JUDICIAL USE OF CUSTOMARY LAW IN THE CRIMINAL JUSTICE PROCESS IN THE NORTHERN TERRITORY OF AUSTRALIA

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Abstract

The Thesis sets out to examine judicial use of customary law in the criminal justice process in the Northern Territory of Australia.

The broad context of the Thesis is the relationship between state law and customary law and the role of the judiciary in interpreting and developing that relationship. The Thesis concentrates on criminal law as it is the subject area where the conflicts are most acute and on the Northern Territory as it is the jurisdiction with the largest proportion of Aborigines living traditional lifestyles.

The categorisation of the acquisition of Australia as by settlement has meant that customary law had been largely excluded from the state legal process. However, changes in the political climate have led to increasing demands for some recognition. The Thesis examines the legal difficulties inherent in such demands, considers the options and concludes that, on balance, the judiciary are the body best placed to resolve such difficulties.

The Thesis begins with an overview of the nature of customary law and of the theoretical arguments for and against the recognition of such law. This is followed by a consideration of the various methods by which such recognition might be achieved. It is argued that the role of the judiciary in the evolution and regulation of the use of customary law in this context is crucial and that it is often the most appropriate body to decide such issues. This argument is elaborated in the following three Chapters which consider those areas of the criminal justice process where the judiciary have most frequently engaged with this dilemma. The Chapters consider procedural issues, substantive law and sentencing. The final Chapter summarises and evaluates the arguments presented and sets out the conclusion.

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Dedication

This work is dedicated to indigenous peoples throughout the world in sorrow for past and present injustice and in hope for a better future.

And to my parents with love and thanks.

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This work aims to represent the law as at 1 December 2004.

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Introduction:

This Introduction outlines the topic and structure of the Thesis. It describes the central proposition, the scope, methodology, and structure, and includes a literature survey. It then sets the context for the Thesis by a brief discussion of the nature and content of customary law, of the possible ways in which such law may relate to the state, and of the main state proposals for some recognition of customary law. The Chapter concludes with a section introducing some of the arguments which support the central proposition of the Thesis.

0.1: Outline of Thesis:

i. Central proposition argued in the Thesis:

The Thesis examines the ways in which Northern Territory criminal Courts deal with customary law in the treatment of Aboriginal defendants and argues that the use of judicial reasoning and discretion is the most effective way of according some recognition to such law.

ii. Scope of Thesis:

The following points should be noted at the outset:

a. The Thesis is written by a lawyer and from a modernist, positivist perspective on law and the state, the perspective from which the judiciary, as an organ of the state, inevitably operates. This perspective assumes that Courts may not apply any system of law which is not recognised and validated by the state.[1] The integrity of this position is not undermined by the fact that the judiciary itself often makes law. Modernism and positivism require that the judiciary applies only law made by organs of the state, not that it applies only law made by organs of the state other than itself. In practice, of course, the judiciary often creates law which has similar or identical content to an already existing extra-legal norm, including, on occasion, a norm of customary law. However, the legal validity of such a law derives from the status of the judiciary as an organ of the state and not from its prior existence. Whilst there is some consideration of broader debates and conceptual issues in order to give an outline of the intellectual discourse within which the judiciary operates, the Thesis is not a work of jurisprudence, anthropology or social science and, therefore, this perspective will not be justified but assumed. Moreover, whilst reference will be made to the major insights of these disciplines, they will not be discussed in detail.

[1] For an exposition of this position and the challenges which it poses to the acceptance of non-state systems, see: Griffiths. J. 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism and Unofficial Law*, 1986, 1-55, especially pp. 1-8. See also: Galanter. M. 'The Modernization of Law' in Weiner. M. (ed.) *Modernization: the Dynamics of Growth* New York: Basic Books, 1966, at 153-161. See also Chapter 2.

b. There is some consideration of state and government initiatives – and indeed non-state and non-government initiatives - but it is not intended provide an exhaustive analysis of the Australian state's treatment of Aboriginal customary law nor to recommend, except in the broadest possible terms, courses of action to be taken by organs of the state other than the judiciary. It is appreciated that the judiciary does not operate in isolation, but its work is the central point of the Thesis which is, essentially, concerned with the way in which judges can give effect to non-state legal systems within the criminal justice process.

c. The Thesis concentrates on criminal law because this is the area which poses the broader dilemma of competing legal systems in its most acute form. States are especially concerned to maintain control – usually monopoly - over criminal law and it is the area in which the public has the greatest stake. It is also the area of law where sanctions are potentially most severe and, therefore, the question of the acceptability of various forms of punishment and the possibility of either dual or no sanction is of more concern than in other areas of law.[2]

[2] There are several legislatures and several jurisdictions within the Commonwealth of Australia. The structure of the Australian federal system is such that criminal law is primarily a matter for the States. Criminal offences may only be created by the Commonwealth as an incident to the exercise of some other power, one of which is the governance of federal territories. New South Wales, Victoria and South Australia remain governed by the common law in regard to criminal offences although there is also a great deal of statutory criminal law. The Commonwealth is also a common law jurisdiction in so far as it possesses criminal law powers. Queensland, Western Australia and Tasmania have all adopted Criminal Codes which are the guiding law for criminal matters. The Australian Capital Territory is largely, though not entirely, governed by the law of New South Wales and can, therefore, be counted as a common law jurisdiction in criminal matters. The criminal law of the Northern Territory is contained in the Criminal Code Act, 1983 which

d. The Thesis considers the question posed primarily in the context of the Northern Territory which has the highest proportion of Aboriginal inhabitants.[3] The dilemma is, therefore, posed most acutely in that system. However, the Northern Territory Courts do not operate in a legal or intellectual vacuum and reference will be made to other jurisdictions where relevant.

e. The Thesis covers the period from the mid-1950's (when the decisions of the Northern Territory Courts began to be systematically recorded) to the present day. Reference will be made to earlier cases where relevant and this will be particularly so in Chapter 1.

iii. Methodology:

The primary materials, on which the Thesis largely relies, are the Judgments and Sentencing Remarks of the Courts. It is assumed that these are the clearest and most authoritative indicators of judicial thinking and creativity. There is also consideration of the major secondary literature in so far as it elucidates the practice of the judiciary. Finally, the author undertook some brief fieldwork in

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consolidated the various South Australian statutes and ordinances which had been the source of the applicable criminal law prior to self-government in 1976. The Code is loosely based on the Queensland and Western Australia Codes.

[3] The most recent figures available are from the 2001 Census which showed 50,785 indigenous inhabitants in the Northern Territory out of a total population of 202,729 - i.e. approximately 25%: Australian Bureau of Statistics website http://www.abs.gov.au/Ausstats (last accessed on 1 December 2004). For an overview of available statistical information, see: *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* Human Rights and Equal Opportunity Commission website http://www.hreoc.gov.au/social_justice/statistics (last accessed on 1 December 2004).

the mid-1990's at a point when judicial activism in this area appeared to be increasing. This took the form of research into (then) unpublished materials and some interviews. Reference will be made to the latter at the relevant points in the Thesis. However, it should be noted that the interviews were too few and insufficiently systematic to allow of more than informative and anecdotal value.

There are, admittedly, some limitations to this methodology. First, reliance on public statements[4] does not disclose whether there is a coherent paradigm informing the decisions or whether they are *ad hoc*. However, this does not appear to be significant as the contention of the Thesis is that judicial decision making should be exercised with flexibility and should not be overly constrained by a dominating paradigm. Moreover, even if such a paradigm were found to exist, given the scope of judicial discretion discussed in the Conclusion, it could be extended or altered by the judiciary as and when necessary or desirable. Second, it is acknowledged that the evaluations of customary law both by the judges and by the author of the Thesis are made from a standpoint external to that system. Inevitably this leads to partial understanding. However, the Thesis is not aiming to study customary law *per se*, but the reaction of the judiciary and the methodology employed is valid for that purpose.

[4] 'Public' includes, for present purposes, unreported decisions or remarks.

iv. Outline of structure:

The Thesis is structured as follows:

Chapter 1: The first Chapter considers the status of any pre-existing customary law system and the effect of the British arrival in 1770-1788. If the system survived 1770-1788, there would be a strong argument that the state legal system should – or at least could - be applying customary law. This Chapter will examine the international law on the acquisition of territory which was applicable in 1770-1788, and the application of that law to the historical events. It will then analyse judicial understanding and interpretation of those events. There have been three clear phases in the evolution of such judicial understanding. The first began with the establishment of a fully functioning legal system in the 1820's and lasted for some sixty years, by which time the judiciary was virtually unanimous in its view that Australia had been *terra nullius* and the acquisition had been by settlement. There was then a long period with virtually no further development of the law. The second phase began in the 1970's when a new series of challenges, largely inspired by increasing political awareness among Aborigines, was mounted to the established understanding. None were successful in altering the judiciary's position. The third phase was initiated by the decision of the

High Court in the Mabo[5] case. This case decided that the original categorisation of Australia as *terra nullius* was in error. However it did not overturn the established position on settlement. Although the case was concerned with native title, it has proved the *impetus* for attempts to gain recognition for other areas of customary law. It will be argued that the Mabo decision was partially incorrect and that such customary law as existed did not survive 1770-1788 as a legal system. This means that, from the perspective of the Courts, Aboriginal law can only be recognised to the extent that it is in some way approved by the state.

Chapter 2: Given that customary law can only be legally effective if the state recognises it, the next question to consider is whether the state must or should grant such approval in the sense of endorsing a separate legal system or rules and, if so, to what extent? This will involve, firstly, a brief overview of Australia's international law obligations. There are three possible areas of law where such an obligation might be grounded; international human rights law, the law on the rights of minorities or groups and the law on the rights of indigenous peoples. It will be concluded that there is no such obligation capable of binding the judiciary.[6] The Chapter will then consider the moral and philosophical arguments which may inform the decision-making powers in a state,

[5] Mabo v. State of Queensland (No. 2) (1992) 175 CLR 1.

[6] There *may* be an obligation on the state of Australia to recognise customary law to some extent, but this area of international law is uncertain and still developing. It will be considered in Chapter 2. However, the judiciary, as an arm of the state and an organ of domestic government, is not empowered to apply international law in the absence of executive or legislative endorsement.

including the judiciary: the doctrines of equality and non-discrimination, multiculturalism and legal pluralism. It will be concluded that there are persuasive arguments to consider at least partial recognition, but that the endorsement of such a separate set of norms as legally binding is problematic. In the light of this analysis, the next three Chapters will consider the ways in which the judiciary has dealt with the issue to date and suggest ways forward. The intervention of the judiciary takes place at three stages in the criminal justice process and a Chapter will be devoted to each stage.

Chapter 3: This Chapter will deal with the way in which the judiciary has made use of customary law in deciding procedural issues. It should be noted that customary legal systems do not draw a distinction between procedural and substantive elements of the law.[7] However, the state legal system within which the judiciary operates does draw such a distinction and that practice is followed in the Thesis. This Chapter discusses several such procedural issues - for example, the institution of the jury trial - which have no direct customary law ramifications, but where such law might impact upon the interaction between an Aborigine and the legal system. It then goes on to consider two procedural issues which are inextricably connected with customary law: first, the implications of customary law for the taking of Aboriginal evidence and second, the

[7] *Infra* 39-40.

proof of customary law. This Chapter will be considerably shorter than the following two as there is less caselaw available on this issue than on either substantive law or sentencing.

Chapter 4: This Chapter will deal with the way in which the judiciary has made use of customary law in the substantive law, in considering the elements of offences and defences. There is little scope for such use in the case of offences – apart from the possibility of customary law being relevant to the establishment of intent – but it has been used extensively in considering whether the elements of defences have been made out. The Chapter will concentrate on four defences, though others will be mentioned. By far the greatest amount of judicial consideration has been given to provocation, where discussion has centred on the relevance of Aboriginality and customary law to the assessment of the gravity of the provoking act and the expected standard of self-control. In relation to duress and diminished responsibility, there has been much less caselaw and the possible application of the defences to customary law circumstances raises difficult and sensitive questions. The defence of intoxication has no specific customary law connotations, but it is considered in brief as many offences involving Aborigines take place against a background of indulgence in alcohol and this may have consequences in terms of the analysis of the offence. It is, for example, sometimes difficult to determine whether a violent incident was merely a

drunken revenge attack or whether it involved customary law punishment.

Chapter 5: This Chapter will deal with the way in which the judiciary has made use of customary law in sentencing. In terms of the number of defendants affected, this is much the most significant stage of judicial use of customary law. It is far less problematic than such a use in determining the elements of substantive offences and defences as the judiciary is possessed of a wide discretion as to factors that may be taken into account at the stage of sentencing. Matters which may not be relevant to guilt may nevertheless be relevant to the sentence imposed. The judiciary has made use of two broad categories in considering issues which arise when sentencing an Aboriginal defendant. The first, Aboriginality *per se*, may not generally be taken into account. The second, factors associated with Aboriginality, may be. These categories will be discussed and their application in the case of customary law analysed. There will be particular consideration of the relevance of payback – customary law punishment – both to sentencing and to the wider law.

Conclusion: This Chapter will bring together the arguments and debates which have been raised throughout the Thesis. It will conclude that the most effective way of incorporating elements of customary law within

the state legal system is by the use of judicial reasoning and discretion and that the benefits of such judicial flexibility outweigh those of the certainty which may be attained by constitutional or statutory regulation or endorsement.

v. Literature survey:

The primary 'literature' considered by the Thesis is case-law, mainly from Australian federal, state and territory jurisdictions – particularly the Northern Territory - but also from foreign and international jurisdictions where appropriate. There is also consideration of relevant constitutional or statute law from the same range of jurisdictions.

Several of the areas covered by the Thesis have been the subject of extensive consideration in the secondary literature which is discussed and referenced at the appropriate point. This literature falls into several categories, in each of which the various sources tend to cover substantially the same ground and, therefore, the Thesis cites only a representative sample in each category.

1. Journal articles: there are numerous journal articles on areas covered by the Thesis. Generally a significant case, piece of legislation or government initiative prompts a large number of articles: thus, the rash of publications on Mabo, on the 'stolen generations', and on the

Australian Law Reform Commission Report on customary law. These articles contain insight into and analysis of the areas which they cover and are particularly useful in providing differing perspectives on an issue. However, none of them provide a systematic and comprehensive coverage of the subject area of the Thesis. Examples include Hill's 'Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* decision, and the Meaning of Land'[8], Amankwah's 'Post-*Mabo*: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia'[9], Kennedy and Nance's 'Stolen Generations: the Kruger Action'[10] and Byers' 'The Kruger Case'[11].

2. Edited collections on Aborigines in Australia: these generally include chapters on a broad range of topics such as the effect of imprisonment, alternative justice schemes or the question of settlement. Examples of this type of collection are Hazlehurst's *Ivory Scales: Black Australia and the Law* [12] and Johnston, Hinton and Rigney's *Indigenous Australians and the Law* [13]. These collections include some work which is relevant to the

[8] Hill. R. P. 'Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* decision, and the Meaning of Land.' *Human Rights Quarterly* 17 (1995) 303.
[9] Amankwah. H.A. 'Post-*Mabo*: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia.' *University of Queensland Law Journal* Vol. 18, (1994-1995) 15.
[10] Kennedy. L. and Nance. D. 'Stolen Generations: the Kruger Action' *Aboriginal Law Bulletin* Vol. 3, No. 78, February, 1996, 11.
[11] Byers. M. 'The Kruger Case' *Public Law Review* Vol. 8, December 1997, 224.
[12] Hazlehurst. K.M. (ed.) *Ivory Scales: Black Australia and the Law* Kensington, N.S.W.: New South Wales University Press, 1987.
[13] Johnston. E., Hinton. M. and Rigney. D. *Indigenous Australians and the Law* Sydney: Cavendish Publishing (Australia) Pty Limited, 1997.

subject of the Thesis[14], but they are not concerned with a focused study of the work of the judiciary.

3. Themed collections: on, for example, comparative law, alcohol abuse, indigenous rights in international law. Examples of this type of collection are Havemann's *Indigenous Peoples' Rights in Australia, Canada and New Zealand*[15] and Hocking's *International Law and Aboriginal Human Rights*[16]. These collections are informative on the particular aspect which they cover, but again are not concerned with a focused study of the judiciary.

4. Books on a discrete topic: these are comparatively rare. They provide a more in depth study of a particular issue, for example, dispute resolution, but do not focus on the main area of the Thesis. An example of this is Behrendt's *Aboriginal Dispute Resolution*[17].

5. General texts on particular subject areas such as criminal law, international law, sentencing and evidence: these often include a chapter or section on Aborigines or indigenous peoples. Whilst they contain

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[14] See, for example: Debelle. B. 'Aboriginal Customary Law and the Common Law' in Johnston. E., Hinton. M. and Rigney. D. *Indigenous Australians and the Law* Sydney: Cavendish Publishing (Australia) Pty Limited, 1997, 81-100.

[15] Havemann. P. (ed.) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* Oxford: Oxford University Press, 1999.

[16] Hocking B. (ed.) *International Law and Aboriginal Human Rights* North Ryde: Law Book Co., 1988.

[17] Behrendt. L. *Aboriginal Dispute Resolution* Leichardt, New South Wales: Federation Press, 1995

some relevant materials, these books are primarily concerned with the areas of law which they set out to address and not with judicial use of customary law. Examples include Findlay's *Problems for the Criminal Law*[18], Gans and Palmer's *Australian Principles of Evidence*[19]and Lindley's *The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law and Practice Relating to Colonial Expansion* [20].

6. Literature from areas other than law: texts on anthropology, history, politics, cultural theory, legal philosophy, religion. These are referred to at appropriate points, but are generally not considered in detail as the Thesis is primarily concerned with the judiciary and state law. Examples include Levy's *The Multiculturalism of Fear*[21] and Neal's *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* [22].

7. Conference papers and collections, published and unpublished: for example, conferences held by the Australian Institute Criminology and the Aboriginal and Torres Strait Islander Commission. As with published edited collections, these collections include some papers which are

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[18] Findlay. M. *Problems for the Criminal Law* Melbourne: Oxford University Press, 2001.
[19] Gans. J. and Palmer. A. *Australian Principles of Evidence* Coogee, NSW: Cavendish Publishing Limited, (2nd ed.) 2004.
[20] Lindley. M.F. *The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law and Practice Relating to Colonial Expansion* London: Longmans, Green and Co. Ltd., 1926.
[21] Levy. J.T. *The Multiculturalism of Fear* Oxford: Oxford University Press, 2000.
[22] Neal. D. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* Melbourne: Cambridge University Press, 1991.

relevant to the subject of the Thesis[23], but they are not generally primarily concerned with the work of the judiciary in the use of customary law. Examples include *Aboriginal Justice Issues*[24] and *The Use of Customary Law in the Criminal Justice System*[25].

8. Government publications: there have been numerous studies and proposals undertaken by various governments, including by Law Reform bodies. The most important for present purposes are the Australian Law Reform Commission's Report *The Recognition of Aboriginal Customary Laws*[26] and the Northern Territory Law Reform Committee's *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory*[27]. These will be discussed at the relevant points in the Thesis. Both Reports include recommendations, but they do not, of course, focus entirely on the recognition of customary criminal law nor do they make a sustained argument that such recognition is best left to the judiciary.

9. Non-governmental organisations: there are some Reports of work undertaken by non-governmental organisations. These are comparatively

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[23] See, for example: Debelle. B. *supra* n 14, 81-100.
[24] *Aboriginal Justice Issues* Canberra: Conference Proceedings 21, Australian Institute of Criminology, 1992.
[25] *The Use of Customary Law in the Criminal Justice System* Canberra: Proceedings - Training Project No. 23, Mar. 1-5 1976, Australian Institute of Criminology, 1976.
[26] Australian Law Reform Commission's Report *The Recognition of Aboriginal Customary Laws* (Summary Report, Full Report 2 Volumes), Final Report No. 31 Canberra: Australian Government Publishing Service, 1986.
[27] Northern Territory Law Reform Committee *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory* Darwin: Northern Territory Law Reform Committee, 2003.

unimportant, but provide some information and analysis. An example is Brady and Palmer's *A Study of Drinking in a Remote Aboriginal Community*[28].

10. Theses or Dissertations: there are some studies on areas akin to the subject matter of the Thesis. Examples are Coles' *Matter of Principle and Practice: The Sentencing of Australian Aborigines in the Northern Territory Supreme Court, 1974-1982*[29], McCorquodale's *Aborigines: A History of Law and Injustice, 1829-1985*[30] and Kingsbury's *Indigenous Peoples in International Law*[31]. There is inevitably some slight overlap of material between Coles' work and the present Thesis, but his work deals solely with sentencing and covers only a twelve year period. None of these works, including Coles', is on the precise area of the Thesis and none is concerned to establish the argument that the judiciary is the most appropriate body to recognise customary law in the criminal justice process.

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[28] Brady. M.A. & Palmer. K. *A Study of Drinking in a Remote Aboriginal Community* Adelaide: Report prepared for Australian Associated Brewers, Western Desert Project, School of Medicine, Flinders University, Adelaide, South Australia, 1982.

[29] Coles. G. *A Matter of Principle and Practice: The Sentencing of Australian Aborigines in the Northern Territory Supreme Court, 1974-1982* B. Litt. Thesis, Australian National University, 1983.

[30] McCorquodale. J. *Aborigines: A History of Law and Injustice, 1829-1985*. PhD Thesis, University of New England, August 1985.

[31] Kingsbury. B. *Indigenous Peoples in International Law* D. Phil. Thesis, University of Oxford, 1990.

11. International comparisons: there is a considerable literature on the use of customary law in other jurisdictions. Moreover, the issue of incorporation is a live one in several jurisdictions giving rise to law reform proposals. Thus, for example, the Papua New Guinea Law Reform Commission not only conducts studies on the question, but also has a constitutionally guaranteed role in relation to the integration of customary law into the state system. The Thesis is not a work of comparative law and this literature is referred to only briefly. Examples include Karsten's *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600-1900*[32] and Zorn and Corrin Care's '"Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific'[33].

However, despite the extensive literature outlined above, there has (to the author's knowledge) been no systematic attempt to place the role and practice of the judiciary within the debate on the recognition of customary law. Several studies contain some discussion of these issues. Yeo, for example, has written

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[32] Karsten. P. *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600-1900* Cambridge: Cambridge University Press, 2002.

[33] Zorn. J.G. and Corrin Care. J. '"Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' *International and Comparative Law Quarterly* July 2002, 51.3 (611).

extensively on criminal law in general and homicide in particular, and on the relevance of ethnicity, including Aboriginality, to the application of that law.[34] He has also written specifically on Aboriginality[35], but the focus of this work is on the definition and recognition of Aboriginality rather than on the significance of the actions of the judiciary in taking account of customary law. Purdy has written on the effect of the application of the common law to colonised people[36], but her work is primarily concerned with the adverse characterisation – and often criminalisation - of ethnic groups. This involves some consideration of the judiciary, but neither it nor customary law is the focus of her work. The significance of the present work lies in its distinctive contention that the judiciary is the most important agent in taking into account that which is commonly referred to as customary law, not least because it will be responsible for applying any legislative incorporation. In order to establish this argument, it undertakes a comprehensive study of the practice of the judiciary at all stages of

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[34] See, for example:Yeo. S.M.H. *Partial Excuses to Murder* Leichardt, New South Wales: Federation Press with the assistance of the Law Foundation of New South Wales, 1990; *Unrestrained Killings and the Law: Provocation and Excessive Self-Defence in India, England and Australia* Delhi: Oxford University Press, 1998; *Compulsion in the Criminal Law* North Ryde, New South Wales: Law Book Co. ltd., 1990; 'Native Criminal Jurisdiction after Mabo' *Current Issues in Criminal Justice* Vol.6, No.1, July 1994, 9; 'Ethnicity and the Objective Test in Provocation.' *Melbourne University Law Review*. Vol. 16. June, 1987, 67; 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited.' *Sydney Law Review*, Vol. 18, 1996, 304; 'Power of Self-Control in Provocation and Automatism' 14 *Sydney Law Review* 3. March, 1992.

[35] 'The Recognition of Aboriginality by Australian Criminal Law' in Bird. G., Martin. G. and Neilsen. J. *Majah: Indigenous Peoples and the Law* Leichardt, New South Wales: Federation Press, 1996, 228

[36] 'British Common Law and Colonised Peoples: Studies in Trinidad and WesternAustralia' in Bird. G., Martin. G. and Neilsen. J. *Majah: Indigenous Peoples and the Law* Leichardt, New South Wales: Federation Press, 1996; *Common Law and Colonised Peoples: Studies in Trinidad and Western Australia* Aldershot: Ashgate Dartmouth, 1997; 'Postcolonialism: The Emperor's New Clothes' *Social and Legal Studies* Vol. 5 (3) 405-426 1996; '"I Suspect You and Your Friends are Trifling with Me": Encounters between the Rule of Law and the Ruled' *Australian Journal of Law and Society* (2000-2001) 15, 67-89.

the criminal justice process and considers the advantages – and possible disadvantages - of judicial discretion and flexibility.

