

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 publicly-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.

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¹ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [37].

² Aboriginal Resource and Development Services Inc, ‘The Madayin’ [1996] (7) *Information Paper* 1, 36.

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.

⁴ George Pascoe Gaymarani, ‘An Introduction to the Ngarra Law of Arnhem Land’ (2011) 1 *Northern Territory Law Journal* 283, 286–7.

⁵ James Gurrwanngu Gaykamangu ‘Ngarra Law: Aboriginal Customary Law from Arnhem Land’ (2012) 2 *Northern Territory Law Journal* 236.

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.

Madayin is the Yolngu term describing ‘the complete system’ of customary and religious law for the Yolngu people of Arnhem Land⁷ including the general law, the objects and documents that record the law, oral law, songs, ceremonies and institutions associated with the law and the sacred places associated with the law.⁸ It has been translated into English as ‘sacred law’.⁹ 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.¹⁰ Fertility is at the core of Yolngu customary law and religion.¹¹

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*).¹² *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.¹³ Gaykamangu writes that ‘when the world was nothing the law was there. We believe that this law created this country’.¹⁴ Gondarra believes that the *Madayin* law comes from the *wangarr*, ‘the highest authority in the universe’.¹⁵

The precise meaning of *wangarr* may not be translatable into English though it has been translated as ‘ancestral past’ and ‘ancestral beings’.¹⁶

The *Wangarr* gave each clan its *Madayin* or sacred Law, consisting of chants (*manikay*), dances (*bunggu*), 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.¹⁷

⁷ Aboriginal Resource and Development Services Inc, ‘The Madayin’, above n 2, 33; Djiniyini Gondarra and Richard Trudgen, ‘The Assent Law of the First People: Principles of an Effective Legal System in Aboriginal Communities’ (Speech delivered at the Law and Justice within Indigenous Communities Conference, Melbourne, 22 February 2011) 2–3.

⁸ Aboriginal Resource and Development Services Inc, ‘The Madayin’, above n 2, 33.

⁹ Howard Morphy, ‘From Dull to Brilliant: The Aesthetics of Spiritual Power Among the Yolngu’ (1989) 24 *Man* 21, 25.

¹⁰ Ronald Berndt, *An Adjustment Movement in Arnhem Land, Northern Territory of Australia* (Cashiers de L’Homme, , 1962) 27.

¹¹ Ronald Berndt and Catherine Berndt, *Man, Land and Myth in North Australia: the Gumatj people* (Michigan State University Press, 1970) 117.

¹² Gondarra and Trudgen, above n 7, 3–4.

¹³ Aboriginal Resource and Development Services Inc, ‘The Madayin’, above n 2, 33.

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.

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.¹⁸

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'.¹⁹ What is sacred in *Madayin* may not necessarily be sacred in the neighbouring Aboriginal 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*) myth²⁰ 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 *wangar*'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: *Ngarra and Magaya*

The greatest *Madayin* institution²⁸ 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

¹⁸ Ibid 32-3; Morphy, above n 9, 33.

¹⁹ Graham Paulson, 'Towards an Aboriginal Theology' (2006) 19(3)*Pacifica: Australasian Theological Studies* 310, 318.

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).

²⁴ Ian Keen, *Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land* (Clarendon Press, 1994) 132.

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.

²⁹ Ronald Berndt, *Djanggarnu: An Aboriginal Religious Cult of North-Eastern Arnhem Land* (Philosophical Library, 1953) 14.

³⁰ Gondarra and Trudgen, above n 7, 8; Gaymarani, above n 4, 286.

³¹ Gaymarani, above n 4, 286.

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

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.³⁵ In *Ngarra*, the settlement of disputes, including any discipline, is by negotiation.³⁶ The over-riding preoccupation guiding dispute resolution in *Ngarra* is to re-establish *magaya*, the *Madayin* state of peace.³⁷ 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'.³⁸

Ngarra law does not assert sole jurisdiction over its adherents. In both the traditional context,³⁹ and the post-colonial context,⁴⁰ *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.⁴¹ 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'.⁴² 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'.⁴³

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.⁴⁴

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'.⁴⁵ *Ngarra* is considered *dhuyu* (holy, sacred)⁴⁶ and much spiritual power is invoked in the

³² Aboriginal Resource and Development Services Inc, 'The Madayin', above n 2, 33.

