FOUNDATIONAL SOURCES AND PURPOSES OF AUTHORITY IN MADAYIN

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The Madayin system that continues to be maintained by the Aboriginal Yolngu people of Arnhem Land in the Northern Territory is a holistic system of legal, religious and political authority. A recent increase in publically available information has enabled a broader audience to learn about the Madayin system. This article examines Madayin primarily on its own terms by analysing the foundational sources of authority and purpose in that normative system.

I: MADAYIN IS A HOLISTIC SYSTEM OF AUTHORITY

Madayin is a form of what is commonly referred to as ‘Aboriginal customary law’. Very little formal study or recording of Aboriginal customary law has occurred in Australia.¹ The greatest difficulty surrounding the study of Aboriginal customary law is that traditionally so much of it has been secret.² Breaching Aboriginal customary law secrecy – even viewing sacred objects by uninitiated people – can be punished by ‘death or [other] very severe punishment.’³

However in 2011 and 2012 this situation changed significantly with the publications of two texts on Madayin in English by Yolngu law leaders Gaymarani George Pascoe⁴ and James Gaykamangu.⁵ Both texts are intended for Yolngu and non-Yolngu readers, especially lawyers and parliamentarians, in order to facilitate discussion of recognition of Madayin in Australian law. Preceding the publication of Gaykamangu’s text, about 200 members of his clan and others presented a sacred Ngarra (Madayin) law painting (rangga)⁶ to the Northern Territory Parliament and Supreme Court. (Ngarra is probably the largest and most unifying institution in Madayin.) The painting had been secret prior to the presentation. With the advent of the revealing of certain aspects of Madayin to the public by Gaymarani and Gaykamangu, the sources, notions and functions of Madayin authority are now able to be comparatively analysed by reference to Australian legal authority and Christian authority.

Madayin is the Yolngu term describing ‘the complete system’ of customary and religious law for the Yolngu people of Arnhem Land including the general law, the objects and documents that record the law, oral law, songs, ceremonies and institutions associated with the law and the

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³ Baldwin Spencer and F J Gillen, The Native Tribes of Australia (1899), reproduced in Ian Weeks (ed), Sacred Space: Australian Aboriginal Religion (Deakin University, 1990) 38.
⁶ Carved objects and paintings of a sacred and usually secret nature in Yolngu religions. Rangga are proof of the source of law in Yolngu society and have been equated with constitutional documents and title deeds to lands.
sacred places associated with the law. It has been translated into English as ‘sacred law’. Describing Madayin as a ‘complete’ system of law does not reduce its openness to syncretism or its existence in and membership of a network of Aboriginal normative systems. Fertility is at the core of Yolngu customary law and religion.

This article examines Madayin primarily on its own terms by analysing the foundational sources of authority and purpose in that normative system. Attention is given to the Madayin institutions and agents that together maintain the practice of Madayin. A brief consideration is given to how Madayin intersects with the two major normative systems introduced into Arnhem Land, namely Australian law and Christianity. The primary conclusion drawn is that Madayin is a highly relative, eclectic and syncretic normative system that, despite its relative nature, is also quite holistic.

II: SOURCES AND PURPOSE OF MADAYIN AUTHORITY

Madayin claims mythical origins, existing, or brought into existence, at the beginning of the earth by the ancestral beings (wangarr). Madayin has been practiced by successive generations of Yolngu until the present, thereby making it the first in time and most established normative system in Arnhem Land. Gaykamangu writes that ‘when the world was nothing the law was there. We believe that this law created this country’. Gondarra believes that the Madayin law comes from the wangarr, ‘the highest authority in the universe’.

The precise meaning of wangarr may not be translatable into English though it has been translated as ‘ancestral past’ and ‘ancestral beings’. The Wangarr gave each clan its Madayin or sacred Law, consisting of chants (manikay), dances (bunggul), sacred objects (rangga), paintings (miny’tji) and ‘power’, or secret names (likan). These beings are celebrated today in the poetic chants and stylised dances performed at the religious ceremonies.

According to Yolngu beliefs, each Yolngu has two spirits (birrimbirr and mokuy), one of which (birrimbirr) returns to the wangarr upon a person’s death whilst the other (mokuy) is considered evil and is driven away from the deceased’s body.

