BY VIOLENCE, BY SILENCE, BY CONTROL: THE MARGINALIZATION OF ABORIGINAL WOMEN UNDER WHITE AND 'BLACK' LAW

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[*Aboriginal women have endured particular social and institutional forms of violence since European settlement. Typically, the European legal system failed to recognize their traditional cultural and legal position. Rather, it was used to establish reproductive and social control. The distortion of traditional forms of sanction and the persistently masculine, Anglocentric nature of Australian law have retarded the practical recognition and equality of Aboriginal women. Recent deaths within their own communities have highlighted the continuing marginalization and silencing of Aboriginal women, and the inability of the legal process to recognize and defend their needs.*]

INTRODUCTION

The first part of this paper describes some of the effects of early colonization and how Aboriginal women were subjugated and controlled under 'old' European laws, particularly through the Aboriginal Protection Acts. The latter half looks at the violence these women face from within their own communities as they struggle to regain something of the status and autonomy they once held. This violence is partly a consequence of the failure of the 'new' European law and distortions of 'old' traditional law. Aboriginal women are often caught between both, and left unprotected and violated. They are still being defined legally and socially by people outside the Aboriginal community, without a voice that is properly heard and without the autonomy to determine what is best for their lives.

1 *PROTECTION UNDER THE ACTS*

From earliest contact with the Anglo-European colonizers, Aboriginal women were denied the cultural and legal recognition also denied to Aboriginal men. Because they were women, they were denied status independent from their men as it was assumed by Anglo-Europeans that Aboriginal women, like their own, were an extension of an inherently patriarchal society. The differences that revealed Aboriginal women as having a distinct and separate social, religious and legal role in Aboriginal society, and hence a separate, independent and respected voice, were either ignored, trivialized or simply remained undiscovered. Recognition, when it did come, was negative and consequently it was considered that 'drastic

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measures [were] needed for moral control and protection of females and suppression of miscegenation.'[1] Aboriginal women, as a consequence of their reproductive capacity, were perceived as carriers of a social problem requiring legally enforceable definition and control.

Contact and Communication — Man to Man

Contact, official and unofficial, between the two societies was made overwhelmingly by European males. Anglo-European women did not generally exercise authoritative political and economic power within European society or during early settlement. Over time there was greater contact between women of the different cultures, although contact remained fundamentally relational or as part of the existing male administrative structures. Anglo-European women remained confined to 'women's business', often without the same degree of autonomy traditionally held by Aboriginal women, particularly with regard to land. Moreover Anglo-European women were often regarded negatively by Aboriginal people because of their part in the overall colonization process. According to one source:

> In many cases our women considered white women worse than men in their treatment of Aboriginal women, particularly in the domestic service field.[2]

Direct official communication between colonists and Aboriginal women was seen as either pointless or inadvisable. For example, the then Commissioner of Native Affairs in Western Australia stated:

> [A]boriginal women will usually not give information to a white woman. The fact is that native women are regarded as the chattels of their men folk, who will not allow them to give information when it is sought. Such information can be obtained only from the men by a man.[3]

This attitude was hardly surprising given that until just over 100 years ago, under British law, 'women were legally under the control of their husbands along with all their property and earnings.'[4] As a result, much of the time Aboriginal women were silent because they were either not asked, or were approached in such a culturally inappropriate way that they could not respond.

While such barriers to communication and understanding continue today, Aboriginal women remain described not by themselves but by the male dominated systems that impact upon them. Along with Aboriginal people in general, Aboriginal women came to be 'defined in terms of non-Aboriginal perceptions'[5] and this way of looking at Aboriginal people greatly influenced legislative and administrative conditions and procedures. Aboriginal women were thus and continue to be silenced. They have been covered in a kind of invisibility derived from the same 'invisibility [which

1 Commonwealth of Australia, *Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities* (1937) (*'Initial Conference Paper'*) 8.

2 Huggins, J. *et al.*, *Letter to the Editor of Women's Studies International Forum*, unpublished, 14 February 1990.

3 See *Initial Conference Paper, op. cit.* n. 1, 33.

4 Bolger, A., *Aboriginal Women and Violence* (1991) 49.

5 Commissioner Dodson, P. L., *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) Vol. I, 19, 20.

has been] imposed by the legal system on white Australian women'.[6] The marginalization of Aboriginal women is complicated by the additional and continuing obstacles of language, cultural difference and racism.

In *R v. Dennis Narjic*[7] the defence counsel was asked by Justice Maurice:

> [W]hy should we only hear from men ... why shouldn't we hear from some ... female leaders of the [community] ... as to what is culturally acceptable behaviour?

The defence counsel responded: 'But we may not be able to get women to speak.'

