Customary Law, Sentencing and the Limits of the State

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Introduction

Judges in the Northern Territory of Australia regularly deal with the perplexing relationship between Aboriginal customary law and the white legal system. More recently many judges have accepted that, partly as result of alcohol abuse, Aboriginal communities have become devastated places. These judges have begun to consider that sentencing practice informed by customary law may help to repair damaged communities. The issue of customary law punishment, especially "payback"[1] has stretched the limits of the criminal law in a range of sentencing judgements. This stretching has been particularly pronounced where Aboriginal defendants and their representatives have asked the court to take into account intended violent punishments condoned by customary law in relation to mitigation of penalty. Although successive Australian judicial decisions have stated that Aboriginal criminal law did not endure beyond British settlement,[2] the jurisprudence of the Northern Territory does not quite reflect this position. The response of the judiciary in the Northern Territory to customary punishments has been to develop a kind of soft legal pluralism. Judges both take into account the proposed punishment and yet do not formally condone it. The judiciary has attempted to maintain control over customary punishment while being beholden to Aboriginal communities for evidence of appropriate customary responses, and for the carrying out of the promised punishments. This leads to a complex situation where Aboriginal people are both supervised and supervisor, and the state is both in, and out of control. In this paper I examine a number of sentencing decisions where these tensions are revealed and discussed.

* Senior Lecturer, Griffith University, Queensland, Australia. This research is part of a broader project. A version of this paper was presented at the Socio-Legal Studies Association (SLSA) conference, Glasgow, April, 2004. The paper was written while the author was a visitor at the Centre for Socio-Legal Studies at Oxford University during 2004.

1 For a definition of "payback" see Austl., Commonwealth, Northern Territory Law Reform Committee, *Aboriginal Communities and Aboriginal Law in the Northern Territory: Background Paper 1* (Darwin: NTLRC, 2003) at 31-32 [NTLRC 1], where payback is described as the penalty for causing the death of someone. The NTLRC notes that in the Northern Territory spearing in the thigh is a widespread "payback" penalty and it is not intended to cause death (*ibid.* at 32).

2 *Walker v. New South Wales* (1995), 69 A.L.J.R. 111 at 113 [*Walker 1*]. See also Stanley Yeo, "Native Criminal Jurisdiction After Mabo" (1994) 6 C.I.C.J. 9.

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"White Poison":[3] Alcohol abuse and social devastation

The Northern Territory Law Reform Committee recently reported that alcohol abuse was one of two main issues of concern to Aboriginal people with respect to the maintenance of law and order.[4] There is significant judicial concern about the relationship between alcohol, violence and Aboriginal people. In the case law, strong connections between alcohol use and the devastated nature of Aboriginal communities are played out in numerous ways, including "lawless" behaviours such as sexual offences, wife abuse, and "wrong-skin" babies, and in other ways, such as early death, and causing Aboriginal people to drift into trouble in white towns.[5] The cases tend to support one commentator's thesis that the "drunken aborigine" is a powerful iconic image of Aboriginal people out of control,[6] at least in the higher courts. Especially more recently, judges have regularly recognised alcohol abuse as a sign of cultural breakdown, social devastation, and disadvantage. This recognition has had ramifications for their approach to sentencing.

For example, in the case of *Juli,*[7] an Aboriginal defendant was found guilty of two counts of sexual assault. There was evidence that the defendant abused alcohol, and that on previous occasions he had drunk alcohol to excess and then committed violent offences.[8] The court accepted that when he carried out the offences he was intoxicated. Malcolm C.J. noted:

> It is a notorious fact that the increased use of alcohol by Aboriginal persons in relatively recent times has caused grave social problems, including problems of violence, in the communities in which they live. The general circumstances which have led to problems associated with the consumption of alcohol may themselves provide circumstances of mitigation.[9]

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3 Austl., Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Too Much Sorry Business: The Report of the Aboriginal Issues Unit of the Northern Territory*, vol. 5, app. D., by Marcia Langton *et al*. (Canberra: Australian Government Publishing Service, 1991) at 308 [Langton, *Report*].

4 Substance abuse was allied to alcohol abuse and the other issue was family violence, see NTLRC 1, *supra* note 1 at 16. For a discussion of the relationship between alcohol and social devastation amongst Aboriginal people in Australia, see Langton, *Report*, *ibid.* at 275.

5 Lawless both in a white-law and Aboriginal-law sense. See Deborah Bird Rose, "Indigenous Customary Law and the Courts: Post-Modern Ethics and Legal Pluralism" Discussion Paper, (1996) (ANU: North Australian Research Unit, Canberra) at 21 [Bird Rose]; *R. v. Hudson* (16 August 1999), Northern Territory SCC9825802 (N.T.S.C.) at 51 (wrong-skin babies); *Robertson v. Flood* (1992), 111 F.L.R. 177 at para. 12 (early death) [*Robertson*]; *R. v. Herbert* (1983), 23 N.T.R. 22 at 29 (drifting into towns).

6 Marcia Langton, "Rum, Seduction and Death: 'Aboriginality' and Alcohol" in Gillian Cowlishaw & Barry Morris, eds., *Race Matters* (Canberra: Aboriginal Studies Press, 1997) at 93 [Langton, *Race Matters*].

7 *R. v. Juli* (1990), 50 A.C.R. 31 [*Juli*]. This case has been referred to by Northern Territory judges as an authority on this issue, see *R. v. Minor* (1992), 79 N.T.R. 1 at 12 [*Minor*].

8 *Juli, ibid.* at 32.

9 *Ibid.* at 36, Malcolm C.J., referring to his previous judgment in *Rogers v. Murray* (1989), 44 A.C.R 301 at 305–08 [*Rogers*].

