

RESPONSES TO PETER SUTTON

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As an anthropologist with no expert-witness experience in matters Aboriginal, I know little of the relevant law. Therefore my remarks on Sutton's paper draw mainly on anthropology, and on one philosophical point.

Sutton summarizes his argument thus:

in the case of cultural relativism and its application to matters of law within Australia, wider demographic, cultural and social changes are working to hasten the decline and fall of the kind of strong relativism that informed liberal progressive opinion thirty years ago. Narrow political, economic and social forces also still work to keep strong relativism alive as an ideology, producing some highly problematic contradictions.

There are two contentions in this passage and I agree with them both. Sutton's first point is that 'strong relativism' as he describes it in the course of his discussion is becoming less appropriate than possibly it once was in some areas of Australia and in some practice of the law. The second point is that there are factors in Australian society that sustain an 'ideology' of relativism for particular ends. Among these factors are 'indigenous enclave politics and non-indigenous self-redemptive feel-goodism'.

I will support Sutton's first point by relating an example of the use of police-sanctioned payback to settle a dispute among a group of Arrernte (mainly southern and western Arrernte) in Central Australia. This example will support the view that today ostensibly traditional feud can involve forms of practice and appeal that are culturally diverse. Correlatively, simple notions of cultural relativism, be they employed in either legal or extra-legal contexts, will be inadequate to capture the nature of events. As a consequence, more general and mainstream ideas of relevance and context may serve as well in legal procedure as Aboriginal-specific notions of cultural relativism.

The dispute I have in mind occurred in the early 1990s. It was triggered when one man killed another in a public place in Alice Springs. The popular and shared view

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of the event was that man A accosted man B concerning the fact that B had, some years earlier, run away with A's first wife. Argument followed during which B fatally knifed A.

At the remote community where both men resided, news of the event travelled fast both by word of mouth and telephone. Within six hours, news not only reached the settlement but also outstations 100 kilometres further west. Relatives on both sides came into the settlement both to grieve and confer. Man B had gone into hiding and relatives of man A suggested first that payback should be executed on a brother of B's who was residing at an outstation with his (and B's) mother. She called on other relatives and decamped with B's brother to a distant settlement. She was reported to have said that, as a Christian, she did not agree with payback. It was therefore incumbent on her to protect her sons. In the next few days, the dispute became more diffuse as various groups of young men identifying with one protagonist or the other, circled around the settlement. Groups confronted and threatened each other and there were sporadic fights. Some time later, a large clash occurred. Three adult male relatives of B stepped between the opposing groups. One of these three was a prestigious senior man who might have expected to exert authority. In the scuffle that followed, the senior man and one other of the three were killed. They were run down by a car and knifed to death. The community was deeply shocked by these events and some relatives on both sides observed that things had gone too far.

Later, police contacted a non-indigenous service worker. He was a fluent Arrernte speaker closely associated with respected elders, and respected in his own right. Meetings followed. It was determined that B should be taken into police custody and that there should be a supervised payback for the death of B's relatives. In the payback, two sons of A by his second wife were speared. This second wife had one arm broken and the flesh on her back opened with a spear.

Initially people on both sides thought these acts were appropriate. They damped down the feud (people commented though that feuds are never entirely dead and may be brought back to life through future events). Subsequently, a relative of A's second wife died of diabetes-related causes. This was interpreted by some as an act of sorcery, possibly on the part of B's relatives. This made the payback settlement less satisfactory and some relatives of A's second wife began to complain that the act against her was not right. A number of A's relatives left the settlement altogether for at least a year.

I wish to draw out four relevant features of these events: (i) the social dynamics involved non-indigenous as well as indigenous factors; (ii) this inter-mixing of culturally diverse social acts, technologies and values almost certainly magnified events; (iii) and underlined the tension between universal human rights and classical indigenous practice - factors that the Arrernte themselves manipulate. Finally, (iv) it is not clear that any court-based or community-based procedures could encompass these events. The conclusion I draw is that, in these circumstances, cultural relativism is no 'quick fix' and, given rapid and ambiguous changes in remote

communities, it may be better to rely on mainstream ideas of relevance and context in legal procedure. These can address Aboriginal contexts without always granting them an absolute priority.

