The black and white of Wunungmurra

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Aboriginal people who follow customary law in the Northern Territory often find that obeying customary law can mean breaching Australian law and vice versa. Recent Australian law purports to remove consideration of customary law in the sentencing process. These issues are illustrated in the case of R v Wunungmurra. This article proposes that ignorance or rejection of Aboriginal customary law by Australian law is not a just or workable approach. Rather, Australian lawyers need to better understand customary law in order to devise just and workable solutions where the two legal systems meet and honesty will be required when undertaking this endeavour.

INTRODUCTION

That pluralistic legal regimes exist but do not work together is illustrated clearly in the case of R v Wunungmurra.¹ The clash between the Australian legal system on the one hand, and the Aboriginal customary law legal systems on the other, creates situations where individuals are sometimes forced to make decisions and behave in ways that will break laws in one of the two legal systems.

In Wunungmurra, the defendant, Dennis Wunungmurra, was a customary law leader according to Yolngu rom, that is, the customary law of the Yolngu Aboriginal people of Arnhem Land. He is known as a dalkaramirri, which is often translated into English as a judge.² Wunungmurra was charged with the offences of intent to cause serious harm and aggravated assault arising from his actions while delivering a customary law punishment, namely corporal punishment to his wife for her breaches of the Ngarra (customary) marriage law.³

Difficulties that arise at this meeting point of white and black law are discussed in this article. It is suggested that lawyers should make greater efforts at learning customary law so that a fuller form of justice be accomplished in cases involving Aboriginal people living traditional or part-traditional lives.

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¹ R v Wunungmurra (2009) 196 A Crim R 166.
² R v Wunungmurra (2009) 196 A Crim R 166 at [7].
³ In this article, I am interested in exploring the intersection of two legal systems, especially in their compatibilities and incompatibilities. I am aware of the many other issues that the Wunungmurra case raises, such as questions of fundamental human rights, sovereignty and racial and sexual discrimination; however, those issues are not addressed in detail here.
**WUNUNGMRRA: THE FACTUAL CONTEXT**

After being in a Ngarra law marriage for a number of years, Wunungmurra’s wife left him to live in Darwin for a period of six years before returning to his home in 2008. They lived together for a short time until the relationship broke down again. On 17 August 2008, the defendant and the victim (Wunungmurra’s wife) were arguing in a bedroom. The defendant stabbed the victim while she was making efforts to leave the bedroom. A second incident occurred a few weeks later on 8 September 2008, when the defendant threw a rock at the victim who attempted to retaliate with a broom stick whereupon the defendant stabbed the victim a number of times. Wunungmurra was charged with intent to cause serious harm under s 177 of the *Criminal Code* (NT) – an offence that carries a maximum penalty of imprisonment for life – and aggravated assault. The court was informed to expect a plea of guilty to both charges.

**THE BLACK (NGARRA) LAW**

It was contended by the defence lawyers that Wunungmurra’s wife had breached the Ngarra marriage law and consequently the Ngarra law required Wunungmurra to discipline his wife by inflicting upon her corporal punishment. The defendant’s actions that gave rise to the charges were the punishment he gave his wife for her purported breach of Ngarra law. The court accepted that the context of the charges was the punishment related to the later breakdown of the marriage; Wunungmurra did not punish his wife for her previous six year absence.

Details of the material Ngarra law were made available to the court by way of an affidavit sworn by Rose Laymba Laymba in accordance with s 104A of the *Sentencing Act 1995* (NT), a Northern Territory legislative provision that allows a court to hear information on Aboriginal customary law for sentencing purposes. Laymba Laymba’s affidavit included the statement that the defendant was carrying out his duty as a responsible husband, father and dalkaramirri (Ngarra judicial officer) under Ngarra law by the infliction of “severe and corporal punishment on his wife with the use of a weapon”.

The proposition that under Ngarra marriage law it is lawful for a husband to punish his wife for certain breaches of the Ngarra marriage law is supported by two other leading figures in customary law in Arnhem Land. Wali Wunungmurra

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4 “Ngarra law” may be translated as “Yolngu customary law”; “Yolngu” being the Aboriginal people group that Dennis Wunungmurra belongs to, the Aboriginal people of Northeast Arnhem Land.

