

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'.<sup>1</sup> 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]'.<sup>2</sup> 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

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

<sup>2</sup> 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?

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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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