³³ Aboriginal Resource and Development Services Inc, 'Magayamirr: A Foundational Principle of the Yolngu Legal and Governmental Systems' [1993] (2) *Information Paper* 1, 7.

³⁴ Ibid 9.

³⁵ Gaymarani, above n 4, 286.

³⁶ Nancy Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Australian Institute of Aboriginal Studies, 1987) 85; Gaymarani, above n 4, 285.

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.

⁴² Berndt, *An Adjustment Movement in Arnhem Land*, above n 10, 14.

⁴³ Keen, above n 24, 6-7.

⁴⁴ Ibid 6.

⁴⁵ Gaymarani, above n 4, 284.

⁴⁶ Ibid 286.

Ngarra.⁴⁷ Capital punishment is one of the lawful punishments in the *Madayin* system⁴⁸ and ‘offences against the sacred are the most serious of all’ and often attract the death penalty.⁴⁹ Gaymarani George Pascoe writes:

In Arnhem Land there are many clans but they are all united under *Ngarra*... the *Ngarra* is the umbrella. The *Ngarra* 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 *Ngarra* law is still practiced now.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.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’.⁵²

The Yolngu people assent to the *Madayin* in a ceremony known as *wanga luptun*⁵³ in which the people (not just the leaders) collectively immerse themselves in water.⁵⁴ It appears that involvement in the *wanga luptun* is compulsory for Yolngu.⁵⁵ A *wanga luptun* 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.⁵⁶ The two moieties complement each other to complete Yolngu society. *Ngarra* ceremonies are moiety-specific.⁵⁷ The *Yirritja Ngarra* is sourced to the ancestral beings Laintjung and Banaitja.⁵⁸ Barama is another major Ancestral being for the *Yirritja* moiety.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 Land⁶⁰ and provides the authority for the *dhuwa* moiety *Ngarra*.⁶¹ The central theme of Djanggawul is fertility.⁶² More specifically,

⁴⁷ Berndt, *Djanggawul*, above n 29, 15–16.

⁴⁸ Djiniyini Gondarra, ‘Customary Law’ (Paper presented at the Garma Festival, Arnhem Land, 24 August, 2001) 17.

⁴⁹ Ronald Berndt, ‘Law and Order in Aboriginal Australia’ in Ronald Berndt and Catherine Berndt (eds), *Aboriginal Man in Australia: Essays in Honour of Emeritus Professor A P Elkin* (Angus and Robertson, 1965) 194.

⁵⁰ Gaymarani, above n 4, 286–7.

⁵¹ Aboriginal Resource and Development Services Inc, ‘Magayamirr’, above n 33, 2.

⁵² Ibid.

⁵³ Gondarra and Trudgen, above n 7, 2.

⁵⁴ Ibid 8.

⁵⁵ Yolngu clans of Ngaymil Gampurrtji, Ngaymil Bulkmana, Ngaymil Datwuy and Ngaymil Gondarra , Galiwinku, *Melngur Gapu Dhularpa Ganiya: Raypirri Ngarrangur Romgurr Magayakurr (Law and Punishment of Ngarra): Information Paper* (2005) article 24.

⁵⁶ Berndt, *Djanggawul*, above n 29, 14.

⁵⁷ Ibid.

⁵⁸ Ibid 14.

⁵⁹ Morphy, above n 9, 25.

⁶⁰ Berndt, *Djanggawul*, above n 29, xvii.

⁶¹ Ibid.

