A reflection on Indigenous Leadership and Customary Governance

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Abstract
It is widely accepted that pre-contact Indigenous societies in Australia did not have instituted leadership. There were no kings, queens, chiefs or other formal leadership titles. Yet pre-contact societies did exist, these societies were fully functional in every respect and indeed developed a level of social sophistication and resource management unrivalled by today’s standards. It appears that Indigenous Australians developed a system of governance that did not require institutional leaders. It is also widely accepted that the years since contact has seen a massive decline in the ability of Indigenous Australian societies to articulate a system of governance to counteract the intrusive effects of colonisation. This is immediately apparent when one measures Indigenous Australia against indicators used for “Developed” Australia. In this discussion I would like to reflect on remnant pre-contact governance structures and offer a suggestion to Indigenous leaders to think and act beyond the confines of our colonial experience. I want Indigenous leaders to seek inspiration in their pre-contact past and to map out a future for their communities in a Globalised world not a parochial localised world.


Hello. To the bosses of this land, the Larrakia traditional owners, I am happy to be sitting on your land. To you others gathered here today to listen to me. Gathered to hear my story. I am very happy to see you.

My name is Kado Muir. My skin group is Tjarurru and I am a Ngalia man. I come from the sandhills in the west.

Introduction
I live in two worlds. I am an Australian citizen and two, I am a wati. As a wati I have roles and responsibilities within my society, I follow the law and perform the obligations expected of a wati. These roles, rights, responsibilities and obligations have no standing in my position as a citizen of Australia yet I like many other Aboriginal people cannot remove myself from my situation. These customary obligations are intrinsic to my identity, to who I am.

What are these customary obligations? How do these obligations operate in this modern democratic society? Is there a place for Aboriginal custom in these modern times?
The intention of this paper is to offer some comment on the governance discourse from a customary perspective. I have been on the fringe of the governance debate, yet what I see concerns me. The first thing I think everyone agrees to is that a state of chaos has erupted in Aboriginal society. Social, cultural and economic indicators situate Aboriginal people at the very base of the ladder of opportunity. Everyone agrees that existing models of governance have failed Aboriginal people and have failed the good intent of other Australians. I don’t believe there is a single person in Australia, be it Pauline Hanson, John Howard or anyone in this room who want to see Aboriginal people remain marginalised from opportunity. Everyone wants to fix it. Yet everyone has a different view on how to fix it. What sets my contribution apart from others is that will not claim to have a solution. What I claim to have is a contribution, a set of ideas to put into the discourse, which I hope, will assist in formulating a bipartisan commitment to create an opportunity for Aboriginal people to be informed in their decisions for change. The ideas I present arise from a mixture of my knowledge of customary law, my experience as an anthropologist and my position as a member of an Aboriginal community.

This paper starts with the assumption that existing models of governance have failed. It suggests that existing models of governance are a reflection of socio-political power imbalances arising from the colonial experience. Attempts to institute governance in Aboriginal communities have been based on applying Western concepts and ideology without reference to Aboriginal conceptions and ideology. It argues that the solution will not be found in constructing models based on political agendas but rather based on communication, dialogue and facilitation of Aboriginal communities and their leaders to reach a common position inspired by Aboriginal custom, resourced and
supported by other Australians. The solution does not reside in one ideological camp or another; the solution resides in a cooperative initiative based on respect, integrity and a commitment for change.

**Governance: A Divine Authority**
The Queen of England is our sovereign. Australians owe our right to peace, freedom and security to the divine will of the Queen. In turn the Queen owes her divine authority to God. All the institutions in Australia ranging from governance structures, legal institutions and educational institutions through to Aboriginal Land Rights exist at the will of her majesty.

It is well known now that Australia was settled under a legal fiction known as terra nullius. Terra Nullius arose from observations made by Joseph Banks that because there were no farms, domesticated animals or towns then Australia must be a land empty of people. He reported back to the British parliament that there were people living in Australia but they were living exclusively off the coast and the remainder of the land was indeed terra nullius. The net effect of this was that the settlement of Australia was based on the premise that there were no people inhabiting the land and therefore the English legal system could be transplanted directly into the colony.

