

The intersection of Aboriginal customary law with the NT criminal justice system: the road not taken?

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Summary

Indigenous people make up about 30% of the Territory's population but more than 80% of the prison population. A substantial number of these prisoners have been sentenced for crimes of violence and the commonest victims of this violence are indigenous women – often the partners or other family members of the perpetrators.

The causes of this epidemic of violent abuse are multiple and complex, prominent contributing factors being unemployment and passive welfare dependency, lack of access to adequate education, health and mental health services, lack of adequate housing, overcrowding, substance abuse, dispossession and loss of culture, and above all the 'rivers of grog' that run through our communities. However, we should also recognise that there is a cultural dimension to some of the violence that occurs.

There is, among some Aboriginal people, a view that the use of physical violence to 'discipline' wives (and others who have done the 'wrong' thing) is lawful under customary law. There is also a widespread belief that the infliction of violence in retaliation for violence – whether formally in organised payback or haphazardly in individual assaults, raids or vendettas – is lawful (and at times obligatory). The blood

feud is alive and well in the Territory and, by and large, the participants believe that they are justified by customary law.

This aspect of the violent offending, and its contribution to the over-representation of Aboriginal people in our prisons, can only be effectively addressed in co-operation with the Aboriginal communities and in the context of Aboriginal culture and customary law, which is as capable of evolution and change as any other body of law. There have been numerous recommendations for the recognition of Aboriginal customary law in appropriate ways within the framework of the mainstream legal system. There has also been a history of sentencing decisions in the Northern Territory taking into account aspects of customary law; the enactment of s 104A of the Sentencing Act (NT) which made provision for evidence as to Aboriginal customary law to be adduced on sentencing hearings; and the introduction of community courts (later abolished by former Chief Magistrate Hilary Hannam). However, there has been little real progress in the implementation of these recommendations, and what progress there has been received a major setback with the enactment of s 91 of the Northern Territory National Emergency Response Act 2007 (Cth) (the Intervention Act) (since replaced by s 16AA (1) of the Crimes Act).

There is a need for Australian lawmakers and policy makers to sit down and talk with women and men who are knowledgeable in Aboriginal law, and to demonstrate respect for Aboriginal culture. One way of working towards this end would be to implement some of the recommendations to recognise Aboriginal customary law in appropriate ways within the framework of the mainstream legal system, in particular the recommendations of the Northern Territory Law Reform Committee of Enquiry into Aboriginal Customary Law which were tailored to the unique situation of the Northern Territory.

The epidemic of violent crime

Indigenous people make up about 30% of the Territory's population but more than 80% of the prison population. A large proportion of these prisoners have been sentenced for crimes of violence and the commonest victims of this violence are indigenous women – often the partners or other family members of the perpetrators.

Indigenous women are approximately 10 times more likely to be the victim of an assault than non-indigenous women, and the assaults they suffer are more serious. An indigenous woman victim of assault is 35 times more likely to end up in hospital than a non-indigenous woman victim. (These figures are taken from a paper entitled *Law and Disorder in Aboriginal Communities* presented by the then Territory DPP, Richard Coates at the CLANT Conference in Bali in 2011. The figures are from 2010.)

The causes of this epidemic of violent abuse are multiple and complex, prominent contributing factors being unemployment and passive welfare dependency, lack of access to adequate education, health and mental health services, lack of adequate housing and consequent overcrowding, substance abuse, dispossession and loss of culture,¹ consequential despair and above all the 'rivers of grog' that run through our communities.² These factors cannot be overestimated and deserve urgent attention. However, we should also recognise that there is a cultural dimension to some of the violence that occurs. There is still, in some quarters, a view that the use of physical violence to 'discipline' wives (and others who have done the 'wrong' thing) is lawful under customary law. There is also a widespread belief that the infliction of violence in retaliation for violence – whether formally in organised payback or haphazardly in individual assaults, raids or vendettas – is lawful (and at times obligatory). Although elders have complained at times that young people are not following traditional rules

¹ Dispossession and loss of culture are not given the priority in this list that they often receive in observations from other States. Owing to the unique situation of the Territory, dispossession has not been as complete as elsewhere and in many communities culture is strong and traditional languages flourishing. That is not to say that dispossession and loss of culture are not problems in the Territory, just that they do not feature so prominently in the list of factors contributing to dysfunction and violence in our communities.

² This list is obviously not intended to be exhaustive.

and taking matters into their own hands, the blood feud is alive and well in the Territory and, by and large, the participants believe that they are justified by customary law.

Violence in traditional laws and customs

There has been a tendency in recent times for Aboriginal leaders and others to deny that violence (in particular family violence) has ever been a part of Aboriginal culture or customary law,³ in part in efforts to discourage that kind of destructive violence from occurring. For example, in a speech to the National Press Club in 2003, Mick Dodson had this to say:

“Most of the violence, if not all, that Aboriginal communities are experiencing today are not part of Aboriginal tradition or culture.

