'GUM TREE' JUSTICE: ABORIGINES & THE COURTS

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1. INTRODUCTION

In the years since the colonisation of Australia the philosophy underlying policies relating to Aborigines has fluctuated from that of extermination, segregation and malevolent neglect to a more recent one of assimilation and Europeanisation.(1) Though seen as an enlightened way of solving the 'racial' problem, in the United States of America and elsewhere the concept of the 'melting pot'(2) has proved to be ill-founded, with minorities of all kinds unwilling to accept the mores and values of the predominant culture. The subtle and not-so subtle discrimination and the tokenism which have passed as 'equality' are slowly being replaced by the notion of 'ethnocentricity', a pride in one's background and differences. Pluralist society is being recognised in theory as well as in fact.

Over the last three decades in Australia rapid shifts in policy have been noted,(3) from segregation to assimilation and more recently towards the goal of equal but dissimilar development.(4) The courts, like other social agencies have reflected these changes, both in the substantive criminal law and in their sentencing policies.

It is proposed in this paper to examine the role of the criminal law as a social tool in a pluralist society, to elicit some of the principles which have emerged in the sentencing of traditionally oriented Aborigines(5) and to discuss some of the suggestions which have been proposed to resolve the problems.

2. LEGAL PLURALISM IN AUSTRALIA

There were some doubts early in the nineteenth century as to the status of the Aborigines vis-a-vis British law with some judges holding that the Aborigines were not subject to British law. Willis J., the first resident judge of Port Phillip indicated in one case that:

> 'the aborigines were not, with regard to the prevalence of our law among themselves, in the unqualified condition of British subjects, and that in disputes among themselves they might be governed by their own ancient usages'.(6)

A similar view was taken by the Chief Justice of South Australia in 1836.(7)

Later decisions, however, overruled these cases and it has been regarded as settled law for a long time that black and white are governed by one law. Kriewaldt J., of the Supreme Court of the Northern Territory, cited R. v. Peter(8) and R. v. Jemmy(9) as authorities for the proposition that:

> 'except to the extent that legislation has made some alteration, the whole of the criminal law, both substantive and procedural, and the whole of the law of evidence, applie[s] equally to whites and aborigines.'(10)

Although the present law generally recognises only the majority system, there have been continuing doubts as to its justice and in recent years criticism has become more vociferous.(11) These criticisms fall under a number of heads.

(a) Imposed law and the notion of moral guilt

Perhaps the most basic criticism and one which engenders the perception of egregious injustice in a legal centralist system is that based on the imposition of a system of law that is foreign and uninvited.

As has been found in many of the colonial states of the world the imposed law introduces a concept and system of justice which is quite alien to the indigenous population. The notion of *mens rea* is central to British law, it generally being crucial to the determination of guilt or innocence of a person and consequently, his liability to penalty. However, as one author has pointed out, while the defendant may technically be guilty, he may not be in the moral sense:

> '[C]olonial law... selected its victims without regard to moral guilt; it imposed its norms upon the indigenous population by sheer terror.'(12)

'Pre-scientific' man acts in ways which are logical within the framework of his understanding of natural processes, but which the criminal law, embodying a totally indifferent sort of understanding, characterises as criminal.(13) Apart from the few ways to be discussed below there has been little attempt to relate the imposed law to the needs and conditions of its new home.(14)

It would not be unreasonable to expect the law and its agencies to be meaningful to the people who are subjected to it and it would seem that unless this is done and if the law becomes increasingly removed from what is viewed as justice, it will rely more on force for its validity than on consent.

(b) *'Quid pro quo'*

The earliest criticisms arose from claims that the colonial courts had no jurisdiction over Aboriginal people and that they were free and independent tribes with full sovereignty. Counsel in R. v. Jack Congo Murrell[15] argued that subjection to the laws of a country is based on the notion of reciprocity, i.e. subjection for protection, a social contract rather than an Austinian view. Aborigines, in counsel's submission, not being protected by the colonial law in sundry respects, were not bound by such laws. The Court tersely rejected this argument.[16] However, it was on this basis that Cooper C.J., of the South Australian Supreme Court held that the killing of one Aborigine by another was not a concern of the government because 'claiming no protection of the law, the Aborigines owed it no allegiance'.[17]

In Murrell's case Burton J. said that if the offence had been committed on a white, it would be generally acknowledged that the colonial courts had jurisdiction. The court could see no distinction between that situation and the one before the Court. He said:

'[S]erious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them.'(18)

It appears that whereas counsel for the defendant was arguing that subjection to the criminal law only flows from protection by it, Burton J. took the view that the subjection of the guilty to the criminal law affords protection to other members of the community. Implicit in the Judge's statement is a belief that the Anglo-Australian criminal law acts as a deterrent to Aborigines from certain forms of

conduct, a belief which over one hundred years later and with substantially increased law enforcement is probably hard to substantiate without qualification.

Kriewaldt J. in his discussion of this problem accepted the notion of *'quid pro quo'* as the basic principle underlying the criminal law, but stressed the importance of the protection aspect. The main problem as he saw it is the protection of an Aborigine against crimes by other Aborigines.(19) He wrote:

'In many cases he [the accused] was not only an offender but also a person offended against, and as such entitled to have the criminal law set in motion against the persons who offended against him... Failure to prosecute the other aborigine, if his acts amount to a criminal offence, is a denial to the accused aborigine of his right to be protected by the criminal law.'(20)

The main difficulty is where the act complained of does not constitute a crime under the majority legal system. Stanner gave the example of an elderly Aborigine whose wives were being 'stolen' by his sons. Stanner, paraphrasing, wrote:

'Who ever heard of a son running away with his mother? ... Why would no one help him? The police, he said, would do nothing; they had told him no one had broken the Europeans' law; and, if he hurt or killed anyone, they would send him to Fanny Bay (the gaol), or hang him.'(21)

Even Gore J. a Judge in Papua and New Guinea for many years and strong proponent of colonial rule, said in discussing punishment for crime among indigenous people:

'until such time as the inability to seek the aid of the law can be negatived the courts cannot award punishment for crime. Crime is never countenanced and arrest and trial follow as a necessary sequence but the delinquent cannot receive punishment for following his natural bent when nothing has been effectively provided to supplant it.'(22)

The conflict between the two systems of law is obvious and while little or no recognition is given to the minority law, injustices will continue.

(c) <u>The discriminatory nature of the law</u>

This criticism centres around the problems of the Aborigines in their contact with the Anglo-Australian law and is closely

linked with the notion of '*quid pro quo*'. Willis J. in a case in the early colonial days of Port Phillip, while addressing a native prisoner at the bar who was found unfit to stand trial because of his inability to comprehend the proceedings, summed up the contradictory situation:

'For protection and for responsibility in his relations to the white man the black is regarded as a British subject. In theory this sounds just and reasonable, but in practice how incongruous becomes its application! As a British subject he is entitled to be tried by his peers. Who are the peers of the black man? Are those of whose laws, customs, language, and religion he is totally ignorant his peers? He is tried in his native land by a race new to him, and by laws of which he knows nothing.'(23)

Problems of comprehension do not stand alone. Misner observed of the contemporary scene, that there is no Aboriginal judge to try the native defendant, no Aboriginal lawyer to represent him and no Aboriginal gaoler to keep him once he is convicted. As Misner states, he has only one role, that of prisoner.(24)

Some courts have shown concern that Aborigines are not only subjected to legal concepts and proceedings which are foreign to them, they have even had to contend with active hostility against them. Mr Justice Kriewaldt referred many times to the strongly racist views which existed among members of the community in the Northern Territory during the 1950s. He found it necessary to warn juries of the need to give Aborigines as much consideration in a court of law as they would to a white person and to rid their minds of such ideas as 'the sooner aborigines kill each other off the better'.(25) Extra-judicially he went so far as to say:

'I advance the theory that the five acquittals out of six trials in Darwin before Wells J. can only explained by the attitude that white persons should not concern themselves with crimes committed by aborigines on other aborigines'.(26)

The sense of injustice felt by Aborigines would be compounded where white defendants are involved in crimes against Aborigines. One may speculate that to convict a white defendant of an indictable offence against an Aboriginal victim might be considerably harder than to convict an Aboriginal defendant of a similar offence against a white.(27)

To catalogue the whole range of discrimination both inherent in the law and manifest in its application is beyond the scope of this paper. It has been recently been written that:

'The available statistics indicate that Aborigines are arrested, held without bail, and incarcerated in numbers far disproportionate to their representation in the general population. For example, in New South Wales in 1971 and 1972, Aborigines were disproportionately represented both as defendants in Courts of Petty Sessions and in gaols; furthermore, statistics from 1972-3 indicate that imprisonment is used as punishment significantly more frequently in towns with many Aboriginal residents than in other towns or in Sydney(28)... It was reported in 1973 that Aborigines, comprising only 26 percent of the population of the Northern Territory made up 56 percent of inmates in gaol.'(29)

Literature on this topic is considerable(30) but for present purposes, it is appropriate merely to observe that in the administration of criminal justice, the Aboriginal may receive less than a fair deal.

(d) Practicability

This criticism concerns the practical administration of justice under present conditions. Misner[31] pointed out that in the Northern Territory at least there are immense distances to travel. This, of course, not only affects members of the Bench but other court personnel, parties to legal proceedings, police and witnesses. It would be remarkable if such difficulties did not affect the quality of the proceedings. He wrote that:

'...what is needed is a system which guarantees minimal remand time for persons awaiting trial, minimal travel by defendants and witnesses to court, minimal delays so that punishment can seem to be responsive to a particular act and a maximum amount of court time to consider each case.'(32)

3. MITIGATION OF THE HARSHNESS OF THE LAW

The subjection of Aborigines to Anglo-Australian criminal law in many cases is tantamount to a conversion of offences requiring proof of *mens rea* to offence of strict liability. To nations wedded strongly to a link between law and morality some means of mitigation had to be found.

Writing of the application of Anglo-Australian law to traditionally oriented Aborigines, Eggleston writes:

'It seems unjust to an Aboriginal defendant who is ignorant of white law and acts in accordance with tribal law to subject him to criminal punishment in the ordinary courts. It seems equally unjust to convict an Aborigine who acts under the compulsion of tribal law, even though he knows his action is contrary to white law. He may have no real choice but to act in accordance with tribal law.'(33)

(a) Through the sentencing process

Many writers have suggested that while an imposed law remains in force the principal means of mitigation is through the sentencing process.(34) Even this is hardly a real concession 'for sentencing has never been regarded as part of the substantive law'.(35) The traditional view of the reconciliation of the conflict inherent in a pluralist society with a centralist legal system has been put by Ollerenshaw J. in the Papua New Guinean case of R. v. Womeni Nanagawo(36) when he said that:

'The Code [the Queensland Criminal Code] applies here to both European and native inhabitants. Whatever may have been the arguments in favour of the introduction of modifications of that Code on account of and to meet the cases of the primitive standards and beliefs of the native inhabitants who are found from time to time still living amid their native customs in their native environments, that course, with its innumerable difficulties and problems was not followed. It was doubtless considered that such standards, beliefs, customs and so forth could and would be taken into consideration by the judges upon the question of the proper punishment in each case.'

Although this solution has a superficial appeal in that it conveniently divides the criminal trial into two distinct areas, it has been criticised as being incongruous, undesirable and unjust. It is incongruous in that customary laws and beliefs apply only to punishment and not to criminal responsibility. Gawi asks:

'[w]hy should one be held liable for an act induced by beliefs or customs if the courts do, in the end, recognise the effects of such beliefs and customs?' (37)

It is undesirable and unjust in that a conviction is recorded where there is little, if any, moral guilt and the consequences of conviction may be stigmatisation and liability to a wide range of penalties.(38)

(b) Through the substantive law

In certain circumstances the courts have accepted the principle

that the substantive criminal law should be adapted to meet the requirements of the administration of justice as to traditionally oriented peoples. There are a number of areas of the criminal law where such adaptions have or might have occurred.

(i) Provocation

This has been the principal defence where the law has shown a measure of flexibility to ameliorate the incongruity of the application of Anglo-Australian law to Aborigines. Kriewaldt J. in particular, although taking the view that the whole of the criminal law applies to blacks and whites equally, accepted the fact that in some circumstances it should be adapted.

Perhaps his best known decision relating to provocation was R. v. Muddarubba[39] in which he directed the members of the jury that in determining whether or not the defendant was provoked into killing the victim, they should consider whether the average member of the defendant's tribe would have lost his self-control in similar circumstances and would have retaliated in the same manner as the defendant.[40]

To Kriewaldt J. the general principle of the law was the creation of a standard which would be observed by the average person in the community in which the accused lives, and this, in general, is the white community. However, as Howard pointed out, 'if any particular system of law is to work reasonably and justly, it must conform fairly closely with the habitual way of thought of the people to which it applies',[41] and in the case of communities extremely dissimilar, reason and justice could not accept other than a change in definition of what is 'reasonable', a definition that was not assimilative in intent.

The Privy Council had come to the same conclusion earlier in the West African case of Kwaku Mensah v. The King[42] and recent authority in Papua and New Guinea has also

confirmed the need for flexibility when considering how an 'ordinary person' would react.[43] The Supreme Court of Papua and New Guinea has held that if the accused comes from a very primitive area the same degree of self-control is not expected as from a sophisticated urban accused.[44] Similarly, if he comes from a tribal group in which members are renowned for their volatile temperament as opposed to their phlegmatism, provocation may be available as a defence.[45] However, Eggleston observed that a wholesale approval of different standards is too facile and that rather than assume that all non-whites are more primitive, savage or hot-tempered,[46] evidence should be introduced 'showing that the type of provocation he received was perceived by him as more serious than it would be by a white person and that the way he responded to it was socially sanctioned'.[47]

The problem of how far the law will go to accommodate the minority culture is best exemplified by the situation where there is indirect provocation in that a third party is involved. The Supreme Court of Papua New Guinea has held that the defence of provocation may be available when a wrongful act or insult is offered not to the accused himself but to other persons standing in a specifically defined relationship to him, including 'filial or fraternal relationships', and this has been applied to the extended family as it exists in Papua New Guinea.[48]

However in a case where the defendant was provoked by one person but retaliated against another, as authorised by the customary law prevailing the court was unwilling to go outside the provision of the Code. The Chief Justice did say though:

'If the Court were free to evolve a Common Law basis for the operation of the defence of provocation... it might appear that the established practice of striking back against the nearest clan relative ought to be recognised as carrying a different degree of criminal responsibility...' (49)

It would seem that somewhere along the slide down the slippery slope from the Clapham Omnibus reasonable man to the localised more subjective reasonable man the courts must stop to ask the question whether it is the assimilative or the segregative ideal they are aiming towards and what are the consequences of each.[50]

(ii) Mistake of fact and self-defence

In the defence of provocation it can be seen that the courts have been willing to extend the concept of reasonableness, to exculpate the defendant when he suffers from the same weakness as his fellow men.[51] However, in the areas of mistake of fact and self-defence the courts seem to be less willing to fragment or localise[52] the concept of reasonableness.

The problem usually arises where the accused person believes that he is being attacked by a sorcerer or witch and kills the perpetrator of the spell or the evil.[53] In traditional societies, '[w]itchcraft and magic are tenable hypotheses to explain an adverse and sometimes terrifying environment in the light of limited and ill-organised factual knowledge'.[54]

The courts however have held that the defence of self-defence is not available because the belief in sorcery is itself unreasonable, though it may be held honestly. As Clarkson J. has said in the Supreme Court of Papua New Guinea:

'Whether a mistake is reasonable so as to attract the operation of that section [of the Code] may well have to be tested objectively, and if this is so I would be reluctant to hold that because a superstition is generally held it is necessarily a reasonable belief.'(55)

In a later case[56] the argument that the accused acted in self-defence or aided another by killing a sorcerer in the honest and reasonable but mistaken belief that the deceased had been using his powers to cause certain deaths, was rejected on the ground that under the Code, self-defence to an assault only applied to physical and

similar assaults and that sorcery does not constitute an assault. In East Africa it has also been held that a threat must be 'physical' and not 'metaphysical', but as Seidman indicates, this distinction itself is a Western concept, i.e. it is unreasonable, or un-European to believe in metaphysical assault.(57)

Another possibility is that the accused actually believed that the person attacking him was a 'supernatural being, and not a human being with supernatural powers'.(58) In one Sudanese case(59) it was held that because the defendant had intended to slay a ghost and not a human being, he was not guilty of murder. Howard believes that in theory perhaps a distinction might be made between a situation in which the defendant kills the victim believing him to be an evil spirit and one in which he merely believes him to be a human being under the control of an evil spirit. It could be argued that the former case should not amount to murder because the defendant neither intends to kill a human being nor is reckless about it, but that the latter case could lead to a murder conviction. However, Howard doubts that the defendant would really be capable of the necessary degree of abstraction to appreciate such a distinction and suggests that if the defendant's beliefs about the victim were materially conditioned by a fear of the supernatural, he should not be convicted, under any circumstances, of more than manslaughter.(60)

(iii) Duress

In the case of R. v. Skinny Jack and Others(61) the facts were that the deceased, an Aborigine who had been killed by five of the defendants, had stolen certain sacred relics of his tribe and had sold them to a tourist. The deceased was a full blood member of the Pitjantjatjara tribe whereas the defendants came from more than one tribe and at least the first had to some extent been detribalised.(62) The defendants, who all pleaded guilty to conspiracy to murder,(63) claimed that the deceased had committed a serious tribal offence and that they

acted in accordance with the tribal laws. The younger ones, in particular, argued that they would have been in a serious position if they failed to comply with a decision of the elders.

It is not always the case that charges are laid against all the people who determined the conduct should take place. Elkin[64] cites a case where a group of Aborigines were ordered by the old men of the tribe to kill the victim for having divulged tribal secrets to a native woman. Only two of the punitive party were arrested and were each given 10 years' imprisonment to mark the disapproval of the courts of the native law. He wrote:

> 'Undoubtedly the tribal elders were the persons we should have dealt with, for the young men were agents who could only have refused to obey them on pain of death or banishment. The two who were caught by us were therefore punished severely for obeying orders which in their own society could not be defied. This would not result in a modification of tribal custom nor a lessening of the old men's authority.'