The Judge replied: 'It's just because historically no one ever asks them.'[8]

Reproductive Control

Although relegated by Anglo-Europeans to the edges of their own Aboriginal society, and then to the margins of the whole Australian society, Aboriginal women were not left alone. From the beginning women were taken for sexual services and later for menial labour and domestic service, used as a sexual or labouring commodity. Inevitably 'half-caste' children were born. These children were rarely granted the status of European legitimacy, and were usually abandoned by their white fathers. As numbers grew so did the perception that these 'half-caste' children were a threat to the goal of a homogenous white Australia. Similarly some Aboriginal tribes in outback areas perceived these children as a threat to their own culture, and often 'light-skinned infants were killed at birth, because they were living proof of the outrage ... being perpetrated against [them]'.[9] However, mostly these children remained with their Aboriginal mothers despite being a stress on the traditional kinship networks, as well as an being uneasy and growing reminder of failed cultural interaction.

The main Anglo-European response to the situation were the Aborigines Protection Acts passed in Western Australia[10] and elsewhere in the country.[11] These Acts were concerned with the ramifications of this miscegenation, the inter-breeding of Aboriginal and non-Aboriginal people. Aboriginal women were specifically targeted by the various state governments in a sustained effort to exercise some kind of ongoing reproductive control over their lives. There is 'evidence to suggest that throughout the "protection," "assimilation," "integration" eras of the twentieth century, Aboriginal women [were] consciously nominated targets of government in its pursuit to destabilise and dismantle Aboriginal society.'[12] Ironically it was their capacity to

6 Scutt, J. A., 'Invisible Women? Projecting White Cultural Invisibility on Black Australian Women' (1990) 2/46 *Aboriginal Law Bulletin* 4.

7 *R v. Dennis Narjic*, unreported, Supreme Court of the Northern Territory, 1988, 24. This case involved the rape of two young girls by other members of their tribe. The defence had contended that customary law elements were relevant to sentencing, but the judge insisted that the Aboriginal women's views should be canvassed as well as those of the male elders.

8 *Ibid.* 25.

9 Sykes, B., 'Black Women in Australia: A History' in Mercer, J., *The Other Half* (1975) 313-21.

10 Aborigines Protection Act 1886 (W.A.); Aborigines Act 1905 (W.A.).

11 *E.g.* Aboriginals Preservation and Protection Acts 1939-1946 (Qld).

12 Commissioner Dodson, P. L., *Royal Commission into Aboriginal Deaths in Custody, op. cit.* n. 5, 376.

reproduce successfully that caused Aboriginal women to become the official focus for bureaucratic control. This was despite the effects of colonization, which by the 1880s had pushed Aboriginal affairs out of the urban mind.[13] By this stage, 'half of the continent's 600 and more tribes [had been] more or less obliterated.'[14] As late as the 1930s historians and governments alike had assumed that the extinction of the Aboriginal peoples was inevitable.[15]

Official policies were variously concerned with protecting 'full-blood' Aboriginal populations from further depredations as they gradually died out, while simultaneously controlling the growth of the 'half-caste' population. This population was variously described as 'poor imitation whites,' 'superior type[s] of half-breeds,' 'crosses of lower alien races,' and 'quadroons.'[16] The situation was perceived as potentially critical. In the words of one Commissioner of Native Affairs at the time:

> [I]f we leave the aborigines in the north alone they will die out. On the other hand, if we bring them under our influence they will breed, and their numbers increase until they menace our security ... The answer is that we must make the coloured girls acceptable as whites.[17]

The Aborigines Protection Act 1886 (W.A.) was introduced to control and regulate the Aboriginal population in Western Australia. A further piece of legislation, s. 8 of the Aborigines Act 1905 (W.A.), made the Chief Protector legal guardian of 'every aboriginal and half-caste child until such child attains the age of sixteen'. A 1911 amendment added that this control was 'to the exclusion of the rights of the mother of an illegitimate half-caste child.'[18] The Protector determined where Aboriginal children lived, moved and worked. He could prevent the marriage of 'female aboriginals with any person other than an aboriginal.'[19] Half-caste children were removed from their mothers and placed in institutions and homes where the State had custody and provided maintenance and education.[20] In Western Australia, in the words of one Protector, one solution was

> to send [Aboriginal girls] out into the white community [as domestic servants], and if a girl comes back pregnant our rule is to keep her for two years. The child is taken away from the mother and sometimes never sees her again. Thus these children grow up as whites, knowing nothing of their own environment.[21]

Accordingly a legislative structure was developed, where '[t]he aim of the white protector was to make black people as much like the white as possible, but within a framework of dominance and subservience.'[22]

Laws were passed to discourage the 'unscrupulous white or alien'[23] from fraternizing with Aboriginal women. Although this included the banning of

