Law from the earth, law from the demos and law from heaven: nature and intersections of authority of Madayin, Australian law and Christianity in Arnhem Land

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Declaration

I hereby declare that the work herein, now submitted as a thesis for the degree of Doctor of Philosophy at Charles Darwin University, is the result of my own investigations, and all references to ideas and work of others have been specifically acknowledged. I hereby certify that the material in this thesis has not already been accepted in substance for any degree, and is not being currently submitted in candidature for any other degree.
Abstract

In Arnhem Land\(^1\) in the Northern Territory of Australia, normative pluralism exists between the three major normative systems present: Madayin\(^2\) or indigenous customary law, Australian law and Christianity. As such, individuals can find themselves simultaneously subject to more than one normative system. This can become an issue when the norms of the different systems are not mutually compatible. At times, an individual may breach a rule or norm of one system in order to follow another.

This thesis examines whether the Madayin normative system can be reconciled with the Australian legal system, and with Christianity, upon each system’s own terms. To accomplish this, the thesis makes a comparative analysis of the nature of normative authority in the three major normative systems. In each system the source and purpose of authority is analysed in order to discover the nature of authority of each system. The nature of authority of Madayin is then compared to that of the other two systems in


order to discover if the nature of authority of the systems are reconcilable with each other.

Instances of pluralism between the systems are evaluated to determine if the integrity of the nature of authority of each system is maintained in the intersections that give rise to the pluralism. The primary conclusion that is drawn is that pluralism between Madayin and Australian law is consistent with the nature of authority of each of those systems whereas the pluralism that exists between Madayin and Christianity contains authoritative consistency from the Madayin perspective but not from the Christian perspective.

The findings are significant because scholarship on pluralism that involves Aboriginal customary law is rare in the Australian context. The conclusions drawn in this thesis provide a basis, previously non-existent, to evaluate instances of pluralism between Madayin (and possibly, by extension, other systems of Aboriginal customary law) with Australian law and Christianity.
Acknowledgements

I had three excellent supervisors for this thesis: Dr Richard Curtis, Associate Professor David Price and Professor Les McRimmon. They provided me with timely, useful and wise feedback on drafts of each chapter that kept me on track. In supervising me each of my supervisors needed to read material that they varyingly would not have normally chosen to read. I thank them here for the generosity they showed me in many ways.

I would not have completed this thesis without the encouragement of my wife, Desak. She is the best person I have ever met. Time that I spent writing this thesis was often time not spent with her. Hopefully now that this thesis is finished I can spend more time with my best friend and our children.

I also wish to thank my Yolngu teachers, James Gaykamangu and George Gaymarani Pascoe and my Mudburra sister and teacher, Janet Sandy Gregory. I could not have completed this thesis without them.

Most importantly I wish to acknowledge and thank my God, Jesus Christ. This thesis simply would not have even started, let alone finish, except for Him: Proverbs 3:5-6; Psalm 21:1-7. To Him be the glory forever!
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Chapter One: Introduction
Chapter I

Introduction

This thesis contains an analysis of the nature of authority in the three major normative systems present in Arnhem Land\(^1\) in the Northern Territory of Australia: Madayin\(^2\) or indigenous customary law of the Yolngu\(^3\) people, Australian law and Christianity. The nature of authority in Madayin is then compared to the nature of authority of the other two systems in order to discover the potential for reconciliation of authority between Madayin and Australian law on the one hand and Madayin and Christianity on the other. In addition to discovering the reconcilability of authority in each system, this thesis aims to increase knowledge in the public domain about the existence of normative pluralism (coexistence of


\(^3\) ‘Yolngu’ can refer generally to the Aboriginal people of Arnhem Land or specifically to the people of North East Arnhem Land (who were ‘known in earlier writings as ‘Murngin’, ‘Wulumba’, and ‘Miwuyt’: Ian Keen, ‘Ancestors, magic, and exchange in Yolngu doctrines: extensions of the person in time and space’ (2006) 12 *Journal of the Royal Anthropological Institute* 515, 527.
more than one normative system) in Arnhem Land involving the three normative systems of Madayin, Australian law and Christianity. It is a multidisciplinary thesis with inputs from law, jurisprudence, comparative religion, theology and anthropology, though for the sake of locating it in the literature it may be primarily described as a jurisprudence thesis.

In order to discover the nature of authority in each system, the primary sources and purpose of authority are analysed at the foundational level (that is the most basic or general level) and in the specific areas of marriage and sorcery. The foundational level authorities are necessarily considered so that the core tenets of each system are included in the analysis. Marriage is considered as a topic because in each of the three systems the concept of marriage is common, important and well developed. Selected related topics are also included under the heading of marriage such as kinship and children as appropriate. In contrast to marriage, sorcery is considered because it is a topic that is accommodated in the Madayin system, totally abhorred and rejected by Christianity, and has a varied history in Australian law, from once being outlawed to contemporarily being lawful. Also, sorcery is a major concern within the Aboriginal communities with which this thesis is concerned and so is included in the analysis. It is not the purpose of this thesis to comprehensively and definitively articulate every aspect of the topics considered, that is, foundational authority and
authority in relation to marriage and sorcery. The aim, rather, is to develop general propositions in relation to the nature of each system, developed by synthesising the analysis of the primary sources and purpose of authority of each system. These propositions succinctly articulate what I have termed ‘the essential nature of authority’ of each system so that one may be compared to the others.

Legal and religious pluralism involving Madayin and the other two systems exist in Arnhem Land, and I have termed the instances of pluralism as ‘intersections’ of two or more of the normative systems. The propositions pertaining to authority are used to evaluate these intersections with a view to establishing whether normative integrity of each system is maintained at those intersections. The emphasis in this thesis is on comparing and evaluating Madayin with Christianity and Australian law. The intersections of Australian law and Christianity are not the focus of this thesis as this type of research has been previously conducted elsewhere.4

This thesis contends that the essential nature of the three systems are radically different to each other. The essential nature of Madayin is the continuity of an ancient mythical past source of spiritual authority primarily concerned with fertility. This essential nature of Madayin

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contrasts with the essential nature of Australian law, namely to enable the contemporary demos\textsuperscript{5} to govern. Both Madayin and Australian law contrast with Christianity, the essential nature of which is the advancement of the Kingdom of Heaven on earth by people voluntarily following the teachings of Jesus Christ. (The essential nature of each system is established later in the thesis, especially in Chapter Six.) While Madayin is a highly relative, eclectic and syncretic system, Christianity is virtually the opposite in that God is the only source of accepted authority. Therefore, authority in Christianity may be described as being universal and absolute. Australian law is relative in the sense that it accepts the limits of its own jurisdiction and the legitimacy of authority of other legal systems outside of its jurisdiction, but it is also largely absolute in that it only partially embraces legal pluralism within its own jurisdiction. The conclusion drawn is that normative pluralism as it exists in Arnhem Land has integrity of authority from the Madayin perspective, has some integrity from the Australian law perspective but is without integrity from the Christian perspective. Philosophically and practically, to adhere to Madayin will, at times, result in a breach of one or both of the other normative systems.

The rest of this introductory chapter provides a recount of how this thesis came to be written, an expansion on the methodology used in this research

\textsuperscript{5} The voting population of a jurisdiction expressed through their democratically elected representatives in parliament.
and a chapter overview in order to provide an orientation of the thesis as a whole. A glossary of special terms, especially Yolngumatha terms, used in this thesis concludes the introductory chapter.

1.1 The Genesis of this Thesis

The desire to write this thesis grew from my experiences with Aboriginal people in the Northern Territory since 2001, but especially since 2008 when I started working as a solicitor at the North Australian Aboriginal Justice Agency (NAAJA). My work at NAAJA was to establish a community education program aimed at helping Aboriginal people understand Australian law. I was blessed to have so many wonderful Aboriginal people help me to make the education program successful, people such as Speedy McGinness (from Batchelor), James Gaykamangu (from Milingimbi, Arnhem Land), Janet Sandy Gregory (from Elliot), Jerry Banji (from Ngukurr, Arnhem Land) and Gaymarani George Pascoe (from Maningrida, Arnhem Land). The success of those community legal education programs belong to them. While working with these people and others I experienced first-hand the injustices suffered by so many Aboriginal people affected by the Northern Territory criminal justice system, both Aboriginal offenders and victims. Very often when I asked
respected Aboriginal elders what they would like me to include in the community legal education program they asked to have their customary law recognised by the Australian legal system. This answer did not seem to match the question that I had put to them until I realised that it was the clash of laws that was so often at the heart of the injustices that I had witnessed. I began to think about these issues as potential research topics which eventually led to undertaking this doctoral research.

I formed the impression that Aboriginal customary law is as much a legal system as it is a religious system. Many, but not all, of the Aboriginal people that I talked to about this topic share the Christian faith, as do I, and consequently many of the discussions included the topic of the compatibility or the incompatibility of Christianity with aspects of Aboriginal customary law and Australian law. While the incompatibility of aspects of Aboriginal customary law with Australian law usually seemed clear cut in these discussions, the reconciliation of Aboriginal customary law with Christianity was never clear. Some Aboriginal people that I listened to said very clearly that these two systems could no more mix than could water and oil, while others gave convoluted or inconsistent reasons why the two could be mixed. Some examples of both of these approaches are considered in Chapter Seven.
My overall observation was that a great lack of respect had been shown to Aboriginal people by non-Aboriginal people, both historically and contemporarily. This lack of respect I discovered to be manifest in the almost total absence of serious studies of Aboriginal customary law by Australian lawyers, including legal academics. Aboriginal customary law is not taught in Australian law schools nor are there books written by lawyers on Aboriginal customary law in Australian libraries, though books on African or Indonesian customary law are easy to find.

Two of my Aboriginal collaborators and Yolngu men from Arnhem Land, James Gaykamangu and Gaymarani George Pascoe, had been commissioned by their respective clans to educate non-Aboriginal people about their customary laws by writing the laws down in English so that they could be studied, and hopefully eventually recognised, by Australian lawyers. Gaymarani writes:

Many senior law men that I have met and studied with have entrusted me with their law, because they wanted to make sure that some day this law would be taught to someone who would write it down for Australian readers across the Northern Territory and further.

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6 I use the term ‘lawyer’ in this thesis in a broad sense to include legal practitioners, judicial officers and law academics.

I worked with both Gaykamangu and Gaymarani on their manuscripts and eventually they were published; the manuscripts have become a significant component of the original research data for this thesis.

The term for the over-arching system of Aboriginal customary law in Arnhem Land is Madayin and the largest Madayin institution is known as Ngarra. Ngarra functions similarly to a parliament in that it is preoccupied with matters of governance and it acts as a unifying institution across clans and even moieties throughout Arnhem Land. Due to the opportunity afforded to me in compiling the manuscripts for both Gaykamangu and Gaymarani I decided to use the Yolngu Madayin jurisdiction, roughly represented by the geographical boundaries of Arnhem Land, as the example in this thesis of Aboriginal customary law. While this thesis focuses upon the Madayin system, the comparison of other Aboriginal customary religio-legal systems with Australian law and Christianity are highly likely to produce similar conclusions to those drawn in this thesis. This is because the approach taken to the analysis is to focus upon the primary sources, purpose and nature of authority of the three systems being considered - Australian law, Christianity and Madayin - to determine if at the most fundamental level these systems can be reconciled.
I observed that specific legislative provisions on the same topic in different Australian states might be different yet the primary sources, purpose and nature of the Australian legal system remain the same. For example, the minimum age that one can hold a driver’s licence in Victoria may be 18 while in the Northern Territory it may be 16 yet these differences do not alter the fundamental primary sources, purpose and nature of the systems: both laws are derived from legislation made by a democratically elected representative legislative body subject to the same federal constitution. Similarly one Christian group may teach that the bread and wine of Communion are the real presence of Christ while another Christian group may teach that the bread and wine are merely symbols, neither teaching contradicts the fundamental primary source, purpose and nature of Christianity, that is, God’s plan for the Kingdom of Heaven in which Jesus Christ rules as King. Accordingly, I did not want to produce an analysis that would be rendered meaningless should legislation change or should the topic be considered from a particular Christian denomination. Rather, I wanted to produce an analysis and evaluation that would be useful in all relevant and reasonably conceivable circumstances, hence my approach of analysing the fundamental aspects of primary sources, purpose and nature.

Justice is a stated aim of all of the three major normative systems in Arnhem Land that are the focus of this research, though the nature of
justice varies with the different systems. By writing this thesis I hope that individuals, both Aboriginal and non-Aboriginal, can make more informed decisions resulting in less injustice (anyway understood) in the Northern Territory.

1.2  Research Methodology

The data for the research has been collected in a number of ways. The data is primarily cited in Chapters Three, Four and Five. For the data on Australian law, primary legal sources (legislation and case law) have primarily been gathered using LexisNexis, Austlii and other online legal services as required. Secondary legal sources have been found in both online and printed legal scholarship journals and texts. For the data on Christianity, the primary source is the Bible and various theological publications have been selected to augment the Bible as appropriate. The data for Australian law and Christianity was easy to collect; the data for Madayin was not.

Accessing published English language texts specifically on Madayin (or other Australian Aboriginal systems of law) has been, until very recently,
quite difficult. The relevant information that is available is scant.\textsuperscript{8} Aboriginal law has traditionally been communicated orally and primarily in the context of religio-legal ceremonies (such as Ngarra and Kunapipi which are described in Chapter Three). When it has been recorded it traditionally has been recorded as visual designs such as paintings. However, both the paintings and the ceremonies are typically highly secretive; only authorised persons are permitted entry into the ceremonies or to view the paintings. However, two prominent Yolngu customary law leaders, Gaymarani George Pascoe and James Gaykamangu,\textsuperscript{9} were both commissioned by their clan peers and Madayin seniors to make the Madayin system known to the rest of Australia. From 2007 I started assisting these two Yolngu leaders to bring knowledge of the Yolngu Madayin system to a wider audience, primarily the law making and law practicing fraternities of the Northern Territory.


\textsuperscript{9} Gaymarani and Gaykamangu are both senior Yolngu Madayin law men and are very capable in English. Gaymarani George Pascoe is a teacher with the NT Department of Education and has been teaching in Yolngu languages and in English for decades. James Gaykamangu is a nationally qualified interpreter working for the Northern Territory Aboriginal Interpreter Service and the Northern Territory Department of Justice. He has worked extensively in the Northern Territory Court system including interpreting in Supreme Court matters.
The first collaboration was between Gaymarani and me when early in 2011 the article ‘An Introduction to the Ngarra Law of Arnhem Land’ was published in the *Northern Territory Law Journal*.\(^{10}\) Gaymarani was the author of the article and I was the editor. This article was novel in that for the first time significant detail of the Madayin Ngarra system, including a number of highly sensitive matters, was published in English by a Yolngu customary law leader and in a format (the *Northern Territory Law Journal*) that made it very accessible to the Australian legal profession.

My second collaboration was with James Gaykamangu in August of 2011 when about 200 members of his clan and others presented a sacred Ngarra (Madayin) law painting (rangga\(^{11}\)) to the Northern Territory Parliament and Supreme Court at a combined ceremony held at the Northern Territory Parliament House. Prior to the presentation the painting had been secret. To commemorate the event the Northern Territory Law Society published an incomplete version of a paper that I had been working on with Gaykamangu in the Society’s bimonthly professional

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\(^{10}\) Gaymarani, above n 7.

\(^{11}\) 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.
publication, *Balance*.12 The final and complete version of that paper was published in 2012 in the *Northern Territory Law Journal* under the title ‘Ngarra law: Aboriginal customary law from Arnhem Land’.13 Gaykamangu was the author of this article and I was its editor. Gaykamangu’s article is also on the topic of the Madayin Ngarra system.

The original manuscripts were first drafted by Gaymarani and Gaykamangu. Later, under their instructions, I edited the texts and returned them to the two men for their revision. The authors would also consult with other Yolngu law leaders and have them review the draft text. After they reviewed the drafts I would then make the amendments according to instructions, and submit the next draft to the authors for review. This process continued until the authors and their Madayin colleagues were completely satisfied with the end product. My part in the texts was as editor, not author. All of the content of both texts came from the two Yolngu authors. My responsibility as editor was to edit their original texts into English so as to be accessible to English speaking readers, especially lawyers. In having done so, I have retained as much as possible the voice and style of the authors whilst avoiding over use of ‘legalese’. Nevertheless the authors themselves chose at times to express

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themselves using English legal terms and, so as far as it remained reasonably accurate, I retained the authors’ original use of English. This approach ensured that the true authors of the articles were Gaymarani and Gaykamangu. On this point I reproduce here the caution I added in Gaymarani’s ‘An Introduction to the Ngarra Law of Arnhem Land’:

This article attempts to describe the Ngarra law of Arnhem Land in order to provide access to the law for interested people, especially “white” (Balanda) lawyers. The law described is that of the Yolngu people (who speak the Yolngu matha languages) yet the article is written in English. Hence many terms and concepts from one language have been used to describe the law of another. In addition, the Ngarra law is not simply “law” as understood in Australian legal circles. Ngarra “law” is religious customary law, that is, the law of the tribal religion of the Yolngu adherents. Accordingly, this article has not been drafted with Australian methods of legal interpretation in mind, which should not be applied to it. Rather, this article may be understood as more akin to a secondary legal source than a primary legal source; the primary sources having been retained (and remain mostly secret) by the Ngarra law custodians. As a law text, this article is unique in the Australia law landscape and accordingly may be described as sui generis.14

Gaykamangu’s text does not warrant the above warning as its genre does not approximate a typical law text in English. Rather it functions as a type

14 Gaymarani, above n 7, 283.
of precursor or invitation to interested audiences to pursue their study of Ngarra law, perhaps by reading Gaymarani’s ‘An Introduction to the Ngarra Law of Arnhem Land’. Combined, these texts constitute a substantive text on the Madayin system by recognised Madayin leaders published in English. In addition to the Gaymarani and Gaykamangu texts, the writings of other Yolngu and other Aboriginal authors, as well as relevant non-Aboriginal anthropologists, have been drawn upon to augment these sources.

Notwithstanding the existence of the Gaymarani and Gaykamangu texts, the amount of information on Madayin available in English is heavily dwarfed by the amount of primary and secondary sources readily available in English concerning Australian law and Christianity. The combined word count of the Gaymarani and Gaykamangu texts is about 15,000 words. The Bible is readily available in bookstores, libraries and online and contains about 700,000 words. A large proportion of Australian legislation and case law, with a combined word count in the order of millions, is freely available online via the Australian Legal Information Institute (AustLii). In my own university’s library there are thousands of titles on Australian law and I have had access to a substantial theological library for additional Christian titles.

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15 Australian Legal Information Institute <www.austlii.edu.au>
In these circumstances it is very possible for the sheer volume of detailed information on Australian law and Christianity to overwhelm the information available on Madayin. A ‘level playing field’ does not exist yet so some sort of proportionality must be attempted in order to accomplish a comparison between the three systems. Accordingly, I approached the matter in the following way:

1. I started with the Gaymarani and Gaykamangu texts and identified the main topics present in those texts to be a general introduction to the Madayin system, some detail on marriage law and sorcery and the collaboration of Madayin with Australian law. These topics informed the major content areas of the thesis and the sections on Australian law and Christianity were also confined to these same content areas.

2. I identified another predominant Yolngu writer on point to be Djiniyini Gondarra and therefore decided to make significant reference to his writings in the thesis. Gondarra’s writings cover both law and religion and often focus upon the collaboration of Madayin with both Australian law and Christianity.

3. In order to increase the content referenced for Madayin I drew upon a number of secondary materials such as the writings of lawyers, anthropologists and theologians. I also included some material that related
to Aboriginal customary law generally, that is, not specifically from the Madayin system, but which has the purpose of providing insights from other very similar systems.

The combination of these approaches has enabled what otherwise might not be possible, namely, a serious study of authoritative pluralism involving the Madayin system.

While this thesis is concerned with three normative systems, I am not evenly knowledgeable about each system. Out of the three systems, my knowledge of the Christian scriptures is the strongest notwithstanding that I am not formally qualified in this area. Next in order of level of knowledge would be law: I have a Bachelor of Laws degree (with honours) and am admitted as a legal practitioner. The normative system that I am least knowledgeable about is Madayin. There are no formal courses (in a modern western sense) on Madayin but I have learned according to the Madayin norms of being instructed by Madayin leaders (dalkarmirris) on their terms. This means that I was instructed in as much of the Madayin system as the dalkarmirris permitted; some areas being withheld from me. I have often mentioned in this thesis the dalkarmirris Gaymarani George Pascoe and James Gaykamangu and this is appropriate because I have learned more from them than any other dalkarmirri. Also, it has been their written publications that have enabled me to reference material on
Madayin written by dalkarmirris. But I also need to mention Matthew Dhulumburrrk Gaykamangu who taught me much in only a few, though intensive, sessions. Similarly, William Hall also taught me certain things about the Madayin system. Djiniyini Gondarra also instructed me sitting under a tree in Milingimbi one day. Gondarra is also the author of some English language documents on Madayin which are cited in this thesis. All of these men are leaders in their respective communities and were extremely generous in sharing their knowledge with me. However, this reveals another limitation: all of my instructors in Madayin were men. I had no instruction from a Yolngu woman on Madayin, though I did have instruction on various aspects of Aboriginal customary law generally from Janet Sandy Gregory, a Mudburra (Aboriginal but not Yolngu) woman from the Barkly region of the Northern Territory. This is the way in Aboriginal customary law – men teach men and women teach women. Janet was able to overcome this barrier because of our shared Christian faith but because of this unorthodox approach I have chosen not to reference her in this thesis. Of course I also read the anthropology literature on point, though this material was written by non-Yolngu authors.
The importance to this thesis of the two manuscripts on Madayin published by Gaymarani\(^\text{16}\) and Gaykamangu\(^\text{17}\) cannot be over-emphasised. These two articles are remarkable for a number of reasons. Firstly, the articles provide for the first time, in English and publicly, substantial detail of the Madayin system described as a legal system. The articles bring substantial clarity to an area that had long been shrouded in uncertainty. Secondly, the articles are uniquely authoritative as they were written by Yolngu customary law leaders (dalkarramiris). Previously the Madayin system had been described in part by anthropologists, but not from a legal framework perspective and not by Yolngu in a substantial way. Thirdly, the articles were published in a format that made them very accessible to the Australian legal profession. This accessibility, and interest in the articles by the legal profession, is evidenced by the New South Wales Bar Association appending a copy of Gaymarani’s article to their website\(^\text{18}\). Additionally, both Gaymarani and Gaykamangu have presented


Continuing Professional Development presentation on the Madayin system to Northern Territory lawyers for the NT Law Society.²⁰

Of the two articles, Gaymarani’s provides more detail on Madayin substantive law than does Gaykamangu’s. However, Gaykamangu’s article was preceded by his Gupapuyngu tribe, in complete unity, presenting a sacred Ngarra (Madayin) law painting to the Northern Territory Parliament and Supreme Court at a combined ceremony held at the Northern Territory Parliament House. The Madayin painting sets out the wangarr sources of authority for the Gupapuyngu tribe. This is significant because whereas the articles may be described as secondary sources of authority in the Madayin system, the paintings may be described as primary sources.

This thesis is the first attempt at analysis of the Gaymarani and Gaykamangu texts. Now that the articles exist it is hoped that others may also engage with them in scholarly activity. Ideally, these first articles will be added to over time to cover more of the Madayin system.

1.3 Chapter Overview

The following Chapter Overview provides an indication of the topics that will be explored in detail in later chapters. Statements or claims made in the Chapter Overview are established in the chapters referred to.

The thesis is organised as follows. This first chapter includes an overview of the thesis and brief introduction to the topic as a whole, a recount of the genesis of the thesis, a section on the methodology used for this research, a chapter overview and a glossary of key words used in the thesis, especially the Yolngu-matha words used.

Chapter Two surveys key thesis concepts and establishes contextual matters relevant to the thesis including time, place and relevant literature. These contextual matters identify the historical interactions of Madayin, Australian law and Christianity as they have occurred in Arnhem Land and locate this research within the relevant research that has preceded it. The question of ‘what is Aboriginal customary law?’ is answered together with some notes on traditional Aboriginal society.

Chapter Three sets out the foundational sources of authority and purpose of the three normative systems being considered. The term ‘foundational’ is used to denote general authority or authority at the highest level within
each system. This is important because the whole thesis is primarily concerned with authority so this chapter functions as a warehouse of source material for later chapters.

The first part of Chapter Three is concerned with the foundational sources of authority and purpose in Madayin. An explanation of what is meant by ‘Madayin’ starts the section followed by a description of the largest Madayin institution of authority, the Ngarra assembly and ceremony. The Madayin concept of magaya, which is highly authoritative in the Madayin system, is then considered. The way that authority is manifested in moieties, clan groups and individuals is then analysed followed by an account of authoritative Madayin texts. The very significant and controversial Kunapipi ceremony is then discussed.

The foundational sources of authority and purpose in Australian law are then identified and considered. Australia is considered firstly in an international context followed by a consideration of the English heritage of Australian law. The theoretical socio-political conceptualisations of authority in English law are analysed before the actual legal framework of the Commonwealth of Australia and the Northern Territory of Australia are described.
Finally in this chapter, the foundational sources of authority and purpose in Christianity are covered. The section begins by considering the key figure in Christianity, Jesus Christ, and the key purpose of Christianity, the Kingdom of God. The central concepts of sin and forgiveness of sin through the Saviour, Jesus Christ, are detailed as it is through the Saviour that entry into the Kingdom of God is made possible. The key Christian text, the Bible, is then analysed to develop an understanding of the nature of the authority of these scriptures, followed by a discussion on the nature and functioning of authority in Christianity including oppositional authority.

Having covered the foundational sources and purpose of authority in Chapter Three, Chapter Four considers the sources and purpose of authority specific to marriage in the three systems. The area of marriage is selected because it is an area that is common to Madayin, Australian law and Christianity and written sources in the public domain exist for all three systems. This chapter investigates the sources and purpose of authority in relation to marriage in the three systems with a view to establishing whether or not the purposes of marriage are consistent with the foundational purposes of each respective system.
Chapter Five considers the sources and purpose of authority specific to sorcery. Sorcery is selected as an area because it is of significant interest to Madayin, but neglected in contemporary Australian law and condemned in Christianity. Written sources also exist in the public domain for all three systems on the topic of sorcery. Chapter Five investigates the sources and purpose of authority in relation to sorcery in the three systems with a view to establishing whether or not the purposes of sorcery are consistent with the foundational purposes of each respective system.

Thus the thesis from Chapter Three to Chapter Five includes analysis and evaluation of:

- the foundational sources and purpose of authority in each system,
- the sources and purpose of authority specific to marriage as an example of a specific area common and very significant to all three systems, and
- the sources and purpose of authority specific to sorcery as an example of a specific area that is very significant to one system, somewhat significant to another system and of little significance to the third system.

In this way the thesis is developed from three angles, namely from a foundational level, from a specific level that is very common to all systems and from a specific level that is not very common to all systems.
Accordingly, a type of triangulation is achieved which strengthens the veracity of the final evaluations and conclusions regarding the integrity of the normative systems when they intersect with other normative systems.

Chapter Six contains an analysis of the essential nature of Madayin compared to that of Australian law and Christianity. This analysis is based upon the primary sources and purposes articulated in the preceding chapters covering the foundational sources and purpose of authority, marriage and sorcery. This analysis results in a set of succinct propositions on the essential nature of each system. The propositions are as follows:

I. The essential nature of Madayin is the continuity of the ancient mythical past source of the wanggar beings’ spiritual authority. This authority is executed predominantly by the practising of a fertility philosophy, the outcome of which is described as magaya, that is, a state of balance, order and peace. Madayin is relative and exists only in the localised jurisdiction of Arnhem Land. It is open to syncretism and engages in pluralism with other normative systems.

2. The essential nature of Australian law is to enable the contemporary demos to rule by a system of representative democracy, parliamentary supremacy and self-subscribed sovereignty within national borders and
mediated via legislation in accordance with the Constitution. Rule by the contemporary demos gives Australian law a relative nature (relative in time) as preceding and proceeding demos’ are lawfully able to change the law, even the foundational Constitution. National borders reveal both the absolute nature of Australian law and an aspect of its relative nature. Australian law is relative in terms of place (geography) as foreign jurisdictions are not denied their authority, yet legal pluralism is resisted within Australia’s borders.

3. The essential nature of Christianity is the advancement of the Kingdom of Heaven on earth by people (not limited to any jurisdiction) being ‘born again’ and voluntarily following the teachings of Jesus Christ while awaiting his return to the earth and his eternal reign. Christianity is universal and absolute making it unprepared to enter into syncretism with any other authority. While Christianity recognises the existence of many authorities it places itself at the apex of all authorities and claims that in time all authorities will acknowledge the highest authority of Jesus Christ.

These succinct propositions provide the focus for the rest of the thesis. It is submitted that these propositions are accurate based upon the analysis of the preceding chapters. It is not submitted that these statements reflect the only purpose and nature of the systems or that these purposes and natures
are in every instance perfectly performed. For example, the statement that ‘the primary purpose of Australian law is to enable the contemporary demos to rule by a system of representative democracy’ reflects not every purpose or possibility; rather it states the primary purpose. It is conceded that not every aspect of every piece of legislation directly and certainly reflects the desires of the demos. However, the system includes periodic parliamentary elections which provide the demos an opportunity to approve or disapprove the previous government’s legislative activity, albeit in an imperfect way. Therefore, the description that the primary purpose of Australian law is to enable ‘rule by the demos’ is accurate, if not exhaustive and perfect. It may be juxtaposed to totalitarianism and theocracy and other approaches to law that clearly do not characterise the Australian system.

The propositions in Chapter Six provide a basis for evaluating some of the intersections that have occurred in Arnhem Land between Madayin and Australian law, and Madayin and Christianity. This evaluation occurs in Chapter Seven. Briefly, the major points of intersection considered are:

- the Australian law definition of religion (which intersects with the Madayin system);
- the Australian law recognition of native title and other Aboriginal land rights under legislation;
- changes to Madayin due to Yolngu interaction with Australian law and Christianity; and
- the development of theology that syncretises Madayin and Christianity (known as ‘two-way’).

In particular, Chapter Seven examines if the essential natures and purposes of each system retain internal systemic integrity at the points of intersection.

Chapter Eight then critically reflects upon the findings in the previous chapters. It argues that the essential nature of each of the three systems is radically different to that of the others. Therefore when a person is acting in accordance with the nature and purpose of one system, they will, at times, breach an aspect of one or both of the other systems. This becomes problematic when an individual is attempting to adhere to more than one of these systems, as is the case for many Yolngu.

The thesis concludes with Chapter Nine which begins with a summary of the key findings, namely that the nature of Madayin enables it to engage in normative pluralism, the nature of Christianity prevents it from engaging in
normative pluralism and the nature of Australian law is such that it is able to engage in mild forms of normative pluralism. Accordingly, when pluralism is attempted in opposition to the nature of authority of a system, a confrontation ensues. Therefore, Chapter Nine also includes a discussion on the appropriateness of facing confrontation according to the norms of each system, recommendations for future research and a succinct conclusion.

### 1.4 Glossary

As this thesis is concerned with the Yolngu Madayin system of customary religious law from Arnhem Land, many of the terms used in the thesis are borrowed from the Yolngu language, Yolngumathá. Accordingly a glossary of these terms that are frequently used in this thesis is provided here. A number of other specialised or potentially ambiguous terms are also included here for reference.

<table>
<thead>
<tr>
<th>Yolngu, special or ambiguous term</th>
<th>Meaning of the term as used in this thesis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal customary law</td>
<td>The religio-legal systems of Australian Aboriginal peoples.</td>
</tr>
<tr>
<td>Aboriginal religious customary law</td>
<td>Used interchangeably with ‘Aboriginal customary law’ or just ‘customary law’.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>dalkarmirri</td>
<td>The highest office in the Ngarra system for the yirritja moiety; a legal, religious and political leader in Ngarra.</td>
</tr>
<tr>
<td>Demos</td>
<td>The voting population of a jurisdiction expressed through their democratically elected representatives in parliament.</td>
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<tr>
<td>dhulmu-mulka bathi</td>
<td>A Madayin law sacred dilly bag; a small, around 30 cm, woven bag made from pandanus leaves and orange lorikeet feathers used to contain amulets and held in ceremonies.</td>
</tr>
<tr>
<td>dhuwa</td>
<td>One of the moieties of Yolngu society.</td>
</tr>
<tr>
<td>dhuyu</td>
<td>Holy or sacred.</td>
</tr>
<tr>
<td>jirrikaymirri</td>
<td>The highest office in the Ngarra system for the dhuwa moiety; a legal, religious and political leader in Ngarra.</td>
</tr>
<tr>
<td>jungay</td>
<td>Complimentary and support officers to the dalkarmirri and may be regarded as roughly equivalent lawyers, police and correctional officers.</td>
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<tr>
<td>kunapipi</td>
<td>A fertility ceremony under the Madayin umbrella that links Yolngu across Arnhem Land and with other Aboriginal groups across the Northern Territory and Western Australia.</td>
</tr>
<tr>
<td>Madayin</td>
<td>The complete system of customary and religious law for the Yolngu people of Arnhem Land.</td>
</tr>
<tr>
<td>madayin</td>
<td>The use of the term ‘madayin’ (without the capital ‘M’) indicates the Madayin quality of sacredness.</td>
</tr>
<tr>
<td>magaya</td>
<td>A relative state of peace and harmony in the Madayin</td>
</tr>
</tbody>
</table>
system.

marr  Spiritual power or strength or supernatural power.

moiety  A form of social organisation in the Madayin system which divides Yolngu society into two complimentary halves.

Ngarra  The largest and most unifying institution of the Madayin system; a combined legislative and judicial institution.

nulla nulla  A wooden weapon approximating a baton used by the Yolngu for ceremonial purpose and in actual combat.

rangga  Secret sacred objects in the Madayin system; a rangga is ‘an object up to about a metre long, made of wood, stone, paperbark or wax, incorporating string, fur, feather and painted decoration. It is sacred (dhuyu), described as very important, and imbued with the power of the wangarr’. 20

Religio-legal system  A system combining indivisible elements of religion and law. There will be considerable overlap between the concepts of ‘religio-legal system’ and ‘theocracy’. However, the term ‘theocracy’ may conjure certain connotations (such as an Islamic theocracy) that are not helpful in trying to conceptualise the functioning of the Madayin system, hence the use here of the phrase

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‘religio-legal system’.

**wangarr**  
The Yolngu ancestral beings who provide the mythical origins of the Madayin system.

**yirritja**  
One of the moieties of Yolngu society.

**Yolngu**  
The term ‘Yolngu’ is sometimes used just to represent Aboriginal people in northeast Arnhem Land and sometimes to represent all Aboriginal people of Arnhem Land. All of the tribes of Arnhem Land have essentially the same social, kinship, legal and religious organisation.\(^\text{21}\) In this thesis the term ‘Yolngu’ is used generally to cover all Aboriginal people in Arnhem Land.

Chapter Two:
Context in Time, Place and Literature
Chapter 2

Context in Time, Place and Literature

This chapter establishes some essential definitional and contextual matters in relation to Madayin and other topics relevant to this thesis. As this thesis is concerned with notions of authority, law and the sacred, a brief exploration of these terms initiates this chapter. It is argued that authority may be described as having the quality of directing the decision making of a person (or group).

Related to the definition of authority is the definition of law. For the purposes of this thesis, law is defined broadly as ‘expressions of authority’, such as legislation and scripture. The sacred is defined as having a supernatural association which can be contrasted to a purely profane existence. The sacred, so defined, can involve a supernatural association perceived as either good or evil.
The context of the Yolngu people and the Madayin system is considered in time and place by briefly recounting how contact has occurred with Australia law and Christianity in Arnhem Land. Yolngu contacts with white pastoralists, government officials and Christian missionaries are followed from their origins to the more recent post-colonial situation. Following the context in time and place is context in literature. Some preliminary but important concepts relating to traditional Aboriginal society in general are clarified here, such as the nature of Aboriginal customary law, totems and ‘the Dreaming’. The extent to which Aboriginal customary law has been explored and considered by law reform bodies is briefly surveyed. This contextual material provides the necessary background to Chapter Three which considers the foundational sources and purposes of authority in Madayin, Australian law and Christianity.

This thesis focuses upon comparing Madayin with Australian law on the one hand and with Christianity on the other as this is a largely unexamined area of scholarship. A significant amount of material exists
on the bilateral relationship between Australian law and Christianity\(^1\) – and much material exists on the relationship between Christianity and Western law generally.\(^2\) However, very little literature exists comparing Madayin authority with Australian law and Christian authority. Therefore, this thesis concentrates upon comparing Madayin authority with that of Australian law and Christianity.

2.1 **Notions of authority, law and the sacred**

A primary objective of this thesis is to analyse and evaluate the essential nature of authority in the three most dominant normative systems in Arnhem Land, being Madayin, Christianity and Australian law. A normative system may be an official or positive legal system (such as Australian law), a customary normative system (such as Madayin), a religious normative system (such as Madayin), an economic or capitalist normative systems (such as the *lex mercatoria* – the law of merchants), functional normative systems (such as a school or a hospital, that is an

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\(^1\) For a recent collection of writings on this topic see John Williams and Paul Babie (eds) ‘Law and Religion in Australia: Contemporary Scholarship’ (2009) 30(1) *Adelaide Law Review.*

organisation pursuing a specific function) and community or cultural normative systems (such as the Balinese community cultural normative system).\(^3\) Other types of normative systems may be possible and some normative systems overlap the types described above. For example, Madayin is a customary normative system, a religious normative system and a community or cultural normative system. The term ‘normative system’ is used in this thesis to refer to systems of authority that attempt to establish norms.

The following notes on authority, law and the sacred are by no means meant to be comprehensive. They serve as introductions to a reader new to this area and as reminders to those familiar with the topics. Many additional concepts relevant to this thesis could be explored or defined (such as what constitutes a ‘system’?). However, to do so would run the risk of becoming so over-burdened with qualifications or restrictions on the meaning of terms used that the substance of the thesis is overshadowed by its introduction. Furthermore, in the area of inquiry of this thesis, that is normative authority, there exists among scholars ‘no

agreed vocabulary, no settled taxonomy of types of rules or norms, and an uneven body of theorizing about a bewildering range of issues’.4

2.1.1 Authority

A working definition of what is meant by the term ‘authority’ is needed in order to bring cohesion to the inquiry. This working definition needs to be broad enough to cover varying notions of authority since there ‘may be law in societies which do not have our concept of authority’5, yet it must possess sufficient internal integrity so as to not render the definition meaningless.

Writing on authority, law and morality Raz argues:

The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e. by the institutions of the law. The law’s claim to authority is manifested by the fact that legal institutions are officially designated as “authorities”, by the fact that they

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regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed... Even a bad law, is the inevitable official doctrine, should be obeyed for as long as it is in force.⁶

Raz finds the phenomena of authority to be pluralistic, not singular. More specifically Raz suggests two major types of authority in law:

[A]uthority in general terms can be divided into legitimate and de facto authority. The latter either claims to be legitimate or is believed to be so, and is effective in imposing its will on many, over whom it claims authority, perhaps because its claim to legitimacy is recognised by many of its subjects. But it does not necessarily possess legitimacy.⁷

Raz further suggests that legitimate authority ‘is either practical or theoretical (or both)’.⁸ In instances of practical authority the ‘directives of a person or institution with practical authority are the reasons for action for their subjects’.⁹ One obeys the law because it is the law. On the other hand ‘the advice of a theoretical authority is a reason for belief for those

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⁶ Ibid 416.
⁷ Ibid 413.
⁸ Ibid.
⁹ Ibid.
regarding whom that person or institution has authority’. That is, one obeys the law because the one who gave the law is authoritative.

The legitimacy of the notions of practical and theoretical authority is questioned by Hurd. While acquiescing to the possibility of the theoretical authority of law, Hurd doubts that law itself can possess practical authority (which may override one’s morality). Yet whether law can or cannot possess authority (practical, theoretical or other), Hurd’s rejection of Raz’s concepts of authority in law does not alter the quality of legitimate authority itself, which put simply is ‘surrendering one’s judgment to’ that which is considered authoritative. The decision maker follows the guidance given by the authority; the authority effectively makes the decisions for the one who recognizes the authority. In other words ‘the acceptance of authority is the denial of one’s moral autonomy.’ Freeman writes:

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10 Ibid.
12 Ibid 153-184.
13 Ibid 62-94.
14 Raz, above n 5, 413.
15 Ibid.
Authority implies that obedience is rendered by one person to another because the former recognises that the latter has a right to obedience… [that is] hierarchical subordination between subject and ruler.\(^\text{16}\)

This definition of authority, that is, that one decides the matter for another, is consistent with the primary definition of authority given by the *Macquarie Dictionary*, namely ‘the right to determine, adjudicate, or otherwise settle issues or disputes; the right to control, command, or determine’.\(^\text{17}\)

The idea of authority in law being hierarchical is also put forward by Kelsen who describes expressions of law as normative ‘oughts’,\(^\text{18}\) each norm leaning upon a more foundational norm until the very normative bedrock or basic norm of that particular legal system is reached, that bedrock of legal authority being termed by Kelsen the ‘grundnorm’.\(^\text{19}\) Kelsen writes specifically with positive law in mind, making strident efforts at removing influences of non-law disciplines such as psychology,

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\(^{18}\) ‘Oughts’ being things the adherent ought to do or ought not to do.

biology, ethics and theology.\textsuperscript{20} Kelsen argues that, within the narrow boundaries of the positive legal system, it is possible to trace the authority of all legitimate subordinate legal norms to the grundnorm of the state’s most foundational constitutional document,\textsuperscript{21} arriving eventually at the ‘final postulate’.\textsuperscript{22} Where Kelsen’s grundnorm theory ceases to account for authority, however, is when the question ‘by what authority is the most foundational constitutional document made?’ is asked. Kelsen has responded to this question by explaining that the grundnorm itself is not positive law, but is ‘presupposed in juristic thinking’\textsuperscript{23}, an assumption ‘unlikely to be true’ according to Freeman.\textsuperscript{24} Kelsen desires to separate law from non-law disciplines in his grundnorm theory, and consequently grundnorm theory as expounded by Kelsen can only account for authority in law to the level of foundational positive law.

Yet it is axiomatic that there exists in all legal (indeed all normative) systems, an even more basic norm than the grundnorm, namely, the authority that establishes the grundnorm (as defined in positive law terms

\footnotesize
\begin{itemize}
  \item \textsuperscript{20} Ibid. See also Hans Kelsen, \textit{The Pure Theory of Law} (1934-1935) 477, reproduced in Freeman, above n 16, 286-287.
  \item \textsuperscript{21} Kelsen, \textit{General Theory of Law and State}, above n 19, 286.
  \item \textsuperscript{22} Ibid.
  \item \textsuperscript{23} Hans Kelsen, ‘Professor Stone and the Pure Theory of Law’ (1965) 17 \textit{Stanford Law Review} 1130, 1141.
  \item \textsuperscript{24} Freeman, above n 16, 265.
\end{itemize}
by Kelsen). Kelsen restricts his inquiry to positive law in order to develop a legal science. The difficulty with this approach is that law is not made in a social vacuum; rather law is made (or at least interpreted and applied) in the reality of its social context - the very things that Kelsen tries to disentangle law from, that is psychology, biology, ethics, theology and the like.\footnote{This positivist-versus-realist debate is one of the largest in Western jurisprudence. However, this thesis does not pursue this debate. As the scope of this thesis includes religion and customary law, this thesis necessarily takes a realist approach. For an overview of this debate see William Twining, ‘The Significance of Realism’ in Karl Llewellyn and the Realist Movement (Fred B. Rothman & Co, 1973).} If Kelsen’s definition of grundnorm is extended beyond positive law, then the more basic, indeed the ultimate, authority that underpins a society’s legal system may be discovered.

If the inquiry into this deeper seated authority is broadened to include non-law sources of norms, then the narrow Kelsenian approach to understanding authority must be abandoned. This more abstract inquiry needs to consider not merely legal documents but whatever norms have expression in the context being studied. Twining broadly defines norms to be ‘prescriptions that guide behavior and provide reasons for action’.\footnote{William Twining, ‘Normative and Legal Pluralism: A Global Perspective’ (2009-2010) 20 Duke Journal of Comparative and International Law, 473, 480.} Such norms may be co-related to form a system. In one context there may
exist more than one such normative system which has been defined as ‘a set of constraints on the behaviour of agents, corresponding to obligations, which may or may not be observed by agents.’\textsuperscript{27}

By synthesising the propositions of Raz, Hurd, Freeman and Twining above, authority may be described as having the quality of directing the decision making of a person (or group). This is the working definition of authority that this thesis embraces.

\textbf{2.1.2 Law}

The term ‘law’ may overlap with ‘authority’. Attempts made at defining ‘law’ (that is, ‘what is law?’) have been notoriously plagued by unsatisfactory results over many centuries.\textsuperscript{28} While many of the world’s leading socio-legal scholars ‘have announced their allegiance to the concept of legal pluralism… there is no agreement on the underlying


The concept of law. The issue has been described by Tamanaha as unresolvable. The realist approach favoured in legal anthropology casts the wide net of ‘the maintenance of normative order within a social group’. Influences such as religion, psychology, culture, custom and economy are considered helpful to the realist in order to understand the law in context. On the other hand, the legal positivist approach has favoured a stricter definition of ‘public institutionalised enforcement of norms’. A decision to study positive law only allows the production and use of the grundnorm theory by Kelson. While a clearer or narrower definition aids in specificity, it also necessarily limits the enquiry which may result in an artificial data set and a contrived framework of analysis inappropriate for understanding the phenomena being studied. As useful as grundnorm theory may be for certain limited purposes, it is incapable of handling a broader enquiry into the source and nature of authority beyond positive law.

31 Ibid 391.
32 Ibid 392.
These two approaches are really divided by choice, that is, how wide a net does the enquirer wish to cast? Or, what question is the inquirer attempting to answer? Consider a parallel scenario: what is meant by the term ‘teaching’. Does ‘teaching’ only mean what occurs in classrooms situated in the formal and institutionalised facilities such as schools and universities, or does ‘teaching’ also include a mother helping her young child to recall the alphabet in the home and a middle aged man explaining to his friend how to select the right golf club for teeing off on a par three hole? Of course ‘teaching’ can be all of these. So too with the term ‘law’ – we can place our own parameters according to our own purpose.

According to Tamanaha, a danger involved in studying normative system pluralism is to fall into ‘either of two opposite errors: the first error is to think that state law matters above all else... [and] the second is to think that other legal or normative systems are parallel to state law’. The first error is sometimes made by legal scholars who assume that positive law is the only ‘real’ law. In doing so they make the mistake of ignoring other important normative forces (such as religion) that interact with positive

34 Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, above n 30, 410.
law. The second error is sometimes made by sociologists and anthropologists equating all normative systems with the same qualities as a decidedly legal system. Rather than approach the subject from either of these inadequate methods, Tamanaha considers that each particular system ‘must be examined on their own terms to see what their relations with other normative systems are’. Accordingly, this thesis analyses and evaluates each normative system upon its own terms.

Because this enquiry involves a legal system (Australian law), a religion (Christianity) and a mixed system of customary religious law (Madayin) a broad concept of ‘law’ is required. That is to say that the realist approach will be taken over the positivist approach simply because not all of the normative systems being considered contain positive law. Therefore, for the purposes of this thesis, law will be considered to be expressions (types of communication) of authority as deemed appropriate by each system respectively. For Australian law it is the primary sources of case law and legislation followed by the secondary sources of journal articles, textbooks, etc. For Christianity it is primarily the Bible, though some

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35 Ibid.
36 Ibid.
37 Ibid 410-411.
denominations include certain traditions and theological writings other than the Bible as highly authoritative, such as sacred tradition in the Roman Catholic faith.\textsuperscript{39} For Madayin it is the secret-sacred painted designs and ceremonial practices such as song and dance. These art forms produce signs or texts that require long-term training in order to read. As I do not possess this skill, this thesis will reply upon the previous efforts of Madayin leaders and anthropologists who have reduced these Madayin texts to written English texts.

### 2.1.3 The Sacred

Authority as a notion encompasses a wide array of possibilities in jurisprudence. However, this thesis is particularly concerned with sacred authority given that a primary object of inquiry, Madayin, is religion as well as law.

A useful but incomplete definition of the sacred may be ‘the sacred and the religious life are the opposite of the profane and the secular life’.\(^{40}\) The sacred is awesome: leading comparative religion scholar Otto described it as the *mysterium tremendum* – the awful mystery.\(^{41}\) The sacred is a power, a supernatural power that may result in both ‘ecstasy [and]… grisly horror’.*\(^{42}\) Being the opposite of secular and profane, Otto labels the sacred as ‘wholly other’.*\(^{43}\) Taboos involve the sacred: ‘taboo… means… things, or places, or persons, being cut off, or forbidden, because contact with them is dangerous’.*\(^{44}\)

Sacred power may be vested in a person such a priest or a king.

A king is an absolute powerhouse of forces simply because he is a king, one must take precautions before approaching him; he must not be directly looked at or touched; nor must he be directly spoken to.\(^{45}\)

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\(^{40}\) Mircea Eliade, *Patterns in Comparative Religion* (Sheed and Ward, 1958) 1.

\(^{41}\) Rudolf Otto, *The Idea of the Holy* (John Harvey trans, Oxford University Press, 1943) 12-24. Otto's original work *Das Heilige* (1917) is translated from the German as *The Idea of the Holy* (*heilig* is translated as *holy* or *sacred*).

\(^{42}\) Ibid 13.

\(^{43}\) Ibid 25.

\(^{44}\) Eliade, above n 40, 15.

\(^{45}\) Ibid 16.
Otto writes much about numinous experiences. To the individual who experiences the numinous firsthand it may 'come sweeping like a gentle tide... (or be) thrillingly vibrant and resonant... from the depths of the soul with spasms and convulsions' and may lead to 'the strangest excitement, to intoxicated frenzy, to transport, and to ecstasy'.

According to Durkheim, an entity becomes sacred not by inherent means but by its being set apart from banality - it is the prohibition rather than any requisite connection to the divine that marks something as sacred. However once something has become sacred it can, by association or direct transference, enable other entities in turn to be marked as sacred. ‘If a stone is found to have a supernatural power, it is because a spirit has associated itself with it’. This ‘power by association’ is a common phenomenon in Aboriginal religions. The sacred power of the totemic emblem is both positive and negative, productive and destructive. The essential element is that it is powerful by supernatural means.

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46 Otto, above n 41, 12.
48 Ibid, see especially Durkheim’s view of Australian totemic belief.
The idea of the sacred as explained above is based on a comparative religion approach and it portrays a common understanding across religions of the existence of supernatural power and of the authority of the sacred. Note also that the mention of ‘sacred’ or ‘supernatural’ does not automatically imply the power or authority is of a benevolent nature or origin. Something sacred can be either good or evil. For example, in the Bible both God and Satan are attributed with sacred or supernatural powers:

Finally be strong in the Lord and in his mighty power. Put on the full armour of God so that you can take your stand against the devil’s schemes. For our struggle is not against flesh and blood, but against the rulers, against the powers or this dark world and against the spiritual forces of evil in the heavenly realms.  

Therefore, care should be exercised to ascertain the context in which ‘sacred’ or ‘supernatural’ are mentioned as they could be describing powers or authorities of ‘good’ as easily as ‘evil’. The conflation of the different types of sacred qualities is sometimes at the heart of incongruous theology, as discussed in Chapter Seven.

50 Ephesians 6:10-12.
2.2 Traditional Aboriginal society

The Yolngu may be located as existing not only within the social landscape of the Commonwealth of Australia and the Northern Territory but also within a network of Indigenous social systems. In all instances these ‘social’ systems are multifaceted, including legal, religious and political aspects. This section begins with some brief observations of traditional Australian Aboriginal religions as recorded predominantly by white anthropologists. Some major and common themes in Aboriginal religion are considered, such as ‘the Dreaming’, sacred authority and supernatural power. This general account of Aboriginal religion provides some context for a more specific consideration of the Yolngu people and their Madayin.

Aboriginal society, including law and religion, is ‘small’ compared to the Australian legal system or Christianity. It is very localised. It exists in a network of other societies (Indigenous and non-Indigenous) that may have very different beliefs and values. It has a relative outlook. Its general disposition is to work side by side with other jurisdictions and religions.
It does this through economic and religious exchange. Esteemed individuals of other tribes are invited to learn about the local law, that is, the local spirituality and social organisation.

Stanner writes that traditional Aboriginal social structure was highly intricate yet government was small. People spent most of their time in small nomadic bands with members numbering in the tens. A group of bands make up a tribe that may number in the hundreds or thousands and the tribe would come together only occasionally for certain important religious ceremonies.51

In the Yolngu system, the whole population is organised into two halves, that is two moieties, dhuwa and yirritja.

Another common characteristic of traditional Aboriginal society is the absence of change.52 Stanner writes that the

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52  Ibid 84.
value given to continuity is so high that… [Aboriginal people] are not simply a people 'without a history': they are a people who have been able, in some sense, to 'defeat' history, to become ahistorical in mood, outlook and life.\footnote{Ibid.}

According to Stanner this ahistorical outlook accomplishes a type of continuity:

The more one sees of aboriginal life the stronger the impression that its mode, its ethos and its principle are variations on a single theme – continuity, constancy, balance, symmetry, regularity, system, or some such quality as these words convey.\footnote{Ibid.}

One change that does occur in the life of an individual in Aboriginal society is the increased knowledge of sacred law and religion that one is allowed to know as one grows older.

Power, authority, influence, age, status [and] knowledge, all run together… men of power, authority, and influence are old men… the greater the secret knowledge and authority the higher the status.\footnote{Ibid.}
Commenting upon traditional Aboriginal religion in 1979, Ronald Berndt was able to say that it:

is well to remember that, traditionally, Aboriginal culture was not the same throughout the continent. Nor was there any central or federal authority… It was not strictly possible to speak of one Aboriginal religion. There were, rather, many Aboriginal religions… [nevertheless the] lineaments of all Aboriginal religion… were basically alike. They rested on a three-fold set of relationships: between human beings themselves; between human beings and nature; and between human beings and their deities. This was articulated through what has been called in translation ‘the Dreaming’, a concept which was and is a key to the eternal verities of human living. Variously expressed it provides a charter for the whole pattern of human existence.56

Aboriginal religion is all-pervasive in the life of the individual and society; it is part of every aspect of life.57 Aboriginal societies of Arnhem Land, like other Australian Aboriginal societies, understand life and the universe

through a magico-religious system,\textsuperscript{58} that is, a system that ritually uses magical practices to produce supernatural events.\textsuperscript{59}

Being a religion that regulates all aspects of life, traditional Aboriginal religion also performed some of the functions that many modern societies describe as the realm of law.

Aboriginal religion concerned everyone within a community… [and] was intimately associated with everyday social living, with relations between the sexes, with the natural environment, and with food-collecting and hunting [as well as] the meaning of life, with the fundamental patterning of human existence, and with what we can call the moral universe.\textsuperscript{60}

Secrecy is an inherent aspect of the nature of much of Aboriginal law and religion\textsuperscript{61} and breaching secrecy can be punished most severely.\textsuperscript{62} Berndt and Berndt recorded:

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Berndt, above n 56, 20.
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\textsuperscript{60} Berndt, above n 56, 20.
\textsuperscript{61} Ibid.
A woman who has looked at or fingered one of the men’s secret emblems should, as a rule, forfeit her life, and her kin may not avenge her death. But in some places she is offered first an alternative choice. If she is willing to go out into the Bush, making herself available to all the local men for as long as they wish, the episode will be overlooked and no more will be said.63

In Arnhem Land, ritual sex has been used as punishment when a woman intrudes upon certain secret ceremonies conducted by men.64 (This topic is explored in detail in Chapter Four.)

2.2.1 The Dreaming

‘The Dreaming’ has been described by Professor Stanner as holding ‘unchallengebly sacred authority’ for Aboriginal people. The Dreaming contains creation myths and other elements of Aboriginal religion and law, revealed previously in time immemorial and made known presently through ceremony.65

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63 Ronald M and Catherine H Berndt, _The First Australians_ (1967, Ure Smith) 122-123.  
Stanner has described the Dreaming as having ‘no gods, just or unjust, to adjudicate the world.’ On the other hand Berndt ‘equates the Spirit Ancestors with deities’.

Whilst breaches of the customary law may be punished temporally, conformance to the customary law may be rewarded in the afterlife. Berndt records the belief of Gunwinggu (Western Arnhem Land) speakers that

a spirit of a newly dead person is not judged according to the good or bad behaviour of that person during his or her lifetime. The tests [that will determine the spirit’s future] relate entirely to whether or not he or she had conformed with traditional custom.

Although this is specifically a Gunwinggu belief, Berndt is able to draw upon his extensive experience of studying Aboriginal societies across much of Australia to write that the ‘absence of accountability to mythic

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66 Rose, above n 57, 102.
beings for what a person has or has not done during his or her lifetime, emphasizes a basic Aboriginal view toward such issues.'

After interviewing an Aboriginal man of the Western Desert who adheres to both a traditional Aboriginal religion and Christianity, Noel Wallace wrote:

[t]he Spirit Ancestors are revered but not worshipped. They are not the subject of prayers… ‘God must have made [them]… because He made everything’… [as the Dreaming] world-view does not include a god, so they [Aboriginal people] have no difficulty in accepting the Christian God as the total Creator.

Stanner warns against drawing many parallels between Judeo-Christian notions of God and Aboriginal religion notions of the Dreaming ancestors, who, though they completed miraculous feats, are not understood by adherents as omniscient or omnipotent and with ‘no notion of grace or redemption… (and) no heaven of reward or hell of punishment’ which are central concepts in Judaism and Christianity.

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69 Ibid.
70 Charlesworth, above n 67, 137.
More prevalent in the Dreaming is a ‘magical awareness of nature… complex totemism, ritual and art… [and an] intricately ordered life.’\textsuperscript{72} Absolutes of right and wrong are not characteristic of Aboriginal customary religious law.\textsuperscript{73}

Just as the Ancestral Beings who established the Aboriginal religions are numerous and varied, so too are the Aboriginal religions. The Ancestral Beings and the religions they established ‘have authority only in regions where their rites are performed’\textsuperscript{74}. These religions include ‘conceptions of right and wrong’ but they are relative, ‘not universal’, varying from one expression of the religion to another.\textsuperscript{75}

Notwithstanding the parochial nature of the various Aboriginal religions, the source of the Dreaming is commonly believed to have been the earth which is considered to be a ‘living female being who gave birth… to all other living things, and who is still the ultimate source of life.’\textsuperscript{76} Not surprising most of the ceremonies performed by women are related to

\textsuperscript{72} Ibid.
\textsuperscript{74} Berndt and Berndt, The First Australians, above n 63, 120.
\textsuperscript{75} Ibid.
\textsuperscript{76} Rose, above n 57, 99.
‘procreation, copulation, childbirth, child rearing and introduction to the Law.’\textsuperscript{77} In addition to the women-only ceremonies are fertility rituals which ‘often involve sexual licence on the sacred ground, when ordinary kinship tabus and prohibitions are ignored or deliberately flouted.’\textsuperscript{78}

The primary theme of the Dreaming is the interrelatedness of the cosmos. Of predominant concern for humans is to live in such a way as to preserve the cosmic interrelatedness of the Dreaming. This type of life includes, but is not limited to, the performance of religious ceremonies. Aboriginal people engaged in religious ceremony are simultaneously mythically re-creating and maintaining the cosmos, itself another living thing, constituted by the many parts including humans. In fact ‘the essence of Dreaming Law, expressed through myth, song cycles and so on, is that it shows how and why the cosmos constitutes a living system.’\textsuperscript{79} With this worldview of an interrelated cosmos, Professor Eliade writes that the sacred and the profane are not mutually exclusive qualities in Aboriginal religion since simply ‘living as a human being is in itself a religious act.’\textsuperscript{80} Aboriginal religion does not promise its adherents

\textsuperscript{77} Charlesworth, above n 67, 139-140.
\textsuperscript{78} Berndt and Berndt, \textit{The First Australians}, above n 63, 122.
\textsuperscript{79} Rose, above n 57, 99.
\textsuperscript{80} Ibid 102.
a future improved state nor promote a transcendent attitude; rather it embraces a timelessness experience of ‘here and now.’

2.2.2 Spiritual power

Conducting and participating in the religious ceremonies of the Dreaming is understood as an obligation, not a privilege. It is an obligation that people are too scared not to perform as it is widely believed that ‘if you don’t look after the Law that spirituality will diminish and tragedy will befall the people.’ There is a spiritual power that is the currency of Aboriginal religious ceremonies. This spiritual power is increased upon correctly conducting the ceremony. The increase is within the ceremony participants and the site, totem or other sacred object of the ceremony. Aboriginal people are often interested in learning the ceremonies of another clan in order to appropriate the spiritual power from the other’s ceremony and therefore increase their personal spiritual power even further. This is often the approach

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81 Ibid 103.
82 Charlesworth, above n 67, 126.
83 Ibid.
84 Known as *karunpa* in the Western Desert and *marr* in Arnhem Land.
Aboriginal people bring to adopting Christianity; they do so in order to obtain the spiritual power of Jesus Christ.\textsuperscript{86}

The more serious ceremonies in Aboriginal religion often involve the letting of human blood. The blood may be used for a variety of reasons. At times it is used as a glue to stick feather down on dancers’ bodies. In some instances human blood\textsuperscript{87} is ‘mixed and taken by all present as a physical and spiritual mutual strengthening process of the body and the vital karunpa (spiritual power), to the benefit of the people, and the Spirit Ancestor, who is strengthened also’.\textsuperscript{88}

\subsection*{2.2.3 Totems}

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\textsuperscript{86} Charlesworth, above n 67, 135.
\textsuperscript{87} Blood taken from the arm is generally preferred although it is easier and results in less enduring pain when taken from the scar tissue of a urethra incision, known as ‘whistlecock’ or burra in Walpiri; John Cawte, \textit{Medicine is the Law: Studies in psychiatric anthropology of Australian tribal societies} (1974) 121.
\textsuperscript{88} Charlesworth, above n 67, 136.
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An integral aspect of Aboriginal religion is the totem, a spiritual link between humans and other parts of the surrounding natural world. Totems are typically plants and animals but may also be inanimate objects such as clouds and water. Commonly a prohibition exists that prevents a person from eating their totem. Although various exemptions can be found, for those without a legitimate exemption it can be a dangerous thing to eat the prohibited totem. Enforcement of such a breach may not be conducted by the offender’s group, rather ‘it is believed that the sacrilege produces death automatically’\(^89\) by supernatural means. The mythic beings that formed the landscape and remain in it by their spirit are also ‘directly related to living Aborigines’\(^90\) through their totems. According to Aboriginal totemism, the creatures living in the land:

are a reflection of different [Dreaming] spirits, and all are believed to contain the essential essence (spirit) of the Dreaming. This totem is a manifestation of the bond between human beings and the Dreaming beings.\(^91\)

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\(^90\) Berndt, ‘A profile of good and bad in Australian Aboriginal religion’, above n 56, 19.

\(^91\) Ibid.
By a person manifesting that bond ‘it underlines the belief that he, or she, has the same spiritual quality as a particular mythic being, and is closely identified with that being.’ ⁹² From a Dreaming perspective, Aboriginal people ‘are regarded as being part of nature, bound to it… [and] sharing a common life-force’. ⁹³

The ‘structure of mythic events’ of the Dreaming ‘is believed to have been set once and for all at the very beginning of things, during the creative era’ ⁹⁴. However, due to the remnant spiritual power of the Dreaming beings in the land, in the totems and in the Aboriginal people themselves, there continues ‘the contemporary relevance of a living mythology which concerns everyday behaviour and thought’. ⁹⁵ Aboriginal mythology ‘is not so much a celebration of the past… [as] [i]t has to do with the present, and is a continuing force, adaptive to changing social circumstances’. ⁹⁶ When Dreaming stories are re-told they form ‘symbolic statements, believed to convey more than their bare story value. They are explanatory vehicles which are subject to interpretation.’ ⁹⁷

⁹² Ibid.
⁹³ Ibid.
⁹⁴ Ibid.
⁹⁵ Ibid.
⁹⁶ Ibid.
⁹⁷ Ibid.
2.2.4 Religious Offices in Aboriginal Religion

As adults receive progressively more sacred knowledge, certain individuals are identified as possessing the requisite qualities to become ceremonial leaders. These people make extra efforts at learning the sacred law esoterically, both naturally and supernaturally. These roles are fulfilled by both women and men (though it is the men who succeed to the highest offices) and are known in English as ‘clever men’ or ‘witch doctors’.

Within Aboriginal society the ‘clever men’ are understood to largely practice ‘white magic’, that is benevolent magic, though they (and others) are also known to be capable of exercising ‘black magic’, that is sorcery.\textsuperscript{98} Whilst white magic is practiced openly, black magic is usually practiced in secret, yet may involve a number of people.

In general terms, traditional Aboriginal societies are based on localised belief systems that vary in detail across the different systems yet share a number of common and core phenomena. Some of those core and common aspects include the secret-sacred nature of the religious law, the

\textsuperscript{98} Berndt and Berndt, \textit{The First Australians}, above n 63, 129.
notion that authority in the religion is of a supernatural (sacred) quality and the source of that spiritual authority is the earth. These religio-legal systems regulate all aspects of life, whether it be in matters concerning individuals, their social community or their living physical environment. Also, Aboriginal people are linked to the spiritual source of the mythical ancestral beings who initiated the religious law through totemic beliefs and practices.

2.3 Context of Madayin in Time and Place

The Yolngu\textsuperscript{99} Aboriginal people have lived in Arnhem Land\textsuperscript{100} since time immemorial.\textsuperscript{101} Traditionally, the Yolngu recognised authority primarily in their customary religion and legal system, which are referred to in

\footnotesize{\textsuperscript{99} The term ‘Yolngu’ is sometimes used just to represent Aboriginal people in northeast Arnhem Land and sometimes to represent all Arnhem Landers. All of the tribes of Arnhem Land have essentially the same social, kinship, legal and religious organisation: W Lloyd Warner, \textit{A Black Civilisation: a social study of an Australian tribe} (Harper & Row, 1969 revised edition) 15. In this thesis the term ‘Yolngu’ is used generally to cover all Aboriginal people in Arnhem Land.

\textsuperscript{100} This thesis is largely concerned with central and north-eastern Arnhem Land though the general propositions put forward are common for Arnhem Land generally and for many Aboriginal societies beyond Arnhem Land. For a map of Arnhem Land see Yothu Yindi Foundation, \textit{Arnhem Land Location Map} (2005) Garma Key Forum Report 2005 <http://www.cdu.edu.au/garma-report/map.htm>.

