

# background paper 5

## Aboriginal customary laws reference – an overview

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## 1. Terms of reference

The Law Reform Commission has been asked 'to enquire into and report upon Aboriginal Customary Laws in Western Australia'. I have been asked to prepare a 'background paper' for the Reference.

I take that task to involve saying something of matters that go to make up the fabric of the society in which customary laws have existed, and continue to exist, side-by-side with laws brought to this country by its white settlers and developed by legislatures and the judiciary over many years. Reporting to government whether there should be recognition of those laws within the State's legal system—and if so to what extent and in what manner—is the Commission's role. Nevertheless one cannot be divorced entirely from the other and some of my comments inevitably bear on the 'practicality' of recognition, using that term to mean the extent to and manner in which the two laws can co-exist.

## 2. Recognition

It is worth dwelling for a moment on what is meant by 'recognition' here. It is a term commonly used in any discussion of the place of Aboriginal law in our society. In its ordinary use it includes the perception of something formally as existing or true. It may also mean the acknowledgement of something as valid, or as entitled to consideration.<sup>1</sup>

There can be no doubt that Aboriginal customary laws exist and that they are important to Aboriginal people. Clearly they are entitled to consideration. Indeed, they are valid for the people concerned though their acceptance within the State's legal system is the very question with which the present Reference is concerned.

It is of interest and, I think, of some importance that although the Australian Law Reform Commission (ALRC) entitled its 1986 report 'The Recognition of Aboriginal Customary Laws',<sup>2</sup> that was not the language of its reference. It required the ALRC:

*To inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular:*

- a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
- b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
- c) any other related matter.

The reference speaks of applying customary law and it was the ALRC's conclusion that 'the arguments in favour of recognition establish a case for the appropriate recognition of Aboriginal customary laws by the general legal system'.<sup>3</sup> The ALRC made its position clear when it spoke of recognising customary laws 'within the framework of the general law, rather than through the creation of separate formal systems'.<sup>4</sup> The present Reference states at the outset that 'there may be a need to recognise the existence of, and take into account within [the State's] legal system, Aboriginal customary laws'. No doubt the language was carefully chosen to make it clear that the framework within which the Commission is to operate does not include recognition of customary laws as a legal system operating independently of the State's legal system but rather as dependent upon recognition within that system.

Furthermore, the Reference is couched in a way which does not of itself accord any particular status to customary laws. Indeed its terms require the Commission to give particular reference to whether these laws should be recognised. No doubt the very existence of the Reference invites some positive response.

## 3. Arguments for and against recognition

In its 1986 report the ALRC noted arguments in favour of and against recognition.<sup>5</sup> These arguments were summarised by the Northern Territory Law Reform Committee (NTLRC) in a Background Paper to its recent report on Aboriginal Customary Law<sup>6</sup> and I borrow that summary as a guide to the arguments in question.

1. *Macquarie Dictionary* (3rd ed., 1780).

2. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

3. *Ibid* [194].

4. *Ibid* [196].

5. *Ibid* [102]–[127].

6. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003).

The ALRC noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal Territory residents
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct
- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles of 'self-management' or 'self-determination' are more appropriate
- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create 'two laws' within our society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.<sup>7</sup>

These arguments have been proffered, in one form or another, pretty much since white settlement. In more recent years there has been a willingness by governments to recognise the reality of customary laws for many Aboriginal people, whether actively practised or seen as an integral part of their culture. In turn this has led governments to consider the strength of the arguments in favour of recognition and the practicalities of recognition within a country in which the indigenous people are now a minority. The issue has been heightened by the strength of the land rights movement and the recognition of native title and by a greater willingness to appreciate what Justice Blackburn described as a 'subtle and elaborate system highly adapted to the country in which the people led their lives' and which led him to conclude: 'If ever a system could be called 'a government of laws, and not of men,' it is that shown in the evidence before me'.<sup>8</sup> In *Milirrpum* Blackburn J said that 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship'.<sup>9</sup> The emphasis on spiritual connection and on the role of the mythical ancestors in the 'Dreamtime' as the source of law may overshadow what the NTLRC described as 'an extremely broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights'.<sup>10</sup> It may also cause the role of customary laws in the resolution of disputes within a community to be overlooked.

The notion of a treaty or an agreement between indigenous and non-indigenous Australians or, as it is sometimes put, between the two peoples of this country, is not part of the Commission's remit. That does not mean that the Commission should simply close its eyes to these wider considerations. If, from the ongoing debate they produce, it is possible to gain a better understanding of customary laws and what Aboriginal people expect from their recognition, it may help the Commission in its approach to the question posed by the Reference, namely, 'whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis'.

Professor Enid Campbell pointed out in a paper written for the ALRC reference mentioned earlier:

Suffice it to say that when Australia was settled it was by no means a forgone conclusion that the imperial law should be universally applied to the exclusion of native custom and that the decision to apply that law to Aborigines

7. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 6. (Footnotes omitted.)

8. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

9. *Ibid* 167.

10. NTLRC, above n 6, 42.

not only in their dealings with Europeans, but in their dealings inter se, seems to have been taken quite deliberately as a matter of policy.<sup>11</sup>

In *Walker v New South Wales*,<sup>12</sup> Mason CJ held that sovereignty carried with it the legislative competence of Australian parliaments to regulate or affect the rights of Aboriginal people and that customary laws could not stand against that competence. Clearly that is the legal basis on which the Commission must proceed. It is another question whether the common law may recognise custom where to do so would not run counter to existing laws within the State's legal system. The recognition of native title in *Mabo [No 2]*<sup>13</sup> and *Wik*<sup>14</sup> bears on that question but an examination of the wider question of the common law is outside the scope of this paper.

#### 4. Background facts

It is worth setting out a few basic facts which bear on the background against which the Commission will report. I do so in brief form.

1. Western Australia is Australia's largest State with an area of 2,527,621 square kilometres.
2. On Census night 7 August 2001 there were counted 1,851,252 in the State.
3. Of these 58,496 persons identified as being of indigenous origin.
4. This number represents 3.2 per cent of the total population. By way of contrast the indigenous population of the Northern Territory is somewhat less but constitutes more than 28 per cent of its total population.
5. The greatest number of Aboriginal people in Western Australia live in the Perth metropolitan area – just over 20,000. The Kimberley has the highest proportion of Aborigines of any of the State's regions. Outside the major towns they make up the overwhelming majority of the population. The Pilbara presents a similar picture. In other regions there is a greater concentration in the major population centres but Aboriginal people make up significant proportions of the populations of rural and regional areas.
6. All residents of Western Australia are subject to the laws of Parliament and the decisions of the courts.
7. Western Australia is part of a federation; its laws are State and Federal.
8. Australia has international obligations which touch the lives of all its citizens, not least in the field of human rights.

These propositions serve to demonstrate the complexity of the Commission's task – a relatively small population, spread over the whole of the State, some living lives pretty much untouched by customary laws, others in whose lives those laws play a significant part.

#### 5. Implications of contact

As the ALRC pointed out: 'For practical purposes there are no Aboriginal people who have not had at least some contact with Australian society'.<sup>15</sup>

That report was published nearly 20 years ago; the degree of contact inevitably has grown since then. While many communities complain of the breakdown of traditional law and practices, there are overarching considerations which have resulted in a greater awareness of Aboriginal identity, both on the part of Aborigines themselves and of those who are not Aboriginal. The acceptance of traditional ownership of land, the protection of sacred sites and the enhanced interest in Aboriginal dance, music and painting are among those considerations. More directly in point, the courts have shown an increased willingness to look at aspects of traditional life that may throw light on the circumstances in which an offence was committed and on appropriate forms of sentence.

The paradox of course is that where customary laws have lost influence it is because of the impact of the non-indigenous population over the years. At the same time any effective recognition of those laws lies very much in the hands of that non-indigenous population.

In any event I do not read the Reference as limited to a purely utilitarian answer or some response dependent upon the size of the indigenous population. Whether customary laws should be recognised may give a moral aspect to

11. Campbell E, "Accommodating Aboriginal Law" (25 September 1977) 2.

12. (1994) 182 CLR 45.

13. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1.

14. *Wik Peoples v Queensland* (1997) 141 ALR 129.

15. ALRC, above n 2, [34].

recognition, but such a claim has to be placed in the scales along with the existence of the State's legal system, the practical value of recognition and indeed the wishes of the indigenous population. Those wishes may vary according to the remoteness of the population, their ages and gender and a variety of other factors.

## 6. Manner of recognition

Where these considerations assume great importance is in the manner in which customary laws 'should be recognised and given support to' – one of the matters to which the Commission is required to give particular reference. This is an aspect of the inquiry which, in a sense, comes at the end of the Commission's work. It arises at the point at which the Commission is satisfied that there should be some recognition of customary laws and must then consider whether recognition should have a geographical aspect or be limited to those leading a more traditional life style or turn on other criteria.

The recommendations in the report of the NTLRC 'concentrate on matters affecting Aboriginal communities'.<sup>16</sup> They do so because of the distribution of the Aboriginal population in the Territory, a minority living inside urban areas and the majority outside. Indeed, 'Two-thirds of all Aboriginal people in the Northern Territory live outside urban areas in small communities on Aboriginal land or special purpose leases or on pastoral leases'.<sup>17</sup> That is not so true of Western Australia where there is a greater concentration in cities and towns. Nevertheless, as appears earlier in this paper, a substantial number of Aboriginal people live in communities in which they constitute the majority.

The NTLRC saw the answer to recognition in allowing each community to develop its own plan to incorporate traditional law into the community 'in any way that the community thinks appropriate'.<sup>18</sup> This approach envisages models dealing with a wide range of matters, civil and criminal, which in part can be left to the community and otherwise are put to government for its response. There is an expected caveat: 'No model can permit the infringement of human rights'.<sup>19</sup> This distinction might be expressed as the difference between legislative and administrative recognition, oversimplified though that might be.

In speaking of the manner of recognition I have strayed beyond the sort of background I had in mind. Furthermore to look at manner of recognition before reaching some conclusions about the range of matters where recognition is thought appropriate may seem like putting the cart before the horse, so to speak. However, the communities are in so many respects the key to the strength of customary laws in this State, to the matters to which they pertain and the manner in which recognition can be accorded, without adversely affecting the legitimate rights and expectations of those who live in the communities.

## 7. Ascertaining customary laws

### Theory

Recognition of customary laws provokes the question: what are those customary laws? And in turn, what are the implications of their recognition?

The Reference wisely does not seek to define customary laws. Those laws cannot be reduced to writing as if they were a statute or code. Even the *Customs Recognition Act 1963* of Papua New Guinea, an Act specifically relating to the determination and recognition of custom, balks at a definition. Rather it sets out the situations in which custom may be taken into account. The ALRC, in its Draft Aboriginal Customary Laws (Recognition) Bill 1986, took much the same approach in some cases but in others gave more direct force to customary laws.

However it goes about its task the Commission must gain some understanding of Aboriginal customary laws, if only to appreciate their source and the basis upon which they are accepted by indigenous people as binding upon them. It is important not to see customary laws only through the prism of western ideas. It is artificial to seek to isolate Aboriginal law from religion and culture. As I suggested in my 1999 paper 'Understanding Aboriginal Law',<sup>20</sup> it is

16. NTLRC, above n 6, 14.

17. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 6.

18. NTLRC, above n 6, 6.

19. NTLRC, above n 7, 48.

20. The paper 'Understanding Aboriginal Law' is attached as an appendix to this Background Paper, see below pp 186–212.

enough 'to see law in Aboriginal society as a body of rules, accepted by the society and enforced by recognisable constraints'.<sup>21</sup> This approach is developed in the paper; I shall not repeat what appears there.

However, there is a comment by Professor Max Charlesworth which bears on these matters. Speaking of the modifications which have taken place in rituals and songs, he observed:

But one must distinguish here between the public rhetoric of Aborigines, which gives the impression that Aboriginal religion is essentially devoted to the faithful replication of the primordial design laid down by the Ancestor Spirits, and the reality of actual life and practice where there is a continual process of development and creative invention.<sup>22</sup>

I say something about the immutability of Aboriginal law later in the paper. All I am concerned to do here is to warn against expecting to find parallels between customary and non-customary laws and to keep in mind that Aboriginal people who have to deal with this word 'law' may be using it in a wider sense than a lawyer would use it.

Inevitably popular discussion of recognition tends to focus on aspects of criminal law: that is, conduct that within the State's legal system attracts the operation of the criminal law. The importance of dealing with such conduct in the recognition of customary laws is obvious but it does tend to put the notion of punishment, with particular reference to payback, at the forefront of any discussion. Nothing I say is intended to diminish the difficulties this area presents. However, it would be quite wrong to allow these difficulties to overshadow other areas of law.

The Reference puts the matter in context by requiring the Commission to have regard to a range of matters including those corresponding to criminal law (including domestic violence), civil law, local government law, the law of domestic relations, inheritance law, law relating to spiritual matters and the laws of evidence and procedure.

## Practice

The Commission has conducted a series of field trips aimed at hearing at first hand the views of indigenous communities. The summaries state that these consultations have been guided by four key questions which ask in effect:

- How is Aboriginal law still practised?
- In what ways is it practised?
- In what situations is it practised?
- What issues confront Aboriginal people when practising their law today?

In the time available to the Commission, this is no doubt the most useful way of ascertaining the views of the people in question. It is also a useful basis on which to consider a number of issues that arise in thinking about customary laws.

However, questions limited to existing practice may result in an unduly narrow approach. As a generalisation, the practice of customary laws reflects the distance of a community from the influence of cities and towns. But even in locations where overt practice is not apparent people may see their laws as a valuable means of maintaining an ordered society. Such a view is likely to come from older persons but a younger generation may well have an important contribution to make in this regard. That generation may have a more realistic approach to how the two sets of laws may work, one with the other, at least in relation to juveniles.

As to ascertaining the views of the indigenous people, it is apparent from the thematic summaries and from what the Commission itself has said that its members are alive to the difficulties of ensuring that the views of individuals reflect the views of the community. The difficulties are more acute the less time the Commission is able to spend in particular locations. I hasten to say that this is not peculiar to the task the Commission has embarked on. It exists whenever the views of any community are sought.

Aboriginal communities, like other communities, are not free from factions and from family divisions. As with any community, it is not always easy to tell whether someone purporting to be a spokesperson is indeed in that position. The difficulty is compounded where some matters cannot be talked about in front of women; and the reverse applies. But those sorts of assessments have to be made and made in the light of advice from those who are part of, or familiar with, the community, be they Aboriginal or non-Aboriginal.

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21. Ibid, see below p 188.

22. Charlesworth M, *Religious inventions: four essays* (Cambridge: Cambridge University Press, 1997) 65–66.

There is an upside to this. Although there is often diversity among those with whom the Commission makes contact, a pattern does tend to emerge. Furthermore, although there are often long distances between locations, many Aboriginal communities in Western Australia are linked by dreaming tracks, sharing ceremonies and traditions. And there are strong common themes associated with the 'dreamtime' so that although stories about the mythical ancestors may vary, there is evident a common basis in the origins and activities of those ancestors and their responsibility for the law. It does not follow that there should be one overall approach to the implementation of customary laws within the State's legal system. That is a different question.

The approach to be taken to any system of recognition is one of the most formidable tasks facing the Commission. I return to this aspect later in the paper. At this point I simply wish to note the obvious connection between customary laws and the communities in which they were and are practised. Indeed the NTLRC's general view is that 'each Aboriginal community will define its own problems and solutions'.<sup>23</sup> While that approach might be thought to beg the question, the NTLRC was speaking in the context of specific communities proposing specific plans to government. Those plans—referred to as models—may relate to a range of matters, civil and criminal. An obvious illustration is dispute resolution processes. Whether that approach is the most appropriate for this State lies at the heart of the Reference.

## 8. Immutability

There is an aspect of Aboriginal customary laws that is relevant to the work of the Commission. It arises in this way.

Aboriginal people sometimes point to what they see as a distinction between their law and, adopting the language of the Reference, the State's legal system. The latter, they say, is ever changing; the former is immutable. How they ask, not always rhetorically, can one respect a law which Parliament may change at will?

In my paper 'Understanding Aboriginal Law', I offer a quotation from a Bunitj man from Kakadu:

Law never changes...  
Always stay same  
Maybe it hard  
But proper one for all people.

Not like white European law...  
Always changing  
If you don't like it  
You can change.

Aboriginal law never change  
Old people tell us  
'you got to keep it'  
It always stays.<sup>24</sup>

One response to the charge is that Aboriginal law is not always as immutable as it might seem. For instance, it is common practice now for young people to marry against the kinship system and for their marriage to be accepted within the community. The rejoinder will be that the dictates of the law are clear and should be obeyed and that acceptance is reluctant. Like any society, there is a difference between the law and obedience to the law. For the Commission the relevance of all this lies in the need to explore, not the jurisprudential significance of the distinction, but the practicalities of recognition and giving effect to the law.

We are in a difficult area here. In part the difficulties are semantic – what is 'change'? Legislatures are constrained by constitutional and other obligations. And while the common law has developed through judicial decisions, the courts are not open to adopt rules 'if their adoption would fracture the skeleton of principle which gives this body of our law its shape and internal consistency'.<sup>25</sup> Customary laws, it may be thought, present a somewhat analogous picture.

