fact shapes its contemporary unfolding.

Feudalism

Among historians the question of feudalism has not been a simple one. Significant and ongoing disputation about the nature of feudalism has generated a great deal of scholarship ever since the term was first used by the humanists in the late sixteenth century. An evaluation of the emergence and descent of feudalism as a social structure allows us to see how particular circumstances in England went towards the evolution of a feudalism which was uniquely English and in part why Australian law is still concerned with the idea of feudalism.

What then is 'feudalism'? How did it occur? Anderson, a Marxist, adopts the dialectical method:

> The catastrophic collision of two dissolving anterior modes of production - primitive and ancient - eventually produced the feudal order.[2]

And, more specifically:

> In England, where there was no confrontation, but merely caesura, between the Roman and the Germanic orders, the controversy was shifted to the inverse invasion of the Norman Conquest, and Freeman and Round successively polemicised over the relative merits of the 'Anglo-Saxon' or 'Latin' contributions to the local feudalism.[3]

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* BA(Hons), LLM(Hons)(Syd), GradDipPracLegTraining (UTS); Lecturer, Faculty of Law, University of Newcastle.

1 (1992) 175 CLR 1.

2 P Anderson, *Passages From Antiquity To Feudalism* (NLB, 1974) p 128.

3 Id p 129.

By looking deep into the past, into the macrocosm of European civilisation, the antecedents of feudal structures are interpreted, by radical and conservative alike, as the contrapuntal worlds of tribalism and super-tribal homogeneity. Feudalism is seen as the accommodation of these two aspects of social reality - their synthesis perhaps. In his feudal model, albeit with the caveat of any model builder, Anderson identifies three fundamental facets of feudalism: the 'parcellization of sovereignty'; an agrarian mode of production; and the position of the monarch as suzerain of the great lords, but not as king of the whole people.[4] However, because of the decentralisation of power, there could be no clearly defined judiciary to interpret acts of (a non-existent) legislature. The idea called 'justice' was a very broad concept encompassing all bureaucracy, administration, policing, enforcing, fining and tolling. 'It was the ordinary name of power'.[5]

While English history looks 'feudal' in terms of the social criteria set out above, those aspects of the English experience which can be seen to undermine and negate feudalism were: the oath of fealty sworn by all orders of vassals to the king directly;[6] the occasional calling of the *fryd* (host) lead by the king; the king's supervening powers of taxation;[7] and England's escape from a 'syndrome of economic stagnation and involution' inherent in feudalism.[8] All these things go to bolster that highly 'centralised' government seen by Windeyer, Stenton and Fisher.[9]

An economic explanation of English history can be used to show how much our ideas about feudal structures are essentially matters of legal form[10] and therefore help remove any lingering doubts as to the reality of feudalism, in any 'pure' sense, in England. While by today's standards the England of about one thousand years ago looks agrarian, it must be noted that the development of towns occurred at a faster rate there than elsewhere in northern and western

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4 Id pp 148-150.

5 Id p 153. Windeyer agrees: see WJV Windeyer, *Lectures on Legal History*, (Law Book Company, 1957) pp 48-9.

6 See M Evans and RI Jack, *Sources of English Legal and Constitutional History* (Butterworths, 1984) p 2.

7 Anderson, op cit note 2, pp 160-161.

8 MJ Bennett, 'The English Experience of Feudalism', in E Leach, SN Mukherjee and J Ward (eds), *Feudalism: Comparative Studies* (Sydney Association for Studies in Society and Culture, 1985) p 130.

9 Windeyer, op cit note 5, p 42; F Stenton, *The First Century of English Feudalism: 1066-1166* (Clarendon Press, 1932) p 9; HAL Fisher, *A History of Europe* (Edward Arnold, 1936) pp 213-14.