A Papua New Guinean case raised the same problems in a slightly different way. In R. v. Iakapo and Iapirikila[65] the accused were a mother and daughter who were charged with the wilful murder of the mother's new born child. According to traditional law this child, because of its parentage brought great shame to the entire clan, and the mother ordered the daughter to bury the baby alive. The daughter protested, but obeyed after being threatened by her mother that she would be beaten. The mother was convicted of infanticide but the daughter was acquitted because she was below the age of criminal responsibility.[66] However, the court indicated that had the child been of the age of criminal responsibility, it would have been prepared to take into account her knowledge of the shame that the baby's existence would have brought to the clan. The daughter knew that challenge to her mother's authority would undoubtedly cause her mother to beat her severely. She also believed that the action ordered by her mother would be accepted by most of her people as a practical solution to the shame of

the baby's birth. Furthermore, the court accepted that the child thought the only alternative to obeying her mother would be to run away, a solution which would induce in her a greater fear which would amount to torture.

Although Eggleston in her consideration of the Skinny Jack case suggested that, as a matter of justice, the defence of duress should have been available to the two youngest defendants, she believed it unlikely that courts would accept such a defence. In particular, she referred to the well-known dictum in Attorney-General v. Whelan,(67) which Sholl J. of the Supreme Court of Victoria had cited in R. v. Smyth,(68) which suggested that:

'[t]hreats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of the general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification...'

One particular difficulty which Eggleston saw in the Skinny Jack case was that it appeared that duress was not appropriate to murder and she felt it unlikely that a court would hold it available even in a case of conspiracy to murder. However, if the dissenting view of Bray C.J. in R. v. Brown and Morley(69) finds favour, it may well be that in future, courts do not regard the mere fact that the defendant is charged with a particular crime as rendering him ineligible to raise the defence. Bray C.J. felt, approving the comments of Williams,(70) that 'the proper approach is not to exclude crimes by name but to consider in concrete detail what the accused has done and what harm he was trying to avoid.' Howard, too, has approved this approach and has suggested that in murder cases, it may be suitable to treat the defence like provocation, namely that it can reduce murder to manslaughter.(71)

The second difficulty which Eggleston saw in the Skinny

Jack case was that Attorney-General v. Whelan required that the threats be immediate and relate to death or serious personal violence. Unless courts are prepared to extend the scope of the rule to cover situations in which the actual threat may be hard to identify and may be postponed, this requirement may constitute an obstacle to the success of the defence in future cases. However, as Eggleston observes, the mere fact that the threat is vague rather than precise may aggravate the defendant's fear. It is submitted that courts should be prepared to give further consideration to the requirements of the defence and that the articulation by the courts of hard and fast rules may lead to considerable injustice in individual cases. It may well be that an Aboriginal defendant who has committed a crime under a well-founded fear of tribal retribution should, as a matter of justice, succeed with the defence, even though he may find it hard to specify the precise nature and time of anticipated retaliation.

(iv) Insanity and automatism

Another attempt to avoid the imposition of majority law has been through the defence of insanity. In R. v. Womeni Nanagawo,[72] the defendant was charged with the murder of an alleged sorcerer and it was argued that 'natural mental infirmity' covered an unsophisticated and primitive belief in sorcery. The judge rejected this argument on the ground that 'unsophisticated' was not meant to be included under the above phrase, and that such beliefs in a society such as Papua New Guinea are not abnormal. Belief in sorcery and witchcraft is obviously a sane delusion, and, in the context of some societies is not so aberrant that it would indicate a diseased mind.

Inevitably the consequence of accepting beliefs in sorcery and witchcraft as consistent with sanity rather than insanity is to increase the number of traditionally oriented people who are convicted of criminal offences and subjected to penalties. But is the threat or

the imposition of punishment efficacious in changing beliefs which are an integral part of the individual's weltanschauung? Secondly, and even more importantly, are we justified in attempting to change his religion? As Seidman states:

'To expect an African to be "stimulated" by fear of penal sanction to abandon his whole ethical, factual, religious and psychological world is to adhere to a delusion no less superstitious than those to which the tribalised Africans themselves adhere.'(73)

In R. v. Hatenave-Tete and Loso-Saratu(74) one of the accused was successful in raising the defence of automatism. The facts were that relatives of the accused had recently died and their deaths were generally attributed to sorcery. The defendants suspected the victim of causing the deaths and on the day of the alleged offence the second defendant began to tumble and jump and shout in a manner consistent, as believed by the villagers, with possession by the spirit of a deceased relative. In this state it was believed that the person could identify the sorcerer. A group of about 50 people was gathered to search for the victim and when they found him, the first defendant killed him. The judge held that automatism was open as as a defence to the second accused as distinct from insanity and the onus was on the Crown to prove beyond reasonable doubt that she was not acting independently of her will.

It would seem however that the circumstances under which such a defence would be successful are far fewer than where the 'ordinary' defence of insanity is attempted. Interesting as the decision may be, the facts of R. v. Hatenave-Tete and Loso-Saratu are unlikely to recur and for that reason, the case is unlikely to set a valuable precedent.

4. THE AIMS AND FUNCTIONS OF THE CRIMINAL LAW

(a) Assimilation

The foregoing discussion of the substantive criminal law has illustrated how the concept of reasonableness has been used

as a tool by which the values and standards of European man have been imposed on indigenous peoples. Where the Clapham Omnibus is but a short trip from Clapham the notion of reasonableness serves well to define the standards of conduct of an essentially homogeneous society. Where, however, there are thousands of miles between Clapham and the bus the incongruity is immense between the 'reasonable man' and the 'average'man in the community and the gap between 'moral' and 'legal' guilt is equally great. The function of the law becomes less humanitarian but more educational. The object is to deter certain behaviours and encourage others.(75) As Gore J. said, referring to Papua in the 1920s,'[t]he paramount object of punishment in any community is the prevention of crime',(76) crime, that is, as defined by the colonial law, and the conformity with the new standards, euphemistically termed progress, is part of the assimilative ideal.

Whether 'morally' or 'subjectively' guilty, once conviction has occurred the sentencing process has been used to obtain the best means for ensuring future conformity with the law. The underlying philosophy has been that long term kindness justified short-term cruelty and once the wisdom of the new ways is perceived, previous injustices will be forgotten.(77) While punishment in the form of retribution has been thought an inapplicable concept, for it would be the punishment of a morally innocent person, as a means of changing behaviour, albeit a crude means, it has certainly been acceptable. The following excerpts from Gore J. exemplify the high-water mark of the assimilative ideal:

'The untutored savage can be likened to the child of tender years who knows not the difference between right and wrong or to the person of natural mental infirmity which deprives him of the capacity to control his actions... Punishment... suffices to influence him in not committing further crime through the enlightenment gained during imprisonment...

[Where the defendant has acted in ignorance of European law it] is inconceivable that he should be awarded punishment in equal degree to that which would be given to a European for corresponding crime when he is void of that moral sense which binds the actions of the European with the law which the latter himself has helped to create. What he is awarded is something much less, hoping for the day when he will emerge from the slough of ignorance and savagery onto the firm ground of civilisation.(78)

'The sanctions of savagery, however, have been wholly displaced by those of civilisation and the native races have to be moulded into the new order.'(79)

In a similar vein Kriewaldt J. wrote that if 'aborigines... are to be assimilated,... it is essential that they be punished for crimes they commit'.(80)

It would seem that the notions of deterrence, both specific and general, and reformation have been invoked by the courts as justification for interfering with the way of life of the indigenous peoples,(81) to assimilate them to the predominant culture. The essential problem, the dilemma for the courts in sentencing such cases has been to reconcile general deterrence, with the individual case in which moral culpability is negligible. The ambivalence of the courts in such a difficult situation is reflected in the differing attitudes taken by them in a number of cases and pronouncements. Compare for example, an East African case where the victim died, having been beaten for stealing bananas, and the court, in reducing a heavy sentence stated that:

'In determining sentence it has to be borne in mind that the theft of food crops by night is in native eyes very rightly regarded as a very serious offence... [and] prior to the advent of British rule the killing of persons caught stealing foodstuffs was held... to be justifiable homicide,'(82)

with the attitude taken by a Transvaal court, in upholding a sentence:

'...where one is endeavouring to protect a somewhat primitive community,... it is clear... that almost paramount consideration must be given to the possible deterrent effect to others of the punishment without at the same time overlooking the punishment the accused himself merits... it... seems to me that even where moral guilt may be found to be absent a court may, in a proper case, where a very large section of the community, especially an unenlightened one, requires to be protected against dangerous practices, disregard the existence of that form of mitigation.'(83)

Closer to Australia, Minogue C.J., of the Supreme Court of Papua New Guinea, in reducing the sentences of three New Guinean tribesmen from 10 years' to six years' imprisonment for the wilful murder of a reputed sorcerer remarked that:

'I am convinced that they had no sense of guilt for what they had done and rather regarded themselves as having eliminated in defence of their village a person who whilst alive was a threat to the lives and safety of its inhabitants - as indeed he was. I am fully aware of the incidence of homicide, particularly in the Highlands, and of

the necessity for stern deterrent measures, but I feel that killing brought about by a belief in sorcery will for some time to come need special and individual treatment.'(84)

A perhaps harsher view was taken by Clarkson J. in another Papua New Guinean case, R. v. Iu Ketapi and Another[85] which involved 'pay-back' killing. The judge viewed the conduct of the prisoners as 'a challenge to the administration of justice in the Territory'[86] and saw the role of the court as one of a number of agencies aiding in the social enlightment of the primitive communities. He said:

'In this context the function of the court is not merely to inflict punishment but to encourage acceptance of the general law as a step towards a more orderly, humane and unified society.'

'I intend that the punishment I now impose will be not only a just punishment to the accused but a deterrent against the pay back killings which are at present expected.'(87)

In Australia it seems that the courts have not been as troubled by this dilemma, or perhaps if they have, they have not articulated as much in their judgments.

Mr Justice Kriewaldt in the 1950s made reference to his perception of the criminal law as one means of assimilating Aborigines into an integrated Australian community.[88] He believed that a sentence of an Australian criminal court would serve an educative function in bringing to the notice of Aborigines the fact that such tribal practices as spearing are not to be tolerated. Similarly, in R. v. Skinny Jack and Others, Chamberlain J. in 1964 implied that the most acceptable policy was one of assimilation when he said:

'[t]hose most anxious to see the aborigines assimilated into our civilisation should be the most ready to acknowledge that their first lesson should be to obey our laws.'(89)

That assimilation was the accepted policy is borne out, and indeed emphasised, by the fact that in some jurisdictions legislation existed, the purpose of which was to provide incentives to those Aborigines who renounced tribal affiliations and adopted certain features of white acculturation. Cranston cited the Western Australian Native (Citizenship Rights) Act 1944-1964 (repealed in 1971) as an example of the "demeaning nature' of such provisions. Under that Act, a Native (Citizenship Rights) Board could confer

certain rights upon an Aborigine who had 'dissolved native and tribal associations' except with close relatives. 'These assertions had to be attested by two "respectable" citizens; that he was capable of managing his own affairs; that he could speak and understand English; and that he was not suffering from leprosy, syphilis or similar diseases.'(90)

(b) Segregation and preservation of traditional values

Although the major theme has been one of assimilation and acculturation to white society there has constantly been the minor theme, expressed by the doubt that the policy of assimilation was just and correct. In 1933 the National Missionary Council urged that in order that full justice be done in cases of breaches of the law, full consideration should be given to tribal conditions and customs.(91) The effects of imprisonment on an Aboriginal defendant were also the subject of a submission by the Chief Protector of Aborigines in South Australia when giving evidence in a murder trial. He expressed the view that it is 'not desirable that [the] defendant remain away from his people and his home district for a long period. Experience has shown that the process of detribalisation... is unduly hastened by a long absence from home and in such case the prisoner almost inevitably becomes derelict.'(92)

Writers such as Stanner also questioned whether the policy of assimilation, which is meant to offer the Aborigines a 'positive' future of absorption and integration also meant a loss of natural justice for the living Aborigines.(93) The courts have echoed this interplay between the major and minor themes. Blackburn J. in sentencing an elder for spearing a fellow member of the tribe in conformity with tribal law remarked:

'I am faced with the difficulty that on one hand I have to enforce the law on an Aboriginal living in a relatively primitive life. On the other hand, I must recognise that such Aborigines have moral standards of their own to uphold which are not necessarily the same as ours. I think in the circumstances a relatively light sentence will mark disapproval of the law both for him and other Aboriginal members of the community.'(94)

More recently, some decisions, particularly those of Mr Justice Muirhead in the Northern Territory seem to suggest that the crumbling of Aboriginal traditions is having an adverse effect on many youths who are caught in the culture conflict. Far from advocating a policy of assimilation, his Honour's remarks on sentencing several youths in Alice Springs could be interpreted as a wish, probably a vain one, to reverse the trend and to strengthen the authority of traditional societies to deal with their own errant members. In R. v. Daniels and Others,[95] Muirhead J. in addressing one of eight defendants who had been convicted of sexual offences committed in a pack against a white girl, said:

'Like all the accused, you find yourself... in the cultural dilemma of conflicting societies with the temptation, if not the tendency, to reject your tribal values and discipline. You would do well, as would the others, to hold on to your aboriginal traditions.'

And to all the defendants in the same case, his Honour said:

'I accept the concern of your own communities, and you all appear to retain tribal ties. Any punishment they may eventually administer - and I make no request along these lines - is likely to be more salutary than anything I myself can do.'

Of course not all such 'non-integrationist' views are based on such benevolent motives, and as was stated earlier, Kriewaldt J. constantly had to remind his juries that the purpose of segregation was not simply to afford the blacks the opportunity of killing off each other. The resolution of this assimilation-segregation dilemma is fraught with difficulties. While on the one hand one may wish to recognise the values and culture of traditional society, on the other hand, contact must be maintained to ensure the availability of health and welfare services. Should the processes of mobility, mutual tolerance and social and economic development be impeded,[96] or are these concepts themselves simply euphemisms for the processes of assimilation? Is the majority culture prepared to accept a divided society in law as well as in fact?

5. ATTITUDES OF THE COURTS ON SENTENCING

Having examined the underlying tensions which exist between the assimilative and segregative views of the criminal law, it is proposed now to examine the methods by and the extent to which the courts have been prepared, as a matter of discretion, to consider

the special factors which may arise in sentencing traditionally oriented Aborigines.

There are few decisions in this area which make the formulation of generalisations hazardous. As the decisions of magistrates, who deal with the bulk of cases, are not reported, a questionnaire was circulated by the authors to those who sit in remote areas and have constant contact with traditionally oriented Aboriginal defendants. Some of the replies are included in the present text but it must be stressed that they are illustrative only and are not representative of the views of other magistrates.

(a) No discrimination against Aborigines

As there is increasing evidence of the disproportionate representation of Aborigines among the population of penal institutions in Australia,(97) it is perhaps hard to conceive that in some cases it has been held that an Aborigine should never receive a more severe penalty than a white even where a sexual offence has been committed against a white victim. However, in the leading authority of R. v. Anderson(98) Mr Justice Kriewaldt said:

'In every case where I have been under a duty to pass sentence on a native, irrespective of the charge (99) I have heard such evidence as has been available throwing light on the background and upbringing of the native... In general, it has been my practice, since I have been the occupant of this office, to impose on natives sentences substantially more lenient than the sentences imposed on white offenders for similar offences. But all of those cases have been cases where the injured party was also either wholly or partly and aboriginal native.

The main question... is whether in the instant case [where the defendant had been found guilty of attempted rape, indecent assault and common assault against a white victim] that some degree of leniency should be extended.... There are, I suppose, many who think that it is my duty to impose an exemplary sentence which will serve as a strong deterrent.(100) There are some, no doubt, who think that in the circumstances before me a native should receive a more severe penalty than a white person because the injured party has by reason of the assault on her suffered what they regard as a more serious injury than if her assailant had been white. Others again may feel that even in these cases the comparative lack of education of the native should operate in his favour.

I have come to the conclusion that my first approach to the problem of punishment must be that a native, by reason of his colour, should never receive a sentence more severe than a

white person would receive in similar circumstances. His colour may work to his advantage, but never against him.(101) That rule, I think, must apply even in sexual cases and in cases where the injured party is a white woman.'

(b) Extent of culture contact

As another 'general principle' of sentencing traditionally oriented persons, the courts have tried to develop a sort of sliding scale of culpability, the graduations being the extent of culture contact, the greater the contact, the greater the responsibility.

Kriewaldt J. not only took into account the fact of race but also the defendant's degree of acculturation. In fact he wrote that the extent to which Aborigines have been in contact with white civilisation 'is probably the most important factor of all'.(102) In Anderson's case(103) he said:

'[T]he prisoner is about 21 years old and has throughout his life been in touch with white people and subject to the influences of white civilisation. He was described in evidence by the Acting Superintendent of Native Affairs as "sophisticated" and as "substantially civilised". He has had some education and is fairly well conversant with the English language... I think that the extent to which the native has adopted white ways and manners, perhaps, rather, the extent to which he has not yet done so is a very material factor in arriving at a just sentence. The nearer his mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime.'

In Papua New Guinea this same balancing act is attempted, the courts trying to assess culpability and balance punishment against the requirements of social improvement. It is difficult to isolate this element of 'extent of culture contact' because it is intimately bound up with the arguments discussed above of protection in return for subjection and the problems of duress and acting in accordance with tribal custom. Gore J. set out the main considerations for determining punishment as follows:

'(1) No previous knowledge of the Government or only a vague idea of a Government existing.

(2) Some knowledge of the existence of the Government but inability to resort thereto for the punishment of crime.

(3) Crime committed arising out of native custom.

(4) The degree of advancement made through contact with civilisation.