5 *R v Wunungmurra* (Sentencing remarks, SCC 20824528, 14 August 2009).

6 The material elements of s 177 of the *Criminal Code Act* (NT) read: “Any person who, with intent to disfigure or disable any person, or to cause serious harm to any person, or to resist or prevent the lawful arrest or detention of any person: (a) Causes any serious harm, or causes any other harm, by any means … is guilty of a crime and is liable to imprisonment for life.”


8 Rose Laymba Laymba was described by the sentencing judge, Southwood J, as a jungaya (that is a Yolngu customary law lawyer) for three relevant clan groups in Arnhem Land: *R v Wunungmurra* (2009) 196 A Crim R 166 at [6].


10 “Wunungmurra” is a common family name of the Dhalwangu clan in Arnhem Land.
– current Chairman of the Northern Land Council – under cross-examination in the NT Supreme Court stated that the Yolngu customary law does under certain conditions allow violence towards women.\footnote{R v Wunungmurra (Sentencing remarks, SCC 21004270, 29 September 2009).}

Gaymarani George Pascoe, a dalkarramiri from Western Arnhem Land, writes that under Ngarra marriage law:

The husband is required to be the head of the household; that is his duty. The wife has duties towards her husband and towards her children.

…

In some circumstances it will only be the husband that can punish his wife for a breach of the marriage law.

…

The punishment will largely depend on the facts of the breach. The most serious offences can be punishable by death.\footnote{Gaymarani GP, “An Introduction to the Ngarra Law of Arnhem Land” (2011) 1 NTLJ 283 at 290, 292.}

Therefore, it is conceivable that Wunungmurra’s actions of beating and stabbing his “errant” wife constitute appropriate punishment within the bounds of Ngarra marriage law.

**THE WHITE (AUSTRALIAN) LAW**

The prosecution objected to Laymba Laymba’s affidavit being read in court “for the purpose of establishing the objective seriousness of the crimes committed by the defendant”\footnote{R v Wunungmurra (2009) 196 A Crim R 166 at [4].} on the basis that s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) renders the affidavit inadmissible. The prosecution, however, did not object to the affidavit being read for other purposes.\footnote{R v Wunungmurra (2009) 196 A Crim R 166 at [5].} In the Supreme Court of the Northern Territory, Southwood J was required to make an evidentiary ruling relating to the admissibility of the affidavit, which contained aspects of Aboriginal customary law and cultural practice. The question was whether s 91 of the Act rendered the affidavit inadmissible. Section 91 reads:

> In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
> (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

As the affidavit included aspects of customary law and cultural practice, the prosecution submitted that s 91 would render the affidavit inadmissible. Southwood J accepted that the terms “lessening” and “aggravating” were synonymous with determining the gravity or objective seriousness of the criminal
behaviour. Southwood J also found s 91 “clear in its terms” and so had no difficulty accepting the prosecutor’s submission that the section precluded considering customary law (and hence Laymba Laymba’s affidavit) for the purposes of determining objective seriousness and moral culpability.

**Affidavit admitted for purposes other than those covered by s 91**

Southwood J held that for the purposes of s 91 the affidavit would not be admissible. The affidavit was filed for purposes in addition to determining objective seriousness and moral culpability, however, and so for those other purposes the affidavit was allowed to be read. Those purposes, related to sentencing, were:

- to provide a context and explanation for the defendant’s crimes … to establish the offender does not have a predisposition to engage in domestic violence and it is unlikely the offender will re-offend; to establish the offender has good prospects of being rehabilitated; and to establish the defendant’s character.

Following a plain and strict approach to statutory interpretation, Southwood J wrote “penal statutes should be read strictly and courts must only apply the actual commands of the legislation”. The judge concluded that “the purpose and operation of s 91 of the Act is not to remove all consideration of customary law and cultural practice from the sentencing process”. Southwood J also noted that the prosecution did “not object to the affidavit … being read for the other purposes”. The effect of Southwood J’s construction of s 91 is that customary law may be considered for sentencing purposes, but not in the determination of the objective seriousness of the criminal behaviour.