10 See 'The "Feudal System" Of Land Law' p 105 below.

Europe at this stage.[11] Tied in with this growth was the royal power of taxation (the retention of the danegeld, and then the all-embracing reach of the Exchequer) which gave the king the ability to operate his government, if need be, without the contributions of the great feudatories.[12]

The power of the English King - and this is another of the contradictions of feudalism - is often attributed to the fact that William sat in his novel castle at Windsor by right of conquest.[13] This is of course true, but again not the whole story. If the system we call feudalism is an admixture of primitive decentralisation and imperial order then it must be noted that this fusion was already taking place in England prior to 1066. It must also be recognised that the Normans, descendants of vikings but resident in France (among other places), had also undergone, prior to 1066, their own assimilation.[14] Perhaps the interpretative mistake we make is similar to that seen by Maitland in Blackstone's analysis: namely, that we presume development towards centralisation.[15] This is teleology. The counterbalance to the immense and cumulative power of the king under the Normans is the accepted observation that so little substantive law was tampered with by these latest invaders.[16]

While evidence of the Norman centralisation exists,[17] it is also clear that the common law of England was principally the customary rules of the 'English folk'.[18] The Norman kings and their judges were content, for the most part, to permit the continued evolution of this

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11 See generally F Braudel, *Civilisation And Capitalism*, Vol I (*The Structures of Everyday Life: The Limits of the Possible)* (Collins, 1981) pp 274-82.

12 Stenton, op cit note 9, p 221ff.

13 Eg FW Maitland, *The Forms of Action at Common Law* (Camb UP, 1969), p 9 and p 9 n 1 notes that it is Blackstone's miosis.

14 Thus Anderson's 'inverse invasion' is overly simplistic. The reality of admixture, on both sides of the channel prior to 1066, made the Conquest, in historico-social terms, a far more complex event. See EZ Tabuteau, 'Ownership and Tenure in Eleventh-Century Normandy' 21 *Am J Leg Hist* 97 (1977).

15 See also P Vinogradoff, *Villeinage in England* (Clarendon Press, 1892) pp 7-9.

16 AL Poole, *Obligations of Society in the XII and XIII Centuries* (Clarendon Press, 1944) p 2 ; Anderson, op cit note 2, p 160; Fisher, op cit note 9, p 213; Windeyer, op cit note 5, p 3.

17 See SE Thorne, 'Livery Of Seisin' (1936) 52 *LQ Rev* 345 at 355-359, and (generally) Windeyer, op cit note 5, pp 47-74.

18 Windeyer, op cit note 5, p 3; Fisher, op cit note 9, p 213; KA Ziegert, 'A Sociologist's View' in E Kamenka and AE-S Tay, *Law And Social Control* (Arnold, 1980) pp 65-7.

common law and confined themselves to intervention, only rarely, in order to fill the strategic hiates of efficient justice/government.[19] As such the centralisation (as we think of it) of government under the Normans might easily be interpreted as subconscious effect rather than as deliberate purpose. Cases before the courts were, and always have been, treated on unique circumstances and merits.[20] To superimpose political tenets and linguistic artifices, not altogether intelligible to those people to whom they are attributed, is of dubious analytical value. If 'justice' was the ordinary name of power, then in looking at a 'feudal' England perhaps one ought also try to substitute terms like 'the king's peace' for centralisation and even 'immutability' for evolution of law. Certainly the word 'feudal' would not have been recognised by anyone until the discovery of feudalism by humanist scholars of the renaissance.

The 'Feudal System' of Land Law

For lawyers the debate about feudalism has been less complicated. The legally sanctioned stratification of society grounded in dual foundations of tenure and fealty is both the telling characteristic of 'feudal' jurisprudence and an accurate description of the realities of English law. The thesis here is that of Vinogradoff, namely, that feudalism (as legal theory) gears up under the Anglo-Saxons and is perfected by the Normans.[21] Perhaps the lineage is even longer. The origin of private ownership of land is traced to Britain's post-imperial Celtic regeneration and the introduction of Teutonic institutions with the next wave of invaders.[22]

Before the Normans, England was subdivided annually on criteria of kinship groups and military service.[23] This arrangement of land holding solidified by the reign of Edgar (957-975) with the overbearing of free ceorls (with rights to fokland) into a class of dispossessed, dependent villeins attendant upon the hlaford (lord) to which they had been tithed, as their grantor or bohr.[24] Similarly, the popular justice system of the germanic tribes of shire, hundred and tun moots was gradually absorbed, while retaining its legal form, into the halimot (private jurisdictions) of such manorial lords. As a further

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19 Eg Evans and Jack, op cit note 6, pp 9-11.