Sutton's second point is also well taken. The minority status of Aborigines in Australia encourages an emphasis on 'rights' politics and the politics of difference rather than equality. In other words, bids on the state for resources and/or legal statuses emphasise distinctive features of indigenous culture rather than features that Aborigines might share with other Australian citizens. I take this to be Sutton's point when he refers to 'indigenous enclave politics'. Land rights is the prominent example where this politics has been appropriate and has served Aboriginal people well. However, rights claims can be abused when they are used as a 'strategic essentialism' to justify exclusive reliance on difference politics. This becomes apparent when issues concerning health, unemployment and violence are brushed aside as mere issues of 'statistical equality' that take no account of culture. The suggestion that fundamental issues of human well-being do not apply to remote Aborigines or are merely an excuse for assimilation projects is dangerous. Not only does this position encourage the forms of moral panic evident recently in Australian media. It also obfuscates the real need to address remote indigenous unemployment, poor health, substance abuse and domestic violence – as issues pertaining to universal human right.

I want to make a final, general comment. Some time ago, the philosopher Bernard Williams observed that in today's world 'a fully individuable culture is at best a rare thing'.¹ He also proposed that it is characteristic that people aim both to extend and to reproduce their ethical values among like others when they are involved in 'real' as opposed to 'notional confrontations'. He noted that in the former case people must 'recognize that others are at varying distances from [them]'.² One conclusion to draw from these remarks is that cases of relativism between bounded different wholes are relatively rare in the modern world. In fact most relevant judgments concerning ethical values including justice are more complexly contextual and tentative. Fictions of bounded incommensurable wholes can be used in politics and in the law to simplify matters or, sometimes, to protect a weaker party in relation to a stronger one. However, as the weaker one will invariably tend to change in the direction of the stronger one, these fictions can bring adverse results as well as positive ones.

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Peter Sutton argues that the toleration of local indigenous practices by the Australian legal code has failed because it is a glaring example of an outdated and politically blunted form of 'cultural relativism' which has failed to keep up with

¹ Bernard Williams, *Ethics and the Limits of Philosophy* (1985) 158.

² Ibid 160.

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new social circumstances. He cites 'pay-back' measures in the Northern Territory, the observance of 'leg-spearings', the rejection of Western medical practices, and the tolerance of male and female circumcisions as examples where social violence is perpetuated under the protection of the law. The question of 'whose' relativism we are talking about here seems to strike at the heart of the argument. However, while there is the call for 'relativism' to be historicised (and revised), the same cannot be said in regard to the logic of Australian law itself which remains curiously free of scrutiny as the major legitimating factor in the dispossession of Aboriginal peoples in the first place.

The controversy of Sutton's argument is not so much in regard to the claim that much social violence has stemmed from the observance of Aboriginal practices and their defence under Australian law. This is a courageous and not irrelevant statement to make. First, because it confronts socially paternalistic attitudes which hinder legal intervention in Aboriginal communities on account that such action is regarded as a form of cultural imperialism. Second, it demonstrates that issues of violence against women or the resistance to medical intervention need to be articulated as part of a new social domain where culturally framed notions of the 'universal' clearly need to be applied to Aboriginal communities.