Malcolm C.J.'s comments suggest that alcohol abuse is synonymous with cultural devastation and alienation specifically among Aboriginal people.[10]

Social devastation associated with the consumption of alcohol is now routinely discussed in sentencing judgements about Aboriginal people in the Northern Territory.[11] For example, in one case relating to an offence of assaulting a police officer at the community of Ali Curung, alcohol consumption was the focus of the plea.[12] During his sentencing remarks, the judge commented that:

> (…) one must have regard to the general policy of leniency towards those Aboriginal offenders who are disadvantaged socially, economically and in other ways because of their membership of a deprived section of the community (…). In this respect it is also relevant to consider the effect that alcohol has had on the appellants chances in life (…) the effects of alcohol can in such circumstances be seen as a mitigating factor, [this] has on many occasions been accepted.[13]

In this example, alcohol abuse is again tied to deprivation and disadvantage among Aboriginal people as a social group. Other judges have found that "poor self image and other demoralising factors"[14] placed stress on Aboriginal people which lead to their alcohol abuse and consequent offending. In the case of *Long,*[15] the defendant was convicted of manslaughter, and found to have been intoxicated when he stabbed his victim. Again, the judge focussed his discussion on alcohol and its associated social devastation among Aboriginal people.

In the case of *Fernando,*[16] the defendant was drunk when he wounded his de facto wife. In sentencing Fernando, the judge accepted that problems of alcohol and violence "go hand in hand"[17] in Aboriginal communities. Again alcohol abuse was seen as indicative of the social deprivation amongst Aboriginal people. Generally judges have been unwilling to explicitly recognise race as a disadvantage per se, on the basis that it would be contrary to racial discrimination legislation.[18] Specifically, the judge in

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10 Alcohol consumption does not guarantee mitigation of sentence, see *Alderson v. R.* (30 September 2002), Northern Territory CA22/2001-20018453 (N.T.C.A.) Martin C.J., Mildren & Thomas JJ.; *R. v. Wurramara* (1999), 105 A.C.R. 512 at 522.

11 See for example *Cook* v. *Chute* (16 June 1997), Northern Territory 23/1997 (N.T.S.C.); *R.* v. *Clinch* (1994), 72 A.C.R. 301; *R.* v. *Berida* (5 April 1990), Northern Territory 10/1990 (N.T.S.C.), Angel J., at para. 24; *Lalara* v. *Watkinson* (8 November 2001), Northern Territory 2002/WL241351 (N.T.S.C.), Martin C.J. at para. 7 [Lalara]; *Munungurr* v. *R.* (1994), 4 N.T.L.R. 63 at para. 7 [Munungurr].

12 *Robertson, supra* note 5.

13 *Ibid.* at para. 33.

14 *R. v. Yougie* (1987), 33 A.C.R. 301 at 304.

15 *R. v. Long* (13 February 1995), Northern Territory SCC9508033 (N.T.S.C.), Martin C.J.

16 *R. v. Fernando* (1992), 76 A.C.R. 58 [*Fernando*], see the discussion of this case in *Amagula v. White* (7 January 1998) Northern Territory 61/1998 (N.T.S.C.), Kearney J.

17 *Fernando*, *ibid.* at 62.

18 See *Rogers, supra* note 9 at 307, Malcolm C.J. This aspect of the judgement is discussed by Mildren J., in *Minor, supra* note 7 at 12. Compare with *R. v. Welsh,* (14 November 1997), New South Wales (N.S.W.S.C.): "(…) much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture (…)" (*ibid*. at 6).

Fernando found that the sentencing judge must "(…) avoid any hint of racism, paternalism or collective guilt (…)."[19] However, the judgements discussed above do make a strong link between Aboriginality, alcohol abuse, and social devastation. They recognise the discriminatory nature of social life,[20] or what Lefebvre might call "uneven development."[21] The everyday lives of Aboriginal people are at least implicitly recognised by the judiciary as colonised; social systems are shattered and dissociated, and many communities are at an extreme point of alienation.[22] The recurring theme in the cases referred to above is an equation of alcohol abuse, Aboriginality and social dysfunction. In this context alcohol abuse has become entrenched as a symbol of this triumvirate. Langton suggests that the "drunken Aborigine" provides "(…) the narrative, presenting a modern image of uncontained and undisciplined violence which can not be made to accept (…) the constraints of civilisation."[23] It is this picture of a destroyed society that has prompted judges to rethink the role of sentencing. More lenient penalties have been applied,[24] and judges have increasingly looked to the cultural expertise of Aboriginal people and to customary law to repair the destruction.

Subjects and objects of knowledge

Sentencing provisions in the Northern Territory do not expressly require the courts to take customary law into account. However legislation leaves it open for judges to do so.[25] Judges in the Northern Territory have engaged a range of experts to provide evidence of customary law. For example in *Minor,*[26] the court heard evidence about Aboriginal cultural beliefs from a field officer employed by a Lutheran Mission.[27] In *Jamilmira,*[28] there was significant emphasis placed on anthropological evidence presented to the court.[29] As I have noted, judges have increasingly emphasised the role that

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19 *Fernando*, *supra* note 16 at 63.

20 See also *R. v. Friday* (1985), 14 A.C.R. 471 at 472; the defendant was "(…) a victim of the circumstances in which her life had placed her."

21 Henri Lefebvre, *Critique of Everyday Life Volume II: Foundations for a Sociology of the Everyday* (London: Verso, 2002) at 3, 113.

22 *Ibid.* at 11; Langton, *Report*, *supra* note 3 at 308 where alcohol is described as part of the deliberate destruction of traditional culture and law. See also Neil Lofgren, "Diminshed Life Expectancy as a Mitigating Factor in Sentencing" (1997) 4:3 Ind. L. Bull. 21. Nicholsen suggests that Aboriginal communities are suffering from a form of post-traumatic stress syndrome, see John Nicholson SC, "The Sentencing of Aboriginal Offenders" (1999) 23 Crim. L.J. 85 at 86.