0.2: Customary Law and the State:

Before considering the recognition of customary law by the state and the part played by the judiciary in such recognition, it is necessary to examine briefly the nature and content of that law and its relation to the state. There is, of course, a massive general literature on customary law, its nature and its relationship to other systems of law. Many of the considerations are applicable across all states which have populations which either did or still do act out of compliance with such a customary system, though some take particular forms in Australia.[37] In the present

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[37] See, for example, the works cited *infra* n 55 and also: Evans-Pritchard. E.E. *The Nuer* New York: Oxford University Press, 1969; Hogbin. H.I. *Law and Order in Polynesia: A Study of Primitive Legal Institutions* Melbourne: Melbourne University Press, 1934; Twining. W.L. *The Place of Customary Law in the National Legal Systems of East Africa* Chicago: University of Chicago Law School, 1964; Roberts. S. *Order and Dispute* Harmondsworth: Penguin Books, 1979; Maine. H. *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* London: Murray, 1876; Abel. R.L. 'The Comparative Study of Dispute Institutions in Society' *Law and Society Review* Vol. 8 (1973) 217-347; Diamond. A.S. *The Evolution of Law and Order* London: Watts, 1951; Moore. S.F. *Law as Process: An Anthropological Approach* London: Routledge and Kegan Paul, 1978.
Note also the specifically Australian works. These tend to be general works of anthropology which include consideration of law and order mechanisms. There are comparatively few studies dealing only with customary law. See, for example: Spencer. B. and Gillen. F. *The Native Tribes of Central Australia* London: Macmillan, 1899; Spencer. B. *Native Tribes of the Northern Territory of Australia* London: Macmillan, 1914; Radcliffe-Brown. A. *The Social Organization of Australian Tribes* Sydney: Oceania Publications, 1931; Elkin. A.P. *The Australian Aborigines: How to Understand Them* Sydney: Angus and Robertson, 1938; Strehlow. T.G.H. *Aranda Traditions* Melbourne: Melbourne University Press, 1947, *Journey to Horseshoe Bend* Sydney: Angus and Robertson, 1969, and *Songs of Central Australia* Sydney: Angus and Robertson, 1971; Meggitt. M. *Desert People: A Study of the Walbiri Aborigines of Central Australia* Sydney: Angus and Robertson, 1962; Stanner. W.E.H. *On Aboriginal Religion* Sydney: University of Sydney, Oceania Publications, 1963, and *White Man Got No Dreaming: Essays 1938-1973* Canberra: Australian National University Press, 1979; Hiatt. L.R. *Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land*; Canberra: Australian National University Press, 1965; Berndt. R.M. and C.H. (eds.) *Aboriginal Man in Australia* Sydney: Angus and Robertson, 1965, *The World of the First Australians* Canberra: Aboriginal Studies Press, (5th ed.) 1992 and *A World that*

context, three questions need to be considered: first, what is meant by the concept of 'customary law'?; second, how is its content to be determined?; and third, what is its relation to the state system? Detailed consideration of these questions is beyond the scope of the Thesis. This is particularly so in the case of the first question. The nature of customary law is primarily a matter of anthropology and legal philosophy and is not *per se* of direct interest to the judiciary. The second and third questions are more relevant to the present work as they can, indeed must, be considered by the judiciary if they are to make use of customary law. It must be reiterated that the focus of the Thesis is the judicial process. This approach should not be understood to deny that Aboriginal people may well have a different – and doubtless better-informed - perspective on at least the first two of these three questions, but it is the views of the judiciary which are the subject of the Thesis. In all three questions, it is proposed merely to outline the major issues and debates and to do so from its perspective.

Was Melbourne: Melbourne University Press, 1993; Berndt. R.M. (ed.) *Australian Aboriginal Anthropology* Canberra: Australian Institute of Aboriginal Studies, 1970; Berndt. R. and Tonkinson. R. (eds.) *Social Anthropology and Australian Studies: A Contemporary Overview* Canberra: Aboriginal Studies Press, 1988; Gale. F. (ed.) *Woman's Role in Aboriginal Society* Canberra: Australian Institute of Aboriginal Studies, 1970; Tindale. N.B. *Aboriginal Tribes of Australia* Canberra: Australian National University Press, 1974; Shapiro. W. *Social Organization in Aboriginal Australia* Canberra: Australian National University Press, 1979; Maddock. K. *The Australian Aborigines: A Portrait of their Society* Ringwood: Penguin, (2nd ed.) 1982; Bell. D. *Daughters of the Dreaming* Melbourne: McPhee Gribble, 1983; Myers. F. *Pintupi Country, Pintupi Self: Sentiment, Place and Politics among Western Desert Aborigines* Washington: Smithsonian Institute Press, 1986; Williams. N. *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* Canberra: Australian Institute of Aboriginal Studies, 1987; Keen. I. (ed.) *Being Black: Aboriginal Cultures in 'Settled' Australia* Canberra: Aboriginal Studies Press, 1988; Burbank. V. *Fighting Women: Anger and Aggression in Aboriginal Australia* Berkeley: University of California Press, 1994; Hiatt. L.R. *Arguments about Aborigines: Australia and the Evolution of Social Anthropology* Cambridge: Cambridge University Press, 1996.

i. The nature of customary law:

This is the most complex of the three questions. There is no clear and universally accepted definition of 'customary law' or 'customary legal systems'. It would appear that all that can be said with certainty is that customary law and systems encompass many more areas of life than do their state counterparts - that there is, for example, no clear distinction between what the state would categorise as law or morality, or as law or religion - that the norms in all spheres of life are considered to be binding, and that the norms are part of the understanding of the whole community and are not simply imposed – or indeed revoked - by a specialised body.[38] A further characteristic of customary systems

[38] Definitions of customary law given by both lawyers and anthropologists seem to agree on these elements. See, for example: "In Aboriginal society there was no system of government in any institutionalised sense. There was no body which made any laws and no hierarchy of courts or other enforcing authorities. There were tribal elders but no chieftains nor any ruling class. There was no hierarchical system of government within a tribe or group of tribes. Nevertheless, mechanisms for the maintenance of order and the resolution of disputes existed. When they spoke of law, Aborigines did not distinguish in the way white Australians do between norms of social behaviour and mandatory rules, a breach of which might result in severe consequences. All of this would be understood as law. The law had no separate identity so that a system of legal rules cannot be easily identified." Debelle. B. *supra* n 14 at 82; the Mardudjara (a Gibson Desert people) term for law " ... connotes a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns'; it is practically a synonym for 'traditional culture'" Tonkinson. R. *The Jigalong Mob: Aboriginal Victors of the Desert* Crusade Menlo Park, California: Cummings Publishing, 1974, 7 at 70, cited in Maddock. K. 'Aboriginal Customary Law' in Hanks P. & Keon-Cohen B. (eds.) *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* North Sydney: George Allen & Unwin, 1984, 212-237, at 212; "Aboriginal Customary law is very broad in its full context, covering topics such as criminal matters, copyright, adoption, land ownership and usage, and basically every other aspect of western legal system (*sic.*), as well as other sacred and sometimes secret issues that are far broader than the scope of the western legal system. ... Aboriginal customary law is fundamentally a means of dispute resolution based on traditional spiritual beliefs and cultural traditions that provide sanctions against those actions which are harmful to the community. In a criminal context fundamentally customary law is simply a means of a community establishing its set of basic values and providing a means to punish those who transgress against established community laws. It also provides a means where an aggrieved victim of an offence can have recompense, where any existing family or community tension resulting from the offence can be resolved quickly and as a means to ensure that disputes within communities and between sections of communities do not fester and lead to greater ongoing tension and conflict. Customary law is fundamentally a means of maintaining social order .." Aboriginal Justice Advisory

is that no distinction is drawn between those areas which state systems would – in general - categorise as substantive and those they would categorise as procedural. Whilst this distinction is readily understood and accepted by positivist lawyers, there has been much debate amongst anthropologists and legal theorists as to whether 'law' is composed of rules or of process. The debate was current for much of the twentieth century, but was substantially resolved with the publication of *Rules and Processes: The Cultural Logic of Dispute in an African Context*[39] in 1981 and the view that law is an amalgam of both rules and process is now widely accepted.[40] There is, however, still room for debate about the types of rules and the types of process which go to make law: this issue will be dealt with when considering the relationship between customary law and the state.

None of the definitions of customary law outlined above answers the question 'what is customary law?' to the satisfaction of a positivist lawyer. Whilst there are certainly difficulties in attempting to identify the nature of customary law in terms of admissibility of evidence, disputes about content and so forth, these difficulties can be contained within the conceptual framework of a judge in the Australian system. More problematic for such a judge, is to understand a customary law system and *corpus* as 'legal' and to apply it within the state

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Committee of the New South Wales Attorney-General's Department, Government of New South Wales *Strengthening Community Justice: Some Issues in the recognition of customary law* undated, at http://www.lawlink.nsw.gov.au/ajac.nsf/pages/customarylawDP (last accessed on 25 June 2005).

[39] Comaroff. J.L. & Roberts. S. Chicago and London: University of Chicago Press, 1981.

[40] Some scholars analyse the question as one of dispute settlement: see, for example: Roberts. S. *supra* n 7.

framework. For the state system, 'customary law' is almost an oxymoron. However, for many indigenous groups 'law' carries the much wider meaning discussed above. Whilst custom and law share many features – for example, they are predictable and breach carries sanction – they also have many differences – for example, the relevance of the status of the parties, the concept of *taboo* matters and the requirement for positivist law decisions to either follow authority, whether statute or precedent, or to provide justification for not following those authorities. The existence of these two quite different and irreconcilable concepts of law is a fundamental and insoluble problem in the application of customary law by the state systems. State Courts will only ever be able to apply customary 'law' which can somehow be fitted into their understanding of 'law' and 'system'.[41]

Various attempts have been made to facilitate the understanding and use of customary law by the Courts. Eggleston analysed the structure and functioning of Aboriginal traditional law and the difficulties posed for recognition in her still influential work *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*[42]. She distinguishes 'pure' tribal law, as it existed pre-contact with white society, from 'modified' tribal law, which itself takes stronger or weaker forms according to the lifestyle of its

[41] This is indisputably so. Even the most extensive form of 'recognition' would still have to be applied by the Courts within their own powers and jurisdiction. This would not, of course, be the case if there were an alternative system where customary law issues did not come before state Courts at all. However, as the Thesis is concerned with the role of the judiciary, such an alternative will not be discussed in detail.

[42] Eggleston. E.M. Canberra: Australian National University Press, 1976, at 276-305.

adherents. Her argument is that the main way in which state Courts can take customary law into account is by the extensive use of anthropological evidence which will assist in fitting such law into a scheme which may be applied by the Courts. This use of anthropological analysis and evidence appears to be the most satisfactory – or the least unsatisfactory – way in which the judiciary can inform itself on customary law and it will be discussed below and in detail in Chapter 3.

It is important to note the effect which the interaction of the customary system with the state system has had on the former. Colonial authorities adopted a variety of approaches, frequently pursuing policies of indirect rule, recognising existing hierarchies and leaving them to apply customary law – though sometimes with a state sanction attached - at least in the main and on issues which were solely between the natives. This approach tended to rigidify and distort customary law, causing it to become static in a way characteristic of statute law, or even to some extent of common law - which, though flexible, is, to some extent, constrained by the doctrine of precedent - but which is alien to the nature of customary law. It also interfered with the structure of traditional societies, increasing the power of the chiefs and reducing the participation of the other members of the society in the negotiating process which was often an integral part of customary law systems. The integrity of the systems was thereby adversely affected and the result was the application of something which was

not in reality customary law - true customary law requiring, as discussed, above a combination of content - rules - and system - process.[43]

The judiciary, in practice, rarely concerns itself with consideration of the nature of customary law. Of far greater concern is the determination of the content of that law and the relationship of that law to the state system. These questions will now be examined.

ii. The content of customary law:

The next question to arise is how to determine the content of customary law? For the state legal system, this is conceptually more straightforward than determining the nature of customary law and relies largely on the evidence of informed parties, Aboriginal or white. Yet whilst the question may be conceptually simple, the answer is not always easy to find. The judiciary is accustomed to looking to statute, to case-law, possibly to international law. Customary law is, as already discussed, not the same type of system. It certainly has rules, but it is more than rules.[44] How are the judges to know what the content of the customary law is? There have been some attempts to resolve this difficulty, but they have been of varying success. Early attempts, such as the

[43] On these points, see: Snyder. F.G. *Capitalism and Legal Change: An African Transformation* New York: Academic Press, 1981; Chanock. M. *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* Cambridge: Cambridge University Press, 1985. See *infra* 45-46 on the 'hybridisation' of customary law.

[44] On this point, see: Renteln. A.D. and Dundes. A. (eds.) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta* New York: Garland Publishing, 1995.

Restatement of African Law[45], sought to codify the relevant law and essentially provide a sourcebook for the judiciary. It is now generally recognised that, for a variety of reasons, codification does not work.[46] However, occasional attempts are still made to at least partially 'codify' customary law: for example, the Australian Institute of Judicial Administration recently published the *Aboriginal Benchbook for Western Australian Courts*[47] which attempts to provide an outline of customary law as guidance for magistrates making decisions in cases which involve such a law.[48] Generally, however, the judiciary will rely on either established anthropological opinion, if current and applicable, or on expert evidence before them in a given case. Thus, questions about the content of customary law are largely questions about evidence, about how to decide what the system contains. As far as the judiciary is concerned, these are not conceptual questions[49] and it is not proposed to discuss them at this point. They will be considered in full in Chapter 3. For now it is sufficient to note the questions raised and to add the *caveat* that even whilst considering evidence the

[45] This project commenced in 1959 at the School of Oriental and African Studies of London University and published several volumes over a number of years, each volume attempting to codify the customary law either of a particular state and/or on a particular subject.

[46] Codification is conceptually inappropriate given the nature of customary law outlined above: it ignores the fluidity and, at least partially, process-based nature of customary law. As Roberts points out such attempts are " ... all flawed by an underlying assumption that the material they are dealing with can safely be submitted to those forms of analysis which lawyers can use upon English law". Roberts. S. *supra* n 37, at 195. Moreover, even if these difficulties were to be resolved, codification fixes customary law at a particular time and so would need constant updating. Other problems also arise – for example, who determines the content of the code? - but these are not peculiar to codification and also arise in relation to, for example, expert evidence.

[47] Fryer-Smith. S. *Aboriginal Benchbook for Western Australian Courts* Carlton, Victoria: Australian Institute of Judicial Administration Incorporated, 2002.

[48] See also: Law Commission of New Zealand *Maori Custom and Values in New Zealand Law* Study Paper No. 9, Wellington: 2001.

[49] Such matters may, of course, be considered to be 'conceptual' by the customary system itself.

Courts inevitably do so from within their own mindset and so may be constructing, at least partially, their own version of customary law.[50]

The argument that the customary law applied by Courts is never 'pure' but a hybrid created by the mix of the two systems is frequently made. This hybridisation of customary law is not a new phenomenon. Whilst many scholars agree that there were indigenous legal systems in existence before the advent of the colonisers and cite examples of such systems,[51] others argue that what is now identified as customary law did not exist as an indigenous system before colonisation, but is a hybrid produced by the interaction of received law and indigenous law and by the codification – thus preventing evolution - and ongoing construction of customary law by the Courts and officials of the colonial power.[52] Related to this hybridisation and the consequent existence of various forms or degrees of customary law – for example, 'pure' or 'modified' - is the question of terminology. 'Customary law' goes under a variety of names: folk law, people's law, native law, indigenous law, unofficial law.[53] It should be noted at this point, although against the background of the above debates, that

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[50] On this point, see, for example: Shaw. W.S. '(Post) Colonial Encounters: Gendered Racialisations in Australian Courtrooms' in *Gender, Place and Culture*, Vol. 10, No. 4, 315-332, December 2003.

[51] See, for example: Gluckman. M. *The Judicial Process among the Barotse of Northern Rhodesia* Manchester: Manchester University Press, 1955, and *The Ideas in Barotse Jurisprudence* New Haven, CT: Yale University Press, 1965; Nadel. S.F. *The Nuba* Oxford: Oxford University Press, 1947; Rattray. R.S. *Ashanti* Oxford: Clarendon Press, 1923.

[52] See, for example: Mann. K. and Roberts. R. *Law in Colonial Africa* Portsmouth, NH: Heinemann, 1991; Snyder. F.G. 'The creation of "customary law" in Senegal' in Ghai. Y.P., Luckham. R. and Snyder. F.G. (eds.) *The Political Economy of Law* New York: Oxford University Press, 1987; and Woodman. G.R. 'How State Courts Created Customary Law in Ghana and Nigeria' in Morse. B.W. and Woodman. G.R. (eds.) *Indigenous Law and the State* Dordrecht: Foris, 1988. On Australia, see: Eggleston. E.M. *supra* 35.

[53] It is worth noting that the terminology is often inconsistently applied.

the term 'customary law' will be used throughout the Thesis to apply to all forms of non-state law recognised by Aborigines, whether that law be pure or modified.

iii. The relationship of customary law to the state system:

The relationship of customary law to a state system is, at least in theory, easily analysed.[54] There are essentially two views: the first is that the state has the monopoly of law-making and any other system can only have legal effect if it is validated by the state, a kind of delegated legislation; the second is that the state does not have such a monopoly and that its legal system is simply one among others, one of which may be customary law. A positivist legal system, such as that of Australia, necessarily takes the first view.

The interaction between customary law and the state has been analysed in a number of studies[55], dealing both with situations where a body of traditional law

[54] The following discussion on possible understandings of the relationship between customary law and the state overlaps – though is not identical to - the analysis of legal pluralism *infra* 157-162.

[55] See, for example: Llewellyn. K.N. and Hoebel. E.A. *The Cheyenne Way* Norman: University of Oklahoma Press, 1941; Hoebel. E.A. *The Law of Primitive Man* Cambridge, MA: Harvard University Press, 1954; Weber. M. *On Law in Economy and Society* New York: Simon and Schuster, 1954; Malinowski. B. *Crime and Custom in a Savage Society* Paterson, N.J.: Littlefield, Adams, 1926; Gluckman. M. *supra* n 20; Schapera. I. *A Handbook of Tswana Law and Custom* London: Oxford University Press for International African Institute, 1938; Gulliver. P.H. *Social Control in an African Society* London: Routledge and Kegan Paul, 1963; Nader. L. *Law in Culture and Society* Chicago: Aldine Press, 1969: Bohannan. P.J. *Justice and Judgment among the Tiv* London: Oxford University Press for the International African Institute, 1957; Chanock. M. *supra* n 10.; Moore. S.F. 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' 7 *Law and Society Review*; Galanter. M. 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' 19 *Journal of Legal Pluralism and Unofficial Law* 1; Pospisil. L. *Anthropology of Law: A Comparative Theory* New York and London: Harper and Row, 1971; Fitzpatrick. P. *The Mythology of Modern Law* London: Routledge, 1992. For a synthesis of the early

existed within societies which were then (in the main) colonised by (mainly European) states and with situations of pluralism within states which is not a clash between pre-existing traditional law and externally imposed law, but reflects the heterogeneous make-up of the society. These latter studies are less concerned with adversarial interaction between state and 'unofficial' law and more with the way in which different normative orders can interact.[56]

The method and effects of the imposition of colonial law upon customary law varied both according to the system of the coloniser and to the perceived system of the colonised. The British colonisers were inclined to leave much of indigenous law in force, at least as it operated *inter se* and as long as it did not offend English notions of natural justice or equity – the repugnancy principle - and to make use of local authority structures within the overall dominant hierarchy. However, the colonisers' perceptions of the colonised were also relevant. In this respect, international law laid down *criteria* for assessment of the systems of those colonised and the results of that assessment determined whether those systems were deemed to have survived colonisation, and if so, in what form. The British assessment of the Aborigines and their lifestyle meant

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theories, see: Hooker. M.B. *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* Oxford: Oxford University Press, 1975. For an interesting overall view of the importance of customary law today, see: Sheleff. L. *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* London: Frank Cass Publishers, 2000, especially 79-90.

[56] For example, Moore developed the concept of the semi-autonomous social field – a field which can make rules and can induce compliance, but which is itself subject to rules and forces from the world around it. Moore. S.F. *supra* n 55.

that the usual British policy towards customary law was not pursued in Australia.[57]

It might be said that many of the works dealing with the imposition of colonial law upon customary law were primarily concerned with how to determine the content and pedigree of law that could be enforced – would the state take cognisance of traditional law? Or, as Yilmaz says, all forms of ordering are rooted in official law.[58] Most of the studies dealing with heterogeneity outside the colonial context take the view that there are legal orders other than the one run by the state and that the interaction between those is the subject matter of the doctrine of legal pluralism – or, Yilmaz again, there are other forms of ordering which interact with the official law.[59]

Aboriginal customary law in Australia would appear to fit more accurately into the first category, indigenous law imposed upon by colonialism. It might, therefore, have been expected that the British would deal with it as outlined above and leave it, or some of it, in force until there was a problem. Indeed, in reality, much of customary law remained operative for some time after settlement, but this was largely a matter of the practical impossibility of

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[57] This will be discussed in Chapter 1. However, it should be noted that even when the colonial powers left the customary system in force, they did not doubt that the state should have the final say, even if that final say were to accord some form of recognition. This is, in effect, delegation where the content of the delegated powers replicates the indigenous system.

[58] Yilmaz. I. *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan* PhD Thesis, University of London April, 1999, at 67, now published as *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* Aldershot, Hampshire: Ashgate, 2005.

[59] Yilmaz. I. *supra* n 58 at 67.

suppressing it totally and immediately. However, the legal position was – as will be argued in Chapter 1 - that, with the exception of residual rights, the settlement of Australia meant that there was no cognisable legal system in force. Therefore, from the perspective of the judiciary there was no option to leave local law in force, nor to incorporate indigenous legal hierarchies. However, it would have been quite possible to treat the existing system as if it were legal, to leave it in operation, and essentially to make it law by validating it.[60] This was not done in 1770-1788, but there is no reason why it should not be done now. Indeed, it could be argued that this is what happens on an *ad hoc* basis when the judiciary takes customary law into account.

Customary law could also be granted some recognition within the second type of situation outlined above, that of a state with an heterogeneous population. Essentially, in theory, Australia is a single-system state, but there is a body of the population which regulates its life by separate rules. Whilst this form of recognition is obviously less satisfactory for Aborigines – it amounts to the acceptance and perpetuation of the colonial treatment of them and their systems – it is not without some, albeit minor, advantages. The state's requirements for claiming some form of minority right, or some form of cultural accommodation, are likely to be less strict than for the endorsement of a separate legal system and it may be possible to make out a case for the former when it is not possible

[60] Such a system would, of course, always be under the control of the state legal system and could be dismantled at any time.

to do so for the latter. The possible use of this approach to justify the recognition of customary law will be discussed in Chapter 2.

iv: Proposals to date for the recognition of customary law:

If it is decided to accord some recognition to customary law, the question arises of the method by which this is to be done. The most radical solution would be to grant powers of self-government to various groups who would then be able to use customary law if they chose to do so.[61] This is extremely unlikely. The state has never recognised Aboriginal groups as states or nations - indeed such status has rarely been claimed by Aborigines themselves – and there is no indication that they will ever do so. Another possibility is to acknowledge that the customary law system survived settlement and is still in force to the extent that there has been no subsequent inconsistent legislation. It will be argued in Chapter 1 that, for a variety of reasons, such an acknowledgment is not possible within the legal framework of the Australian state.

Given the above, any recognition is likely to be effected by the ordinary common law – by statute or by judicial decision - within the state's legal system. This can be done in two ways. The first is incorporation by common law which, in matters other than land and property rights, consists in recognising customary practices or methods of establishing situations, which practices or situations then

[61] This is the position of, for example, some tribes in the United States: see *infra* 141-143.

invoke the application of the general law: thus, a customary marriage might be accepted as a procedure establishing a marriage which is legal by the state's *criteria* with all that entails.[62] The second way is simply to validate the content of all or part of the customary law by statute or by judicial decision. The difference between these two methods is that in the former the customary norms are used *per se* as reference points for state law. In the latter, the state is essentially making law in the normal way, but the content of that law replicates the customary system or a norm thereof. All the proposals outlined below are premised on the use of the common law to grant recognition.

There have been many initiatives which display the openness of both the Australian state in general and the Northern Territory in particular to granting a degree of recognition. However, the limited extent to which these proposals have been implemented is an indicator of the very real difficulties inherent in any such attempt and it is these difficulties which render the judiciary the most appropriate body to further recognition. The major proposals are listed here in chronological order[63] with a brief comment and, where appropriate, will be discussed and referenced at the relevant points in the Thesis.

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[62] Levy describes these types of incorporation as "typically recognitions not of customary ways of making law, or of the content of customary law, so much as customary ways of establishing legal conditions and situations." Levy. J.T. *The Multiculturalism of Fear* Oxford: Oxford University Press, 2000, at 167.

[63] *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986. There had been some earlier discussion, but the present debate can be said to date from the 1986 Report. The Reference was prompted by the decision of Wells J. in the case of R. v Sydney Williams (1976) 14 SASR 1. In this case the defendant was convicted of the manslaughter of an Aboriginal woman and Wells imposed a two year suspended sentence upon the defendant's agreement to submit himself to rule of the tribal elders for a year. The case caused great

1. The Australian Law Reform Commission Report *The Recognition of Aboriginal Customary Laws*, 1986[64]: The Commission argued that there was a case for appropriate recognition of customary law and that this would not be racially discriminatory. However, this recognition should be on an issue by issue basis, not a general recognition of the entire customary system. The Commission was not in favour of new and separate legal structures unless a need was clearly demonstrated and it rejected the notion of a general customary law defence. It did recommend a partial customary law defence which, if made out, would reduce murder to manslaughter if the killing had been carried out under the compulsion of customary law.[65] This Recommendation has never been implemented. The Report made specific recommendations on certain aspects of customary law – family matters, inheritance, hunting and gathering rights - and on local justice mechanisms. It also made a number of recommendations in relation the criminal justice process. Some of these recommendations take the form of principles to be followed or matters to be considered[66] and many would, if implemented, depend on judicial discretion[67]. There is no doubt that if all the recommendations were to be implemented, customary law would be accorded much more recognition in the state legal system than is presently

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controversy although Kirby points out that Wells was merely following the long-established practice of the judiciary: Kirby. M. *Reform the Law: Essays on the Renewal of the Australian Legal System* Melbourne: Oxford University Press, 1983, at 123.

[64] The Australian Law Reform Commission *supra* n 63.

[65] Paragraphs 451-453. For discussion of the desirability of specific customary law or more general cultural defences, see *infra* 332-333.

[66] For example, prosecuting authorities should consider not proceeding in certain cases which involve customary law: Paragraph 475.

