

ARTICLES

The Culture of Consent and Traditional Punishments under Customary Law

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*"Every society is adept at looking past its own forms of violence, and reserving its outrage for the violence of others."***

Introduction

Traditional punishments are still common amongst traditional Indigenous communities in Australia.¹ Administration of traditional punishment raises the issue of whether those involved in the process should be charged with assault under Anglo-Australian law.² Currently traditional punishments can be prosecuted as assaults. Under the *Crimes Act 1900* (NSW) Aboriginal people carrying out traditional punishments may be charged with malicious wounding or infliction of grievous bodily harm (s 35), causing grievous bodily harm (s 54), and assault occasioning actual bodily harm (s 59).

The Australian Law Reform Commission (ALRC) contends that the issue of traditional punishments need not "be resolved by...reform of the law relating to consensual assaults."³ The ALRC asserts that it is

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** Clendinnen, I, *Dancing with Strangers*, Text Publishing, Melbourne, 2003, p 190.

¹ Sheehan P, *Among the Barbarians*, Random House Australia, Sydney, 1998, p 16.

² Sheehan P, note 1, p 16; *R v Wilson* (1995) 81 A Crim R 270 at 276 per Kearney J. For a good account of infliction of an actual tribal punishment see Sheehan P, note 1, p 9-11.

³ Australian Law Reform Commission, Report No. 31, *The Recognition of Aboriginal Customary Laws*, (Canberra, 1986), para 503.

appropriate for the issue to be dealt with by a police policy of non-prosecution of these matters.⁴ However, the relationship between Aboriginal people and the police is rooted in a history of racism and colonialism⁵ so that police policy is likely to be inadequate in safeguarding the interests of Aboriginal people. Something more is required. This article will argue that the appropriate legal response to this issue is to recognise a cultural defence of consent for those carrying out traditional punishments.

Recognising Aboriginality within Anglo-Australian Criminal Law

The aim of full recognition of Aboriginal customary law has much to commend it. However, it is inevitable that progress towards this goal will be slow, particularly in the current political climate. Until the process of full recognition of Aboriginal customary law is accomplished, Aboriginality should be recognised as much as possible within the current criminal law.⁶ It is essential to do so because, despite its claims to the contrary, the law is far from objective.⁷ The law is not separate from morality, as proposed by Austin;⁸ rather the law is embedded with the morality of those possessing power within the dominant culture.⁹ Critical Legal Studies scholars maintain that “political and ideological motivations...underlie... the law”.¹⁰ Australian criminal law is no exception. It has been used to criminalise Aboriginal culture and dispossess Aboriginal people.¹¹ Originating from English law, it is characterised by ethnocentric and monocultural

⁴ Australian Law Reform Commission, note 3, para 503.

⁵ See Bird G, *The ‘Civilising Mission’: Race and the Construction of Crime*, Contemporary Legal Issues, No 4, Faculty of Law, Monash University, Clayton, 1987, pp 28-29.

⁶ Yeo S, “The Recognition of Aboriginality by Australian Criminal Law” in Bird, Martin, and Nielsen (eds), *Majah; Indigenous Peoples and the Law*, Federation Press, Sydney, 1996, pp 2-3.

⁷ Davies M, *Asking the Law Question*, The Law Book Company, Sydney, 1994, p 88.

⁸ See Davies, note 7, p 77.

⁹ Davies, note 7, p 149; also see Leane, G, “Testing some theories about law: can we find substantive justice within law’s rules?” (1994) 19(4) *Melbourne University Law Review* 924, p 937.

¹⁰ Davies, note 7, p 149.

