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Aboriginal traditional and customary law

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Abstract

About a month ago, I had a frantic phone call from a new Australian woman named Ramya, of Lebanese descent. She implored me to help her son, a Higher School Certificate student of Granville Boys' High School, as he was given an assignment on the subject of Aboriginal law. He had to write up an in-depth study into forms of Aboriginal customary law and punishment, and why it should be recognised as an acceptable form of trial for Aborigines.

I was flabbergasted! I was desperately trying to explain to her how ironic it was that the education system now wanted to know about Aboriginal law when in fact we were dispossessed of our own land, that we urban Kooris were forced to assimilate and give up our languages and culture and become like white people. We were forced to conform to their laws and standards, the laws and standards of the invaders of our country, because we were never allowed to be our damn selves, as we are an oppressed people. We had our own laws, and a very democratic society before the whiteman stuck his nose into our affairs, and literally stuffed our culture up! Besides, I told her that some of our laws were sacred and not to be spoken about to anyone, only our own tribal people. I told this lady that I would do my best to help her son with what information [had, as I could only speak about the laws of my own Bundjalung people, because it would be wrong of me to talk about any other tribal laws.

ABORIGINAL TRADITIONAL AND CUSTOMARY LAWS

Ruby Langford Ginibi

About a month ago, I had a frantic phone call from a new Australian woman named Ramya, of Lebanese descent. She implored me to help her son, a Higher School Certificate student of Granville Boys' High School, as he was given an assignment on the subject of Aboriginal law. He had to write up an in-depth study into forms of Aboriginal customary law and punishment, and why it should be recognised as an acceptable form of trial for Aborigines.

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Aboriginal laws were encoded in each group's religious tradition, and were handed down from generation to generation, by word of mouth. They were a part of the oral tradition, passed on by the guardians of that tradition, who gained access to it as they were initiated. All Aboriginal and Torres Strait Islander people were familiar with their own laws and with the daily rights and obligations that were imposed. From early childhood they learnt what the law allowed and what it forbade. They knew both the spiritual dangers and punishments that threatened the law breaker. They witnessed the process by which offenders were punished, cases argued and decided.

The process of the law was one of political negotiation that involved everyone in the community. When there was a dispute, the elders met to discuss the punishments: their word was LAW. Offences regarded as unlawful included the unauthorised killing of a person, sacrilege, incest, adultery,

theft, unauthorised assault, insult and neglect of kinship obligations. Punishments could range from making compensation over an agreed period of time to having to face a squad of spearmen, with only a shield and that person's ability to protect himself.

Disputes between Aboriginal groups were settled by negotiation, ritual punishment, or formal battles. Settling disputes under Aboriginal law was part of the purpose of the great gatherings of Aboriginal people; other purposes were to trade, to hold Bunya nut and shellfish feasts (this was how the middens of shells were formed), to arrange marriages, and to perform ceremonies.

The experience of living under two systems of law — the English and Aboriginal — has not been a happy one for all the Original Australians. In every state and Territory, Aborigines and Islanders have a rate of imprisonment that is far out of proportion to our numbers in the communities. In New South Wales alone there are 6,430 Aboriginal men, women and our juveniles incarcerated in her majesty's prisons and correctional institutions, and we are not quite 2% of the total population, which stands now at 17 million; and I for one don't think that we Kooris are the most evil people in the whole of bloody Australia!

We had a royal commission into 99 Aboriginal deaths in custody in October 1987 and it made 339 recommendations. Yet, still now in 1994, none of those recommendations has been implemented. It's just like our people are banging their heads up against a brick wall, for all the good our crying out in anger does! Nobody gives a damn! Since that royal commission there's been another 55 Aboriginal deaths in custody and no one was found guilty of any wrong-doing. "Suicide! copycat suicide!" they said. And I say this, if suicide was a cultural trait, there'd be thousands of my people hanging on bloody tree-branches all over Australia! They are being brutalised but nobody gives a damn! Where are our rights to live in such a racist, brutal society?

This statement goes into every history paper I write: it says, that the people who colonised this country were not the cream of the british aristocracy; they were the dregs of an oppressed society, who brought that oppression here, and oppressed my people with it. They were the builders of jails and

prisons, and in two hundred and five years that mentality hasn't changed. The only change is that those oppressors are the bosses, and we Aboriginal people are on the lowest rung of the social ladder in this country, and we are fifteen to twenty years behind everyone in all the basic human rights, such as health, housing, education and employment.

Today, in many parts of Australia, Aborigines continue to settle many offences under their own law. In doing so they find themselves in trouble under Anglo-Australian laws. For instance, an Aborigine who speared an Aboriginal woman was acting in accordance with tribal law because she insulted him, with gestures and words. However, he was prosecuted under whiteman's law.

