■ Agnes Schreiner

It takes pluck

In the case of R v Walker in 1994, Brian Martin, the Chief Justice of the Supreme Court of the Northern Territory (NT) ordered Wilson Jagamara Walker's suspended sentence with a good behaviour bond. The Chief Justice assumed that Walker, who had confessed to having stabbed another Aboriginal to death in a fight that had got out of hand, would receive the punishment he deserved among the Aborigines. The defence had succeeded in persuading the judge that Walker would have to submit to a spear combat according to Aborigine law. Walker would be struck in the leg by a member of the family of the deceased, the Fry family; once this happened the case would be closed.

The ruling according Anglo-Australian law

At first sight, the Chief Justice would appear to have been acknowledging the limits of his jurisdiction and to have abandoned the case accordingly. In fact however he did not abdicate his jurisdiction. On the contrary, from the position of Anglo-Australian law he was simply confirming a principle of criminal justice — that of *ne bis in idem,* that forbids anyone from being punished twice for the same offence. This principle was the kernel of his ruling. This verdict meant that the Aboriginal response to assault, offences against life and culpable homicide has come to be treated on an equal footing with Anglo-Australian sanctions. The Walker case is therefore seen as a milestone in the recognition of the Aborigine law

of punishment.[1] But the reversal implied in the recognition of the Aborigine legal system really occurred two years earlier. The High Court of Australia had already acknowledged the existence of Aborigine rights and claims in the now famous *Mabo* case about land rights.[2] The judge in the Walker case must have figured that if Aboriginal rights concerning land were recognized, Aboriginal criminal law would have to do the same.[3] The court instructed Blair McFarland, the Senior Parole Officer to produce a report on whether Walker had genuinely undergone his punishment. If no 'payback' - a pidgin term - had taken place within six months, the court would review its decision.

On the Australian side the discussion remains as to how far the application of Aboriginal criminal law is in breach of the International Torture Convention or whether, quite simply, the imposition of the punishment does not itself amount to a punishable offence that the local police should take measures to deal with. After all a country like Australia 'cannot allow Aborigines going around spearing each other...' or 'people being stabbed ', as the *Minister of Correctional Services* (NT) Eric Poole put it on camera.[4] After all, he declared,' The usual police tactics is that of the proverbial ostrich with its head in the sand. 'Police - that is, my - policy is: we will not intervene', the sergeant in question told the reporter. Not only, as he himself admitted, was his knowledge of ' tribal laws' insufficient for him to intervene - were he to do so he would be risking life and limb...[5]

The ruling according Aboriginal law

On the Aborigine side astonishment was the prevailing response. Walker had been remanded in custody for nine months before being sentenced by the Australian court. Instead of implementing the sentence, the court decided that the punishment they

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1 The case even made the front page of a Dutch national daily. *Cf.* Esther Bootsma, Aboriginals mogen steken en slaan, *Trouw,* 2 September, 1994. As in previous cases such as that of *Jadurin v R* (1982), the defence appealed to the judge to makes use of his discretionary powers in deciding on a sentence, with the argument that the Aboriginal could also expect a punishment from his own people. But the Australian judges had in each case refused to sanction the Aboriginal form of 'retribution'. *Cf.* Diana Bell, Exercising discretion: sentencing and customary law in the Northern Territory, in: Bradford W. Morse & Gordon R. Woodman (eds.) *Indigenous Law and the State,* Foris Publications, Dordrecht 1988, p. 376.

2 About the *Mabo* case and the *Native Title Act (Cth)* of 1993 in which the verdict was converted into legislation, see Agnes Schreiner, De film 'Two Laws' in een twilight zone, *Recht der Werkelijkheid,* vol.18 (1997), no. 2, p. 112 ff.

3 Another reason for trying to find an alternative for a punishment based on Anglo-Australian law is the relatively high figures for suicide among Aboriginal detainees.

4 In *Payback,* a TV documentary by Liz Jackson, produced by Ray Moynihan, broadcast in Australia as part of the ABC series *4corners* op 12 September, 1994.