⁶² Ibid 5–10.

the source of Djanggawul is female fertility⁶³ and for this reason females are considered sacred⁶⁴ in ways that men are not.⁶⁵ The myth focuses upon the primal birth of the original Yolngu by the ancestral beings, the Djanggawul brother and sisters.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.⁶⁷ However, the Djanggawul do not create the land, sky, fauna or flora.⁶⁸ The Djanggawul ceremony includes songs of a sacred nature ‘peculiar to the Djanggawul’⁶⁹ and the Djanggawul are considered by many Yolngu to be the original ‘law-givers’.⁷⁰

Every member of Yolngu society is a member of one moiety and one clan.⁷¹ Yolngu are born into the clan group and moiety of their father.⁷² 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.⁷³ Each clan draws upon the authority it receives from their specific *dbulmu-mulka bathi*, a *Madayin* law sacred dilly bag.⁷⁴ Clans enter into alliances with other clans to form small federations known as *ringgiji*.⁷⁵ Each *ringgiji* has its own *Ngarra*⁷⁶ and each moiety has its own supreme *Ngarra*.⁷⁷ 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.⁷⁸

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.⁷⁹ Thomson writes that, for Yolngu, law is determined by tradition, ‘defined in the mythology ... maintained by public opinion, [and] enforced by the old men’.⁸⁰ 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’.⁸¹ Munn and Keen agree that ‘[m]embers of the senior generation ... are “essentially ancestor-like” insofar as they are donors to

⁶³ Ibid 58.

⁶⁴ Ibid.

⁶⁵ Ibid 293.

⁶⁶ Ibid 22–3, 30–1.

⁶⁷ Ibid 27–48.

⁶⁸ Ibid 53, 304.

⁶⁹ Ibid 61–2.

⁷⁰ Ibid 51.

⁷¹ Gondarra and Trudgen, above n 7, 5.

⁷² Ibid 9.

⁷³ Ian Keen, ‘A Bundle of Sticks: The Debate Over Yolngu Clans’ (2000) 6 *Journal of the Royal Anthropological Institute* 419–36.

⁷⁴ Aboriginal Resource and Development Services Inc, ‘Native Title: The Basis of Ownership’ [1993] (5) *Information Paper* 22, 24. A sacred dill 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.

⁸⁰ Donald F Thomson, *Economic Structure and the Ceremonial Exchange Cycle in Arnhem Land* (Macmillan, 1949) 11.

⁸¹ Ibid.

juniors of sacred objects “permeated with [the elders’ own] will and authority”.⁸² 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’.⁸³ Older men are able to enhance their status within Aboriginal society by religious advancement.⁸⁴ 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 group’s economic, social and ceremonial activities’.⁸⁵ 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’.⁸⁶ 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’.⁸⁷

In Yolngu society, political authority and religious authority are ‘distinct but related’.⁸⁸ 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’.⁸⁹ Because religious authority bestows political authority, the latter is subordinate to the former.⁹⁰ Berndt writes that in traditional Aboriginal society ‘the mantle of authority is... mostly, religion’.⁹¹ 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’.⁹²

Religious authority is the highest type of authority in Yolngu society and highly valued.⁹³ As people grow older in Yolngu society they are attributed greater levels of sacredness.⁹⁴ Consequently, an elderly male *Madayin* leader enjoys high status in Yolngu society.⁹⁵ This high status is maintained by restricting the transference of the religious knowledge to the younger men.⁹⁶ Williams writes that for the Yolngu the most important things are hidden and access is highly restricted’.⁹⁷

The two most prominent functionaries in the *Ngarra* system are the *dalkarmirri* (or *jirrikaymirri*)⁹⁸ 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

⁸² Ian Keen, ‘Ancestors, Magic, and Exchange in Yolngu Doctrines: Extensions of the Person in Time and Space’ (2006) 12(3) *Journal of the Royal Anthropological Institute* 515, 517, citing N Munn, ‘The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth’ in R M Berndt (ed), *Australian Aboriginal Anthropology* (University of Western Australia Press, 1970) 141-63.

⁸³ A P Elkin, *The Australian Aborigines* (Angus and Robertson, 3rd ed, 1954) 87.