\textsuperscript{101} In English and Australian legal terms ‘time immemorial’ is equivalent to ‘before legal memory’ which was fixed at 1189 by the \textit{Statute of Westminster I 1275}; Peter Butt (ed), \textit{Butterworth’s Concise Australian Legal Dictionary} (LexisNexis, 3rd ed, 2004).}
broad terms in this thesis by the Yolngu term ‘Madayin’, an all-embracing Yolngu term for Yolngu customary religion and law.\textsuperscript{102} While Yolngu society is not homogenous and uniform throughout Arnhem Land, the broad institutions of the Yolngu world (such as law and religion) are more similar than dissimilar. This thesis concentrates on these broad uncontested institutions rather than localised differences.\textsuperscript{103}

From 1788 the English began settling Australia,\textsuperscript{104} concentrating initially in the southern regions. English statutes ‘provided that the settlers were governed by the common and statute law of England’.\textsuperscript{105} The frontier lines that surrounded new English settlements as they encroached upon Indigenous\textsuperscript{106} society continued to widen over successive decades.\textsuperscript{107} Arnhem Land, in the northern most region of the Northern Territory of

\textsuperscript{102} Ian Keen, \textit{Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land} (Clarendon Press, 1994) 211, 256.

\textsuperscript{103} Ibid 14.


\textsuperscript{106} The term 'Indigenous' is used here as a general word to describe the numerous Indigenous people groups throughout Australia. The term ‘Aboriginal’ refers only to mainland Indigenous people though it would also cover Tasmania. In this thesis the Aboriginal people referred to are almost all from the Northern Territory, especially Arnhem Land.

\textsuperscript{107} Patricia Grimshaw, Marilyn Lake, Ann McGrath, and Marian Quartly, \textit{Creating a Nation} (McPhee Gribble, 1994) 131.
Australia, provided a number of barriers to English settlement, including being a great distance from the first English settlements, a tropical climate and many other natural aspects extremely foreign to the English way of life.\textsuperscript{108} Around the turn of the twentieth century, some pastoralists made incursions into southern and western regions of Arnhem Land but did not remain.\textsuperscript{109} The Yolngu opposed the cattle industry in Arnhem Land, ‘mainly in the form of cattle killing’\textsuperscript{110} These frontiers were dangerous places for Yolngu who suffered greatly at the hands of pastoralists and police\textsuperscript{111} although Yolngu society was not destroyed by colonial efforts.\textsuperscript{112} Consequently, non-Indigenous Christian Missionaries established sanctuaries throughout Arnhem Land as places where Yolngu could find safety from the frontier and hear the Christian message\textsuperscript{113} of eternal salvation through faith in Jesus Christ.\textsuperscript{114} These missions were often ‘the only places where people were able to find a level of sanctuary

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\textsuperscript{109} Ibid 54.

\textsuperscript{110} Keen, above n 102, 24.

\textsuperscript{111} Peter Berthon, Marjorie Hall, William Hall, John Harris, Andrew Robertson and Carol Robertson (Eds) \textit{We are Aboriginal: Our 100 years: from Arnhem Land’s first Mission to Ngukurr today} (CMS Acorn, 2008), 12 – 17.

\textsuperscript{112} Keen, above n 102, 20-35.

\textsuperscript{113} Berthon, et al, above n 111, 16 – 19.

\textsuperscript{114} John 3:16.
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from the depredations of uncontrolled frontier violence’.\textsuperscript{115} Many of the Aboriginal people became Christian while maintaining, to varying degrees, their traditional religion and law.\textsuperscript{116}

A number of Christian ‘missions’ – physical locations that served as meeting places for Christian missionaries and Yolngu – were established in Arnhem Land. The Church Missionary Society (CMS) is the extension of the Anglican Church that conducts missionary activities amongst the Yolngu of Arnhem Land.\textsuperscript{117} The first CMS mission base in Arnhem Land was established in 1908 on the Roper River and was relocated ten kilometres upstream to present-day Ngukurr in 1940 after serious flooding of the first location.\textsuperscript{118} Another half dozen missions were established by the CMS throughout Arnhem Land including on Groote Eylandt, Oenpelli and Numbulwar. The Methodist Overseas Mission (MOM), a missionary arm of the Methodist Protestant denomination,

\textsuperscript{116} See for example Howard Morphy, ‘Mutual Conversion?: The Methodist Church and the Yolngu, with particular reference to Yirrkala’ (2005) \textit{Humanities Research} 7(1), 41–51.
\textsuperscript{118} Ibid 39.
established its first mission base at Milingimbi in 1926.\textsuperscript{119} From Milingimbi other mission bases were set up by MOM throughout Arnhem Land including Galiwinku on Elcho Island and Yirrkala. The Methodist Church later merged with the Presbyterian and Congregationalist Churches to form the Uniting Church.\textsuperscript{120} Presently the Uniting Church has about a dozen church congregations through Arnhem Land, most of which are predominantly constituted by Yolngu. Each mission base of the MOM and the CMS established for the Yolngu in Arnhem Land was established in an area with no existing church. In this way no Yolngu community established by the missionaries had more than one church. All of the missions established by CMS and MOM were taken over by the Australian government and reconstituted as Aboriginal communities between 1960 and 1980.\textsuperscript{121}

Over time, the non-Indigenous Missionaries were replaced by local Yolngu Christians to lead the local churches.\textsuperscript{122} Many of the Yolngu

\textsuperscript{119} Howard Morphy, ‘The Methodist Church and the Yolngu, with particular reference to Yirrkala’ (2005) 12 \textit{Humanities Research} 41, 42.

\textsuperscript{120} The Uniting Church in Australia, \textit{About the Uniting Church} (12 April 2011) The Uniting Church in Australia <http://www.uca.org.au/about.htm>.

\textsuperscript{121} See for example Cole, \textit{From Mission to Church}, above n 117, 80, 108, 118.

church leaders have also been leaders in Madayin.\textsuperscript{123} Meanwhile, the Australian law,\textsuperscript{124} both Commonwealth and Northern Territory, assert jurisdiction over the Yolngu in Arnhem Land.\textsuperscript{125} Therefore, as a result of around 100 years of contact with non-Indigenous settlers and Christian missionaries, most Yolngu are influenced by three sources of authority: Madayin, Christianity and Australian law. These three normative systems include phenomena (such as practices and authorities) that are not always compatible with those of the other two normative systems.\textsuperscript{126} Consequently, the Yolngu are faced with situations in which they need to compromise their adherence to one system in order to preserve their adherence to another.\textsuperscript{127} These situations arise in a variety of ways, such as decisions regarding places of burial, school attendance, marriage and mining on Yolngu lands.

\textsuperscript{123} Such as Djiniyini Gondarra, a well-known Uniting Church minister and a \textit{jirrikaymirri} (customary law leader for the \textit{dhawu} moiety in Arnhem Land).

\textsuperscript{124} In this thesis I have used the term ‘Australian law’ as an efficient term to refer to the cases and legislation of the Commonwealth of Australia and the Northern Territory of Australia and to avoid the use of an acronym. The term does not infer that in some way Madayin specifically, or Aboriginal customary law generally, is not Australian or is not law.

\textsuperscript{125} For the Commonwealth of Australia see the \textit{Australian Constitution} Chapter I, II and III. For the Northern Territory of Australia see \textit{Northern Territory (Self-Government) Act 1978} (Cth) Part III and IV in respect to legislative and executive power; for judicial power see Supreme Court Ordinance 1911 (Cth) No. 9 of 1911, \textit{Northern Territory Supreme Court Act 1961} (Cth) and \textit{Supreme Court Act 1979} (NT).

\textsuperscript{126} Berthon, et al, above n 111, 52-53.

\textsuperscript{127} Ibid.
In his classic work ‘White Man Got No Dreaming’,\(^{128}\) eminent anthropologist Professor Stanner simply and forcefully wrote ‘Aboriginal customary law … is in radical conflict with European (ie, Australian) law in almost every respect… which… makes life worth living’ for Aboriginal people.\(^{129}\) Stanner suggested that ‘[o]nly by extremely high abstraction can the two systems be brought together at all, and then only in a way which is almost useless administratively’.\(^{130}\) Unfortunately, Stanner’s suggestion that Australian law and Aboriginal customary law conflict ‘in almost every respect’ has yet to be tested by empirical research. The issue is typically only examined by lawyers\(^{131}\) in an ad hoc and incomplete manner as it arises in cases before courts. Notwithstanding Professor Stanner’s remarks, many Madayin leaders and other Yolngu from Arnhem Land have advocated having their Madayin law recognised by the Australian legal system and the Christian Churches.\(^{132}\) Typically, Madayin leaders call for Madayin law to work together with the other normative systems


\(^{129}\) Ibid.

\(^{130}\) Ibid.

\(^{131}\) I use the term ‘lawyer’ in this thesis in a broad sense to include legal practitioners, judicial officers and law academics.

in an eclectic and syncretic fashion. Some forms of syncretism have already emerged in discordant areas of Australian law (such as native title), whilst syncretism in Yolngu church theology is more developed and practiced.\textsuperscript{133}

The question ‘should Madayin law be recognised?’ is answered differently in different periods. Following the British declaration of terra nullius and contemporaneous claim of sovereignty over Australia in 1788, there was little room for consideration of Indigenous law before Federation. Australian law was reformed in various ways in the second half of the twentieth century for the purpose of delivering benefits to Indigenous peoples. Significant law reform milestones in this period include: the successful passing of the 1967 Constitutional Referendum (which gave Aboriginal people the right to vote, enabled Aboriginal people to be included in the Commonwealth census and gave the Commonwealth power to legislate in respect of Aboriginal people); the enactment of the \textit{Aboriginal Land Rights (Northern Territory) Act 1976}, which resulted in around 50 per cent of the land in the Northern Territory being awarded as freehold title to the relevant Aboriginal traditional owners; and, the recognition by the Australian common law of native title in the

\begin{footnotesize}
\textsuperscript{133} See for example Keen, above n 102, 255-289 and Fiona Magowan, \textit{Melodies of mourning: music and emotion in Northern Australia} (UWA Press, 2007).
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case of *Mabo v Queensland No. 2* (1992) 175 CLR 1. The last few decades of government policy in the area of Indigenous affairs has largely pursued a ‘self-determination’ approach, that is an approach that aims to empower Aboriginal people to determine economic, social and political (but not including sovereignty or succession) outcomes for themselves. In this context, many Yolngu law leaders have demanded Madayin to be recognised by the Australian legal system in the spirit of self-determination. It is timely therefore, to give serious consideration to how Madayin may be recognized by, and work together with, the Australian legal system and Christianity.

While Christianity is typically described as ‘religion’, and parliamentary legislation and cases from courts described as ‘law’, Madayin is both law and religion. This thesis therefore takes the approach developed in comparative religion scholarship of accepting the veracity of the phenomena for the adherent without evaluating the ultimate truth of the

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135 Ibid.
136 Gondarra and Trudgeon, above n 132.
phenomena. Accordingly, the thesis does not attempt to make value judgments in regards to any of the three normative systems it considers, rather each system is evaluated against the other two in order to establish in what respects they are mutually compatible and in what respects they are not. This approach allows a comparison of similar phenomena across systems in order to discover their similarities and differences.

Adherents of two systems may be able to agree on a practical measure yet draw upon radically different sources of authority to establish or justify the practice. For example, both the Atheist and the Christian agree that it is wrong to murder. The sources of authority that each system draw upon to establish that rule are wildly different even though the same practical outcome results. Both systems have deeper, more foundational, norms than merely ‘do not kill’ that provide the essential character of the system. However, those foundational norms do not agree with each other. Whilst the Christian has received the commandment ‘do not kill’, it is the deeper phenomena of sin, God’s abhorrence of sin and the believer’s desire to please God, that provides the authoritative basis for not killing. Thus the primary normative aspect for the Christian is avoidance of sin. The

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Atheist does not accept God or sin, and so cannot accept the authority that persuades the Christian not to kill. Yet the Atheist may still approve of anti-murder laws. Therefore the Atheist and the Christian both agree not to murder, and both agree with anti-murder laws, but each does so for very different reasons.

When this occurs it does not mean that we need, ought or can reconcile the authoritative sources of the different systems. It is too simple to insist that such an effort be made. It is as absurd as reasoning ‘all dogs have four legs, and since a cat has four legs, a cat is a dog’. Just because two systems accord in some practices it does not lead to the conclusion that their respective authority sources are also in agreement. Therefore, when considering Aboriginal religion and Christianity in this thesis it is not assumed that ‘it’s all the same God anyway’. Rather the actual authority claims made by each system, as well as the nature and functioning of those authorities, are accepted upon their own terms, and those claims critically evaluated against each other. The same critical evaluation is made of authority in Australian law.
2.3.1 Yirrkala as a snapshot of intersections

If the three normative systems never interacted with each then this analysis would have only theoretical value. However, in Arnhem Land the three normative systems of Madayin, Australian law and Christianity are often interacting. The observations by Williams of the Arnhem Land community of Yirrkala provides a snapshot of the three normative systems interacting with each other and just how interwoven the intersections of these three systems can be.

Williams has observed that, in relation to non-Indigenous Australians who claimed and exercised authority over Yolngu in Yirrkala, such as police officers, judicial officers, welfare offices and Christian missionaries, ‘Yolngu tended to perceive (these) white Australians… as being in positions of authority as defined by Yolngu social structure’.\footnote{Nancy Williams, \textit{Two Laws: managing disputes in a contemporary Aboriginal community} (1987) 12.}

Williams writes that in the competition for resources, the authority of clan leaders defeats merit by non-clan leaders. One highly sought-after resource is a new government house. At the time of Williams’ research
the criterion for Yolngu to receive a government house akin to a standard Australian house was to first demonstrate “ability to maintain a ‘transitional’ house at a satisfactory level of order and cleanliness”.[140]

However, if a Yolngu clan leader claimed the new house before other Yolngu who had met the prescribed criterion were able to occupy it, the meritorious Yolngu would defer to the authority exercised by the clan leader and would not take occupancy of the new house.[141] Another highly valued resource for Yolngu men are women. Widows do not necessarily go to the most meritorious potential husband. Williams notes that a young Yolngu man who replaced his deceased father as the leader of a certain clan practiced the Ngarra law in respect of inheriting some of his late father’s wives rather than distributing those widows to other men.[142]

In the post-colonial context, the Yolngu ‘had made certain accommodations in the time and place of ritual performance’[143] required by the traditional religion, however ‘their beliefs remained essentially intact’.[144] Williams argues that the Yolngu ‘were aware of conflicts that

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[140] Ibid 19.
[141] Ibid.
[142] Ibid 21.
[143] Ibid 33.
[144] Ibid.
resulted from subscribing to Christian dogma and ideology while retaining their own’ Indigenous religion.145

Galarrwuy Yunupingu, who would later become the Chairman of the Northern Land Council, had ‘long wrestled with these syncretism problems he faced in considering the decision to become a candidate for the Christian ministry’.146 Yunupingu is reported to have attempted to synthesis the supernatural healing ministry in Christianity with a local source of supernatural power found in certain natural objects such as rocks and sand.147

According to Williams, Yunupingu reconciled these two sources of power in the following way:

natural objects were put here by God; they were gifts of God. Each clan had its own special natural things. Christ made use of natural things in healing people, for example, he made a blind man see by putting mud over his eye lids.

145 Ibid.
146 Ibid.
147 Ibid.
Galarrwuy said that he always combined prayer with the use of sand in treating people. It was the prayer rather than the sand, he added, that cured.\footnote{\textsuperscript{148} Ibid.}

Even though Yunupingu seriously considered becoming a Christian minister he holds a number of beliefs such as reincarnation and that a totemic crocodile is his clan’s creator and giver of tribal lands\footnote{\textsuperscript{149} Galarrwuy Yunupingu, cited in H Watson and D W Chambers, \textit{Singing the Land, Signing the Land} (Deakin, 1989) 26, cited in Murray Seiffert, \textit{Gumbuli of Ngukurr: Aboriginal Elder in Arnhem Land} (Acorn, 2011) 333.} that ‘are anathema to the Christian faith’.\footnote{\textsuperscript{150} Seiffert, above 149, 331.} Yunupungu explains:

\begin{quote}
I see a crocodile as an animal that is part of me and I belong to him, he belongs to me. It’s a commonness of land ownership. Everything that I have comes from the crocodile. Crocodile, he’s the creator and the land-giver to the Gumatj people... we have always treated crocodile in a way that it is part of a family. We consider ourselves, even name ourselves as crocodile and we come back as crocodile. When our body’s dead, gone, our spirit becomes crocodile.\footnote{\textsuperscript{151} Yunupingu, above 88.}
\end{quote}

In Yolngu society authority is linked to land.\footnote{\textsuperscript{152} Williams, above n 149, 41.} The Yirrkala Christian mission and the surrounding village were located on the land of a certain clan. Therefore a Yolngu with a complaint or a dispute to resolve could
draw upon the authority of either the local Christian minister or the leader of the clan upon which land the mission and the village was located in order to seek a remedy.\textsuperscript{153} Although the clan leader may still draw upon authority from the traditional system, the new Christian normative system was not by any means shunned. Williams reports how the Yirrkala village council president, a Yolngu man, opened a dispute resolution meeting with a Christian prayer, ‘and then stressed the ‘new way of life’ free from the revenge expeditions of the ‘old way’ (before the mission was established at Yirrkala)’.\textsuperscript{154} The same exhortation was given by a number of other speakers at the same meeting.\textsuperscript{155}

\textsuperscript{153} Ibid 29.  
\textsuperscript{154} Ibid 86.  
\textsuperscript{155} Ibid.
2.4 Inquiries into Aboriginal customary law by Australian Law Reform bodies

In the Australian Law Reform Commission’s *Recognition of Aboriginal Customary Laws* report\(^{156}\) the Commission noted that very little formal study or recording of Aboriginal customary law has occurred in Australia.\(^{157}\) The greatest difficulty surrounding the study of Aboriginal customary law is that traditionally so much of it has been secret.\(^{158}\) Breaching Aboriginal customary law secrecy – even viewing sacred objects by uninitiated people – can be punished by ‘death or [other] very severe punishment.’\(^{159}\)

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 Pascoe\(^ {160}\) and James Gaykamangu.\(^ {161}\) Both texts are

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\(^{157}\) Ibid [37].


\(^{160}\) Gaymarani, above n 137.

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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)\(^\text{162}\) 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.

There have been three major reports completed by Australian law reform bodies over the last thirty years looking into issues of Aboriginal customary law. The first of these was the Australian Law Reform Commission’s (ALRC) *Recognition of Aboriginal Customary Laws*


\(^{162}\) 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.
Report\(^{63}\) which stated that the term ‘Aboriginal customary law’ is ‘highly ambiguous’.\(^{164}\) The ALRC also noted that systematic studies of Aboriginal customary laws in ways accessible by non-initiates were rare\(^{165}\) and that in relation to Australian Aboriginal customary law no reference books existed as indeed they did and do exist in other countries such as the Natal Code of Native Law in South Africa.\(^{166}\)

In attempting to define Aboriginal customary law the ALRC observed that:

The classification of this body of rules, values and traditions as ‘law’ has, however, caused divisions of opinion, especially for lawyers in the positivist tradition of jurisprudence, and for anthropologists adopting definitions of ‘law’ from that tradition. The difficulty is greater because most systems of indigenous customary laws include customs or principles which may appear to observers to be more like rules of etiquette or religious beliefs, as well as other more obviously ‘legal’ rules and procedures.\(^{167}\)

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\(^{63}\) ALRC, above n 96.

\(^{164}\) Ibid [98].

\(^{165}\) Ibid [37].

\(^{166}\) Ibid [98].

\(^{167}\) Ibid [100].
The ALRC Report also draws upon comments by a respected legal academic, Elizabeth Eggleston, to make the point that:

Law and religion were intimately bound up in Aboriginal society... and any attempt to identify certain segments of Aboriginal life as ‘legal’ involves the imposition of alien categories of thought on the tribal society. Some modern Aborigines have made comparisons between their law and the Australian legal system on the basis of common notions of rules and sanctions for their breach but they have also interpreted the word ‘law’ to mean ‘way of life’ and ‘religion’.168

The ALRC concluded that ‘narrow legalistic definitions of Aboriginal customary laws will misrepresent the reality’.169 The Commission agreed with Justice Blackburn in Milirrpum’s case where his Honour wrote:

I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions... What is shown by the evidence is, in my opinion, that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is

168 Elizabeth Eggleston, Fear Favour and Affection (Australian National University Press, 1976) 278; cited in ALRC, above n 96, [100].
169 ALRC, above n 96. [101].
definable, in that it is the community of aboriginals which made ritual and
economic use of the subject land. In my opinion it does not matter that the
precise edges, as it were, of this community were left in a penumbra of partial

The Northern Territory Law Reform Committee’s ‘Report on
Aboriginal customary law’\footnote{Northern Territory Law Reform Committee, \textit{Report on Aboriginal customary law} (2003).} sought to clarify the meaning of ‘customary law’ with the following:

Under the general [Australian] law, the term “customary law” is a
contradiction. “Custom” and “law” are regarded as two distinct concepts and
never the twain shall meet unless and until “custom” is converted into a law by
statute; in which case it ceases to be “custom”… [However] such a
distinction is unknown to Aboriginal society. Aboriginal members of the
Committee and many others who have expressed their views, have emphasized
Aboriginal tradition as an indivisible body of rules laid down over thousands of
years and governing all aspects of life, with specific sanctions if disobeyed. The
The expression “customary law” is therefore correct, as containing both concepts in
the one expression.\textsuperscript{172}

The most recent law reform report into Aboriginal customary law is that
of the Law Reform Commission of Western Australia (LRCWA).\textsuperscript{173}

This report includes the following statement:

During the Commission’s consultations with Western Australian Aboriginal
communities, Aboriginal people emphasised that their traditional ‘law’ was a
part of everything, was within everyone and governed all aspects of their lives.
In other words, customary law cannot be readily divorced from Aboriginal
society, culture and religion.\textsuperscript{174}

The LRCWA determined that:

Aboriginal customary law embraces many of the features typically associated
with the western conception of law in that it is a defined system of rules for the
regulation of human behaviour which has developed over many years from a

\begin{footnotes}
\item[172] Ibid II.
\item[173] Law Reform Commission of Western Australia, \textit{Aboriginal Customary Laws},
\item[174] Ibid 64.
\end{footnotes}
foundation of moral norms and which attracts specific sanctions for noncompliance.\textsuperscript{175}

However, this ‘legal’ character of customary law does not negate its ‘religious’ character. Indeed attempts at separating aspects of Aboriginal life into discreet categories of ‘legal’ and ‘religious’ will impose ‘alien categories of thought’ upon the Aboriginal society.\textsuperscript{176} Aboriginal customary law also includes the purpose of connecting ‘people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and… [the] responsibility to the maintenance of this order’.\textsuperscript{177}

The LRCWA concluded:

\textquote{The term ‘customary law’ cannot be [and on some arguments should not be] precisely or legalistically defined. Instead, the Commission favoured an understanding of the term that encompassed the holistic nature of Aboriginal customary law which the Aboriginal people of Western Australia shared with the Commission.}\textsuperscript{178}

\textsuperscript{175} Ibid.
\textsuperscript{176} Eggleston, above n 168, 278.
\textsuperscript{177} Ibid.
\textsuperscript{178} Law Reform Commission of Western Australia, above n 104, 64.
All three law reform bodies observed that Aboriginal customary law is a system that regulates Aboriginal life in a holistic way. Aboriginal life, including law, ‘was organised fundamentally in religious terms’. The scope of customary law is not simply legal; it is also religious.

In a general sense, it is not a matter of contention to state that Aboriginal customary law is ‘based on... the ‘dreaming’ or that ‘Aboriginal legal systems are inextricably linked with religion’, though it might be better put by simply saying that in the Aboriginal context law and religion are one and the same. In the famous *Milirrpum v Nabalco Pty Ltd* case that also concerned Madayin adherents, Blackburn J held that ‘the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship’ notwithstanding that His Honour also held, and based on the same evidence, that ‘[i]f ever a system could be called “a government of laws, and not of men”, it is that

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181 Ibid, 3.

182 (1971) 17 FLR 141.

shown in the evidence before me’.\textsuperscript{184} In fact traditional Aboriginal religion is all-pervasive in the life of the individual and society; it is part of every aspect of life.\textsuperscript{185} From spear making to cooking, marriage law to mortuary rites, ‘everything… is ordained by the Spirit Ancestors’.\textsuperscript{186} Berndt writes ‘[t]raditional Aboriginal societies were examples of what have been called sacred societies. That is to say, religion was all-pervasive and permeated all aspects of social living.’\textsuperscript{187}

Being a religion that regulates all aspects of life, traditional Aboriginal religion also performed some of the functions that many modern societies describe as the realm of law alone. Whist law and religion have long been separate enterprises in Australia and England, this is not the case in Australian Aboriginal society. Professor Berndt commented:

\begin{quote}
Aboriginal religion concerned everyone within a community… [and] was intimately associated with everyday social living, with relations between the sexes, with the natural environment, and with food-collecting and hunting [as
\end{quote}

\begin{flushleft}
\textsuperscript{184} Ibid, 267.  \\
\textsuperscript{185} Rose, above n 57, 97.  \\
\textsuperscript{186} Charlesworth, above n 67, 133.  \\
\end{flushleft}
Indeed as a legal system that draws upon spiritual sources for its authority, a traditional Aboriginal religion may be described as a theocracy.\textsuperscript{189} Writing on the Djanggawul mythical beings who are the ultimate source of authority for half of the Ngarra rituals,\textsuperscript{190} Professor Berndt notes that the Djanggawul:

are acknowledged as law-givers... the present marriage rules [in Ngarra customary law] are said to have been instituted by the Djanggawul... [who] created and gave to their people the complete structure of their social organization, with its associated culture... [and]... are considered responsible for establishing the fundamental pattern of this Aboriginal society.\textsuperscript{191}

\textsuperscript{188} Ibid.
\textsuperscript{189} Ronald Berndt, \textit{An Adjustment Movement in Arnhem Land, Northern Territory of Australia} (Cashiers de L’Homme, Mouton) 14; A theocracy is described in Alison Moore (ed), \textit{Macquarie Concise Dictionary} (Macquarie Dictionary Publishers, 4\textsuperscript{th} ed, 2006) 1270 as ‘a form of government in which God or a deity is recognised as the supreme civil ruler, his laws being interpreted by the ecclesiastical authorities.’
\textsuperscript{190} Ronald Berndt, \textit{Djanggawul: an Aboriginal Religious Cult of North-Eastern Arnhem Land} (Philosophical Library, 1953) xvii.
\textsuperscript{191} Ibid, 51.
A dichotomy between law and religion in the Madayin context will only be a false dichotomy. Gaymarani George Pascoe, a dalkaramirri,\textsuperscript{192} writes ‘the Ngarra law is not simply “law” as understood in Australian legal circles. Ngarra “law” is religious customary law, that is, the law of the tribal religion of the Yolngu adherents’.\textsuperscript{193} Ngarra marriage law is sacred.\textsuperscript{194} Ngarra law concerns itself with sacred sites, objects and paintings.\textsuperscript{195} In Yolngu language marr means ‘spiritual power or strength or supernatural power… Marr is very important in Ngarra law because that is where the strength is. A dalkarmirri has marr’.\textsuperscript{196}

2.5 Chapter Summary

The Yolngu Aboriginal people of Arnhem Land have a holistic normative system known as Madayin that can be described as both law and religion. The Australian legal system asserts universal application of its law to all people within its jurisdiction, including the Aboriginal people of Arnhem

\textsuperscript{192} A dalkaramirri is ‘the primary legal, religious and political figure in the Ngarra system’; Gaymarani, above n 137, 287.
\textsuperscript{193} Ibid 283.
\textsuperscript{194} Ibid 289.
\textsuperscript{195} Ibid 294-295.
\textsuperscript{196} Ibid.
Land, and generally ignores Aboriginal customary law.\textsuperscript{197} Kriewaldt J wrote ‘[t]he Australian courts have consistently held that the whole of the law at any given time applies to Aborigines and whites alike’.\textsuperscript{198} The Yolngu people have also has sustained contact with Christianity due to the presence of Christian missionaries in Arnhem Land, indeed the majority of Yolngu identify themselves as Christian.

Undisputedly, there is more than one normative system functioning in the lives of most Yolngu people and most Northern Territory Aboriginal people, especially those living in remote communities. If, as Southwood J has declared, ‘the time has well and truly come when men in Aboriginal communities must totally abandon... violent customary laws and practices’ then the time has also come for non-Indigenous Australian lawyers to undertake a serious study of Aboriginal customary law, especially those lawyers working in areas in which the customary legal systems are still functioning. Ignorance of customary law is not a viable solution to accomplishing justice for Aboriginal Australians.

\textsuperscript{197} Eggleston, above n 168, 277.
\textsuperscript{198} Kriewaldt J, ‘The application of the criminal law to the Aborigines of the Northern Territory of Australia’ (1960) University of Western Australia Law Review 5, 17.
Having covered the essential preliminary matters of context and terminology in this chapter, Chapter Three will begin the analysis of authority in each of the three systems at the foundational level.
Chapter Three: Foundational sources of authority and purposes of the three normative systems
Chapter 3

Foundational sources of authority and purposes of the three normative systems

This chapter describes and analyses the foundational sources and purposes of authority of the three normative systems of Madayin, Australian law and Christianity. In this thesis ‘foundational’ is used to describe the most fundamental, general and overarching elements of the normative systems. The purpose of this chapter is to introduce the main tenets of authority in the three systems being considered, but this thesis does not attempt to exhaustively cover each normative system considered. Rather, points of reference from each system are identified, analysed and evaluated in order to enable a comparative study across the three systems. The first points of reference considered are the general or primary sources and purposes of authority.

The chapter begins with a description and analysis of authority in Madayin. Topics include the origins and purposes of authority in
Madayin, personal authority of leaders in Madayin, and the relative and the eclectic approach of Madayin including the exercise of Madayin authority in the post-colonial context.

Following on from the Madayin system, the sources and purposes of authority in Australian law are described and analysed. Topics include a brief overview of the relevant English heritage of Australian law, jurisprudential conceptualisations of authority in modern Western law especially English law, and relevant aspects of the Australian and Northern Territory constitutions. This section of the thesis establishes many contextual and historical elements relevant to understanding the issues from the Australian law perspective.

The chapter then describes and analyses the sources and purpose of authority in Christianity. This section begins by briefly recounting the major themes in Christianity. Other topics include the authority of the Scriptures, the nature and functioning of Christian authority, and opposition to Christian authority. In this thesis the terms ‘Christian’, ‘Christianity’ and ‘the Church’ are used in their general, universal sense. The terms ‘Scripture’ and ‘Bible’ are used interchangeably as too are the terms ‘Kingdom of Heaven’ and ‘Kingdom of God’.
3.1 Foundational sources of authority and purposes in Madayin

Madayin is the Yolngu term describing ‘the complete system’ of customary and religious law for the Yolngu of Arnhem Land\(^1\) 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.\(^2\) It has been translated into English as ‘sacred law’.\(^3\) 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.\(^4\) Fertility is at the core of Yolngu customary law and religion.\(^5\)

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\(^2\) Aboriginal Resource and Development Services Inc, above n 1, 33.

\(^3\) Howard Morphy, ‘From dull to brilliant: the aesthetics of spiritual power among the Yolngu’ (1989) 24 *Man* 21, 25.


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.\footnote{Ibid 32-33; Morphy, above n 3, 33.}

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’.\footnote{Graham Paulson, ‘Towards an Aboriginal Theology’ Pacifica 19 (October 2006) 310, 318.} 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) myth\footnote{Gaykamangu, above n 8, 242.} and Gaymarani, a member of the Warra Warra clan, describes how Baru the mythical crocodile gave law to people in Arnhem Land.\footnote{George Pascoe Gaymarani, ‘An Introduction to the Ngarra Law of Arnhem Land’ (2011) 1 Northern Territory Law Journal 283, 286–287.} 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.\textsuperscript{16}

In addition to the term Madayin being used as an over-arching description of the Yolngu normative system of law and religion, ‘madayin’\textsuperscript{17} is both an adjectival term used generally for ‘anything connected to the wanggar’\textsuperscript{18} and a name of a specific ceremony, the ‘Madayin’ ceremony.\textsuperscript{19} 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’.\textsuperscript{20} Also, the ceremony emphasises ‘group identity as well as connections between groups of the same moiety – connections through women necessary for reproduction’.\textsuperscript{21}

\begin{itemize}
\item[17] 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).
\item[18] Ian Keen, \textit{Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land} (1994, Clarendon) 132.
\item[19] Ibid 143.
\item[20] Ibid.
\item[21] Ibid 151.
\end{itemize}
3.1.1 Ngarra and Magaya

The greatest Madayin institution in Arnhem Land is Ngarra. Conceptually Ngarra may be considered to be a combined legislative and judicial institution.

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’. Djiniyini Gondarra is recorded as describing magaya as when ‘[e]verything is still and tranquil’. Magaya is considered as foundational to the Yolngu legal and governmental system; 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’.

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22 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.
24 Gondarra & Trudgen, above n 1, 8; Gaymarani, above n 15, 286.
25 Gaymarani, above n 15, 286.
26 Aboriginal Resource and Development Services Inc, above n 1, 33.
28 Ibid 9.
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

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29 Gaymarani, above n 15, 286.
31 Gaymarani, above n 15, 286.
33 Berndt, Djanggawul, above n 23, xvii.
34 Gaymarani, above n 15, 299–300.
35 Gondarra & Trudgen, above n 1, 14.
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

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36 Berndt, An Adjustment Movement in Arnhem Land, Northern Territory of Australia, above n 4, 14.
37 Keen, above n 18, 6-7.
38 Ibid 6.
39 Gaymarani, above n 15, 284.
40 Ibid 286.
41 Berndt, Djanggawul, above n 23, 15–16.
system and ‘offences against the sacred are the most serious of all’ and often attract the death penalty. 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.

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. 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’.

The Yolngu people assent to the Madayin in a ceremony known as wanga lupthun in which the people (not just the leaders) collectively

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43 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.
44 Gaymarani, above n 15, 286 – 287.
46 Ibid.
47 Gondarra & Trudgen, above n I, 2.
immerse themselves in water. It appears that involvement in the wanga lupthun is compulsory for Yolngu. A wanga lupthun ceremony is typically held every few years and is the culmination of the largest Ngarra ceremony.

3.1.2 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. The two moieties complement each other to complete Yolngu society. Ngarra ceremonies are moiety-specific. The Yirritja Ngarra is sourced to the ancestral beings Laintjung and Banaitja. Barama is another major Ancestral being for the Yirritja moiety. 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 and provides

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48 Ibid 8.
50 Berndt, Djanggawul, above n 23, 14.
51 Ibid.
52 Ibid 14.
53 Morphy, above n 3, 25.
54 Berndt, Djanggawul, above n 23, xvii.
the authority for the dhuwa moiety Ngarra. The central theme of Djanggawul is fertility. More specifically, the source of Djanggawul is female fertility and for this reason females are considered sacred in ways that men are not. The myth focuses upon the primal birth of the original Yolngu by the ancestral beings, the Djanggawul brother and sisters.

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. However, the 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.

3.1.3 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

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69 Gondarra & Trudgen, above n I, 6.
70 Ibid.
71 Ibid 8.
72 Ibid.
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 (m)embers 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 group’s economic, social and

73 Berndt, Djanggawul, above n 23, 169.
75 Ibid.
78 Berndt, Djanggawul, above n 23, 174.
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’.

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79 Elkin, above n 77, 87.
80 Gondarra & Trudgen, above n 1, 7.
81 Ibid.
82 Williams, above n 30, 45.
83 Ibid 46.
84 Ibid 45.
85 Berndt, Djanggawul, above n 23, 182.
86 Williams, above n 30, 45; 81.
Religious authority is the highest type of authority in Yolngu society and highly valued.\textsuperscript{87} As people grow older in Yolngu society they are attributed greater levels of sacredness.\textsuperscript{88} Consequently, an elderly male Madayin leader enjoys high status in Yolngu society.\textsuperscript{89} This high status is maintained by restricting the transference of the religious knowledge to the younger men.\textsuperscript{90} Williams writes that for the ‘Yolngu the most important things are hidden and access is highly restricted’.\textsuperscript{91}

The two most prominent functionaries in the Ngarra system are the dalkarmirri (or jirrikaymirri)\textsuperscript{92} 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.\textsuperscript{93} The jungay performs a number of complementary and support roles for the dalkarmirri and may generally be regarded as Ngarra lawyers\textsuperscript{94} or police.\textsuperscript{95} A dalkarmirri may be

\begin{enumerate}
\item[Ibid 46.]
\item[Ibid 45.]
\item[Ibid 46.]
\item[Ibid.]
\item[Ibid.]
\item[Ibid.]
\item[Dalkaramirri is the yirritja moiety term and jirrikaymirri is the dhuwa moiety term for equivalent offices: Gaymarani, above n 15, 287.]
\item[Ibid.]
\item[Ibid.]
\item[Gondarra & Trudgen, above n I, 9.]
\end{enumerate}
described as a ‘caller of the invocation’ in ceremonies.\footnote{Keen, above n 18, 94.} They are appointed by due process and must be a ‘competent man belonging to a group with rights to perform the invocation’.\footnote{Ibid; Gondarra & Trudgen, above n 1, 6.} Dalkarmirri also act as mediators in disputes and decision-makers for the group, and while ‘they do not make laws binding on the community’\footnote{Keen, above n 18, 95.} 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’.\footnote{Gondarra & Trudgen, above n 1, 9.} This doctrine of reciprocal responsibility and separation of authority in Yolngu society is known as yothu yindi.\footnote{Ibid.}

Essential to the dalkarmirri is marr, that is, ‘spiritual power or strength or supernatural power’.\footnote{Gaymarani, above n 15, 287.} Gaymarani writes that a ‘dalkarmirri has marr’.\footnote{Ibid.} According to Gaymarani one ‘can see marr in some people, such as Djininy [Gondarra]’.\footnote{Ibid.} Gaymarani traces the source of the marr in a dalkarmirri to the ancestors.\footnote{Ibid.} Marr may be understood to have a positive aspect ‘associated with happiness, strength, health and

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\begin{itemize}
\item \footnote{Keen, above n 18, 94.}
\item \footnote{Ibid; Gondarra & Trudgen, above n 1, 6.}
\item \footnote{Keen, above n 18, 95.}
\item \footnote{Gondarra & Trudgen, above n 1, 9.}
\item \footnote{Ibid.}
\item \footnote{Gaymarani, above n 15, 287.}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\end{itemize}
fertility, \textsuperscript{105} though it can also have a dangerous aspect such as being associated with death.\textsuperscript{106} Marr is considered ‘dangerous to anybody who is spiritually weak… [and can] give strength to participants in an avenging expedition’.\textsuperscript{107} 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{108}

3.1.4 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{109}. The designs themselves are also known as ‘madayin’, as are ‘anything connected to the wanggar’.\textsuperscript{110} These sacred law paintings function in Yolngu religion to re-create the mythical ancestral events, to prove ‘rights held by a clan’\textsuperscript{111} under Madayin including rights to land, ‘and as a source of spiritual power’.\textsuperscript{112} The designs may be painted on

\textsuperscript{105} Morphy, above n 3, 30.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
\textsuperscript{108} Fiona Magowan, 'It is God who Speaks in the Thunder . . .': Mediating Ontologies of Faith and Fear in Aboriginal Christianity', \textit{The Journal of Religious History} Vol. 27, No. 3, October 2003 293, 305.
\textsuperscript{109} Morphy, above n 3, 26.
\textsuperscript{110} Keen, above n 18, 132.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
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. 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’.

3.1.5 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. Kunapipi, like Djanggawul, is described in the literature as a fertility ceremony and is known not only in Arnhem Land but widely across the north of the Northern Territory and Western Australia.

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113 Ibid 132-133.
114 Gaykamangu, above n 8, 242.
115 Keen, above n 18, 286.
Kunapipi ritual is not indigenous to Arnhem Land; most probably it was introduced from a region to the south of Arnhem Land. Kunapipi comes under the Ngarra umbrella. The songs sung in the Kunapipi ceremony are considered sacred and echo the first songs sung by the ancestral beings.

There are variations on the name and the practice of the Kunapipi ceremony. Berndt has used the terms ‘Kunapipi’ and ‘Gunabibi’ to mean the same thing. 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.

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118 Ibid 144.
119 Gaymarani, above n 15, 297.
120 Berndt, Djanggawul, above n 23, 51; Berndt, Kunapipi: A Study of an Aboriginal Religious Cult, above n 116, Chapter 7.
121 There are a number of variations of spelling for ‘Kunapipi’ including ‘Kunabibi’, ‘Gunabibi’ and ‘Gunapipi’.
122 Berndt, An Adjustment Movement in Arnhem Land, Northern Territory of Australia, above n 4, 40; Berndt and Berndt, Man, Land and Myth in North Australia: the Gunwinggu people, above n 5, 117. See also Berndt’s reference to a Dr Warner spelling ‘kunapipi’ as ‘gunabibi’: Berndt, Kunapipi: A Study of an Aboriginal Religious Cult, above n 116, 16.
123 Berndt, Kunapipi: A Study of an Aboriginal Religious Cult, above n 191, 12.
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) as common to all variants of Kunapipi. While anthropologists have historically emphasised the fertility aspects of Kunapipi, contemporary Arnhem Land 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 Ngarru 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

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According to Gaymarani, offenders are retained in Kunapipi by force and are taught discipline throughout their term in Kunapipi.\textsuperscript{127} Entry into the Kunapipi ceremonial ground is strictly regulated by senior customary law leaders.\textsuperscript{128} Other than the offenders, only those who are participating in the ceremony are permitted entry.\textsuperscript{129}

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.\textsuperscript{130} Gaykamangu suggests that Kunapipi camps are suitable for offenders to ‘work off their sentences as community work orders’.\textsuperscript{131} 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’.\textsuperscript{132} 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’.\textsuperscript{133}

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\textsuperscript{126} Gaymarani, above n 15, 297.  \\
\textsuperscript{127} Ibid.  \\
\textsuperscript{128} Ibid.  \\
\textsuperscript{129} Ibid.  \\
\textsuperscript{130} Gaykamangu, above n 8, 243.  \\
\textsuperscript{131} Ibid 248.  \\
\textsuperscript{132} Ibid.  \\
\textsuperscript{133} Ibid.  
\end{flushleft}
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*\(^\text{134}\) Kunapipi is described as not being the same as ‘Gunapipi’. In the same document, Kunapipi, as recorded ‘by anthropologists such as Professor Ronald Berndt’,\(^\text{135}\) is known in its local form as ‘Ngurlmarrk’ which ‘originates from the Djungawul law’.\(^\text{136}\) However, Ngurlmarrk was closed or ended in approximately 1960.\(^\text{137}\) Another 2011 source states that Kunapipi has replaced Ngurlmarrk.\(^\text{138}\)

One possible explanation is, as Berndt has noted, that Kunapipi ‘conventionally includes ritual coitus, but the songs may be sung without


\(^{135}\) Ibid.

\(^{136}\) Ibid.

\(^{137}\) Ibid.

that accompaniment’;\textsuperscript{139} 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).\textsuperscript{140} However, the secret aspects of Kunapipi have been described in times past by non-Indigenous anthropologists.\textsuperscript{141}

Further and more detailed research on this issue is desirable but is not within the scope of this thesis. Some additional discussion on the intersections of Kunapipi with Christianity can be found in Chapter Seven. For the purposes of this thesis 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.

\textsuperscript{139} Berndt and Berndt, \textit{Man, Land and Myth in North Australia: the Gunwinggu people}, above n 5, 141-142.

\textsuperscript{140} Berndt, \textit{Kunapipi: A Study of an Aboriginal Religious Cult}, above n 191, 24-25.

\textsuperscript{141} Garde, above n 138, 403.
3.2 Foundational Sources and Purposes of Authority in Australian law

The starting point in understanding Australia’s socio-legal place in an international context is to be familiar with its Western legal tradition.\textsuperscript{142} Some of the characteristics of the Western idea of law include the separation of law from other normative systems (such as religion), the centrality or primacy of law as a method of regulating society, and the inherent authority of law.\textsuperscript{143} Other major socio-legal features of contemporary Australia include a multicultural population\textsuperscript{144} and government by representative democracy.\textsuperscript{145} Australian law has sprung out of the English branch of the Western legal tradition,\textsuperscript{146} therefore the English heritage of Australian law will first be considered.

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\textsuperscript{142} Patrick Parkinson, \textit{Tradition and Change in Australian Law} (Lawbook Co, 4th ed, 2010) 23.\\
\textsuperscript{143} Ibid 23-28.\\
\textsuperscript{145} s 24, \textit{Australian Constitution}.\\
\end{flushright}
3.2.1 The English heritage of Australian law

The location and division of authority in English law has changed over time.\(^{147}\) Prior to the thirteenth century the English Monarch enjoyed supreme authority in England and shared little of that authority other than with the Christian Church.\(^{148}\) The *Magna Carta* of 1215 recorded *inter alia* a decisive limiting of the authority of the King, an increase in power to the barons who would become the predecessors of Parliament, and the embryonic stage of what would later be described as ‘rule of law’.\(^{149}\) Rule of law becomes a re-occurring theme in English legal history and will be discussed further later in this chapter.

The theory of the divine right of kings (that ‘God had not only called the monarch to the throne, but had given him a sacred character and ordained that he should enjoy unrestricted power’)\(^ {150}\) was expounded by King James I in the sixteenth century.\(^ {151}\) The divine right of kings

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\(^{148}\) See for example ‘William I: Ordinance on Church Courts’ reproduced in Carl Stephenson and Frederick George Marcham, *Sources of English Constitutional History* (Harper & Row, 1937) 35.

\(^{149}\) *Magna Carta of 1215*. The English concept of ‘rule of law’ as expounded by Dicey occurs in the proceeding discussion.


\(^{151}\) Ibid.
doctrine has enjoyed wide acceptance at times, at least for its practical absolutist applications if not so much for its theocratic claims.\textsuperscript{152}

In the tumultuous reign of King Charles I (1625 – 1649) the Parliament and the Monarch were engaged in drastic measures to determine power sharing arrangements, not only between the Parliament and the Monarch but also between them both and the judiciary. Reflective of this power struggle is the \textit{Act Abolishing Arbitrary Courts} which the Parliament passed in 1641 and which reads:

declared and enacted by authority of this present parliament, that neither his majesty nor his privy council have or ought to have any jurisdiction, power, or authority by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands, tenements, hereditaments, goods, or chattels of any the subjects of this Kingdom, but that the same ought to be tried and determined in the ordinary courts of justice and by the ordinary course of the law\textsuperscript{153}

Judicial independence from the legislature was enhanced in the \textit{Act of Settlement 1701} by requiring both houses of parliament to be involved in removing judicial officers from their office\textsuperscript{154} as opposed to the whim

\textsuperscript{152} Ibid.
\textsuperscript{153} \textit{Act Abolishing Arbitrary Courts 1641}, 16 Charles I, c 10.
\textsuperscript{154} \textit{Act of Settlement 1701}, 12 and 13 William III, c 2.
of a monarch or a prime minister. This aspect of judicial independence finds modern expression in the *Supreme Court Act 1981* (UK).\(^{155}\) In modern times the Westminster Parliament, especially the House of Commons, enjoys almost prerogative legislative power,\(^ {156}\) although Parliament still seeks assent of the Monarch for its legislation to have the force of law.\(^ {157}\)

In his seminal work *Introduction to the Study of the Law of the Constitution*\(^ {158}\) the eminent English jurist, A V Dicey, recorded ‘two or three guiding principles which pervade the modern constitution of England’.\(^ {159}\) According to Dicey ‘[t]wo features have at all times since the Norman Conquest characterised the political institutions of England.’\(^ {160}\)

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and

\(^{155}\) Section 11(3).

\(^{156}\) *Parliament Act 1911*, I and 2 Geo 5, c 13.

\(^{157}\) Ibid ss 2, 4.


\(^{159}\) Ibid preface v.

\(^{160}\) Ibid 175.
the maintainer of order...This royal supremacy has now passed into that sovereignty of Parliament.\textsuperscript{161}

Whilst Dicey observes that Parliament has received the undisputed supremacy of authority that previously resided in the Crown, he writes that part of modern English constitutionalism is the doctrine of separation of powers between the three arms of government: the legislature, the executive and the judiciary. Dicey distinguishes the English application of this doctrine from the French jurisprudence as expounded by Montesquieu\textsuperscript{162} and points to the English experience of the reverence that surrounds the independent judiciary as a defining difference between the two.\textsuperscript{163} However, there is no doubt in Dicey’s mind that these three arms of government have only one source of authority, namely the Parliament. Dicey declares that the ‘executive of England is in fact placed in the hands of a committee called the Cabinet’\textsuperscript{164} who are members of the Parliament. Case law, that is law made by the authority of the Courts, is termed by Dicey as ‘judicial legislation’\textsuperscript{165} which, he asserts ‘is, in short, subordinate legislation,\textsuperscript{161}

\textsuperscript{161} Ibid.
\textsuperscript{162} \textit{Esprit des Lois}, Book XI. c. 6, cited in Dicey, above n 158, 314.
\textsuperscript{163} Dicey, above n 158, 327.
\textsuperscript{164} Ibid 8.
\textsuperscript{165} Ibid 58.
carried on with the assent and subject to the supervision of Parliament.166

Dicey continues with the second feature that characterises English constitutionalism, namely ‘the rule or supremacy of law [which] is closely connected with’ the supremacy of authority of Parliament.167 Dicey defines the phrase ‘rule of law’ in the English context to consist of three distinct but related aspects, namely:

1. ‘no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land,’168

2. ‘every man, whatever be his rank or condition, is subject to the jurisdiction of the ordinary tribunals,’169 and

3. ‘the constitution is pervaded by the rule of law... [as] the result of judicial decisions determining the rights of private persons.’170

166 Ibid.
167 Ibid 175.
168 Ibid 179.
169 Ibid 185.
170 Ibid 187.
Dicey’s conceptualisation of supremacy of Parliament and rule of law have gained wide acceptance among common law jurists and many subsequent jurists have embraced and further developed Dicey’s ideas.\textsuperscript{171}

Morison identifies in the writings of some of the classic English legal scholars such as Dicey and Pollock a ‘belief in the validity of continuing values, enshrined in the law… [and] anxiety about threats to those values from social factors developing outside the law.’\textsuperscript{172} Morison contends that this is the very reason why Pollock attempted ‘to pin down such of the law as could be pinned down through codifying various branches of it.’\textsuperscript{173} Other appeals have been made to associate law with common sense as a means of attributing authority to it, even proposing that the law itself is a monument to common sense.\textsuperscript{174}

Whilst the concept of utilitarianism as formulated by Jeremy Bentham and refined by John Austin attempts to promulgate its own inherent authority in the notion of the greatest happiness of the greatest number,

\begin{footnotes}
\item[173] Ibid.
\item[174] Ibid 20.
\end{footnotes}
it still relies upon the ‘command of the sovereign’ to lend authority to law.\textsuperscript{175} The American Roscoe Pound’s ‘conception of law as a handmaiden to the general forces of social development’\textsuperscript{176} allows furtherance of the utilitarian enterprise without the explicit need for sovereign command upon which Bentham and Austin rely. By Pound’s conceptualisation, received ideals, whether from a sovereign, religion, custom or another source, become merely one of a number of possible sources of authority together with whatever else is found in contemporary society. Pound hypothesised successive states of development in law in accordance with the level of development of the society in which it functions, namely ‘primitive law, strict law, equity and natural law, maturity of law’ and a further stage of law that attempts to ‘satisfy as much as possible of the sum total of human demand’.\textsuperscript{177}

Pound’s pragmatic formulation of law as a handmaiden to the general forces of social development carries the risk of forgetting that ‘reasoning can justify itself only in terms of some source of norms’.\textsuperscript{178} When norms are plural and incompatible ‘the greatest happiness’ becomes even more relative than when a single norm exists, such as the Sovereign. When

\begin{footnotes}
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society is used as a ‘reference for formulating ideals for law… rather than finding ideals in law’,\textsuperscript{179} as in Pound’s pragmatic approach, Hume’s warning of the futility of attempting to derive ‘ought’ from ‘is’\textsuperscript{180} is ignored.

3.2.2 The Commonwealth of Australia and the Northern Territory of Australia

Beginning in the late eighteenth century efforts were made by the English to establish colonies on the continent of Australia.\textsuperscript{181} The Commonwealth of Australia was founded as a nation in 1901 by the federation of the colonies that had developed on the continent into member states of the new nation.\textsuperscript{182} By counting the Australian states, territories and the Commonwealth, there are nine major judicial systems in Australia, yet there is only one common law, achieved through the

\textsuperscript{179} Ibid 31.
\textsuperscript{180} Hume, ‘A Treatise of Human Nature’ in M D A Freeman, Lloyd’s Introduction to Jurisprudence (Thomson, 7\textsuperscript{th} ed, 2001) 28.
\textsuperscript{181} George B Barton, History of New South Wales from the Records, Volume 1: Governor Phillip, 1783-1789 (Charles Potter Government Printer, 1889) 481.
\textsuperscript{182} Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict.
application of the doctrine of precedent and the apex of the High Court
of Australia for all Australian courts.183

The Northern Territory of Australia is a body politic184 and territory of
the Commonwealth of Australia.185 As such, the Commonwealth
Parliament retains legislative authority over (that is, a prerogative to
legislate for) the Northern Territory, even in opposition to (and thereby
defeating) Northern Territory legislation. 186 The Northern Territory
does, however, enjoy a degree of self-governance, having its own
Legislative Assembly with the power ‘to make laws for the peace, order
and good government of the Territory’.187 It has long been determined
in common law jurisprudence that the terms ‘peace, order and good
government’ do not ‘impose judicially enforceable limits on the
legislative power’ and that in fact this formulation of words ‘were used
by the Imperial Parliament to confer unlimited, sovereign power’188 and

183 Australian Constitution s 73; Lipohar v The Queen (1999) 200 CLR 485,
505-6.
184 Northern Territory (Self-Government) Act 1978 (Cth) s 5.
185 Northern Territory Acceptance Act 1910(Cth).
186 Australian Constitution s 122.
188 Jeffrey Goldsworthy, 'Interpreting the Constitution in Its Second Century'
App Cas 889; Hodge v The Queen (1883) 9 App Cas 117; Powell v
Apollo Candle Co Ltd (1885) 10 App Cas 282; Riel v The Queen; Ex
parte Riel (1885) 10 App Cas 675; D'Eidem v Pedder (1904) 1 CLR 91,
describe the central purpose of all Australian governments. Nevertheless the purposes of the Commonwealth Parliament are restricted to the specific powers given to it by the Constitution, predominantly those in s 51. Thus there are two primary sources in Australian law other than the Constitution, namely legislation and case law.189

In terms of sources of authority, the Northern Territory derives its authority from the Commonwealth of Australia, specifically ‘the Queen, and the Senate and House of Representatives of the Commonwealth of Australia’190 and the Commonwealth of Australia in turn derives its authority from the Westminster Parliament, specifically ‘the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons… and by the authority of the same.’191

Authority in both the Commonwealth of Australia and the Northern Territory is separated into three arms of government: the parliament, the

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110–11 (Griffith CJ); Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, 9–10.
189 Hughes and Leane, above n 146, 44.
190 Preamble, Northern Territory (Self-Government) Act 1978 (Cth).
191 Preamble, Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict.
executive and the judiciary.\textsuperscript{192} The constitutional document of the Commonwealth of Australia asserts that legislative authority for its jurisdiction rests in the Commonwealth Parliament.\textsuperscript{193} Similarly, the Australian Constitution asserts that executive authority is ‘vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’ who in turn is advised by a Federal Executive Council constituted by members of the Commonwealth Parliament.\textsuperscript{194} Judicial authority in the Commonwealth is asserted by the Constitution to be vested in the High Court of Australia.\textsuperscript{195} Structurally similar to the Commonwealth’s constitutional separation of powers is the arrangement in the Northern Territory of Australia where legislative authority is vested in the Legislative Assembly,\textsuperscript{196} executive authority in the Administrator and the Executive Council\textsuperscript{197} and judicial authority in the Supreme Court of the Northern Territory.\textsuperscript{198} The Australian

\textsuperscript{192} For the Commonwealth of Australia see the \textit{Australian Constitution} Chapter I, II and III. For the Northern Territory of Australia see \textit{Northern Territory (Self-Government) Act} 1978 (Cth) Part III and IV in respect to legislative and executive power; for judicial power see Supreme Court Ordinance 1911 (Cth) No. 9 of 1911, \textit{Northern Territory Supreme Court Act 1961(Cth)} and \textit{Supreme Court Act 1979 (NT)}.

\textsuperscript{193} For the Commonwealth of Australia see \textit{Commonwealth of Australia Constitution Act} 1900 (Imp) 63 & 64 Vict, c 12, covering clause 5 and \textit{Australian Constitution} ss 51 – 53. For the Northern Territory of Australia see \textit{Northern Territory (Self-Government) Act} 1978 (Cth) s 6.

\textsuperscript{194} \textit{Australian Constitution} ss 61 – 64.

\textsuperscript{195} \textit{Australian Constitution} ss 71, 73 & 75.

\textsuperscript{196} \textit{Northern Territory (Self-Government) Act} 1978 (Cth) s 6.

\textsuperscript{197} \textit{Northern Territory (Self-Government) Act} 1978 (Cth) s 31 – 33.

\textsuperscript{198} Supreme Court Ordinance 1911 (Cth) No. 9 of 1911, \textit{Northern Territory Supreme Court Act 1961(Cth)} and \textit{Supreme Court Act 1979 (NT)}. 
Constitution can be changed by referendum\textsuperscript{199} and the \textit{Northern Territory (Self-Government) Act} 1978 (Cth) can be changed by a regular Act of the Commonwealth Parliament. Within its jurisdictional borders Australian law asserts sovereignty: it asserts itself upon all persons within its jurisdictional borders and it asserts its own supremacy should a conflict of laws arise.\textsuperscript{200} Barring a few odd exceptions,\textsuperscript{201} this monopoly over legal authority permeates the Commonwealth and Northern Territory legal systems.

The Australian legal system has been described as a ‘product of a tradition of so-called ‘liberal’ thinking about law, politics, economics and social relations’ which ‘involves beliefs about the sanctity, the uniqueness and the priority of the individual human being’.\textsuperscript{202} Liberal ideology has ‘eschewed any direct relationship between religion and politics or law. It has adopted the view that legal knowledge is a matter of technique concerned with the manipulation of technical rules.’\textsuperscript{203}

\textsuperscript{199} \textit{Australian Constitution} s 128.
\textsuperscript{200} \textit{Australian Constitution} cl 5.
\textsuperscript{201} Such as native title (see \textit{Native Title Act} 1993 (Cth) s 223) and the rules of statutory interpretation when interpreting domestic legislation enacted pursuant to an international instrument (see \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168, 265; \textit{Acts Interpretation Act} 1901 (Cth) s 15AB(2)(d)).
\textsuperscript{202} Hughes and Leane, above n 146, 2.
\textsuperscript{203} Ibid 5.
3.2.3 Human rights

International human rights morality, expressed in international human rights law, is often touted as having great influence upon modern Australian law. For example, Brennan J in *Mabo v Queensland (No 2)* opined that ‘it is imperative in today’s world’ for the common law to ‘keep in step with international law’.204 There exists a common law presumption that legislation is made in accordance with human rights.205

A brief consideration will be given here to the influence of human rights and human rights law in Australian law, particularly as it relates to Indigenous people and their customary law.

A number of international instruments originating from the United Nations populate the literature on international human rights pertaining to Aboriginal customary law. The *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, ratified by Australia in 1975 and enacted into domestic legislation as the *Racial Discrimination Act 1975* (Cth), seeks to ‘ensure that indigenous communities can exercise their rights to practise and revitalise their

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204 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 41-42 (Brennan J).

cultural traditions and customs’. Article 27 of the *International Covenant on Civil and Political Rights* states that minority groups, Australian Aboriginal people being one such minority group, ‘shall not be denied the right, in community with the other members of their group, to enjoy their own culture, [or] to profess and practise their own religion’. The *United Nations Declaration on the Rights of Indigenous People*, endorsed by Australia but not yet enacted into domestic legislation, states in Article 34 that:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

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This right is subject to ‘limitations as are determined by law and in accordance with international human rights obligations’. 209

Of significance to Aboriginal customary law that permits betrothal and marriage by children 210 who have not yet attained marriageable age in Australian law is Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women which states that ‘the betrothal and the marriage of a child shall have no legal effect’. The same Article requires governments to take ‘all necessary action, including legislation... [in order] to specify a minimum age for marriage’, yet the actual minimum age is left for each jurisdiction to determine.

The above examples seemingly indicate that international human rights law has had a significant effect, not only upon Australian law generally, but specifically upon Australian law that relates to Indigenous people. However, human rights law in Australian law exists as legislation that can be repealed by the government of the day. For example, the Racial Discrimination Act 1975 (Cth) was revoked by another piece of legislation, as part of the Northern Territory ‘Intervention’ raft of

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209 Article 46 (2), United Nations Declaration on the Rights of Indigenous People.

210 All of the examples that I know of involve girls, not boys.
If a major piece of human rights legislation can be ended by ordinary legislation then the human right of freedom from racial discrimination can hardly be argued to form part of the essential nature of Australian law. The parliament has prerogative to enact legislation that will not be bound by the enactments of previous governments nor defeated by the common law. An Australian parliament enjoys supremacy in law making for the life of the parliament subject to Constitutional constraints. Therefore, while international human rights law has influenced Australian law it cannot be said that human rights law forms an essential element of the character of Australian law.

3.2.4 The Demos and Legislation

As the parliaments - the bodies empowered to enact legislation - are constituted by democratically elected representatives of the demos, it is this demos that is the primary source of authority in the Australian legal system. Certainly the Constitution describes the mechanisms by which legal authority is established, but in summary and in effect the mechanisms that the Constitution provide are for the contemporary

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demos to determine the contemporary legislative program, within the parameters of possibility set out in the Constitution for the Federal government (but wider, indeed plenary, possibilities for the States). This approach to jurisprudence does not deny or belittle valid debates on interpreting the Constitution, that is, whether the meaning of the words of the Constitution should be what they were when the Constitution was formed or what they may mean contemporarily, if there is a difference.\textsuperscript{212} Rather, the debates over interpretation are seen in the larger perspective of the whole system of government which allows for Courts to interpret legislation but also allows for parliaments to enact legislation in response to an unfavourable Court interpretation. Thus while separation of powers exists, the legislature remains able to respond to a decision of a Court, even to enact retrospective legislation.\textsuperscript{213} (This does not apply to High Court interpretations of the Constitution, though even then a referendum is possible.)


\textsuperscript{213} R v Kidman (1915) 20 CLR 425; Rodway v The Queen (1990) 169 CLR 515.
The contemporary demos are the contemporary members of the population who are able to vote.\textsuperscript{214} Members of parliament are elected via periodical elections.\textsuperscript{215} The jurisdiction is divided into geographical ‘seats’, each seat electing one representative to parliament by the majority vote.\textsuperscript{216} This system enables the demos to rule not directly and immediately, but indirectly via their representatives and at intervals by the holding of an election. Nevertheless, the authority for legislation is still sourced from the demos via the parliamentarians.

As the contemporary demos provide the source of authority for legislation, the content of legislation can change radically from one contemporary group to another. These changes in legislative content are not limited to any set morality, that is the morality of one contemporary demos may also be radically different to the morality of another.

\textsuperscript{214} \textit{Australian Constitution}, s 24.
\textsuperscript{215} \textit{Australian Constitution}, ss 13, 28.
\textsuperscript{216} The methods of determining the winners of seats differ from parliament to parliament but generally speaking all of the methods embrace a majority approach.
3.3 Foundational Sources of Authority and Purposes in Christianity

This section details the foundational sources of authority and purposes of Christianity. The authority and purpose of the key figure of Christianity, Jesus Christ, is examined in the broader context of oppositional authority. Key aspects of Bible translation and interpretation are also covered.

3.3.1 Jesus and the Kingdom of God

The pivotal figure in Christianity is Jesus Christ, understood by Christians to be the human incarnation of God (truly God and truly human)\(^\text{217}\) and the Saviour of humanity.\(^\text{218}\) Christians understand God to be a Trinity of Persons (the Father, Son [Jesus Christ] and the Holy Spirit) yet perfectly united as one.\(^\text{219}\) Jesus taught that a radically new paradigm was about to be implemented by God, namely the ‘Kingdom of God’.\(^\text{220}\) The gospel (literally, ‘good news’), which Jesus commanded his followers to take into the entire world,\(^\text{221}\) is that all people are

\(^{217}\) John 1:1-18.
\(^{218}\) John 3:16.
\(^{220}\) Mark 1:15; also termed ‘the Kingdom of Heaven’: Matthew 19:16-24.
\(^{221}\) Matthew 28:19-20; Mark 16:15-16; Luke 24:47.
invited into the Kingdom of God. Jesus explained that the way for people to enter the Kingdom of God is to be ‘born again’: ‘I tell you the truth, no one can see the Kingdom of God unless he is born again’. Jesus explained that to be ‘born again’ into the Kingdom of God is to believe in him. According to Jesus, the Kingdom of God is infinitely more valuable than anything else, has universal application and will last forever. Having entered the Kingdom of God, one is given eternal life amongst many other blessings. The essential purpose of Christianity therefore is to enable people to enter the Kingdom of God.

3.3.2 Sin and the Need for a Saviour

According to the Bible, sin has been part of the human condition since the very first people, Adam and Eve. The Bible declares that all of humanity have sinned and that the consequence of sin is death, both

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223 John 3:3.
224 John 3:14-17.
225 Matthew 13:45-46
228 John 3:16-21.
229 Genesis 3.
230 Romans 3:23; 1 John 1:8.
231 Romans 6:32.
physical death\textsuperscript{232} and spiritual death.\textsuperscript{233} Many examples and definitions of sin are provided in the Bible but I John 5:17 provides the comprehensive definition of ‘all wrongdoing is sin’. An exhaustive coverage of Biblical wrongdoing is beyond the scope of this work. For present purposes it is noted that ‘sin is the transgression of the law’\textsuperscript{234} and all of the law and the original Ten Commandments\textsuperscript{235} was summarised by Jesus as follows:

‘Love the Lord your God with all your heart and with all your soul and with all your mind.’ This is the first and greatest commandment. And the second is like it: ‘Love your neighbour as yourself.’ All the Law and the Prophets hang on these two commandments.\textsuperscript{236}

Jesus (and Jesus alone), however, was without sin.\textsuperscript{237} In the shedding of his blood unto death on the Cross, Jesus paid the price for humanity’s sins, thereby appropriating to humanity forgiveness of sin.\textsuperscript{238} In accepting Jesus’ sacrifice people are ‘born again’ into the Kingdom of God.