Madayin authority, like Aboriginal religions generally, are highly localised to specific sites and tribes, ‘confined to the regional topography owned and shared by members of a tribe’. What is sacred in Madayin may not necessarily be sacred in the neighbouring Aboriginal

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12 Gondarra and Trudgen, above n 7, 3–4.
14 Gaykamangu, above n 5, 243.
15 Gondarra and Trudgen, above n 7, 4.
16 Morphy, above n 9, 28.
17 Janice Reid, Sorcerers and Healing Spirits: Continuity and Change in an Aboriginal Medical System (ANU Press, 1983) 5-6.
18 Ibid 32-3; Morphy, above n 9, 33.
normative systems. This high degree of locality, together with the existence of each system in network with other systems, highlights the relative nature of Aboriginal religions.

In the Madayin system, many variations of names and other details of the law-giving ancestor myths exist. Gaykamangu attributes his Gupapuyngu clan’s source of law to the Honey Bee (Niuda gugu) myth\(^{20}\) and Gaymarani, a member of the Warra Warra clan, describes how Baru the mythical crocodile gave law to people in Arnhem Land.\(^{21}\) While the details often vary, the pattern of mythical beings transforming themselves and moving from one place to another leaving the landscape imbued with sacred power is common.\(^{22}\)

In addition to the term Madayin being used as an over-arching description of the Yolngu normative system of law and religion, ‘madayin’\(^{23}\) is both an adjectival term used generally for ‘anything connected to the wanggar’\(^{24}\) and a name of a specific ceremony, the ‘Madayin’ ceremony.\(^{25}\) The functions of the Madayin ceremony are many, such as to ‘reveal secret dances and sacred objects to young men... to commemorate a dead leader, and... a re-enactment of ancestral creative acts’.\(^{26}\) Also, the ceremony emphasises ‘group identity as well as connections between groups of the same moiety – connections through women necessary for reproduction’.\(^{27}\)

\[A: \text{Ngarra and Magaya}\]

The greatest Madayin institution\(^{28}\) in Arnhem Land is Ngarra.\(^{29}\) Conceptually Ngarra may be considered to be a combined legislative and judicial institution.\(^{30}\)

Gaymarani writes the ‘[o]bservance of Ngarra law accomplishes magaya – a state of people living in peace with each other and their environment… The performance of Ngarra ceremony brings about peace and harmony among the people’.\(^{31}\) Djiniyini Gondarra is recorded as describing magaya as when ‘[e]verything is still and tranquil’.\(^{32}\) Magaya is considered as foundational to the Yolngu legal and governmental system;\(^{33}\) the ‘structures of traditional Yolngu law and government create a state of magaya… a fair and just system that is above the whims and wants of human desires’.\(^{34}\)

\(^{20}\) Gaykamangu, above n 5, 242.
\(^{21}\) Gaymarani, above n 4, 286–7.
\(^{22}\) Ronald M Berndt, *A Profile of Good and Bad in Australian Aboriginal Religion* (Charles Strong Memorial Trust, 1979) 19.
\(^{23}\) Note the use of the lower case ‘m’ for the adjective compared to the upper case ‘M’ when used as a proper name to refer to the whole system (or the specific ceremony).
\(^{25}\) Ibid 143.
\(^{26}\) Ibid.
\(^{27}\) Ibid 151.
\(^{28}\) The term ‘institution’ is used here to describe a well-established phenomenon central to the operation of the system. Thus the institution of Ngarra in Madayin may be compared to (though not necessarily equated with) the institution of the parliament in Australian law and the institution of the church in Christianity.
\(^{30}\) Gondarra and Trudgen, above n 7, 8; Gaymarani, above n 4, 286.
\(^{31}\) Gaymarani, above n 4, 286.
In addition to achieving magaya, the Ngarra ceremony serves to educate Yolngu about Ngarra law, punish wrongdoers (including the possibility of death by sorcery), resolve disputes generally and conduct trade. In Ngarra, the settlement of disputes, including any discipline, is by negotiation. The over-riding preoccupation guiding dispute resolution in Ngarra is to re-establish magaya, the Madayin state of peace. In Ngarra ‘there need be no attempt to satisfy an outraged principle – only a concern with peacemaking, restoring the status quo, getting back the social balance which has been disturbed by intolerable behaviour’.

Ngarra law does not assert sole jurisdiction over its adherents. In both the traditional context, and the post-colonial context, Ngarra law is pluralistic in its outlook to other normative systems. This relative characteristic of Madayin has been described as permissive, that is, Madayin permits and seeks to collaborate contemporaneously with other normative systems. Berndt has termed the syncretic process allowed by this relative quality of Madayin as ‘a rapprochement between the alien and the indigenous: the one is in the process of being adapted to the other’. Keen also suggests that relativity is ‘at the very heart of Yolngu religious and other practices’ and that ‘systematic ambiguity... [is] one basis for the constitution of [Yolngu Madayin] religious mystery and secret knowledge’.