⁸⁴ Berndt, *Djanggawul*, above n 29, 174.

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.

political leader in *Ngarra*.⁹⁹ The *jungay* performs a number of complementary and support roles for the *dalkarmirri* and may generally be regarded as *Ngarra* lawyers¹⁰⁰ or police.¹⁰¹ A *dalkarmirri* may be described as a ‘caller of the invocation’ in ceremonies.¹⁰² They are appointed by due process and must be a ‘competent man belonging to a group with rights to perform the invocation’.¹⁰³ *Dalkarmirri* also act as mediators in disputes and decision-makers for the group, and while ‘they do not make laws binding on the community’¹⁰⁴ 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 of their life working for another clan’.¹⁰⁵ This doctrine of reciprocal responsibility and separation of authority in Yolngu society is known as *yothu yindi*.¹⁰⁶

Essential to the *dalkarmirri* is *marr*, that is, ‘spiritual power or strength or supernatural power’.¹⁰⁷ Gaymarani writes that a ‘*dalkarmirri* has *marr*’.¹⁰⁸ According to Gaymarani one ‘can see *marr* in some people, such as Djininy [Gondarra]’.¹⁰⁹ Gaymarani traces the source of the *marr* in a *dalkarmirri* to the ancestors.¹¹⁰ *Marr* may be understood to have a positive aspect ‘associated with happiness, strength, health and fertility’¹¹¹ though it can also have a dangerous aspect such as being associated with death.¹¹² *Marr* is considered ‘dangerous to anybody who is spiritually weak... [and can] give strength to participants in an avenging expedition’.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.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’.¹¹⁵ The designs themselves are also known as ‘*madayin*’, as are ‘anything connected to the *wanggar*’.¹¹⁶ These sacred law paintings function in Yolngu religion to re-create the mythical ancestral events, to prove ‘rights held by a clan’¹¹⁷ under *Madayin* including rights to land, ‘and as a source of spiritual power’.¹¹⁸ The designs may be painted on bodies in preparation for performance in ceremonies or on more durable media

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.

¹⁰⁵ Gondarra and Trudgen, above n 7, 9.

¹⁰⁶ Ibid.

¹⁰⁷ Gaymarani, above n 4, 287.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Morphy, above n 9, 30.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Fiona Magowan, ‘It is God who Speaks in the Thunder: Mediating Ontologies of Faith and Fear in Aboriginal Christianity’, (2003) 27(3) *Journal of Religious History* 293, 305.

¹¹⁵ Morphy, above n 9, 26.

¹¹⁶ Keen, *Knowledge and Secrecy in an Aboriginal Religion*, above n 24, 132.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

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.¹¹⁹ Thus James Gaykamangu, a Yolngu customary law leader (*dalkaramirri*), writes that his painting retells the ancestral Honeybee story (*Ninda gugu*) as ‘not just a painting [but]... a legal document in *Ngarra* law’.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 unifying of Yolngu and other Aboriginal people.¹²¹ *Kunapipi*, like *Djanggawul*, is described in the literature as a fertility ceremony¹²² and is known not only in Arnhem Land but widely across the north of the Northern Territory and Western Australia.¹²³ The *Kunapipi* ritual is not indigenous to Arnhem Land; most probably it was introduced from a region to the south of Arnhem Land.¹²⁴ *Kunapipi* comes under the *Ngarra* umbrella.¹²⁵ The songs sung in the *Kunapipi* ceremony are considered sacred and echo the first songs sung by the ancestral beings.¹²⁶

There are variations on the name¹²⁷ and the practice of the *Kunapipi* ceremony. Berndt has used the terms ‘*Kunapipi*’ and ‘*Gunabibi*’ to mean the same thing.¹²⁸ In his book, *Kunapipi*, Berndt writes:

The *Kunapipi* 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.¹²⁹

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

Kunapipi 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)¹³⁰ as common to all variants of *Kunapipi*.¹³¹ While anthropologists have historically emphasised the fertility aspects of *Kunapipi*, contemporary Arnhem Land

¹¹⁹ Ibid 132-3.