20 See SFC Milsom, 'The Past and the Future of Judge-Made Law' (1982) 8 *Mon UL Rev* 1 at 3.

21 Vinogradoff, op cit note 15, pp 131-4. See also SJ Madge, *The Doomsday of Crown Lands* (Cass, 1938) pp 15-19.

22 Madge, op cit note 21, pp 13-15 and notes attached thereto.

23 For general reference to Anglo-Saxon societal organisation, see Windeyer, op cit note 5, pp 1-29.

24 Evans and Jack, op cit note 6, p 3, I-C-8.

indication of this discernible lordly accretion of power, participation ebbed into representation (in the persons of doomsmen) and the local reeve was increasingly appointed by the lord from one of his retainers or kin, rather than being elected. Reeves of the shire moots were royal appointees of significant primary as well as locally delegated authority. However the king, even when claiming the style Bretwaldas, was never regarded as a territorial sovereign. He was selected, and could be deposed, by the witenagemot. The monarchy was therefore still elective, although in later Anglo-Saxon times from candidates within a defined 'royal' family.[25]

How did the Normans perfect these evolved legal arrangements? Most legal historians advance the idea that rather little was altered by William and his successors.[26] But how, then, is it possible for some (and indeed there is an overlap) to hold that the Normans introduced feudalism?[27] So far as legal structure is concerned, the answer lies in the land law, and in particular in the process of subinfeudation: the tenurial sub-letting, guaranteed by mutual oaths of fealty, of the entirety of England.[28] Feudalism, for the lawyer at least, is a legal institution defined 'according to the mode of tenure of land and the obligations inherent in the mode of tenure'.[29] Therefore, what the Normans introduced was not so much the underlying pattern of social organisation, as the legal and institutional quintessence of that pattern.[30]

This legal classification was tempered, to some extent, by two antithetical factors: firstly by the continued recognition of customary law predating the tenurial scheme (in the manorial courts) and secondly, by ongoing temporal contingencies. Windeyer puts it like this:

> Lords of manors were to have their rights defined in terms of sac and soc, toll and team, infangthef and utfangthef, long after these words had become a meaningless jargon and the privileges of

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25 Bennett disagrees with the proto-feudal argument: Bennett, op cit note 8, at p 125.

26 Eg Poole, op cit note 16, p 2, Vinogradoff, op cit note 15, pp 131-134; Stenton, op cit note 9, p 9; Windeyer, op cit note 5, p 3.

27 Windeyer, op cit note 5, pp 40-42; Stenton, op cit note 9, pp vii-viii, 123ff and 216-17.

28 'Subinfeudation was in theory subject to no limits': P Butt, *Land Law* (Law Book Company, 1988) p 37.

29 Poole, op cit note 16, p 2.

30 See Vinogradoff, op cit note 15, pp 44-6. Littleton, in about the mid-fifteenth century, compiled a treatise on tenures in some detail which is extracted by Evans and Jack, op cit note 6, pp 74-83.

> private jurisdiction, which they had originally described, had either disappeared or become mere forms, shadowy, ghostlike survivals.[31]

An essential point here is the fact that the feudal framework, even as mere legal classification, began to decay before reaching a high degree of resolution with the effective dismantling of the mainspring of the feudal machine, subinfeudation, in the statute *Quia Emptores* (1290). But even before 1290 there is strong evidence of the disintegration of what we might call pure legal feudalism. It is suggested from the earliest records that immediately following the Conquest it was necessary, in order for land pass to an heir, that a grant be made by the lord to the new tenant. That requirement goes towards the existence of pure feudalism. The institution of the assize of novel disseisin in 1166, protecting the ungranted 'interest' of a new tenant, jettisoned this prerequisite of (pure) feudalism.[32]

Nevertheless, the idea of feudalism in the law has been one of its most persistent and recurrent themes. Feudalism, as a historical and legal construct, has provided the juristic foundations for much of what is, even today, readily accepted legal fiction. It seems that if the quandary of feudalism is related to ongoing systems of hierarchical personal relations which permeate history then what it is about is a social constant - it is really nothing less than a description of power. So, while the legal classification of feudalism can be seen to evolve over time, through the authors of the *Old Tenures* (in the thirteenth century), through Littleton (in the mid-fifteenth century), through Coke (in 1628) and through Blackstone (in 1766), that evolution must be seen to be in accordance with the contemporary social context's decreasing need for a detailed knowledge of the workings of tenures and estates and its increasing need for the theoretical foundation of its present laws. By the time of the reception of English law into Australia the practical legal consequences of the idea of feudalism were minimal to say the least, yet *in theory* the jurisprudence of the common law could not be understood without recourse to the feudal idea.[33]

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31 Windeyer, op cit note 5, p 42. For a brief synopsis of the English survival see JH Spencer, 'The Freeholder and Feudalism Today' (1977) 122 *So J* 289-91.