Articulating the contradiction between the perceived 'universality' of Australian law and the perceived anarchy of 'Aboriginal law' as a reflection of an outdated form of liberal niceness, the historical tensions upon which the colonial state gained its legitimacy seem to be eclipsed. Turning to a parallel global context might also give us more insights into the predicaments of the argument from an historical point of view. In India, for example, British colonial law faced cultural relativism of a much more pervasive and complicated kind and where secular 'human rights' were articulated within a specific political discourse of cultural protection. On the one hand, the British legal campaign against cultural relativism, as seen in the abolition of *sati* (self-immolation of widows) or the banning of child-marriage was enacted to affirm the legitimacy of British law over the 'oriental despotism' of the 'natives'. The rule of colonial law was designed to protect them from the tyranny of their own cultural practices. The legacy of this predicament can be seen today in regard to the contemporary legal approach towards the so-called 'tribal' peoples (or *Adivasis*) whose own cultural practices and tribal laws are observed by an Indian federal legal code. This code has inherited the protectionist structure of British colonial law as the only tool to manage indigenous dispossession in a contemporary context. When liberal ethics were welded to the colonial project in such an intimate way, the postcolonial legal code found itself haunted by its own legacy. The solution to 'leave them to their own devices' is at once neglectful as it is a response to the paralysis of working with a poisoned legal chalice. Sound familiar?

Sutton's prognosis for the future seems bleak indeed without a dialogue on the ways in which the philosophy of the law can disentangle itself from its murky colonial past. Moreover, there is also the question of cultural audience. By blaming both culturally relativist attitudes and Aboriginal communities themselves for the

continuing deprivation which hinders social equity, this argument will seem like music to the ears of those who wish to abolish separate legal domains altogether on the proviso that they support a privileged 'Aboriginal industry'. Couching such an argument in today's extremely reactionary political climate, a condemnation of cultural relativism at this juncture may add undue philosophical weight to the view that separate Aboriginal legal domains are inherently discriminatory. While the author points out that the historical conditions underscoring our definition of the term 'relativism' have radically changed since the 1970s, and that we desperately need new categories of Aboriginality, a new agenda for social change is not entirely clear. Instead, the anti-relativism of the right often meets the anti-relativism of the left in a rhetorical convergence that is not always easy to politically disentangle. While the saccharine 'niceness' of those who defend customary law may irritate the author, the nastiness of assimilation is never too far from the surface, all too eager to replace it.

Cultural Imperialism in the Name of Common Values: Response to Peter Sutton, Customs Not in Common?

ARCHANA PARASHAR*

The tone of Sutton's article is that cultural relativism is on the decline, with good reason, and it could be no other way as there is repugnance in the values of the customary and state legal system. The burden of Sutton's argument is that everybody agrees that certain values or behaviors are bad. But from this assertion does it follow that whatever the majority's values are they have to be followed by everyone?

The difficulty in reaching consensus about moral values is played out regularly in the jurisprudential debates between the positivists and natural law theorists. Despite the valiant efforts of the modern natural law theorists there is enough unease about any implication that everyone has to live by a common standard. The issue is not whether we can live without values but how to reach agreement about common values that are to be imposed upon everyone – whether for 'common good' or 'coexistence' or maintaining 'law and order' or some thing else. The legal positivists' slogan that we have an obligation to follow the law because it is the law surely must ring hollow to the indigenous peoples. Therefore, if the argument is that 'we' are entitled to feel repugnance at some practices is to be taken seriously, the responsibility lies with the author to establish what those common values are and how we reach a consensus about them. This responsibility is not discharged by listing a number of practices as obvious evidence of the common sentiment, or by arguing that cultural pluralism allows the dominant sections of a cultural community to silence and disempower the less dominant sections of the same community. Therefore, what is repugnant and why has to be the major focus of discussion which is totally missing from this article.

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But even if it is conceded for the sake of argument that ‘our’ values are to be imposed on ‘others’ one at least needs to establish why this may be so. The author assumes rather than establishes that the state legal system by definition is the better system that ought to operate unfettered and unrestricted. Moreover, to even imply that the Indigenous peoples are similarly situated to non-indigenous peoples and therefore the law can only ever give them the ‘same’ rights and entitlements is either to admit huge ignorance or to show bad faith.

