

## CUSTOMS NOT IN COMMON: CULTURAL RELATIVISM AND CUSTOMARY LAW RECOGNITION IN AUSTRALIA

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It would be too strong to say that Aboriginal customary law is getting a bad reputation even among those who have been seen as its natural defenders. But its real or imagined drawbacks are being exposed in a way which is new at the very time that demands are being made for its recognition as a component of a treaty, as a technique of 'reconciliation' or as a remedy for the ills of Aboriginal society. Unless some hard thinking is done about what customary law is and what its recognition would entail, any political initiative in its favour may end in tears and disillusion. (Kenneth Maddock 2001).<sup>1</sup>

### I INTRODUCTION

In the 1990s and 2000s some members of the Northern Territory judiciary and Police supported the practice of indigenous regulated revenge, or 'payback', and police officers at times attended public leg-spearings to, as it were, keep an eye on

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<sup>1</sup> Kenneth Maddock, 'Sceptical Thoughts on Customary Law' in Gary Johns (ed), *Waking up to Dreamtime: The Illusion of Aboriginal Self-Determination* (2001) 152.

things.<sup>2</sup> On the other hand in 2003-2006 a new toughness developed in that jurisdiction when it came to the use of customary law arguments regarding sentencing for carnal knowledge or sexual assault on underage promised wives by Aboriginal men.<sup>3</sup> It should not be a surprise if Aboriginal people, or at least men of seniority, were to find this kind of difference unacceptably inconsistent. In this paper I suggest that inconsistency is only one of the prices one pays when a system of laws based on one set of principles attempts to accommodate bits and pieces of another set of rules for conduct based on quite different cultural principles.

Other kinds of contradiction are not hard to find. According to a recent NT Aboriginal Customary Law report, each 'community' should define its own problems and solutions,<sup>4</sup> but, on the other hand, the processes involved must ensure that women, young people and 'less dominant groups' are heard and their rights to equal protection not compromised.<sup>5</sup> With all due respect, the potential here for an inconsistency that takes the form of a profound contradiction seems fairly obvious. As was to become a matter of public comment in the media during 2006, remote Aboriginal community victims of violence tended to adhere to 'community' norms of silence, or to silence based on fear of retribution from other members of the community. As a result, police complained that they had great difficulty getting victims to provide evidence about perpetrators, especially those whose local power and standing could help shield them.

Again, most Australians abhor clitoridectomy but also stand silent at the male circumcisions undergone by hundreds of boys over much of the outback each summer. These instances are typical of the contradictory elements one comes across repeatedly when looking at attempts to deal with the issue of indigenous customary law in Australia.

The issues and the contradictory elements are not confined to matters of crime, conflict resolution, customary marriage, property inheritance and other areas readily classed as legal in character. Recognition of custom combined with denial of custom is to be found, for example, in the Aboriginal health industry. Traditional Aboriginal healers may publicly oppose surgery and blood transfusions, teach that injections do not work, deny the germ theory of disease and thus effectively proclaim the safety of squalor, encourage delay in hydration treatment for infants suffering severe diarrhoea, and advertise their own treatments as being highly efficacious in the face of evidence of massive Aboriginal ill-health. Despite this, such healers are still employed by a government-funded health delivery system that is based on science and its reliance on empirical evidence and methodological

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<sup>2</sup> Tom Svikart (verbal personal communication 7 May 2003).

<sup>3</sup> Karen Michelmore, 'Prosecutor Appeals 24-Hour Term for Underage Sex', *The Age* (Melbourne), 14 March 2003, Lindsay Murdoch, 'Court Boosts Penalty in NT Elder Sex Case', *The Age* (Melbourne), 23 December 2005, 9.

<sup>4</sup> Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law*, Report No 9 (2005) [6.11].

<sup>5</sup> *Ibid* [6.16].

doubt. The relevance of this here is that such traditional doctors are working not just in a somatic domain but in their own understanding are also working under Aboriginal Law, *ngangkari* *Tjukurpa* [doctors' Law] as it is known for example in Pitjantjatjara. They can be quite open about the fact that they are in a power struggle with Western-style medical practitioners for recognized 'doctor' status, for wages, and for motor vehicles.<sup>6</sup>

Well-meaning whitefellas who support traditional doctors in their quest to peel back the postcolonial power differential have to face the fact that, with the likely exception of palliative care and possibly that of mental health care, traditional healers who promulgate such views as I have mentioned are likely to constitute a danger to the already disastrous health of their communities. The issue I raise here is not, however, to question their existence but to question why agents of the state, whose primary brief is to improve health, should blur the domain distinction between traditional and interpersonal voluntary behaviour on the one hand, and state-sanctioned and funded services on the other, in such a self-defeating manner. A parallel concern is with the way the Northern Territory Police are being used as peacekeepers and supervisors at leg-spearings. These confusing attempts at relativism ironically seem to echo the traditional Aboriginal complaint that the whitefellas' law is not predictably fixed and 'one-way', the way laws should be.