\textsuperscript{232} Genesis 3:19.
\textsuperscript{233} Romans 5:12; 6:23.
\textsuperscript{234} 1 John 3:4.
\textsuperscript{235} Exodus 20.
\textsuperscript{236} Matthew 22:37-40.
\textsuperscript{237} 2 Corinthians 5:21; Hebrews 4:15; 1 Peter 2:22.
\textsuperscript{238} Matthew 26:28; Acts 2:38; Romans 3:25, 1 John 2:2, 4:10.
Thus the critical role of Jesus in enabling people to enter the Kingdom of God is that he paid the debt accumulated by humanity through sin by being crucified. By accepting the punishment of humanity’s sin in being crucified, Jesus is able to afford forgiveness of sin for anyone who asks him. There are two major forces at work in Jesus’ crucifixion: justice and love. The requirement by a just God for justice by sin being punished is accomplished in the crucifixion and death of Jesus, whilst God expressing his love for people by paying the price of sin himself rather than requiring people to bear their own punishment. With a pardon from sin, people are ‘born again’ and able to enter the Kingdom of God.

3.3.3 Christian Texts: the Authority of the Scriptures

The predominant Christian text is the collection of books known as ‘the Bible’. The Bible consists of the Old Testament and the New Testament. The books of the Old Testament were completed before the birth of Jesus and the books of the New Testament were written after his death and resurrection. The typical Christian view of the Old Testament is that it primarily serves to ‘prepare for the coming of Christ, the redeemer of all and of the messianic Kingdom,’\textsuperscript{239} that is the

\textsuperscript{239} Vatican, \textit{Dogmatic Constitution on Divine Revelation – Dei Verbum} (18 November 1965) Documents of the Vatican II Council
Old Testament is incomplete in itself but it is completed by the New Testament. Therefore both the Old and the New Testaments are authoritative for the Christian, the New completing the Old. This raises some questions for Christians in relation to certain laws regulating behaviour and methods of worship that are prescribed in the Old Testament. For example, the Old Testament prescribed religious sacrificial offerings are to be made in very specific ways. Just one aspect of one type of sacrifice shall suffice for illustrative purposes:

Bring the bull to the front of the Tent of Meeting, and Aaron and his sons shall lay their hands on its head. Slaughter it in the Lord’s presence at the entrance to the Tent of Meeting. Take some of the bull’s blood and put it on the horns of the altar with your finger, and pour out the rest of it at the base of the altar. Then take all the fat around the inner parts, the covering of the liver, and both kidneys with the fat on them, and burn them on the altar. But burn the bull’s flesh and its hide and its offal outside the camp. It is a sin offering.\(^\text{240}\)

However, in the New Testament Christians are told to make their sacrifice by living their daily lives in ways pleasing to God:

\(^{240}\) Exodus 29:10-14.
Therefore, I urge you, brothers, in view of God's mercy, to offer your bodies as living sacrifices, holy and pleasing to God--this is your spiritual act of worship. Do not conform any longer to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God's will is--his good, pleasing and perfect will.\footnote{Romans 12:1-2.}

While the Old Testament instructs to circumcise boys at eight days of age,\footnote{Leviticus 12:3.} the New Testament teaches that physical circumcision is meaningless and completely unnecessary.\footnote{Galatians 5:2.} True circumcision is described in the New Testament as something that happens deep in one's heart, not something merely done to a part of the body.\footnote{Romans 2:29.} What is supremely important for the Christian is faith in Jesus Christ, not performing rituals in certain prescribed ways or 'sticking the letter of the law':

It is for freedom that Christ has set us free. Stand firm, then, and do not let yourselves be burdened again by a yoke of slavery. Mark my words! I, Paul, tell you that if you let yourselves be circumcised, Christ will be of no value to you at all. Again I declare to every man who lets himself be circumcised that he is obligated to obey the whole law. You who are trying to be justified by law have been alienated from Christ; you have fallen away from grace. But by
faith we eagerly await through the Spirit the righteousness for which we hope. For in Christ Jesus neither circumcision nor uncircumcision has any value. The only thing that counts is faith expressing itself through love.  

The way in which the New Testament does not reject but rather completes the Old Testament is also articulated in depth by Paul in his New Testament Letter to the Hebrews.  

Jesus himself demonstrated this New Testament approach together with his commandment to love one another when he was confronted by a group including teachers of the Old Testament law who had brought to him a woman caught committing adultery. The group told Jesus what had happened and reminded him of the Old Testament law in Leviticus that says a man or a woman who commits adultery should be stoned to death. Jesus responded to the group by saying that whoever among them has never themselves sinned should be the first person to stone her. The crowd dispersed without stoning the adulteress: the implication is that by leaving and not stoning the woman they all admitted their own sin since Jesus said whoever among you that has not

246 See especially Chapters 8, 9 and 10 of Letter to the Hebrews.  
249 Leviticus 20:10.  
250 John 8:7.
sinned should stone her. Once the crowd had left Jesus asked the woman if any of her accusers remained, to which she answered no.\textsuperscript{251} Jesus responded by telling her that he also does not accuse her but that she should sin no more.\textsuperscript{252} Jesus does not shy away from describing her adultery as sin, but rather than condemning her he forgives her and calls her to refrain from future sinning. This highly illustrative example of Jesus’ approach of simultaneously rejecting or condemning sin but forgiving and loving the person affected by sin was also formulated by Jesus as:

Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you. Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? How can you say to your brother, 'Let me take the speck out of your eye,' when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye.\textsuperscript{253}

\textsuperscript{251} John 8:10-11.
\textsuperscript{252} John 8:11.
\textsuperscript{253} Matthew 7:1-5.
Therefore, although the Old Testament is authoritative for the Christian, the New Testament explains more fully the purpose of the Old Testament.

The Bible is a source of authority and doctrine common to the overwhelming majority of Christian churches.254 The Bible is the primary source of authority in most Protestant churches. Indeed for the churches that subscribe to the sola scriptura doctrine, the Bible is the only source of authority. The Roman Catholic Church also recognises the Bible as authoritative, yet combines scripture with ‘sacred tradition… [to] form one sacred deposit of the word of God.’255

The actual contents of the Bible are largely agreed upon by nearly all Christians256 with the exception of a relatively small collection of writings known as the Apocrypha or the Deuterocanonicals which are recognised as Scripture by the Roman Catholic Church but not by most Protestant Churches.257 The books of the Apocrypha do not in any significant way alter the Christian message.258 The Christian organisation

254 John Hinnells (ed), A Handbook of Living Religions (Pelican, 1985) 84.
255 Vatican, above n 239, [10].
256 Hinnells, above 254, 83-84.
257 Ibid 42.
258 Indeed one Protestant author, Professor C H Dodd, describes the Apocrypha as bringing the reader ‘into the spiritual atmosphere in which the new religious movement represented by the New Testament comes to
that went into Arnhem Land and brought Christianity to the Yolngu was the Methodist Overseas Mission, a missionary arm of the Methodist Protestant denomination, which established its first mission base at Milingimbi in 1926.\textsuperscript{259} The Methodist Church later merged with the Presbyterian and Congregationalist Churches to form the Uniting Church.\textsuperscript{260} From their contact with the Uniting Church, the version of the Bible that Yolngu Christians are most familiar with does not include the Apocrypha. In order that this thesis is not in places rendered irrelevant to a Protestant audience, and because the books of the Apocrypha are not relevant to the present context of a comparative analysis of normative authority, the books of the Apocrypha will not be relied upon as a source of scriptural authority.

In order to achieve consistency, all Bible quotations are taken from the New International Version unless otherwise specified. The New International Version is the work of hundreds of scholars over many years and is trans-denominational.\textsuperscript{261} It purports to provide a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{259} Howard Morphy, ‘The Methodist Church and the Yolngu, with particular reference to Yirrkala’ (2005) 12 \textit{Humanities Research} 41, 42.
\item \textsuperscript{260} The Uniting Church in Australia, \textit{About the Uniting Church} (12 April 2011) The Uniting Church in Australia <http://www.uca.org.au/about.htm>.
\item \textsuperscript{261} International Bible Society, \textit{The Holy Bible, New International Version: Zondervan NIV Study Bible (Fully Revised)} (Zondervan, 2002) xi.
\end{enumerate}
\end{footnotesize}
contemporary English translation that is faithful to the original languages.\textsuperscript{262}

Christians understand that the Scriptures of the Bible are given by God. In the second book of Timothy is the following statement: ‘All Scripture is given by inspiration of God and is profitable for doctrine, for reproof, for correction, for instruction in righteousness.’\textsuperscript{263} In 2 Peter 1:21 is the declaration that prophesy recorded in scripture is not a merely a human product, rather ‘holy men of God spoke as they were moved by the Holy Spirit.’

The instances of scripture declared to be inspired or authored by God are numerous in the Bible, but the following examples will suffice as a representative selection. Two sources are from the Old Testament (Jeremiah and Ezekiel) and three sources are from the New Testament (Acts and Revelation).

In the fourth year of Jehoiakim son of Josiah king of Judah, this word came to Jeremiah from the LORD: Take a scroll and write on it all the words I have spoken to you concerning Israel, Judah and all the other nations from

\textsuperscript{262} Ibid.
\textsuperscript{263} 2 Timothy 3:16
the time I began speaking to you in the reign of Josiah till now: Jeremiah 36:1-2.

[The word of the LORD came to Ezekiel the priest, the son of Buzi, by the Kebar River in the land of the Babylonians. There the hand of the LORD was upon him: Ezekiel 1:3]

In those days Peter stood up among the believers (a group numbering about a hundred and twenty) and said, "Brothers, the Scripture had to be fulfilled which the Holy Spirit spoke long ago through the mouth of David concerning Judas, who served as guide for those who arrested Jesus: Acts 1:16

They disagreed among themselves and began to leave after Paul had made this final statement: ‘The Holy Spirit spoke the truth to your forefathers when he said through Isaiah the prophet: “Go to this people and say, You will be ever hearing but never understanding; you will be ever seeing but never perceiving. For this people's heart has become calloused; they hardly hear with their ears, and they have closed their eyes. Otherwise they might see with their eyes, hear with their ears, understand with their hearts and turn, and I would heal them”’: Acts 28:25-27, referring to the prophecy in Isaiah 6:9-10

Then I heard a voice from heaven say, "Write: Blessed are the dead who die in the Lord from now on". "Yes," says the Spirit, "they will rest from their labor, for their deeds will follow them": Revelation 14:13
Not every verse of the Bible attributes God as the author. Paul, the human author of much of the New Testament, at times ‘claims to speak the word of the Lord, but at other times “gives his opinion” quite tentatively’ as demonstrated in the following:

Now to the unmarried and the widows I say: It is good for them to stay unmarried, as I am. But if they cannot control themselves, they should marry, for it is better to marry than to burn with passion.

To the married I give this command (not I, but the Lord): A wife must not separate from her husband. But if she does, she must remain unmarried or else be reconciled to her husband. And a husband must not divorce his wife.

To the rest I say this (I, not the Lord): If any brother has a wife who is not a believer and she is willing to live with him, he must not divorce her. And if a woman has a husband who is not a believer and he is willing to live with her, she must not divorce him: 1 Corinthians 7: 8-13.

Now about virgins: I have no command from the Lord, but I give a judgment as one who by the Lord’s mercy is trustworthy. Because of the present crisis, I think that it is good for you to remain as you are: 1 Corinthians 7: 25-26.

Thus the Bible itself describes scripture as inspired or originating from God (although not always explicitly so) yet physically written by humans. The Bible is authoritative for Christians, especially for teaching.

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264 Dodd, above n 258, 26.
3.3.4 Interpreting Christian Scripture

At the heart of many disputes regarding Christian scripture, including disputes amongst Christians, is how the scriptures are interpreted.\textsuperscript{265} This thesis does not rely upon or critique any particular Christian denomination, interpretation or theological position, rather it compares and analyses from a Biblical perspective. The scriptures cited as authority in this thesis are cited as they appear in the Bible without interpretation (other than the inherent and obvious literal interpretation) unless otherwise described.

The Bible contains writings in many genres. A proportion of the Bible, especially the Old Testament, is written as poetry.\textsuperscript{266} Not all Christian scriptures are intended to be interpreted literally as some scriptures are clearly to be used as metaphor or for their value as parable.\textsuperscript{267} In order to increase reliability, this thesis avoids scriptures of a metaphoric or parable nature unless otherwise specified. Of course genre alone does not determine how a text should be interpreted: the genre of poetry does

\footnotesize{\textsuperscript{265} Nigel M de S Cameron, \textit{Evolution and the Authority of the Bible} (Paternoster Press, 1983) 33. The same could be said in regards to many disputes amongst lawyers.

\textsuperscript{266} Norman Snaith, \textit{The Inspiration and Authority of the Bible} (1956, Epworth) 15.

\textsuperscript{267} See for example Matthew 23:37.}
not prohibit a literal interpretation as so much of Banjo Paterson’s poetry unequivocally makes clear. Therefore, this analysis and its conclusions will be relevant to any particular group (denomination) or individual who interpret the Bible literally. Others who require a particular lens of interpretation to be applied will need to apply their lenses as they see fit. (The same principle applies to the stating of authority in this thesis in relation to Australian law and Madayin unless otherwise indicated.)

3.3.5 The Nature and Functioning of Authority in Christianity

With the authority of the Bible in Christianity established above, the Bible is sourced to ascertain what it has to say on the topic of authority. The source, nature and function of authority in the Bible need to be understood within the Christian paradigm in order to appreciate the truth claims made by and the norms of Christianity.

The starting position on authority from a Biblical Christian perspective is that ‘all authority comes from God, and those in positions of

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authority have been placed there by God'.\textsuperscript{269} According to the Bible, ‘God has put all things under the authority of Christ’\textsuperscript{270} who has all authority to judge all people,\textsuperscript{271} that is, Jesus is at the apex of all authority given by God.\textsuperscript{272} The Bible also explains that there is a plurality of authorities below Jesus\textsuperscript{273} but in time Jesus will defeat these authorities before handing over the Kingdom of God to the Father.\textsuperscript{274} Therefore, Christian notions of authority are central to the most essential aspect of the Christian paradigm that is the Kingdom of God.

The authorities below Jesus are both natural and supernatural. In Romans 13 Paul implores Christians to submit to all governing authorities for ‘those in positions of authority have been placed there by God’.\textsuperscript{275} Some of these authorities are ‘unseen… in the heavenly places’,\textsuperscript{276} namely, angelic beings set over each nation by God as their heavenly ruler and guardian.\textsuperscript{277} The fact that God places individuals in positions of authority does not mean that those individuals are necessarily obedient to God as intimated by the following proverb:

\begin{footnotes}
\footnoteref{269} Romans 13:1.
\footnoteref{270} Ephesians 1:22.
\footnoteref{271} John 5:22, 27.
\footnoteref{272} Revelation 5:12; 19:1.
\footnoteref{273} 1 Peter 3:22.
\footnoteref{274} 1 Corinthians 15:24.
\footnoteref{275} Romans 13:1-7.
\footnoteref{276} Ephesians 3:10.
\end{footnotes}
When the righteous are in authority, the people rejoice: but when the wicked beareth rule, the people mourn: Proverbs 29:2 (King James Version)

Nor does it mean that those placed in authority are even aware that God has put them there or that God exists:

"Do you refuse to speak to me?" Pilate said. "Don't you realize I have power either to free you or to crucify you?" Jesus answered, "You would have no power over me if it were not given to you from above: John 19:10

3.3.6 Opponents of the Kingdom of God are Supernatural, not Natural

Writing in Ephesians, Paul sheds further light on the existence of spiritual authorities:

For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms.\(^{278}\)

\(^{278}\) Ephesians 6:12.
This important scripture in Ephesians points not only to the existence of the supernatural realms and authorities, but it also instructs the Christian that the opponents of the Kingdom of God are not ‘flesh and blood’, that is natural people, but supernatural ‘rulers... authorities,... powers of this dark world and ... spiritual forces of evil in the heavenly realms’. These opponents to the Kingdom of God are to be struggled against by the Christian - not by waging ‘war as the world does’ with the ‘weapons of the world’ but rather with supernatural ‘divine power to demolish strongholds’ that oppose God.

According to the Bible, the supernatural authorities below Jesus are variously described as principalities, powers and dominions, amongst other names. The unifying aspect of these Kingdoms is that they have Satan at their apex.

Though Satan was originally created and ordained by God as an angelic guardian, he committed the sin of pride by desiring to be exalted to a God-like level. Consequently Satan was cast out of Heaven, that is, from God’s throne room, to lower planes of existence including the

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279 Ephesians 6:12.
280 2 Corinthians 10:3-4.
281 Ephesians 1:21.
284 Isaiah 14:13-14.
In these lower realms Satan formed the head of what the Bible calls the dominion or kingdom of darkness, also known as the ‘kingdoms of this world.’ In this capacity, Satan is variously termed the devil and enemy of Christians, the wicked one, the god of this age, the ruler of this world, the prince of the power of the air, and Beezelbub (the prince of demons).

As the ‘ruler of this world’, Satan attempted to have Jesus surrender to his authority as recorded in Luke 4:5-8:

The devil led him [Jesus] up to a high place and showed him in an instant all the kingdoms of the world. And he said to him, "I will give you all their authority and splendor, for it has been given to me, and I can give it to anyone I want to. So if you worship me, it will all be yours." Jesus answered, "It is written: 'Worship the Lord your God and serve him only.'"

In the above scripture (Luke 4:6) the Bible records the devil pronouncing his authority over the ‘kingdoms of the world’, a

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286 Colossians 1:13.
288 1 Peter 5:8.
289 Matthew 13:19.
290 2 Corinthians 4:4.
292 Ephesians 2:2.
293 Matthew 12:24.
pronouncement that Jesus does not refute. Yet whilst the ‘Kingdoms of the world’ are under the authority of the devil, Jesus has authority over him.\textsuperscript{294} This hierarchy of authority whereby Jesus is set in authority over the devil does not suggest cooperation between the two beings. Rather it sets the boundary of the devil’s authority. Jesus as God, on the other hand, has no limit to his authority.\textsuperscript{295}

The Bible also records prophecy stating that in time Jesus will defeat these authorities under Satan before handing over the Kingdom of God to the Father.\textsuperscript{296} This event is recorded in Revelation 11:15 which reads:

\begin{quote}
The seventh angel sounded his trumpet, and there were loud voices in heaven, which said: "The kingdom of the world has become the kingdom of our Lord and of his Christ, and he will reign for ever and ever."
\end{quote}

Christians understand that they have been delivered from the power of darkness, that is, they have been delivered from the power of the ‘Kingdoms of this world’, and have been translated into the Kingdom of God.\textsuperscript{297} Jesus explained that his Kingdom is ‘not of this world’,\textsuperscript{298} rather he is the ‘light of the world’ and that ‘anyone who follows him shall not

\begin{itemize}
\item \textsuperscript{294} Ephesians 1:21.
\item \textsuperscript{295} Ephesians 1:21-22.
\item \textsuperscript{296} 1 Corinthians 15:24.
\item \textsuperscript{297} Colossians 1:13; Ephesians 2:6.
\item \textsuperscript{298} John 18:36.
\end{itemize}
That is, Jesus’ followers are able to follow him notwithstanding the fact that whilst on the earth they are in enemy territory, for the Christians ‘citizenship is in heaven’. Hence Christians are called to be ‘in the world’ but ‘not of the world’; ‘not of the world’ meaning not given to worldliness.

The Bible points to a cohort of angels who followed Satan in his original rebellion and fall from heaven to become what the Bible terms ‘demons’. Satan is called the prince or the head of the demons and the demons are under the authority of and follow Satan. Recalling that the Bible proclaims Satan to be the ruler of the ‘Kingdoms of this world,’ it becomes apparent that Satan and his demons are the authorities of the ‘unseen world’, the occupiers of the ‘principalities’, the holders of the ‘powers’, and the ‘world-rulers of this darkness’, ‘the spiritual hosts of wickedness in the heavenly places’.

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299 John 8:12.  
300 Philippians 3:20.  
301 John 17:15-16.  
302 Revelation 12:3-9.  
303 Matthew 25:41.  
305 Revelation 12:7-12.  
307 Ephesians 6:12.
The Bible describes a number of spiritual realms in a hierarchy. Knowledge of these spiritual realms is essential to understanding the nature of Biblical truth claims.

*The heavens*

The Bible uses the word ‘heaven’ to describe various spiritual realms. The ‘third heaven’ is described as ‘paradise’ which is where Jesus went to after his crucifixion and resurrection and where exists the ‘tree of life’. This third heaven is the ultimate destination for all those accepted into ‘eternal life with God’ and is an exceptionally blessed place. The ‘sky’ that extends upward from its interface with the surface of the earth – that is, where the birds fly - is also described as heaven in scripture. Another heaven that is described in the Bible is a

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I acknowledge the concise treatment of this topic by John Edmiston, *A Quick Primer on Spiritual Warfare* (10 May 2011) Global Christians <http://www.globalchristians.org/ebooks/spirwarfare.htm>. The structure that Edmiston uses in this publication has guided the structure I have used here.

2 Corinthians 12:2.

2 Corinthians 12:2-4.


Revelation 2:7.


2 Corinthians 12:2-4.

Genesis 1:20, Psalm 104:12, Daniel 2:38.
place where the angels of God war with the angels of Satan\textsuperscript{315} and is termed the middle heaven.\textsuperscript{316} The term ‘middle heaven’ suggests that a heaven below the middle heaven exists. It is reasonable to conclude that the heaven below the middle heaven is the ‘sky’ heaven described above. Therefore, there exists a first heaven (sky), a second heaven (middle) and a third heaven (where Jesus is).

In addition to these heavens the Bible describes a place above the heavens which is reached by God’s glory and love\textsuperscript{317} and where Satan wanted to exalt himself to.\textsuperscript{318}

\textit{The earth}

Another spiritual realm that is described in the Bible is the earth – the realm of human affairs but also where Satan ‘prowls’.\textsuperscript{319} The Bible says that, as well as creating the earth and everything in it, God also created the various nations, determining their boundaries and ‘when they should rise and fall’.\textsuperscript{320} The Bible pronounces that the purpose of the nations of

\textsuperscript{315} Revelation 12:4-12.
\textsuperscript{316} Revelation 14:6,7.
\textsuperscript{317} Psalm 8:1, 108:4,5.
\textsuperscript{318} Isaiah 14:12-14.
\textsuperscript{320} Acts 17:24-26.
the earth is to seek after God, that they may find him. It is prophesied that not only on the earth but also in heaven and below the earth that ‘every knee will bow and every tongue confess that Jesus Christ is Lord’.

It is possible for living humans to become involved with demons. According to the Bible, sacrifice to idols is in fact sacrifice to demons. Other, more explicit, forms of demonic involvement include divination, necromancy, magic, sorcery and witchcraft. A human ruler may also be wicked, evil in open rebellion against God, aligned with a supernatural demonic authority and be involved with or used by Satan even without the human’s knowledge.

On the other hand, a human temporal ruler may also be aligned with God. Humans are said to be able to know God whilst on the earth; in

\[321\text{ Acts 17:27.} \]
\[322\text{ Philippians 2:10-11.} \]
\[323\text{ 1 Corinthians 10:19;20.} \]
\[324\text{ See examples in Genesis 44:5; Hosea 4:12; Ezekiel 21:21.} \]
\[325\text{ See example in 1 Samuel 28:8.} \]
\[326\text{ See example in Exodus 7:11.} \]
\[327\text{ See examples in Isaiah 47:9-13; Acts 19:19.} \]
\[328\text{ See examples in 1 Chronicles 10:13; Galatians 5:20.} \]
\[329\text{ Proverbs 28:15} \]
\[330\text{ 1 Kings 13:33.} \]
\[331\text{ Psalm 2:2-3.} \]
\[332\text{ Isaiah 14:3-15; Ezekiel 28:1-19.} \]
\[333\text{ Matthew 16:23. See also 2 Kings 3:27, Micah 4:5 and Deuteronomy 32:8.} \]
\[334\text{ Daniel 1: 1-6; 2:46-49.} \]
fact the Bible states that it is the purpose of humanity to know God.\textsuperscript{335}

Romans 1:19-20 reads:

\begin{quote}
what may be known about God is plain to... [people] because God has made it plain to them. For since the creation of the world God’s invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that people are without excuse.
\end{quote}

This simple knowledge of God is superseded by a relationship with God for the Christian through faith in Jesus Christ.\textsuperscript{336} In this relationship the Christian does not simply know God but is comforted\textsuperscript{337}, led\textsuperscript{338} and taught\textsuperscript{339} by God.

\textit{Below the earth}

‘Below the earth’ there exists further spiritual realms described in the Bible.\textsuperscript{340} The spiritual realm below the earth that is termed ‘sheol’ in the Hebrew of the Old Testament\textsuperscript{341} is the grave, that is the place for the

\begin{flushright}
\textsuperscript{335} Acts 17:27.  
\textsuperscript{336} Romans 5:1-2.  
\textsuperscript{337} John 14:26.  
\textsuperscript{338} Galatians 5:25.  
\textsuperscript{339} 1 Corinthians 2:12,13.  
\textsuperscript{340} Philippians 2:10, Revelation 5:3. There is also the realm of the sea: Genesis 1:2, Exodus 20:4, Deuteronomy 5:8.  
\end{flushright}
dead. In the Greek of the New Testament, sheol is translated as hades or gehenna. Sheol, hades and gehenna are usually translated as ‘hell’ in English.

Other realms below the earth are named in the Bible as the bottomless pit, the deep, the lake of fire, and tartarus which is the place of confinement for angels who have sinned. Whether these are distinct realms in their own right with specific functions or synonyms for sheol, hades and gehenna is a matter that is not completely addressed by scripture.

Gehenna is repeatedly described by Jesus in the New Testament as a terrible place of fire characterised by ‘weeping and gnashing of teeth’ and is reserved as punishment for those who refuse to be obedient to God. Those in hell experience God’s wrath and eternal

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342 Genesis 37:35.
343 Motyer, above n 340, 266-267.
344 Ibid.
348 2 Peter 2:4.
351 See for example Matthew 8:12; 22:13.
352 Psalm 88:7.
destruction\textsuperscript{353} of both body and soul\textsuperscript{354} and separation from God which is juxtaposed to the experience of those in heaven.\textsuperscript{355}

The single term ‘hell’ may be too blunt an instrument to accurately describe the spiritual realms below the earth according to the Bible. Nevertheless the existence of one or more spiritual realms below the earth is well established by scripture.

3.3.8 Biblical Law and Instructions for Christian living

Law is typically divided into two types in the Bible: the ‘Law of Moses’ (or ‘the Law’) and the ‘Law of Christ’. The core of biblical law is the ‘Ten Commandments’\textsuperscript{356} which were given by God to Moses and was further developed into the Mosaic Law which consists of 613 discrete laws as recorded in the five books known as the Torah.\textsuperscript{357} This law was mediated (that is given) to humans by angels.\textsuperscript{358} Jesus is recorded as saying that the Mosiac Law was proclaimed until John the Baptist (who immediately preceded Jesus). However, since John the Baptist, the

\textsuperscript{353} Matthew 7:13.
\textsuperscript{354} Matthew 10:28.
\textsuperscript{355} Matthew 7:13-14.
\textsuperscript{356} Exodus 20.
\textsuperscript{357} These five books are the first five books of the Bible (Genesis, Exodus, Leviticus, Numbers and Deuteronomy) and are collectively known to Christians as the Pentateuch.
\textsuperscript{358} Acts 7:53; Galatians 3:19.
Kingdom of God (rather than the Mosaic Law) is proclaimed.\textsuperscript{359} Yet Jesus also asserted that he was not abolishing the Mosaic Law but fulfilling it.\textsuperscript{360}

The above account of spiritual realms according to the Bible is far from exhaustive, yet it suffices for the purposes of this thesis. The main idea carried forward in this thesis is the Biblical proposition of a hierarchy of spiritual realms. The uppermost levels of the spiritual realms are blessed places and conditions whilst the lower levels are cursed. The earth upon which we live constitutes one of the Biblical spiritual realms and whilst on the earth humans are able to interact both with God and with Satan. Christians are called to co-labour with God\textsuperscript{361} to see the Kingdom of God come upon the earth. The Bible explains that the opponents of the Kingdom of God are not natural people but supernatural powers who are disobedient to God and have Satan as their leader. The Bible calls Christians to fight these opponents of the Kingdom of God not by natural means but by supernatural means.\textsuperscript{362}

\textsuperscript{359} Luke 16:16.
\textsuperscript{360} Matthew 5:17.
\textsuperscript{361} 1 Corinthians 3:9.
\textsuperscript{362} 2 Corinthians 10:3-5.
3.4 Chapter Summary

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

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363 Gaymarani, above n 15, 299-300.
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 that now exist in Arnhem Land, namely Australian law and Christianity.

Australian law has an English heritage. Whereas originally all legal authority in English law was sourced from the monarch, that authority has been, over time, divested to the parliament, the executive and the judiciary. An evolution of the doctrines of supremacy of parliament, separation of powers and rule of law has occurred in English government and has been transmitted to the Australian and Northern Territory legal systems. The constitutional documents of both the Northern Territory and the Commonwealth of Australia assert their authority in legislative, executive and judicial matters and do not allow for alternative sources of authority (other than the source of their derived authority).
As the general purpose of both the Northern Territory and the Commonwealth systems is to make laws to regulate behaviour, they are appropriately described as normative systems. The purpose of the Legislative Assembly in the Northern Territory is very broad, namely ‘to make laws for the peace, order and good government of the Territory’, whereas the purpose of the Commonwealth Parliament is restricted to certain prescribed areas of law making. Parliament is ‘the institution that gives consent to government ... the government of the realm is the business of the Crown and its immediate servants’. In the Australian and Northern Territory contexts, parliaments derive their legal authority from constitutional powers and social authority from the demos who elect the parliamentarians (according to constitutional provisions). The ultimate source of authority is the demos as they also have the power to change the Constitution.

The Kingdom of God, that is the reign of Jesus Christ, is the primary purpose of Christianity. This is accomplished in two ways: first, in the present era, by attracting individuals to voluntarily allow Jesus and his teachings to reign in their life; and second, in a future era, the material

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reign of Jesus Christ throughout the whole earth for eternity.\textsuperscript{365} Jesus explained that because in the present era the Kingdom of God is accomplished by individuals voluntarily following his teachings, the Kingdom of God, at least contemporarily, is within or near an individual.\textsuperscript{366} In the coming era, however, the Kingdom of God will be as material as the present Australian government and the presence of God will be as material as the present presence of the Prime Minister of Australia.\textsuperscript{367} Consequently the present era of Christianity is accomplished by voluntary adherence, whereas in the future era the Kingdom of Heaven will assert sovereignty. Whether in the present era or in the future the Christian Kingdom of God is universal and absolutist, that is, its claims are made on a universal basis (for example, it is appropriate for all peoples in all times to follow the teachings of Jesus) without allowing compromise by way of syncretism with other normative systems.

Having established the fundamental sources and purpose of authority for the three systems in this chapter, Chapter Four describes and analyses a specific area of regulation common to all three systems, namely marriage. (Chapter Five furthers the exploration of specific areas

\textsuperscript{365} Isaiah 45:23; Romans 14:11; Philippians 2:10.
\textsuperscript{366} Matthew 3:2; Luke 17:21.
\textsuperscript{367} Revelation 21:3.
of regulation by considering the topic of sorcery.) The analysis of these specific areas will reveal whether or not there exists consistency of the fundamental purposes of each system in the specific areas examined.

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Chapter Four:  
Marriage: Sources of Authority and Purpose
Chapter 4:

Marriage: Sources of Authority and Purpose

For the next point of reference, this chapter examines the sources and purpose of authority in relation to marriage in Madayin, Australian law and Christianity. Marriage has been selected as an area appropriate for a focus for two major reasons. First, the institution of marriage, broadly understood, is an important and very common one in Yolngu life, as it is in Christian life and Australian life generally. Secondly, two significant documents on Madayin’s Ngarra law written by Yolngu customary law leaders Gaymarani and Gaykamangu have recently been published and include substantial information on marriage law.

As an institution common to all of the three systems considered in this thesis, marriage offers a specific area of authority to be analysed to discover if the foundational purposes of authority as described in

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1 The term ‘marriage’ has different semantic properties in each of the systems considered. Nevertheless the same term will be used to describe the institution in all three systems so as to aid in continuity and efficiency.
Chapter Three find consistent expression and application in a specific area of regulation. Consistency on this point strengthens the reliability of the analysis conducted in Chapter Three and the propositions constructed in Chapter Six.

In this chapter, the sources and purposes of marriage are considered by examining marriageable age, approved marriage partners, number of marriage partners, sexual activity within marriage, extra-marital sexual activity, rights and responsibilities of spouses, procreation, and divorce in each system.

4.1 Madayin Marriage Law

In the Yolngu world, marriage is an institution as old as Madayin itself. Many Yolngu ancestral being myths include marriage between the ancestral beings.⁴

Madayin, ‘the complete system of law’⁵ for Yolngu society, authorizes marriage under the general Ngarra law.⁶ Ngarra marriage law is for the

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⁴ For merely one example see; Ronald Berndt, *Kunapipi: A study of an Australian Aboriginal Religious Cult* (International Universities Press, 1951) 23.
purpose of ‘people to live in peace and harmony’ and has a sacred nature. In fact the observance of Ngarra marriage law is said to accomplish Madayin itself that is, ‘peace and order according to the sacred Ngarra law’. Demonstrated love between marriage partners is a witness to others of the sacredness of marriage according to Madayin principles. Pregnant wives and mothers are considered as examples of Madayin and ‘sacred like the Mother of the Earth’ and the ‘birth of a child is a sacred event’.

Ngarra marriage is only permitted between men and women and is central to Yolngu culture. For Yolngu men and women, marriage is ‘a right under Ngarra law’. A polygamous marriage is also a right under Ngarra law. Yolngu men generally marry later and have a shorter married life than women. Data collected by Keen shows that the average age difference between Yolngu husbands and wives is thirteen

6 Ibid; Gaykamangu, above n 3, 239.
7 Gaymarani, above n 2, 289.
8 Ibid 291.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Gaykamangu, above n 3, 245.
15 Gaymarani, above n 2, 289.
16 Ian Keen, Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land (1994, Clarendon) 85.
years with the most extreme difference about forty years with ‘a man in his mid-sixties married to a girl in her mid-teens’. Men tend to practice polygyny with an age-related increase in the number of their wives: average wives per husband increase from just over one when a husband is in his twenties to five when a man is in his sixties. Upon a husband’s death widows tend to remarry and they may do this a few times in their lives, therefore Yolngu women tend to marry serially, ‘sometimes to younger men as a woman got older’. Warner writes that in Yolngu society ‘[t]here is a close correlation of having many wives with [the] fighting strength [of the husband], or with being the son of a man powerful in war who had thereby acquired a large number of women’ and who will later inherit his father’s wives. While Keen has observed that older Yolngu men benefit the most from the age-related practice of polygyny he has also queried the men’s ability to ‘sustain the arrangements only by means [of]... their own use of physical force’. Threatened and actual use of physical force form ‘an important aspect of [Yolngu] marriage politics; in the past, men sometimes killed a

17 Ibid 85-86.
18 Polygyny is the form of polygamy in which the husband is singular and the wives plural.
19 Keen, above n 16, 86.
20 Ibid 85.
22 Keen, above n 16, 85.
husband and took his wives by force’. Rather, Keen postulates that the older Yolngu men draw upon a different type of power in order to keep their polygynous marriages from being broken by other men taking their wives, namely ‘through authority derived from control of access to valued religious knowledge and practice, and from apparent access to supernatural power’.

This authority enabled them [the older men] to channel the young men’s aggressive power towards their own ends rather than against them, and was more a matter of young men deferring to older men’s interests than the ability to issue binding commands.

The primary purpose of marriage in Ngarra law is ‘to continue the descendant line of the tribal clan’, which necessitates sexual relations between the marriage partners resulting in offspring. A widow may be given as a wife to her deceased husband’s brother in order to continue the descendant’s line. Personal and intimate (ie, sexual) relations between marriage partners is expected under Ngarra law, in fact it is a

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23 Ibid 87.
24 Ibid 85.
25 Keen, above n 16, 86-87.
26 Gaymarani, above n 2, 289.
27 Berndt, Kunapipi, above n 4, 39.
28 Gaymarani, above n 2, 291
major purpose of marriage for both the men and women involved to enjoy sexual fulfilment in marriage.\(^{29}\)

Parents may choose for their daughter to not marry, or she may choose this for herself.\(^{30}\) Marriages may be arranged whilst the girl is quite young, even before her birth,\(^{31}\) but the marriage itself does not occur ‘until the girl is sexually mature’.\(^{32}\) Even though the focus of the arranged marriage is the giving of the female, the male is equally arranged into the marriage. Nevertheless, a woman is “given” to a man rather than the other way round.\(^{33}\) The ideal Madayin marriage is arranged\(^{34}\) though contemporary ‘Yolngu may find their own partners’.\(^{35}\) However, whether the marriage is by choice of the married couple or by arrangement of their parents ‘the husband and wife must be “right skin”, that is in correct relationship according to the moiety system’.\(^{36}\) There are two moieties in the Madayin system: dhuwa and yirritja. A dhuwa must not marry a dhuwa and a yirritja must not marry a yirritja.

\(^{29}\) Ibid.

\(^{30}\) Ibid.

\(^{31}\) Keen, above n 16, 88.

\(^{32}\) Ibid.

\(^{33}\) Ibid 87.

\(^{34}\) Keen, above n 16, 289.

\(^{35}\) Gaykamangu, above n 3, 238.

\(^{36}\) Ibid.
Kinship is constructed initially along the lines of moiety and clan. A Yolngu man takes the moiety of his father\textsuperscript{37} ‘which determines the child’s place in the totemic ceremonies which are of major import in his adult life... (even) his whole spiritual identity’.\textsuperscript{38} Yolngu kinship rules require him to marry a woman of the opposite moiety, therefore he is ‘constantly looking to his mother’s people for his wives’.

A Yolngu man may, in theory, marry a woman from any Yolngu clan of the opposite moiety however in practice clans prefer marriage with certain other clans.\textsuperscript{39} This he does while maintaining his own moiety responsibilities and ‘forming his family of procreation’\textsuperscript{40} with his wife of the other moiety. When he has a son he still seeks the father of his mother’s group to obtain wives for his male offspring.\textsuperscript{42} When he has a daughter he is in a strong bargaining position as petitions from potential husbands or their families will seek him out.\textsuperscript{43} The bifurcation of the population may be thought of in terms of vertically dividing the Yolngu while the clan groups horizontally divide the group. Also operating in the Yolngu kinship system is ‘the principle of equivalence of brothers’\textsuperscript{44} such that a Yolngu ‘man’s paternal uncles are addressed by the same

\textsuperscript{37} See ‘Moieties and clans’ in Chapter 3.
\textsuperscript{38} Warner, above n 21, 42.
\textsuperscript{39} Ibid 43.
\textsuperscript{40} Ibid 28-29.
\textsuperscript{41} Ibid 43.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid 45.
term as his father’ because they are equivalents.45 Similarly, ‘the paternal grandfather and his brothers are given one term by the father’s children’.46 The moiety system in combination with the clan system and the principle of equivalence of collateral relatives mean that every individual Yolngu exists in some sort of relationship with every other Yolngu individual.47 Prohibitions on incest in the Yolngu system only extend to immediate family, that is brother with sister and child with parent. The brother-sister taboo is quite extreme in that avoidance behaviours are required that prevent any direct contact between siblings thereby ensuring marriage and procreation occurs with partners outside of the immediate family.48

Thus marriages in the Madayin system may be considered ideal, possible or unacceptable. Whilst monogamy is possible, polygyny is preferred under Ngarra.49 The ideal (and safest)50 type of marriage in Ngarra is both arranged and polygynous51 between partners in correct kin relationship.52 Certain proposed marriages are unacceptable due to

45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid 42.
49 Ibid; Gaymarani, above n 2, 283.
50 Gaymarani, above n 2, 291.
51 Ibid 289.
incorrect kin relationship, that is, at a minimum a person must marry someone of the other moiety. Many variations of marriage arrangements in between these two extremes are possible under Ngarra law. The exact point at which a right marriage is distinguished from a wrong marriage is unclear; the important thing is that the arrangements are between the two extremes. This system of marriage has been described as preferential as opposed to prescriptive. This preferential nature of Ngarra marriage law reflects a general relative nature of Madayin, open to a pluralistic existence with other authority systems within limits.

Another purpose of marriage in Ngarra law is to build relationships, including economic relationships, between certain clans. A marriage is not only a union ‘between the pair concerned but between their respective families’. Economic support is organised in Yolngu society along marriage lines. A marriage that is lawful under Ngarra must be economically supported by the wider family; ‘a marriage must not fail

53 Gaymarani, above n 2, 289.
54 Berndt and Berndt, above n 52, 94; Ronald Berndt, *An Adjustment Movement in Arnhem Land, Northern Territory of Australia* (Cashiers de L’Homme, Mouton) 73.
55 Berndt and Berndt, above n 52, 94.
56 Ibid.
57 Ibid.
59 Ibid.
for reason of lack of economic support by the family'.\textsuperscript{60} Economic support must be generous even if the individuals giving are themselves in poverty.\textsuperscript{61} Even a marriage from a different clan group may be economically supported for the sake of the ‘kinship relationship established by their Ancestors’.\textsuperscript{62}

In a system where relationship is so highly significant and relevant to so much of life, Yolngu marriage is seen as the key mechanism to establishing new and maintain existing relationships; ‘[t]he relations involved in marriage bestowal, as well as the resulting marriage-networks, were expressed as kin relations between groups, their countries, their sacra, and their wangarr ancestors’.\textsuperscript{63}

Under Ngarra, marriages are typically between older men and younger girls.\textsuperscript{64} Ngarra law does not describe a marriageable age in terms of years but in terms of competency, the defining aspect being ‘sexually mature’.\textsuperscript{65} Gaymarani offers the ages of 13 to 16 years\textsuperscript{66} as perhaps being congruent with sexual maturity for a girl but these ages are not offered

\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid.
\textsuperscript{63} Keen, above n 16, 88.
\textsuperscript{64} Gaymarani, above n 2, 289-290.
\textsuperscript{65} Ibid 289.
\textsuperscript{66} Ibid 290.
as a substitution for the test of ‘sexual maturity’. It is not until the promised bride has reached sexual maturity that the marriage may be consummated.\textsuperscript{67}

A sexually mature but nevertheless young Yolngu bride will not, as a rule, possess a great knowledge about Ngarra, whereas her husband, who may be two or three times her age\textsuperscript{68} will typically be well versed in Ngarra as progression in gaining knowledge of the Ngarra law is restricted by age in the Madayin system. Under Ngarra the young bride enjoys a right to learn from her husband ‘all the law that he knows that took him a lifetime to learn’.\textsuperscript{69} With this increased knowledge comes increased responsibility: a serious breach of the Ngarra marriage law may result in the wife being speared through the leg.\textsuperscript{70} Under Ngarra the most appropriate person to deliver the punishment to the wife is the husband, though if he chooses he may require her mother, brother or sister to deliver the punishment, ‘perhaps by hitting her with a heavy nulla nulla’.\textsuperscript{71}

\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid.
Ngarra marriage law imposes obligations upon married men and women ‘to meet the daily domestic needs of the family’.\textsuperscript{72} The husband is under a Ngarra duty to lead the household and the wife has certain duties imposed upon her ‘towards her husband and towards her children’.\textsuperscript{73}

Yolngu parents have certain rights to decide who may marry their daughter under Ngarra law though the daughter and the proposed husband must be ‘in right skin relationship’ to each other,\textsuperscript{74} that is they must be of different moieties. Familial relationships strongly determine identity in Yolngu society and marriage between individuals who are not in correct skin, clan or moiety relationship with each other is a serious breach of Ngarra law\textsuperscript{75} which may ‘result in a heavy punishment’.\textsuperscript{76} Marriage between individuals in incorrect relationship is ‘dishonouring to the clan group’ and thwarts the primary purpose of marriage in Ngarra, namely ‘to continue the descendant line of the tribal clan’.\textsuperscript{77} Marrying into an incorrect tribal clan ‘mixes’ the descendant line and the identity of children from the marriage is clouded.\textsuperscript{78}

\begin{itemize}
  \item \textsuperscript{72} Ibid.
  \item \textsuperscript{73} Ibid.
  \item \textsuperscript{74} Ibid 289-290.
  \item \textsuperscript{75} Ibid 290.
  \item \textsuperscript{76} Ibid.
  \item \textsuperscript{77} Ibid.
  \item \textsuperscript{78} Ibid.
\end{itemize}
Conjugal faithfulness between husband and wife is a relative concept in the Madayin system. While random sexual infidelity is not condoned, sexual activity between unmarried people in the Madayin system may in some circumstances be not only lawfully sanctioned but an instrumental aspect of legal and religious processes.

An example of extra-marital sexual relations that are lawful in the Madayin system can be found in the Kunapipi ceremony which has traditionally been described as a fertility ceremony. Berndt writes that the ‘major theme in all Kunapipi ritual is the natural cycle of reproduction and fertility’. The ritual culminates in ‘ceremonial copulation’ between male and female ritual participants on the gudjiga section of the Kunapipi ceremony ground. This ritual copulation invokes the ‘Great Mother’ deity to effect continued fertility in humans and the rest of the natural world. Ceremonial copulation is between men and women who are not married to each other, often accomplished

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79 Additional discussion of Kunapipi can be found in Chapter 3.
80 For example see Berndt, above n 4, xxv; Keith Cole, *The Aborigines of Arnhem Land* (Rigby, 1979) 39.
81 Berndt, *Kunapipi*, above n 4, 16.
82 Berndt and Berndt, above n 52, 142.
by men exchanging their wives with other men.\textsuperscript{84} The lending of wives by one man to another in Kunapipi may also be for payment of a debt.\textsuperscript{85}

Often the exchange of wives occurs between ‘tribal brothers’ from distant groups.\textsuperscript{86} The tribal brother status of individuals from distant groups is determined by employing the Yolngu kinship system consisting of the equivalence of the brothers principle, the moiety system and the clan system.\textsuperscript{87} The calculations of relationship between the individuals may take some time and are considered an intellectual activity.\textsuperscript{88} Once tribal brothers are known an agreement is made to exchange wives between the tribal brothers on the ceremony grounds (though clandestine intercourse may occur beforehand).\textsuperscript{89} Gifts are given by the men to the women and a woman may have intercourse with more than one man on the Kunapipi ceremony grounds due to a persistent lack of women attending the ceremony.\textsuperscript{90} Performative coitus between

\textsuperscript{84} Cole, above n 80, 48; Berndt, \textit{Kunapipi}, above n 4, 47.
\textsuperscript{85} Silas Roberts (Ngulatji) cited in Peter Berthon, Marjorie Hall, William Hall, John Harris, Andrew Robertson and Carol Robertson (Eds) \textit{We are Aboriginal: Our 100 years: from Arnhem Land’s first Mission to Ngukurr today} (CMS Acorn 2008), 52-53.
\textsuperscript{86} Warner, above n 21, 296.
\textsuperscript{87} Ibid 28-29, 43, 45.
\textsuperscript{88} Ibid 296.
\textsuperscript{89} Ibid 296-297.
\textsuperscript{90} Ibid.
two men may occur in Kunapipi however one of the men will be acting in a female role.\textsuperscript{91}

At times intercourse may occur between two individuals for whom contact with each other is normally tabu according to customary law, however, ‘the \textit{sacredness} of the occasion demanded that sexual intercourse take place between individuals who were at other times tabu’.\textsuperscript{92}

Such coitus would, on the sacred ground, be considered far more potent, from the point of view of fertility, than that between persons who were classified as “husband” and “wife”, were of different moieties, and were comparatively easy of access even if not living together.\textsuperscript{93}

The usually tabu couple may be two cousins or another two family members for which sexual relations between the two would normally be considered incestuous in the Madayin system.\textsuperscript{94} The incestuous aspect re-enacts the incestuous acts of the wangarr responsible for starting Kunapipi, the Wauwalak sisters, who are the central figures in Madayin

\textsuperscript{91} Berndt, \textit{Kunapipi}, above n 4, 45.
\textsuperscript{92} Ibid 49. My emphasis.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
from whom all of the key Madayin ceremonies and purposes originate.\textsuperscript{95} This re-arrangement of tabu based on a higher sacredness of Kunapipi illustrates Madayin’s relative (as opposed to absolute) nature.

The ceremonial copulation is usually considered consensual by all participants.\textsuperscript{96} Nevertheless there is one variation of Kunapipi that involves the forcing of one girl to copulate with all of the male ceremony participants.\textsuperscript{97} Post-menarche girls may experience ceremonial defloration and ceremonial copulation with a number of men.\textsuperscript{98} Additionally, a female who erroneously enters a Kunapipi site may be required to have sexual intercourse with all of the men present for an indeterminate length of time; and additional or alternative remedy may be for the offending female to be married to one of the men.\textsuperscript{99}

An account given by Berndt from Western Arnhem Land in 1965 describes how a husband who had relinquished his rights over his wife and allowed another man to assume those rights nevertheless continued to have sexual intercourse with his estranged wife when the new husband

\textsuperscript{95} Ibid 18-20, 49. See also Chapter Seven.
\textsuperscript{96} Ibid 55.
\textsuperscript{97} Ibid 209.
\textsuperscript{98} Cole, above n 80, 38.
\textsuperscript{99} Gaymarani, above n 2, 296.
was away.\textsuperscript{100} This arrangement was described as secondary husband rights.\textsuperscript{101} In the 1984 case of \textit{Re Willie Gudabi v R.},\textsuperscript{102} Gudabi, a Madayin law man from Ngukurr in southern Arnhem Land, touched a married woman with a sacred object – a koolinga stick – that was forbidden for women to see or touch under Madayin. According to the Madayin law her penalty for being touched by the sacred stick was to ‘pay with her body’ by having sexual intercourse with the offender\textsuperscript{103} and so, out of fear of the sacred object, the woman allowed Gudabi to have sexual intercourse with her numerous times over a number of months. Although Gudabi’s actions were lawful under Madayin law the Australian law court found him guilty of rape.

The ratification of a debt settlement, or the payment of the debt itself, may be by temporary exchange of wives,\textsuperscript{104} an event ‘fairly common in Aboriginal Australia’.\textsuperscript{105} In the southern Arnhem Land region of the Roper River the exchange of wives to settle debts between men was common ‘in the old days’.\textsuperscript{106} Roberts is reported as saying that due to

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\textsuperscript{100} Ronald Berndt, ‘Law and Order in Aboriginal Australia’ in Ronald Berndt and Catherine Berndt (eds), \textit{Aboriginal Man in Australia: Essays in Honour of Emeritus Professor A P Elkin} (Angus and Robertson, 1965) 171-172.
\textsuperscript{101} Ibid 172.
\textsuperscript{102} 52 ALR 133.
\textsuperscript{103} 52 ALR 133, [15, 21, 22].
\textsuperscript{104} Ronald Berndt, ‘Law and Order in Aboriginal Australia’, above n 100, 185-186.
\textsuperscript{105} Ibid 186.
\textsuperscript{106} Roberts, above n 85, 52-53.
\end{flushleft}
the influence of Christianity ‘[a] lot of bad parts of ceremonies have been washed out. In Gunabibi, in the old days, men used to lend their wives to others for payment. We have finished with bad parts like that, but we keep the good part’.107 Whether debt settlement by temporary exchange of wives is still common in Aboriginal Australia is not known although, according to Gaymarani, it is still current Madayin law that a woman who breaches Kunapipi law may pay for the breach by having sexual intercourse with men other than her husband.108

In the Warlpiri109 context, men may hold other men’s penises in connection with customary law processes. One ceremony in which penises may be held is conducted in order to remove past grievances.110 Also, a male Warlpiri defendant may seek the support of a defender by offering his penis to be held111 while a female Warlpiri defendant may have the accusation withdrawn by offering herself, or a female substitute, for sexual intercourse with all of the men concerned with the matter.112 Berndt writes that

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107 Ibid.
108 Gaymarani, above n 2, 296.
109 Warlpiri is a large Aboriginal tribe in the central region of the Northern Territory.
110 Ronald Berndt, ‘Law and Order in Aboriginal Australia’, above n 100, 187.
111 Ibid 188-189.
112 Ibid 189.
[s]ettlement need not take the form of physical violence or the handing over of material goods. Nor is it framed simply in terms of person-to-person satisfaction, affecting only those immediately involved. The group as such displays an interest in maintaining the peace.\(^{113}\)

In the Daly River region (just to the West of Arnhem Land in Northwest Northern Territory) a woman who has breached customary law by walking past a cache of sacred objects, inadvertently or otherwise, has in the past been required to offer herself for sacred coitus to the men for a period of time in order to repay the men for her offence and to ‘expiate the sin she has unknowingly committed’.\(^{114}\) Berndt writes that while ‘it seems to have been quite common for women to settle their obligations through coitus’ in much of Aboriginal Australia, in the Daly River region the practice was ‘carried to an extreme, and used as a cover for promiscuity on the part of some men’.\(^{115}\) One woman, a wife, was sexually abused ‘by a number of men’ as a ‘traditional penalty’ for purportedly having ‘illicitly seen’ a sacred object.\(^{116}\) Stanner described

\(^{113}\) Ibid 190.
\(^{114}\) Ibid 192; Berndt, *Kunapipi*, above n 4, 206.
\(^{115}\) Ronald Berndt, ‘Law and Order in Aboriginal Australia’, above n 100, 192.
the phenomena as mass rape,\textsuperscript{117} yet while it ‘involved coercion, it was socially sanctioned’.\textsuperscript{118}

The phenomena of extra-marital sexual activity, consent to sexual activity and the use of sexual activities as lawful punishments in Aboriginal customary religio-legal systems has occasionally been noted by the Northern Territory Supreme Court. Gallop J, for example, has observed and noted in judgements that ‘rape is not as seriously considered in the Aboriginal community as it is in the European community’\textsuperscript{119} and that ‘the chastity of [Aboriginal] women is not as importantly regarded [by Aboriginal people] as [it is] in white communities’.\textsuperscript{120} Gallop J’s comments have drawn criticism\textsuperscript{121} however it appears that his comments are consistent with the observations of both non-Indigenous anthropologists and at least one contemporary Aboriginal customary law leader.\textsuperscript{122}

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\textsuperscript{117} Ibid 192.
\textsuperscript{118} Ronald Berndt, ‘Law and Order in Aboriginal Australia’, above n 100, 192.
\textsuperscript{121} Joan Kimm, \textit{A fatal conjunction: two laws two cultures} (Federation Press, 2004) 88.
\textsuperscript{122} Gaymarani, above n 2, 287-9; 297.
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As the grundnorm of Australian law, the *Australian Constitution* provides the starting point and the foundational source of authority in relation to marriage law in Australian law. The relevant heads of power in the *Constitution* are:

1. s 51 (xxi) marriage;
2. s 51(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants; and
3. s 51 (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Marriage in Australian law is primarily regulated by the *Marriage Act 1961* (Cth). The *Marriage Amendment Act 2004* (Cth) determined s 5 of the *Marriage Act* to define marriage as meaning ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’, that is, a permanent, monogamous arrangement between adults of the opposite sex. Specifically, the *Marriage Amendment Act 2004* 123

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123 Via *Marriage Amendment Act 2004* (Cth).
(Cth) ‘proscribes both same-sex marriages contracted in Australia and the recognition of same-sex marriages validly contracted overseas’.  

The *Family Law Act 1975* (Cth) also defines marriage as ‘the union of a man and a woman to the exclusion of all others voluntarily entered into for life’.  

Any court exercising jurisdiction under the *Family Law Act* must have regard to ‘the need to preserve and protect the institution of marriage’ as well as ‘the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children’.

The High Court has not been required to specifically determine if the term ‘marriage’ in the Constitution includes same-sex marriage, however it has produced conflicting *obiter* on the matter. Brennan J has accepted the authority of *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 which defined marriage as being ‘the voluntary union for life of one man and one woman, to the exclusion of all others’.

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125 Section 43(1)(a).
126 Section 43(1)(a).
127 Section 43(1)(b).
definition was to be inserted as an amendment\textsuperscript{130} to the statutory
definition of marriage in the \textit{Marriage Act}.\textsuperscript{131} On the other hand,
Higgins J in \textit{Attorney-General for New South Wales v Brewery
Employees Union of New South Wales}\textsuperscript{132} has opined that ‘under the
power to make laws with respect to marriage, I should say that the
parliament could prescribe what unions are to be regarded as
marriages’\textsuperscript{133} and McHugh J in \textit{Re Wakim; Ex parte McNally}\textsuperscript{134} opined
that ‘arguably “marriage” now means, or in the near future may mean, a
voluntary union for life between two \textit{people} to the exclusion of
others’,\textsuperscript{135} and not limited only to ‘one man and one woman’. Most
recently in the decision of \textit{Commonwealth v Australian Capital
Territory} the High Court plainly stated that ‘whether same sex marriage
should be provided for by law… is a matter for the federal
Parliament’.\textsuperscript{136}

The term ‘spouse’ is defined in the Macquarie Dictionary as meaning
‘either member of a married pair in relation to the other; one’s husband

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\textsuperscript{130} Marriage Amendment Act 2004 (Cth).
\textsuperscript{131} See \textit{Marriage Act 1961} (Cth) ss 5 (1), 46.
\textsuperscript{132} (1908) 6 CLR 469.
\textsuperscript{133} Ibid, 610.
\textsuperscript{134} (1999) 198 CLR 511.
\textsuperscript{135} Ibid, 553.
\textsuperscript{136} [2013] HCA 55 [1].
or wife’. 137 The Macquarie Dictionary definition includes the term ‘pair’ connoting that there can only be two members to a marriage. However in Northern Territory law, ‘spouse’ takes on a wider meaning by virtue of s 19A of the Interpretation Act (NT) which states that ‘spouse’ means ‘a person to whom... (another) person is validly married under the Marriage Act 1961’ 138 or:

if the person is an Aboriginal or Torres Strait Islander – an Aboriginal or Torres Strait Islander to whom the person is married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies. 139

Since Aboriginal marriage includes polygyny, 140 the Macquarie Dictionary definition of spouse is not as wide as the Northern Territory legal definition. In relation to the Criminal Code Act in the Northern Territory, the terms ‘husband and wife’ and like terms include, in the case of Aborigines, persons living in a husband and wife relationship according to tribal custom’. 141

138 S 19A(1)(a).
139 S 19A(1)(b).
140 Gaymarani, above n 2, 289.
141 Criminal Code Act (NT), sch 1, s 1. In regards to the constitutionality of Federal legislation to recognise Aboriginal marriages see: Attorney-General (Vic) v Commonwealth (1962) 107 CLR 529.
A literal construction of the material provisions of both the Interpretation Act and the Criminal Code Act would extend the definition of spouse, husband and wife to people in an Aboriginal marriage only when both husband and wife are Aboriginal.

4.2.1 Marriageable Age in Australian Law

The standard minimum marriageable age under current Australian law is eighteen years.\textsuperscript{142} However, this is quite a recent and dramatic increase in age from past laws. Until the nineteenth century the primary source of authority in relation to lawful marriageable age in England was English ecclesiastical law which permitted children to ‘marry upon the age of reason’\textsuperscript{143} which was determined to be seven years.\textsuperscript{144} By the turn of the twentieth century marriageable age was being determined in relation to puberty in both England and Australia, the age of puberty being presumed to be ‘12 years for girls and 14 years for boys’,\textsuperscript{145} though marriage at earlier ages was considered ‘not void but merely voidable’\textsuperscript{146}.

\textsuperscript{142} Marriage Act 1961 (Cth), s 11; no maximum age is stated in the legislation or in common law.
\textsuperscript{143} Anthony Dickey, Family Law (Lawbook Co, 5\textsuperscript{th} ed, 2007) 130.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid, citing Frederick Pollock and Frederic Maitland, History of English Law (Cambridge University Press, 2\textsuperscript{nd} ed, 1898) vol 2, 390-391.
\textsuperscript{146} Dickey, above n 143, 130.
In the 2006 case of *XYZ v Commonwealth* the High Court referred to a number of international authorities on the legal age for consenting to sexual activity and to marriage. The Court noted that conventionally, under English law, the age of consent for marriage for males was 14 years and for females, 12 years, ‘a fact reflected in several royal marriages’. Should the royal instances seem distant or rare the Court also noted that ‘[l]arge numbers of women were married in England at the age of 15 years well into the nineteenth century’. The Court also observed that currently ‘Canada adopts a general age of consent of fourteen years for most sexual activity’ which is the same age applicable in Albania, Croatia, China, Colombia, Germany, Hungary and Iceland. The Court also noted that in Chile, Mexico and other countries, the ‘age of consent is said to be twelve years’.

In England marriageable age was set by statute in 1929 to be 16 years for both males and females. In Australia, Commonwealth legislation took effect in 1963 prescribing the minimum marriageable age to be 18

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148 Ibid.
149 Ibid.
150 Ibid 580, fn 223.
151 Ibid.
152 Ibid.
153 Ibid.
154 *Marriage Act 1961 (Cth)*, s 11.
and 16 years for males and females respectively. The difference in ages between the sexes was removed by a 1991 amending Act which instituted the marriageable age to be 18 years for both sexes. Under current legislation a marriage is void where either of the parties was not of marriageable age at the material time. While Australian law sets these minimum ages for lawfully valid marriages contracted in Australia, lawfully valid marriages contracted overseas involving females 14 years or over are recognised by Australian law.

In ‘exceptional and unusual’ circumstances, the marriageable age for both males and females may be lowered to 16 years in order to marry another of marriageable age. Family law academic, Anthony Dickey QC, asserts that the most common reason to seek the exception is the expectation of a child from the relationship of the prospective marriage partners, though this has generally not been accepted as ‘exceptional and unusual’ circumstances by the courts. On the other hand, if a judge is able to assess that the marriage is likely to be successful and happy then there exists judicial authority that this alone would

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155 Dickey, above n 143, 130.
156 Sex Discrimination Amendment Act 1991 (Cth).
157 Marriage Act 1961 (Cth), s 11, as amended.
158 Marriage Act 1961 (Cth), s 23B(1)(e).
159 Marriage Act 1961 (Cth), s 88C(3).
160 Marriage Act 1961 (Cth), s 12.
161 Marriage Act 1961 (Cth), s 12(1).
162 Dickey, above n 143, 131.
163 Ibid.
constitute ‘exceptional and unusual’ circumstances ‘since so many marriages of people of the young age referred to in s 12 have been absolute failures and doomed to failure from the start’.\textsuperscript{164}

In the 1968 case of \textit{Re S G}\textsuperscript{165}, Blackburn J held that an applicant under s 12 would not fall within the category of ‘exceptional and unusual’ circumstances by relying upon Greek law and custom which would permit the under-age marriage even though the ‘proposed marriage is perfectly normal and usual by Greek standards’.\textsuperscript{166} Blackburn J opined that the Greek sources of authority were merely applicable to a class of persons whereas s 12 required that the ‘exceptional and unusual’ circumstances ‘relate to the particular parties concerned’.\textsuperscript{167} This Supreme Court of the Northern Territory authority would provide a significant barrier for any Aboriginal applicant in arguing along similar lines to those in \textit{Re S G}, namely that their law or custom permitted the under-age person to marry.

Notwithstanding the general legislation on marriageable age, in the Northern Territory the \textit{Criminal Code} came into effect in 1984 and ‘included a provision whereby it was not unlawful for an Aboriginal

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\textsuperscript{164} \textit{Re K} (1963) 5 FLR 38; cited in Dickey, above n 143, 131.
\textsuperscript{165} \textit{Re S G} (1968) 11 FLR 326.
\textsuperscript{166} \textit{Re S G} (1968) 11 FLR 326, 327.
\textsuperscript{167} \textit{Re S G} (1968) 11 FLR 326, 328.
\end{flushright}
person to enter into a tribal marriage with a child under 16, or to have sexual intercourse with a child under 16 to whom he was married in accordance with customary law’. It wasn’t until 2004 that this provision was repealed by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT).

Australian law on minimum marriageable age, as set out above, creates a regime of strict and ‘legalistic’ determination of marriageable age based on time, and time very strictly counted. The minimum lawful age has been set at 18 years, bar the ‘exceptional and unusual’ circumstances exception. An individual of an age one day short of the prescribed age would be considered not of a marriageable age.

The minimum marriageable age under Australian law, whether 18 in normal circumstances or 16 in ‘exceptional and unusual’ circumstances, allows no consideration of an individual’s specific circumstances to be taken into account in determining their readiness, or otherwise, for marriage. Australian law ignores that an under-aged individual may be ‘mature in the physical sense and... fully aware of the nature of the

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responsibilities of marriage’,\textsuperscript{169} even ‘anxious to assume them’\textsuperscript{170} as it similarly ignores that an 18 year old individual may in fact be far from physically or mentally mature enough for marriage. The Australian law on marriageable age, as it currently stands, in effect creates a legal right for an individual of age to marry.

The response by Australian law to a party to a purported marriage not being of marriageable age at the time of initiating the marriage is to void the marriage.\textsuperscript{171} Furthermore, Australian law makes it a criminal offence, punishable by 5 years imprisonment, for a person to ‘go through a form or ceremony of marriage’\textsuperscript{172} with an under-age person. Thus justice under Australian law requires not only the restoration of the condition before the illegal marriage, but also provides the possibility of imprisonment to one who marries an under-aged person.