Homogeneity implies agreement about meaning, resulting from a common history, common conditions, or coercion. Yolngu and their neighbours negotiated shared languages of forms or practice, but deliberately created differences to constitute and distinguish groups, and interpreted shared (and negotiated) religious forms differently.

The Ngarra law that began with the ancestral beings has been ‘handed down from one generation to the next until it reached the current generation living now in the 21st century’. Ngarra is considered dhuyu (holy, sacred) and much spiritual power is invoked in the Ngarra. Capital punishment is one of the lawful punishments in the Madayin system and ‘offences against the sacred are the most serious of all’ and often attract the death penalty. Gaymarani George Pascoe writes:

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35 Gaymarani, above n 4, 286.
37 Gaymarani, above n 4, 286.
38 W Clifford, An Approach to Aboriginal Criminology (1982) 6-13, reproduced in Williams, above n 36, 95.
39 Berndt, Djanggawul, above n 29, xvii.
40 Gaymarani, above n 4, 299–300.
41 Gondarra and Trudgen, above n 7, 14.
43 Keen, above n 24, 6-7.
44 Ibid 6.
45 Gaymarani, above n 4, 284.
46 Ibid 286.
47 Berndt, Djanggawul, above n 29, 15–16.
49 Ronald Berndt, ‘Law and Order in Aboriginal Australia’ in Ronald Berndt and Catherine Berndt (eds), Aboriginal Man in Australian: Essays in Honour of Emeritus Professor A P Elkin (Angus and Robertson, 1965) 194.
In Arnhem Land there are many clans but they are all united under *Ngarr*... the *Ngarr* is the umbrella. The *Ngarr* law tells us how much of the land we can use, where we can go and where we can live... The law was made in the Dreamtime... That same *Ngarr* law is still practiced now.\(^\text{50}\)

While continuity of the ancestral law is very important in the Madayin system, new laws, adaptations of old laws, or simply new decisions are possible and are made from time to time by the Madayin law leaders reaching consensus.\(^\text{51}\) Discussions and deliberations may take ‘days, months or even years... no one person is forced to go along with others and the decision never comes down to just a majority vote’.\(^\text{52}\)

The Yolngu people assent to the Madayin in a ceremony known as wanga lupthun\(^\text{53}\) in which the people (not just the leaders) collectively immerse themselves in water.\(^\text{54}\) It appears that involvement in the wanga lupthun is compulsory for Yolngu.\(^\text{55}\) A wanga lupthun ceremony is typically held every few years and is the culmination of the largest Ngarra ceremony.

**B: Moieties and Clans**

Yolngu society is divided into two moieties, dhuwa and yirritja, and the two moieties are co-dependent upon each other for many social (including legal and religious) purposes.\(^\text{56}\) The two moieties complement each other to complete Yolngu society. Ngarra ceremonies are moiety-specific.\(^\text{57}\) The Yirritja Ngarra is sourced to the ancestral beings Laintjung and Banaitja.\(^\text{58}\) Barama is another major Ancestral being for the Yirritja moiety.\(^\text{59}\) The Djanggawul myth, indigenous to Arnhem Land, has been described as perhaps the most important aspect of autochthonous religion in some parts of Arnhem Land\(^\text{60}\) and provides the authority for the dhuwa moiety Ngarra.\(^\text{61}\) The central theme of Djanggawul is fertility.\(^\text{62}\) More specifically, the source of Djanggawul is female fertility\(^\text{63}\) and for this reason females are considered sacred\(^\text{64}\) in ways that men are not.\(^\text{65}\) The myth focuses upon the primal birth of the original Yolngu by the ancestral beings, the Djanggawul brother and sisters.\(^\text{66}\)

In the Djanggawul myth, brother and sisters roam the Arnhem Land region leaving physical landmarks, Dreamings and the progenitors of the Yolngu in their tracks.\(^\text{67}\) However, the

\(^{\text{50}}\) Gaymarani, above n 4, 286-7.


\(^{\text{52}}\) Ibid.

\(^{\text{53}}\) Gondarra and Tradgen, above n 7, 2.

\(^{\text{54}}\) Ibid 8.


\(^{\text{56}}\) Berndt, *Djanggawul*, above n 29, 14.

\(^{\text{57}}\) Ibid.

\(^{\text{58}}\) Ibid 14.

\(^{\text{59}}\) Morphy, above n 9, 25.

\(^{\text{60}}\) Berndt, *Djanggawul*, above n 29, xvii.

\(^{\text{61}}\) Ibid.

\(^{\text{62}}\) Ibid 5–10.