¹¹ See Bird, note 5.

approaches. This is evident in the existing exceptions to the general rule that a person cannot consent to bodily harm in the law of assault. Boxing, wrestling,¹² contact sports such as football, cosmetic surgery, general surgery, ear-piercing, dangerous exhibitions and rough horseplay have all been regarded as legally recognised exceptions.¹³

Consent to Assault

The general rule in the law of assault is that “it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial”.¹⁴ In the English case of *R v Donovan*, Swift J expressed the view that “‘bodily harm’ has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such injury need not be permanent, but must...be more than merely transient and trifling.”¹⁵ This passage has since been approved by Australian courts.¹⁶

In the case of *Attorney-General’s Reference (No 6 of 1980)*, the English Court of Appeal accepted that there were certain exceptions to the general rule such as “properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference [and] dangerous exhibition”.¹⁷ Lord Lane considered that “these apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public

¹² *Foster’s Crown Law* (1762) at 260, cited in Devereux J, “Consent as a Defence to Assaults Occasioning Bodily Harm- The Queensland Dilemma” (1987) 14 (2) *University of Queensland Law Journal* 151, p 152.

¹³ See *R v Brown* [1993] 2 All ER 75 at 106-110 per Lord Mustill.

¹⁴ *R v Donovan* [1934] All ER Rep 207 at 210 per Swift J.

¹⁵ [1934] All ER Rep 207 at 212.

¹⁶ See for example, *Salasch v The Queen* [2002] FCAFC 119 at [20], and *The Queen v Holmes* (unreported, Supreme Court of Tasmania, Wright J, No. 257 of 1992, 11 February 1993), at [5], <<http://www.austlii.edu.au/>>, (12 August 2002).

¹⁷ *Attorney-General’s Reference (No 6 of 1980)* [1981] 1 QB 715 at 719.

interest, in the other cases”.¹⁸ This ruling has also been approved by the Australian courts.¹⁹

The Social Utility Approach

The House of Lords in *R v Brown*²⁰ declared that there must be some “good reason”²¹ why a particular consensual activity should be legally recognised as an exception to the general rule expressed in *R v Donovan*.²² This is similar to the ruling in *Attorney-General’s Reference (No 6 of 1980)* that it was unlawful to cause “bodily harm for no good reason”.²³ Thus, the consensual harm must involve some form of social utility, that is, “it must be shown that the public interest positively requires that such conduct be permitted”.²⁴

It is contended that social utility is served by administering traditional punishments under customary law. In many cases, administering a traditional punishment is necessary for the peace and welfare of Aboriginal communities. Traditional punishment is part of the healing process for an Aboriginal community after there has been a crime.²⁵ Thus, in the Supreme Court of the Northern Territory case of *R v Barnes*,²⁶ evidence was admitted to show that the administration of traditional punishment is essential for the community so “peace can be obtained”.²⁷ Similarly, in the Northern Territory Court of Criminal Appeal case of *R v Minor*,²⁸ evidence was given that, in addition to

18 *Attorney-General’s Reference (No 6 of 1980)* [1981] 1 QB 715 at 719.

19 See for example, *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B. (Marion’s Case)* (1992) 175 CLR 218 per McHugh J, *The Queen v Holmes* (unreported, Supreme Court of Tasmania, Wright J, No. 257 of 1992, 11 February 1993), at [6], <<http://www.austlii.edu.au/>>, (12 August 2002), *R v Barnes* (1997) 96 A Crim R 593 at 597, and *Whimpress v Police* [1998] SASC 6957 at [24].

20 [1993] 2 All ER Rep 75.

21 [1993] 2 All ER Rep 75 at 89.

22 *R v Donovan* [1934] All ER Rep 207 at 210 per Swift J.

23 [1981] QB 715 at 719.

24 Kell D, “Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal?” (1994) 68 (5) *Australian Law Journal* 363, p 376.

25 *R v Wilson* (1995) 81 A Crim R 270 at 276 per Kearney J.

26 *R v Barnes* (1997) 96 A Crim R 593.

27 (1997) 96 A Crim R 593 at 594.