The kinship system in Aboriginal communities is and can be a ... powerful force. Social relations between people are among the most important aspects of Aboriginal life and have a huge impact on what Aboriginal people do.

Family ties and extended relationships underpin how people interact, including which individuals have obligations toward each other, and individuals they should avoid. There is a strong sense of reciprocity between Aboriginal people. Adults have ongoing commitments to one another, and to other younger and older members of the community. All disputes are resolved by kinship structures of reciprocity and in most Aboriginal communities, senior lawmen or elders receive great respect.

Some of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behaviour.

Physical punishment is not unknown in Aboriginal culture as it is in other cultures. However, in Aboriginal culture it was highly regulated and governed.

³ I use the composite phrase because in Aboriginal societies there is no clear cut distinction between law and other aspects of culture. [Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal customary law* (2003) 11: “Such a distinction (i.e. between law and custom) is unknown to Aboriginal society. Aboriginal members of the Committee and many others who have expressed their views, have emphasised Aboriginal tradition as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed.”].

Carried out by and witnessed by people with particular relationships with the perpetrator and the victim.”⁴

In its *Final Report on Aboriginal Customary Laws (Project 94)* the Law Reform Commission of Western Australia stated:⁵

“The relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted upon the extent of violence and sexual abuse in Aboriginal communities. It has been observed that in response to the recent public debate Aboriginal women and men have clearly condemned any suggestion that violence, child abuse and sexual assault are part of Indigenous culture. The Aboriginal and Torres Strait Islander Social Justice Commissioner has emphatically stated that:

‘Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour. Perpetrators of violence and abuse do not respect customary law and are not behaving in accordance with it.’⁶”

In her report for the Criminology Research Council and the Northern Territory Commissioner of Police, *Aboriginal Women and Violence*, Audrey Bolger refers to the distortion of traditional law in the interests of men who attempt to justify violence which takes place for illegitimate reasons with claims of traditional right – referred to by one woman as “bullshit traditional violence”.⁷

It is undoubtedly true that the kind of family violence Professor Dodson was referring to, “domestic violence between partners, sexual violence against men, women and

⁴ Mick Dodson, ‘Violence Dysfunction Aboriginality’ (Speech delivered at the National Press Club, Canberra, 11 June 2003)

⁵ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project 94 (September 2006) 22; For other examples of such disclaimers see Peter Sutton, *The Politics of Suffering* (Melbourne University Publishing, 2011) 63-4

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: key issues: an overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001-2006* (June 2006) 10

⁷ Audrey Bolger, Australian National University, North Australia Research Unit Criminology Research Council (Australia) and Northern Territory Commissioner of Police, *Aboriginal women and violence: a report for the Criminology Research Council and the Northern Territory Commissioner of Police* (1991) 50

children ... alcohol and drug induced violence, and the sheer madness of communities supporting clubs and wet canteens where alcohol related violence and dysfunction dominate the rhythms of life for everyone”, “violence that traumatises entire families and communities that is sometimes referred to as ‘dysfunctional community syndrome’, where people are traumatised even by association and the knowledge of, and the witnessing of acts of violence”⁸ could never have been part of the culture or customary law of any people, and could never be excused by appeals to culture or custom. However, to the extent that such statements imply that violence within the family was never part of traditional Aboriginal culture, or that there is no ‘cultural’ component to the present epidemic of violence, it is contradicted by ethnographic studies, and the strong beliefs of some contemporary Aboriginal people. Of course the traditional laws of different Aboriginal societies are and were different, but there are common themes.

In *The Politics of Suffering*, Peter Sutton quotes a number of references to violence as an aspect of traditional culture in various parts of Australia at the time of first contact. He refers to “frontier accounts” of formal pitched battles, skirmishes and “sneak attacks by night resulting in a substantial number of casualties” in north-east Arnhem Land in the first part of the 20th century,⁹ and to Stanner’s descriptions of formalised large-scale fights in the Daly River area in the 1930s, as well as “raids, ambushes and cutting-out expeditions for which the young bloods had a liking” – the latter referring to wife-stealing raids.¹⁰ Sutton cites early contact reports of “widespread and frequent” domestic violence among traditional Aboriginal people in other parts of Australia and quotes Bronislaw Malinowski’s 1913 study¹¹ in which he described a ‘standard’ husband–wife relationship in these terms:

⁸ Dodson, above n 4

⁹ Peter Sutton, *The Politics of Suffering* (Melbourne University Publishing, 2011) 91 referring to field work over a period of 20 years by Lloyd Warner, who published *A black civilization: a social study of an Australian tribe* in 1937

¹⁰ Ibid 93-4

¹¹ Bronislaw Malinowski, *The family among the Australian aborigines; a sociological study* (London: University of London press, 1913)