32 SE Thorne, 'English Feudalism And Estates In Land' [1959] *Camb LJ* 193 at 199-201; SFC Milsom, *The Legal Framework Of English Feudalism* (Camb UP, 1976) pp 45-7, 64. Cf JL Barton, 'The Rise Of The Fee Simple', (1976) 92 *LQ Rev* 108 at 116-117; TG Watkin, 'Feudal Theory, Social Needs and the Rise of the Heritable Fee' (1979) 10 *Cambrian L Rev* 39.

33 Bl Comm ii 44 ('Of The Feodal System') writes: 'It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the

Australian Feudalism

The received idea of feudalism, essentially from Blackstone and by this stage highly abstracted, unequivocally informed the articulation of Australian land law. The first expression of 'feudalism' by the courts in Australia was in *Attorney-General v Brown*[34] where the Chief Justice of New South Wales, Sir Alfred Stephen, referred to 'the feudal principle' as one of the two bases of the ownership of the land by the Crown. Although the greater part of the judgment rested upon the other basis, that of possession or occupation, His Honour made it clear that there was no question as to the operation of feudal rules in the Colony and that it was incorrect to equate the Crown's proprietary rights with mere political control.[35]

It was held by the Privy Council in *Cooper v Stuart*[36] that upon annexation Australia had 'no land law or tenure' but that these things were amongst the immediate legal importations touching annexation and settlement. In *Williams v Attorney-General for New South Wales*[37] Isaacs J held that the feudal principle was certainly applicable to Australia, while, in *Council of the Municipality of Randwick v Rutledge*[38] Windeyer J endorsed the judgment of Stephen CJ in *Brown* (in general terms at least) with the concurrence of Kitto J. In *Milirrpum v Nabalco Pty Ltd*[39] Blackburn J understood these authorities to support:

> the principle, fundamental to the English law of real property, that the Crown is the source of title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in

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> feodal law: a system so universally received throughout Europe, upwards of twelve centuries ago, that Sir Henry Spelman does not scruple to call it the law of nations in our western world ... surely no industrious student will imagine his time mis-employed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impractible to comprehend many rules of the modern law, in a scholarlike and scientific manner, without having recourse to the ancient'.

34 (1847) 1 Legge 312.

35 Id at 318.

36 (1889) 14 App Cas 286 at 292.

37 (1913) 16 CLR 404 at 439.

38 (1959) 102 CLR 54 at 71.

39 (1971) 17 FLR 141.

> subjects of the Crown were the direct consequence of some grant from the Crown.

In *New South Wales v Commonwealth*[40] Stephen J treated either the possessory or feudal theses as equally significant in his finding that the property in land in Australia was in the Crown. His Honour cited both *Brown* and the judgment of Isaacs J in *Williams*.

Mabo

Each substantive judgment of the High Court in *Mabo v Queensland (No 2)*[41] made some reference to the feudal essence of land law as expressed in the doctrine of tenure. Australian law was nevertheless introduced, by the majority of the Court, to a refinement and a sophistication of this doctrine as the counterbalance to the Court's wholesale rejection of the notion of *terra nullius*. It is no surprise to find, particularly in the judgment of Justice Brennan, that such juridical revisionism was effected under the banner of bringing the law into conformity with history.

Justices Deane and Gaudron made a transient reference to the 'feudal system of medieval times'.[42] They commented that by 1788 the practical effect of this system was confined to the Crown's ownership of escheat and foreshore rights and that:

> the underlying thesis of the English law of real property remained that the *radical title* (or *ultimate ownership* of) all land was in the Crown and that the maximum interest which a subject could have in the land was ownership not of the land itself but of an estate in fee in it.[43]

Their Honours did not explain exactly what they meant by the terms *radical title* or *ultimate ownership* save to say that:

> the practical effect of the vesting of radical title in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony.[44]

Later in their judgment[45] Deane and Gaudron JJ addressed four Australian authorities[46] which together affirmed the doctrine of

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40 (1975) 135 CLR 337 at 438-439.

41 Note 1 above (hereafter *Mabo*).

42 Mabo at 80.

43 *Mabo* at 80, emphasis added.

44 *Mabo* at 81.