In the period immediately following settlement observations began to surface that there were far greater numbers of Aboriginal people inhabiting the land than officially assumed, indeed some observed that people were also living inland as can be evidenced from their smoke and what they could learn from neighbouring tribesmen. The legal basis of settlement, terra nullius or empty land was in jeopardy.
However there was a way out. It was clear from the outset that the British settlers could not fathom the social, political and legal constitution of Aboriginal society. Aboriginal people had no visible hierarchy or leadership, they did not farm the land, they did not domesticate animals nor did they live in permanent dwellings. Put simply Aboriginal society did not demonstrate a level of sophistication to warrant the status of a society governed by a system of laws.

In the face of evidence to the contrary the concept of terra nullius was recast as not simply a legal fiction that the land is empty, but rather a legal fiction that yes people did inhabit Australia but these people are so low in the scale of social evolution that they did not govern themselves with a system of laws. The concept of terra nullius became one where it was assumed that Australia was empty not of people but empty of a sovereign and a system of laws to govern the society.

This modified version of terra nullius became the official legal doctrine in Australia for 205 years. It held unchallenged supremacy until 1972 when a Supreme Court Judge Justice Blackburn in his decision on the Nabalco case, declared that Aboriginal (Yolngu) society were regulated by a system of laws. The first crack had appeared. Terra nullius was finally discarded in the Mabo decision 1992, where the Justices said that the common law could not remain rooted in the past. Mabo dealt a deathblow to terra nullius, however I believe it replaced terra nullius with another legal fiction, that new legal fiction is native title.

In summary Mabo found Aboriginal and Torres Strait Islanders enjoyed rights and interests in their land sourced from their traditions, laws and customs that have been
recognised as native title. Goodbye terra nullius. However don’t ask where the authority for those traditions, laws and customs come from because you are then treading on the issue of sovereignty. It is easier to just accept that a pre-common law system of laws exists and these traditions, laws and customs have conveniently appeared in the Australian common law, I would argue as a new legal fiction. There is no basis to recognising the authority from whence native title arises. There were no treaties, no conquest as the result of a declared war and importantly the land was not empty so how did the sovereign or Queen’s authority enter Australia? That is another paper in itself.

The common law and statutory legal system has finally evolved to find that rights and interests exist in land, yet it does not want to engage with the source or authority of those rights and interests. On a fundamental level the refusal of the Sovereign in Australia to address its assertion of sovereignty leaves a question mark over the relationship with Aboriginal and Torres Strait Islander peoples. Some would argue this issue has been dealt with in the numerous Court decisions on sovereignty (Coe vs Commonwealth) telling Aboriginal claimants that you can’t challenge the right of the sovereign, but that is only like a bodyguard saying you can’t come near my master. At the end of the day there needs to be a conclusion to the debate in Australia. There needs to be a Treaty or series of Treaties between Indigenous Australians and the Sovereign of Australia, be that the Crown or in the unlikely event we become a republic, the people.

**Aboriginal Authority and Customary Governance**

Aboriginal Customary governance does not owe its authority to the Queen. The official legal response to Indigenous customary governance is that it does not exist.
This is despite the fact that Indigenous Australians have been living subject to those laws from time immemorial well into the present, and continue to do so today.

In my peoples Tjukurrpa (Dreaming) stories we are told how the laws that govern our society came into being. Laws, which we follow and observe today, were introduced to us by the ancestral dreaming beings, these Laws or systems of customary governance regulate all aspects of our lives from declaring land as no-go avoidance (mayaka) areas through to determining social relationships through to identifying the sanctions for breaking the law. Tjukurrpa establishes a divine authority for the laws that regulate our society.

Tjukurrpa (dreaming) is the process of creation. Aboriginal communities throughout Australia all have a similar series of events known by different terms that articulate creation. In the Dreaming, there were no moral, physical or social laws. Life was chaos. The people were spirit beings they shifted between human and animal form, the earth was soft and there were no laws regarding incest, murder, cannibalism or any number of other offences. At some point in this murky period some of the beings took into upon themselves to bring order to this chaos and in so doing they moved across the landscape introducing laws for the good governance of all. A secondary series of events showed how once the laws were introduced some dreaming beings broke the law, their punishment serve as the legal precedent for those breaking laws today.

One institution in my society is Nyamirri, or skin groups. Skin groups are one of the fundamental social organising principles in many Aboriginal communities. It serves a
similar function as a surname, it acts as a social passport by determining one's social relationships with anyone and everyone who also has a skin name and importantly for small scale societies like traditional Aboriginal societies it serves as a system to prevent genetic disorders through close kin relationships. A person possessing a skin name can immediately slot into the complex social world of Aboriginal people and determine one's relationship simply by telling someone their skin name. Sometimes the skin system operating in one community may be different to that in another community, but there is always someone around who can translate a skin name into the local terminology.