## II THE OLDER KIND OF RELATIVISM: TURNING A BLIND EYE?

Relativism is not entirely post-1960s in Australian law's dealings with indigenous people. Under frontier conditions it was often the case that internal Aboriginal conflicts and delicts were left for Aboriginal people to sort out among themselves. Willis J in the colony of New South Wales at some point prior to 1845 stated that his jurisdiction's customary practice was to visit the rigour of the law on whites for 'aggressions on the helpless savages', and on Aborigines for 'outrages upon [their] white brethren'. But, he said, '[a]s between the Aborigines themselves, the court has never interfered, for obvious reasons'.<sup>7</sup> The key point here is that British law was applied within British society or at the points where British and indigenous societies intersected, but not in the notionally separate polity of the Aboriginal world. To the extent that indigenous customary law is promoted now as a distinct legally recognised domain, to that extent distinct polities are affirmed or constructed. But 2006 is not 1845. Most Aboriginal people in 2006 move about in what is sometimes called an intercultural space, that is also an inter-ethnic social space, and an economic and political space, where nobody's relations are entirely with members of a single race.

<sup>6</sup> See statements by various *ngangkari*s in Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Aboriginal Corporation, *Ngangkari Work – Anangu Way: Traditional Healers of Central Australia* (2003) 20, 37, 43, 49, 54-55, 57, 62-63, 65, 70, 74-75, 83-84.

<sup>7</sup> Willis J quoted in Edward John Eyre, *Journals of Expeditions of Discovery into Central Australia and Overland from Adelaide to King Georges Sound, in the years 1840-1841* (first published 1845, 1997 ed) vol 2, 495.

Until the 1950s in the Northern Territory a blind eye was turned to homicides when they were in the category of intra-indigenous acts, so long as traditional weapons were used.<sup>8</sup> The famous case of the killing of Kai-Umen, which involved a police pursuit, the killing of one of the alleged offenders by a police officer at Ayers Rock, and a trial of Aboriginal men accused of the original murder, was an historic break-point for that territory.

There are various accounts of the killing of Kai-Umen near Mount Conner in 1934.<sup>9</sup> Lively Palyingka told T G H Strehlow that the killing had been for some kind of sacrilege.<sup>10</sup> Strehlow's published account says the murdered man was 'secretly accused of betraying "tribal secrets" to women'.<sup>11</sup> Paddy Uluru, then known to Europeans as Ooleroo Paddy, was one of the prisoners pursued in 1934, and in the 1970s told Robert Layton that Kai-Umen had been killed by his party for revealing secrets to 'White men,' but only made mention of sticks and stones as the murder weapons.<sup>12</sup> Cowarie told the 1935 coronial inquiry that Kai-Umen had been executed for revealing secrets to his wife Judy.<sup>13</sup> The consistent element here is that the killing was said to be for a religious crime, although the case shows some of the difficulties in eliciting consistent witness evidence in such a case. As a religious execution the killing would normally have been classed as 'blackfella business' and perhaps of marginal interest to police. However the forensic evidence was crystal clear that Kai-Umen had been shot in the head with a rifle. The message seemed to be that the modernisation of means – from strangulation, clubbing or spearing, for example, to gunshot – made the act culturally inappropriate, no longer fully Aboriginal, and thus outside the purview of a tolerant official relativism:

The unusual severity of the sentence ... was without doubt due to the grave concern felt by members of the European jury that a rifle borrowed from a European dogger had been used to shoot the victim. Had the latter been speared in the normal way, no alarm would have been aroused.<sup>14</sup>

This tolerant approach to Aboriginal homicides was documented in some detail by Justice Martin Kriewaldt for the years 1944 to 1957 in the Northern Territory, in cases heard by Kriewaldt J himself and earlier by Willis J. Justice Kriewaldt noted that even before a 1939 ordinance relieved courts of a mandatory death sentence for murder where the perpetrator was Aboriginal, the death sentence had 'in practice always been commuted', and:

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<sup>8</sup> T G H Strehlow, 'Geography and the Totemic Landscape in Central Australia: A Functional Study' in Ronald M Berndt (ed), *Australian Aboriginal Anthropology* (1970) 92, 121.

<sup>9</sup> See eg, *ibid* 120–121, W E (Bill) Harney, *To Ayers Rock and Beyond* (1963) 40–41, Robert Layton, *Uluru. An Aboriginal History of Ayers Rock* (revised ed, 2001) 69–72, Jim Downing, *Ngurra Walytja, Country of my Spirit* (1988) 9–11, Barry Hill, *The Rock: Travelling to Uluru* (1994) 117–129.

<sup>10</sup> T G H Strehlow, *Field Diary XL* (1969) 18 (handwritten diary held at the Strehlow Research Centre, Alice Springs).

<sup>11</sup> Strehlow, above n 8, 120.

<sup>12</sup> Layton, above n 9, 70.

<sup>13</sup> Layton, above n 9, 72.

<sup>14</sup> Strehlow, above n 8, 121. Harney makes the same comment (above n 8, 40).