\(^{\text{63}}\) Ibid 58.

\(^{\text{64}}\) Ibid.

\(^{\text{65}}\) Ibid 293.

\(^{\text{66}}\) Ibid 22–3, 30–1.

\(^{\text{67}}\) Ibid 27–48.
Djanggawul do not create the land, sky, fauna or flora. The Djanggawul ceremony includes songs of a sacred nature ‘peculiar to the Djanggawul’ and the Djanggawul are considered by many Yolngu to be the original ‘law-givers’.

Every member of Yolngu society is a member of one moiety and one clan. Yolngu are born into the clan group and moiety of their father. There are only two moieties in the Yolngu system though there are probably more than 50 Yolngu clans; the actual number and constitution of the clans is a contested matter for some anthropologists. Each clan draws upon the authority it receives from their specific dhulmu-mulka bathi, a Madayin law sacred dilly bag. Clans enter into alliances with other clans to form small federations known as ringgitj. Each ringgitj has its own Ngarra and each moiety has its own supreme Ngarra. The individuals who may enter Ngarra and participate in the proceedings are restricted; they form an inner chamber of Ngarra which is not public, although there is a public area outside of the inner chamber.

C: Personal Authority

Berndt writes that ‘Aboriginal society is kin-based; and so, consequently, is its law’, however that does not mean that Aboriginal legal matters are only determined by reference to kin. Thomson writes that, for Yolngu, law is determined by tradition, ‘defined in the mythology… maintained by public opinion, [and] enforced by the old men’. The authority of the ‘old men’, that is the male elders, is sourced directly from totemic ancestors ‘whose edicts are enforced by the threat of supernatural sanctions’. Munn and Keen agree that ‘members of the senior generation… are ‘essentially ancestor-like’ insofar as they are donors to juniors of sacred objects ‘permeated with [the elders’ own] will and authority’’. Elkin notes that the authority of the elders is ‘not just a matter of age and grey hair; knowledge of tribal law and custom and the mythological sanction behind this, is also necessary’. Older men are able to enhance their status within Aboriginal society by religious advancement. Elkin has observed the exercise of authority by the ‘old men’ in activities such as presiding at meetings, settling quarrels and making ‘decisions bearing on the

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68 Ibid 53, 304.
69 Ibid 61–2.
70 Ibid 51.
71 Gondarra and Trudgen, above n 7, 5.
72 Ibid 9.
74 Aboriginal Resource and Development Services Inc, ‘Native Title: The Basis of Ownership’ [1993] (5) Information Paper 22, 24. A sacred dilly bag is a small, around 30 cm, woven bag made from pandanus leaves and orange lorikeet feathers used to contain amulets and held in ceremonies.
75 Gondarra and Trudgen, above n 7, 6.
76 Ibid.
77 Ibid 8.
78 Ibid.
79 Berndt, Djanggawul, above n 29, 169.
81 Ibid.
84 Berndt, Djanggawul, above n 29, 174.
group’s economic, social and ceremonial activities’. In Madayin law, office bearers are recognised by the community in a ceremonial appointment in which the appointees are ‘hoisted up into a solid tree fork above all the Clan members where they take an oath’. Gondarra informs that the appointment of such high office can be removed by the community if the appointees ‘do not follow and uphold Madayin Law and ways’.

In Yolngu society, political authority and religious authority are ‘distinct but related’. Religious authority is related to political authority in that religious authority ‘establishes the rights necessary to maintain the viability of intra-group social and political structures, intergroup relations, and the relationships between people and land’. Because religious authority bestows political authority, the latter is subordinate to the former. Berndt writes that in traditional Aboriginal society ‘the mantle of authority is… mostly, religion’. Disputes that may arise between individuals of political authority with those of religious authority may occur but the dispute does not include ‘conflicting contentions about the basis of authority’.

Religious authority is the highest type of authority in Yolngu society and highly valued. As people grow older in Yolngu society they are attributed greater levels of sacredness. Consequently, an elderly male Madayin leader enjoys high status in Yolngu society. This high status is maintained by restricting the transference of the religious knowledge to the younger men. Williams writes that for the ‘Yolngu the most important things are hidden and access is highly restricted’.