28 (1992) 59 A Crim R 227.

being the fault of the murderer, a death is considered to be the fault of that person's relatives and traditional punishment "is a form of freeing the family concerned from their guilt".²⁹ The Supreme Court of the Northern Territory also acknowledged in *R v Wilson* that traditional punishments enable "the two groups of people involved with the dead person and the prisoner ... to be reconciled".³⁰

The restoration of harmonious relations within Aboriginal communities certainly constitutes a 'good reason' to allow customary law punishments. If cosmetic surgery, boxing and other violent sports can be regarded as serving some useful social purpose, there is no 'good reason' why it should be concluded that traditional punishments do not. The purpose of traditional punishments is clearly less frivolous than the purposes of the aforementioned exceptions. This argues strongly in favour of the development of an exception category for traditional punishments.

The Social Disutility Approach

In contrast to the social utility approach, the social disutility approach considers whether it is "strictly necessary" that particular consensual activity be criminalised.³¹ The social disutility approach requires that the public interest positively demand the consensual conduct to be criminalised.³² This provides a more rational and systematic explanation for the existing exceptions to the general rule in *R v Donovan*.³³ Lord Mustill takes this approach in *R v Brown*.³⁴ Firstly, he considered whether the act was automatically criminal³⁵ in which case consent was irrelevant. If the conduct was not automatically criminal he went on to consider public policy reasons which might justify making the conduct unlawful.³⁶

²⁹ (1992) 59 A Crim R 227 at 236-237.

³⁰ *R v Wilson* (1995) 81 A Crim R 270 at 276 per Kearney J.

³¹ Kell, note 24, p 377.

³² Kell, note 24, p 377.

³³ Farrugia P, "The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law"(1997) 8(2) *Auckland University Law Review* 472, p 495 and Kell, note 24, p 376.

³⁴ [1993] 2 All ER 75 at 115-117.

³⁵ [1993] 2 All ER 75 at 112-113.

³⁶ See [1993] 2 All ER 75 at 115-117.

In applying this approach to the facts in *R v Brown*, Lord Mustill held that the sado-masochistic activities of the appellants were not automatically criminal.³⁷ Indeed, his Lordship was unwilling to presume that consensual “infliction of bodily harm ... is invariably criminal absent some special factor which decrees otherwise”.³⁸ Lord Mustill expressed a preference for examining “each individual category of consensual violence in the light of the situation as a whole.”³⁹ His Lordship then considered public policy reasons which might justify making the conduct unlawful such as whether the appellant’s conduct was likely to involve the risk of infection or disease, whether the activities might get out of hand and cause very serious injury or death, and whether such activities would be likely to involve and harm young people.⁴⁰ After evaluating these public policy issues, Lord Mustill concluded that they did not justify making the appellant’s conduct unlawful.⁴¹

Following this approach, it is strongly argued that traditional punishments are not automatically criminal. While Aboriginal people have no legal right under Anglo-Australian law to practice customary law, it does not necessarily follow that the practice of their law is unlawful. Support for this proposition comes from the Northern Territory Court of Criminal Appeal in *R v Minor* where Mildren J held that traditional punishments were not ‘unlawful’ violence.⁴² He gave the explanation that “[t]he reason why courts usually say they do not condone ‘payback’ is because it is a form of corporal punishment, carried out by persons not employed by the State to impose punishment; not because the imposition of the punishment is necessarily unlawful”.⁴³ What then are the public policy considerations which might justify making traditional punishments unlawful?

37 [1993] 2 All ER 75 at 113-114.

38 [1993] 2 All ER 75 at 113.

39 [1993] 2 All ER 75 at 113.

40 [1993] 2 All ER 75 at 116-117.

41 [1993] 2 All ER 75 at 117.

42 (1992) 59 A Crim R 227 at 239.

43 (1992) 59 A Crim R 227 at 240.

Policy Considerations Favouring Criminalisation

Public policy considerations for criminalising traditional punishments include concerns over health and safety, the infliction of corporal harm, and that such practices constitute human rights violations under the *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (CAT).

