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Aboriginal Customary Law under Siege

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Introduction

Customary law is presently under siege. We have politicians who want to abolish it. We have a media who demonise it. We have a general population who seem content to either ignore it or denigrate it. And then we have that small, but proud, percentage of the population who understand it, cherish it and live it.

Somewhere in the middle we have a legal system that has made and is making some effort to acknowledge and respect it. However, much more needs to be done, now more than ever.

There is a definite movement at present away from acknowledgement and respect of customary law. There is a school of thought gaining popularity that the only way for Indigenous people to survive and prosper is for them to abandon the 'old ways' and to embrace the English language, a capitalist lifestyle and the 'rule of law'. In other words, assimilation is definitely back on the agenda.

One of the driving forces behind this agenda is the current demonisation of customary law based on a perception of its involvement in recent court cases. This demonisation is gaining popularity not only with the media and politicians but also within the legal fraternity.

The paradox is that those who seek to use these cases to support their argument often do not in fact understand what is and what is not customary law. Nor do they understand how the courts have received cultural information, the reason why that information has been put forward and how the courts have used that information.

Lawyers who work for Indigenous people have a responsibility to 'discover' the customary law applicable in the cases they deal with. These lawyers then must strive to have the relevant customary law acknowledged and taken into account by the court or other relevant legal body.

Unfortunately that responsibility often comes a distant second to expediency and a belief in the superiority of the Western legal system. The time is well overdue for a

paradigm shift that sees more respect given to, and a more prominent role played by, customary law.

The 'GJ Case'

The GJ case has been generally misunderstood. The starting point for a better understanding of that case is an acceptance of the fact that in 2006 there are still many Indigenous people in this country who do not speak English, who do not read newspapers or watch TV News, and who see as the primary dictate of their lives and social order a system of rules and regulations that have existed for many thousands of years. It surprises me the number of people who do not accept this fact, and further, that those people speak in an authoritative fashion have never spent any significant time in a 'traditional' community.

The next step is to accept that Indigenous culture views the world from a different perspective than that of the dominant culture. The dominant culture sees an innocent 14 year old girl. The relevant Indigenous culture sees a grown up young woman. The dominant culture favours freedom of choice. The relevant Indigenous culture favours a social cohesion and the forming of important relationship bonds that are ensured, amongst other things, through arranged marriages.

Acceptance of these facts does not mean you have to adopt that perspective. Importantly, this isn't about your view of what is "right" or "wrong". This is about acknowledging that cultures are different, for all cultural attitudes, beliefs and values are learned from one's social environment, yet to the members of each culture, those attitudes, values and beliefs seem natural, and other cultures seem strange by comparison.

Many in Australian society now recognise certain 'human rights' that in some instances are at odds with traditional ways. If the dominant culture has decided that traditional ways must be superseded by these 'human rights' then the way to do it is through culturally appropriate education, a plan for adaptation and support through that process. That has rarely been done. The biggest complaint from the old people of GJ's region was that they had never been informed that the age of 16 was the magical age below which sex was illegal. Once properly educated they were happy to adapt and conform.

The customary law relevant to GJ's case was that she was recognised as his wife. He had obligations to her and her family. She had obligations to him - one of which was not to form relationships with other men in that community. That is where the customary law aspect of the case ends.

It is a subtle but important distinction that what was important in this case was not customary law, but GJ's personal beliefs.

To appreciate GJ's personal beliefs you have to appreciate the following facts. His people first had contact with the white world approximately 100 years ago. The main contact GJ had with the white world was as a stockman. There was no mission. He rode horses with white men but when it came time to eat he would not socialise with

them. He sat separately from the whitefellas and 'yella fellas'. His English to this day is very minimal and is his *fourth* language. He was raised in a very strong traditional society and still regularly attends ceremonies and lives according to traditional law.

That law included the system of 'promised wives'. This is not a system aimed at providing young women for the sexual gratification of old men. It is a very complex system that has many practical aspects. The obvious ones are to prevent inter-family marriage, to provide a system of custodianship to land, information and ceremonies and to ensure that women and children are cared for by a mature man who can protect and provide for them. It is one of the most common systems of social organisation in the world.

The 'marriage' begins from the time of the 'promise'. But the man is forbidden to have sexual contact with the girl until she is a woman. A girl is considered a woman when she is post pubescent – usually around 13-14 (Just as a boy is considered a man after his initiation at around the same age).

This is a very simplistic explanation.

The point is that such a system was very important to maintaining law and order in traditional life and it is still considered very important to this day in some communities.

In this particular case the young woman, S, had been promised to GJ since she was a small child. He made no effort to have any sexual contact with her while she was growing up. He raised his own daughter, is still close to her and she is now a policewoman.

S knew that she had been promised to GJ. But she had grown up very differently to him. She had been to school and she, like many young people, was losing respect for the ways of the old people. Not because of anything the old people had done but because of the way that wider society portrayed and treated them.