45 *Mabo* at 102-104.

terra nullius and could also be interpreted to stand for the proposition that the operation of the doctrine of tenure vested absolute, that is to say full legal and beneficial, ownership of all land in Australia in the Crown. Their Honours conceded that 'the authority which the four cases lend to the two propositions is formidable' but they also distinguished these cases on the basis that none of the four were matters involving Aboriginal land rights and in any case the pertinent statements which these authorities contained were *obiter dicta* and could all be characterised by a 'paucity of reasoning'.[47]

Toohey J also equivocated over the distinction between absolute and radical title, saying that:

> the distinction between sovereignty and title to or rights in land is crucial. The distinction was blurred in English law because the sovereignty of the Crown over England derived from the feudal notion that the King owned the land of that country. It was ownership of the land that produced the theory of tenures, of obligations owed to the Crown in return for an estate in land. The position of the Crown as the *ultimate* owner of land, the holder of the *radical* title in land, has persisted and is not really in issue in these proceedings.[48]

His Honour relied (somewhat precariously) upon the thesis of McNeil to transcend the 'blurred' gap between a 'feudal', absolute title and the modern notion of radical title.[49] Much later in his judgment Toohey J expanded on how this gap was to be spanned. His Honour indicated that as the doctrine of tenure is based upon a fiction whereby the King was in possession of all land (and therefore that all holders took from a royal grant), the fiction should be given no wider meaning than would be necessary for the doctrine to operate. Thus the title of the Crown would be a radical title only because the fictitious possession of the Crown could be met with a fictitious lost Crown grant to present occupiers. In this His Honour also relied upon McNeil.[50]

Justice Brennan gave more serious consideration than his colleagues to what he called '[t]he feudal basis of the proposition of

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46 *Attorney-General v Brown* (1847) 1 Legge 312; *Cooper v Stuart* (1889) 14 App Cas 286; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404; and *Randwick Corporation v Rutledge* (1959) 102 CLR 54.

47 *Mabo* at 104.

48 *Mabo* at 180 emphasis added.

49 K McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989). See also K McNeil, 'A Question Of Title: has the Common Law Been Misapplied to Dispossess the Aboriginals ?' (1990) 16 *Mon UL Rev* 91.

50 *Mabo* at 212.

absolute Crown ownership'.[51] His Honour prefaced this consideration with a solemn caution:

> A basic doctrine of the land law is the doctrine of tenure ... and it is a doctrine which could not be overturned without fracturing the skeleton which gives our land law its shape and consistency. It is derived from feudal origins.[52]

Brennan J went to the trouble of investigating the few instances of non-feudal land to be found in Britain. They are to be found in parts of the Orkney and Shetland islands, these lands having been acquired by the Scots Crown in 1468 from the Norwegian Crown. Although some of the land in these remote northern islands was feudalised, that part which was not was held by the inhabitants under Norwegian *udal* custom and was therefore allodial land.[53] It is interesting to note that it is also possible that Scots kirks were allodial.[54] But His Honour held that it was too late in the day for an allodium to exist in remote islands to the north of Australia, and the doctrine of tenure did, His Honour held, have ubiquitous application in Australia.[55]

His Honour stated that the idea of a radical title in the Crown was '*adapted* from feudal theory' and here is the rub.[56] Brennan J cited two cases which had made this adaptation: *Amodu Tijani v Secretary, Southern Nigeria*[57] and *Nireaha Tamaki v Baker*.[58] Neither of these cases appears to give any historical basis for such an adaptation prior to 1889.[59] His Honour also compared, that is he cited with the prefix 'cf', these decisions with that of the Australian High Court in *Daera Guba*[60]

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51 *Mabo* at 46.

52 *Mabo* at 45.

53 *Mabo* at 46.

54 On Scots feudalism generally, see R Nicholson, 'Feudal developments in late medieval Scotland' [1973] *Juridical Review* 1.

55 *Mabo* at 47.

56 *Mabo* at 48 emphasis added.

57 [1921] 2 AC 399.

58 [1901] AC 561.

59 The opinion of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*, note 57 above, at 403 cites a previous Privy Council advice in *St Catherine's Milling and Lumber Co* v *R* (1889) 14 App Cas 46, presumably referring to p 55 where their Lordships said 'there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished'.

60 (1973) 130 CLR 353.