A perusal of the analysis of sentences imposed on aborigines found guilty of murder or manslaughter which is contained in an earlier section [of the paper] will show that neither Wells J. nor I consistently imposed heavy sentences on aborigines convicted of murder. The penalties on aborigines have been consistently lighter than penalties imposed on white offenders.<sup>15</sup>

There is anecdotal evidence, at least, that a number of Aboriginal disappearances in Central Australia in recent years have been pursued with less than the usual vigour by police, and there is certainly an extremely strong view in that region that executions for religious and other misdemeanours, and payback killings, continue to take place, although alleged cases rarely come to police attention.

A former Northern Territory Police Superintendent, Tom Svikart, now a lawyer, has published the view that the *Criminal Code* of the Northern Territory would only prohibit payback using spearing or beating if it were found that the assault was *intended* to kill or cause grievous bodily harm to the subject. He has argued that *consensual* payback may have grievous harm and death as possible outcomes, but this is also true of boxing, which is legal, the implication being that spearing in the leg as payback should be allowed to continue under the right conditions.<sup>16</sup> He says, from his own observation, that properly organised and supervised paybacks that are conducted according to agreement are ‘neither random nor arbitrary’ and can be a ‘measured and supervised ceremony’.<sup>17</sup> To some extent, at least, this has become police business: ‘It is to the end of maintaining appropriate procedure that police are generally notified and invited to keep the peace’.<sup>18</sup>

Payback properly so called as discussed here is not lawless revenge. It is orderly and the presence of police is sought to maintain order to the end that no drunks or persons not entitled to be present or to participate interfere and further that when punishment is completed the process ceases.<sup>19</sup>

Is this a hybrid legal artefact, or is it better defined as the methods of one law enforcement system propping up the apparently inadequate methods of another?

But the Northern Territory judicial system has withdrawn from facilitating payback openly,<sup>20</sup> especially since the case of *Wilson Jagamara Walker*<sup>21</sup> where, as Svikart

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<sup>15</sup> Justice Martin Chemnitz Kriewaldt, ‘The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia’ (1960) 5 *University of Western Australian Law Review* 1, 47.

<sup>16</sup> G T Svikart, ‘Aboriginal Customary Law and the Criminal Law – “Payback,” – Exculpation and Protection’ (Submission to the Aboriginal Customary Law Inquiry of the Northern Territory Law Reform Committee, 2003) 2-3.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 2.

<sup>19</sup> Ibid 3.

<sup>20</sup> Ibid.

<sup>21</sup> *R v Wilson Jagamara Walker* (unreported, Northern Territory Supreme Court, Martin CJ, 10 February 1994).

put it, 'the anticipated payback was never carried out and a killer effectively walked free'.<sup>22</sup> As Rick Sarre commented,

the judge failed to negotiate or consult with the victim's family at Yuendumu, and indeed, at the end of the day, the opportunity for pay-back had passed. This case illustrates, with respect to the judge, the errors that are possible when judges embrace the notion of customary law without requisite information and cultural knowledge.<sup>23</sup>

But one should be wary of attributing lack of punishment or resolution only to judges. Aboriginal relatives of victims of sexual violence may also abandon the victims in order to maintain solidarity or at least peace with the perpetrators' kin, whether from fear, favour, or affection.<sup>24</sup> There is an unnerving resemblance between this kind of situation and one in which the urban liberal prefers what is seen, romantically or otherwise, as an act of decolonisation, such as valuing legal pluralism over the principle of equality before the law and over the principle of repugnance. But is repugnance against violent payback, or circumcision of minors, or under-age promised marriage, or the obligation some men feel to attack their sisters when the latter are verbally abused in a sexual way,<sup>25</sup> just so much bourgeois squeamishness, evidence of an insufficiently robust cultural relativism and an overly sensitive disposition? It was a lot easier, in my own circles, to think this way in 1976 than it had become in 2006. Not only had the baby-boomers matured, but the world had changed. I shall return to factors causing this shift at the end of the paper.

### III THE END OF ROSE-COLOURED IDEALISM?

During his remarks at the 2005 launch of a book on Aboriginal petrol sniffing and judicial issues at the Law Society of South Australia, Christopher Charles of the Aboriginal Legal Rights Movement, said in effect:

This book represents the maturing of the legal profession in South Australia on the subject of Aboriginal-related issues. We have moved beyond past attitudes of, on the one hand, benign pessimism, and, on the other, rose-coloured-glasses idealism.<sup>26</sup>

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<sup>22</sup> Svikart, above n 16, 3.

<sup>23</sup> Rick Sarre, 'Aboriginal Customary Law' in LeeAnn Marks (ed), *Proceedings of the 1995 Australasian Law Teachers Association* (1996) 133, 140. See also Rick Sarre, 'Sentencing in Customary Australia: An Overview of the Issues' in Rick Sarre and Digby Wilson (eds), *Proceedings of Roundtable on Sentencing and Indigenous Peoples* (1998) 7.