And this is where the crux of the problem lies. Rather than assisting this community, and others like it, to maintain harmony, law and order the dominant culture has consciously (and unconsciously) encouraged the young to break traditional law without preparing the older members of the community to deal with this. In effect the poles holding the up bridge have been mercilessly demolished without substituting alternative support.

When S spent a night with a man from another community everyone believed she had sexual relations with him. At this time she was post pubescent and considered a woman in her community. The dominant culture has reacted strongly to this assertion and constantly highlights that S was a 'young child'. Yet it was only in 1883 that the NSW Parliament upped the Australian age of consent from 12 to 14 (The age of consent is still 12 in Mexico, Chile and Paraguay – in Spain, Korea and Nigeria it is 13). It was not until 1910 that the age of consent was raised to 16. It contained an exemption in that a case of carnal knowledge could be dismissed if the girl looked over 16 years of age, or where the man believed that the girl was immoral or promiscuous (see *Historical Reflections on the Age of Consent*, New Doctor 81,

Winter 2004). It took white Australian society 100 years to raise the age of consent to 16 and then another 100 years to change attitudes towards women – yet it is expected that traditional Indigenous society will automatically be in synch with this.

Of course it was S's right as an individual to be with whomever she wanted. But in this community it was perceived as an act of defiance and disrespect to the traditional law.

Traditionally she was already considered to be GJ's wife. If someone tells you that your wife had sex with someone else it is a natural response to feel anger and humiliation. That is a small indication of how GJ felt. Add to this the important fact that GJ had taken S's brother through ceremony and you have a situation where he had lifelong reciprocal obligations with S, her brother and her entire family. Numerous cultural expectations had been shattered and a further blow of disempowerment to GJ and the traditional members of the community had been delivered.

It was clear from the evidence given by elders during the case that they believed that their system of social cohesion was being destroyed and replaced with rampant promiscuity amongst the young people, often with community outsiders. The impact of this from their perspective is that family structure is being weakened and the whole fabric of cultural life is under threat. This deeply concerns the elders but they feel helpless in the face of a rapidly changing world that does not listen to them, consult with them or work with them.

So you have a neglected community and a generational gap. When people believe that their whole way of life and everything they believe in is under threat then it is understandable they may act out with violence.

It has been a little reported fact that S's 70 year old grandmother also struck her. This was done with a nulla nulla. The same grandmother ordered her to go with GJ and in fact packed her bags for her more than likely knowing that he would have sex with her.

GJ was deeply affected by S's actions. He *believed* he had to punish his 'wife' and that she had no right to refuse sex. He *believed* that by taking her he would ensure law and order would be restored, cultural obligations fulfilled and his position within the cultural life of the community preserved. His actions were the actions of a man struggling with change. Pre-colonisation actions like his would have been rare. And the reason for that is that the actions of S would have been just as rare. Everything would have happened differently.

The cultural context was put forward as *one* aspect of mitigation. The Judge could not ignore it - because it was real. The Judge said the following in his sentencing remarks:

"I have said that you believed that what you did was permissible and justified. It must be said, however, that there was nothing in your Aboriginal law which required you to strike the child or to have intercourse with her...Recognising these beliefs and their effect upon your culpability is not to condone what you

did, but simply to recognise as a factor relevant to sentence the effects of your culture and your state of mind at the time... I hope that these proceedings today and that the sentence I will impose upon you will get the message through to all members of the community that what you did to the young child was wrong”

So what exactly was it that GJ believed was permissible and justified. He believed it was permissible to have sex with his wife and he believed he was justified in doing this violently due to her previous actions. These were his beliefs. These beliefs were influenced in part by customary law but they are not customary law. To assert otherwise would be like saying that raping and beating your wife within a ‘Western’ marriage is a legally recognised part of marriage. Yet it was not that long ago that rape within a western marriage was not illegal. It was never part of our law that this could occur but it did occur and was influenced by a belief that women had to submit to sex with their husband. It was also not that long ago that a Supreme Court Judge indicated it was permissible, within the context of a ‘Western’ marriage, to strike your wife in certain circumstances. Again this was based not on law but on a belief that a man was entitled to discipline his wife. These beliefs have changed gradually over time through education, law reform aimed at criminalising the said behaviour and a gradual increase in punishment.

The wider Australian society expects that Indigenous Australia will automatically and rapidly change to reflect the same beliefs. This is despite a lack of education, an unwillingness to understand the Indigenous perspective and a lack of support to adapt.

It must also be noted that customary law was unlikely to be the only influence on GJ’s beliefs. There is little doubt that the impact of colonisation and a general feeling of despair and disempowerment also influenced his beliefs. He may also have been influenced by how he saw white stockmen treat women when he was growing up.

The bottom line is that at no stage was it ever argued that forced anal sex was in any way part of customary law. What was argued initially was that there was strong evidence that GJ had never turned his mind to the question of consent – that is, his belief system prevented him from having the necessary mental element to be found guilty of rape. The law in the NT as far as rape is concerned is that not only does the Prosecution have to prove that the victim did not consent, they also must prove, beyond reasonable doubt, that the offender did not have a genuine belief that the victim was consenting (see *Director of Public Prosecutions (NT) v WJI* [2004] HCA 47). If the offender genuinely believes (as was the case here) that the victim must submit to his will and has no choice in the matter then it would be difficult for the Prosecution to prove this mental element to the required standard (this law is likely to be changed in the near future).