(an instance of unmistakably Barwickian doublespeak). Then his Honour said:

> The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty .... The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants .... The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant.[61]

Brennan J then went on to utilise two cases, *The Tanistry*[62] from Ireland and *Witrong v Blany*[63] from Wales, to indicate precedent in the common law for the recognition of existing native rights subsequent to English conquest. Upon close examination, neither of these cases proves particularly strong precedent for the proposition that the doctrine of tenure applied only to granted land; in particular, both indicate that native rights will only survive the introduction of English law upon their recognition. His Honour (while decrying the 'fallacy' of equating sovereignty with beneficial title) then went on to equate recognition with a failure expressly to extinguish.[64]

The dissenting judge, Justice Dawson, understood the meaning of radical title differently. His Honour stated that while upon conquest the Crown acquired a radical title to (rather than actual possession of) land, the survival of occupier's rights was dependent upon the Crown's recognition of such rights. For Dawson J it was clearly the case that conquest brought with it a 'radical' title which would be in reality an absolute title unless earlier occupier's rights were expressly recognised:

> The notion that only the Crown has the radical title stems from the feudal system of land tenure but ... it does not much matter whether it now be regarded in that way or whether it be regarded as a prerogative right accompanying the exertion of sovereignty. The

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61 *Mabo* at 48-49.

62 (1608) Davis 28. This was a case heard by the King's Bench over a period of three or four years, but which was eventually settled by leave of the Court. Nonetheless the report of the judges' opinions reveals some interesting points regarding the survival and/or extinguishment of traditional Irish proprietary rights upon the introduction of English law into Ireland.

63 (1674) 3 Keb 401.

64 *Mabo* at 50-52.

> result is the same: upon annexation the lands annexed became the property of the Crown and any rights in the land that the plaintiffs have must be held under the Crown.[65]

This was because his Honour found that upon annexation of land the Crown had asserted its rights to the exclusion of any existing rights.[66] His Honour had a somewhat different view to that of Brennan J on the effect of the decision in *The Tanistry*.[67]

The respect with which the Court dealt with the question of the doctrine of tenure, and the appeal of all its members to the possibilities suggested by the idea of feudalism (namely, radical title) is a sign of the enduring importance which we place on the historical, or mythological, foundations of law. The process of unpacking the intellectual baggage of the law is thus revealed as the preferred method of legal development by the Courts.

Law, History and Immutability

How does the legal historian deal with dislocations such as have been suggested here? For example: the formalities of feudalism in law and those characteristics of feudalism's 'other' - like royal prerogatives; or an idea of law which is both evolutionary and yet changeless?

In a more concrete elucidation of this series of paradoxes, a series so far only inscribed in terms of black and white, it becomes increasingly apparent that the question of feudalism twists, largely, on the institutionalisation of systems of sanctified personal relations (fealty). Ancient parallels of guest-friendship and clientela spring to mind. An orthodox analysis might then interpret such a perspective in terms of feudalism as a climax.[68] But a more subtle approach

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65 *Mabo* at 122-123.

66 *Mabo* at 155-156.

67 *Mabo* at 162-163. Both Brennan and Dawson JJ quoted at length from the concluding sections of Davies' report where the reporter relates the plaintiff's last-ditch argument concerning the factual possession of land by conquest. Whether these remarks are those of the Court or a summary of the plaintiff's argument cannot be readily ascertained for Davies does not here, as he does elsewhere in the report of this 'decision', use a qualification such as 'and [it was] resolved by the Court' after his initial preface 'where it was objected by one of the council for the plaintiff'. Perhaps these words do express the Court's opinion because immediately following these remarks the reporter informs us that the case is settled. All the same, the doubtful value of the precedent, both in terms of its ratio (if any) and its factual differences, is such as to permit Brennan and Dawson JJ's bifurcation of interpretation.