Furthermore, when the state legal system allows some customary practices to be enforced it does so in the most paternalistic manner. Contrary to Sutton’s assertion this is not an instance of one legal system propping up another legal system. Instead it is the state legal system trying to gain some legitimacy for itself in the eyes of the still colonized people. The state legal system assumes that it remains the only source of valid use of force and it, in its magnanimity, has decided to allow some customary rules to operate. But by the very nature of this grant of largesse, it is susceptible to be withdrawn anytime. This is not cultural relativism but cultural imperialism continuing as ever before.

SIMON RICE*

Peter Sutton is concerned about the courts’ preference, in native title proceedings, for the evidence of aboriginal witnesses over that of anthropologists.

His concern arises from his own experience of the native title court process. When he says ‘[i]t can be argued that the anthropological reportage is a parallel inquiry greatly inferior to that of the court itself’ Sutton is referring in fact to the very argument that was put against his own ‘anthropological reportage’ – and agreed with by the Federal Court – in the case of *Jango v Northern Territory of Australia*.³

Despite his being aggrieved by this criticism and the many other comments on his own evidence,⁴ Sutton does identify the role of the anthropologist as an important issue in native title claims. His first and lesser point is that an anthropologist’s role in preparing a claim compromises their later role as an expert in the hearing of the claim. This concern was allayed in *De Rose*,⁵ although O’Loughlin J did caution that some factors may dictate otherwise, such as ‘the witness [having] become an advocate for a party rather than a neutral observer’.⁶

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³ [2006] FCA 318 (Unreported, Sackville J, 31 March 2006) (*‘Jango’*) [321].

⁴ [2006] FCA 318 (Unreported, Sackville J, 31 March 2006) (*‘Jango’*) [316]-[338], and in *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (Unreported, Sackville J, 3 August 2004) [30]-[67], and in *Jango v Northern Territory of Australia* (No 4) (2004) 214 ALR 608, [20]-[22], [32]-[35] and [41]-[42].

⁵ *De Rose v State of South Australia* [2002] FCA 1342 (Unreported, O’Loughlin J, 1 November 2002) (*‘De Rose’*) [350].

⁶ *De Rose v State of South Australia* [2002] FCA 1342 (Unreported, O’Loughlin J, 1 November 2002) (*‘De Rose’*) [350].

It is unremarkable for a court to evaluate the evidence of an expert who was involved in preparing the case, and the involvement need not be fatal to the expert's evidence.⁷ Uncomfortably for Sutton, however, his involvement in preparing the *Jango* claim (as well as his admitted lack of relevant expertise) *did* qualify the court's acceptance of his evidence.⁸

Sutton's more substantial concern is the position invariably taken by the courts that even if an anthropologist's evidence is heard in full, where it conflicts with that of the aboriginal claimants the latter is preferred.⁹ Indeed the native title claimants themselves in *Jango* argued that 'primary attention' should be given the evidence of the aboriginal elders.¹⁰

Sutton argues that aboriginal claimants often cannot give the best evidence of their own cultural practices, and sometimes are simply unable to articulate the evidence in the necessary manner. Concessions in applying the hearsay rule,¹¹ and in taking evidence out of court – in-country – follow from the fact that courts do assume that the claimants are best placed to give the evidence that supports their claim.

Sutton's point is that this assumption is not always warranted. He questions the view that 'an eminently qualified anthropologist could not be more important than the [aboriginal] claimants' evidence' in native title proceedings.¹² He does so in the special context of native title claims, where what has to be proved is an historical question¹³ rather than an event or occurrence within the claimant's experience, and might indeed be better known to someone who has researched it than to someone who relies on oral tradition. It is not self-evident that the evidence of aboriginal witnesses is necessarily 'the most compelling'¹⁴ in every case, or that anthropologists' reports should merely 'supplement' or 'assist'.¹⁵

At the same time Sutton overstates his claim (and maintains his dim view of lawyers) when he says that native title lawyers have an 'utter dependency' on anthropologists. His 'arguable' solution – a separate fact finding exercise, not bound by the rules of evidence – would presumably exclude lawyers and privilege

⁷ See, eg, *Gumana v Northern Territory of Australia* (2005) 141 FCR 457, 502, 504.