When the marriageable age is lowered to 16 years in ‘exceptional and unusual’ circumstances,\textsuperscript{173} the person is considered a minor and parental consent is required for the marriage to be solemnised and valid.\textsuperscript{174}

Where parental authority has been displaced by another authority then

\begin{flushleft}
\textsuperscript{169} Re S G (1968) 11 FLR 326, 327.
\textsuperscript{170} Ibid.
\textsuperscript{171} Marriage Act 1961 (Cth), s 23B(1)(e).
\textsuperscript{172} Marriage Act 1961 (Cth), s 95(1).
\textsuperscript{173} Marriage Act 1961 (Cth), s 12.
\textsuperscript{174} Marriage Act 1961 (Cth), s 13.
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the consent of the prescribed authority is required.\textsuperscript{175} In certain circumstances the prescribed authority may dispense with consent\textsuperscript{176} and a magistrate may supplant consent in cases where a parent has refused to give consent.\textsuperscript{177}

### 4.2.2 Purposes of Marriage in Australian Law

While the common law does not require procreation in order to establish the legal validity of a marriage,\textsuperscript{178} the common law has considered marriage to be ‘a social institution having its origins in ancient Christian law and... [at least in] some general sense the role of marriage was closely connected to the generation and care of children’.\textsuperscript{179} The special status of marriage in common law for the generation and care of children is juxtaposed to the legal condition of bastardy, which is, or at least was until 1962, ‘a legal condition resulting from birth out of wedlock’.\textsuperscript{180}

\textsuperscript{175} Marriage Act 1961 (Cth), s 13 (1)(b); s14.
\textsuperscript{176} Marriage Act 1961 (Cth), s 15.
\textsuperscript{177} Marriage Act 1961 (Cth), s 16.
\textsuperscript{178} Attorney-General v Otahuhu Family Court [1995] 1 NZLR 603, 606.
\textsuperscript{179} Re Kevin (Validity of Marriage of Transsexual) (No 2) [2003] FamCA 94 [57-61].
\textsuperscript{180} Attorney-General (Vic) v Commonwealth (1962) 107 CLR 529, 540.
The common law has long held that since two of the major purposes of marriage are lawful sexual relations between the spouses and procreation, an essential aspect of marriage is that the marriage partners need to cohabitate. In the High Court matter of *Pearlow v Pearlow*\(^{181}\) Dixon CJ cited the leading New Zealand case on divorce, *Lodder v Lodder*\(^{182}\), in which Sir John Salmond wrote that the essential purposes of marriage are frustrated by separation for a lengthy period.\(^{183}\) In *Synge v Synge*\(^{184}\) Lord St Helier wrote that "[n]either party to a marriage can, I think, insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it".\(^{185}\) The insistence on cohabitation in the traditional common law view\(^{186}\) reflects the Biblical principle\(^{187}\) "that, for some purposes, marriage "rendered the husband and wife as one"."\(^{188}\)

However, in the 2003 matter of *Kevin and Jennifer*\(^{189}\) the notion that a major purpose of marriage is procreation was questioned by the Full Court of the Family Court. In *Kevin and Jennifer*, Jennifer had always

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\(^{181}\) (1953) 90 CLR 70.

\(^{182}\) [1921] NZLR 876.

\(^{183}\) Ibid, 877.

\(^{184}\) [1900] P 180, followed in *Hugh Lawton Bartlett v Ada Pearl Bartlett* (1933) 50 CLR 3.

\(^{185}\) Ibid, 21.

\(^{186}\) Deane J, *Re Cook & Maxwell; Ex parte C* (1985) 156 CLR 249, 262.

\(^{187}\) Leviticus 18:8 and Genesis 2:24, cited in *Re Cook & Maxwell; Ex parte C* (1985) 156 CLR 249, 262.


\(^{189}\) [2003] FamCA 94.
been and continued to be a female while Kevin was legally described as a male who ‘[a]t the date of the marriage... was a post-operative transsexual person who, at the time of his birth, was registered as a female’.\(^{190}\) Kevin and Jennifer ‘went through a ceremony of marriage on 21 August 1999 and thereafter have resided together as a married couple’.\(^{191}\) Having completed the transsexual process ‘Kevin is recognised, under both Commonwealth law and the law of New South Wales where he resides, as a man for various purposes’ including having his new sex recorded on the Register of Births.\(^{192}\)

Kevin and Jennifer sought and received from the Family Court a declaration that their marriage was valid, however, the Attorney-General for the Commonwealth appealed the decision to the Full Court of the Family Court.\(^{193}\) The question before the Court was not could two women be legally married to each other, but, could a woman and a transsexual man be married to each other. The respondents argued that Kevin was a man for the purposes of the \textit{Marriage Act} while the

\(^{190}\) \textit{Kevin and Jennifer} [2003] FamCA 94, [2].

\(^{191}\) \textit{Kevin and Jennifer} [2003] FamCA 94, [2].

\(^{192}\) Pursuant to s 32B \textit{Births, Deaths and Marriages Registration Act 1995 (NSW)}; \textit{Kevin and Jennifer} [2003] FamCA 94, [2].

\(^{193}\) Nicholson, above n 124, 560.
Attorney-General argued that Kevin was not a man for the purposes of the *Marriage Act*.194

The Full Court considered the narrow interpretation of marriage for the purposes of the *Marriage Act* as provided by Brennan J above and the wider interpretations of the same provided by Higgins, Windeyer and McHugh JJ above. The Full Court, consisting of Nicholson CJ, Ellis and Brown JJ, opined that:

> It seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen in time to 1901. We therefore approach the matter on the basis that it is within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.195

Additionally the Full Court considered that there was no demonstrable Parliamentary intent that the term ‘marriage’ in the *Marriage Act* should be ‘confined to its traditional meaning’,196 nor should the term ‘man’ be defined in a historical or technical way but only in a contemporary meaning way.197 Accordingly, the appeal from the Attorney General was

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194 *Kevin and Jennifer* [2003] FamCA 94, [3].  
195 *Kevin and Jennifer* [2003] FamCA 94, [69].  
196 *Kevin and Jennifer* [2003] FamCA 94, [129].  
197 *Kevin and Jennifer* [2003] FamCA 94, [110-111].
dismissed resulting in the marriage between Kevin and Jennifer being deemed lawful.

Lawyer, academic and Catholic priest, Frank Brennan, has also written on the *Marriage Amendment Act 2004* (Cth) and the issue of the legal regulation of civil same sex marriage in Australia. Brennan concludes that ‘[t]he legal definition of marriage should continue to follow the contours of... [the traditional Christian-inspired] meaning and experience’ of marriage, and that if a civil same-sex union were to be legislated it should avoid the term ‘marriage’ because of the popular and religious connotations of that word.

### 4.2.3 Nullity and Divorce in Australian Law

A nullity can occur where a marriage seemingly exists however ‘one or more of the necessary conditions of a valid marriage do not exist’. A divorce may end a valid marriage.

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198 Frank Brennan, ‘Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples Their Due’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005) 83.

199 Ibid 84.


201 Dickey, above n 142, 173.

202 Ibid.
The Australian colonies enacted legislation regulating divorce in the second half of the nineteenth century and all of these statutes required an element of fault by at least one spouse in order for a court to order a divorce. Faults included unlawful sexual activity, extended absence (including imprisonment) and prolonged drunkenness. As the colonies became states the legislation in relation to divorce remained as it was except for the emergence in Western Australia for the possibility of divorce without fault due to separation between the spouses of at least five years. The Commonwealth collected together the various legislated conditions for divorce from the states and, in 1959, enacted the *Matrimonial Causes Act 1959* (Cth) which for the first time provided the possibility of no-fault divorce in all Australian jurisdictions by adopting the Western Australian provision of five years’ separation. This became the standard for the sole ground for divorce that would, in 1975, be contained in the *Family Law Act*, ‘namely the irretrievable breakdown of a marriage as established by 12 months separation’.

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203 Ibid 178-179.
204 Ibid 179.
205 Ibid.
206 Ibid 179-180.
207 Ibid 182; s 48 *Family Law Act* (Cth).
The *Family Law Act* does not make consummation of marriage a condition which may render a marriage a nullity, however the *Matrimonial Causes Act 1959* (Cth), which was repealed and replaced by the *Family Law Act*, did. In England, incapacity to consummate a marriage remains a ground for annulment.

In addition to the dissolution of a marriage, the *Family Law Act* (Cth) also regulates the tangential matters of division of wealth among the formerly married couple, child custody and future financial responsibilities in relation to children. Yet the *Family Law Act* ‘is not primarily concerned with divorce... [rather, it] has a variety of functions, many of which are designed to support marriage and family life’. Indeed the *Family Law Act* provides ‘for counselling to assist reconciliation between the parties, and it establishes the Institute of Family Studies [for] the promotion of the family as the natural and fundamental group unit in society’.

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208 Matrimonial Causes Act 1959 (Cth) s 21(1)(a).
209 Matrimonial Causes Act 1973 (Eng) s 12(a).
210 Dickey, above n 143, 43.
211 Ibid; s 114B(2)(a).
4.2.4 Prohibited Relationships in Australian Law

Australian marriage law requires marriage partners to not be closely related to each other. The *Matrimonial Causes Act 1959* (Cth) essentially followed the Leviticus rules of prohibited relationships in the Bible to construct a list of prohibited degrees of consanguinity and affinity for marriage.\(^{212}\) The *Family Law Act* abandoned the Levitical scheme by reducing the prohibited relationships for marriage to between an individual with their brother, sister, ancestor or descendant.\(^{213}\)

4.3 Christian Marriage: Sources and Purposes of Authority

He who finds a wife finds a good thing.

And obtains favour from the LORD: Proverbs 18:22.

Marriage is a major concept and institution in Christianity and there are numerous sources of Biblical scripture on the subject. Christian marriage

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\(^{212}\) Dickey, above n 143, 128. The list can be found in Second Schedule to the Act.

\(^{213}\) Ibid 129. The relevant *Family Law Act* provisions are now found in the *Marriage Act 1961* (Cth) s 23B.
is a life-long covenant\textsuperscript{214} between a man and a woman for the major purposes of a mutually beneficial condition for the spouses\textsuperscript{215} and procreation,\textsuperscript{216} especially of ‘Godly children’.\textsuperscript{217} It is also in part to avoid fornication.\textsuperscript{218}

Christians may be married or unmarried and church leaders are specifically commanded to have a maximum of one wife.\textsuperscript{219} The scriptures on point draw a distinction between Christians who remain single and celibate for the purposes of the Kingdom of God and those who marry, though the married Christians are not disqualified from serving in the Kingdom.\textsuperscript{220} For the Christians who choose to marry there is an implicit suggestion that they have only one spouse.\textsuperscript{221} Christian marriage is expected to be between just one man and one woman;\textsuperscript{222} more than one spouse would be a demonstration of lack of sexual control which is not a Christian virtue.\textsuperscript{223} There are numerous examples

\begin{footnotes}
\item[214] Mark 10:9.
\item[215] Genesis 2:18.
\item[216] Genesis 1:28; 9:1.
\item[218] I Corinthians 7:2.
\item[219] I Timothy 3:1; 12.
\item[220] I Corinthians 7.
\item[221] Ibid.
\item[223] I Corinthians 7:9; I Peter 1:13.
\end{footnotes}
of polygyny in the Old Testament and they do not draw criticism from God except where one man who already had many wives arranged for another man with only one wife to be killed in order that he may lawfully be able to marry the dead man’s wife.

In Genesis, the Bible records the existence of marriage from as soon as a man and a woman (Adam and Eve) are made: ’And God blessed them, and God said to them: 'Be fruitful and multiply, and fill the earth and subdue it’. God Himself is described as the author of marriage. Once married, a husband is to leave his parents and to cleave to his wife. A woman is given as a wife by God to be a helper for her husband and is comparable to him. The unity between husband and wife is described in very strong terms: ‘they will become one flesh’ and ‘what God has put together let not man put asunder’. The spouses become ‘one flesh’ and are not to be parted. The indissolubility of Christian marriage is seen as a reflection of God’s faithfulness, especially

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For example see: 1 Samuel 18:27; 25:42-44; 2 Samuel 3:2-5; 5:13.
2 Samuel 11:12.
Genesis 1:26-27.
Genesis 1:28.
Catechism of the Catholic Church, 1603; Mark 10:9.
Genesis 2:24.
Genesis 2:18-25.
Genesis 2: 24.
Mark 10:9.
Ibid; Mark 10:9.
as it relates to God’s covenant with Israel. Jesus also referred to the book of Genesis when queried about marriage:

"Haven't you read," he replied, "that at the beginning the Creator 'made them male and female,' and said, 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh'? So they are no longer two, but one. Therefore what God has joined together, let man not separate."

In some Christian traditions marriage is termed 'holy matrimony' and is understood to be a sacrament that is a visible sign of God among people. The Catholic tradition teaches that ‘marriage helps to overcome self-absorption, egoism, pursuit of one's own pleasure, and to open oneself to the other, to mutual aid and to self-giving’. 

The Christian understanding of procreation is that God is literally the Creator of all people whether or not their parents are married. Yet one of the major purposes of marriage in Christianity is procreation.

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235 Hosea 1-3; Isaiah 54; 62; Jeremiah 2-3; 31; Ezekiel 16; 23; Malachi 2:13-17.
236 Matthew 19:4-6.
237 Tabbernee, above n 222, 17, 44, 56.
238 Catechism of the Catholic Church, 1609.
239 Psalm 139:13-16.
240 Genesis 1:28.
Therefore, marriage, according to Christian scripture, is not the only means of procreation, though it is the God-sanctioned means.241

In Christianity marriage is seen to be an institution from God, however, celibacy is also a condition approved by God, especially when it is for the sake of the Kingdom of Heaven:

For there are eunuchs who have been so from birth, and there are eunuchs who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive this, let him receive it.242

To remain single and celibate is considered a gift from God in order to serve God in a certain way; but so too is marriage, albeit in a different way.243 The general thrust is to live and serve God, whether single or married, in the condition that one finds oneself in.244

Christian scripture instructs husbands to love their wives, ‘as Christ loved the church and gave himself up for her’.245 The book of Ephesians contains instructions on being Christian husbands and wives:

241 Genesis 1:28.
242 Matthew 19:12.
243 1 Corinthians 7:7.
244 1 Corinthians 7:17-24.
245 Ephesians 5:25-26; 31-32.
Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.

Husbands, love your wives, just as Christ loved the church and gave himself up for her to make her holy, cleansing her by the washing with water through the word, and to present her to himself as a radiant church, without stain or wrinkle or any other blemish, but holy and blameless. In this same way, husbands ought to love their wives as their own bodies. He who loves his wife loves himself.  

Immediately following these scriptures the author of Ephesians links the relationship between husbands and wives to the relationship between Christ and the church. It is a theological masterstroke to capture such a profound Christological mystery in such succinct writing:

After all, no one ever hated his own body, but he feeds and cares for it, just as Christ does the church--for we are members of his body. "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh." This is a profound mystery--but I am talking about Christ and the church.  

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246 Ephesians 5: 22-28, Similar exhortations are given in 1 Peter 3:1-7.
247 Ephesians 5: 29-32.
As if the writer of the book of Ephesians expects some readers to struggle with the spiritual aspects of this theology, the previous scripture is followed by returning to the basic intent of the instruction for both husbands and wives, that is, mutual valuing: ‘However, each one of you also must love his wife as he loves himself, and the wife must respect her husband’.248

4.3.1 Marriageable Age and Consent to Marry in Christianity

There are many instances of marriage in the Bible; some are approved by God249 and others are not.250 However there is no instance in the Bible of a marriage being approved or not approved by God by reason of the age of one or both of the spouses. The well-known Biblical marriage between Joseph and Mary, and the birth of their son, Jesus, is well documented in the Bible251 yet their ages are not mentioned. According to the local custom at the time of their marriage girls and boys married in their teens including early teens252 and there is no suggestion in

248 Ephesians 5: 33.
scripture that Joseph and Mary did not comply with this custom. Younger widows are encouraged to remarry rather than remain single.\textsuperscript{253}

The Bible does not prescribe marriageable ages, at least not strictly prescribed in terms of years. However, given that the Biblical purpose of marriage is predominantly the procreation of Godly offspring,\textsuperscript{254} it is logical that a marriage that involves one or more spouses of insufficient age to be biologically able to produce children would be a marriage in which the primary purpose is thwarted. Logically, then, spouses in a Christian marriage should be of sufficient age so as to be able to procreate. Accordingly, the Catholic Church has set the minimum marriageable ages of men at sixteen and women at fourteen.\textsuperscript{255}

It is common in the Old Testament for potential marriage partners to obtain permission from their parents to marry;\textsuperscript{256} indeed some marriages are arranged by the parents of the spouses.\textsuperscript{257} The New Testament also includes a reference to the practice of a father giving his daughter in marriage.\textsuperscript{258} These practices do not reflect a specific God-given

\textsuperscript{253} 1 Timothy 5:14.
\textsuperscript{254} Malachi 2:15.
\textsuperscript{255} Code of Canon Law, Canon 1083.
\textsuperscript{256} Genesis 24:2-4, 49-51; Genesis 34:8; Deuteronomy 7:3; Judges 14:2-3; Ezra 9:12.
\textsuperscript{257} For example see Genesis 24.
\textsuperscript{258} 1 Corinthians 7:38.
command to have parents arrange marriages or to obtain parental permission to marry, however they do reflect a general command for children to honour their parents.\textsuperscript{259}

A Christian marriage requires consent from both spouses\textsuperscript{260} and the consent results in the two individuals becoming ‘one flesh’.\textsuperscript{261} In the Catholic Church consent of both parties is required for marriage and that consent consists of mutually giving and accepting each other irrevocably in order to establish marriage.\textsuperscript{262} Without mutual consent ‘there is no marriage’.\textsuperscript{263}

\subsection*{4.3.2 Sexual Activity Outside of Marriage}

A literal interpretation of scripture specifically prohibits many scenarios of sexual activity outside of marriage, such as fornication,\textsuperscript{264} adultery\textsuperscript{265} (including lust without committing the physical act),\textsuperscript{266} homosexuality\textsuperscript{267} and prostitution.\textsuperscript{268} Other interpretations of these scriptures are possible.

\begin{itemize}
\item \textsuperscript{259} For example see Exodus 20:12 and Ephesians 6:2.
\item \textsuperscript{260} Ephesians 5:32.
\item \textsuperscript{261} Genesis 2:24; Matthew 10:8; Ephesians 5:31.
\item \textsuperscript{262} \textit{Code of Canon Law}, Canon 1057.
\item \textsuperscript{263} \textit{Code of Canon Law}, Canon 1626.
\item \textsuperscript{264} Mark 8:21-23; Hebrews 13:4.
\item \textsuperscript{265} Exodus 20:14, Deuteronomy 22:22; Hebrews 13:4.
\item \textsuperscript{266} Matthew 5:27-32.
\item \textsuperscript{267} Leviticus 20:13; Romans 1:26; 1 Corinthians 6:9; 1 Timothy 1:9-11.
\item \textsuperscript{268} Leviticus 18:22; 19:29; 1 Corinthians 6:15-16.
\end{itemize}
For example, former Justice of the High Court of Australia and self-described Christian, Michael Kirby, advocates an interpretation of the scriptures which does not render homosexuality a sin or a type of sexual activity condemned by God.\footnote{269} However, the Bible contains scripture that literally conflicts with Kirby’s reasoning.\footnote{270}

As described in Chapter Three, the way in which scriptures are interpreted are often matters of dispute.\footnote{271} However, this thesis does not rely upon a particular method of interpretation other than it cites what the Bible literally states, thus the only interpretation is the inherent literal interpretation. The same approach is taken in this thesis to Australian law and Madayin. Individuals who would rather a particular form of interpretation, whether it is in relation to the Christian scriptures, Australian law or Madayin will need to apply their particular methods of construction (and the authoritative basis to their reasoning for such) to the sources cited.


\footnote{270} Proverbs 3:5; Leviticus 20:13; Romans 1:26; 1 Corinthians 6:9; 1 Timothy 1:9-11.

\footnote{271} Nigel M de S Cameron, \textit{Evolution and the Authority of the Bible} (Paternoster Press, 1983) 33. The same could be said in regards to many disputes amongst lawyers.
Christian scripture permits divorce only when a spouse has committed sexual immorality, most typically, adultery. In Christianity the marriage bond is so strong that should a person divorce their spouse and marry another they commit adultery against their first spouse, that is, the marriage bonds (at least in relation to matters of sexual significance) continue even after divorce. God will judge and punish the husband or wife that defiles the marriage bed.

4.3.3 Spousal Roles in Christian Marriage

There exists a type of hierarchy in a Christian marriage: Jesus Christ is the head of the husband and the husband is the head of the wife. Husbands are commanded to love their wives and treat their wives in an understanding and honourable way. Christian spouses are required to fulfill their conjugal (sexual) obligations to their spouses, that is, not to deprive the other of sexual intimacy. Christian scripture commands husbands to materially provide for their households.

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272 Matthew 5:31-32; Matthew 19:9.
273 Mark 10:11-12.
274 Hebrews 13:4; 1 Thessalonians 4:4-6.
275 1 Corinthians 11:3; Colossians 3:18
276 Ephesians 5:25; Colossians 3:19; 1 Peter 3:1.
277 1 Peter 3:7.
278 1 Corinthians 7:3-5.
279 1 Timothy 5:8.
admonishes wives ‘to love their husbands, to love their children, to be
discreet, chaste, homemakers, good, obedient to their own husbands,
that the word of God may not be blasphemed’. 280 Young widows are
encouraged by Scripture to remarry, have children and manage the
house. 281 An Old Testament rule states that ‘if brothers dwell together,
and one of them dies and has no son, the widow of the dead man shall
not be married to a stranger outside the family; her husband’s brother
shall go in to her, take her as his wife, and perform the duty of a
husband’s brother to her’. 282 However, the application of this rule to
Christian widows is uncertain especially if the surviving brother is a
Church leader. 283

4.3.4 Christian Marriage Partners

Scripture instructs Christians to marry other Christians and to avoid
marrying non-Christians. 284 However, if a Christian is married to a non-
Christian then scripture instructs the Christian to remain married rather

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281 1 Timothy 5:14.
282 Deuteronomy 25:5.
283 1 Timothy 3:1; 12.
than to seek a divorce. There exists a fundamental spiritual incompatibility between a Christian and their non-Christian spouse.

Chapter 18 of Leviticus contains a number of prohibitions against certain types of sexual relations. These provisions are worded in terms of warnings against forms of sexual relations and not marriage per se. However, as sexual relations are a central activity and purpose of marriage, the Leviticus prohibitions also define appropriate marriage partners. The provisions are comprehensive and succinct and so are reproduced below in full:

"'No one is to approach any close relative to have sexual relations. I am the Lord."

"'Do not dishonor your father by having sexual relations with your mother. She is your mother; do not have relations with her."

"'Do not have sexual relations with your father's wife; that would dishonour your father."

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285 1 Corinthians 7:10-20.
"Do not have sexual relations with your sister, either your father's daughter or your mother's daughter, whether she was born in the same home or elsewhere.

" Do not have sexual relations with your son's daughter or your daughter's daughter; that would dishonor you.

" Do not have sexual relations with the daughter of your father's wife, born to your father; she is your sister.

" Do not have sexual relations with your father's sister; she is your father's close relative.

" Do not have sexual relations with your mother's sister, because she is your mother's close relative.

" Do not dishonor your father's brother by approaching his wife to have sexual relations; she is your aunt.

" Do not have sexual relations with your daughter-in-law. She is your son's wife; do not have relations with her.

" Do not have sexual relations with your brother's wife; that would dishonour your brother.
"'Do not have sexual relations with both a woman and her daughter. Do not have sexual relations with either her son's daughter or her daughter's daughter; they are her close relatives. That is wickedness.

"'Do not take your wife's sister as a rival wife and have sexual relations with her while your wife is living.

"'Do not approach a woman to have sexual relations during the uncleanness of her monthly period.

"'Do not have sexual relations with your neighbor's wife and defile yourself with her.

"'Do not give any of your children to be sacrificed to Molech, for you must not profane the name of your God. I am the Lord.

"'Do not lie with a man as one lies with a woman; that is detestable.

"'Do not have sexual relations with an animal and defile yourself with it. A woman must not present herself to an animal to have sexual relations with it; that is a perversion.287

The primary purpose in Christianity is the ‘kingdom of God’,288 which all people are invited into289 and which will last forever,290 that is, those

287 Leviticus 18: 6-23.
who enter receive eternal life.\textsuperscript{291} This purpose is manifested in the Christian teachings on marriage as the conjugal faithfulness of spouses is designed to be a sign of God's faithfulness, especially his faithfulness to ultimately bring salvation and the eternal Kingdom of Heaven into fulfilment. The fullness of the Kingdom of God will not be reached until Jesus Christ returns\textsuperscript{292} at which time people who have died will be resurrected, ‘those who have done good, to the resurrection of life, and those who have done evil, to the resurrection of condemnation’.\textsuperscript{293} Once resurrected, people will not marry.\textsuperscript{294}

4.4 Discussion and Chapter Summary

The purposes of marriage in the Madayin system are the engagement in, and the enjoyment of, sexual activity between men and women with the intended outcome of producing offspring to continue the descendant’s line. Marriage has a sacred nature under Ngarra law; marriage partners who fulfil the Ngarra marriage law effect supernatural magaya. Lawful

\textsuperscript{288} Mark 1:15; also termed 'the Kingdom of Heaven': Matthew 19:16-24.
\textsuperscript{289} Matthew 14:21-23, 28:19-20; Mark 16:15-16; Luke 24:47; John 3:16
\textsuperscript{290} John 10:28; Isaiah 9:6-7.
\textsuperscript{291} John 3:16-21.
\textsuperscript{292} I Corinthians 15:12-28.
\textsuperscript{293} John 5:29.
\textsuperscript{294} Matthew 22:30.
sexual activity is not limited to husband and wife; in certain circumstances sexual activity between persons not married to each other may be used to lawfully pay a debt or to effect a religious outcome.

The primary purpose of Madayin is the continuity of an ancient past source of spiritual authority executed predominantly by the practising of a fertility philosophy. This primary purpose of Madayin is manifested in the specific area of marriage as it is through marriage that generational continuity is managed according to the authority of the wanggar. The relative nature of Madayin is demonstrated in the Madayin regulation of marriage in that conjugal faithfulness and acceptable marriage partners are not absolute.

The *Marriage Act 1961* (Cth), amended by the *Marriage Amendment Act 2004* (Cth), defines marriage as meaning ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’ and makes unlawful same-sex marriages whether purportedly contracted in Australia or validly contracted overseas.

295 s 5.

296 *Marriage Amendment Act* sch 1, items 1, 2, amending *Marriage Act* ss 5(1), 88B.
If Australian marriage law were to ever recognise a lawful same-sex marriage, whether termed ‘marriage’ or something else, it must be by the demos via the legislature and not by courts creatively interpreting legislation, for the demos is the ultimate repository of authority in Australian law.\(^\text{297}\)

The primary purpose of Australian law is to enable the contemporary demos to rule by a system of representative democracy. The demos have expressed their will via the legislature in an interesting way in Australian marriage law as the legal definition of marriage is essentially a Christian one yet the legal requirements for divorce are very un-Christian.\(^\text{298}\) Obviously this is an inconsistent arrangement for a Christian system but the Australian legal system is not a Christian system. It is a system in which the demos rule and if the demos choose to include Christian influence in one area of law but not in another then it may do so without being inconsistent because the purpose of the Australian legal system is contemporary demos rule, not the Kingdom of God.

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\(^{298}\) The only Biblical ground for divorce for Christians is sexual infidelity: Matthew 5:32.
The purposes of procreation are radically different in each system. Procreation in Ngarra marriage is a re-enactment and a witness to the fertility theme of the mythical Yolngu Ancestors and accomplishes the spiritual quality of Madayin. Procreation in Christian marriage is a product of mutually faithful spouses living as visible signs of God’s faithfulness to humanity. Australian marriage law has been heavily influenced by Christian values yet Australian marriage law stops short of declaring that marriage is, like in Christianity, procreation as a product of mutually faithful spouses living as visible signs of God’s faithfulness. Rather, procreation in Australian law simply serves as a purpose in itself. In the common law tradition, procreation is well established as a purpose of marriage. However, the recent cases of *Kevin and Jennifer*[^299] and *Commonwealth v Australian Capital Territory*[^300] challenge this traditional purpose of marriage.

In summary, the primary purpose of marriage in Madayin is to re-create magaya (peace, order, fertility) according to the primary method used by the mythical progenitors of Yolngu society, that is, procreation which concurrently continues the descendant line of the clan. The primary purpose of marriage in Christianity is procreation between permanent and devoted spouses who, through their mutual faithfulness, act as

[^299]: [2003] FamCA 94.
[^300]: [2013] HCA 55 [1].
visible signs of God’s faithfulness. In Australian law, marriage is defined as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’ with a traditional primary purpose of procreation which has been judicially challenged in the last decade.

This chapter has described and analysed the sources and purposes of marriage as an example of an area of life that is common to Madayin, Australian law and Christianity. All three systems include authority that supports the notion of marriage, broadly understood. Chapter Five considers the topic of sorcery, a topic which each system expresses an opinion on, but of very differing sorts. Just as Chapter Four has linked the foundational purposes of each system to the specific topic of marriage, so too does Chapter Five link the foundational purposes to the specific topic of sorcery.
Chapter 5

Sorcery: Sources of Authority and Purpose

This chapter examines the sources and purpose of authority in relation to sorcery in the three systems. The topic of sorcery is included in this thesis because, unlike marriage which all three systems embrace in varying forms, sorcery is accepted as an integral and legitimate activity in Madayin, actively and wholly rejected by Christianity and contemporarily mostly ignored by Australian law.

As an aspect uncommon, or variably common, to the three systems considered in this thesis, it may be thought that sorcery presents as a specific area of authority that is unable to be consistent with the analysis of foundational purpose of authority as described for each system in Chapter Three. However, the analysis in this chapter will demonstrate that the uncommon approach to sorcery by the three systems actually is consistent with the foundational purposes described. Accordingly, the analysis of authority in relation to sorcery further strengthens the reliability of the analysis conducted in Chapter Three and the propositions constructed in Chapter Six.
Sorcery is defined by the Macquarie dictionary as ‘the art, practices, or spells of a sorcerer; magic, especially black magic in which supernatural powers are exercised through the aid of evil spirits; witchcraft’.\(^1\) This definition is sufficient for present purposes. It describes the evil nature of the supernatural power but leaves the nature of the outcomes of sorcery open. That is, it may include both ‘evil’ outcomes such as harm and ‘good’ outcomes such as healing.

5.1 Sorcery in Madayin

Sorcery exists, and is being used increasingly,\(^2\) in the Madayin system which categorises sorcery in two ways: authorised and unauthorised.\(^3\)

\(^1\) Alison Moore (ed), *Macquarie Concise Dictionary* (University of Sydney, 4\(^{th}\) ed, 2006) 1162.


\(^3\) Janice Reid, *Sorcerers and Healing Spirits: continuity and change in an Aboriginal medical system* (ANU Press, 1983) 32-44; 57; Claims have been made that all sorcery is illegal for Yolngu society (see Aboriginal Resource and Development Services Incorporated, above n 2; *Melngur Gapu Dhularrpa Gawiya: Raypirri Ngarrangur Romgurr Magayakurr* (Law and Punishment of Ngarra), (Information Paper authored by the Yolngu clans of Ngaymil Gampurtji, Ngaymil Bulkmana, Ngaymil Datiwuy and Ngaymil Gondarra, Galiwinku, Arnhem Land, 3 September 2005), Article 20, though those claims are not supported by numerous other statements to the contrary: see Steven J Etherington, *Learning to be Kunwinjku: Kunwinjku People Discuss Their Pedagogy* (PhD thesis, Charles Darwin University, 2006) 209; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 361 and George Pascoe Gaymarani, ‘An Introduction to the Ngarra
Unauthorised sorcery is always harmful and destructive but authorised sorcery may be either destructive or beneficial to the recipient.\(^4\) Both authorised and unauthorised types of the most potent harmful sorcery are known by the Yolngu language term ‘galka’ and the sorcerer is also known as a ‘Galka’\(^5\) (sometimes called a black magician).\(^6\) Other types of less potent sorcery are also known though the most infamous is galka.\(^7\) The beneficial types of sorcery are commonly sorcery for healing, and in Madayin system such a healer is known as Marrnggitj (sometimes called a white magician).\(^8\) A Marrnggitj draws upon the same source and nature of spiritual power, marr, as does a galka, namely the wanggar.\(^9\)

A Marrnggitj, sometimes referred to as a medicine man, ‘gains his power through extraordinary experiences with two or possibly three soul-children who afterwards become his helpers (spirit familiars). Both the medicine man and the familiars are called marngit [alternative spelling for maarnggitj].\(^10\) A Marrnggitj may lose his familiars if he breaches a

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\(^5\) Gaymarani, above n 3, 285.

\(^6\) Warner, above n 4, 183.


\(^8\) Ibid 35.

\(^9\) Ibid.

\(^10\) Warner, above n 4, 200.
tabu placed on him by the familiars. One example of a taboo placed on a Marrnggitj by his familiars was that he was not to be submersed in salt water: 'If you go down under the salt water, we two [familiars] will be dead'. (Presumably this particular taboo would require a dispensation for the Marrnggitj to participate in the Ngarra wanga lupthun ceremony which requires all Yolngu the people to collectively immerse themselves in salt water.)

A Marrnggitj can ‘see’ inside other people, and in the case of a victim of soul stealing a Marrnggitj can tell that the soul has left the victim’s heart, however the Marrnggitj cannot heal such a victim. In cases where a Marrnggitj can heal, the methods used are a combination of physical, such as massage or sucking out foreign objects from a victim’s body, and supernatural. By means of sorcery, a Marrnggitj may kill a Galka who has previously killed a family member of the Marrnggitj’s client.

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11 Ibid 207.
12 Ibid 203.
14 Ibid 8; Nupurra et al, above n 3, Article 24.
15 Warner, above n 4, 201.
16 Ibid.
17 Ibid.
Belief in the existence, indeed the prevalence, of galka is wide spread in Arnhem Land. In cases of death the most plausible cause for the Yolngu is galka.\(^\text{18}\) For the Yolngu,

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\text{[a]ll deaths, sicknesses, certain types of bad luck, and, in general, all those occasions on which the individual is seriously out of adjustment with his community, physically, mentally, or socially, are looked upon as the effects of black magic; and in almost every case except that of soul-stealing the white magician is called in to remedy the situation.}\(^\text{19}\)
\]

Exceptions to blaming galka for unwelcomed circumstances are few. Even when an elderly person dies the usual diagnosis is galka as opposed to ‘just old age’.\(^\text{20}\)

Yolngu take ‘great care not to commit a religious transgression’,\(^\text{21}\) that is, a Madayin transgression. Gaymarani writes that the ‘\text{punishment of death by the sorcery of a Galka is a just punishment under Ngarra law for the most serious offences, such as dishonouring, disrespecting and abusing the Ngarra law.}’\(^\text{22}\) The theft of sacred ritual objects (rangga), sacred ritual songs (manikay), sacred paintings (miny’tyi) myths or land

\(^{18}\) Reid, above n 7, 35-36.
\(^{19}\) Warner, above n 4, 183.
\(^{20}\) Ibid.
\(^{21}\) Reid, above n 7, 44.
\(^{22}\) Gaymarani, above n 3, 296.
‘are often given as legitimate reasons for seeking revenge by sorcery.’\textsuperscript{23} Deaths that are caused by authorised sorcery ‘are lawful under Ngarra law’.\textsuperscript{24} The most common result from galka is death.\textsuperscript{25}

Galka, both sorcery and sorcerer, enjoy immense power and authority in the Madayin system.\textsuperscript{26} Great prices\textsuperscript{27} over many years\textsuperscript{28} must be paid by those who seek to obtain power to practice sorcery. This payment is an investment, though, as ‘[w]henever a [Yolngu] magician, black or white, is called upon, payment must be made to him’ for the sorcery services rendered.\textsuperscript{29} A Galka ‘gains his power originally from a near relative, usually his father, often his maternal uncle, but at times his paternal uncle’.

A novice Galka must be involved with an older sorcerer in one or two deaths by galka before he can be considered a sorcerer in his own right.\textsuperscript{30}

First, power is transmitted from a man who is a killer and master of the souls of several dead men; and, second, the beginner must have been associated with

\begin{flushright}
\textsuperscript{23} Reid, above n 7, 45.  \\
\textsuperscript{24} Gaymarani, above n 3, 297.  \\
\textsuperscript{25} Ibid 286.  \\
\textsuperscript{26} Ibid 287-288.  \\
\textsuperscript{27} Ronald M Berndt and Catherine H Berndt, \textit{The First Australians} (Ure Smith, 1967) 81.  \\
\textsuperscript{29} Warner, above n 4, 183.  \\
\textsuperscript{30} Ibid 188.  \\
\textsuperscript{31} Ibid. 
\end{flushright}
the killing of a man and therefore with the dead before he is given the social personality as a sorcerer by his community. In brief, his personality as a sorcerer is by double association with the power of the dead. He has the power to change the living into the dead before his sacred power comes from the sacred dead.\textsuperscript{32}

Punitive sexual activity conducted by Yolngu men against a woman who erroneously entered into a Madayin ceremony is protected by the authority of galka.\textsuperscript{33} Other Madayin law breaches that may incur the penalty of death by galka include but are not limited to:

- ‘[a] person who curses another while the \textit{Ngarra} court is in session’;\textsuperscript{34}
- ‘women who breach ‘ceremony rules when they are in the female ceremony ground’;\textsuperscript{35}
- a man who steals another man’s wife;\textsuperscript{36}
- prostitution;\textsuperscript{37}
- a person who molests or otherwise sexually abuses or assaults a child;\textsuperscript{38}

\textsuperscript{32} Ibid.
\textsuperscript{33} Gaymarani, above n 3, 288.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid 291.
\textsuperscript{36} Ibid 292.
\textsuperscript{37} Ibid 293.
• a male who ‘engages in sexual activity with an untouchable girl’\textsuperscript{39} (an untouchable girl in Ngarra law is a female who has been designated by her parents to remain single, not to have her own children and to look after her parents in their old age),\textsuperscript{40}

• the misuse of sacred painting designs;\textsuperscript{41}

• extreme and repeated unlawful public violence;\textsuperscript{42}

• murder;\textsuperscript{43}

• a woman who, having trespassed upon a Gunapipi ceremony ground, refuses to accept the negotiated punishment;\textsuperscript{44}

• a ‘breach of... [a] Ngarra court order’;\textsuperscript{45}

• repeated ‘use of a weapon against another person’;\textsuperscript{46}

• a woman who has engaged ‘in extramarital affairs behind her husband’s back’;\textsuperscript{47} and

• unlawful ‘[e]ntry into a restricted area such as ceremonial grounds’.\textsuperscript{48}

\textsuperscript{38} Ibid 294.
\textsuperscript{39} Ibid 292.
\textsuperscript{40} Ibid 294.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid 295-296.
\textsuperscript{43} Ibid 296.
\textsuperscript{44} Ibid 297.
\textsuperscript{45} Ibid 301.
\textsuperscript{46} Ibid 303.
\textsuperscript{47} Ibid 291.
\textsuperscript{48} Ibid 299.
For authorised galka, a Galka will be assisted by Madayin officials, usually the jungay, and their sorceries will be deemed legal in the Madayin system.

The role of the Galka may include the investigation of an incident. The Galka will act secretly in their investigations. The traditional justice committee consisting of the leading jungay of different language groups will give the Galka the order to cause the offender’s death by sorcery. These actions by the Galka are lawful under Ngarra law.49

Sorcery in Arnhem Land is conducted in many and various ways though Reid has constructed a list of four phases typical of galka attacks:

First of all the galka either waylays his victim in a secluded place or draws him there. Second, he puts the victim to sleep, cuts open his body, removes or mutilates his organs and drains away his blood. Third, he induces amnesia in his victim to ensure that he is either unable to remember or unable to tell anything about the attack. Fourth, the victim dies, usually within hours or days of returning home.50

49 Ibid 297.
50 Reid, above n 7, 37.
When the Galka practices soul stealing, the purpose of opening the body is primarily to access the victim’s blood directly from the heart, thereby stopping the heart which in turn releases the victim’s soul enabling the Galka to steal the soul which is the major goal of the sorcery.\footnote{Warner, above n 4, 185.} According to Yolngu belief ‘[w]hen the heart stops beating the soul is let out... the heart’s blood is different from the body’s blood, the home of the soul being in the heart’.\footnote{Ibid.} When the victim is a male the body is cut open as described above, however when the victim is a female the Galka access the heart via the victim’s vagina.\footnote{Ibid 186.} Whether the victim is male or female the goal remains to access the soul residing in the heart. When the victim’s soul is released it becomes the Galka’s familiar spirit, that is, a spirit, often taking the form of an animal that accompanies and assists the Galka.\footnote{Ibid 186-187.} When a Galka accesses a female victim’s heart via her vagina, the Galka will attempt to restrain himself ‘for fear sexual desire will overcome his magic’,\footnote{Ibid 186.} however when the victim is male, the Galka will attempt to copulate with the victim’s wives in order to accomplish ‘the perfect killing’.\footnote{Ibid.}
Parts of victims’ bodies are often used in galka and the connection to the wanggar exists in the use of body parts in sorcery: ‘[l]ike the blood, flesh, and fat of the wangarr, the blood, flesh, and fat of the dead are a source of power which can be appropriated (by sorcery) – power traced ultimately to the wangarr’. Blood of victims is especially common in galka practices; the blood of a victim may be kept in a paperbark parcel and used to aid in future acts of sorcery such as murder or even sorcery used in hunting. One method is for the sorcerer to ‘draw the image of a person at such a [sacred] place, or leave an intended victim’s item of clothing or bodily matter at the site, in the galka invoking the power of the wangarr to harm the person’.

Not all sorcery in Arnhem Land necessitates the Galka being in actual physical contact with the victim or the use of body parts. Other varieties of sorcery include image magic where the sorcerer paints an image of the intended victim on a stone and burns it until the stone breaks, singing magic where the sorcerer ‘sings’ the victim to death, possession by an evil spirit directed by a Galka, image whipping where the image of the intended victim is whipped with strings, sorcery via dreams and sorcery

58 Reid, above n 7, 38.
59 Keen, above n 57, 522; Reid, above n 7, 33.
conducted by using excreta or waste food products of the intended victim.60

Marrnggitj may use magic combined with natural remedies to cure ailments such as diarrhoea, headache, spear wounds and infections.61 Magic spirit bags may be used by any Yolngu man ‘for good luck in hunting or to hold in their mouths when they are fighting... [this type of magic] is not confined to the magician’.62 Also, any Yolngu person may attempt rain magic in order to, by supernatural means, make rain fall.63 While anyone can attempt to make rain, no one, not even a Marrnggitj, can make rain stop.64

The link between sorcery and the foundational source of authority in Madayin, the wangarr ancestral beings is not in dispute. The powers of the wanggar are drawn upon in the practice of sorcery and there is no moral conflict created.65

Yolngu do not draw absolute boundaries between domains such as sorcery and the domain of ancestral beings. Sorcery is implicated in the

60 Warner, above n 4, 196-200.
61 Ibid 209-212.
64 Ibid 209.
65 Reid, above n 7, 35.
protection of secrecy of ancestral rom (‘law’, complexes of rituals, songs, designs, and sacred objects), while ancestral powers may be drawn on to attack one’s enemies.66

Places that contain the wanggar are sacred and are considered dangerous. A person who ‘trespasses in these areas, whether by choice or ignorance, is likely to be stricken with illness’.67 By way of illustration if ‘a man walks through a certain wangarr place... he will lose his strength and the bones in his legs and arms will break. It is also possible to contract leprosy as a result of entering such an area’.68 Another wangarr area is said to have caused a woman ‘to be “weak kneed” because she persistently collected shellfish at a location close to... [the] dangerous wangarr place’.69

In the Yolngu Madayin system a healer (marrnggitj, witch doctor) draws upon the same source and nature of spiritual power, marr, as does a galka.70 Warner writes that the galka sorcerer ‘can injure or kill his

66 Keen, above n 57, 525.
67 Reid, above n 7, 50.
68 Ibid.
69 Ibid.
70 Ibid 35.
victim, and the ‘white’ magician (marrnggitj) can cure him or restore his faculties’. 71

Foundational sources of authority in the Madayin system can be drawn upon by sorcerers in order to practice sorcery. Both the sorcery itself and the practice of drawing upon the spiritual power of the Madayin foundational sources, the wanggar, are sanctioned in Madayin. Naturally, such practices and philosophies have brought into question the nature of the ancient Madayin doctrines. 72 Even though the source and nature of the spiritual power used by both galka and marrnggitj are the same and the potential for marrnggitj to do harm exists, Yolngu marrnggitj ‘vigorously deny that they work sorcery, even on enemies’. 73

The primary purpose of Madayin is the continuity of an ancient past source of spiritual authority and this can be seen in the Madayin practice of galka as the source of the spiritual power that is accessed by the Galka is the wangarr, the ancestral beings. Madayin continuity is executed predominantly by the practising of a fertility philosophy 74 and this is manifested often in the practice of galka as many of the offences

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71 Warner, above n 4, 193.
72 Keen, above n 57, 515, 519.
73 Reid, above n 7, 35.
74 See Chapter 3.
that may result in death by sorcery relate to sexual activity.\textsuperscript{75} This regulation of fertility by sorcery achieves magaya, the Madayin state of balance, order and peace.

5.2 Sorcery in Australian Law

In ‘the early modern period of European history, witchcraft was seen as a very real crime and those convicted of engaging in it often suffered the death penalty’.\textsuperscript{76} The United Kingdom supplies Australian law with a long heritage on the law in relation to sorcery. Pollock and Maitland note that the ancient ‘Anglo-Saxon dooms... have a good deal to say about sorcery’.\textsuperscript{77}

Owing to the supernatural basis of sorcery, most sorcery matters were dealt with by Church courts rather than the secular courts as the secular courts typically found themselves incapable of dealing with the matter. The fourteenth century was a time when the King and Parliament shared

\textsuperscript{75} Gaymarani, above n 3, 288-303.
\textsuperscript{77} Frederick Pollock and Frederic William Maitland, The History of English Law before the time of Edward I: Volume II (Liberty Fund, 2010; Originally published as 2nd ed, Cambridge University Press, 1898) 579.
a considerable amount of authority with the Church\textsuperscript{78} and it was during this time that a spate of sorcery cases involving Richard Ledrede, the Bishop of Ossory in Ireland, emerged. Bishop Ledrede was successful in prosecuting persons accused of sorcery in Church courts whereas the ‘Anglo-Irish law was utterly unprepared to deal with heretics’,\textsuperscript{79} sorcerers being a class of heretic.

In the Papal Bull of 1484 Pope Innocent VIII ‘vigorously denounced the evil works of witches, and provided papal support and encouragement to witch-hunting’.\textsuperscript{80} Guidelines for the practical implementation of the Bull were published in 1487 under the title \textit{Malleus Maleficarum} (the ‘Hammer of Witches’). Garland writes:

\begin{quote}
The Malleus Maleficarum detailed an exposition of witchcraft and a code of procedure for the detection and punishment of witches... The Malleus Maleficarum became a handbook for the guidance of judges and magistrates, running into 14 editions between 1486 and 1520.\textsuperscript{81}
\end{quote}

In the early fifteenth century the first English statute containing provisions related to sorcery came into force.\textsuperscript{82} One of the earlier restrictions upon the secular system was that it lacked the requisite

\textsuperscript{78} Ibid 575-576.
\textsuperscript{79} Ibid 576.
\textsuperscript{80} Garland, above n 76, 1153.
\textsuperscript{81} Ibid, 1153-1154.
\textsuperscript{82} 33 Hen. VIII, cap. 8; Pollock and Maitland, above n 77, 581.
ability to arrest and hold on remand or imprison sorcery suspects.\textsuperscript{83} But with the new legislation the King 'empowered the Bishop of Norwich to arrest sorcerers and witches, and to keep them in prison after conviction until further order'\textsuperscript{84}. If the Court converted the witch suspect to a witch offender, then the ‘witch could be tried and burnt under the statute against heretics’.\textsuperscript{85} This statute was repealed after only five years\textsuperscript{86} though a short time later in 1563 witchcraft again became a crime by statute.\textsuperscript{87}

In the sixteenth and seventeenth centuries ‘[t]he sincere belief in harmful witchcraft was endemic and witch-beliefs were part of people’s mindset’.\textsuperscript{88} English parliaments kept the law on sorcery and greatly increased the number of cases tried and offenders punished.\textsuperscript{89} These anti-sorcery statutes remained in force until they were repealed in 1562,\textsuperscript{90} they were replaced by the \textit{Witchcraft Act of 1563} which in turn was repealed and replaced by King James’ \textit{Witchcraft Act 1604} which demanded ‘more severe penalties for witchcraft confessed or proven’.\textsuperscript{91}

\begin{footnotes}
\footnotetext[83]{Ibid 576.}
\footnotetext[84]{Ibid 581-582.}
\footnotetext[85]{Ibid 581-582.}
\footnotetext[86]{Garland, above n 76, 1161.}
\footnotetext[87]{Ibid; 5 Eliz. I, cap.12.}
\footnotetext[88]{Ibid 1158.}
\footnotetext[89]{Pollock and Maitland, above n 77, 582.}
\footnotetext[90]{Ibid 582.}
\footnotetext[91]{Garland, above n 76, 1161-1162.}
\end{footnotes}
The punishment for anyone suspected of practicing witchcraft under the new Act was death.92

The *Witchcraft Act 1604* ‘made injuring people a capital offence on the first conviction... conjuration of spirits a capital offence, and... using dead bodies, or parts thereof, for witchcraft or sorcery... punishable by death’;93 it also ‘addressed not just the conjuring or invoking, but the feeding, of evil spirits’.94

Authority ebbed and flowed between Church and King (through the Parliament and the Courts): at times the authority of the Church was greater than the King and at times the reverse condition existed.95 Typically though a Church authority would hear and try accusations of sorcery then hand the prisoner over to the secular authorities for the sentence to be carried out.96 Any sorcery resulting in criminality such as murder could be treated by the secular law as regular criminals and dealt with accordingly; the belief among the population that sorcery existed

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92 Ibid.
93 Ibid.
94 Ibid 1162.
95 Pollock and Maitland, above n 77, 577-578.
96 Ibid 577, 580.
and was capable of accomplishing murder was widespread. 97 When the court’s focus was upon the secular outcome (for example, murder) rather than the method (sorcery) the jurisprudence on sorcery was not developed. 98

If a king was particularly ‘Christian’ he may instigate his own proceedings against a sorcerer. 99 King James I was personally involved in sorcery trials and while he was convinced of the existence of sorcery and sorcerers he also discerned that not all of the accused were genuinely witches and accordingly he ‘urged the judiciary to be extremely cautious when dealing with prisoners committed for trial on evidence of bewitching’. 100

By the 1640s ‘witch-beliefs continued to flourish more among the mainstream than the intellectual elite’. 101 By the 1660s ‘[t]here was an outbreak of scepticism among lawyers and judges’ 102 and ‘[t]he intellectual elite became sceptical of the reality of witchcraft and began to take a more rational view of the world’. 103 The last execution for

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97 Ibid 579.  
98 Ibid 581.  
99 Ibid 580.  
100 Garland, above n 76, 1160.  
101 Ibid 1178.  
102 Ibid.  
103 Ibid.
witchcraft in England was in 1684 and fifty years later the death penalty for witchcraft was abolished in England when the *Witchcraft Act 1604* was repealed in 1735.\footnote{Ibid 1179.}

The English began settling Australia from 1788\footnote{Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford, 2nd ed, 2009) 5.} and the official law of the colonies was sourced from English statutes which ‘provided that the settlers were governed by the common and statute law of England’.\footnote{Northern Territory Law Reform Committee, *Report on Aboriginal customary law*, (2003) 10, citing section 24, *Australian Courts Act 1828 (Imp)* (9 Geo IV c 83).} By the nineteenth century the practice of witchcraft, or the pretence of the practice of witchcraft, had been made a statutory offence by Australian legislatures.\footnote{Lynne Hume, *Witchcraft and Paganism in Australian* (Melbourne University Publishing, 1997) Chapter 2.} In Queensland the *Community Services (Aborigines) Act 1984* established Aboriginal Courts which have jurisdiction to hear matters relating to sorcery though no recent cases are recorded.\footnote{Australian Law Reform Commission, above n 3, 31-40.} In the twentieth and twenty-first centuries most of these anti-sorcery statutes were repealed, the most recent being in 2005 in Victoria with the repealing of s 13 of the *Vagrancy Act 1966*\footnote{Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic) s 3.} which read:
Any person who pretends or professes to tell fortunes or uses any subtle craft means or device by palmistry or otherwise to defraud or impose on any other person or pretends to exercise or use any kind of witchcraft sorcery enchantment or conjuration or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels stolen or lost may be found shall be guilty of an offence.

The Victorian Attorney-General commenting on the repeal said ‘[t]he times have long passed when witchcraft and fortune-telling represented a danger to law and order, or a focus of criminal activity’.\textsuperscript{110} The Attorney-General’s comments demonstrate that the primary purpose of Australian law is to enable the contemporary demos to rule. In times past both Australian and English statute included offences related to sorcery and courts gave judgements on sorcery cases brought before them. However, in recent times Australian legislation outlawing sorcery has been repealed and courts no longer consider themselves competent to judge such matters.

While sorcery does not often make its way into contemporary Australian legal matters, an exception exists in the Northern Territory Coroner’s Court when hearing matters from Arnhem Land where

‘untimely deaths are widely believed to have been caused by galka or sorcery/black magic’. The following excerpts are from a Coroner’s Report on the inquest into the death of Yolngu man Danny Gumana. These excerpts are representative of the requests frequently made by Yolngu family of a deceased person for Coroners to make findings in relation to sorcery and the refusal of Coroners to do so:

100. I am aware that some family members were seeking coronial findings in relation to who was responsible for the galka that they believe caused the death of the late Mr Gumana and also that some family members do not accept that ‘suicide’ in the way this court would understand it, exists, rather they believe that such deaths are always as a result of galka.

101. I explained during the inquest, and again in these findings, that the question of galka is not one that I can allow witnesses to be cross-examined about because it is not an area that I can make findings about. I consider it outside the ability of the Coroner’s court to make a determination in this area. This is not something that only applies to aboriginal beliefs; I would take the same approach to a request to make a finding about whether God did or didn’t cause a death. I consider that there are some questions that are outside the realm of factual findings. This does not mean they are not important, it just means that answers need to be found in other ways.

Inquest into the death of Danny Gumana (Unreported, Northern Territory Coroner’s Court, Celia Kemp, Deputy Coroner, Monday 28 September 2009) [99].
102. I am very grateful that the family honestly raised their concerns before me. I consider the coronial system is very successful at answering many of the questions that family members have. However, as in many coronial deaths, some of the questions families have remain unanswered by the coronial system. In this case questions of galka remain in the hands of the Yolngu people. I do not make any findings in relation to the role of galka in this death.\footnote{112}

The law in relation to sorcery in Australia demonstrates that the primary purpose in Australian law is for the demos to rule via legislation. While in times past the demos, through statute, considered anti-sorcery laws appropriate, collectively the contemporary Australian demos does not find it appropriate to have such laws in legislation. This legislative directive of the demos also affects the Yolngu minority group who typically request Coroners to investigate and make findings in relation to sorcery as Coroners consistently respond to grieving Yolngu families by saying that they are not competent to make such findings.

\footnote{112} Ibid [100-102].
5.3 Sorcery in Christianity

The Bible makes it abundantly clear that sorcery is the domain of Satan and that Christians should have nothing whatsoever to do with sorcery.

As Moses was preparing the people of Israel to enter into the Promised Land he warned against practising all sorts of sorcery, which was practised by the non-Israelites who were already living in the land practised.

When you enter the land the Lord your God is giving you, do not learn to imitate the detestable ways of the nations there. Let no one be found among you who sacrifices his son or daughter in the fire, who practices divination or sorcery, interprets omens, engages in witchcraft, or casts spells, or who is a medium or spiritist or who consults the dead.

Anyone who does these things is detestable to the Lord, and because of these detestable practices the Lord your God will drive out those nations before you. You must be blameless before the Lord your God.
The nations you will dispossess listen to those who practice sorcery or divination. But as for you, the Lord your God has not permitted you to do so.\textsuperscript{113}

In the book of Jeremiah, the prophet Jeremiah warned Israel not to listen to other prophets who predict the future by calling up the spirits of the dead or by magic as their advice is deceiving.\textsuperscript{114} In the Apocalyptic book of Revelation it is revealed that by sorcery all of the earth’s nations had experienced deceit.\textsuperscript{115}

The nature of sorcery is described in the book of Ezekiel where God says through the prophet Ezekiel:

\begin{quote}
Woe to the women who sew magic charms on all their wrists and make veils of various lengths for their heads in order to ensnare people. Will you ensnare the lives of my people but preserve your own? You have profaned me among my people for a few handfuls of barley and scraps of bread. By lying to my people, who listen to lies, you have killed those who should not have died and have spared those who should not live.\textsuperscript{116}
\end{quote}

\begin{flushright}
\textsuperscript{113} Deuteronomy 18:9-14.
\textsuperscript{114} Jeremiah 27:9-10.
\textsuperscript{115} Revelation 19:23.
\textsuperscript{116} Ezekiel 13:18-19.
\end{flushright}
It can be seen from these scriptures that the aim of sorcery is control over other people’s lives. The injustice of sorcery is also articulated in Ezekiel: ‘You kill people who don’t deserve to die; and you keep people alive who don’t deserve to live’.117 Thus the injustice of sorcery is clear: sorcery accomplishes what shouldn’t be accomplished. God’s response to the sorcery is even clearer:

I am against your magic charms with which you ensnare people like birds and I will tear them from your arms; I will set free the people that you ensnare like birds.118

In the book of Numbers a pagan king who wanted the nation of Israel cursed organised a large payment for the curse to be pronounced by a prophet.119 The prophet heard from God that Israel was blessed by God and could not be cursed.120 The resultant prophecy spoken by the prophet included the declaration that God is with Israel and that God Himself fights for Israel: ‘there is no magic charm, no witch-craft, that can be used against the nation of Israel’.121 This suggests that authority and power derived from sorcery is not as authoritative or powerful as

117 Ezekiel 13:19.
120 Numbers 22:12.
121 Numbers 22:21-23.
that derived from God or God’s servants. The following examples will illustrate this ordering of spiritual authority and power.

In the Old Testament, Moses, by God’s instruction, supernaturally brought forth the boils that covered all of the Egyptians, including the Egyptian magicians who were unable to relieve themselves of their affliction by using their magic; they were not able to appear before Moses, as they had on previous accounts, due to being covered in boils. \(122\) In the New Testament, Paul had been invited by the governor of the island of Paphos to come to him so that he could hear what Paul had to say (about Jesus and the Kingdom of Heaven, etc). A sorcerer by the name of Elymas tried to oppose Paul and to turn the governor away from the Christian faith whereupon Paul looked at Elymas and said:

> You are a child of the devil and an enemy of everything that is right! You are full of all kinds of deceit and trickery. Will you never stop perverting the right ways of the Lord? Now the hand of the Lord is against you. You are going to be blind, and for a time you will be unable to see the light of the sun. \(123\)

And at once Elymas became blind.

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\(122\) Exodus 9:8-11.

At Philippi Paul and his group had been harangued by a slave woman with an evil spirit who earned money for her owners by predicting the future.\textsuperscript{124} For many days she followed Paul’s group and shouted ‘(t)hese men are servants of the Most High God, who are telling you the way to be saved’ such that Paul became irritated.\textsuperscript{125} Paul turned to the woman and said to the spirit in her ‘[i]n the name of Jesus Christ I command you to come out of her!’ and the spirit left her immediately.\textsuperscript{126}

In the city of Ephesus seven non-Christian men were trying to drive evil spirits out of people by saying ‘[i]n the name of Jesus, whom Paul preaches, I command you to come out’.\textsuperscript{127} By referring to the name Jesus indirectly (‘who Paul preaches’) rather than directly (as Paul had done with the evil spirit in Philippi) these men revealed that they themselves do not believe in Jesus and have not entered into the Kingdom of God, accordingly they have not received the authority from God to cast out demons.\textsuperscript{128} The evil spirit responded to the men: ‘Jesus I know, and I know about Paul, but who are you?’;\textsuperscript{129} then the man possessed by the

\textsuperscript{124} Acts of the Apostles 16:16.
\textsuperscript{128} Mark 16:17.
\textsuperscript{129} Acts of the Apostles 19:15.
evil spirit attacked and overcame the seven.\textsuperscript{130} This event put much fear into Christians and non-Christians alike in Ephesus and consequently many of the Christians who had been involved in sorcery made public confessions and publicly burned their books of sorcery.\textsuperscript{131}

Another very interesting example of a new Christian with a background in sorcery is the story of Simon in Samaria. Simon had been a sorcerer of great reputation: he boasted he was great and many people were amazed at his magic, calling him ‘the Great Power’.\textsuperscript{132} Philip, a Christian, went into Samaria where Simon lived and started preaching the gospel of Jesus Christ with many miracles accompanying his preaching, so much so that Simon himself came to believe in Jesus and was baptised.\textsuperscript{133} Later, some other Christians, Peter and John, came to Samaria so that the new Christians there could receive the Holy Spirit and be able to preach the gospel and perform miracles just as they had seen Philip do.\textsuperscript{134} When Simon saw that Christians received the Holy Spirit when Peter and John laid hands on them, Simon offered them money to be able to do the same: ‘\textsuperscript{[g]}ive me also this ability so that

\textsuperscript{130} Acts of the Apostles 19:16.
\textsuperscript{132} Acts of the Apostles 8:9-11.
\textsuperscript{134} Acts of the Apostles 8:14-17.
everyone on whom I lay my hands may receive the Holy Spirit’. Simon offered to pay money for this spiritual power because it is common practice for people involved in sorcery to obtain additional spiritual power by paying a price of some sort. As a very new and immature Christian perhaps he did not yet understand the incompatibility of sorcery with God and a Christian life. Peter, a far more mature Christian than Simon, rebuked Simon strongly:

May your money perish with you, because you thought you could buy the gift of God with money! You have no part or share in this ministry, because your heart is not right before God. Repent of this wickedness and pray to the Lord. Perhaps he will forgive you for having such a thought in your heart.

The Bible describes sorcery as wicked and evil and people who are involved with sorcery are considered defiled. God is angered by people practicing sorcery and they are punished by God. God instructs the nation of Israel to put to death any Israelite who practices witchcraft; God personally removes witches from Israel. Sorcerers will not inherit

138 Isaiah 47:9-10.
139 Leviticus 19:31.
141 Isaiah 47:9; Malachi 3:5.
142 Exodus 22:18.
143 2 Kings 17:17-18; Leviticus 20:6; Micah 5:12.
the Kingdom of God; their ultimate destination is the lake of fire, that is, hell.

The strong prohibitions placed on all forms of sorcery in Christianity are concomitant with the primary purpose of Christianity which is the advancement of the Kingdom of Heaven. The enemy of the Kingdom of Heaven is Satan and sorcery is described in the Bible as having its source and purpose in Satan’s realm.

5.4 Discussion and Chapter Summary

While Australian (and English) law has sometimes outlawed sorcery and sometimes allowed it, Madayin has always allowed the authorised forms of sorcery while Christianity has always denounced and rejected all forms of sorcery.

Early English law made sorcery a crime and the secular legal system often collaborated with the Church on matters of sorcery. In these early times there was a wide spread belief among the population that

\[^{144}\] Galatians 5:20.
\[^{145}\] Revelation 21:8.
\[^{146}\] Garland, above n 76; Pollock and Maitland, above n 77, 575-582.
sorcery existed and was capable of causing great harm. This belief and fear was reduced, at least among the English ruling elites if not the broader English population, by the mid seventeenth century and sorcery was removed from the English statute books in the eighteenth century shortly before the English began settling Australia. Australian legislatures were reasonably quick to make the practice of witchcraft, or the pretence of the practice of witchcraft, a statutory offence. In the twentieth and twenty-first centuries these anti-sorcery statutes were all repealed. By repealing all previously existing legislation, the Australian demos have revealed its ambivalent nature towards sorcery. The Australian demos have, in the last half century, taken a morally neutral stand in relation to sorcery. Whether contemporary Australian law recognises the existence of sorcery or not is unclear. Current Australian criminal legislation ignores sorcery and therefore, at least tacitly, makes sorcery a lawful activity. Australian courts also do not consider themselves competent to judge matters of sorcery. This large change in legislation achieves the primary purpose of Australian law, that is, for the demos to rule, even if the legislation from one period is diametrically opposed to legislation of another period in the same jurisdiction. This ability to change reflects the relative nature of

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147 Pollock and Maitland, above n 77, 579.
148 Garland, above n 76.
Australian law; the only absolute is that the contemporary demos are able to rule.

Sorcery has always been an accepted aspect of the Madayin system while it has always been wholly denounced and rejected by Christianity. In the Madayin system the ancestral beings, the wanggar, who established the Madayin system, are the source of spiritual power for sorcery.\textsuperscript{149} Completely juxtaposed to this arrangement is Christianity which describes all sorcery to be abhorrent and originating from and being for the purposes of God’s enemy, the Devil. The Bible describes all forms of sorcery as disgusting,\textsuperscript{150} deceiving,\textsuperscript{151} manipulative,\textsuperscript{152} and unjust.\textsuperscript{153}

The Madayin system categorises sorcery as either authorised or unauthorised. The issue is not whether sorcery is a morally acceptable aspect of the Madayin system, the issue is only whether the sorcery has specifically been sanctioned by the Madayin leaders. Thus Madayin again reveals its relative nature: it is less concerned with absolute rights and wrongs than it is with bringing actions within the Madayin

\begin{footnotes}

\footnotetext[149]{Keen, above n 57, 515-525.}
\footnotetext[150]{Deuteronomy 18:9-14.}
\footnotetext[151]{Jeremiah 27:9-10.}
\footnotetext[152]{Ezekiel 13:18-19.}
\footnotetext[153]{Ezekiel 13:19.}
\end{footnotes}
umbrella. Christianity stands in stark contrast to the Madayin system on this point.

In the Madayin system both sorcery and the sorcerer enjoy significant power and authority.\(^{154}\) The Bible describes the power of sorcery to be far less than the power of God\(^{155}\) such that no sorcery can prevail against God’s people.\(^{156}\) By the repealing of anti-sorcery legislation, Australian law does not consider a sorcerer’s power to be a negative that should be outlawed. Another possibility is that Australian law (that is the contemporary demos) simply does not accept that sorcery is real.

Sorcery protects the practices of Madayin ceremonies. Individuals who transgress the Madayin ceremony law can be punished by sorcery; an alternative punishment for a woman who has transgressed Madayin ceremony law is that she is subject to sexual acts with multiple men and this punishment is delivered with impunity by the men as they are protected by sorcery in doing so.\(^{157}\) The fertility philosophy of Madayin is enforced and protected by sorcery in multiple ways: some of the Madayin offences that can attract punishment by sorcery include women

\(^{154}\) Gaymarani, above n 3, 287-288.
\(^{155}\) Numbers 22:12.
\(^{157}\) Gaymarani, above n 3, 288
who breach female ceremony ground rules,\textsuperscript{158} wife stealing,\textsuperscript{159} prostitution,\textsuperscript{160} the sexual abuse of a child\textsuperscript{161} or an ‘untouchable girl’,\textsuperscript{162} a woman who refuses to accept the punishment for trespassed upon a Gunapipi ceremony ground,\textsuperscript{163} and a woman who has engaged in secretive adultery.\textsuperscript{164} The primary fertility purpose of Madayin, linking the ancient past source of spiritual authority to the present is aided by sorcery in the Madayin system. The wanggar beings are the source of spiritual power and authority for Madayin sorcery; the wanggar-derived regulation of fertility by sorcery accomplishes the Madayin goal of magaya, a state of balance, order and peace.