But the difficulties go deeper than that. People who have an oral tradition may see history through a different lens to those who have a written tradition. The former may be less prepared to acknowledge that contemporary culture differs from the past. This subject has been critically examined by Dr Peter Sutton in 'The politics of suffering: Indigenous

23. NTLRC, above n 6, 21.

24. Toohey, above n 20, see below p 186. Extract taken from Neidjie B, Davis S & Fox A, *Kakadu Man ... Bill Neidjie* (NSW: Mybrood Pty Ltd, 1985) 39.

25. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 29 (per Brennan J).

policy in Australia since the 1970s'.<sup>26</sup> A result of all this for the Commission is likely to be a problem in identifying whether some course of conduct is truly customary law and therefore presents a case for recognition. The answer must lie in the voice of the Aboriginal people themselves.

The NTLRC concluded that 'The examination of Aboriginal law as primarily a dispute resolution mechanism has revealed, not surprisingly, that *non-fundamental* legal norms may ultimately be negotiable'.<sup>27</sup> The Committee did not seek to define the line between the non-changeable and the changeable, except to speak of adapting punishment to meet modern circumstances.

It is not possible to define this line. To take one illustration, the system of promised marriage in which an infant girl is promised to an adult male is more complex than appears in some commentaries. And such an arrangement may be adaptable in the sense that an elderly man may surrender his position to a younger suitor, acceptable to the young woman, in return for goods and services rendered by the younger man.

There is scope for a better understanding of the concept of promise and what it implies. Nevertheless, within the State's legal system the protection and welfare of children is paramount and any recognition of customary laws must proceed on that basis.

## 9. Law and culture

Another distinction made is between law and culture. The all-embracing nature of Aboriginal law seems at odds with this distinction and I doubt that many Aborigines would find it acceptable except in the sense that people often use the term 'culture' to speak of everything they hold dear in their Aboriginality, including their law.

Dr Sutton has written in the article previously mentioned:

Indigenous people in this country themselves propose various kinds of cultural change as integral to improved wellbeing. There are those who promote engagement in the 'real economy' instead of reliance on welfare, greater engagement in Western education on a combined 'two ways' education, conscious intervention in dietary and other health and related practices, the promotion of non-violent ways of resolving adult conflict at the expense of fighting, the re-introduction of greater degrees of coercion as a means of controlling crime, emigration from Indigenous settlements to cities, alcohol, prohibition, and so on.<sup>28</sup>

Dr Sutton has expressed concern that the argument against cultural change focuses unduly on a limited set of aesthetic practices and gives insufficient weight to the freedom to choose a more 'modern' way of life. The argument, he says, 'implies a negative comparison between ancient ways and modern ways'.<sup>29</sup>

Whether or not one agrees with Dr Sutton's views on the meaning to be attached to culture in this context, it is apparent that there are complex issues involved here. I do not suggest that they are issues the Commission need explore in depth but an awareness of them may be useful in its approach to what it is that recognition may imply.

## 10. Customary law and violence

There is one aspect of customary laws that calls for particular attention. At times an Aborigine charged with an offence within the State's legal system will raise by way of defence or mitigation the alleged acceptance of his conduct by the law or culture of the community to which he belongs. This is usually in relation to violence against another, a man or more likely a woman. The courts face this situation frequently and certainly where the violence is against a woman may not be persuaded that there is such acceptance. The lesson here is caution in assessing what acceptance there is of particular conduct involving violence. And there is the further question of whether any such acceptance is at odds with legislative or other protection of human rights.

Wherever recognition of customary laws is under consideration in this country the position of Aboriginal women comes to the fore. It does so in the present context because of the difficulties in reconciling some aspects of customary laws having a particular relevance to women with their position under the legal systems of the States or Commonwealth.

26. Sutton P, 'The politics of suffering: Indigenous policy in Australia since the 1970s' (2001) 11 *Anthropological Forum* 125.

27. NTLRC, *The Recognition of Aboriginal Customary Law as Law*, Background Paper No 2 (2003) 12.

28. Sutton, above n 26.

29. *Ibid.*

I do not propose to deal with these difficulties in detail; they warrant a paper in their own right. However, it is helpful to focus on them to an extent, not only because the subject matter is so important but also because they illustrate the nature of the task presented by this Reference.

The extent of violence suffered by Aboriginal women at the hands of Aboriginal men has been documented quite extensively in recent years. Much of the material is noted by Joan Kimm in *A Fatal Conjunction*<sup>30</sup> which is a valuable treatment of what appears as a sub-title to the book, namely two laws, two cultures. It is the existence and identification of any customary law aspect with which the Commission is concerned.

Violence against Aboriginal women by Aboriginal men occurs in various circumstances. There may or may not be a sexual content. The violence may on its face be a straight-forward case of rape. Some sexual violence may be allegedly consensual or allegedly traditional, said to be by way of punishment for an offence against a customary law. In that last regard it has been argued that there was a sort of consent to sexual intercourse, required as a way of expiation for such an offence. Of course the age of the female may preclude any question of consent or the situation may be one in which she has not truly consented to intercourse with the man in question.

The difficulties inherent in identifying the category into which an act of violence falls may take on an extra dimension in the particular circumstances. What conclusions may properly be drawn from the evidence where a charge is brought under the State's legal system? Do the circumstances suggest that there may be a traditional element present? Was the person charged influenced in any way by that element?

These are considerations going to the position of the accused. They are questions for the court or the body responsible for dealing with the 'case'. Whether there should be recognition of the role customary law has played in the violence and if so in what way are questions the Commission is called upon to answer. But it cannot provide answers oblivious to the consequences of recommending that recognition be accorded or not accorded.

I have spent time on the issue of violence to women, not only because of its obvious importance, but because it points up, perhaps more than any other situation, the task facing the Commission. If customary laws in this area are to be recognised, is it by empowering the courts to have regard to those laws? If so, is it to provide an answer to a charge of assault or to point to appropriate forms of punishment? The Reference requires the Commission to have regard to 'relevant Commonwealth legislation and international obligations' so any recommendation must operate within those strictures.

Aboriginal women want such protection as the State's legal system allows them; indeed they want more in the administration of the law. The protection once offered by customary laws has been weakened over time but that does not mean that a recommendation should not aim to strengthen the procedures Aboriginal women would put in place as a way of dealing with violence, without surrendering the protection offered by the State's legal system.

As to violence against children, clearly their welfare is paramount and they must be afforded all the protection the State's legal system and its authorities can give. Is there a role for customary laws in this situation? If there is it is likely to lie in the application of those laws on an administrative basis, aimed at ensuring that violent situations do not occur.

## 11. Frozen in time?

There is another aspect of Aboriginal customary laws that is somewhat allied to immutability. While I do not see it as a requirement of the Reference that the Commission identify with any precision the scope of customary laws, it may need to ask itself from time to time: are we being told about practices that have existed without change or, in some cases, are they practices that have been adapted to meet the changing conditions in which Aboriginal people live? I have focused on practices so as to differentiate the issue of immutability of the law itself.

Within this area of discourse lies a further refinement. It goes to the content of customary laws and to that extent does not, I think, call for any detailed consideration by the Commission. Any such consideration is more likely to arise within any recognition that may be accorded to those laws. It does however present an issue to which the Commission may think it advisable to advert, if only to show it has not escaped notice.

30. Kimm J, *A fatal conjunction: two laws two cultures* (Annandale, NSW: The Federation Press, 2004).

The issue is whether customary laws are frozen in time, to borrow a phrase that is often used. In other words, is the scope of a particular customary law ascertained by reference to the time of European contact only or are traditional customs and practices inherited in adapted form fairly to be regarded as part of that law?

The issue has arisen in the context of native title claims with the argument that there is an evidential burden to establish rights and interests under pre-sovereignty traditional laws and customs and to show a continuance of those laws and customs in order to make good a connection with the land claimed. There are several decisions of the High Court and of the Federal Court in which this issue has been canvassed and in more recent decisions the evidential burden has been prominent.

The Reference speaks in general terms of Aboriginal customary laws. There is nothing that ties recognition only to customary laws that have remained unaltered since white settlement. The point is that laws and customs 'have their origins in the culture and social organisation of the relevant group as it existed prior to the advent of non-Aboriginal interference with the culture and social organisation'.<sup>31</sup> Or, as put by Lee J in *Ward v Western Australia*: 'Law in Aboriginal terms is an aggregation of traditional values, rules, beliefs and practices derived from Aboriginal past'.<sup>32</sup>

Changes to Aboriginal traditions have been recognised in the writings of anthropologists and courts, sometimes but not always in the context of native title. Examples are noted by Graeme Neate in his valuable paper 'Turning back the tide? Issues in the legal recognition of continuity and change in traditional laws and customs'.<sup>33</sup> Illustrations are changes to hunting and fishing practices, to leadership and lifestyle and in the performance of ceremonies.

Whatever the legal position with regard to the extinguishment of native title, there is no reason in this Reference to give Aboriginal customary laws a narrow connotation. For the Commission the importance of customary laws, whether untouched or adapted over the years, goes to the case for recognition and, importantly, the extent and the manner in which they should be recognised.

The Reference begins with this pronouncement:

Recognising that all persons in Western Australia are subject to and protected by the State's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws.

What the ALRC said early in its report is applicable here:

In a sense the giving of the Reference was itself a recognition of the existence of Aboriginal customary laws and of the continuing adherence by Aborigines to their customary laws and traditions. On the other hand the Terms of Reference do not imply that the formal recognition of Aboriginal customary laws is the best response to the problems identified.<sup>34</sup>

The approach implicit in this paragraph is reflected in the draft bill proposed by the ALRC. It fastens on to particular situations and deals with them accordingly.

The term 'recognition' is no doubt a handy one so long as it is not thought to foreclose any of the matters upon which the Commission must report which is 'to inquire into and report upon Aboriginal customary laws in Western Australia'. What is it that Aborigines want from this Reference? Some may see a political solution as the answer, in effect a treaty or an agreement but as mentioned earlier this is outside the Commission's remit.

Others may visualise a situation in which customary laws are taken into account in the sense that they form part of the fabric of the legal system rather in the way that the Papua New Guinea legislation empowers a court to take custom into account for certain purposes depending on the nature of the case. That offers a possible approach though it would not satisfy those who argue for the blanket operation of customary laws. The distribution of indigenous people throughout Western Australia militates against an overall approach, except perhaps where relationships such as marriage and parenthood are involved.

31. *Yarmirr v Northern Territory* (1998) 82 FCR 533, 568.

32. (1998) 159 ALR 483, 504.

33. Neate G, 'Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Laws and Customs', paper delivered to the Native Title Conference 2002 (Geraldton, September 2002).

34. ALRC, above n 2, [5].

## 12. Marriage

Although I have been speaking of situations in which, except in the case of promised marriages, there may be no particular relationship between the persons involved, there is the wider question of recognising traditional marriages.

In so far as de facto relationships now carry rights and obligations comparable with marriages according to the civil law, it may be thought that recognition has no great part to play in this area. On the face of it there may seem no reason why marriage according to customary law should not be recognised.

However, the view of the ALRC was that 'direct underwriting of Aboriginal marriage rules would change the location of authority over domestic relations from the Aboriginal community or group to courts or other agencies'.<sup>35</sup> The approach taken by the ALRC was that traditional marriages should be recognised for the purpose of particular laws, in other words, that there should be a functional recognition.

The whole question of marriage, children and family property is explored in the ALRC Report as the Commission is well aware.

## 13. Payback

Discussions about recognition and media coverage of the subject inevitably fasten on to payback. Those who oppose any form of recognition ask how Parliament can condone, let alone authorise, physical violence as a form of punishment. Some Aborigines, particularly older men in remote communities, argue that if such a traditional form of punishment can no longer be available, it is false to speak of recognition.

Payback colours unduly the idea of recognition. To some it implies a gap between the State's legal system and customary laws which cannot be bridged. I have said something about payback in my paper 'Understanding Aboriginal Law' and I shall not repeat what is said there, except to draw attention to its symbolic nature in some cases and its role in the process of reconciliation of the families offended by the conduct which led to payback.

This is not to say that the physical impact of payback is not present in some cases; it is and always has underlain the process. My own experience suggests that the symbolic nature of payback, accompanied by some form of compensation to the relatives of the victim, has become more and more common. Just how common I do not know but it would be helpful to get some overall picture. Again, the views of Aboriginal people in this regard are likely to depend on age, gender and the remoteness of the community.

This is one of those situations in which consultation with the communities and a better understanding of the current approach to payback is needed to see whether there can be accommodation between the State's legal system and customary laws.

## 14. Communities

Legislation in Western Australia and the Northern Territory (perhaps elsewhere) empowers communities to control and enforce civic obligations. This is a long way from recognition of customary laws or even taking them into account. Is it an edifice on which to build so as to vest control of certain conduct in the hands of the community?

The members of the Commission are well aware of the different responses Aboriginal people make to the idea of recognition. The older people see their authority crumbling. They mourn the conduct of younger men and women which offends the community and demeans the young themselves. In the more isolated communities the role of customary laws is more evident though many of those communities are beset by social problems. In any event people move into towns and back into communities so that control is difficult.

The views of the older people must be respected but what do the young think about customary laws and their application to them? In many communities the initiation of young men still takes place, though often with reluctance on the part of those to be initiated. And in the absence of some ongoing teaching process, the impact of initiation may soon be lost. Women are unwilling to surrender the protection the State's legal system offers in the case of domestic

35. ALRC, above n 2, [246].

violence, particularly where the protection offered by customary laws no longer operates or at any rate operates with diminished efficacy.

These are, to a degree, random thoughts but they do point out the difficulties of a blanket approach. On the other hand an approach that permits customary laws to operate only in situations of minimal importance is unlikely to satisfy anyone for whom those laws are important.

However, the State's legal system and customary laws need not be mutually exclusive. In many respects the two can operate in conjunction. It would be unduly limiting to see taking customary laws into account as placing those laws in juxtaposition to the statute law of Western Australia. The State's legal system embraces a range of administrative procedures where greater flexibility is possible. However, when these are situations in which customary laws are envisaged as operating, Aboriginal people would expect some formal recognition of those situations.

In all of this discussion we are inevitably drawn back to the role of law in a society. It does not mean that its members have this constantly in mind; within it is a general awareness of the importance of obedience to the law and indeed the integral place it holds in a people's culture. Even where traditional law seems to carry little weight in some Aboriginal communities there is an appreciation of how that law has served people in the past and for many a hope that it will continue to do so, even though their lives are affected by two laws and two cultures. The task of reconciling the two through recognition lies at the heart of the Reference.

## **15. Customary laws – where no equivalent**

Recognition is usually seen as something which, in one form or another, allows the State's legal system and customary laws to operate together. It is then a matter of seeing whether some positive law, statutory or otherwise, can accommodate customary laws and practices. But there is the other side of the coin, namely, conduct which is offensive to customary laws, in particular misuse of sacred objects and the use of language forbidden to women and children and to men except as part of a ceremony.

This sort of conduct is unlikely to attract the attention of the legal system. Can it be left to the communities to deal with, without at the same time exposing the community to prosecution?

## **16. Complaints about the legal system**

This brings me to another matter which is important for the way in which the Commission approaches its task, in particular the way in which it approaches its report

No Aboriginal person in Western Australia is untouched by the State's legal system. More than that, most have some familiarity with an aspect or aspects of that system. Of course for some it may be as defendant or accused in a criminal proceeding, but I have in mind a much wider range of situations – community organisations, employment, contact with government. The range of situations is no different from those that face non-indigenous persons. Likewise the extent of familiarity will depend upon location.

The complaints indigenous people have about the State's legal system do not go generally to the substance of the law. They go to the way in which the law is administered, often in a way that seems oblivious to Aboriginal culture. Here I am using 'culture' loosely but as a term of wide import.

Very often what indigenous people are seeking is not the exclusion of 'our law', rather the administration of that law in a way that is sensitive to their wishes. A few months ago there was a report on the ABC of a group of women in Broome who say they are dissatisfied with the way in which violence to partners and children is being handled by the authorities. The report was brief but I took their spokesperson to be saying, not that they wish the existing laws to be changed as that they should have the opportunity to see how this most important problem can be lessened through their own ideas and practices.

In many cases where Aborigines criticise the legal system, they are criticising the administration of the system and the lack of their own input. Whether they see the answer in some cases as a separate court or tribunal is another matter. Again, my own experience is that most (though perhaps not all) communities would rather leave it to the State to deal with the most serious criminal offences.

The Commission is asked to consider the need to take into account Aboriginal customary laws and that means the substance of those laws, not merely the administration of the legal system. Nevertheless, it is important to know whether complaints about that system are complaints about the law or its administration.

## 17. Conclusion

The matters raised by this paper reflect a number of issues facing the Commission. The most basic is an understanding of what Aboriginal people expect from the Reference. There is no single response to that expectation.

There are those who would give customary laws a broad operation, at least within their own community. Such an operation could only be available within the limits met by the Reference itself, essentially the extent and manner in which customary laws should be taken into account within the State's legal system.

There are those who seek recognition of the value of certain aspects of traditional law, especially in the maintenance of order within their community. This concern tends to focus on alternative processes for the resolution of disputes, not necessarily to the exclusion of the State's legal system but at least carrying some formal recognition, legislative or administrative.