⁸ [2006] FCA 318, [316]-[338].

⁹ See, eg, *ibid*, [292]-[293], and *De Rose* [2002] FCA 1342, [351].

¹⁰ *Jango* [2006] FCA 318, [287].

¹¹ *Native Title Act 1993* (Cth) s 82, and see, eg, *De Rose* [2002] FCA 1342, [271].

¹² *De Rose* [2002] FCA 1342, [351].

¹³ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [19.26] citing Ketley and C Ozich, "'Snapshots of Adventitious Content': The Assessment of Oral and Historical Evidence in Native Title Claims" in Christine Choo and Shawn Hollbach (eds), *History and Native Title* (2003) 83, 83, and [19.102] citing Ann Genovese, *The Use of History in Native Title: Historical Perspectives* (2003) unpublished manuscript, 8-9.

¹⁴ *De Rose* [2002] FCA 1342, [351].

¹⁵ *Jango* [2006] FCA 318, [292], [293].

the views of anthropologists. But there is no simple solution to the complexity of taking evidence in native title cases.¹⁶

When it is disentangled from his obvious frustration at the way his own evidence has been dealt with, Sutton's challenge to the courts is important: in the special context of native title claims, explain the invariable preference for a claimant's evidence over an anthropologist's. Even if the courts were to concede, as I think they could, that the preference ought not be invariable, they are unlikely – for the many reasons set out in native title decisions and reports such as those of the ALRC – to defer to anthropologists to the very considerable extent that Sutton clearly expects.

IRENE WATSON*

As an Aboriginal women activist, legal academic and practitioner, I am saddened by the image Sutton conjures; a decaying Aboriginal present without a future. But many of us are intact in the present and see the future before us. We have not been smothered by the dying pillow of colonialism. Our living Aboriginal being is alive and awake causing a disruption to the colonial project. We live just as colonialism continues in a relationship of resistance and conflict. The screams have never been heard by Sutton who deems the 'community norm of silence'. I see instead a dominant culture of deafness infected with a failed will to act upon our communities' and individuals' repeated calls for assistance. This is not a matter of a silent 'primitive' culture but one in which adequate resources for the building of safe and healthy communities were removed a long time ago. Aboriginal law ways were removed, and in that vacuum we have seen the perpetrators of violence go unapprehended. Prior to the British invasion Aboriginal women and children had safe spaces, spaces held by Aboriginal women and their laws, laws which protected women from the power and force of men. What is the possibility of these today? Sutton has argued there is none. As a response to violence the federal government has proposed the removal of Aboriginal children from families and communities. On these questions of space, colonialism has been effective in assimilating Aboriginal women into the same unsafe places that non-Aboriginal women occupy. However Sutton's paper fails to engage this issue; instead it turns to the abstract principle of equality before the law, ignoring the fact that Aboriginal peoples mostly live the reality of inequality. So what are the possibilities of equality when Australia's colonial foundation makes imperative the Australian government's stake in retaining inequality and its oppression of Aboriginal peoples? Extending 'protection' of the law and the 'heroic' call to protect the 'human rights' of Aboriginal women under Anglo-Australian law creates the illusion that 'equality' for Aboriginal women is possible. But under colonialism it is never a possibility, for

¹⁶ See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.42]; [7.78]-[7.86]; ALRC Report 102, above n 11, [19.24]-[19.105].

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maintaining privilege is the natural position of colonialism. Universal principles of equality remain abstract, disembodied and meaningless in practical terms, and the maintenance of privilege ensures that that is how they remain. The reality is that our Aboriginal women's laws have no space under colonialism to grow up healthy and safe communities. The oppression of Aboriginal people is guaranteed by the state's failure to deliver basic human services, such as adequate housing and health care, while white privilege remains guaranteed. In Australia the divide between Aboriginal and non-Aboriginal women is well illustrated by all social and economic indices. The reality for many Aboriginal women is that of lives lived on the outside, far away from the 'centre' and the place where the rationing of privilege is most likely to occur. The 'trickle down effect' never reaches the outer periphery, it was never intended to. Sutton writes from the centre, his privilege missing entirely the impact of an ugly colonial (dis)order.