**Between a rock and a hard place**

Recall that if the affidavit evidence of Laymba Laymba was accepted, it was the defendant’s actions of carrying out his duty as a dalkaramirri – a judge of the relevant Aboriginal customary law – that gave rise to the charges in this matter. Wunungmurra, a judge of one jurisdiction, has been tried by a judge of another jurisdiction for carrying out the lawful work of administrating justice under the law that governs him. It must be conceded that Wunungmurra was “between a rock and a hard place”. He was faced with two normative systems (the Australian

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15 R v Wunungmurra (2009) 196 A Crim R 166 at [22].
16 R v Wunungmurra (2009) 196 A Crim R 166 at [20].
17 R v Wunungmurra (2009) 196 A Crim R 166 at [24], [28].
18 R v Wunungmurra (2009) 196 A Crim R 166 at [23], [24], [28].
19 R v Wunungmurra (2009) 196 A Crim R 166 at [29].
20 R v Wunungmurra (2009) 196 A Crim R 166 at [3].
22 R v Wunungmurra (2009) 196 A Crim R 166 at [29].
23 R v Wunungmurra (2009) 196 A Crim R 166 at [29].
24 R v Wunungmurra (2009) 196 A Crim R 166 at [5].
law and the Ngarra law) each seeking his conformity, yet those two normative systems are in parts mutually incompatible. Whatever his response to his wife’s behaviour in neglecting her marriage duties, Wunungmurra was going to breach the law of one of the legal systems that demanded his obedience. His choice was to uphold Ngarra law and breach Australian law or uphold Australian law and breach Ngarra law. It is submitted that his choice was guided by the normative system that he finds more authoritative.

Southwood J also included in his sentencing remarks:
the time has well and truly come when men in Aboriginal communities must totally abandon such violent customary laws and practices. There is no reason why Aboriginal customary laws and practices cannot be developed in other ways. Such a change will in no way weaken the strong traditional culture on Elcho Island.25

It is worth noting that Wunungmurra apparently said at his sentencing that “upon his release from prison, he is prepared, in consultation with other members of his community, to try and change Aboriginal customary law in this regard”.26

CRITICISM OF THE WUNUNGMURRA DECISION
Adrian Howe writes a scathing article27 on the judgment by Southwood J in Wunungmurra. The first paragraph of her article reads, inter alia, the question is “what counts as ‘culture’ when it comes to defending Aboriginal men who assault and kill ‘their’ women”?28 In Wunungmurra, the victim was not killed nor was “culture” used to defend the accused: he pleaded guilty. Yet of greater concern than these exaggerations is the inclusion of comments attributed to law academic and Indigenous person Professor Larissa Behrendt, who Howe reports as saying:

[there was] “nothing” in Aboriginal culture or values that suggested it was “appropriate to treat Aboriginal women and children with disrespect” and “nothing in those cultural values that actually permit people to abuse” them.29

The point has been firmly made that a court is not assisted by “sweeping statements encompassing the behaviour of all Aboriginal citizens”, rather a court may derive benefit from “positive evidence that a particular group of Aboriginals follow particular customs in particular circumstances”.30 (A point that Howe makes herself elsewhere31 in the article but seems to have forgotten when citing Behrendt.)

Yet worse than the “sweeping statements” is a small yet critical error in Howe’s citing of Behrendt. Behrendt qualified her words by explaining that she grew up in “an” Aboriginal community and that her particular Aboriginal culture

25 R v Wunungmurra (Sentencing remarks, SCC 20824528, 14 August 2009).
26 R v Wunungmurra (Sentencing remarks, SCC 20824528, 14 August 2009).
28 Howe, n 29 at 163.
29 Howe, n 29 at 163.
31 Howe, n 29 at 167 (where Howe discusses contested authority in culture communities).
was the one she was referring to. Behrendt was not purporting to speak for all Aboriginal people; she had clearly qualified her comments, but Howe did not include those qualifications in her article. Howe would have done well to read one of Behrendt’s earliest articles in which she wrote “[t]his is my perspective. I do not speak for all Aboriginal women”. Similarly, in her affidavit tendered in Wunungmurra, Laymba Laymba does not purport to speak for all Aboriginal people; her affidavit is specifically in relation to the Ngarra customary law of the Yolngu people of Northeast Arnhem Land.