The two most prominent functionaries in the Ngarra system are the dalkarmirri (or jirrikaymirri) and the jungay. The role of the dalkarmirri is the highest in the Ngarra system and as Ngarra is a religio-legal system, the dalkarmirri is recognised as a legal, religious and political leader in Ngarra. The jungay performs a number of complementary and support roles for the dalkarmirri and may generally be regarded as Ngarra lawyers or police. A dalkarmirri may be described as a ‘caller of the invocation’ in ceremonies. They are appointed by due process and must be a ‘competent man belonging to a group with rights to perform the invocation’. Dalkarmirri also act as mediators in disputes and decision-makers for the group, and while ‘they do not make laws binding on the community’ they do interpret and proclaim the Madayin law. Jungay work for their mother’s clan, which means that ‘they are born in one clan and spend most

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85 Elkin, above n 83, 87.
86 Gondarra and Trudgen, above n 1, 7.
87 Ibid.
88 Williams, above n 36, 45.
89 Ibid 46.
90 Ibid 45.
91 Berndt, Djanggawul, above n 23, 182.
92 Williams, above n 36, 45, 81.
93 Ibid 46.
94 Ibid 45.
95 Ibid 46.
96 Ibid.
97 Ibid.
98 Dalkaramirri is the yirritja moiety term and jirrikaymirri is the dhuwa moiety term for equivalent offices: Gaymarani, above n 4, 287.
99 Ibid.
100 Ibid.
101 Gondarra and Trudgen, above n 7, 9.
102 Keen, Knowledge and Secrecy in an Aboriginal Religion, above n 24, 94.
103 Ibid; Gondarra and Trudgen, above n 7, 6.
104 Keen, Knowledge and Secrecy in an Aboriginal Religion, above n 24, 95.
of their life working for another clan’.\textsuperscript{105} This doctrine of reciprocal responsibility and separation of authority in Yolngu society is known as yothu yindi.\textsuperscript{106}

Essential to the dalkarmirri is marr, that is, ‘spiritual power or strength or supernatural power’.\textsuperscript{107} Gaymarani writes that a ‘dalkarmirri has marr’.\textsuperscript{108} According to Gaymarani one ‘can see marr in some people, such as Djininy [Gondarral].’\textsuperscript{109} Gaymarani traces the source of the marr in a dalkarmirri to the ancestors.\textsuperscript{110} Marr may be understood to have a positive aspect ‘associated with happiness, strength, health and fertility’\textsuperscript{111} though it can also have a dangerous aspect such as being associated with death.\textsuperscript{112} Marr is considered ‘dangerous to anybody who is spiritually weak… [and can] give strength to participants in an avenging expedition’.\textsuperscript{113} Many sacred places such as ceremony sites and other sacred sites in the Madayin system are imbued with marr and are often considered highly dangerous places.\textsuperscript{114}

**D: Madayin ‘texts’**

Madayin sacred law was not traditionally recorded in written texts, but rather it was and continues to be recorded in paintings of ancestral ‘designs which are the properties of clans and which contain spiritual power’.\textsuperscript{115} The designs themselves are also known as ‘madayin’, as are ‘anything connected to the wanggar’.\textsuperscript{116} These sacred law paintings function in Yolngu religion to re-create the mythical ancestral events, to prove ‘rights held by a clan’\textsuperscript{117} under Madayin including rights to land, ‘and as a source of spiritual power’.\textsuperscript{118} The designs may be painted on bodies in preparation for performance in ceremonies or on more durable media such as tree trunks. People take great care ‘to ensure the correctness of form’ of the designs and to distinguish their designs from those of another group.\textsuperscript{119} Thus James Gaykamangu, a Yolngu customary law leader (dalkaramirri), writes that his painting retells the ancestral Honey Bee story (Niuda gugu) as ‘not just a painting [but]… a legal document in Ngarra law’.\textsuperscript{120}

**E: Kunapipi**

An important institution in Yolngu customary law and religion that links the Yolngu in the north to other Aboriginal groups in the Northern Territory is the Kunapipi. While other ceremonies and expressions of authority in the Madayin system are highly localised, Kunapipi is more

\textsuperscript{105} Gondarra and Trudgen, above n 7, 9.
\textsuperscript{106} Ibid.
\textsuperscript{107} Gaymarani, above n 4, 287.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Morphy, above n 9, 30.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid.
\textsuperscript{115} Morphy, above n 9, 26.
\textsuperscript{116} Keen, Knowledge and Secrecy in an Aboriginal Religion, above n 24, 132.
\textsuperscript{117} Ibid.
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid 132-3.
\textsuperscript{120} Gaykamangu, above n 5, 242.
unifying of Yolngu and other Aboriginal people.\textsuperscript{121} Kunapiipi, like Djanggawul, is described in the literature as a fertility ceremony\textsuperscript{122} and is known not only in Arnhem Land but widely across the north of the Northern Territory and Western Australia.\textsuperscript{123} The Kunapiipi ritual is not indigenous to Arnhem Land; most probably it was introduced from a region to the south of Arnhem Land.\textsuperscript{124} Kunapiipi comes under the Ngarra umbrella.\textsuperscript{125} The songs sung in the Kunapiipi ceremony are considered sacred and echo the first songs sung by the ancestral beings.\textsuperscript{126}