In the Yolngu Madayin system sorcery can be used to heal as by a marrnggitj or to harm as by a galka: both marrnggitj and galka draw upon the same spiritual power.\textsuperscript{165} This conflicting outcome of Yolngu sorcery does not produce an internal inconsistency in the primary purposes of Madayin, namely the continuity of an ancient past source of spiritual authority for the purposes of maintaining a fertility philosophy and magaya. The introduction to the Yolngu of the Christian

\begin{itemize}
\item \textsuperscript{158} Ibid 291.
\item \textsuperscript{159} Ibid 292.
\item \textsuperscript{160} Ibid 293
\item \textsuperscript{161} Ibid 294.
\item \textsuperscript{162} Ibid 292, 294.
\item \textsuperscript{163} Ibid 297.
\item \textsuperscript{164} Ibid 291.
\item \textsuperscript{165} Reid, above n 7, 35.
\end{itemize}
understanding that all sorcery, whether describable as good or bad, performed by a marrnggitj or a galka, originates from Satan, can be a confusing concept, especially those who have experienced healing by a marrnggitj.\textsuperscript{166} This quandary is further explored in Chapter 7.

In Christianity, sorcerers are rejected as unfit to be Christians.\textsuperscript{167} Even sorcery that some may describe as ‘good’ or sorcery that simply proclaims the truth about Jesus Christ is considered evil and to be shunned by Christians\textsuperscript{168} as Paul at Philippi illustrated with the slave woman who by an evil spirit earned money for her owners by predicting the future.\textsuperscript{169} The complete rejection of sorcery in Christianity, even if the sorcery could be described as agreeing with the claims of Christianity, illustrates the absolute nature of Christianity. No room is made for ‘fair weather friends’; no compromising deals will be done by God. The source, nature and ultimate purpose of sorcery disqualifies it from being acceptable to Christianity. This absolute quality of Christianity emanates from the holy quality of God.

Sorcerer-turned-Christian, Simon, saw that when certain Christians laid hands on new Christians the new Christians could receive spiritual

\textsuperscript{166} Ibid 74-76.
power from the Holy Spirit. Simon offered to pay money so that he could obtain this additional spiritual power by paying a price. While paying money or goods is a common way for sorcerers to acquire spiritual power, it is a wholly inappropriate way in Christianity because in this system such things are considered truly gifts from God and are not earned or paid for. A Galka sorcerer enjoys power and authority in the Madayin system but it requires of the sorcerer much time and cost to obtain the requisite power. Australian law is silent on this point.

The absolute rejection of sorcery in Christianity reflects Christianity’s absolute nature and its primary purpose, the Kingdom of Heaven. Sorcery is described in the Bible as having its source and purpose in Satan’s realm. Sorcerers will not partake in the Kingdom of God; their ultimate destination is hell. Earlier Australian legislation reflected the contemporary demos’ desire to take a more Christian approach towards sorcery by making certain sorcery activities offences. Presently, however, Australian law does not make sorcery an offence. This change in law

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170 Numbers 22:7.
173 Galatians 5:20.
illustrates the primary purpose of Australian law, that is, that the contemporary demos should rule via their democratically elected parliamentary representatives enacting legislation. Madayin allows authorised sorcery for the purposes of regulating fertility and other aspects of Yolngu life which in turn achieve the overarching purpose of Madayin, that is, magaya.

This chapter has provided an analysis of authority in relation to sorcery for Madayin, Australian law and Christianity and has demonstrated that the sorcery-specific authority is consistent with the foundational authority of each system. Chapter Six synthesises the analysis of authority from Chapters Three, Four and Five into succinct propositions that purport to describe the essential nature of authority for each system. These propositions of essential nature of authority are used in later chapters to compare the three systems and to evaluate the integrity of the intersections of the systems from the perspective of authority.
Chapter Five:
Sorcery: Sources of Authority and Purpose
Chapter 5

Sorcery: Sources of Authority and Purpose

This chapter examines the sources and purpose of authority in relation to sorcery in the three systems. The topic of sorcery is included in this thesis because, unlike marriage which all three systems embrace in varying forms, sorcery is accepted as an integral and legitimate activity in Madayin, actively and wholly rejected by Christianity and contemporarily mostly ignored by Australian law.

As an aspect uncommon, or variably common, to the three systems considered in this thesis, it may be thought that sorcery presents as a specific area of authority that is unable to be consistent with the analysis of foundational purpose of authority as described for each system in Chapter Three. However, the analysis in this chapter will demonstrate that the uncommon approach to sorcery by the three systems actually is consistent with the foundational purposes described. Accordingly, the analysis of authority in relation to sorcery further strengthens the reliability of the analysis conducted in Chapter Three and the propositions constructed in Chapter Six.
Sorcery is defined by the Macquarie dictionary as ‘the art, practices, or spells of a sorcerer; magic, especially black magic in which supernatural powers are exercised through the aid of evil spirits; witchcraft’. This definition is sufficient for present purposes. It describes the evil nature of the supernatural power but leaves the nature of the outcomes of sorcery open. That is, it may include both ‘evil’ outcomes such as harm and ‘good’ outcomes such as healing.

5.1 Sorcery in Madayin

Sorcery exists, and is being used increasingly, in the Madayin system which categorises sorcery in two ways: authorised and unauthorised.

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1 Alison Moore (ed), Macquarie Concise Dictionary (University of Sydney, 4th ed, 2006) 1162.
3 Janice Reid, Sorcerers and Healing Spirits: continuity and change in an Aboriginal medical system (ANU Press, 1983) 32-44; 57; Claims have been made that all sorcery is illegal for Yolngu society (see Aboriginal Resource and Development Services Incorporated, above n 2; Melngur Gapu Dhalarpa Gawiya: Raypirri Ngarrangur Romgurr Magayakurr (Law and Punishment of Ngarra), (Information Paper authored by the Yolngu clans of Ngaymil Gampurrntji, Ngaymil Bulkmana, Ngaymil Datiwuy and Ngaymil Gondarra, Galiwinku, Arnhem Land, 3 September 2005), Article 20, though those claims are not supported by numerous other statements to the contrary: see Steven J Etherington, Learning to be Kunwinjku: Kunwinjku People Discuss Their Pedagogy (PhD thesis, Charles Darwin University, 2006) 209; Australian Law Reform Commission, Recognition of Aboriginal Customary Laws, Report No 31 (1986) 361 and George Pascoe Gaymarani, ‘An Introduction to the Ngarra
Unauthorised sorcery is always harmful and destructive but authorised sorcery may be either destructive or beneficial to the recipient.\(^4\) Both authorised and unauthorised types of the most potent harmful sorcery are known by the Yolngu language term ‘galka’ and the sorcerer is also known as a ‘Galka’\(^5\) (sometimes called a black magician).\(^6\) Other types of less potent sorcery are also known though the most infamous is galka.\(^7\) The beneficial types of sorcery are commonly sorcery for healing, and in Madayin system such a healer is known as Marrnggitj (sometimes called a white magician).\(^8\) A Marrnggitj draws upon the same source and nature of spiritual power, marr, as does a galka, namely the wanggar\(^9\)

A Marrnggitj, sometimes referred to as a medicine man, ‘gains his power through extraordinary experiences with two or possibly three soul-children who afterwards become his helpers (spirit familiars). Both the medicine man and the familiars are called marngit [alternative spelling for maarnggitj]’.\(^10\) A Marrnggitj may lose his familiars if he breaches a

\(^5\) Gaymarani, above n 3, 285.
\(^6\) Warner, above n 4, 183.
\(^8\) Ibid 35.
\(^9\) Ibid.
\(^10\) Warner, above n 4, 200.
A Marrnggitj can ‘see’ inside other people, and in the case of a victim of soul stealing a Marrnggitj can tell that the soul has left the victim’s heart, however the Marrnggitj cannot heal such a victim. In cases where a Marrnggitj can heal, the methods used are a combination of physical, such as massage or sucking out foreign objects from a victim’s body, and supernatural. By means of sorcery, a Marrnggitj may kill a Galka who has previously killed a family member of the Marrnggitj’s client.

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11 Ibid 207.
12 Ibid 203.
14 Ibid 8; Nupurra et al, above n 3, Article 24.
15 Warner, above n 4, 201.
16 Ibid.
17 Ibid.
Belief in the existence, indeed the prevalence, of galka is wide spread in Arnhem Land. In cases of death the most plausible cause for the Yolngu is galka. For the Yolngu, all deaths, sicknesses, certain types of bad luck, and, in general, all those occasions on which the individual is seriously out of adjustment with his community, physically, mentally, or socially, are looked upon as the effects of black magic; and in almost every case except that of soul-stealing the white magician is called in to remedy the situation.

Exceptions to blaming galka for unwelcomed circumstances are few. Even when an elderly person dies the usual diagnosis is galka as opposed to ‘just old age’.

Yolngu take ‘great care not to commit a religious transgression’, that is, a Madayin transgression. Gaymarani writes that the ‘[p]unishment of death by the sorcery of a Galka is a just punishment under Ngarra law for the most serious offences, such as dishonouring, disrespecting and abusing the Ngarra law’. The theft of sacred ritual objects (rangga), sacred ritual songs (manikay), sacred paintings (miny’tyi) myths or land

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18 Reid, above n 7, 35-36.
19 Warner, above n 4, 183.
20 Ibid.
21 Reid, above n 7, 44.
22 Gaymarani, above n 3, 296.

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‘are often given as legitimate reasons for seeking revenge by sorcery.’
Deaths that are caused by authorised sorcery ‘are lawful under Ngarra law’. The most common result from galka is death.

Galka, both sorcery and sorcerer, enjoy immense power and authority in the Madayin system. Great prices over many years must be paid by those who seek to obtain power to practice sorcery. This payment is an investment, though, as ‘[w]henever a [Yolngu] magician, black or white, is called upon, payment must be made to him’ for the sorcery services rendered. A Galka ‘gains his power originally from a near relative, usually his father, often his maternal uncle, but at times his paternal uncle.’ A novice Galka must be involved with an older sorcerer in one or two deaths by galka before he can be considered a sorcerer in his own right.

First, power is transmitted from a man who is a killer and master of the souls of several dead men; and, second, the beginner must have been associated with

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23 Reid, above n 7, 45.
24 Gaymarani, above n 3, 297.
25 Ibid 286.
29 Warner, above n 4, 183.
30 Ibid 188.
31 Ibid.
the killing of a man and therefore with the dead before he is given the social personality as a sorcerer by his community. In brief, his personality as a sorcerer is by double association with the power of the dead. He has the power to change the living into the dead before his sacred power comes from the sacred dead.\textsuperscript{32}

Punitive sexual activity conducted by Yolngu men against a woman who erroneously entered into a Madayin ceremony is protected by the authority of galka.\textsuperscript{33} Other Madayin law breaches that may incur the penalty of death by galka include but are not limited to:

- ‘[a] person who curses another while the Ngarra court is in session’;\textsuperscript{34}
- ‘women who breach ‘ceremony rules when they are in the female ceremony ground’;\textsuperscript{35}
- a man who steals another man’s wife;\textsuperscript{36}
- prostitution;\textsuperscript{37}
- a person who molests or otherwise sexually abuses or assaults a child;\textsuperscript{38}

\textsuperscript{32} Ibid.
\textsuperscript{33} Gaymarani, above n 3, 288.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid 291.
\textsuperscript{36} Ibid 292.
\textsuperscript{37} Ibid 293.
• a male who ‘engages in sexual activity with an untouchable girl’;\textsuperscript{39}

(an untouchable girl in Ngarra law is a female who has been designated by her parents to remain single, not to have her own children and to look after her parents in their old age);\textsuperscript{40}

• the misuse of sacred painting designs;\textsuperscript{41}

• extreme and repeated unlawful public violence;\textsuperscript{42}

• murder;\textsuperscript{43}

• a woman who, having trespassed upon a Gunapipi ceremony ground, refuses to accept the negotiated punishment;\textsuperscript{44}

• a ‘breach of... [a] Ngarra court order’;\textsuperscript{45}

• repeated ‘use of a weapon against another person’;\textsuperscript{46}

• a woman who has engaged ‘in extramarital affairs behind her husband’s back’;\textsuperscript{47} and

\begin{itemize}
  \item unlawful ‘[e]ntry into a restricted area such as ceremonial grounds’;\textsuperscript{48}
\end{itemize}

\begin{footnotes}
\item[38] Ibid 294.
\item[39] Ibid 292.
\item[40] Ibid 294.
\item[41] Ibid.
\item[42] Ibid 295-296.
\item[43] Ibid 296.
\item[44] Ibid 297.
\item[45] Ibid 301.
\item[46] Ibid 303.
\item[47] Ibid 291.
\item[48] Ibid 299.
\end{footnotes}
For authorised galka, a Galka will be assisted by Madayin officials, usually the jungay, and their sorceries will be deemed legal in the Madayin system.

The role of the Galka may include the investigation of an incident. The Galka will act secretly in their investigations. The traditional justice committee consisting of the leading jungay of different language groups will give the Galka the order to cause the offender’s death by sorcery. These actions by the Galka are lawful under Ngarra law.49

Sorcery in Arnhem Land is conducted in many and various ways though Reid has constructed a list of four phases typical of galka attacks:

First of all the galka either waylays his victim in a secluded place or draws him there. Second, he puts the victim to sleep, cuts open his body, removes or mutilates his organs and drains away his blood. Third, he induces amnesia in his victim to ensure that he is either unable to remember or unable to tell anything about the attack. Fourth, the victim dies, usually within hours or days of returning home.50

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49 Ibid 297.
50 Reid, above n 7, 37.
When the Galka practices soul stealing, the purpose of opening the body is primarily to access the victim’s blood directly from the heart, thereby stopping the heart which in turn releases the victim’s soul enabling the Galka to steal the soul which is the major goal of the sorcery. According to Yolngu belief ‘[w]hen the heart stops beating the soul is let out... the heart’s blood is different from the body's blood, the home of the soul being in the heart’. When the victim is a male the body is cut open as described above, however when the victim is a female the Galka access the heart via the victim’s vagina. Whether the victim is male or female the goal remains to access the soul residing in the heart. When the victim’s soul is released it becomes the Galka’s familiar spirit, that is, a spirit, often taking the form of an animal that accompanies and assists the Galka. When a Galka accesses a female victim’s heart via her vagina, the Galka will attempt to restrain himself ‘for fear sexual desire will overcome his magic’, however when the victim is male, the Galka will attempt to copulate with the victim’s wives in order to accomplish ‘the perfect killing’.

51 Warner, above n 4, 185.
52 Ibid.
53 Ibid 186.
54 Ibid 186-187.
55 Ibid 186.
56 Ibid.
Parts of victims’ bodies are often used in galka and the connection to the wanggar exists in the use of body parts in sorcery: ‘[l]ike the blood, flesh, and fat of the wangarr, the blood, flesh, and fat of the dead are a source of power which can be appropriated (by sorcery) – power traced ultimately to the wangarr’. Blood of victims is especially common in galka practices; the blood of a victim may be kept in a paperbark parcel and used to aid in future acts of sorcery such as murder or even sorcery used in hunting. One method is for the sorcerer to ‘draw the image of a person at such a [sacred] place, or leave an intended victim’s item of clothing or bodily matter at the site, in the galka invoking the power of the wangarr to harm the person’.

Not all sorcery in Arnhem Land necessitates the Galka being in actual physical contact with the victim or the use of body parts. Other varieties of sorcery include image magic where the sorcerer paints an image of the intended victim on a stone and burns it until the stone breaks, singing magic where the sorcerer ‘sings’ the victim to death, possession by an evil spirit directed by a Galka, image whipping where the image of the intended victim is whipped with strings, sorcery via dreams and sorcery

58 Reid, above n 7, 38.
59 Keen, above n 57, 522; Reid, above n 7, 33.
conducted by using excreta or waste food products of the intended victim.\textsuperscript{60}

Marrnggitj may use magic combined with natural remedies to cure ailments such as diarrhoea, headache, spear wounds and infections.\textsuperscript{61} Magic spirit bags may be used by any Yolngu man ‘for good luck in hunting or to hold in their mouths when they are fighting... [this type of magic] is not confined to the magician’.\textsuperscript{62} Also, any Yolngu person may attempt rain magic in order to, by supernatural means, make rain fall.\textsuperscript{63} While anyone can attempt to make rain, no one, not even a Marrnggitj, can make rain stop.\textsuperscript{64}

The link between sorcery and the foundational source of authority in Madayin, the wangarr ancestral beings is not in dispute. The powers of the wanggar are drawn upon in the practice of sorcery and there is no moral conflict created.\textsuperscript{65}

Yolngu do not draw absolute boundaries between domains such as sorcery and the domain of ancestral beings. Sorcery is implicated in the

\textsuperscript{60} Warner, above n 4, 196-200.
\textsuperscript{61} Ibid 209-212.
\textsuperscript{62} Ibid 202.
\textsuperscript{63} Ibid 202.
\textsuperscript{64} Ibid 209.
\textsuperscript{65} Ibid.

Ibid, above n 7, 35.
protection of secrecy of ancestral rom (‘law’, complexes of rituals, songs, designs, and sacred objects), while ancestral powers may be drawn on to attack one’s enemies.66

Places that contain the wanggar are sacred and are considered dangerous. A person who ‘trespasses in these areas, whether by choice or ignorance, is likely to be stricken with illness’.67 By way of illustration if ‘a man walks through a certain wangarr place... he will lose his strength and the bones in his legs and arms will break. It is also possible to contract leprosy as a result of entering such an area’.68 Another wangarr area is said to have caused a woman ‘to be “weak kneed” because she persistently collected shellfish at a location close to... [the] dangerous wangarr place’.69

In the Yolngu Madayin system a healer (marrnggitj, witch doctor) draws upon the same source and nature of spiritual power, marr, as does a galka.70 Warner writes that the galka sorcerer ‘can injure or kill his

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66 Keen, above n 57, 525.
67 Reid, above n 7, 50.
68 Ibid.
69 Ibid.
70 Ibid 35.
victim, and the ‘white’ magician (marrngggitj) can cure him or restore his faculties’.71

Foundational sources of authority in the Madayin system can be drawn upon by sorcerers in order to practice sorcery. Both the sorcery itself and the practice of drawing upon the spiritual power of the Madayin foundational sources, the wanggar, are sanctioned in Madayin. Naturally, such practices and philosophies have brought into question the nature of the ancient Madayin doctrines.72 Even though the source and nature of the spiritual power used by both galka and marrngggitj are the same and the potential for marrngggitj to do harm exists, Yolngu marrngggitj ‘vigorously deny that they work sorcery, even on enemies’.73

The primary purpose of Madayin is the continuity of an ancient past source of spiritual authority and this can be seen in the Madayin practice of galka as the source of the spiritual power that is accessed by the Galka is the wangarr, the ancestral beings. Madayin continuity is executed predominantly by the practising of a fertility philosophy74 and this is manifested often in the practice of galka as many of the offences

71 Warner, above n 4, 193.
72 Keen, above n 57, 515, 519.
73 Reid, above n 7, 35.
74 See Chapter 3.
that may result in death by sorcery relate to sexual activity.\textsuperscript{75} This regulation of fertility by sorcery achieves magaya, the Madayin state of balance, order and peace.

\textbf{5.2 Sorcery in Australian Law}

In ‘the early modern period of European history, witchcraft was seen as a very real crime and those convicted of engaging in it often suffered the death penalty’.\textsuperscript{76} The United Kingdom supplies Australian law with a long heritage on the law in relation to sorcery. Pollock and Maitland note that the ancient ‘Anglo-Saxon dooms... have a good deal to say about sorcery’.\textsuperscript{77}

Owing to the supernatural basis of sorcery, most sorcery matters were dealt with by Church courts rather than the secular courts as the secular courts typically found themselves incapable of dealing with the matter. The fourteenth century was a time when the King and Parliament shared

\textsuperscript{75} Gaymarani, above n 3, 288-303.
\textsuperscript{77} Frederick Pollock and Frederic William Maitland, \textit{The History of English Law before the time of Edward I: Volume II} (Liberty Fund, 2010; Originally published as 2nd ed, Cambridge University Press, 1898) 579.
a considerable amount of authority with the Church, and it was during this time that a spate of sorcery cases involving Richard Ledrede, the Bishop of Ossory in Ireland, emerged. Bishop Ledrede was successful in prosecuting persons accused of sorcery in Church courts whereas the ‘Anglo-Irish law was utterly unprepared to deal with heretics’, sorcerers being a class of heretic.

In the Papal Bull of 1484 Pope Innocent VIII ‘vigorously denounced the evil works of witches, and provided papal support and encouragement to witch-hunting’. Guidelines for the practical implementation of the Bull were published in 1487 under the title *Malleus Maleficarum* (the ‘Hammer of Witches’). Garland writes:

> The Malleus Maleficarum detailed an exposition of witchcraft and a code of procedure for the detection and punishment of witches... The Malleus Maleficarum became a handbook for the guidance of judges and magistrates, running into 14 editions between 1486 and 1520.

In the early fifteenth century the first English statute containing provisions related to sorcery came into force. One of the earlier restrictions upon the secular system was that it lacked the requisite

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78 Ibid 575-576.
79 Ibid 576.
80 Garland, above n 76, 1153.
81 Ibid, 1153-1154.
82 33 Hen. VIII, cap. 8; Pollock and Maitland, above n 77, 581.
ability to arrest and hold on remand or imprison sorcery suspects. But with the new legislation the King ‘empowered the Bishop of Norwich to arrest sorcerers and witches, and to keep them in prison after conviction until further order’.

If the Court converted the witch suspect to a witch offender, then the ‘witch could be tried and burnt under the statute against heretics’. This statute was repealed after only five years though a short time later in 1563 witchcraft again became a crime by statute.

In the sixteenth and seventeenth centuries ‘[t]he sincere belief in harmful witchcraft was endemic and witch-beliefs were part of people’s mindset’. English parliaments kept the law on sorcery and greatly increased the number of cases tried and offenders punished. These anti-sorcery statutes remained in force until they were repealed in 1562, they were replaced by the *Witchcraft Act of 1563* which in turn was repealed and replaced by King James’ *Witchcraft Act 1604* which demanded ‘more severe penalties for witchcraft confessed or proven’.

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83 Ibid 576.
84 Ibid 581-582.
85 Ibid 581-582.
86 Garland, above n 76, 1161.
87 Ibid; 5 Eliz. I, cap.12.
88 Ibid 1158.
89 Pollock and Maitland, above n 77, 582.
90 Ibid 582.
91 Garland, above n 76, 1161-1162.
The punishment for anyone suspected of practicing witchcraft under the new Act was death.\(^{92}\)

The *Witchcraft Act 1604* ‘made injuring people a capital offence on the first conviction... conjuration of spirits a capital offence, and... using dead bodies, or parts thereof, for witchcraft or sorcery... punishable by death’;\(^{93}\) it also ‘addressed not just the conjuring or invoking, but the feeding, of evil spirits’.\(^{94}\)

Authority ebbed and flowed between Church and King (through the Parliament and the Courts); at times the authority of the Church was greater than the King and at times the reverse condition existed.\(^{95}\)

Typically though a Church authority would hear and try accusations of sorcery then hand the prisoner over to the secular authorities for the sentence to be carried out.\(^{96}\) Any sorcery resulting in criminality such as murder could be treated by the secular law as regular criminals and dealt with accordingly; the belief among the population that sorcery existed

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\(^{92}\) Ibid.

\(^{93}\) Ibid.

\(^{94}\) Ibid 1162.

\(^{95}\) Pollock and Maitland, above n 77, 577-578.

\(^{96}\) Ibid 577, 580.
and was capable of accomplishing murder was wide spread.\textsuperscript{97} When the court’s focus was upon the secular outcome (for example, murder) rather than the method (sorcery) the jurisprudence on sorcery was not developed.\textsuperscript{98}

If a king was particularly ‘Christian’ he may instigate his own proceedings against a sorcerer.\textsuperscript{99} King James I was personally involved in sorcery trials and while he was convinced of the existence of sorcery and sorcerers he also discerned that not all of the accused were genuinely witches and accordingly he ‘urged the judiciary to be extremely cautious when dealing with prisoners committed for trial on evidence of bewitching’.\textsuperscript{100}

By the 1640s ‘witch-beliefs continued to flourish more among the mainstream than the intellectual elite’.\textsuperscript{101} By the 1660s ‘[t]here was an outbreak of scepticism among lawyers and judges\textsuperscript{102} and ‘[t]he intellectual elite became sceptical of the reality of witchcraft and began to take a more rational view of the world’.\textsuperscript{103} The last execution for

\begin{itemize}
\item \textsuperscript{97} Ibid 579.
\item \textsuperscript{98} Ibid 581.
\item \textsuperscript{99} Ibid 580.
\item \textsuperscript{100} Ibid 1178.
\item \textsuperscript{101} Ibid 1178.
\item \textsuperscript{102} Ibid.
\item \textsuperscript{103} Ibid.
\end{itemize}
witchcraft in England was in 1684 and fifty years later the death penalty for witchcraft was abolished in England when the *Witchcraft Act 1604* was repealed in 1735.\footnote{Ibid 1179.}

The English began settling Australia from 1788\footnote{Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford, 2nd ed, 2009) 5.} and the official law of the colonies was sourced from English statutes which ‘provided that the settlers were governed by the common and statute law of England’.\footnote{Northern Territory Law Reform Committee, *Report on Aboriginal customary law*, (2003) 10, citing section 24, *Australian Courts Act 1828 (Imp)* (9 Geo IV c 83).} By the nineteenth century the practice of witchcraft, or the pretence of the practice of witchcraft, had been made a statutory offence by Australian legislatures.\footnote{Lynne Hume, *Witchcraft and Paganism in Australian* (Melbourne University Publishing, 1997) Chapter 2.} In Queensland the *Community Services (Aborigines) Act 1984* established Aboriginal Courts which have jurisdiction to hear matters relating to sorcery though no recent cases are recorded.\footnote{Australian Law Reform Commission, above n 3, 31-40.} In the twentieth and twenty-first centuries most of these anti-sorcery statutes were repealed, the most recent being in 2005 in Victoria with the repealing of s 13 of the *Vagrancy Act 1966*\footnote{*Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic)* s 3.} which read:

\begin{itemize}
\item \footnote{Ibid 1179.}
\item \footnote{Lynne Hume, *Witchcraft and Paganism in Australian* (Melbourne University Publishing, 1997) Chapter 2.}
\item \footnote{Australian Law Reform Commission, above n 3, 31-40.}
\item \footnote{*Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic)* s 3.}
\end{itemize}
Any person who pretends or professes to tell fortunes or uses any subtle craft means or device by palmistry or otherwise to defraud or impose on any other person or pretends to exercise or use any kind of witchcraft sorcery enchantment or conjuration or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels stolen or lost may be found shall be guilty of an offence.

The Victorian Attorney-General commenting on the repeal said ‘[t]he times have long passed when witchcraft and fortune-telling represented a danger to law and order, or a focus of criminal activity’. The Attorney-General’s comments demonstrate that the primary purpose of Australian law is to enable the contemporary demos to rule. In times past both Australian and English statute included offences related to sorcery and courts gave judgements on sorcery cases brought before them. However, in recent times Australian legislation outlawing sorcery has been repealed and courts no longer consider themselves competent to judge such matters.

While sorcery does not often make its way into contemporary Australian legal matters, an exception exists in the Northern Territory Coroner’s Court when hearing matters from Arnhem Land where

‘untimely deaths are widely believed to have been caused by galka or sorcery/black magic’. The following excerpts are from a Coroner’s Report on the inquest into the death of Yolngu man Danny Gumana. These excerpts are representative of the requests frequently made by Yolngu family of a deceased person for Coroners to make findings in relation to sorcery and the refusal of Coroners to do so:

100. I am aware that some family members were seeking coronial findings in relation to who was responsible for the galka that they believe caused the death of the late Mr Gumana and also that some family members do not accept that ‘suicide’ in the way this court would understand it, exists, rather they believe that such deaths are always as a result of galka.

101. I explained during the inquest, and again in these findings, that the question of galka is not one that I can allow witnesses to be cross-examined about because it is not an area that I can make findings about. I consider it outside the ability of the Coroner’s court to make a determination in this area. This is not something that only applies to aboriginal beliefs; I would take the same approach to a request to make a finding about whether God did or didn’t cause a death. I consider that there are some questions that are outside the realm of factual findings. This does not mean they are not important, it just means that answers need to be found in other ways.

[99] Inquest into the death of Danny Gumana (Unreported, Northern Territory Coroner’s Court, Celia Kemp, Deputy Coroner, Monday 28 September 2009) [99].
102. I am very grateful that the family honestly raised their concerns before me. I consider the coronial system is very successful at answering many of the questions that family members have. However, as in many coronial deaths, some of the questions families have remain unanswered by the coronial system. In this case questions of galka remain in the hands of the Yolngu people. I do not make any findings in relation to the role of galka in this death.112

The law in relation to sorcery in Australia demonstrates that the primary purpose in Australian law is for the demos to rule via legislation. While in times past the demos, through statute, considered anti-sorcery laws appropriate, collectively the contemporary Australian demos does not find it appropriate to have such laws in legislation. This legislative directive of the demos also affects the Yolngu minority group who typically request Coroners to investigate and make findings in relation to sorcery as Coroners consistently respond to grieving Yolngu families by saying that they are not competent to make such findings.

112 Ibid [100-102].
5.3 Sorcery in Christianity

The Bible makes it abundantly clear that sorcery is the domain of Satan and that Christians should have nothing whatsoever to do with sorcery.

As Moses was preparing the people of Israel to enter into the Promised Land he warned against practising all sorts of sorcery, which was practised by the non-Israelites who were already living in the land practised.

When you enter the land the Lord your God is giving you, do not learn to imitate the detestable ways of the nations there. Let no one be found among you who sacrifices his son or daughter in the fire, who practices divination or sorcery, interprets omens, engages in witchcraft, or casts spells, or who is a medium or spiritist or who consults the dead.

Anyone who does these things is detestable to the Lord, and because of these detestable practices the Lord your God will drive out those nations before you. You must be blameless before the Lord your God.
The nations you will dispossess listen to those who practice sorcery or divination. But as for you, the Lord your God has not permitted you to do so.\textsuperscript{113}

In the book of Jeremiah, the prophet Jeremiah warned Israel not to listen to other prophets who predict the future by calling up the spirits of the dead or by magic as their advice is deceiving.\textsuperscript{114} In the Apocalyptic book of Revelation it is revealed that by sorcery all of the earth’s nations had experienced deceit.\textsuperscript{115}

The nature of sorcery is described in the book of Ezekiel where God says through the prophet Ezekiel:

Woe to the women who sew magic charms on all their wrists and make veils of various lengths for their heads in order to ensnare people. Will you ensnare the lives of my people but preserve your own? You have profaned me among my people for a few handfuls of barley and scraps of bread. By lying to my people, who listen to lies, you have killed those who should not have died and have spared those who should not live.\textsuperscript{116}

\textsuperscript{113} Deuteronomy 18:9-14.
\textsuperscript{114} Jeremiah 27:9-10.
\textsuperscript{115} Revelation 19:23.
\textsuperscript{116} Ezekiel 13:18-19.
It can be seen from these scriptures that the aim of sorcery is control over other people’s lives. The injustice of sorcery is also articulated in Ezekiel: ‘You kill people who don’t deserve to die; and you keep people alive who don’t deserve to live’.\(^1\) Thus the injustice of sorcery is clear: sorcery accomplishes what shouldn’t be accomplished. God’s response to the sorcery is even clearer:

\[
\text{I am against your magic charms with which you ensnare people like birds and I will tear them from your arms; I will set free the people that you ensnare like birds.}\(^2\)
\]

In the book of Numbers a pagan king who wanted the nation of Israel cursed organised a large payment for the curse to be pronounced by a prophet.\(^3\) The prophet heard from God that Israel was blessed by God and could not be cursed.\(^4\) The resultant prophecy spoken by the prophet included the declaration that God is with Israel and that God Himself fights for Israel: ‘there is no magic charm, no witch-craft, that can be used against the nation of Israel’.\(^5\) This suggests that authority and power derived from sorcery is not as authoritative or powerful as

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that derived from God or God’s servants. The following examples will illustrate this ordering of spiritual authority and power.

In the Old Testament, Moses, by God’s instruction, supernaturally brought forth the boils that covered all of the Egyptians, including the Egyptian magicians who were unable to relieve themselves of their affliction by using their magic; they were not able to appear before Moses, as they had on previous accounts, due to being covered in boils. In the New Testament, Paul had been invited by the governor of the island of Paphos to come to him so that he could hear what Paul had to say (about Jesus and the Kingdom of Heaven, etc). A sorcerer by the name of Elymas tried to oppose Paul and to turn the governor away from the Christian faith whereupon Paul looked at Elymas and said:

You are a child of the devil and an enemy of everything that is right! You are full of all kinds of deceit and trickery. Will you never stop perverting the right ways of the Lord? Now the hand of the Lord is against you. You are going to be blind, and for a time you will be unable to see the light of the sun.

And at once Elymas became blind.

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122 Exodus 9:8-11.
At Philippi Paul and his group had been harangued by a slave woman with an evil spirit who earned money for her owners by predicting the future.\textsuperscript{124} For many days she followed Paul’s group and shouted ‘(t)hese men are servants of the Most High God, who are telling you the way to be saved’ such that Paul became irritated.\textsuperscript{125} Paul turned to the woman and said to the spirit in her ‘[i]n the name of Jesus Christ I command you to come out of her!’ and the spirit left her immediately.\textsuperscript{126}

In the city of Ephesus seven non-Christian men were trying to drive evil spirits out of people by saying ‘[i]n the name of Jesus, whom Paul preaches, I command you to come out’.\textsuperscript{127} By referring to the name Jesus indirectly (‘who Paul preaches’) rather than directly (as Paul had done with the evil spirit in Philippi) these men revealed that they themselves do not believe in Jesus and have not entered into the Kingdom of God, accordingly they have not received the authority from God to cast out demons.\textsuperscript{128} The evil spirit responded to the men: ‘Jesus I know, and I know about Paul, but who are you?’;\textsuperscript{129} then the man possessed by the

\begin{footnotes}
\item[128] Mark 16:17.
\end{footnotes}
evil spirit attacked and overcame the seven.\textsuperscript{130} This event put much fear into Christians and non-Christians alike in Ephesus and consequently many of the Christians who had been involved in sorcery made public confessions and publicly burned their books of sorcery.\textsuperscript{131}

Another very interesting example of a new Christian with a background in sorcery is the story of Simon in Samaria. Simon had been a sorcerer of great reputation: he boasted he was great and many people were amazed at his magic, calling him ‘the Great Power’.\textsuperscript{132} Philip, a Christian, went into Samaria where Simon lived and started preaching the gospel of Jesus Christ with many miracles accompanying his preaching, so much so that Simon himself came to believe in Jesus and was baptised.\textsuperscript{133} Later, some other Christians, Peter and John, came to Samaria so that the new Christians there could receive the Holy Spirit and be able to preach the gospel and perform miracles just as they had seen Philip do.\textsuperscript{134} When Simon saw that Christians received the Holy Spirit when Peter and John laid hands on them, Simon offered them money to be able to do the same: ‘give me also this ability so that

\textsuperscript{130} Acts of the Apostles 19:16.
\textsuperscript{132} Acts of the Apostles 8:9-11.
\textsuperscript{134} Acts of the Apostles 8:14-17.
everyone on whom I lay my hands may receive the Holy Spirit.’ Simon offered to pay money for this spiritual power because it is common practice for people involved in sorcery to obtain additional spiritual power by paying a price of some sort. As a very new and immature Christian perhaps he did not yet understand the incompatibility of sorcery with God and a Christian life. Peter, a far more mature Christian than Simon, rebuked Simon strongly:

May your money perish with you, because you thought you could buy the gift of God with money! You have no part or share in this ministry, because your heart is not right before God. Repent of this wickedness and pray to the Lord. Perhaps he will forgive you for having such a thought in your heart.

The Bible describes sorcery as wicked and evil and people who are involved with sorcery are considered defiled. God is angered by people practicing sorcery and they are punished by God. God instructs the nation of Israel to put to death any Israelite who practices witchcraft; God personally removes witches from Israel. Sorcerers will not inherit

138 Isaiah 47:9-10.  
139 Leviticus 19:31.  
141 Isaiah 47:9; Malachi 3:5.  
142 Exodus 22:18.  
143 2 Kings 17:17-18; Leviticus 20:6; Micah 5:12.
the Kingdom of God; their ultimate destination is the lake of fire, that is, hell.

The strong prohibitions placed on all forms of sorcery in Christianity are concomitant with the primary purpose of Christianity which is the advancement of the Kingdom of Heaven. The enemy of the Kingdom of Heaven is Satan and sorcery is described in the Bible as having its source and purpose in Satan’s realm.

5.4 Discussion and Chapter Summary

While Australian (and English) law has sometimes outlawed sorcery and sometimes allowed it, Madayin has always allowed the authorised forms of sorcery while Christianity has always denounced and rejected all forms of sorcery.

Early English law made sorcery a crime and the secular legal system often collaborated with the Church on matters of sorcery. In these early times there was a wide spread belief among the population that

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144 Galatians 5:20.
145 Revelation 21:8.
146 Garland, above n 76; Pollock and Maitland, above n 77, 575-582.
sorcery existed and was capable of causing great harm. This belief and fear was reduced, at least among the English ruling elites if not the broader English population, by the mid seventeenth century and sorcery was removed from the English statute books in the eighteenth century shortly before the English began settling Australia. Australian legislatures were reasonably quick to make the practice of witchcraft, or the pretence of the practice of witchcraft, a statutory offence. In the twentieth and twenty-first centuries these anti-sorcery statutes were all repealed. By repealing all previously existing legislation, the Australian demos have revealed its ambivalent nature towards sorcery. The Australian demos have, in the last half century, taken a morally neutral stand in relation to sorcery. Whether contemporary Australian law recognises the existence of sorcery or not is unclear. Current Australian criminal legislation ignores sorcery and therefore, at least tacitly, makes sorcery a lawful activity. Australian courts also do not consider themselves competent to judge matters of sorcery. This large change in legislation achieves the primary purpose of Australian law, that is, for the demos to rule, even if the legislation from one period is diametrically opposed to legislation of another period in the same jurisdiction. This ability to change reflects the relative nature of

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147 Pollock and Maitland, above n 77, 579.
148 Garland, above n 76.
Australian law; the only absolute is that the contemporary demos are able to rule.

Sorcery has always been an accepted aspect of the Madayin system while it has always been wholly denounced and rejected by Christianity. In the Madayin system the ancestral beings, the wanggar, who established the Madayin system, are the source of spiritual power for sorcery.\(^{149}\) Completely juxtaposed to this arrangement is Christianity which describes all sorcery to be abhorrent and originating from and being for the purposes of God’s enemy, the Devil. The Bible describes all forms of sorcery as disgusting,\(^ {150}\) deceiving,\(^ {151}\) manipulative,\(^ {152}\) and unjust.\(^ {153}\)

The Madayin system categorises sorcery as either authorised or unauthorised. The issue is not whether sorcery is a morally acceptable aspect of the Madayin system, the issue is only whether the sorcery has specifically been sanctioned by the Madayin leaders. Thus Madayin again reveals its relative nature: it is less concerned with absolute rights and wrongs than it is with bringing actions within the Madayin

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\(^{149}\) Keen, above n 57, 515-525.
\(^{150}\) Deuteronomy 18:9-14.
\(^{151}\) Jeremiah 27:9-10.
\(^{152}\) Ezekiel 13:18-19.
\(^{153}\) Ezekiel 13:19.
umbrella. Christianity stands in stark contrast to the Madayin system on this point.

In the Madayin system both sorcery and the sorcerer enjoy significant power and authority.\textsuperscript{154} The Bible describes the power of sorcery to be far less than the power of God\textsuperscript{155} such that no sorcery can prevail against God’s people.\textsuperscript{156} By the repealing of anti-sorcery legislation, Australian law does not consider a sorcerer’s power to be a negative that should be outlawed. Another possibility is that Australian law (that is the contemporary demos) simply does not accept that sorcery is real.

Sorcery protects the practices of Madayin ceremonies. Individuals who transgress the Madayin ceremony law can be punished by sorcery; an alternative punishment for a woman who has transgressed Madayin ceremony law is that she is subject to sexual acts with multiple men and this punishment is delivered with impunity by the men as they are protected by sorcery in doing so.\textsuperscript{157} The fertility philosophy of Madayin is enforced and protected by sorcery in multiple ways: some of the Madayin offences that can attract punishment by sorcery include women

\textsuperscript{154} Gaymarani, above n 3, 287-288.
\textsuperscript{155} Numbers 22:12.
\textsuperscript{157} Gaymarani, above n 3, 288
who breach female ceremony ground rules,\textsuperscript{158} wife stealing,\textsuperscript{159} prostitution,\textsuperscript{160} the sexual abuse of a child\textsuperscript{161} or an ‘untouchable girl’,\textsuperscript{162} a woman who refuses to accept the punishment for trespassed upon a Gunapipi ceremony ground,\textsuperscript{163} and a woman who has engaged in secretive adultery.\textsuperscript{164} The primary fertility purpose of Madayin, linking the ancient past source of spiritual authority to the present is aided by sorcery in the Madayin system. The wanggar beings are the source of spiritual power and authority for Madayin sorcery; the wanggar-derived regulation of fertility by sorcery accomplishes the Madayin goal of magaya, a state of balance, order and peace.

In the Yolngu Madayin system sorcery can be used to heal as by a marrnggitj or to harm as by a galka: both marrnggitj and galka draw upon the same spiritual power.\textsuperscript{165} This conflicting outcome of Yolngu sorcery does not produce an internal inconsistency in the primary purposes of Madayin, namely the continuity of an ancient past source of spiritual authority for the purposes of maintaining a fertility philosophy and magaya. The introduction to the Yolngu of the Christian

\textsuperscript{158} Ibid 291.
\textsuperscript{159} Ibid 292.
\textsuperscript{160} Ibid 293
\textsuperscript{161} Ibid 294.
\textsuperscript{162} Ibid 292, 294.
\textsuperscript{163} Ibid 297.
\textsuperscript{164} Ibid 291.
\textsuperscript{165} Reid, above n 7, 35.
understanding that all sorcery, whether describable as good or bad, performed by a marrnggitj or a galka, originates from Satan, can be a confusing concept, especially those who have experienced healing by a marrnggitj.\textsuperscript{166} This quandary is further explored in Chapter 7.

In Christianity, sorcerers are rejected as unfit to be Christians.\textsuperscript{167} Even sorcery that some may describe as ‘good’ or sorcery that simply proclaims the truth about Jesus Christ is considered evil and to be shunned by Christians\textsuperscript{168} as Paul at Philippi illustrated with the slave woman who by an evil spirit earned money for her owners by predicting the future.\textsuperscript{169} The complete rejection of sorcery in Christianity, even if the sorcery could be described as agreeing with the claims of Christianity, illustrates the absolute nature of Christianity. No room is made for ‘fair weather friends’; no compromising deals will be done by God. The source, nature and ultimate purpose of sorcery disqualifies it from being acceptable to Christianity. This absolute quality of Christianity emanates from the holy quality of God.

Sorcerer-turned-Christian, Simon, saw that when certain Christians laid hands on new Christians the new Christians could receive spiritual

\begin{itemize}
\item \textsuperscript{166} Ibid 74-76.
\item \textsuperscript{167} Acts of the Apostles 13:10-11.
\item \textsuperscript{168} Acts of the Apostles 16:18-19.
\item \textsuperscript{169} Acts of the Apostles 16:16-18.
\end{itemize}
power from the Holy Spirit. Simon offered to pay money so that he
could obtain this additional spiritual power by paying a price. While
paying money or goods is a common way for sorcerers to acquire
spiritual power\textsuperscript{170} it is a wholly inappropriate way in Christianity
because in this system such things are considered truly gifts from God
and are not earned or paid for.\textsuperscript{171} A Galka sorcerer enjoys power and
authority in the Madayin system but it requires of the sorcerer much
time and cost to obtain the requisite power.\textsuperscript{172} Australian law is silent on
this point.

The absolute rejection of sorcery in Christianity reflects Christianity’s
absolute nature and its primary purpose, the Kingdom of Heaven.
Sorcery is described in the Bible as having its source and purpose in
Satan’s realm. Sorcerers will not partake in the Kingdom of God;\textsuperscript{173} their
ultimate destination is hell.\textsuperscript{174} Earlier Australian legislation reflected the
contemporary demos’ desire to take a more Christian approach towards
sorcery by making certain sorcery activities offences. Presently, however,
Australian law does not make sorcery an offence. This change in law

\begin{footnotes}
\item[170] Numbers 22:7.
\item[172] Gaymarani, above n 3, 287-288; Berndt and Berndt, above n 27, 81; W E H
\item[173] Galatians 5:20.
\item[174] Revelation 21:8.
\end{footnotes}
illustrates the primary purpose of Australian law, that is, that the contemporary demos should rule via their democratically elected parliamentary representatives enacting legislation. Madayin allows authorised sorcery for the purposes of regulating fertility and other aspects of Yolngu life which in turn achieve the overarching purpose of Madayin, that is, magaya.

This chapter has provided an analysis of authority in relation to sorcery for Madayin, Australian law and Christianity and has demonstrated that the sorcery-specific authority is consistent with the foundational authority of each system. Chapter Six synthesises the analysis of authority from Chapters Three, Four and Five into succinct propositions that purport to describe the essential nature of authority for each system. These propositions of essential nature of authority are used in later chapters to compare the three systems and to evaluate the integrity of the intersections of the systems from the perspective of authority.

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Chapter Six:
The nature of authority in Madayin compared to the nature of authority in Christianity and Australian law
Chapter 6

The Nature of Authority in Madayin Compared to the Nature of Authority in Christianity and Australian Law

The aim of this chapter is to discover the essential nature of each system so that a qualitative comparison of each system can occur. So far this thesis has described the context of authority of the three major normative systems in Arnhem Land (Madayin, Christianity and Australian law) and analysed their sources and purpose of authority. This analysis has occurred at the foundational level of authority, that is the most fundamental and overarching level of authority, for marriage as a specific area of regulation common to all three systems and for sorcery that is an accepted part of the Madayin system, abhorred by the Christian system and contemporarily not regulated by Australian law.

In order to discover the essential nature of each system, the analysis of the foundational sources and purpose of authority in each system is
combined with the analysis of the sources and purpose of authority specific to marriage and sorcery. The foundational sources and purpose of authority in each system are the most critical to establishing the essential nature of each system as these authorities provide the constitutional framework of authority for each system. By including the sources and purpose of authority specific to marriage and sorcery in the construction of the essential nature of each system, it is possible to check if the essential nature of each system manifests consistently in some specific areas as well as at the foundational level.

In this chapter the analysis of the sources and purpose of authority of the three systems in the previous chapters is brought together in a highly summarised form. These dense summaries are synthesised to produce the general propositions which reveal the essential nature of authority of each system. The purpose of the essential nature propositions is to allow comparison of the nature of authority of one system with the other systems.

The propositions are constructed by arranging the analysis of authority under various sub-headings termed ‘basic aspects’. These basic aspects
reflect categories of qualities that frequently arose out of the analysis that occurred in the preceding chapters and are common to all three systems. When combined, the basic aspects reveal the essential nature of each system. The basic aspects are:

- The primary sources of authority of the system,
- The primary purpose of authority of the system,
- The method or methods by which the primary purpose of authority of the system are achieved,
- Whether the authority claims of the system are universal or relative, and
- Whether the system is absolute or open to syncretism and pluralism.

The term ‘universal’ is used here to indicate the quality of universal application of authority, that is, does the normative system purport that its authority has universal application. The term ‘relative’ is used to indicate that the normative system itself does not purport that its authority has universal application, rather it purports that its authority is restricted by jurisdictional boundaries.
The term ‘absolute’ is used above to indicate that the normative system considers its own authority to be complete and therefore it does not seek or accept the addition of authority from other normative systems in order to complete or complement it. The phrase ‘open to syncretism and pluralism’ means that the system has an eclectic approach to authority. The term ‘syncretism’ means that the system will accept aspects of authority from other systems and incorporate them into the system in an inclusive way. The original system remains as one system albeit enlarged by the syncretism of authority from other systems. The term ‘pluralism’ means that the system will function in collaboration with other normative systems. The distinction between syncretism and pluralism is that in syncretism there remains only one system whereas in pluralism more than one system function together. The other terms used in the basic aspects are unambiguous.

These basic aspects are set out below in table format and are immediately followed by the proposed propositions.
6.1 The Nature of Authority in Madayin

Madayin is a system of customary and religious law\(^1\) of mythical origins that is largely concerned with fertility.\(^2\) The underlying theme of fertility is present at the foundational level of authority and manifests at the specific level of marriage; in fact Madayin marriage is central to Yolngu life and achieving the Madayin purpose of magaya which is ‘a state of people living in peace with each other and their environment’.\(^3\)

Madayin is described as a ‘complete system’ of customary and religious law,\(^4\) it regulates Yolngu life holistically,\(^5\) yet it welcomes syncretism with other legal and religious systems.\(^6\) This makes Madayin a relative

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4. Aboriginal Resource and Development Services Inc, above n 1, 33; Gondarra & Trudgen, above n 1, 2–3.


6. See for example Ronald Berndt, Djanggawul: An Aboriginal Religious Cult of North-Eastern Arnhem Land (Philosophical Library, 1953) xvii; Gaymarani, above n 3, 299 – 300; Djiniyini Gondarra, Father, you gave us the Dreaming (Uniting
normative system: it claims to be normative but not on a universal level.

Madayin is eclectic: it exists within a network of normative pluralism (legal and religious, Indigenous and non-Indigenous) in which it does not merely recognise the existence of other normative systems but synthesises at least some aspects of the other normative systems. Madayin does not attempt to assert sole sovereignty although it demands loyalty from its Yolngu members born into the system.\textsuperscript{7} The Madayin system expects pluralism, therefore it is necessarily permissive; it actively seeks collaboration with other normative systems.\textsuperscript{8} It is an inherent characteristic of the Madayin system to attempt ‘a rapprochement between the alien and the indigenous’.\textsuperscript{9}

This relative quality is manifested throughout the Madayin system. Rights and wrongs are described as preferences rather than absolutes.\textsuperscript{10} For example, in marriage monogamy is possible but polygyny is

\textsuperscript{7} Berndt, \textit{Djanggawul}, above n 6, xvii; Gaymarani, above n 3, 299 – 300.
\textsuperscript{8} Ronald Berndt, \textit{An Adjustment Movement in Arnhem Land, Northern Territory of Australia} (Cashiers de L’Homme, Mouton) 14.
\textsuperscript{9} Ibid.
preferred. An ideal marriage type is polygynous, arranged and between partners in a certain kin relationship but many variations of marriage arrangements are permitted. Extreme arrangements are known but they are more accurately described as best and worst rather than absolutely right and wrong.

The inclusion of sorcery in the Madayin system is considered moral and just provided it is sorcery that has been authorised by the Yolngu elders. In so doing, Madayin demonstrates its relative nature: sorcery itself is not immoral or unlawful so long as it has been authorised.

Further adding to the relative (as opposed to absolute) character of Madayin is the fact that authority in the Madayin system is highly localised and operates as a network built up across the clan groups rather than as a hierarchy. This network structure can be seen in contemporary politico-legal organisation of Yolngu leadership in attempts to engage the Australia legal system institutions and agents.

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11 Ibid; Gaymarani, above n 3, 283.
12 Gaymarani, above n 3, 289.
13 Berndt and Berndt, Man, Land and Myth in North Australia, above n 2, 94.
14 Ibid.
15 Ibid.
16 Gaymarani, above n 3, 283, 286, 291, 292-294, 296, 297, 301, 303.
such as the Marthakal Makarr Dhuni, a group of largely coastal dwelling Yolngu in East and Northwest Arnhem Land that comprises members from Miwatj, Laynha, Raminy, Mathakal, Garriny, Gumurr-Rawarrang, Gattjirrik and Midiyirrk clans. Marthakal Makarr Dhuni is a clan and regional based organisation that forms part of the Yolngu Makarr Dhuni; the Yolngu Makarr Dhuni is a ‘representative body for the [Yolngu people of] East and Northwest area of Arnhem Land [assisting and advocating for the Yolngu clans]... in governance and law and order issues... [and] represents the authority and governance structures that have governed Yolngu societies for countless generations’.

Spiritual power is possessed by Madayin ceremony leaders and acquired by all participants in Madayin ceremonies. Madayin law was not traditionally recorded in written texts, but rather it was, and continues to be, recorded in paintings of ‘Ancestral designs... which contain spiritual power’. This spiritual power, marr, is understood to have both positive and negative qualities. Clearly Madayin is a normative

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18 Nyomba Gandangu and Djalaŋgi Garawirrtja, Marthakal Makarr Dhuni Media Release, 2 April 2013.
21 Morphy, above n 20, 30.
system with a spiritual basis that regulates both religious and secular activities.

The primary source of authority in the Madayin system is the ancestral wanggar beings who have been described as ‘the highest authority in the universe’. The wanggar did not create the universe, rather they originate from the earth or the sea. The claim of being ‘the highest authority in the universe’ seems to establish an inconsistency with Madayin’s relative nature and leaves unanswered the question ‘who or what created the earth and the seas from which the wanggar came?’

Madayin is promulgated and enforced primarily by Ngarra, a combined legislative and judicial institution. The observance of Ngarra law and the performance of Ngarra ceremony accomplish ‘magaya – a state of people living in peace with each other and their environment’. Essential to magaya is fertility, both of people and of the rest of the living world.

Continuity from the ancient mythical past to the present is

22 Ibid 25.
23 Gondarra & Trudgen, above n 1, 3 – 4. Gondarra and Trudgen assert that it was ‘Wanggar, the Great Creator Spirit, the highest authority in the universe’ that is the ultimate source of Madayin.
25 Gondarra, above n 6, 4-6; John Blacket, Fire in the Outback (Albatross, 1997) 248.
26 Gondarra & Trudgen, above n 1, 8; Gaymarani, above n 3, 286.
27 Gaymarani, above n 3, 286.
accomplished by successive generations,\textsuperscript{28} hence the concern with fertility.\textsuperscript{29} Fertility is protected by Madayin law enforcement which includes sorcery and there are many specific examples of offences relating to fertility that attract the punishment of death by sorcery.\textsuperscript{30}

Magaya is the primary purpose of Madayin, a system that has been handed down from the ancient past and is not able to be changed by contemporary human whims.\textsuperscript{31} Nevertheless the details of Madayin are promulgated by Madayin leaders in Ngarra, which creates a small window of opportunity for reform in Madayin should the leaders so desire and believe that they can do so without destroying the essential 'backbone' or skeletal principle of Madayin; a situation reminiscent of Australia's High Court judges in\textit{Mabo (No 2)}.\textsuperscript{32} Entry into Ngarra, and into the knowledge of the whole of Madayin law, is highly regulated: there is an inner chamber of Ngarra which is not public and an outer public area that is not restricted.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{28} Ibid, 284.
\item \textsuperscript{29} Berndt and Berndt, \textit{Man, Land and Myth in North Australia}, above n 2, 117.
\item \textsuperscript{30} Gaymarani, above n 3, 288-294.
\item \textsuperscript{32} \textit{Mabo v Queensland (No 2)}(1992) 175 CLR 1, 43.
\item \textsuperscript{33} Gondarra & Trudgen, above n 1, 8.
\end{itemize}
While Yolngu people assent to the Madayin law\textsuperscript{34} the law is not considered to come from the people, therefore the Madayin system is not a law of the demos. While the source of Madayin is accurately described as being the wanggar, the wanggar themselves originate from the earth (or the sea) so Madayin may be referred to as ‘law from the earth’.

The existence of sorcery (galka) is widespread in Arnhem Land.\textsuperscript{35} In the Madayin system sorcery is known in two forms: authorised and unauthorised.\textsuperscript{36} Unauthorised sorcery is harmful and authorised sorcery may be either harmful or beneficial to the recipient.\textsuperscript{37} Gaymarani considers that authorised death by the sorcery of a Galka is a lawful and just punishment under Ngarra law.\textsuperscript{38} Galka, both sorcery and sorcerer, enjoy great power and authority in the Madayin system and significant efforts are made by individuals to develop their sorcery abilities.\textsuperscript{39}

\begin{thebibliography}{99}
\bibitem{34} Ibid 2.
\bibitem{36} Reid, above n 35, 2-44; 57.
\bibitem{37} Warner, above n 35, 183.
\bibitem{38} Gaymarani, above n 3, 296-297.
\end{thebibliography}
The source of power and authority used to conduct sorcery in the Madayin system is ‘traced ultimately to the wanggar’ and a spiritual healer (marrnggiti) draws upon the same source and nature of spiritual power as does a sorcerer.

Yolngu do not draw absolute boundaries between domains such as sorcery and the domain of ancestral beings. Sorcery is implicated in the protection of secrecy of ancestral rom (‘law’, complexes of rituals, songs, designs, and sacred objects), while ancestral powers may be drawn on to attack one’s enemies.

The Madayin system is highly concerned with the continuity of an ancient past source of spiritual authority from the wanggar, a concern evident in the Madayin practice of sorcery as the source of the spiritual power needed in order to conduct sorcery is the wanggar, the Madayin ancestral beings. Sorcery in the Madayin system aides in the accomplishment of the Madayin fertility philosophy as many of the Madayin offences punishable by sorcery relate to sexual activity.

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41 Reid, above n 35, 35.
42 Keen, above n 40, 515, 525.
43 See Chapter 3.
44 Gaymarani, above n 3, 288-303.
The highest functionary in the Madayin system is the dalkarmirri (or jirrikaymirri)\(^{45}\) who is described as a legal, religious and political leader.\(^{46}\) Dalkarmirri are appointed by due process involving all clan members but they are not elected as such.\(^{47}\) The primary quality required of a dalkarmirri is supernatural power.\(^{48}\) Dalkarmirri enjoy the highest personal authority in Yolngu society and are considered to be repositories of supernatural power\(^{49}\) in the same way that Madayin sacred law painting texts\(^{50}\) also contain spiritual power.\(^{51}\)

Kunapipi, one of the fertility ceremonies\(^{52}\) in the Madayin pantheon, traditionally included ceremonial copulation between male and female ceremony participants who are not married to each other,\(^{53}\) and even between two individuals for whom contact with each other is normally

\(^{45}\) Dalkaramirri is the yirritja moiety term and jirrikaymirri is the dhuwa moiety term for equivalent offices: Gaymarani, above n 3, 287.

\(^{46}\) Ibid.

\(^{47}\) Gondarra & Trudgen, above n 1, 6.

\(^{48}\) Gaymarani, above n 3, 287.


\(^{50}\) Morphy, above n 20, 26.

\(^{51}\) Ibid.


not permitted according to customary law.\textsuperscript{54} That sexual activity between certain individuals is usually not permitted but at times is permitted is another example of Madayin’s relative rather than absolute character. It is possible that Christianity has influenced the Yolngu to bring about a change in Kunapipi\textsuperscript{55} such that it no longer includes ceremonial copulation even if the underlying fertility philosophy remains.\textsuperscript{56} Contemporary Arnhem Land customary law leaders describe Kunapipi as akin to a correctional facility.\textsuperscript{57}

The relative character of Madayin is displayed in its dispute resolution processes as settlements occur by negotiation and mediation as opposed to determination by a third party such as occurs in litigation or arbitration.\textsuperscript{58} The aim of Madayin dispute resolution is not the righting of wrongs but the restoration of magaya.\textsuperscript{59} That Madayin dispute settlements aim to restore magaya, rather than righting absolute wrongs, illustrates the relative nature of Madayin.

\textsuperscript{54} Berndt, \textit{Kunapipi}, above n 53, 49.
\textsuperscript{55} Cole, above n 52, 254; Berndt and Berndt, \textit{Man, Land and Myth in North Australia}, above n 2, 128.
\textsuperscript{56} Berndt, \textit{Kunapipi}, above n 53, 39.
\textsuperscript{57} Gaymarani, above n 3, 297.
\textsuperscript{58} Nancy Williams, \textit{Two Laws: managing disputes in a contemporary Aboriginal community} (1987) 85; Gaymarani, above n 3, 285.
\textsuperscript{59} Gaymarani, above n 3, 286; W Clifford, \textit{An Approach to Aboriginal Criminology} (1982) 6-13, reproduced in Williams, above n 58, 95.
Madayin is eclectic: it exists within a network of normative pluralism (legal and religious, Indigenous and non-Indigenous) in which it does not merely recognise the existence of other normative systems but synthesises at least some aspects of the other normative systems.\(^6\) From the perspective of the highly relative character of Madayin it is natural to view both Christianity and Australian law as additional normative systems that could be incorporated into an enlarged, networked normative system, by taking the same approach to these new systems as Madayin takes to other systems of Aboriginal customary law.\(^6\) The following table draws these authorities together.

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Table 6.1: Basic Aspects of Madayin

<table>
<thead>
<tr>
<th>Primary sources of authority:</th>
<th>Primary purpose of authority:</th>
<th>Method by which the primary purpose achieved:</th>
<th>Universal or relative authority claims:</th>
<th>Absolute or open to syncretism and pluralism:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wanggar, ancient mythical past</td>
<td>continuity of an ancient past source of spiritual authority (wanggar) to achieve magaya, a state of balance, order and peace</td>
<td>the practising of a fertility philosophy</td>
<td>relative</td>
<td>Syncretic and open to pluralism</td>
</tr>
</tbody>
</table>

Source: compiled by the author.

By synthesising the above analysis the following proposition is made:

The essential nature of Madayin is the continuity of the ancient mythical past source of wanggar spiritual authority, executed predominantly by the practising of a fertility philosophy the outcome of which is described as magaya, that is a state of balance, order and peace.

Madayin is relative and exists only in the localised jurisdiction of Arnhem Land. It is open to syncretism and engages in pluralism with other normative systems.
Influenced by centuries of English jurisprudence specifically, and western legal philosophy more generally, both the Commonwealth of Australia and the Northern Territory of Australia include formal separation of powers measures in their constitutional arrangements. This formal separation of powers provides what is known as the three arms of government: the parliament, the executive and the judiciary. Australian law is derived from two primary sources, legislation and case law, however the operation of the doctrine of supremacy of parliament effectively subordinates case law to legislation. Accordingly, legislation is the pre-eminent source of law in Australian law with the Australian Constitution being the ultimate source of law for both the Commonwealth and the Northern Territory. Since legislation is enacted by legislators who are elected by eligible voters, Australian law (at least legislation) primarily takes its nature from this system of representative democracy and accordingly may be described as ‘law of the demos’.

62 See Chapter 3.
63 See Chapter 2.
65 Catriona Cook, Robin Greyke, Robert Geddes and David Hamer, Laying Down the Law (Lexis Nexis, 8th ed, 2012) 138-139.
The phrase ‘law of the demos’ is used in this context to mean the ‘law of the populace’.

According to Australian law, the Northern Territory Legislative Assembly exercises sovereign legislative power throughout the Northern Territory\(^67\) other than being subject to legislative interventions by the Commonwealth Parliament under s 122 of the Constitution.\(^68\) Both the Commonwealth and the Northern Territory exercise executive authority in the Northern Territory according to their respective jurisdiction. A hierarchy of courts within and across Australian jurisdictions, including the Northern Territory, contribute to the development of a single common law which is ultimately determined by the High Court of Australia.\(^69\)

The constitutional documents of both the Northern Territory and the Commonwealth of Australia purport to assert legal authority within their jurisdictions. This means that Australian law is relative (not

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\(^67\) *Northern Territory (Self-Government) Act* 1978 (Cth) s 6.

\(^68\) Section 122 reads: The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

\(^69\) *Australian Constitution* s 73; *Lipohar v The Queen* (1999) 200 CLR 485, 505-6.
universal) as it purports to apply only within its own geographical boundaries and does not typically purport to regulate behaviour outside of its geographical boundaries.\(^{70}\) This assertion effectively denies legal pluralism, or at least the prima facie possibility of legal pluralism. The effect of this is to create a legal monopoly. A handful of exceptions to this rule exist. Legal authorities from other systems have become legal authority in Australian law in a few rare instances including:

- in statutory interpretation law when interpreting domestic legislation enacted pursuant to an international instrument;\(^{71}\) and

- the recognition of Aboriginal customary law title to land (to be discussed in greater detail in Chapter 7).\(^{72}\)

Even with these exceptions Australian law is characterised as sovereign rather than having an eclectic nature.\(^{73}\) The purpose of the Australian legislatures is ‘to make laws for the peace, order and good government’ and it has long been determined in common law that the function of

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\(^{70}\) For some examples of exceptions *Criminal Code Act 1995 (Cth)* Part 2.7 – Geographical jurisdiction, and Division 70 – Bribery of foreign public officials.  
\(^{71}\) *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Acts Interpretation Act 1901 (Cth)* s 15AB(2)(d).  
\(^{72}\) For example see *Native Title Act 1993 (Cth)* and *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.  
\(^{73}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 43.
these terms is to confer sovereign power, that is, the purpose of the legislatures is to govern sovereignly subject only to the Constitution. Parliamentary supremacy in law making is tempered by the Constitutional constraint of representative democracy. The legislatures are constituted by members who have been democratically elected as representatives of the eligible voters of a jurisdiction. Therefore it may be said that parliament enjoys legislative supremacy at the behest, even at the whim, of the demos.

While the Australian legal system may include ideas such as ‘beliefs about the sanctity, the uniqueness and the priority of the individual human being’ there is little explicit evidence of this thinking in the system’s essential Constitutional structure. The reality is that the Australian Commonwealth Parliament and the Northern Territory

74 Jeffrey Goldsworthy, ‘Interpreting the Constitution in Its Second Century’ (2000) 27 Melbourne University Law Review. 681. See also the following cases cited by Goldsworthy: R v Burah (1878) 3 App Cas 889; Hodge v The Queen (1883) 9 App Cas 117; Powell v Apollo Candle Co Ltd (1885) 10 App Cas 282; Riel v The Queen; Ex parte Riel (1885) 10 App Cas 675; D’Emden v Pedder (1904) 1 CLR 91, 110–11 (Griffith CJ); Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, 9–10.

75 For the Northern Territory of Australia see Northern Territory (Self-Government) Act s 13; for the Commonwealth see the Australian Constitution ss 9, 24.

76 Hughes and Leane, above n 64, 2.

77 There are five rights that could be described as human rights in the Constitution: the right to vote in Federal elections (s 41), the right to protection against acquisition of private property by government on unjust terms (s 51(xxi)), the right to a trial by jury for an indictment (s 80), freedom of religion (s 116) and the right to freedom from State of residency discrimination (s 117).
Parliament derive their authority from constitutional powers and from the people who elect the parliamentarians. Therefore the nature of parliamentary legislation in the Commonwealth and the Northern Territory is that it must be agreeable to the demos. Hence the arrangement can be described as 'law of the demos'. There is no higher purpose for legislation other than to govern according to the will of the demos. Even the Constitution can be changed by the demos, although this rarely happens.

