Whose Lore is It Anyway?

An Analysis of the Parasitic Interaction Between Lore and Law

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I am born of the conquerors,
you of the persecuted.
Raped by rum and an alien law …[1]

Indigenous Australians hold a deep, spiritual, and even emotional connection with the land.[2] This connection is because of the important relationship Indigenous Australians have with the lore of the land – the Dreaming, which prescribes the 'blueprint'[3] for every aspect of life.[4] This paper argues that the greatest threat to the preservation of lore is the Australian legal system's failure to afford appropriate recognition to lore. Instead, the Australian legal system effectively immobilises lore to the extent that it is not operative. Dominant state legal systems should grant autonomy to non-state legal systems in order to ensure fidelity to the tenets of legal pluralism, namely the existence and operation of two legal systems in one geography. The Australian legal system's failure to accord sufficient recognition to the value of legal pluralism has gradually encroached on lore, resulting in adverse and unjust judicial outcomes for Indigenous peoples. Many examples of this failure to acknowledge legal pluralism exist, including land rights and native title,[5] commercial and consumer issues,[6] and most notably in the area of criminal law.[7]

Firstly, I begin by conceptualising legal pluralism, drawing on Tamanaha's understandings of pluralism following colonisation by focusing on the recognition of native title.[8] I then draw on the contemporary example of strip searches, where the judicature has been called upon to consider this interaction, criticising both institutional competency and the ways in which the State reconciles incompatibilities. Finally, I propose that we entrust Indigenous entities such as tribal courts to administer and preserve lore.

I Definitional Distinction

Preliminarily, a fundamental distinction ought to be drawn as to the difference between lore and law. Lore is a complex and varied system which recognises not only rules, but norms, rights, and relationships between everything in existence.[9] The definition of 'law' can be philosophically divisive, but for the purposes of this paper, I merely mean the statutory instruments enacted by Parliament and judicial determinations made in the interpretation or application of those instruments. Although homonyms, the Dreaming of Indigenous Australians (the lore) is distinct from Western law.[10]

Lore was originally viewed as inept at providing a mechanism for an organised society.[11] Of late, this has been subject to historical and anthropological revisionism.[12] Pascoe understands that all interactions between Indigenous peoples and clans were

regulated by strict rules.[13] Lore is more than just rules, and in this way, is more comprehensive than law.[14] Lore has been described as 'genius' in the sense that Indigenous peoples could collectively assent to a system of rules without there being legislation.[15]

In essence, there exists two distinctive legal systems within Australia[16] – better known as legal pluralism.

II Legal Pluralism

Legal pluralism is where two or more legal systems coexist within the same social field.[17] Legal pluralism is most often achieved where a state legal system recognises and operates alongside cultural norms, traditions, and institutions.[18] Accepting that legal pluralism is a contested concept,[19] it is not sufficient for the state to merely accept as a matter of fact that another legal system exists within the same geography.[20] Thus, where the state attempts to, or successfully destroys lore, it cannot be said that there are 'two … legal orders coexist[ing] in the same social field',[21] as the state action renders lore inoperable.

We therefore arrive at the distinction between 'state pluralism' and 'deep pluralism'. The former has been labelled a legacy of colonialism whereby the state retains the ultimate authority to enact law.[22] Deep legal pluralism can be characterised as truly cooperative as the state accepts that it does not hold a monopoly over the ability to make or apply law.[23] The preferable approach to pluralism is one that does not include significant curtailment of non-state lore, but instead endorses a cooperative system of autonomy and mutual respect.

The Australian approach to pluralism can be characterised as state legal pluralism on the basis that the state decides what elements of lore to give effect to.[24]

A Pluralism Post-Invasion

The process of colonisation was a major contributing factor to the creations of these competing legal systems,[25] not only in Australia but globally. Tamanaha postulates that there were four different approaches taken by colonial superpowers to attempt a harmonious exchange between distinctive legal systems: (1) to leave customary law and practices to function as they had, especially in areas where the colonists were not interested in expanding to; (2) incorporating customary law by codifying it in statute; (3) incorporating customary law by entrusting state courts with the application of the laws; and (4) recognising customary law and entrusting customary courts administered by the community.[26]

The Australian system does not fit neatly within Tamanaha's categories of legal pluralism but subjugates them. In effect, the archetype of legal pluralism at play is 'combative legal pluralism',[27] but not in the sense prescribed by Swenson insofar as Indigenous lore does not 'actively seek to destroy'[28] the Australian legal system. The reverse, however, cannot be said. Instead, I propose that this intersection be more aptly named 'parasitic legal pluralism' whereby the Western legal system encroaches upon Indigenous lore.