13 Stanner, W. E. H., *The Boyer Lectures 1968: After the Dreaming* (1968) 34.
14 *Ibid.* 34.
15 *Ibid.* 38. *E.g.* the historian Hancock spoke of the 'predestined passing of the Aboriginal people.'
16 *Initial Conference Paper*, *op. cit.* n. 1, 7, 8, 21.
17 *Ibid.* 17.
18 Aborigines Act Amendment Act 1911 (W.A.) s. 3.
19 Aborigines Act 1905 (W.A.) s. 42.
20 *Ibid.* s. 6(3).
21 *Initial Conference Paper*, *op. cit.* n. 1, 12.
22 Bird, G., The 'Civilizing' Mission: Race and the Construction of Crime (1987) 4 *Contemporary Legal Issues* 5.
23 *Initial Conference Paper*, *op. cit.* n. 1, 8.

unauthorized white men from settlement areas, and other punishments such as fines, the focus of the legislation concerning racial separation[24] was always on the Aboriginal men, women and their children. For example, the Chief Protector could always order Aboriginal people camped near towns to move elsewhere.[25] The effect of the legislation was to comprehensively strip away their powers of self-determination and replace what autonomy they had with a system of social, legal and institutional dependency.

2 *THE 'NEW VIOLENCE'*

Despite all these privations, Aboriginal people have survived, although the consequences of the external assault on their society continue to damage and wound. The Protection Acts have disappeared but many of the patriarchal assumptions from which they were developed remain, and the exposure of Aboriginal people to bureaucratic control is still inordinately high. The police, the courts, gaols, social welfare, land and its occupancy and management, a plethora of councils, boards, agencies, continue to guide, support, study, direct, advise and intrude into every aspect of Aboriginal life. Yet despite this domination and controlling power the 'supporting' system is passive, unable to protect Aboriginal women from the violence they face in their own communities.

Alcoholic Violence, Traditional Violence and Bullshit Traditional Violence

> As one woman remarked "there are now three kinds of violence in Aboriginal society — alcoholic violence, traditional violence, and bullshit traditional violence." Women are victims of all three. By "bullshit traditional violence" is meant the sort of assault on women which takes place today for illegitimate reasons, often by drunken men, which they attempt to justify as a traditional right.[26]

In the last generation many Aboriginal people have faced permanent dependency on welfare, have become acculturated to the heavy consumption of alcohol, and are being repeatedly targeted, convicted, incarcerated and generally criminalized by Anglo-European laws. Many have grown up without the traditional influences and constraints of customary law.

Violence is pervasive in many Aboriginal communities. While attention has been focused on Aboriginal deaths in custody, many other deaths happen outside prison which are not as publicized. The Royal Commission into Aboriginal Deaths in Custody Interim Report[27] records that twelve Aboriginal men but no women died in custody in the Northern Territory between 1980 and 1988. In contrast, within the Aboriginal community during that same period, 'thirty-nine Aboriginal people died due to homicide, and seventeen of these were women', according to Northern Territory Police Department records.[28] Some Aboriginal women have died in custody

24 Aborigines Act 1905 (W.A.) s. 36.
25 *Ibid.* s. 37.
26 Bolger, *op. cit.* n. 4, 49.
27 Commissioner Muirhead, J. H., *Royal Commission Into Aboriginal Deaths In Custody: Interim Report* (1988) 86.
28 Bolger, *op. cit.* n. 4, 24.

but the underlying reasons for their death lie outside prison walls.[29] Like all Aboriginal people, Aboriginal women are far more likely to suffer violence and death in their own homes and communities than anywhere else and in fact are safer in gaol.[30] It has been commented that: 'On some communities [violence] has reached a level that women expect to be bashed'.[31]

While traditional violence (such as spearing, beating or even death) was a mechanism of social control exercised against a person by the community as a specific punishment for a recognized crime, it only accounts for a minority of the incidents of abuse against women.'[32] Distortions of customary law, referred to as 'bullshit traditional law', are being used to condone acts of violence against Aboriginal women. Police are sometimes reluctant to interfere to stop what would otherwise be illegal acts. There are variations in the way 'old' law is treated in court. Some judges have mitigated the severity of a sentence. One judge did this on the basis that 'it is pointless and unjust to impose a sentence which the defendants have been awarded even in cases involving matters like violent "disciplining" of disobedient wives.'[33] Other judgments handed down in cases concerning rape and consensual sexual intercourse with under-age girls accepted evidence that local Aboriginal communities considered that the offender's conduct was blameworthy and contrary to customary law, but that the penalties imposed by European law were disproportionate to the seriousness of the offence under customary law.[34]

Conversely in *The Queen v. Wally Hagen & Robert Tilmouth*,[35] concerning a charge of unlawful assault with the intent to have carnal knowledge of a 14 year-old girl, Kearney J. found against the accused, stating that 'Aboriginal women have a right as all other women do, to be protected by the law . . . That means in practice I think stiffer sentences for Aboriginal men who wreak unprovoked violence on Aboriginal Women while under the influence of drink.'[36] He commented that, 'as to [the] evidence about your right to have sex with Bessie in Aboriginal law, I treat that as irrelevant on the facts of this case.'[37] There is a balance that must be found but not in favour of traditional laws which do not actually exist or exist in favour of selfish aggression.