There are those who seek greater recognition of traditional law in the prosecution and disposition of conduct attracting the State's criminal laws and indeed conduct which offends particular communities without a clear counterpart in those laws.

There are those who seek a greater recognition of traditional law in a range of personal relationships, at the same time accepting the protection offered by the State's legal system.

And there are, I suggest, many Aboriginal people who see traditional law as part of their Aboriginal identity and culture and in that sense wish to maintain the importance of that law even though it may have no practical application in their everyday lives. The recognition they seek may be largely formal, but nevertheless important.

It is for these reasons that there is no single answer to the question of what recognition means to Aboriginal people and how it can be taken into account. It is on that footing the Commission approaches its task.

# Appendix: Understanding Aboriginal law

John Toohey\*

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## The Inquiry

Perhaps I should apologise for the title of this paper. It suggests that I have reached an understanding; that would be too extravagant a claim. 'An Attempt at Understanding Aboriginal Law' would be a more accurate title but unduly self-deprecatory since I have been aided by the writings of legal anthropologists, usually anthropologists rather than lawyers, too few of whom have ventured into this field. Most of all, I have learned from the Aboriginal people themselves with whom I have spoken in Western Australia and in the Northern Territory.

I began with the working title 'The Jurisprudential Basis of Aboriginal Customary Law'. While it has a rather pretentious ring, in a very real sense it conveys what I set out to do. In past years, anthropologists and others have written about law in 'primitive' or, more happily, 'small-scale' societies. Generally, though not always, the treatment of the subject involved looking at the way in which law operates in such a society, often as part of a wider description of the society itself. To say this is not to minimise the work of those writers. Rather, it is to point out that such a treatment may leave unanswered the fundamental question of the meaning of 'law' in such a context, also whether there is anything in the society that answers that term, indeed whether the question can usefully be asked without first making clear what the commentator means by law. The answer to that last question determines the ambit of the inquiry; to some extent it determines the outcome. All this is not surprising. After all, writers in western countries have debated these issues for centuries and the debate has lost none of its fervour:

Few questions containing human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'<sup>1</sup>

The Australian Law Reform Commission's monumental work on *The Recognition of Aboriginal Customary Laws* was able to identify various aspects of Aboriginal law and, in some respects, to recommend its incorporation in the wider system of law prevailing in this country.<sup>2</sup> It was able to do so without probing too deeply into matters of jurisprudence. The Commission's terms of reference spoke of 'Aboriginal customary law' without in any way foreclosing how the Commission might treat that phrase.

There is in the hearts and minds of Aboriginal people a real concern that the legal system to which they, and the rest of us, are subject has failed abjectly to appreciate the strength of their law, to understand its origin and to acknowledge the sanctions that give it force. The effectiveness of their own law is denied to them in many ways but its substitute does not always command the respect which is necessary for a law abiding society, particularly among the young. Aborigines say: 'Our law is strong, it does not change. Your law is weak, it changes every time parliament sits'. Just how far the contrast can be sustained may be a matter of debate. At this point, it is the existence of the concern that needs to be noted.

Comparisons and contrasts between Aboriginal law and Australian law assume that there is some common understanding of what is meant by 'law'. The correctness of that assumption is at the forefront of this paper. It is not just a matter of semantics, it goes much deeper than that. But even at the level of semantics many Aboriginal words do not translate readily into English, at least not without failing to convey the full flavour of the Aboriginal language.<sup>3</sup> In particular, concepts which may be encapsulated in a word or phrase rarely admit of such conciseness in translation. If the touchstones for the existence of law include a political system with an identifiable legislature, executive and judiciary and with a recognisable system of enforcement, it is tempting to conclude that a particular society has no

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1. Hart HLA, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994) 1.

2. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* Report 31 (Canberra: AGPS, 1986). To avoid undue repetition, I shall use 'Aboriginal law' to describe the customary law of the Australian Aborigines and 'Australian law' to describe the statute and common law prevailing in this country.

3. 'The Aboriginal language' is no more than a convenient shorthand expression for the many languages spoken. Alan Rumsey has written: "there are, even now, at least 100 quite distinct Aboriginal languages, and 200 years ago there were many more.": "Language and Territoriality in Aboriginal Australia" in M Walsh & C Yallop (eds) *Language and Culture in Aboriginal Australia* (Canberra: Aboriginal Studies Press, 1993, 191 ).

system of law. That is not to say that it is lawless in the ordinary acceptance of the term, rather that it has no law worth studying. It is in this way that a particular definition may virtually determine the outcome of the inquiry. On the other hand, the existence of institutions having some parallel in our own law may not readily reveal itself. There may be a problem of language or simply a failure to recognise the parallel.

A warning was sounded by Simon Roberts when he wrote:

It has come to be recognized as a central problem of the social sciences that in any inquiry the observer is prone to fit the material under investigation, consciously or unconsciously, into a conceptual and institutional framework of his own, distorting the material as he does so. The hazard is obvious where the subject matter he is trying to understand and describe is located in an alien culture; and the risks are perhaps greatest where the arrangements under observation bear a superficial resemblance to those in our society about which we may have established clear and dogmatic ideas.<sup>4</sup>

The more acceptable approach is to avoid colouring 'law' with western concepts, rather to proceed to examine the society in question against the widest understanding of the term. Perhaps one could ignore the term altogether and simply look at all possibly relevant features of a society. That however becomes a somewhat undisciplined inquiry, one without any parameters. The fact is that, so far as the present context is concerned, the term law has been used so often in relation to Aboriginal society that it is more profitable to give it some meaning, one that is not dictated by non-Aboriginal understanding of the term. Along the way, features of Aboriginal society emerge that seem to have some counterpart in Australian law. Sometimes the comparison is quite striking, though one should be on guard against a too ready conclusion that there are counterparts, particularly of an institutional character. That should not change the course of the inquiry which is essentially one into the Aboriginal understanding of their law.

Aborigines have become accustomed to the English word 'law' representing something imposed on them and as something the transgression of which carries particular consequences. At the same time, they draw a sharp distinction between that law and their own law, especially the changing nature of the former and the immutability of the latter. They point to the activities of parliament and the ever changing laws emanating from it. How, they say, can this be a law which deserves to be obeyed? They express concern that parliament makes laws in public including in the presence of women and children. Again, they ask, how can a law made in such circumstances be respected? One can point by way of response to the fact that in every Aboriginal community young people are marrying in ways that offend the kinship system. Their marriages are not 'straight'. One can say that the system by which young girls were promised in marriage has broken down. These departures from the law will be acknowledged, in many cases with regret, but with the response that the dictates of the law are clear and should be obeyed. A more positive answer to the charge against Australian law is that the changes made by parliament do not overturn basic principles but rather the rules with which those principles are clothed. And while the common law has always involved a process of development and indeed judges make law from time to time, the courts are not free to adopt rules 'if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency'.<sup>5</sup> In any event, the inquiry is into Aboriginal law, not a comparison with Australian law.

Despite the emphasis Aboriginal people place on the timelessness of their law, the law is part of their culture. And in a number of respects that culture has adapted to changes in their society. I am speaking in general terms at this stage, by no means oblivious to the differences that exist in Aboriginal communities throughout the country.

Rituals and songs have been modified, sometimes by those who have acquired a right to those rituals and songs by exchange or trade, sometimes as a result of creative activity. Professor Max Charlesworth has discussed these questions with reference to Aboriginal religion and concluded:

But one must distinguish here between the public rhetoric of Aborigines, which gives the impression that Aboriginal religion is essentially devoted to the faithful replication of the primordial design laid down by the Ancestor Spirits, and the reality of actual life and practice where there is a continual process of development and creative invention.<sup>6</sup>

It would be artificial to isolate Aboriginal law from Aboriginal religion and culture. Perhaps it is the apparent suddenness with which parliament makes changes that leads Aborigines to conclude that Australian law lacks stability. The

4. Roberts S, *Order and Dispute* (Victoria, A'ia: Penguin Books, 1979) 17.

5. *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

6. M Charlesworth *Religious Inventions* (Cambridge: Cambridge University Press, 1997) 65-66.

creative process of the common law is closer to the way in which Aboriginal law responds to change. However, I would not wish to push this analogy too far.

The more one focuses on what are thought to be the indicia of law based on western ideas, the sharper the distinction between the two laws appears. To a considerable extent, however, the sharpness is artificially created by an unduly narrow approach to law by western society. For instance, undue emphasis on the use of force to support legal rules overlooks the wider constraints, some overt, some not, which control behaviour within a particular society.

A European jurist places great emphasis on a Code as the source of law, emanating in a direct and comprehensive way from a legislative body. Against that background, a conclusion might readily be drawn that there is no truly comparable law in a particular society. Someone trained in the common law brings to bear a different approach. Given the critical role of custom and judicial decisions in the development of that law, the less institutionalised features of Aboriginal society do not present a great obstacle to recognising the existence of law in that society.

Some lines of inquiry need to be marked out so that when “law” is used in reference to Aboriginal society there is some understanding of where the inquiry is going. One could eschew the term altogether, but that would make communication difficult. So what sort of a working definition will serve for the purpose of this paper? It is enough, I think, to see law in Aboriginal society as a body of rules, accepted as binding by the society and enforced by recognisable constraints. The flavour of what I am trying to convey by these few words is enhanced by the writings of some anthropologists.

Professor Diane Bell, writing with Pam Ditton, a lawyer:

In Aboriginal English the word ‘law’ is frequently used to encompass both the body of rules which are backed by religious sanctions and to explain the daily behaviour of peace abiding persons. It is all the law.<sup>7</sup>

Dr MJ Meggitt, speaking of the Walbiri:

There are explicit social rules, which, by and large, everybody obeys; and the people freely characterize each other’s behaviour insofar as it conforms to the rules or deviates from them. The totality of the rules expresses the law, *djugaruru*, a term that may be translated also as ‘the line’ or ‘the straight or true way’.<sup>8</sup>

Professor Robert Tonkinson, speaking of the Mardu and the word *juluburdi* (*yulubirdi*), glossed as ‘law’ by those who speak English, says that the term:

connotes a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns that are believed by the Aborigines to have originated in the creative period, the Dreamtime...a concept so central and so pervasive as to be virtually synonymous with ‘traditional culture’.<sup>9</sup>

Professor Nancy Williams, speaking of the Yolgnu:

‘Law’ refers to the existence of an overarching concept of order in human affairs backed by belief in its moral base, and certainty in the application of rules legitimated by the moral order.<sup>10</sup>

## Legal anthropology

The term legal anthropology is one with which anthropologists are more familiar than lawyers. Professor Sally Moore concludes her anthropological approach to law as process with these words:

[T]he classical task of legal anthropology has been to understand the relationship between law and society. The general goal in the past has been to identify the kinds of societies in which certain legal institutions appear, and to examine the kinds of legal procedures, norms, principles, rules and concepts that are found under given social conditions. These interests continue. But a shift that is now under way in some quarters is partly a shift in method, partly a shift in problem. There is a new emphasis on sequences of events – on legal transactions, disputes and rules seen in the dimension of time.<sup>11</sup>

7. Bell D & Ditton P, *Law: The Old and New* (Canberra: Aboriginal History, 1980) 22.

8. Meggitt MJ, *Desert People* (Sydney: Angus & Robertson, 1962) 251.

9. Tonkinson R, *Aboriginal Victors of the Desert Crusade* (Sydney: Cummings, 1974) 7, 70.

10. Williams N, *Law, Laws and ‘The Law’* (Canberra: Australian Institute of Criminology, 1 November 1997) 1 (unpublished paper).

11. Moore SF, *Law as Process* (Sydney: Routledge & Kegan Paul, 1983) 255-256.

The field of legal anthropology has been filled by anthropologists more than lawyers though one of its pioneers was a lawyer by training – Sir Henry Maine, with his *Ancient Law* published in 1861. There followed a period when much of the work on law in pre-literate societies was written by colonial administrators and by missionaries, each group having a particular end in view. The anthropologists whose writings on law are best known – Malinowski, Schapera, Hoebel, Gluckman, Bohannan and Gulliver – wrote just before World War II and since, though in Malinowski's case a little earlier.<sup>12</sup> KN Llewellyn and EA Hoebel's *The Cheyenne Way* (1941) is the best known example of joint research by a law professor and an anthropologist. The omission of Australian names is deliberate; they are mentioned in what follows.

To gain some understanding of the nature of Aboriginal law it is necessary to go to the writings of anthropologists rather than lawyers. A little more than twenty years ago Anthony Dickey wrote:

It seems scarcely credible that despite the immense amount of research that has so far been undertaken into Aboriginal culture studies of traditional Aboriginal law are almost non-existent. Yet from the point of view of academic lawyers and legal scientists generally such is the case.<sup>13</sup>

In 1934 Malinowski had complained that the anthropology of law had been neglected 'to an extent which the layman would find unbelievable and which the specialist realises with a shock'.<sup>14</sup> As it happens, Elizabeth Eggleston's study of Aborigines and the criminal law was published in 1976, about the same time as Dickey was writing. There is a chapter on tribal law which, however, is largely concerned with the conflict between the two laws.<sup>15</sup> While the Australian Law Reform Commission has published its report since then, as I have already noted the task of the Commission involved identifying aspects of customary law rather than looking too closely at the source of that law.

When anthropologists have written about customary law in Australia, it has sometimes been as part of a wider survey of Aboriginal society, as for instance in the writings of RM and CH Berndt, sometimes in the course of depicting a particular society as in the work of MJ Meggitt and T Strehlow. Some anthropologists, Kenneth Maddock, Nancy Williams and Diane Bell come to mind, have put a particular emphasis on Aboriginal law in their writings. But anthropologists and lawyers may have different ends in view when they write about Aboriginal law and their background of studies is different.<sup>16</sup> Writing in 1953 and seeking to distinguish the concerns of anthropologists from administrators in African societies, AN Allott said:

The anthropologists seek to show the social purpose of customary rules, and how they fit into the structure of behaviour. The aim of legal research is narrow, to record those rules of custom or usage which are either enforced in the courts, or are of a kind which the courts would enforce. Appreciation of the part which these rules play in the social structure is therefore irrelevant or, at most, only needed as background knowledge, or for the better elucidation of the meaning of these rules.<sup>17</sup>

Whatever might be the reaction of anthropologists to this conspectus, it hardly does justice to the scope of legal research by jurists such as Henry Maine, Julius Stone, Roscoe Pound and Karl Llewellyn, to mention but a few.

The elusiveness of the subject which language presents is highlighted in the comment by Dr Dickey that 'what anthropologists mean by "law" is usually quite different from what lawyers or legal scientists mean when they use the same word'.<sup>18</sup> It is worthwhile spending a little time on this alleged difference because in the search for the jurisprudence of Aboriginal law it is necessary to settle on some understanding of the law in question. If we are using the term in a non-Aboriginal context, there inevitably will be a constraint on the search because it will tend to focus on those aspects which have their counterpart in Aboriginal society, with the consequence that some aspect which fails to reflect the non-Aboriginal understanding of law may be left out of account.

The distinction drawn by Dickey is questionable. For lawyers, he suggests, law signifies 'those rules which are supported by, or which concern, the legitimate use of force by a socially authorised agent'. For anthropologists, he

12. The writers on legal anthropology are placed in their historical context by Professor Moore (above n 11, ch 7) and by Professor Laura Nader 'The Anthropological Study of Law' in *The Ethnography of Law* (1975) an American Anthropologist Special Publication, 3.

13. Dickey A, 'The Mythical Introduction of "Law" to the Worora Aborigines – Part One' (1975-1976) 12 *UWAL Rev* 350.

14. Malinowski B, 'Introduction' in HI Hogbin *Law and Order in Polynesia* (London: Christophus, 1934) 1xi.

15. Eggleston E, *Fear, Favour or Affection* (Canberra: ANU Press, 1976) ch 9.

16. Williams NM, 'Studies in Australian Aboriginal law 1961-1986' in Berndt RM & Tonkinson R (eds) *Social Anthropology and Australian Aboriginal Studies* (Canberra: Aboriginal Studies Press, 1988) 191 contains a valuable treatment of anthropological writing on Aboriginal law.