[67] For example, judges should have the power to empanel single-sex juries if they think it appropriate on customary law grounds: Paragraph 595.

the case. This is, however, very unlikely to occur and it remains the case that the judiciary is the organ most likely to be able to achieve this recognition. Moreover, the Report itself recognises the importance of judicial discretion. It recommends, for example that general legislative endorsement be given to the practice of taking into account customary law factors in sentencing, but recognises that the interpretation and application of such a provision would depend on the judiciary[68]

2. The Australian Law Reform Commission Report *Multiculturalism and the Law*[69]: The Commission argued for greater recognition of cultural background, but stressed that multiculturalism is not unlimited and is subject to, *inter alia*, the rule of law and equality. It restated the view expressed in its earlier *Report* on customary law that a separate legal system was not desirable and that it was preferable to make the general system more accommodating of cultural difference. It also rejected the notion of a cultural defence, except in extremely limited circumstances.[70] The Report was not primarily concerned with the position of Aborigines or with customary law and its treatment of these issues adds little to its earlier Report on customary law.

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[68] Paragraph 517.
[69] *Multiculturalism and the Law* Sydney: Report 57, Australian Law Reform Commission, 1992.
[70] The Commission endorsed its earlier Recommendation for a partial customary law defence for Aborigines accused of murder – *supra* 52 - but rejected it in all other cases: paragraph 811 and 8.12.

3. Royal Commission into Aboriginal Deaths in Custody, 1992[71]: The Commission acknowledged that there was a large number of Aborigines in the Northern Territory who still lived their lives in accordance with customary law and who often felt alienated from the mainstream system. The *Report* recommended that some respect for and recognition of customary law would assist in reducing this sense of alienation, but did not propose separate legal systems. It urged compliance with the Australian Law Reform Commission Report on customary law.[72]

4. Office of Indigenous Affairs progress Report, 1994: In response to the Royal Commission into Deaths in Custody's Recommendation 219 the Commonwealth requested a further report on the progress of implementation. That *Report*[73] found that there had been no implementation due to the complexity of the issues and the fragmented nature of government in Australia.[74]

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[71] Royal Commission into Aboriginal Deaths in Custody, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (5 Volumes) Canberra: Australian Government Publishing Service, 1991-1992.

[72] *National Report of the Royal Commission into Aboriginal Deaths in Custody* Recommendation 219, *supra* n 37, Vol. 4, at 97-102.

[73] Office of Indigenous Affairs, Department of the Prime Minister and the Cabinet *Aboriginal Customary Laws, Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission* Canberra: Australian Government Publishing Service, 1994.

[74] For an overview of community law and justice plans in the Northern Territory, see: Northern Territory Government, Department of Community Development, Sport and Cultural Affairs *A Model for Social Change: the Northern Territory's Aboriginal Law and Justice Strategy 1995-2001.*

5. Meetings of Ministers for Aboriginal Affairs and Federal and State Attorneys-General: to discuss ways of preparing for formal and informal recognition in each jurisdiction.[75]

6. The Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development: in the course of its work on drafting a new Constitution for the Northern Territory the Committee became aware of the strength of customary law and of the demands for recognition. It produced two Discussion Papers which deal with the issue. The first[76] raised various questions about the desirability of recognition and possible methods. The second[77] raised the possibility of extending community control of 'customary rights and practices' - which may include customary law - already permissible to some extent under the *Local Government Act*.[78] The Committee submitted its Report[79] to the Legislative Assembly in November 1996 and recommended express recognition of customary law as an official source of Northern Territory law under the new Constitution, on a par with common law, but, like common law, subject to statute. This appears to be a

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[75] Sarre. R. *Aboriginal Customary Law* Paper presented at 'Cross Currents: Internationalism, National Identity and Law' Australasian Law Teachers' Association, 1995. The meetings are described at 2 but no further details are given and it has not been possible to obtain a record of the meetings.

[76] Sessional Committee on Constitutional Development Discussion Paper No. 4 *Recognition of Aboriginal Customary Law* August 1992.

[77] Sessional Committee on Constitutional Development Discussion Paper No. 6 *Aboriginal Rights and Issues – Options for Entrenchment* July 1993.

[78] See, for example, the *Lajmanu Community Government Scheme*, clause 13 (zf). The Local Government Act (NT) allows communities to apply for approval of election of a Governing Council whose powers will be decided by the community and may extend to the making of by-laws enforceable by the Northern Territory police.

[79] Sessional Committee on Constitutional Development *'Foundations for a Common Future' The Report on Paragraph 1(a) of the Sessional Committee on Constitutional Development's Terms of Reference on a Final Draft Constitution for the Northern Territory* Volume 1, November 1996.

sensible way forward and is similar, though not identical, to the position in some other jurisdictions.[80] It is difficult to assess exactly what the result of such a provision would be. However, the interpretation and application of the provision would depend on the judiciary. It may be that the judges would be able to make more use of customary law if expressly authorised to do so by constitutional provision or statute. This would not, however, reduce their importance, but rather enlarge the areas within they could exercise their discretion.

7. Northern Territory Attorney-General's *Concept Proposal*, 1996: The then Attorney-General released a paper proposing three principles to be adopted in recognising customary law.[81]

8. Northern Territory Statehood Conference 1998: The Conference resolved that customary law should be accepted as a source of law in the Constitution of the proposed new state. The *Draft Constitution* was rejected by voters and the move to statehood was not approved.

9. Northern Territory Standing Committee on Legal and Constitutional Affairs 2002: The Committee resolved to conduct an inquiry into indigenous

[80] See, for example, the position in Papua New Guinea: *infra* n 321.
[81] Hatton. S. *The Recognition of Aboriginal Customary Law: A Concept Proposal for the Northern Territory* 1996. The three principles were: recognition of commonality between the state and customary systems, that recognition of customary law should be driven from the 'bottom up', and that customary laws which breached international human rights standards could not be recognised.

government in the Territory and issued a discussion paper[82] on wide range of options.

10. *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory*[83] Northern Territory Law Reform Committee 2003: The Committee made twelve Recommendations. Several deal with general cultural awareness, others with increasing Aboriginal participation in the general justice system or establishing consultation procedures on, for example, sentencing. Recommendations 5, 6 and 11 are potentially the most far-reaching. Recommendations 5 suggests the establishment of a consultation process in relation to 'promised brides', Recommendation 6 the establishment of an inquiry into the issue of payback and Recommendation 11 with the implementation of the Northern Territory Statehood Conference resolution that customary law be recognised as a source of law. It is difficult to comment on Recommendations 5 and 6. Obviously, any discussion of the issues is to be welcomed, but until the results are known, little more can be said. It is likely, however, that any eventual proposals will involve the application of judicial discretion at some point.

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[82] Standing Committee on Legal and Constitutional Affairs of the Legislative Assembly of the Northern Territory Discussion Paper No. 1 *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance within the Northern Territory* June 2002.

[83] Northern Territory Law Reform Committee *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory* Darwin: Northern Territory Law Reform Committee, 2003.

11. Western Australia Law Reform Commission on customary law: The Commission is currently carrying out work in this subject. Two background papers[84] have been issued, but no date has been announced for publication of the Report.

As well as these general proposals, there have been numerous more specific recommendations for recognition – on, for example, the establishment of community courts or schemes, or the specific acceptance of customary law in land, property or family matters - some of which have been implemented. Where relevant, they will be discussed and referenced at the appropriate point in the Thesis.

0.3: Conclusion:

This Conclusion aims to raise some of the arguments which will be developed throughout the Thesis in support of the central proposition. It is intended merely to provide an introduction and, therefore, matters which are discussed more fully in the main body of the Thesis are referenced at the point of that discussion.

The situation addressed by the Thesis is one of great sensitivity. It is beyond doubt that Aborigines have suffered serious injustices: in their original

[84] Williams. V. *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law* Background Paper No. 1. Perth: Law Reform Commission of Western Australia, December, 2003; Cooke. M. *Caught in the Middle: Indigenous Interpreters and Customary Law* Background Paper No. 2, Perth: Law Reform Commission of Western Australia, March 2004.

dispossession of their lands and the accompanying violence; in the policies of segregation and then of assimilation[85]; in the ill-treatment meted out by some officials; in the pervasive racism of the wider society. It is also beyond doubt that many Aborigines today still suffer from problems caused by the fragmentation of their societies and the destruction of their authority structures: poor social conditions and health, alcohol and drug problems, disproportionate involvement in the criminal justice and prison systems. Faced with such problems, and perhaps aware of a sense of responsibility for at least some of them, it seems desirable to grant recognition to at least some customary law. It might appear that this would reverse some of the historical injustice and possibly help to restore the integrity and coherence of Aboriginal societies. However, whilst this view might be understandable in terms of morality, it is not necessarily a sound basis on which to make legal decisions.

[85] The assimilation of Aborigines within wider society was, for some years, official policy in Australia. After much discussion, it was introduced in the Northern Territory in 1951 and continued until approximately the late 1960's. The details of the policy changed slightly over time, but the overall aim was clear: "all Aborigines and part-Aborigines will attain the same manner of living as other Australians and live as members of a single Australian community, enjoying the same rights and privileges, observing the same customs, and influenced by the same beliefs, hopes and loyalties as other Australians." *The Policy of Assimilation: Decisions of Commonwealth and State Ministers* The Native Welfare Conference, Canberra, 26-27 January 1961, issued by the Department of Territories, Canberra, cited in Tatz. C. *Aboriginal Administration in the Northern Territory of Australia* Ph.D. Thesis, Australian National University, 1964 at 261. It should be noted that although the formal policy of assimilation is no longer in force, its effects continue. In some cases, individual Aborigines have lost the connection with their culture; in other cases, the integrity of the culture itself has been damaged. Despite the widespread acceptance today of the desirability of at least some endorsement of differing cultural norms – see Chapter 2 for discussion of these points - many of these effects are difficult to reverse. Moreover, the state legal system assumes the assimilation of customary law to its own standards: this is, of course, the dilemma examined throughout the Thesis.

If Aboriginal customary law is to be recognised, it must be within the framework of the existing legal system. The events of 1770-1788 cannot be undone. The acquisition of sovereignty by the British cannot be denied and the jurisdiction of the present-day Australian legal system cannot be defeated. Attempts to gain recognition for customary law must begin from the present situation. This means that if such recognition is to be granted, it can only be by one of three methods.

First, international law might impose an obligation on the state of Australia to recognise. It will be argued in Chapter 2 that no such obligation currently exists and there is no reason to think that it will so exist in the future. Second, the legislature – at state, territory or federal level – might pass legislation giving effect to customary law. This is a possibility. Some such legislation already exists and there are numerous proposals, such as those discussed above, to extend legislative provision. It seems reasonable to assume that at least some further recognition will be granted by this means. However, very little of the legislation – whether enacted or proposed – deals with the criminal law. Criminal law is the 'hard case'. For reasons discussed in Chapter 2, the state is reluctant to allow differential provisions in criminal law and extremely reluctant to allow its monopoly of the content and enforcement of such law to be compromised. There are various schemes to allow Aboriginal communities to play a greater part in the administration of the criminal law[86] – for example, to

[86] See *infra* 329-330.

make their views known in the sentencing process - but none of these extend to determining the content of the law. The third method by which some recognition might be granted is by the intervention of the judiciary. As outlined above, the judiciary is able to intervene at various stages in the criminal justice process. Its powers are not unlimited: constitutional law or even an ordinary statute will bind it. However, in a common law system such as Australia – even in the Code states such as the Northern Territory – the judiciary exercises considerable power and influence. In strict theory its role is to interpret and apply the law, but there can be little doubt that, in many instances, it makes law.

The judiciary is accustomed to analysis - to refining, distinguishing, developing concepts - and is endowed with a wide discretion and a high degree of flexibility. Whilst it is certainly the case that legislation on criminal matters may make provision for distinctions and different standards, once enacted, it is fixed. Of course, it can be repealed or amended, but in reality this rarely happens unless there is a very serious defect. Thus, for example, in the case of provocation, which will be discussed in Chapter 4, the law is almost entirely judge-made. The possibility of considering ethnicity in relation to the *criteria* for establishing the defence is a judicial creation. Some of the Codes now make provision for such an understanding of the defence – for example, s.34 of the Northern Territory Criminal Code - but these were introduced many years after the judiciary began to employ it.

The judiciary has, therefore, played a crucial role in the increasing recognition of customary law within the legal system in general and the criminal justice system in particular. The judges in the Northern Territory have been especially progressive in this respect. From the early days of the Territory's legal system, the judiciary was taking account of customary law in ways not widely practised at that time. Much of the early consideration of customary law - and indeed of general issues relating to Aborigines and the legal system – is to be found in the judgments of Kriewaldt. J., the sole judge in the Northern Territory for much of the 1950's. His contribution, and its strengths and weaknesses, will be discussed at various points throughout the Thesis. After Kriewaldt's death, there was a long period of relative judicial quietude in the Northern Territory. The reasons for this are not easy to assess. It seems unlikely that the cases simply ceased and it has been suggested that subsequent judges were simply not as interested as was Kriewaldt in Aborigines and in ensuring their fair treatment under the criminal law. By the 1970's the judiciary was again making decisions which advanced the use of customary law in criminal matters and this continues to the present day.

It has been suggested above that the likelihood of any substantial legislative recognition of customary law in criminal matters is low, but it is not impossible. The Northern Territory Law Reform Committee's Recommendation for the establishment of an inquiry into the issue of payback has already been mentioned. Any eventual legislation on this issue would be enormously

significant: payback is arguably the situation which poses the dilemma of the two competing systems most acutely. However, even if the legislature were to pass far-reaching legislation either rejecting or endorsing the practice – or more likely settling on some middle ground such as the use of payback as a sentencing consideration – the judiciary would still be, as it were, the 'front line' applying, interpreting and developing the law. This would always be the case whatever the legislation. It is for these reasons that the judiciary is more able than any other body to make use of customary law within the criminal justice system.

Chapter 1: The status and effect of the acquisition of Australia in 1770-1788: settlement and *terra nullius*

1.1: Introduction:

The Thesis assumes that Aboriginal customary law is not *per se* binding on the courts of Australia and that it is, therefore, legitimate to discuss whether, and if so how, customary law should be used by the criminal Courts. Until 1992 it would undoubtedly have been possible to make those assumptions. However, the High Court decision in the case of Mabo v. State of Queensland (No. 2)[87] (hereinafter 'Mabo') requires that the matter be re-examined. The decision in Mabo will be discussed in detail below[88], but it should be noted at the outset that it contains argument on two issues which appear relevant to the present work: first, was the common law rule that some rights may survive a finding of *terra nullius* and acquisition by settlement applicable in the present case?; and second, were the events of 1770-1788 rightly categorised under international law as the acquisition of *terra nullius* by settlement and, if so, what were the consequences of that categorisation? It is contended that only the second point is of importance to the Thesis as a whole. The common law rule on the survival of certain rights is largely irrelevant as it concerns predominantly property rights. As such, it was, of course, crucial to the decision in Mabo but provides little support for the

[87] (1992) 175 CLR 1.
[88] *Infra* 100-108.

contention that customary 'criminal' law may have remained in force.[89] However, the re-examination of the categorisation of the events of 1770-1788 as settlement of *terra nullius* is of considerable importance as if customary law, including possibly customary criminal law, survived 1788 then it can, indeed arguably should, be taken into account by present day Courts. The Chapter will analyse the way in which the Australian legal system has dealt with Aboriginal customary law for the past two hundred years and, thereby, set the scene for the examination of possible ways forward.

First, it will consider the occupation of Australia and whether that occupation was rightly categorised at the time as 'settlement'. It will conclude that, however morally unacceptable it may be today, the categorisation was correct.

Second, it will examine the Australian Courts' treatment of the issue before 1992 and demonstrate that the original categorisation as settlement was almost universally accepted by the judiciary. Some judges – and, of course, most if not all Aborigines – did not accept the categorisation or the consequences which flowed from it. These views will also be discussed.

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[89] For discussion of this issue, see *infra* 113-117. The term 'customary criminal law' is imprecise as 'criminal' is not a transferable concept, implying as it does the existence of a state monopoly over the proscription and punishment of certain types of behaviour. It will be used of those matters and procedures in customary law which are the equivalent of criminal matters and procedures in state law.

Third, it will consider the decisions in Mabo, Wik Peoples and Thayorre People v Queensland[90] (hereinafter 'Wik') and derivative caselaw and will stress that Mabo did not overturn the view that Australia was acquired by settlement and that whilst these cases are of considerable importance to native title, their possible application to other areas of law is limited.

Finally, it will consider the possible subsistence of Aboriginal rights in the present day criminal justice system.

1:2: History of the Occupation of Australia:

i. International law relating to the acquisition of territory and ensuing jurisdiction current in 1770-1788:[91]

Historically there were many methods of acquiring territory[92] but only three are relevant to the present discussion: treaty or cession, settlement and conquest. Whilst the law in this area developed as a means of deciding one European

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[90] (1996) 187 CLR 1.

[91] On this point, see generally any text on public international law, but especially relevant is: Lindley. M.F. *The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law and Practice Relating to Colonial Expansion* London: Longmans, Green and Co. Ltd., 1926, and Roberts-Wray. K.O. *Commonwealth and Colonial Law* London: Stevens, 1966. For general histories of international law, see: Ruddy. F.S. *International Law in the Enlightenment: The Background of Emerich de Vattel's Le Droit de Gens* Dobbs Ferry, New York: Oceana Publications Inc., 1975; and Nussbaum. A. *A Concise History of the Law of Nations* New York: Macmillan Company, 1962.

[92] On these points, see: Verzijl. J.H.W. *International Law in Historical Perspective Part III State Territory* Leyden: A.W. Sijthoff-Leyden, 1970, at 297-346. Most of these methods of acquisition are no longer possible. In particular, it is generally accepted that title may no longer be acquired by conquest. However, there are arguments to the contrary: see, for example: Korman. S. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* Oxford: Clarendon Press, 1996.

claim against another, the lands being acquired were usually inhabited by indigenous peoples. Thus, the early law on the acquisition of territory is inextricably connected with the law on the rights of such peoples and it is this aspect which is relevant to the present work.

The importance of being able to establish title to territory first arose as a major issue in the fifteenth and sixteenth centuries when European explorers began to claim lands throughout the globe. The earliest major attempt to set out a justification for such acquisitions was in the sixteenth century when Pope Alexander VI (1492-1503) sanctioned the Spanish Empire in the Americas on the grounds that he held temporal lordship over lands which lordship he might grant to others. The theory that the Papacy enjoyed sovereignty over all territory was subject to increasing criticism throughout the fifteenth century, partly due to the growth of Protestantism and the consequent reluctance to grant the claims of the Papacy, but also on account of the treatment of the indigenous peoples by the Iberian conquerors.[93] Moreover, whilst it was the ostensible justification for

[93] On these points see: Stogre. M. *That the World May Believe: The Development of Papal Social Thought on Aboriginal Rights* Sherbrooke, QC: Éditions Paulines, 1992, esp. 10-11, 20 and 47-124. In fact, whilst the Papal Bulls issued in this respect are often cited as marking the high point of Papal claims, the reality was that by this time the power of the Papacy was already waning. It is at least arguable that colonisation would have proceeded with or without Papal approval and that the Papacy was simply trying to reserve its control over evangelisation and to protect the natives from the abuses of Spanish power rather than that it was exercising temporal power. Indeed, Korman points out that such was the decline of the Papacy's temporal influence by this point, that Papal donation as a means of acquiring territory was only recognised by Spain and Portugal and then only as effective between themselves. The other major European colonial powers, France, Holland and England, did not recognise the validity of Papal donation and in asserting title as against them, Spain and Portugal relied rather on discovery or conquest than on the actions of the Papacy. Korman. S. *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* Oxford: Clarendon Press, 1996, n 92 at 43. Nor should it be assumed that there was no criticism of the approaches of both the Papacy and Spain from within the Church. The most prominent critics were the Dominican theologians Bartolomé de las Casas (1474-1566) and Francisco de Vitoria

the acquisition of lands in the first great wave of European colonial expansion, it was not in any meaningful sense the basis of modern international law on the acquisition of territory which law was derived from common law concepts. There was, here, no question of sovereignty, a concept which did not develop until Bodin (1530-1596) and had little influence on international law until much later. The law which operated in legitimating the Iberian Empires in South America was the medieval law which regarded territory as the personal property of the monarch or ruler. Whilst there may have been arguments over what was or was not the property of the Papacy and over whether the right to deal with such property was unlimited, there was no real argument about the underlying principles.

A major development came with the work of Grotius (1583-1645). He is generally regarded as having 'secularised' the law of nations, in that his postulates turned on reason and not divine will, and in effect become the father of modern international law.[94] Until this point, the prevailing philosophy in Europe was a naturalist one and accepted that there was a 'right order' to which all human conduct, including that of monarchs either religious or secular, should conform. The source of that order was variously conceived: for the religious or theologians - such as de las Casas and Vitoria - God, for the secular - such as

(1480-1546). For discussion of their work see, for example: Marks. G.C. 'Indigenous peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas' 13 *Australian Yearbook of International Law* (1992) 1-51.

[94] Though see Janis. M.W. 'Religion and the Literature of International Law: Some Standard Texts' in *The Influence of Religion on the Development of International Law* ed. Janis. M.W. Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1991, at 61-84, for arguments that Grotius remained deeply influenced by both the works of the sixteenth century Spanish theologians and by his Protestant background.

Grotius - natural law or right reason, but in all cases it was accepted that there were inbuilt limits on what could rightly be done by rulers. It was within this framework that it had been possible to criticise the actions of both the Spanish rulers and the Papacy.

The foundations of international law, as recognisable today, and as prevailed in the period 1770-1788, were laid in the late seventeenth century - though not substantially developed until the mid-nineteenth century - by the work of theorists such as Pufendorf (1632-1694), Wolff (1679-1754) and Vattel (1714-1769) who began to develop a system of laws applicable to states, the beginning of the present day doctrine of state sovereignty. Anaya points out that this model of international law which recognised only two categories of subject - individuals or states - made it almost impossible for non-European indigenous societies to be recognised other than as a collection of individuals.[95] They did not qualify as states - as the concept was based on the European model which involved notions such as territorial exclusivity, hierarchy and centralisation – and could, therefore, be disregarded.

By 1770-1788 most commentators – both international[96] and English[97] - argued that title to territory was gained by purchase or cession, by conquest, or by first

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[95] Anaya. S.J. *Indigenous Peoples in International Law* New York and Oxford: Oxford University Press, 1996 at 15.

[96] 'International' in this context must be understood as European.

[97] In 1770-1788 there was no rigid divide between domestic or municipal and international law. Had there been such a divide, the fact that the acquisition of territory was justified under the domestic law of the acquirer would be irrelevant. However, as there was no fully developed system of public

discovery[98] and effective occupation (i.e. settlement), a position which, apart from the arguable prohibition of conquest, remains substantially unaltered today. Inevitably their understanding of the requirements for each method of acquisition was affected by the ideas discussed above and particularly by the acceptance of only two subjects: individuals and states. In Australia there was no purchase or cession. Therefore, the only way in which the acquisition of the territory was legally justified is if it was by conquest[99] or by settlement. The difference lies essentially in the perceived status of any pre-existing inhabitants.

For land to be acquired by settlement there are two requirements: that the land be *terra nullius* and that the claimant occupies it by exercising both first discovery and effective occupation. Land which is *terra nullius* - literally no-one's land - is deemed to be available for acquisition. However, the term '*terra nullius*' has been variously understood over time and its exact meaning, even at a given period, has not always been clear. According to the understanding current in 1770-1788, it was not necessary that land be physically unoccupied: the crucial factor was that there should be no-one who had established rights in the land. If it was occupied by peoples who were not considered to have established ownership, then it was available for acquisition despite their presence. Whether

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international law, the legality or otherwise of an action was determined by a consensus of legal opinion across the European world.

[98] For a consideration of the concept of 'discovery', see: Sheleff. L. *supra* n 55 at 93-119.

[99] The right to acquire territory by conquest was not unlimited. However, the law on this point will not be considered in detail as the dominant understanding for the past two hundred years has been that Australia was acquired by settlement. The rules on conquest would only be relevant if that categorisation were in error.

ownership had been established depended on European assessment of the lifestyle and societal structure of the inhabitants.

By 1770-1788 '*terra nullius*' had come to mean land which, although it may be inhabited, was not cultivated or tilled.[100] Certain beliefs about the development of society and the rights of individuals were commonly held (though with many variations) in Europe during the seventeenth and eighteenth centuries. One such belief was that man lived first in a state of nature in which the only property to which he had an inherent right was the labour of his body. This could be used to acquire more property by, for example, mixing the labour of the body with the produce of the earth, by gathering and thus acquiring a right to the produce. Further rights could be obtained by settling in one place and cultivating the earth. It followed from this that nomadic tribes who did not cultivate land could not be considered to have asserted any legal title to it.

A second factor to be considered in determining whether the original inhabitants of territory had established rights in it was the structure of their society. It was often held necessary, reflecting European notions of social organisation, for there to be some form of hierarchical leadership.[101] The social groupings of peoples who did not possess any recognisable hierarchy were regarded as too

[100] This view is pre-eminently expressed by Locke. See 'The Second Treatise on Government' Chapter Five (first published 1689) in Locke J. *Political Writings* London: Penguin Books, 1993, at 273-286. On this point, see: Kolers. A. 'The Lockean Efficiency Argument and Aboriginal Land Rights' *Australasian Journal of Philosophy* Vol. 78, No. 3, September 2000, 391-404.