The health and safety concerns regarding traditional punishments appear to be exaggerated. Generally, the infliction of bodily harm in traditional punishments is not intended to result in serious injury. Thus, it has been judicially noted that “no permanent injury to health is intended when tribal spearings occur”.⁴⁴ On the rare occasions when a serious injury is inflicted, the person is taken to hospital and receives medical treatment,⁴⁵ they are not left unattended to die from their injuries.

As for traditional punishments constituting the infliction of corporal harm, such punishments are only carried out when grave offences have been committed under customary law.⁴⁶ It is somewhat sanctimonious of non-Aboriginal Australia to claim that such conduct is uncivilized given the history of the treatment of Aboriginal people in this country.⁴⁷ Some Aboriginal people may well view a “ritual spearing [as] less cruel than a term of imprisonment”.⁴⁸ From their perspective, a traditional punishment may be considered more humane than depriving an offender of their culture and community support for long periods of time.

As for the concern that traditional punishments constitute human rights violations under the CAT, it ignores the fact that the rights rhetoric of the Western world is “culturally and historically

⁴⁴ *R v Minor* (1992) 59 A Crim R 227 at 239 per Mildren J.

⁴⁵ As in the case of Steven Barnes, see the account of his tribal punishment in Sheehan P, note 1, pp 9-11.

⁴⁶ Ginibi R, “Aboriginal Traditional and Customary Laws” (1994) 1 *Law/Text/Culture* 8, p 11; and “Australian Aborigines - History and Culture, Research Project: A to Z Encyclopedia of Aboriginal Information”, <http://www.aaa.com.au/bizskills/A_Z/atoz3.shtml#Punishment>, (20.5.2000).

⁴⁷ Sheehan, note 1, p 16 and generally Bird, note 5.

⁴⁸ Bird, note 5, p 43 and see Watson, I, “Indigenous People’s Law Ways: Survival Against the Colonial State” (1997) 8 March *The Australian Feminist Law Journal* 39, p 58.

specific”.⁴⁹ Imposing Western notions of human rights on Aboriginal people in regard to traditional punishments may be seen as part of the ‘civilizing mission’ of colonization because it is founded on the denigration of Aboriginal culture and assumptions that Western values are superior.⁵⁰ It constitutes assimilation in a new guise.

As against the view that traditional punishments are human rights violations, Australia’s international obligations require it to allow Indigenous peoples to continue their cultural practises. To punish Aboriginal people for carrying out traditional punishment is to punish them for practising their culture. Under Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) Indigenous peoples⁵¹ have the right to “enjoy their own culture”. Likewise, Article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides Indigenous peoples with the right to “take part in cultural life”. Furthermore, under Article 12 of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, “Indigenous Peoples have the right to practise and revitalize their cultural traditions and customs.” For some Aboriginal people, an important part of their cultural life includes administering traditional punishments in accordance with their customary law. All told, the policy reasons for criminalising traditional punishments are without merit.

The Level of Consensual Harm

As noted previously, the general rule declared in *R v Donovan* is that a person cannot consent to the infliction of actual bodily harm.⁵² However, the law recognises certain exceptions such as “properly

49 Bird, note 5, p 44 and see Pritchard S, “The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice” (1995) 2 (1) *Australian Journal of Human Rights* 4-32, <<http://www.austlii.edu.au/au/>>, (20 May 2000).

50 See generally Bird, note 5.

51 The Human Rights Committee has decided that Indigenous peoples are covered by article 27 even though they are not to be considered minorities, see General Comment No23 (50), adopted by the Committee at its 1314th meeting, 6 April 1994, Pritchard S, *Indigenous Peoples, the United Nations and Human Rights*, The Federation Press, Sydney, 1998, p 28.