“The husband ‘had a nearly unlimited authority, and in some cases, when he had special reasons (and undoubtedly deemed himself to be within his rights), he might use his authority for a very brutal and severe chastisement.’”¹²

For good measure, Sutton quotes an archaeological study by Stephen Webb which found an abnormally high incidence of depressed skull fractures in prehistoric skeletal remains of Aboriginal women.¹³

The Northern Territory Law Reform Committee of Inquiry into Aboriginal customary law *Background Paper No 1* cites reports of “feuds” and “blood vengeance” in Thompson DF, *Report on Expedition to Arnhem Land, 1936 – 37* (Canberra Minister for the Interior, 1939)¹⁴

The practice of interpersonal violence as a form of punishment, the infliction of violent revenge, and the belief in the legitimacy of such practices, have continued through the second half of the twentieth century and beyond.

In *Two Laws: managing disputes in a contemporary Aboriginal community*, Nancy M Williams described the operation of traditional law and the interaction between Yolgnu law and mainstream Australian law in Yirrkala in 1969–70. In it she provides details of a dispute over the inheritance of a promised wife in which the man asserting the right to have a 15 year old girl established as his wife beat her a number of times for running away. The story is full of complications but she reports general indignation in the community when the man was arrested and charged with assault. She reported:

“Each clan had at least one cautionary tale in which a clan hero summarily and justifiably killed a young wife who had committed an offence. Men trying to claim young women betrothed to them and finding the young women effectively resisting their attempts frequently said they wished they could emulate their clan

¹² Ibid 74-5 quoted by Peter Sutton, *The Politics of Suffering* (Melbourne University Publishing, 2011) 99

¹³ Sutton, above n 9, 101-5

¹⁴ Northern Territory Law Reform Committee, *Background Paper 1: Aboriginal Communities and Aboriginal Law in the Northern Territory* (2003), 27 fn 99

heroes. Yolgnu leaders, however, felt obliged to rely increasingly on moral suasion because severe physical sanctions were denied them.”¹⁵

In *The Camp at Wallaby Cross: Aboriginal fringe dwellers in Darwin*, Basil Sansom describes life in such camps in the late 1970s. He describes two kinds of licensed “moral violence” carried out in public, in the presence of assenting witnesses: “standin for spear” and “taking beating”.¹⁶ In the first, the victim presented himself as target for a spear, in the second, weapons were not used, the perpetrator loudly proclaimed to all present the reason / justification for the beating and the victim supinely accepted a violent flogging without either fighting back or making any move to protect him / herself or the vulnerable parts of his / her body.¹⁷ This was distinguished from an assault where someone was bashed “for no reason”.¹⁸ If the victim did not supinely accept the beating or the witnesses did not assent, then the violence inflicted was not “moral violence” of this kind but an offence.

The Australian Law Reform Commission Aboriginal Customary Law Reference conducted a Field Trip (No 7) to Central Australia in October 1982, and reported on the discussions with men and women at various Central Australian communities.

The report on the men’s meeting at Kintore summarised the men’s view on traditional punishment as follows:

“There was obviously strong feeling that traditional punishments would and should remain at Kintore (spearing were apparently not uncommon). It was considered legitimate that Aboriginal law should run at Kintore because of the distance from the closest police station and the appropriateness of traditional punishments as against punishments given by white courts.” [A recent example was given.]

The report from the women’s meeting was similar:

¹⁵ Nancy M Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Aboriginal Studies Press, 1987) 151

¹⁶ Basil Sansom, *The camp at Wallaby Cross: Aboriginal fringe dwellers in Darwin* (Australian Institute of Aboriginal Studies, 1980) 105

¹⁷ Ibid 92-102

¹⁸ Ibid 93

“There was general approval of the use of customary punishment, as in the case of a ‘cheeky girl’ being given a beating by older women. But a couple of slightly younger women at the meeting spoke against customary law punishments being applied, e.g. by a husband against a young ‘lover boy’. Feelings about customary law punishments were not hard and fast. There was, however, approval of spearing to death in the appropriate case, where there is justification. Then, ‘it’s finished and there is no court case’.”

At the men’s meeting at Utopia, these views were expressed:

“In the old days it was necessary to ‘square up’. If you killed someone then you would get killed. However, this did not happen now and a person only received a spear or a ‘hiding’. There appeared to be some regret about this change, the white law being held responsible. The advantage of punishing in the Aboriginal way was that it finished matters and resolved disputes.”

Fred Meyers reported in 1986 that revenge killings and violence had been commonplace among the Pintupi people¹⁹ and described revenge raiding parties.