The proposition that the essential source of authority in Australian law is the demos is supported by Tamanaha's theory that law has a particular nature and purpose which is determined by its function of maintaining social order. The maintenance of social order in the Australian law context is 'peace, order and good governance' via the legislature which is constituted by democratically elected representatives of the demos. Thus the morality created by this system is a highly relative one in which the majority of the adult population at any given time are deemed capable and appropriate to give authority to the Parliament in order to legislate.

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78 Australian Constitution, Chapter VIII.
Lobby groups attempt to draw upon value-laden ideals in order to persuade electors and parliamentarians to vote in a certain way and of course some parliamentarians themselves may subscribe to certain philosophies that do include a higher purpose. Consequently some legislation may be imbued with particular values espousing a higher purpose; however, such appeals to a higher purpose are not required by the legal system itself. The morality of the Australian legal system merely requires parliamentarians to be elected by the demos and for legislation to be within the bounds of constitutionality.

In the history of Australian law to date, the legal definition of marriage has reflected a Christian morality and as such may be described as a pseudo-Christian legal arrangement. Section 5 of the Marriage Act defines marriage to mean ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. This definition is Christian in origin\(^8\) and as such creates a pseudo-Christian morality in relation to marriage in Australian law. The morality of s 5 can only be a pseudo-Christian morality; it cannot be said to be exactly the same as it is in Christianity for two reasons. One, the primary reason that s 5

\(^8\) Genesis 1:28; 2:18; 9:1; Malachi 2:15.
reads as it does is because a majority of the elected parliamentarians agreed upon the wording at the time of the 2004 Amendment\textsuperscript{81} in order to bring it into law, thus the demos have again ruled through their parliamentary representatives. Secondly, the morality created by Christian marriage authority is that there is only one moral arrangement for people to have sexual relations, that is, in a marriage between a man and a woman.\textsuperscript{82} Australian law does not include this major aspect of Christian morality as sexual relations between unmarried men and women and same-sex couples is not unlawful. The Australian demos may, through a future parliament, change the law on marriage to include specifically non-Christian elements. The current Australian law of divorce is a decidedly non-Christian example. If a future parliament is able to get a majority of parliamentarians to agree to change the wording of s 5 then the wording, and thus the law, will change, subject to any Constitutional constraints. Even Constitutional constraints may be removed by the demos via referendum.

\textsuperscript{81} Marriage Amendment Act 2004 (Cth).

\textsuperscript{82} 1 Corinthians 7:2.
Early English law included sorcery as a crime, often accompanied by the death penalty.\textsuperscript{83} In the fourteenth and fifteenth centuries the King and Parliament largely shared authority with the Church\textsuperscript{84} which ‘vigorously denounced the evil works of witches, and provided papal support and encouragement to witch-hunting’.\textsuperscript{85} The first English legislation relating to sorcery was enacted in the early fifteenth century\textsuperscript{86} and the secular authorities collaborated with the ecclesial authorities to arrest, try and punish sorcerers.\textsuperscript{87} England in the sixteenth and seventeenth centuries saw continued widespread ‘belief in harmful witchcraft’.\textsuperscript{88} English parliaments kept the law on sorcery and an increased number of witchcraft cases were tried and offenders punished.\textsuperscript{89} The \textit{Witchcraft Act 1604} ‘made injuring people a capital offence on the first conviction... conjuration of spirits a capital offence, and... using dead bodies, or parts thereof, for witchcraft or sorcery... punishable by


\textsuperscript{84} Pollock and Maitland, above n 83, 575-576.

\textsuperscript{85} Garland, above n 83, 1153.

\textsuperscript{86} 33 Hen. VIII, cap. 8; Pollock and Maitland, above n 83, 581.

\textsuperscript{87} Pollock and Maitland, above n 83, 576-582.

\textsuperscript{88} Garland, above n 83, 1158.

\textsuperscript{89} Pollock and Maitland, above n 83, 582.
death’;\textsuperscript{90} it also ‘addressed not just the conjuring or invoking, but the feeding, of evil spirits’.\textsuperscript{91}

However by the 1660s there was ‘an outbreak of scepticism among lawyers and judges’\textsuperscript{92} in relation to sorcery and the ‘intellectual elite became sceptical of the reality of witchcraft and began to take a more rational view of the world’.\textsuperscript{93} The last lawful execution for witchcraft in England took place in 1684 and the death penalty for witchcraft was abolished half a century later.\textsuperscript{94} Soon after this time the English began settling Australia and the new Australian law of the colonies was sourced from English statutes which ‘provided that the settlers were governed by the common and statute law of England’.\textsuperscript{95} By the nineteenth century in Australian colonies the practice of witchcraft, or the pretence of the practice of witchcraft, had been made a statutory offence by nearly all Australian legislatures, the Northern Territory being a notable exception.\textsuperscript{96} In the twentieth and twenty-first centuries these anti-sorcery statutes were repealed with the last repeal occurring in

\textsuperscript{90} Garland, above n 83, 1161-1162.
\textsuperscript{91} Ibid 1162.
\textsuperscript{92} Ibid 1178.
\textsuperscript{93} Ibid 1178.
\textsuperscript{94} Ibid 1179.
Victoria in 2005.\textsuperscript{97} Sorcery continues to be present in contemporary Australian legal matters in the Arnhem Land context, especially in the Northern Territory Coroner’s Court\textsuperscript{98} however the Coroner has consistently refusal to get involved in matters of sorcery.\textsuperscript{99}

Australian law in relation to sorcery has been in the form of legislation rather than case law. Australian parliaments enacted anti-sorcery legislation in the first hundred years of Australia’s legislative history however the second hundred years has seen democratically elected members of parliaments repeal these statutes. The following table draws these authorities together.

\textsuperscript{97} Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic) s 3.
\textsuperscript{98} Inquest into the death of Danny Gumana (Unreported, Northern Territory Coroner’s Court, Celia Kemp, Deputy Coroner, Monday 28 September 2009) [99].
\textsuperscript{99} Inquest into the death of Danny Gumana (Unreported, Northern Territory Coroner’s Court, Celia Kemp, Deputy Coroner, Monday 28 September 2009) [100-102].
Table 6.2: Basic Aspects of Australian law

<table>
<thead>
<tr>
<th>Primary sources of authority:</th>
<th>Primary purpose of authority:</th>
<th>Method by which the primary purpose achieved:</th>
<th>Universal or relative authority claims:</th>
<th>Absolute or open to syncretism and pluralism:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demos via legislation in accordance with the Constitution</td>
<td>enable the contemporary demos to rule</td>
<td>representative democracy, parliamentary supremacy and self-subscribed sovereignty within national borders</td>
<td>relative</td>
<td>absolute</td>
</tr>
</tbody>
</table>

Source: compiled by the author.

By synthesising the above analysis the following succinct proposition is constructed:

The essential nature of Australian law is to enable the contemporary demos to rule by a system of representative democracy, parliamentary supremacy and self-subscribed sovereignty within national borders and mediated via legislation in accordance with the Constitution. Rule by the contemporary demos gives Australian law a relative nature (relative in time) as preceding and proceeding demos’ are lawfully able to change the law, even the foundational Constitution. National borders reveal both the absolute nature of Australian law and another aspect of the relative nature of Australian law (relative in place) as foreign
jurisdictions are not denied, yet simultaneously pluralism is not accommodated within Australia’s borders.

6.3 The Nature of Authority in Christianity

The essential source of Christianity is Jesus Christ, who as both God and human, is the Saviour of humanity. Jesus’, and thus Christianity’s, primary purpose is the ‘kingdom of God’. Christian scripture recounts Jesus declaring that the Kingdom of God is supremely valuable, of universal application and eternal.

Critical to the function of Jesus as Saviour is the Christian proposition that all of humanity have sinned and that the consequence of sin is death. However, Jesus’ death on the cross paid the price for

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100 John 1:1-18.
101 John 3:16.
102 Mark 1:15; also termed ‘the Kingdom of Heaven’: Matthew 19:16-24.
103 Matthew 13:45-46
107 Romans 6:32; Genesis 3:19; Romans 5:12; 6:23.
humanity’s sins, thereby appropriating to humanity forgiveness of sin.  

In accepting Jesus’ sacrifice people enter the kingdom of God.

The predominant Christian text is the Bible. The Bible is the major source of authority and doctrine common to the majority of Christian churches. Christians understand that the scriptures of the Bible are given by God. According to the Bible all authority comes from God, and those in positions of authority have been placed there by God. Also, God has put all things under the authority of Christ who has all authority to judge all people. Therefore Jesus is at the apex of all authority. The Bible describes a hierarchy of spiritual realms including in simple terms the heavens, the earth and hell. The authorities below Jesus are both natural and supernatural, and may be either obedient or disobedient (or both at different times) to God. The supernatural authorities below Jesus are described in the Bible as principalities,

108 Matthew 26:28; Acts 2:38; Romans 3:25, 1 John 2:2, 4:10.
109 John 3:16.
110 John Hinnells (ed), *A Handbook of Living Religions* (Pelican, 1985) 84. The Catholic Church also considers ‘sacred tradition’ as a major source of authority.
111 2 Timothy 3:16; 2 Peter 1:21.
112 Romans 13:1; John 19:10.
113 Ephesians 1:22.
114 John 5:22, 27.
115 Revelation 5:12; 19:1.
powers and dominions amongst other names. All of these supernatural authorities are under the leadership of Satan, the head of the dominion or kingdom of darkness, also known as the ‘kingdoms of this world’ and the enemy of Christians. A Christian is someone who has been delivered from the power of Satan and brought into the Kingdom of God. The Bible instructs Christians to fight Satan not by natural means but by supernatural means, for the Christian ‘struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms’.

Christians are called to be imitators of God and God is described as ‘love’, therefore Christians are called to act from love. This includes husbands to love their wives, ‘as Christ loved the church and gave himself up for her’. Marriage has an important role to play in the Christian demonstration of love by the dedication each spouse has for

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118 Ephesians 1:21.
120 Colossians 1:13.
122 1 Peter 5:8.
123 Colossians 1:13; Ephesians 2:6.
124 2 Corinthians 10:3-5.
125 Ephesians 6:12.
126 Ephesians 5:1-2.
127 1 John 4:8.
129 Ephesians 5:25-26; see also Ephesians 5: 22-28; 31-32 and similar exhortations given in 1 Peter 3:1-7.
the other, especially in the area of sexual fidelity, and in the raising of children who also follow God. Christian scripture compares the natural husband-wife relationship to the spiritual Christ-Church relationship.\textsuperscript{130} Indeed marriage is so highly regarded in Christianity that even Jesus is scripturally described as a spiritual husband to his spouse, the Church.\textsuperscript{131}

The Bible is adamant that sorcery is always evil,\textsuperscript{132} a domain of Satan, and with which Christians should not in any way be involved.\textsuperscript{133} The Bible describes people who are involved with sorcery as defiled\textsuperscript{134} and God is angered by such people.\textsuperscript{135} Sorcerers will not inherit the Kingdom of God,\textsuperscript{136} rather they will be punished by God\textsuperscript{137} and their ultimate destination is hell.\textsuperscript{138}

Christian scriptures describe sorcery as deceitful\textsuperscript{139} and unjust with the aim of trying to control other people’s lives.\textsuperscript{140}

\begin{footnotes}
\item[130] Ephesians 5: 29-32.
\item[131] Revelation
\item[132] Isaiah 47:9-10.
\item[133] Deuteronomy 18:9-14.
\item[134] Leviticus 19:31.
\item[135] 2 Kings 21:6.
\item[136] Galatians 5:20.
\item[137] Isaiah 47:9; Malachi 3:5.
\item[138] Revelation 21:8.
\item[139] Jeremiah 27:9-10; Revelation 19:23.
\item[140] Ezekiel 13:18-21.
\end{footnotes}
the existence and power of sorcery, it also declares that the authority and power of sorcery is less than God’s authority and power.\textsuperscript{141} Christians are able to draw upon God’s authority and power in order to conquer sorcery\textsuperscript{142} but this is done by faith and cannot be bought.\textsuperscript{143}

The primary purpose of Christianity is the advancement of the Kingdom of Heaven. The enemy of the Kingdom of Heaven is Satan and sorcery is described in the Bible as having its source and purpose in Satan’s realm. Therefore sorcery is anathema to Christianity.

The following table draws these authorities together:

\textit{Table 6.3: Basic Aspects of Christianity}

<table>
<thead>
<tr>
<th>Primary sources of authority:</th>
<th>Primary purpose of authority:</th>
<th>Method by which the primary purpose achieved:</th>
<th>Universal or relative authority claims:</th>
<th>Absolute or open to syncretism and pluralism:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jesus Christ (God, as recorded in the Bible)</td>
<td>advancement of the Kingdom of Heaven</td>
<td>people (not limited to any jurisdiction) to be ‘born again’ and voluntarily follow the teachings of Jesus Christ while awaiting his return to the earth</td>
<td>universal</td>
<td>absolute</td>
</tr>
</tbody>
</table>

Source: compiled by the author.

\textsuperscript{141} Numbers 22:7-23; Exodus 9:8-11.
The synthesis of the above analysis enables the following proposition to be made:

The essential nature of Christianity is the advancement of the Kingdom of Heaven on earth by seeking people (not limited to any jurisdiction) to be ‘born again’ and voluntarily follow the teachings of Jesus Christ while awaiting his return to the earth and his eternal reign. Christianity is universal and absolute making it unprepared to enter into syncretism with any other authority. While Christianity recognises the existence of many authorities it places itself at the apex of all authorities and claims that in time all authorities will acknowledge the highest authority of Jesus Christ.

6.4 Summary of Synthesised Propositions

When the basic aspects of each system are viewed side by side, the similarities and differences of the essential nature become apparent.

Each system has a different primary source of authority and different primary purpose. The primary source of authority in the Madayin
system is the wangarr and the primary purpose of Madayin is to continue the wangarr rule to achieve magaya. The primary source of authority in Australian law is the demos through contemporary legislation in accordance with the Constitution and the primary purpose of Australian law is to enable the demos to rule. The primary source of authority in Christianity is Jesus Christ (as recorded in the Bible) and the primary purpose of Christianity is the advancement of the Kingdom of Heaven.

The methods that each system employ to accomplish their primary purpose are radically different to each other. Madayin pursues a fertility philosophy, Australian law employs representative democracy, parliamentary supremacy and sovereignty within national borders and Christianity employs voluntary adherence following a ‘born again’ experience.

Madayin only claims local authority (that of Arnhem Land). Other normative systems exist alongside Madayin and Madayin views the other systems as operating pluralistically in co-existence with it. Madayin also has a syncretic approach to other normative systems: Madayin elements
are offered to other systems for inclusion and Madayin includes elements of other systems within its own. The combination of Madayin’s relative, syncretic and pluralistic characteristics gives Madayin a completely relative nature. Juxtaposed to Madayin in this respect is Christianity which makes absolute and universal claims of its authority. Australian law makes absolute authority claims but only within its national borders; outside of its national borders Australian law recognises the authority of other legal systems. This approach gives Australian law a relative yet absolute nature.

Each system has a different essential nature. When one of these systems interacts with another, an evaluation of the reconcilability of the essential nature of one system with the other will determine if, and to what extent, the interaction can result in collaboration while maintaining integrity of authority.

The following chapter (Chapter Seven) considers a number of actual interactions of Madayin with Australian law and with Christianity. The particular focus of Chapter Seven is to evaluate those intersections with regard to determining if integrity of authority for each system is
maintained in the intersections. The intersections are specific occurrences of one system meeting another, for example, where an aspect of Australian law incorporates an aspect of Madayin or where the Madayin system incorporates an aspect of Christianity. These intersections of authority are evaluated in order to determine if the normative pluralism that occurs in Arnhem Land maintains integrity of authority from each system that is involved in the interactions.
Chapter Seven: Intersections of Madayin with Australian Law and Christianity
Chapter 7

Intersections of Madayin with Australian Law and Christianity

This chapter evaluates a range of normative intersections of Madayin with Australian law and Christianity by considering if the integrity of the essential nature of authority of each system (as established in the previous chapter) is retained or compromised in the intersections. The chapter has two sections: one, interactions between Madayin and Australian law and two, interactions between Madayin and Christianity.

The section on the interactions between Madayin and Australian law focuses upon the Constitutional definition of religion, property law, and sentencing law. The well-trodden path of how Aboriginal customary law has, at times, been recognised either positively or negatively by Australian criminal law, especially in the areas of bail and sentencing, will not be covered in this chapter, except for the recent development of s 91 of the Northern Territory National Emergency Response Act 2007 (Cth) which restricts the admission of evidence of Madayin and the related case
of *R v Wunungmurra* (2009).\(^1\) In addition to being well documented elsewhere,\(^2\) the partial recognition of Aboriginal customary law by Northern Territory bail and sentencing law, described by law academic Heather Douglas as a form of soft legal pluralism,\(^3\) is very piecemeal and ad hoc and as such probably does not proffer insight into the authoritative nature of the relevant systems which is the primary concern of this thesis. Numerous other intersections between Madayin and Australian law exist, such as in evidence law\(^4\) and child protection law.\(^5\) However these intersections do not offer the richer jurisprudential material that the Constitutional definition of religion and property law provides.

The section on the interactions between Madayin and Christianity include pertinent aspects of both theology and practice as both areas provide excellent material on the interactions of normative authority in both systems. The theologies of leading Yolngu church and Madayin leaders are analysed and evaluated for authoritative integrity from the

\(^1\) 231 FLR 180.
\(^4\) See for example *Evidence (National Uniform Legislation) Act* ss 72, 78A.
\(^5\) See for example *Care and Protection of Children Act (NT)* s 12.
perspectives of both Madayin and Christianity. Relevant writings of non-Yolngu authors, some theologians and some anthropologists, are also analysed and evaluated in the same way.

The connections between Christianity and Western legal systems generally, and English and Australian law specifically, are well documented, even if often forgotten by contemporary lawyers. Babie writes that ‘the history of the Western legal tradition, of the common law itself, is intimately bound up with Christian theology’. The general intersections between Australian law and Christianity will not be considered in this chapter as those intersections are well documented elsewhere and are not the focus of this thesis.

7.1 Intersections between Madayin and Australian Law

This section considers how Australian law has intersected with Aboriginal customary law generally, and Madayin in particular, in respect of the Constitutional definition of religion, property law (including sacred sites law), and an aspect of sentencing law. These three areas of intersection

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7 Ibid 298.
8 See for example ‘Special Issue: Law and Religion in Australia: Contemporary Scholarship’ (2009) 30 1 Adelaide Law Review 1, 1-184 and many articles in the University of Notre Dame Australia Law Review.
are probably the most developed in terms of Australian law engagement with Aboriginal customary law. The normative integrity of the intersections for each system is evaluated by reference to the essential natures articulated in Chapter Six.

7.1.1 Is Madayin a Religion for the Purposes of the Australian Constitution?

In Chapter Two of this thesis it was established that Madayin is as much religion as it is law. Therefore the question that is now asked is: does Madayin meet the legal definition of religion in Australia, especially for the purposes of s 116 of the Constitution which reads ‘[t]he Commonwealth shall not make any law... for prohibiting the free exercise of any religion’?

In 1943 Latham CJ of the High Court wrote that s 116 applies in respect to all religions and ‘not merely in relation to some one particular religion’.\(^9\) His Honour also noted that

have existed, in the world… Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds.\(^\text{10}\)

This wide interpretation by Chief Justice Latham was somewhat narrowed by the High Court forty years later in the Scientology case.\(^\text{11}\) In this case the Court had to decide if the Church of Scientology was a religion for the purposes of paying pay-roll tax (as religious organisations are exempt from this tax). In a joint judgment, Mason ACJ and Brennan J accepted that although ‘[t]here can be no acceptable discrimination between institutions which take their character from religions which the majority of the community recognizes as religions’\(^\text{12}\) and those that do not, the definition of religion cannot be so wide as to include ‘the beliefs, practices and observances of any group who assert their beliefs, practices and observances to be religious’.\(^\text{13}\) The mere assertion of religion ‘cannot

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\(^{10}\) Ibid 123.

\(^{11}\) Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120.

\(^{12}\) Ibid 132.

\(^{13}\) Ibid.
be adopted as a legal criterion'.\footnote{14} If a mere assertion were accepted the Court argued that the result would be that the ‘mantle of immunity’ that s 116 provides ‘would soon be in tatters’.\footnote{15} The Court insisted that ‘[a] more objective criterion is required’.\footnote{16} Accordingly, Mason ACJ and Brennan J offered the following two criteria: ‘first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief’.\footnote{17}

Cognisant of ‘venturing into a field which is more the domain of the student of comparative religion than that of the lawyer’,\footnote{18} Wilson and Deane JJ preferred a ‘set of indicia’ approach to defining religion to the simpler and more prescriptive approach of Mason ACJ and Brennan J. Wilson and Deane JJ decided that it is important that a religion for the purposes of s 166 to include ‘belief in the supernatural’.\footnote{19} ‘If that be absent’, the judges opined, ‘it is unlikely that one has "a religion"’.\footnote{20} Wilson and Deane JJ also considered it important that a s 116 religion includes ‘ideas [that] relate to man’s nature and place in the universe and his relation to things supernatural’.\footnote{21}
Further indicia that Wilson and Deane JJ added were a requirement that the religion’s ‘ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance’.22 Their Honours also set the indicia of the adherents to the religion constituting an ‘identifiable group or identifiable groups’.23 A final indicium that Wilson and Deane JJ admitted may be somewhat controversial ‘is that the adherents themselves see the collection of ideas and/or practices as constituting a religion’.24

In a separate judgment Murphy J preferred a wide definition of religion, writing ‘[a]ny body which claims to be religious, and offers a way to find meaning and purpose in life, is religious’.25 His Honour made specific mention of Aboriginal religion, writing that ‘[t]he Aboriginal religion of Australia and of other countries must be included’26 in the legal definition of religion. In the important case of Milirrpum v Nabalco Pty Ltd27 (a precursor to land rights legislation and the establishment of native title in Mabo (No 2)28) Blackburn J wrote:

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22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid 151.
26 Ibid.
27 (1971) 17 FLR 141.
the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship. . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.29

The advent of native title law in Australia has required the common law to consider the religious nature of Aboriginal customary law. In Ward v Western Australia (2002)30 Gleeson CJ, Gaudron, Gummow and Hayne JJ wrote that it ‘is now well recognised [that] the connection which Aboriginal peoples have with “country” is essentially spiritual’.31

The same High Court judges encapsulated succinctly the difficulty of the task of determining native title cases when they wrote ‘[t]he spiritual or religious is translated into the legal’.32 The court warned in Commonwealth v Yarmirr (2001)33 not ‘to conduct an inquiry about the existence of native title rights and interests [which have their source in customary law] in the language of the common law property lawyer’. In Yarmirr the Aboriginal claimants asserted that ‘in accordance with their

30 213 CLR 1.
31 Ibid 64.
32 Ward v Western Australia (2002) 213 CLR 1, 65.
33 Commonwealth v Yarmirr (2001) 208 CLR 1, 37.
traditional law, they… held cultural and religious beliefs’ concerning the claimed area.\textsuperscript{34} It seems the Australian lawyer attempting to delve into areas involving Aboriginal customary law will need to employ new ways of thinking.

\section*{7.1.2 The Pattern of Aboriginal Religions}

The argument that Madayin is an Aboriginal religion for the purposes of s 116 is strengthened by its similarity to other Aboriginal religions. The anthropologist Berndt notes that the accounts of the mythical beings of Aboriginal religion that are the sources of Aboriginal customary law generally follow a typical pattern:

usually [the accounts of the mythical beings] conclude in either of two-ways. One was transformation or metamorphosis: they finally changed their physical shape, adopting the physical forms we can see them in now. Or they moved out of one particular area into another; and within a certain range, their paths provide lines of communication and shared ritual linkages between neighbouring groups. In either case, they left behind them an essential quality which we call sacred power. Thus they continue to live on eternally in spiritual form, and to influence the actions of human beings. They also left tangible expressions of themselves throughout the countryside. Such places contain

\textsuperscript{34} Ibid 71.
something of their spiritual essence. They sanctify the land, and are often focal points for ritual action.\textsuperscript{35}

James Gaykamangu, a dalkaramirri, retells the Honey Bee (Niuda gugu) story of his clan which comes under Ngarra and which conforms to the pattern described by Berndt:

The honey bee flew over the saltwater and made a diamond design on the back of a whale. Then the honey bee flew to ganalbingu country which is around the Arafura swamp area. Instead of landing on a tree the honey bee landed on a rock and out of the rock came running fresh water. After this happened the honey bee flew to butgari country and then flew back to the Djiluirri Yirralka home country. This Niuda gugu landed in Warrayngu and Bunggu clan groups. Niuda gugu flew to different places to invite them to become peaceful tribal people and to recognise each other as being part of the Niuda gugu law.\textsuperscript{36}

Similarly, Gaymarani George Pascoe confirms the pattern observed by Berndt as he retells how Baru the mythical crocodile gave law to people in Arnhem Land:


In the Dreamtime, Baru [the mythical totem crocodile] came along from the east. Baru named certain places and gave law to those places… plants… fish… [fresh water law and salt water law… people and animals. We are linked to other clans by the same totem. This is the Dreamtime… When Baru gave the law to the land he made Dreaming tracks as he went along.37

Baru once fought with Jarkitj (Willy wag tail) who cut off one of Baru’s arms. They fought for a very special reason. Jarkitj had a fire. Baru wanted fire so he could cook his meat because he had been eating it raw. Baru stole the fire from Jarkitj. He swallowed Jarkitj’s fire. Lots of people speared Baru because of that terrible thing he did, that is stealing Jarkitj’s fire. Finally Baru admitted he stole the fire. Then he did the right thing. As he travelled he first named the tribes, he gave them the law. He named all the things that he saw, such as the plants and trees. Those plants and trees are metaphors for knowledge of the law from Baru.38

Both of the accounts of the origins of Yolngu customary law above evidence ‘belief in a supernatural Being, Thing or Principle; and… the acceptance of canons of conduct in order to give effect to that belief’ as required by the most specific criteria of the legal definition of religion to

38 Ibid.
come from the High Court of Australia. Other accounts of Aboriginal religions in Arnhem Land concur.

It is difficult, if not impossible, to arrive at a comprehensive and workable legal definition of ‘religion’ in Australian law. Latham CJ was right. However, if Madayin is ‘religious customary law, that is, the law of the tribal religion of the Yolngu adherents’, if Madayin itself is sacred and concerned with sacred sites, objects and paintings, if Madayin and Madayin leaders have ‘spiritual power or strength or supernatural power’ as Gaymarani George Pascoe writes, then it would seem at least more probable than not that Madayin would meet the legal definition of religion - regardless of which of the tests from the Jehovah’s Witnesses case or the Scientology case were applied.

In the Jehovah’s Witnesses case Latham CJ insists that s 116:

is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to

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39 Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 136, per Mason ACJ and Brennan J.
40 See for example Ronald Berndt, Djanggawal : an Aboriginal religious cult of northeastern Arnhem Land (Philosophical Library, 1953).
41 Gaymarani, above n 37, 283.
42 Ibid, 289.
43 Ibid 294-295.
44 Ibid.
protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.\textsuperscript{45}

The Madayin religion may well be an ‘unpopular minority’ religion requiring the protection of s 116. With the total Yolngu population numbering about 10,000\textsuperscript{46} compared with the Northern Territory population being about 220,000\textsuperscript{47} (and the Australian population around 23,000,000\textsuperscript{48}) the ‘minority’ aspect is not in doubt. The term ‘unpopular’ may describe the minority or the actual elements of religion being considered – in this case Madayin. If adherence to the requirements of Madayin or another form of Aboriginal customary law offends the ordinary Australian laws, such ‘conduct [will be] outside the area of any immunity, privilege or right conferred on the grounds of religion’.\textsuperscript{49} However the application of s 116 of the Constitution in relation to Aboriginal religions has had little examination in Australian Courts.

\textsuperscript{45} Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth (1943) 67 CLR 116, 124.
\textsuperscript{47} Ibid.
\textsuperscript{49} Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120, 136.
Writing in *Ward v Western Australia*, Kirby J noted that ‘[t]he full significance of s 116 of the Constitution regarding freedom of religion has not yet been explored in relation to Aboriginal spirituality and its significance for Aboriginal civil rights.’

The term ‘Aboriginal customary law’ has been defined broadly by Australian law reform bodies to include its religious nature and consensus exists among legal scholars, anthropologists and customary law leaders alike that customary law is as much ‘law’ as it is ‘religion’. As Madayin is an instance of Aboriginal customary law, Madayin too is as much ‘law’ as it is ‘religion’. Furthermore, Aboriginal customary law generally and Madayin specifically satisfy the Australian constitutional law definition of religion.

The existence of High Court judicial writings on s 116 form an authoritative source of law on point and serve as a reminder of the two primary sources of law in Australian law, case law and legislation, as well as the Constitutional separation of powers between the legislature and the courts. The absence of legislation on point probably reflects the Constitutional directive of s 116 that the Commonwealth legislature

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50 CLR 1, 249.
51 See Chapter Two.
‘shall not make any law... for prohibiting the free exercise of any religion’.

Given that an aspect of the essential nature of Australian law is to enable the contemporary demos to rule, the Constitutional restriction on a contemporary parliament to enact legislation contrary to s 116 requires the demos to assert the greater effort of passing a Constitutional amendment by referendum in order to legislate in respect of religion, or at least in respect of ‘prohibiting the free exercise of any religion’. The effect of this Constitutional brake on contemporary demos rule is to lessen, but not completely remove, the relative aspect of the essential nature of Australian law.

7.1.3 Property and Sacred Sites Law

This section analyses the intersections of Australian property law with Madayin and Aboriginal customary law generally. Sacred sites law is also considered here as Aboriginal sacred sites are linked to land and sea.
7.1.3.1 Non-recognition of Aboriginal Customary Law Title to Land in Australian Law

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 1963, the Commonwealth government excised what was then a part of the Arnhem Land Aboriginal Reserve in order to establish a bauxite mine. In protest to the government’s actions a number of Yolngu constructed what became known as the ‘bark petition’ – a petition written in both English and Yolngu matha and framed in bark painted with designs belonging to the clans that signed the petition. The petition was sent to the Commonwealth Parliament and a Parliamentary Committee was established to investigate the matter. The mine went ahead regardless. The Yolngu petitioners brought the matter to the Northern Territory

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52 Commonwealth of Australia Gazette (14 April 1931) 643.
53 Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.
Supreme Court and this case - *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 - became a milestone in the history of Australian law recognising the Madayin system specifically and land rights under Aboriginal customary law generally. The Yolngu plaintiffs argued that the type of rights that they hold under their Aboriginal customary law can be described as ‘communal native title’. The judge, Blackburn J, held that the doctrine of communal native title ‘does not form and never has formed, part of the law of any part of Australia’, whether as legislation or as case law, and was therefore unable to recognise the plaintiff’s claims.

Although the judge’s decision meant that Aboriginal land rights under Aboriginal customary law were not recognised by Australian law, the judgement contained many other findings that would in following years be often cited by lawyers, academics and advocates of Aboriginal rights including perhaps most famously the following part of His Honour’s judgement:

> The evidence shows a subtle and elaborate [Madayin] system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a “government of laws, and not of men” it is that shown in the evidence before me.

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56 Ibid 245.
57 Ibid 267.
The *Milirrpum* case proved to be a catalyst for legislative reform in respect to Aboriginal people’s land claims in the Northern Territory. The Australian Labor Party included Aboriginal land rights as part of their 1972 election platform. Gough Whitlam, the then Labor leader, declared that if Labor won the election they would enact Aboriginal land rights legislation, ‘not just because their case is beyond argument, but because all of us as Australians are diminished while the aborigines are denied their rightful place in this nation’. Labor won the election and Woodward, counsel for the Yolngu plaintiffs in *Milirrpum v Nabalco*, was appointed to conduct the Aboriginal Land Rights Commission.

### 7.1.3.2 The *Aboriginal Land Rights (Northern Territory) Act 1976*(Cth)

Aboriginal Land Rights Commissioner Woodward’s second and final report included the stated aims of recognizing land rights for Aboriginal people including ‘[t]he preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and

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59 Ibid, 4.


Although the Whitlam Labor government started the \textit{ALRA} process it was the successive Fraser Liberal government that passed the bill into law. In this way the demos gave authority first to a Labor government then to a Liberal government to enact the \textit{ALRA} legislation. The Minister who introduced the \textit{ALRA} into Parliament, the Honourable Ian Viner, said in his second reading speech that the \textit{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’.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 4 June 1976, 2.}
It is worth noting that whilst Blackburn J held in the *Milirrpum* case that the Aboriginal customary law concept of communal customary (native) title ‘does not form and never has formed, part of the law of any part of Australia’, it the ALRA changed that by specifically including Aboriginal customary law concepts such as communal title in the requirements of a successful land claim under *ALRA* - a demonstration of parliamentary supremacy if nothing else. Additionally, the ALRA provides that for the purposes of ALRA where group consent of traditional Aboriginal owners of an area of land is required, the process for obtaining consent shall be the relevant Aboriginal traditional process (where it exists) of giving consent, in other words according to the relevant Aboriginal customary law.

The ALRA includes as Schedule I a list of lands (constituting about 20% of all land in the Northern Territory) for the direct vesting to Aboriginal groups under ALRA. Arnhem Land is included in the Schedule. Section 50(1) of ALRA makes a provision for Aboriginal people to apply to the Aboriginal Lands Commissioner to have their customary law land rights recognised. The Commissioner ascertains whether the applicants or any other Aboriginal people are the traditional Aboriginal owners of the land,

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64 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 245.
65 *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, ss 3, 11, 12.
66 Ibid s 77A.
67 Ibid Schedule I, Part I.
and reports his or her findings to the Minister together with recommendations for granting land under ALRA. A 1987 Amendment to ALRA (s 50(2A)) precludes new claims from being submitted after 5 June 1997. The 2008 ‘Blue Mud Bay’ case saw the High Court recognise the right of Aboriginal land owners under ALRA to exclude persons from fishing in tidal waters connected to ALRA land. Currently approximately 50% of Northern Territory land is held under ALRA title.

An essential qualification required of traditional owners to be awarded land rights under ALRA is a spiritual one. Traditional Aboriginal owners of ALRA land are defined to mean, inter alia, Aboriginals ‘who have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land’.

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68 Ibid s 50.
71 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s 3, definition of traditional Aboriginal owners.
72 Ibid.
7.1.3.3 Native Title

The Yolngu claim for recognition by Australian law of communal native title failed in the Milirrpum case. But twenty years later the Mirriam people of the Island of Mer in Far North Queensland were successful in having the High Court of Australia recognise their title to land under their customary law in the landmark case of Mabo v Queensland (No 2) (1992) 175 CLR 1. For the first time in Australian legal history, title to land under Indigenous customary law was recognised by the Australian common law by the name of ‘native title’.

The High Court in Mabo (No 2) held that recognition of native title rights by the common law would be impossible if such recognition would be inconsistent with ‘the basic doctrines of the common law’.\(^{73}\) One such basic doctrine of Australian land law is the doctrine of tenure; ‘a doctrine which could not be overturned without fracturing the skeleton which gives... (Australian) land law its shape and consistency’.\(^{74}\) The Court held that the Crown possessed not an allodial title but rather a radical title, ‘a postulate of the doctrine of tenure and a concomitant of sovereignty’.\(^{75}\)

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\(^{73}\) Mabo v Queensland (No 2) (1992) 175 CLR 1, 45.

\(^{74}\) Ibid.

\(^{75}\) Ibid 48.
The High Court in *Mabo (No 2)* held that native title survived the assertion of sovereignty by the English colonials. In *Mabo (No 2)* Brennan J declared that native title ‘has its origins in and is given its content by the traditional laws and customs acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’. As the previously held common law doctrine of terra nullius was rejected by the Court in *Mabo (No 2)*, so too was ‘the notion that sovereignty carried ownership in its wake’.

This was a remarkable finding by the court given the common law’s prior consistent refusal to recognise native title. This monumental change of jurisprudence was well recognised by the High Court: their judgements included obiter on the need to not break an Australian land law ‘skeletal principle’ with such a major change.

The *Mabo (No 2)* decision was handed down in 1992. In 1993 the Commonwealth government enacted the *Native Title Act 1993 (Cth)* which provided the legal mechanisms for determining future native title.

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77 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58.
78 Ibid 45.
80 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 43, 45.
claims and included in its objectives ‘to provide for the recognition and protection of native title’. 81 Significantly, the *Native Title Act* took for its definition of ‘native title’ ostensibly the same definition that Brennan J formulated in *Mabo (No 2)*, that is ‘the rights and interests ... possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’. 82 The enactment of the *Native Title Act* provided the authority of the demos (via the legislature) for the recognition of native title by Australian law. However the jurisprudence remains complicated.

In *Wik Peoples v Queensland* (1996) 187 CLR 1, Toohey J opined that the types of native title available could form a spectrum of rights with full ownership at one end and merely rights to access land for ceremonial purposes at the other end. 83 The majority in *Wik* held that native title could co-exist with other types of title to land, 84 especially when the native title was of a type in the lower end of the spectrum. 85 The ‘spectrum’ that Toohey J spoke of became known in native title

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81 *Native Title Act 1993 (Cth) s 3a.*
82 *See Mabo v Queensland (No 2) (1992) 175 CLR 1, 58 and Native Title Act 1993 (Cth) s 223(1).*
84 Ibid 2.
85 Ibid 127.
jurisprudence as a ‘bundle of rights’,\footnote{Western Australia v Ward (2002) 213 CLR 1, 95.} that is, a collection of various types of interest in land as perceived by Australian lawyers.

As native title finds its way into Australian law via ordinary statute, it is vulnerable to be extinguished by another ordinary statute.\footnote{Mabo v Queensland (No 2) (1992) 175 CLR 1, 64.} In Wik\footnote{Wik Peoples v Queensland (1996) 187 CLR 1.} the High Court held that native title rights could co-exist with pastoralists’ rights. However Wik prompted the demos via the federal government of the day to amend the Native Title Act. As a consequence of the amendment, the ability to extinguish native title rights was increased.\footnote{Native Title Amendment Act 1998 (Cth)}

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 (2000),\footnote{99 FCR 316.} 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’\footnote{Ibid 483.} within the parameters of s 223(1) of the Native Title Act. On appeal, the High Court in Western Australia v Ward (2002)\footnote{213 CLR 1.} agreed with the Full Federal
Court on this point\footnote{Ibid 84, 274-275.} 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).\footnote{Ibid 84.}

Kirby J, in dissent, argued that ‘the right to protect cultural knowledge is, in my view, sufficiently connected to the area to be a right “in relation to” land or waters for the purpose of s 223(1) of the NTA (Native Title Act)’.\footnote{Ibid 247.} His Honour accepted submissions by counsel for Wik that the connection between a native title right and the material land and waters need not be a physical connection, and that cultural knowledge in a traditional context is inextricably linked to the land.\footnote{Ibid.} While recognising that such a right would be ‘akin to a new species of intellectual property’,\footnote{Ibid 248.} Kirby J accepted that existing Australian ‘laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case’.\footnote{Ibid.} Kirby J also suggested the future possibility of ‘a constitutional argument for the protection of the right to cultural knowledge’\footnote{Ibid 249.} based upon the Constitutional right to freedom of from laws affecting the free exercise of religion found in s 116 of the

\footnote{Ibid 84, 274-275.} \footnote{Ibid 84.} \footnote{Ibid 247.} \footnote{Ibid.} \footnote{Ibid 248.} \footnote{Ibid.} \footnote{Ibid 249.}
Constitution. It would be interesting to see how the contemporary legislature would react to a court decision that reflected Kirby’s position. Given that the legislature (and not a court) is empowered to enact the will of the demos combined with the doctrine of parliamentary supremacy, the essential nature of Australian law of rule by the contemporary demos should, at least in theory, be preserved.

7.1.3.4 Northern Territory Aboriginal Sacred Sites Act

The Northern Territory Aboriginal Sacred Sites Act (Sacred Sites Act) is a statute of the Northern Territory Legislature that synthesises Aboriginal customary law norms with Australian law. The Sacred Sites Act applies to all Madayin sacred sites as well as to the sacred sites of other Aboriginal religions in the Northern Territory. This Act makes it an offence to affect, destroy or desecrate an Aboriginal sacred site anywhere in the Northern Territory.\(^{100}\) The Act adopts the meaning of sacred site from the Aboriginal Land Rights (Northern Territory) Act 1976,\(^{101}\) which defines sacred site as meaning:

\[
\text{a site that is sacred to Aboriginals or is otherwise of significance according to}\]

\(^{100}\) ss 33-39A.
\(^{101}\) s 3.
Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.\textsuperscript{102}

The long title to the \textit{Northern Territory Aboriginal Sacred Sites Act}\textsuperscript{103} provides a clear expression of Parliament’s intention in enacting the Act. The long title states inter alia that the Act is:

to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement.

The long title provides an insight into the purpose of the demos as acted upon by the legislature. That is, the purpose of the \textit{Northern Territory Aboriginal Sacred Sites Act} is not merely the protection of sacred sites but also to affect a balance between purposes of the relevant stakeholders.

The \textit{Northern Territory Aboriginal Sacred Sites Act} establishes the Aboriginal Areas Protection Authority in order to implement the provisions of the Act.\textsuperscript{104} Such provisions include the exclusive

\textsuperscript{102} Aboriginal Land Rights (Northern Territory) Act 1976, s3.

\textsuperscript{103} Northern Territory Aboriginal Sacred Sites Act, long title.

\textsuperscript{104} s 5.
responsibility$^{105}$ of prosecuting offences of entry onto sacred sites without permission,$^{106}$ desecration of sacred sites$^{107}$ and administering a regime for allowing entry onto sacred sites for certain approved activities.$^{108}$ Even with a valid permit for entry upon sacred sites, the Aboriginal customary law of secrecy$^{109}$ finds statutory expression in s 38 of the Act which forbids the making of a record or communicating ‘information of a secret nature according to Aboriginal tradition acquired by reason’$^{110}$ of being connected to the Act as an Authority member, an Authority employee or involvement in a procedure for the purposes of the Act.$^{111}$ Also, the views of the custodians of the relevant sacred site must be taken into account when the Authority exercises a power under the Act.$^{112}$

The essential nature of Australian law to enable the contemporary demos to rule by a system of representative democracy, parliamentary supremacy and self-subscribed sovereignty within national borders and mediated via legislation in accordance with the Constitution is all demonstrated in the above account of the intersections of Australian law with Madayin and other Aboriginal customary law systems. Parliamentary supremacy is

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105 s 39.
106 s 33.
107 s 35.
108 s 34.
109 See Chapter I.
110 s 38.
111 s 38.
112 s 42.
demonstrated in Parliament enacting the ALRA in response to Milirrpum v Nabalco and in enacting the Native Title Act in response to Mabo No 2. The sovereignty that was challenged, or at least queried, by the High Court’s decision in Mabo No 2 was reinforced by the Native Title Act.

Another aspect of Australian law’s essential nature is its relative nature, that is, relative in time. This relativity is demonstrated in the intersections of Australian property law and Madayin as the contemporary demos were lawfully able to change the law, especially in the case of Milirrpum v Nabalco, in which the court held that the Yolngu plaintiffs could not have their claims to land title recognised, followed by ALRA which did recognise Yolngu title.

7.1.4 Australian Law Rejects Madayin: A Madayin Judge is Judged by an Australian Law Judge

That pluralistic legal regimes exist but do not work together in Arnhem Land is illustrated clearly in the case of R v Wunungmurra. In Wunungmurra, the defendant was a Ngarra leader. He is known as a

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dalkaramirri which is often translated into English as a judge.\textsuperscript{115} Wunungmurra was charged with the offences of intent to cause serious harm and aggravated assault arising from his actions whilst delivering a customary law punishment, namely corporal punishment to his wife for her breaches of the Ngarra (customary) marriage law.\textsuperscript{116}

While Australian common law has managed to recognise Aboriginal customary law in relation to native title, it continues to have difficulty recognizing Aboriginal customary law in relation to crime. In the 1994 case of \textit{Walker v New South Wales}\textsuperscript{117} the High Court held that Aboriginal customary criminal law had not survived the Crown’s assertion of sovereignty, notwithstanding the recognition of native title in the 1982 case of \textit{Mabo (No 2.)}\textsuperscript{118} In \textit{Walker v New South Wales}, Mason CJ wrote:

\begin{quote}
It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle… English criminal
\end{quote}

\begin{flushright}
\textsuperscript{115} Ibid 181.
\textsuperscript{116} In this section I am interested in exploring the intersection of two legal systems, especially in their compatibilities and incompatibilities. I am aware of the many other issues that the \textit{Wunungmurra} case raises, such as questions of fundamental human rights, sovereignty and racial and sexual discrimination; however those issues are not addressed in detail here.
\textsuperscript{117} (1994) 182 CLR 45.
\textsuperscript{118} (1992) 175 CLR 1.
\end{flushright}
Nevertheless Aboriginal customary law, including Madayin, has had a significant history of being recognised and intertwined with Australian law by Northern Territory sentencing courts.¹²⁰

After being in a *Ngarra* law婚姻 for a number of years, Mr Wunungmurra’s wife left him to live in Darwin for a period of six years before returning to Mr Wunungmurra’s home in 2008. They lived together for a short time until the relationship broke down again. On 17 August 2008, the defendant and the victim (Mr Wunungmurra’s wife) were arguing in a bedroom. The defendant stabbed the victim while she was making efforts to leave the bedroom. A second incident occurred a few weeks later on the 8th of September 2008, when the defendant threw a rock at the victim who attempted to retaliate with a broom stick whereupon the defendant stabbed the victim a number of times.¹²² Wunungmurra was charged with intent to cause serious harm under section 177 of the Criminal Code (NT)¹²³—an offence that carries a

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¹²⁰ See Martin, above n 2.
¹²¹ *Ngarra* law is part of the Madayin system.
¹²³ The material elements of s177 of the *Criminal Code Act* (NT) read:
maximum penalty of imprisonment for life — and aggravated assault. The Court was informed to expect a plea of guilty to both charges.

The defence contended that Mr Wunungmurra’s wife had breached the Ngarra marriage law and consequently the Ngarra law required Mr Wunungmurra to discipline his wife by inflicting upon her corporal punishment. The defendant’s actions that gave rise to the charges were the punishment he gave his wife for her purported breach of Ngarra law. The court accepted that the context of the charges was the punishment related to the later breakdown of the marriage; Wunungmurra did not punish his wife for her previous six year absence.

Details of the material Ngarra law were made available to the court by way of an affidavit sworn by Rose Laymba Laymba, a jungaya (Madayin lawyer), in accordance with s 104A of the Sentencing Act (NT); a Northern Territory legislative provision that allows a Court to hear

Any person who, with intent to disfigure or disable any person, or to cause serious harm to any person, or to resist or prevent the lawful arrest or detention of any person:

(a) Causes any serious harm, or causes any other harm, by any means… is guilty of a crime and is liable to imprisonment for life.

124 R v Wunungmurra, above n 114, [8].
125 Ms Laymba Laymba was described by the sentencing judge, Southwood J, as a jungaya (Madayin lawyer) for three relevant clan groups in Arnhem Land at R v Wunungmurra above n 114, 181 [6].
information on Aboriginal customary law for sentencing purposes. Ms Laymba Laymba’s affidavit contained aspects of Aboriginal customary law and cultural practice including that the defendant was carrying out his duty as a responsible husband, father and dalkaramirri (Ngarra judicial officer) under Ngarra law by the infliction of ‘severe and corporal punishment on his wife with the use of a weapon’.  

The proposition that under Ngarra marriage law it is lawful for a husband to punish his wife for certain breaches of the Ngarra marriage law is supported by two other leading figures in customary law in Arnhem Land. Mr Wali Wunungmurra127 – current Chairman of the Northern Land Council – is on record as saying that the Yolngu customary law does under certain conditions allow violence towards women.128

Gaymarani George Pascoe, writes that under Ngarra marriage law:

The husband is required to be the head of the household; that is his duty. The wife has duties towards her husband and towards her children… and [i]n some circumstances it will only be the husband that can punish his wife for a breach

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126 R v Wunungmurra, above n 114, 181 [8].
127 ‘Wunungmurra’ is a common family name of a clan (the Dhalwangu clan) in Arnhem Land.
of the marriage law…The punishment will largely depend on the facts of the breach. The most serious offences can be punishable by death.129

Therefore, it is conceivable that Mr Wunungmurra’s actions of beating and stabbing his ‘errant’ wife constitute appropriate punishment within the bounds of Ngarr marriage law. However it is also conceivable that Wunungmurra simply retaliated in anger during an argument and later drew upon Ngarra law to justify his actions.

The prosecution objected to Ms Laymba Laymba’s affidavit being read in court ‘for the purpose of establishing the objective seriousness of the crimes committed by the defendant’130 on the basis that s 91 of the Northern Territory National Emergency Response Act 2007 (Cth) rendered the affidavit inadmissible. The prosecution, however, did not object to the affidavit being read for other purposes.131 Southwood J was required to make an evidentiary ruling relating to the admissibility of the affidavit. The question was whether s 91 of the Northern Territory National Emergency Response Act 2007 (Cth) rendered the affidavit inadmissible. Section 91 of the Emergency Response Act reads:

129 Gaymarani, above n 37, 290-292.
130 R v Wunungmurra above n 114, 181 [4].
131 Ibid [5].
In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.\(^\text{132}\)

Southwood J accepted that the terms ‘lessening’ and ‘aggravating’ were synonymous with determining the gravity or objective seriousness of the criminal behaviour.\(^\text{133}\) Southwood J also found s 91 of the Act ‘clear in its terms’\(^\text{134}\) and so had no difficulty accepting the prosecutor’s submission that s 91 of the Act precluded considering customary law (and hence Ms Laymba Laymba’s affidavit) for the purposes of determining objective seriousness and moral culpability.\(^\text{135}\)

Southwood J held that, for the purposes stated in s 91, the affidavit would not be admissible.\(^\text{136}\) The affidavit was filed for purposes in addition to determining objective seriousness and moral culpability.

\(^{132}\) Northern Territory National Emergency Response Act (Cth) s 91.

\(^{133}\) R v Wunungmurra above n 114, 184 [22].

\(^{134}\) Ibid [20].

\(^{135}\) Ibid 185 [24]; 186 [28].

\(^{136}\) Ibid 185 [23, 24]; 186 [28].
however, and so for those other purposes the affidavit was allowed to be read.\textsuperscript{137} Those purposes, related to sentencing, were:

- to provide a context and explanation for the defendant’s crimes… to establish the offender does not have a predisposition to engage in domestic violence and it is unlikely the offender will re-offend; to establish the offender has good prospects of being rehabilitated; and to establish the defendant’s character.\textsuperscript{138}

Following a plain and strict approach to statutory interpretation,\textsuperscript{139} Southwood J wrote that ‘penal statutes should be read strictly and courts must only apply the actual commands of the legislation’.\textsuperscript{140} The judge concluded that ‘the purpose and operation of s 91 of the Act is not to remove all consideration of customary law and cultural practice from the sentencing process’.\textsuperscript{141} Southwood J also noted that the prosecution did ‘not object to the affidavit… being read for the other purposes’.\textsuperscript{142} The effect of Southwood J’s construction of s 91 is that customary law may be considered for sentencing purposes, but not in the determination of the objective seriousness of the criminal behaviour.

\begin{itemize}
\item \textsuperscript{137} Ibid 186 [29].
\item \textsuperscript{138} Ibid 181 [3].
\item \textsuperscript{139} Ibid 184 [20], following the precedent of \textit{R v Glennan} (1970) 91 WN (NSW) 609.
\item \textsuperscript{140} Ibid 186 [29].
\item \textsuperscript{141} Ibid.
\item \textsuperscript{142} Ibid 181 [5].
\end{itemize}
If the affidavit evidence of Ms Laymba Laymba was accepted, it was the defendant’s actions of carrying out his duty as a dalkaramirri – a judge of the relevant Aboriginal customary law – that gave rise to the charges in this matter. Wunungmurra, a judge of one jurisdiction, has been tried by a judge of another jurisdiction for carrying out the lawful work of administrating justice under the law that governs him. If Wunungmurra’s defence is accepted it must be conceded that he was ‘between a rock and a hard place’. He was faced with two normative systems (the Australian law and the Madayin Ngarra law) each seeking his conformity, yet those two normative systems are in parts mutually incompatible. Whatever his response to his wife’s behaviour in neglecting her marriage duties, Wunungmurra was going to breach the law of one of the legal systems that demanded his obedience. His choice was to either uphold Ngarra law and breach Australian law, or uphold Australian law and breach Ngarra law. It is submitted that his choice was guided by the normative system that he found more authoritative.

Taking the defendant’s case at its highest, R v Wunungmurra describes a man caught between two normative systems. From the Ngarra law perspective Wunungmurra is a dalkarramiri, a judicial officer, who was penalised by another justice system for lawfully administering justice in
his own jurisdiction. Yet from the Australian law perspective he is a criminal who has committed crimes of physical assault upon a woman and has tried to use customary law for purposes of mitigation.

The case of *Wunungmurra* demonstrates the demos, via the legislature, re-defining the extent of collaboration it is prepared to have with Madayin and other Aboriginal legal systems. Whereas previously Australian sentencing law took into account relevant aspects of Aboriginal customary law, the enactment of s 91 of the NTER changed the approach to not accepting such submissions.

### 7.2 Madayin Changes in Response to Interacting with Christian and Australian Law Normative Systems

In his article *Ngarru law: Aboriginal customary law from Arnhem Land*,143 James Gaykamangu includes some aspects of how the Madayin law as espoused and practiced by his Gupapuyngu tribe (yirritja moiety and largely living in the northeast Arnhem Land communities of Milingimbi, Ramingining and Galiwinku) has changed in response to interacting with Christian and Australian law normative systems.

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143 Gaykamangu, above n 36.
Gaykamangu writes that this process of change started soon after first contact between the Yolngu and the non-Yolngu Christian missionaries at the command of the then Gupapuyngu leader Ngaritjngaritj Garawarrpa a ‘Ngarra law scholar and peaceful leader’.¹⁴⁴ Ngaritjngaritj ‘managed leadership and change from a tribal culture to engagement with modern society and his descendants survived’.¹⁴⁵ Succeeding Ngaritjngaritj was his ‘first son George Dhawadanygulili Garawarrpa Morgunu Gaykamangu, the supreme legal authority of the Gupapuyngu tribe’.¹⁴⁶ It was George’s ‘responsibility to keep peace and keep the Gupapuyngu tribe and clans together. He taught this to other tribal leaders too’.¹⁴⁷ George delegated to his younger brother, Djawa, who ‘was also central in the Gaykamangu leadership... the task of learning the types of law [that] the [Christian] missionaries brought and practiced among the Aborigines’.¹⁴⁸

George sent Djawa to find out what the missionaries were bringing to teach the people because George was suspicious that the Balanda (white people) were coming to destroy the Aboriginal culture, the Ngarra law, the Yolngu people and take over the Yolngu land. Djawa reported back to the Ngarra (the Yolngu court where laws are discussed and made; similar to a parliament) that the

¹⁴⁴ Ibid 236.
¹⁴⁵ Ibid.
¹⁴⁶ Ibid.
¹⁴⁷ Ibid 239.
missionaries were bringing a good Christian story and had come to help the people.\footnote{Ibid 238.}

George had the foresight to see ‘that there would be big changes in the future brought by the Balanda’ and that these changes would significantly ‘influence the Yolngu peoples’ lives such as education and industries such as timber, fishing and art’.\footnote{Ibid.} George considered that these changes would be good for the Yolngu and so in accordance with Madayin’s essential nature of syncretism and pluralism with other normative systems\footnote{See Chapter 6.} he set about to engage with the Christian system in a collaborative and pluralistic way:

When George saw that the missionaries were bringing good things he decided it would be good to sit side by side. Both sides were to learn and respect each others law and culture. The aim was to put the two laws together. George was a lawyer and a peacemaker.\footnote{Ibid 238.}
Gaykamangu notes that violence between husband and wife was one of the specific areas of change to the Madayin system that George and Djawa mediated for their tribe. According to Gaykamangu:

Domestic violence is no longer appropriate. Ngarra law has no room for domestic violence. In the past, husbands did hit their wives sometimes – this happened in both Balanda and Yolngu society. The law – both Balanda law and Yolngu law – allowed it to happen. Not anymore! Ngarra law these days has no room for domestic violence. We don’t have to be ashamed of what happened in the past, but we all need to work together now as a nation.153

Another area of change for the Gupapuyngu stream of the Madayin system is in what has commonly become known as ‘pay back’:

‘Pay back’ is another thing that has changed over time. When ‘pay back’ happened in the past, it involved physical punishment, just like in the old law of the Old Testament: ‘an eye for an eye and a tooth for a tooth’. These days ‘pay back’ is more like mutual obligation: when you look after my children when they visit you, I have to ‘pay back’ by looking after your children when they visit me. When people break the Ngarra law these days they can be...

153 Ibid 242.
punished by other means, including compensation or discipline training camps in the bush (Gunapipi).\textsuperscript{154}

Gaykamangu’s writing reveals that the nature of ‘pay back’ remains in Madayin though the methods of its practice have been significantly changed, at least in the Gupapuyngu tribe, in response to interacting with Australian law and Christianity. Whether pay back exists in its old or new form in other Yolngu tribes cannot be established without new fieldwork. Gaykamangu writes that for ‘most Aboriginal people, traditional law has not changed much. If the Aboriginal people themselves want change then that may be possible in some areas of Ngarra law. New Ngarra laws may be pronounced in relation to modern life’.\textsuperscript{155} Gaymarani confirms this approach when he writes that whether Ngarra law (and Madayin more generally) can change is a matter for the Madayin leaders to decide.\textsuperscript{156}

Gaykamangu’s account of Madayin interacting with and responding to the new introduced normative systems of Australian law and Christianity demonstrates Madayin’s essential nature in that while the continuity of the ancient mythical past source of wanggar spiritual authority is maintained in order to achieve magaya, Madayin’s relative approach

\textsuperscript{154} Ibid 243.
\textsuperscript{155} Ibid 247.
\textsuperscript{156} Gaymarani, above n 37, 285.
makes it open to syncretism and pluralism with Australian law and Christianity.

### 7.3 Interactions between Madayin and Christianity

Madayin is as much a religious system as a legal system. Accordingly, when Madayin interacts with Christianity a number of possibilities arise: mutual ignorance or exclusion, complete rejection of one system in favour of the other or some amount of syncretism.

A number of Yolngu church leaders have attempted to craft Christian theology and practice that reconciles Madayin with Christianity. A number of other Australian Christian churches with a significant proportion of Aboriginal membership have also attempted to create theologies that reconcile aspects of various traditional Aboriginal religions with Christianity. The resultant theology is often termed ‘two-way’ or ‘Rainbow Serpent’ theology. At times the term ‘two laws’ has

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157 See Chapter 2.
160 Habel, above n 158.
been used to refer to Aboriginal customary religious law in collaboration with Christianity or Australian law.\(^{161}\)

This section considers the results, practical and theoretical, of interactions between Madayin and Christianity. Having completed the propositions on the essential nature of Madayin and Christianity in Chapter Six, this section uses those essential natures in order to evaluate the authoritative integrity that exists when these systems interact with each other.

Some consideration is also given to examples of interaction between other Aboriginal traditional religious systems and Christianity in order to make the eventual evaluation more comprehensive.

The theologies of leading Arnhem Land church leaders such as Gondarra and Gumbuli are evaluated to ascertain if the integrity of the essential natures of each system, as described in the essential nature propositions in Chapter Six, are maintained. Assistance is also had from the insights and theories of academics Magowan, Kadiba and Paulson and Cairns indigenous pastor Miller.

The following section recounts and analyses some direct experiences of intersections of Madayin and Christianity in the lives of Yolngu people, especially leaders in both Madayin and the Christian churches in Arnhem Land. Instances of practice and theology will be examined as both offer significant insights into the interactions of normative authority of Madayin and Christianity.

7.3.1 The ‘Adjustment Movement’

The Christian Church on Arnhem Land’s Elcho Island experienced a major cross-road in terms of the opposing sources and natures of authority in the Madayin system compared to the Christian system in 1957 in an event which became known as the Adjustment Movement.

At this time Wili Wallalipa and Batangga (both Yolngu tribal Madayin leaders and church leaders) led a number of senior Yolngu men who were leaders in the Madayin system ‘in an act of commitment to God in a ceremony where secret and sacred tribal totems (madayin, rangga)\textsuperscript{162} were brought out into the open before the women and children and concreted into a monument alongside the church, with a sign declaring their

\textsuperscript{162} The use of the term ‘madayin’ here indicates the Madayin quality of sacredness; rangga are secret sacred objects in the Madayin system.
allegiance to the “true God in heaven”.163 The majority of the formal leadership of this group were from the yirritja moiety, not the dhuwa moiety.164 This is appropriate as in the Madayin system the yirritja moiety have the responsibility for mediating introduced elements whereas the dhuwa moiety have the responsibility of focussing on the indigenous elements.165 Of interest though is that the father of Djiniyini Gondarra (who would go on to lead the Uniting Church in Arnhem Land), Wili Wallalipa, was one of the key figures in the Adjustment Movement and was of the dhuwa moiety.166

The precise meaning of publicly revealing the previously secret and sacred Madayin objects of the Adjustment Movement is highly contested.167 Anthropologist Ronald Berndt first made a formal record of the event in the following year.168 Berndt concludes that the Adjustment Movement ‘is primarily an attempt to integrate the “traditional” Aboriginal world with the outside world’ and ‘has a strongly political flavour’.169 The political

165 Ibid.
166 Ibid 34; Blacket, ‘Rainbow or the Serpent?’, above n 163, 5.
169 Ibid.
element is no doubt true. However, Berndt’s primary informant in relation to the Adjustment Movement, Buramara, conveyed a decidedly more religious flavour in relation to the event. Buramara, a Yolngu man and participant in the Movement, said:

We began to think of this Memorial, a memorial for the julngu [Yolngu]... the Bible came to our hearts and to our minds – it spoke of graven images, and we thought of our rangga. The word of God made us ashamed. Could we keep our laws? Could we hide our rangga? The Bible was here. Instead we must show these rangga to all: to men, women and children. We must do this instead of hiding them. And we began to think of the Memorial.\[^{170}\]

Rangga are the secret sacred objects of Madayin; their secrecy is an essential aspect of the Madayin religion.\[^{171}\] To reveal the rangga is to risk losing their inherent power. Buramura’s comments suggest that Christianity is displacing Madayin as the Yolngu religion: ‘the Bible came to our hearts and to our minds... The word of God made us ashamed. Could we keep our laws? Could we hide our rangga? ... Instead we must show these rangga to all’.\[^{172}\] To end the continuity of the ancient mythical past source of wangarr spiritual authority is anathema to the essential

\[^{170}\] Ibid 40.
\[^{171}\] See Chapter 2.
nature of Madayin.\textsuperscript{173} However, the pooling of various rangga and making them public was said by Buramara to give the Yolngu leaders power – even the long serving Christian missionary on Elcho Island, Mr Shepardson, was said to be ‘supported by the rangga’.\textsuperscript{174}

Buramura also suggested that the memorial would be a sort of thanks giving to Mr Shepardson, ‘as well as to all missionaries and native welfare people’,\textsuperscript{175} that is public servants working in departments concerned with Aboriginal affairs.

The memorial contained a number of public inscriptions on boards written in the Yolngu language. For present purposes the most relevant of the inscriptions is translated into English by Berndt as:

And this is the (Christian) law of peace, helpful for us all. The law will show us the way to be happy (comfortable: ‘new time will make us all happy’). The (Yolngu) leader Badangga has the memory (‘head’) of the old way – the rangga. Now we have changed our minds and worship God.’\textsuperscript{176}

\textsuperscript{173} See Chapter 6.
\textsuperscript{174} Berndt, ‘An Adjustment Movement’, above n 164, 41.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid 47.
The public inscriptions seem to support the view that the Yolngu involved decided to end the continuity of the ancient mythical past source of wangarr spiritual authority and to replace it with Christianity.

However a seemingly conflicting account is provided by Badangga, another central Yolngu participant in the Movement, to Berndt in regards to a rangga that he made and included in the memorial. Badangga’s rangga is a large wooden log with Madayin designs including that of a stone ‘that was lodged in the vagina of an ancestral woman and on being removed became a rangga’\(^{177}\) and at the very top of the rangga is a cross. The representation is ambiguous: does the Christian cross at the top of the rangga indicate a triumph of Christianity over Madayin, or does the inclusion of the cross in the rangga (albeit at the top) indicate a triumph of Madayin synthesis over Christian absolutism? Berndt reports that Badangga said:

\[\text{I believe in both ways – our own and the Christian. If we had taken both ways and thought of them separately we would have become confused. We believe in the old law and we want to keep it: and we believe in the Bible too. So we have selected the good laws from both and put them together.}^{178}\]

\(^{177}\) Ibid 60.

\(^{178}\) Ibid.
While the public inscription proclaims that the Yolngu involved changed their minds from following the old Madayin ways and instead embraced Christianity, the comments from both Buramura and Badangga suggest that the old ways were not cast aside at all. Rather, as Berndt suggests, a rapprochement between the two systems has been attempted. The triumph is by way of Madayin’s relative nature, open to syncretism and engaging in pluralism with other normative systems. In this instance the Christian cross has been synthesised with Madayin authority in an act in accordance with Madayin’s essential nature of syncretism and pluralism. Badangga is clear that he has taken a Madayin-centric approach to the rapprochement as he has adhered to Madayin’s relative nature. Badangga has ensured that a careful analysis of the sources, nature and purposes of authority in both systems do not prevent the synthesis that Madayin seeks: ‘If we had taken both ways and thought of them separately we would have become confused’.179

Berndt offers that ‘the addition of a Christian cross... accords with the convention that the jiridja [yirritja] moiety should handle imported symbols’.180 Berndt considers that the totality of the memorial achieves a

179 Ibid.
180 Ibid 63.
highly accurate ‘synthesis of north-eastern Arnhem Land religion’.\textsuperscript{181} He continues:

On the one hand are the Djanggawul, on the other the Laindjung, and with them a sufficiently wide range of supporting motifs to underline, in abstract, the main religious themes: for example, the significance of the female and her activities in men’s sacred ritual; the association of man with nature, his intimate relationship with his environment; the importance of fertility and procreation in the increase of all natural species, including man; and the fundamental linkage between man and the Creative Beings [wangarr] in a spiritual sense, expressing the basic notion of the interdependence of the past, present and future.\textsuperscript{182}

Having noted the permissive, syncretic, relative and pluralistic approach of the Madayin system,\textsuperscript{183} Berndt also writes that the Yolngu attempts at understanding and relating to the new normative system of Christianity (and to a lesser extent Australian law) have been conducted by the Yolngu in a way wholly faithful to the Madayin system, that is ‘a rapprochement between the alien and the indigenous: the one is in the process of being adapted to the other’.\textsuperscript{184} This is possible from the Madayin system point of view notwithstanding the major differences in

\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid 63-64.
\textsuperscript{183} Ibid 14.
\textsuperscript{184} Ibid.
the sources, natures and purposes of authority in the three normative systems. Rather than viewing the rapprochement from the perspective of authority, the Yolngu have had ‘a focus on the ‘sacred’, so that movement along the continuum, between the ‘Aboriginal’ and the ‘European’, is not beset with too many difficulties despite widely differing ideologies’. It will be recalled from the introductory chapter of this thesis that the use of the word and the concept of ‘sacred’ does not necessarily imply that the power or authority is of a benevolent nature or origin. The ‘sacred’ can describe powers or authorities from radically different sources on a continuum from ‘good’ to ‘evil’: in the Bible both God and Satan are attributed with sacred or supernatural powers. Thus by focussing on ‘sacred power’ as the method of rapprochement between Madayin and Christianity, the Yolngu involved have side-stepped the irreconcilable differences in essential natures of the two systems to succeed in a type of synthesis, a rapprochement.