Notwithstanding the contextual errors in Howe’s article, it is still a worthwhile exercise to examine the key terms of “disrespect” and “abuse” which are inherently ambiguous. Both terms are framed in the negative (dis-respect and ab-use), establishing the actions they describe as a lack of, or improper from, normal or acceptable behaviour. And if that is all they describe then most people would agree with those comments. The difficulty of course is determining what behaviour constitutes normal or acceptable behaviour. For most Australians, almost any form of physical harm done by a man to a woman would meet the definition of “disrespect” and “abuse”. Wunungmurra and his wife, however, also live under the Yolngu Ngarra law. Under Ngarra law the actions of a wife neglecting her marital duties, as apparently happened in the Wunungmurra matter, would meet the definition of “disrespect” and “abuse”. Seen through Ngarra law eyes, the physical punishment of the victim is purported to be done precisely to “respect” the Ngarra law; the only “abuse” that occurred was the wife neglecting her marriage duties. The “sweeping statements” that Howe attempts to establish of there being “nothing in Aboriginal culture or values” that supports “disrespect or abuse” of women or children is simply inaccurate as she fails to explain how “disrespect” and “abuse” are measured.

The Wunungmurra decision was also emotionally but erroneously criticised in a recent article in the Northern Territory Law Journal by Andrew Hemming. Hemming criticised Southwood J’s decision by insisting that the “words of s 91 are comprehensive” thereby eliminating the consideration of customary law and cultural practices from the sentencing process, yet in the very next sentence Hemming suggests other mitigation factors not caught by s 91 all of which are for the very reasons that the sentencing judge allows the Laymba Laymba affidavit to be read. 

35 Macquarie Concise Dictionary, n 36, p 5.
37 Hemming, n 38 at 320.
38 R v Wunungmurra (2009) 196 A Crim R 166 at [3], [29].

232 (2012) 2 NTLJ 227
In 2006, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, declared “[w]e need to be continually countering the false claims that customary law is itself the problem ... [w]e should be speaking of the perpetrators of violence and abuse as people who do not respect customary law”. Later in the same speech, Mr Calma made an important and related observation:

Just as many Australians have little understanding of Indigenous knowledge systems and systems of law, many Indigenous peoples across Australia have a very limited understanding, or a narrow perspective of the Australian legal system ... and about individual civil rights as defined by human rights standards.

Herein lies the heart of the problem, that is that so many Indigenous and non-Indigenous people know very little of each other’s law. In the Wunungmurra case no-one disputes that Wunungmurra assaulted his wife, but whether that assault is considered lawful punishment or domestic violence will depend upon from which ontological and epistemological perspective one approaches the assault. An assault is not always unlawful in Australian law. A patient can agree to a surgeon’s incisions, a football player can agree to an opponent’s tackle, and parents may discipline their children with a smack. In none of these cases is the assault agent considered culpable. In other contexts or without permission the incision, tackle or smack could constitute an unlawful assault. Calma began his speech with the statement: “Customary law is part of a wider ideological framework – a world view – and one that is very different from contemporary Australian social customs and norms.”

A society’s customs and norms typically find expression in their laws as they have done in the “incision, tackle, smack” laws mentioned above. That the “very different” ideological framework and world view inherent in Aboriginal customary law might consider an assault lawful whereas in Australian law the same assault would be considered unlawful should not challenge any thinking person.

Kyllie Cripps writes that the “indiscriminate violence occurring in Indigenous communities today is far removed from the traditional context”. Cripps’ opinion may have currency for many Indigenous communities but its application to the Wunungmurra context is doubtful. Wunungmurra lives on the same land that his ancestors did in unbroken succession since time immemorial. He is known in his tribe as a dalkaramirri – a customary law and religion specialist. He is living in a traditional context.