¹²⁰ Gaykamangu, above n 5, 242.

¹²¹ Keen, *Knowledge and Secrecy in an Aboriginal Religion*, above n 24, 286.

¹²² For example, see Ronald Berndt, *Kunapipi: A Study of an Aboriginal Religious Cult* (Cheshire, 1951) xxv; Keith Cole, *The Aborigines of Arnhem Land* (Rigby, 1979) 39.

¹²³ Berndt, *Kunapipi*, above n 122, 12.

¹²⁴ Ibid 144.

¹²⁵ Gaymarani, above n 4, 297.

¹²⁶ Berndt, *Djanggawul*, above n 29, 51; Berndt, *Kunapipi*, above n 122.

¹²⁷ There are a number of variations of spelling for ‘*Kunapipi*’ including ‘*Kunabibi*’, ‘*Gunabibi*’ and ‘*Gunapipi*’.

¹²⁸ Berndt, *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 ‘*gunabibi*’: Berndt, *Kunapipi*, above n 122, 16.

¹²⁹ Berndt, *Kunapipi*, above n 122, 12.

¹³⁰ Berndt and Berndt, above n 11, 123; Phillip Roberts cited in I Lockwood, *I, the Aboriginal*, reproduced in Murray Seiffert, *Gumbuli of Ngukurr: Aboriginal Elder in Arnhem Land* (Acorn, 2011) 334.

¹³¹ Berndt, *Kunapipi*, above n 122, 12-14.

customary law leaders have emphasised the correctional aspects of *Kunapipi*.

Gaymarani describes *Kunapipi* 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 *dalkarramiris*). 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.¹³²

According to Gaymarani, offenders are retained in *Kunapipi* by force and are taught discipline throughout their term in *Kunapipi*.¹³³ Entry into the *Kunapipi* ceremonial ground is strictly regulated by senior customary law leaders.¹³⁴ Other than the offenders, only those who are participating in the ceremony are permitted entry.¹³⁵

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.¹³⁶ Gaykamangu suggests that *Kunapipi* camps are suitable for offenders to ‘work off their sentences as community work orders’.¹³⁷ 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’.¹³⁸ 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’.¹³⁹

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*¹⁴⁰ *Kunapipi* is described as not being the same as ‘*Gunapipi*’. In the same document, *Kunapipi*, as recorded ‘by anthropologists such as Professor Ronald Berndt’,¹⁴¹ is known in its local form as ‘*Ngurlmarrk*’ which ‘originates from the Djungawul law’.¹⁴² However, *Ngurlmarrk* was closed or ended in approximately 1960.¹⁴³ Another 2011 source states that *Kunapipi* has replaced *Ngurlmarrk*.¹⁴⁴

¹³² Gaymarani, above n 4, 297.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Gaykamangu, above n 5, 243.

¹³⁷ Ibid 248.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ *Maningrida Justice Collaboration Agreement Between the Maningrida Elders and Charles Darwin University* (2012) http://customarylawproject.yolasite.com/resources/Burnawarra%20CDU%20Justice%20Collaboration%20Agreement%20SIG_NED.pdf.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Murray Garde, ‘The Forbidden Gaze: The 1948 Wubarr Ceremony Performed for the American-Australian Scientific Expedition to Arnhem Land’ in Martin Thomas and Margo Neale (eds), *Exploring the Legacy of the 1948 Arnhem Land Expedition* (ANU Press, 2011) 407-8.

One possible explanation is, as Berndt has noted, that *Kunapipi* ‘conventionally includes ritual coitus, but the songs may be sung without that accompaniment’,¹⁴⁵ 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 (‘*dhuyw*’ in Yolngumatha).¹⁴⁶ However, the secret aspects of *Kunapipi* have been described in times past by non-Indigenous anthropologists.¹⁴⁷

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.