17. Allott AN, 'Methods of Legal Research into Customary Law' (1953) 5(4) *Journal of African Administration* 172.

18. Dickey above n 13, 350.

continues, law comprehends 'all the main rules which control the behaviour of a particular society regardless of any sanction, or the type of sanction, attached'.<sup>19</sup> The distinction is, I think, exaggerated because it implies a difference which in fact may not be so great. Force and social control are contrasted yet social control may comprise overt and subtle constraints. If, as Dickey suggests, anthropologists consider the lawyers' concept of law to be code-based, (and I do not think this is the assessment of contemporary Australian anthropologists), they are under a misapprehension. The common law stands in marked distinction to the idea of a code. It has been developed over many years by judicial decisions. And to take but one example, the common law has recognised and given effect to custom. Again, the concept of public policy developed by the common law picks up the mores of the community, its attitude to what is right and what is wrong, and applies those mores to cases of contract, tort and crime.<sup>20</sup>

What some call primitive law and modern law have been placed in stark contrast, not so much because they are fundamentally different but because, lacking a written law, primitive law is examined from the view point of European or, in the present case, English law. In one of the few works on legal anthropology, KN Llewellyn and EA Hoebel approach their inquiry with this preliminary reservation:

When Law comes to take on the form most familiar to us, that of authoritative rules and doctrines expressed in their own queer, technical language, gaining precision from the operations of technical specialists at work in their own peculiar context of technique, then law becomes a world of its own.<sup>21</sup>

The authors claim that the obstacle standing between the study of modern law and of primitive law is the acceptance of the realm of law as being of a different order, 'for if of a different order, then it sets its own premises and becomes impenetrable on any premises except its own'.<sup>22</sup> If one moves the technical side of law out of the central position, if it be seen merely as a 'batch of tools' to get jobs done in a culture, then every item among those tools becomes familiar rather than different. On this approach, authority is a tool, so too are norms and imperatives, procedures and institutions for handling trouble and channelling behaviour. In their words: 'When seen thus, each legal concept becomes a candle to illumine the working of society'.<sup>23</sup>

It is significant that Llewellyn and Hoebel begin their work with what they call Five Histories which illustrate the sort of rules of conduct that are envisaged by use of the word law, or as the authors put it, 'indicators of Cheyenne law-ways'. They appear to be actual histories in the sense of incidents that took place and in that sense can be contrasted with the stories Aborigines tell of how their law came into existence. I deliberately avoid the use of the words Dreaming or Dreamtime at this point because they are labels that have been too readily applied without sufficient consideration of what the terms convey. In the Cheyenne stories are found juristic concepts which set the authors on the inquiry which is the sub-title of their book: Conflict and Case Law in Primitive Jurisprudence.

An approach along these lines clears out of the way much dead wood in thinking about Aboriginal law. It still leaves a number of questions, in particular, when we fasten on to some aspect of Aboriginal society are we looking at anything more than good manners or private morality? In any event, is that a useful distinction to make in this context? In the English language, unconscionability might once have been thought as relating to aspects of private conduct but it has now assumed an important part of the law – in equitable doctrines and in statutes empowering the courts to strike down harsh and unconscionable contracts. Indeed equity itself developed as a means of tempering the common law with ethical concepts.

The report of the Royal Commission Into Aboriginal Deaths In Custody contains a report by the Aboriginal Issues Unit of the Northern Territory. One section speaks of 'the body of norms, rules and beliefs which our people call "law" or "Tjukurrpa" or "Tjurruka"'. The Unit describes law in these terms:

[A] system of rights and obligations adhered to by members of the group, partly because of the threat of penalties and punishment, but also to avoid the more common, everyday pressures of social life which induce people to behave socially and properly: the gossip, ostracism, banishment, withdrawal of services and cessation of exchanges.

The Unit expresses the Aboriginal understanding of law as:

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19. Ibid.  
20. For a recent illustration, see *Ridgeway v The Queen* (1995) 184 CLR 19.  
21. Llewellyn KN & Hoebel EA, *The Cheyenne Way: Conflict and caselaw in primitive jurisprudence* (Norman: Uni of Oklahoma Press, 1941) 41.  
22. Ibid.  
23. Ib, 42.

[A] cosmology, a worldview which is a religious, philosophic, poetic and normative explanation of how the natural, human and supernatural domains work. Aboriginal Law ties each individual to kin, to 'country' – particular estates of land – and to Dreamings. One is born with the responsibilities and obligations which these inheritances carry.<sup>24</sup>

The eminent anthropologist, WEH Stanner, essayed that Aboriginal customary law conflicted in almost every respect with the root assumptions of Australian law. In his view, the two were irreconcilable in notions of tort and crime, and procedures of arrest and trial, in concepts of admissible evidence as well as in other respects.<sup>25</sup> Much has happened since Stanner wrote, in particular the land rights movement and the detailed pictures this has presented of Aboriginal society. In any event, I take him to be saying not that this apparent irreconcilability meant that there was no such thing as Aboriginal law but rather that the approach taken by legal writers led inevitably to such a conclusion.

Just what is meant by Aboriginal law depends on a more detailed consideration of certain aspects of Aboriginal society. That is something I shall pursue later in this paper. Of the existence of that law there can be no doubt. One of the most powerful affirmations by someone not Aboriginal was made by Blackburn J in *Milirrpum v Nabalco Pty Ltd.*, when he said of the Yolgnu of north-eastern Arnhem Land:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influences. If ever a system could be called 'a government of laws and not of men', it is that shown in the evidence before me.<sup>26</sup>

## The source of Aboriginal law: the Dreaming

Anyone who inquires into the existence or content of Aboriginal law inevitably, and fairly quickly, encounters the Dreaming or the Dreamtime. (Or it may be the Tjukurrpa though I am not to be taken as suggesting that the one is necessarily synonymous with the others.) I am not sure that Aboriginal people have been well served by these expressions, notwithstanding their attractiveness. They tend to colour our understanding of Aboriginal law as having not only a mythical quality but, more importantly, as being unlikely to have a serious practical operation.

In *The World of the First Australians*, the Berndts speak of the formative or creative period 'when the foundations of human life were established once and for all'.<sup>27</sup> They instance various terms used in different areas throughout the continent and conclude: 'All these have been variously translated as "creative period", "ancestral times", "Dreaming", "Dreamtime", "Eternal Dreamtime", and so on'.<sup>28</sup> As the Berndts point out, Dreaming is a rather unfortunate choice because it fails to carry the idea that the foundations have continued as integral to Aboriginal society. Dreaming, they say, is a direct translation of one of the relevant native words, hence its use. That is not to say that Aboriginal people fail to distinguish between ordinary dreams and the time perspective which Dreaming conveys.

Professor Nancy Williams has discussed the significance of 'Dreaming', in particular two possible explanations for the use of the term. One explanation is that because Aborigines spoke of times 'so distant that no human link could be shown', English speakers used the term in order to highlight the lack of any connection with reality 'except as distorted and dismembered reflection, sometimes even embarrassing and more to be suppressed than explicitly related to a reality with moral order'. Anthropologists kept the term but meliorated its meaning. The other explanation lies in the translation of Aboriginal languages, particularly Elkin's view:

The concept 'dreamtime' arose out of Spencer and Gillen's use of the Aranda word Alcheringa (*Altjiranga*) in their classic *The Native Tribes of Central Australia* (1899) to denote the mythic times of the ancestors of the totemic groups.<sup>29</sup>

Professor Williams explores the 'language explanation' at some length. It is unnecessary for me to do so.<sup>30</sup>

In discussing the Mardu people of the Western Desert, Professor Tonkinson has said:

The profoundly spiritual worldview of the Aborigines rests on a complex set of beliefs and behaviours commonly referred to as the Dreaming, or Dreamtime, which is typically described as the period of creation... At one level of

24. Australian Government *Royal Commission into Aboriginal Deaths in Custody National Report* (Canberra, 1991) Vol 5, Appendix D(i) ¶ 2.3.1.

25. Stanner WEH, *White Man Got No Dreaming: Essays 1938-1973* (Canberra: ANU Press, 1979) 93.

26. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 267.

27. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life: Past & Present* (Canberra: Aboriginal Studies Press, 1996) 229.

28. *Ibid.*

29. Elkin AP, *The Australian Aborigines: How to understand them* 4th edn (Sydney: Angus & Robertson, 1964) 210.

30. Williams NM, *The Yolngu and Their Land* (Canberra: Australian Institute of Aboriginal Studies, 1986) Appendix 1, 234–37.

meaning this is an indistinct era in the distant past, a time long, long ago ... when the continent was transformed from an empty and featureless plain by the activities of a great number of ancestral beings.<sup>31</sup>

The Dreaming beings were human-like but could assume animal form at will. As they moved through the country they created distinctive forms such as a creek bed, brought into existence by the movement of an ancestral snake, or a gap between hills opened by a blow from the stone axe of a fighting lizard man. Ultimately, these beings 'disappeared or metamorphosed into stones or other natural features or into celestial bodies'. But their spiritual essence remains. The Mardu see their entire culture as the legacy of the Dreaming epoch, a legacy which

is now connoted in the use of the English word 'law', the coining of which suggests that they see parallels in terms of obedience to a set of powerful dictates and of punishment for non 'conformity since, in both systems, human agents are involved in the punishment process.<sup>32</sup>

The denial by the Mardu of human creativity in favour of the world – creative acts of spiritual powers means that the kinship system, marriage rules and social categories are treated as part of the master plan bequeathed by the creative beings of the Dreaming and also as imperatives, because the law demands conformity to them. The imperatives embodied in the Dreaming are the Law which locates the origin and ultimate control of power outside human society, that is from the spiritual realm. The creative beings demand conformity to the Law in a proper performance of ritual, in return for which they will ensure the reproduction of earthly society through a continuing release of life-giving power into the physical and human world.<sup>33</sup>

The Ngarinyin people form the largest of the three Wandjina tribes of the North West Kimberley Region. Their country lies north and west of the Gibb River Road. Hannah Rachel Bell, who worked closely with the lawman David Mowaljarlai (now deceased) over many years, has written:

Ngarinyin Law is not man-made. Rather, it is constantly evident in the dual essence of the natural world. Ngarinyin Law is the Law of the sacred revealed in the daily life of ancestral beings who are present in the landscape, in nature, and in art forms. These beings cannot be ignored, their stories cannot be forgotten, and the Law that they generate cannot be changed. To do so would be to profane the sacred.<sup>34</sup>

Father Kevin McKelson was at La Grange (Bidyadanga) for 30 years or more. He has written:

When asked by me for the Aboriginal word for law, my Aboriginal friends would invariably translate it as *pukarrikarra*, *jukurra*, *jumangkarni*, *mangarrikarra* or *manguny-ja* according to the language each one spoke.<sup>35</sup>

*Pukarri*, he says, means dream and, with *karra* added to it, means dreams or a state in which there are many dreams. The composite is the word for Dreamtime in *Yawuru*, referring to a very long period of time,

during which events happened which shaped the history of the people locking them into a certain view of the world and to a definite pattern of behaviour.

*Manguny* means always and, with the suffix *ja*, formed *mangunja* meaning 'always from', implying a tradition which is unchanging.<sup>36</sup>

The picture presented then is one of ancestral beings who shaped the physical world in a way that brought into existence the laws of nature and the laws that regulated social behaviour. No sharp distinction was made between the two.

It is the work of men, especially in the great ceremonies, to 'follow up' the Dreaming; that is, to maintain the universe by means of 'rites of passage' for the living and the dead to provide for the fecundity of natural species, etc. Any infraction of the law is believed to invite danger and will be punished by human or supernatural agency or both.<sup>37</sup>

Although an understanding of Aboriginal law inevitably leads into particular areas of conduct and the consequences that follow, that is part of the creative acts of the ancestral beings. Father Worms, speaking of one such being, writes:

31. Tonkinson R, *The Mardu Aborigines*, 2nd edn (Sydney: Holt Rinehart & Winston, 1991) 20–22.

32. *Ibid.*

33. *Ibid.*, 106.

34. Bell HR, *Men's Business, Women's Business: The spiritual role of gender in the world's oldest culture* (Rochester: Vermont: Inner Traditions, 1998) 135.

35. McKelson K, *Japulu Kankarra: The Father in Heaven* (Sydney: Nelen Yubu, 1995–1996) 22.

36. *Ibid.*

37. Maddock S, 'Can There Be a Sovereignty of Law?' in Wright B, Fry G & Petchovsky L (eds) *Contemporary Issues in Aboriginal Studies: Nepean College of Advanced Education Proceedings of the First Conference on Aboriginal Studies* (Sydney: Firebird Press, 1986) 110.

Ancient cave paintings in Western Australia represent *Bundjil* accompanied by a dingo named *Wirangen*. When he was living on earth *Bundjil* fashioned its surface in a way that gave it its present appearance: the earth itself is eternal. Moreover he institutionalised the 'Law', that is to say the order of the world which is eternally operative.<sup>38</sup>

Because the law is not of human origin, the people cannot change it. And if it is not obeyed there will be a return to the state of lawlessness that existed before the work of the mythical ancestors.

It should not be assumed that the activities of the mythical ancestors presented a model for human behaviour:

The *Djanggal* Brother and Sisters commit incest. *Jurawadbad* kills his own wife and mother-in-law. *Bomboma* the trickster rapes a young girl, killing her in the process. Ancestral men steal, from women, the first sacred objects. *Njirana* spends most of his time following the Seven Sisters, the *Gunggaranggara* women. The two wives of *Balangudjalngudjalng* the white cockatoo are unfaithful; pretending to go out hunting, they spend all their time playing with other men until finally he tricks them into entering into an inaccessible cave, high in the rocks, then pulls away the tree-ladder and leaves them to die. And so on.<sup>39</sup>

The co-existence of a cosmic creative force, personified in some way and with very human failings, is of course well known. Ancient Greece is as good an example as any.<sup>40</sup> But as L. R. Hiatt has observed:

behind the articulated trivialities and obscenities of [Aboriginal] myths lies a mute striving, most clearly evident in their sacred rites, to express the idea of an exalted and transcendent Power, a Father, Mother and Maker.<sup>41</sup>

Whatever the frailties of the mythical ancestors, their power to lay down precepts of behaviour for those who come after them cannot be questioned.

Anyone seeking to understand Aboriginal law is conscious of the many communities throughout Australia and of differences between them. This might be thought to be a barrier to making generalisations. Certainly it imposes a level of caution. Nevertheless, more than one commentator has remarked in one form or another on 'the remarkable homogeneity of social and religious life throughout the continent'.<sup>42</sup>

Sheila Maddock suggests that normally we would associate systematic coherence on such a scale with an efficient political organisation but that is not the case with Aboriginal society. Some would say that 'primitive' people have a simple culture and that what is simple is much the same everywhere. However, Aboriginal religious and social life is extremely complex and elaborate. 'The kinship and social class systems of Australia are among the most complicated in the world'.<sup>43</sup> Many of the institutions of Aboriginal society actually provide for a systematic interaction of people over a wide area, principally through the kinship system. The system of moieties is so elaborate that everyone an Aborigine comes into contact with, who is another Aborigine, is likely to be related to that person.<sup>44</sup> This relationship determines how they will act in relation to each other.

And people are linked by the journeys of the mythical ancestors who travelled great distances. The Berndts have observed:

If the situation we find in such places as the Great Victoria and Western Desert, through the mountainous core of Central Australia and up the Canning Stock Route to the eastern Kimberleys, in the Victoria River areas and across the Northern Territory to Arnhem Land is any guide, hundreds of such tracks or roads criss-crossed one another right through the Continent, representing, at least potentially, a net-work of intercommunication.<sup>45</sup>

The Wadi Gudjara, the Berndts have noted:

wandered across almost the whole Great Victoria and Western Desert, passing through dozens of local group territories and covering possibly twenty-five to thirty dialect or language units.<sup>46</sup>

38. Worms EA, *Australian Aboriginal Religions* (Kensington: Nelen Yuby Missiological Unit, 1986) 108.

39. Berndt & Berndt, above n 27, 337.

40. Homer's *The Iliad* attributes to the gods and goddesses on Mount Olympus some very unattractive qualities.

41. Hiatt LR, *Arguments about Aborigines* (Cambridge: Cambridge University Press, 1996) 104.

42. Maddock S, above n 37, 109.

43. Ibid.

44. 'Moiety': a system of tribal classification into two divisions or moieties. They are generally exogamous, that is, a person must marry into the opposite moiety. The division is relevant for social and ceremonial purposes.

45. Berndt & Berndt, above n 27, 243.

46. Ibid.

A group of mythical beings, the *dingari*, moved over the whole Western Desert. The story of the Two Men, of which people speak in Broome, tells of their journey from places in the south such as Jigalong, linking people over a great area of the North West of Western Australia.

People at Borraloola speak of the Dreaming that came to them from Queensland and continued south to the Roper River and beyond. In western Arnhem Land, among the *Gunwinggu*, a major myth concerns an ancestral woman who came from over the sea in the direction of Indonesia. In some accounts, she disappeared in the direction of Yirrkala. In eastern Arnhem Land the journeys often relate to the Two Sisters who arrived from an island far to the east, the land of the dead some say. As they moved inland they changed shape, one of the transformations being into the Wagilag Sisters whose story is recounted later in this paper.

I have a bark painting by Laklak Ganambarr whose homeland is Rorruwuy in north-east Arnhem Land. The painting relates to the Dhuwa moiety and the arrival by canoe of two sisters from an island far to the east. The two women, known as *Djan'kawu*, are referred to as "the two who created the world". The artwork information continues:

After arriving at Yalanbara in Rirratjinu clan country they commenced to journey across all Dhuwa land and as they went they sang their special ceremonial song language and created the minutiae of the environment up to the shape of the land itself. As they travelled through the land they plunged their *mawalan* (sacred digging sticks) into the ground to create sacred fresh water or *milnurr*. They gave birth to the first members of each *Dhuwa* clan and gave these new people their distinctive clan dialects or languages.

These accounts of the Dreamtime ancestors have their counterparts throughout Australia and in some cases, the Two Sisters for instance, there is a striking similarity over long distances. And what the accounts bring home is that the process of creation was not only of the physical landscape but of language, law and social behaviour.