The 1957 Adjustment Movement was the first major attempt by Yolngu to reconcile the different normative authority systems of Madayin and Christianity. The next two sections will focus on the theologies of two prominent Yolngu Christian leaders Gumbuli and Gondarra. Both

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185 Ibid.
Gumbuli and Gondarra have risen to significant positions of church leadership in Arnhem Land following the Adjustment Movement and continue to influence the Arnhem Land churches.

7.3.2 Gumbuli’s theology

Michael Gumbuli Wurramarra is an Aboriginal man born in 1935 into a tribal family on Groote Eylandt just off the Arnhem Land coast who spent most of his life associated with the Roper River Mission which later became the community of Ngukurr in southern Arnhem Land.\(^\text{187}\) Gumbuli was ordained a priest in the Anglican Church in 1973 and has been instrumental in the life of the church in Ngukurr and more widely, especially in Anglican circles, in the Northern Territory.\(^\text{188}\)

Practical morality is at the heart of Gumbuli’s approach to a mild form of two-way theology.\(^\text{189}\) Often it is in the area of practical morality that competition between Madayin and Christian teachings emerge.

Yolngu Christian leaders often reflect on the nature of their moral selves in relation to their ancestral identities as they pertain to the foundational

\(^{187}\) Seiffert, above n 159, 359-360.
\(^{188}\) Ibid 361-362.
\(^{189}\) Ibid 325-339.
principles of ancestral cosmology. Despite disparate views about the synchronicity between Christian and ancestral belief on Galiwin’ku, all Yolngu share a common concern of moral accountability to one another in the ancestral law.\(^{190}\)

Gumbuli is reported as saying:

I used to be involved in [Madayin] ceremonies. I used to go in to ceremony and mix in with the people and then realised that digging up all of the old ways… is like it says in the Bible is what ‘we must worship the Lord and not idols’… And I clearly know the word of God, the Ten Commandments. I follow that. But I am still going to [one kind of] ceremony… It is an open one… good clean ceremony and dancing. Honest way.\(^{191}\)

Murray Seiffert is a former Academic Dean at Nungalinya College in Darwin.\(^{192}\) In the Ngukurr region, Aboriginal people who discussed matters of Madayin ceremonies with Seiffert often described some of the ceremonies as ‘good because they taught young people how to behave properly, like with the Ten Commandments, only much more detailed’.\(^{193}\)

Gumbuli considered the ‘good’ Madayin ceremonies to be the ones that

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\(^{191}\) Seiffert, above n 159, 328.

\(^{192}\) Ibid, front cover. Nungalinya is a theological college that prepares Aboriginal people for Christian ministry and many Arnhem Land Church leaders have been involved with Nungalinya.

\(^{193}\) Ibid 328.
teach morality, such as ceremonial circumcision and others that are ‘like the Ten Commandments’.  Gumbuli states that ‘Aboriginal law [is]… a good thing, teaching not to murder, not to take another man’s wife’ however there are also ‘bad’ ceremonies including those where ‘women used to be exploited’.  Gumbuli ‘values having young men taught about the ordering of society and the moral teachings’ which is a view ‘widely held amongst the people of Arnhem Land’.  The existence of both good and bad Madayin ceremonies is problematic for any attempt at ‘two-way’ theology with Christianity, yet Gumbuli offers a weak form of syncretism by suggesting that ‘God gave Aboriginal law to keep Aboriginal society ordered until the Gospel came to them’.  This approach is respectful towards Madayin, especially the past role it played in ordering Aboriginal society, but it also considers Christianity to be a better way than Madayin. Clearly Gumbuli is being highly respectful to the Madayin system while maintaining his Christian convictions, however he does not address the question of why God would give the Madayin law which contains sorcery.

194 Ibid.
196 Ibid 329.
197 Ibid.
198 Ibid.
One topic to which Gumbuli has rejected a two-way approach is creation. Gumbuli is ‘clear about his rejection of Aboriginal creation stories, otherwise known as ‘Dreaming’. His main concern is that most ceremonies fail to recognise God as Creator and indeed look to the spirit world to bring about increase of one sort or another’.199 Gumbuli has rejected Rainbow Serpent theology outright. Referring to a copy of the book ‘Rainbow Spirit Theology’200 Gumbuli says ‘how can I believe ‘that thing’ when God made it… God is creator not rainbow’,201 that is, a Christian should place their faith in God who made all things and not place their faith in a part of God’s creation as that would be idolatry.

Gumbuli also rejects Madayin ceremonies where sorcery or evil spirits are clearly involved.202 Gumbuli’s approach to evil spirits and spirits generally is to acknowledge the existence of the spirits but to recall that God’s Holy Spirit is stronger than all other spirits so that no evil power or sorcery can overcome ‘someone living under the protection of God’s Spirit, regardless of any activities of the sorcerer… [an approach that is] consistent with the teachings of the Gospel’.203

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199  Ibid.
200  Habel, above n 158.
201  Seiffert, above n 159, 331.
202  Ibid 329.
203  Ibid 330.
Gumbuli’s theology is consistent with the essential nature of Christianity in that he declares the universal and absolute qualities of Christianity and denying syncretism and pluralism. Gumbuli, just like Christianity, recognises the existence of many authorities however he places Christian authority at the apex of all other authorities.

7.2.3 Gondarra’s theology

The leading exponent of two-way theology in Arnhem Land is Djiniyini Gondarra. Gondarra is a Yolngu man who is simultaneously a djerrikay (Yolngu term for a Madayin customary law leader of traditional religion, politics and society for the dhuwa moiety) and an ordained Christian minister in the Uniting Church. He is not trained in Australian law; however he is often outspoken on matters of Australian law and justice. For example, after the Northern Territory Parliament passed the 1995 Rights of the Terminally Ill Act providing for lawful euthanasia,

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204 Magowan, 'It is God who Speaks in the Thunder', above n 190, 296; Seiffert, above n 159, 336.
205 Djiniyini Gondarra & 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 Feb 2011) 1; Djiniyini Gondarra, Father, you gave us the Dreaming (Uniting Church in Australia, 1988).
206 Such as Gondarra & Trudgen, above n 205.
207 The long title reads: An Act to confirm the right of a terminally ill person to request assistance from a medically qualified person to voluntarily terminate his or her life in a humane manner; to allow for such assistance to be given in certain
Gondarra wrote a ‘diplomatic communication’ which he described as the equivalent of a traditional letter stick from the traditional Ngarra Parliaments of Arnhem Land to the Australian Federal Parliament as a form of protest and endorsing a Private Member’s Bill to draw upon the Constitutional power of the Federal Parliament to repeal the Northern Territory legislation.208 He also unsuccessfully brought an action against the Northern Territory and its Administrator in the NT Supreme Court seeking a declaration that the Rights of the Terminally Ill Act was unlawful.209 As Gondarra wears both Madayin and Christian hats the following section focusses upon analysing his public statements on Madayin and Christian matters and evaluating the reconcilability of his propositions according to both Madayin and Christian authority.

In 1998 Gondarra wrote ‘Father, you gave us the Dreaming’,210 a brief (only 9 pages) account of his ideas in relation to Christian and Yolngu circumstances without legal impediment to the person rendering the assistance; to provide procedural protection against the possibility of abuse of the rights recognised by this Act; and for related purposes. The Act was eventually overturned by the Australian Commonwealth Parliament pursuant to the Constitutional power (s 122) to make law for territories by the Euthanasia Laws Act 1997 (Cth), Schedule 1.


210 Gondarra, above n 205.
religious syncretism. Gondarra describes himself as ‘a tribal Aboriginal’ and clarifies the term ‘Dreaming’ to mean ‘all the Aboriginal spirituality’ which is composed of ‘religious, social and political’ aspects.

In one place Gondarra asserts that the Dreaming is ‘in tune with the creator’ which, in Gondarra’s writings, seems to allude to the same person as ‘Creator God Himself’ to which Gondarra also refers. This creator or Creator (Gondarra’s writing is ambiguous in this respect) is the one who gave the Yolngu their ‘religious laws, ceremonies, teaching, holy sacred land and… sacred site[s]’, in other words the complete Madayin system. However in another place Gondarra clearly states that it is the wangarr that gave the Yolngu their Madayin system. A most peculiar and inconsistent position is then taken by Gondarra as he calls the wangarr not the Yolngu ‘ancestral past’ or ‘ancestral beings’ as do all other writers but as ‘Wangarr the Great Creator Spirit’.

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211 Ibid 4.
212 Ibid.
213 Ibid.
216 Gondarra & Trudgen, above n 205, 3.
218 Gondarra & Trudgen, above n 205, 3.
Other writers have described the wangarr as a plural concept and with very temporal qualities such as ‘blood, flesh, and fat’ and involved with evil practices such as sorcery. Yet Gondarra elevates the wangarr to spirit only, even (at times) the Creator. From the Christian perspective this is an impossible situation. The Bible states that there is only one Creator, God: ‘but we know that there is only one God, the Father, who created everything, and we live for him. And there is only one Lord, Jesus Christ, through whom we have been given life’. The Bible does not deny the existence of other gods but describes them as false gods or mere idols. God cannot be compared, that is, God is nothing like an idol which is of no good value. Christians are instructed in the very first of the Ten Commandments to have no other god but God.

Gondarra also elevates the wangarr to be ‘the highest authority in the universe’. This is an attribute never claimed by the wangarr themselves. Additionally, it is not necessary or desirable for the Madayin system for

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219 Keen, above n 217, 515, 523; Reid, above n 217, 33.
221 1 Corinthians 8:6.
222 Exodus 32:4.
224 Deuteronomy 27:15.
225 Isaiah 40:19.
226 Habakkuk 2:18.
227 Exodus 20:3-17.
228 Exodus 20:3.
229 Gondarra & Trudgen, above n 205, 4.
the wangarr to be described as the highest authority in the universe as Madayin identifies itself as a relative normative system within a larger and networked normative system.\footnote{230} Indeed nothing in Madayin requires or claims any sort of universal quality of the wangarr: the Madayin system only purports the authority of the wangarr to be geographically located in Arnhem Land.\footnote{231} Even Gondarra himself declares the perfectly relative nature of Madayin by beginning the document in which he claims that the wangarr are the highest authority in the universe with a disclaimer that as a Madayin leader he has ‘no right’ to talk about the law systems of other Aboriginal Australians.\footnote{232} If the wangarr are the highest authority in the universe wouldn’t the other Australian Aboriginal law systems also originate from the wangarr? If so, why would Gondarra have ‘no right’ to talk about them? Indeed if the wangarr are the highest authority in the universe then it follows that Australian law, English law and even Christianity should originate from the wangarr. Gondarra’s statement that he has ‘no right’ to talk about the law systems of other Aboriginal Australians reveals the relative nature of Madayin and all of the other Aboriginal systems of authority.

\footnote{230}{See Chapter 6.}
\footnote{231}{See Chapter 3.}
\footnote{232}{Gondarra & Trudgen, above n 205, 1.}
Gondarra insists that the Aboriginal people practice their Madayin religion ‘just as the Hebrews’ \(^{233}\) practiced theirs and that the Biblical God was active in both Hebrew and Aboriginal history \(^{234}\) - ‘the God of the Bible was with… [Yolngu people] in the dreamtime’ \(^{235}\) - although he offers no explanation or details of how that occurred. Again, this claim is not reconcilable with the Bible. The Bible makes it very clear that Israel was marked out by God for a singularly unique role in human history, so much so that Judaism and the Old Testament divides the whole of humanity into two groups, Jews and Gentiles, \(^{236}\) and as the Yolngu are not Jews they are Gentiles. The unique role of the Jews was to be ‘a light to the Gentiles’. \(^{237}\) Biblically there is an extreme separation between Jews and Gentiles before the advent of Jesus Christ, however since Jesus initiated the Christian faith, all Christians are considered the same in God’s eyes, whether Jew or Gentile. \(^{238}\)

Gondarra writes that God has spoken to the Yolngu through the created world. \(^{239}\) This claim of Gondarra’s is in agreement with the Bible. The book of Romans states ‘ever since the world was created, people have seen

\(^{233}\) Ibid.
\(^{234}\) Ibid 5.
\(^{235}\) Ibid.
\(^{236}\) Romans 3:9.
\(^{237}\) Isaiah 49:6.
\(^{238}\) Acts 10; I I; Romans 3:9; Galatians 3:28.
\(^{239}\) Gondarra, above n 205, 4.
the earth and the sky. Through everything God made, they can clearly see his invisible qualities – his eternal power and divine nature’.

And in the book of Acts of the Apostles it states ‘[i]n the past he [God] permitted all the nations to go their own ways, but he never left them without evidence of himself, and his goodness. For instance he sends rain and good crops and gives you food and joyful hearts’.

These scriptures, at least in isolation from their context, are in agreement with Gondarra’s statement that God has spoken to the Yolngu through creation. However, the point that Gondarra is trying to make is that by the Yolngu knowing about God through creation before the introduction of Christianity, the whole Madayin system should be accepted as coming from God; indeed the wangarr should be understood as God. In addition to the irreconcilability already described above, the Christian scriptures that are in agreement with Gondarra’s claim that God has spoken to the Yolngu through the created world need to be read in context in order to ascertain the true purposes of these scriptures. Thus the excerpt from Romans above when read in context is:

The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them.

240 Romans 1:20.
For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that men are without excuse. For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened.

Although they claimed to be wise, they became fools and exchanged the glory of the immortal God for images made to look like mortal man and birds and animals and reptiles. Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth of God for a lie, and worshiped and served created things rather than the Creator—who is forever praised. Amen.

And the context for the scripture cited above from the book of Acts reads:

We [some Christians] are bringing you good news, telling you to turn from these worthless things to the living God, who made heaven and earth and sea and everything in them. In the past, he let all nations go their own way. Yet he has not left himself without testimony: He has shown kindness by giving you rain from heaven and crops in their seasons; he provides you with plenty of food and fills your hearts with joy.

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242 Romans 1:18-25.
243 Acts 14:15-17.
The fuller context surrounding the scriptural extracts that Gondarra relies upon do not lend support to his proposition. Gondarra argues that God has spoken to the Yolngu through the created world as therefore the Madayin system is also from God. The scriptures show that while God did reveal aspects of himself through nature to all people including the Yolngu, the point of doing so was so that they would turn from sin and pre-Christian ways of living and turn to the salvation offered through Jesus Christ. The very point of the scriptures is to exhort people to follow the Christian way of life rather than to justify maintaining pre-Christian contact systems of authority. Gondarra disagrees. The leaders of the Yolngu customary religious law have a certain ‘religious behaviour’ according to Gondarra that ‘cannot be taken away by the present foreign political, religious and social system’, presumably by which Gondarra means Christianity and the Australian legal systems. Nevertheless, Gondarra attests to preparedness among Yolngu to ‘throw away any wrong interpretation of the creator spirit which the Holy Spirit (ie, God’s Spirit in Christianity) now reveals to us’ and acknowledges that certain aspects of Aboriginal religions are not from God. Gondarra writes ‘some of the Aboriginal ceremonies and rituals are not God given gifts to the Aboriginal race. It has come to us through the fall of mankind (that

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244 Gondarra & Trudgen, above n 205, 1.
245 Ibid 6.
246 Ibid.
is, sin) who became disobedient to God’s purpose and plan for all His creation’. Gondarra is recorded to have had a dream in which God said to him ‘lay down every totem and ceremony’.  

You lay down every totem and ceremony. In each of them there is good and bad. All of them must come under my Lordship, be washed by the blood of Jesus Christ, and then you will see a new Aboriginal culture. I don't want to destroy and leave you empty. I will restore and renew what is good.

However, it seems that Gondarra has not followed the direction given him in the dream. Gondarra writes that Christians who are of the opinion that the totems of Aboriginal religions are a form of idolatry are mistaken. Although Gondarra does not explain how, both totems and Aboriginal sacred sites somehow retain the Madayin supernatural power of marr ‘in a way analogous to that of the ark of the covenant’ in the Jewish religion.

Gondarra finishes with a call for Christian churches in Australia to be more receptive of culture and spirituality of Aboriginal as well as other

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247 Gondarra, above n 205.
249 Ibid.
250 Gondarra, above n 205, 4.
251 Ibid.
Gondarra’s writing demonstrates a clear convergence or syncretism of Christianity and Madayin in Arnhem Land. As such Gondarra’s theology is consistent with the essential nature of Madayin but inconsistent with the essential nature of Christianity. Gondarra’s syncretism theology has been widely discussed if not accepted in Arnhem Land churches due to his influence as a leader in the Uniting Church, the largest Christian denomination present in Arnhem Land.

Gondarra seems to be taking a highly inconsistent path with his statements. He describes the wangarr explicitly as being universal by naming the wangarr ‘the Creator’ and ‘the highest authority in the universe’ but implicitly as relative by admitting the pluralistic nature of the network of Aboriginal law systems. By describing the wangarr as the Creator and the highest authority in the universe Gondarra equates the wangarr with the Christian God. Gondarra writes that the Madayin system came from the wangarr and he acknowledges that some aspects of Aboriginal religions are not from God yet he maintains that wangarr and God are the same.

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252 Ibid 9.
253 For an example of Gondarra’s theology published by the Uniting Church see: Gondarra, above n 205.
What could drive Gondarra to such inconsistent theology? It is submitted here that Gondarra has taken a Madayin approach to Christianity rather than Christian approach to Madayin. Madayin is a relative normative system existing in a network of other normative systems. In order to exist within a network that includes members of different systems sharing and collaborating for certain religious purposes, Madayin (and the other Aboriginal systems) must maintain a flexible and relative nature, even to the point of being self-contradicting if necessary, in order to maintain the collaborations and work towards the collective goals. Such is the essential nature of a relative and networked normative system. The stated goal of Madayin, magaya, is described in sufficiently broad terms and open to interpretation - a state of people living in peace with each other and their environment, when ‘[e]verything is still and tranquil’, a fair and just system that is above the whims and wants of human desires - such as to allow for the inclusion of the goals of other normative systems. Should an Aboriginal system be absolutist and universal it immediately sets itself up as a competitor rather than a collaborator and hence the network could not function.

254 See Chapter 3.
255 Gaymarani, above n 37, 286.
However, Gondarra is also wearing the Christian hat of being a church leader. Christianity is a universal and absolutist system that is intolerable of syncretism based on authority.\textsuperscript{258} The goal of Christianity, the Kingdom of God, and entry into the Kingdom of God, ‘you must be born again’, is narrowly described in the Bible.\textsuperscript{259} Christianity offers no room for compromise or syncretism: it rejects a collaborative existence within a network of other relative authority systems.\textsuperscript{260} The apex of the universal Christian system is God the Creator, therefore by describing the wangarr as Wangarr the Great Creator Spirit\textsuperscript{261} and as being ‘the highest authority in the universe’\textsuperscript{262} Gondarra has surreptitiously translated wangarr as God. Gondarra’s theology removes the difficult task of trying to remove the un-Godly (un-Christian) aspects of the Madayin system for Yolngu who have inherited the Madayin system and who have embraced the Christian system. This approach is acceptable from the standpoint of the relative Madayin system but unacceptable from the absolutist and universal Christian perspective.

\textsuperscript{258} See Chapter 3.
\textsuperscript{259} Mark 10:17-27.
\textsuperscript{260} Ephesians 1:22.
\textsuperscript{261} Gondarra & Trudgen, above n 205, 3.
\textsuperscript{262} Ibid 4.
It is perhaps worth noting here that Gondarra is of the dhuwa moiety, the other Yolngu moiety being yirritja, since according to Madayin tradition the yirritja moiety ‘is associated with “introduced” and alien features’ whereas the dhuwa moiety ‘is said to be conservative’. For example the yirritja moiety is responsible for Madayin song cycles that include alien features such as the Lainjung-Banaindja cycle, the Macassan cycle (from present day Indonesia) and the Badu cycle (from present day Torres Strait Islands and the south New Guinea coast). Berndt writes that “this represents a conceptual division of responsibility [within the Madayin system], as between ‘change introduced from outside’ (the concern of the jiridja [yirritja] moiety), and ‘concentration on indigenous themes’ (the concern of the dua [dhuwa] moiety). Being a dhuwa moiety Yolngu following the Madayin system, Gondarra will feel a certain obligation to concentrate in indigenous ways and features compared to those of the introduced systems of Australian law and Christianity. According to the Madayin way a yirritja person should focus on the introduced systems of Australian law and Christianity and their relationship with and possible integration into the Madayin system. Thus dhuwa are considered conservative while yirritja are considered

264 Ibid.
265 Ibid.
progressive. The dhuwa conservatism may in part explain Gondarra’s theology retaining the traditional Yolngu ways at the expense of Christian claims of authority.

7.3.4 Kunapipi and Christianity

Kunapipi is an important and unifying institution in Yolngu law and religion. Kunapipi is described by anthropologists as having the same primary purpose of fertility as does the Madayin system generally, and ‘conventionally includes ritual coitus’. However, contemporary Arnhem Land customary law leaders such as Gaymarani emphasise correctional aspects of Kunapipi for offenders convicted under Ngarra law, and Gaykamangu adds a broader educational dimension in Kunapipi, not only for offenders but for any Yolngu, especially younger Yolngu, to be educated in Madayin ways. As discussed in Chapter 3, these differing accounts of Kunapipi may be explained in that Gaykamangu and Gaymarani have described only the ‘outside’ or publicly

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266 Ibid 65.
268 For example see Ibid 39; Ronald Berndt and Catherine Berndt, Man, Land and Myth in North Australia: the Gunwinggu people (Michigan State University Press, 1970) 123; Phillip Roberts cited in I Lockwood, I, the Aboriginal, reproduced in Seiffert, above n 159, 334.
269 Berndt and Berndt, above n 268, 141-142.
270 Gaymarani, above n 37, 297.
knowable aspects of Kunapipi but not the ‘inside’ or secret aspects (which may possibly still include ritual coitus). Another possible explanation is that changes in the Kunapipi ceremony have occurred between the anthropologists’ accounts (prior to 1980) and the contemporary Madayin leaders’ accounts (2011 and 2012) to exclude ritual coitus. The reason for such change, as is discussed in the following section, seems to be the presence of Christianity in Arnhem Land.

Christian missionaries in parts of Arnhem Land are known to have discouraged some aspects of Yolngu customary law practice, such as infant betrothals and polygyny. Apparently, Christianity has influenced the Yolngu to bring about a change in Kunapipi. Berndt writes that the Christian Mission in Arnhem Land ‘frowns on the Kunapipi and its attendant rituals’, especially ceremonial intercourse, such that the length of time devoted to Kunapipi is greatly reduced ‘with the result that much of the intricate symbolism is omitted’. Berndt also writes that the ceremony leaders have some degree of flexibility in deciding what the order and content of the Kunapipi ceremony including whether or not to

273 Berndt and Berndt, above n 268, 200.
275 Ibid 47.
276 Ibid 39.
include ceremonial coitus. Berndt reports that the Yolngu of one particular Arnhem Land location are of the opinion that the ceremonial coitus, especially the exchange of wives, ‘does not seem to be well integrated with indigenous social behaviour’.

Lamilami, a Yolngu Christian leader, has been recorded as saying ‘[t]he Kunapipi has problems for Christian people. They can dance part of it but not all’. Various other Yolngu Christian leaders have considered Kunapipi something to be avoided by Aboriginal Christians and even that Kunapipi is antithetical to Christianity. Yolngu Christian leader from the Ngukurr region and mentor to Gumbuli, Silas Roberts, is reported as saying that due to the introduction of Christianity:

>a lot of bad parts of [Madayin] ceremonies have been washed out. In Gunabibi [Kunapipi], in the old days, men used to lend their wives to others for payment. We have finished with bad parts like that, but we keep the good part.

Roberts continues:

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277 Ibid 47.
278 Ibid.
280 Ibid 128; Blacket, Fire in the Outback, above n 248.
281 Silas Roberts (Ngulatji) cited in Peter Berthon, Marjorie Hall, William Hall, John Harris, Andrew Robertson and Carol Robertson (Eds) We are Aboriginal: Our 100 years: from Arnhem Land’s first Mission to Ngukurr today (CMS Acorn 2008), 52-53.
Today, I don’t take my Aboriginal religions as a true one, I may go up to the ceremony ground to see what’s going on and it’s like looking back into history to my father’s and grandfather’s life. I’d like to keep the totem as a design but not openly, just as a drawing that we can remember the old folks who used to believe in them. We don’t believe as they did; we believe in a spiritual god, the True One. I believe in the True God – not because I saying this in front of you, but because I’m saying this before God from my heart.282

7.3.5 Non-Yolngu Commentary on Two-Way Theology

The previous discussion was concerned with arguments made by Yolngu church leaders for and against two-way theology. This section analyses some academic, theological and direct experiences of intersections of Madayin (and other Aboriginal normative systems) and Christianity. All of the writers considered here are non-Yolngu though some are indigenous people from other areas. The contribution made by this section is to place the Yolngu discourse on two-way theology in a broader context of two-way theology discourse.

282 Ibid.
7.3.5.1 Magowan’s commentary on two-way theology in Arnhem Land

The syncretic approach to Christianity by many Yolnu who agree with Gondarra’s theology has been described by anthropologist Fiona Magowan inter alia as ‘negotiated and strategic’.\(^ {283}\) Magowan relates a dream of a Yolnu man described only as David:

Last night I had a dream. You know those two sisters?’ he quizzed, (referring to the first ancestral sisters, the Djangka’wu who birthed the Yolngu clans). ‘They came to me in a dream wearing their orange feather lorrikeet armbands and their special headresses. They were all painted up and dancing... They were dancing at my uncle’s homeland... but then I saw a light and a cross and Jesus standing there. I realised that this was a sacred area and that it had always been sacred.’ By now he was trembling excitedly, and Susan [David’s wife] went on, ‘None of us knew that the area had been used for the ngarra, the fertility ritual, a long time ago. One of our uncles was so moved he started to cry, calling out to God. He said we must put a cross on it and dedicate the ground for [Christian] worship. So, we’re going to have a youth rally there in two week’s time.’\(^ {284}\)

Magowan describes this syncretism (or ‘synchronicity’ as she prefers to call it) ‘as a cohesive internal state’ that ‘emerges as a result of re-


\(^ {284}\) Ibid 275-276.
territorialising ancestral places and lifeworlds as Christian topography and experience, generating a new spiritual and emotional synchronicity between them’.\textsuperscript{285} Magowan writes that this ‘is a way of conceptualising the intermingling of the two spiritual sources—the Ancestral Law and Christianity’.\textsuperscript{286}

In the matter of supernatural healings Magowan observes that ‘Yolngu do not necessarily make a distinction between the spiritual source underpinning ancestral and Christian healings’.\textsuperscript{287} More broadly, Magowan writes that the Yolngu do not ‘perceive a necessary disjuncture between ancestral and Christian beliefs in heaven and hell’.\textsuperscript{288} Magowan suggests that ‘feelings of power, strength and vitality gained at the site of the fertility ritual (ngarra) are reembodied in the iconicity of the cross which comes to be erected on the same ground’.\textsuperscript{289} Magowan writes that for the Yolngu ‘Christianity offers a transformative power from social degradation to spiritual triumphalism... [because] the suffering Christ resonates with Yolngu pain and struggle for social justice while at the same time providing a utopian sanctuary of ancestral reclamation and

\textsuperscript{285} Ibid.  
\textsuperscript{286} Ibid.  
\textsuperscript{287} Ibid 282.  
\textsuperscript{288} Ibid.  
\textsuperscript{289} Ibid 284.
regeneration\textsuperscript{290} though she offers no explanation of how this could be achieved nor how this proposition sits with the stated purposes and natures of Christianity or Madayin. This lack of discernment or consideration allows the creation of syncretic systems that produce a fundamental inconsistency in philosophy and authority from the Christian perspective. Yet to ignore or overlook divergent spiritual sources, natures and purposes is the correct approach in the Madayin system which exists in a pluralistic normative network with other Aboriginal authority systems.

Magowan recounts an example of a type of syncretism that does not contradict or compromise authority, nature and purpose in Christianity:

Redemptive visions require congregational endorsement in order to be considered valid for collective social action. One such vision came to the assistant minister of Galiwin'ku, in 1990, when he saw himself standing before Jesus. During a Sunday morning service, he related how he knelt down and presented Jesus with a set of clapsticks and didjeridu. They were plain and void of clan designs. Jesus walked forward and took them from him, then told him to rise. As soon as he got up, he saw the clapsticks and didjeridu shining golden, as if painted with varnish. Jesus held them out and told him to take them and use them for his glory. Later that week, the minister fashioned a

\footnote{Ibid 279.}
didjeridu and pair of clapsticks, varnished them and brought them to church where they were dedicated for worship and used by the musicians to accompany the congregational singing.²⁹¹

The didgeridoo and clap-sticks of themselves are religiously neutral: it is the association of these instruments with an authority system that can see them take on a particular normative character. The didgeridoo and clapsticks presented to Jesus in the assistant minister’s dream were ‘plain and void of clan designs’. This is significant because the clan designs are given to the clans by the wangarr ancestral beings. Without the clan designs the didgeridoo and clap-sticks are religiously neutral. Jesus hands back the didgeridoo and the clap-sticks in a shining golden state (gold can represents purity in the Bible)²⁹² and the assistant minister and the rest of the congregation proceed to use them in their Christian worship activities. Although the clap-sticks and the didgeridoo had previously been used in Madayin ceremonies the clan designs that provide the link to the wangarr ancestors had been removed resulting in religiously neutral instruments which were subsequently given a Christian character. Therefore there is in fact no syncretism of authority in this example; there is only a neutral item given a Christian character. In the context of the Tiwi Islands to the east of Arnhem Land (and to the north of Darwin) the Catholic Church

²⁹¹ Ibid 285.
²⁹² Proverbs 17:2; Revelation 3:18.
leader, Bishop Ted Collins, would allow clap sticks to ‘be used to herald the entry of a person into the church, but the actual service was likely to be an unmodified Catholic service’.293

The next set of examples that Magowan draws upon significantly synthesise elements of authority of both the Madayin system and the Christian system, meaning that the approach taken is in accordance with the Madayin way but not the Christian way.294 The syncretic activities were primarily in the forms of song and dance. Yolngu ‘church representatives painted and adorned themselves with ancestral designs and sacred feather armbands’295 and in other specifically Madayin ways. A Christian worship song contained lyrics that are only Christian in content but the song was accompanied by ‘the ritual actions of the first [Madayin] ancestral sisters journeying across the landscape from homeland to homeland.’296 The ‘ancestral sisters referred to are the Wauwalak sisters, the central mythical figures in Madayin from whom all of the key Madayin ceremonies and purposes originate including Kunapipi.297 Briefly, the Wauwalak sisters began their journey after the elder of the two sisters ‘had incestuous relations with a clansman, and as a
result she became pregnant’.\textsuperscript{298} During their journey they killed animals and collected plant foods; they gathered these items into a bag (a bulpul dilly-bag) and said that in time those items would become ‘madayin’ (translatable here as sacred).\textsuperscript{299} The elder sister gave birth to a daughter and as the afterbirth and blood accompanying the birthing continued to exit the mother the two sisters tried to cook their food.\textsuperscript{300} However all of the dead animals came alive and ran away as the sisters tried to cook them; even the plant items fell into the ashes of the fire and their spirits left.\textsuperscript{301} The reason why this happened was because the sisters had inadvertently set up camp near a sacred water hole which was tabu for them to enter or be near.\textsuperscript{302} The animals that the sisters tried to cook and the spirits of the plant items all entered the sacred water hole.\textsuperscript{303} All of this activity and the blood from the birth disturbed the mythical big snake (also known as the Rainbow Snake) which entered the sisters’ hut, sprayed all those inside with saliva and swallowed the older sister, her baby and the younger sister who by this time had begun menstruating.\textsuperscript{304} These actions by the snake with the sisters and their hut are interpreted as sexual intercourse.\textsuperscript{305} All of these mythical events are re-enacted by

\begin{flushright}
\textsuperscript{298} Ibid 20.
\textsuperscript{299} Ibid.
\textsuperscript{300} Ibid 20-21.
\textsuperscript{301} Ibid.
\textsuperscript{302} Ibid.
\textsuperscript{303} Ibid.
\textsuperscript{304} Ibid 20-23.
\textsuperscript{305} Ibid 24-25.
\end{flushright}
contemporary Yolngu in the Kunapipi ceremony in order to effect fertility in both humans and the rest of the natural environment:306 ‘we want to see the seasons come, and things to grow, and people to be born: that is the real meaning of what we do’.307 Berndt writes ‘the sexual act is basic to these rituals, its significance deeply rooted in the concept of procreation... ceremonial copulation, ritualized in the Kunapipi, substantiates the religious doctrine, and stresses its underlying meaning of fertility’.308 Kunapipi intercourse may occur between individuals that the Madayin system would normally categorise as tabu.309 This arrangement is considered more potent in terms of fertility than is the normal Madayin husband and wife arrangement.310 The sexual activity between the usually tabu couple is normally considered incestuous in the Madayin system.311 The incestuous element reflects the incest of the ancestral Wauwalak sisters who provide the origins of Kunapipi.312 This re-arrangement of tabu based on a conception of the higher sacredness of Kunapipi demonstrates Madayin’s relative nature. The authority of Kunapipi is recognised by Madayin adherents: ‘their understanding of the

306 Ibid 39- 60.
307 Ibid 39.
308 Ibid 48.
309 Ibid 49.
310 Ibid 49.
311 Ibid.
312 Ibid.
importance of such ritualized copulation [for the purposes of the Madayin fertility philosophy], predetermines their full acceptance'.

The Wauwalak sisters and the Kunapipi ceremony that has resulted from their mythical activities, establish and maintain religious activities and meanings that are in stark contrast to the teachings and morality of Christianity. Some of the most obvious are the veneration of ancestral beings and totems, a fertility religious philosophy and ritualised sexual intercourse, especially between partners not married to each other.

Magowan’s conclusion is that the Christian faith of the Yolngu people is ‘inseparable from the ancestral aesthetic through which Yolngu culture is structured’. The use of the adjective ‘inseparable’ reflects a conclusion drawn too easily; she has merely described a very small sample of symbolic phenomena rather than analysing and evaluating the authoritative significance that is communicated by those phenomena. By glossing over or ignoring the actual content, nature and purpose of the sources of Madayin authority and merely describing the Madayin

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313 Ibid 53.
314 ‘Have no other gods before me’: Exodus 20:3.
315 Deuteronomy 23:17,18; Jeremiah 19:5 in reference to the requirement for human sacrifice to pagan god Baal.
316 Revelation 2: 14, 20.
317 Magowan, ‘Syncretism or Synchronicity?’ above n 283, 286.
elements of the syncretism as ‘ancestral aesthetic’ the conflicts of content, nature and purpose of Christianity with those of the Madayin systems are hidden. For example, the members of the church on Arnhem Land’s Elcho Island had developed the habit of translating ‘God’ as the name of one of the Madayin ancestral beings (Motj or Malagatj) but in 1976 an Aboriginal committee of this church banned the use of the Madayin names ‘as a translation of the name of God, as they came to realise they were clearly not the same nature or being’. Magowan’s approach may be convenient but it also ignores the fundamental differences in source, purpose and nature of authority of the two systems.

Providing some context for the two-way theology, Magowan observes that ‘a number of Yolngu leaders negotiate their [Christian] faith from a [Madayin] cultural basis’. While some Yolngu Christian ‘leaders profess a [morality that is] situated and rooted in... the ancestral law [others] hold to a Christo-centric profession of belief and experience, renouncing ancestral rootedness as unnecessary for living with appropriate moral accountability to God’. Others again attempt the two-way

318 Blacket, ‘Rainbow or the Serpent?’, above n 163, 4.
319 Magowan, ‘It is God who Speaks in the Thunder’, above n 190, 297.
320 Ibid.
theology approach but it has been expressed by one such adherent that it is 'so hard to hold church and totem together'.\textsuperscript{321}

Sacred places in the Madayin system (such as ceremony sites and other sacred sites) are repositories of spiritual power and considered very dangerous places.\textsuperscript{322} For some 'Yolngu Christians the fear of spiritually dangerous places may be covered by the blood of salvation that is to be found by believing in Jesus' (italics in original).\textsuperscript{323} One Yolngu Christian minister, Mawunydjil, 'is concerned about the nature of spiritual forces that may come into play during ancestral events'.\textsuperscript{324} He is cited as saying:

\begin{quote}
We know in our sacred sites there are good and bad things. Maybe we have to open the Bible and see what it says about bad things. When our forefathers had visions who was the spirit who gave it? Good or bad spirits can talk to us. Now we all claim when we have a vision it’s God. When people sit and sing at sacred sites who are they singing to? We tell people, “Be quiet this is a sacred place, you have to be careful”. I ask, who are we respecting or afraid to offend?\textsuperscript{325}
\end{quote}

\begin{flushright}
\textsuperscript{321} Anderson and Carroll, ‘Developing Theology among Vernacular-Speaking Indigenous Australians’ 7, cited in Seiffert, above n 159, 328.
\textsuperscript{322} Magowan, ‘It is God who Speaks in the Thunder’, above n 190, 305.
\textsuperscript{323} Ibid.
\textsuperscript{324} Ibid 306.
\textsuperscript{325} Ibid.
\end{flushright}
Magowan writes ‘the articulation of fear is a controlling aspect of social behaviour through ancestral rituals but it may be overcome by the reconciling power of Christ’.326

As Yolngu Christians believe in the assurance that Jesus protects, they also hold a healthy regard for abstaining from things that could contaminate the spiritual self. Scripture provides moral codes for living, however there are contested views about the boundaries of Yolngu cultural practices. Indeed, individuals hold diverse opinions about what might be acceptable or unacceptable engagement with certain ancestral elements and ritual practices, such as singing and dancing. A few Yolngu consider their ancestral identity unnecessary for living, because they believe Jesus offers true life. They speak of walking in the dhunupa dhukarr (straight path) following the yuwalk rom (true law). A significant number of Yolngu struggle to relate their ancestral identity to Christianity. Others seek to bring insight to the idea that ancestral creation and identity reveal a divine relationship of God with His world. A few reject the teachings of Christ altogether.327

In the Madayin system, the source of power in sorcery is the wanggar, the Madayin ancestral beings who also provide the source, nature and purpose for the whole Madayin system, yet in Christianity, sorcery is only associated with the Devil,328 hence the dilemma for Yolngu: ‘[i]n Arnhem

326 Ibid.
327 Ibid 297-298.
328 See Chapter 5.
Land, the relationship between fear of the Devil through sorcery and the power of Jesus is at the heart of Yolngu issues between culture and the Gospel... there is a tension between God’s purposes and cultural obligations’.  

### 7.3.5.2 Paulson’s theology

Graham Paulson was, in 1968, the first Australian Indigenous person ordained a minister in the Baptist Church. A very common approach to two-way theology or ‘hybridity’ as Paulson writes, is the presumption that ‘culture’ must be the mediator of the theology: ‘Indigenous animistic spirituality is the most important and all encompassing single cultural window through which we should be viewing the scriptures’.

This starting position approaches Christianity as if it were merely another culture or ideology. Certainly Christianity generally, and the many expressions of it in various times, places and denominations, give rise to various cultural expressions, but they are very much a consequence and not a cause of Christianity. Christianity offers a universal, radical and

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329 Magowan, ’It is God who Speaks in the Thunder’, above n 190, 302-303.
330 Elizabeth Pyke and Anne Elvey, ‘Contributors’ in ’Towards an Aboriginal Theology’ Pacifica 19 (October 2006) 310.
331 Graham Paulson, ’Towards an Aboriginal Theology’ Pacifica 19 (October 2006) 310, 312.
alternative normative system to all other normative systems of the world. To view Christian scriptures through a particular ‘cultural window’ is to evaluate Christianity against another normative system. Certainly people may undertake such an enterprise, but that is the work of non-Christians, not people who purport to be Christians. There is no literal scriptural support for Christians to evaluate Christian ideology from the viewpoints of other normative systems and form a syncretic theology out of the parts that are convenient. If anything the evaluation should be the other way around for Christians given Christianity’s claims of absolute and universal truth. If this approach were taken in the Australian Aboriginal context then, as Paulson writes, ‘some parts of Aboriginal culture will be adopted, some will be adapted, and as is the case in all cultural developments, some may be rejected’. The challenge, of course, is in determining what parts will be adopted, adapted and rejected. It goes without saying there is nothing anti-Christian in a Christian incorporating into their life certain cultural aspects that do not offend any Christian norm.

Paulson offers some possible analogies between the Bible and Aboriginal religion as suggestions for syncretism:

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332 See Chapter 3.
333 Ibid.
334 Paulson, above n 331, 312.
At the beginning of the Bible’s first creation story, God’s Spirit... is “hovering” over the unshaped earth and waters. This verb “to hover”... is also used of an eagle caring for its young, and there are at least two other key points in Israel’s Dreaming where God’s activity is compared with an eagle’s... An Aboriginal reader might be tempted to see an analogy: if God’s Spirit is like an eagle caring for its young, then perhaps God is like a totemic eagle.\textsuperscript{335}

Paulson is right: an animistic Aboriginal reader might be tempted to draw a long bow and compare God with a local totem. However, the comparison is between the absolute, supreme and universal God of the Bible with a totemic eagle that has spiritual relevance and authority according to a particular local Aboriginal religion, in a relative, partial and parochial way. This comparison is only seriously possible for a non-Christian. No fanciful analogies or complicated theologies are required to make sense of other scriptures that stand in stark contrast to such a syncretic theology, scriptures such as the Christian God’s command to have ‘no other gods before me’\textsuperscript{336} and the celebratory prayer of praise ‘No one is like you, LORD; you are great, and your name is mighty in power... there is no one like you’\textsuperscript{337}.

\textsuperscript{335} Ibid 315. Scriptures referred to by Paulson are Genesis 1:2, Exodus 19:4 and Deuteronomy 32:11.

\textsuperscript{336} Exodus 20:3.

\textsuperscript{337} Jeremiah 10:6–7.
One clear and major point of divergence between Aboriginal religions and Christianity is the destination of the souls of deceased people. Aboriginal religions, including Madayin, teach a form of reincarnation\(^{338}\) whereas any form of reincarnation is anathema to Christianity as the whole purpose of Christianity's Kingdom of God is eternal life,\(^{339}\) not eternal (or any) rebirths. The Bible declares that all ‘people are destined to die once, and after that to face judgment’.\(^{340}\) Interestingly, Swain considers that that Warlpiri people in central Northern Territory would rather sustain the tension associated with this confrontational divergence between the two normative systems rather than attempt a serious comparative evaluation of the different authorities.\(^{341}\)

Paulson offers another syncretic possibility:

the stories of Elijah are interesting from an Aboriginal point of view, since at one point Elijah is fed by an “angel”... and at another point he is fed by “ravens”... In the latter case, these birds are therefore given the same task as the

\(^{338}\) Magowan, 'It is God who Speaks in the Thunder', above n 190, 21-22.

\(^{339}\) Paulson, above n 331, 312.

\(^{340}\) Hebrews 9:27.

“angels” or “messengers”, something that would not at all be surprising when viewed through the cultural window of Aboriginal spirituality.\textsuperscript{342}

The unwritten implication in Paulson’s writing is that because ravens and angels have been given the same task in the Bible, and because ravens may be a totem in Aboriginal religions, therefore totemic ravens in Aboriginal religions may be compared or even equated with angels of the Bible and that support for this proposition exists in the Bible. If totemic ravens and angels are equated, then surely the God of the Bible not only assigned the totemic ravens their positions and functions in Aboriginal religion but also approves of them and approves of adherents of Aboriginal religions valuing and following the norms that come from the totemic ravens. And if this is the case for totemic ravens then why should it be any different for all of the other totems?

There are at least two critical errors in this type of theology from the Biblical perspective. One, the Bible declares that all religions, including Judaism and Christianity were mediated by angels, however the Bible also declares that a third of the angels rejected God’s rule and followed Satan in his fall from grace and that these ‘fallen angels’ have mediated all of the

\textsuperscript{342} Paulson, above n 331, 316. Scriptures referred to by Paulson are 1 Kings 17:4-6; 19:5-8.
world’s religions other than Judaism and Christianity, those two religions having been mediated by angels who remained faithful to God.\footnote{343} Second, Paulson’s angel-raven reasoning above ignores a far simpler and Biblically accurate account, that is, that, quite simply, on one occasion God used ravens and on another occasion God used an angel to bring Elijah food. Nothing more needs to be read into the scriptures. A convoluted, even if convenient, theology is not required or justified.

The highly localised and relative nature of Aboriginal religions is not generally denied by proponents of two-way theology.\footnote{344} Difficulties caused by trying to reconcile a specific landscape-dependent religious system with a universal one have been observed among some Aboriginal Christians.\footnote{345}

A particularly ‘slippery eel’ in the two-way theology talk is how the word ‘culture’ is used. At times ‘culture’ is used in reference to religious or other norms and at times it is used to mean social activities devoid of

\footnote{343}{John Edmiston, \textit{A Quick Primer on Spiritual Warfare} (10 May 2011) Global Christians <http://www.globalchristians.org/ebooks/spirwarfare.htm> 3-4.}
\footnote{344}{Paulson, above n 331, 318-319.}
norms such as food or clothing. The effect of the ambiguity is to blur the lines defining the content of the discussion, namely the compatibility of Christianity with Aboriginal religions. Attention is drawn away from the religious nature and the normative claims of what is being discussed and another category is established which, as it is purportedly not religion, is of a benign or neutral nature which does not invite criticism from or comparison with Christianity. Once the argument is accepted as theology, the lexeme of ‘culture’ remains the same but the semantic contents of the lexeme can change as required. With the lines blurred the two-way theology seemingly allows to a Christian what would not be allowed if clarity prevailed.

Such usage of the term ‘culture’ is illustrated in Paulson’s writing. Paulson starts with a reasoned approach to acculturate the gospel since, he asserts, the Western missionaries who brought Christianity to Aboriginal people did exactly the same thing:

What Western missionaries have done is perfectly legitimate and desirable for the expression of Christianity within their own culture. What I am advocating is that Aboriginals and Islanders should have the freedom and the capacity to

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346 For example see: Habel, above n 158.
be able to do the same within the various expressions of our own Indigenous cultures.\footnote{Paulson, above n 331, 319.}

At first glance this approach sounds reasonable. The problem with it is that it presumes that just as non-Aboriginal Christians must have ‘incarnated the gospel’ into their culture so too must Aboriginal people do the same.\footnote{Ibid.} This may be appropriate from the traditional Aboriginal society perspective because religion, law and culture are all intertwined into one.\footnote{See Chapters 2 and 3.} Paulson insist on a need for acculturalisation by asserting as a ‘fact’ (although not supported with authority or reasoning) that ‘no meaning can be conveyed apart from culture’.\footnote{Paulson, above n 331, 320.} However there is no Biblical support for the proposition that Christians are required to acculturate the gospel. In fact from a Biblical perspective, raising the importance of culture (or anything else) to an equal importance with the revealed ways of God as described in the Bible is considered in Christianity to be the serious sin of idolatry.\footnote{F W Worsley, ‘Idolatry’ in J Hastings (ed) \textit{Dictionary of the Apostolic Church}, \textit{Volume I}, (Clark, undated, circa 1950) 593-594.} It is a common phenomenon for new converts to Christianity to reject idols previously worshipped or venerated to serve the ‘true and living’ God of the Bible.\footnote{I Thessalonians 1:9.}
The sleight of hand using the term ‘culture’ then enters in the following paragraphs as Paulson characterises ‘sacred sites... mythology...ritual, and ceremony’ as merely ‘culture’.353 The religious character, and therefore the normative character, of these things are silenced.

Seiffert writes that ‘[e]xamining contemporary culture in the light of Bible is a never-ending task of the church as it was for the first Christians in New Testament times’.354 Christianity is not anti-culture but it does object to aspects of any culture which offend the norms of the Kingdom of God.355 Culture that does not contain norms in opposition to Christianity is not an issue for Christians as Pope Paul VI said to Australian Indigenous peoples when he visited Sydney in 1970:

We know that you have a lifestyle proper to your own ethnic genius or culture – a culture which the Church respects and which she does not in any way ask you to renounce... Society itself is enriched by the presence of different cultural and ethnic elements.356

353 Paulson, above n 331, 319-320.
354 Seiffert, above n 159, 325.
7.3.5.3 Kadiba’s theology

An example of mistaking the culture or modus operandi of a group of Christians for authority is found in Kadiba’s discussion of the matter of polygamy in Arnhem Land churches. Kadiba is a theologian originally from Papua New Guinea who moved to Darwin to teach at Nungalinya College. Writing on polygamy, Kadiba cites the opinions of two writers in relation to African churches, six writers in relation to polygamy in Arnhem Land churches and the Minutes of the Methodist Church’s 1971 Annual District Synod in Arnhem Land but he does not once refer to the authoritative Bible texts on point. In regards to the possible ordination of a Christian Yolngu man with more than one wife Kadiba quotes from the Synod minutes a resolution passed that ‘an Aboriginal man who ‘had taken more than one wife would be ineligible for these offices’ and from a text by Robert Bos who wrote that Yolngu people ‘feel that, had he (the polygamous man in question) not taken additional wives after becoming a Christian, the Methodist Church would have ordained

358 Ibid.
359 Ibid 246.
Rather than quote from the Biblical sources of authority, Kadiba has cited a decision made by a particular group of Christians (the Synod minutes) and what one individual wrote about what some other people feel. Kadiba has preferred secondary sources (even hearsay in the case of Bos) to primary sources. All the while the relevant Biblical authority clearly states that church leaders are to have one wife at most: ‘If anyone sets his heart on being an overseer [a church leader], he desires a noble task. Now the overseer must be above reproach, the husband of but one wife.’ The other Biblical option for a church leader is to remain single and celibate.

By referring to the Biblical authority on point rather than what various people – who may or may not be Christians themselves – think, Kadiba would have discovered that the Christian teaching on polygamy is clear: monogamy or unmarried and celibate is required for Christian leaders.

Another effort made by two-way proponent Kadiba to justify his theology is to claim that Christianity itself is a syncretic religion, ‘an amalgamation of Judaism, new ideas taught by Jesus and the Apostles’.

\[360\] Ibid 246.  
\[361\] 1 Timothy 3:1-2. See also 1 Timothy 3:12.  
\[362\] See also Matthew 19:12, 1 Timothy 3:12 and 1 Corinthians 7 and Chapter 4 of this thesis.
and later cultural, theological and philosophical additions. This argument is flawed for two reasons: it is factually incorrect and it is authoritatively incorrect. It is factually incorrect because Jesus taught in accordance with Judaism. When asked which of the Jewish laws was the ‘greatest’ Jesus replied:

Love the Lord your God with all your heart and with all your soul and with all your mind. This is the first and greatest commandment. And the second is like it: Love your neighbour as yourself. All the Jewish Law and the Prophets hang on these two commandments.

Jesus teachings already existed, albeit in sometimes undeveloped ways, in Judaism either explicitly in laws or prophetically. Jesus explained:

Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfil them. I tell you the truth, until heaven and earth disappear, not the smallest letter, not the least stroke of a pen, will by any means disappear from the Law until everything is accomplished.

\[\text{Kadiba, above n 357, 244.}\]
\[\text{Matthew 22:36-40.}\]
\[\text{Hebrews 10:1.}\]
\[\text{For example see Matthew 8:17; 21:1-6 John 12:38; 13:18; 15:25.}\]
\[\text{Matthew 5:17-18}\]
Also, Jesus said ‘every teacher of the [Jewish] law who has been instructed about the kingdom of heaven is like the owner of a house who brings out of his storeroom new treasures as well as old’.\textsuperscript{368} Kadiba’s claim is factually incorrect also because the Apostles taught consistently with Jesus’ teachings.\textsuperscript{369}

It is authoritatively incorrect because culture, theology and philosophy, even if they are expressed by a group of Christians are not of themselves the truth claims recorded in the Bible that Christianity is based upon. The resulting Christian culture is a product and not a provider of Christianity. To include these elements when describing Christianity is to take an approach based on sociology or phenomenology rather than authority. By taking a sociological or phenomenological approach, the culture, theology and philosophy of any group of purported Christians, regardless of whether their ideas and practices aligned with the Bible or historical Christian teachings, would suffice in order to define what it means to be Christian. Clearly this is a flawed approach as it allows unlimited, relative and potentially heretical ideas and practices to usurp established authority.

\textsuperscript{368} Matthew 13:52.  
\textsuperscript{369} Ephesians 2:19-22.
The problem with two-way theology is that while it is faithful to Madayin it is unfaithful to Christianity. This fundamental mismatch is captured by Kadiba:

Syncretism in relation to indigenous missiology was evolved by indigenous receptors of Christianity themselves, either consciously or unconsciously, in an attempt to blend the beliefs and practices of Christianity with elements of indigenous cosmology in order to make sense out of new beliefs and practices which had been introduced to their cosmological framework. The issue involved here was one of meaning and connectedness – connectedness of their newly acquired beliefs and practices with their world-view, in order to find existential meaning in the evolving new context.\(^{370}\)

While this syncretic approach is permissible in the Madayin system it is not permitted by Christianity if norms or authority are involved. Due to the absolute claims made by Christianity, the two-way theology which is really ‘one-way’ (Madayin’s way) can only contain an internal integrity or consistency if the elements of Christianity that are included are done so selectively. This is exactly what has occurred in Arnhem Land as proposed by Kadiba:

\[^{370}\] Kadiba, above n 357, 244.
The [Yolngu] Aboriginal people [in constructing their Christian-Madayin syncretistic religion] were operating on a principle of selective Christian syncretism, in which they selected elements from their own cosmology and Christian teachings, integrating them and evolving an Aboriginal understanding and form of Christianity. They attempted to do this in the light of their understanding and interpretation of the Bible in their cosmological context.371

A selective approach to Christianity is an inconsistent approach. Any Bible verse that causes offence to the host or to-be-syncretised normative system can simply be overlooked, yet Christianity calls its adherents to recognise the sovereignty of God above all else.372 A case in point is found in the First Book of Peter wherein the Bible states that a non- or pre-Christian way of life is an empty way of life: ‘[f]or you know that it was not with perishable things such as silver and gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ’.373 This scripture is anathema to the Madayin system which is handed down from one generation to another in continuous succession since the original wangarr ancestral beings. By employing a selective syncretic approach to a Madayin-Christian hybrid religion this contention in First Peter can simply not be

371 Ibid 255.
372 See Chapter 3.
373 1 Peter 1:18-19.
selected therefore avoiding an irreconcilable point of difference between
the two normative systems. However such an approach is inconsistent
from the Christian perspective as the truth claim of the Christian system
is simply ignored.

7.3.5.4 Miller's theology

Not all Aboriginal pastors agree with Gondarra and Paulson. An
ordained Aboriginal minister in Far North Queensland, Norman Miller,
has publicly rejected any notion of rainbow serpent or two-way
theology.\textsuperscript{374} According to Miller ‘[w]hatever culture you are, when you
become a Christian, it’s above culture, it becomes a higher value. When
you view your culture, you view it through the eyes of your faith’\textsuperscript{375}
Miller explains that when a person of any cultural background becomes a
Christian their task is to reject the elements of their past that do not agree
with Christianity but continue to embrace those elements that do not
make normative claims in competition with Christianity. Miller writes:

\textsuperscript{374} Sallie Anderson, ‘Rejecting the Rainbow Serpent: an Aboriginal artist’s choice of
the Christian God as Creator’, \textit{The Australian Journal of Anthropology} 2001 13:3,
291, 293-294.

\textsuperscript{375} F S Wright, ‘Church rejects native beliefs’ in \textit{The Cairns Post} (9 September 1998)
some Aboriginal people have been told they have to leave their culture behind when they become Christians and live like Europeans. This is not true. However, when a person anywhere in the world becomes a Christian they re-examine their lifestyle and maybe reject some aspects of their culture if it does not line up with their faith. Only in the past 200 years or so has it been erroneously seen to be a white man’s religion or the religion of the coloniser. There are millions of Asian, African and South American Christians around the world as well as Aborigines in Australia, who’re able to integrate or reconcile their Christian faith and their culture.  

Miller totally rejects rainbow serpent or two-way theology as a form of idolatry: ‘[t]here’s no way I’m going to take part in [rainbow serpent theology], not something that tries to be a god, and some believe that it’s the creator but it’s not’. However Miller is not opposed to all cultural expressions, only those that oppose Biblical teachings:

You know that the snake is food for Aboriginal people, but it’s the way it’s painted that makes it the rainbow serpent. And everyone is deceived by the idea that the rainbow serpent is the only Aboriginal creator – there are many. The snake was food for our people [an aspect of culture], but when it was taken and believed to be the maker of all things, that’s when I have to take some stands.  

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377 Ibid 296.
That’s when I have to start praying and say no. When it’s seen as being the creator, I say well, I don’t want to be created by it. It insults me when it’s implied I was created by a snake.\footnote{378}

Miller’s theology is in agreement with the Bible on all counts: he places culture below Christian truth thereby avoiding idolatry\footnote{379} and he rejects culture that opposes Christian truths while he accepts culture that does not oppose Christian truths.\footnote{380} As discussed above, Gumbuli also rejects Rainbow Serpent theology, in fact he objects to ‘theological aspects of ceremonies, including most of the Dreaming, which challenge God as Creator of the Universe’\footnote{381}. Yet Gumbuli’s observers agree ‘that his rejection of some aspects of Aboriginal tradition has not made him one bit more Western’\footnote{382}.

Religious syncretism is an expression of the relative, eclectic and pluralistic outlook of Aboriginal religions but denies the universal and exclusive claims of Christianity. This is an allowable approach from the Aboriginal religion perspective but not from the Christian perspective. Madayin permits syncretism while Christianity refuses it. As such two-

\footnote{378} Ibid.
\footnote{381} Seiffert, above n 159, 337.
\footnote{382} Ibid 338.
way is not really two-ways at all but one way: it is simply Aboriginal religion engaging with another normative system (Christianity) on its own relative and pluralistic terms, not on the terms of Christianity. In two-way theology, Christianity is added to the Aboriginal religion as an ornament.

7.4 Chapter Summary

The above analysis and evaluation demonstrates that legal pluralism exists in Arnhem Land between the Madayin system and Australian law. The instances of pluralism have occurred in an ad hoc manner; the lack of a systematic approach to the legal pluralism that exists in Arnhem Land is obvious. The analysis and evaluation also demonstrates that religious pluralism exists in Arnhem Land between the Madayin system and Christianity. The intersections of authority demonstrate the eclectic nature of Madayin but ignore the absolute nature of Christianity. A detailed discussion of the above evaluation of the integrity of authority that exists in the intersections of Madayin with the other two systems is contained in the next chapter.
Chapter Eight: 
Evaluation of the 
Intersections of Madayin 
with Australian Law and 
Christianity
Chapter 8

Evaluation of the Intersections of Madayin with

Australian Law and Christianity

This chapter evaluates the analysis of the intersections between Madayin, Australian law and Christianity provided in the previous chapter and concludes that normative pluralism clearly exists in Arnhem Land albeit with varying degrees of authoritative integrity according to the different normative systems considered. The argument made is that the condition of the legal pluralism that exists in Arnhem Land is weak and ad hoc yet it allows the integrity of the essential nature of both Madayin and Australian law to remain intact. On the other hand, strong religious pluralism exists in Arnhem Land that has integrity from the Madayin perspective but not from the Christian perspective. These findings are then situated in the broader national and international context of normative pluralism to ascertain if the theories developed in this area of scholarship are applicable to the Arnhem Land context.
8.1 Evaluation of Madayin and Australian Law Intersections

Madayin and Australian law intersect in a number of instances in the Arnhem Land context, including in respect to the Constitutional definition of religion, land law and criminal sentencing law. Intersections also exist in other areas outside of the scope of this thesis, such as child welfare law. These intersections, including both those considered in detail in this thesis and those not considered, 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.

The essential nature of Australian law of enabling the contemporary demos to rule is what occurred in the case of *Milirrpum v Nabalco* when Blackburn J found that native title did not exist in Australian law and the proceeding legislative changes that provided for the recognition of Aboriginal land rights. Although *Milirrpum* was a failure in court for the Yolngu plaintiffs, it added to the contemporary political momentum for better treatment of Aboriginal people, such as the industrial action by Aboriginal stockmen at Wave Hill that started in 1966 and the 1967

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1 See for example *Care and Protection of Children Act (NT)* s 12.
Federal Referendum that saw Aboriginal people receive Constitutional rights. While the demos had not approved of native title at the deciding of *Milirrpum*, the *Milirrpum* case, in part, prepared the demos for a future change of law. *Milirrpum* acted as a catalyst for the legislative recognition of Aboriginal land rights that followed soon after in the form of the *Aboriginal Land Rights (Northern Territory) Act* [*ALRA*].

Land title under *ALRA* is sourced from Commonwealth legislation and accordingly the freehold communal title that is possible under *ALRA* is a creature of statute. However, eligibility to be recognised as a traditional owner under *ALRA* is primarily established by the existence of a spiritual connection to the land according to Aboriginal traditional law and religion. As the sources of authority for establishing title to land under *ALRA* are both statute and Aboriginal customary law, a synthesis of legal authority is created. However the synthesis is too weak, too unbalanced, to enable the collaboration to be considered anything more than a weak form of legal pluralism. The power imbalance remains clear in that it is the statute that allows customary title to be recognised and protected in the Australian legal system.

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Constitution, s51(xxvi) and s 127 as amended; Museum of Australian Democracy and National Archives of Australia, *Commonwealth of Australia Constitution Act Amendment to Section S1*, Documenting a Democracy <http://foundingdocs.gov.au/amendment-amid-17.html>
ALRA demonstrates the essential nature of Australian law, that is, to enable the contemporary demos to rule by a system of representative democracy, parliamentary supremacy and self-subscribed sovereignty within national borders without accommodating a serious form of legal pluralism.\(^4\)

With *Mabo (No 2)* the Australian common law started to recognise Indigenous native title to land. Although recognised by the common law, native title is not a creature of the common law; rather native title sources its authority from Indigenous traditional laws and customs.\(^5\) The *Native Title Act* took the same approach, sourcing authority for native title not from statute but from Indigenous traditional laws and customs.\(^6\) While the Australian legal profession work within these common law and statutory frameworks, authority for native title is sourced not from these Australian law sources but from Indigenous normative systems. As such, an instance of legal synthesis arguably amounting to a form of true legal pluralism between Australian law and Indigenous law is created. Hence the *Native Title Act* arguably poses a threat to the essential nature of Australian law of assertion of sovereignty and rejection of legal pluralism within national borders, at

\(^4\) See Chapter 6.2.

\(^5\) *Mabo v Queensland (No 2)*(1992) 175 CLR 1, 58.

\(^6\) Ibid and *Native Title Act 1993* (Cth) s 223(1).
least in relation to property law. An alternative view would be that the demos have continued to rule via the legislation (*Native Title Act*) at the behest of which the recognition of Indigenous traditional laws and customs is allowed. Since the recognition of Indigenous traditional laws and customs is by the authority of the *Native Title* legislation, sovereignty is not threatened even if the existent legal pluralism is undeniable.

Later native title cases continued to affirm that ‘native title has its origins in traditional laws and custom, and is neither an institution of the common law nor a form of common law tenure’.

As such, the development of jurisprudence in this area has been challenging for those working in the common law system because it involves learning the law and jurisprudence of legal systems other than their own. The High Court has warned against the ‘tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer’.

Toohey J declared that ‘it would defeat the purpose of recognition and protection [of native title] if only those existing rights and duties which were the

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7 See Chapter 6.2.
8 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 37; see also *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.
9 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 37.
same as, or which approximated to, those under English law could comprise traditional title’.10

By way of example, Australian property law in relation to land title emphasises control of access.11 However, the High Court in *Western Australia v Ward* (2002) 213 CLR 1 insisted that it ‘is wrong to see Aboriginal connection with the land as reflected only in concepts of control to access of it’.12 That would ‘reduce a very complex relationship to a single dimension… [and would] impose common law concepts of property on peoples and systems which saw the relationship between community and the land very differently from the common lawyer’.13 The ‘preferable approach’, opined Deane and Gaudron JJ in *Mabo (No 2)*,14 is ‘to recognize the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as sui generis or unique’.15

The Indigenous customary law systems that are the source for native title are not merely positive law systems – they are religio-legal

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10 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 187.

11 *Western Australia v Ward* (2002) 213 CLR 1, 95.

12 *Western Australia v Ward* (2002) 213 CLR 1, 93.

13 Ibid.

14 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 187.

15 Ibid.
systems.\textsuperscript{16} The difficulties presented to common law judges who are required to determine native title matters were succinctly described in the \textit{Ward} judgement as requiring the ‘spiritual or religious… [to be] translated into the legal’\textsuperscript{17} which ‘requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them’.\textsuperscript{18}

The interactions of Aboriginal customary law with Australian law in the context of the \textit{Northern Territory Aboriginal Sacred Sites Act} cannot be said to form a regime of legal pluralism as the two systems do not collaborate. Rather, one system (Australian law) includes a number of provisions that mirror principles in the other (Aboriginal customary law). The power imbalance again is clearly in favour of Australian law which defines the scope and the extent of the inclusion of aspects of Aboriginal customary law in an area of Australian law. As such, sovereignty is protected, legal pluralism does not emerge (other than in a very weak form) and the essential nature of Australian law remains intact by the operation of the \textit{Northern Territory Aboriginal Sacred Sites Act}, notwithstanding the subject matter that it regulates.