It is, however, arguable that the Prosecution could have. They decided not to. I cannot say what the main factors were in influencing this decision. There would have been a balancing of various factors, including, the prospects for conviction, the potentially destructive effect of a trial on the victim and the community, the fact that the offender was a 55 year old traditional Indigenous man with no prior convictions and the fact that a plea resolution was available that had added possible educational value (i.e. a

plea in the actual community where the offending occurred had far greater potential to send a message than a trial 700km away).

The plea resolution was accepted and GJ's personal beliefs were put forward as one aspect of mitigation, in the same way any defendant's beliefs are put forward on a plea.

The sentence imposed reflected several factors, not just GJ's personal beliefs. Particular mention must be made of the fact that GJ pleaded guilty to what is commonly known as 'sex with a minor'. He did not plead guilty to rape. At the time he was sentenced there were only two precedents. The first was over 20 years old and resulted in a fully suspended sentence. The second occurred in 2003 (see *Hales v Jamilmira* [2003] NTCA 9). The 2003 case was very similar to the GJ case and ended up in the Court of Criminal Appeal which decided that a sentence of 12 months suspended after 1 month was appropriate. I am at a loss to explain why 2 years later the Court of Criminal Appeal decided the appropriate sentence was now 3 years and 6 months suspended after 18 months (see *The Queen v GJ* [2005] NTCCA 20).

The Chief Justice at first instance in the GJ case afforded the community enormous respect. Not many Supreme Court Judges would leave the comfort of their courtrooms to sit under a tree in 30 degree heat and listen patiently to community elders. The community in turn listened, through a female Indigenous interpreter, patiently to him. It was reciprocal respect and education in action.

The sight of the old man being carted away in a police wagon was more powerful to the community than any time he actually served. They got the message. The men understood that they would have to consider their responses to the breakdown of traditional law more carefully and in a way that did not conflict with NT law. They also understood that their perspective as to when a young woman was able to have sex would need to change and that they would have to become conscious of the dominant cultures concept of age.

Four months after he was released GJ was rounded up and re-imprisoned (he was not present at the appeal and had little understanding of it). Many thought the case had been finished and were confused and hurt as to why the Court that had shown them respect by coming to their community and explaining everything had then changed its mind 5 months later and 700km away.

The feeling was summed up in a comment made to me by an old man who said

"They ('whitefellas') are always doing that - telling us one thing to our face and then changing their minds behind our back"

The Court Of Appeal in fact endorsed the Chief Justice's findings, *including* his finding that GJ was unaware he was breaking NT law. All they decided was that the Chief Justice had erred in the length of the sentence. The Court of Appeal stressed that it was still very appropriate to take into account GJ's personal beliefs and customary law in so far as it impacted upon those beliefs. They did in fact take it into account to impose a sentence that whilst still significantly higher than the initial

sentence was less than that which would be imposed on a 'paedophile' living in a different context and motivated by sexual gratification.

I personally disagree with the Court of Criminal Appeal's decision. However, in no way do I condone GJ's behaviour. His actions sicken me and nobody should have to endure that type of conduct. My argument is that it is the dominant culture that is largely to blame for this behaviour occurring and locking up an old man for 18 months who does not fully understand why he is being locked up adds nothing to the solution.

I recently read an article about one of the Territory's most notorious Indigenous outlaws, a Muringpatha man named Nemarluk. Nemarluk was sentenced to death in 1934 for killing three Japanese fishermen. The death sentence was commuted after a public outcry from organisations in southern Australia who said Nemarluk was:

“an uncivilised Aboriginal who had not been in contact with white civilisation and was wholly ignorant of the British code” (NT News, September 19 2006)

Even though the dominant cultures efforts to educate people about its law have been poor the winds of change have reversed and sentiments like the one above are no longer expressed. Yet the understanding of the dominant cultures 'law' is still at a very low level for many Indigenous people. As an old man said on the SBS TV Show '*Living Black*':

“We have a law and order, strongest law we make, we don't break our law, we don't break our promise but white man do. They put their words in the paper, next two years come they change the law, papers blow away with wind” (Two Laws)

I have gone to some lengths to explain the GJ case as it is frustrating, in fact devastating, to see it being used in support of a malicious campaign to denigrate customary law.

The 'Yunupingu Case'

This is not the first time this has happened. In *Police v Yunupingu* (Unreported decision of the NT Magistrates' Court delivered on 20 February 1998) the defendant was found not guilty of assault and criminal damage on the basis that he acted in accordance with an honest belief that he was entitled, under Yolngu law as recognised by the civil law of the Northern Territory, to enforce traditional laws on Aboriginal land. In seizing a camera and damaging it the defendant acted in accordance with a native title right which was enforceable under the *Aboriginal Land Rights Act (NT)*. The photographer from whom the camera was seized did not have a statutory permit or permission under Yolngu law to be on the land and take photographs (for a full discussion of this case see *Native Title and the Criminal Law: the Defence of Galarrwuy Yunupingu* by Ron Levy [1998] ILB 55).