<sup>24</sup> See eg, Deborah Bird Rose, *Indigenous Customary Law and the Courts: Post-modern Ethics and Legal Pluralism* (Discussion Paper No 2, 1996) 21.

<sup>25</sup> See W Lloyd Warner, *A Black Civilization: A Social Study of an Australian Tribe* (revised ed, 1958) 66; L R Hiatt, *Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land* (1965) 117; L R Hiatt, 'A Spear in the Ear' (1966) 37 *Oceania* 153; Raoul Makarius, 'Incest and Redemption in Arnhem Land' (1966) 37 *Oceania* 148.

<sup>26</sup> Christopher Charles, 'Remarks Made at the Book Launch of Christopher Charles (ed), *The Effects of Petrol Sniffing* (2005)' (speech delivered at the Law Society Rooms, Adelaide, 17 May 2005).

For those in legal circles with some years of experience in the indigenous arena, I think this observation holds well. But there is still pretty abundant evidence that ignorance and naiveté are no barrier to authorship of widely circulated official legal pronouncements. This is from the 2000 report of the New South Wales Law Reform Commission called *Sentencing: Aboriginal Offenders*:

#### VIOLENCE AGAINST WOMEN

3.112 Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions. Specifically, there is a danger that the judiciary, and others involved in the sentencing process, will accept the claim or myth that sexual and domestic violence against women is sanctioned by Aboriginal culture, or, at least, not regarded as seriously as it is in non-Aboriginal culture. This premise must be categorically repudiated.<sup>27</sup>

The evidence against this quite simplistic view is overwhelming. The field of the recognition of customary law seems perpetually fraught with a deep rift between this kind of idealisation of history with its politicised reconstruction of the past, on the one hand, and a scientific approach to the evidence on the other.<sup>28</sup> Any application of legal pluralism to Aboriginal people has had to involve awareness of cultural differences in, for example, what is regarded as the legitimacy of various forms of assault. It has had to pick its way through a minefield of exceptions to the mainstream acceptability of customary rules based on consideration of what liberals tend to see as universal rights (not just ‘Whitefella rights’) which have no parallel in classical Aboriginal practice. The criminal code and customary law are not merely different, they at times collide head-on.

The most profound difference is between the theoretically objectified law of the state, enacted by officers appointed other than on the basis of their relationship to the active parties in a case, and the emergent nature of Aboriginal law in the conduct of face to face relations between kin. There is often a lot of focus, in discussions of Aboriginal customary law, on the relationship between the crime and the so-called punishment (wrongs and expiations are better terms). Reliable

<sup>27</sup> New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) [3.112].

<sup>28</sup> The tendency of anthropologists to sometimes sanitise their accounts of other societies has probably played a role in creating this body of pollyannas. This sanitising tendency has been lampooned for quite a while, eg: ‘No more than we might expect a surgeon to say “Dead and good riddance” would an anthropologist exclaim, stepping from the culture just surveyed as one might shed a set of working clothes, “What a lousy way to live!” Because, even if the natives were impoverished, covered with dust and sores; even if they had been trodden on by stronger feet till they were flat as a path; even if they were rapidly dying off; still, the observer could remark how frequently they smiled, or how infrequently their children fought, or how serene they were. ... It was amazing how mollified we were to find that there was some functional point to food taboos, infibulation, or clitoridectomy; and if we still felt morally squeamish about human sacrifice or headhunting, it is clear we were still squeezed into a narrow modern European point of view, and had no sympathy, and didn’t – couldn’t – understand’ (William Gass quoted in Clifford Geertz ‘Distinguished Lecture: Anti Anti-Relativism’ (1984) 86 *American Anthropologist* 263, 266).

accounts stress that the processes described are principally aimed at restoring equilibrium in relationships between people, in particular the kin groups of the central parties. The primary desired outcome is 'satisfaction' of the plurality of the aggrieved. It is Westerners, not classically-minded Aboriginal people, who concentrate largely on the individualities of perpetrator and victim.

One view is that unless payback such as leg-spearing for murder is enacted, there will be cases where 'grievances remain unresolved with possibly very serious outcomes at other times and in other places'.<sup>29</sup> In the short term this is undoubtedly true. Unfortunately it is also true of the grievance of a man against his partner for running away with her lover. In this situation his community's opinion may be that he is entirely justified in giving her a thorough thrashing when he retrieves her, without which the two families – hers and his – may suffer a continuing and unresolved tension. These two instances would be consistent outcomes of a single system of values and expectations, but they obviously have contradictory degrees of acceptability to the wider Australian public.