[101] This requirement is predicated on an Austinian concept of sovereignty: sovereignty is about obedience which may be enforced by a superior. However, Lindley says: "Sovereignty may reside in the community as a whole, and not necessarily in some superior individuals, or body of individuals." Lindley. M.F. *supra* n 91 at 21.

primitive to count as societies and assumed not to possess such attributes as a legal system and, therefore, not to have rights. Whilst this understanding of *terra nullius* may well be untenable today, it was dominant in 1770-1788 in both English and international legal thinking.[102]

Once land is deemed to be *terra nullius* and thus available for acquisition by settlement, the second requirement for establishing such a title must be met. The concept of occupation has two elements: first discovery and effective occupation. It follows from what has been said above that first discovery does not require that the land has no inhabitants when the settlers seeking to claim the title arrive. First discovery is essentially about staking a claim to *terra nullius* before any other state does so. Historically this amounted to being the first European power to arrive at the land. A preliminary right to possession is established by formal claiming of the land on behalf of a sovereign who has authorised such an act and a symbolic act of sovereignty such as the planting of

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[102] Blackstone and Vattel were, for example, cited with approval in Campbell v. Hall (1774) 20 St. Tr. 239 and the principles in that case were applied in the New South Wales case of Cooper v. Stuart (1889) 14 App. Cas. 286. For the present day understanding of *terra nullius,* see: Advisory Opinion on Western Sahara (1975) ICJ 12. However, what is relevant here is the understanding current in 1770-1788. According to the doctrine of intertemporal law, it is by those rules that the acquisition must be judged. The doctrine has been defined in the following way: " .. a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled" *per* Huber J. in Island of Palmas Case (Netherlands, United States) 2 R. International Arbitration Awards 831 at 845, cited in Elias T.O. 'The Doctrine of Intertemporal Law' 74 *American Journal of International Law* April, 1980, 285. On the same point, see also: Sharma. S.P. *Territorial Acquisition, Disputes and International Law* The Hague: Martinus Nijhoff Publishers, 1997, at 98-99.

a flag. Preliminary rights of possession are inchoate and must be rendered real by effective occupation within a reasonable time.[103]

Whether territory was acquired by purchase or cession, conquest or settlement, the acquisition was legal. The importance of deciding the method of acquisition lies in the fact that the consequences of the various methods are different. If there is a treaty, however procured and on whatever terms, issues such as the status of pre-existing law will often be dealt with in that document. If acquisition is by treaty, by cession or by conquest, the assumption is that there is pre-existing law, at least for the natives *inter se*, and in many cases this remains in force until it is altered. If acquisition is by settlement, no pre-existing legal system is recognised.[104]

ii. Application of international law to 1788:

The facts of the British acquisition of Australia may be briefly stated. Cook landed just south of present-day Sydney in April 1770, having been instructed to explore the area and discover its trading possibilities. There was contact with a few Aborigines, some attempts at trading and a minor skirmish. After a short

[103] For discussion of the symbolic actions used in establishing sovereignty see: Keller. A.S., Lissitzyn. O.J. and Mann. F.S. *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* New York: Columbia University Press, 1938. For discussion of the usual English usage towards native governments, see 10-15, and for discussion of English practice with regard to the symbolic actions performed in the claiming of land, see 49-99. It should be noted that the authors assert, in contrast to the usually accepted position, that there is no requirement for the formal taking of possession to be supplemented by effective occupation, at 148-149.

[104] On the general principles of state succession, see: O'Connell. D.P. *State Succession in Municipal Law and International Law* Cambridge: Cambridge University Press, 1967.

period of mainly scientific exploration, Cook sailed north and eventually landed on Possession Island. He hoisted the Union Jack and claimed, in the name of King George III, all the land from where he stood to Cape Everard in Victoria, the point at which the shore had first been sighted though no landing had taken place. Unfortunately for the Aborigines, the 1770 landings seemed to point the way to a solution to quite unconnected problems faced by the British. Initially interested only in trade, in the years immediately following 1770 Britain's attitudes to its new possession began to change. There were several factors, but the overall cause of the change of attitude was the rise in crime in the United Kingdom coupled with the inability to deal with that rise by any of the traditional methods. For various reasons - economic and social - the Government wished to deal with this situation by continuing to use transportation. It therefore needed to find a new destination to replace the recently lost American colonies and settled on New South Wales. Once the decision to establish the colony was made, action was taken quickly. The First Fleet, under Phillip, landed on 20 July 1788 and was met by local Aborigines, but there was no violence. The colony was subsequently established at Port Jackson, now Sydney.

The legality of the British actions and the validity of their claim that acquisition was by settlement must be tested by reference to the law outlined above. Cook's Instructions on setting sail stated:

> "You are with the Consent of the Natives to take possession of Convenient Situations in the (Southern Continent) in the Name of the King of Great Britain; or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions as first discoverers and possessors."[105]

The wording of these Instructions suggests that the Admiralty, and probably the Government, had no preconceived view as to whether or not the land was inhabited nor of the legal method by which it was to be acquired. If there were inhabitants, they were not simply to be massacred or dispossessed, but negotiations were required. If there were no inhabitants, the land could be acquired by settlement in accordance with established international law on the acquisition of territory.

Cook's claiming of the land was carried out by the method appropriate for the acquisition of land by settlement. It seems clear that he was mindful of his Instructions, had decided that the appropriate method was settlement and had taken the necessary actions to establish a legal claim on that basis. The question arises as to whether Cook was correct to use this method of acquisition or whether he should have negotiated.[106] It might seem that he ignored the Instructions in terms of obtaining the "consent of the natives" and that he

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[105] Admiralty Lords, Additional Secret Instructions for Lt. James Cook, 30th July, 1768, in *The Journals of Captain James Cook of his Voyage of Discovery.* (ed.) J.C. Beaglehole, Hakluyt Society, Cambridge (1955-1967) Vol. 1. p.cclxxxiii, cited in Frost. A. *Botany Bay Mirages: Illusions of Australia's Convict Beginnings* Carlton, Victoria: Melbourne University Press, 1994, at 183.

[106] See *infra* 97-99 for the argument in R. v. Walker (1989) 2 Qd. R. 79 on the point that Cook exceeded his Instructions.

thereby exceeded his authority. Despite the wording of the Instructions and despite having encountered natives, Cook simply claimed possession of the eastern part of the continent. However, Frost argues[107] that Cook knew the legal requirements when claiming the land and that he considered the relevant questions: first, was the land *terra nullius* or had some population established a right to the territory?; and second, if it were *terra nullius*, was he the first European to discover it? He argues that Cook's answer to the first question was that the land was *terra nullius*. He quotes extensively from the words of Banks, the leader of the independent scientific party which accompanied the voyage, and Cook, and argues that Cook's decision that the land was *terra nullius* was made in accordance with the theories of Locke and other current writers on the law of nature and nations. Thus, he considered the lifestyle of the Aborigines and it seemed clear that the latter were, according to European ideas, at a very basic level of civilisation. This estimate of the state of Aboriginal life and society meant that to Cook the land was indeed *terra nullius*. Frost concludes that:

> "had Pitt and his advisers known that the Aborigines were not truly nomadic, that they had indeed mixed their labour with the land and that they lived within a complex social, political and religious framework - that is had the British not seen New South Wales as terra nullius, then (I) believe that they would have negotiated for the right to settle the Botany Bay area."[108]

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[107] Frost. A. *supra* n 105 at 183.
[108] Frost. A. *supra* n 105 at p.187.

He goes on to point out that this conclusion is supported by the approach of the Government and its advisers to the settlement of other areas of the world at about the same date. It was the character of Aboriginal society and the consequences which the British believed flowed from that character which made the British pursue quite different policies[109] in Australia from those which they pursued in other colonies.

As for the question of whether Cook was the first European to discover the territory, he found no evidence of European occupation and so he assumed that to be the case. He therefore took the requisite steps to establish preliminary occupation and claim the land.

It was almost inevitable that the Aborigines would suffer from the colonising process but it was no part of official policy that they should be subjected to the near genocide which was to result from British occupation. Cook's Instructions required that if any natives were found, there should be negotiations.[110] Similar

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[109] Korman. S. *supra* n 92 at 41-66 points out that it was very rare for the colonising power to assert that land was *terra nullius* and that acquisition was, therefore, by settlement. The spread of European rule into lands occupied by indigenous groups from the sixteenth century onwards was almost entirely justified on the basis of conquest.

[110] Harring argues that in the early days of settlement there was, in fact, very little official policy and it seems that not a great deal of thought had been given to the place of the Aborigines in the settler society. He believes that this was due partly to misinformation, to a genuine belief that Australia was *terra nullius* and that there were very few inhabitants who would soon disappear into the interior. If this were so, it seems remarkably short-sighted. Even if the ideas about the numbers of Aborigines and their presumed readiness to move into the interior had been correct, it could surely have been foreseen that the settlers would not be content with the original boundaries of settlement, but would want to move further into the interior. He goes on to say that to the extent that there was a policy it was based on British experience in the colonies of Canada and the United States. In the late eighteenth century Britain's colonial experience was limited to those colonies and to the Caribbean, the Cape Colony, Guyana and India. Canadian Indian policy sought to maintain a tightly controlled frontier, minimising conflict by keeping very strict control on the whites and punishing them for infringements. Attempts were also made

official policy was expressed in the Instructions dated 25 April, 1787, given by George III to Arthur Phillip. The natives were to be kindly treated and left alone as much as possible:

> "You are to endeavour by every possible means to open an Intercourse with the Natives, and to conciliate their affections, enjoining all Our Subjects to live in kindness and amity with them. And if any of our Subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several Occupations, it is Our Will and pleasure that you do cause such Offenders to be brought to punishment according to the degree of the Offence."[111]

The Instructions given to Governor Darling in 1825 repeat that the natives and their property must be protected, although attempts to convert them to Christianity are encouraged:

> "And it is Our further Will and Pleasure that you do to the utmost of your power, promote religion and Education among the Native Inhabitants of Our said Colony or of the Lands and Islands thereto adjoining; and that you do especially take care to protect them in their persons, and in the free enjoyment of their possessions; and that you do by all lawful means prevent and restrain all violence and injustice, which may in any moment be practised or attempted against them; and that you take such measures as may appear to you with the advice of Our said

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to integrate the Indians into colonial society primarily through economic means. The application of this policy to the new colony was destined to fail as it was premised upon being able to control the white population, the very thing which was impossible in penal Australia. Harring. S.L. 'The Killing Time: A History of Aboriginal Resistance in Colonial Australia' *Ottawa Law Review* Vol.26:2, 1994, 385 at 393.

[111] *Historical Records of Australia* Series 1. Vol.1, 9 at 13.

Archdeacon to be necessary for their conversion to the Christian faith and for their advancement in Civilisation."[112]

Clearly the assertion of sovereignty was not intended as a licence for the settlers wantonly to dispossess and kill the Aborigines. The violence and dispossession which occurred was not generally sanctioned by law[113] nor was it the inevitable or intended result of British colonial policy. Such behaviour was however, on occasion, sanctioned by the local colonial governments in Australia. Thus, Governors from Phillip onwards sanctioned reprisals raids when the Aborigines had in some way 'offended' against English law.[114] They did not, however,

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[112] *Historical Records of Australia* Series 1. Vol. XII, 107 at 125.

[113] Harring provides an interesting synopsis of the views of various academics as to the stance taken by the law with regard to the Aborigines during the early days of contact. For Reynolds, the characteristic of the law in those years was impotence expressed as inactivity: the law was powerless to protect or uphold as it did nothing to prevent the dispossession and ill-treatment of Aborigines. For Alex Castles, the attitude of the law to the Aborigines was one of ambivalence. By this he means that the law was potent, it could serve to protect or uphold, but it was applied inconsistently. Enid Russell argues a more specific variation of ambivalence, stating that the legal position of the Aborigines depended on who had the upper hand at the time: the Home Office and the humanitarians or the ordinary settlers. Neal sees the law as powerful and the situation as more complex. For him, the law authorised dispossessions but at the same time provided some rights, although these latter were largely illusory. Bridges and McCorquodale both hold that there was no thought-out policy on the place of the Aborigines in the system and the law was essentially reactive according to the circumstances. Harring also makes the further point that when talking of the role of 'law' or the 'application of law', it is not possible to talk of a monolith: different types of law were applied or ignored in different contexts. Harring. S.L. *supra* n 110 at 389-391.

[114] Even Governor Macquarie, widely regarded as an enlightened administrator, authorised such raids. In 1815 he sent a punitive expedition to the Hawkesbury District. Fourteen Aborigines were shot and five taken prisoner, However, it is clear from his subsequent communication to Lord Bathurst that he considered that such raids must have a 'justification': "Stating in the first instance the causes which led to the necessity of resorting to Military Force, and holding out to the Natives various encouragements with a view to invite and induce them to relinquish their Wandering Predatory habits and to avail themselves of the indulgences offered to them as Settlers in degrees suitable to their Circumstances and Situations. It is scarcely possible to calculate with any degree of Precision on the result that this Proclamation may eventually have on so rude and unenlightened a race;` but it has already produced the good effect of bringing in some of the most troublesome of the Natives, who have promised to cease from their Hostility and to avail themselves of the Protection of this Government by becoming Settlers, or engaging themselves as Servants, as Circumstances may suit; and upon the whole there is reason to hope that the examples, which have been made on the One hand, and the encouragements held out on

generally sanction aggression without reason or where the only reason was that the Aborigines stood in the way of further settlement. Most of the violence which occurred was the result of actions by individuals or groups acting outside the law and was born partly of a misunderstanding of the consequences of the acquisition of sovereignty - that is, a belief that there was no limit to what the settlers could do – but mainly of a simple disregard for the very law which was being asserted.

The colonial government did make some attempts to control the violence perpetrated by the settlers on the Aborigines. Such attempts largely failed for a number of reasons. First, much of the violence took place in remote geographical areas often beyond the official limits of settlement. These areas were difficult to police in practical terms. Second, the expense involved in making such policing effective was considerable. Third, and perhaps most important, any such attempts met with hostility from, and lack of co-operation by the settlers, who wished to be able to expand regardless of the presence of the Aborigines. Harring says:

> "The essence of the problem of white killings of Aborigines and the law is that convict society was largely beyond the reach of the law, protected both by distance and a code of silence."[115]

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the other, will preserve the Colony from the further recurrence of such Cruelties" L. Macquarie to Lord Bathurst, 8th June, 1816, *Historical Records of Australia* Series I, Vol. IX, 139 at 140.

[115] Harring. S.L. *supra* n 110 at 395.

Despite its opposition to wanton violence, the colonial government was neither willing nor indeed able to curb pastoral expansion. Governor Gipps pointed out that whilst such a curb might well avoid conflicts with the Aborigines, it was no longer possible:

> "As to the evils of dispersion, I fear it is now too late to talk of them, for we have beyond the boundaries nearly two millions of sheep and several hundred thousand head of cattle, which all the powers of the Government could not bring back within the settled limits of the colony."[116]

However, there seems to have been little doubt about the legal position. Thus, for example, in 1826 Attorney-General Saxe-Bannister protested to Governor Darling about the illegality of a reprisals patrol in the Hunter River area:

> "I have formed the opinion that the indiscriminate slaughter of offenders, except in the heat of immediate pursuit, or other similar circumstances, required preliminary solemn Acts - and that to order soldiers to punish any outrage whatever in their way is against the law, which is powerful enough to guard the Public Peace from any persistent aggression."[117]

Thus, most violence was not sanctioned by the law. Even those who argued most strongly that British sovereignty and jurisdiction had been established

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[116] Gipps' speech, quoted in the *Sydney Gazette*, 23 March, 1839, cited in Burroughs. P. *Britain and Australia 1831-1855: A Study in Imperial Relations and Crown Lands Administration* Oxford: Clarendon Press, 1967, at 157.

[117] Saxe-Bannister to Darling 9th September, 1826. PRO. CO. 323/146 f208, cited in Neal. D. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* Melbourne: Cambridge University Press, 1991, at p.79.

would, in the main, have agreed that if the Aborigines were to be subject to English law, they must also be protected by it.[118]

iii. Conclusion:

It is clear that within the law as it then stood the analysis of the events of 1770-1788 as settlement was correct. The Mabo decision will be discussed in detail below[119], but it should be noted that there is nothing in that decision to justify the assertion that this was not so. Despite the fact that the Court found that the view that Australia was *terra nullius* was in error, it still declined to overturn the categorisation of the events as settlement. It might seem that in the light of the Mabo decision that Australia was not *terra nullius*, its historical categorisation as such is now irrelevant. This is not so. It is arguable that part of the Mabo was incorrect in that it found that the acquisition of Australia fell into a category unrecognised by international law: land which is not *terra nullius,* but is nevertheless acquired by settlement. A future Court which took this point and sought to correct the position might revert to the pre-Mabo analysis.[120] Given this point, consideration of judicial treatment of the issues remains relevant.

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[118] See Macquarrie's Proclamations *infra* 86 nn 128, 129.
[119] *Infra* 100-108.
[120] Alternatively such a Court might agree that Australia was not *terra nullius* and pursue the logic of that argument by finding that the events of 1770-1788 were, in fact, conquest. Whilst a finding of conquest would not affect the acquisition of sovereignty and would make the issue of the survival of Aboriginal customary law clearer in theory, it would make little or no difference in practice as, at least with regard to criminal law, there is certain to have been subsequent inconsistent law which would extinguish any surviving custom.

1:3: Judicial consideration of the classification of 1770-1788 as settlement and of the consequent amenability of Aborigines to British jurisdiction[121] prior to 1992:

Most of the pre-1992 cases concern the public international law points subsequently discussed in Mabo, the applicability of the rules on the acquisition of territory and ensuing jurisdiction. Provided that the acquisition of territory was in accordance with the law, sovereignty and jurisdiction were established, but the method of acquisition determines the status accorded to customary law. When the British acquired Australia by settlement, English law became applicable throughout the colony. The claim that Australia was settled necessarily carried with it the assertion that there was no cognisable Aboriginal law or legal system in existence[122]. This was the legal position: the reality was quite different. Aboriginal societies encompassed systems which were most certainly legal in character and purpose although with a wider understanding of 'law' and 'legal system' than was common in eighteenth century English thinking.[123] It is the subsistence of these laws and legal systems which gives rise to the dilemma faced in the Thesis.

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[121]The concept of jurisdiction essentially involves the right of a sovereign state to regulate, by its domestic law, all matters within its territorial boundaries. Jurisdiction is, at least in the present context, a much less complex and controversial area than the acquisition of territory and the classification of that acquisition. Basically its establishment and scope follows automatically from the method of acquisition.

[122] Apart from property rights which could survive. See *infra* 103-104.

[123] This has been recognised by both academics and the judiciary. See, for example: Harring. S.L. *supra* n 110 at 391; Blackburn J. in Milirrpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia (hereinafter 'Milirrpum') (1970) 17 FLR 141, at 266-268.

Whilst it was Cook's estimate of the situation and his actions on landing – mistaken and *ultra vires* or not - which initiated the categorisation of the British arrival as settlement, there was little attempt to disavow his claims. The acceptance of this categorisation meant that the policy pursued in colonial Australia in relation to the acknowledgement of pre-existing laws and legal systems was very different from the indirect rule policy pursued in many other British colonies. There the colonisers left local hierarchies in place and incorporated them as a layer of colonial government. They were left to run the affairs of the original inhabitants and, in general, pre-existing local law remained in force and continued to govern the natives *inter se*. This pre-existing law was only amended or disregarded when a problem arose or if it impinged on the interests of the colonisers.[124] In Australia this was not the case. Settlement meant that there was no acknowledgement of Aboriginal society or legal systems. In such a legal vacuum the laws of the settlers become immediately effective in totality (subject to the general principle of applicability[125]) throughout the land and applicable to all the inhabitants. Whilst some aspects of Aboriginal law may have survived the British arrival[126], until 1992 the interaction of the white system, including the legal system and the Courts, with Aborigines and their law was within the conceptual framework of the legal

[124] See, for example, British practice in St. Lucia referred to by Willis J. in the Bon Jon case, Port Phillip Gazette, 18th September, 1841, referred to in Bridges. B. 'The Extension of English Law to the Aborigines for Offences Committed Inter Se, 1829-1842' (Dec. 1973) *Journal of the Royal Australian Historical Society*, Vol.59. Pt.4, 264-269 at 267.

[125] It is clear law that even when a country is totally uninhabited, settlers take only such law as is applicable in the circumstances.

[126] See *infra* 103-104.

notions of settlement and *terra nullius* and that which flowed from those notions.

It took some fifty years from 1788 to establish coherent and fully functioning governmental and judicial systems. During those years relations between the Aborigines and the settlers and the British understanding of what had happened in 1770-1788 were shaped by the colonial and local administrations, by the settlers themselves and by the practical realities of establishing the colony. It follows from the gradual nature of the establishment of the colony that the original assertions as to the contents of the terms 'sovereignty' and 'jurisdiction', and the decision to classify Australia as 'settled' rather than as 'conquered' or 'ceded', were not judicial opinions but political ones. It took time for the judicial system to formulate and express the legal basis of what had originally been political statements. It was the British Colonial Office which decided to acquire Australia and from the beginning held to a certain understanding of the factual acquisition which the Courts were able to fit within the scope of the legal doctrine of *terra nullius*. The relative status of political and legal argument in the acquisition of Australia is put well by Crawford: "Once it was decided to acquire the whole of Australia for the Crown, British authorities faced the question of method."[127] It was as a result of these political assessments that there were no treaties or agreements: having categorised Australia as 'uninhabited', the British understanding would have been that there were no

[127] Crawford. J. 'The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal' (1988) 62 *Law Institute Journal,* 1174-1179 at 1174.

parties competent to conclude such treaties. Moreover, in the early days of the colonies, questions as to amenability of Aborigines to the British system were often addressed by the administration before they were addressed by the Courts. Although Macquarie's 1816 Proclamation[128] made no mention of the general amenability of Aborigines to English law for crimes committed *inter se*, the provisions relating to tribal punishment were the first attempt to interfere with native customs as they applied to Aborigines alone without affecting the white population. Moreover, in the same year Macquarie issued a second Proclamation[129] which outlawed ten Aborigines, thus claiming by necessary implication that they were subject to the English law, though still not stating categorically the extent of that law's applicability. By the time the courts were articulating the position, it was *de facto* established.[130]

Some expressed disquiet and argued that it was unwise and unjust, though not legally incorrect, to use the acquisition of jurisdiction to apply English law *in toto*. Thus the House of Commons Select Committee on Aborigines in the British Settlements stated in 1837 that to require from Aborigines "the observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust."[131] This view was not,

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[128] *Historical Records of Australia*, Series 1, Vol. IX, 141.
[129] *Historical Records of Australia*, Series 1, Vol. IX, 362.
[130] There was an unsuccessful attempt to pursue a different policy in South Australia: see: Cassidy. J. 'A Reappraisal of Aboriginal Policy in Colonial Australia: Imperial and Colonial Instruments Recognising the Special Rights and Status of the Australian Aboriginals' 10 *Journal of Legal History* (1989) 365.
[131] British House of Commons, Select Committee on Aborigines (British Settlements), *Report* 26 June 1837 at p.84, cited in Harring. S.L. *supra* n 110 at nn 30 and 87.

however, incorporated in the actual recommendations and never gained widespread support. The Committee recognised both the existence of customary law and the importance of allowing it to continue to function and there was some suggestion that the two legal systems should coexist as they did in conquered colonies. Harring points out that the Report of the Committee is equivocal on this point for two reasons: first, that English law could not be seen to be sanctioning 'barbarous customs'; and second, that if the Aborigines appeared to be beyond the reach of the settlers' law, the settlers would take the law into their own hands.[132] Some of the English colonists in Australia also believed in allowing customary law to continue to function.[133] The Aborigines did not, of course, accept British sovereignty, though they may in some cases have bowed to what seemed inevitable, and as well as armed resistance, many challenged the establishment of both sovereignty and consequent jurisdiction through the Courts, a paradoxical position since those Courts only had any jurisdiction to hear the challenge if sovereignty were in fact established. Such challenges were infrequent and from the outset there was little doubt amongst the British in general, and the judiciary in particular, that sovereignty and thus jurisdiction had been established. The doubts expressed, such as they were, were over the scope of the jurisdiction and the manner of its exercise in relation to the Aborigines: were they amenable to British jurisdiction on all points and could they be treated differently from white settlers?

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[132] Harring. S.L. *supra* n 110 at 404.

[133] South Australia seems to have allowed customary law to run for longer than the other colonies. The first conviction of an Aborigine for a killing *inter se* did not take place there until 1873. See: Griffiths. A.R.G. 'Capital Punishment in South Australia, 1836-1964' (1970) 3 *Australian and New Zealand Journal of Criminology*, 214, cited in Harring. S.L. *supra* n 110 at 405.

For most of the early judiciary, the question was straightforward: jurisdiction was established, all inhabitants were amenable to all aspects of jurisdiction which was to be exercised on the English rule of law model which did not allow for differential treatment.[134] However, notwithstanding the policies of the British Government and the Proclamations of Governor Macquarie, some of the judiciary were not certain of the real nature of the colonisation nor of the correctness of the application of procedures and sanctions to Aborigines or for offences committed *inter se*[135] and there was, therefore, some lack of uniformity in the early decisions on these points.[136] Just as physical settlement was gradual, so too was the articulation of the right to sovereignty and jurisdiction and the actual application of English law. However, over time the colonial system developed and unified and within fifty years the Australian Courts were delivering judgements which clearly set out the, at least majority, position.

Judicial consideration of the issues of settlement and jurisdiction can be divided into three phases. The first began in the 1820's and lasted for about sixty years. By then the uncertainties appeared to be resolved. In the ensuing years there were a few cases on these points, but it was not until the 1970's that the second phase began and the Courts were again faced with a major reconsideration of the issues. The third phase began in 1992 with the Mabo case.

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[134] See Chapter 2 for discussion of this point

[135] See: Kercher. B. *An Unruly Child: A History of Law in Australia* St. Leonards, NSW: Allen and Unwin, 1995.

[136] On the development of law in Australia generally, see: Bird. G. *The Process of Law in Australia: Intercultural Perspectives* Sydney: Butterworths, (2nd ed.) 1993. See also: Hookey. J. 'Settlement and Sovereignty' in Hanks P. & Keon-Cohen B. (eds.) *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* North Sydney: George Allen & Unwin, 1984, at 1-18.