23 Langton, *Race Matters*, *supra* note 6 at 93. Other Aboriginal leaders generally agree with Langton's assessment. See for example Mick Dodson, "Violence Dysfunction Aboriginality" (Address to the National Press Club, Canberra, June 2003) [unpublished]; Noel Pearson, *Our Right to Take Responsibility* (Cairns: Cape York Partnerships, 2000).

24 See Francois Ewald, "Norms, Discipline and the Law" (1990) 30 Representations 138 at 155.

25 See *Sentencing Act* (N.T.), s. 5(2) (f): "(…) the presence of any aggravating or mitigating factor" and "(…) any other relevant circumstance."

26 *Minor*, *supra* note 7.

27 *Ibid.* at 11 where Mildren J., notes this evidence was taken into account.

28 *Hales v. Jamilmira* (2003), 142 N.T.R. 1.

29 *Ibid*., Martin C.J., Mildren & Riley JJ., at paras. 18-19. Jamilmira had pleaded guilty to statutory rape of a child under 15. The crown appealed against the sentence. An anthropologist's report had been presented at earlier hearing. The report found that the

sentencing can play in supporting the achievement of "peace" or settlement in Aboriginal communities. In this sense, judges have taken up some of the aims of customary law punishment.[30] This shift in the role of sentencing corresponds to the view articulated above, that Aboriginal people and their communities are devastated and in need of repair. In a number of cases judges have explicitly confirmed that resolution and settlement of matters along customary lines within a specific Aboriginal community was extremely important with respect to the decision about penalty. For example, Kearney J. pointed out in one case that:

> (…) the continued unity and coherence of the group of which the particular accused is a member is essential, and must be recognised in the administration of criminal justice by a process of sentencing which takes due account of it and the impact of a member's criminal behaviour on it.[31]

A change in the role of Aboriginal witnesses in sentencing hearings has developed simultaneously with the shift in focus in relation to the perception of devastation in Aboriginal life. Where historically Aboriginal people were generally limited to a role of witness to facts,[32] they have become key actors in advising courts about cultural issues related to sentence and applicable sentencing responses. Courts in the Northern Territory now anticipate that Aboriginal people will provide expert knowledge about themselves and their communities to the court, where in the past such expertise has been the preserve of white experts.

Other changes have also occurred which support this approach. In order to facilitate the evidence-giving of Aboriginal witnesses, judges have afforded some flexibility to Aboriginal people in relation to how their evidence may be relayed to the court.[33] For example, the judge in *Wilson*[34] found that, "[w]hen it comes to considering traditional matters of Aboriginal law and custom it is preferable indeed that the evidence come from a representative group."[35] In *Wilson,* three Aboriginal people were called together to give evidence of the kind of "payback" that could be expected by

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tradition of promised wives continued in Jamilmira's community and his carrying out of that tradition should operate to mitigate penalty. The report was referred to by all three judges at the Court of Appeal.

30 See Bird Rose, *supra* note 5 at 16.

31 See *Joshua v. Thomson et al* (27 May 1994) Northern Territory 50/1994 (N.T.S.C.) at para. 39 [*Joshua*]. For further examples see *R. v. Miyatatawuy* (1996), 6 N.T.L.R. 44 at 49 [*Miyatatuwuy*]; *R. v. Poulson* (2001), 122 A.C.R. 388 at 392 [*Poulson*]; *Minor*, *supra* note 7 at 10, Mildren J.; *Barnes v. R.* (1997), 96 A.C.R. 593 at 597-98 [*Barnes*]; *R. v. Walker* (10 February 1994), Northern Territory 46/1994 (N.T.S.C.), Martin C.J. [*Walker 2*]; *Atkinson v. Walkely* (1984), 27 N.T.R. 34 at 35; *Mununguri, supra* note 11 at para. 36.

32 See for example some of the cases heard by Kriewaldt J., in the Northern Territory in the 1950's, for example *R. v. Muddarubba* (1956), N.T.J. 317; *R. v. Charlie* (1953), N.T.J. 205.

33 Note a number of approaches have been put in place from time to time in the Northern Territory to facilitate this. See Austl., Commonwealth, Northern Territory Law Reform Committee, *Legal Recognition of Aboriginal Customary Law: Background Paper 3* (Darwin: NTLRC, 2003) at 43 [NTLRC 2].

34 *R. v. Wilson* (1995), 81 A.C.R. 270 [*Wilson*].

35 *Ibid.* at 275, Kearney J.

the defendant when he returned to his community.[36] The court accepted that in a supportive group Aboriginal people are more likely to give a clear explanation of the customary law position which best represents the community.[37] Thus the courts have placed emphasis on the need to obtain cultural information from *representative* bodies, or individuals within communities.[38] Courts have also travelled to hear cases in Aboriginal communities, so witnesses will be more comfortable to give their evidence.[39] Further, evidence has been successfully presented to the court in alternative forms such as community petitions. Victim statements have also received distinct attention in some circumstances. These latter two approaches are illustrated in the case of *Miyatatawuy*[40] discussed below.

In *Miyatatawuy,* the defendant was found guilty of assaulting her husband. She had relevant prior convictions and was at risk of receiving a jail penalty. Through the prosecutor, the victim Barramala, presented a statement to the court that sought to support a non-custodial penalty. Barramala's statement focussed attention on the fact that the community had already dealt with the matter to their satisfaction via customary law. Essentially, the defendant had been required to attend a number of meetings under certain conditions. Barramala's statement said in part:

> [t]his [customary law] system has already decided that the issue is finished (…). If the prosecution proceeds, not only does it discredit our decision to deal with our own problems according to our cultural law, but [the defendant] would be tried twice for the (…) offence (…).[41]

The judge in this case also received a written statement from members of Miyatatawuy's community. This was in a form similar to a petition, and was signed by about 140 people from the defendant's community. Essentially, the petition asserted that the defendant had already been dealt with via customary law.[42] According to the statements in the petition, the defendant had been banished from her community for a period of time,[43] and had promised to be of good behaviour. She had been supervised by members of her community. Martin C.J. noted that the criminal law was related to public wrongs, and therefore could not be settled privately.[44] It is for this reason the victim's wishes in relation to sentencing would not usually be relevant.