Similar outcomes of a focus on the balancing of interests may also seem less than acceptable to Western-style progressives. Deborah Bird Rose recorded that

in a case in which a young man raped a girl who was the promised wife of a senior man, senior men interpreted the rape as an act of contempt for their authority in managing marriage arrangements. Senior women spoke of their role in determining when a girl is old enough to engage in sexual relations, and interpreted the rape as an act of contempt for their authority. Thus, senior men and women separately had interests in upholding their (separate) domains of authority in evaluating a particular case. These gendered interests of seniority co-existed with the interests of the families of the offender and victim, and with those of the mediators.<sup>30</sup>

It is arguable that providing official sanction for regulated revenge through magistrates' bail hearings and sentencing processes, or through police umpiring at payback spearings or beatings (all of which occur in the Northern Territory), is to encourage not just a different cultural approach to dealing with acts such as homicide, but also to give official comfort to certain elements of an ethnic separatist view of the polity. This requires careful pondering and should not be glossed over. Considerations of social cohesion, as compared with considerations of multicultural freedoms, have risen rapidly in the public consciousness in recent years, at least in the modern liberal democracies, and especially in Western Europe, including the UK where I have recently been living, and Australia. Just as multiculturalism in the strong form is facing what some might see as a terminal struggle - in the UK it has been 'pronounced dead' by the Guyana-born head of the Commission for Racial Equality, Trevor Phillips<sup>31</sup> - in Australia we have had a spate of law reform

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<sup>29</sup> Svikart, above n 16, 3.

<sup>30</sup> Rose, above n 24, 19.

<sup>31</sup> Jasper Gerard, 'Honest, I'm on Your Side White Boy', *The Sunday Times* (London), 4 July 2004, 5.

commissions revisiting the question of the recognition of indigenous customary law twenty years after the last large scale investigation led to a deafening parliamentary silence.

I suspect one reason for the resurrection of this quest is a persistent idealism, another is probably a hopeful ameliorative response to the much publicised levels of disorder and crime in indigenous communities, and another may be the irredentist movement among western-educated indigenous people in the bureaucracies whose careers are often closely linked to separatist claims over resources. However yet another reason is probably the arrival of a new cadre of professionals on the Aboriginal scene, the legal cleanskins.<sup>32</sup>

#### IV ANTI-SCIENTIFIC RELATIVISM

There is a new factor propelling many cleanskin legal professionals into contact with indigenous people and cultures for the first time, from solicitors to judges, and that is the native title industry. Here one comes across cases of what might be called relativism of an anti-scientific sort. This is the approach which privileges the self-representations of a smallish number of indigenous witnesses, made under culturally alien circumstances, and over a short period, elicited through questions asked not by ethnographers but by barristers. These representations are expected to do the lion's share of the work of revealing the indigenous system of laws and customs of the relevant community, with the anthropological expert analysis being given little role in deliberations.<sup>33</sup>

It is not uncommon for judges in different kinds of land claim cases to say that the cultural evidence that really matters is that of the indigenous witnesses, not that of experts, and that where there is conflict between the two, the evidence of indigenous witnesses is to be preferred.<sup>34</sup> That is, their customary law, for example, is what senior indigenous witnesses tell the court it is. Nevertheless anthropological evidence is always admitted – in some form – and is thus accepted as having something to offer the legal process. This is not to say that the court culture is relativistic and recognises two differing but equally valid views of the matter, that of the claimant witnesses and that of the anthropologist, albeit on different days. The court may be interpreted instead as seeking to take the only valid bird's eye view, treating both the expert evidence and the claimant evidence alike, as more or less raw material.

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<sup>32</sup> Originally an unbranded animal, and more latterly an unlabelled bottle of wine, a cleanskin is also generically anyone who is new to a certain situation.

<sup>33</sup> There is a touching irony here when one compares this attitude with that of Justice Kriewaldt, above n 15, who thought judges on Aboriginal cases should ideally also be anthropologists (at 48).

<sup>34</sup> See eg, *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, 562; *De Rose v South Australia* [2002] FCA 1342 (unreported, O'Loughlin J, 1 November 2002) [342], [351]; *Jango v Northern Territory of Australia* [2006] FCA 318 (unreported, Sackville J, 31 March 2006) [288], [291].

What this obscures is the uncomfortable fact that the anthropological processes involved in such cases – field work, library research, analysis, release of a report – can be represented as a kind of parallel inquiry to that of the court. The expert report can be seen as a kind of pleadings, to the detriment of the perceived standing of the expert as a non-advocate whose primary duty is to the court. Where the report is actually the basis of relevant sections of pleadings, the expert is even more likely to be seen to be crossing role boundaries. This set of problems arises from the usual dependency of the lawyers on the anthropologists for a grasp of the details and the systematicity of a culturally alien and complex case. It is a good basis for arguing that the cultural and historical facts in such cases should be established by a specialised inquiry not bound by the rules of evidence. Thus adversarial litigation could be reserved for arguing points of law or sorting out how the cultural and historical facts as found are to be interpreted as a basis, or not, for recognition of native title or compensation for its loss.