The first phase centred on two separate – though connected – issues. First, the analysis of 1788 as settlement and second, the consequences of that analysis in terms of the establishment of jurisdiction over Aborigines. There were two major decisions on the question of settlement *per se*: MacDonald v. Levy[137] and Cooper v. Stuart[138]. Both found that there was no doubt that Australia had been acquired by settlement, using the type of analysis discussed above. In the latter case before the Privy Council, the highest Court in the newly-established Australian judicial system, Lord Watson said:

> "There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class."[139]

Thus, the position of the Courts on settlement and the subsequent acquisition of jurisdiction was established early and there was little dissent. However in these cases the references to Aborigines were purely for the sake of establishing settlement and, therefore, the applicability of the laws in question. No Aborigines were actually involved. When Aborigines were involved, the matter was less clear. From the beginning there was unease about the scope and exercise of jurisdiction and alongside the cases challenging settlement were others challenging the amenability of Aborigines to the jurisdiction to which

[137] (1833) 1 Legge 39.
[138] 14 App. Cas. 286.
[139] At 291.

settlement gave rise. Even in the early days some argued that whilst jurisdiction was certainly established, it did not extend to the Aborigines. In McHugh v. Robertson[140] Holroyd J. made this point specifically although the case did not involve an Aborigine. He said:

> "In determining that the restrictive law before mentioned was reasonably capable of being applied in New South Wales in 1828, I have altogether put out of my mind the aboriginal inhabitants. The Imperial Parliament was not thinking of them. From the first the English have occupied Australia as if it were an uninhabited and desert country. The native population were not conquered, but the English Government and afterwards the colonial authorities assumed jurisdiction over them as if they were strangers who had immigrated into British territory, and punished them for disobeying laws which they could hardly understand, and which were palpably inapplicable to their condition."[141]

The unease about jurisdiction over Aborigines was especially acute in relation to criminal law and particularly offences *inter se*. There was little difficulty or uncertainty if the criminal offence was by an Aborigine against a white settler and it is clear that from the very early days of settlement the Courts regarded Aborigines as amenable to English law for such offences.[142] However, if the offence was by one Aborigine against another there was a certain reluctance to intervene whatever the theoretical position. As early as 1829 doubts were

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[140] (1885) 11 VLR 410.
[141] At 431.
[142] On the general question of the applicability of English law to Aborigines see: Bridges. B. The Aborigines and the Law: New South Wales 1788-1855 *Teaching History* Vol. 4. Pt. 3. Dec. 1970. Note especially his assertion that the first application of legal process to an Aborigine was as early as 1812 when Moowattin was hanged for the rape of a white woman, at 45.

expressed about the fairness of applying English law to Aborigines for offences committed *inter se*, though different courts took different views. In that year the first case[143] to consider this issue arose when the Attorney-General sought an opinion from the Supreme Court of New South Wales[144] on the amenability of an Aborigine to English law for a crime committed against another Aborigine and it was held that it would be unjust to apply it. The trial never came to Court.

The most important early case on the point is R. v. Jack Congo Murrell[145] which came before the Supreme Court of New South Wales seven years later. The Court, with Forbes and Dowling again on the bench, unanimously reversed the opinion given in the Bob Barrett case and held that it had jurisdiction to try one Aborigine for the murder of another. The defendant's Counsel put several distinct arguments. The general argument concerned the interaction between the original population and the newcomers and the assertion that it was unfair to apply the new law. There was also the more specific argument that as the settlers' law did not give Aborigines the same protection as whites, they should not be subject to it. All the arguments were rejected. Burton stated in the judgement that the Aborigines had not reached the status of a sovereign people on the British arrival and therefore there was no question that they were not

[143] Bob Barrett Sydney Gazette, 4th April and 16th June, 1829. Cited in Bridges. B. *supra* n 86 at n 2.

[144] For an overview of the early jurisprudence of the Supreme Court of New South Wales on this issue, see: Kercher. B. 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836' in Buck. A.R., McLaren. J. and Wright. N.E. (eds.) *Land and Freedom: Law Property Rights and the British Diaspora* Aldershot: Ashgate Publishing, 2001 at 83 – 102.

[145] (1836) 1 Legge 72. This was the first reported case of the trial of an Aborigine. See Bridges. B. *supra* n 86 for a full account of the background of the trial and the papers from the Supreme Court Papers of the State Archives of New South Wales.

subject to English law.[146] Applying the principle of equality before the law, he went on to state that it would be scandalous to allow murders of natives by natives to go unpunished when murders of whites by natives would be punished[147]. The Murrell case is widely regarded as having settled the issue of jurisdiction over the Aborigines for crimes whether committed against whites or *inter se*. This seems to have been confirmed two years later in the case of Long Jack, accused of murdering his wife when drunk.[148] The jurisdiction question having been settled in Murrell, he was found guilty[149].

The cases so far examined are from the jurisdiction of New South Wales, but similar questions arose elsewhere and gave rise to similar debates. The first case on the point to be heard in Victoria was in 1841.[150] In the Bon Jon case[151] the defendant was charged with the murder of another Aborigine. The case came before Mr. Justice Willis in Melbourne. He was not prepared to accept as conclusive the opinion of the judges in the Murrell case on jurisdiction and reviewed all the arguments relating to the status of the 'settlement' and the

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[146] At 73.
[147] At 73.
[148] New South Wales State Archives, Supreme Court Papers, (62), cited in Bridges. B. *supra* n 86 at n 12.
[149] Burton passed the death sentence but commuted it to transportation for life. Harring. S.L. *supra* n 110 at n 86 argues that this was a way of reconciling the strict application of Murrell with justice. Records from this period are few, but this case seems to suggest that from the earliest days the judiciary used discretion to take account of the fact that the defendant was an Aborigine.
[150] For an account of Aboriginal violence and murder *inter se* in Victoria during the years 1841-1851 and the reaction of the judicial system, see: Davies. S 'Aborigines, Murder and the Criminal Law in Early Port Phillip, 1841-1851' (1987) *Historical Studies*, Vol. 22, No. 88, April, 1987, 313-335; and Cannon. M. *Who Killed the Koories?* Port Melbourne, Victoria: William Heinemann, 1990, especially 77-83.
[151] Unreported, but see: Bridges. B. *supra* n 86; Kercher. B. 'R. v. Ballard, R. v. Murrell and R. v. Bonjon' (1998) 3 *Australian Indigenous Law Reporter* 410. This was the first trial for murder *inter se* in the Port Phillip district. The Supreme Court in Melbourne only opened in April, 1841.

question of amenability for crimes committed *inter se*. He concluded that the natives were under British rule, but was not convinced that he had jurisdiction over them for crimes committed *inter se*, supporting his opinion by reference to the practice in other British colonies where systems of indirect rule were established. He reserved the question of jurisdiction pending the result of the trial. The charge was dropped as evidence suggested that Bon Jon did not really understand the nature of the proceedings. Judge Willis remained unsatisfied on the question of jurisdiction and sought clarification from the English legal system *via* Governor Gipps. The Governor instead asked the advice of Chief Justice Dowling who insisted that the matter was clear and had been authoritatively decided by the full Bench in the Murrell case and applied in 1838 in the Long Jack case. No further action was taken. In 1848 Governor Gipps issued instructions that in such trials "all Magistrates should proceed as they would if the parties were white men".[152]

The question of the amenability of Aborigines to the legal system of the settlers in Victoria seems to have been resolved beyond question in two later cases in the Supreme Court. In R. v. Peter[153] the accused claiming that he was amenable only to the jurisdiction of his own tribe and not to English law. The argument failed and the Court held that everyone within the geographical area of the colony was subject to English law. Three months later in R. v. Jemmy[154] the

[152] Cannon. M. *supra* n 149 at 78.
[153] 29th June, 1860. Argus Newspaper. SC (Vic) Full Court
[154] 7th September, 1860. Argus Newspaper. SC (Vic) Full Court

Court held itself bound by the decision in R. v. Peter and stated clearly that it made no difference whether the victim were white or a native.[155]

It is clear from the above analysis, that despite some dissenting voices, within eighty years of British arrival in Australia the main line of cases had effectively settled the question of the amenability to jurisdiction of Aborigines. On the whole, this was no longer challenged: the arguments now began to centre around the issue of *what* the English legal system actually contained? i.e. the extent to which Aborigines were to be treated differently and to which their own legal systems were to be recognised.

In the 1970's and 1980's a further series of cases was brought on essentially similar grounds - challenging notions of sovereignty, settlement and the amenability of Aborigines to the settlers' jurisdiction - and the second phase of judicial consideration of the issues began. The impetus for this series of challenges was largely political. The preceding years had seen an expansion of political consciousness among Aboriginal communities and they were inspired to re-open the legal questions. None of the cases were successful or added much to the jurisprudence of the Courts in these issues. However, they should be mentioned briefly as they indicate that the issues were again prominent and set the stage for Mabo.

[155] On similar issues in Western Australia, see: Reece. R.H.W. '"Laws of the White People": The Frontier of Authority in early Western Australia' in Hocking B. *supra* n 16 at 110-136.

The 1971 case of Milirrpum, otherwise know as the Gove case, was the only pre-Mabo case in which the question of Aboriginal title to land had been considered. It was concerned solely with the question of land rights, but the discussion of Aboriginal society and notions of settlement, as well as the decision itself, proved a catalyst for this second phase of judicial consideration of the issues. It came before Blackburn J. sitting alone in the Supreme Court of the Northern Territory. He faced a difficult task as there was no domestic judicial statement on the question and he was essentially "adjudicating in a near vacuum"[156]. He concluded that there was no common law doctrine of native title in Australia and relied on the early line of cases related to the effect of settlement.[157] He conceded, however, that as a matter of fact there had had been structured societies with law prior to settlement,[158] although he maintained that a factual re-evaluation did not change the law.[159]

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[156] Ritter. D. 'The 'Rejection of Terra Nullius' in Mabo: A Critical Analysis.' *Sydney Law Review* Vol. 18, 1996, 5 at 13.

[157] At 244-245.

[158] He defined law as: "a system of rules of conduct which is felt as obligatory upon them by members of a definable group of people" and referring to the way of life of the people of Gove in the Northern Territory, he said that they possessed: " .. a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me." at 266-268.

[159] This decision has been widely criticised. For discussion of the difficulties and the decision in this case, see: Hookey. J. 'The Gove Land Rights case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia' (1972) 5 *Federal Law Review* 85; Watson. P. 'The Gove Land Rights Case: Hard Cases make Hard Law' (1994) 1 *Canberra Law Review* 97. For detailed discussion of the historical and anthropological background, see: Williams. N.M. *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* Canberra: Australian Institute of Aboriginal Studies, 1986. For a study of the conflict of state and customary law in Yolngu society, see: Williams. N.M. *Two Laws: Managing Disputes in a Contemporary Aboriginal Society* Canberra: Australian Institute of Aboriginal Studies, 1987.

The issue of the amenability of Aborigines for crimes committed *inter se* was raised directly in 1976 when the case of R. v. Wedge[160], came before Rath J. in the Supreme Court of New South Wales. The defendant argued that the Court had no jurisdiction over him as he was an Aborigine and put two arguments: first, that the Aboriginal people were, and still are, a sovereign people and are therefore not subject to English law; second, and in the alternative, that even if they are not a sovereign people, the English colonists brought with them only so much of the English law as was applicable to their circumstances[161] and that this law affected only British settlers *inter se*. Rath J. held that the defence arguments were untenable as they were both premised on the assumption that the colony of New South Wales was not founded by settlement and there is clear authority, most notably Cooper v. Stuart, that it was so founded.

The case of Coe v. Commonwealth and Another[162] in 1979 raised a number of issues. Coe sought, *inter alia*, a Declaration to restrain the Commonwealth of Australia from interfering with Aboriginal possession of lands which they still occupied and compensation for those lands which had been taken from them. He argued that before the Europeans came to Australia the Aborigines were in exclusive possession and that Australia was not *terra nullius* but occupied land and, as such, was acquired by conquest rather than by settlement. It followed from this analysis that Aboriginal sovereignty and title to land had survived

[160] (1976) 1 NSWLR 581.
[161] See *supra* n 125 on the principle of applicability.
[162] (1979) 24 ALR 118.

1788. The case went to the High Court which held that the question of Australian sovereignty was not justiciable in a domestic Court.[163] The judges were divided on the question of whether or not acquisition was by settlement, but agreed that the issue of native title surviving 1788 remained open whatever the answer to that question.[164] This was the first case in which the expression *terra nullius* was used by an Australian court to describe pre-1788 Australia. Three of the four High Court judges either ignored the expression completely or considered it a matter of international law and of no relevance to a domestic case, but Murphy J. thought it relevant and that the plaintiff was entitled to raise and argue the issue. However having made that point, he reached no decision on the matter. Coe's arguments all failed, but in the acknowledgement that the question of native title remained open and in Murphy J's dissenting judgment there are, perhaps, indications that judicial opinion was beginning to move towards reconsidering the long-established positions on these matters.[165]

A recasting of the traditional position is to be found in the 1989 case of R. v. Walker[166]. Walker argued two points in his appeal to the Court of Criminal Appeal of Queensland, the first of which – and the only one which is relevant – was that the District Court had no jurisdiction to try him. He maintained that Stradbroke Island, where the offences took place, was occupied both before and after 1770 by the Nunukel, from whom he was descended, and that they had a

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[163] *Per* Gibbs J. at 128-129.
[164] *Per* Gibbs J. at 131.
[165] Jacobs J. pointed out that there had been no decision of the High Court or the Privy Council stating that the land was settled, at 136.
[166] R. v. Walker (1989) 2 Qd. R. 79.

system of law and government under which they occupied and were entitled to those lands prior to European settlement. It followed from this that Cook acted illegally in claiming the east coast of Australia contrary to his Instructions which required the "consent of the natives". The Nunukel had given no consent. The Court held on this argument that whatever the irregularity, if any, of the action by Cook, it had been ratified by subsequent British action. However, the Court conceded that there were unanswered questions and observed that the claim to sovereignty:

> " ... raises the issue of how it is that judges and others in Queensland apply, and regard themselves as bound to apply, these laws to Stradbroke Island; and conversely, why the Nunukel people, who in times long past once exercised sovereignty over Stradbroke Island, are, without any formal displacement of their own legal system, now expected and obliged to submit to laws not of their own making."[167]

It went on to say that the duty of the Courts was not to answer such questions, but simply to administer and obey the law. However, it did attempt some explanation:

> " ... it may be said that the Nunukel legal system was at some unspecified time after 1788 overthrown by a revolution which introduced a new legal order for Stradbroke Island. The appellant obviously contests the legitimacy of that event, but the efficacy and durability of the regime, which displaced it and which now prevails, is not open to question.
> ... the fundamental fact, be it historical, political or social, is that we as judges recognise the authority in Queensland of laws having their source in the Imperial, Colonial, State and Commonwealth statutes to which I

[167] *Per* McPherson at 83.

have referred. We acknowledge no other legal system and we are not at liberty to do so."[168]

Walker appealed and that appeal was heard after the decision in Mabo. It is discussed below.[169] For now it is sufficient to note that the appeal confirmed McPherson's judgment in all respects. This case, like Coe, did not depart from the traditional position that the only applicable law and jurisdiction was that of the state - there was no other - but the Court was willing to admit that this had not always been the case. There is an acknowledgement that the Nunukel had been sovereign and had possessed a legal system. The result was the same, but the reasoning, as in Coe, shows signs of an increasing judicial awareness that a different analysis was possible. Apart from Willis in Bon Jon, there had been little early dissatisfaction with the traditional understanding of settlement and jurisdiction, but the cases in the second phase began to show an awareness that something needed to change. The judges did not depart substantively from the established law, but the judgments showed an increasing tendency to revise earlier assessments. The opportunity for substantive change – though it will be argued below that the decision was incorrect and that the change was, in any event, of no great legal significance other than in the area of native title – came in Mabo, the first case in which the issue of native title was considered by the High Court.[170]

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[168] *Per* McPherson at 84.
[169] *Infra* 115-117.
[170] Mabo gave rise to extensive academic comment. See, for example: Hocking. B. 'Aboriginal Law Does Now Run in Australia - Reflections on the Mabo case: from Cooper v. Stuart through Milirrpum to Mabo' *Sydney Law Review* Vol. 15, 187 (1993); van Krieken. R. 'From Milirrpum to Mabo: the High Court, Terra Nullius and Moral Entrepreneurship' *University of New South Wales*

1.4: Judicial consideration of the classification of 1770-1788 as settlement and of the amenability of Aborigines to Australian jurisdiction post 1992:

Mabo concerned claims by the Meriam people to their traditional homelands in the Murray Islands. They could only possibly succeed if the Court accepted two pre-requisite analyses: first, that they had at some point enjoyed such rights, i.e. that the assumption by the British in 1788 that the Aborigines had no right to the land was wrong, either because the land was not *terra nullius* or because title to land could exist even where land was *terra nullius*; and second, that, if such rights had existed, they had survived settlement. If such rights were found to have existed, they could have survived in one of two ways: either as part of a customary system which survived 1770-1788 and was cognisable by the state system or as a customary property right which was subsumed into the state system and recognised as a common law right. The Court found that the categorisation of Australia as *terra nullius* was wrong and that a legal system and legal rights to property existed at the time of the British arrival. It went on to find that the rights had survived 1770-1788 and that, to the extent that they had not been extinguished, they still survived. It is beyond the scope of the Thesis to discuss the Mabo case in detail as much of the specific argument deals with land

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Law Journal Vol. 23(1) (2000); Webber. J. 'The Jurisprudence of Regret: the Search for Standards of Justice in Mabo' *Sydney Law Review* Vol. 17, 5 (1995); Ritter. D. 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' *Sydney Law Review* Vol. 18, 5 (1996); Simpson. G. 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' *Melbourne University Law Review* Vol. 19, 195, June 1993.

rights. However, the main lines of argument in the decision need to be examined.

The Meriam people accepted that sovereignty had been established and that the lands had been annexed by the Crown. As a result ultimate or radical title[171] vested in the Crown. However, they maintained that their traditional - native title - rights had survived 1788. They accepted that these rights now derived from the Crown as common law rights, that they were not absolute and could be extinguished by the clear and unambiguous action of the Crown. However, they argued that as such action had not been taken in relation to the lands which were the subject of the claim, their rights were still in existence. The Government of Queensland argued that on annexation they had become absolute owners and were in law in possession of the lands. Therefore, no possessory title on the part of the Meriam people could exist.

Essentially the Court decided in favour of the Meriam people. It should be noted at the outset, that the judges spelled out very clearly that there was no question that the British had indeed acquired sovereignty in 1788. There was no possibility of denying that - nor were the Meriam people attempting to do so - and any such attempt would not be given a hearing in an Australian municipal

[171] It was established in Attorney General v. Brown (1847) 1 Legge 312 that the Crown held Australia in feudal title and thus English land law was applicable *in toto*. For discussion of this point see: Buck. A.R. ''Strangers in their own Land': Capitalism, Dispossession and the Law' in Buck. A.R., McLaren. J. and Wright. N.E. (eds.) *supra* n 144 at 39-56. Karsten argues, however, that the early decisions on property matters show some improvisation alongside the strict application of English land law rules: Karsten. P. ''They seem to argue that Custom has made a Higher Law': Formal and Informal Law on the Frontier' in Buck. A.R., McLaren. J. and Wright. N.E. *supra* n 144 at 63-81.

Court. This is, of course, the only logical position as such a Court only has any jurisdiction if sovereignty was, in fact, established. The question before the Court was the effect of that acquisition of sovereignty.

The Court set out the two lines of argument outlined above[172]. On the public international law points the judges found that the assertion that Australia was *terra nullius* in 1788 was no longer tenable – though it still categorised the acquisition as by settlement - and would be out of line with international thinking. Justice Brennan said:

> "If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organisation' that it is 'idle to impute to such people some shadow of the rights known to our law' (In re Southern Rhodesia (1919) AC at 233-234) can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination."[173]

and again:

> "It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which,

[172] *Supra* 64.
[173] At 41, 42.

> because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."[174]

This amounted to an acceptance that Aborigines who were in occupation of the land at the time had enjoyed some form of title and it was at least possible for that title to have survived.

On the common law argument, the Court considered the distinction between different aspects of sovereignty. The power to govern is a matter of public law; title to land is a matter of private law. The assumption of the first does not automatically and immediately give a right to the second. If land occupied by an incoming power was *terra nullius* in the sense of being uninhabited, then on arrival that power acquired both the power of government and absolute title to the entire territory. If, however, it was not *terra nullius* or was *terra nullius* but was inhabited, then it was still possible for the incoming power to acquire the power of government under the rules of public international law on the acquisition of territory discussed above. However, this acquisition of public law rights would not automatically displace the private law rights and systems of the occupants, including rights to land. Those rights and systems, governed by common law, would survive until the arriving power used its right to govern to enact inconsistent law. Once it had done that, the enacted law would prevail

[174] At 42.

over the inconsistent existing law in governing private law rights such as title to land.[175]

Both arguments were examined in some detail in Brennan J.'s judgment. He affirms that the acquisition of New South Wales was by settlement[176] and states that this was possible due to the currency in 1770-1788 of an "enlarged notion of terra nullius"[177], 'enlarged' in that land which was inhabited could still be regarded as *terra nullius*. The categorisation of the events as settlement meant that there was a presumption that no sovereign existed and that there was a legal vacuum. On arriving, the British acquired sovereignty and common law filled the vacuum, being immediately and universally applicable within the territory. However, Brennan goes on to say that as the presumption of a legal vacuum was, in fact, erroneous, common law did not totally applicable.[178] He then points out that a distinction must be drawn between the Crown's acquisition of title to the colony – a consequence of acquiring sovereignty – and the ownership of land – a matter of common law. The two matters have been confused by the enlarging of the notion of *terra nullius*. After considering various authorities, including Roberts-Wray[179], he concludes:

> "It was only by fastening on the notion that a settled colony was terra nullius that it was possible to predicate of the Crown the acquisition of

[175] For a useful discussion of the distinction between the acquisition of sovereignty and the acquisition of title to land, see Roberts-Wray. K.O. *supra* n 91 at 625-636.
[176] At 36.
[177] At 36.
[178] At 39.
[179] *Supra* n 91.

> ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too."[180]

Thus, the Aboriginal property rights which existed before settlement could survive.

Brennan next considers the common law understanding of the same points. The common law on title to land attributed radical title to the Crown once sovereignty was established, but it "is not a corollary of the Crown's acquisition of radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of the land to the exclusion of the indigenous inhabitants"[181]. Thus, under common law too, property rights could survive.

Until 1992, the survival of Aboriginal property rights had never been expressly recognised in Australia. The one case which had considered the issue – Milirrpum - had expressly held that the non-recognition of individual or collective aboriginal rights to land at common law was justified. However, it had been arguable even before Mabo that the decision in Milirrpum needed revisiting and that the classification of Australia as settled did not necessarily mean that all pre-existing rights to land were null and void. In many other common law countries such

[180] At 45.
[181] At 48.

rights survived. Hocking points out that, in general, British colonial policy consistently declined to abrogate pre-existing indigenous property rights when sovereignty was established whichever method of acquisition had been employed.[182] Indeed, Brennan cites a number of cases, some of which were decided at a relatively early date, to inform his analysis of the issue in Mabo.[183] Thus, in one sense the High Court was saying nothing new – although it was new in Australia - but its reassessment of the legal consequences of 1788 had major implications. It cannot be doubted that on arrival the British acquired the power to govern, but if the land was not *terra nullius* - if the enlarged notion was reduced to its proper proportions - they did not automatically acquire absolute title to those lands which were subject to private law rights and those rights survived their arrival. It was, of course, possible for the Crown, exercising its power to govern, to act in a way which was inconsistent with the continuation of those rights and, if they had done so, the private rights were extinguished. However, if the Crown had not acted in such a way then the private rights, including title to land, would still be in existence.

Once it is accepted that common law recognises a form of native title, provided it has not been extinguished, then the question arises as to its nature.[184] The Court

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[182] 'Colonial Laws and Indigenous Peoples: Past and Present Law concerning the Recognition of Human Rights of Indigenous Native Peoples in British Colonies with particular reference to Australia' in Hocking. B. (ed.) *supra* n 16, 3-17, at 4.

[183] Lyons (Mayor of) v. East India Co. (1836) 12 ER 782, cited at 36; Case of Tanistry (1608) 80 ER 516 and Witron and Blany (1674) 84 ER 789, both cited at 49.

[184] Various questions also arose as to the content of native title, what amounted to acting in a way which extinguished title and how to prove continuing connection. These questions are not strictly relevant here and so will not be examined in any detail. The Court's position is summarised by Brennan J. at 69-70. It should be noted that whilst most of the discussion has centred on native title

held that such title reflected the rights which the inhabitants had enjoyed to their lands in accordance with their own traditional laws and customs; in other words it was a condition of the survival of native title that the claimants were still exercising those rights in a manner clearly connected to the original way of life. However, by insisting on this requirement the Court has confused the issue by asserting that the property rights which exist in some way derive their current validity from customary law. What survived 1788 in Australia was common law Aboriginal title,[185] completely compatible with the finding of *terra nullius* and acquisition of sovereignty by settlement. It may be that the Courts now wish to use customary evidence to decide who had such rights, what they were and whether they still exist, but they cannot be considered to be binding customary titles. The Court was divided on the issue of the exact nature of native title though clear that it was not related to sovereignty. It is worth noting that whilst common law title may have less symbolic or cultural value than customary title, it gives different and arguably greater rights to the group. Under customary title they must use the land in accordance with customary rules, including frequently prohibitions on alienation; under common law, they may do as they wish, in theory even alienate. Mabo failed to pursue the full logic of its position by its finding that aboriginal

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to land, what could have survived is a system of property rights which would include such interests as hunting and fishing rights, rights of passage and, to a certain extent, intellectual property. See: Mason v. Tritton (1994) 34 NSWLR 572 and Yanner v. Eaton (1999) 201 CLR 351. For the applicability of the Mabo principles in respect of indigenous rights in art, see: Gray. S. 'Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art' *Griffith Law Review* (2000) Vol. 9, No. 2, 227-247. On intellectual property rights generally, see: 'Copyrighting Culture: Indigenous Peoples and Intellectual Rights' in Hastrup. K. (ed.) *Legal Cultures and Human Rights: The Challenge of Diversity* The Hague: Kluwer Law International, 2001, at 42-65.