The Northern Territory Chief Minister and Attorney-General, Shane Stone attacked the decision claiming that Aboriginal law is '*barbaric and unacceptable*', and that the

Magistrate's reasoning may authorise '*tribal killings, the taking of child brides and sexual intercourse with minors*' (*Sydney Morning Herald* 23 February 1998).

The case that involved a defence based on lawful property rights where the cultural context was a Yolngu belief that the taking of photographs captured the spirit of the land or people. I'm not sure which part of this is supposed to be 'barbaric'! However, it certainly demonstrates how quick certain politicians are to take any opportunity to attack customary law.

The media is similar. In the case mentioned above there were newspapers that reported the victim as having been punched and feeling petrified when this was not in fact his evidence. With the GJ case, reports keep referring to GJ having been found guilty of rape when this was not in fact the case.

In neither of the above cases was it argued that customary law excuses violence nor that customary law should take precedence over Australian law. In fact in both cases the defendants' relied on Australian law:-GJ on the decision in *WJI* and Yunupingu on the relevant sections of the *Aboriginal Land Rights Act (NT)* and the *Criminal Code Act*. It's much like the situation where a person is called a 'black bastard' and responds with a punch – if the defendant was white it would be unlikely that provocation would be raised but if he was Indigenous then, as the law stands, clearly it would be. The fact of the person being Indigenous is relevant but it is not itself the defence. None of these examples impact on the principle that everyone is equal before the law.

Both of the above cases are poor examples of the role of customary law in the criminal justice system. Yet these are the cases that the media love to report under the banner of customary law and the cases that the politicians love to quote to support the abolition of customary law.

Sub-Cultures

Special mention must be made here of the phenomenon of sub-cultures. That is, certain non-traditional practices that have developed since colonisation.

A recent case in a Territory community involves the allegation that an 11 year old boy was stupefied with cannabis by a group of 10 males, aged from 12 to 39, then tied to a bed, forced to watch a pornographic video and anally raped by the 10 males. Since this allegation was made public there have been further allegations in the media that this type of conduct is commonplace in Indigenous male traditional ceremonies.

I doubt that very much. There may be cases of this happening in certain communities, but it is unlikely to be happening in most of the 700 plus Indigenous communities in the NT. The primary effect of this type of reporting is to further demoralise Indigenous people, particularly men, and demonise Indigenous culture. The way these matters are presented in the media and by the politicians almost always infer that either Indigenous culture promotes or tolerates this type of behaviour or Indigenous culture is so inherently weak that it is unable to prevent this type of behaviour. Neither inference is true. The effects of describing it thus are devastating.

If abuse during ceremonies is happening in some places it is highly unlikely that it is part of customary law. What is more likely is that it is the result of some deplorable behaviour by a non-Indigenous person preying on vulnerable people and creating a sub-culture that has nothing to do with traditional Indigenous culture. In the Tiwi Islands there is a sub-culture of 'Sister-Girls' - men who dress and act like women. That is not a part of Traditional Tiwi culture. There is credible evidence that the emergence of this sub-culture can be traced back to an extended period of child sex abuse inflicted on young Tiwi boys by a Christian Brother.

Respected Yolngu elder Reverend Djiniyini Gondarra, in a recent media release, stated:

“However, right now there is a sub-culture forming within Aboriginal communities that is violent and abusive. Unfortunately this sub-culture even believes that it is acting within “white fella” law when being abusive. A thinking that began with the systemic undermining of our own law with the colonization of Australia and the atrocities that followed. It is now reinforced by TV, movies, pornography and drugs brought into our community from wider Australia” (19 May 2006 see ards.com.au for the full media release)

Anecdotal evidence abounds of non-Indigenous persons introducing abusive behaviour into Indigenous communities. Allegations have even been levelled at a man who went on to represent the NT in the Senate.

There is a sub-culture of drunken payback in Alice Springs. There is even a sub-culture around the drinking of alcohol.

None of these sub-cultures can be described as customary law (although there is potential for aspects of them to be relevant for sentencing purposes).

It is arguable that the majority of these sub-cultures and the violence and sexual abuse that accompany them are directly attributable to behaviour learned from non-Indigenous people which has proliferated in an environment where the traditional structures that preserved law and order have been broken down.

This is not to say there was no violence in traditional society. There was. But it seems that it was normally controlled violence with a purpose. A purpose of preserving law, order and community harmony. The following two examples demonstrate how customary law can impact positively on the law and order of the communities involved and how the courts have acknowledged and respected this positive impact.