Sutton reported that “occasional disappearances and known killings in the Ayers Rock region of the Western Desert were still being attributed to religious executions, as well as paybacks, in the 1990s and early 2000s” when he was working in the area, as a result of which he “came to the view that people’s expressed fears of being strangled for religious misbehaviours were realistic.”²⁰

In *R v Wunungmurra*²¹ (in 2009) a senior Dalkarra Aboriginal man from Milingimbi was charged with assaulting his wife. The assault was serious: one of the charges was causing harm with intent to cause serious harm. He indicated that he intended to plead guilty and sought to read an affidavit from a senior woman “knowledgeable about

¹⁹ Fred R. Myers, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among Western Desert Aborigines* (University of California Press, 1991) 169

²⁰ Sutton, above n 9, 78-9

²¹ *R v Wunungmurra* (2009) 196 A Crim R 166

customary law and cultural practices of the Yolgnu people who live at Milingimbi”.²²

The substance of her evidence is set out in the judgment.

“In her affidavit Ms Laymba Laymba deposes to certain traditional Aboriginal laws that apply to women who are married to Yidditja men and the circumstances when according to traditional Aboriginal law a man who comes from the Yidditja and Dhalwangu clan groups and is a Dalkaramirri may inflict severe corporal punishment on his wife with the use of a weapon. It is her opinion that the defendant acted in accordance with traditional Aboriginal law when he engaged in the behaviour which is the subject of the counts charged on the indictment. Ms Laymba Laymba states the defendant was carrying out his duty as a responsible husband and father and he was acting in accordance with his duty as a Dalkarra man.”²³

In his 2011 article explaining the basics of the Ngarra (Yolgnu customary law from North East Arnhem Land), George Pascoe Gaymarani lists “being beaten by her husband” as one of the traditional punishments for “marriage troubles”.²⁴

These views sometimes surface in the context of the criminal justice system. To quote one prisoner discussing his application for parole with a parole officer, “under Aboriginal Law you can ‘get mad with wife’ and also stab someone in the leg.” He explained, “All generations of Aboriginals used to do that. White fellas came and changed the law.”

A woman who pleaded guilty before me to causing serious harm to her niece (she broke her niece’s arm when she hit her with a *nulla nulla*) explained through her interpreter that she had a right to discipline her niece. Her niece had done the wrong thing by refusing to give her beer when she asked for it and she had been cheeky to her before.

²² Ibid [7]

²³ Ibid [8] The affidavit was accepted for the purposes of providing a context and explanation for the defendant’s crimes; establishing that the offender did not have a predisposition to engage in domestic violence and was unlikely to re-offend; establishing that the offender had good prospects of rehabilitation; and establishing the defendant’s character. The Court was precluded by s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) from accepting the affidavit for the purpose of establishing the objective seriousness of the crime: [28].

²⁴ George Pascoe Gaymarani, ‘An introduction to the Ngarra law of Arnhem Land’ (2011) 1 *Northern Territory Law Journal* 283, 291

Revenge attacks (individually or in groups) have also continued, and are believed by many to be required by traditional laws and customs.

Recent examples which have come before the courts sitting in Alice Springs include an extended series of assaults arising out of the troubles in Yuendumu which began (or were perhaps just exacerbated by) the death of the death of Kwentiyaye Watson in a fight in Alice Springs between two groups of young men from that community, and a series of attacks and counter attacks between two family groups from Laramba, which have also led to deaths.

In *Two Laws: managing disputes in a contemporary Aboriginal community*, Nancy M Williams explains:

“... Yolgnu ... assume a grievance continues to exist until it is redressed through the mediation of an act with opposite effect. *Rom ditjuwan* (the law of return or ‘payback’) expresses the assumption that an offence may be satisfied through the agency of a like offence. Individuals, moreover, may be liable through kin-defined obligations to be the agency of satisfaction for another’s grievance.”

The Northern Territory Law Reform Committee of Inquiry into Aboriginal customary law *Background Paper No 1* (published in 2003) noted that “kinship obligations may require a person to take sides in a dispute, regardless of the particular rights and wrongs of the dispute”.²⁵ The Paper²⁶ referred to an example cited by the South Australian Aboriginal Customary Law Committee, *Children and Authority in the North-West* (Adelaide, 1984), p 44, where the kin of a person injured in the process of mediating a dispute between others were expected to retaliate to cancel the wrong done to her, and as well as to anecdotal references to the Committee of Inquiry itself.

²⁵ Northern Territory Law Reform Committee, above n 14, 27

²⁶ Ibid 27 fn 99

The evolution of customary law

The culture and customary laws of Aboriginal societies can change, have changed, and are changing.

As noted in the Northern Territory Law Reform Committee of Inquiry into Aboriginal customary law *Background Paper No 2* (at p 12), there are parallels between certain aspects of Aboriginal customary law and that of Anglo–Saxon England, in particular, the fact that personal protection and revenge for wrongs were matters for kinship groups. Such systems can and do evolve. Sometime after the Norman conquest administration of criminal justice became centralised in the King’s courts, but well before that the practice of revenge killings leading to blood feuds had evolved into a system largely based on compensation: the payment of wergild, a sliding scale of compensation according to the sex and rank of the victim.