(5) The decline of population in a particular tribe'.(104)

In the case of R. v. Peter Ivoro(105) Prentice J. summed up some of the considerations which the courts have weighed when determining sentence:(106)

'primitiveness, absence from village, ignorance of Government, upbringing, tribal custom demanding killing: Lakalyo's case;(107) lack of formal education, primitiveness, family situation, tribal setting: Dogwaingikata's case;(108) immediate circumstances, state of sophistication, development of community, knowledge of Government, accessibility to and protection by Government, force of custom, ignorance, upbringing, obedience to tribe: R. v. Ketapi;(109) lack of sophistication, remoteness, lack of contact, commerce, ignorance of Government law, little Government influence: Harape's case;(110) some doubt of degree of knowledge of illegality under administration law, youthfulness of most accused who were not from normal decision-making age group, tribal excitement, first contact outside highlands, some doubt as to degree of ritual association: Re Hame; (111)

Wilson J. in R. Tsauname Kilapeo and Alouya Palina(112) and R. v. Iki Lika(113) also took into account the fact that the defendants had had little contact with Europeans and that their actions had some customary merits which decreased their culpability.

(c) Tribal custom as a factor in mitigation of sentence

The existence of a tribal custom or habit may be mitigating in two senses. First, it may be treated as a mitigating circumstance that the defendant has acted in accordance with tribal custom or habit. Secondly, it may be mitigating that the defendant can show that his conduct will attract pay-back or some mark of disapproval on the part of his own community. In the former case, the defendant's community has prescribed or encouraged the conduct which is deemed criminal in Anglo-Australian law. In the latter case, the community has proscribed or disapproved the conduct. Before discussing these two distinct set of circumstances in detail a few prefatory remarks are made.

Eggleston has pointed out that there are very few Aborigines who live under 'pure' tribal law, while a greater number who

live on reserves, missions and pastoral properties are better described as 'traditionally oriented'. There are also the de-tribalised fringe-dwellers who are in a limbo between Aboriginal and white culture, belonging to neither.(114)

It should be stressed that it is not the mere existence of the particular tribal custom or habit which must be proved but 'that the customs or beliefs relied on did in fact induce the commission of the offence',(115) although as Eggleston notes, this may cause some difficulty in that it may be the case that no-one but an anthropologist can assess the extent to which tribal law survives and is influential.(116) Kriewaldt J. in fact was of the opinion that only in a few cases was the crime due to causes which could be referred to tribal laws or customs.(117)

This also raises the problem of the ascertainment of tribal law or custom, which will be discussed in more detail below, but the point must now be made that there is by no means a general agreement that tribal laws, whatever they were, were binding. Hiatt, for example, was of the opinion that it was not clear that there was a defined course of action following certain behaviour which a person was bound to follow.(118) Berndt and Elkin, according to Eggleston, on the other hand, considered that there were definite legal institutions and accepted procedures for settling disputes.(119) The views a court may take will affect the extent to which it will take into account tribal custom.

(i) Defendant's conduct prescribed or encouraged by his own community

One of the leading cases was R. v. Skinny Jack and Others(120) the facts of which were discussed earlier under the heading of duress. On passing sentence, Chamberlain J. in the Supreme Court of South Australia said explicitly that he was making allowance for the fact that the defendants acted in accordance with tribal law and that had they been white and convicted of a similar crime, they could expect sentences 'many times as severe'.

There were several interesting features of the case. First, the tribal offence had actually been committed by the deceased some five years earlier, but the event which had precipitated the defendants' conspiracy was a personal affront to one of them. Secondly, the fact that the defendants came from differing tribes did not, in the Judge's view, invalidate their claim that they were acting in pursuance of tribal law. Eggleston comments that inter-tribal meetings are more common in quasi-traditional society than they were before the Europeans arrived in Australia[121] and the result is that where there are such meetings, modified tribal law tends to operate rather than 'pure' tribal law. She argues that the fact that there is modified rather than a pure version of tribal law does not render it less genuine. The third notable feature of the decision is that Chamberlain J. did not state that the mitigating circumstances failed to apply to the first defendant because he had been partly detribalised. It is true that the first defendant was amongst those who received a two year rather than a one year sentence but it appears to have been the youth of the defendants who were treated more leniently which accounted for the disparity rather than any other factor.

It appears, then, that Chamberlain J. like Kriewaldt J. in R. v. Anderson, was prepared to accept the proposition that a defendant is not precluded from the benefit of claiming that his conduct was influenced by tribal law merely because he has in some respects been acculturated to white society. It is not clear how far Chamberlain J. would have been prepared to extend leniency but Kriewaldt J. was willing to adopt the view that the mere influence of tribal habits may be mitigating although the defendant, has for practical purposes, been completely detribalised. In the famous case of Namatjira v. Raabe,[122] the appellant, a well know artist, had been convicted of supplying liquor to a fellow tribesman who was a ward of the State under a Welfare Ordinance 1953-1957 and was therefore prohibited from drinking intoxicating liquor. Namatjira, a member of the Aranda tribe, had reached such

a state of assimilation into the white community that he was no longer a ward[123] and consequently he was not deemed to be in need of 'special care and assistance'. Notwithstanding the degree of assimilation he had achieved, Kriewaldt J. found that all his life, the appellant had habitually shared his belongings with his friends and therefore he should not be denied the benefit of the mitigating circumstance of the influence of tribal custom. It is significant that Kriewaldt J. was prepared to consider anthropological literature which indicated that members of the appellant's tribe were generous and were accustomed to sharing all their possessions with their fellows.[124]

However, in the later case of Wilson v. Porter[125] Kriewaldt J. was not prepared to accept the argument that the defendant had acted in accordance with tribal custom. The appellant, like Namatjira, had been convicted of supplying liquor to a ward. On the face of it, one might perhaps expect that the Court would be even more willing than in Namatjira's case to find that the appellant had been influenced by the tribal custom of sharing because he, too, was a ward and had not been assimilated to the white community as Namatjira had been. However, the appellant had neither a blood nor a tribal relationship with the recipient of the liquor, and Kriewaldt J. found that the pressure on the appellant to share had probably been no stronger than that felt by half-castes and whites who associate with Aborigines.

Occasionally tribal custom is relevant to offences of dishonesty. In the South Australian case of R. v. Curly Punjunkan and Others,[126] the four defendants, in accordance with tribal custom, had been required to 'go bush' for a month or so before their initiation ceremonies. They went to the hills behind an Aboriginal Mission but on becoming hungry, they raided the Mission store for provisions. Judge Ligertwood was prepared to accept that tribal custom was at least a partial explanation for the offences and therefore was mitigating with regard to penalty.

The period of segregation preceding initiation may be for a considerably longer period than one month. Apparently among the members of the Pitjantjatara tribe, it may extend for as long as two years.[127] One of the traditional purposes of segregation is to afford the nyingka[128] the opportunity to learn of self-reliance. During segregation, the nyingka has little opportunity for remunerative employment, as even if work is available, he is not allowed to take any job which will bring him into contact with ordinary members of his tribe. He is therefore dependent for food and clothing on foraging and on relatives who at times leave provisions on the edge of the camp where they are likely to be found. It is ironical that the main purpose of the exercise is to teach self-reliance and yet the effect of it is often to increase dependence and crime.

In Papua New Guinea the courts also regard actions done in pursuance of customary law as an extenuating circumstance, as it does the extent of cultural contact and knowledge of the imposed law. In R. v. Tsauname Kilapeo and Alouya Palina[129] pay-back was the motive behind a murder. The victim had failed to pay the compensation required for having killed the first defendant's sister and it was the custom of the tribe that a brother avenges his sister's death. The first defendant received nine years' imprisonment and the second defendant, who had been asked to help, received six years. It was stated that Kilapeo felt 'a sense of pride as he performed the clan duty'.[130]

In R. v. Ika Lika,[131] a case of conspiracy to defeat the course of justice, the defendant conspired to have two innocent men stand trial for an offence of riotous behaviour instead of the people who had been originally charged. Villagers paid the Council taxes of the innocent men in return for their standing trial for riotous behaviour because it was felt by the villagers that the two men originally charged had just come out of gaol and should not go back. The judge thought that this act had some customary merit.

Probably the strongest Australian statement concerning the recognition of tribal custom came from Mr Justice Forster in R. v. Lee[128] in the Supreme Court of the Northern Territory. The defendant had been convicted of the attempted murder of his tribal wife and of inflicting grievous bodily harm on her. The Judge found that the victim had been guilty of misconduct for which the defendant was not only encouraged but 'almost required' to punish her. In such circumstances Forster J. considered that the defendant was 'very close to [being] entitled to be released'. In the event, his Honour imposed a suspended sentence of 12 months' imprisonment on the defendant and released him on a bond to be of good behaviour for two years. If such a penalty had been imposed on a European for a similar offence it would have undoubtedly have been regarded as very light.

In cases of this type however, the courts must be very careful to ascertain that the defendant was in fact compelled or encouraged to act in the way he did and was not merely relying on his 'Aboriginality' as an excuse. Eggleston cites one case similar to R. v. Lee where the defendant pleaded guilty to the manslaughter of his de facto wife. The defendant was a fringe dweller, though it was unclear whether he was a part blood or full blood Aborigine. A welfare officer had given evidence that 'the practice of these people in punishing their wives or de facto wives is to give them considerable beatings'.[133] The Judge, on sentencing the defendant stated:

'I am told that it is the custom amongst the people of your race for a man to administer physical chastisement to their women folk for misbehaving... But, although, I propose to make allowance for your racial customs I must make it quite clear to you and other people of your race that if you are to live with white people and live as it is the ambition of the authorities that you should live on equal terms then you must conform to the white laws and customs...'[134]

Eggleston argues that it is difficult to accept that wife-beating is justified by 'tribal custom' and that such a statement is misleading and defamatory of the race. She regards such practices as arising from the conditions of fringe-dwelling and that the white community also has its share of wife-beaters.[135]

A number of the magistrates who replied to the questionnaire felt that where they were satisfied that the defendant's tribe had placed on him an obligation to behave criminally they would regard the fact as mitigating. Whilst most believed that this generally applied to more serious offences and was closely allied to the defendant's degree of contact with the law, some felt that the situation could arise in relation to offences over which they had jurisdiction. As one magistrate stated, 'a person's measure of guilt must be determined inter alia by community attitudes'. He gives the example of an Aboriginal girl who was employed in a bank agency at Yirrkala. She was directed by Aboriginal elders to whom she owed filial loyalty to hand over funds to them (quite illegally). Clearly, he said, her sentence should not be the same as if she had stolen for her own personal gain.

Another magistrate felt that such a situation was impossible as no tribes, at least in his area, would place such an imposition on a member. Yet another magistrate thought that he would regard such a situation as mitigating, but probably to no greater extent than where the offender was a white man acting under a comparable degree of pressure.

(ii) Defendant's conduct proscribed or discouraged by his own community

Although the defendant's community may proscribe or discourage conduct which under Anglo-Australian law is criminal, it is not necessarily the case that the tribe will take such a severe view as the Australian courts.(136) Conversely, the Australian courts may take a less serious view than the defendant's community or may indeed have no jurisdiction at all because the conduct does not fall within the definition of a crime.(137) In short, there is no correspondence between the attitudes taken by tribal communities and Australian courts in their classification of proscribed conduct and their ranking of it in terms of severity. Furthermore, the sanctions which are applied are of a quite different nature. Whereas emphasis is placed by most Aboriginal tribes on the death penalty, on corporal

punishment and sometimes on banishment, those sanctions are rarely applied by Australian courts. It would be beyond the scope of the present paper to catalogue conduct which is proscribed by the different Aboriginal tribes and the sanctions which are commonly applied but one example will suffice to show the range of offences and the penalties which may be imposed. Meggitt records that the Walbiri tribe in the Northern Territory proscribed the following:

'A. Offences of commission

1. Unauthorized homicide (that is, not decreed as a punishment for another offence).
2. Sacrilege (that is, the unauthorized possession of sacred knowledge and objects and the unauthorized observation of sacred rituals).
3. Unauthorized sorcery (1. and 3. are not easily distinguished).
4. Incest (copulation with actual kin or certain categories).
5. Cohabitation with certain kin (usually classificatory relatives in the categories associated with 4.)
6. Abduction or enticement of women.
7. Adultery with certain kin (usually classificatory relatives in the categories associated with 5.)
8. Adultery with potential spouses (7. and 8. in effect cover all cases of fornication).
9. Unauthorized physical assault, not intended to be fatal.
10. Usurpation of ritual privileges or duties.
11. Theft and intentional destruction of another's property (exclusive of 2.).
12. Insult (including swearing, exposure of the genitals).

B. Offences of omission

1. Physical neglect of certain relatives.
2. Refusal to make gifts to certain relatives.
3. Refusal to educate certain relatives.'

And the penalties which such forms of conduct may attract are:

'1. Death - a. caused by a non-human agency (A2).
b. caused by human sorcery (A1, possibly A3).
c. caused by physical attack (A1, A2 possibly A3).
2. Insanity - caused by a non-human agency (A2).
3. Illness - caused by human sorcery (A1, A2, A3, A5, A6, A7, A8; B1, B2).

4. Wounding - attack with a spear or knife, intended to draw blood (A5, A6, A7, A8, A9, A10, A11).
5. Battery - attack with a club or boomerang (A6, A7, A8, A9, A10, A11, A12; B1, B2, B3).
6. Oral abuse - this accompanies all human punishments.
7. Ridicule - this is directed mainly at offences of omission.'(138)

However, Meggitt observes that the penalties are regarded by the Walbiri as maxima only and that people who are sympathetic to the offender may plead for the infliction of a lesser penalty.

Assuming that an Australian court is prepared to receive and can obtain information concerning the attitude of the defendant's community towards his conduct, there are a number of perplexing problems which it has to face. First, it will have to assess the degree of likelihood that a particular tribal sanction will be applied, secondly, it will need to determine how knowledge of that sanction should affect its own deliberation, and thirdly, it may feel the need to dissociate itself from condonation of a sanction it may deem to be cruel.

It is proposed to consider first a decision which is related to a situation where the Australian courts would normally take a more severe view of the defendant's conduct than his own community and secondly, cases will be considered in which the sentencing court has felt convinced that whatever attitude it takes the defendant's community will inflict its own severe penalty.

More severe attitude by Australian courts

There are a number of offences regarding which the Australian courts take a more severe attitude than the community from which the defendant comes, for example some assaults, carnal knowledge and incest. With regard to incest it seems clear, as O'Regan has written, that:

'in some communities the relationships prohibited by the code... are not the same as those prohibited by local custom. It sometimes happens, therefore, that conduct regarded as blameless is punished while conduct regarded as heinous goes unpunished.'(139)

In R. v. Mangukala(140) Forster J. sentenced the defendant who had pleaded guilty to the unlawful carnal knowledge of a 10 year old Aboriginal girl. He thought it likely, in view of the sexual precocity of young Aboriginal girls, that the victim had had previous sexual experience and in view of the 'different' social customs, was prepared to deal more leniently with the defendant than he would have done if both participants had been white. His Honour found it necessary to add that he was not thereby attaching less value to the virtue of Aboriginal girls than of white girls, an impression which was probably hard to dispel. He gave the defendant a suspended sentence of 12 months' imprisonment on his entering into a bond to be of good behaviour for two years and during that time to be under the general direction of his father.

It is submitted that in cases such as R. v. Mangukala, it is essential that the court makes it quite clear, as Forster J. did, that it was the defendant's tribal attitude towards sexual conduct with the particular victim which justified the court's order. In the absence of such a statement, the case might almost be taken by whites and fully detribalised Aborigines as a licence to seduce young Aboriginal girls.

Severe sanction by defendant's community

A particularly difficult problem confronts Australian courts when the sentencing judge or magistrate is aware that whatever penalty he imposes, the defendant's own community(141) will exert its own retribution in the form of pay-back.(142)

Unfortunately there are few cases where this difficulty has been faced squarely and explicitly by Australian courts. On the one hand, Australian courts should be prepared to recognise that if they inflict only a

nominal penalty in the case of serious crime it might be interpreted as abdication of responsibility and a licence to the defendant's community to exact retribution which, in European eyes, may even be of a sadistic and inhuman nature. On the other hand, if the Australian courts ignore the pay-back tradition, the defendant will be subjected to double punishment. In at least one Western Australian case, a trial judge has apparently gone so far as to impose a longer sentence for manslaughter than he would have done otherwise in an attempt to delay, if not prevent, the pay-back system from operating.(143) However, on appeal, both the sentence and the minimum term were halved to six years' and three years' imprisonment respectively. The Chief Justice commented that the trial judge's motives were 'kindly' but 'inappropriate'. The word 'kindly' is strangely incongruous in such a context but at least the appellant was spared a prolonged sentence of imprisonment and the probability of pay-back at the end of it.

More recently, two Supreme Court Judges in Western Australia have made a novel attempt to reach a solution in cases where they have known the defendant would be subjected to pay-back at the termination of a prison sentence. In both R. v. Ferguson(144) and R. v. Fazeldean(145) the defendants were convicted of manslaughter and the sentencing Judges, Burt J. and Wallace J. respectively, were aware of the problem of double punishment.(146) In the circumstances, Burt J. attached the low minimum term of one month's imprisonment to a full term of two years and Wallace J. attached a minimum term of six months' imprisonment to a full term of five years.

While these decisions are to be welcomed in the sense that they represent, with respect, a brave attempt to deal with a difficult problem, it is doubtful that the attachment of a low minimum term to a sentence of imprisonment will always be appropriate, or indeed,

will meet the purpose intended by the sentencing judge. It may well be the case that the Parole Board views the situation differently and the recommendation of the sentencing judge will not be heeded. It would have been possible, for instance, for Ferguson to serve two years' imprisonment and Fazeldean, five, before release and subjection to pay-back.

Among the magistrates who replied to the questionnaire there was some difference of opinion on the issue of pay-back. Some felt that it was correct to take into account the suffering experienced (or to be experienced) by an offender in addition to the formal sanction imposed by the court, but this depended on the facts of the case, and where tribal retribution was not of a serious nature, it would not affect sentence at all. One magistrate thought that by consultation with the offender's community, the court could discover what punishment the tribe deems sufficient to avoid retaliatory action. Another has imposed nominal penalties in such cases and has in others banished the offender from a particular tribal area by inserting a condition in binding him over to keep the peace or be of good behaviour.