It can be argued that the anthropological reportage is a parallel inquiry greatly inferior to that of the court itself, since there is no verbatim and complete transcript of what is said during the recording process; the transcripts, such as they are, are not made by professional transcribers (actually the latter usually make far more transcription errors than anthropologists); witnesses are not under oath or affirmation when speaking to the anthropologist; and translators may or may not be assisting, whereas they are theoretically present at all necessary times in court. That is, the ability of the claimants to represent their society and its rules, it may be said, should be thrown largely or wholly onto their own shoulders.<sup>35</sup>

But this view, which there is not room here to refute in detail, presents a conundrum for its own apparent relativism: namely, would this not give some Aboriginal people an unfair disadvantage? It is extremely noticeable, for example, that Aboriginal people from the Western Desert region have nowhere near the capacity to objectify and coherently articulate their cultural practices as that enjoyed by the Yolngu peoples of north-east Arnhem Land. There are ancient cultural reasons for this that predate colonisation by Great Britain.<sup>36</sup> If the outcome of a case is to depend critically on the ability of indigenous witnesses to objectify and articulate the cultural and historical basis of their own cases, they will in effect be subjected to a civilisation test. Thus we come full circle back to terra nullius.

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<sup>35</sup> There are scholars in the social sciences who would tend somewhat towards this view as well, privileging the 'voice' of the native over that of Orientalising and Othering foreigners.

<sup>36</sup> One key reason for this difference is arguably that centuries of contact with Macassans have modified Yolngu culture and added to its complexity and self-consciousness. There may be a roughly similar argument applicable to the relative complexity and self-consciousness of Cape York Peninsula peoples who have absorbed centuries of influences from Melanesia, and whose comparatively rich environment supported considerable populations and their competitive cultural elaboration. Western Desert people by contrast survived in an extremely difficult environment, with minimal social organisation and technology, well away from the influence of non-Aboriginal cultures.

## V REPUGNANCE IN AN AGE OF CULTURAL SHOPPING?

For all their catholicity, anthropologists are seldom able to claim expert knowledge on all aspects of Aboriginal customary law in a region. All field studies are to some extent blinkered by the concerns of the age, the temperament of the scholar, and the art of the politically possible. Given the significance of sexuality and violence in the lives of many of Australia's Aboriginal citizens, and in the reporting and judicial handling of serious crimes among Aboriginal populations, it may seem odd to non-anthropologists that it is extremely hard to find more than a handful of living anthropologists who can claim to have focused on these basic topics let alone on their relationships to the field of customary law.

A reluctance to seem prurient, an acceptance of local taboos on publishing certain truths, and perhaps a measure of repugnance, may lie behind this scarcity. In earlier times anthropologists were perhaps a little more wide-ranging in this regard, Lloyd Warner including a substantial chapter on 'Warfare' in his 1937 book about north-east Arnhem Land,<sup>37</sup> and Ronald and Catherine Berndt publishing books on Aboriginal sexuality in Arnhem Land in 1951 and 1976, for example. These are not judgmental works, but, typical of their times, anthropological exercises in attempted objectivity. They also come from a time when Aboriginal custom was closer to its deep past and the handling of conflict and sexuality were in a far less chaotic state than they have become, especially in the last 30 years and since the substance abuse epidemic hit so many people.

## VI CATCHING FALLING STARS?

Some hold out a hope that, once broken or in the process of breaking down, indigenous customary law can nevertheless rise like a phoenix from its own ashes and come back to restore law and order among the people. For example, former Human Rights and Equal Opportunities Commissioner, Bill Jonas, said:

As I stated in my submission to the Northern Territory inquiry:

there is currently a crisis in Indigenous communities. It is reflected in all too familiar statistics about the over-representation of Indigenous men, women and children in criminal justice processes and the care and protection system; as well as in health statistics and rates of violence. Ultimately, one thing that these statistics reflect is the breakdown of Indigenous community and family structures. They indicate the deterioration of traditional, customary law processes for regulating the behaviour in communities. This is due in part to the intervention of the formal legal system through removal from country, historical lack of recognition of traditional rights to country and non-recognition of customary law processes as an integral component of the operation of Aboriginal families and societies in the Northern Territory. ...

Customary law should be treated by the Government as integral to attempts to develop and maintain functional, self-determining Aboriginal communities.

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<sup>37</sup> Warner, above n 25, 155-90.

Customary Law is therefore more than a mitigating factor in sentencing processes before the courts. It is about providing recognition to Aboriginal customary processes for healing communities, resolving disputes and restoring law and order.<sup>38</sup>

I have to say that I don't know of any evidence that supports the view that the loss of Aboriginal customary law traditions is substantially reversible, although there are cases where such traditions resurface after being sidelined or undergrounded for a period. Even if this loss were reversible, I don't know of any evidence that suggests that this reversal in some remote places, alone, would radically alter the general situation in which many indigenous people find themselves. In any case, one major structural and cultural factor, at least, works firmly against maintenance or revival of customary law, namely, rapidly advancing integration of indigenous with non-indigenous people. This is on the march perhaps as never before, the rate of Aboriginal out-marriage by 2001 reaching 68% nationally. The proportion of couples in which there were an indigenous and non-indigenous partner recorded in the Australian Census over the last couple of decades has been rising sharply, thus:<sup>39</sup>