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36 *Ibid.* at 275-76.

37 See also *Munungurr, supra* note 11 at para. 24, where the court discussed this issue.

38 I note Dorsett and Rush's discussions with respect to determining native title adjectivally, that is evidentially. Their point also applies in this context. See Shaunnagh Dorsett, "'Since Time Immemorial': A Story of Native Title and the Case of Tansitry" (2002) 26 Melbourne U.L. Rev. 3 at 18, referring to Peter Rush, "An Altered Jurisdiction: Corporeal Traces of Law" (1997) 6 Griffith L.R. 144 at 155 [Rush].

39 *Munungurr, supra* note 11 at para. 23; *Robertson, supra* note 5 at para. 6.

40 *Miyatatawuy, supra* note 31 at 44.

41 *Ibid.* at 46-47.

42 *Ibid.* at 47. See also *Mamarika v. R.* (1982), 42 A.L.R. 94 at 96 [*Mamarika*], where a similar petition was submitted.

43 For another example of banishment see *R. v. Yunipingu* (24 June 2002), Northern Territory SCC2001/3733 (N.T.S.C.), Martin C.J. [*Yunipingu*].

44 *Miyatatawuy, supra* note 31 at 47.

However, in this case, Martin C.J. found that the statement of the victim Barramala, could be distinguished, because the victim spoke as a *representative* of his community and in his capacity as a leading member of his community.[45] Ultimately, Martin C.J. accepted both pieces of evidence as supporting mitigation of the penalty.[46]

Aboriginal people are now often heard by Northern Territory Courts in relation to explaining the customary punishment planned by the community. In *Walker,*[47] Martin C.J. referred to the evidence of a community leader, Grant Granites, who had advised the court that the defendant:

> (…) will be called upon to face tribal punishment; probably, (…) by getting speared in each of your legs a couple of times in such a way that you will be pained for at least a couple of weeks (...) a hunting spear will be used. The punishment would be administered by the brother of the dead man (…). It would be done publicly (…).[48]

Importantly, Granites advised the court that the proposed punishment was in the interests of settling down the community. Similarly, in *Jadurin*,[49] the appellant's father gave evidence that when Jadurin eventually returned to his community the victim's relatives:

> [w]ill tribally encircle [him] and on cue will be allowed to let fly with boomerangs and nulla nullas and spears. When a tribal elder chosen by the group feels that punishment is complete, he will take a spear, a woomera and a burning stick and signal that they are to stop (…).[50]

The Full Court of the Federal Court accepted that this material should be taken into account in relation to sentence determination.[51]

In all of the cases referred to, the defendants and/or the victims, were intoxicated to some extent at the time of the offence.[52] Thus the equation of Aboriginality, alcohol, and social devastation is often present in cases where Aboriginal peoples' cultural expertise is sought with respect to penalty. It is likely that the changed perception of the role of penalty, as community settlement or repair, is a pivotal reason why this kind of evidence is sought. In many of the cases judges are no longer concerned to relocate Aboriginal people within the white community. That is, they are not concerned to use sentencing for the purpose of assimilating Aboriginal people. Rather, judges

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45 *Ibid.* at 49. Compare with *Lalara, supra* note 11 at para. 11 where the judge did not accept the victim's signed document as representative of the community's wishes.

46 *Miyatatawuy, ibid.*

47 *Walker 2*, *supra* note 31.

48 *Ibid.* at 6.

49 *R. v. Jadurin* (1982), 44 A.L.R. 424 [*Jadurin*].

50 *Ibid.* at 427. See also the description of payback by Aboriginal witnesses in *Barnes, supra* note 31 at 594. For a discussion about weapons used by Aboriginal people including images, see D.S. Davidson, "Australian Throwing Sticks, Throwing Clubs and Boomerangs" (1936) 38:1 American Anthropologist 76.

51 *Jadurin, ibid.* at 428.

52 *Minor* maybe an exception, intoxication is not mentioned, however given the description of the facts it is nevertheless likely that both the defendant and victim were intoxicated in this case as well. *Minor, supra* note 7 at 7. Munungurr was a non-drinker but drink was at the core of the troubles behind the assaults. See *Munungurr, supra* note 11 at paras. 6-7. I note that in most cases the victim was also intoxicated.

draw on Aboriginal witnesses for explanations about how customary law can assist defendants to be restored to *their* communities, and, as a corollary, how the peace can be reinstated to, and devastation repaired in, Aboriginal communities. In other words, how customary law can restore discipline to Aboriginal communities. It is for this purpose Aboriginal people's expertise about their own culture is increasingly recognised by the white legal system.

There is a tension implicit in the judicial recognition of these witnesses and the material they present.[53] The form of customary response they describe is often not recognised as a "legal" response by the legal system with which they are communicating.[54] There is nevertheless some kind of space made for them within the law. However, as Rush points out, in order to be heard by the legal system, to enter this space, Aboriginal people must "(…) orient their daily lives to law, to pledge themselves as subjects to law, to experience themselves as legal subjects."[55] The recognition and incorporation of Aboriginal witnesses in courts in the way described, is another means of making Aboriginal people and customary law subjects of general law. Aboriginal people become caught up in supporting this paradigm, by becoming experts in their own culture at the same time as being subjects of their expertise.[56] This is not necessarily negative, as Foucault notes:

> [w]e must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "masks", it "conceals". In fact, power produces, it produces reality; it produces domains of objects and rituals of truth.[57]

Customary law has become intrinsic to the general law sentencing process. It cannot ultimately override the judges' control over sentence,[58] and yet at the same time it asserts its own independent force. Once this kind of evidence of the implementation and role of customary law is accepted, judges appear to be more flexible about the kind of penalty that is imposed.

