

Customary law - What is it really?

For the Yolŋu people of north-east Arnhem Land, what is called 'customary law' is a holy and precious thing. It is the law and law processes that create peace and harmony, guards individual and corporate rights, protecting the old, the young, the sick and the vulnerable in our society. Of course many Australians, and even some Aboriginal people, now see this same customary law as 'payback' and other things like 'the abuse of women' etc. That idea is definitely not Yolŋu law and it is not part of true customary law.

The customary law that we are talking about is the law that was here in this land before the British came and took over Australia. Words like 'customary law' and all these other words like 'payback', and even the thinking about Yolŋu law came originally from white people as they made observations and named what they thought our law was, without any real understanding. Now because these common English words like 'dreaming', 'payback', etc. are used to explain traditional law, the real understanding of customary law is lost in the confusion that these common English words create - because Yolŋu know their law is not customary!

The idea that Yolŋu law was just 'custom' came from white people who thought we were 'simple natives' without any systems of law. The early colonists did not recognise our land or our resources or anything that belonged to us, in the same way they did not recognise that we had a system of law.

But there is a lot of confusion about what is 'customary law'. For example, if a person from one clan or family hurts a person in another clan or family, the grieved family or clan will get upset. Now some people in this clan or family will just want to go straight away and hit the other clan or family. This is only human nature. It is seen in any cultural group.

Or if a young woman ran away with a man that she was in love with, many people think that Yolŋu 'law' allows all the old men to rape her as punishment. This is not 'customary law'. This is really *revenge* and it does not have any part of a true system of law. That is not to say that some Aboriginal people have not done these things. They have, just like many other Australians have carried out revengeful acts that break Australian law. All societies have lawbreakers and there are lawbreakers in Aboriginal society.

Yolŋu law is called the *Madayin* and other traditional Aboriginal people have their own names for their customary law. This is a full system of law and it has the three main elements that are found in any good system of law. This is true for *all* traditional Aboriginal systems of law.

If a society has a 'rule of man' and not a 'rule of law' as its basis, then all we see is anarchy. When this happens what we find is societies that operate using 'payback' and other vicious ways to bring about the ordering of society. This is not the way it is in traditional Aboriginal society.

For societies to exist and progress and also to co-exist with each other then they had to operate under a civilised 'rule of law'. A 'rule of law' like we see in the *Madayin*.

Traditional Aboriginal people are now citizens of two laws

Because many traditional Aboriginal people are still assenting to their ancient traditional systems of law ('*customary law*'), we now have a situation that is reaching crisis point for all Australians. But this situation has actually been occurring since initial contact with white society. That is, that traditional Aboriginal people are living under two laws.

The ramifications of this are massive as Aboriginal people, are constantly placed in a position of "double jeopardy" as they are ruled over by the dominant Australian law, yet still live by their traditional Aboriginal 'customary law'. And it is only the 'customary law' that they understand and assent to.

This leads to a total disrespect for Australian law, its peacekeepers (police) and officers (the courts). It promotes a society where anarchy or a 'rule of man' forces itself upon a system of law that is there to provide a 'rule of law'.

Aboriginal people, on a daily basis, are forced to choose which law they will follow and uphold. Often to follow one law is to break the other. This is usually the case for the peacekeepers and officers of the *law from the traditional society*. Sanctions under one system are not understood or recognised under the other. So carrying out the requirements of 'customary law' leads to charges of breaking Australian law. This is the daily dilemma that traditional Aboriginal people find themselves in.

Until there is true understanding and subsequent recognition of true traditional Aboriginal 'customary law', as encoded in systems such as the *Madayin*, then the "double jeopardy" will continue and so will the anarchy that lies festering like an open, untreated wound within the dominated society that is Aboriginal Australia. system of government, based on that of the Westminster system of government. Section 51 of the Australian Constitution states that the parliament shall -

"have power to make laws for the peace, order and good government of the Commonwealth."