5 The same strategy was adopted in the episodes of rough justice in Staphorst in Holland. The police or local constables either did not intervene or were prevented from doing so. This was until the press started raising the issue and in 1961 the mayor gave the order for firmer measures. *Cf.* G.C.J.J. van den Bergh, *Staphorst en zijn gerichten,* Boom, Meppel/Amsterdam 1980, p. 151 resp. p. 169.

deemed necessary could be implemented by the Aborigines. 'Why didn't they listen to us?' asked Kevin Fry, the brother of the deceased. Asked for his reaction, John Tippett, Walker's defence counsel declared that 'our legal system does not encourage to have such contact with the family of the victim'. The Fry family made it known that they had decided that Walker should be tried according to 'whitefella' law and that they had stated as much in the presence of the judge.[6] 'He must do time in prison', was their conclusion.

Seen this way, the Aborigines held the initiative in this case. The decision to apply Anglo-Australian law was theirs. One can rightly state that in the Walker case, the Aborigines had accepted the official Australian law as an alternative, with its resulting Australian form of punishment.

Were the case to be referred back to them, they would have had to initiate the Aboriginal procedure, including the possibility of a spear combat. The question of if - and if so, how, when and where - action should be undertaken, is determined per case and is the subject of a face-to-face public debate between the parties involved. Walker's nine months absence in custody had made a proper implementation of the Aboriginal procedure impossible. In the TV documentary the Aborigines interviewed stressed that it had been 'left too long', that it was 'no right time' and was 'not appropriate'.[7] 'It's too late now', concluded 'mother' Fry, the aunt of the deceased.

The implementation of the penalty

In the view of Anglo-Australian law, the spear fight can be treated separately from Aborigine procedure. It regards spearing as an autonomous punishment that can be incorporated as an alternative punishment in the series of judicial penalties and measures available to judges. After the different stages of the trial have been proceeded with and the punishable offence has been ascertained, the verdict of 'guilty' follows together with a form of punishment decided on by the judge. So far there is no difference between the modern judicial systems in countries in Europe and America. There is a linear sequence of separate moments - the initial enquiry, the ascertaining of the facts, of whether the norm has been broken, the verdict of 'guilty' and the decision on the form of punishment (obviously in accordance with the legal description of the offence). Then comes the concluding moment, namely that of the punishment. There is a clear difference here with Aboriginal law, because spearing cannot be isolated as a one-dimensional form of execution of a penalty, resulting in

[6] *Cf.* Eric Venbrux, *A death in the Tiwi Islands,* Cambridge University Press, Cambridge/New York/Melbourne 1995, p. 84, where the Tiwi Aborigines also discuss whether a case belongs to their competence or to the *whitefella law.* In many instances the Aborigines are prepared to leave cases to the dominant Australian legal system. The rationale for this undoubtedly lies in their experience of the colonial masters who treat murder and manslaughter trials as belonging to their jurisdiction and are prepared to resort to the strong arm of the law to ensure that they stay there.

[7] *Cf.* note 4.

the closing of the case.[8] Spearing with the Aborigines is at any rate not carried out according to the scenario of an execution, with the guilty party standing in some enclosed courtyard faced with an alternative form of firing squad.

The old film images that accompany the TV documentary, Payback, show a duel in which both parties, equipped with wooden spear throwers and spears, strike each other in turn in the presence of a large group of people who are sitting or standing. One party makes a thrust, then waits, strikes again and parries immediately afterwards; his actions are constantly mirrored by the other. They do not aim at the head or torso - only at the legs. It requires a certain technique and skill, and even gracefulness. The audience watches intently. As the spear fight continues, either party can be wounded, and the result is anything but certain. It is more appropriate to talk of a judicial duel than of the implementation of a punishment.[9] During the duel, a judgement is carried out in the Aboriginal manner, a ritual form of judgement, such as has also been granted a place in European legal history alongside oracles and trials by ordeal.[10] The spear fight is therefore not a substitute for the punishment; rather it replaces the actual court hearing or trial.[11] If he had been serious about respecting Aboriginal law, the Chief Justice would have had to declare himself unauthorized to try the offence the party was charged with.

The rules of the duel

By contrast with 'fooling' round' or 'fightin' dirty' - namely, a spontaneous fight usually provoked by jealousy, an insult or other supposed injustice as background cause, with, still more often, drunkenness or the 'heat of the moment', in the foreground - a fight according to Aboriginal law is called a 'good fight'.[12] A dirty fight can be the immediate pretext for a 'good fight' even if the latter does not immediately follow on from the former. The former sort of fight is a banal event that can happen in the same way as so many chance occurrences. But it does of course have consequences. The initial skirmish is - if possible - broken up to invite the contending parties to take each other on at another moment in a 'good fight'. Aborigines make use of the occasion to

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[8] The same goes for penalties such as 'pointing', involving a voodoo-like stabbing with a bone, or 'singing to death', which is a sort of exorcism, to mention only the most remarkable forms of Aboriginal sentences.