In the dreaming one man, Wati Kalaya, the Emu man introduced the laws we now know as Nyamirri or skin groups. Wati Kalaya travelled into our country from the north. When he started out he was very enthusiastic and energetic. He would meet tribes of people who were living in chaos, practicing incest and not knowing it was wrong. He would sit down with these people and he would form them into groups, asking one group to line up here, another group to line up there and so on. As each group settled down he would then tell them their skin names, once he told them their skin names he would then explain how each group must relate to the other groups. Group A, Tjarurru, can only marry into group B, Panaka, their children, depending on the gender of their parents will be either be group C Karimarra or group B, Purungu. And so he would continue.

Our story tells us that at the beginning of his journey Wati Kalaya was full of energy and introduced very long complex skin systems, but as he travelled further south he started to tire. When he entered into my country he gave my people, the Ngalia, six skins, and as he visited our neighbours he was even more tired, his legs were tired and
he was exhausted so he only gave them four skin groups. Eventually when he left our region he went to our south western neighbours, by that time he was so tired all he could utter was one word, so all the people in the west are known to only have one skin, they are all Karimarra!

The dreaming story for the introduction of skin groups tells us that, in the beginning people were living in a state of social and moral chaos. Then one man took it upon himself to lead the way out of this chaos by introducing a new law, a system of social governance to bring order to this chaos. This man travelled great distances teaching and demonstrating the efficacy of his system. The people he visited were so impressed with his system that they retain it even into the present day. A secondary lesson in this story is that one man, cannot change the world by him self, even dreaming characters must rest.

This story is only one of many such stories recounted from the dreaming. The stories give us a divine authority for our laws, some stories give us legal precedents for our laws and it often the stories set out the penalties one can expect if one breaks any of these laws. To the wider world these stories are seen as simply fairy tales, sometimes presented in cartoon form, with little or no understanding as to the significance. This is often the case because the real knowledge is guarded under gender and age based restrictions, only suitably qualified people can gain access to the higher knowledge. These restrictions on access to knowledge coupled with a determined arrogance from non-Aboriginal Australia to remain ignorant does not augur well for an informed understanding of Aboriginal laws and customs regulating Aboriginal society.
**Operation of Customary Governance: A Legal response?**

There are many forms of customary governance operating in Aboriginal communities. One expression of customary governance is the operation of customary Law. How does the Australian legal system respond to it? In a situation where there is no legal authority for customary law and no understanding that it forms a part of a system of customary governance we have a bizarre set of circumstances in States like Western Australia and the Northern Territory.

The operation of Customary governance in Aboriginal communities causes consternation among authorities, especially in the criminal justice sector. In Western Australia a magistrate working in Broome attempted to incorporate customary law into his sentences so that the punishment fit the crime. The enactment of the Aboriginal Councils and Associations Act was based on a review (Fox Inquiry), which called for the establishment of a special corporation to take into consideration models of customary governance. The Australian Law Reform Commission completed a twenty-year multi volume review into customary law. In the Northern Territory much work was put into recognising customary law in the constitution of the State of the Northern Territory and more recently the Western Australian Law Reform Commission is undertaking a review into how customary law may be incorporated into the Western Australian legal system.

In addition to these reviews and reports the criminal justice legal system has had to deal with the operation of Indigenous customary law. There are many court cases that required special consideration of issues pertaining to customary law. The police in Western Australia and I imagine the Northern Territory have long understood how customary law may influence their treatment of Aboriginal offenders in their custody.
It was common practice in Wiluna for instance for Police to take offenders accused of murder out to the old reserve for tribal spearing before putting them in custody.

In instances where Aboriginal people are punished for their crimes under customary law, you get those same persons punished for their crimes under criminal law; the question arises as to whether these persons have experienced double jeopardy. In other instances as Magistrate Sydell observed in Broome in the 1970’s, the purpose of imprisonment was to ensure the punishment fit the crime, if persons were not concerned about doing time then clearly they were not receiving punishment. There are probably many cases of governance issues in criminal law, but what of other areas of governance.