There have been statements by Aboriginal people (particularly Western desert people) to the effect that, unlike white fella law, Aboriginal law cannot be changed, but similar things have been said in the past about the Common Law. Judges, it has been said, do not make law, they discover the law and apply existing law to new situations in a way that only appears to make new law.

Moreover, the fact that traditional law can and does evolve has been recognised by Aboriginal people in some circumstances. For example, during the Yulara Native Title claim hearings, some of the claimants gave evidence that babies are now regularly born in the Alice Springs hospital instead of on their families’ traditional lands, and this is being accommodated under customary law by replacing the fact of birth or conception on country by ‘smoking’ of the new baby on country as the event of significance giving rise to affiliation with a particular dreaming and concomitant rights to country. These same witnesses in other parts of their evidence asserted strongly that the law (Tjukurrpa) could not be changed.

Further, in consultations with Aboriginal people in Alice Springs in 1982, the Commissioner in the Australian Law Reform Commission Aboriginal Customary Law Reference reported:

“In the discussion that followed, strong disagreement was expressed [by Aboriginal people at the meeting] with the view of Mr Tambling MHR that Aboriginal customary law was declining or vanishing. Changes were occurring, in response to outside pressure and to new technologies, but these were consistent with the maintenance of established rules and traditions in many areas of life.”

It is possible that Yolgnu attitudes to changes to customary laws may be more open than those expressed by people from the Centre. In *Two Laws: managing disputes in a contemporary Aboriginal community*, Nancy M Williams referred to aspects of Yolgnu law that had been consciously changed in response to contact with the missionaries.

In his article, *An introduction to the Ngarra law of Arnhem Land*²⁷, George Pascoe Gaymarani adverts to the fact that there can be a conscious decision to change aspects of customary law. He describes the laws and the sanctions that apply to the breach of those laws (which include the death penalty for certain offences and a wife “being beaten by her husband”) and says:

“Some punishments under *Ngarra* law may be considered harsh. In writing this article I have not tried to hide the harsh parts; rather I have honestly and accurately recorded the law as it is. Whether these harsh laws can be changed or not is a question for the *Ngarra* law leaders to decide inside the *Ngarra*.”²⁸

In his article *Ngarra law: Aboriginal customary law from Arnhem Land*,²⁹ James Gurrwangu expressed the view that Ngarra law had already changed in significant ways:

²⁷ Gaymarani, above n 24

²⁸ Ibid 285

²⁹ James Gurrwangu, ‘Ngarra law: Aboriginal customary law from Arnhem Land’ (2012) 2 *Northern Territory Law Journal* 236

“Domestic violence is not permitted. Domestic violence is no longer appropriate. Ngarra law has no place for domestic violence. In the past, husbands did hit their wives sometimes – this happened in both Balanda and Yolgnu society. The law – both Balanda law and Yolgnu law – allowed it to happen. Not anymore! We do not have to be ashamed of what happened in the past, but we all need to work together now as a nation.

‘Pay back’ is another thing that has changed over time. When ‘pay back’ happened in the past, it involved physical punishment, just like in the Old Testament: ‘an eye for an eye and a tooth for a tooth’. These days ‘pay back’ is more like a mutual obligation: when you look after my children when they visit you, I have to ‘pay back’ by looking after your children when they visit me. When people break the Ngarra law these days they can be punished by other means, including compensation of discipline training camps in the bush (Gunapipi).³⁰ When there has been a really serious breach of law, say murder or rape, the Balanda system can take care of it. The Ngarra law can work together with the Balanda law.”

I think it can be accepted with confidence that all laws, even customary laws whose origins go back many thousands of years, can evolve to meet changing circumstances. The real question is which direction that evolution will take.

Recommendations to recognise customary law

There have been numerous recommendations for the recognition of Aboriginal customary law in appropriate ways within the framework of the mainstream legal system (for example the *Australian Law Reform Commission Report on the Recognition of Aboriginal Customary Laws (ALRC Report 31)*,³¹ the *Northern Territory Law Reform Committee Report of the Committee of Inquiry into Aboriginal Customary Law*,³² and the *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007* [The Wild Anderson “Little Children are Sacred” Report]³³).

³⁰ Interestingly, George Pascoe Gaymarani, in his article (above n 24) says (at p 297): “Once in the *Gunapipi* ceremony the offender will be taught discipline. An offender who misbehaves in the *Gunapipi* ceremony will be tortured inside the ceremony ground.”