[9] And one should at any rate avoid any terminology that might suggest that what is involved is a form of taking the law into one's own hands or a rabid attempt at getting revenge, as Poole's description - 'going around spearing each other' - would seem to imply.

[10] If the judicial duel is allocated a position next to the oracle and the ordeal it can then be regarded as belonging to the European past, something that modern law would certainly welcome. But the question remains of whether judicial duels can also be treated as a thing of the past. It might allow one to see the fight between soccer supporters at Beverwijk in 1997 in a different light.

[11] *Cf.* Johan Huizinga, *Homo ludens, A study of the play element in culture.* Beacon Books, New York, 1986.

[12] Gaynor Macdonald, A Wiradjuri fight story, in: Ian Keen (ed.), *Being black: Aboriginal cultures in 'settled' Australia,* Aboriginal Studies Press, Canberra 1988, p. 181. *Cf.* also Bell, *op. cit.*, p. 377, where the fight, that incidentally is also one between women, is called 'fair'.

organize the fight as a ritual. Rituals lend themselves perfectly to obtaining control over whatever it is that happens to human beings. Whether it is a disaster or bad weather, a change of season, a birth, a piece of good fortune, a knifing incident or a death - ritual makes sure that the pretext or banal event does not have its normal consequences and that in its stead a new well-organized situation is created. Of course the situation is a purely artificial one, supervised by masters of ceremony, whose role varies from boss to village elder or referee. The moment that the ritual event commences the everyday world and normal motives are suspended. 'The motives for wanting to fight the night before may be very different from those constructed by the time morning comes and the circumstances and the audience have changed' - that is Macdonald's comment on an official duel that took place on the morning after an initial conflict.[13]

The judicial duel then has its own beginning at an agreed time. It has someone who stands above the contending parties and ensures that the prescribed rules of the fight are obeyed. The place too where the fight takes place is also not a coincidence. Macdonald jotted down a detail of a story about a duel among the Wiradjuri or Koori Aborigines of New South Wales (NSW): 'There used to be gates right up there in the corner, there used to be gates - are they still there? Yes... up at the gates, at the gates, that's where they had the fightin' ring - and underneath the railway bridge.'[14] It is a fixed place that both friend and enemy make their way to before the hour decided on; they assemble on opposite sides according to the party they support. This arrangement is regulated by the person who acts as referee - his position is also proven on the spot by means of a test or challenge.[15] During the combat, the public is not permitted to interfere with the fight - they may not even urge on or encourage their own side or shout catcalls or insult the other side.[16] In such events, which as Bell says are 'very carefully stage-managed', it is clear that the character of the fight and the weapons to be used are also determined in advance.[17]

Bearing these rules in mind, a duel has a course of its own and - this was the reason for explaining the rules - its own result too.. The duel is considered finished when one of the parties falls down or is struck. The wound with which the fight ends may result in death, but the rule is to 'hit to wound', not to 'hit to kill', as the Australian judge in the case of *R v Herbert et al* realized.[18]

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[13] *Cf.* Macdonald, *op. cit.*, p. 182.

[14] Macdonald, *id.*, p. 179. On p. 181 she tells us that the spot involved is a lighted vacant site used as a carpark, outside the gates of a mission post.

[15] His authority does not apply in advance; it depends on whether his intervention is appreciated and his instructions will be followed. The same goes for the next person to come forward in the absence of a response. *Cf.* Macdonald, *id.*, p. 184.

[16] Macdonald, *id.*, p. 184. On p.186 she describes how the referee intervenes and calls for order when an onlooker begins to urge her party on.

[17] *Cf.* Bell, *op. cit.*, p. 377, in cases of a fight where a traditional fighting stick is the weapon used. *Cf.* Bell, *id.*, p. 377 and p. 378. In the duel described by Macdonald, the agreement is that the contendants may only fight with their fists. *Cf.* Macdonald, *op. cit.*, p. 195. For 'fighting with the tongue', see the article by Marcia Langton, Medicine Square, in: Ian Keen (ed.), *Being black: Aboriginal cultures in 'settled' Australia,* Aboriginal Studies Press, Canberra 1988, pp. 201-225.