40Calma, n 39.
41Schloendorff v Society of New York Hospital 211 NY 125; 105 NE 92 (1914).
42McNamara v Duncan (1971) 26 ALR 584.
44Calma, n 39.
That some Aboriginal customary law contains (or contained) aspects that are unacceptable to contemporary Australian social customs, norms and laws is a fact hinted at by both Calma and Cripps. Cripps writes “ritual or customary law violence is something quite other than family violence”. Calma said:

The International Covenant on Civil and Political Rights sets out that … minorities shall not be denied the right … to enjoy their own culture, to profess and practise their own religion [however] the Committee on Civil and Political Rights (ICCPR) makes clear that in the enjoyment of Article 27 … no State, group or person is to violate the right of women or other groups to the equal enjoyment of any Covenant rights, including the right to equal protection of the law [and] Article 27 should be read consistently with the provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women.

In a recent Aboriginal sacred site matter where the white offenders installed an open pit toilet on a sacred site in Numbulwar, the senior responsible custodians of the site wrote in their Victim Impact Statement: “[i]f this had been done by an Aboriginal person in the old days they would be put to death … Nowadays if this had been done by an Aboriginal person their clan or family would have to pay compensation or the offender would face spearing”. Not even the most abhorrent crimes under current Australian law attract penalties of death or physical infliction. It is of no benefit to the many Aboriginal people in the Northern Territory who want their customary law recognised by the white legal system to pretend that Aboriginal customary law will always fall within the ambit of “acceptable” to non-Aboriginal people. What is required in this debate is knowledge and honesty. Knowledge of each other’s legal systems needs to be increased and honesty needs to prevail when discovering in what ways the two are compatible and in what ways they are not.

Regardless of one’s ontic starting position, what is required in such a clearly intercultural issue as the Wunungmurra case is openness to difference, including the possibility of irreconcilability. To fulfill Calma’s call for a mutual increase in knowledge of Australian law and Aboriginal customary law, we must avoid denying the realities, whether intentional or unintentional, even when they may offend certain sensibilities. As Gaykamangu offers:

Domestic violence is no longer appropriate (in Aboriginal customary law) … In the past, husbands did hit their wives sometimes – this happened in both Balanda (White) and Yolngu (Aboriginal) society. The law – both Balanda law and Yolngu law – allowed it to happen. Not anymore … We don’t have to be ashamed of what happened in the past, but we all need to work together now as a nation.

It is perfectly defensible to have a “no violence against women” philosophy. This is my personal position. However, “no violence” advocates are not assisted by adopting a denialist approach to the violent aspects of some Aboriginal customary law (or for that matter, violent aspects of Australian law).

46 Cripps, n 47.
47 Calma, n 39.
48 Re Sacred Site 6069-2 (unreported, NT Mag Ct, Carey SM, 17 September 2010).
CONCLUSION

It is a simple and undisputable fact that there is more than one law (that is one body of law and one legal system) functioning in Wunungmurra’s life and in the lives of most Northern Territory Aboriginal people; especially those living in remote communities. It is the epitome of ignorance for anyone to pretend otherwise; it is pure arrogance to assert “one law for all”. Wunungmurra is a man caught between two normative systems. From the Ngarra law perspective, he is a dalkarramiri, a judicial officer, who was penalised by another justice system for lawfully administering justice in his own jurisdiction. From the Australian law perspective, he is a criminal who has committed crimes of physical assault upon a woman and has tried to use “customary law” for purposes of mitigation.

If, as Southwood J declared, “the time has well and truly come when men in Aboriginal communities must totally abandon such violent customary laws and practices”, then the time has also come for white Australian lawyers to undertake a serious study of Aboriginal customary law, especially those lawyers working in areas in which the customary legal systems are still functioning. Ignorance of customary law is not a viable solution to accomplishing justice for Aboriginal Australians.