³¹ reinforced by recommendation 219 of the Royal Commission into Aboriginal Deaths in Custody (1991)

³² preceding and (owing to the unique nature of the Territory) going somewhat further in its recommendations than the Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project 94 (September 2006)

³³ in particular Recommendations 31, 71 and 72

The Northern Territory Statehood Conference resolved that Aboriginal customary law be recognised as a source of law in the Northern Territory, and the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law recommended that that resolution be implemented.³⁴

Moreover, the pre-amble to the terms of reference for the Committee of Inquiry into Aboriginal Customary Law contained the following statement:

“It is the view of the Northern Territory Government that, in accordance with Australian and international law, Aboriginal customary law should be recognised consistent with universally recognised human rights and fundamental freedoms.”

The report which resulted from that reference paid close attention to the unique situation of the Northern Territory as the only jurisdiction in Australia with a substantial minority Aboriginal population, noting that outside the major centres, Aboriginal people formed the majority of the population. It also took into account the fact that in the Aboriginal communities (as distinct from major centres) “the institutions of law are strong and in place” and made detailed recommendations for the recognition of customary law, the implementation of law and justice plans in the communities, a community sentencing model, and a number of other matters. However, little or no progress has been made in implementing these recommendations.³⁵

There has also been a history of sentencing decisions in the Northern Territory taking into account aspects of customary law;³⁶ the enactment of s 104A of the *Sentencing Act* (NT) which made provision for evidence as to Aboriginal customary law to be adduced on sentencing hearings; and the conduct of community courts (later abolished

³⁴ Resolution 11

³⁵ This paper is confined to a consideration of the intersection of Aboriginal customary law with the mainstream criminal justice system. There has been recognition of some aspects of Aboriginal customary law in other areas of Territory law, for example in recognition of Aboriginal customary marriages (monogamous and polygynous) in the distribution of intestate estates.

³⁶ A useful and interesting review of these decisions can be found in Russell Goldflam’s article referred to below.

by former Chief Magistrate Hilary Hannam). However, the development of this jurisprudence received a major setback by the enactment of s 91 of the *Northern Territory National Emergency Response Act* (the *Intervention Act*) (since replaced by s 16AA (1) of the *Crimes Act*) which provides that in determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

As Russell Goldflam has pointed out in his excellent paper, *The (Non-) Role of Aboriginal Customary Law in Sentencing in the Northern Territory*:³⁷

“Notably, the words ‘Aboriginal’ and ‘Indigenous’ do not appear in section 91 or section 16AA: on its face, the new provision applies to all Northern Territory offenders. But the unavoidable implication, given its statutory context in the legislative package of the Intervention, is that the reference to culture and custom is aimed primarily at yapa [Aboriginal people]: kardiya [non- Aboriginal people] it would seem, don’t have “culture”, a standpoint which has been characterised as the ‘majoritarian privilege of never noticing [oneself]’. So much for what many had imagined had by now become the received wisdom of multiculturalism, as enshrined in section 16A of the *Crimes Act 1914* (Cth) passed with bipartisan support only a few years previously, providing that a sentencing court *must* take into account the “cultural background” of an offender.”

In fact, there are very few ‘cultural practices’ which cannot be properly re-characterised in more general, non-culturally specific human terms. (For example an offender who breached the terms of his suspended sentence by failing to report in circumstances where he had a cultural obligation to attend a ceremony, could also, and just as validly, be said to have been attending to important family obligations.) Moreover, although customary law and cultural practices cannot be taken into account for the purposes set out in s 16AA, they can be taken into account for other sentencing

³⁷ Russell Goldflam, ‘The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory’ (2013) 17(1) *Australian Indigenous Law Review* 71, 74

purposes such as assessing the offender's prospects of rehabilitation.³⁸ The major impact of s 91 and s 16AA would therefore seem to be a psychological one – the sending of a clear message that the Commonwealth legislature has no respect for Aboriginal cultural practices or customary law and categorises them as having no worth – worse, as having negative worth. In a jurisdiction where large sections of the community owe their primary loyalty and allegiance to Aboriginal culture and law, this can only be described as unhelpful.

As already noted, cultural practices and customary law can evolve – and are evolving. If they are to evolve in directions which are in harmony with the mainstream legal system's values, this will need to occur in partnership between respected and knowledgeable members of the various Aboriginal communities and non-Aboriginal leaders, lawmakers and policymakers and there can be no partnership, and no co-operation where there is no respect.