29 Commissioner Wyvill, L. F., *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of Fay Lena Yarrie* (1990); Commissioner Wyvill, L. F., *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of Barbara Ruth Tiers* (1990); Commissioner Wyvill, L. F., *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of Karen Lee O'Rourke* (1989); Commissioner O'Dea, D. J., *Royal Commission into Aboriginal Deaths in Custody: Report of the Inquiry into the Death of Faith Barnes* (1990).

30 Bolger, *op. cit.* n. 4, 24.

31 Atkinson, J., in Cobb, J. (ed.), *N.S.W. Aboriginal Women's Conference 1990: Report* (1991) 23.

32 Bolger, *op. cit.* n. 4, 49.

33 McRae, H., Nettheim, G. and Beacroft, L., *Aboriginal Legal Issues: Commentary and Materials* (1991) 273, referring to cases such as *Police v. Wurramurra* (1977), unreported, Court of Summary Jurisdiction, Groote Eylandt, Northern Territory, 1977.

34 *Ibid.* 273.

35 *R. v. Wally Hagen & Robert Tilmouth* (1990), unreported, Supreme Court of the Northern Territory, 1990, noted in (1990) 2/46 *Aboriginal Law Bulletin* 18.

36 *Ibid.*

37 *Ibid.*

Finally, the ritual role Aboriginal women have had in maintaining harmony and resolving conflict has been compromised. Restricted access to their land has 'diminished their authority and undermined their sense of worth and identity.'[38] Social disruption, such as violent drunkeness, places 'people outside the bounds of [traditional] peacekeeping mechanisms'[39] where there are no clear cut rules to follow. As Betty Pearce has stated:

> What is more important is for the funding agencies, the Federal and State Governments and the Australian Law makers to understand, accept and legally recognise Aboriginal Customary Law. I don't mean replace white law for black law but incorporate the two.[40]

The violence directed against Aboriginal women by Aboriginal men must not be dismissed as a problem peculiar to the Aboriginal people. A National survey in 1988 found that twenty percent of the population 'believe that it is acceptable for men to bash their wives in some circumstances'[41] and domestic violence in all forms within the wider Australian community is appallingly common. Therefore even '[i]f Aboriginal laws do in fact tolerate a high degree of violence against women they are not too far removed from Anglo-Australian laws and community attitudes.'[42] A comparison between the Aboriginal community and Australian society as a whole has shown that there is a marked 'similarity of violence suffered by Aboriginal women and by their non-Aboriginal sisters.'[43] It has been noted that '[t]he types of abuse were similar — physical, psychological, emotional, economic, sexual.'[44] The forms of abuse and their underlying reasons were also similar.[45]

> [Women are] bashed because food [is] not available; because of sexual jealousy, real or imagined; over money; when they [are] pregnant; when the man [is] having an affair; because of women's greater social and economic success; because "he just wants to be boss".[46]

The kind of legal and social equality Aboriginal women require is deeply allied to their cultural traditions within the Aboriginal world. The kinds of violence they endure can occur because they have been silenced, spoken for, and stripped of power and social place. The wider Australian and Aboriginal communities must learn to listen and listen again to a voice long ignored. In the end it is the totality of all Aboriginal women who have the first right to say what they want and choose what they want. Above all they must have the right to obtain power to control and influence the mechanisms that direct their legal and social lives that have so often in the past, for whatever reasons, been made about and for them by others. This is not an equality to be granted to them, but one to be restored.

38 Bell, D. and Ditton, P., *Law: The Old and the New: Aboriginal Women in Central Australia Speak Out* (1980) 24.
39 *Ibid.* 24.
40 Pearce, B., *Tangentyere Council*, unpublished workshop paper delivered at the Women and the Law Conference, Australian Institute of Criminology (24-6 September 1991) 2.
41 *The Australian* (Melbourne), 9 March 1988.
42 See McRae, Nettheim and Beacroft, *op. cit.* n. 33, 275, commenting on the case of *R v. Watson* (1987) 69 A.L.R. 145. This was a case decided by the full Queensland Supreme Court which considered whether an Aboriginal defendant could exculpate himself by raising the argument that customary law permitted him to use violence to punish an Aboriginal spouse for disobedience.
43 Bolger, *op. cit.* n. 4, 38.
44 *Ibid.*
45 *Ibid.*
46 *Ibid.*