[18] Quoted by Bell, *op. cit.*, p. 378.

The duel sanctions

In a physical sense there may be a winner and a loser, but the true victory of the Aborigines does not lie in the result but in the beginning of the fight and in the course it takes, in the fact that it is entered on and that both parties put up a good show. 'Someone who does not make a good show for themselves - is half-hearted or starts to fight dirty - will not win support. Someone may put up a good fight against an opponent recognised as being stronger and more skilful. Although technically the loser, they will still be admired for their pluck.'[19] 'Pluck', or courage, is what it is all about. The pluck to come up for the deed one has perpetrated.[20] Furthermore, the act itself testified to the necessary courage - the courage, that is, to break a taboo. Not to mention that of the people who come up for the taboo that's been broken - that takes some courage too!

No matter how often the opposite is claimed, breaking a taboo should not be regarded as the transgression of a norm - at least not if we base ourselves on the original meaning of the word 'taboo'. The fact that something is taboo doesn't mean that it is forbidden, but that it is provided with a identifying mark.[21] Taboo therefore means a sign or a mark. Something that attracts attention and that is open to being read. Something one takes notice of, and that one cannot simply overlook. One can pass it by on condition that one respects the mark and is prepared to take the consequences. What the consequences are depends entirely on the departure point or the intention with which the taboo is broken. In most cases it works out alright and everything goes as it should.[22] But sometimes more is at stake: one has broken the taboo and is on the other side; one has come to stand as it were *behind* the taboo. The consequence is that the taboo breaker has himself become taboo, thus acquiring for himself the qualities that were tabooed and which were taboo for him. These qualities include exceptional talents or powers, often dedicated to ancestors of guardian spirits ('genii'). It cannot be said that these taboo qualities are bad in principle.[23] They are summed up under the term 'mana'.[24] If the person in question is positively tabooed,

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[19] Macdonald, *op. cit.*, p. 189.

[20] In her enquiry into the social value that fighting has for the Aborigines, Macdonald concludes - mistakenly in my view - that pluck is a right: 'the right of individuals to stand up for themselves and to brook no interference from others' (Macdonald, *id.*, p. 188).

[21] *Oosthoeks Encyclopedie,* Utrecht 1968, 6th edition: 'Polynesian adjective *tapoe,* meaning provided with an identifying mark, used for places and objects where something exceptional is involved, but not necessarily anything to do with religion.'

[22] A small ritual is sufficient to show respect, One lowers one's eyes or makes a detour (for instance if one has to walk past one's mother-in-law or sister), or one bows or says a greeting (for instance, if one meets an elder), one offers some food on a leaf or the first draft of a bottle as a sacrifice (on passing the spot where one's ancestors are buried). Seen in this light, the ritual is also a sign included in a series that goes from sign to sign, instead of a behavioural norm issuing from a system of norms, in which one norm weighs more than another.

[23] It can go either way, similar to Machiavelli's concept of 'virtù' (*Il Principe,* 1532), that derives from the Latin word 'virtus' and which can also be translated as 'courage'.

[24] *Cf.* as in note 21, *Oosthoeks Encyclopedie.*

'mana' may mean fame, honor, prestige, success, sex appeal and privilege - things that as everyone knows are not reserved for everyone. To figure out whether 'mana' is auspicious or not it has to be weighed in the scales, on the principle of who dares wins. It is this set of scales that, in keeping with Huizinga's line of thought, is effectively the Scales for the Aborigines.[25]

It is too simple to assume that what is involved in the combat is a split between the two conflicting parties with one side defending the taboo and the other breaking it. Is it that one warrior fights for the norm and thus for peace and quiet and a certain way of dealing with the established signs and taboos? Does he take a stand against the other warrior who has had the effrontery to transgress the form, because he wants to claim more 'mana' for himself? But neither of the spear fighters lack courage ('mana'): the pluck to challenge and the pluck to accept the challenge. They are recognized by the bystanders as challenger and challenged (taboo) and will engage in the fight ('mana') in an enclosed space (taboo). In compliance with the rules (taboo), one blow will follow on another. Pluck is involved, as said already; but dexterity, cunning, concentration, aggression, skill and strength (all of them 'mana') are also at stake. Every blow that is delivered, no matter whether by challenger or challenged, evokes a moment of 'mana' upon which a moment of taboo follows immediately and unmediated, after which another moment of 'mana' dawns and so on. There is no serious possibility of 'mana' and taboo being installed as a permanent moment, let alone that a prohibition or a norm could be instituted. Only the moment of 'that's enough now' or 'no more then' will have that opportunity.[26]