68 Eg Windeyer, op cit note 5, p 40.

would be to consider such an interpretation as merely the intellective prerequisite to the unravelling of these relations. Remember that the word feudal is itself an invention of the Elizabethan Antiquarians. But plunging into hermeneutics requires, in the historical context, prepared flotation. If feudalism is the 'other' of the modern world - a common and sophisticated Marxist interpretation - then the sobering alternative of Weberian analysis, that feudalism is a 'structure of dominance ... universally diffused throughout history', serves to correct this surreptitious intrusion of ideology.[69]

There can be little doubt that the practice of history is ideological, as well as being subject to ideologies, but the role of the legal historian is to put these influences and aspects to the centre of the stage, rather than to allow them to control discourse from the secrecy of the wings.[70] Taking this line of argument one step further, contemporary images of feudalism can easily confound present investigations. Symbols like knights, ramparts, crowns, oaths, the everyday activity of the supernatural, and even deeper mythical preoccupations such as piety, honour, romance, the memory of pagan gods and imperial homogeneity, are as much a part of a 'feudal' past (and of a present thinking of it) as the documents of lawyers.[71] The psychology of feudalism, as both structure and subject, requires an understanding on our part, not only of the mental outlook of a peasant or a knight[72] but also of the moral and intellectual responsibility of the legal historian, when using words like 'feudalism' or 'centralisation', of explaining his or her terminology and meaning(s). In Umberto Eco's question, when we assess the early middle ages in terms of regionalism (or its 'other') and a scattered array of economies of

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69 The idea derives mostly from Marcuse, because Marx himself was really only demonstrably interested in feudalism as the precursor to capitalism (and here the problem is epitomised), see H Marcuse, 'Repressive Tolerance' in P Connerton (ed), *Critical Sociology* (Penguin, 1976) pp 307-308; M Weber in HH Gerth and CW Mills (eds) *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) p 300.

70 See generally M Foucault, *The Archaeology of Knowledge* (Tavistock, 1972) pp 3-14, and specifically M Foucault, 'Nietzsche, Genealogy, History' in DF Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1977) pp 152-164.

71 See MV Clarke, *Medieval Representation and Consent* (Longmans, 1936) pp 62-87 especially at p 68; Weber, op cit note 69, p 283 on ruled-class orientation of the magic/ideology of chivalry and supernature; and generally on the role of images in historical constitution: GS Spivak, 'The Rani of Simur: An Essay in Reading the Archives' (1985) 24 *History and Theory* pp 247-52; D Malouf, *An Imaginary Life* (Pan, 1980) pp 153-4.

72 Eg L Le Roy Ladurie, *Montaillou* (Penguin, 1980).

power, what is it that we say at the same time about our own honesty, dreams and unconscious consents?[73]

This, therefore, is the context of the immutability of law. Like any other societal norm, law is necessarily immutable and fictive because it is quite simply too impractical for people to always consider every possible turn of circumstance.[74] Immutability is the masque which, for pragmatic and functional reasons, obscures society's consensual forgetting to continually consent to and decide upon each and every problem or issue which emerges. The fictive element of legal immutability is thus exposed as a technique of system-maintenance. A proposition, for example, that the law is therefore still 'feudal' does contain a kernel of reality. Of course, the corollary to this ideal of systematic perfection, within all systems of relations, are built-in resistances.[75] Although the terminology differs this is essentially what Maitland argues in finding 'an element of struggle' as the key to understanding legal history.[76]

The death of Henry II in 1189 is thus, irrespective of the degree of feudal-ness of society then or now, a mythologised moment which brands the English experience as unique. In contrast, after two centuries of a more simple, perhaps more 'pure' (and therefore less intellectually problematic) experience of feudalism, Australia's legal icon-dates are numerous (1788, 1828, 1901 and 1986). The shadowy and ghostlike recurrence of the feudal idea in *Mabo* opens a threshold for lawyers and historians to reflect on how our historical perspective on the law in fact moulds its contemporary development.

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73 U Eco, 'Dreaming Of The Middle Ages' in *Travel In Hyperreality* (Pan, 1986) p 72. The idea of this period as one of a 'scattered array', as opposed to one of unified vision, is the thesis of RF Newbold, 'Centre, Periphery and Eye in the Late Roman Empire' (1981) 3 *Florilegium* 72 at 83.

74 Ziegert, op cit note 18, pp 67-8.

75 J Derrida, *Of Grammatology* (Johns Hopkins UP, 1976) pp 44-6; G Deleuze, *Nietzsche And Philosophy* (Athlone, 1983) pp 101 and 121; F Nietzsche, *Beyond Good And Evil* (Penguin, 1973) (4, 6, 36 and 211); *The Genealogy Of Morals* (91(3)), and especially *The Birth Of Tragedy* (Doubleday, 1956) (24).

76 Maitland, op cit note 13, p 9. We might extend this quotation: 'an element of struggle, of struggle for jurisdiction'.