The initial approach adopted by the Imperial Parliament and successive Australian governments towards Indigenous lore has reflected a desire to extinguish it. The reception of English law in Australia was based upon the doctrine of *Terra Nullius* — meaning land belonging to no one, or land that is possessed in such a way that sovereignty and property rights are not established.[29] By declaring Australia *Terra Nullius*, the intention of the Imperial Parliament was to introduce British law into the new colony,[30] and to ensure that there was no recognised competing legal system.[31] Although this legal fiction[32] has been challenged,[33] remnants of this flawed understanding of Australia prior to invasion still pervade Australian law,[34] evidenced by the failure of Parliament to effectively recognise and accept Indigenous lore.[35]

One attempt at defining the more contemporary interaction between lore and law was made by prominent Cape York Aboriginal leader, Noel Pearson. Pearson argued, in the context of native title, that a 'recognition space'[36] was created whereby the Western legal system was required to acknowledge and work with Indigenous lore.[37] Consequently, the type and extent of native title rights are not restricted by statute but are derived from the lore of the native title holders.[38] This conceptualisation of native title is reinforced when considering the decision-making processes of the registrar, court, or delegate. In one instance, the Native Title Tribunal was asked to determine the boundaries of a claim where the lore set the sea boundary at 'as far as the eye can see',[39] requiring a unique interaction between

Western and Indigenous understandings of property boundaries. It is plausible that on the topic of native title, the interaction between lore and law fits within Tamanaha's third category of legal pluralism.

On the other hand, native title under statute has been conceptualised as a process of deterritorialisation and subsequent reterritorialisation[40] of Indigenous land to fit a Western understanding of law. Native title is not lore, but a recognition of lore by the common law,[41] which has been enshrined within the *Native Title Act 1993* (Cth). Importantly, however, this regime recognises mechanisms of ownership beyond Western understandings, thus conforming to Tamanaha's second category of legal pluralism. As well as recognising legal pluralism, the native title regime seeks to qualify when or if native title arises. For example, native title rights will not be enforceable if there is an extinguishing act.[42] The effect of extinguishment is a grant of compensation,[43] which arguably ignores the importance of land to Indigenous peoples. In granting compensation, the Court's task is to 'determine the essentially spiritual relationship which the [native title holders] have with their country and to translate the spiritual hurt from the compensable acts into compensation'.[44]

The codification of lore is therefore not verbatim, but subject to qualifications by the Parliament, demonstrating a subtle means by which lore is undermined.

III Recent Case Study: Not So Secret Women's Business

The judicature has frequently been asked to consider issues beyond land rights which involve Indigenous customs and lore.[45] These cases indicate a more systemic concern about Australia's recognition and application of Indigenous customs and lore.

In *Lacey v Attorney-General (NSW)* ('*Lacey*'),[46] the New South Wales Court of Appeal considered whether evidence containing gender sensitive materials under lore could be viewed and scrutinised by the opposite sex. A central element of the prosecution's case, as well as the defendant's case, was footage of a strip search conducted in Wagga Wagga police station, which shows the defendant's chest and buttocks.[47] According to Mutthi Mutthi and Wemba Wemba lore, it would bring shame upon Lacey if her naked figure was to be viewed by any man.[48]

The Court agreed that there were instances where a defendant could apply to have certain people excluded from viewing evidence where it is gender-sensitive,[49] drawing an analogy to the powers of the Federal Court when hearing native title claims.[50] However, the Court rejected the appeal on the basis that the failure to grant an order by the Children's Court did not 'affect the dispositive reasoning of the magistrate.'[51]

The trial judge made two significant findings which were not disturbed on appeal. Firstly, where the prosecution's case rests almost entirely on the testimony of members of the opposite gender, the exercise of the power to restrict particular gendered officers or actors would offend the proper administration of justice.[52] Similarly, the primary judge reasoned that because some men would be present, it did not matter that the magistrate was male.[53] This reasoning demonstrates a high level of apathy towards the cultural sensitivities of women's business and

Indigenous lore. It instead endorses the philosophy of 'come one, come all' — that if one can see the video, why should others be precluded. Both of these arguments are premised upon the distinct lack of personnel.[54]

This decision demonstrates that in circumstances of inconsistency, the primacy of the Western law is retained irrespective of the social and anthropological importance of lore. This belief may be reflective of the archaic understandings of lore, such as it being unintelligible and inferior.[55] Secondly, and perhaps more critically, this exemplifies my argument that the court sets down a principle, virtually signalling the intention of respecting lore and then curtailing the circumstances it is applicable to the extent that it is practically inapplicable.