The *Wandjina* of the Kimberley region, which are associated with the *Ngarinyin* and with the *Wanumbal* and the *Worora* (also spelled *Worrora*), occupy a somewhat unusual position in the creation story. They are more localised than some of the mythical beings just mentioned. And their image is to be found still in rock shelters of the country of the three tribal groups. People speak of them as the source of law and their image is a recurring theme of the senior painters of the region. At the same time there are other mythical ancestors such as the *Wunggud*, whose waters were created by the Snake, which play their part in the creation.

Whatever the origin of the term 'Dreaming', it has gained wide currency throughout Australia, even among Aborigines. Strike up a conversation about the law and where it comes from and the answer will usually involve a reference to the term. However, the Yolgnu of north-eastern Arnhem Land tend to resist that terminology because it suggests a lack of reality in their law. Some will use it when speaking with *balanda*, that is non-Aborigines, because *balanda* themselves use it. And that is no doubt how the terminology has taken on the currency that it has.

It has been said that *madayin* is the name for the complete system of law of the Yolgnu, a term embracing the law itself, the instruments and objects that encode and symbolise the law, together with oral teaching, names, song cycles and sacred places.<sup>47</sup> Inevitably there are difficulties of language and translation in seeking to come to grips with conceptual matters. I note that Professor Williams gives *madayin* a more restricted meaning, implying something of greatest value, often signifying something sacred.<sup>48</sup> Whatever the reconciliation, if there be one or needs to be one, we should be careful of using English expressions such as Dreaming or Dreamtime as if somehow they offered a ready explanation for a complex aspect of Aboriginal society.

In particular, there is nothing unreal or dream-like about the law which the phenomena brought into existence nor is there anything transient about that law in its application to a group or to an individual.<sup>49</sup>

## Origin of the law

I have asked many Aboriginal people where their law comes from. The answer is generally in terms of their mythical ancestors. But a more direct retort came from Lucy Marshall, a Nigina lady living in Derby: 'Why do you ask where our law comes from? Where does your law come from?' An answer in terms of parliament and the courts hardly serves

47. Aboriginal Resource and Development Services Inc. *Information Paper No. 7 – The Madayin* (Darwin: ARDS Inc, 1996) 1. ARDS is an organisation based in Yirrkala, north east Arnhem Land. Its executive officer is Rev Dr Djinyini Gondarra, OAM, a Yolgnu and a member of the Uniting Church with a deep knowledge of Yolgnu law and a concern for its recognition by Australian law.

48. Williams, above n 30, 29, 45-46, 65, 86, 243.

49. Charlesworth, above n 6, 72-73.

to explain the authority of Australian law or the historical tradition which underpins it. The responses of Aboriginal people must be seen in the same light, illuminating but not necessarily comprehensive.

There are many stories of how the law came to be made known to Aboriginal people. One is told by David Mowaljarlai:

During Wodoi and Djingun time there was a man called *Wibalma* who made sacred things. He kept them in a workshop, at a distance from where he lived. He had a wife who was old and blind.

One day, when he was out hunting, Wodoi and Djingun came to visit him. They came up and asked the old woman. "Where is Wibalma?" And she said, "Out hunting. He'll be back soon."

So the two men went over to the workplace and took a whole lot of things away with them.

Wibalma was a banman – he got a feeling out there in the bush, where he was hunting. He came straight back. [Medicine men have an extended psychic perception.] He said, "What happened here?"

His wife said, "Two men came here, Wodoi and Djingun. I heard them rattling there, but I am too blind to see what was going on. It was silent after that. They never came back to me, they went off."

He got really angry then. He took a boomerang. He got so angry he threw that boomerang and it split an ironwood tree, which we call *djinnang gang*.

He split this tree in half with his boomerang. But then he said, "Ah, never mind I'll make a new Law from this tree that was split" And he made a new Law.

Wodoi and Djingun came to the community, where they were stopping. They said, "We have a Law. We stole it from this man."

The next day Wibalma followed their track. Where they walked on stone, he could see their track; but where they walked on the plain ground, he could not see their track. He had to go to the rocky places and find their tracks there.

This is how the Law came to be. The sand ground, where he did not see their tracks, represents the space of time since Creation and the introduction of the Law.

Then he came up to where they were and the Council got them all together. They apologised to him, these two, Wodoi and Djingun: "Very sorry, but we got law now. We had to get this thing, a covenant to put agreement on, to make Wunnan a law. That is why we took it away."

*Maggan*, Wodoi and Djingun said. *Maggan* means 'no got'.

They didn't have anything to relate to in life. So Wibalma said, "All right, I won't be angry now. I was angry in the first place, but I split another tree with the boomerang to make a new one."<sup>50</sup>

The story, as recounted to Dr Dickey and Hannah Rachel Bell, takes events rather further. When the three men met up, Wibalma (Ngyarri in the Dickey account) accepted the idea of sharing the law and let the others keep the sacred objects they had taken. In this way the law started.

In Part Two of his article, Dr Dickey discusses the relationship between the law and the sacred boards of the Worora. He makes the point that

the boards in question have never had any inscription, writing or, hieroglyph on them which has objectively symbolized any facts or information; the pre-contact Aboriginal tribes were pre-literate and the Worora were no exception.<sup>51</sup>

That does not mean that the markings are not distinctive and do not carry a message to the Worora. Not surprisingly, Aborigines steeped in their own law make comparisons that may help others to understand that law and the society in which it operates. To this end some informants used expressions such as 'like the Bible' and 'like the Ten Commandments' when explaining the boards. Comparisons like these and others I will mention in other contexts help to understand the significance of what is being told. They should not obscure the search for what is the true understanding of Aboriginal people.

After considering the relationship between the sacred boards and the law in the myths, Dr Dickey concludes that regardless of the precise relationship,

it is clear that the tribal law of the Worora was not deemed to be 'God given' as was the law of most Aboriginal tribes.<sup>52</sup>

50. Mowaljarlai D & Malnic J, *Yorro Yorro: Spirit of the Kimberley* (Broome, WA: Magabala Books, 1993) 150–52. (The story also appears in Dickey, above n 13, 363–364; and in Bell, above n 34, 142–43.)

51. Dickey, above n 13, 480.

52. *Ib.*, 484.

The reference to 'the law of most Aboriginal Tribes', it would appear, is to the statement by Professor R. M. Berndt:

The 'law' to [Aborigines] is 'God given', including all things associated with the Dreaming era.<sup>53</sup>

One might fairly ask whether in truth there is any irreconcilability here. Once again, we are in the realm of language, this time English as much as Aboriginal. It would be necessary to look more closely at what Professor Berndt meant by 'God given'. Clearly, he was using it in the broad sense of embracing all things connoted by the Dreaming. Does this not include the activities of the mythical ancestors, including those sacred objects which in some way encoded the law? Over the years boards have been damaged or destroyed but the replacements are treated as conveying the original messages. To stray into analogy, the replacements are not statutory amendments.

The narrative of the two Wagilag Sisters has been described as 'a Creation Story with wide significance for the Dhuwa moiety among the Yolngu of Central and Eastern Arnhem Land'.<sup>54</sup> It has also been described as a narrative

that relates the encounter between human and animal ancestors, who in the process create and make sense of their world and its creative forces. It provides the basis the key aspects of the Yolngu social life and its rituals, as expressed in ceremony and song, as well as in the laws relating to authority, kinship, territory and, significantly, marriage.<sup>55</sup>

There is more than one version of the story but in each case its significance is much the same. The story of the Wagilag Sisters is commonly associated with Witiitj, the Olive python. It relates how the two sisters, the older of whom has a child and the younger of whom is pregnant, leave their home in the south-east. They are followed by clansmen and reach Ngilipidji or the Stone Country of the Wagilag clan, from where they get their name. They camp at Mirarrmina. Their actions incite the python, in some accounts because one of the sisters pollutes the waterhole and the younger sister gives birth. Witiitj, the Python, creates a flood as the first monsoon pours down its rain. The sisters dance and sing to deter Witiitj but eventually he enters their hut and swallows them and their children. As a consequence Witiitj develops a terrible stomach ache, the pain of which becomes so great he falls to earth and vomits the sisters, though not the children who belong to the opposite moiety, the Yirritja. There is more to the story than that but essentially it serves to explain how the women, through their irregular behaviour precipitated the laws relating to marriage and social structures and invented ceremonies in response to the threats of Witiitj. It also explains how the power of Witiitj summoned the first monsoon and, in the process, created the seasons. The actions of Witiitj also serve to identify the proper relationship between the moieties. The exhibition that took place in the National Gallery of Australia in 1997 brought together a collection of paintings which depict the story of the Wagilag Sisters in its many facets.

Placing Aboriginal law within the Dreamtime disassociates it from the vagaries of man-made law but at the same time might be thought to diminish its practical operation. In this regard it is interesting to see how the law is viewed by the Yolgnu.<sup>56</sup> The Yolgnu reject their law as part of the Dreaming because it is inimical to the reality of their law. Their word for 'law' is *rom*, a word which Professor Williams has described as embracing a number of meanings – the religious beliefs expressed in ritual, binding custom and as designating all Yolgnu rules of conduct and customary behaviour in contrast to those of whites.<sup>57</sup>

There is a Yolgnu term *Madayin* which includes but is wider than *rom*. The ARDS paper describes it as including:

all the peoples law (*rom*), the instruments and objects that encode and symbolise the law (*Madayin girri*), oral dictates, names and song cycles and the holy, restricted places (*dhuyu nungat wana*) that are used in the maintenance, education and development of law.<sup>58</sup>

The *Madayin* was not brought into existence by humans; it was there from the creation of the world. The word *nurrngitj* literally means the charcoal or black ashes left over from a fire. The Yolgnu say that their *Madayin* or *rom* comes from the *nurrngitj*, that is, the ancient practice of the people and the established rule of law. There is something of a problem here in that the *Madayin* preceded humankind. Perhaps it is not so much that the *Madayin* comes from the *nurrngitj* as that the *nurrngitj* exemplifies aspects of the system of law. Whatever the correct explanation, if indeed an explanation is called for, the Yolgnu are at pains to emphasise the strength and comprehensiveness of their law.

53. Berndt RM, 'Law and Order in Aboriginal Australia' in RM & CH Berndt (eds) *Aboriginal Man in Australia* (Sydney: Angus & Robertson, 1965) 174.

54. *The Painters of the Wagilag Sisters Story 1937–1997* (Canberra: National Gallery of Australia) 9.

55. *Ibid.*

56. In what follows, I have relied on Aboriginal Resource and Development Services Inc *Information Paper No 7*, above n 47.

57. Williams NM, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 107–109.

58. ARDS, above n 47, 1.

Critical to our understanding of these concepts which underly Aboriginal law is the rendering into English of the relevant languages. Father McKelson has been quoted as saying, in regard to the Kimberley language groups with which he has become familiar over the years:

They have a distinct law language, just as we do in our legal system, describing behaviour in the Dreamtime, which is the pattern for behaviour today, and if this behaviour pattern is transgressed people are punished.<sup>59</sup>

This comment was made in the context of a general discussion about the importance of language in the preservation of Aboriginal culture. I took the opportunity to ask Father McKelson, when I was speaking with him in Broome, what he meant by ‘a distinct law language’. I understood him to be referring in particular to the vocabulary of terms which identify the progress of a young boy to manhood. The words themselves are largely related to ceremonies in the course of which aspects of the law are imparted.<sup>60</sup> Language is a vital element of any culture and the contemporary significance of Aboriginal law is very much tied to the use of Aboriginal language. A different and not directly related issue is the use of Aboriginal terms to explain to Aborigines proceedings in the courts in which they are involved.<sup>61</sup>

## Aspects of Aboriginal law

This is not a treatise on Aboriginal law; it is an attempt at understanding the basis of that law. The only satisfactory way to reach that understanding is to see how Aboriginal communities meet situations in which their law, that is their rules of conduct, is transgressed. We cannot observe traditional law in a completely pristine state, that time has passed. In particular, conduct which once would have resulted in death will rarely do so today. This does not mean that the conduct has lost its seriousness. It does mean that the impact of Australian law dictates some other form of punishment. A consequence is that the victim who responds according to Aboriginal law may become an offender in Australian law. And of course the same fate may await those Aborigines whose responsibility is to enforce the law. The situations I later describe are to some extent random and they are to some extent anecdotal, except where they have been recorded in the writings of anthropologists and others. Anecdotal simply means that the situations have been instanced by Aborigines in the course of talking about their law.

The kinship system is critical to an understanding of so much of Aboriginal society, including law. The complexities of the system are discussed in the works of many anthropologists and also in the reports of Aboriginal Land Commissioners made under the *Aboriginal Land Rights (Northern Territory) Act 1976*. There is one relationship which it is important to understand in order to see how traditional law operates. In what is usually referred to as the Top End, the local descent group responsible for an area of land generally comprises *mingirringgi* and *djunggayi*. The *mingirringgi* are those whose descent is traced patronymically. The *djunggayi* for an estate in land are the children of the female members of the patronymic clan. Questions have arisen during the hearing of land claims under the *Land Rights Act* whether *djunggayi* and *mingirringgi*, or *mingirringgi* alone, should be identified as the traditional Aboriginal owners of the land being claimed. It is the *djunggayi* who control ceremonies and it is they who have the ultimate responsibility to ensure that knowledge is maintained for the benefit of the *mingirringgi*.

In desert areas, and again I am generalising, there is a similar relationship. The terms used are *kirda* and *kurdungurlu*, the first equating with *mingirringgi* and the second with *djunggayi*. The *kurdungurlu* are the sons and daughters of the female members of the patriline and they are *kurdungurlu* for the country of the patriline. In the desert they are sometimes referred to as managers; this points up their responsibility for the land and the ceremonies performed on it and the knowledge which goes with it, though they may not answer the description of traditional owners in terms of the *Land Rights Act*. In what follows I shall speak only of the *djunggayi*, intending thereby to refer to the patriline of the mother, by whatever name it is called.

At this point I should say that although the relationship of Aborigines to the land is truly part of Aboriginal law, deriving as it does from the mythical ancestors who formed the environment, I regard this as a topic in its own right. It has been the subject of a great deal of comment – in the writings of anthropologists, in the reports of Aboriginal Land Commissioners and in judicial decisions. The relationship was expressed in elegant terms by Professor Stanner when he wrote:

59. Whittaker M, 'Tongues Tied' *The Australian Magazine* 23-24 January 1999, 21.

60. The words and their significance appear in McKelson K, *Topical Vocabulary in Northern Nyangumarta* (Broome: Aboriginal Studies Dept, Nulungu Catholic College, 1989) 57-58.

61. See Wurm SA, 'Aboriginal Languages and the Law' (1963) 6 *UWAL Rev* 1.

If Aboriginal culture had an architectonic idea I would say that it was a belief that all living people, clan by clan, or lineage by lineage, were linked patrilineally with ancestral beings by inherent and imperishable bonds through territories and totems which were either the handiwork or parts of the continuing being of the ancestors themselves.<sup>62</sup>

The reference to “patrilineally” should not obscure the significant role of women to which reference is made later in this paper.

Perhaps the most obvious illustration of when traditional law comes into play is when one person dies at the hands of another. It is for the family of the deceased to respond and traditionally that was by killing the offender. It was the *djunggayi* who assumed this responsibility though in some circumstances, if for instance the offender had left the area, it was possible to engage someone from outside the family for the purpose. While in conversation people spoke in terms suggesting strict liability, it is apparent that in some situations such as accidental death a response, or at any rate a commensurate response, was not required. But in those cases where a commensurate response was required, the family of the deceased stood to suffer themselves if they did not act accordingly. If the killing was at the hands of a member of the family of the deceased, the family was still called upon to make a response against the offender. Discussions I had at Borraloola, Katherine, Mataranka, Timber Creek and Yirrkala emphasised that it was for the family of the deceased, through its *djunggayi*, to make the response. The decision was not in the hands of all the ‘elders’ or of the community generally. In north east Arnhem Land the situation is complicated by the *ringitt* or alliance formed by various clans. This gives the *djunggayi* of other clans within the alliance authority as to the appropriate way of dealing with an offender.

But again, the emphasis is on the kin relationship rather than on some broader basis of authority such as a council.

It is one thing to record the importance of kinship in dispute resolution. It is quite another to spell out the complexities of that relationship, for instance the power of discipline a man may have over those whom he calls ‘sister’, a much wider relationship than is contemplated by non-Aborigines. And, as Ronald Berndt has pointed out:

The problem in law, in relation to kinship and its associated range of roles, is not so much how kin are formally supposed to react in a situation of conflict, relevant as this is, but how they actually respond when each person concerned acknowledges ties with *all* the other participants. Choice enters here, and the outcome is not so easily predicted.<sup>63</sup>

I have used the term ‘family’ because that is the term used by informants. It is both narrower and wider than ‘clan’, narrower because it does not extend back through the patriline but wider because the rule of exogamy ensures that members of more than one clan are involved. Depending on the size of the families of the victim and the offender, the participants may reflect the communities at large. That will not necessarily be the case.

Despite their familiarity with the physical facts of death and bodily decay of all living things, Aboriginal people tend to look for the cause of the death of a human being beyond what is immediately apparent. They do not ignore the obvious when one man spears another. But they look for something beyond the obvious.