[185] On this point in general, see: McNeil. K. *Common Law Aboriginal Title* Oxford: Clarendon Press, 1989. The common law doctrine of Aboriginal rights presumes continuity of rights – see Campbell v. Hall (1774) 98 ER 848 - and gives pre-existing custom the force of law under English law. However, such force is derived from the common law and subject to change.

land subject to native title is inalienable. This seems incorrect: if it is common law title, supported by the fact that it can be extinguished by subsequent dealing, then it should be alienable.

The categorisation of Aboriginal title is a difficult issue and the difficulties are not peculiar to Australia. In the Canadian case of Delgamuukw v. British Columbia[186] Lamer. CJ argued that aboriginal title was a hybrid owing something to common law title and something to customary law. Thus, the landholders may do things not part of the customary usage, but not if inconsistent with the attachment to the land which formed the basis of their title. Part of this attachment, according to Lamer, was to pass the land from one generation to the next and thus the title does not include the right to alienate.[187] Both Mabo and Canadian jurisprudence[188] are following the settled position in the United States, expounded in the Marshall judgements[189], that indigenous land is inalienable. However, those judgements were based primarily on the status of the tribes as sovereign nations. Moreover, the recent Treaty[190] between the governments of Canada and British Columbia on the one hand and the Nisga'a nation on the other grants fee simple. Thus, the land may be sold – as far as Canadian law is concerned - though the Nisga'a would retain sovereignty just as the Crown does in England.

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[186] (1997) 3 SCR 1010

[187] At 111, 113.

[188] For a comparison of the positions in Australia and Canada, see: Dick. D. 'Comprehending 'the genius of the common law' – Native Title in Australia and Canada compared post-Delgamuukw' (1999) 5(1) *Australian Journal of Human Rights* 79.

[189] See, for example: Worcester v. Georgia 31 US 515 1832 and, less centrally, Johnson v. M'Intosh 21 US 543 1823.

[190] Nisga'a Final Agreement, 1998 at http://www.gov.bc.ca/tno/negotiation/nisgaa/docs/ (last accessed on 1 December 2004) Chapter 3(3), (4) and (5).

There has been considerable case-law on Mabo and a flurry of legislative activity[191] which is considered here only in outline. The decision in Mabo left two major issues unresolved: native title on pastoral leases and native title to the seas. The first issue was resolved by the High Court decision in Wik in 1996. The lands which were the subject of the claim included some areas in respect of which the Crown, i.e. the Queensland Government, had granted pastoral leases.[192] The claimants argued that their titles were not extinguished by these grants, but continued to exist concurrently with the interest of the leaseholders. Whilst the specific point at issue in Wik was the effect of pastoral leases on native title, the Court's comments were of wider applicability.[193] The High Court took the view, applying Mabo, that the crucial requirement for extinguishment was that the interest which it is claimed extinguished the title conferred exclusive possession. In deciding this, it is necessary to look both at the common law or legislation under which the instrument is granted and at the instrument itself. If they displayed a clear intention to extinguish native title and

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[191] The Mabo decision was given statutory effect by the Native Title Act, 1993 . The Act established a National Native Title Tribunal and laid down the procedures for determining native title rights and for deciding what dealings were permissible on native title land. The Native Title Act 1993 was amended by the Native Title Amendment Act, 1998 which was prompted by the High Court decision in Wik, and severely curtailed native title rights. In addition to Commonwealth provisions there are various State and Territory regimes. The relevant legislation in the Northern Territory is the Aboriginal Land Rights (Northern Territory) Act, 1976 which was prompted by the Milirrpum decision. The Act which has been amended twice is currently being reviewed by the Commonwealth. Further claims of land on pastoral leases were made possible by the Pastoral Land Act, 1992.

[192] Pastoral leases are a special form of land tenure created by the British Colonial Office as a response to the seizing by squatters of large areas of land in the 1830's and 1840's. A feature of the leases was that they did not grant the squatters exclusive tenure and that the land remained in the ownership of the Government. Whilst the leases did not grant exclusive tenure, they did grant exclusive rights of use for grazing.

[193] On this point see 'Forum - Wik: The Aftermath and its Implications' *University of New South Wales Law Journal* Volume 3, No. 2, June 1997.

conveyed a specific right to exclusive possession, then the native title was extinguished. If, however, the rights were not necessarily in conflict and could continue to co-exist, then the native title was not necessarily extinguished. In the present cases the High Court found that whilst the holders of the leases had been granted certain rights over the land, they were not entitled to exclusive possession and any native title which existed would not necessarily be extinguished. The second issue left unresolved by Mabo was native title to the seas. This was resolved in the Commonwealth v. Yarmirr[194] where the Court said that non-exclusive native title rights in the seas could be recognised. The Court continues to develop the jurisprudence on the nature and extent of native title. The two other most important cases are Western Australia v. Ward and O'rs[195] where the Court found that native title was not a single indivisible right, but consisted of a bundle of connected rights and that it is possible for the title to be only partially extinguished, and Members of the Yorta Yorta Aboriginal Community v. Victoria and O'rs[196] where the Court found that native title is extinguished if the group concerned has ceased to practice its traditional lifestyle in a way which is clearly connected to that of the time before settlement.[197]

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[194] (2001) 208 CLR 1.
[195] (2000) 99 FCR 316.
[196] (2002) 194 ALR 538
[197] These cases have generated much academic comment and analysis: see, for example, Cockayne. J. 'Members of the Yorta Yorta Aboriginal Community v. Victoria; Indigenous and Colonial Traditions in Native Title (2001) *Melbourne University Law Review* 25; Bartlett. R. 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* Vol. 31, Feb. 2003, 35-46; Barnett. K. 'Western Australia v. Ward; One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' (2000) *Melbourne University Law Review* 17.

The decision in Mabo is unsatisfactory for a number of reasons. The reliance on public international law, and on its current thinking on *terra nullius*, is misplaced on two grounds. First, public international law has no precedential value in the Australian legal system and cannot even be argued to be persuasive in the face of clear domestic authority to the contrary such as Cooper v. Stuart. It would have been possible, of course, for the High Court to overrule Cooper v. Stuart and it could then have looked to international law to provide persuasive authority. However, it did not do so. Second, having looked to international law, the Court then misapplies it. First, it fails to take due account of intertemporality. Whilst that doctrine could be displaced - and in any event, as a doctrine if international law, does not bind the High Court - it does exist and, the Court having invoked international law, should not simply be ignored without adequate justification. Second, the Court invents a new method of acquiring territory: settlement of land which is not *terra nullius*. There is no basis in international law for such a finding and by the invention of this new category, the High Court created further difficulties. If the Court had found that, as the land was not *terra nullius*, the acquisition was not by settlement but by conquest, it would have employed a recognised means of acquiring territory and, moreover, the end result would have been very similar. Whilst customary law would have survived conquest until extinguished by subsequent incompatible law, very little, and certainly no criminal law, would not have been so extinguished.[198] What survived would have been, in the main, customary property rights.

[198] *Supra* 64-65 and n 89.

It would have been more appropriate, and more correct, for the Court to have founded its decision entirely on domestic law. If it was intent on undoing the original categorisation of the events of 1770-1788 as settlement of *terra nullius*, it could simply have overruled Cooper v. Stuart without any discussion of international law. As the Court of last resort in the Australian system, it has the power to overrule previous decisions, including those of the Privy Council. It would then have been free to reassess the acquisition of the territory and its consequences.

If the Court was primarily interested in the development of the common law to allow the recognition of native title, it is submitted that it should have analysed the matter as one of the survival of property rights as common law native title. This would have rendered any discussion of settlement and *terra nullius* unnecessary and the same conclusion would have been reached. However, it seems clear that the decision was made in its present form at least partly for political reasons, out of a desire to right a historical wrong and to promote justice and fairness as the Court perceived them: what Webber describes as a "jurisprudence of regret".[199] This view is supported by the fact that *terra nullius* was largely irrelevant to the facts of the case, the plaintiffs' rights being a matter of common law title native title. In the

[199] Webber. J. *supra* n 170. On these points, see also: van Krieken. R. and Simpson G. both *supra* n 170. Simpson says: "The judgment represents legal decision-making at its most politically charged and emotionally resonant" at 196 and that the "High Court appears to have developed a theory of acquisition that is politically expedient but ultimately indefensible." at 197-198.

final analysis, these laudable aims have produced a decision which is legally flawed.

1:5:. Subsistence of customary criminal law Post-Mabo:

The most immediately apparent application of the *terra nullius* doctrine is, of course, in relation to native title, but there are other areas where it may have application[200] and the implications of this decision for the recognition of other areas of pre-existing law are not clear. The decision in Mabo, and the ensuing case-law and legislation, accept customary land law as the basis of assessing claims to native title. It has been argued in a series of cases since Mabo that if customary land law survived 1788 and the establishment of British sovereignty, then other forms of customary law, including on matters which are part of state criminal law, may also have survived. These arguments will now be considered, but there is in reality nothing in the Mabo decision to substantiate them and all such attempts to date have failed. None of the cases develop the law significantly and it will be sufficient to cite three as indicative of the general arguments. Moreover, even if the reasoning in Mabo is applied to other areas of pre-existing law, they must not only have survived settlement, but not have been subsequently extinguished. Therefore, any inconsistent statute or judicial decision would serve to defeat them. Clearly in the field of criminal law this extinguishment would be likely to be total.

[200] See Yeo, 'Native Criminal Jurisdiction after Mabo' (July, 1994) *Current Issues in Criminal Justice,* Vol. 6. No. 1, 9.

One of the first criminal cases to challenge the jurisdiction of the Court basing its arguments on Mabo was R. v. Archie Glass[201]. Sulley J. rejected the argument saying:

> "Before leaving the case I should perhaps advert, however briefly, to what the applicant has been pleased to describe as a challenge to the jurisdiction of the Court. It is based, as I have followed it, upon the notion that the recent decision of the High Court in the Mabo case entails by reason of that decision's rejection of the common law doctrine of terra nullius, that the courts of this country, and this court in particular, do not have jurisdiction over a person in the present position of the applicant.
>
> It is apparent from what the applicant has said in support of that challenge that he is misinformed as a good many other people seem to be about what exactly the High Court said in the Mabo case and about what exactly are the limits of the consequences. I think that it needs to be said very plainly indeed that it would be a very great mistake for anybody in the position of this applicant to run away with the idea that the Mabo decision, taken at its highest point, entails that there has been introduced into this country a differential system of law which creates classes of citizen to some of whom the law applies and to some of whom it does not apply.
>
> ... Generalised appeals to the Mabo decision, to terra nullius, to undeclared states of war, to customary and tribal law and practice, to something said by Mr. Justice Rath decades ago and to the International Court of Justice at the Hague, will not sway this Court, and I hope will not sway any other Court, from the principles that all are equal before the law and that the law applies equally to all."[202]

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[201] Supreme Court of New South Wales - Criminal Division. Sulley J. 22 January 1993. Unreported. See: Behrendt. J. *Aboriginal Law Bulletin* Vol. 3. No. 63. August 1993, 18.
[202] At 18-19.

Six months later the case of R. v. Leeton James Jacky[203] came before the same Court and again the accused argued that the Court had no jurisdiction in the light of the Mabo decision. However, in this case the argument was slightly different. It was accepted in argument that prior to the Mabo decision the Murrell case was binding authority for the proposition that the instant Court had jurisdiction to try Aborigines. The question was whether Mabo had overruled Murrell. Campbell J. said:

> "For the reasons stated by Rath J. in R. v. Wedge (1976) 1 NSWLR 581 at 586, I am bound by the decision in Murrell unless Mabo has expressly overruled that decision or, perhaps, the reasoning of the High Court clearly overrules the earlier decision.
>
> .....
>
> It is common ground that Mabo does not expressly overrule Murrell, and I am of the view that the reasoning in the judgements does not impliedly do so.
>
> ... It is my opinion that I remain bound by Murrell to hold this Court had jurisdiction to deal with the charge against the accused. Further, I would, on authority and principle, take the same view were I not so bound."[204]

It seems to have been established beyond doubt that customary criminal law did not survive 1770-1788 by the High Court decision in the appeal case of Walker v. New South Wales[205]. Walker claimed that he could not be guilty of an offence because he was not amenable to State or Commonwealth criminal law, the

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[203] Supreme Court of New South Wales - Criminal Division. Campbell J. 10 June 1993. Unreported. See: Flood. S. *Aboriginal Law Bulletin.* Vol. 3. No. 63. August 1993, 19.
[204] At 19.
[205] (1994) 69 ALJR 111.

Australian Parliaments having no power to legislate for Aborigines without consent. The Court ruled that the pleadings were untenable as they were couched in terms which asserted the legislative incapacity of the state and essentially denied that sovereignty had been acquired in 1770-1788. Mason CJ. referred to his own judgment in the case of Coe v. The Commonwealth[206] where he pointed out that there was nothing in Mabo to suggest either that the Crown lacked sovereignty or that the Aboriginal people possessed it:

> "Mabo (No. 2) is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law."[207]

However, he goes on to point out that, regardless of the way in which the pleadings were drafted, counsel for Walker had argued on the point of the possible recognition by the common law of a surviving customary criminal law, analogous to the native title recognised in Mabo. The Court rejected that argument and stated clearly and unambiguously that the criminal law was the

[206] (1993) 118 ALR 193.
[207] At 200.

same for everyone regardless of race[208] and that there was no analogy between native title and criminal law. Even if customary criminal law had existed and survived, it had been extinguished by general criminal statutes.[209] Such a definitive statement from the High Court rules out any possible argument that some form of customary criminal law survived 1770-1788.

1.6: Conclusion:

It has been argued that the acquisition of Australia was correctly categorised as by settlement. The law which validated it now seems morally unacceptable, but that does not affect the legality of the acquisition. The reasoning in the Mabo case is not inconsistent on this point. The finding of *terra nullius* is declared to have been wrong. There can only possibly be two reasons why this might be so: either that the then current law was applied incorrectly and the finding can therefore be overturned; or that the present law can overturn that finding even though it was correct at the time. The first suggestion would require not only that the assessments on which the finding of *terra nullius* was made were wrong, but also that they have not since been ratified. The second argument requires that the current law may reverse a finding made over two hundred years ago even though it was correct at the time. Both these approaches are possible.

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[208] At 113.

[209] At 115. Subsequently Walker was charged with another offence and applied to the High Court for an Order that he be tried by a magistrate sitting with the Elders of the area where the offence occurred. This application was rejected. See: Walker v. Speechley S133/1997 (17 August 1998) High Court of Australia Transcripts, cited and discussed in Purdy. J. "'I Suspect You and Your Friends are Trifling with Me": Encounters between the Rule of Law and the Ruled' *Australian Journal of Law and Society* (2000-2001) 15, 67-89, at 67-74.

The judiciary cannot, of course, admit to making new law, however desirable, and thus the common law courts are frequently faced with the need to reinterpret a previous decision in order to reach a different conclusion. However, whichever of the two approaches is taken, the result ought to be either an acknowledgement that the British occupation was illegal or a reclassification of the events as conquest. The High Court took neither of these courses of action and did not overturn the finding of settlement, the inescapable consequence of finding that the land was not *terra nullius*. Instead it seems to have invented a new category of acquisition – settlement of occupied land. Whatever the correct interpretation of 1770-1788 or of the Mabo decision, it is beyond dispute that sovereignty and jurisdiction were acquired by settlement. It is possible that some property rights survived, but this does not amount to a recognition that there was customary law system in force which system has survived until the present day[210] and is of little assistance in areas other than native title.

[210] In reality, of course, the customary legal system has survived in the unofficial sphere, unrecognised by the state.

Chapter 2: Analysis of possible arguments for the recognition of customary law

2.1: Introduction:

Given the conclusion reached in Chapter 1 that customary law did not, in the view of the state, survive settlement as a cognisable legal system, the next question is to what extent should or can customary law be relevant to the present-day Australian criminal law? The first point to consider is whether there is an obligation upon a state to recognise the existence of customary law, particularly in respect of an indigenous population. It will be demonstrated that there is no such obligation. The arguments for and against voluntary recognition will then be discussed. On balance it seems that some recognition is desirable and the Chapter will then outline a variety of ways in which such recognition might be effected. However, all these proposals are problematic, both practically and theoretically, and it will be suggested that the best way forward is minimal incorporation thus maintaining largely uniform standards, but with flexible application by the judiciary. The actions of the judiciary will be discussed in detail in Chapters 3 – 5.

2.2: Obligation to recognise customary law:

Once it is acknowledged that Aboriginal customary law did not survive 1788 as a cognisable system, an obligation to recognise it today can only be derived from one source: public international law, law which, of course, binds the

Australian state. It might seem paradoxical for Aborigines to look to international law for assistance in asserting their claims. It was, after all, international law which categorised the acquisition of Australia as settlement and thereby refused recognition to customary law. However, international law is no longer the exclusive preserve of western states, though they undeniably remain the most powerful actors. The international community today is more diverse than in 1788 and the approach of the western powers has shifted. Thus, it is not unreasonable to examine international law to see if it will support claims for recognition.[211] It is beyond the scope of the Thesis to examine international law in detail or to look at the consequent question of whether, if such an obligation does exist, there is any scope for the judiciary to incorporate such law in their judgments in the absence of legislation.[212] Australia clearly has multiple obligations under international law many of which affect the situation of Aborigines, in some cases disproportionately or specifically.[213] The application of public international law, including international human rights law, to groups in general, and indigenous peoples in particular, is unclear and no attempt will be made to analyse it in detail. There are, however, three areas of international law which are relevant and need to be considered: international human rights

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[211] This point is made by Pritchard when considering the relevance of public international law to indigenous peoples and highlighting recent developments which have allowed non-state actors to be subjects: Pritchard. S. (ed.) *Indigenous Peoples, the United Nations and Human Rights* London: Zed Books Limited, 1998, at 2-3.

[212] Australia has a dualist legal system and, therefore, international law obligations are not part of domestic law unless incorporated.

[213] There is useful collection of links to internet websites dealing with Australia's international law obligations in respect of indigenous peoples at: http://www.hreoc.gov.au/social_justice/ internat_ develop.html (last accessed 11 April 2004).

law, the law on the rights of minorities and groups and the law relating to indigenous peoples.[214]

i. International Human Rights Law:

International human rights law requires states to respect and protect the various rights of individuals and, in some cases, groups. An Aborigine is, of course, entitled to the same individual rights as any other person and to seek the protection of those rights in the relevant *fora*. Moreover, the application of legitimate state laws and/or policies may affect Aborigines disproportionately and those laws and/or policies may be violations on the grounds of that disproportionality. Violations have arisen most frequently in relation to the rights protected under the International Convention on the Elimination of All Forms of Racial Discrimination, 1966[215], (hereinafter 'CERD'), the International Covenant on Civil and Political Rights, 1966 (hereinafter 'ICCPR'), the International Covenant on Economic, Social and Cultural Rights, 1966, (hereinafter 'ICESCR') and the Convention on the Rights of the Child. Under all these systems specific aspects of the treatment of Aborigines has been condemned.[216]

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[214] Only international law applicable to Australia will be considered and, therefore, there will be no discussion of, for example, European regional regimes for the protection of minorities.

[215] Note the Committee on the Elimination of Racial Discrimination's General Recommendation 23 on the rights of indigenous peoples under CERD. Paragraph 4 calls on states to ensure against discrimination and also to recognise indigenous cultures including "traditions and customs". It is, however, unlikely that this could be used to argue for the mandatory acceptance of customary law.

[216] See, for example: Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia 19/04/2000 UN Doc. CERD/C/304/Add.101 which contained criticisms based, *inter alia*, on amendments to native title legislation, the 'stolen generations', the rate of

Of particular relevance is Article 27 of the ICCPR which reads:

> "In those states in which ethnic, linguistic or religious minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

This Article has been the basis of many communications by indigenous peoples under the individual complaints procedure of the Optional Protocol.[217] Article 27 always gives rise to difficulty of interpretation, usually on two points. First, the wording suggests that the rights are given to individuals to practice aspects of their culture together with other members of the group. The Committee has made this clear in General Comment 23[218] on Article 27 where it stated:

> "The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognisable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognisable under the Optional Protocol."[219]

Aboriginal incarceration, and mandatory sentencing; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia 1/09/2000 UN Doc. E/C.12/1/Add.50 which contained criticism of the Native Title Amendment Act, 1998. For a general discussion of Australia's response to its obligations under United Nations human rights regimes, see: Hovell. D. 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' *Alternative Law Journal* Vol. 28, No. 6, Dec. 2003, 297-301.

[217] Australia ratified in 1991. It also accepted the individual complaints procedure under CERD in 1993.

[218] General Comment No. 23 (50) (art. 27) adopted by the Human Rights Committee at its 1214th meeting on 6 April 1994.

[219] Paragraph 3.1.

However, it goes on to recognise the special quality of these personal rights:

> " ... The protection of (article 27) rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant."[220]

Second, it appears to require only that the state does not prevent this right from being exercised, rather than that it has a positive role to ensure that it is possible to do so. Both these restrictive interpretations are reasonable given the context: a regime for the protection of first generation, civil and political rights, premised on the rights of an individual to have the state refrain from interfering in particular aspects of her/his life. If read in that way, Article 27 adds little to the other provisions of the Covenant and is of no assistance to groups which cannot exercise the rights for some reason other than state interference. However, the Human Rights Committee has shown itself ready to depart from that interpretation in a number of cases. Thus, for example, in the Lubicon Lake Band case[221] the Committee by protecting an individual's right to culture, which included economic and social activity, protected his community's claim to control over land and natural resources and thereby effectively used Article 27 and the First Optional Protocol to protect a group right. Yet even if the Article can be read to impose positive obligations on the state - to ensure conditions

[220] Paragraph 9.

[221] Ominayak and the Lubicon Lake Band v. Canada Communication No. 167/1984, Human Rights Committee, *Report of the Human Rights Committee*, UN Doc. A/45/50 (1990). See also: Kitok v. Sweden UN Doc. A/43/40 (1988) where the same reasoning was applied though there was no violation on the facts.

under which members of minorities can exercise their rights, including the prevention of interference by others – it cannot realistically be argued that it imposes a duty to recognise customary law. Indeed in Lovelace[222], which concerned the discriminatory loss of rights of residence by a woman on marrying a non-Indian, the opposite was almost the case and Article 27 was understood to impose a duty to protect the rights of the individual by not recognising traditional principles governing group membership.[223]

ii. Minority and Group Rights:

International law provisions on the protection of minority rights are usually related to the principles of equality and non-discrimination. There is a distinction between the recognition or acceptance of such minority rights, cultures or practices[224] and an acceptance of the right of that minority to self-determination. As discussed above, whilst it seems that Article 27 gives rights to individuals rather than to the group, it is clear that some group rights are recognised at international law though their scope and enforceability is

[222] Lovelace v. Canada, Communication No. 24/1977, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc. CCPR/C/OP/1 (1988) pp. 86-90.
[223] For a discussion of Lovelace and of the apparent clash between the right of indigenous women to equal treatment and of the group to self-determination, see: Knop. K. *Diversity and Self-Determination in International Law* Cambridge: Cambridge University Press, 2002 at 358-372.
[224] These have enjoyed a long history and have been consistently recognised in the major international regimes and jurisprudence. See, for example: South West Africa Cases (Second Phase) (1966) ICJ Rep 1966 (Judge Tanaka dissenting opinion). See also: the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* General Assembly Resolution 47/135 1992.

contentious.[225] This is particularly so of the right to self-determination[226], the availability and scope of which is uncertain outside a colonial situation.[227] In order to claim the right to self-determination the group must satisfy the *criteria* of international law and it may then make a choice about its own future. The availability of the legal right to self-determination for indigenous groups is unclear. In the Lubicon Lake Band case the Human Rights Committee stated that Article 1 could not be the subject of an individual complaint under the Optional Protocol although it went on to consider the substance of the complaint under Article 27. Moreover, in its Concluding Comments on the initial report made by Azerbaijan, the Committee took the opportunity to make some general remarks on self-determination and stated specifically that the right in Article 1 of the ICCPR is not limited to the colonial context, but extends to all peoples.[228] The right to self-determination does not necessarily include the right to secede and the majority opinion amongst scholars is that there is no right to secede except in two circumstances: overt colonialism or reclaiming state territory which is subject to unjust military occupation.[229] However, the precise legal scope of self-determination[230] short of secession is unclear. Lapidoth[231] argues

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[225] On group rights generally, see: Alston. P. (ed.) *People's Rights* Oxford: Oxford University Press, 2001.

[226] Art. 1 of ICCPR and ICESCR. See also, the many General Assembly Resolutions defining the scope of the right, especially the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations* Resolution 2625 (XXV) 1970.

[227] For a general discussion of the right see: Crawford. J. 'The Right of Self-Determination in International Law: Its Development and Future' in Alston. P. *supra* n 225 at 7-67.

[228] Human Rights Committee, *Report of the Human Rights Committee*, UN Doc. A/49/40 (1994), paras. 291 ff, 296.

[229] On these points see: Cassese. A. *Self-Determination of Peoples: A Legal Reappraisal* Cambridge: Cambridge University Press, 1995 at 37-38.