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53 I note that the High Court have recently suggested that Brennan J.'s judgement in *R. v Neal* (1982), 149 C.L.R. 305 at 326, (1982) 42 A.L.R 609 at 622, Brennan J. [*Neal*], represents the authoritative position on the question of taking Aboriginal customary law into account in sentencing. Brennan J., found that customary law could be taken into account as a material fact. See *Jamilmira v. Hales* [2004] H.C.A. Trans 18 (13 February 2004), online: High Court of Australia Transcripts http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/HCATrans/2004/18.html?query=jamilmira, (application for special leave to appeal to the High Court, 13 February 2004, Gummow, Hayne & Heydon JJ. per Gummow J).

54 Tribal law is not "condoned" see *Minor, supra* note 7 at 11; *Wilson, supra* note 34 at 276; *R. v. Anthony* (12 February 2004), Northern Territory 20326538 (N.T.S.C.) [*Anthony*]. "Customary criminal law was extinguished by the passage of criminal statutes of general application (…)" (*R. v. Miyatatawuy*, *supra* note 31 at 49, Martin C.J.).

55 Rush, *supra* note 38 at 154.

56 See Michel Foucault, *Discipline and Punish* (London: Penguin, 1977) at 103,187 [Foucault].

57 *Ibid.* at 194.

58 *Miyatatawuy*, *supra* note 31 at 49. Note Jackson's comment that indigenous law may be "captured" within white law, M. Jackson, "Justice and Political Power: Reasserting Maori Legal Process" in Kayleen Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy* (Aldershot: Avebury, 1995) at 252.

The expanding arsenal of penalty

In spite of numerous reports and discussions over the years on the question of sentencing Aboriginal people,[59] there has been little change in the rate of their imprisonment. In the Northern Territory, Aboriginal people continue to be literally controlled and contained by the white legal system. Aboriginal people make up 28.8% of the Northern Territory population,[60] yet, in 2003, a staggering 78% of those in custody in the Northern Territory were Aboriginal people.[61] Numerous other Aboriginal people are at liberty subject to certain conditions imposed on their behaviour, and are supervised by government officials. Many in this latter group could be imprisoned if conditions are breached. Although it cannot be argued that there has been any significant variation in the sentencing of Aboriginal people, there are some indications of a gradual shift in approach.

Generally it is the wide acceptance of a view of Aboriginal people as socially devastated that has encouraged some new approaches to sentencing. The increasing acceptance of the evidence of Aboriginal people on issues related to customary law and its place in restoring community peace, discussed previously, has helped to open the door for the recognition and implementation of sentences which suggest a tentative recognition of sentencing practice informed by customary law.

Mildren J.'s judgement in *Minor*[62] is regularly referred to as an authority on the current position in the Northern Territory with respect to the role of customary law in sentencing decisions. Minor pleaded guilty to two counts of manslaughter. The initial sentencing judge took into account evidence that tribal punishment, in the form of a spear in the thigh,[63] would be carried out by the defendant's community after his release from prison, and the fact that Minor consented to the punishment. The sentencing judge then sentenced Minor to 10 years imprisonment (the head sentence). Minor was required to serve four years of the sentence, and then he was to be released on a bond to be of good behaviour for three years. The Director of Public Prosecutions

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59 Note recent examples: Austl., Commonwealth, Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law* (Darwin: NTLRC, 2003) [NTLRC 3]; Austl., Commonwealth, Law Reform Commission, *Background Paper on the approach of the Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and family Law* by Victoria Williams (Perth: L.R.C.W.A., 2003); Justice Dean Mildren, "Aboriginal Sentencing" (Paper presented to the Colloquium of the Judicial Conference of Australia Inc. Darwin, May 2003) online: The Judicial Conference of Australia http://www.jca.asn.au/pubs.html.

60 NTLRC 1, *supra* note 1 at 6.

61 On average about 558 Aboriginal people are daily in custody in the Northern Territory. See Austl., Northern Territory, Department of Justice, *Annual Report 2002-2003* (Darwin: Northern Territory Government, 2003) at 48. I note also that 66% of children placed "in care" by state officials in the Northern Territory are Aboriginal children. See Austl., Northern Territory, Department of Health and Community Services, *Annual Report 2002-2003* (Darwin: Northern Territory Government, 2003) at 120. A previous report found that when imprisoned, sentences for most Aboriginal people are less than three years, see Austl., Commonwealth, *Report on the Royal Commission into Aboriginal deaths in Custody,* vol. 1 (Canberra: AGPS, 1991) at 382.

62 See *Minor*, *supra* note 7 at 7-16. Asche C.J., and Martin J., agreed with him.

63 *Ibid.* at 8.

(DPP) appealed the sentence on the basis that there was an error of principle because the bonded part of the sentence fell short of the head sentence. The DPP also appealed on the basis that by taking "payback" into account, the judge was sanctioning unlawful violence.

Mildren J. appeared to accept that finalising the matter "in the tribal way" would help to settle down the community.[64] He found that by merely taking the possibility of payback into account, the sentencing judge did not sanction unlawful violence. Further, the Court of Appeal found that a sentencing judge was entitled to have regard both to the interests of the wider community, and the special interests of the community in which the respondent was a member.[65] Mildren J. noted that:

> [t]he reason payback punishment, either past or prospective, is a relevant sentencing consideration is that considerations of fairness and justice require a sentencing court to have regard to "all material facts, including those facts which exist only by reason of the offenders" membership of an ethnic or other group. So much is essential to the even administration of administrative justice.[66]

Thus the consideration that payback was likely to take place was merely one of a number of "material facts" to be taken into account. The fact that payback was something intrinsically associated with the defendant's Aboriginality did not mean that it should be ignored. Mildren J. also recognised a general concern, that as a rule, people should not be punished twice for same offence.[67]

Since 1975 judges have been restrained by anti-discrimination legislation and thus race itself is not a permissible ground of discrimination.[68] Further, judges have generally accepted that social, economic, and other disadvantages that may be associated with the defendant's Aboriginality should be taken into account in mitigation of penalty.[69] Evidence about "payback" and other customary law responses has generally been accepted in relation to its potential to address disadvantage. The possibility of violent physical customary law responses severely tests the legal system.[70] In *Minor,* there was some emphasis placed on the legality of the payback proposed. The DPP argued that the payback assaults were likely to be illegal according

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64 *Ibid.* at 14. See also Geoff Clark, "Not Just Payback: Indigenous Customary Law" (2002) 80 Reform 5 at 10, where he notes: "[a]s a matter of priority, we need to make an investment in the restoration of structures that support cultural authority and anchor our people in the sense of who they are and what they can achieve."