Magayamirr is a structure that allows for good government within a civilised code, accepted by the citizens. The people see themselves as the **rom wataiju walal'** (owners of the law). They are at one with the law and know it protects them and gives them rights and responsibilities as citizens.

2. Dhapirrk

The ancient Law/Madayin gives the 'Traditional Parliaments/' arra' the powers to create Acts of Law/Wayuk. Any laws that come from these chambers of law must be consistent - **dhapirrk** - with all others aspects of the whole system of law. That is, all laws and the whole system of law as it operates everyday for the people must be *magayamirr*. Any individual law or group of laws that are not consistent with other laws and do not produce *magaya* are not acceptable to the citizens (*rom watalu walal*).

3. Wana Lupthun

After a draft law is discussed and by consensus is agreed to by the representatives in the chamber of law, the objects which represent the law (such as the **Dhulmulka bathi** - sacred dilly bag) are brought out for the citizens to see. They then assent to the law. In this ceremony the objects representing the law are held above the people and all the people of that clan go under the water to indicate that they are under the discipline, responsibility and protection of the law. No one is above the law!

Laws included in the Madayin

The *Madayin* covers the ownership of the land and waters (**yirralka**) and the resources on or within these lands and waters (i.e. birds, fish, animals and plant life). It also controls the production and trade of goods and resources including the laws for the conservation of, and farming of flora, fauna and aquatic life. As well as these the *Madayin* also controls and regulates the moral, social and religious laws of the clan.

This is the complete system of law that traditional Aboriginal people know as their 'customary law'.

Rule of Law

In 1971 Justice Blackburn, in his judgement and summing up of the Gove Land

Rights case, said: that he "could see that a 'rule of law' and not a 'rule of men', an'
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For the *Madayin* these three elements come from the *djalkiri* or the foundational source of our law.

Foundational Source: From the Foundation of the Earth

Djalkiri literally means the foot, footprint or root of a tree, but when it is applied to law or *Madayin* it takes on a more profound meaning. The people talk about their *Madayin* saying, "When I am teaching young people the law from the **djalkiri**, I mean it is not a lie, nor is it something I have made up, because this law has its roots in the foundation, or creation of the world. In other words when the earth came into form and was created by **Waijarr** (the creator spirit), the **Madayin** was there at the same time. The **Madayin** was not brought into existence by humans, it was there in the beginning. When humans first breathed, the *Madayin* was there already. The *Madayin* tells us who we are at law, and who are the **yirralka wataou** (owners of a particular estate), who has the right to the resources of these estates, and it tells us our rights and obligations, and the way we should live. This is not something man has made up, it is set down in the *Madayin* from the **djalkiri** (from the foundation of the earth).

The *djalkiri* gives us these three main elements that must be found in all law. They are;

1. The law must create *Magaya*. That is, the law must create a state of peace, harmony, and tranquillity, with true justice for all the citizens.
2. The law must be **Dhapirrk**. That is, the law must be perfectly consistent with all the different levels of law from the source down to the lowest acts of law.
3. The third element of good law is that it must be **Wana Lupthun**. That is, the law must be assented to by the citizens in a ceremony that shows that they are all under the discipline, responsibility and protection of the law.

1. Ma" gaya

Magaya has been literally translated as "peace, no trouble, cessation of hostilities" whilst *mirr* is a suffix which denotes the possessive. So **magayamirr** means to

be with peace, having no trouble, to have a cessation of hostilities.

"Magayamirr is like when you walk into a yard where there is no breeze. Everything is still and quiet, with not a leaf or anything moving. Everything is very still and tranquil."

Rev Dr Djiniyini Gondarra OAM

"Magayamirr Uayi ga Uorra dhukarrjur romdja" translates literally as 'peace and tranquillity lies on the structure (way) of the law'. The name **Yoliju** give to their system of government (many parallels an underlying principle of the Australian

1 Temporary Gupapuypu Dictionary' compiled largely from notes of Beulah Lowe made in the mid-1960's.