Except in regard to the very young or the very old, or from the viewpoint of a person deliberately responsible for the killing, the impression is that any given death is unnatural; that it should not have happened and would not have happened had it not been for some departure from the normal course of events, some active malevolence on the part of another human being.<sup>64</sup>

The inclination is to see a death as due to sorcery. As Kenneth Maddock has pointed out:

sorcery beliefs provide a conceptual framework within which misfortune can be understood personally, not only in the sense of happening to persons but in the sense of being made to happen by persons. This is less a rejection of the evidence of the senses than an attempt to get behind appearances to the real cause of events.<sup>65</sup>

At Borraloola men spoke of a victim being rendered unconscious, the kidney fat removed and replaced with straw and the victim being told that he would die within the next day or so. But this was an explanation, given retrospectively, of the death, not necessarily an account of a sequence of actual events.<sup>66</sup>

62. Stanner WEH, ‘Some aspects of Aboriginal religion’ (1976) 9(1) *Colloquium* 19.

63. Berndt, above n 53, 172. Chapter 7, in which this quotation appears, contains illustrations of the place of kinship in the resolution of disputes.

64. Berndt, & Berndt above n 27, 458.

65. Maddock K, *The Australian Aborigines, A Portrait of their Society* (London: Allan Lane, Penguin Press, 1972) 162.

66. The removal of kidney fat as a form of sorcery is mentioned in RM & CH Berndt, above n 27, 326- 327. See also AP Elkin *Aboriginal Men of High Degree* (Sydney: Australasian Publishing, 1946) 60–62.

The identity of the immediate killer may of course be well known; the killing may have taken place in front of witnesses. If it is not known, there will be an 'investigation' or 'inquest' by the appropriate person or persons. There may be footprints; there may be a clue in the direction in which the head of the deceased falls while being carried to burial or in the direction in which bodily fluids leave a corpse. In north east Arnhem Land I was told that pins (wood or bone once, steel now) may be inserted into the knees of a deceased as an aid to identifying the offender.<sup>67</sup>

Retaliation may take several forms. The offender may be killed, probably covertly, and perhaps employing sorcery to bring about the death. The victim's family may in a formal way confront the offender's family and demand satisfaction. That satisfaction may be offered and accepted through compensation or through payback, a practice which is discussed later in this paper.

The kinship system also dictates the proper relationship for marriage and clearly distinguishes between straight marriages and wrong marriages. Once, the person who entered into a wrong marriage would be punished by the family. Although Aboriginal people still uphold the idea of straight marriages, they acknowledge that many young people enter into wrong marriages. No longer, it would seem, is this a transgression which is punished. More likely, an appropriate ceremony will 'straighten things out' by placing any children within the mother's skin and thereby maintaining a proper kinship. Nevertheless accepted relationships are disturbed because, for ceremonial purposes, the children may have to follow, not their natural father but those whom their mother might have married straight.

Much the same can be said about the system of promised marriages. The young girl who is promised in marriage to a man from another clan may marry the man of her choice if he undertakes to make certain payments or perform certain services for the man to whom the girl was promised. Again, people assert that this would not have been permitted years ago but it has come to be accepted as a way of meeting changed conditions.

Diane Bell recounts a conversation with an Aboriginal woman at Warrabri (now Ali Curung) regarding the apparent breakdown in the marriage code among girls living in a town camp. 'Does this mean', she asked, 'that the Law is breaking down?' 'No', was the reply, 'people just get lazy. The Law is still there'. Bell comments: 'Of course in time the Law becomes, within limits, what people do, but there is the notion that it is there as the framework'.<sup>68</sup>

The idea of Aboriginal law as a framework within which changes may occur is not one that all Aborigines would accept. Yet they are faced with the undoubted fact that in some respects the operation of their law has changed, albeit under the pressure of non-Aboriginal law and society. And it is not an adequate explanation simply to say that the law has not changed but in some respects is not enforced. What I think people would say, justifiably, is that they do not consciously and deliberately make changes. In that respect Aboriginal law stands in sharp contrast to Australian law even though the development of judge made law is incremental. The Report of the Parliamentary Inquiry into the Reeves Report quotes an important statement by Billy Bunter made at Kalkarindji:

Aboriginal people do not change the law. We would never ever change the law until the world ends. Every Aboriginal person in the Northern Territory, whatever tribe they are, we do not change the law. Interpretation is made by lingo. But law and order, Dreaming—the things we do—are the same in the Territory or in Australia.<sup>69</sup>

The interpretation of the Australian Constitution and of statutes is a well recognised function of the courts. Where interpretation ends is a constant source of debate. I would not press the analogy too far, particularly as the transcript of the evidence of Billy Bunter shows that he was not asked to elaborate. But he does seem to be drawing a distinction between interpretation of the existing law on which views may change and a deliberate alteration to the law itself.

## Women and the law

I have given this topic a separate heading with some reluctance. It seems to perpetuate the notion to be found in the writings of some anthropologists (male) that 'women's business' is an offshoot of Aboriginal law, rather than an integral part of it. But it is precisely for that reason, for the purpose of restoring the balance and countering the inadequate role often assigned to women in the discussion of Aboriginal law, that I have thought a separate heading worthwhile.

67. See generally Maddock, above n 63, Ch 7.

68. Bell D, *Daughters of the Dreaming* (Melbourne: McPhee Gribble, 1983) 92. See generally RM Berndt 'Tribal Marriage in a Changing Social Order' (1960-1962) 8 *UWAL Rev* 326.

69. Australian Government, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (Canberra: AGPS, 1999) 36.

The reason for the imbalance is, I suppose, apparent. Most of the early anthropologists and others who wrote about Aboriginal society were men. Inevitably, their information came from male Aborigines. Although I have taken (and made) opportunities to speak with Aboriginal women about the law, I am conscious of the limitations there are in seeking and receiving information. Fortunately there are a number of contemporary female anthropologists who, in their writings, have given focus to the place of law in the lives of Aboriginal women.<sup>70</sup>

The dichotomy of men's business/women's business is a basic feature of Aboriginal society. True, the circumstances in which the ritual life of each sex is closed to the other does vary. Thus Tiwi men and women are initiated at the same ceremony. But this is not the norm. In the communities with which I am familiar there are some ceremonies which both sexes may witness. But at some point the performance of ritual inevitably involves segregation and it is dangerous to ignore the secret nature of what then takes place. Nevertheless, the dichotomy should not obscure the fact that for both the law has its origin in the Dreamtime. Nor should it fail to take into account the complementary role each sex performs in relation to the law. The knowledge that the Dreamtime imparts is, in each case, to be found in the sacred boards, the songs and the paint designs. Professor Bell has observed:

Men stress their creative power, women their role as nurturers, but each is united in their common purposes – the maintenance of their society in accordance with the Dreamtime Law.<sup>71</sup>

Men and women both trace their descent from the Dreamtime, though through two distinct lines of descent. From one's father and father's father come the rights and responsibilities of *kirda* (or *mingirringgi*). Through one's mother and mother's father come those of *kurdungurlu* (or *djunggayi*). I have spoken of these relationships earlier in the paper; what is to be emphasised here is the complementarity of the two roles.

Notwithstanding the closed nature of certain rituals, Bell has suggested that women may know more of men's rituals than is commonly thought and that the converse is true. Certainly that confirms my own experience, at any rate in speaking with Aboriginal women. They learn from their husbands much of the men's ceremonial life. And some fathers impart information to their daughters as they mature, information that would not ordinarily be available to them. Also there is an interdependence of the sexes that is not always recognised. In some communities women may be present at each stage of the boys' initiation though they cover their faces when the actual circumcision is performed. A father may paint his daughter for the purpose of a woman's ceremony.

Naturally women's ceremonies focus on the stories which have particular significance for women. They provide an opportunity for instruction about sex and marriage, birthing rituals, rules to be observed in the preparation of food and its availability, or non-availability, at certain times of a woman's menstrual cycle and pregnancy. Instruction may also involve disciplining those who are learning where there is a failure to observe the precepts being taught.

For the most part the stories to which women's ceremonies relate are about ancestral women, as the men's are about ancestral men.

Dreamings travelled; they were sometimes in human form, and sometimes in animal or other form. But whatever the form, they were almost inevitably either male or female. Dreaming men and women sometimes walked separately and thus created gendered places. There are now women's places and men's places: places which are associated with one or the other because Dreaming made it that way.<sup>72</sup>

Although I have spoken of the relationship of Aborigines to the land as 'a topic in its own right', I have also said that it is truly part of Aboriginal law. The role of women in that law would not be fully understood unless something was said about their rights in and responsibilities for land, its dreamings and sites. The hearings of land claims are replete with evidence to this end. In relation to the Cox River Land Claim in 1982, Professor Bell has written:

In July 1981 I was able to record and participate in a *jarada*, a closed women's ceremony held at Nutwood Downs (in the Roper River area) which women from far-flung communities attended. In song and dance, in gesture and design, the assembled women celebrated the travels of the *Munga Munga* ancestral women who pioneered the country from Tennant Creek to Arnhemland. They scattered across the Barkly Tablelands; they travelled from Macarthur River and from the junction of the Wilton and Roper Rivers to a site on Hodgson River and thence to

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70. Diane Bell, Catherine Berndt, Jane Goodall, Annette Hamilton, Nancy Munn, Marie Reay, Deborah Bird Rose & Nancy Williams are the best known: the list is lexicographical and does not purport to indicate the degree of importance each has attached to the law in what she has written.

71. Bell D, *Daughters of the Dreaming* (Melbourne: McPhee Gribble, 1983) 182-183.

72. Rose DB, *Nourishing Terrains, Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 36.

Nutwood Downs, where their tracks divide, one following the “road” to Alice Springs, the other to a site on Brunette Downs. The *Munga Munga* assumed different forms, met with, crossed over, absorbed and transformed the essence of other ancestors; their influence infused country with the spiritual essence of women ... Within the context of this overarching responsibility for the Dreaming, women also stated their responsibility for particular tracts of land.<sup>73</sup>

## Enforcement of the law

The existence of law is generally regarded as dependent upon some procedures for enforcement. To search in Aboriginal society for procedures equivalent to those in Australian law is unnecessary and generally unfruitful. What is important is to identify those sanctions that do exist and the mechanisms by which disputes are resolved.

When Aboriginal society is mentioned, the term ‘elders’ is frequently used, though not so much by anthropologists. The term conjures up an image of old men who in some sort of collegiate way control a particular community and are the means by which the law is enforced. This is far too simplistic a picture and is likely to be highly misleading.

Elizabeth Eggleston has noted a disagreement among anthropologists as to the way disputes were settled in traditional Aboriginal society.<sup>74</sup> She mentions Berndt and Elkin as considering that there were definite legal institutions, composed of the elders, and accepted procedures by which they settled disputes. Other anthropologists such as Hiatt and Meggitt do not accept that there were elders who exercised authority over an entire group. Rather, they see the procedures as more flexible and authority as dependent largely on considerations of kinship status. They are not denying that behaviour is governed by rules in each situation. Those rules determine kinship responsibilities and expected behaviour.

Hiatt reached the same conclusions about the Gidjngali at the Blyth River in Northern Arnhem Land as Meggitt reached in regard to the Walbiri of Central Australia, conclusions which Hiatt summed up as follows:

Old men had considerable prestige, especially in matters of religion, but they did not stand out as general leaders, nor did they constitute a formal body exercising power over others. Particular men organised circumcision ceremonies and revenge expeditions, but their special roles depended on genealogical connections with the key individuals on each occasion, such as the novice or the victim, and not on age... Men of high ritual status played no special part in settling disputes; they were not even exempt from attacks by a person who felt he had a legitimate grievance.<sup>75</sup>

Kenneth Maddock has noted the views of Strehlow who spoke of a head man of the local clan or ‘ceremonial chief’ who had the power of enforcement though ‘his actions had to have the approval, or at least the consent, of the other fully trained elders’.<sup>76</sup> Professor RM and Dr CH Berndt observed that formal gatherings in the nature of law courts do not exist in Aboriginal Australia but that councils of elders or men of importance or leaders seem to have been, traditionally, fairly common. But, they suggested, these councils were very informal and did not handle all types of disputes.<sup>77</sup> Maddock has suggested that the differences between these anthropologists are ‘more apparent than real’.<sup>78</sup>

LR Hiatt has discussed the existence and role of the ‘headman’ whose importance was noted by early writers such as AW Howitt and Spencer and Gillen. On the other hand, Radcliffe-Brown who had carried out fieldwork in Western Australia, denied the existence of a tribal chief or any form of tribal government. A similar view was expressed by L Sharp, in respect of fieldwork in Queensland. Hiatt’s own fieldwork confirmed Meggitt’s findings, namely, that though some men were prominent by reason of their hunting or other skills:

No one emerged as a paramount leader or universal organizer for the simple reason that individual citizens performed their kinship duties religiously and guarded their kinship prerogatives jealously.<sup>79</sup>

This area of debate is by no means academic. If the elders exercise authority over the group, it may be easier to set in place some sort of tribal court. In Western Australia between 1936 and 1954 there was legislation providing for the

73. Bell D, *Aboriginal Women and the Religious Experience – the Young Australian Scholar Lecture Series: Number 3* (South Australia: SA College of Advanced Education, 1982) 12).

74. Eggleston, above n 15, 280.

75. Hiatt LR, *Kinship and Conflict* (Canberra: ANU, 1965) 145-146.

76. Maddock K, ‘Aboriginal customary law’ in P Hanks & B Keon-Cohen (eds) *Aborigines and the Law* (Sydney: George Allen & Unwin, 1984) 212 at 227.

77. Berndt & Berndt, above n 27, 348-349.

78. Maddock, above n 76, 229.

79. Hiatt, above n 41, 91.

establishment of Courts of Native Affairs.<sup>80</sup> Each court was constituted by a special magistrate and a protector nominated by the Commissioner of Native Affairs. The legislation required the court 'if practicable' to 'call to its assistance a headman of the tribe to which the accused person belongs'. It empowered the court to take tribal custom into account in mitigation of punishment. It is important to stress that these courts were in fact constituted by a magistrate. The arguments for and against the constitution of such courts is not directly a concern of this paper but they point up the importance of understanding just where authority does reside in Aboriginal society. Equally, the practice in some magistrates' courts of seeking advice on penalty from an 'elder', usually chosen because of their command of English, does not always take into account the importance of kinship and the implications it may have. It may be quite inappropriate for someone to sit in court, formally or informally, where there is a particular kinship relation between that person and the defendant. An appreciation of these issues must throw a great deal of light on the character of Aboriginal law and its relevance to the matter before the court.

Important as these issues are, their resolution is not easy. Anthropologists have written a great deal on these matters, usually by reference to the particular tribal group with which they are most familiar. Without seeking to minimise the differences that exist, there is a recognised 'Aboriginal commonality' which allows some generalisations to be made.<sup>81</sup> My own experience, based not only on what I have read but on speaking with Aboriginal people in many communities, makes it clear that the enforcement of transgressions relies very heavily on the kinship system and the relationship between the offender and victim. In some cases, there may not be a particular victim, it may be the community at large that is offended. This happens, for instance, when words that form part of a secret ceremony are uttered in public or when sacred objects are shown to someone who has no right to see them.

The disclosure of sacred objects to someone not entitled to see them or the use of words associated with ceremonies of particular importance was (and still is) regarded very seriously by Aboriginal communities. Indeed, 'hard law', as some Aboriginal people describe it, inevitably demanded the death penalty. Over 20 years ago I appeared, together with other counsel, in a murder trial in Kalgoorlie where some six Aborigines were charged with wilful murder. The killing by spears took place in a camp east of Kalgoorlie when a drunken man wandered into the camp and began to shout words of a secret nature in the presence of women and uninitiated boys. Urged not to do so, he refused and continued shouting until, in outrage, the men picked up spears and threw them at him. One spear penetrated the femoral artery as a result of which he died. As it happened, the trial judge accepted a no-case submission at the end of the Crown case and the accused were discharged. The reason was of a somewhat technical nature which has nothing to do with the subject of this paper. But the incident illustrates how seriously people still take this sort of conduct.

As mentioned earlier, remedying a wrong is very much a matter for the family of the person who has been wronged. Where the wrong occurs within the family itself, for instance when one brother kills another, it is for the family to see that the wrong is put right. This does not mean that the appropriate response lies within the discretion of the wronged family. The appropriate response or at any rate the appropriate options are well understood and must be followed. Indeed, failure to follow them can put the wronged family in the position of a wrongdoer and therefore itself subject to punishment.

In this regard one feature of Aboriginal society should not be overlooked. It is that the complexities of the kinship system will often mean that in a small community the appropriate persons to enforce the law may look very much like a council of elders. In a larger community this may not be so. As a further variation on the theme, the clan system of the Yolgnu of North Eastern Arnhem Land operates so that the appropriate course of action to be followed upon a transgression of the law may involve representatives from a number of clans.

Of course there is now a council to be found in most Aboriginal communities. But this is a consequence of government funded and the requirement of incorporation in order to receive money and to account for it.<sup>82</sup> Those who comprise such councils are generally not chosen because of their deep knowledge of traditional matters. Rather they are more likely to be chosen by the community because they are younger, articulate in the English language, and have the ability to deal with the service providers and with the complexities of maintaining those services. The importance which those councils inevitably assume may at times overshadow the standing of those who would ordinarily be regarded as the 'elders'.