65 *Minor*, *supra* note 7 at 14, Mildren J. (the rest of the court agreed with him). See also *Joshua*, *supra* note 31.

66 *Minor, ibid.* at 12, Mildren J. is quoting partly from *Neal, supra* note 53 at 326 per Brennan J.

67 *Minor, ibid.* See also Austl., Commonwealth, Law Reform Commission, *The Recognition of Aboriginal Customary Laws,* (Report No. 31) (Canberra: AGPS, 1986) at para. 508. See also Kayleen Hazlehurst, "Australian Aboriginals Experiences of Community Justice" (1991) 6 Law & Anthropology 46.

68 Specifically see *Racial Discrimination Act 1975* (Cth.), s. 9.

69 *Rogers, supra* note 9 at 307, quoted by Mildren J., in *Minor, supra* note 7 at 12.

70 Mark Finnane, "'Payback', Customary Law and Criminal Law in Colonised Australia" (2001) 29 Int'l J. Soc. L. 293 at 303 [Finnane].

to the criminal law because, regardless of any evidence of consent, the payback was likely to cause permanent injury to health, or "grievous bodily harm;" a form of injury that could not be consented to.[71] For his part, Mildren J. drew on his long experience in the Northern Territory, he referred to the lack of medical evidence, and ultimately did not accept that the form of proposed payback, spearing in the thigh, was likely to cause grievous bodily harm. Subsequent judges have usually not agreed with this assessment,[72] however Mildren J.'s view was that once consented to, this type of punishment was theoretically legal.[73]

In any event, Mildren J. was of the view in *Minor,* that even if the proposed payback was illegal, it should be taken into account.[74] Mildren J. referred to *Mamarika* as authority on this point.[75] I note that in *Mamarika,* the defendant had entered a plea of guilty to manslaughter. Mamarika had appealed against the severity of his sentence on the basis that punishment had already been inflicted on him and should be taken into account. In this case, the defendant had been "punished," by spearing and stabbing, and had received some injuries. This had occurred at a time between committing the offence, and appearing in court for the offence. Mamarika had not consented to the punishment meted out on him in his community. The judges were reluctant to accept that this was traditional punishment as there had been insufficient time to establish the appropriate tribal response. The court accepted that Mamarika's punishment had resulted from anger. In spite of this, the judges in this case found that Mamarika had "(…) already undergone substantial punishment for what he did (…)"[76] and reduced the penalty. Regardless of whether the punishment in *Mamarika* was tribal or lawful (and in the Judge's assessment it was most likely neither) the point is that the court was able to take into account something that had already taken place. *Mararika* is not particularly helpful in assisting us to understand why potential unlawful activity should be taken into account to mitigate penalty. In any event, Mildren J notes that the usual reason why courts say that they do not condone payback is because "(…) it is a form of corporal punishment, carried out by persons not employed by the State to impose punishment (…)"[77] rather than because tribal punishment is unlawful per se.

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71 See *Criminal Code* (N.T.), s. 26(3).

72 See *Anthony*, *supra* note 54 at para. 34. In *Barnes, supra* note 31, Bailey J., heard evidence of the risk that the applicant would be crippled permanently by the spear in the femoral artery (*ibid.* at 2). See also NTLRC 3, *supra* note 59 at 26.

73 Because not likely to cause grievous bodily harm. But note *Barnes, ibid.* at 597, and see Bill Ilkovski, "Tension Unresolved: The Place of Traditional Punishment in the Criminal Law" (1997) 21 ALMD Advance 2 at 3, where he notes that Barnes had consented to payback but in spite of this consent the court were concerned for his safety in the face of payback, and refused to allow bail.

74 Note Bailey J.'s view it was "not irrelevant" to bail whether the proposed payback was an offence under the criminal law. See *Barnes, supra* note 31 at 597.

75 *Mamarika*, *supra* note 42.

76 *Ibid.* at 99. See also *Miyatatuwuy, supra* note 31 at 47, where the repercussions of the assault had been dealt with to the satisfaction of the community.

77 *Minor, supra* note 7 at 13-14. See also Finnane, *supra* note 70 at 294.

Often judges have suggested that the crucial distinction is between recognising the inevitability of payback on the one hand, against facilitating it on the other hand.[78] However, the line is often thinly drawn. Sometimes courts have contrived a penalty on the basis that payback would occur. In recognition of this they have integrated supervision arrangements into the sentence. For example Walker pleaded guilty to manslaughter and as part of his plea for mitigation of sentence he advised the court that he expected to face payback on his release from prison. There was evidence that tribal punishment would help settle the community.[79] With respect to tribal punishment, evidence was given to the effect that Walker would be speared in each of his legs by a hunting spear. Martin C.J. accepted this evidence and noted:

> (…) I think the first thing the court has to do in this case, and maybe others, is to try and work out a regime whereby it can be informed as to whether what is expected has happened or not and to bear in mind the powers of the Director of Correctional Services who might be asked to supervise people and report to the court (…) with a view to changing the terms and conditions of a good behaviour bond.[80]