\textsuperscript{16} See Chapter I.
\textsuperscript{17} \textit{Western Australia v Ward} (2002) 213 CLR 1, 93.
\textsuperscript{18} Ibid.
The Constitutional definition of religion is a point of intersection of Madayin and Australian law. Section s 116 of the Constitution reads ‘[t]he Commonwealth shall not make any law... for prohibiting the free exercise of any religion’. Madayin is a religion for the purposes of the Constitution. Since s 116 of the Constitution prevents the Commonwealth from making any law for prohibiting the free exercise of any religion, and since Madayin is a religion for the purposes of the Constitution, Madayin presents a qualification, a restriction, on the rule of the contemporary demos, because the demos must rule within the confines of the Constitution. A contemporary demos could change the Constitution by a referendum, but that takes considerably more time and effort than does regular legislation. Thus the Constitution acts as a brake mechanism, and Madayin as a brake instrument, though neither are a complete brake, on the authority of the demos.

The case of Wunungmurra reveals the essential natures of both Australian law and Madayin. The authority of the demos is exercised in the enactment of s 91 of the Northern Territory National Emergency Response Act 2007 (Cth) via the legislature and sovereignty has been asserted by this provision in its explicit rejection of aspects of another

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19 See Chapter 7.
legal system operating within its geographical borders. Wunungmurra declares himself both guilty and not guilty. Wunungmurra pleaded guilty to the Australian law charge notwithstanding his own testimony, and that of Laymba Laymba, that he was not guilty in accordance with Madayin. His actions were born from norms and responsibilities that he is obliged to uphold in the Madayin system yet he has accepted, or was forced to accept, the jurisdiction of Australian law. Wunungmurra reveals that the intersection between Madayin and Australian law in this situation is an awkward one. Southwood J accepts evidence on Aboriginal customary law for purposes other than those precluded by s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth). Consequently a type of weak legal pluralism exists but it is inelegant. The Australian law’s absolutist approach confronts Madayin’s pluralistic nature which strives for a negotiated settlement. However the eclectic Madayin is defeated by the universalism (within national borders) of Australian law.

Gaykamangu’s accounts of change to Ngarra law due to the influence by both Australian law and Christianity demonstrate some of the essential natures of Madayin: the aim of living in peace (magaya) and interaction with other normative systems by syncretism and pluralism. The responses to these intersections are driven by agents of the Madayin
system and involve authority that applies to Yolngu only, therefore the
relative nature of Madayin is able to produce the syncretic outcome.

8.2 Evaluation of Madayin and Christian Intersections

In some Australian Christian contexts, particularly those that have a
large proportion of Aboriginal membership, attempts have been made at
crafting theology that reconcile traditional Aboriginal religions with
Christianity.\(^{20}\) The resultant theology is often termed ‘two-way’\(^{21}\) or
‘Rainbow Serpent’ theology.\(^{22}\) At times the term ‘two laws’ may be used
to refer to Aboriginal customary religious law in collaboration with
Christianity or Australian law.\(^{23}\)

A substantial analysis of sources, purposes and natures of Madayin and
Christianity is hardly necessary to raise doubts that these two systems
can be reconciled. For example, the word ‘rom’ is the general Yolngu
term for ‘law’ such that the phrase ‘Madayin rom’ would be translated
as ‘Madayin law’. However ‘rom’ has also been translated into English

\(^{20}\) See for example: Norman Habel (ed) Rainbow Spirit Theology: Towards
and Australian Aboriginal Theology (1996, ATF Press).
\(^{21}\) Murray Seiffert, Gumbuli of Ngukurr: Aboriginal Elder in Arnhem Land
(Acorn, 2011) 326.
\(^{22}\) Habel, above n 20.
\(^{23}\) Diane J. Austin-Broos, ‘Two Laws’, Ontologies, Histories: Ways of Being
as ‘culture’, ‘right practice’, ‘proper practice’ or ‘the way’. When rom is translated as ‘the way’ it indicates ‘something of… [the] religious connotations’ inherit in the term. Christian scriptures also term Christianity as ‘the Way’. The shared term of ‘way’ offers a superficial agreement between the two systems. However, the definite article (‘the’) that precedes the references to both Madayin and Christianity indicate exclusivity of both which gives rise to competition rather than agreement. Another prima facie example is in the title of one of Gondarra’s two-way texts, ‘The Land is My Mother…’, notwithstanding that in Christian scripture, Mary, the mother of Jesus, is described as the mother of Christians.

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

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25 Ibid.
replacement, of traditional religion’. 29 One of these early leaders, Ellemor, states that the Methodist Church in Arnhem Land sees many links between the Madayin system and Christianity. 30 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. 31 Another Methodist leader, Jack Goodluck, encouraged two Yolngu church leaders, ‘George Winungudj and Wali Walanybuma, to openly bring before the… [Methodist] Synod the proposition that: ‘God’s Spirit had always been with Aboriginal people and their culture was a response to the truth they had received and as valid as that of any other culture’. 32

MacDonald writes that the churches in Arnhem Land make a strong case ‘for continuity between Aboriginal traditions and Christianity’, 33 and have ‘concertedly worked through Djiniyini’s [Gondarra’s]

31 Bos, above n 29, 430.
Aboriginal theology’. Consequently, most of the Aboriginal Church leaders in Gondarra’s region of northern Arnhem Land ‘are also significant ceremonial leaders’, 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’. It is in this context of various pressures that Djiniyini Gondarra, leading exponent of two-way theology in Arnhem Land, has approached his two-way theology. Gondarra writes ‘Church leader[s] have been encouraging me to write an Aboriginal theology of the land…. It was God who entrusted the land to our ancestors [wanggar]’. Gondarra writes on behalf of Aboriginal Christians ‘[w]e have felt the need for a theology that addresses both the traditional spirituality of Aboriginal people and the contemporary situation of our peoples… [including] the reality of spiritual powers’. Gondarra is reported as saying:

If I am to have my true identity before God, you cannot lock me into your ways. You must give me freedom to be me . . . He [God] has given us the

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34 Magowan, above n 33, 309.
35 Seiffert, above n 21, 336.
36 Magowan, above n 33, 309.
37 Gondarra, ‘The Land is My Mother…’, above n 27, 8-9; cited in Keen, above n 24, 47.
vision for the Aboriginal Church to think and theologise the Gospel in the language and the culture of the people.\textsuperscript{39}

Gondarra is viewing Christianity through cultural eyes. He feels that he cannot convert Aboriginal people to Christianity in its Western forms, so he needs to construct an Aboriginal acculturated version of Christianity.\textsuperscript{40} In asserting the place of Madayin culture in Yolngu Christianity, Gondarra reveals one of the essential natures of Madayin, namely Madayin’s awareness of co-existence with other normative systems and Madayin’s preparedness to engage in syncretism and pluralism.\textsuperscript{41} Gondarra writes ‘[w]e must promote Christ as the living and acceptable part of their own [that is, Aboriginal] ceremony and culture’.\textsuperscript{42} Unfortunately, Gondarra provides no analysis of the ontological or theological ramifications of making Christ the acceptable part of Aboriginal ceremony and culture; he only states that it must be done.

Some attempt at theological reconciliation between Aboriginal religious systems and Christianity is offered by Carrington but it is only done by

\begin{itemize}
\item \textsuperscript{39} Magowan, above n 33, 309.
\item \textsuperscript{40} Gondarra, ‘Overcoming the Captivities of the Western Church Context’, above n 38, 177-178.
\item \textsuperscript{41} See Chapter 6.
\item \textsuperscript{42} Gondarra, ‘Overcoming the Captivities of the Western Church Context’, above n 38, 177-178.
\end{itemize}
extracting a theme from a parable in Christianity and comparing it to a similar theme from an Aboriginal Dreaming story. In so doing, Carrington offers positive affirmation of the inherent value of both normative systems. However, by focusing on a theme and not the authority by which the theme is resolved, Carrington ignores the authority claims of both systems. This approach may guarantee a type of reconciliation between two normative systems (that otherwise may not be reconcilable) but the result is ignorant of any conflicts of authority that may exist between the two systems. A much earlier attempt at religious syncretism between Christianity and Madayin is documented by foundational missionary Wilbur Chaseling at Yirrkala on the Arnhem Land coast. However, it too avoids the difficult task of analyzing and evaluating norms and authorities of the two religions. Morphy also writes a brief summary of some of the syncretic religious practices in Arnhem Land, including the existence of some of the expressed doubts and anxieties associated with them. A large portion of Morphy’s text, including some long direct quotes, describes the Arnhem Land syncretism in positive terms, yet his article does not

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44. Wilbur Chaseling, Yulengor (Epworth Press, 1957).

consider the basis of the doubts of syncretism from the Christian perspective. Carrington, Chaseling and Morphy are all non-Yolngu and not Madayin adherents, yet their approach to seek syncretism or pluralism without considering the nature of authority of the systems involved demonstrate an aspect of Madayin’s essential nature, namely relativism.\(^\text{46}\)

Some versions of religious syncretism purport that the Christian God is a snake, in particular, the Rainbow Serpent of traditional Aboriginal religions.\(^\text{47}\) However, the Bible describes Satan (the enemy of Jesus and his followers), and not God, as a snake.\(^\text{48}\) The Rainbow Serpent is one of the wangarr ancestral beings in the Madayin system where it is sometimes referred to as the Great Father Snake.\(^\text{49}\) Indeed the Rainbow Serpent, known by many and varied names, is a common Dreaming being throughout much of Aboriginal Australia.\(^\text{50}\) Radcliffe-Brown writes that ‘[t]he rainbow-serpent is not confined in Australia to any particular ethnological province, but is very widespread and may very possibly be practically universal. In other words it is characteristic of

\(^{46}\) See Chapter 6.

\(^{47}\) Habel, above n 20.

\(^{48}\) Revelation 20:2.


\(^{50}\) See generally A P Elkin, *Aboriginal Men of High Degree* (1977, 2nd ed, University of Queensland Press).
Australian [Aboriginal] culture as a whole'.\textsuperscript{51} However the idea that a single ancestral being has an elevated position above all other ancestral beings is inconsistent with Aboriginal religion itself.\textsuperscript{52} The elevation of the rainbow serpent seems to be a recent development, probably at the hands of Radcliffe-Brown who wrote that the rainbow-serpent ‘as it appears in Australian belief may with some justification be described as occupying the position of deity’.\textsuperscript{53} Later adherents of Aboriginal religions, two-way theology and New Age philosophy have carried forward and developed Radcliffe-Brown’s invention.\textsuperscript{54} Anthropologist Taylor writes:

In the Australian context, and partly as a result of anthropological exposition, the image of rainbow serpent enjoys an ever widening appeal as a symbol of unity both to Aborigines in Arnhem Land, amongst urban Aborigines and, it would appear, converts to New Age philosophies.\textsuperscript{55}


\textsuperscript{53} A R Radcliffe-Brown, ‘The rainbow-serpent myth in south-east Australia’ (1930) 1(1) \textit{Oceania}, 342.


The modern rainbow serpent theology allows a ‘multiplicity of meanings... [to] be projected onto it’ producing a vagueness which is an attractive and useful symbol for the eclectic and relative New Age movement, notwithstanding its fictitious origin. Anderson has observed that:

From the early anthropological commentary on the rainbow serpent myths they are easily transformed into a New Age icon of Aboriginal spirituality. The authors of many New Age books on Aboriginal culture and spirituality pick and choose characteristics from ethnographic descriptions of various rainbow serpent myths that seemingly support their comparisons with the Kundalini, electromagnetism, Vishnu, fertility and death, vibration and energy sources and various other themes.

The ‘multiplicity of meanings’ possible in Rainbow Serpent theology fits comfortably with Madayin’s relative nature, but not with Christianity’s universal and absolute nature. Notwithstanding these inconsistencies, two-way theology has permeated many of the Aboriginal Churches, including in Arnhem Land. Therefore this section of the thesis provides a more substantial analysis and evaluation of the claims made for and against two-way theology and will evaluate those

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56 Ibid.
57 Anderson, above n 54, 297.
58 See Chapter 6.
claims according to the established sources, purposes and natures of both Christianity and traditional Aboriginal religions with a focus on Madayin.

The use of the word ‘culture’ when discussing religious syncretism or propounding two-way theology involving Christianity, can be misleading. The word culture on its own can denote normative aspects as well as non-normative aspects. When Christianity is one of the normative systems included in the syncretic discussion, care must be made to distinguish whether normative aspects of the other system are being considered. Christianity has no objection to the inclusion of non-normative aspects of a culture but refuses to accommodate normative authority that opposes Christian authority. Therefore, what is being described as culture needs to be clarified as having normative authority or not. Madayin does not object to such competing authority, rather it avoids the confrontation by simply refusing to engage in an analytical approach to reconciling concordant authority.\footnote{See discussion in 7.3.1 The ‘Adjustment Movement’.

Christianity requires its adherents to demarcate the lines of difference when normative authority is involved though where minor matters of difference exist amongst a
group of Christians they are instructed by the Bible to overlook their minor differences and focus on unity.  

Non-normative aspects of Aboriginal culture may be used in expression of Christianity but when the term ‘culture’ is used as a Trojan horse for normative authority sourced from the Aboriginal religions in a syncretic way with Christianity, the absolute claims of Christianity are compromised. For the reasons discussed above the term ‘culture’ is best avoided when discussing competing normative claims in the context of the syncretic theology that exists Arnhem Land.

Citing observations by Maddock and Trigger, anthropologist Austin-Broos notes that ‘the ‘two-laws’ language does not describe separate cultures, but rather, ones in transformative interaction with one another... whereby Aborigines define (and defend) themselves in the face of European incursions’; 61 “‘two-laws talk’ is an affirmation of ‘dignity and value’ (of Aboriginality), ‘profundely opposed to assimilation’”. 62

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60 See discussion in Chapter 9.2 ‘Facing Confrontation’.
61 Austin-Broos, above n 23, 2.
Any attempt at reconciling the wangarr with the God of the Bible (and Madayin with Christianity generally) must give consideration to the fundamental natures and purposes of each system. The primary purpose of Christianity is the advancement of the Kingdom of Heaven on the earth by seeking people (not limited to any jurisdiction) to voluntarily follow the teachings of Jesus Christ while awaiting his return to the earth and his eternal and absolute reign. Christianity is a future-orientated and universal system. The primary purpose of Madayin is continuity of an ancient past source of spiritual authority executed predominantly by the practising of a fertility philosophy and purporting to achieve an outcome termed ‘magaya’, that is a state of balance, order and peace. The Madayin purposes are self-described as only being relevant for the localised but networked jurisdiction of Arnhem Land and open to syncretism. Its orientation is towards the past with the necessary present practices re-enacting and maintaining the ancient past natures and purposes of Madayin. The fundamental natures and purposes of Madayin and Christianity are almost direct opposites. In order to maintain systemic integrity of both Madayin and Christianity, the two systems, including the wanggar of Madayin and the God of the Bible, cannot be reconciled.

See Chapter 6.
By synthesising authority in Madayin with authority in Christianity, Gondarra is following the example set by most of the non-Yolngu Christian missionaries, especially the early missionaries, that he has learned from. Bos notes that the ‘missionaries who were in positions of authority during the formative years [of the Christian mission in Galiwinku of] 1930 to 1960 had a high regard for traditional [Madayin] forms of religious expression, and encouraged the integration of traditional religion with Christianity’. 64 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. 65 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. 66

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

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64 Bos, above n 29, 274.
65 Ibid.
66 See Chapters 6 and 7.
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.

8.3 Pluralism in a broader context

It follows from the above evaluation that the inherently syncretic and eclectic nature of Madayin means that it actively engages in normative pluralism and that the nature of Australian law is also such that, when it so wills, it is also tolerant of an amount of normative pluralism. On the other hand, the absolute and universal nature of Christianity means that it rejects normative pluralism. This section of Chapter Eight places the experience of normative pluralism in Arnhem Land in a broader national and international context of normative pluralism. Theories of normative pluralism will be applied to the Arnhem Land experience. This discussion concludes that the established theories of normative pluralism are well-suited to Madayin and Australian law but ill-suited to Christianity.

Normative pluralism exists as an everyday fact of life in Arnhem Land but so too normative pluralism exists almost everywhere else in the
modern world. Tamanaha has observed that ‘the longstanding vision of a uniform and monopolistic law that governs a community is plainly obsolete... normative and legal pluralism... are not passing phenomena’. 67

Twining writes that ‘different cosmologies or belief systems coexist [and is] a social fact of considerable significance in the current context of "globalization"’. 68

According to Twining:

We all encounter normative pluralism every day of our lives. For the most part we cope with it without thinking. We treat it as a social fact. Occasionally, it throws up acute dilemmas or obstacles, but on the whole we skillfully navigate our way through and round dozens of kinds of rules as a routine form of multi-tasking. Only if someone asks: "how do you manage?" are you in danger of paralysis, like the centipede who was asked how she coordinated her legs... We can live with normative pluralism so long as we don’t ask too many questions about it. 69

This is precisely the approach that Gondarra (and other two-way proponents) take in creating two-way theology. Norms and authorities

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69 Ibid 476.
are synthesised into creatively constructed amalgams but ‘not too many questions’ are asked of the sources, purposes and natures of the component authorities. Yet the sources and purposes of each system are often at odds with those of the other. This syncretism of mutually antagonistic authorities has created ‘an uneasy intellectual truce’\textsuperscript{70} in which the claims of source and purpose of authority of each system are not critically addressed.

Present day Yolngu Christians are not sure if the relationship of their ancestors to the supernatural [wanggar] Beings could be described as “worship” or not. If they were to acknowledge that the supernatural Beings were worshipped, they would leave their forefathers open to the charge of idolatry from other Christians. They do not wish to be so negative about their own cultural heritage. They would rather speculate about ways in which the traditional Yolngu system and Christianity may be integrated.\textsuperscript{71}

Gondarra even speculates ‘that the two carved winged creatures which protect the Ark of the Covenant [in the Old Testament]... were the [Madayin wangarr] Djankawu Sisters’ of the Kunapipi myth\textsuperscript{72} This is notwithstanding that the winged creatures on the Ark of the Covenant

\textsuperscript{70} Bos, above n 29, 274.
\textsuperscript{71} Ibid 279-280.
\textsuperscript{72} Ibid 285.
are clearly described as cherubim in the Bible\textsuperscript{73} and that the Kunapipi ceremony is anathema to Christianity.\textsuperscript{74}

The lack of normative agreement between Aboriginal customary law and Australian law has been observed by Sutton who also notes some of the inconsistencies that occur when a cultural relativism approach to intersections between the two systems is taken. Sutton writes:

most Australians abhor clitoridectomy but also stand silent at the male circumcisions undergone by hundreds of [Aboriginal] boys over much of the outback [including the Northern Territory] each summer. These instances are typical of the contradictory elements one comes across repeatedly when looking at attempts to deal with the issue of indigenous customary law in Australia.\textsuperscript{75}

In pluralist contexts where the sources, purposes and natures of the normative authorities are not ignored, the conflicting norms often result in an unresolved tension. This tension brings into focus not only conflicting normative authority but also different and conflicting notions of justice. By way of example, Hofri-Winogradow has observed this tension in relation to Israel:

\textsuperscript{73} Exodus 25:17-20.
\textsuperscript{74} See Chapter 7.
The Israeli state legal system's incorporation of religious norms into the law it applies... prevents it from providing those subject to it with a just legal order; some parts of the Jewish, Muslim and other religious norms of family formation and dissolution applied by the Israeli state system offend, against fundamental human rights.76

Arguably the leading socio-legal research model of pluralistic contexts is that devised by Sally Falk Moore, namely the semi-autonomous social field.77 In the following paragraphs, Moore’s model is applied to the Arnhem Land context to determine if her model remains valid in this novel situation.

Essentially, Falk Moore proposes that the whole social structure is constructed from many semi-autonomous social fields which are defined ‘by a processual [rather than an organisational] characteristic, the fact that it can generate rules and coerce or induce compliance to them’.78 These semi-autonomous social fields are numerous and varied; directly relevant examples for present purposes include the Northern

Territory Supreme Court, Ngarra and a Church service. Other relevant examples would be a sporting club, a household and a school. The semi-autonomous social field is able to:

- generate rules and customs and symbols internally, but is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.

Falk Moore’s proposition requires that individuals are associated with more than one semi-autonomous social field; otherwise each field would be autonomous rather than a semi-autonomous and intersections would not occur. In the context of Arnhem Land it is the case that most individuals are associated, to greater and lesser degrees, with all three systems considered in this thesis. Furthermore, each system is prepared for these intersections in that they include aspects that prepare in advance the system’s response to other semi-autonomous social fields.

Australian law asserts a general sovereignty of self and rejection of other

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80 See Chapters 1 and 2.
normative systems but includes provisions for specific acceptance of other normative systems when so desired; Madayin has an open preparedness towards syncretism and eclecticism.\(^81\) Therefore, as both Australian law and Madayin accommodate other semi-autonomous social fields (albeit in a limited way by Australian law), they both demonstrate the behaviour of a semi-autonomous social field and confirm the validity of Falk Moore’s model where they exist.

However, Christianity plainly and completely rejects syncretism and eclecticism involving normative authority.\(^82\) By rejecting syncretism and eclecticism, Christianity purports to be an autonomous social field rather than a semi-autonomous social field and therefore Christianity threatens the validity of results gained from applying Falk Moore’s model to contexts involving Christianity. However it must be remembered that this conclusion is reached when a largely literal interpretation of the Bible is taken and the rejection of syncretism and eclecticism is in relation to normative authority. Christianity recognises the existence of other systems of authority; indeed Christianity recognises the valid role of secular authority: Jesus said ‘[g]ive to Caesar what is Caesar's, and to God what is God's.’\(^83\) Mediated resolutions to

\(^{81}\) See Chapters 1 and 2.
\(^{82}\) See Chapter 6.
\(^{83}\) Matthew 22:21.
disputes, even those involving normative authority conflicting with
Christianity, remain possible and are encouraged in Christianity. This is
not to say that Christian authority is prepared to compromise its
authoritative integrity and accept conflicting normative authority as a
means to accurately describe and order life and the world, rather it
simply encourages adherents to settle matters quickly by mediation
rather than let a dispute linger and potentially have it resolved by the
imposition of a decision by a third party, especially a third party that
does not recognise the norms of Christianity.84 Should an analysis of
Christianity as it is practiced in the Yolngu Churches take a
phenomenological rather than a normative authority approach, the
analysis would reveal a location-specific form of Christianity that
embraces syncretism and eclecticism behaving as a semi-autonomous
(rather than autonomous) social field and Falk Moore’s model would
be valid.

Adherents to more than one of these systems, including those forcibly
subjected to one or more systems,85 will at times be conflicted in terms
of allegiance. This is so because maintaining the integrity of one system
will, at times, compromise the integrity of another. While the conflict

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85 Australian law asserts its authority over the Yolngu people without requesting
their agreement. See Chapter 2 and 3.
occurs at the theoretical level of jurisprudence, practically, dispute resolution outcomes may be able to negotiate a compromise without compromising the integrity of each system. In Indonesia, especially in the Islamic province of Aceh (which includes sharia law as a regular source of law in the state legal system), legal practitioners (if not theorists) may ‘weave into a single argument not only appeals to three distinct bodies of legal rules - adat (customary law), shari’a, and state law - but also arguments about the relations between these norms and internal differences of interpretation within these different traditions’.\textsuperscript{86} This sounds like an ever widening chasm of potentially conflicting authority, however the practitioners tend ‘not to choose a specific norm or construct a hybrid one to apply to a fact situation, but to reason towards an acceptable, typically negotiated, resolution of the problem’.\textsuperscript{87}

It would be a bridge too far to describe such a method of resolving disputes as a strength of pluralistic contexts. The very nature of a pluralistic context continuously threatens the stability that authority in a non-pluralistic context offers. Santos argues that there is nothing ‘inherently good, progressive or emancipatory’\textsuperscript{88} gained by romanticising


\textsuperscript{87} Twining, above n 66, 495. Italics in original.

\textsuperscript{88} Boaventura de Sousa Santos, Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (Butterworths, 2nd ed, 2002) 89.
legal pluralism. Yet when a resolution to a dispute is achieved that can, at least to some extent, satisfy the disputing parties that adhere to different and normatively conflicting authority systems, it seems that an objectively good outcome has been accomplished. Such a negotiated or mediated practical resolution to specific disputes is possible, even encouraged, by Madayin,\textsuperscript{89} Christianity\textsuperscript{90} and Australian law,\textsuperscript{91} rather than dispute resolution by litigation, prosecution or arbitration, that is by having an outcome imposed upon the parties by a third party.

The data and analysis contained in this thesis suggest that the essential nature of authority of each system present in Arnhem Land are not equivalent and not reconcilable with each other, yet these systems co-exist in a complex and patchy arrangement of normative pluralism.\textsuperscript{92} The lack of a holistic integration of normative authority in Arnhem Land creates situations where individuals who adhere to more than one system (which is the vast majority of the Yolngu people) will at times compromise adherence to one system in order to adhere to another. This pluralist and ill-functioning normative arrangement in Arnhem Land


\textsuperscript{90} Matthew 5:25-26.

\textsuperscript{91} For example, Family Law Act 1975 (Cth) s 60I; Supreme Court Act (NT) s 83A.

\textsuperscript{92} See Chapter 6.
means that authority is in competition. Tamanaha’s prediction at a
global level seems equally appropriate to the local Arnhem Land level:

Existing normative systems - the people who believe in them, the people who
hold positions in them, and the interests that benefit from them - will fight to
maintain their power and positions. People and groups in social arenas with
coexisting, conflicting normative systems will, in the pursuit of their
objectives, play these competing systems against one another.93

But of course the quality and extent of pursuing the objectives of a
particular normative system, and whether that pursuit will include
playing off competing systems against one another, will depend on the
nature of authority of the particular system. Australian law asserts self-
sovereignty within its geographical borders so it would be expected that
Australian law will compete against Madayin and Christian authority for
recognition of its sovereignty. The primary source of authority in the
Australian legal system is the demos and the purpose of Australian law is
to enable the demos to rule, therefore whether Madayin and Christianity
are invited to the Australian law table in a pluralistic context will depend
upon the will of the contemporary demos. Similarly the contemporary
demos will determine whether it will play off Madayin against
Christianity. Madayin also asserts a type of sovereignty and authority

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93 Tamanaha, above n 65, 409-410.
but over the much smaller area of Arnhem Land, and only for the Yolngu people. Madayin also has a syncretic and eclectic nature such that out of all of the three systems in Arnhem Land it is the one which is, by its own nature, more willing and able to engage in compromise and pluralism rather than outright competition.

Accordingly, Madayin may, like the above example from Indonesia, tend ‘not to choose a specific norm or construct a hybrid one to apply to a fact situation, but to reason towards an acceptable, typically negotiated, resolution of the problem’\(^4\) even at the expense of compromising normative authority of at least one system. Whether Madayin would play off Christianity against Australian law would most likely depend on the specific outcome that is sought: if one system rather than the other could aid Madayin in its goals then it may predictably engage in playing off one system against the other. On the other hand, Christianity is the least able of the three systems to engage in pluralism, at least as far as it relates to normative authority. While Christianity claims and seeks universal application, it does so by people’s free will. Christianity seeks to dominate in normative authority, on a spiritual level, not on a ‘flesh and blood’, that is natural, level. As Christianity claims to be universal

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\(^4\) Twining, above n 66, 495. Italics in original.
and absolute it has neither business nor interest in playing off one
normative system against another.

Christian scripture makes a claim that neither Australian law nor
Madayin make, namely that ‘all authority comes from God, and those in
positions of authority have been placed there by God’\(^95\) and ‘God has
put all things under the authority of Christ’.\(^96\) These absolute and
universal claims involve both natural and supernatural authorities
including the Madayin wangarr, dalkarmirri and jungaya as well as the
Australian Constitutional drafters, parliamentarians and judges even if
they are unaware of such. The authorities below Jesus Christ, both
supernatural and natural, may be either obedient or disobedient (or
both at different times) to God.\(^97\) The supernatural authorities are
described in the Bible as principalities, powers and dominions\(^98\) amongst
other names and all are under the leadership of Satan,\(^99\) the head of the
dominion or kingdom of darkness,\(^100\) also known as the ‘kingdoms of
this world’\(^101\) and the enemy of Christians.\(^102\) A Christian is someone

\(^{95}\) Romans 13:1; John 19:10.
\(^{96}\) Ephesians 1:22.
\(^{97}\) Romans 13:1-7; Ephesians 3:10, 6:12; Proverbs 29:2; Clinton Morrison,
*The Powers That Be: Earthly Rulers and Demonic Powers in Romans 13:1-7*
\(^{98}\) Ephesians 1:21.
\(^{100}\) Colossians 1:13.
\(^{101}\) Luke 4:5-6.
\(^{102}\) 1 Peter 5:8.
who has been delivered from the power of Satan and has been translated into the Kingdom of God. The natural authorities, 'placed there by God', are governments (such as the Commonwealth of Australia or the Northern Territory Government). This point is well illustrated in the dialogue between Jesus Christ and his contemporary local temporal ruler, Pilate:

"Where do you come from?" he [Pilate] asked Jesus, but Jesus gave him no answer. "Do you refuse to speak to me?" Pilate said. "Don't you realize I have power either to free you or to crucify you?" Jesus answered, "You would have no power over me if it were not given to you from above."

Given that Christianity is such a globally wide-spread religion, a reconsideration of normative pluralism theories specifically as they relate to Christianity would be a worthwhile endeavour.

8.4 Chapter Summary

The intersections of Madayin and Australian law in Arnhem Land reveal the essential natures of both systems. The Constitutional definition of religion that encapsulates Madayin highlights a brake that

103 Colossians 1:13; Ephesians 2:6.
104 Romans 13:1; John 19:10.
the Constitution places upon the rule by the demos. The *ALRA* and the *Sacred Sites Act* reveal an ability of Australian legislatures to recognise Aboriginal land rights, including those that specifically relate to religion, yet do so without threatening the asserted sovereignty of Australian law. On the other hand, *Mabo (No 2)* and the *Native Title Act* arguably pose a threat to Australian sovereignty, though only in a mild form if at all. The case of *Wunungmurra* and s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) demonstrates the absolute nature of Australian law which rejects, as a rule, legal pluralism. Gaykamangu’s recount of how Madayin has been influenced by both Australian law and Christianity demonstrates Madayin’s preparedness to embrace pluralism. Consequently a mild and ad hoc form of legal pluralism exists in Arnhem Land at the intersections of Australian law and Madayin.

The basic error in religious syncretism between Christianity and Madayin is that Christianity makes universal and absolute truth claims whereas Madayin makes local and relative truth claims. Syncretism is possible, even advantageous in the Madayin system but impossible for Christianity if it is to maintain the integrity of its truth claims. Syncretism is right under Madayin but wrong under Christianity.
In conclusion, the preceding evaluation demonstrates that contemporary normative pluralism theories apply well to Madayin and Australian law but not to Christianity. The absolute and universal nature of Christianity prevents it from conforming to the pluralist theories notwithstanding the manifest actual normative pluralism of Arnhem Land, and indeed, the world.\footnote{Tamanaha, above n 65, 375.}

This chapter has evaluated the analysis of the systemic integrity of authority in various intersections of Madayin with Australian law and Madayin with Christianity. The next and final chapter in this thesis, Chapter Nine, synthesises the main conclusions of the thesis in a summarised form and provides a reflection on the appropriateness to discuss, and if need be, confront, issues of normative pluralism. Chapter Nine also considers some of the limitations of this thesis and suggests some directions for future research related to the topics of this thesis.
Chapter Nine: Conclusions
Chapter 9

Conclusion

The essential nature of each of Madayin, Australian law and Christianity, are radically different to each other. The essential nature of Madayin and Australian law enable them to engage in normative pluralism (more so for Madayin, less so for Australian law) while maintaining the authoritative integrity of each system. However, the essential nature of Christianity prevents it from engaging in pluralism with other normative systems if it is to maintain the integrity of its sources and purposes of authority.

This concluding chapter summarises the key findings of this thesis in relation to the nature of authority and normative pluralism for each system. Following on from this brief summary, consideration is then given to the issue of whether it is appropriate or not, from the perspective of each system, to confront issues of normative pluralism and discordance. Some suggestions for future research ensues followed by a succinct conclusion summarises the chapter and completes the thesis.
9.1 Overview of the analysis and evaluation

The primary aim of this thesis has been to analyse and evaluate the sources, purpose and nature of authority of Madayin, Australian law and Christianity and the interactions between them. In so doing it increases knowledge in the public domain about the existence of normative pluralism in Arnhem Land. Tamanaha considers that in order to acquire a complex understanding of these situations, one must always keep an eye on two foci: on the normative systems themselves (including the people who staff them) and how they exist and interact with one another, and on how strategic actors relate to, deal with, or respond to legally plural situations.¹

This has been the approach of this thesis. In regards to the normative systems themselves, the primary sources, purposes and natures of authority of each system have been identified, analysed and evaluated. In regards to how strategic actors relate to, deal with, or respond to legally plural situations, the approaches of key actors in relevant jurisprudence and theology have also been identified, analysed and evaluated.

Over the last thirty years a number of Australian law reform commissions and committees have conducted enquiries and written, sometimes substantial, reports on Aboriginal customary law with a particular emphasis on the questions of should and how may Aboriginal customary law be recognised by the broader Australian legal system. Yet these reports have produced a ‘deafening parliamentary silence’ in response.

Writing in response to the Australian Law Reform Commission’s *Recognition of Aboriginal Customary Laws Report*, Kenneth Maddock stated that

The terms of reference of the Law Reform Commission do not point the way to resolution of these conflicts. Logically at least they would be resolved if either the traditional or the European life style were made clearly superordinate to the other, but to take this step would require what seems to be lacking: confidence in value judgments extending to a willingness to enforce the ‘better’

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against the ‘worse’. One can only suppose that Aboriginal communities will be left wrestling with these conflicts for a considerable time.\footnote{Kenneth Maddock, ‘Aboriginal customary law’ in Peter Hanks and Bryan Keon-Cohen (eds), \textit{Aborigines and the Law: essays in memory of Elizabeth Eggleston} (George, Allen & Unwin, 1984) 213, 235.}

Rather than re-tackle the questions of ‘should’ and ‘how’, this thesis has focussed upon ‘can’, that is, can the normative system of Madayin (and Aboriginal customary law generally by extension) be reconciled with the Australian legal system, and with Christianity, upon each system’s own terms? For the aims of this thesis it is not necessary to attempt to establish one system as better as or worse than another. Rather, this thesis has included an analysis of authority from each system and then the analysis of one system is compared with that of the others in order to determine if the authorities of the different systems are compatible and reconcilable.

This thesis started by clarifying some essential contextual and conceptual matters in the first two chapters. The conceptual matters include notions of authority, law and the sacred. There is also an explanation of how this thesis was conceived, the research methodology employed, a chapter overview and a glossary of Yolngumatha words and other specialised words used in the thesis. The contextual matters focus upon an
introduction to traditional Aboriginal society (with a focus upon law and religion), a review of the literature on Aboriginal customary law that has been produced by Australian law reform bodies and the history of contact between the Madayin system with Australian law and Christianity in Arnhem Land. The combined effect of the first two chapters is to clarify the concepts and the context required to approach the analysis in the chapters that follow.

Chapter Three described and analysed the foundational, that is, the general or highest, sources of authority and purpose of Madayin, Australian law and Christianity. In terms of Australian law some key jurisprudential notions of authority in Western law generally and English law specifically were deconstructed before being followed by an analysis of authority present in the Australian and Northern Territorian legal systems. The analysis revealed that authority in Australian law is ultimately sourced from the demos, that is, the voting population. The foundational sources of authority and purpose in Madayin were analysed and evaluated with special consideration given to the highly authoritative Madayin concept of magaya and the manifestation of Madayin authority in kinship. The Kunapipi ceremony was analysed in order to uncover the philosophy of the nature and role of fertility in Madayin authority. It is this deep-seated fertility purpose, sourced from the ancestral wanggar,
that characterises the Madayin essential nature. The analysis of Christian foundational sources of authority and purpose revealed the central Christian concepts of the Kingdom of God and Jesus Christ as Saviour and Lord. The Bible is analysed to reveal the nature of authority in Christianity, especially the universality of Christian authority exercised in an, as yet, incomplete manner though which will be complete once Jesus has returned to the earth.

Having analysed the nature of authority at the foundational level in each normative system in Chapter Three, Chapter Four considered the sources and purpose of authority specific to marriage in each system. The area of marriage was selected because it is an area that is common to Madayin, Australian law and Christianity and that written sources in the public domain exist for all three systems. Following on from, and in contrast to, marriage, Chapter Five considered the sources and purpose of authority specific to sorcery. The area of sorcery is selected as an example of an area that is of very little interest to contemporary Australian law, reasonable interest to Christianity and significant interest to Madayin. Written sources also exist in the public domain for all three systems on the topic of sorcery.
Thus Chapter Three until Chapter Five includes analysis and evaluation of:

- the foundational sources and purpose of authority in each system,
- the sources and purpose of authority specific to marriage as an example of a specific area common and very significant to all three systems, and
- the sources and purpose of authority specific to sorcery as an example of a specific area that is very significant to one system, somewhat significant to one system and of little significance to one system.

In this way the thesis has developed from three angles, namely from a foundational level, from a specific level that is very common to all systems and from a specific level that is not very common to all systems. The specific areas of marriage and sorcery have been selected so that the analysis of the nature of authority at the general level can be compared to the analysis of authority of two specific (and not obviously related) areas of regulation. The comparison of analysis occurs in order to establish whether or not the nature of authority at the foundational level of each system is consistent with the nature of authority in two specific and unrelated areas of regulation. Consistency of the nature of authority across foundational and specific levels within a system strengthens the
reliability of the analysis in each instance. Accordingly, a type of triangulation is achieved which enhances the veracity of the final evaluations and conclusions.

The analysis of authority undertaken in Chapters Three, Four and Five has enabled the primary sources and functions of each of the three systems considered to be synthesised into the propositions found in Chapter Six. These propositions reveal the essential natures of each system. The propositions on the essential natures have allowed a comparative evaluation of intersections of authority between the three systems conducted in Chapter Seven.

Intersections may or may not involve authority, that is an intersection may occur when authorities of two systems interact or when authority from one system interacts with something that does not express authority but is nevertheless associated with another system. (An example would be an unmarked didgeridoo being used in a Christian context, for while a didgeridoo marked with wangarr designs is a symbol of authority in the Madayin system, an unmarked didgeridoo is simply a normatively neutral instrument that may be used for any purpose.) Interactions involving authority may produce irreconcilability while an interaction that involves non-authoritative aspects shall usually be reconcilable. Whether an
interaction is reconcilable or not will depend on the internal integrity requirements of each system.

The sources of Madayin authority are divided into two categories: the ‘outside’ or publicly knowable (‘garma’ in Yolngu matha) aspects and the ‘inside’ or secret aspects (‘dhuyu’ in Yolngu matha). Knowledge of the inside secret Madayin authority is highly restricted and costly for the seeker to obtain. This stands in contradistinction to the sources of both Australian law and Christianity, the texts of both systems being freely accessible and at no charge.

Australian law intersects with Madayin on its own terms, as demonstrated by the cases of Millirrup and Nabalco and Mabo (No 2) and the implementation of the Aboriginal Land Rights (Northern Territory) Act, the Sacred Sites Act and the Native Title Act. In Millirrup, Blackburn J found strong evidence of the existence and functionality of the Madayin system but explained that he was bound by Australian law such that he was not able to give legal recognition to Madayin’s claims. The High

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7 Ian Keen, Knowledge and Secrecy in an Aboriginal Religion: Yolngu of North-East Arnhem Land (1994, Clarendon) 287.
8 Australian public libraries are typically free and provide access to these materials including immediate online access.
9 See Chapter 7.
Court in *Mabo (No 2)*, on essentially the same point as *Millirrpum*, held that native title was recognised by Australian law. But in doing so, the Court, by its own admission, warned against a potential threat to the very doctrinal backbone of Australian property law.

The nature of Christianity is uncompromising in its attitude toward normative pluralism with Madayin (or indeed any other normative system). Christianity claims universal authority and for all time. Due to its universal and absolute claims on authority, Christianity has neither need nor interest in normative pluralism, and accordingly it rejects all forms of syncretism or eclecticism involving authority. Christianity recognises the existence and functionality of other legal and religious authorities but purports that all authority is under the authority of Jesus Christ, notwithstanding that not all of those authorities recognise Jesus as having such a pinnacle position of authority. However, this is a temporary situation that will be rectified upon the return of Jesus who will then, according to scripture, rule as universal King.11

Madayin is a highly relative and holistic authority system. Its very nature is eclectic and it exists in a network of normative pluralism with other Aboriginal customary law systems. It makes no universal claims and all of

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11 Matthew 25, 31-32.
its applications are local to Arnhem Land. Madayin is open to normative pluralism, whether legal or religious. Madayin achieves pluralism by focussing upon phenomena common to Madayin and the other systems. It does not analytically map agreement and disagreement in normative authority between Madayin and the other system. By ignoring normative authority, Madayin is able, on its own terms, to broker syncretism and eclecticism between Madayin and other systems that may not be possible should consideration be given to the conflicting claims of authority made by the two systems.

Australian law is a moving feast that changes with successive governments in a relationship with the demos. Of the three systems considered here it is the most flexible system, being changeable as the collective values of the electors change. Madayin is preoccupied with magaya (the Madayin type of peace and harmony), achieved through continuity of the authority of the ancestral wangarr beings from the past into the present and based upon fertility. However, Madayin is also relative and open to collaboration with other normative systems. While Australian law is relative but not eclectic and Madayin is both relative and eclectic, Christianity is universal, eternal and not eclectic.
Christianity purports that its sources of authority are from God and that its purposes are the realisation of the absolute, universal and eternal Kingdom of God. It is not open to sharing authority or purpose with any competing normative system. It does not impose itself upon believers or non-believers: rather it seeks believers to voluntarily follow its precepts. Australian law exists in a hierarchy. For the Commonwealth of Australia, and ultimately for the Northern Territory of Australia, the highest source of law is the Australian Constitution with the High Court of Australia the arbiter of interpretation of the Constitution. The Australian Constitution can be changed democratically. Legislation is made by parliaments constituted by representatives democratically elected according to the Constitution, thus the demos rule via parliamentary agents and legislative instruments. The source of authority that parliamentarians draw upon for their power to legislate is ultimately the demos (not the Constitution as the demos are also able to change the Constitution). The values of the demos change over time and, as the parliament draws its authority from the demos, the values of legislation also change over time.\textsuperscript{12} Australian law, even the Constitution, makes no claim to be a universal or eternal law though it does assert itself as having jurisdictional sovereignty within Australian geographical borders.

Madayin has multiple sources of authority in the wangarr ancestral beings. It is a highly localised and relative system operating its own network of local spiritual sources and existing in a wider network of Indigenous and, since colonisation, non-Indigenous normative systems. It is able, on its own terms, to be syncretic, that is, to collaborate with and absorb aspects of other normative systems. Due to Madayin’s supernatural sources of authority and holistic coverage of areas of regulation it is a type of theocracy.

According to each system’s own claims, Madayin authority is sourced from the earth, Australian law authority is sourced from the demos and Christian authority is sourced from heaven. Therefore, at the most fundamental level, the primary sources of Madayin, Australian law and Christianity are radically different and mutually exclusive to each other. The primary purposes of each of the three normative systems are also radically different and mutually exclusive to each other. The primary purpose of the Australian law is to enable the demos to rule as expressed in parliamentary legislation. The primary purpose of Madayin is to accomplish magaya, a Madayin-specific form of harmony. The primary purpose of Christianity is the advancement of the Kingdom of God.
When the essential natures of the three systems are set side by side it becomes apparent that:

1. Madayin is freely able to engage in normative pluralism with Australian law and Christianity, without breaching its own internal integrity;

2. Australian law is, in a modest way, able to engage in normative pluralism with Madayin (and Christianity), without breaching its own internal integrity; and

3. Christianity is not able to engage in normative pluralism with Madayin or (Australian law) without breaching its own internal integrity.

The primary way that this thesis contributes to knowledge is through the evaluation of the integrity of authority of each normative system concerned when one system intersects with another. This type of knowledge is not common in the Australian context and there exists no substantial work on this topic. Where this knowledge does exist it is limited for the most part to a few submissions to law reform bodies and included in their reports on Aboriginal customary law and to the odd Christian publication. The material that is produced by the law reform

13 See mainly Chapters 7 and 8.
bodies is mostly limited to analysis of the Australian law. Analysis of Aboriginal customary law in any forum is very rare, the exception being native title law. There is no established forum that is concerned with this type of knowledge in Australia. Given the more recent case law and legislative changes that require the consideration of Aboriginal customary law by courts, it is unfortunate that such a forum does not exist. This situation is exacerbated in the Northern Territory where about one third of the population is Aboriginal.

A second contribution to knowledge in this thesis is the analysis and synthesis behind the propositions on the nature of authority in each system. The material analysed and the conclusions drawn by these propositions exist in other places for Christianity and Australian law but not for Madayin and not in such a succinct form for Australian law. It is also valuable to have these propositions on the nature of authority sitting side-by-side with each other as the three systems, though variously described as legal, religious and both, can be compared and contrasted on the even keel of the nature of authority.

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14 See Chapter 7.1.
15 Ibid.
16 See Chapter 6.
The implications of the findings of this thesis are two-fold. First, Madayin, as an eclectic and relative normative system, has a type of authority that means that it can engage in normative pluralism without compromising its own nature of authority. Australian law has a type of authority that permits it to engage in normative pluralism provided that the demos agree to such. The combination of these two types of authority mean that Australian law can collaborate with Madayin in the instances that Australian law is agreeable. In the light of the many and varied socio-legal issues that Australian Aboriginal people contend with, it seems remiss of Australian law makers not to explore collaborative arrangements, that is legal pluralism, of Australian law with Madayin (and other Aboriginal legal systems) in order to attempt to address these issues. Second, though Madayin is agreeable to normative pluralism, Christianity is absolutely disagreeable to such an arrangement. This finding has serious implications for the ‘two-way’ theology and practices that occur in many Arnhem Land churches (and other churches in Aboriginal contexts). ‘Two-way’ is, simply, inconsistent with Christianity.

9.2 Facing Confrontation

Confrontation is common in Australian law as evidenced by the adversarial court system and parliamentary debates. Confrontation is
avoided if possible in Madayin by ignoring the conflicting claims and assertions made by different normative systems even while engaging in normative pluralism. Therefore, in both Madayin and Australian law, the issue of confrontation is not a live one even though each system has a polemic approach to the other. On the other hand, Christianity advocates both confrontation and non-confrontation depending upon the circumstances.

The rejection of normative pluralism by Christianity means that of those who adhere or are subjected to Madayin, Australian law or Christianity, Christians will potentially face more instances of normative confrontation when authorities from different normative systems intersect than will non-Christians. Two-way (whether theology or jurisprudence) has a simple logic that is attractive, namely, the reconciling of different normative systems so as to avoid the usually uncomfortable task of confrontation. To not pursue an argument seems preferable for social cohesion compared to exposing potentially unresolvable differences and pursuing an argument followed by the task of deciding which side of the difference one takes.

The Bible teaches not to pursue an argument where the context is a group of believers who, notwithstanding that they all share the same general
faith in Jesus as their Saviour, continue to have varying beliefs in minor matters such as whether they should refrain from eating meat or drinking wine.\textsuperscript{17} In such a context, Christians are instructed by scripture to avoid arguments over such things and to keep personal opinions between themselves and God.\textsuperscript{18} A practical example arises in the Bible when new Christians not from a Jewish background (Gentiles) are attempting to reconcile their previous way of life with their new Christian faith.\textsuperscript{19} In such a situation, the Apostle James is recorded as stating to his fellow Christian leaders:

\begin{quote}
It is my judgment, therefore, that we should not make it difficult for the Gentiles who are turning to God. Instead we should write to them, telling them to abstain from food polluted by idols, from sexual immorality, from the meat of strangled animals and from blood.\textsuperscript{20}
\end{quote}

The group of Christian leaders agreed and accordingly they collectively instructed the new Christians with James’ judgment.\textsuperscript{21}

The key to avoiding arguments over minor matters as described by James above is that the Gentiles should not be unduly troubled in their new

\begin{footnotes}
\item[17] Romans 14.
\item[18] Romans 14:22. The whole of Romans 14 is on point.
\item[19] Acts 15.
\end{footnotes}
faith. The matters of food and drink are not normative of themselves from a Christian perspective, and therefore they should not form the basis of an argument involving Christians. However this does not provide license to create heretical theologies. The whole issue above arises because the Gentiles ‘are turning to God’. The presumption in this context is that the Gentiles have believed that the Jesus of the Gospels is truly God and with that essential belief established, arguments over trivial things are so insignificant that they are best avoided.

The scriptures in Romans 14 make it clear that minor arguments over faith are to be avoided by Christians, and that personal weaknesses and strengths in Christian faith should remain private matters. Since these personal opinions should remain private it would be wrong, from a Christian perspective, to teach other Christians those opinions as items of dogma or theology. Indeed the Bible instructs Christians to avoid people, even other purported Christians, who teach a doctrine counter to the Apostles’ teachings and who cause divisions in the Church and upset the faith of other Christians. A Christian leader ought to advise such teachers ‘not to teach false doctrines any longer nor to devote themselves to myths... These promote controversies rather than God's work’. Hence

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22 Acts 15:19.
23 Romans 16:17.
24 1 Timothy 1:3-4.
the warning in the book of James: ‘not many of you should presume to be teachers, my brothers, because you know that we who teach will be judged more strictly’.  

One aspect relevant to the present discussion that should not be confused is the scriptural assignment of Christians to be agents of reconciliation.  

It is essential to understand that the reconciliation written of in the scriptures is not a patch work of reconciliation of Christianity with other normative systems forming a collection of relative and ‘lowest common denominator’ reconciliations but reconciliation between God and humans through Jesus Christ:

God, who reconciled us to himself through Christ... gave us the ministry of reconciliation... [which is]... that God was reconciling the world to himself in Christ, not counting men's sins against them. And he has committed to us the message of reconciliation.  

Therefore, a Christian is to avoid arguments over minor matters with other Christians. However when the differences relate to a major matter, Christians are instructed by scripture to ‘draw a line in the sand’ and stand firmly on the Christian side in contradistinction to any non-

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26 2 Corinthians 5:18-19.  
27 Ibid.
Christian alternative. This distinguishing of one’s self from non-Christian alternatives should occur whether the opposing ideology comes from a purported Christian or a non-Christian but it must be done in love, not argumentatively just for argument’s sake or with condemnation.

Thus the question for present purposes is: is two-way theology a minor or major matter of contention? The Bible (as outlined above) defines major matters to involve normative authority contrary to Christianity and minor matters to not involve normative authority contrary to Christianity. As two-way theology does involve normative authority contrary to Christianity the issue of two-way theology is one which Christians should confront.

### 9.3 Further Research Directions

While normative pluralism is not a possibility with integrity for Christianity, future research could investigate particular subject areas with a view to discovering what, if any, specific areas of Madayin authority are not normative and therefore may be acceptable to Christianity. Similarly,
future research could be undertaken in order to discover what, if any, specific areas of Madayin authority are reconcilable with Australian law. As this research has not yet been undertaken it is impossible to say what those areas might be; however, one such subject area may be dispute resolution by mediation as mediation is an approved form of dispute resolution in Madayin, Christianity and Australian law. Disputes between individuals who adhere to more than one system may practically be able to be resolved by means of mediation that does not compromise normative authority. Accordingly, research into mediation of disputes involving intersections of Madayin, Christianity and Australian law would be worthwhile future research that could build upon the knowledge generated in this thesis.

The nature of authority of the three systems as described in this thesis potentially reveals aspects about notions of justice, peculiar and common, to each system. Further research in this area could also build upon the work here and potentially inform justice issues in each system and particularly justice issues that involve intersections of authority from the three normative systems.

This thesis has analysed primary sources and purpose of the three systems in order to develop succinct and generally applicable thesis propositions
which reveal the general and essential nature of Madayin, Christianity and Australian law. This foundational approach has been augmented by including two specific subject areas, marriage and sorcery, in order to widen the sample size that the analysis and evaluation draws upon. Future research that included other relevant subject areas would enable more rigorous testing and refining of the propositions to occur. The limits of geography imposed upon this thesis were necessitated by having a focus upon the Madayin system of Arnhem Land. Widening the research approach of this thesis to include other systems of Aboriginal customary law in other parts of Australia would also enable more rigorous testing and refining of the propositions to occur. Similar research in other countries would enable a more comparative approach to be developed which may, in turn, be able to offer additional insights into normative pluralism theory. Given the anti-pluralism stance of Christianity and its world-wide distribution, it would be appropriate to review contemporary normative pluralism theories with a view to enabling them to accommodate the Christian position. Such an endeavour will require a particular approach or interpretation of the Bible to be determined, otherwise an innumerable number of interpretive approaches would render the task unmanageable. Consistent with the approach taken in this thesis, a literal approach would be best suited to formulate the base-line
knowledge. Individuals who require a particular approach to interpretation will need to apply their interpretive lenses as required.

### 9.4 Concluding Remarks

The nature of Madayin is such that, on its own terms, it is able to engage in normative pluralism with both Australian law and with Christianity. On the other hand, the nature of Christianity is such that, on its own terms, it is not able to engage in normative pluralism with either Madayin or Australian law. The nature of Australian law is such that it is able to engage in mild forms of normative pluralism with both Madayin and Christianity depending upon the will of the contemporary demos. These differing natures of authority are brought into focus when authority in one system intersects with authority from another.

Interactions between authority of Madayin, Australian law and Christianity demonstrate that normative pluralism, both legal and religious, exist in Arnhem Land. Christianity does not tolerate normative pluralism, nevertheless the Christian churches in Arnhem Land have engaged in a large project of synthesis of Madayin with Christianity. This synthesis was begun by non-Yolngu Church leaders and continued by Yolngu church leaders. This condition is faithful to the Madayin way but
not to Christianity. Meanwhile, Australian law has a modest capability to engage in normative pluralism and the interactions between Australian law and Madayin that have led to a form of mild legal pluralism in Arnhem Land have been at the discretion of Australian law.

This thesis has analysed authority in the normative pluralist context of Arnhem Land and has found that the primary sources, purposes and natures of authority in each of the existing systems clash. As the essential nature of each of the three systems is radically different to the nature of each of the other systems, philosophically and practically, to adhere to Madayin will, at times, result in a breach of an aspect of one or both of the other systems. Therefore, the conflicts of authority produce situations in which individual Yolngu will at times necessarily compromise the integrity of their adherence to one system in order to adhere to another. Tamanaha suggests that ‘[s]ometimes these clashes can be reconciled. Sometimes they can be ignored. Sometimes they operate in a complementary fashion. But very often they will remain in conflict, with serious social and political ramifications’.31

This thesis concludes that while the nature of Madayin and Australian law enable those systems to engage in normative pluralism, the nature of

Christianity prevents it from engaging in pluralism with other normative systems. This conclusion is reached by evaluating the essential natures of each system based upon an analysis of the primary sources and purpose of authority in each system. While normative pluralism is not an option for Christianity, pluralism is an option for Australian law.

Given the persistent calls by Madayin leaders for the recognition of Madayin by Australian law and the lingering injustices that occur in the lives of Yolngu (and other Aboriginal people), a serious effort at rapprochement between Madayin and Australian law ought to be attempted that does not compromise the norms of Australian law. This rapprochement would stand a greater chance of success if it focussed on local and practical justice issues rather than systemic and philosophical matters, on issues of lesser rather than greater seriousness, and took a mediation-based approach to dispute resolution rather than prosecution and litigation.
Bibliography

A Articles


Falk Moore, Sally, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 Law & Society Review, 720


Kriewaldt, Martin, ‘The application of the criminal law to the Aborigines of the Northern Territory of Australia’ (1960) University of Western Australia Law Review 5


Magowan, Fiona, 'It is God who Speaks in the Thunder . . .”: Mediating Ontologies of Faith and Fear in Aboriginal Christianity', The Journal of Religious History 27(3) 293


Morphy, Howard, ‘From dull to brilliant: the aesthetics of spiritual power among the Yolngu’ (1989) 24 Man 21

Morphy, Howard, ‘Mutual Conversion?: The Methodist Church and the Yolngu, with particular reference to Yirrkala’ (2005) 12(1) Humanities Research 41


O'Sullivan, Dominic, 'Pope John Paul II and Reconciliation as Mission’ in *Pacifica* 19 (October 2006) 265

Paulson, Graham, 'Towards an Aboriginal Theology' *Pacifica* 19 (October 2006) 310

Pyke, Elizabeth and Anne Elvey, 'Contributors’ in 'Towards an Aboriginal Theology' *Pacifica* 19 (October 2006) 310

Radcliffe-Brown, A R, ‘The rainbow-serpent myth in south-east Australia’ (1930) 1(1) *Oceania*, 342


Special Issue: Law and Religion in Australia: Contemporary Scholarship’ (2009) 30 1 *Adelaide Law Review* 1


B Books

Alchourron, Carlos and Eugenio Bulygin, Normative Systems (Springer, 1971)


Berkhof, Louis, Systematic Theology (Banner of Truth Trust, 1949)


Berndt, Ronald, ‘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)

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

Berndt, Ronald, Djanggawul: An Aboriginal Religious Cult of North-Eastern Arnhem Land (Philosophical Library, 1953)

Berthon, Peter, Marjorie Hall, William Hall, John Harris, Andrew Robertson and Carol Robertson (Eds) *We are Aboriginal: Our 100 years: from Arnhem Land’s first Mission to Ngukurr today* (CMS Acorn, 2008)

Blacket, John, *Fire in the Outback* (Albatross, 1997)


Brennan, Frank, ‘Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples Their Due’ in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005)


Chaseling, Wilbur, *Yulengor* (Epworth Press, 1957)

Cole, Keith, *The Aborigines of Arnhem Land* (Rigby, 1979)


Dodd, C H, *The Authority of the Bible* (Fontana, 2nd ed, 1960)


Eliade, Mircea, *Patterns in Comparative Religion* (Sheed and Ward, 1958)


F W Worsley, ‘Idolatry’ in J Hastings (ed) *Dictionary of the Apostolic Church, Volume I*, (Clark, undated, circa 1950)

Freeman, M D A, *Lloyd’s Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001)


Gondarra, Djiniyini, ‘The Land is My Mother...’, in I R Yule (ed) *My Mother the Land* (Galiwinku Christian Action Group, 1980)

Gondarra, Djiniyini, *Father, you gave us the Dreaming* (Uniting Church in Australia, 1988)


Hinnells, John (ed), *A Handbook of Living Religions* (Pelican, 1985)


Munn, N, ‘The transformation of subjects into objects in Walbiri and Pitjantjatjara myth’ in *Australian Aboriginal anthropology* R.M. Berndt (ed), (University of Western Australia Press, 1970)


Patricia Grimshaw, Marilyn Lake, Ann McGrath, and Marian Quartly, *Creating a Nation* (McPhee Gribble, 1994)


Reid, Janice, *Sorcerers and Healing Spirits: continuity and change in an Aboriginal medical system* (ANU Press, 1983)
Roberts, Silas (Ngulatji), cited in Peter Berthon, Marjorie Hall, William Hall, John Harris, Andrew Robertson and Carol Robertson (Eds) *We are Aboriginal: Our 100 years: from Arnhem Land’s first Mission to Ngukurr today* (CMS Acorn 2008)


Seiffert, Murray, *Gumbuli of Ngukurr: Aboriginal Elder in Arnhem Land* (Acorn, 2011)

Snaith, Norman, *The Inspiration and Authority of the Bible* (Epworth, 1956)


Stephenson, Carl and Frederick George Marcham, *Sources of English Constitutional History* (Harper & Row, 1937)

Swain, Tony *A Place for Strangers: Towards a History of Australian Aboriginal Being* (Cambridge University Press, 1993)


Watson, Helen and D W Chambers, *Singing the Land, Signing the Land* (Deakin, 1989)

Williams, Nancy, *Two Laws: managing disputes in a contemporary Aboriginal community* (Australian Institute of Aboriginal Studies, 1987)


C Reports


D Cases

*Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116

*Al-Kateb v Godwin* (2004) 219 CLR 562

*Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529

*Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469

*Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603

*Brotherhood of Locomotive Firemen and Enginemen v Hogan* (1934) 5 Fed Supp 598

*Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120

*Commonwealth v Yarmirr* (2001) 208 CLR 1

*Cormick and Cormick v Salmon* (1984) 156 CLR 170

*Fejo v Northern Territory* (1998) 195 CLR 96

*Fisher v Fisher* (1986) 161 CLR 376

*Gottliffe v Edelston* (1930) 2 KB 378, 383-387

*Hugh Lawton Bartlett v Ada Pearl Bartlett* (1933) 50 CLR 3

*Inquest into the death of Danny Gumana* (Unreported, Northern Territory Coroner’s Court, Celia Kemp, Deputy Coroner, Monday 28 September 2009)

*Kevin and Jennifer* [2003] FamCA 94

*Koowarta v Bjelke-Peterson* (1982) 153 CLR 168

*Lipohar v The Queen* (1999) 200 CLR 485
Lodder v Lodder [1921] NZLR 876

Mabo v Queensland (No 2) (1992) 175 CLR 1

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24

Pearlow v Pearlow (1953) 90 CLR 70

R v Glennan (1970) 91 WN (NSW) 609


R v Kidman (1915) 20 CLR 425


R v Wilkes and Briant [1965] VR 475

R v Wunungmurra (2009) 231 FLR 180

R v Wunungmurra [2009] Sentencing remarks, 14 August 2009, SC 20824528

Re Cook & Maxwell; Ex parte C (1985) 156 CLR 249

Re F; Ex parte F (1986) 161 CLR 376, 389

Re K (1963) 5 FLR 38

Re Kevin (Validity of Marriage of Transsexual) (No 2) [2003] FamCA 94

Re S G (1968) 11 FLR 326
Re Wakim; Ex parte McNally (1999) 198 CLR 511

Rodway v The Queen (1990) 169 CLR 515

Stuart v Cooper (1889) 14 App. Cas. 286

The Queen v L (1991) 174 CLR 379

Wake and Gondarra v Northern Territory of Australia and the Administrator of the Northern Territory (1996) 109 NTR 1

Walker v New South Wales (1994) 182 CLR 45

Western Australia v Ward (2002) 213 CLR 1

Wik Peoples v Queensland (1996) 187 CLR 1

E Legislation

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Act Abolishing Arbitrary Courts 1641, 16 Charles I

Act of Settlement 1701, 12 and 13 William III

Acts Interpretation Act 1901 (Cth)

Australian Constitution

Australian Courts Act 1828 (Imp) (9 Geo IV c 83)

Births, Deaths and Marriages Registration Act 1995 (NSW)

Care and Protection of Children Act (NT)

Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict

Criminal Code Act (NT)

Criminal Code Act 1995 (Cth)
Euthanasia Laws Act 1997 (Cth)

Evidence (National Uniform Legislation) Act (Cth)

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth)

Marriage Act 1961 (Cth)

Marriage Amendment Act 2004 (Cth)

Matrimonial Causes Act 1959 (Cth)

Matrimonial Causes Act 1973 (Eng)

Native Title Act 1993 (Cth)

Native Title Amendment Act 1998 (Cth)

Northern Territory (Self-Government) Act 1978 (Cth)

Northern Territory Aboriginal Sacred Sites Act (NT)

Northern Territory Acceptance Act 1910 (Cth)

Northern Territory National Emergency Response Act (Cth)

Northern Territory Supreme Court Act 1961 (Cth)

Parliament Act 1911, 1 and 2 Geo 5

Sex Discrimination Amendment Act 1991 (Cth)

Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth)

Supreme Court Act 1979 (NT)

Supreme Court Ordinance 1911 (Cth) No. 9 of 1911

Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005 (Vic)
F Other

‘Witch ban repealed’, The Age (online), July 21, 2005


About the Uniting Church (12 April 2011) The Uniting Church in Australia <http://www.uca.org.au/about.htm>


*Catechism of the Catholic Church*

*Code of Canon Law*


*Commonwealth of Australia Gazette* (14 April 1931) 643


Edmiston, John, *A Quick Primer on Spiritual Warfare* (10 May 2011)

New Testament Prayer

<http://www.newtestamentprayer.org/ebooks/spirwarfare.htm>


F S Wright, ‘Church rejects native beliefs’ in *The Cairns Post* (9 September 1998)
Gandangu, Nyomba and Djalangi Garawirrtja, Marthakal Makarr Dhuni
Media Release, 2 April 2013

Gaymarani, George Pascoe and James Gurrwanngu Gaykamangu, ‘An
Introduction to the Ngarra Law of Arnhem Land’ (continuing professional
development presentation presented for the Law Society at William
Forster Chambers, Darwin, Australia, 15 August 2011)

Gondarra, Djiniyini & 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 Feb 2011)

Gondarra, Djiniyini, 'Customary Law', Ngaarra Legal Forum: Session 7 -
Options for reducing arrest and imprisonment rates, Garma Festival 2001,
Friday August 24

Gough Whitlam, It’s time for leadership, Policy speech for the Australian
Labor Party, 13 November 1972

Harris, Marty, The origins of Australia’s uranium export policy (2
December 2011) Parliament of Australia

Kadiba, John, The Methodist Mission and the Emerging Aboriginal
University, 1998)

Kirby, Michael, ‘Religion and Sexuality: Uncomfortable Bed Fellows’
(Speech delivered at the 42nd Reverend Dr Barry Marshall Memorial
Lecture, Trinity College, University of Melbourne, 22 August 2012)

Magna Carta of 1215 (30 December 2013) The Constitution Society
<http://www.constitution.org/eng/magnacar.htm>

Project

Martin, Brian, ‘Customary Law – Northern Territory’ (Paper presented at
the Eleventh Colloquium of the Judicial Conference of Australia Inc,
Darling Harbour Sydney, 5 to 7 October 2007)

Melngur Gapu Dhularrpa Gawiya: Raypirri Ngarrangur Romgurr
Magayakurr (Law and Punishment of Ngarra), (Information Paper
authored by the Yolngu clans of Ngaymil Gampurrtji, Ngaymil Bulkmana, Ngaymil Datiwuy and Ngaymil Gondarra, Galiwinku, Arnhem Land, 3 September 2005)

Miller, Norman, ‘Sensitivity is understood’ The Cairns Post (12 September 1998)

Museum of Australian Democracy and National Archives of Australia, Yirrkala bark petitions 1963 (Cth), Documenting a Democracy

Museum of Australian Democracy and National Archives of Australia, Commonwealth of Australia Constitution Act Amendment to Section 51, Documenting a Democracy

Northern Land Council, What we do, Northern Land Council


Paul VI, “Speech to Indigenous Australians” (Sydney, 1970)

The Second Vatican Council, Lumen Gentium (1964) Vatican

United Nations Declaration on the Rights of Indigenous People

Vatican, Dogmatic Constitution on Divine Revelation – Dei Verbum (18 November 1965) Documents of the Vatican II Council