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80. *Aborigines Act Amendment Act 1936* (WA) inserting s 59D in the *Native Administration Act 1905* (WA). The section was repealed by the *Native Welfare Act 1954* (WA). See generally Eggleston above n 15, 284-287.

81. Sansom B, 'The Aboriginal Commonality' in Berndt RM, (ed) *Aboriginal Sites, Rights and Resource Development* (Perth: Uni of WA Press, 1982) 117.

82. And more recently because of the operation of the *Native Title Act 1993* (Cth).

## Payback

The practice of 'payback' is often misunderstood. From time to time in Australian law it is urged in mitigation of the sentence to be imposed on an offender, usually someone who has badly assaulted another. The courts in the Northern Territory, and the Federal Court when it was the Court of Appeal in the Territory, have wrestled with the problem, that is the extent to which traditional punishment either inflicted or to be inflicted should be taken into account when sentencing an offender. One view was expressed by a judge when sentencing in the Supreme Court in Alice Springs on 12 June, 1997. His Honour said:

The practice of payback, sometimes unwisely praised in the community, cannot be tolerated in a society which is governed by the rule of law, enforced by public peace officers, and the sooner it is stamped out the better for all concerned including the Aboriginal community.

Other judges, while in no way endorsing the practice, have accepted the reality of the situation and have given traditional punishment some weight in the sentence to be imposed.<sup>83</sup>

A proper understanding of payback is helped by some reference to history. In 1839 members of the United States Exploring Expedition 1838–42 were in Sydney. The report of the expedition spoke of the situation in which a man who killed his wife or lover was obliged to defend himself with a shield while the victim's tribal relatives threw spears at him:

Such punishments are inflicted with great formality, upon an appointed day, and the whole tribe assemble to witness it. The person most injured has the first throw, and it depends upon the feelings of the tribe respecting the offence committed, whether they endeavour to do injury to the culprit or not; and thus it may be supposed that there is some judgement evinced in this mode of punishment.<sup>84</sup>

The reference to 'endeavour to do injury' shows that an apparent strict liability could be mitigated by circumstances. Payback mostly involves physical punishment in front of witnesses and rarely involves capital punishment. The idea is to give the family of the injured person satisfaction and thereby bring the matter to an end. Because it takes place in front of witnesses, everyone knows that the trouble has been put to rest and that it will not be carried on further. What takes place is not truly a trial for the guilt of the person in question has already been determined. Trial by ordeal is, in any event, an inappropriate term since there are no combatants in the ordinary acceptance of that term. Because the event occurs only after tempers have cooled (it may be much later) and because of the ritualised nature of the action taken, payback may be readily understood as Aboriginal law in action. An instance of how payback works or rather, in this particular case, did not work, appears in the report of the Royal Commission Into Aboriginal Deaths in Custody.<sup>85</sup>

In *R v Minor*, which was an appeal against sentence, Asche CJ put payback in its proper context when he said:

Payback is not vendetta... As I understand it, payback, in certain cases, which must be carefully delineated and clearly understood, can be a healing process; vendetta never ...In some cases the payback is purely symbolic. In one such case before me, payback consisted of merely touching the assailant on the thigh with a blunt nosed spear; the families concerned having previously come to certain financial arrangements. The formal ceremony, however, was an important and necessary part in the reconciliation of the families; because only through that ceremony could certain relatives be relieved of what, to them, was otherwise a solemn and sacred obligation to avenge the wrong inflicted on the victim.<sup>86</sup>

Professor Nancy Williams has explained the matter in this way:

Just as Yolngu assume that conflict perdures, and may at any time be transformed into a grievance, so they 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. *Gur'yun* (to push, or to tempt) expresses the process of implementing that obligation.<sup>87</sup>

83. *Jadurin v R* (1982) 44 ALR 424; *R v Minor* (1992) 2 NTLR 183.

84. Wilkes C, *Narrative of the United States Exploring Expedition 1832–1842* (Philadelphia: Lea & Blanchard, 1845) 205 (quoted in Hiatt, above n 41, 82).

85. Royal Commission, above n 24, [2.3.2]. There is a detailed account of the Tiwi formula for handling allegations of seduction by a formalised duel in CWM Hart, Pilling AR & Goodale JC, *The Tiwi of North Australia* 3rd edn (Sydney: Holt Rinehart & Winston, 1988) 85–89.

86. *R v Minor*, above n 83, at 184–85.

87. Williams, above n 57, 103.

## Cursing

Another misunderstood feature of Aboriginal law is the so called 'curse'. A great deal of media attention has been given to the occasional occurrence in the Northern Territory when the occupants of a store or some other building have felt compelled to vacate because of what is said to be a curse placed on the building. The true position is explained in the following words, written in regard to the Yolngu:

'Cursing' is not an act of sorcery (*galkapuy djama*), and therefore it is *not* a curse, hex, or spell of any kind. It is the act of placing a 'restriction' over a place, food or thing (in this case the store, office etc.) by the proclamation of the name of a clan or of a personal totem. The proclamation is akin to the placing of a seal of ownership, and therefore allows only the adult owners of that name to have free access within that restriction or proclaimed area, or to that 'proclaimed thing'.<sup>88</sup>

Each Yolngu clan (*bapurr*) possesses a group of names (*bundurr*) that can institute proceedings in law. Some of these names should be used only to instigate proceedings for an important occasion such as the *narra*. Each male is given one or several *bundurr* which they inherit from their *mar*<sup>89</sup> and those names are to be used only by their owners in important traditional councils. To use *bundurr* in a public situation for personal gain or as a response in anger is an abuse and traditionally involved spearing, sometimes death. The point is that when a person proclaims his *bundurr* over a building, that building assumes the character of a ceremonial place. That immediately limits the range of persons who can continue to use the building, hence the sudden departure of many. It is necessary to carry out a ceremony which restores the building to its normal function so that its access is available.

Unhappily, the concept of *bundurr* has been used as a sort of blackmail. A person may demand money and, when this is refused, threaten to proclaim *bundurr* over the local store. At the same time the conduct, which is so serious in traditional law, has no real counterpart in Australian law. So long as *bundurr* is seen as some sort of a curse, its seriousness will not be properly appreciated. And it will be so much the harder to know how this sort of conduct might best be dealt with.

A somewhat comparable situation can arise when ceremonial ground is violated, say by driving a vehicle over it. Such a situation occurred in the Northern Territory when a young man unlawfully assumed control of a vehicle and drove it to another community where, presumably under the influence of alcohol, he executed manoeuvres on ground reserved for the performance of the very important *gunabibi* ceremony. Members of the community in effect impounded the vehicle and, initially at least, refused to return it to the community from which it was taken, because of its involvement in a serious breach of traditional law. Yet another instance of the victims in Aboriginal law becoming the offenders in Australian law.

## Sorcery

The use of sorcery was well understood in Aboriginal society though the extent of belief in its powers varied among tribal groups. Belief does not necessarily accord with acceptability.

Sorcery is illegal in Yolngu society and calls for punishment.<sup>90</sup> There are claims that *galka' djama* (sorcery) is on the increase so as to avoid *dhagir'yun* (to punish) which may involve methods offensive to *balanda* (non Aboriginal) law. This belief, it is said, is reinforced by instances when traditional punishment has been applied and the keeper of the law has been brought before the *balanda* legal system and dealt with, while the original offender who was being punished for violations of Yolngu law was seen by Australian law as a victim. Because sorcery is still regarded as unlawful, it leads to lawlessness. And it causes confusion in the minds of many Yolngu about the harmful effects of introduced things, disease and sickness, new foods, substances of abuse and sometimes even technology. The extent to which sorcery is practised among Aborigines and its consequences is not dealt with in any detail in this paper.

Professor Williams has documented grievances she became aware of among the Yolngu at Yirrkala during the 12 months beginning November 1969. These include nine grievances said to arise from allegations of sorcery.<sup>91</sup> As she

88. Aboriginal Resource and Development Services Inc, *Information Paper No 6 – It's not a Curse, but a Proclamation* (Darwin: ARDS Inc, 1996) 1.

89. *Mari* include mother's mother, mother's mother's brother; father's father and father's father's sister.

90. Aboriginal Resource and Development Services Inc *Information Paper No 4: 'Galka Djama'* (Darwin: ARDS Inc, 1993).

91. Williams, above n 57, 68- 70.

points out, sorcery is by definition practised with malintention and is not to be confused with Yolngu, healing practises in which the assistance of spirits is involved. Reid, who analysed Yolngu uses of sorcery in relation to individual and community health, concluded that the Yolngu attribute all serious illness and death to sorcery. The ultimate causes of such misfortunes, in her view, are breaches of law and of relationships between people and the supernatural.<sup>92</sup>

Quite a lot has been written about sorcery in Aboriginal society. There is a general discussion by the Berndts in *The World of the First Australians*.<sup>93</sup> It is not always easy to distinguish between the sorcerer and the native doctor, the sort of person identified by Elkin in *Aboriginal Men of High Degree*.<sup>94</sup> These are men who possess knowledge and power over and above ordinary members of the community; their powers are used to heal, not to harm.

Yet the distinction is not always drawn. For instance, Meggitt writes about the Walbiri medicine men or 'clever fellows', 'with assumed curative, destructive and divinatory powers, either on his own or other people's behalf'.<sup>95</sup> Meggitt gives the medicine man a variety of roles. He may announce the death of a dying man. If the death appears to have been caused by sorcery, he visits the deceased's shelter before it is burned down and searches for evidence of the identity of the putative killer. If the death was not caused by wounds inflicted by a known person, the men of the deceased's matriline assemble to hold an inquest and, with the aid of the medicine man, look for clues that might identify the sorcerer responsible for the death.

The relevance of this discussion to traditional law is the extent to which the use of sorcery, at least in more recent times, points up a disenchantment on the part of Aborigines with the effect of white law on their own law, in particular the way in which it precludes traditional forms of punishment. In other words, if those forms are unavailable because they offend Australian law, there is a temptation to employ sorcery because of its covert nature and also to employ it against a member of the offender's family if the offender is not accessible.

## Sanctions

Earlier discussion made the point that enforcement is a necessary characteristic of law only so long as a range of constraints is accepted. It is against that background that the question of sanctions falls to be considered.

When Australian law is the subject of debate, the focus is often on the consequences of a breach of that law. When Aboriginal people are asked what happens when their law is broken, the response tends to be one of puzzlement. But, they say, we expect people to obey the law. That is not to say that they fail to recognise that the law may be broken but they operate in the expectation that it will be observed. When the law is not observed, various procedures come into play. First, something must be said about the sort of conduct that is regarded as 'unlawful' and therefore as triggering an appropriate procedure.

Professor Williams has used the term 'grievances' to refer to conflicts within the Yolgnu, whether made public or not, and 'disputes' to refer to those grievances which are made public. She has identified grievances in terms of particular breaches which arose from 'associated jural aspects (that is, about which Yolgnu could address explicit norms), and from allegations of sorcery'.<sup>96</sup> She has identified them in the following way, recognising the impossibility of confining discussion of a grievance to one category:

1. Breaches of contractual obligations.
2. Failure to acknowledge specific rights of control by securing requisite permission.
3. Breaches of religious restrictions.
4. Breaches of exile.
5. Grievances arising from allegations of sorcery.

This list draws no distinction between what Australian law calls civil and criminal matters. And it may be unhelpful, even misleading, to look for such a distinction. On the other hand, there is a recognisable distinction between conduct which causes physical injury to another and conduct which is simply offensive.

92. Reid JC, *Sorcerers and Healing Spirits: Continuity and change in an Aboriginal medical system* (Canberra, ANU Press, 1983).  
 93. Above n 27, Chapter IX.  
 94. Elkin, above n 66, ch 1.  
 95. Meggin, above n 8, 249.  
 96. Williams, above n 57, 67.

Dr Meggitt has produced a table of what he describes as offences that are commonly recognised by the Walbiri. These have a more direct counterpart in the Australian criminal law, though not all answer this description. Omitting some detail, the table reads:

A. Offences of commission.

1. Unauthorised homicide.
2. Sacrilege.
3. Unauthorised sorcery.
4. Incest.
5. Cohabitation with certain kin.
6. Abduction or enticement of women.
7. Adultery with certain kind.
8. Adultery with potential spouses.
9. Unauthorised physical assault, not intended to be fatal.
10. Usurpation of ritual privileges or duties.
11. Theft and intentional destruction of another's property.
12. Insult.

B. Offences of omission.

1. Physical neglect of certain relatives.
2. Refusal to make gifts to certain relatives.
3. Refusal to educate certain relatives.<sup>97</sup>

It is useful at this stage to note Meggitt's further table of penalties, which is linked to the previous table:

1. **Death** – a. caused by a non-human agency (A2).  
b. caused by human sorcery (A1, possibly A3).  
c. caused by physical attack (A1, A2, possibly A3).
2. **Insanity** – caused by a non-human agency (A2).
3. **Illness** – caused by human sorcery (A1, A2, A3, A5, A6, A7, A8, B1, B2).
4. **Wounding** – attack with a spear or knife intended to draw blood (A5, A6, A7, A8, A9, A10, A11).
5. **Battery** – attack with a club or boomerang (A6, A7, A8, A9, A10, A11, A12, B1, B2, B3).
6. **Oral abuse** – this accompanies all human punishments.
7. **Ridicule** – this is directed mainly at offences of omission.<sup>98</sup>

Professor Williams has put the matter in terms of grievances and this, no doubt, has led her to cast her net widely. Unlike Dr Meggitt, she does not speak of offences though some of the conduct she identifies as giving rise to grievances among the Yolgnu would answer Dr Meggitt's table of offences recognised by the Walbiri.

The Berndts take a somewhat different approach. Their classification of offences within a tribal group adopts two main headings. In the first place and what they describe as 'primary importance', are breaches of sacred law, that is regulations, tabus and codes of behaviour, thought to have a clearly supernatural basis. In the second place, there are offences against other persons or against property. Some conduct falls somewhere between these two categories, depending on the seriousness of what is involved. Thus, incest is both an offence against the person and a breach of traditional and supernaturally sanctioned laws.<sup>99</sup>

For my purposes, it is not especially profitable to spend too much time on specific categories of conduct. In particular, to seek for a close analogy with the distinction between private and public law drawn by Australian law is not rewarding. While much of what Australian law regards as criminal offences is to be found in a comprehensive statute such as the *Criminal Code* of Western Australia, there is an increasing range of conduct which once was thought to give rise to civil remedies only but now may ground a prosecution as well. There are many examples in the areas of corporations law and trade practices law. Given the broad definition of law with which this paper began, it seems more useful to identify the sorts of conduct (including omissions) which give rise to disputes in Aboriginal society.

97. Meggitt, above n 8, 256-257.

98. Ibid, 258.

99. Berndt & Berndt, above n 27, 343-345.

One reason, and to my mind the primary reason, why the search for an analogy with the public law, private law distinction will be unprofitable is because of the critical role which the kinship system plays in the resolution of disputes. I mentioned this earlier in regard to the role of elders and of councils. The point is made very clearly by Meggitt when he says:

The legal norms not only define the offence and its consequence but also nominate who should carry out the punishment. Community membership and genealogical connection are the basic criteria in the selection; and there is rarely any doubt about the identity and the acceptability of the person who should act. Thus, an inquest following a sudden death reveals (magically) the kinship category and the community affiliation of the putative killer; the law states specifically that the close mother's brothers of the deceased must ascertain the actual identity of the murderer and then kill him. If a man wounds his wife for some trifling delinquency, the law asserts that her father, brother, or mother's brother (but nobody else) should attack him.<sup>100</sup>

The central role of the kinship system should not be misunderstood. It does not mean that a dispute is resolved in some secret or arbitrary way so that it is not possible to judge whether the requirements of Aboriginal law have been observed. The community will know what has happened and whether the family has exposed itself to some form of sanction by its failure to observe those requirements. That does not mean that every minor grievance is dealt with in a formal way and under the eyes of the community but that would be the case with anything of a serious nature.

Professor Williams has explained that among the Yolgnu an individual may bring a grievance into the public arena 'by a number of patterned means'.<sup>101</sup> She suggests that the means by which a grievance is made public has an important bearing on the procedures that are put in place in trying to settle it. There may be an oral declaration, a show of strength or a ritual dance.

Dispute resolution among the Yolgnu is complicated by the presence of the *Narra*. I do not pretend to have a full understanding of its role. Djiniyini Gondarra has defined *Narra* as:

[A] chamber of law and jurisdiction where the leaders are called together by the clap sticks. Secrecy provisions apply creating a type of parliamentary privilege so that the only information to leave the chamber is the publicly viewed objects that encode the law (like the sacred Dilly Bag). The citizens are outside the chamber or the ceremonial place and the law is taken to them.<sup>102</sup>

As explained, the *Narra* is a sort of parliament but the reference to jurisdiction suggests a role in dispute resolution. On my visits to Yirrkala in April and September 1999, where I spoke with many of the clan leaders, the analogy with parliament tended to break down because, while the *Narra* is a body that meets and expounds the law, it does not make new law. One of the clan leaders spoke in these terms:

The foundation of the earth is the foundation of the law and out of this comes the power to proclaim things. We know the first *Narra* made by the two creators but we don't know before this. We have followed that pattern since.