[230] The language of self-determination is often used imprecisely, in a political rather than a legal sense, to describe any choices made or actions taken by the indigenous group.

that there is no right to autonomy outside full self-determination which is only clearly available in the two cases outlined above. However, her study explicitly excludes indigenous peoples and they may be a special case. [232] The emerging law in this area is unclear and will be considered below, but it seems unlikely that it could be argued that the recognition of customary law is mandatory.

iii. Rights of Indigenous Peoples:

The most obviously applicable area of law, potentially providing a better prospect of recognition of customary law as an obligation, is the developing field of the rights of indigenous[233] peoples.[234] However, there is very little

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[231] Lapidoth. R. *Autonomy: Flexible Solutions to Ethnic Conflicts* Washington, DC: United States Institute of Peace Press, 1996 at 177, cited in Buchanan. A. *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* Oxford: Oxford University Press, 2004 at 342.

[232] For consideration of the right to self-determination in the context of the Aborigines, see: 'Self-determination and effective participation "within the life of the nation"? An Australian perspective on self-determination' at: http://www.hreoc.gov.au/social_justice/international_docs/self_determination. htm) (last accessed 12 April 2004) and Aboriginal and Torres Strait islander Social Justice Commissioner 'Self-determination – the freedom to 'live well'' in *Social Justice Report 2002* at http://www.humanrights.gov.ay/social_justice/sjreport_02/chapter2.html (last accessed 12 April 2004).

[233] It is worth noting at this point that there is no universally accepted definition of 'indigenous'. The most commonly used is that given by the Special Rapporteur on Indigenous Populations:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories .... They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." José Martinez Cobo *Study of the Problem of Discrimination against Indigenous Populations.* UN Doc E/CN.4/Sub.2/ 1986/7/Add. 4, para 379 (1986).

There may be uncertainty as to whether a given group is an indigenous population, a minority or both. On the difficulties which arise over the precise definition, status and rights of access of indigenous peoples at international law, see: Ketley. H. 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples *International Journal on Minority and Group Rights* 8: 331-368, 2001, and Sheleff. L. *supra* n

55 at 153-171. Difficulties may also arise as to the status of an individual as indigenous. Such status is usually defined by descent, self-identification and acceptance by the group.
There is also no clear definition of 'Aboriginality'. If, and howsoever, customary law is recognised it will be applicable mainly to Aborigines, though it might, for example, be applicable to a white person married to an Aborigine if that marriage were governed by customary law. Any such scheme will necessarily entail some method of determining who is an Aborigine for this purpose. There are difficulties both in identifying who is an Aborigine and in attempting to classify different groups of Aborigines. Early attempts at defining Aboriginality tended to concentrate on biological descent. On genetic descent as a determinant of Aboriginality, see: Australian Law Reform Commission *Essentially Yours: the Protection of Human Genetic Information in Australia* Report 96 Sydney: Commonwealth of Australia, March 2003, paras. 36.1 – 36.75. Such a stress is unacceptable today for two reasons: first, it undervalues the importance of other elements of Aboriginal identity, such as social belonging; second, it is widely accepted today that 'race' is a socially constructed category and not simply a question of genetic descent. The generally accepted test today for determining a person's legal status as Aboriginal dates from the early 1980's and is the threefold test outlined above - descent, self-identification, and acceptance by the community: Department of Aboriginal Affairs *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders* Canberra: Commonwealth of Australia, 1981, unpublished, cited in *Essentially Yours* at para. 36.14. This test was cited with approval by the High Court in The Commonwealth of Australia v. Tasmania (1983) 158 CLR 1:

> "By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of the term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal." Per Deane J. at 273-274.

The Australian Law Reform Commission considered the question at some length in *The Recognition of Aboriginal Customary Laws* (Summary Report, Full Report 2 Volumes), Final Report No. 31 Canberra: Australian Government Publishing Service, 1986, paras. 88-95. It agreed with the broad threefold test and concluded that "there are distinct advantages in leaving the application of the definition to be worked out so far as is necessary on a case by case basis." at para. 95. This view was endorsed by the Northern Territory Law Reform Committee in its 2003 Report *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory* Darwin: Northern Territory Law Reform Committee, 2003 at paras. 3.2 and 3.3. The exact definition of Aboriginality has moreover, whilst much debated in political and academic *fora*, rarely been a significant issue before the Courts. On these points, see, for example: de Plevitz. L. and Croft. L. 'Aboriginality under the Microscope: The Biological Descent Test in Australian Law' Vol. 3, No. 1, *Queensland University of Technology Law and Justice Journal* (2003) 1-17.
A further difficulty arises, however, in the assessment of the lifestyles of different groups. 'Aborigines' are not, of course, a homogenous group. The Task Force appointed by the government of Western Australia to report on Aboriginal Social Justice in that state pointed out that Aboriginal people believed that there were at least six separate sub-groups or types of Aboriginal society: tradition-oriented communities in settlements formed prior to European occupation with a high degree of observance of cultural traditions; those in homeland centres or outstations who had moved to these settlements of their own will and were classified by the Task Force as self-governing; Aborigines in non-traditional communities such as government reserves or missions; Aborigines living in metropolitan urban communities, i.e. in discrete groups of dwellings or in areas with high concentrations of Aboriginal people; rural isolated Aborigines living in minor urban centres and including those who do not live in groups; and metropolitan urban isolated Aborigines living in major cities but who could not be identified as part of an urban Aboriginal community. Western Australia Task Force on Aboriginal Social Justice *Report of the Task Force on Aboriginal Social Justice* Perth: Government of Western Australia, 1994. Alongside these lifestyle divisions are tribal divisions. Presumably Aborigines in other states and territories would identify a similar diversity. Such distinctions may be important because, as will be discussed throughout the Thesis, judges have

binding substantive law in this area: the only specific instruments are the International Labour Organisation Convention 107[235] of 1957 and International Labour Organisation Convention 169 of 1989[236]. The provisions of Convention 107 were essentially assimilationist[237] in that they were intended to enhance the position of members of indigenous groups in order that they might enjoy the same rights and standards of living as other individuals and thereby to integrate them into wider society.[238] It has been much criticised on that account, but as

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often drawn a distinction between Aborigines who live 'traditional' lifestyles and others and that distinction has been relevant in their consideration of matters before them.
Attempts to define Aboriginality and to classify Aborigines into groups are not universally accepted as either possible or desirable. The Australian Law Reform Commission declined to give a definition of 'traditional Aborigine': Report 31 at para. 95 and the Royal Commission into Aboriginal Deaths in Custody acknowledged the difficulties, pointing out both that the definition and categorisation of Aboriginality has shifted over time and also that many Aborigines resent such attempts when made by non-Aborigines: Royal Commission into Aboriginal Deaths in Custody, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (5 Volumes) Canberra: Australian Government Publishing Service, 1991-1992 at paras. 11.12.20 and 11.12.4. Charles argues that the use of terms such as 'tribal', semi-tribal' and 'urban' are "colonial relics that, in an attempt to categorise, serve only to further mystify and confuse European conceptions of Aboriginal life" Charles. C. 'Sentencing Aboriginal People in South Australia' (1991) 13 *Adelaide Law Review* 90 at 92. He quotes Cowlishaw who argues that such categories are artificially created, based on racist notions and bestow meanings on otherwise neutral phenomena such as biological characteristics. See: Cowlishaw. G.K. 'Colour, Culture and the Aboriginalist' (1987) 22 *Man* 221 at 227-228, quoted in Charles. C. at 93-94. See also: Cowlishaw. G.K. 'Censoring Race in "Post-Colonial" Anthropology' *Critique of Anthropology* Vol. 20(2), 101-123 (2000) and *Blackfellas, Whitefellas and the Hidden Injuries of Race* Oxford: Blackwell, 2004. This bestowing of meaning, Charles argues, renders the use of such categories inappropriate in judicial activities such as sentencing. However, despite these objections it seems likely that the judiciary will continue to classify people as Aborigines and to differentiate between 'types' of Aborigines – albeit on a rather informal and inexact basis - in order to assess the relevance of customary law in a given case. Indeed, it is difficult to see how they can do otherwise if they are to take cognisance of customary law at all: the only alternative would seem to be to apply it to everyone.

[234] For overviews of the position of indigenous peoples under international law see: Anaya. S.J. *supra* n 95; Brownlie. I. *Treaties and Indigenous Peoples* Oxford: Clarendon Press, 1992; Crawford. J. (ed.) *The Rights of Peoples* Oxford: Clarendon Press, 1988; Pritchard. S. (ed.) *supra* n 211; Thornberry. P. *Indigenous Peoples and Human Rights* Manchester: Manchester University Press, 2002; Kingsbury B. 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in Alston. P. *supra* n 225 at 70-110.

[235] Convention 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 1957.

[236] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

[237] For discussion of assimilation, see *supra* n 85.

[238] For discussion of this point, see Anaya. S.J. *supra* n 95 at 44-45.

Anaya points out[239], it served to put indigenous peoples on the international human rights agenda and thus on the public international law agenda, till then closed to them on the basis of its statist position. Convention 169 removed the assimilationist perspective and provided for greater recognition of indigenous institutions and lifestyles within the framework of the state. However, it should be noted that whilst Convention 169 is undoubtedly a more radical document than its predecessor, it is still based on the premise that the state retains ultimate authority over indigenous peoples: this is not a recognition of independence or a return to pre-colonial days. Moreover, the provisions dealing with customary law make it clear that whilst it should be taken seriously, it is not an alternative system of equal standing and that it is subject to the endorsement of the state.[240]

The United Nations, and its various organs, has produced a vast amount of documentation, studies and proposals on indigenous peoples[241] including the Draft United Nations Declaration on the Rights of Indigenous Peoples[242]. This is a wide-ranging document including specific rights to self-determination and to the use of customary law, though this latter right is expressed to be "in accordance with internationally recognized human rights standards"[243]. It does not, however, include any definition of 'indigenous'. The recent Report of the

[239] Anaya. S.J. *supra* n 95 at 45.
[240] Articles 8, 9 and 10.
[241] Non-Governmental Organisations have been crucial to placing issues on the agenda of the United Nations and to helping shape the content of the documents. However, they do not, of course, make law.
[242] U.N. Doc. E/CN.4/Sub.2/1995/2, E/CN.4/Sub.2/1994/56.
[243] Article 33.

Special Rapporteur on Indigenous Issues[244] to the Human Rights Commission also recommends that states reform criminal justice systems in a way which "should include respect for indigenous legal customs"[245]. However, neither this Report nor the Draft Declaration has any legal force, although the latter may be useful as a standard-setting exercise. Indeed, nothing produced by United Nations has any legal effect in promoting the recognition of customary law. Brownlie says:

> "The fact remains that in the sphere of law-making activity and the sponsorship of legally binding instruments, the United Nations has not done anything substantial to recognize the interests of indigenous populations outside the agenda of normal human rights protection."[246]

iv. Conclusion:

It can be seen from the above brief analysis that there is no obligation on a state to recognise customary law as a system. Where a situation breaches international law, there is an obligation on the state to remedy it. However, whilst it is possible that the subject matter of such cases may relate to customary law, none of the provisions discussed place an obligation on the state to recognise such law as a right enjoyed by an individual or a group. Moreover, it should perhaps be noted that greater involvement of public international law

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[244] *Indigenous Issues: Human Rights and Indigenous Issues Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen* E/CN.4/2004/80 26 January 2004.
[245] At 3.
[246] Brownlie. I. *supra* n 234 at 66-67

would not necessarily always operate to the advantage of those who seek to incorporate customary law. There are several reasons for this caution. First, non-discrimination and equality before the law is a well-enshrined principle of international law. This need not be fatal to special regimes for indigenous peoples (indeed they may be supported by the notion of affirmative action) or for customary legal systems, but it is likely to provide baseline tests which must be met.[247] Second, some of the content of customary law may fall short of the requirements of public international law and especially of international human rights law. Again this is not an insoluble problem - rights often clash – but it should not be assumed that the recognition of customary law as a system would necessarily enable it to be incorporated *in toto* and to be free of any external supervision. Third, whilst the state may not be liable for, for example, unacceptable sanctions if it has not endorsed them - on the principles of the public-private divide and state responsibility - it will become liable if it has itself endorsed the customary system and this is likely to mean a reluctance to do so. Finally, international law may actually place an obligation on a state to alter or prohibit certain customary practices.[248]

It is, however, arguable that whilst the provisions discussed above do not create binding obligations, it is desirable to operate in a way which respects them and thus that they may, in fact, inform and encourage voluntary compliance and

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[247] See *infra* 137-145.

[248] On this point see: An-Na'im. A.A. 'State Responsibility under International Human Rights Law to change Religious and Customary Laws' in Cook. R.J. (ed.) *Human Rights of Women: National and International Perspectives* Philadelphia: University of Pennsylvania Press, 1994, at 167.

recognition. This is the – at least implicit - position taken by the judiciary when they make use of their powers of interpretation and discretion to further the use of customary law in the state legal system.[249]

2.3: Voluntary recognition of customary law:

Having concluded that there is no international legal obligation on Australia to give recognition to customary law, the next question is whether such recognition is desirable and should be accorded voluntarily. There are some significant practical reasons to recommend at least some acceptance and also several moral or philosophical arguments which suggest that it should be considered. The former are instrumentalist[250] and aimed at the need to redress past injustice or the elimination of present social disadvantage. It may be, of course, that the recognition of customary law would go some way to achieving these ends. However, there is no inevitable causal connection and it would need to be established in each case. With that *proviso*, both instrumentalist arguments and those which maintain that the acceptance of diverse cultural norms is desirable *per se* can be used to support the case for recognition.

[249] See: Cranwell. G. 'Treaties and Australian Law Administrative Discretions, Statutes and the Common Law' (2001) *Queensland University of Technology Law and Justice Journal* 5.
[250] 'Instrumentalist' is used to mean with a particular practical end in mind; it does not connote the absence of any moral consideration in the desire to meet that end.

i. Instrumentalist arguments:

a. Past injustice[251]:

The first of these arguments is based on past injustice. This is not simply about the desirability of treating people or groups equally, but is tied to recognition of historical injustice. Whilst the international law of 1770-1788 meant that settlement was legally justified, there is no doubt that in 2004 it is understood to have been morally indefensible. This acknowledgement of moral failing and the accompanying sense of guilt have been the imperative behind many state initiatives and policies, some of which will be discussed below.[252] It is true that in most, if not all, of these situations there has been considerable lobbying and pressure by Aboriginal groups, by other activists and by Non-Governmental Organisations prior to such action being taken. Nevertheless, such action can only be effective, in the absence of legal obligation, if taken against a reasonably responsive state. This sense of failing and guilt has also affected judicial decision-making, including as has already been discussed[253], in relation to native title and Mabo. Webber[254] maintains that this regret for past injustice caused a moral unease which was the main rationale behind the decision and Connolly says of the

[251] For discussion of the theoretical basis of the 'obligation' to make recompense for past injustice, see: Thompson. J. 'Historical Obligations' *Australasian Journal of Philosophy* Vol. 78, No. 3 September 2000, 334-345; Sparrow. R. 'History and Collective Responsibility' *Australasian Journal of Philosophy* Vol. 78, No. 3 September 2000, 346-359; Ivison. D. 'Political Community and Historical Injustice' *Australasian Journal of Philosophy* Vol. 78, No. 3 September 2000, 360-373.

[252] See, for example, *infra* 134-136 for discussion of the stolen generations.

[253] *Supra* 112-113.

[254] See: Webber. J *supra* n 170.

decision that it "was, of course, a political one in the sense that it was based on considerations of social policy"[255]. The moral imperative behind Mabo has also been operative in other judicial decisions and will arise at various points throughout the Thesis. This need for redress is not restricted to the original events of 1770-1788. The treatment of Aborigines both in the immediate aftermath of settlement and until very recent times has been deplorable. Clearly this cannot be undone, but a two-fold strategy is now necessary: first, some recompense for the past should be made[256]; and second, policies which ensure that no further injustice is committed or continues should be adopted. Often, of course, these are intertwined.

Recompense for the past may take various forms.[257] There have been symbolic gestures - sometimes of greater importance than is immediately apparent - and the recognition of native title rights, which includes taking cognisance of at least some elements of customary law, goes some way to undoing the confiscation of lands. One of the most vexed questions is that of reparations and/or compensation. There is some progress towards acceptance of this concept, at least in limited circumstances. Thus, the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*[258], which found various violations of human rights in respect of the stolen generations,

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[255] Connolly. P.D. 'The Theory of Universal and Absolute Crown Ownership' *University of Queensland Law Journal* Vol. 18, 1994-1995, 9 at 11.
[256] The use of the term 'recompense' – or similar - should not be taken to imply that the past can somehow be redeemed by payment of whatever kind.
[257] On this point generally, see: Follesdal. A. 'Indigenous Minorities and the Shadow of Injustice Past' *International Journal of Minority and Group Rights* Vol. 7 (2000) 19-37.
[258] Sydney: Human Rights and Equal Opportunities Commission, 1997.

recommended, *inter alia*, reparations which were to include acknowledgement and apology, and resources for rehabilitation and monetary compensation.[259] Whilst the Commonwealth Government rejected many of the Report's findings, it has established a fund for rehabilitation though thus far it will not countenance monetary compensation.[260] Clearly the state fears a floodgates effect if reparations are granted. The 'Stolen Generations' is only one issue for which such claims seem at least morally justifiable. There have been a number of cases claiming compensation for genocide all of which have failed.[261] Whilst monetary compensation will never be adequate, it is difficult to see what else can be offered

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[259] The Senate Legal and Constitutional Reference Committee recommended in its report *Healing: A Legacy of Generations*, November 2000, on the implementation of the National Inquiry recommendations that a Reparations Tribunal should be established. See also the similar recommendations made by the *Moving Forward – Achieving Reparations for the Stolen Generations Conference*, held on 15 - 16 August, 2001.

[260] See: Pritchard. S. 'The Stolen Generations and Reparations' *University of New South Wales Law Journal* Vol. 21(1) (1998) 259-267; and Jones. A. 'The State and the Stolen Generations: Recognising a Fiduciary Duty' *Monash University Law Review* Vol. 28, No. 1 (2002) 59-84. However, an alternative route to compensation has been demonstrated by the decision of the New South Wales Victims Compensation Tribunal in the Linow claim (unreported, but see (2003) *Indigenous Law Bulletin* 6) to make a monetary award to a member of the Stolen Generations. It should be noted, however, that all such applications would require leave under s.26 of the Victims Support and Rehabilitation Act 1996 as they would be out of time and also that Linow's award was on the basis of criminal assault, not on the removal *per se*. Both previous and subsequent litigation by members of the Stolen Generations has been largely unsuccessful: see, for example: Kruger v Commonwealth (1997) 146 ALR 126, Cubillo v. Commonwealth of Australia; Gunner v. Commonwealth of Australia (2000) FCA 97, Williams v. The Minister No. 2 (1999) NSWSC 843. Note also the various 'stolen wages' campaigns aimed at reclaiming lost earnings. On the Cubillo case, see: Ransley. J. and Marchetti. E. 'The Hidden Whiteness of Australian Law: A Case Study' *Griffith Law Review* (2001) Vol. 1, No. 1, 139-152.

[261] Attempts to obtain redress in international law *fora* have failed as have domestic actions under the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. On this point, see: Nulyarimma and Others v Thompson (1999) FCA 1192; Mitchell. A. 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v. Thompson' *Melbourne University Law Review* Vol. 24 (2000) 15-49; and Cunneen. C. 'Criminology, Genocide and the Forced Removal of Indigenous Children from their Families' *Australian and New Zealand Journal of Criminology* Vol. 32, No. 2, (1999) 124-138.

at this stage. Claims for compensation for past injustices are not limited to Australia and are increasing throughout the world.[262]

One form of recompense might, of course, be the recognition of customary law. The argument here is that past injustice denied and suppressed cultural norms which should now be reinstated and endorsed. However, this argument is more complex than those raised above. It has been argued in Chapter 1 that, from the perspective of the Australian legal system, it cannot be denied that customary law did not survive the events of 1770-1788 as a legal system. However, much of the customary system has in fact, survived even though the state views it as an extra-legal code. It is, of course, possible to validate such extra-legal norms, either by statute or by the exercise of judicial power to develop the common law, but difficulties arise in deciding exactly what should be validated. Presumably most people, including the judiciary, would accept that the state action in relation to the stolen generations, for example, was morally wrong, though they may not necessarily agree about what should now be done. The issue of the recognition of customary law is less clear. Whilst it is clearly arguable that the total disregard of customary systems was morally - if not legally – wrong and requires some recompense, it is very unlikely that all customary law norms would be validated by the state which has other obligations in respect of, for example, international human rights standards.[263] Moreover, it is not clear that the validation of all norms

[262] On reparations generally, though mainly in relation to the United States of A, see: Munford. C.J. *Race and Reparations: A Black Perspective for the 21st Century* Trenton, New Jersey: Africa World Press, Inc., 1996, especially pp. 413-439.
[263] Such difficulties arise and are discussed throughout this Chapter.

would, in general, be desirable[264] or serve as redress to promote social justice. Arguments for such recognition, whether based on redress for past injustice or elimination of present disadvantage, must therefore establish either a causal connection in each case - i.e. that this particular problem will be addressed by recognition[265] - or that the acceptance of diverse norms is, in itself, desirable.

b. Present day disadvantage and inequality[266]:

The second instrumentalist argument is that customary law can be used to address present-day disadvantage and inequality. Whatever the past causes, it is undeniable that Aborigines today suffer from enormous disadvantage. Almost every social indicator demonstrates this: health, education, employment, housing, domestic violence, child abuse, involvement in crime, substance abuse.[267] It is, therefore, morally imperative that this situation be addressed. This is a general argument, applicable to all groups that suffer similarly, based on the belief that people should be treated equally. Such situations can only be addressed by creating conditions under which the group concerned is operating at the same level as other groups within society. The issue here is whether these disadvantages can – or indeed should – be addressed by differential treatment under the law. The recognition of

[264] Presumably Aborigines would consider it desirable to validate all customary law. The analysis of the possibility and desirability of such validation is, of course, from the perspective of the state legal system.
[265] Some such arguments will be discussed below in relation, for example, to the breakdown of law and order in some communities. See Chapter 5.
[266] For discussion of the moral 'obligation' to address such disadvantage, see: Raikka. J. 'The Moral Relevance of Cultural Disadvantage' *Australasian Journal of Philosophy* Vol. 78, No. 3, September 2000, 374-390.
[267] See *supra* n 3

customary law would, of course, be differential treatment and would need to be justified.

The basic argument against differential treatment, and hence against recognition of customary law *per se*[268], is premised on the legal principle of equality and non-discrimination which is enshrined in both international and Australian domestic law. The international provisions are numerous as the principle underlies all international human rights regimes as well as many public international law doctrines. The most important provisions are in the two specific anti-discrimination Conventions – the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (hereinafter 'CEDAW') and CERD – and in Article 26 of the ICCPR. In relation to the latter, the Human Rights Committee has pointed[269] out that the principle is not limited to those rights in the ICCPR but applies to all rights and freedoms.

The general rule applicable in Australia is that all citizens of the state should be treated equally and in the same way *mutatis mutandis*. The Australian constitutional and legal systems were derived from the English and the principle of the rule of law remains fundamental. The classic exposition of the rule of law was given by Dicey:

> "That 'rule of law,' then, which forms a fundamental principle of the constitution, ...

[268] There may be arguments against particular provisions even if some is accepted
[269] General Comment No. 18 (37) (art. 26)

> .... means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
>
> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; ... "[270]

This principle is based firmly on a modernist, centrist view of the state. It is concerned with the maintenance of law and order, considered to be within the monopoly of the state, which both determines content and enforces compliance. The principle both rests on and reaffirms the authority and unique position of the state. Thus, the 'rule of law' excludes any recognition of customary law as an independently validated system: only state-enacted law can bind a man (*sic.*) and all people are subject to the ordinary law of the land administered by the ordinary courts.[271] These concepts of non-discrimination and equality, expressed by the rule of law doctrine, have been strengthened and embodied in Australian domestic legislation, most notably in the Racial Discrimination Act. 1975 (Cth.). They permeate all the organs of the Australian state, including the legal system,

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[270] Dicey. A.V. *Introduction to the Study of the Law of the Constitution* Hampshire and London: Macmillan Education Ltd., (10th ed.) 1959, at 202-203.

[271] It may be possible to include at least some customary law, both substantive and procedural, within the state system and thereby grant it a measure of independence, though the exemption of certain groups from the ordinary law is contentious. These points will be considered in Chapters 3-5. This situation is faced by many legal systems throughout the world and is the subject of much debate. See for example: Donovan. D.A. and Assefa. G. 'Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism' 51 *American Journal of Comparative Law* 505, Summer 2003; Sierra. M.T. 'Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla' Law *and Society Review*, Volume 29, Number 2, 227 (1995).

and are accepted as a *sine qua non* by the Australian Law Reform Commission.[272] As to judicial treatment of Aborigines, from the very earliest days of settlement the majority of the judges were at pains to stress the requirement of equal – understood then as uniform - treatment before the law. This stress on formal equality was not unreasonable given the climate of the time: formal equality guarded (in theory at least) against Aborigines being more harshly treated than whites.[273]

However, whilst both international and Australian law are aimed at avoiding discrimination and ensuring equality, disagreement arises about how this should be achieved: by formal equality or by substantive equality. Those who support the rule of law in literal terms argue that equality may only be promoted by education and changes in attitude and that the only permissible legal intervention should be the negative one of anti-discrimination provisions: affirmative action or positive discrimination – the terms are, for present purposes, interchangeable - is antithetical to the rule of law and simply creates another inequity. Others argue that attaining equality may sometimes require that people be treated differently: affirmative action or positive discrimination 'levels the playing-field'.[274] The latter

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[272] *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, para. 128.

[273] Kriewaldt, for example, often stressed equality before the law in an attempt to guard against such hostile treatment. See Chapters 3-5.

[274] Most of the general literature originates from the United States of America, but the arguments are universal. For general defences of affirmative action policies, see: Ezorsky. G. *Racism and Justice: The Case for Affirmative Action* Ithaca, NY: Cornell University Press, 1991; Rosenfeld. M. *Affirmative Action and Justice* New Haven: Harvard University Press, 1991.

view has been endorsed at both international[275] and national level[276], but always with caution. The limits of permissible positive discrimination are strict. It is generally only permissible when it meets a baseline test, usually expressed in terms of justifiability or in relation to disadvantage based on race or sex, areas which provide most of the case-law and literature.