This has been long recognised by people who have taken the trouble to enquire into the matter. For example, the Northern Territory Law Reform Committee of Inquiry into Aboriginal customary law said, in examining the issue of traditional law punishment by payback:

“... the issue has been a major concern in the Northern Territory for over 50 years and the Committee identifies it as a matter necessitating a government response. The nature of the response is a matter for government, however, it appears to the Committee that any substantial progress towards an accommodation is unlikely unless it involves a meeting of senior Aboriginal law people and their ‘counterparts’ in the general law system.”³⁹

In the Australian Law Reform Commission Reference on Customary Law Research Paper No 8, the Commission set out arguments for and against the recognition of Aboriginal customary law. In doing so, the Commission referred to the fact that many

³⁸ *R v Wunungmurra* (2009) 196 A Crim R 166. Presumably the fact that someone may have (or be likely to) undergo some form of traditional punishment could also be taken into account in the same way that other extra-curial consequences such as public disgrace or loss of employment

³⁹ Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal customary law* (2003) 26-7

Aboriginal people (Warlpiri and Alyawarra people were specifically referred to as were the people from Port Keats) believed that Australian authorities should recognise their customary law because it was binding upon them and it was that law to which they owed their primary allegiance. The Commissioner quoted from a submission from Colin MacDonald:

“With recognition given to their customary law by Australian authorities, the people would see this as a real attempt to communicate with and have respect for Aboriginal values.”

In its Final Report, the Northern Territory Law Reform Committee of Enquiry into Aboriginal Customary Law referred to the fact that “Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory...because it defines a person’s rights and responsibilities, it defines who a person is, and it defines that person’s relationships to everybody else in the world” and said:

“The important factor is that it appears to many Aboriginal people that traditions and customs recognised and applied by Aboriginal people over thousands of years have not been sufficiently or properly recognised by non–Aboriginals, and particularly by those concerned with making and administering the laws of the Northern Territory. Yet the belief is strong that a proper recognition and application of Aboriginal customary law would go a long way to dealing with issues which presently are of concern to many communities. This strong belief has been expressed by many Aboriginals during interviews with the Committee.”⁴⁰

More recently, in his article *Ngarra law: Aboriginal customary law from Arnhem Land*,⁴¹ James Gurrwanngu said:

“The problem we have is one of mutual understanding and mutual respect. The legislation and case law does not work together with Ngarra law. They clash because they do not understand each other. The mainstream legal system comes from England, but Ngarra law has always been in Australia. We need to work together to understand each other, and when there is an issue we need to sit

⁴⁰ Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal customary law* (2003) 13

⁴¹ Gurrwanngu, above n 29

down and work it out together. It will not be resolved by continuing to ignore one another.”

Not everyone agrees that recognition of Aboriginal customary law should be part of the solution. Some aspects of Aboriginal customary law are incompatible with fundamental human rights recognised by Australian law (e.g. the enforcement of promised marriages; ‘disciplining’ of wives; capital punishment). Some see that as a difficulty: others emphasise that these are matters of detail and application of fundamental principles which can be retained while the application of those principles evolves. (For example, the concept of ‘njapatji-njapatji’ (50/50) is said to require revenge – violence for violence to ‘level up’ – before the person or people who have been wronged can be satisfied: but does it? If the fundamental principle of customary law requires levelling up, perhaps that principle can be applied in different ways in different circumstances without doing violence to the underlying principle. The concept of compensation is not foreign to Aboriginal culture, and neither is mediation. Perhaps a wrong can be ‘levelled up’ by the acceptance of compensation following mediation rather than swapping a wrong for a wrong.)

Others oppose the recognition of customary law for different reasons. The late Professor TGH Strehlow, submitted to the Australian Law Reform Commission in its Recognition of Aboriginal Customary Laws Reference (ALRC Report 31) that it is now too late to recognise Aboriginal customary laws because they have ceased to exist in meaningful form. He submitted that there was a danger of creating “a synthetic law which is neither Aboriginal nor Australian.”⁴² He said:

“There is little real understanding today by either black or white people of traditional Aboriginal customary law ... Who today can speak with real authority on tribal law? Who can advise the courts of the validity of claims of breaches of tribal law? ...

As long as aboriginal beliefs were strong, and there were no prisons for offenders ... aboriginal law played a vital role in holding groups together and in

⁴² Australian Law Reform Commission, Report on the Recognition of Aboriginal Customary Laws, Report 31 (June 1986)

keeping aboriginal Australia safe for its inhabitants ... Today there would be few people left in Australia, black or white, who have any detailed knowledge of what 'aboriginal law' really stood for. It was in no way a black mirror-image of our own body of laws: and the most common modern aboriginal offences that come before our own courts – violent assaults, thefts, offences due to drunkenness, and murders – were never punishable by those persons who are today called 'tribal elders' in the press ... Some of these offences did not even occur in the old 'tribal' days. I therefore believe that justice would be best met in our own days if the principle of one system of law for all Australians was firmly adhered to, with the proviso that the proved norms of 'aboriginal law' should be taken into account when determining the actual punishments ...

True 'tribal law' is probably dead everywhere. It could not change, for there were no aboriginal agencies that had the power to change any of the traditional 'norms'".

Two knowledgeable experts from different fields whose views are certainly deserving of respect (one a lawyer: Russell Goldflam, and one an anthropologist: Professor Peter Sutton) share the skepticism of Professor Strehlow about the desirability of recognising an evolving form of customary law. Russell Goldflam writes:

"It has also been suggested that some may 'move from severe physical violence to other forms of maybe shaming, or fining or exiling people, things which aren't as traumatic or as violent to the individual or the family'. But how authoritative and viable could such a diluted, synthetic "Customary Law Lite" be?"