IV Normative Implications of Current Approach

There are three concerning implications of Australia's approach to lore. The first being an issue of recognising the existence of lore, but not necessarily practising legal pluralism. Secondly, that neither the judiciary nor the Parliament may be institutionally competent to adjudicate disputes concerning Indigenous lore. Finally, the issue of lore and law may be polycentric, meaning that it cannot be adjudicated by a court at all.

A Value Judgements as a Means of Reconciling Inconsistencies

The courts acknowledge the existence of lore but do not accept that it sits on equal footing with law. In common law countries without a regime recognising Indigenous customs,[56] the judicature has frequently been criticised for heralding law as 'legitimate'[57] and supreme over lore.[58] The courts often make value judgements to determine which system should prevail. In this regard, the Australian legal system does recognise the existence of lore. It does not grant autonomy to Indigenous communities to apply and practice lore. Instead, state pluralism is practiced whereby the state gives effect to lore to the extent that lore is consistent with Western ideals.

It appears the Court endorsed a utilitarian value judgement in *Lacey*. As the dispute only affected one Indigenous person, the rules of appeal must be strictly applied so as not to disrupt the entire system. However, in recognising that it may affect many more Indigenous persons in the future, the Court confirms that an application to have a female-only or male-only courtroom for particular evidence is possible.[59]

This reflects a similar tendency to the United States Supreme Court whereby the Court treats Indigenous customs as anachronistic, thus legitimising the encroachment of lore.[60] This treatment can subsequently be attributed to the lack of cultural sensibilities of the judicature. The courts are faced with an 'alien law' because they cannot understand it yet are required to decide without the expertise necessary to do so.

In other contexts, Australian courts have preferred giving efficacy to law over lore where Indigenous practices and lore do not accord with Western understandings,[61] and therefore cannot be recognised by the judicial system. This is especially true when the law is viewed as conferring a benefit on Indigenous peoples.[62]

B Institutional Competency

The primary concern of the current model — that is, entrusting the application and consideration of lore to the state courts — is one of institutional competency. Each organ of government is said to have a specific competence or expertise.[63] The recurring criticism is that neither the judiciary nor the Parliament has the expertise or the resources to adjudicate on disputes concerning Indigenous lore.[64]

Importantly, the High Court seems resigned to the fact that the act of invasion is non-justiciable and sits outside of the confines of the common law.[65]

Further, the other organ of government, the Parliament, cannot be considered the 'correct' body to determine Indigenous affairs for two key reasons. Firstly, distinctive from the United States, Australia does not have an express prescription that Parliament must positively discriminate when legislating with respect to affairs within or between Indigenous nations.[66] Whilst the Constitution prescribes that Parliament has the power to make laws for the people of any race,[67] there is no obligation that the law confers a benefit upon Indigenous peoples.[68] Secondly, there is no objective criterion a judiciary could apply to determine the limits of Indigenous sovereignty or lore.[69] Thus, there remains a significant question as to who can adequately determine disputes concerning indigenous lore.

Much of the work that the judicature faces is culturally diverse,[70] whether it is the litigants, the jurisdiction or the evidence. The court as an organ can impact culture through judicial decision-making.[71] Thus, where the gravity of the decision-

making must be appreciated, so too must the importance of understanding the cultures that it adjudicates on. Where a legal system does not attempt to create a level of cultural sensibility, then it could be said that the judicature is not culturally sensitised, especially where it continues to practice a Western one-size-fits-all approach notwithstanding a cognisance of the existence of Indigenous lore.[72]

Thus, Australia's approach to pluralism invokes a doctrine whereby the judicature can make a determination in which they may not be sensitised to or knowledgeable in the subject matter being adjudicated. However, the question of institutional competency or judicial cultural sensitivity could propose a much broader concern over the ability to adjudicate notwithstanding increased expertise.[73]

c Fuller's Theory of Polycentricity

The failure to practice cooperative legal pluralism should be characterised as a polycentric problem,[74] derived from the fact that judicial decision-making on the interaction between lore and law could produce an infinite amount of change to other factors beyond mere legalisms.[75] Through its judicial determination, a court could cause significant ripples to the Indigenous way of life.