Lately there have been some attempts to recognise Aboriginal customary law in the Australian legal system. The Australian Law Reform Commission has also produced a paper exploring the relationship between traditional Aboriginal law and Anglo-Australian law. This paper, "Tribe Punishment: A Jail Alternative" by Sarah Harris, was published in the *Sunday Telegraph* 8 May, 1994. The state's courts should consider Aboriginal tribal law as an alternative to jailing when dealing with Koori offenders. Shadow Attorney General Paul Whelan says tribal laws and penalties could complement the white legal system under which Aborigines were disadvantaged; but he rejects violent "pay-back" punishments, such as spearing. He believes elders could play an important role in the treatment of young offenders charged with minor offences: "It should certainly be looked at as an alternative to prison, particularly if there is going to be some positive response and savings involved. I don't think it should have the force of law, but I think it could be persuasive in a matter raised in court." This parallels the Maori system of justice in New Zealand, where if a young Maori is involved in a skirmish with the law he or she sits with the tribal elders and resolves the problem with the community, both in accordance with criminal law and tribal law.

Mr Whelan also argues that New South Wales courts should have the discretion to consider a defendant's cultural background, but this rarely happens with Aborigines. In the Northern Territory, Western Australia and South Australia, customary laws were often taken into account when dealing with Aboriginal offenders. Earlier this year the Northern Territory Supreme Court Chief Justice, Brian Martin, made legal history when he ordered public servants to report back on the pay-back spearing of an Aboriginal man convicted of the manslaughter of a kinsman. The New South Wales judiciary's objection to tribal law is based on an 1836 Supreme Court ruling which declared that Aborigines "Had no law, only lewd practices". Dennis Walker, son of Oodgeroo Noonuccal, has launched a challenge against the New South Wales jurisdiction saying, "Our customary laws are the natural laws of the land." The implementation of our customary laws, he concludes, "would go a long way to reducing deaths in custody."

LAWS AVENGE THE VICTIM

Aboriginal customary law is heavily influenced by the need to avenge the victim. To an outsider, punishments can at times appear arbitrary and harsh. In one Queensland case last year, elders banished a group of youths charged with the murder of a white for life without waiting for the courts to determine their guilt or innocence. Serious transgressions such as murder may result in a pay-back spearing. Theft and adultery are regarded gravely. In the past, a married woman who slept with another man might be killed by her husband. There are also numerous offences which are not covered by European law, such as insulting an elder, singing sacred songs in public, and showing sacred objects to women.

I'd now like to outline some of the tribal laws of my people, the Bundjalung tribes, and you, the reader, can compare them with what I've written about from other sources that I've used in this paper.

Here are some Bundjalung tribal laws:

1. There was pay-back practised in some tribes, meaning if someone did you wrong, you could get them back. Usually, soon as blood was drawn, the dispute was quashed.

2. You did not trespass on another tribe's land without permission.

3. Punishment for the breaking of most of the tribe's laws was handed down by the elders, the law givers, and you were banished forever, to wander aimlessly, without contact with your family. If you broke the marriage laws, punishment was death!

4. Kinship network was law! Aboriginal man was a social father to all the children of the clan, and Aboriginal woman was a social mother to all the children of the clan. Everyone had a place, no one was excluded or left out: this was our democracy at work.

5. There were harsh laws for elopement. If a man eloped with another woman, he was brought back to the tribe by the men, and had to face spears thrown at him by every male member of the tribe. If he survived, he would be forced to be in the forefront at the next inter-tribal fight, and he chanced spears thrown by his own tribesmen, as well as the enemy.

One country two laws. Aboriginal laws, traditional and customary laws, have never been acknowledged by the colonial invaders of Aboriginal people. They came with their godly marriages and paternalistic ways, and we were forced to assimilate, and give up our languages, and deny our culture and heritage because our traditional practices were classified as "heathen" and "vermin" to be cleared off the face of the earth. Three hundred Aboriginal nations were wiped out by the colonising of our lands, and we were forced by governments to become like white people. We were always the ones who had to conform to white ways and white ideas, because we were never allowed to be our selves.

We still have politicians like John Howard saying that to give Aboriginal people land rights would cause a division. I have news for Mr Howard: there has always been a division, and we Koori people have always had to live with that division. We have never been one nation — ever! — because Aboriginal people have never been included in white social enclaves in this country. We have always been excluded because of the division between the black and white cultures. Even the people who migrate here are on a higher social level than we are. We are classified as the lowest of the low, and we are the first people of this land! And I say, Big Shame Australia! And now they want to know about our laws, to try and lift us out of the “shit” they have created for us Kooris! Again I say, Big Shame Australia!

There has to be a coming together of the two cultures, the black and the white, but not like it is today. It has to be on a fair and equal level. We are fifteen to twenty years behind everyone, including those migrants who have come lately, in all the basic human rights such as health, housing, employment, and education. Again I say, Big Shame Australia!

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