A magistrate who took a strongly assimilative view of the criminal law was adamant that such factors would not influence him. He gave the following reasons:

(1) to bow to such influence would be to acknowledge that the victim or relatives had some colour of of right for subsequent retaliation;

(2) the possibility of retaliation would be a matter to be dealt with by the police or other authority in a preventive or comparable (e.g. educational) role;

(3) a lighter sentence for such a reason would encourage the perpetuation of a dual system of law, and he did not believe the legislature intended that.

The general impression from the survey was that the

pay-back system was either on the way out or was being integrated into the Anglo-Australian system of justice so that both that law and tribal law could be satisfied by one sentence. Of course the fear of being prosecuted for taking part in the pay-back also has a major part in the disappearance of tribal revenge.

(d) Attitudes to offences involving the consumption of alcohol

Few would deny that the consumption of alcohol plays a dominant part in the incidence of Aboriginal crime. Most of the evidence is anecdotal rather than statistical although Hawkins and Misner[147] have reported that in the Northern Territory, where the Aboriginal population is the highest in Australia[148] 75 per cent of all prisoners are gaoled for public drunkenness and the percentage is considerably greater when those who have committed 'drink-related' crimes are included. Momentum in several Australian jurisdictions is gathering for the decriminalisation of public drunkenness[149] but even if the courts are relieved of the substantial burden of dealing with public drunkenness as an offence, there still remains the weighty problem of determining the appropriate attitude towards the clearly high percentage of Aborigines who commit other offences while intoxicated, or at least while under the influence of alcohol.

It is probably the case that the courts of the Northern Territory have more occasion than any others in Australia to consider the relationship between crime, particularly among the Aborigines, and the consumption of alcohol. If so, it is significant that Mr Justice Forster has taken a positive stand in his attitude towards the problem. One of his strongest statements was made in R. v. Lee[150] when he was sentencing the defendant who had been drinking prior to attempting to murder his tribal wife and the infliction of grievous bodily harm on her. His Honour said:

'I regard the over-use of alcohol as being much more the mitigating circumstance in the case of Aboriginal people than in the case of white people: for two reasons, one, of course, is that until comparatively recently in [Aboriginal] history [they] had no experience of intoxicants at all. And secondly I think that Aboriginal people are often led out of despair into drinking.'

His Honour has made similar statements in a number of other decisions.(151)

It is by no means clear, however, that Mr Justice Forster's view is generally representative of those held by judges and magistrates who are accustomed to sentencing Aborigines. The prevalent view seems to be that many offences are committed under the influence of alcohol and that applies to both blacks and whites although the magistrates who responded to the questionnaire generally felt that the former could handle liquor less ably. Drink, said one magistrate, is the curse of the Aborigine, who will sell his wife and neglect his children for it. A frequently expressed view was that the law should apply equally to black and white and if leniency should be extended to blacks on account of alcohol, it should also be extended to whites.

Those magistrates who were sympathetic to Forster J's conclusion varied in their reasons. One magistrate felt that the extent of culture contact was an important factor while another expressed a view similar to that of the Judge in that he tried to understand the 'frustration I know these people feel'. A more paternalistic justification for leniency was taken by another magistrate when he said that he 'accepted that their mentality together with self control is akin to the young of our race' and that they are easily lead by the unscrupulous and do not appear to possess the comprehension of any situation relating to drink.

6. DEFICIENCIES OF THE SENTENCING PROCESS AS A 'MITIGATOR'

(a) White remedies not in accord with traditional remedies

As already discussed, Anglo-Australian law and customary law in many respects are not congruent and many acts which an Aborigine may regard as a serious offence are not criminal at Anglo-Australian law. As Mr Somare, the then Chief Minister of Papua New Guinea has written, one of the problems in his country is to find a way in which the courts and their operation can be meaningful to the people of that country. Difficulties which commonly bedevil the administration of Anglo-Australian law were perhaps peculiarly aggravating in Papua New Guinea. Trials did not occur quickly enough and procedure was so complicated

that justice was not readily seen to be done.

Probably the major problem is that of compensation, for in some communities, punishment of the individual is often 'less important than the payment of compensation to those who have suffered wrong'.(153) One of the magistrates who replied to the questionnaire said that in some cases he may order a fine to be paid to the victim so as to diffuse a situation of pay-back.

(b) Differing notions of guilt

The differing nature of concepts of responsibility between European and traditionally oriented peoples has often been noted. As was seen in the case of R. v. Kauba Paruwo(154) in some societies provocation can be met by direct or indirect retaliation. Kinship or clan systems recognise the individual in only a limited way and place greater emphasis on the general welfare of the total community. In R. v. Iki Lika(155) it seemed clear that individual guilt meant little to the community. It was more important to spread the burden of Anglo-Australian law among the villagers.

Retribution in subsistence communities may mean less than compensation for the loss of a village member so that the determination of guilt is a secondary consideration to ensuring that his clan pays for the offence. Mr Justice Frost of the Supreme Court of Papua New Guinea has recently drawn attention to the failure of Anglo-Australian legal concepts to accommodate the totally different perceptions of highland groups in that country towards responsibility. Following widespread inter-tribal conflict, a Committee was established to investigate the underlying causes. According to Frost J.:

"the Committee considered that the present situation called in question the whole basis of the western legal system which is concerned with individual responsibility based on fault liability and is rigidly divided in its provision of civil remedies and criminal sanctions.

Thus compensation procedures involving the kin groups have been recommended. The radically different approach is seen in the following concepts which the Committee considered should be accepted:-

"(a) If the deceased was a member of a recognized and cohesive kin group then that group is entitled to

be compensated for his loss.

(b) If the person who caused the death is also a recognized member of such a kin group then his kin group is liable for his action.

(c) Liability to pay compensation should not depend upon fault, although whether the death was caused intentionally, negligently or by non-culpable homicide should probably be taken into account when assessing the amount of compensation ....."'(156)

The Committee also recommended that an offence should be created whereby a kin group might be declared liable to group punishment, such as group imprisonment, group pig fines and work camps.(157) The views of the Committee seem also to be reflected in Part V of the Village Courts Act 1973 entitled 'Group Responsibility'. Section 60(1)(b) provides that in some circumstances, orders may be made 'for, against or affecting groups' though a recognized group cannot be liable to conviction.(158)

(c) Differing attitudes to penalty

There has been a continuing dispute in the literature as to whether Europeans and Aborigines have different perceptions of punishment.(159) On the one hand it is argued that imprisonment, which is probably seen by Europeans as the most severe penalty, is similarly perceived by the Aborigines. Kriewaldt J. believed that the fact that 80 per cent of all fines imposed on Aborigines were paid was evidence that imprisonment was viewed as a penalty.(160) Eggleston, on the basis of her observations felt imprisonment was indeed a penalty to Aborigines, and some courts have considered it to be more so for tribal Aborigines. In the submission on sentence in a case of murder in 1953, the Chief Protector in South Australia stated that:

'Tribal or nomadic Aborigines cannot endure the thought of restricted liberty for a long period. The last full-blood sentenced... to a term of imprisonment for two-and-a-half years committed suicide by hanging in the Yatala Labour Prison soon after admission to that institution.'(161)

On the other hand, some believe that for Aborigines incarceration carries no stigma. On the contrary, it is often perceived as a holiday in a place far removed from the immediate threat of pay-back.(162)

The magistrates who responded to the questionnaire also reflected this dichotomy of views. Those who thought it was a deterrent pointed to the loss of liberty, loss of sexual activity, the possibility of missing some tribal event of importance and removal from one's family, tribal area and language group with little possibility of being visited. Those who thought it was not a deterrent, believed that the younger Aborigine especially looked forward to the flight, regular meals and television. Two magistrates even suggested that rather than imposing a stigma, imprisonment was a 'necessary pre-requisite to initiation' or 'a badge to be collected in lieu of manhood ceremonies'. Most who thought it was not a deterrent stressed that the prison offered a superior standard of living compared with that on reserves.(163)

Perceptions vary not only as to the value of imprisonment but also as to the nature of a bond or a suspended term of imprisonment. Sackville has argued that the essence of traditional punishment for Aborigines is its immediacy and that postponed or deferred sentences are not understood by them.(164) Kriewaldt J. rarely used the bond as a sentence for there 'are not many aborigines who would understand what was meant by a release on conditions'.(165) Some of the magistrates doubted that such sentences were really understood by whites either, but at least one felt that if the significance of such a sentence is minimal, it would be unfair to impose a harsher penalty on an Aborigine because he fails to understand, for example, the nature of a bond. Others thought that although an Aborigine might be bewildered by a postponed or deferred sentence this could be taken into account in the event of breach of the conconditions of postponement. One magistrate said he would never impose a bond or suspended sentence because it would indicate weakness on the part of the law and the courts, not only to the defendant but also to his friends and associates.

Those magistrates who thought the bond or suspended sentence was a suitable penalty did so on a number of grounds. One did not necessarily agree that the essence of Aboriginal punishment is immediacy and felt that in fact more immediacy is needed generally in the imposition of penalties. Another magistrate,

although agreeing that immediacy is important thought that this is changing with Europeanisation. He also believed that only by imposing such sentences would the Aborigines become educated to the significance of the sentence. The strongest view in favour of the imposition of bonds was put in terms of the tendency to under-estimate the intelligence of the Aborigines.

If the significance of bonds and suspended sentences is not understood by defendants, one may wonder whether similar problems will be encountered with the introduction of new measures, such as work orders. It is submitted that it is of fundamental importance in any sentencing system that no effort be spared to ensure that the defendant understands the nature of the penalty imposed upon him.

7. SUGGESTED SOLUTIONS

In most societies the answer to the problem of pluralist values has been a centralist legal system which, from a position of power, has assumed the right to subjugate those who are less articulate and less organised. Pluralism has a number of forms, for example, the minority may control the majority, as in South Africa[166] and until recently, Papua New Guinea, or the majority may control the minority, as in the Unites States or Australia. In a few cases the pluralistic elements are almost equally divided, as on some of the Pacific islands. But problems are not confined to racial minorities. In the culture of the 'melting pot', equality meant homogeneity, but in recent times the concept of equality has come to denote more the right to be different,[167] the right to retain and enjoy one's own values. This has entailed a penetrating reconsideration of the role of law in society. Criticism of the 'over-reach' of the criminal law, with its traditional prohibitions of such conduct as homosexual practices, drug-taking, nude bathing, gambling, and prostitution has led to the questioning of the legitimacy of government control and failure to deal satisfactorily with these problems has given rise to discontent.

The idea of 'separate development' has earned an unfavourable reputation because it has been associated with apartheid policies of South Africa, where 'separate' has not been 'equal'.[168] However, as one South African critic has written of legal pluralism:

'The purpose and function of each system is to give recognition in whole or in part to the laws and customs of the various groups within the territory of the community in question. A group may be dispersed throughout the territory or intermingled with other groups, or it may exist substantially as a separate geographical entity... [T]he desirability or otherwise of such pluralism seems to depend on its purpose. Thus, where the purpose of legal pluralism is to ensure that the groups within the community are kept apart, the object being, for instance, not to safeguard the identity of a minority group (whether national, racial or religious), but to preserve its paramountcy over the other groups... it is submitted that there may not be a pluralistic legal system and, if there is, it is certainly objectionable and immoral in fundamental terms in law.'(169)

Assuming that recognition should be given to the laws and customs of various groups, a substantial problem arises as to the means of achieving such an end. There have been numerous schemes in both Australia and elsewhere which have been proposed and some of the advantages and problems of some of these will now be discussed.

(a) Taking the law and practice of the defendant into account

(i) By statute

Australian courts have little or no statutory guidance as to the way in which they should take into account the fact that the defendant has, in the commission of crime, been influenced by the existence of tribal law or custom. Courts in the Northern Territory are authorised to do so by S. 6A of the Criminal Law Consolidation Act and Ordinance 1876-1974 but the Section applies only to a case in which an Aborigine is convicted of murder. It provides:

'For the purpose of determining the nature and extent of the penalty to be imposed where an aboriginal is convicted of murder, the Court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty.'

In the past, Western Australia has had a formal means whereby tribal law could be taken into account in determining penalty. Between 1936 and 1954 legislation was in force which established courts of native affairs.(170) Such a court, which was constituted by a Special Magistrate and a protector nominated by the Commissioner of Native Affairs, had jurisdiction in respect of any offence committed by an Aborigine against another Aborigine. S. 59D(3) of the Aborigines Amendment Act 1936 provided that the court 'may

...take into account in mitigation of punishment any tribal custom which may be set up and proved as the reason for the commission of the offence'.

It does not seem that this court was frequently convened. Eggleston cited only six cases which were heard in Broome, Derby and Hall's Creek between 1947 and 1952[171] and stated that it did not seem that the court built up a tradition of lenient sentencing for out of eight defendants tried in this court, five were sentenced to death.

In Papua New Guinea, a statutory provision allows for the inclusion of native custom. S. 7 of the Native Customs (Recognition) Act 1963 provides:

'Subject to this Ordinance, native custom shall not be taken into account in a criminal case, except for the purpose of -

(a) ascertaining the existence or otherwise of a state of mind of a person;

(b) deciding the reasonableness or otherwise of an act, default or omission by a person;

(c) deciding the reasonableness or otherwise of an excuse;

(d) deciding, in accordance with any other law in force in the Territory or a part of the Territory, whether to proceed to the conviction of a guilty party; or

(e) determining the penalty (if any) to be imposed on a guilty party,

or where the court considers that by not taking the custom into account injustice will or may be done to a person.'

Although this seems to give the court fairly wide powers and discretion in taking native custom into account, other sections of the Act severely circumscribe Section 7 and in practice its use is limited; for example, the Act provides that statute is to prevail over custom where the two are in conflict[172] or where the recognition of custom '... would result in the opinion of the court, in injustice or would not be in the public interest'.[173] 'It would be impossible, therefore, to justify conduct which was prohibited, for example, by the Criminal Code, as custom. Aberrant forms of customary behaviour are thus unlikely to be sanctioned in the courts'.[174]

Some African definitions of customary law which had similar inbuilt limitations were found, for example, in Bechuanaland (now Botswana):

'"Native law and custom", "Native law or custom" and "Native custom" mean in relation to a particular tribe or in relation to any native community outside any tribal area the general law or custom of such tribe or community except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction or repugnant to morality, humanity, or natural justice, or injurious to the welfare of the natives.' (175)

and in Tanzania-Tanganyika:

'"Customary Law" means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African community and accepted by such community in general as having the force of law ... but does not include any rule or practice which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by written law; and references to native law and customs shall be similarly construed.'(176)

One would doubt that statutory provisions have had much success in creating or advancing legal pluralism.

(ii) Non-statutory

Early Australian courts showed a great reluctance to recognise Aboriginal law and custom and in fact questioned whether such laws did exist. In one case concerning the recognition of an Aboriginal wedding the court held that while it would readily recognise a marriage from another country:

'...to extend that law to the aborigines of this colony, or to take the statement of their customs from one of themselves, is to go too far. We may recognise a marriage in a civilised country, but we can hardly do the same in the case of the marriage of these aborigines, who have no laws of which we can take cognizance. We cannot recognise the customs of these aborigines so as to aid us in the determination as to whether the relationship exists of husband and wife.'(177)

Similarly, a Victorian court had come to a like conclusion on the same point. In R. v. Neddy Monkey(178) the Full Court stated that:

'The Court cannot take judicial notice of the religious ceremonies and rites of these people, and cannot, without evidence of their marriage ceremonies, assume the fact of marriage... [It is not] by the assertion of vague rites

and ceremonies, that the general rules of evidence are to be broken down.'

The latter case takes a less uncompromising stance regarding the reception of Aboriginal evidence and seemed to have left open the possibility that given proper evidence Aboriginal laws and customs could be taken into account. In the famous Aboriginal Land Rights case of Milirrpum v. Nabalco Pty Ltd(179) Blackburn J. was prepared to accept evidence of the Aborigines' social organisation, way of life and land-holding rules. The Commonwealth Solicitor-General had insisted that proof of all the facts asserted by the plaintiffs must be by evidence admissible at common law. Blackburn J. while agreeing with this proposition stated that:

'Neither the novelty of the substantive issues, nor the unusual difficulties associated with the proof of matters of aboriginal law and custom, is any ground for departing from the rules of the law of evidence which the Court is bound to apply. On the other hand, the rules of evidence are to be applied rationally, not mechanically. The application of a rule of evidence to the proof of novel facts, in the context of novel issues of substantive law, must be in accordance with the true rationale of the rule, not merely in accordance with its past application to analogous facts.'(180)

This practical and flexible view of the law taken by Blackburn J. at least leaves open the possibility of the introduction of evidence as to customary law, where it is thought relevant. It does however raise problems as to the nature of customary law, its method of proof, its limitations and problems.

The nature of customary law

Although customary law is easy to recognise it is hard to define precisely. As already observed, some attempts have been made in Africa but Elkin noted that to use the word 'law' is to focus far too narrowly:

'To understand laws and customs means a complete study of the social, economic and religious organisation of the tribe, for in primitive society the various aspects of social life are intimately intertwined in a living whole.'(181)

With no code of tribal law, a lack of qualified interpreters and a possible desire for secrecy on the part

of the Aborigines,[182] problems abound.