There are variations on the name\textsuperscript{127} and the practice of the Kunapiipi ceremony. Berndt has used the terms ‘Kunapiipi’ and ‘Gunabibi’ to mean the same thing.\textsuperscript{128} In his book, Kunapiipi, Berndt writes:

> The Kunapiipi Cult is diffused over an immense area, and is known sometimes by alternate names; but though its rituals and ceremonies may differ in some minor points, and its doctrine may vary, its intent [purpose] remains fundamentally the same, and its background is similar throughout all these areas.\textsuperscript{129}

With Berndt’s advice in mind, it is accepted that differences, especially slight differences, in pronunciation or spelling do not signify different meanings.

Kunapiipi is not described in a consistent manner by all writers. Anthropologists have emphasised the underlying fertility aspect involving blood and ritual coitus (ceremonial sexual intercourse)\textsuperscript{130} as common to all variants of Kunapiipi.\textsuperscript{131} While anthropologists have historically emphasised the fertility aspects of Kunapiipi, contemporary Arnhem Land customary law leaders have emphasised the correctional aspects of Kunapiipi.

Gaymarani describes Kunapiipi as follows:

> Once a person is convicted of a serious crime under Ngarra law, he or she is sentenced to serve a Gunapipi “prison” term. Gunapipi prisons are set up in the bush far from where people normally live. Gunapipi camps are supervised and conducted by senior law people (jungays or dalkarramiriti).

> The duration of the Gunapipi sentence depends upon the seriousness of the crime committed. A first offence may attract a sentence of between three and 12 months in a Gunapipi prison.\textsuperscript{132}

According to Gaymarani, offenders are retained in Kunapiipi by force and are taught discipline throughout their term in Kunapiipi.\textsuperscript{133} Entry into the Kunapiipi ceremonial ground is strictly

\begin{itemize}
\item[\textsuperscript{121}] Keen, \textit{Knowledge and Secrecy in an Aboriginal Religion}, above n 24, 286.
\item[\textsuperscript{122}] For example, see Ronald Berndt, \textit{Kunapiipi: A Study of an Aboriginal Religious Cult} (Cheshire, 1951) xxv; Keith Cole, \textit{The Aborigines of Arnhem Land} (Rigby, 1979) 39.
\item[\textsuperscript{123}] Berndt, \textit{Kunapiipi}, above n 122, 12.
\item[\textsuperscript{124}] Ibid 144.
\item[\textsuperscript{125}] Gaymarani, above n 4, 297.
\item[\textsuperscript{126}] Berndt, \textit{Djanggawul}, above n 29, 51; Berndt, \textit{Kunapiipi}, above n 122.
\item[\textsuperscript{127}] There are a number of variations of spelling for ‘Kunapiipi’ including ‘Kunabibi’, ‘Gunahibi’ and ‘Gunapipi’.
\item[\textsuperscript{128}] Berndt, \textit{An Adjustment Movement in Arnhem Land}, above n 4, 40; Berndt and Berndt, above n 11, 117. See also Berndt’s reference to a Dr Warner spelling ‘kunapipi’ as ‘gunahibi’: Berndt, \textit{Kunapiipi}, above n 122, 16.
\item[\textsuperscript{129}] Berndt, \textit{Kunapiipi}, above n 122, 12.
\item[\textsuperscript{130}] Berndt and Berndt, above n 11, 123; Phillip Roberts cited in I Lockwood, \textit{I, the Aboriginal}, reproduced in Murray Seiffert, \textit{Gumbuli of Nyukurr: Aboriginal Elder in Arnhem Land} (Acorn, 2011) 334.
\item[\textsuperscript{131}] Berndt, \textit{Kunapiipi}, above n 122, 12–14.
\item[\textsuperscript{132}] Gaymarani, above n 4, 297.
\item[\textsuperscript{133}] Ibid.
\end{itemize}
regulated by senior customary law leaders. Gaykamangu describes Kunapipi in terms similar to those of Gaymarani, that is, as a discipline and training camp in a remote bush location especially for offenders. Gaykamangu suggests that Kunapipi camps are suitable for offenders to ‘work off their sentences as community work orders’. Gaykamangu also writes that in such a Kunapipi camp offenders could ‘produce artwork which is sold and the proceeds be sent to the victim of the crime’. Gaykamangu writes that offenders can be sent to Kunapipi for ‘short durations for minor offences and long durations – up to three years or more – for more serious offences’.