Clearly Martin C.J. anticipated that payback would take place and he structured the sentence on this basis. He sentenced Walker to three years imprisonment but allowed immediate release,[81] and placed him on a good behaviour bond to be supervised at his home community of Yuendemu. The judge noted:

> I ask the Director of Correctional Services to report to the court as to whether that event [payback] occurs. If so when and as to what happened (…) I would ask the director to inform the court accordingly and to provide any information which he can obtain from the community or others concerning that issue of payback (…) the director may come before the court and seek a variation of conditions (…).[82]

In this case the sentence links the court via the state bureaucracy to the Aboriginal defendant in much the same way as the prison institution does. However the suggestion that the state official watch over the defendant within his own community, and that members of the community are generally expected to inform the state official about the "payback" to be carried out, creates a new set of relationships. The requirements mean that the defendant's community becomes a disciplinary space, and members of the community become connected to the white legal system through a kind of self-surveillance.[83] Martin C.J. was at pains to clarify that although the

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78 *Minor*, *ibid.* at 13. See also *Anthony, supra* note 54 at para. 23, Martin C.J.
79 See *Walker 2, supra* note 31 at 6.
80 *Ibid.* at 9.
81 Walker had already served some nine months in custody.
82 See *Walker 2, supra* note 31 at 10; *Mamarika*, *supra* note 42 at 99-100.
83 See Hubert L Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (New York: Harvester Wheatsheaf, 1982) at 157; Foucault, *supra* note 56 at 176.

court must take into account the violent payback that was planned, it did not condone it.[84] After the sentence in *Walker* was handed down, there was some general concern raised in the broader community about what the decision required. It seems that some people were concerned that the sentence required government officials to actually view the payback, thereby directly involving them in the process. This concern prompted Kearney J. of the Northern Territory Supreme Court to clarify the sentence in *Walker* to the public. He observed that government officers were not asked to be present at, or to observe any payback, and the sentence was not intended to be varied.[85] Although it seems that direct observation by government officials was not required, the language of the sentence does appear to suggest that variation was considered a possibility in the event that payback was not carried out.

Beyond settling communities and ensuring justice to individual defendants, other reasons have been suggested to support the recognition, if not facilitation of, payback in sentencing. In *Jadurin*[86] for example, there was some evidence to the effect that if Jadurin was not released to accept payback, someone else in his family would be targeted to accept it.[87] Ultimately the court reduced a penalty for manslaughter on the basis that some payback had taken place and more was likely to take place at some stage. In reducing the penalty the court sought to recognise "(…) the structure and operation of Aboriginal society (…)"[88] but not to abdicate responsibility to Aboriginal people. Again this illustrates the tensions implicit in trying to ensure that the white legal system both recognises customary law and at the same time maintains control of the sentencing process.

Commonly, sentencing decisions have found that the unity and coherence of Aboriginal communities must be fostered by the criminal justice system and that recognition of "payback" can assist with this.[89] For example, Poulson killed another man during a fight, and was subsequently hit with *nulla nullas* and spears. In sentencing him, Thomas J. noted that: "[w]hilst I do not condone the physical punishment inflicted (…) I must accept that for the respective families (…) it was an important process (…) and has been effective in resolving the enmity between the families (…)."[90] Such cases, where the payback has already occurred at the time of sentencing, create less of a tension for the criminal law. After all, what's done cannot be undone, and there is no question of facilitating future illegal

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84 See *Walker 2*, *supra* note 31 at 6.

85 See Kearney J., "Sentencing: Taking Aboriginal Customary Law Sanctions and Community Attitudes into Account" (1994) Balance 1 at 6.

86 *Jadurin, supra* note 49.

87 *Ibid.* at 427. See also NTLRC 1, *supra* note 1 at 26.

88 *Jadurin, supra* note 49 at 428.

89 *Miyatatawuy, supra* note 31 at 49; *Joshua, supra* note 31 at para. 39.

90 *Poulson, supra* note 31 at 392, Thomas J. I note that the payback had been carried out before Poulson was sentenced.

acts. Nevertheless there is an implicit message of respect for customary law payback within such decisions.

In the case of *Munungurr,*[91] the trial judge had admitted a letter from the accused's community, which stated the community's wish that the defendant be returned to the community for various reconciliation meetings and ceremonies. The trial judge had given no weight to the letter. In spite of accepting the submission of the DPP—that what the community proposed did not involve any punishment[92]—the Court of Criminal Appeal held that the trial judge should not have ignored the wishes of the letter. They found that the trial judge failed to consider the nature of the reconciliation ceremony referred to in the letter, the effect of imprisonment on the offender's family and his people, the community's wish that he be dealt with traditionally and the traditional punishment proposed by the community.[93] In this case the court allowed the appeal and ordered, as part of penalty, that the defendant attend a tribal reconciliation for the purpose of sealing the peace.[94] Similar to the sentence in *Walker*, the Court also asked the Director of Correctional Services to report back to the court once satisfied that the meeting had been held. The Court reminded the Director of his powers to seek a variation if the meeting had not taken place within a reasonable time.[95] Again, similarly to the *Walker* case, the court and community are interdependent in relation to the sentence. Aboriginal people are again both supervisor and supervised.

Conclusion

Aboriginal people who confront the criminal justice system are now frequently perceived as belonging to a devastated community. This changed attitude has fostered a shift in sentencing goals. Judges have been more likely to see peacemaking and community restoration as an important objective in sentencing. To this end courts have also become more open to accepting evidence from Aboriginal people as "experts" about customary law views about penalty. These shifts have in turn lead to more lenient jail sentences and new kinds of penalties being available. Usually these new sentences are articulated as short sentences of imprisonment to be served, coupled with periods where the defendant is bound over to be of good behaviour for a period of time. Often there is a period of sentence suspension associated with the binding over. This formal articulation of the sentence does not express the whole story however. Informally, in some situations, the court has shortened (mitigated) the actual prison sentences on

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91 *Supra* note 11.
92 *Ibid.* at para. 33.
93 *Ibid.* at para. 12; NTLRC 2, *supra* note 33 at 42.
94 *Munungurr, ibid.* at para. 36. For offences of grievous bodily harm and two assaults (against police officers) the overall sentence was 4.5 years, to be suspended after serving three months along with requirements for supervision and attendance at the community meetings.
95 *Ibid.* at para. 36.

the basis that various customary practices such as physical punishment,[96] banishment,[97] or reconciliation meetings,[98] for example, will take place.