In the Aboriginal duel too, no fixed role is attributed to the perpetrator and the challenger, who, according to Anglo-Australian law, takes up the cause of the victim or injured party. The perpetrator becomes a victim as soon as the other party deals him a blow; the other party who represents the victim at once becomes a perpetrator, who again becomes a victim if he suffers the consequences of a counter-attack... Perpetrator becomes victim, victim becomes perpetrator.

This secret reversal, that actually lies hidden in every conflict or confrontation is elevated to the status of a principle in the judicial duel. It should be clear by now no specific moment can be identified in a duel like this in which a punishment is meted out or where a sanction is imposed. In fact the duel sanctions this lack of sanctions.[27]

Nor does the conclusion of the duel offer any sanction, prohibition or norm, because the end is only a consequence of the course of the duel. Between one 'strike' and reception and the following one, the most appropriate strike is decided on and with it an end comes to this permanent interchange just for a moment. At most, the end instigates a new rite, namely that of 'shaking hands' or 'calling it quits'. 'They had

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[25] Huizinga, *op. cit.* p.79

[26] Macdonald, *op. cit.*, p. 187. 'The spectators (...) stop the fights if one of the antagonists says they had enough (*id.*, p. 188).'

[27] For our ancestors who spoke Latin, 'sanctioning' meant in the first place making something sacred, and derives from the word 'sacer'; it thus implied the notion of consecration, a ritual practice, that is. In the first contribution to the *Rode draad* series on 'Sanctions', Henket speaks in this connection of 'positive sanctions', that he then leaves aside because he wants to limit his definition of sanctions to negative ones. *Cf.* M. Henket, Sancties, *Ars Aequi,* 46 (1997), p. 8, note 13.

to shake hands and told them to make friends... and they sorta made friends' - this is how the story of the Wiradjuri duel comes to an end.[28]

'The Kooris are socialized into consistency rather than conformity.'[29]

In the Aborigine approach by which a ritual platform is furnished for the two sides that a conflict or altercation usually consists of, we see Aboriginal law in action, their mode of trial or what in legal anthropology is called their 'disputing process'. The ritual order that is created by them provides a space for no matter which two poles, extremes, or parties that present themselves. Even the poles of Good and Evil are offered a ritual space. The Aborigines are consistent in ritualizing every difference. In this respect, they refuse to make any distinction between one or the other of the two poles. Western and non-Western are therefore both able to appear on the ritual platform. Thus it is possible to see what the Aboriginal approach will be in a situation where the duel is held in a Western context.[30] The chance that policemen will be present at an Aboriginal duel is great. If they take the initiative of intervening, this intervention is seen from the viewpoint of the Aboriginal duel as another 'wager' placed within the fight. 'The usual order of events in Aboriginal is then disrupted after repeated interventions, causing conflict between Aborigines and non-Aborigines which tend to be ritualized.'[31] The policemen may expect a ritual slanging-match and an invitation to engage in a 'fair fight'. But the policemen will undoubtedly respond by making a series of arrests. The Aborigines will be charged with 'unlawful assembly, assaulting police, resisting arrest, hindering police in the execution of their duty, causing damages to police vehicles, assaulting civilians, damaging civilians' vehicles, and damage to property'.[32] It is hardly surprising then that statistics show that very many Aborigines have been locked up in prisons and other detention centers.

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[28] Macdonald, *op. cit.*, p. 190.

[29] Macdonald, *id.*, p. 191.

[30] *Cf.* Langton, *op. cit.*, p. 201. She focuses on the situation in New South Wales. The title of her article refers to a ritual space in Western Australia, that the Aborigines call Medicine Square after Madison Square Gardens. *Cf. id.*, p. 222.

[31] Langton, *op. cit.*, p. 212.

[32] Langton, *id.*, p. 213.