52 *R v Donovan* [1934] All ER Rep 207, *Attorney-General’s Reference (No 6 of 1980)* [1981] QB 715, and *R v Boyea* (1992) 156 JP 505 all considered that inflicting actual bodily harm negatives consent, see *R v Brown* [1993] 2 All ER 75 at 90 per Lord Jauncey.

conducted games and sports, lawful chastisement or correction, reasonable surgical interference [and] dangerous exhibitions”.⁵³

With regard to grievous bodily harm, there is judicial support in Australia for the view that a person cannot consent to grievous bodily harm and no exceptions are recognised.⁵⁴ The Australian Law Reform Commission has also opined that “consent will not justify the deliberate infliction of grievous bodily harm, or of any permanent or serious injury.”⁵⁵ Based on this, it could be said that a person cannot consent to a tribal punishment that will occasion grievous bodily harm.

However, there is also support for the view that a person can consent to a level of harm that exceeds actual bodily harm. Gillies asserts that “[a]s a broad proposition, it may be said that consent to the application of actual bodily harm *and even more serious harm* will be sanctioned by the courts when such application has general social approval”.⁵⁶ Similarly, it has been held in *R v Brown* that “activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm *or may cause serious bodily harm*”.⁵⁷

The issue of whether a person can consent to grievous bodily harm is significant because, although traditional punishments do not inevitably result in the infliction of grievous bodily harm,⁵⁸ occasions may arise where a judge will consider that a traditional punishment does constitute grievous bodily harm.⁵⁹ For those rare occasions where traditional punishment has occasioned grievous bodily harm, it would be appropriate for the court to compare the types of harm resulting

⁵³ *Attorney-General's Reference (No 6 of 1980)* [1981] 1 QB 715 at 719.

⁵⁴ *R v Barnes* (1997) 96 A Crim R 593 at 597; and *R v Minor* (1992) 59 A Crim R 227 at 239.

⁵⁵ ALRC, note 3, para 503.

⁵⁶ Gillies P, *Criminal Law*, 4th ed, LBC Information Services, Sydney, 1997, p 333 (emphasis added).

⁵⁷ *R v Brown* [1993] 2 All ER 75 at 79 per Lord Templeman (emphasis added).

⁵⁸ *R v Minor* (1992) 59 A Crim R 227 at 239. In this case Mildren J stated “a mere spearing into the thigh muscle may not in fact cause any permanent injury to health so as to fall within the definition of grievous bodily harm” (at 239). Permanent injury to health was a factor to be considered under s 1 of the *Criminal Code* (NT).

⁵⁹ *R v Barnes* (1997) 96 A Crim R 593 at 597.

from some of the legally recognised exceptions to the general rule in *R v Donovan*.

A few commentators have suggested that some activities contained within the recognised exceptions for actual bodily harm do in fact involve the infliction of grievous bodily harm.⁶⁰ These include surgery and various sporting activities;⁶¹ yet no attempt is made to criminalise those acts. It would be ethnocentric to maintain that traditional punishments should not be included as an exception on the basis that the level of harm inflicted may on occasion constitute grievous bodily harm, while no attempt is made to criminalise acts which constitute grievous bodily harm under the established exceptions.

A further point to note is that, while it is generally accepted that the acts of general surgery occasioning grievous bodily harm can be justified on the basis of necessity,⁶² it is much more difficult to say the same for cosmetic surgery.⁶³ Clearly what is regarded as ‘necessary’ is influenced by Western perceptions and values. If necessity is a relevant factor in justifying the level of harm, then Aboriginal people should be able to consent to serious harm occasioned by traditional punishments because they are ‘necessary’ to maintain peace and well-being in Aboriginal communities.⁶⁴

The Scope of the Proposed Exception

It is contended here that the exception comprising consent to traditional punishment should cover all types of conduct which can be described as assaults under Anglo-Australian law. These include “spearing...or other forms of corporal punishment, individual

⁶⁰ Gillies, note 56, p 333; on this point also see Freckleton, I, “Masochism, Self-mutilation and the Limits of Consent” (1994) 2 August *Journal of Law and Medicine* 48, p 69.

⁶¹ Gillies, note 56, p 333; also see Freckleton, note 64, p 69.