The Corbett Case

In *The Queen v. Alfred Corbett* (unreported decision of Angel J delivered in the Northern Territory Supreme Court on 16 April 2003) the defendant was charged with causing grievous harm to his brother. The defendant and his brother had been drinking in a group when the brother made a sexual advance towards the defendant's wife. The

defendant became enraged and stabbed his brother with a knife to the body several times.

Evidence was called from a well respected female elder from the relevant language group. She gave evidence that the brother had broken customary law. The defendant was entitled to be angry and it was accepted by the community that he could react with violence. His actual reaction was, however, over the top and clearly influenced by alcohol.

That evidence alone is really evidence, once again, of the breakdown of customary law. The Courts in the Northern Territory have already indicated that they will not accept customary law as a justification for extreme violence. This evidence alone would have had a minimal impact on the ultimate disposition.

Where the elder's evidence was extremely useful, however, was in relation to how customary law had subsequently dealt with the defendant's actions. A portion of the transcript of that evidence is reproduced below:

*Are you familiar with the traditions and customs of the Alyawarra people?---
Yes, I am. I have been through the law of the Alyawarra people.*

And by going through that law does that qualify you to speak in court today about those traditions and customs?---It qualifies me, yes, because I hold the law.

Can you tell the court how strong the traditional ways of thinking and acting are amongst the Alyawarra people today?---It is still primarily the first controlling social structure and I think that is because we have not had missionaries in that area, even to this day.

Can you tell the court your opinion as to how a traditional Alyawarra man, would feel if someone else touched and then propositioned his wife?---He would first of all feel that he has been put down, especially if there were others present. That type of thing just does not happen and is not allowed to happen. The reason being that it was – he is the elder in that family and the younger brother should not do that at all to his legal wife.

*How serious is it considered in Alyawarra society to do something like that?---
It is absolutely forbidden and it is taboo, especially to touch her physically.*

And is that still the case today?---That is still the case today, yes.

You have heard in court today that the younger brother, the victim in this matter, put his arm around the defendant's wife and then asked her to leave the defendant and go with him. And then you have heard the defendant's reaction to that. Are you surprised by that reaction?---No, I am not.

And can you tell the court why you are not surprised?---Because the standing of the defendant was undermined, according to our law.

Have you known people in your community to react in that way when something like this occurs?---Yes, I have.

And have you known them to react in that way even when alcohol is not involved?

---Especially when alcohol is not involved. It was common practice that punishment was rendered to people that went out of that particular understanding or – it's not really a silent understanding. It is one that is forbidden. Nobody is allowed to touch a woman unless it is your wife or proposition anything to her.

Do you believe alcohol played any part in this particular matter?-- It probably did to the extent that there was a frenzied attack rather than a man who is in control. Usually there'll be people around and those people would be called to witness the punishment because that punishment must be meted out because the younger brother had no business to touch the older brother's wife.

What would the normal procedure be where everyone is sober?---The procedure would be that the person touched somebody's wife would be punished. In the old days it would be a spear by the person who has been offended. It would be a procedure of his pride or his ego being put back into place. If the woman allowed herself to be touched and didn't do anything about it the woman also would be punished by the women in that clan group.

Now are you aware that the defendant received payback for this incident?---I am aware. I spoke to the defendant's uncle and the uncle told me that he took the defendant to X Community, and this was because the defendant offered himself and he accompanied him and put him on the ground for people to come and hit him.

Did he tell you what happened during that payback?---The information that I received is that he was struck three times with a waltha, with a stick and he was then stuck a fourth time on the head and he did lose consciousness for, I don't know – I don't know the duration. I don't think it was very long, but it was sufficient to render the defendant unconscious.

Can you tell the court what a waltha is; what it's used for?---It's a big stick that is specifically used in carrying out physical punishment in payback.

HIS HONOUR: Does it resemble a nulla nulla?---Yes, it does, Your Honour.

MR O'CONNELL: Is it unusual to have payback in this situation where the defendant was clearly reacting to provocation from his brother?---In this instance it was very expedient that the punishment or the payback was done as quickly as possible so that the severed relationship between the defendant and his brother was mended and healed as quickly as possible. And it was more needful because they were brothers.

The kind of payback which you have spoken about, is that a common occurrence amongst the Alyawarra people?---Yes, it is. The reason being that

the Alyawarra people believe in having a cohesive relationship between each other and especially in family lineage.

And so what would be the effect of the payback that was inflicted upon the defendant?

---The payback would have made the defendant put away the anger he felt towards his brother. It would have cleansed and absolved him from having punished, physically, his brother. It would have made it easier for the defendant to start bridging the fences towards having a relationship again with his brother.

And would it affect the brother, how the brother felt about things?---The brother would have felt probably in a way ashamed of his actions and it would have enforced on him that was the wrong thing to have done to his older brother. And it would have made it easier for the two of them to get back on an even footing and to continue with the previous relationship that they had.