Census year	Percentage indigenous/non-indigenous intermarriages
1986	46
1991	51
1996	64
2001	68

This is one statistical reflex of the fact that the construction of Aboriginal identity is decreasingly founded on cultural differences or differences of appearance, and increasingly founded on the assertion of an ethnicity based on past ancestry and history and present recognition. But just because people look and live more and more like those who claim no indigenous ancestry, and are increasingly integrated socially and economically into wider Australia, this is not resulting in a diminution of indigenous identification. For example, in the 1996 Census, 87 per cent of the children of interracial unions were identified as Aboriginal.<sup>40</sup>

Those identifying as Aboriginal are in many cases living in a situation of rapid cultural change. One should be cautious about rushing to recognise customary laws that may already be on the way out.<sup>41</sup> One of the discovery problems in this field is that enquiries as to customary laws are likely to be flicked on to the elders, who 'know'. Sometimes the elders are the last to practice certain customary laws but

<sup>38</sup> William Jonas, 'The Recognition of Aboriginal Customary Law' (speech delivered at Human Rights and Equal Opportunity Commission and International Lawyers Association (Australian Division) Workshop, 20 November 2003) [http://www.humanrights.gov.au/speeches/social\\_justice/recognition\\_customary\\_law.html](http://www.humanrights.gov.au/speeches/social_justice/recognition_customary_law.html) > 20 June 2006.

<sup>39</sup> Nicolas Peterson and John Taylor, 'Aboriginal Intermarriage and Economic Status in Western New South Wales' (2002) 10 *People and Place* 11, 11.

<sup>40</sup> Ibid 15.

<sup>41</sup> Sarre, above n 23.

will aver that they still obtain. I have seen this kind of shift happening frequently over 35 years of field work in different regions of Australia.

## VII THE DILEMMAS OF THE NICE

It is an age of the dilemmas of the nice. As the influence of the stronger forms of cultural relativism wane, their language seems to keep on, but in a domain where cross-cultural respect and recognition are also often the vocabulary of indigenous enclave politics and non-indigenous self-redemptive feel-goodism, and also, I have to say, of bureaucratic empire-building and the accumulation of patronage. Cultural relativism has quite a different character when applied between separate and sovereign societies, as against those who, through complex and overlapping networks, are members of the same society and nation state even if they may also claim distinct ethnicities. This is especially so when demographic, legal and political dominance by a majority over a minority may render the differences shown by the minority unthreatening to the majority.

Cultural relativism has had a quite glowing history as a weapon of attack on social Darwinism, eugenics, and racial and ethnic prejudice. Particularly in the early to mid 20<sup>th</sup> century it was promoted by anthropologists, most notably Franz Boas, and then by others, not merely as an intellectual or scientific standpoint but also as a moral stance, a kind of ethnographically underpinned engine of tolerance.<sup>42</sup> It has spawned a vast literature by social scientists, philosophers, legal scholars and others.<sup>43</sup> It has been the topic of some vigorous debates. It is remarkable how many publications there now are which are called, partly or wholly, *Against Relativism*, or something similar such as *Contra Relativism*, *Anti-relativism*, even *Overcoming Relativism*, as if it were some kind of ailment.<sup>44</sup> Perhaps the most frequently cited text among anthropologists is Clifford Geertz's 'Anti Anti-relativism', in which he set out to destroy dread of relativism, 'to attack anti-relativism' rather than to

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<sup>42</sup> Franz Boas, 'The Limitations of the Comparative Method of Antropology' in F Boas, *Race, Language, and Culture* (1940) 270; Franz Boas, *Primitive Art* (1927); Melville J Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (1972).

<sup>43</sup> For a selection of more or less recent efforts see Reza Afshari, *Human Rights in Iran. The Abuse of Cultural Relativism* (2001); Bret L Billet, *Cultural Relativism in the Face of the West: The Plight of Women and Children* (2000); Christopher Herbert, *Victorian Relativity: Radical Thought and Scientific Discovery* (2001); Robert Kirk, *Relativism and Reality: A Contemporary Introduction* (1999); Nenad Miscevic, *Rationality and Cognition: Against Relativism-Pragmatism* (2000); Christopher Norris, *Against Relativism: Philosophy of Science, Deconstruction and Critical Theory* (1997); Gill Seidel and Laurent Vidal, 'The Implications of "Medical", "Gender in Development" and "Culturalist" Discourses for HIV/AIDS Policy in Africa' in Cris Shore and Susan Wright (eds), *Anthropology of Policy: Critical Perspectives on Governance and Power* (1997) 59; Melford E Spiro, 'Cultural Relativism and the Future of Anthropology' in George E Marcus (ed), *Rereading Cultural Anthropology* (1992) 124; Melford E Spiro, 'Postmodernist Anthropology, Subjectivity, and Science: A Modernist Critique' (1996) 38 *Comparative Studies in Society and History* 759.