More recently, where judges have accepted evidence of "payback" or customary law and taken it into account, they have consistently stressed that it is not necessarily condoned, rather it has been recognised as inevitable, and/or helpful in restoring community peace.[99] Courts constantly maintain that the wishes of a specific Aboriginal community are relevant so long as they don't prevail over what would be a "proper" sentence.[100] The absolute control of the white legal system over the exercise of customary law punishments is of course a chimera. Arguably Aboriginal people have developed greater control over the sentencing process, however the flip side of this is that Aboriginal communities and their members have become bound up in the white legal process. The network of surveillance of the legal system over Aboriginal people is strengthened, and Aboriginal people become further integrated into that network.[101] In the process, Aboriginal communities have become further enmeshed as spaces of white legal discipline.[102]

For their part, contemporary judges have become caught in a suspended place neither condoning customary law responses and associated corporal punishment nor disavowing their place.[103] In the past judges have imagined that white society and its laws could be placed like a grid over Aboriginal society and laws.[104] They expected that eventually the struts of white society and law would be able to be laid firmly in place and customary law would disappear.[105] However it has not disappeared, and in response to a situation of perceived social crisis judges in the Northern Territory have recognised the durability of Aboriginal laws and their potential use in disciplining

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96 *Walker 2, supra* note 31.

97 See for example *Yunipingu*, *supra* note 43.

98 *Munungurr, supra* note 11.

99 *Minor*, *supra* note 7 at 10; *Munungurr, ibid.*; *Wilson, supra* note 34 at 276; *R. v. Peipei* (8 July 2002), Northern Territory SCC 20014404 (N.T.S.C.), Riley J.; *Poulson, supra* note 31.

100 *Robertson, supra* note 5 at para. 35; *Munungurr*, *supra* note 11 at para. 36.

101 Thomas Flynn, "Foucault's Mapping of History" in Gary Gutting, ed., The Cambridge Companion to Foucault (Cambridge: Cambridge University Press, 1994) at 41. Foucault notes: "(...) although surveillance rests on individuals, its functioning is that of a network of relations from top to bottom, but also to a certain extent from bottom to top and laterally; this network 'holds' the whole together and traverses it in its entirety with effects of power that derive from one another: supervisors perpetually supervised." (Foucault, supra note 56 at 176-77).

102 Note Paul Rabinow, *Anthropos Today* (Princeton: Princeton University Press 2003) at 45, where he discusses Foucault's insight that power is not external to freedom. In this vein I also note Benton's comment that Aboriginal people can not necessarily be seen to be collaborating just because they take actions that "affirm the legitimacy of colonial courts." See Laura Benton, *Law and Colonial Cultures* (Cambridge: Cambridge University Press, 2002) at 258 [Benton].

103 Rush, *supra* note 38 at 147.

104 For a discussion of the approach of the Northern Territory Supreme Court during the 1950's, see Heather Douglas, "Justice Kriewaldt, Aboriginal Identity and the Criminal Law" (2002) 26:4 Crim. L.J. 204.

105 This kind of analogy is made by Benton describing E.P Thomson's theoretical position. See Benton, *supra* note 102 at 256-58.

Aboriginal people and restoring peace to Aboriginal communities. In this sense there is a kind of weak legal pluralism in operation.[106] "Weak" because there is informal recognition of Aboriginal customary law which gives some small space for an alternative legal authority to operate albeit under conditions purported to be scrutinised by the white legal authority.

Résumé

La question de la punition coutumière, particulièrement de la rétribution (« *payback* »), a étiré les limites du droit pénal dans une série de décisions sentencielles dans le Territoire du Nord de l'Australie. Des arrêts australiens successifs ont établi que le droit pénal aborigène ne s'applique plus au-delà de l'établissement britannique. Cependant, la jurisprudence dans le Territoire du Nord ne reflète pas cette position. La réponse judiciaire aux punitions coutumières y fut de développer une sorte de pluralisme *soft*. Les juges y tiennent compte de la punition suggérée sans toutefois l'endosser formellement. Le système judiciaire tente de garder le contrôle sur la punition coutumière mais dépend des communautés aborigènes pour s'assurer tant d'une réponse coutumière adéquate que de l'exécution des punitions promises. Ceci crée une situation complexe dans laquelle les Aborigènes sont à la fois surveillés et surveillants, alors que l'État contrôle tout en ne contrôlant pas.

Abstract

The issue of customary law punishment, especially "payback", has stretched the limits of the criminal law in a range of sentencing judgements in Australia's Northern Territory. A number of judgments relating to customary law punishment are discussed in this essay. Successive Australian judicial decisions have stated that Aboriginal criminal law did not endure beyond British settlement. However, the jurisprudence of the Northern Territory does not quite reflect this position. The response of the judiciary in the Northern Territory to customary punishments has been to develop a kind of soft legal pluralism. Judges both take into account the proposed punishment, and yet do not formally condone it. The judiciary has attempted to maintain control over customary punishment while being beholden to Aboriginal communities for evidence of appropriate customary responses, and for the carrying out of the promised punishments. This leads to a complex situation where Aboriginal people are both supervised and supervisor, and the state is both in and out of control.

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[106] Benton, *ibid.* at 11, 25. See also Austl., Commonwealth, Northern Territory Law Reform Committee, *The Recognition of Aboriginal Law as Law: Background Paper 2* (Darwin: NTLRC, 2003) at 16-17 for a discussion about what legal pluralism means.