⁶² Lord Mustill alludes to this in *R v Brown* [1993] 2 All ER 75 at 109-110, and see Gillies, note 56, p 333.

⁶³ See Watson A, “Score and Pierce: Crimes of Fashion? Body Alteration and Consent to Assault” (1998) 28 (2) *Victoria University of Wellington Law Review* 371, p 379-380 for an account of the superfluous purposes of cosmetic surgery.

⁶⁴ *R v Barnes* (1997) 96 A Crim R 593 at 594 and *Minor* (1992) 59 A Crim R 227 at 236-237.

‘duelling’ with spears, boomerangs or fighting sticks, [and] collective ‘duelling’”.⁶⁵

Certainly, the scope of the cultural exception must be carefully defined so as to exclude personal vendettas. This accords with the judicial distinction made between ‘payback’, a form of traditional punishment, and vendetta.⁶⁶ While payback seeks to achieve restorative justice, vendetta is incapable of benefiting the Aboriginal community at all.⁶⁷ Hence, violence inflicted out of sheer anger and not in accordance with customary law should not fall within the ambit of the exception.⁶⁸ Likewise, conduct amounting to domestic violence should not fall within the exception;⁶⁹ as such conduct would not have been consented to by the victim.

An Individual’s Right to Consent

John Stuart Mill has asserted that “[o]ver himself [or herself], over his [or her] own body and mind, the individual is sovereign.”⁷⁰ This principle underpins the law of assault. As the Supreme Court of Queensland in *R v Schloss and Maguire*⁷¹ has proclaimed, “[t]he term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all.”⁷²

This principle is particularly apt for Aboriginal people who have repeatedly had their right to determine their own lives taken away under Anglo-Australian law. It is critical to acknowledge that those receiving traditional punishment do so on an entirely consensual basis.⁷³ In the words of a recipient of traditional punishment, “[t]he

⁶⁵ Australian Law Reform Commission, note 3, para 500.

⁶⁶ *R v Minor* (1992) 59 A Crim R 227 at 228.

⁶⁷ (1992) 59 A Crim R 227 at 228.

⁶⁸ For an example see *R v Mamarika* (1982) 5 A Crim R 354.

⁶⁹ For an example see *R v Watson* [1987] 1 Qd R 440.

⁷⁰ Mill J S, *On Liberty*, Penguin Books, England, 1859, p 69.

⁷¹ (1897) 8 QLJR 21.

⁷² (1897) 8 QLJR 21 at 22.

⁷³ Australian Law Reform Commission, note 3, para 503.

courts should realise we are still living traditional around here. I was really glad I was able to face my family in the traditional way.”⁷⁴

Conclusion

The criminal law of assault should be developed to accommodate traditional punishments carried out under Aboriginal customary law. The current criminal law is unsatisfactory because it contains the potential to punish Aboriginal people for practising their own culture. The existing exceptions only embody Western values and traditions. The restoration of harmonious relations within Aboriginal communities fulfils the judicially recognised criterion of social utility underpinning the exceptions to the general rule that consent to harm is irrelevant in determining criminal responsibility.

There is also no satisfactory reason why administering traditional punishments should be criminalised. Western notions of human rights must not be used to criminalise Aboriginal culture. Indeed, it can be argued that Australia’s international human rights obligations require that Aboriginal people be allowed to practise their culture. Those who conclude that traditional punishments are a “barbaric”⁷⁵ infliction of bodily harm need to dispense with their cultural blinkers. Consistent with the principle of self-determination, Australia’s Aboriginal people should have the right to determine what degree of harm they can consent to.

⁷⁴ Quoted in Sheehan, note 1, pp 17-18.

⁷⁵ For example see Stone S, “Victims, not offenders, deserve a break”, *The Australian*, Edition 1, Thursday 17 February 2000, <<http://ink.news.com.au/theaustralian/issues/sentence/chief.htm>>, (20 May 2000).