NICOLE WATSON*

It is impossible to describe everything that concerns me about this piece within the space of 500 words, but if there is one criticism that stands out it is that Sutton views complex human beings and complex legal systems through simplistic lenses. Perhaps, his vision has also been clouded by disillusionment and the loss of objectivity caused by many years in his chosen field. But that is reason to consider a career change, rather than a licence to produce work that is not only poor scholarship, but also dangerous.

Sutton's apparent obsession with the most salacious aspects of Aboriginal cultures, evidenced by his references to 'circumcision of minors,' 'religious execution', 'under-age promised wives' and Aboriginal healers who apparently care more about motor vehicles than the well-being of their patients, is subjective and its voyeurism renders the piece more fitting for a slot on 'Today Tonight' rather than an academic journal. Indeed, after reading Sutton's paper I was left with the impression that historically our societies were filled with more violence than all of Bruce Willis's movies combined. It is amazing that anyone was still alive by the time that the Europeans arrived to steal our land!

In contrast the western legal system appears to be inherently virtuous. This is a selective historical memory that overlooks the common law's discrimination against women. Until recently, married women had no capacity to hold property in their own name and marital rape did not attract criminal liability – hardly the hallmarks of a just legal system.

According to Sutton, the legal profession has conspired to romanticise Indigenous customs, an approach that is without scientific evidence and has resulted in the

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denial of equality to Indigenous victims. Sutton's arguments however, are also poorly supported by evidence, namely, precedent. In his introduction he is correct to point out that recent years have witnessed some highly publicised decisions where the so-called 'promised wife' defence resulted in lenient sentences; decisions that were later corrected on appeal. However, Sutton does not refer to any actual judgments to establish that until recently, this defence formed a part of the Australian common law.

That is not to deny that Indigenous victims do suffer disadvantage in the criminal justice system. However, the multiple barriers to Indigenous victims gaining access to justice cannot be explained solely by reference to cultural relativism, particularly systemic racism in law enforcement. For example, over a decade ago the National Inquiry into Racist Violence received evidence of police officers sexually harassing Aboriginal women.¹⁷ The Royal Commission into Aboriginal Deaths in Custody also received evidence of widespread police indifference to allegations of personal violence against Indigenous women.¹⁸ Painting the judiciary as aloof do-gooders may currently be in vogue, but it sheds no light on such findings.

Sutton's implication that until recently Indigenous offenders were getting off lightly is also at odds with consistently high rates of incarceration of both male and female offenders, the latter being the fastest growing prison population in the country.¹⁹ Arguably, when respected experts such as the Aboriginal and Torres Strait Islander Social Justice Commissioner support the recognition of customary law, it is because the criminal justice system has utterly failed our people as evidenced by such statistics, rather than naivety. It is also out of recognition that justice mechanisms with which Indigenous offenders can identify, such as circle sentencing, have proven to be more effective in cutting recidivism than conventional courts.

No doubt Sutton will consider me to be a member of what he calls an 'irredentist movement' of 'western-educated indigenous people' whose careers are 'closely linked to separatist claims over resources'. Perhaps, he will dismiss my criticisms on that basis. If such a movement exists I may indeed be a part of it, but I am also an academic, lawyer, Murri, member of the Brisbane Aboriginal community, etc – in short, complex. But aren't all human beings?

¹⁷ *Report of the National Inquiry into Racist Violence in Australia* (1991) 88.

¹⁸ Chris Cunneen, *Conflict, Politics and Crime* (2001) 161.

¹⁹ See Aboriginal Justice Advisory Committee, *Speak Out Speak Strong* (2003).