The two very different accounts of Kunapipi (one account by the anthropologists, the other by the dalkaramirris) as outlined above reveal a gap in accounts of Yolngu social life that has not been adequately described or explained in the literature. How are these different accounts of Kunapipi, as described above, to be reconciled?

In the 2012 *Maningrida Justice Collaboration Agreement* Kunapipi is described as not being the same as ‘Gunapipi’. In the same document, Kunapipi, as recorded ‘by anthropologists such as Professor Ronald Berndt’, is known in its local form as ‘Ngurlmarrk’ which ‘originates from the Djungawul law’. However, Ngurlmarrk was closed or ended in approximately 1960. Another 2011 source states that Kunapipi has replaced Ngurlmarrk.

One possible explanation is, as Berndt has noted, that Kunapipi ‘conventionally includes ritual coitus, but the songs may be sung without that accompaniment’; it may be that the ritual coitus element has been dropped from the contemporary practice of Kunapipi. Another possibility is that Gaykamangu and Gaymarani have described the ‘outside’ or publicly knowable (‘garma’ in Yolngumatha) aspects of Kunapipi but not the ‘inside’ or secret aspects (‘dhuyu’ in Yolngumatha). However, the secret aspects of Kunapipi have been described in times past by non-Indigenous anthropologists.

Further and more detailed research on this issue is desirable but is not within the scope of this article. For the purposes of this article Kunapipi will be presumed to include all of the aspects described by all of the authors above while keeping in mind that differences in Kunapipi do occur according to place and time.

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134 Ibid.
135 Ibid.
136 Gaykamangu, above n 5, 243.
137 Ibid 248.
138 Ibid.
139 Ibid.
141 Ibid.
142 Ibid.
143 Ibid.
145 Berndt and Berndt, above n 11, 141-2.
147 Garde, above n 144, 403.
III: INTERSECTIONS OF MADAYIN WITH AUSTRALIAN LAW AND CHRISTIANITY

Madayin and Australian law intersect in a number of instances, including in respect to the Constitutional definition of religion, aspects of criminal law and land law. Only a very brief overview of some of those intersections will be covered here.

The Australian law’s historical starting point in relation to Aboriginal customary law title to land was non-recognition. The road to recognition of Aboriginal customary law title to land has a peculiar history in Australian law and the Yolngu have played a particularly central role in this history.

In the case of *Milirrpum v Nabalco* Blackburn J found that Madayin-sourced native title did not exist in Australian law. Although *Milirrpum* was a failure in court for the Yolngu plaintiffs, it added to the contemporary political momentum for better treatment of Aboriginal people. *Milirrpum* acted as a catalyst for the legislative recognition of Madayin land rights that followed soon after in the form of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (‘ALRA’). The Minister who introduced the *ALRA* into Parliament, the Honourable Ian Viner, said in his second reading speech that the *ALRA* represents ‘a fundamental change in social thinking in Australia to recognise that within our community there are some people, the Aborigines, who live by a unique and distinct system of customary law’.

With *Mabo* (No 2) the Australian common law started to recognise native title to land including that from the Madayin system. The resultant *Native Title Act* also sources authority for native title from Madayin and other Indigenous traditional laws and customs. However, native title has proven to be a difficult intersection of Aboriginal customary law and Australian law. Gray has observed that a degree of uncertainty remains over the nature of native title. She writes that Mabo and subsequent native title cases have ‘failed to offer one conclusion on the question of the nature of native title… (variously describing) native title as (interalia) 'proprietary', 'personal', 'usufructuary', 'sui generis’ … (and a) ‘bundle of rights’.’ Efforts have also been made by Indigenous litigants to have Indigenous cultural knowledge recognised as a form of native title. In the Full Federal Court decision of *Western Australia v Ward*, the Court held that ‘we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title’ within the parameters of s 223(1) of the *Native Title Act*. On appeal, the High Court in *Western Australia v Ward* agreed with the Full Federal Court on this point and also held that

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148 Australian Constitution s 116; Northern Territory Aboriginal Sacred Sites Act 1989 (NT).
150 (1971) 17 FLR 141.
152 Mabo v Queensland (No 2) (1992) 175 CLR 1, 83.
153 Ibid; *Native Title Act 1993* (Cth) s 223(1). For a post-*Yorta Yorta* analysis see, Greg McIntyre ‘Native Title Rights after Yorta Yorta’ (2002) 9 James Cook University Law Review 268.
156 Ibid 483.
158 Ibid 84, 274-275.
Indigenous cultural knowledge does not amount to a new species of intellectual property recognisable by the common law under s 223(1)(c).\textsuperscript{159}

These intersections between Madayin and Australian law do not form a coherent body of jurisprudence. Rather, the intersections give rise to a weak form of legal pluralism that occurs on a seemingly ad hoc basis.