In Papua New Guinea, the phrase 'native custom' is not exhaustively defined in the Native Customs (Recognition) Act 1963, but it says that it 'shall be read as a reference to the custom or usage of the aboriginal inhabitants of the Territory obtaining in relating [sic] to the matter in question at the time when and the place in relation to which that question arises, regardless of whether or not that custom or usage has obtained from time immemorial.'[183]

This definition differs from the common law test which required that a rule had existed from time immemorial, that it had been continuously observed, had been peaceably enjoyed, was recognised as having obligatory force, that it was sufficiently certain, reasonable and that it did not conflict with another rule which established an obligation, such as some other statute or common law.[184] The main respect in which the Papua New Guinean provisions differ from the common law is that under the former, the law need not have existed from time immemorial and so recent custom or an altered custom can be introduced. In the Skinny Jack case,[185] for example, the tribal law which was taken into account was a 'modified' tribal law rather than a 'pure' tribal law, but as Eggleston argues, that did not render it less genuine.[186] If the 'time immemorial' rule had been applied, presumably 'modified' tribal law would not have been taken into account. There are, of course, other problems with a flexible notion of custom such as how short the period has to be for actions to be recognised as custom. Hookey cited, for example, the cargo cults in Papua New Guinea, and asks whether these should also be recognised as custom and thus justify behaviour which otherwise would be criminal.[187]

The next problem when considering customary law is to distinguish between 'customs' 'which are mere habits

or patterns of behaviour that on observation show some degree of regularity and continuance, and those which, in addition... are affected by a notion of obligation, so that it is possible to say not only that the persons affected by the "custom" behave in a certain way, but that they feel themselves obliged to behave in that way.'(188) The question whether the rules are mere norms or are obligations could make a substantial difference to the success of a defence on the basis of customary law. Hiatt, for example, regarding cases of tribal retribution left open the question of whether there was a consensus of opinion as to the correctness of the retribution. Disputes, he said, gave rise to conditions of conflict in the minds of some of the parties. It was not automatic that action should ensue, rather it was a matter for consideration and decision.(189)

Assuming conduct has occurred which gives rise to an obligation, the question then remains as to the nature of the action which is consequential on that obligation. In some communities all that is required is the setting in motion of certain procedures for resolution of the dispute. Such procedures may involve negotiations leading to compromise and reconcilation. Allott felt that in British Africa most of the rules were of this kind(190) and Derham thought the same of rules in Papua New Guinea.(191) In other communities, however, such rules were of a substantive nature. These rules might prescribe, for instance, a beating of the offender by the victim or his kinsman, banishment, or the payment of compensation. It is not clear whether the rules which operate amongst Australian Aborigines are of the nature described by Allott whether they are of a more substantive character. The position may well vary from community to community.

Method of Proof

There are a number of different ways in which customary law may be proved or otherwise taken into account.

Aborigines themselves

The most obvious source of information would appear to be Aborigines themselves and it would usually be the elders of the tribe who would be in the best position to give evidence about customary law. Blackburn J. has stated that in one case:

'No difficulty arose in the reception of the oral testimony of the aboriginals as to their religious beliefs, their manner of life, their relationship to other aboriginals, their clan organisation and so forth, provided, first, that the witness spoke from his own recollection and experience.'(192)

There are however quite a number of other problems for a court in receiving evidence from native persons. The first involves the sheer labour(193) of eliciting the required information from a person who may have difficulties with the language, who may not wish to divulge all the tribal secrets to the court and who, if he is elderly, may tend to idealise the law, to present what it ought to be rather than what it is.(194) This of course excludes the problems of ignorance, bias and corruption. It has been noted that where kinship or clan ties are involved, the evidence of one person may be coloured by his kinship loyalties and the court may have to take this into account.(195)

Most of the magistrates who responded to the questionnaire were receptive to the idea of seeking information from the Aborigines themselves. Tribal elders or tribal councils were, to them, the most obvious source of information though as one magistrate noted, it is often difficult to discover who are the tribal authorities or who is the tribal spokesman. Newly appointed Aboriginal members of the Bench were found useful by one magistrate.(196)

Anthropologists

In Milirrpum v. Nabalco Pty Ltd(197) evidence for the plaintiffs was given by two eminent anthropologists, Stanner and Berndt. However, it was attacked on a

number of grounds. The first ground was not that the witnesses lacked professional qualifications but that the recency and extent of the experience of one of them with Aborigines of the particular community in question. The judge rejected this attack on the basis that the length of time spent went to weight rather than admissibility of the evidence. The next ground of attack was that the hearsay rule prohibited admission of the evidence. The anthropologists' sources of knowledge included what they had been told by the Aborigines. This was rejected on the basis that anthropology drew its information from numerous sources; observation, talking to the natives, reading the published works of the other experts and applying principles of analysis and verification. These methods are generally accepted as valid in the field of anthropology. Thus while an anthropologist's evidence could not simply be put on the basis that 'A told me that this was the land of B tribe', he could express the opinion as an expert that proposition X is true for that tribe. The facts which form the basis of the opinion are selected by the expert and although not always apparent, this must go to weight and not admissibility. 'The ascertainment and description of such facts, and the the extent to which they support the conclusions preferred, can of course be the subject of cross examination.'(198)

The use of anthropologists as expert witnesses has often been suggested. This would be less laborious than receiving evidence from native witnesses and would obviate the problems of bias arising out of kinship conflicts discussed earlier. Most of the magistrates were prepared to hear evidence or consult with anthropologists but felt that it would be more suitable for the higher courts to do so.

Legal services

Since the advent of widely available Aboriginal legal aid it seems that it has had a strong impact on the

operation of the courts. In a recent article, Downing argued for the continuation of the specialised legal services which have built up an expertise and have the kind of relationship with Aboriginal communities which enables them to obtain accurate information and to provide it to the courts.(200) A number of the magistrates who responded to the questionnaire specifically mentioned the Aboriginal legal services as sources of background information and tribal

attitudes though one expressed the opinion that the court should not directly solicit such information but should rely on the submission of the lawyer.

Other persons

There have been a number of other sources mentioned as suppliers of information. Such persons include missionaries,(201) officials of welfare departments, social workers, Departments of Aboriginal Affairs, probation officers and even police. As with all so-called expert witnesses, the weight of their evidence would have to be carefully assessed.(202)

Other means

In some African jurisdictions customary law may be be proved by documentary evidence if a book or manuscript is recognised by the natives as legal authority.(203) This course is however attended by much difficulty, especially as cross-examination may not be possible on the conclusions and as it may be difficult to ascertain whether the alleged facts are actually accepted by the natives.

For the same reasons it would seem unwise to allow a judge to take judicial notice of customary law. In Namatjira v. Raabe(204) Kriewaldt J. considered anthropological literature which indicated that members of the appellant's tribe were generous and accustomed to sharing their possessions with their

fellows. Although his Honour's motives were undoubtedly sound such a course could be hazardous. Anthropologists are by no means unanimous in their views and if a decision regarding conviction or sentence is to turn on such material, knowledge of its contents should be given to counsel, who should have the opportunity to challenge it. As Allott states, the best course for a judge 'is... to call evidence himself, or suggest to the parties that they should do so, in support of his personal view'.(205) However, it may be possible for a judge to rely on his own knowledge where his knowledge is generally shared. In Angu v. Atta, the Judicial Committee of the Privy Council said:

'As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them.'(206)

Whether in fact customs in Australia will be so litigated in the courts as to become 'notorious' to the courts is unlikely but the point here is that it is unwise for judges to rely solely on their own opinions even where founded on a view expressed in literature.

It could be argued that previous judicial decisions could constitute a source of information concerning the nature of customary laws. However, problems may arise in relying on such a source. If customary law is treated as a matter of fact, a previous decision cannot be a precedent for a later case.(207) Furthermore, customary law itself may change and the doctrine of precedent, which is so central to Anglo-Australian law, is not always compatible with development in any field of knowledge, whether it be scientific or sociological. On the contrary, the doctrine of precedent can be an instrument of ossification, particularly if relatively few decisions are reported.

It is indeed the tendency of the law to become rigid which accounts for much of the existing resistance to codification. However, in Australia, the mere existence of many tribal groups with different customary laws would constitute an insurmountable problem for the draftsman of any Code.

Limitations and problems

Some of the limitations to the recognition of customary law have already been discussed in another context. One such limitation, commonly found in statutes is that courts cannot administer customary law which is repugnant to natural justice or morality or is in conflict with any other laws in force.(208) This is a fairly severe limitation and reflects the secondary role which customary law plays in developing societies, but it also reflects the supremacy of statutory law.

The supremacy of statutory law has already been the means of changing some practices which are widely believed to be immoral, such as slavery and sorcery. In this way the legislature plays a major educative and social role by making a value judgment that certain practices must cease. However, abuse or misjudgment on the part of the legislators is always possible and there is need to ensure that in the decision-making process by Parliament that minority groups have adequate representation. Such a safeguard would help remove the overtones of cultural imperalism and would enhance the reputation of the criminal law.(209)

The final problem is that of ascertaining which tribal law is applicable. Intra-tribal disputes are not likely to present this partiular difficulty, but other situations may well do so. For example, inter-tribal fighting is not uncommon, nor is migration of individuals from the territory usually occupied by one tribe to other areas. Legislation may specify that the native custom must be that of the place

> where the alleged crime is committed[210] and that may be the law of neither party. Certain transactions may be unknown to Aboriginal law or custom, (though this is more likely to occur in relation to civil disputes) or issues may arise between Aborigines and non-Aborigines. Eggleston has seen this problem as one of conflict of laws and suggests that perhaps some rules should be developed which govern the choice of law.[211] Clifford[212] thought that for the urban but traditionally oriented person, a system of urban customary courts should be established to administer a 'composite customary law by means of benches of different tribal elders who, given a case where different tribal traditions applied, would select the rule thought to be most appropriate to the novel circumstance'.

(iii) The practice of consultation

The solution of taking customary law into account has been seen to have a number of disadvantages, some of which seem hard to resolve. Yet it is the most widely used method of ameliorating the harshness of the law. With regard to sentencing, there has been a series of Supreme Court decisions from the Northern Territory where the sentencing judge has made an attempt, directly or indirectly, to persuade the defendant's community not to take severe measures against him. Unfortunately information is not available concerning the success of these attempts. They have included cases which Australian courts would normally regardly seriously.

In R. v. Puruntatameri,[213] the defendant had been convicted of assault on a relative occasioning him severe injury from which the victim would probably suffer a permanent impairment. In sentencing the defendant, Forster J. said, 'I take into account that you will incur at least the disapproval of your people', and after imposing on him a suspended sentence of 12 months' imprisonment he placed him on a bond to be of good behaviour for

two years. His Honour made a plea to the defendant's community stating:

'I want to make it clear to the people from Bathurst Island that although this man is going free now, he nevertheless has been punished in a fairly substantial way by this Court. I cannot know what the attitude of the people may be to what happened, but I urge them not to punish this man twice. I do not want to interfere in what are peculiarly Aboriginal tribal matters, but nevertheless I do want the people to understand that [the defendant] has been brought here and he has been punished by the white man's Court, and whereas the people there may disapprove of what he did, I think if I may say so that it would be wrong for them to exact any substantial punishment from him, because this means of course that he would be punished twice, once by me and once by them.'

In both R. v. Iginiwuni[214] and R. v. Lim[215] Mr Justice Muirhead received information concerning the attitude of the defendant's community. In the former case, information was sought concerning the rape of a two-and-a-half year old Aboriginal girl. In the latter case the attitude of the defendant's community was sought towards the offence of arson of a settlement classroom valued at $40,000. In each case information was obtained, directly or indirectly, from the Council for the particular community of which the defendant was a member. A message was received in Lim's case that a meeting of the Council had been held to discuss his offence and it had been decided that there would be no pay-back. Indeed, the Council went so far as to offer to be surety, if the Court ordered the defendant to enter into a recognisance, or if a fine were imposed, to pay it and organise the repayment by the defendant from his wages.

Quite a few of the magistrates who responded to the questionnaire also saw value in obtaining information from the defendant's tribe, to determine for example whether the defendant is a trouble maker or to assist them understand the relationships between the persons involved. In some cases cooperation has been sought to assist in the enforcement of a penalty or order. In one series of cases which arose out of a number of disturbances on a settlement, a group of offenders were 'banished' or

barred from drinking at a club and as the tribe had made the suggestions for sentence it was felt that they were the ones who had to enforce the orders, although there was some initial reluctance. One magistrate felt that the cooperation of the tribes is helpful when placing juveniles on bonds or finding sureties. It was felt important to find the right persons in the tribal organisation to act as surety. Often it is not the parent who has responsibility for the defendant.

It would be naive to suggest that cooperation from the defendant's community is always forthcoming, or indeed that it should be invariably sought. In many cases, the sentencing court will have to look for another solution to its dilemma. However, it is submitted, that if possible, and in the absence of more radical reform, the sentencing court should strive to elicit information and cooperation.

(b) Assessors

One of the more 'radical' reforms, at least in the Australian context would be the use of assessors where traditionally oriented defendants are involved. Such a step would provide at least one means whereby the local people could participate meaningfully in the criminal process, apart from holding judicial office.

There are a number of different views as to functions and powers of assessors. In West Africa, assessors sat with the judge though their opinions did not bind the judge. He selected the assessors from a list prepared by the Government and there was no right of challenge against his choice.(216) In some jurisdictions the opinions of assessors were more than advisory, but this was exceptional and it was not always necessary for the judge to sum up the evidence for the assessors.

Opinions vary as to who should sit as assessors. In some countries it was simply residents who could speak and understand English and who were not for some reason disqualified or exempted.(217) In India, where the system of assessors

originated, it was 'two or more respectable natives'. Kriewaldt J. was in favour of the use of assessors, though with the judge retaining substantial power. The assessors, he felt should be drawn from a panel of 'persons who have had substantial experience of aborigines'.(218) Elkin believed that assessors should be such people as anthropologists, selected officers of the Native Affairs Branch and, in due course, Aborigines themselves.(219) In Papua New Guinea the then Chief Minister expressed his policy in September 1974 that 'experienced Papua New Guineans' would be appointed to sit with Supreme Court judges to assist in the evaluation of evidence, but not to determine guilt or innocence.

In most jurisdictions, assessors in fact act in this way. Allott describes their role in criminal and civil cases thus:

'The functions of assessors can be collected under two heads - their duty to assess and their duty to advise. First, assessors may assess or weigh the evidence and whether an accused is guilty or not, in the light of their special knowledge of African habits, customs, modes of thought, and language; they are peculiarly qualified to judge the probability of the story told by a witness, and may detect in his demeanour what may escape the presiding judge. In this role the assessor's task is similar to that of the juror, though he gives no verdict, but only his opinion, on the evidence. Secondly, the assessors' duty is to advise the judge or magistrates on the matters of which they have special knowledge, and to give their view, in the abstract, of what the custom or law is in the circumstances postulated.'(220)

Allott stresses that in the second function the opinion of the assessors is not by itself admissible evidence of those facts and it is most important, when attempting to decide the nature of the customary law, to give the defence opportunity to cross-examine and to introduce evidence of its own. In this case the assessors' opinion should be more in the nature of the evidence given by an expert witness and should be given publicly.

The use of assessors, however, should not only be seen simply as aiding the judge. The Privy Council has said that as well, '[i]t operates, and no doubt is intended to operate, as a safeguard to the natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood'.(221) This simple, flexible and

economical system seems a reasonable method by which customary law can be taken into account, and a method which will not threaten the judicial function. The question of the amount of power to be given to assessors is one which could be resolved without too many problems. It may well be thought desirable that assessors could also aid in sentencing the offender, and if they were representative of the tribe involved this could be a valuable method of institutionalising the informal means of taking such advice which presently exist.

It will, of course, be necessary to select assessors who have no personal interest in the dispute before the court, and in some communities, the selection may prove difficult because of widely spread kinship ties. However, the problem is not likely to be insurmountable and indeed, in some jurisdictions, Aboriginal Magistrates and Justices of the Peace are already taking part in adjudication. So far as the authors are aware the existence of divided loyalties has not created an obstacle to them in the performance of their judicial duties.

(c) Tribal Courts

Of the number of solutions mooted in the literature to resolve the problems inherent in a pluralist society perhaps the most controversial and complex is that of the establishment of indigenous courts. Whether such courts would represent a great leap forwards or backwards has been a matter of some debate, and it is proposed here to examine some of the merits of such systems and to see whether they are feasible and desirable in Australia.[222]

(i) Advantages

One of the major deficiencies, as has been seen, of a centralist legal system in a pluralist society is the injustice which arises when an imposed law, foreign in both concept and means of execution, is thrust upon persons whose civilisation has developed in a totally different manner. No matter now hard the centralist system strives to accommodate the indigenous law, the metaphysical viewpoints of the two societies are too far removed to enable one comfortably to fit into the other, and an

uneasy detente may well degenerate into confrontation. In such an event, it seems that the indigenous culture generally succumbs.

The main advantage of an indigenous court system is that the arbitrators and the parties have a shared weltanschauung and that there are no intermediaries to interpret and distort the situation as there may be with assessors aiding a European judge or magistrate.

On a more practical level, this solution has the same advantage as the use of assessors in that in involves the indigenous people themselves in the decision-making processes which vitally affect their lives and hopefully, thereby, will diminish the rate of alienation felt by the powerless generally and by the Aborigines in particular. The use of tribal authority, if it is still accepted, must increase the legitimacy of the law and would also decrease the problems now encountered in the sentencing of traditionally oriented people. The logistical problems of administering a centralist law would, by these means, also be overcome.

One of the more important benefits which would flow from the introduction of an indigenous court would be that some measure of flexibility would be possible to accommodate variation in the different areas.

This is especially so regarding the use of appropriate penalties. As was stated above, one of the deficiencies of the sentencing system as it stands at present is that it does not meet the needs of the people it is supposed to serve. As Strathern has indicated regarding Papua New Guinea, dispute resolution and compensation procedures are not just matters of 'mechanical adjustment, of a mercenary interpretation of rights',(223) but cope with people's emotions and if the processes do not accord with the emotional needs of the people, dispute will continue, and give rise to more disputes.

The problems of traditionally oriented people in urban

areas has also been raised and one writer[224] has suggested the introduction of urban customary courts for Papua New Guinea. These would, it is hoped, formalise the present informal controls and make use of the existing practices and traditions understood by the people. The feasibility of such courts for Papua New Guinea is problematical, but in Australia this seems less likely because of the far fewer traditionally oriented Aborigines in urban areas. However, for the fringe-dwelling population in country areas they may have some merit, for it seems that any system must be an improvement over the present one.

(ii) Problems

General

It would be unrealistic to paint a sanguine view of of the possibility of indigenous courts, for the difficulties seem overwhelming. Foremost among these is the question of whether in fact such a system would make use of the existing practices and traditions of the people or whether this scheme is merely another imposition created by an idealised perception of Aborigines on the part of Europeans.