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,¹⁴⁸ aspects of criminal law¹⁴⁹ 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*¹⁵⁰ 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 Hon 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’.¹⁵¹

With *Mabo* (No 2) the Australian common law started to recognise native title to land including that from the *Madayin* system.¹⁵² The resultant *Native Title Act* also sources authority for native title from *Madayin* and other Indigenous traditional laws and customs.¹⁵³ However, native title has proven to be a difficult intersection of Aboriginal customary law

¹⁴⁵ Berndt and Berndt, above n 11, 141-2.

¹⁴⁶ Berndt, *Kunapipi*, above n 122, 24-5.

¹⁴⁷ Garde, above n 144, 403.

¹⁴⁸ *Australian Constitution* s 116; *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

¹⁴⁹ *Northern Territory National Emergency Response Act 2007* (Cth) ss 91-92.

¹⁵⁰ (1971) 17 FLR 141.

¹⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1976, 2.

¹⁵² *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 58.

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.

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 (*inter alia*) ‘proprietary’, ‘personal’, ‘usufructuary’, ‘sui generis’ … (and a) ‘bundle of rights’.¹⁵⁴ 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*,¹⁵⁵ 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’¹⁵⁶ within the parameters of s 223(1) of the *Native Title Act*. On appeal, the High Court in *Western Australia v Ward*¹⁵⁷ agreed with the Full Federal Court on this point¹⁵⁸ and also held that Indigenous cultural knowledge does not amount to a new species of intellectual property recognisable by the common law under s 223(1)(c).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.¹⁶⁰ The resultant theology is often termed ‘two-way’¹⁶¹ or ‘Rainbow Serpent’ theology.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’.¹⁶³ One of these early leaders, Ellemor, states that the Methodist Church in Arnhem Land sees many links between the *Madayin* system and Christianity.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.¹⁶⁵

Most of the Aboriginal Church leaders in Gondarra’s region of northern Arnhem Land ‘are also significant ceremonial leaders’,¹⁶⁶ notwithstanding the major dilemma faced ‘by

¹⁵⁴ Janice Gray, ‘Is Native Title a Proprietary Right?’ (2002) 9(3) eLaw Journal: *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v9n3/gray93nf.html#n106>>. Footnotes omitted.

¹⁵⁵ (2000) 99 FCR 316.

¹⁵⁶ Ibid 483.

¹⁵⁷ (2002) 213 CLR 1.

¹⁵⁸ Ibid 84, 274–275.

¹⁵⁹ Ibid 84.

¹⁶⁰ See, for example: Norman Habel (ed) *Rainbow Spirit Theology: Towards and Australian Aboriginal Theology* (ATF Press, 1996).

¹⁶¹ Seiffert, above n 130, 326.

¹⁶² Habel, above n 160.

¹⁶³ Robert Bos, ‘The Dreaming and Social Change in Arnhem Land’ in Tony Swain and Deborah Bird Rose (eds) *Aboriginal Australians and Christian Missions: Ethnographic and Historical Studies* (Australian Association for the Study of Religions, 1988) 430.

¹⁶⁴ A F Ellemor, ‘Methodism Among the Aborigines’ in J S Udy and E G Clancy (eds) *Dig or Die: Papers Given at the World Methodist Historical Society Wesley Heritage Conference at Wesley College within the University of Sydney, 10–15 August 1980 – Heritage Conference (1981)*, cited in John Kadiba, *The Methodist Mission and the Emerging Aboriginal Church in Arnhem Land: 1916–1977* (Phd Thesis, Northern Territory University, 1998) 225.

¹⁶⁵ Bos, above n 163, 430.

¹⁶⁶ Seiffert, above n 130, 336.

Christian leaders (who are also senior [*Madayin*] elders)', namely 'the need to discern how to live for Christ whilst still negotiating cultural issues'.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.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.

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.¹⁶⁹ *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.

¹⁶⁷ Magowan, above n 114, 309.

¹⁶⁸ Ibid.

¹⁶⁹ Gaymarani, above n 4, 299-300.