*Is there a word in Alyawarra that describes that healing process of payback?--
-There is a word and I can't even think of it at the moment. But it is a common practice, it's a practice of healing. It's a practice of keeping relationships on a cordial and a workable everyday relationship. It's got to be smooth.*

So this type of payback amongst the Alyawarra people is not seen so much as retribution but more as a healing?---It's definitely not a retribution. It's one of cleansing and forgiveness. If there is to be killings done in the old days, even when I was a young girl, we had what we call the killer, the Kutatji man, to do the killing. The payback, as we know it, in English is more of atonement and cleansing so that people can get back to living their normal life and especially their relationship with each other.

The fact that the defendant agreed to participate in that payback, does that tell you anything about how he felt about what happened?---Yes, it does. Payback can only be done if the perpetrator is willing to go and participate. He has to offer himself. I don't think his uncle said he had to physically drag the defendant to receive that punishment. He went willingly because he felt remorse, he had done the wrong thing.

And as far as you are aware, I mean you live at X and you have spoken to the defendant's uncle, is the community satisfied with the payback that's occurred?

---Yes, it is all finished.

HIS HONOUR: Just before you go, you mentioned the old days but I'm not quite clear when the old days - -?---I guess I'm talking about, Your Honour, when the law – when original people at X, about 40 or 50 years ago, as a child when I was growing up. Everything was so orderly that you didn't do anything without the whole – consulting each other. And there were protocols set down from which you did not stray too much. And you kept a very cohesive, well functioning community together.

The Judge in that case was very impressed with the elder's evidence. In particular it challenged the misconception of 'payback' (which is a non-Indigenous label) as being a practice of violent retribution and described it in terms of being part of an overall system of law that is aimed at maintaining balance and harmony within the community. It was not violence for violence sake. The end result was a fully suspended sentence of imprisonment.

The 'Gondarra Case'

In *The Queen v. James Goutjawuy Gondarra* (unreported decision of Southwood J delivered in the Northern Territory Supreme Court on 15 July 2005) the defendant was charged with arson that resulted in a house being destroyed. Evidence from two elders was provided to the court. It is clear from the Judge's remarks that he acknowledged and respected this evidence. Part of the transcript of his sentencing remarks is reproduced below:

"The affidavit of Reverend Dr Djiniyini Gondarra was read to the Court. In the affidavit, Reverend Gondarra deposes that such territorial asylum is conditional. According to his law the offender was subject to many conditions during his asylum, including restrictions on his whereabouts as well as prohibition from drinking and smoking. As a further condition, the offender was directed to spend time on his clan's homeland, Barrkira which is located on the mainland north-west of Gove. The object of sending the offender to this location was for the offender to remain in neutral territory, for him to appreciate the law of his country and to reflect upon the seriousness of his offending. At all times the offender complied with the conditions that were imposed upon him by his elders.

Reverend Gondarra further deposed that the leaders of the relevant clans also decided that it was necessary to erect a "chamber of law" or "Ngarra". The chamber of law is a physical structure. Its sanctity is revered by members of the offender's community. Under traditional law, passing through the chamber of law is a necessary step which allows a person to accept greater responsibilities within the offender's clan nation. In the offender's case, the two objects of erecting the chamber of law were to provide a way to specifically deter the offender from further offending and to provide for his rehabilitation. The offender attended the chamber of law for three months for a period of approximately four hours each day. For approximately one month, the offender received lessons in how to properly observe traditional law. For a further two months, he was taught the ways in which traditional law is fair, rigorous and impartial. The offender's daily routine involved a period of instruction, a period of dance in which the instruction was practised and a period of painting sacred designs which made what was learnt sacred. As I have said, the offender has not as yet completed the third and final stage of the ngarra.

During each of the two completed stages of instruction inside the chamber of law, the offender has impressed the nine constituent elders of the chamber of

law by his commitment. At all times, he has attended promptly and he has participated in his instruction respectfully.

Reverend Gondarra has also deposed that through his commitment inside the chamber of law and as a result of the reserved way in which the offender has carried himself outside of the chamber of law, the offender has demonstrated significant remorse for his offending to the leaders of the clan. In this way, he has expressed his remorse also to all of the members of the community.

Reverend Gondarra says that the members of his clan nation do not want the offender sent to gaol. The clan nation would prefer that the offender do community work.

An affidavit of Mr Richard Garrawurra was also read to the Court. Mr Garrawurra's evidence supports that of Reverend Gondarra.

The evidence of Reverend Gondarra and Mr Garrawurra establish that the prospects of the offender being rehabilitated are good and considerable weight must be given to this element in sentencing the offender.

I have taken into account the fact that the offender has undergone traditional punishment, the extended nature of the punishment and the fact that the offender has pleaded guilty at an early opportunity. As a result of these factors, I have significantly reduced the term of imprisonment that I would have otherwise imposed”

The end result was a fully suspended term of imprisonment.

Conclusion

Both of these cases demonstrate how customary law can interact positively with the criminal justice system. There are many other examples of such interaction in other fields of law. It is my contention, however, that we have not gone far enough when it comes to respecting and utilizing customary law. Cases like *Corbett* and *Gondarra* are not all that common.