There is a disagreement among anthropologists as to whether formal legal institutions exist within the Aboriginal communities, with Meggitt and Hiatt denying that the elders exercise strict authority and Berndt and Elkin suggesting that they do.[225] Whatever was the true situation, it would seem that over the last few decades there has been a breakdown of tribal authority and that an authority vacuum exists.[226] If the views of Meggitt and Hiatt are correct and customary law is applicable more to dispute resolution procedures rather than substantive law, then the imposition of a system of indigenous courts may alter the traditional laws. Stone argues that informal village procedures in Papua New Guinea and elsewhere are often concerned with balancing a number of different principles and interests:

'This process would probably undergo a drastic change when administered by a new institution such as a Village Court. Generally speaking a change in the system of administration or enforcement of a body of law results in a change in the law itself. In particular the tendency of courts to require rules in areas which are really a matter of delicate balances of interests is well known...' (227)

The next problem which arises is that which is based on a questioning of the adequacy of traditional law to cope with changes in Aboriginal society. Misner gives the example of persons behaving drunkenly, for which there was no tribal methods of dealing.(228) At a more fundamental level there is the conflict between 'progress' and 'tradition'. While it is true that progress is a Western concept and its benefits may be questionable, its impact upon traditionally oriented people has been undoubted and probably irreversible. Customary law, which was suitable for a subsistence existence may not, however, be appropriate to solve the problems raised by contact with European society, be they agricultural, social, economic or religious.
It would seem doubtful whether there can be a complete return to the old ways, whatever they were. There have been radical changes wrought by colonial rule and although perhaps unwelcome, the existence of those changes must be recognised,(229) and, it has been said, most of the people themselves would not wish to return to their previous life-style.

It has also frequently been argued against tribal courts that they introduce a system which is foreign to the indigenous people and is as irrelevant and oppressive as the present system of colonial law. With regard to the Tribal Courts of the American Indians it has been written that:

'The very title "Tribal Court" brings to mind a system of traditional justice embodying the law - ways of a distinct culture... a dispute-resolution system which is an outgrowth of the cultural needs of the people evolved through time immemorial.

Nothing could be further from the truth. Tribal courts are only in a very superficial sense "tribal".'(230)

This has led to a problem in America where neither the courts themselves nor the people really understand the true function of the courts. The system, although operated by the Indians, is itself foreign.

In Australia, at one of the mission stations, an experiment was attempted in self-determination, where decision-making authority was handed over to the Aboriginal people. The Community was encouraged to elect various councils and they were given whatever functions and authority the people wanted. The experiment, it was felt, was a failure for a number of reasons, but primary among them was that a different mode of authority had been imposed, albeit with well-intentioned motives. Democratically elected councils did not fit in with the traditional authority structures and in fact they ignored that way of living and interacting, and were even counter-productive. As one of the organisers of the experiment wrote:

'Looking at it from the point of view of the amelioration of social problems however, the most dangerous aspect of the approach we adopted was that it tended to undermine what still remains of the traditional patterns and roles, and so hastened the social disintegration of the groups making it even more difficult for them to deal with their social problems. When we became aware of what our good intentions were achieving we abandoned this approach to our policy objective of transferring effective control to the Aboriginal people, and since then have been working at re-discovering the reality world of the Aboriginal people. What this in fact meant was re-discovering the natural groups, identifying their leaders, trying to understand how their patterns of authority worked, and in this process building up their leaders and working through them.'(231)

In one area in Queensland, however, a magistrate reports that an Aboriginal court has been set up by the Aboriginal Council to run on the same lines as the Magistrates' Court, though not administering

tribal law. According to the magistrate, the Council stated that it wanted no part of tribal law to come into present laws, because tribal law is so harsh.(232)

These are probably just two of the attempts which have been made to involve Aborigines in some of the decision-making processes and it can be seen that two quite different solutions are evolving. One aims to return to traditional methods while the other approaches the European model. Whether either is relevant or successful in Aboriginal terms remains to be seen.

The next objection to tribal courts is raised and answered by Eggleston,(233) namely that in Australia at present there are not enough traditionally oriented Aborigines to make such a system practicable. The fact of small numbers, Eggleston argued, should not be conclusive for such courts could be set up on an ad hoc basis. European concepts such as the need for special courthouses and other facilities are not necessarily relevant to indigenous courts. and if each court served just its own community in its own fashion then it would be valuable only for that. Formal or informal dispute resolution does not need large numbers of people for its viability, provided it is recognised as having an important function for that group.

A more substantial objection comes from those who accept the assimilative ideal. They argue that the existence of two or more systems of law is undesirable because it is divisive and unnecessary.(234) Difficulties arising out of the rules of procedure can be resolved by relaxing those rules, and in general, extra-judicial means of settling disputes of a criminal nature should not be condoned. Derham argued that the problems faced by indigenous peoples become increasingly difficult, and apart from the breakdown of customary law, the problems are not

resolved by 'generating a multiplicity of separately developing bodies of law to govern similar cases'.(235) It seems that the resolution of this problem rests finally with the philosophical view one takes of the value of conformity on the one hand and diversity on the other. To the centralist, diversity means a loss of control which is threatening to his authority. To the pluralist, the existence of a number of solutions to the same problem may indicate creativity and adaptation of law to its environment.

The final major problem regarding the establishment of indigenous courts arises from the possibility of graft, extortion, corruption and partiality or injustice as the result of the kinship system. It is argued that indigenous courts would be in danger of not meting out justice fairly because of the possibility of corruption. As Mattes wrote of Papua New Guinea:

'I think it is important... that the native should be impressed with the fact that the fount of justice is someone above the government; it is the Queen's justice administered by the Queen's courts. The courts do not belong to the administration, the district Commissioner or to the village. It would be fatal to the administration and growth of the law if it were thought in the village that the court belonged to some influential native on the bench, and that it was 'his' court, and the way to obtain a favourable decision or avoid punishment would be to placate that native, not to rely upon the Queen's justice.'(236)

It is submitted that such view of corruption and bias reflect the deeply ingrained conception Europeans have of the nature of the law. One may wonder what practical relevance the Queen may have to an Aboriginal in Arnhemland or to a Papua New Guinean in the Highlands. Decisions based on facts, arguments on the rules of law, impartiality of the bench and so on are essentially notions which belong to the Common law but they do not represent the only concepts of law. In many societies, judges are not meant to be mere arbiters between opposing

teams and in some, corruption and bias are the norm, and as such, are accepted and taken into account by actual and potential litigants. Strathern writes that in Mount Hagen in Papua New Guinea the system of dispute resolution is seen as one which affords individuals the chance to pit their strength against one another. In a society:

'where influence and direction in public affairs is largely a matter of persuasion, where there were few traditonal roles setting persons up in authority over others, corruption does not overly concern people. They assume that leaders will look after their own interests; they also assume that this cannot be done without taking into account other people's interests as well.'(237)

Every system of dispute resolution has its own methods of checks and balances and merely because that system does not accord with that to which one is accustomed does not deny that system validity to the people whom it serves.

Jurisdictional

The experiment already mentioned of handing back authority to Aborigines at the mission station revealed another of the stumbling blocks to the establishment of tribal courts, namely, that where members of different tribes are sharing the same territory, there is no single authority structure.(238) The people do not necessarily form a community, share the same leaders or the same body of knowledge. At the time of the experiment there were no mechanisms whereby the different groups could work together. This problem is especially evident in the urban or semi-urban areas.

Misner poses some of the possibilities regarding the jurisdiction of such a court in these situations. It may extend, for instance to all persons living on a settlement, or it may cover all Aborigines living there. Alternatively, it may be restricted to members of certain tribes. Another approach would

be to confine it only to particular people found on a settlement. A yet further approach would be to extend jurisdiction to those who were alleged to have engaged in particular forms of behaviour in a specified area. In other words, jurisdiction could be defined personally or spatially. With each option problems attend. The use of the word 'Aborigine' may be too wide if there are different tribal groups. Some persons may wish to live on a settlement but not to be subject to tribal law, though this may be overcome by some kind of opting out clause.(239)

In determining questions of jurisdiction, a great deal should depend upon the choice of the Aborigines themselves, but Misner suggests that the most practical solution would be that those who agree to live on the settlement should also agree to be subject to the tribal court. A simple geographic solution to jurisdiction may lead to problems where people are not part of the community but may be temporarily in the area. In some places the test for jurisdiction depends not so much on a person's race but on his membership of a community.

Cotran,(240) writing of some African jurisdictions states that membership of a community may be acquired either by adoption of a community's way of life or by a community's acceptance of the person as a member. Adoption by a new community may, of course, involve loss of membership of a former community. Kriewaldt J. included in his statistics on Aboriginal crime the case of one half-caste 'because... [he] lived like an aboriginal'.(241) And in R. v. Fogarty, Mr Justice Forster was prepared to treat the circumstances as mitigating where the defendant, a Maori, had committed various crimes in the course of attempting to help advance the cause of the Larrakia people in claiming land rights. In his comments on passing sentence he

said "[a]lthough you are not...[a member of the Larrakia community] ... they appear to have accepted you and for a time at least you were their leader..."[242] Forster J's statement suggests that Cotran's formulation may be an acceptable method of deciding jurisdiction.

In the United States, the problem of jurisdiction on Indian reserves is a difficult one where the 'legislative process has created a confusing maze of rules and institutions regarding Indians and the criminal justice system'.[243] Local, State and Federal courts may have jurisdiction, depending on the type of offence and its location and an Indian may be tried in one of several kinds of tribal court. Further a non-Indian caught speeding across an Indian reservation is subject to arrest by State police and may be tried in a State court whereas an Indian committing the same act will be subject to arrest by tribal police and trial in a tribal court.[244]

The problems, however, do not cease with the consideration of jurisdiction over persons but extend also to subject matter. Here, the difficulty of political feasibility arises. It would seem reasonable to suppose that the people and the legislatures of Australia would not return full jurisdiction to indigenous courts. Such a step would be too radical to be acceptable, whatever its merits, though if a policy of completely 'dissimilar development' were introduced this may be an ultimate consequence. The assimilationist, of course, would view the development of any system of indigenous courts as anathema and would urge that no jurisdiction should be given to any such court or body.

As with all such issues the result would probably be a compromise, similar to that which has occurred in the United States and in Papua New Guinea. In

the United States, tribal jurisdiction has been circumscribed in a number of ways. The Major Crimes Act 1885 removed jurisdiction from tribal courts over offences such as murder, manslaughter, rape, assault to kill, arson, burglary and larceny. The Civil Rights Act 1968 imposed nearly all the requirements of the Bill of Rights, such as prohibitions against excessive bail, double jeopardy and so on, and in addition, imposed a limit on punishment of $500 or six months' imprisonment, or both, for any one offence. Tribal jurisdiction is, therefore, confined to relatively minor offences, though civil jurisdiction over Indian defendants is virtually without limits.(245) The jurisdiction is further restricted in that it does not extend to non-Indians in respect of offences committed on reservations, nor does it extend to an Indian who is not on a reservation or otherwise in Indian country.

In Papua New Guinea, under the Village Courts Act 1973 penalties are limited to $50 in cash or goods, or four weeks of community work or compensation or damages to an amount or value not exceeding $100.(246) Jurisdiction is limited to a number of prescribed offences such as theft of goods up to a value of $100, assault, using offensive, insulting or threatening words, intentional damage to property, spreading of false statements, conduct which disturbs the peace, quiet and good order of the village, drunkenness in the Village Court area, carrying of weapons so as to cause alarm to others, failure by a person to perform customary duties or to meet customary obligations after having been informed of those duties or obligations by a Village Magistrate, failure to comply with the directions of a Village Magistrate with regard to the hygiene or cleanliness within a Village Court area and certain acts of sorcery.(247) It would seem that such a system of limited jurisdiction may be both acceptable and suitable in Australia and should be given careful consideration.

Relationship with majority law

The Indian Civil Rights Act 1968, as Misner points out,[248] was introduced in recognition of the fact that the tribal courts were not traditional courts and that Indians were Americans first and Indians second, and as such, are entitled to the basic rights which all other Americans enjoy. Those basic rights of the Constitution are, in European eyes, probably the quintessence of justice namely, the right to free speech, and religion, the rights to be free from illegal search and seizure, not to incriminate oneself, of equal protection, due process, speedy and public trial, counsel, confrontation of witnesses, the right to be informed of the nature and cause of the accusation, and the proscription of cruel and unusual punishment.

However, this issue also gives rise to the perennial conflict between the assimilationist and segregationist view, for the imposition of these rights can also be seen as an act of paternalism which may or may not accord with the perceptions of justice on the part of the recipient. As Misner succinctly put it:

'On the one hand [is] the belief... which requires that the dignity of every individual requires that he be entitled to certain procedural guarantees. On the other hand is the aim that each autonomous group should be able to determine how it will govern itself. This would appear to be an irreconcilable conflict.'(249)

Irreconcilable, perhaps, but that should not preclude debate. In the United States, although the Indian Civil Rights Act is seen as a benefit by the legislators, there is some evidence that the tribal officials themselves are deeply concerned about reconciling their customary law and culture with the various rights in the Act. There is a fear that the Act will, in effect, destroy the judicial system they have built up.[250]

This again illustrates the importance, in any field, of consultation with persons who will be the

subject of legal or administrative action and this is so whether the proposed action is deemed to be 'highly beneficial' to those persons or not. The road to injustice, oppression and extinction as well as that to hell is paved with good intentions.

To argue for the recognition of individual and communal rights is not, however, to argue that the clock can be turned back completely, and while Anglo-Australian justice may not be the perfection of reason, it has had a profound impact on the peoples who have been exposed to it, and it would not seem likely that indigenes would return to such practices as infanticide, widow-immolation and cannibalism.(251) Further, a full reversal to traditional penalties would, of course, involve acceptance of a situation in which punishments were inflicted which, to many, would seem both cruel and unusual. In days when capital and corporal punishment are widely condemned in the western world, such a step might appear incongruous. However, whether one would view such a development as 'progressive' or 'regressive' necessarily involves making a value judgment.

If one assumes the feasibility of the establishment of some system of indigenous courts, one final problem remains, namely, their relationship with other courts. Such problems as double jeopardy, review and appeal must be resolved if the courts are to be integrated into the State and Federal structure. Misner canvasses some of these problems.(252) If there are to be appeals from tribal courts, would it be possible to provide transcripts of proceedings? Will the introduction of a system of appeals require that tribal courts follow rules of evidence and give audience to legal representatives? To whom should appeal be made? If to white courts, on what basis would that court judge a 'miscarriage of justice'? If appeal is to be to a separate court

of Aborigines, would this not be a surrender to an 'alien' group which may have little or nothing in common with the group where the case originated? If appeal is to a magistrate, on what basis could he review the proceedings and would this mean an increase in the number of magistrates or a decrease if much of their original jurisdiction were removed? The answers would seem to depend on the degree of autonomy that was granted to the tribal court.

That the nature of appeals is of vital importance in determining the ultimate development of indigenous courts is shown from the experience in Africa. It has been written that although different communities will have different laws at the beginning:

'The degree to which they continue to maintain separate traditions is influenced greatly by the nature of the imposed legal structure, including the court hierarchy. And the point of main concern here is the path of appeal. It is the visible manifestation of an answer to the question whether colony will have an integrated or a parallel system of courts, with all the resulting implications for the legal and cultural evolution of its people; that is, whether the non-indigenous courts and legal concepts will be superimposed at the top of the system, with open legal channels down to the lowest tribal court, or whether the non-indigenous and indigenous systems will exist side by side in splendid isolation. Clearly an integrated system will foster more direct and immediate changes in the nature of the law administered throughout the entire hierarchy. If one's aim were total legal assimilation, or very consciously directed evolution, some degree of court integration would be sought even though this might mean acute social disorientation at the lowest levels in the transitional stages.'(253)

Similarly, it has been written that the local courts were, in fact, a radical departure from indigenous methods of settling disputes. Geographical areas of jurisdiction cut across tribal and ethnic boundaries and court personnel were by no means the elders according to native law and custom. However, in the westernisation of tribal courts:

'Most significant of all, perhaps, was the creation of a ladder of appeals and revisions with expatriates stationed at the top of the ladder... It was this general overlordship of the local courts by European administrators that provided the most important channel for the infusion of alien ideas into the administration of justice at the lowest levels and at the same time it acted as a unifying influence. Local court holders came to know what was expected of them and some of them may sometimes have imitated what they had seen when acting as witnesses or assessors in the superior courts.(254)

This litany of problems of tribal courts is indeed depressing[255] but should not be overwhelming. It is submitted that despite these difficulties the idea of indigenous courts has much merit and that rather than being dispirited by experience elsewhere, Australia should learn from the errors and develop a system of courts based on Australian needs in the latter half of the twentieth century. In Papua New Guinea, despite recommendations to the contrary,[256] a system of Village Courts has been established as recently as 1974 and is operating in a small number of areas.[257] It is explicity stated in the Act that: 'The primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes'.[258] Some of the jurisdictional limits have been outlined above, but these apply only where the court cannot achieve a settlement and must decide a dispute itself and no distinction is drawn between civil and criminal cases.[259] There are no formal qualifications for the Village Magistrates who are appointed for a period of three years by the Minister for Justice after receiving a submission from the District Supervising Magistrate who must consult with the Local Government Council and other appropriate persons and bodies.[260]

Jurisdiction is generally geographic within the limits of the area[262] or where all of the parties

are normally resident within its area or where some of the parties are normally resident and the other parties consent to the jurisdiction.

Under Section 30 the Court is not bound by any law other than the Act that is not expressly applied to it, but shall 'decide any matter before it in accordance with substantial justice'. Section 30(2) provides that a person charged with a criminal offence shall be presumed innocent until proved guilty. Native custom must apply as determined in accordance with the Native Customs (Recognition) Act and a Local Government Council can make rules declaring the custom of its area.(262)

Records are required to be kept so far as is practicable(263) and appeals may be made by a 'person aggrieved of a decision' either orally or in writing to a Local Court Magistrate or a Magistrate of the District Court,(264) who may at any time review a decision of a Village Court,(265) though reviews and appeals must be heard by that Magistrate with two or more Village Magistrates whose function it is to advise on native custom and on other relevant matters within their knowledge but who may take no other part in the proceedings.(266) There is a further appeal to a District Supervising Magistrate.(267)

CONCLUSION

Australia is by no means the only country faced with the dilemma of reconciling the existence of a centralist legal system with the fact of a pluralist society. The focus of this paper has been upon the involvement of the traditionally oriented Australian Aborigine with the criminal justice system. It is clear that at the least, modifications should be made to those rules of substantive law which seek to impose upon such people characteristically European concepts, and that the sentencing process can be used to ameliorate the greater incongruities, the harsher injustices. But these reforms may constitute a mere tokenism which can serve to prolong rather than reduce injustice and more fundamental changes may be required.