It is tempting to think of the *Narra* as some sort of appellate body but this is to read too much into its functions. It may be that in expounding the law from time to time and with reference to particular events, the *Narra* effectively resolves some grievance that has been aired. On the present state of my inquiry, I cannot take this matter any further. Indeed there soon comes a point where information is not readily available because of the nature of some matters which the *Narra* deals with.

The Berndts have suggested:

Although self-help ... is the basis of legal procedure in Aboriginal Australia, in most areas more or less formal discussions or meetings are held at irregular intervals to settle grievances. The most convenient time for this is when members of different tribes meet for ceremonies.<sup>103</sup>

In the context in which this statement appears, these inter-tribal meetings may deal not only with grievances between the tribes but also grievances between members of the one tribe. In the latter case, it would only be if the two tribes shared the same mythology and ritual. Disputes between the two tribes might more accurately be described as

100. Meggitt, above n 8, 259.

101. Williams, above n 57, 74.

102. Address to the National Youth Reconciliation Convention in Darwin on 17/07/1998.

103. Berndt & Berndt, above n 27, 347.

disputes between members of two tribes, as where the victim and the offender come from different tribes. While these meetings may be significant as providing one means of social control, they are stated not to be judicially based bodies. The Berndts put the matter more positively when they say:

Formal gatherings in the nature of law courts with judiciary functions do not exist in Aboriginal Australia: there is no formally constituted court of law, comprising special persons vested with authority and power to deal with cases, pass judgment, and impose punishment. The immediate demands of self-help, together with a relatively weak political organization, had militated against such a development.<sup>104</sup>

The Berndts go on to give examples, taken from late 19th and early 20th century writings, suggesting the existence in parts of eastern Australia of councils with a dispute settling role. The writings of contemporary anthropologists do not suggest that such bodies now exist though the *Narra* of the Yolgnu warrants further consideration.

The term *Makarata* acquired prominence during the late 1970s and early 1980s when questions of Aboriginal sovereignty were raised and there was a move to have something in the nature of a treaty. The term was thought to avoid the legal problems associated with a treaty between white and black Australians and to have an appeal because it was spoken of as a peace making ceremony. However, the Berndts consider that the *Magarada*, as they call it, is better described as trial by ordeal or settlement by combat.<sup>105</sup> The *Magarada* is a feature of north eastern and western Arnhem Land. It takes place after an offence has been committed, but only after people's rage and resentment have had time to cool. The arrangements are made by the injured party and involve two groups who advance towards each other. There is spear throwing on the part of the injured person's group. The whole process is very ritualised though it may result in a thigh wound. In this latter respect it is comparable to the thigh wounding of the Western Desert. In another context I have spoken of payback. Whatever precise form the procedure takes, it is aimed at putting an end to the grievance which brought it into existence and at effecting a reconciliation between all concerned. It is not a form of revenge.

## The environment

Much has been written and said about the relationship of Aborigines to the land, particularly in the course of land claims made under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Quite a deal has been written also about the way in which Aborigines adapted to the environment, particularly in desert areas where it was necessary for survival. The firing of land as a conservation measure has been the subject of ongoing debate.<sup>106</sup>

Very little has been said about the environment and its maintenance as an aspect of Aboriginal law. In a paper prepared for the Australian Law Reform Commission's Report, Mary Fisher wrote:

Traditional hunting and fishing practices were closely intertwined with the law. Rituals to maintain the land and replenish the food supply were an important part of traditional culture. Strict rules regulated the use of natural resources and governed not *only* the taking of certain species but also the consumption and distribution of food. A person's age, status and sex also had a bearing on his right to take certain species and as such the differing economic roles of men and women were clearly defined.<sup>107</sup>

These matters are explored in the research paper but there is no mention of the consequences for those who transgressed the law in any relevant respect. There may be a distinction between conduct which constitutes a breach of good behaviour but does not damage the environment itself and conduct which has a damaging effect, such as an act of wanton destruction of a tree or spring.

The relationship between Aborigines and the environment is expressed by Strehlow in the following way:

In the interior of Australia, Art, Song, Myth, Dance, Rite and Drama were all linked with the totemic landscape.<sup>108</sup>

However, Strehlow does not suggest what might happen if conduct damages the environment and, to my knowledge, the same may be said of other anthropologists writing about the relationship between Aborigines and the environment. So critical is the land and its resources to Aboriginal people and such importance did food assume in ceremonial life

104. *Ib.*, 348.

105. *Ib.*, 350.

106. Langton M, *Burning Questions: Emerging environmental issues for indigenous peoples in northern Australia* (Darwin: Centre for Indigenous Natural and Cultural Resource Management, NT University, 1998).

107. Australian Law Reform Commission Research, Paper No 15, above n 3, 'Summary' v.

108. Strehlow TGH, 'Culture, Social Structure and Environment in Aboriginal Central Australia' in RM & CH Berndt, above n 53, 121 at 144.

(and indeed still does), it is a little surprising that more has not been said on the subject. This may be due, at least in part, to an aspect of Aboriginal law that has been touched on from time to time in this paper, namely that if correct behaviour is not observed, it may be a matter for reparation rather than some form of penalty, though one is left to wonder at the consequences of the wanton destruction of a tree in an otherwise barren landscape.

I have touched on this matter because it goes to the behaviour of Aboriginal people and may throw some light on the scope of Aboriginal law. The association of the mythical ancestors with the creation of the world and the Aboriginal view of nature which draws no sharp distinction between the physical and spiritual must place the landscape fairly within the bounds of the law.

Professor Tonkinson has said:

If our aim is to understand Aboriginal society primarily from within, then we begin by acknowledging that the worldview of the Aborigines accords primacy to spiritual rather than ecological imperatives as guaranteeing the good life.<sup>109</sup>

I do not understand Professor Tonkinson to downplay the demands of ecology but rather to stress conformity to the law because if people neglect the law the spiritual powers will reciprocate by withholding rain, causing people and the land to become infertile. There is, to borrow Tonkinson's language, a mediation between the creative era and the human realm.

## The exchange of goods

In *The World of the First Australians*, a work that has been referred to more than once in this paper, Chapter 5 is entitled 'The Basis of Economic Life'. The chapter contains a number of headings, one of which is *Economic Exchange and Trade*, and another of which is *Ceremonial Gift Exchange*. The distinction drawn by these headings is between commercial transactions on the one hand and the exchange of gifts as part of ceremonial activities on the other. Each of those aspects of Aboriginal life gives rise to rights and obligations, so much so that one commentator has written about 'Aboriginal contract law'.<sup>110</sup> But, as always, the search is for an understanding of those rights and obligations. From that understanding may spring some useful comparison with an aspect of Australian law. However, the search should not be coloured by such an expectation.

Whether the focus is on commercial or on non-commercial transactions, items of personal property are the medium of exchange. While the property in question is ordinarily corporeal, that is, possessing a physical quality (spears, knives, axes, shields, boomerangs, ornaments and so on), some property traded or exchanged may be incorporeal. That usually takes the form of rights to use of designs, songs and dances, perhaps access to water. Notwithstanding John Batman's purported contract to acquire land in what is now Victoria, land has always been regarded by Aborigines as inalienable. That is because land is communal property and membership of a land owning group is gained by descent or filiation.

It is convenient to look first at commercial transactions. And the first thing to be said in that regard is that the extent of such transactions in Aboriginal society is often not fully appreciated, notwithstanding the writings of some anthropologists, McCarthy and Thomson in particular.<sup>111</sup>

McCarthy identified seven major trade routes crossing or connecting with all parts of Australia. Kim Akerman has written:

Generally trade routes lay like a fine mesh over the land, representing a network of interaction which traditionally linked many differently-oriented cultural and language groups. Goods moved initially within the range of recognised kin and then to defined partners living in adjacent territories, and then farther afield, travelling clockwise or anti-clockwise, according to convention.<sup>112</sup>

109. Tonkinson, above n 31, 25.

110. Ellinghaus MP, 'Towards an Australian Contract Law' in Ellinghaus MP, Bradbrook AJ & Duggan AJ (eds) *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 54-63.

111. McCarthy FD, "'Trade' in Aboriginal Australia and 'Trade' relationships with Tones Strait, New Guinea and Malaya" *Oceania* IX(4): X(1) and (2); DF Thomson *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land* (Melbourne: McMillan, 1949).

112. Akerman K, 'Material Culture and Trade in the Kimberleys Today' in Berndt RM & Berndt CH (eds) *Aborigines of the West: Their Past and Present* (Perth: University of Western Australia Press, 1980) 243, 250.

Ackerman has had a long and close interest in the use of pearl shell by Aborigines. The main source, particularly of engraved shell, was the north-west coast of Western Australia between Port Hedland and the Buccaneer Archipelago. Cape York was another source but not so much, it seems, of decorated shell. Ackerman's map of the distribution and movement of Kimberley pearl shell shows routes as far south as Kalgoorlie and Yalata and as far east as Darwin and Alice Springs.<sup>113</sup> In the introduction to his monograph, he writes in a rather tantalising way:

It should be noted that all the items that are discussed and illustrated are secular in nature; they do not lie within the realm of the secret-sacred. In general, pearl shell art is not held to be secret. However, the objects themselves may, from time to time, be used either centrally or incidentally in a wide range of ritual and ceremonial activities, some of which may be of a secret-sacred nature. Individual shells may also be placed in caches of sacred objects associated with a specific ceremony and remains in this context. Apart from noting that this does occur, no further comment is made on such matters.

It is unnecessary to spell out the nature and extent of commercial transactions. Ellinghaus' paper, with comprehensive footnotes, points the direction to be followed. My main concern is to understand the underlying assumptions on which commercial exchange takes place, the sanctions which attach to what might very loosely (and perhaps misleadingly) be called breach of contract and the means by which disputes arising out of such transactions are resolved.

*Pacta sunt servanda* (agreements are to be kept), like most Latin legal maxims, asserts rather than explains. But it is hard to envisage how there can be order in any society unless there is an expectation that undertakings will be observed. The Berndts emphasise the notion of reciprocity, generally based on kin relationships:

All gifts and services are viewed as reciprocal. This is basic to their economy – and not only to theirs, although they are more direct and explicit about it. Everything must be repaid, in kind or in equivalent, within a certain period.<sup>114</sup>

If reciprocity is so much an aspect of kin relationships, what is the source of the obligation to give something in return when the transaction is a strictly commercial one, devoid of any such relationship? The Law Reform Commission observed:

Aboriginal customs of gift giving, the exchange of goods and services and the role of personal property appear to fit within the normal legal rules.<sup>115</sup>

That observation was made in the context of according recognition to Aboriginal customary law; it does not purport to identify the basis of those customs in Aboriginal law.

It may be that the notion of reciprocity is so ingrained that it pervades situations in which no kinship is involved, allowing of course for the wide scope of that relationship. There is danger in seeking to press concepts of contract in Australian law too far. Ellinghaus recognises this when he writes of Aboriginal society:

In such a society contractual obligation cannot be regarded merely as a matter of voluntary assumption, will or intention, but is extrinsic to human relations.<sup>116</sup>

Indeed, one view is that even where a transaction appears to be commercial, there is a kin relationship of some sort involved. This would seem to give kinship a very wide operation indeed when goods are exchanged between people between distant places. At a meeting I attended at Baniyala near Blue Mud Bay in the south-east of Arnhem Land, I raised this matter with the older Yolgnu men who spoke of an exchange of dilly bags on their part with spear heads from a tribe some distance away. Their answer was that there is always some relationship between the country of those who exchange goods. It might be the sharing of an ancestor. There is always a 'road' between the people involved. And, it would seem, the road may involve a number of tribes, one linked to another in some way, so that the chain allows those from afar to come together. But, they said, if someone was a 'foreigner' there would be no trade.

Gift exchange may occur within the framework of the large sacred ceremonies. These ceremonies bring together tribal groups or persons from more than one moiety. The Berndts have identified six ceremonies in Western Arnhem Land which have as their focal point the exchange of special goods.<sup>117</sup>

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113. Akerman K with Stanton J, Riji and Jakuli, *Kimberley Pearl Shell in Aboriginal Australia – Monograph Series Number 4* (Northern Territory Museum of Arts and Sciences, 1994) 14.  
114. Berndt & Berndt, above n 27, 122.  
115. Above n 3, 223.  
116. Ellinghaus, above n 110, 61.  
117. Above n 27, 131–32.

Whatever the basis of commercial transactions, the distinction between those and exchanges of a ceremonial character is well established. It is of course easier to identify the former when one of the parties is not an Aborigine, as in the case of the Macassans. Donald Thomson tells of a canoe that a Wanguru man (*Yiritja*) and his father 'bought' from a Marrakula man from Blue Mud Bay. The father had given the man some string used in a ceremony and when the father and son visited Blue Mud Bay they received from the man a canoe and other objects as well. Thomson continues:

When I suggested that this was a big 'payment' for what I suggested (tongue in cheek) was a 'small thing' I heard one of my informants, who turned aside, exclaim with a groan: "Yi! *Ballanda!*" ("Oh! White man!").

This type of ceremonial exchange, he says 'is distinguished from economic buying and is called *yarna gurrapän* [=] nothing give'.<sup>118</sup>

## Recognition of Aboriginal land

It is not within the scope of this paper to consider the recognition of Aboriginal law by Australian law and its incorporation into that system. That was the subject of the Australian Law Reform Commission's report to which reference has been made earlier in this paper.<sup>119</sup> Elizabeth Eggleston has a chapter on the recognition of tribal law which she sees as giving rise to a sort of conflict of laws situation.<sup>120</sup> A somewhat similar approach has been taken by Professor Williams.<sup>121</sup> I mention this matter only to make the point that the source of Aboriginal law and its complexities should not be glossed over when any question of recognition does arise. Furthermore, there is a sharp distinction between recognition of some aspect of Aboriginal law and the empowerment of Aborigines to apply within their own community what is an aspect of Australian law.

Thus, the *Aboriginal Communities Act 1979* of Western Australia empowers certain Aboriginal communities, through their elected councils, to prepare by-laws for the control of certain behaviour on community lands. These by-laws may relate to such matters as the prohibition or regulation of admission to the lands, control of the use of vehicles on the lands, prevention of damage to grounds and control of dumping of rubbish, new safety and preservation of buildings and other structures and fixtures, regulation of the conduct of meetings, prohibition of nuisances, offensive, indecent or improper acts, disorderly conduct or language and control of the use, possession or sale of alcohol.

Breach of a by-law is an offence and the council may call on the police to charge the offender and bring the matter before the Court of Petty Sessions. There were pilot schemes with the Bidadanga Aboriginal Community at La Grange and with the Bardi Aborigines Association at One Arm Point. The scheme has been extended to other Kimberley communities and to communities in the central desert. It was envisaged that, when a charge was laid for breach of a by-law, the court would be convened by Aboriginal Justices of the Peace, appointed from among community members. In practice, as I understand it, the court has nearly always been convened by a magistrate who may, however, sit with one or more of the local Aboriginal Justices.

It seems that the Western Australian Act has played a part in ensuring more peaceful and constructive conduct on the lands in question and, no doubt, there are ways in which the operation of the Act can be strengthened. Its relevance to this paper is to draw attention to the ambivalent situation that arises. The scheme is based in Australian law, with its concepts of councils, by-laws and courts. The appointment of Aboriginal Justices of the Peace offers some scope for paying regard to Aboriginal law in the policing of the Act and in dealing with offenders. But in so far as the legislation is an attempt to reconcile two systems of law, and because clearly it is Australian law which in the end prevails, it may cause confusion in the minds of the Aborigines concerned. As mentioned earlier, the importance of the kinship system will sometimes mean that an Aboriginal Justice of the Peace, often selected because he or she is articulate in English and held in regard by the general community, is an inappropriate person to sit on the court.

No doubt those who played a part in legislating the by-laws scheme and in monitoring its operation were aware of these difficulties. Clearly, Mr Terence Syddall, the stipendiary magistrate at Broome who pioneered the work that led to the passing of the Act, was fully conscious of the matters I have discussed. The point of these comments is not to

118. Wiseman JP, *Thomson Time: Arnhem Land in the 1930s: a photographic essay* (Museum of Victoria, 1996) 60.

119. For a very recent argument that the Northern Territory should enact a statutory scheme for the recognition of some aspects of Aboriginal customary law, see S Gray "One Country, Many Laws: Towards Recognition of Aboriginal Customary Law in the Northern Territory of Australia" [1999] *LawAsia Journal* 65.

120. Eggleston, above n 15, Ch 9.

121. Williams, above n 10.

diminish the ideas which led to the legislation but rather to stress the need to know, with any such scheme, what is the law to be applied, whether it is Aboriginal law or Australian law or some admixture. If it is the last of these and if Aboriginal people see their law as taking a secondary role, the absence of clear lines of demarcation must inevitably produce confusion and uncertainty.<sup>122</sup>

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122. Wilkie M, *Aboriginal Justice Programs in Western Australia*, Research Report No 5(Perth: Crime Research Centre, 1991) 26–31; Syddall T, 'Aborigines and the Courts II' in Swanton B (ed) *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984) 144.