Both of those cases depended heavily on exceptional elders who had high levels of western education. Not every community has such people. Both cases occurred in communities where customary law was still extremely strong and traditional methods of justice had been maintained. In many communities these methods have been weakened, corrupted or destroyed. Both cases involved defendants who willingly submitted to customary law. Not every defendant is so willing. Both cases involved counsel who had forged a relationship of trust with the communities involved. Not all lawyers attempt to forge such a relationship.

These are only some of the obstacles that must presently be conquered for customary law to play a significant role in the NT criminal justice system. Add to this the language and cultural barriers, the lack of infrastructure/programs that actively

support and encourage customary law and the general feeling within the Indigenous community that their law is not respected or understood then you have an enormous challenge.

The first step in this challenge is to be clear about what is and what is not customary law.

This is made difficult for Non-Indigenous people because for the most part customary law is not written down. Yet it is a complex, intricate, intelligent and successful system that is passed on orally and is well understood by those who live within that system. Amongst other things, customary law defines a person's rights and responsibilities, who a person is, and it defines a person's relationships to everyone else in the world. It can only really be fully understood by those who live under that law but a good indicator of whether something is customary law or not is whether its purpose is to maintain community harmony.

Customary law has no connection whatsoever to any form of abuse. It does involve physical sanctions and one has to be careful not to overly romanticise it. But it must be understood that these sanctions are for one purpose and one purpose only and that is to restore community harmony – not to inflict abuse.

It is also true that some men that are no longer subject to the checks that customary law used to place on them are claiming and abusing power that they would not ordinarily have been able to. Again, this is not customary law and it does not find its way into the courts as it would never be supported by strong evidence from the community.

Some argue that the 'kinship' system is responsible for a 'culture of silence' when it comes to abusive behaviour. Yet it is just as arguable that this 'culture of silence' is a direct result of a fear of the police and other authority and the impact that culturally inappropriate responses of the police and other organisations may have on community harmony. In a customary law setting people would not remain silent if abused and abuse would not be tolerated. This fear and distrust of police and authority by Indigenous people was once itself the subject of a public outcry. A Royal Commission occurred. Recommendations were made. Nothing was done. And now it is customary laws fault that people won't talk to the police.

Mention must be made at this point of the situation of urban or non-traditional Indigenous people. These people still hold onto elements of culture and law. This is evident through family interactions and obligations as well as surviving knowledge relating to land, stories and customs. This 'urban culture' is very different from the sub-cultures I have referred to. It needs to be acknowledged and respected. It appears through the introduction of such innovations as the Koori Courts in Victoria that this is happening. However, there is some irony in the fact that greater efforts seem to be being made to incorporate traditional culture into the legal system in places where traditional culture has been most significantly decimated. Such efforts should be across the board.

So one of the challenges you will face is to identify whether something is in fact customary law or whether it is corrupted customary law brought about by the effects of colonisation.

Worthy of note here is the situation in Wadeye. Mal Brough was seen on the Sunday program recently commenting on Wadeye gangs and stating that their heavy metal t-shirts and allegiances had *'nothing to do with Aboriginal culture'*. Once again we see a politician commenting on a culture they know nothing about. The so called 'gangs' in Wadeye are not gangs at all. According to evidence given by anthropologist Kim Barber:

"it's probably more accurate to refer to them as a set of kinsmen than a gang. It's not the Bronx, you don't have a set of people formed around in a street who are a particular socio-economic group. The way in which these groups form is by focusing on particular estate groups and then linking together through...marriage" (evidence given in Unreported NT Magistrates' Court proceedings of *Police v. Sylvanus Parmbuk and John Dumoo*, 19 July 2006).

In short, the Wadeye gangs are in fact aligned with kinship groups that have existed for thousands of years. Women and old people are members of these 'gangs'. It is a continuation of culture and customary law with different clothing and symbols.

The problem in Wadeye is that you have several different groups living in one small area. Age old feuds are bound to erupt. In the old days two things would happen. People would either retreat to their own land and things would cool down, or a fight, presided over by the elders, would be arranged. In Wadeye there is no capacity to retreat and a lack of elders to supervise conflict. Yet there is still strong customary law. Unlike gangs, members of the 'Evil Warriors' and 'Judas Priests' do respect authority and customary law. However, there is a lack of authority in existence. If that authority was reinstated and if certain groups were separated then the present 'gang' structures could be utilised to ensure law and order. The alternative option of destroying the structure of the 'gangs' would result in anarchy and chaos.

It is important, as lawyers, that you gain some understanding of the communities you work for.