Similarly, the decision to apply the procedural rules of appeal in *Lacey* has now meant that the applicant risks being shunned from her community.[76] Given that this exclusion could result in adverse health outcomes,[77] decreased education outcomes[78] and increase the propensity for criminality,[79] the orders of the Court have far greater impacts than merely who is in the courtroom when the video is played.

The effect of characterising this relationship as polycentric means, in Fuller's analysis, that the dispute is unfit for adjudication by the court.[80] Obviously, the answer is not to leave these disputes unresolved. Instead, the judicial apparatus needs to endorse procedural reform to ensure that disputes can be resolved in a way in which the effects of the decision can be less pervasive.[81]

v Tribal Courts as an Alternative

Thus, I turn to briefly consider the elusive, yet normatively desirable, fourth category proposed by Tamanaha.[82] The Australian legal system can accommodate law and lore by creating customary courts which are entrusted with the application of customary lore. This system would also require proponents of lore and law to practice mutual respect for one another.[83] By having a non-state body to administer lore, the Australian legal system would move from combative legal pluralism to cooperative legal pluralism — where both systems retain a level of authority and autonomy.[84]

This system would allow for Indigenous lore to be recognised in a way which does not subvert it or mandate the enshrinement of lore as state law,[85] whilst entrusting the application of lore to competent institutions. Recognition via these means protects non-state Indigenous lore, shielding lore from disruptive legislation in the face of inter-normative tension and problematic or combative legal pluralism.[86] In fact, Indigenous peoples are hesitant to allow the codification of lore, as it could result in the effective loss of control.[87] This hesitancy represents, perhaps unintentionally, a desire to shift from state legal pluralism to deep legal pluralism.

Many Indigenous clans have already established forms of tribal courts which operate independently of, but alongside, the Western legal system. One such example is the Lajamanu Kurdiji Group, which is a community court hearing matters involving defendants from the local Indigenous clans.[88] Whilst Indigenous incarceration rates have escalated between 1996 and 2014, the Lajamanu Court recorded a substantial decline (50%) in the overall number of criminal cases over the same period.[89] Community courts are not exclusively for criminal matters. They can be utilised for a wide range of matters including family law disputes and other civil disputes.[90]

These examples are distinctive from what I define as 'quasi-tribal courts' — courts which engage the Indigenous community more than the Western legal system but are heavily regulated by the state. Under this model, the Koori Court would not qualify as a tribal court as its operation is dependent upon the state recommending an offender to the court, which applies Western law. The only difference appears to be the setting and the introduction of an Indigenous elder into the process.

The experience of community justice mechanisms interacting with 'white law'[91] has been generally negative, whereby state law has often superseded

community justice.[92] This interaction reinforces the characterisation of the relationship between law and lore as parasitic. Furthermore, it is clear that the proponents of tribal courts are willing to engage with the Western legal system.[93] Again, the reverse cannot be said.[94] This failure to engage with lore may be symptomatic of the concern that it may be discriminatory for the law to recognise cultural difference, as the aim of law is to treat all identically.[95]

Similarly, there are significant criticisms of tribal courts, including the informal procedures and the lack of respect which may be generated from this informal forum.[96] Again, this criticism is based on a comparison with the Western legal system without having regard to the cultural practices of Indigenous groups. The conceptualisations of justice in Indigenous groups can be likened to methods of alternative dispute resolution under Western law, whereby informality is a cornerstone of these processes.[97]

VI Conclusion

The relationship between lore and law is problematic at best and parasitic at worst. Australian governments have created a trajectory towards the disintegration of lore. Where the judicature has been asked to deliberate on issues concerning lore, it has subverted lore in favour of law by reverting to a value judgement based on Western ideals leading to undesirable results. The way forward is to view the interaction through the lens of deep legal pluralism, understanding that there are other normative systems other than the hegemonic Western legal system. One such method of achieving deep legal pluralism in Australia is to entrust lore to institutions which are competent and culturally appropriate, such as tribal courts.

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