In Arnhem Land churches, attempts have been made at crafting theology that reconciles Madayin with Christianity.\textsuperscript{160} The resultant theology is often termed ‘two-way’\textsuperscript{161} or ‘Rainbow Serpent’ theology.\textsuperscript{162}

Two-way theology in Arnhem Land did not start with Yolngu people; it began with the first non-Yolngu Christian leaders. The early Methodist (later to become the Uniting) Church leaders in Arnhem Land ‘encouraged an integration of traditional religion with Christianity at an intellectual level, seeing Christianity as a fulfillment, rather than a replacement, of traditional religion’.\textsuperscript{163} One of these early leaders, Ellemor, states that the Methodist Church in Arnhem Land sees many links between the Madayin system and Christianity.\textsuperscript{164} For example, since 1929 in the Arnhem Land Methodist/Uniting Church contexts, the God of the Bible has been referred to as ‘wangarr’, the collective Yolngu name for the Madayin ancestral beings.\textsuperscript{165}

Most of the Aboriginal Church leaders in Gondarra’s region of northern Arnhem Land ‘are also significant ceremonial leaders’,\textsuperscript{166} notwithstanding the major dilemma faced ‘by Christian leaders (who are also senior [Madayin] elders)’, namely ‘the need to discern how to live for Christ whilst still negotiating cultural issues’.\textsuperscript{167}

Gondarra’s syncretic theology, blending elements of Madayin with Christianity and giving Christian authority a Madayin heritage, is an active continuation of the process initiated by the non-Yolngu missionaries in order to achieve a type of rapprochement between the two systems.\textsuperscript{168} Gondarra is also doing what the Madayin system requires him to do: to synthesise authority rather than to critically evaluate the contradictory sources and purposes of authority of the different systems.

Yolngu attempts at rapprochement of the Madayin system with Christianity may be successful from a Madayin perspective but not from a Christian perspective. By drawing on the concept of the sacred in order to assist in the rapprochement there seems a prima facie possibility that the two systems may be reconciled. However, when consideration is given to the fundamental sources, natures and purposes of the two systems, a rapprochement that retains internal coherence and integrity from the Christian side of the equation is not possible.

\textsuperscript{159} Ibid 84.
\textsuperscript{160} See, for example: Norman Habel (ed) Rainbow Spirit Theology: Towards and Australian Aboriginal Theology (ATF Press, 1996).
\textsuperscript{161} Seiffert, above n 130, 326.
\textsuperscript{162} Habel, above n 160.
\textsuperscript{165} Bos, above n 163, 430.
\textsuperscript{166} Seiffert, above n 130, 336.
\textsuperscript{167} Magowan, above n 114, 309.
\textsuperscript{168} Ibid.
IV: CONCLUSION

The Madayin system of Arnhem Land is a holistic normative system which purports to regulate most conceivable areas of life, at least tribal life, for Yolngu people and is open to collaborating with other normative systems. Madayin draws upon mythical religious origins for its primary source of authority and this religious aspect is maintained in current Ngarra practice.

The primary purpose of Madayin is the accomplishment of magaya (peace) and the Ngarra leaders are required to attempt to accomplish this aim in their leadership. The concept of magaya is translated as ‘a state of balance, order and peace’; it is for the localised jurisdiction of Arnhem Land. The limit of magaya to the geography of Arnhem Land highlights its relative nature. Magaya is the Madayin system’s unique state of balance, order and peace for Arnhem Land. Yet traditionally Madayin existed in a network of Aboriginal normative systems which required it to function in connection and collaboration with the other Aboriginal customary law systems. Being one part of a pluralistic normative network requires Madayin and magaya to be able to be sufficiently flexible in order to accommodate the purpose and nature of the adjoining Aboriginal customary law systems in the network and vice versa. The requirement of being palatable or acceptable to neighbouring systems in the Aboriginal customary law network necessitates compromise or at least a vague interpretation of magaya. In the Aboriginal customary law network there can be no absolutes as numerous systems intermingle and co-exist.

In the post-colonial context, Madayin brings this eclectic and syncretic approach to the non-autochthonous normative systems (Australian law and Christianity) that now exist in Arnhem Land.

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169 Gaymarani, above n 4, 299-300.