In some desert communities in Western Australia I have observed two patterns of governance emerge. One, a community often appoints an “outsider”, i.e. someone married in to the community or someone whose family lives elsewhere as their chairman. This is to ensure the chairman is seen as a neutral party. Two, in other circumstances I have seen chairmen take responsibility and punishment under customary law for offences committed by members of their community. In other words the chairman took the spear in the leg!

Customary governance operates in the access to, allocation of and utilisation of resources. In pre-contact times and even into the present one cannot simply walk in to a place and start taking the resources. A humorous modern day example is the ownership of the wrecked car bodies out there. If I needed parts for my car and I know there is a particular car body with that part in it, I cannot go and simply take it, I
must first ascertain who the owner of that car body is and ask permission. If he says okay or asks for payment only then can I take the part. The fact that whole communities survive on welfare payments is another example of the operation of customary governance over economics. We have a concept in my part of the desert known as Ngapatjika or for those in the NT familiar with Pitjatjantjarra, it is called Ngapatji-Ngapatji. In this system of governance there is an expectation or an obligation for reciprocity among your kin network. You are expected to share resources with people who have particular relationships to you or particular investments in you. For instance I have an old aunt in Leonora, every time she sees me she asks for money. I in turn rarely hesitate in giving her money. My mother says yes its okay to give her money but don’t give money to other aunts. The reason? This old aunt made an investment in me, when I was a child she would give my mother money for me. The same with your future in-laws a young man cannot deny the parents of his betrothed wife anything! He can’t talk to them and they can’t talk to him yet through intermediaries they can ask for anything. He is expected to make a contribution for the care and well being of his future wife. All of these customs operate as a safety net for the general care and well being of members of a community.

In the discourse of governance one must shift the attention away from trying to make western concepts of corporatism, western concepts of accountability and western concepts of governance fit Aboriginal societies and start to understand the customary processes of governance, which are operating in Aboriginal societies. All Aboriginal societies continue to operate these systems, its just that advisors, guides and facilitators are much too immersed in conventional western method to support or
enhance the customary process. Likewise Indigenous leaders all too often get caught up trying to articulate their role through western based institutions that they lose sight of the cultural values and principles, or worse still they meet their customary obligations and find themselves accused of misconduct or nepotism.

**Leadership and a Toolbox approach to Governance**

On now to the issue of leadership. It is well known that Aboriginal society did not have institutional leaders. In modern times this focus on leadership often sets people up for ridicule in their communities. However as the story of Wati Kalaya tells us, and as the story of many other leaders in the Tjukurrpa show, when things get bad leaders must emerge to bring a new way of doing things forward.

In the dreaming these leaders moved across the land encountering communities of people and through a mixture of coercion, persuasion or leadership through example they brought solutions to the problems. Aboriginal society today is in a state of flux. We are changing from a knowledge based hunter gather economy into a knowledge based cultural and natural resource economy in a Globalised world. The last 100 years have been a period of rapid change and through those changes people have suffered. In the Northern Territory Aboriginal people are ideally situated to develop and effect change based on the best of both worlds. Our ancient wisdom and culture can be applied in a Globalised world using new technologies and the resources and security of a first world developed nation. That is the opportunity for Aboriginal leadership. To take a toolbox approach to create governance modes based on a clear vision and finding the right tools or models to achieve the desired outcome. An essential dimension to this brave new approach to leadership is that individuals need to engage in a discourse for empowerment. Aboriginal people need to feel empowered, to be
confident, to stand tall. To step out into the world and declare our aspirations, to pursue our dreams and to make it happen. Leaders like Noel Pearson in Cape York are taking on that challenge. Not everyone agrees with what he is saying or doing, but everyone agrees that he is doing something.

Conclusion & Future Research Needs
In developing research questions about governance one should not ignore the critical role of existing customary institutions of governance. Early attempts at introducing corporate regimes to adapt and articulate customary governance have deteriorated into some of the most onerous corporate reporting laws in Australia. Other means of attempting to recognise customary governance through recognition of customary laws have also hit a brick wall. It is perhaps inevitable that, in present day Australia where the process of decision making for governance structures and resourcing is tightly controlled by institutions arising from the authority of the Crown, there will never be a suitable model of governance for Indigenous communities. However there is still an opportunity for Indigenous leaders, researchers and others to shift the paradigm and respond to failed governance processes by looking into the past, looking at the present customary governance models operating in communities and bring new models inspired by the Aboriginal way of doing things into effect.

1 Aboriginal Councils & Associations Act 1975 (Cmwnth)