<sup>44</sup> See eg, Ruth Macklin, *Against Relativism: Cultural Diversity and the Search for Ethical Universals in Medicine* (1999); Miscevic, above n 43; Norris, above n 43.

defend relativism itself.<sup>45</sup> This is part of a wider struggle between realist and anti-realist views of knowledge. In social and cultural anthropology the anti-realists have for some time been strongly influential.

It is probably a truism that intellectual shifts often ride the waves of tectonic forces acting far below them, such as the economic swings that are triggered by climate change, or the reallocation of political power due to changes in economic production, warfare, mass migrations and epidemiological changes. My basic argument in this paper is that, in the case of cultural relativism and its application to matters of law within Australia, wider demographic, cultural and social changes are working to hasten the decline and fall of the kind of strong relativism that informed liberal progressive opinion thirty years ago. Narrow political, economic and social forces also still work to keep strong relativism alive as an ideology, producing some highly problematic contradictions.

Curiously, the stronger form of relativism espoused among some social scientists is usually enmeshed in an academic practice that stresses cultural critique rather than the accumulation of factual knowledge based on evidence. The mode of cultural critique typically speaks to us in a moral language, focusing on subjects such as the evils of colonialism and Western power, the racism of pale-skinned people, the wrongs of patriarchy, police violence, and the oppression of minorities. The focus is usually selective, in that cultural critiques of non-Westerners are harder to find, and, when they do occur, may evoke hostility towards their writers on the grounds that they have 'pathologised' the subject population.<sup>46</sup> That is, there is often an unstated appeal by the cultural-critiquer to a universal ethics of social behaviour and cultural values. This universal ethic gives rise to a strong espousal of cultural relativism as an extension or reflection of critical Left political values of egalitarianism and polycentrism, and of its offshoots such as legal and bureaucratic pluralism. To that extent the anti-realist cultural-critique wing of the social disciplines espouses an absolutist variety of relativism. It is thus also yet another force for a globalisation of values that have their origins in the West.

With regard to Aboriginal people and immigrants from non-Western backgrounds, Australian cultural relativism and multiculturalism had an easier time of it when such people of difference were fewer in number and largely far away. Cultural relativism works in its simplest and strongest form when exotic people stay in exotic locations. The mainstream population can be highly tolerant until the

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<sup>45</sup> Geertz, above n 28, 263.

<sup>46</sup> See eg, Gillian Cowlishaw, 'Euphemism, Banality, Propaganda: Anthropology, Public Debate and Indigenous Communities' (2003) 2003/1 *Australian Aboriginal Studies* 2, critique of Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia since the 1970s' (2001) 11 *Anthropological Forum* 125 and Sutton's reply, 'Rage, Reason and the Honourable Cause: A Reply to Cowlishaw' (2006) 2005/2 *Australian Aboriginal Studies* 35. John Bern, 'Politics in the Conduct of a Secret Male Ceremony' (1979) 35 *Journal of Anthropological Research* 47 and Ian Keen, *Knowledge and Secrecy in an Aboriginal Religion* (1994) contained political deconstructions of male dominance in Aboriginal ceremonial life but have not evoked any memorable critical responses on the basis of this.

NIMBY factor arrives (Not In My Back Yard). It has long been visible in surveys and voting patterns that racial intolerance in non-indigenous Australia increases more or less in relation to the intensity of contact between European-derived populations and others.<sup>47</sup> Indigenous urban migration and the penetration of the media into remote places, as well as non-European immigration, have in recent years brought mainstream Australians into new degrees of contact with foreign cultural patterns and behaviours that at times they find unacceptable or even repugnant. Europe has been undergoing some similar changes and a similar disenchantment with multiculturalism, particularly where there are large numbers of non-assimilating and largely endogamous migrants, who are statistically more unproductively dependent on the economy than the original host population, for example, so that immigration has become a central political issue.

My point here is that the adoption of cultural relativism and retreat from its stronger or more naïve forms, historically, are not just intellectual activities. They are embedded in social relationships and affected by mundane things like shifts in the balance of population numbers of particular groups. They cannot be separated from people's experience of key structuring factors such as social and physical distance from the Other, degrees of mutual cultural compatibility and thus of judgments of degrees of repugnance made on the customary behaviours of others, the rate of cultural convergence or assimilation between one's own people and others, and the extent to which these differences and distances are seen to affect the integrity, prosperity and safety not just of neighbourhoods but also of the wider social fabric, such as the nation state. For these reasons, although I tend to be philosophically realist,<sup>48</sup> I would espouse a relativistic view of cultural relativism: its virtues and vices are historically contextual in nature, and it cannot be damned or praised for itself per se.

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<sup>47</sup> See eg, the 1967 referendum regional polling percentages, Bain Attwood and Andrew Markus, in collaboration with Dale Edwards and Kath Schilling, *The 1967 Referendum, Or When Aborigines Didn't Get the Vote* (1997) 56.

<sup>48</sup> Rather in the sense of A J Baker, *Australian Realism: The Systematic Philosophy of John Anderson* (1986).