Indeed, demands for the re-assertion of the traditional norms and values of Aboriginal culture need not represent Canute-like gestures before the assimilationist tide, and if a new brand of conventional wisdom is refined from the flames of the current culture-conflict, the sacrifice of group identity will not be the inevitable price of equality.

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FOOTNOTES

1. For a brief statutory history of these fluctuations see Cranston, R., "The Aborigines and the Law: An Overview" (1973) 8, 1 Uni. of Qld. Law Journal. 60 at 67.

2. This concept has been discussed in the context of the City of New York in Glazer, N. and Moynihan, D.P., Beyond the Melting Pot, 2nd Ed., 1970, M.I.T. Press, Cambridge, Massachusetts.

3. Stevens, F.S., in Racism The Australian Experience Vol.2 Black Versus White, 1972, Australia & New Zealand Book Co., 110 at 115.

4. The phrase "dissimilar development" has been used here in preference to "separate development" because of the perjorative taint that the latter phrase has acquired by its application to South African policies and practices.

5. This phrase has been used in preference to "tribal" Aborigines because it seems there are very few Aborigines still in the tribal situation. "Traditionally oriented" denotes those who may be living at any place but who are still influenced by tribal or traditional beliefs.

6. Vasey, G.B., "John Walpole Willis, The First Resident Judge of Port Phillip" (1911) 1, 2 Victorian Historical Magazine, 36 at 47. cf., R. v. Jack Congo Murrell (1936) 1 Legge (N.S.W.) 72.

7. See Cranston, R., op. cit. at 62.

8. "Argus" (Newspaper, Melbourne), 29 June 1860.

9. "Argus" (Newspaper, Melbourne), 7 September 1860.

10. Kriewaldt, M.C., "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia", (1960) 5 W.A. Law Review 1 at 20. See also Cranston, op. cit.; Milirrpum v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141; cf., the position in the United States where initially tribal jurisdiction was complete and where the Indian tribes were considered "distinct, independent, political communities." Worcester v. Georgia 31 U.S. 515, 559 (6 Pet. 515) (1832), cited by Misner, R.L., "Administration of Criminal Justice on Aboriginal Settlements" [1974] Sydney Law Review 257 at 275. This, according to Misner, has been considerably eroded by later decisions see op. cit. , at 274 et. seq. See also Cohen, F.G., Chappell, D. and Wilson, P.R., Aboriginal and American Indian Relations with Police. A Study of the Australian and North American Experiences. Chapter 3., 1975, Battelle, Seattle, Washington.

11. Such criticism, however, is not new. For a powerful indictment of the Western Australian situation at the turn of the century see Slaughter, C.W., "The Aboriginal Natives of North-West Western Australia & the Administration of Justice" (1901) 156

Westminster Review 411. Many reforms now being suggested were canvassed at that time, e.g. that counsel be permanently employed at a regular salary to defend every Aborigine who is brought before a court, at 421.

12. Seidman, R.B., "Witch Murder & Mens Rea: A Problem of Society Under Radical Social Change", (1965) 28 Modern Law Review 46 at 58.

13. See Seidman, R.B., "Mens Rea & the Reasonable African: The Pre-Scientific World-View & Mistake of Fact" (1966) 15 International & Comparative Law Quarterly 1135.

14. See O'Regan, R.S., "Pruning the English Oak" (1972) 5 Comparative & International Law Journal of Southern Africa 281.

15. (1836) 1 Legge (N.S.W.) 72.

16. The situation may be different however if the Aborigines voluntarily subjected themselves to British law, e.g. Governor Macquarie proposed that Aborigines should only be regarded as under the mantle of British protection if they applied for certificates and conducted themselves in a peaceful, inoffensive and honest manner. See Cranston op. cit. at 61.

17. Ibid at 62.

18. (1836) 1 Legge (N.S.W.) 72 at 73.

19. Op. cit. at 10.

20. Op. cit. at 13.

21. Stanner, W.E.H., "Durmugam, A Nangiomeri" in Casagrande, J.B., (Ed.) In the Company of Man, 1964, Harper & Row, New York, at 87.

22. Gore, R.T., "The Punishment for Crime Among Natives" Territory of Papua. Annual Report 1929-1930, Appendix A, 20 at 21.

23. Vasey, op. cit. at 48. A statement in a similar vein was made by Starke J., in Tuckiar v. The King (1934) 52 C.L.R. 335 at 349 in a case where the High Court for a number of reasons overturned the conviction of an Aborigine for murder. He said: "It is manifest that the trial of the prisoner was attended with grave difficulties, and indeed was almost impossible. He lived under the protection of the law in force in Australia, but had no conception of its standards. Yet by that law he had to be tried. He understood little or nothing of the proceedings or of their consequences to him..." cf., Kriewaldt J. who, while accepting that in many cases the accused could not comprehend the proceedings, and was unable to offer any solution to this problem, believed that the present system was not unjust and would have to continue, in order that the criminal law be applied. For his part, "failure to punish crimes is a serious reflection upon our capacity to assimilate the aboriginal

part of the community and inconsistent with the duty we owe to the aborigines". Op. cit. at 24. See also Eggleston, E.M., Aborigines & the Administration of Justice (1971) Thesis submitted for the degree of Ph.D at Monash University at 197.

24. Misner, op. cit. at 260.

25. See, for example, R. v. Aboriginal Jimmy Balir Balir Unreported decision S.C. No. 5/59; R. v. Wadderwarri Unreported decision S.C. No. 8/58 and R. v. Muddarubba Unreported decision 2/2/56.

26. Op. cit. at 42. In his view Alice Springs juries were also of this opinion and even where the evidence established guilt, verdicts of not guilty were returned.

27. See Elkin, A.P., "Aboriginal Evidence & Justice in North Australia" (1947) 17, 3 Oceania 173 at 195. See also Eggleston, op. cit. at 194: cf., Kriewaldt op. cit. at 11 who stated that no jury would perversely acquit a white accused of the murder of an Aborigine, merely because the accused was white. For findings in the United States see, for example, Garfinkel, H., "Inter and Intra-racial Homicides", (1949) 27 Social Forces No. 4, 370; Bullock, H.A., "Significance of the Racial Factor in the Length of Prison Sentences" in Crime and Justice in Society Quinney, R. (Ed.) 1969, Little Brown & Co., Boston.

28. Farquher, M.F. & Vinson, T., "Minor Offences - City & Country" Mimeographed report, N.S.W. Bureau of Crime Statistics & Research, 1974 at 5.(footnote number altered)

29. Cohen, F.G., Chappell, D. & Wilson, P.R., op. cit. at 6 quoting Misner, op. cit. at 264.

30. See e.g. Eggleston, passim; Parker, D., "The Pattern of Aboriginal Offences", Unpublished paper; Hawkins, G.J. and Misner, R.L., Restructuring The Criminal Justice System in the Northern Territory: Report to the Minister of the Northern Territory, 1973; Parker, D., "Social Agents as Generators of Crime", Unpublished paper.

31. Op. cit. at 258-9.

32. Ibid at 259.

33. Op. cit. at 411.

34. See e.g. Auki, H., "Three Approaches to Sentencing" (1974) 2, 2 Melanesian Law Journal 263; Seidman, "Witch Murder & Mens Rea", op. cit.

35. Cranston, op. cit. at 75; The publication of such books as D.A. Thomas' Principles of Sentencing, 1970, Heinemann, London, indicate that this branch of the law is receiving growing attention.

36. [1963] P. & N.G.L.R. 72 at 79 cited by O'Regan, op. cit. at 282.

37. Gawi, J., "Customs in Criminal Law & Punishment" in Zorn, J. and Bayne, P. (Edd.) Lo Bilong ol Manmeri: Crime, Compensation & Village Courts [1975] University of Papua New Guinea Press, at 71.

38. See Smithers, J., "The Rule of Law and the Administration of Justice in an Emerging Society", in International Commission of Jurists, Australian Section, The Rule of Law in an Emerging Society Report of the Proceedings of the Papua New Guinea Conference, Port Moresby, 1965 at 67.

39. Unreported decision 2/2/56 and see also R. v. Nelson Unreported decision 21/3/56 cited by N. Morris & C. Howard, Studies in Criminal Law 1964, Clarendon Press, Oxford at 97.

40. This conclusion was developed over a number of cases. For a further discussion of these cases see Howard, C., "What Colour is the 'Reasonable Man'?" [1961] Crim. L.R. 41.

41. Ibid at 42.

42. [1946] A.C. 83.

43. See O'Regan op. cit. at 283-5.

44. See R. v. Hamo Tine [1963] P. & N.G.L.R. 9; R. v. Zariai Gavene [1963] P. & N.G.L.R. 203; R. v. Iane Mama [1965-66] P. & N.G.L.R. 96, cited by O'Regan, op. cit.

45. R. v. Manga Kitai [1967-68] P. & N.G.L.R. 1; R. v. Yanda Piaua [1967-68] P. & N.G.L.R. 482, cited by O'Regan, op. cit.

46. Cf., W.R. Penhall, the Chief Protector of Aborigines in South Australia in 1953 who wrote in a pre-sentence submission to a court in a case of murder that "... the conduct of Aborigines generally cannot safely be measured with the yard-stick employed when dealing with offences committed by white people because of the essential difference in character and nature of the two races... I suggest there is nothing like the same degree of inhibition in the conduct of inferior types of Aborigines... as there is in the average white person, that is to say that a really good type of Aborigine excels in self-discipline whereas the inferior type is usually very much inferior and consequently less capable of proper behaviour." in Cleland, J.B., "The Aborigine & British Justice" (1953) 4, 11 Mankind 477 at 478.

47. Op. cit. at 404. An excellent example of this is where certain words may be extremely offensive to one group and innocous to another. See footnote 138 below.

48. See O'Regan, op. cit. at 284: R. v. Yanda Piaua [1967-68] P. & N.G.L.R. 482; R. v. Domara [1967-68] P. & N.G.L.R. 71, and see also O'Regan, "Indirect Provocation and Misdirected

Retaliation" [1968] Crim. L.R. 319.

49. R. v. Kauba-Paruwo [1963] P. & N.G.L.R. 18 at 20. For a general discussion of the concept of "reasonableness" in Papua New Guinea see Hookey, J.F., "The 'Clapham Omnibus' in Papua & New Guinea" in Brown, B.J. (Ed.) Fashion of Law in New Guinea, 1969, Butterworths, Sydney at 117.

50. Arguments have, however, been advanced for the adoption of a totally subjective test. See Brett, P., "The Physiology of Provocation" [1970] Crim. L.R. 634.

51. See Seidman op. cit., "Mens Rea and the Reasonable African", at 1149.

52. See Hookey op. cit. at 130.

53. e.g. Attorney General of Nyasaland v. Jackson [1957] R. & N.L.R. 443 cited in Seidman op. cit. "Witch Murder and Mens Rea" at 49-50.

54. Seidman, op. cit. "Mens Rea and the Reasonable African" at 1137.

55. R. v. Manga-Kitai [1967-68] P. & N.G.L.R. 1 at 11. Discussed in O'Regan, R.S., "Sorcery & Homicide in Papua New Guinea" (1974) 48, 2 Australian Law Journal 76 at 78. Cf., American case of Washington Territory v. Fisk where an American Indian was acquitted when the trial judge instructed the jury that the defendant could rely on his belief that the victim had magical powers. See Eggleston op. cit. at 407.

56. R. v. Ferapo Meata [1967] Unreported, No. 419 cited in O'Regan op. cit. "Sorcery & Homicide in Papua New Guinea" at 78-79 and Gawi, op. cit. at 70.

57. Op. cit. "Mens Rea and the Reasonable African" at 1142.

58. Clarkson J. in Manga-Kitai [1967-68] P. & N.G.L.R. 1 at 11.

59. Abdullah Mukhtar Nur [1959] S.L.J.R. cited in Seidman op. cit. "Mens Rea and the Reasonable African" at 1146.

60. Howard, C., Australian Criminal Law, 2nd Ed., 1970, Law Book Co. Ltd., Melbourne, at 45.

61. Unreported decision of Chamberlain J., in the Supreme Court of South Australia, 13/7/64, cited by Gale, F., Urban Aborigines 1972, ANU Press, Canberra 265 et seq. and Eggleston op. cit. 394 et. seq. Eggleston refers to the case by the name of the victim when she calls it the "Chimney Evans Case".

62. Eggleston op. cit. at 400 and 395.

63. Eggleston suggests that the fact that the defendants were charged with conspiring to murder rather than murder may be

an example of a reduction in charge by the prosecution because of the influence of tribal law.

64. Op. cit. at 202.

65. [1965-66] P. & N.G.L.R. 147.

66. Under S29 of the Criminal Code she could only be held responsible if at the time of doing the act she had the capacity or knew that she ought not to do the act.

67. [1934] I.R. 518.

68. [1963] V.R. 737

69. [1968] S.A.S.R. 467 and see also D.P.P. v. Lynch [1975] 2 W.L.R. 641 noted in (1975) 49, 9 Australian Law Journal at 545.

70. Williams, G., Criminal Law: The General Part, 2nd Ed., 1961, Stevens & Sons Ltd., London, 751 et. seq.

71. Howard, op. cit. "Australian Criminal Law" at 412.

72. [1963] P. & N.G.L.R. 72 discussed in O'Regan op. cit. "Sorcery and Homicide in Papua New Guinea" 76 at 77.

73. Op. cit. "Mens Rea and the Reasonable African" at 1154.

74. [1965-66] P. & N.G.L.R. 336.

75. See generally Seidman op. cit. "Witch Murder & Mens Rea". See also Hookey op. cit. at 130.

76. Op. cit. at 20.

77. There is no doubt that penal sanctions do change traditional behaviour. As Eggleston op. cit. at 413 writes, infanticide has almost died out among some Aboriginal tribes and in Papua New Guinea cannibalism and inter-tribal warfare has also been much reduced.

78. Op. cit. at 21.

79. Ibid at 22.

80. Op. cit. at 15.

81. The extent of such interference if permitted, under a paternalistic guise is indicated by Seidman's suggested solution to the problem of legal pluralism. "The guilty verdict would mean only that the accused was made subject to administrative processes of re-education. The objective of criminal sanction would be to rehabilitate the criminal, not to deter others. There would then be made available to the sentencing authority a whole host of procedures which are foreclosed by an emphasis upon exemplary deterrence: re-education, vocational rehabilitation, family counselling,

compulsory attendance at a job, transportation to another part of the country, and the like." Op. cit. "Witch Murder and Mens Rea" at 60.

82. R. v. Petero Mukasa (1944) 11 E.A.C.A. 114 cited in Seidman op. cit. "Mens Rea and the Reasonable African".

83. R. v. Zanhibe 1954 (3) S.A. 597 cited in Seidman ibid at 1161.

84. R. v. Seki Wanosa (1971), Unreported No. FC 15 cited by O'Regan op. cit. "Sorcery and Homicide in Papua New Guinea" at 77. Similarly, Smithers J. did not find it incongruous to convict of murder a man who killed another with the sanction of custom of the local community and sentence him to 15 months' imprisonment. The basic message of the law was "thou shalt not kill" and the penalty was designed to underline that assertion, despite the custom and to indicate that another method to resolve the problem should be employed in future. Op. cit. at 67.

85. [1971-72] P. & N.G.L.R. 44.

86. Ibid at 46.

87. Ibid 47-48. The sentences were of life imprisonment. Wilson J., also in considering a case of pay-back killing stressed the notion of general deterrence. He said that "[t]he solution in a case such as this is to be found in the application of accepted principles of sentencing ... with emphasis being placed upon the notions of general deterrence (associated with a desire to eliminate cult and traditional pay-back killings) and rehabilitation." R. v. Tsauname Kilapeo & Alouya Paiina (1973) Sup. Ct. No. 763 cited in Auki, op. cit. at 263-4. The sentences were nine and six years respectively. See also case of R. v. Iki Lika (1973) Sup. Ct. No. 764 also discussed there.

88. R. v. Aboriginal Jack Wheeler, Unreported Decision, No. 36 of 1959.

89. Unreported decision 13/7/64.

90. Cranston, op. cit. at 69.

91. See Elkin, op. cit. at 200.

92. In Cleland, J.B., op. cit. at 478.

93. Op. cit. at 88.

94. R. v. Guragi "Australian" (Newspaper) Dec 1 1966 cited in Cranston, op. cit. at 65.

95. Unreported decisions, Nos. 108 to 115 of 1975 and see also R. v. Buller & Others Unreported decisions of Muirhead J. Nos. 170-176 of 1975.

96. Stone, P., "Law & Morals in Plural Societies" in Zorn, J. & Bayne, P. (Edd.) op. cit. at 84.

97. See for example, Eggleston op. cit.; Gale op. cit. at 222 et. seq.; Martin, M., Aborigines & the Criminal Justice System: A Review of the Literature, 1973, W.A. Department of Corrections; South Australian Criminal Law & Penal Methods Committee, Sentencing & Corrections, 1973, S.A. Government Printer at 203.

98. Unreported decision, 17/5/54.

99. Emphasis is ours.

100. For example, Gore J. argued that where offences are very rare this should be a matter of aggravation rather than of extenuation "for when a tribe has advanced so far that crime among its members is rare they are more susceptible to punishment, and in order to preserve the highly satisfactory position an exemplary punishment may be warranted." Op. cit. at 22.

101. His Honour reiterated that view later in an article published posthumously op. cit. at 47, where he wrote regarding sentences for murder or manslaughter that "... neither Wells J. nor I consistently imposed heavy sentences on aborigines convicted of murder. The penalties on aborigines have been consistently lighter than penalties imposed on white offenders."

102. Op. cit. at 29. Emphasis added.

103. Unreported decision 17/5/54.

104. Op. cit. at 20.

105. [1971-72] P. & N.G.L.R. 374 at 387.