In relation to the recommendation of the Northern Territory Law Reform Committee of Enquiry into Aboriginal customary law that each community should define its own problems and solutions, while insisting that women, young people and less dominant groups must be heard, and their rights to equal protection remain uncompromised, Professor Sutton said:

"With all due respect, the potential here for inconsistency and breathtaking contradiction seems fairly obvious."⁴³

⁴³ Sutton, above n 9, 147

Professor Sutton appears to despise such views as impractical cultural relativism and ‘rose-coloured idealism’ and refers to the risks that victims of violence may be afraid to speak out and that even relatives may abandon victims in order to maintain solidarity or at least peace with the perpetrator’s kin.⁴⁴

These fears are real. There is little doubt that such attitudes exist today and can cause real problems for law enforcement by mainstream authorities – despite the non-recognition of customary law. The difficulty with dismissing the idea of some recognition of Aboriginal customary law out of hand in this way is that it ignores the fact that a substantial section of the population of the Northern Territory believe that they are living (more or less) in accordance with Aboriginal customary law and are bound by its dictates. Moreover, it assumes that Aboriginal customary law is incapable of adapting to changing circumstances. Professor K Maddock answered Professor Strehlow’s submission to the ALRC in the following terms:

“Strehlow appears to have assumed that customary law means the law of communities unaffected by outside ideas, concepts and values. As there are no such communities left, there can be no such law. He was judging present-day Aborigines by the standards of their forbears. This argument against recognition loses its force if we see present-day rules and customs as having grown out of the pre-European past but as having been formed and malformed also through the shock of foreign contact and the process of adaptation that followed. Sometimes the outcome may have been a degenerate travesty of an older and purer standard, but there is no reason to view every change with so little sympathy.”

As it stands, there is a real danger that aspects of Aboriginal customary law are evolving in ways that are dysfunctional. A decrease in formal, organised and measured payback in which, for example, a perpetrator may present himself for spearing in a supervised and (importantly) sober setting has not led to a decrease in the overall level of violent retaliation for offences. Rather there has been an increase in uncontrolled, often drunken retaliatory raids in which groups of men travel to the camp of another group and inflict violence on anyone they find there, sometimes with

⁴⁴ Ibid 149-150

fatal results – as in the Laramba and Yuendumu examples. This leads to an escalating cycle of return violence: a blood feud.

Courts deprecate this cycle of violence motivated by cultural and customary law requirements for revenge. Russell Goldflam quotes Bamber SM who, before becoming a magistrate was Principal Legal Officer at the Central Australian Aboriginal Legal Aid Service:

“The message, if it is not clear, needs to be made clear: violence begets violence. There is no place for violent retribution. The days of payback with violence should end. The leaders should be concerned about changing their law. They should be working out ways to deal with disputes without violence, rather than feeling aggrieved with white fellow law preventing them from carrying out their old punishments.”⁴⁵

In his sentencing remarks in *R v Wunungmurra*,⁴⁶ Justice Stephen Southwood said:

“The time has well and truly come when men in Aboriginal communities must totally abandon such violent customary laws and practices. There is no reason why Aboriginal customary laws and practices cannot be developed in other ways. Such a change will in no way weaken the strong traditional culture on Elcho Island.”

I have made similar remarks from time to time, notably when sentencing three young men from Yuendumu who had pleaded guilty in 2012 to various offences in connection with the death of Kwementyaye Watson.

Such well-intended lectures from the bench are largely, if not totally, ineffective. Aboriginal people can act to ensure that their laws and customs evolve – that although the basic fundamental law remains the same, its application to new situations can change with the changing times – but they are not likely to do so in response to a lecture from a judge, however obligated we may feel to deliver the appropriate message at the appropriate time.

⁴⁵ Goldflam, above n 37, 75

⁴⁶ *R v Wunungmurra* (2009) 196 A Crim R 166 (Sentencing remarks 14 August 2009) quoted by Danial Kelly, ‘The black and white of Wunungmurra’ (2012) 2 *Northern Territory Law Journal* 227, 231

Courts must (and politicians and policy makers should) deal with people as they are. If substantial numbers of people believe that they are conducting their domestic relationships and responding to injury or insult to themselves and / or their relations in accordance with their rights and obligations under customary law, what does it matter whether Professor Strehlow or the people he knew and grew up with in the early twentieth century would have agreed, or whether the detail of those laws and customs has remained the same since first contact?

As James Gaykamangu said: “We need to work together to understand each other, and when there is an issue we need to sit down and work it out together.” Judges are largely precluded from taking part in that process. Lawmakers and policymakers should take heed.

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