Fortunately, whilst it is impossible to fully understand customary law unless you are living it, many Indigenous people are willing to teach important aspects of it to those who are prepared to take the time to learn. The Yolngu recently invited the legal community of the Territory to attend an important legal ceremony. The culmination of that ceremony was the release of a written document that incorporated several Yolngu customary laws. The effect of this was that not only did the legal community experience the Yolngu way of doing things it was also provided with a tool (the written document) to make it easier for them to understand Yolngu law. A portion of that written law is reproduced below:

1. Do not murder or cause anyone to die. If you do you will be liable and receive judicial punishment for restitution at law under the Authority of the Därra' court, which is also sanctioned by the whole Yolngu society and by the aggrieved family

2 a) If you are the offending person, you must present yourself for Makarrata (judicial penalty of spearing through the thigh), and be put right with the law and thereby satisfy the requirements of the Därrra Court and the foundational laws of (Yolŋu) society.)

b) If there is no Makarrata (penalty by the spear) you will be required to make full restitution over and made with your own hands. (The full content of this Yolngu traditional law document can be found on the Aboriginal Resource and Development services website – ards.com.au)

You will note that spearing is connected to ‘restitution’. As with the evidence in the *Corbett* case it is clear that ‘traditional violence’ is viewed from a very different perspective to the way the dominant culture sees it.

During that ceremony we were taught about ‘traditional policemen’ and the question was posed why they could not somehow be given certain authority under the mainstream legal system. The then Chief Magistrate responded by asking why the normal police could not just be given the ‘traditional powers’. A stupid response. The Yolngu were not seeking to have extra powers conferred on them or to have traditional powers conferred on those who did not live within that system. They were merely asking for recognition of what already existed.

I have seen much evidence that Indigenous people are prepared to adapt their culture to reflect wider modern attitudes and practices. Indigenous culture does not need to be preserved. Its essence needs to be understood and strengthened where it works in well with the legal system and supported to adapt where it does not. By the same token the legal system needs to be flexible and adapt to avoid certain conflicts with customary law. It is a two way process. Why not have laws that make ‘payback’ legal and regulate the practice of it? Is all ‘violence’ bad? Particularly when it is carefully regulated and its purpose is cleansing and atonement?

In addition to the positive attitude of Indigenous people to sharing knowledge of their law I have also seen some evidence of the beginning of a renaissance in some sections of the legal community to pro-actively recognise true customary law and utilise it to promote law, order and community harmony. This is where our efforts as lawyers need to be focused. Rather than waiting for cases with all the necessary ingredients to appear we need to take a more pro-active approach to incorporating customary law in the criminal justice system.

In any case involving Indigenous people lawyers should ask a series of initial questions: –

- Has customary law impacted on this case already?
- Is there a potential role for customary law here?
- What is the customary law relevant in this situation?
- Can that customary law be recognised within the existing legal framework?
- If it does not fit within the existing framework can the framework be altered to include it?

Recently the Law Reform Commission of Western Australia produced a 472 page Discussion Paper on Aboriginal Customary Law. The Commission's ultimate view was that

“the continuing existence and practice of Aboriginal customary laws in Western Australia should be recognized [with] such recognition [to occur] within the existing framework of the Western Australian legal system”.

The Commission is in favor of “functional recognition” which is

“recognition of Aboriginal customary law for particular purposes in defined areas of law. This approach allows for a variety of methods for recognition”.

The Commission identified two broad categories of recognition, affirmative and reconciliatory.

“In the affirmative category, the objectives of the Commission's proposals are the empowerment of Aboriginal people, the reduction of Indigenous disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This would be achieved by such changes as;

- *the introduction of statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal customary law in the exercise of their discretions where circumstances require;*
- *the adoption of a whole-of-government approach to service delivery;*
- *the introduction of models of self governance;*
- *the functional recognition of traditional Aboriginal marriage; and*
- *the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.*

In the reconciliatory category the objectives of the Commission's proposals are the promotion of reconciliation and of pride in Aboriginal culture, heritage and identity. This would primarily be encouraged by ‘constitutional recognition’”.

With reconciliation effectively being rapidly dismantled by recent media reporting and political rhetoric the importance of achieving these proposals has never been greater than it is now.

As lawyers, we need to get behind proposals such as those put forward by the LRCWA. I have had the good fortune of working with a very talented and motivated group of lawyers on the Law Council of Australia's Indigenous Issues Committee. Together we drafted a submission of support for the LRCWA. This support from the National Law Council is evidence of the importance of lawyers to the future of customary law as it places pressure on the lawmakers.

However, it is ‘on the ground’ where the real work needs to be done. The first step is to establish relationships of trust with the communities with which you work and then to develop an understanding, as best you can, of the importance of customary law.

The term 'customary law' must itself not be seen as a true description as Reverend Gondarra stated in a recent media release

“Our traditional Ma dayin Law is not “Customary Law”, because custom designates no legal process. Our traditional Ma dayin Law is a real law system, the original Common Law of this land. It has parliaments, politicians, constitutions and Acts of Law. Our people assent to this law through a ceremonial process and we have our own traditional police and sanctions at law” (19 May 2006 see ards.com.au for the full media release)

Once you have this understanding then look for ways for this law to be utilized, strengthened, adapted, acknowledged and respected. This is the strongest way for the present injustices experienced by Indigenous people to be turned around and lawyers are best positioned to help make it happen. Once someone is strong in their own law they can be strong in any law. It is going to take a lot of hard work from a lot of dedicated lawyers. Lawyers like you.