106. The numbering of the footnotes has been altered from the original.

107. Unreported. (Clarkson J. - 21st July 1971.)

108. Unreported. (Williams J. - 26th June 1971.)

109. [1971-72] P. & N.G.L.R. 44.

110. Unreported. (Raine J. - 24th March 1971.)

111. Unreported. (Prentice J. - 22nd October 1970.)

112. [1973] Sup. Ct. No. 763 cited in Auki op. cit. at 263 et. seq.

113. [1973] Sup. Ct. No. 764, ibid.

114. Op. cit. at 385. "Today, there are some 106,000 Aborigines and 9,500 Torres Straits Islanders in Australia. They live primarily in rural settings (56%), and country towns (29%),

and many (15%) congregate in urban areas, such as Redfern in Sydney and South Brisbane in Brisbane. Since 1947, the trend has been towards urbanisation, with especially striking increases in the number of Aborigines in country towns." Cohen, F.G., Chappell, D. and Wilson, P.R. op. cit. at 5, citing other works.

115. Gawi, op. cit. at 73. Kriewaldt J. also denied the assumption that "every crime with which an aborigine is charged arises from acts done by him either in accordance with or under the compulsion of tribal customs." Op. cit. at 16. See also Eggleston op. cit. at 385.

116. Op. cit. at 386.

117. Op. cit. at 25.

118. See Hiatt, L., "Social Control in Central Arnhem Land", (1959) 10 South Pacific 182.

119. Op. cit. at 383.

120. Unreported decision 13/7/64.

121. Op. cit. at 400.

122. Unreported decision 6/10/58.

123. For a brief description of the wardship system in the Northern Territory, see Cranston op. cit. at 69.

124. Some of the dangers associated with such a course of action are discussed further below.

125. Unreported decision, S.C. No. 150/59; erroneously cited by Cranston op. cit. at 65 as Williams v. Parker.

126. Unreported decisions of Judge Ligertwood Nos. 9, 13, 5 and 14 of 1973 (Northern District Criminal Court at Port Augusta) and see post.

127. Per information supplied to the authors by South Australian Magistrate, Mr. J. Cramond, 17/9/75.

128. The segregated youth.

129. [1973] Sup. Ct. No. 763 discussed in Auki, op. cit. at 263.

130. Ibid at 264.

131. [1973] Sup. Ct. No. 764 ibid.

132. Unreported decision, Supreme Court of the Northern Territory S.C.C. No. 221 of 1974.

133. Eggleston, op. cit. at 256.

134. Ibid.

135. See e.g. Department of Attorney General and Justice, N.S.W. Bureau of Crime Statistics and Research, Domestic Assaults, 1975.

136. However cf., Kriewaldt J. who felt that in most cases the actions of the accused were regarded as wrong by the Aborigines. Evidence of this, he said, was the number of cases where tribal punishment was inflicted on the accused or would have been inflicted if he had not fled. Op. cit. at 25-6.

137. e.g. see text accompanying footnote 21 ante.

138. Meggitt, M.J., Desert People, 1974 Angus & Robertson at 256-258. Another example is provided in a memorandum of Yirrkala Council, a copy of which was kindly supplied to the authors by Mr. M.A. McDonald, a magistrate of the Northern Territory. For the Yirrkala & Elcho people, certain words, referring to parts of the body, both of a woman and of a man, are sacred words, as are words referring to sacred objects, and must not be used in certain circumstances.
Offences used to be dealt with as follows.
References to bones (sacred objects) spoken where they should not be; the names of dead persons spoken when and where they should not be; the names of women's private parts spoken where they should not be; the names of sacred objects spoken where they should not be; adultery; the names of sacred dilly bags spoken where they should not be; stealing a sacred object; - all punishable by death. It is clear of course that none of these offences are punishable under Australian law. The singing of secret ritual songs was also punishable by death but now these are sung openly by drunken youths who cannot be punished because Australian law does not recognize this.
Under tribal law a person who had offended could be taken by his family to another country, to save him being killed by his own clansmen. He would have to stay there, cast off from his own family and home, until adequate compensation was made and those people whom he had offended were willing to accept his presence again. The other method of punishment was death.

139. Op. cit. "Pruning the Oak" at 283.

140. Unreported decision S.C.C. No. 313 of 1974 and see also R. v. Iginiwuni, unreported decision of Muirhead J. in the Supreme Court of the Northern Territory, S.C.C. No. 6 of 1975.

141. Perhaps even the penalty imposed by the defendant on himself - Sawer writes that if "a primitive man is confident that spirits or gods will deservedly punish him for the infraction of a rule ... then he is likely to sentence himself to sickness and death if he infringes the rule, even if he infringes it unwittingly." Law in Society, Oxford University Press, 1955 at 39.

142. This was felt strongly in the earlier part of the century.

Elkin, op. cit. at 199 quotes a petition from a panel of 60 jurors to a judge of the Supreme Court of the Northern Territory which recommended that the Aborigines be tried in accordance with their own tribal customs. They said "it is known that if one Aboriginal unlawfully and violently injures another, his tribe will see to his proper punishment, irrespective of what the white man does."

143. Jameson v. R. Unreported decision of the Full Court 7/4/65.

144. Unreported decision of Burt J., 8/4/70.

145. Unreported decision of Wallace J., 21/12/73.

146. Wallace J. explicitly said so when sentencing Fazeldean. Burt J. has indicated his awareness extra-judicially per letter to one of the authors from Judge Heenan of the District Court, 26/9/75. Apparently his Honour's fears about pay-back were justified as subsequent enquiries revealed that Ferguson was speared through the leg shortly after his return to his own community.

147. Op. cit. at 1; See also South Australia, Criminal Law & Penal Methods Reform Committee op. cit. at 205; Report prepared for the Poverty Commission, Aborigines and the Law (in press).

148. Per 1973 Commonwealth Year Book.

149. See Hawkins & Misner op. cit. at 2; South Australia, Criminal Law & Penal Methods Reform Committee op. cit. at 205 et. seq.

150. Unreported decision, S.C.C. No. 221 of 1974.

151. See, for example, R. v. Roberts & Daniels, Unreported decisions, S.C.C. Nos. 47 & 48 of 1974; R. v. Gibson, Unreported decision, S.C.C. No. 262 of 1974; R. v. Kaini, Weekend & Keeway, Unreported decisions Nos. 2, 3 & 4 of 1975.

152. Somare, M.T., "Law & the Needs of Papua New Guinea's People" in Zorn, J. & Bayne, P. (Edd.) op. cit. at 15.

153. O'Regan, op. cit., "Pruning the English Oak", at 285.

154. [1963] P. & N.G.L.R. 18.

155. [1973] Sup. Ct. No. 764 discussed in Auki, op. cit. at 264.

156. Frost, S.T., "Modern Developments in Sentencing in Papua New Guinea" in Report of Proceedings of Conference run by the Australian Institute of Criminology, 1974, at 68.

157. Report of Committee Investigating Tribal Fighting in the Highlands, 1973 at 16, cited by Frost, S.T., ibid at 67-68.

158. Section 60 (2).

159. See Eggleston op. cit. at 261.

160. Op. cit. at 9.

161. See Cleland, op. cit. at 478.

162. See Misner, op. cit. at 258-9, also Martin op. cit.

163. In the highlands of Papua New Guinea, similar problems of perception occur. Frost J. noted that the people there resent the provision of more nourishing food to the detainees. Op. cit. at 66.

164. Op. cit.

165. Op. cit. at 13.

166. In most societies, according to a persuasive view, the minority power elites control and oppress the powerless majority, of whatever colour. See C. Wright Mills, The Power Elite, 1957 Oxford University Press.

167. Kittrie, M., The Right to be Different: Deviance and Enforced Therapy, 1971, John Hopkins Press, Baltimore.

168. See generally Lazar, L., "Legal Centralism in South Africa" (1970) 19 International & Comparative Law Quarterly 492 at 494 and Sachs, A. Justice in South Africa, 1973, Chatto, Heinemann; Sachs, A. South Africa: The Violence of Apartheid, 2nd Ed., 1970, Christian Action for Internal Defence Fund.

169. Lazar, L., op. cit. at 494.

170. Aborigines Amendment Act 1936.

171. Op. cit. at 388.

172. Section 6(1)(b) provides that native custom shall not be enforced where "... it is inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory ..."

173. Section 6(1)(c).

174. Hookey, op. cit. at 132. Another problem arises from the fact that under Section 4 of the Ordinance "native custom" refers only to the custom of the place where the question arises, so that a recent migrant to a town cannot have his custom recognized, even if he was acting in pursuance of that custom.

175. Section 1(2) Native Courts Proclamation 1942 cited in Allott, A.N., "Customary Law: Its Place & Meaning in Contemporary African Legal Systems" (1965) 9, 2 Journal of African Law 82.

176. Section 2(1) Interpretation & General Clauses Ordinance (as amended by Magistrates' Courts Act 1963 6th Schedule) cited by Allott, ibid.

177. R. v. Cobby (1883) 4 L.R. N.S.W. 355 at 356.

178. (1861) 1 Wyatt & Webb (Vic.) 40.

179. (1971) 17 F.L.R. 141.

180. Ibid at 154.

181. in "The Aborigines: Legal Problem in North Australia" Sydney Morning Herald, 20 August 1934.

182. Eggleston, op. cit. at 410.

183. Section 4. See generally Hookey op. cit. at 130-131.

184. See Derham, D.P., "Law & Custom in the Australian Territory of Papua & New Guinea" (1963) 30 University of Chicago Law Review 495 at 500.

185. Unreported, Supreme Court of South Australia, 13/7/64 discussed ante.

186. Op. cit. at 400.

187. Op. cit. at 131.

188. Derham, op. cit. at 501.

189. Hiatt, op. cit. at 190-192

190. Allott, A.N., "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20 Modern Law Review 244.

191. See Derham, op. cit. at 502; see also Bayne, P., "The Future of Traditional Law" (1974) 2, 2 Melanesian Law Journal 276 at 279.

192. Milirrpum v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141 at 153.

193. Elkin, A.P., op. cit. "Aboriginal Evidence and Justice in North Australia" at 185-6 cited one case where a statement of only 200 words took one and a half hours to extract.

194. See Allott, op. cit. "Judicial Ascertainment of Customary Law" at 248. This is not to denigrate the expertise of such a witness. "Even a disinterested and expert witness seldom finds it easy to make a precise formulation of a principle or rule of native law and custom." Bentsi-Enchill, K., "The Colonial Heritage of Legal Pluralism" (1969) 1, 2 Zambia Law Journal 1.

195. Eggleston op. cit. at 390. She also notes that under the now defunct native court of Western Australia the court could take evidence from the headman of the tribe, but criticises this provision because it was not clear whether he was acting as an assessor or as a witness for the defence or prosecution, and where there is a conflict of opinion as to what the tribal law actually was, this may be important. For the difficulties

found in Africa over this problem see Bentsi-Enchill, K., op. cit. at 23.

196. Although this magistrate stated that he had "sat with" such persons, it is not clear here whether they sat as part of the Bench, as assessors or merely acted as expert witnesses. It is clear from the case of R. v. Wurramara, Unreported decision No. 215 of 1975, that Mr. Justice Forster of the Northern Territory Supreme Court sometimes finds it helpful to call a senior member of a particular community as a witness before the court to give evidence of law and custom.

197. (1971) 17 F.L.R. 141.

198. Ibid at 163.

199. Downing, J.M., "Aboriginal Legal Services: N.T. Law Society Moves Against A.L.S." (1975) 1, 9 Legal Service Bulletin, 241.

200. Although there may be an ethical problem of a lawyer giving evidence in a case where he represents one of the parties.

201. See e.g. Kriewaldt J. op. cit. at 25.

202. In PNG, under Section 5 of the Native Customs (Recognition) Act 1963 "... questions of the existence and nature of native custom in relation to a matter, and its application in or relevance to any particular circumstance, shall be ascertained as though they were matter of fact."

203. See Allott, op. cit. "Judicial Ascertainment of Customary Law" at 251 et. seq.

204. Unreported decision 6/10/58.

205. Op. cit. "Judicial Ascertainment of Customary Law" at 259.

206. (1916) Gold Coast Privy Council Judgments (1874-1928) 43 cited in Allott, ibid, at 247. Blackburn J. in Milirrpum v. abalco Pty. Ltd. (1971) 17 F.L.R. 141, at 159 did not consider this as part of the common law as it is understood in Australia. Rather it is a special field of the law of evidence and it is adapted to deal with a quite different situation in Africa. It is submitted however that such a statement is valuable in developing a system of law which will enable the proof of native law and custom.

207. See Allott, op. cit. "Judicial Ascertainment of Customary Law" in which the author argues, that in practice, in British Africa, previous decisions are relied on as expository of the law following a dictum in Angu v. Atta. However, it is probably more true to say that no clear doctrine has emerged regarding the effect of previous judicial decisions on customary law.

208. See generally Cotran, E., "The Place & Future of Customary Law in East Africa", in The British Institute of International

& Comparative Law, Commonwealth Law Series No. 5, East African Law Today 1966, Stevens & Sons, London, at 72.

209. See Bentsi-Enchill, op. cit. at 20.

210. As in Papua New Guinea.

211. Op. cit. at 415 and see also Bentsi-Enchill op. cit. at 24 et. seq.

212. "Urban Crime in Papua New Guinea", Paper presented to the Government of Papua New Guinea at 21.

213. Unreported decision S.C.C. No. 104 of 1974 and see also R. v. Goodwin unreported decision of Forster J., No. 191 of 1975.

214. Unreported decision S.C.C. No. 6 of 1975.

215. Unreported decision S.C.C. Nos. 7-9 of 1975 and see also R. v. Bullen & Ward Unreported decision of Muirhead J., Nos. 127-130 of 1975.

216. See generally Macaulay, B., "Assessors in Criminal Trials in West Africa" [1960] Crim. L.R. 748. Cf. O'Regan op. cit. "Pruning the English Oak" at 288.

217. O'Regan, ibid.

218. Op. cit. at 48.

219. Op. cit. "Aboriginal Evidence and Justice" at 198.

220. Op. cit. "Judicial Ascertainment of Customary Law" at 250.

221. Dhalamini v. R. [1943] 1 All E.R. 463, 466 cited by Macaulay, op. cit. at 755.

222. In the following discussion the authors are indebted to Misner's exposition of this topic, op. cit.

223. Strathern, M., "Sanctions & the Problem of Corruption in Village Courts" in Zorn, J. & Bayne, P. (Edd.) op. cit. at 56.

224. Clifford, op. cit.

225. See Misner, op. cit. at 265; Eggleston, op. cit. at 383; Hiatt, op. cit. at 186.

226. Eggleston, op. cit. at 430.

227. Stone, op. cit. at 84.

228. Op. cit. at 266.

229. See Bayne, P., "The Future of Traditional Law" op. cit. at 277.

230. Indian Justice Planning Project, 1971 at 140. See also Misner,

op. cit. at 277.

231. Albrecht, P.G.E., "Aborigines & Alcohol", No. 4 Newsletter on Aboriginal Affairs 12 at 15-16.

232. See Cohen, Chappell and Wilson, op. cit. at 8 who cite Eggleston as saying that on the Queensland reserves there is an "intense dislike" of such courts. It will be interesting to see whether this situation will improve since the enactment of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975. Section 9 of the Act provides that in courts on reserves Aborigines and Torres Strait Islanders shall be entitled to legal representation. The Act prohibits conviction unless the offender has the same rights of appeal which exist from a Magistrates' court.

233. Op. cit. at 391-2.

234. See, for example, Mattes, J.R., "The Courts System" in Fashion of Law in New Guinea, Brown, B.J. (Ed.) op. cit. at 80.

235. Op. cit. at 505.

236. Op. cit. at 81.

237. Op. cit. at 48.

238. See Albrecht, op. cit. at 15; Misner, op. cit. at 266.

239. Misner, op. cit. at 267; see also Eggleston, op. cit. at 418-9.

240. Op. cit. at 83.

241. Op. cit. at 3.

242. Unreported decisions Nos. 355-358 of 1974.

243. Cohen, Chappell & Wilson, op. cit. at 18.

244. See Indian Justice Planning Project, at 96-7.

245. Indian Justice Planning Project at 93-95.

246. Sections 26 & 24. It is interesting to note that under its preventive jurisdiction, however, the Village Court may, for breach of an order, fine the offender up to $200 or impose imprisonment for 6 months or both (Section 18(2)).

247. Section 3 Village Courts Regulations 1974.

248. Op. cit. at 277.

249. Ibid at 283.

250. See National American Indian Court Judges Association, Research Document in Support of the Criminal Court Procedures Manual, 162.

251. Many traditional societies operated on racist and sexist principles. Perhaps a return to such a philosophy would seem strangely incongruous in the 1970s during which cries for equality have been such a dominant theme.

252. Op. cit. at 268-9.

253. Munro, A.P., "Land Law in the Making" in Hutchison, T.W. and others (Edd.) Africa & Law, 1968, 79-80 cited in Suttner, R.S., "Legal Pluralism in South Africa: A Reappraisal of Policy" (1970) 19 International & Comparative Law Quarterly 134 at 143-4.

254. Twining, W., "The Place of Customary Law in the National Legal Systems of East Africa", lectures delivered at the Chicago Law School 1963, cited in Cotran, op. cit. at 77-8.

255. For an even greater list of problems faced by the Indian Courts in America, such as lack of training, selection and pay of officials, administrative problems, the need for independence and so on. See Indian Justice Planning Project at 160-172.

256. See e.g. Derham, op. cit.; Mattes, op. cit.

257. See generally, Zorne, J. & Bayne, P. (Edd.) op. cit.

258. Section 19 Village Courts Act 1973. A dispute is defined as including "any case where a person complains of and is genuinely oppressed by the actions of another." Section 4.

259. Section 40 Village Courts Act 1973.

260. Section 10 Village Courts Act 1973.

261. Section 15 Village Courts Act 1973.

262. Section 29 Village Courts Act 1973.

263. Section 46 Village Courts Act 1973.

264. Section 49 Village Courts Act 1973.

265. Section 50 Village Courts Act 1973.

266. Section 51(1) & (3) Village Courts Act 1973.

267. Section 54 Village Courts Act 1973.