Can affirmative action be used by indigenous groups to argue for the recognition of customary law as a way of achieving equality? As with firstly non-discriminatory policies and then of affirmative action generally[277], the issues have been most thoroughly discussed and litigated in the United States of America. The Supreme Court has engaged with this dilemma when making decisions concerning

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[275] See, for example: South West Africa Cases (Second Phase) (1966) ICJ Rep 6 (Judge Tanaka dissenting opinion). Also, of particular importance is the proviso in Article 1(4) of CERD. CERD prohibits discrimination on grounds of race, colour, descent or national or ethnic origin and this discrimination includes both distinction, exclusion and restriction on the one hand and preference on the other. Article 1(4) expressly excepts from the scope of Article 1(1) "special measures" – essentially affirmative action policies - which, were it not for Article 1(4) would amount to racial discrimination. The special measures thus permitted are defined as:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Commentators have not been able to reach agreement on the precise scope of these Articles, especially when read in conjunction with Article 2(2) which, unusually, "requires" certain action. However, what is clear is that there will be no right under CERD to establish and maintain for ever a separate legal system exempt from the supervision of the state.

[276] *Infra* 143-144.

[277] See the foundational Supreme Court cases of Shelley v. Kraemer 334 U.S. 1 (1948); Brown v. Board of Education 347 U.S. 483 (1954), 349 U.S. 294 (1955); Regents of the University of California v. Bakke 438 U.S. 265 (1978); United Steelworkers of America, AFL-CIO-CLC v. Weber 443 U.S. 193 (1979); Fullilove v. Flutznick 448 U.S. 448 (1980). Note, however, the recent tendency of the Supreme Court to restrict the permissibility of affirmative action policies: Firefighters v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Board of Education 476 U.S. 267 (1986); Adarand Constructors, Inc. v. Pena 515 U.S. 200 (1995). Note also that in all these cases the Court is operating under the authority of and interpreting either the Constitution, usually the Fourteenth Amendment, or the Civil Rights Act, 1964. The judges are not simply introducing affirmative action out of nowhere.

the Indian tribes. The precise details of the history of the relationship between government and tribe is irrelevant, though it should be noted that the government has a particular responsibility for the tribes, enshrined in the Constitution and re-iterated in successive legislation and case-law. This relationship has been variously categorised[278], but is essentially one of protection. A substantial body of federal/state law has developed around this relationship. Federal/state law contains little or no reference to customary law, but provides for a considerable degree of self-government by the tribes who are able to apply customary law as they see fit and without necessarily meeting the equal protection test. Federal/state law and policy with regard to Indians is itself, however, subject to the requirement of equal protection. This requirement has frequently been the ground for legal challenge when differential or preferential treatment has been afforded to Indians,[279] but such challenges have failed, often expressly on the grounds that were they to succeed Congress would be unable to fulfil its responsibility towards the tribes. The justification is that the differential treatment is not based on race or ethnicity which would be impermissible - but on the political status of the tribes as a group to

[278] For example, as 'domestic dependent nations': Cherokee Nation v. Georgia 30 U.S. 1 (1831); Worcester v. Georgia 31 U.S. 515 (1832) For a useful overview of comparative jurisprudence on native title, see: Dick. D. 'Comprehending ' the genius of the common law' – Native Title in Australia and Canada compared post-Delgamuukw' (1999) 5(1) *Australian Journal of Human Rights* 79; Bartlett. R. 'Native Title: From Pragmatism to Equality before the Law' 20 *Melbourne University Law Review* 1995, 283; Human Rights and Equal Opportunity Commission *Native Title Report 2003* Sydney: Human Rights and Equal Opportunity Commission, 2004 at 167-208

[279] See Morton v. Manscari 417 U.S. 535 (1974); Fisher v. Rosebud District Court 424 U.S. 382 (1976); United States v. Antelope 430 U.S. 641 (1977)

whom special responsibility is owed. Similar issues have arisen in other jurisdictions.[280]

The position in Australia is as follows. There is power under s.51(26) of the Constitution to pass "special laws" for Aborigines (amongst others). [281] There is no constitutional protection of the concepts of equality and non-discrimination and the legal protection of these principles is contained in the Racial Discrimination Act (Cth) of 1975 which was passed specifically in order to incorporate CERD into domestic law. The relevant sections are 8(1), 9(1) and 10(1) which read:

> "8.(1) This part does not apply to, or in relation to the application of, special measures to which paragraph 4 of art 1 of the Convention applies
> ...
> 9(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
> 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more

[280] Canadian constitutional laws, for example, make provision for legislative distinctions based on race and ethnicity provided they are aimed at a valid federal objective and are not punitive. Legislating for Canadian Indians, for whom the State has a specific constitutional responsibility, will be a valid federal objective.

[281] Despite disagreement amongst the judges, the High Court decided as early as 1982 that this *proviso* did not automatically entail discrimination Koowarta v. Bjelke-Petersen (1982) 39 ALR 417. See also: Commonwealth v. Tasmania (1983) 46 ALR 625.

limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

Thus, the Racial Discrimination Act allows the type of special measures – affirmative action policies – envisaged by Article 1(4) of CERD, but subject to the same limitations. The first major case on the Act was Gerhardy v. Brown[282] in which the High Court took the view that 'special measures' relating to the recognition of Aboriginal customary law would have to be, and were, justified under Article 1(4). There were differences of emphasis between the Judges, but they rejected the argument that "special measures" must be temporary. Essentially they said that the measures were not *per se* and necessarily permanent, but that they were valid for as long as necessary to achieve their purpose and that might be for ever. It is, however, doubtful whether this argument could be stretched to extend to the recognition of an entire and separate legal system: Gerhardy v. Brown concerned the very specific and limited point of access to traditional land and the need to protect that area. However, neither Gerhardy v. Brown nor any later decisions centred on customary law.

[282] (1985) 57 ALR 472

Affirmative action is an inappropriate concept on which to base arguments for the recognition of Aboriginal customary law. The literature[283] surrounding affirmative action deals largely with such issues as access to education, employment, and health-care and sees the purpose of such action to be putting the disadvantaged group in the same position as the advantaged one: that is, allowing it the same degree of access to the same programmes or services, the same opportunities, the same degree of recognition for way of life, but within the law. Affirmative action is not aimed at supporting the demands of a disadvantaged group to establish an independent system and exempt itself from the ordinary state laws.[284] Moreover, as already discussed, the general view is affirmative action should eventually become un-necessary: once equality is achieved, the action should cease. Such policies – in both international and domestic law – do not generally envisage the permanent establishment of separate systems. It is, therefore, difficult to see how this argument could be used to justify the on-going existence of a parallel customary legal system.

ii. Multiculturalism and Legal Pluralism:

The instrumentalist arguments examined above have defined ends in mind: the removal of injustice or disadvantage, past or present. As already stated, in order to make a case for the recognition of customary law in pursuit of those ends, a causal

[283] See *supra* n 274.

[284] There may be minor examples of this – for example, exemption from certain legal requirements on the basis of religion but these would be minor and not the main thrust of the action. Moreover, those groups benefiting from affirmative action programmes are not usually trying to exempt themselves from the system but to obtain a fairer chance of operating within it.

connection will need to be established. If that cannot be done, the arguments are not substantiated. However, there are other arguments which support the recognition of customary law on the grounds that it is desirable in itself, simply as an acknowledgement and endorsement of diversity. The view that diversity is desirable *per se* is grounded in the related theories of multiculturalism and legal pluralism which may provide a philosophical framework within which the recognition of customary law may be promoted.

a. Multiculturalism:

Theories of multiculturalism[285] promote the belief, today almost universally accepted, that diversity is in itself a desirable goal and that it should be actively pursued: there is here no necessary suggestion that any group suffers disadvantage, though in fact it will nearly always be so. Why should multiculturalism be desirable? Parekh outlines the four main sets of arguments in favour of what he terms 'cultural diversity'.[286] Firstly, cultural diversity increases options and thus expands an individual's freedom of choice. Secondly, that since human beings inescapably operate within and are affected by their cultures, they have a right to that culture which requires the recognition of diversity. Thirdly, cultural diversity creates, essentially, a more attractive and interesting world. Finally, the existence

[285] There is some inconsistency in terminology. Thus, 'multiculturalism' is sometimes used to mean that all cultures should have the same chances – i.e. in reality, equality and non-discrimination. This is the sense of the term used by the Australian state in the *National Agenda for a Multicultural Australia* Office of Multicultural Affairs, Department of the Prime Minister and Cabinet, 1989, and the Law Reform Commission Report *Multiculturalism and the Law* Sydney: Australian Law Reform Commission, 1992.

[286] Parekh. B. *Rethinking Multiculturalism: Cultural Diversity and Political Theory* Basingstoke: Palgrave, 2000, 165- 170

of different systems encourages competitiveness, prevents dominance and encourages progress. Whilst Parekh criticises all four sets of arguments as bases for the desirability of multiculturalism, and some of his points are particularly relevant in the present context,[287] nevertheless they do provide a conceptual basis for the desirability of multiculturalism. Parekh's own argument is that no culture can incorporate all values equally and that, therefore, different cultures are good for society in that they complement each other and help to maintain a full range of value systems. This is so whether or not they are options which individuals could embrace and therefore is applicable to indigenous groups. Essentially Parekh's point is that different cultures serve to broaden people's understanding of their own cultures and thereby aid in their development.

The present debate on multiculturalism dates from the early 1990s when a number of scholars[288] began to argue for the recognition of differential citizenship rights for minority or identity groups. These rights – existing in addition to ordinary citizenship rights – would allow the group a measure of autonomy in matters essential to maintaining the integrity of their culture, possibly including differentiated legal regimes. Much of the recent literature on multiculturalism

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[287] The first set of arguments would not provide any impetus to the recognition of indigenous rights such as customary law as they are not in any sense a choice which can be exercised by mainstream society, though arguably such recognition would increase choice for Aborigines if they can opt in or out. The fourth, like the first, will not protect the rights of indigenous groups who are not interested in competition or in expanding their options in this way.

[288] On multiculturalism generally, see: e.g. Kymlicka. W. *Liberalism, Community and Culture* New York: Oxford University Press, 1989, *Multicultural Citizenship: A Liberal Theory of Minority Rights* New York: Oxford University Press, 1995, *The Rights of Minority Cultures* Oxford: Oxford University Press, 1995, *Citizenship in Diverse Societies* Oxford: Oxford University Press, 2000; Taylor. C. 'The Politics of Recognition' in Gutmann. A. (ed.) *Multiculturalism* Princeton, New Jersey: Princeton University Press, 1994; Young. I.M. *Justice and the Politics of Difference* Princeton: Princeton University Press, 1990; Parekh. B. *supra* n 285.

comes from a liberal perspective and accepts the essentials of modernist thinking on the nature of the state and its relationship to its citizens. Several theorists have attempted to develop the classical concept of liberalism[289] in order that it might more easily support cultural diversity.[290] As liberals, tracing intellectual descent from Mill, all these theorists are essentially concerned with autonomy, but all have slightly different views on what constitutes such autonomy.

The most relevant of these theorists for present purposes is Kymlicka who has developed what has been called a "systematic and provocative account of self-determination for indigenous groups and minority nations within states"[291]. Kymlicka starts from the premise that human beings wish to lead a good life and that this requires autonomy. Autonomy, for him, consists in being able firstly to lead one's life in accordance with one's own belief systems and secondly to question those belief systems and change one's mind. These elements necessitate being able to pursue different ways of life without the fear or imposition of punishment. He goes on to argue that culture provides a framework within which this process may take place. As culture is thus essential in the pursuit of individual autonomy, all cultures should have the right to exist and be protected on equal terms with others.

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[289] Parekh. B. *supra* n 286 at 34 outlines the main characteristics of classical liberalism: a belief in a strong and centralised sovereign state, the rule of law, equality of all citizens, individual rights and duties, and no entity standing between the individual and the state.

[290] For discussion of the evolution of the concept of liberalism and its applicability in pluralist society, see: Parekh. B. *supra* n 286 at 80-113. He examines the work of Rawls, Raz and Kymlicka and maintains that, whilst their work is an advance on classical liberalism, it still fails to meet the challenge of cultural diversity. On the development of liberalism, see also: Gray. J. *Two Faces of Liberalism* Cambridge: Polity Press, 2000.

[291] Buchanan. A. *supra* n 231 at 19

Kymlicka recognises several types of cultural groups which, he argues, should enjoy differing levels of recognition, the highest level pertaining to national minorities which, of course, includes indigenous groups. These groups are entitled to a substantial level of self-determination. However, as the value of culture lies in its encouragement of autonomy, cultures which do not serve to promote this, but instead limit the autonomy of their members by, for example, depriving them of civil and political rights, should suffer reduction of the recognition of their culture and regulation by the state to the extent necessary to protect such basic rights. The state should be sensitive in the extent and manner of its intervention, but should not refuse to act where basic liberties are involved.[292] Of course, these arguments are subject to criticism on the ground that they assume that liberalism itself is the only paradigm for assessing the acceptability of diversity. However, in the context of the present work, it may be the most appropriate. Any theory of multiculturalism which is to find favour with the Australian judiciary – operating within a modernist, positivist legal system - would necessarily be premised on a liberal view of society and rights.

It should not be assumed that there are no arguments against multiculturalism. Some of the opponents of the doctrine oppose it on the grounds that they hold a formal theory of equality and a strongly statist view of law and enforcement, but

[292] Thus, Kymlicka argues that internal restrictions which limit the ordinary human rights of the members of a group should not be recognised: see *Multicultural Citizenship: A Liberal Theory of Minority Rights* supra n 288 at 152-172.

most opponents[293] base their arguments on the assertion that the values or traditions of the non-state culture are in some way oppressive or reactionary and can be harmful to individual members, often depriving them of rights which other members of society enjoy.[294] There are, moreover, difficulties about deciding the boundaries and content of a culture. There is likely to be broad agreement about the essential elements of a culture, but beyond that members may have very different views. Any attempt to base recognition of customary law on theories of multiculturalism will need to address these issues and suggest some ways of dealing with the problems.[295] Yet surely these arguments, powerful though they are, need not defeat the doctrine as a whole? Most theorists would accept that the state has a right – indeed an obligation – to control overtly cruel practices and that there can be no question of a cultural exemption or defence for, say, honour killings.[296] However, even if the practices of minority groups were so repressive that the state would need to intervene in 99% of circumstances to protect those affected, why should the theory not hold for the 1% whose practices are not cruel, simply different from those of the majority? Of course, there will be difficulties and disagreements about deciding

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[293] As a theory, rather than opposing, say, a particular manifestation such as recognition of custom. See, for example: Barry. B. *Culture and Equality* Cambridge: Polity Press, 2001.

[294] One of the strongest critiques of multiculturalism on these grounds has come from feminism. On this point see generally: Schachar. A. *Multicultural Jurisdictions: Cultural Differences and Women's Rights* Cambridge: Cambridge University Press, 2001. Schachar argues that insufficient attention has been paid to the effect of cultural accommodation on those accommodated, especially on dissident or disadvantaged members, often women, within the accommodated group: the paradox of multicultural vulnerability. Indeed Okin concludes that women in many minority cultures would be better off if their cultural group were to become extinct: see Okin. S.M. 'Is Multiculturalism Bad for Women?' *The Boston Review* 22:5 (Oct/Nov. 1997).

[295] On this point, see: Parekh. B. *supra* n 286 at 142-178. See also: Bhabha. H.K. (ed.) *Nation and Narration* London: Routledge, 1993.

[296] For discussion of cultural defences, see *infra* 332-333.

what amounts to behaviour which the state must challenge, but these should not be insoluble.

One of the most emblematic cases is Santa Clara Pueblo v. Martinez[297] where the US Supreme Court essentially rejected claims - made by individual members - that the state should intervene to defeat the sexually discriminatory practices of the Pueblo which practices would have been illegal under wider state law. Were the rules of the Pueblo such that the state should have intervened or were they simply different from those endorsed by the majority population? Levy argues that unless such internal practices amount to "real cruelty"[298] they should not be legislated against, though they may be discouraged:

> "Moreover, just as the range of cultural practices that are subject to legitimate reform is wider than the range that is subject to proscription, so is the range that is subject to legitimate criticism wider than that subject to reforming state action. To put it another way, not every cultural practice that is worthy of criticism as sexist is a legitimate target for state attempts to change it, and not every cultural practice that is a legitimate target for such external pressures for reform is a legitimate object of prohibition. This, by the way, is applicable to the criticism, reform, and proscription of cultural practices generally, and not only those whose problem is that they are sexually discriminatory."[299]

He goes on to argue that pressure to reform cultural practices is often best applied by some form of multicultural accommodation which at least keeps the

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[297] 436 US 49 1978. On similar points see: Canada (Attorney General) v. Lavell (1974) SCR 1349 and Lovelace v. Canada *supra* at n 222.
[298] *Supra* n 62.
[299] *Supra* n 62 at 53.

oppressed members of the minority in some contact with the dominant system which may be of some help to them both as individuals and in attempting to reform the group from within. Thus, if, for example, it is assumed that polygynous marriages are oppressive for women, it may be that their position is better served by some limited form of recognition which will then give them access to state benefits and protections available to married women than by complete refusal to recognise which will essentially leave them at the mercy of their own cultural group with no access to external assistance.

Discussion of multiculturalism is essentially about how a state should respond to cultural plurality within its borders; of what, if any, difference there should be in the way various groups are treated; of what these groups may legitimately claim. It is beyond the scope of this Thesis to attempt a thorough analysis of the debates surrounding multiculturalism, but some of the more pertinent features will be identified. Levy[300] classifies 'cultural right-claims' under eight headings: exemptions from laws which penalise or burden cultural practices; external rules restricting non-members' liberty in order to protect members' culture; internal rules for members' conduct enforced by ostracism or excommunication; recognition or enforcement of the traditional legal code by the dominant legal system; assistance to do those things the majority can do unassisted; self-government; representation of minorities in government bodies, guaranteed or facilitated; and symbolic claims to acknowledge the worth, status, or existence

[300] *Supra* n 62 at 127.

of various groups. Any or all of these types of right may be claimed by a cultural group, but the most relevant for present purposes are the first four. To what extent should the state be obliged by considerations of multiculturalism to grant these claims? Exemptions from laws which burden or penalise cultural practices can often be fairly easily accommodated within the general legal framework. Thus, there may be little difficulty over allowing indigenous groups to hunt otherwise protected species which are the basis of their traditional method of subsistence. However, this is clearly an allowance made by the dominant system and it can be overridden if other factors are considered more important.[301] External rules often take the form of restricting the mobility or access of non-members or of a particular power such as a veto over certain types of development. Internal rules controlling members' compliance will not usually be the subject of state interference unless they are violent or cruel.[302] The most pertinent type of claim-right under Levy's scheme is for recognition or enforcement of customary law. The substantive areas in which this claim most often arises are family law, land rights and crime, but it is the latter which causes the most difficulty. There has been an increasing willingness in most

[301] Both the possibility of being overridden and the demonstration that this type of right is not restricted to indigenous groups can be demonstrated by the case of mandatory schooling. Thus, in Wisconsin v. Yoder, 406 US 205 (1972) the Amish were granted an exemption from mandatory schooling laws. However, many - including Kymlicka - argue that the decision is wrong in that the interests of the children are too important to allow for exceptions. The relevance of this for the present case is that some of the practices for which exemption is granted may be simply unacceptable. It will be a balancing act. Thus, people who wish to argue that the cultural practice of female circumcision should be exempt from the laws on child abuse are likely to fail on the grounds that the protection of the child is the greater interest.

[302] This position is not entirely without difficulty as it is premised largely on the ability of a member to leave the group if the rules are unacceptable and this may well not be a realistic option though possible in theory: thus a Roman Catholic who believes that women should be able to be ordained to the priesthood may be able to become an Anglican with little difficulty, but a traditionally-oriented Aborigine from a remote community will have very little chance – or indeed desire – to move to a liberal metropolis.

states with indigenous populations, including Australia, to recognise at least some of customary family law – marriages, wills and intestacy, and adoption. This may be because recognition in this area is seen merely as analogous to the recognition of foreign law. Land rights have also been increasingly granted as discussed in Chapter 1. However, customary criminal law is a different matter. The difficulties arise both in relation to the substance of the law - some acts or omissions may be criminal under customary law but not under state law and *vice-versa* – and to punishment – some customary law punishments are themselves criminal by the law of the state and the question also arises as to double punishment under both systems. The question of jurisdiction is crucial. If it is proposed that the customary legal system should have exclusive jurisdiction, whether territorial or personal, then difficulties arise both as to the control of discriminatory, repressive or other measures which may be illegal under the general system – for example, the treatment of women - and conversely as to the failure of the customary system to prohibit and punish behaviour which offends the general system - for example, sexual intercourse with a child who is under the age of consent set by state law. This inability to exercise any control over the activities of the customary legal system has proved a stumbling block for many theorists of multiculturalism. The answer sometimes posed is that there could be alternative jurisdictions where the individual can opt out of the customary legal system and opt in to the state one. This will be considered below, but for now it should be noted that this would be fraught with difficulty: first, at a theoretical level, it breaches the argument about equal

protection for cultural and legal systems and actually gives a choice to these individuals which is not available to any other; second, it would involve numerous practical problems – for example, the parties to a dispute may make different choices; third, it is not a realistic assessment of the position and freedom of the individual.[303] For multiculturalists who hold a modernist view of the state and its powers and functions, there is no theoretical debate about status of law or the centrality of the state: the argument is simply that the state should try as far as possible to accommodate the different traditions and values of its population. There is here no suggestion that there is a multiplicity of legal systems, or at least a multiplicity of valid legal systems, though again the state may choose to endorse some.

The argument is sometimes made that multiculturalism is even more desirable when it leads to the promotion of the cultures of indigenous groups who have suffered greater historical injustice and may still be more disadvantaged than, say, an incoming ethnic minority whose customs are not endorsed by the state. Keal[304] maintains that it is possible to build persuasive moral arguments for action in relation to the wrongs perpetrated on indigenous peoples and that these arguments can be founded on more than a vague sense of guilt or sense that something is unfair. He maintains that there are three possible grounds for such an argument. The first lies in the damage caused by constructing the identity of others, almost always adversely, which harm survives the original context and so continues today.

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[303] See *supra* n 302.
[304] Keal. P. *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* Cambridge: Cambridge University Press, 2003

This construction is then used to justify annihilation or, at best, domination. The second argument is based on the feasibility of the notion of collective responsibility and the desirability of reparations for past injustices. Thirdly, Keal discusses the question of the moral legitimacy of states and international society as a whole where there are still issues relating to indigenous peoples unresolved. All these arguments have some force. However, the assessment of whether they add extra weight to the case for multiculturalism when the group in question is indigenous is problematic. For example, it seems unlikely that practices which the state designates 'cruel' under Levy's typology will be condoned if practiced by an indigenous group, but condemned if practiced by some other minority. It seems probable that whilst they may add another level of moral imperative, the application of theories of multiculturalism will not be significantly affected.

Australia has endorsed the principles of multiculturalism and government policy on multiculturalism[305] has been set out in two major documents: *The National Agenda for a Multicultural Australia*[306] and *A New Agenda for Multicultural Australia*[307]. These are aimed at the promotion and acceptance of cultural diversity in all forms. However, they have little to say about Aborigines in particular or about the criminal justice system and so offer no real indication of the likelihood legislative recognition of customary law. More relevant is the

[305] For general discussion of multiculturalism in Australia, see: Glass. A. 'Multiculturalism, Law and the Right to Culture' *University of New South Wales Law Journal* Vol. 24 (3), (2001) 862-868; Levey. G.B. 'The Political Theories of Australian Multiculturalism' *University of New South Wales Law Journal* Vol. 24 (3), (2001) 869-881; and Webber. J. 'Multiculturalism and the Australian Constitution' *University of New South Wales Law Journal* Vol. 24 (3), (2001) 883-893.
[306] *Supra* n 285.
[307] Department of Immigration and Multicultural Affairs, Commonwealth of Australia, 1999.

Australian Law Reform Commission Report on *Multiculturalism and the Law*[308] which made recommendations for changes in the criminal justice system which, if implemented would seem to give some scope for customary law to be considered.[309]

b. Legal Pluralism[310]:

A second theoretical framework which might support the recognition of customary law is that of legal pluralism.[311] In many ways legal pluralism might seem to be no more than the application of theories of multiculturalism to the fields of law, but it is often understood to be a rather stronger concept. The term 'legal pluralism', like the term 'post-modernism' with which it has some conceptual connections, is imprecise.[312] It is used to describe the many situations where the state does not enjoy a monopoly over the creation of

[308] Sydney: Report 57, Australian Law Reform Commission, 1992

[309] *Supra* 53.

[310] For a useful overview of recent debates in the area, see: Woodman. G.R. 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 21-59.

[311] Some theorists us the term 'legal pluralism', others 'legal polycentricity'. For present purposes, the two may be treated as the same. See: *Legal Polycentricity: Consequences of Pluralism in Law* eds. Petersen. H. and Zahle. H. Aldershot: Dartmouth Publishing Co. Ltd., 1995.

[312] For general literature on legal pluralism see: Griffiths. J. 'What is Legal Pluralism?' in 24 *Journal of Legal Pluralism* 1, p.2.; Pospisil. L *The Anthropology of Law: A Comparative Theory of Law*; S.E. Merry 'Legal Pluralism' in 22 *Law and Society Review* 869; Nader. L. (ed.) *Law in Culture and Society*; Allott. A.N. and Woodman. G.R. (eds.) *People's Law and State Law: The Bellagio Papers*; Sack. P. and Minchin. E. (eds.) *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*; Hooker. M.B. *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* Oxford: Clarendon Press, 1975; Geertz. C. *Local Knowledge: Further Essays in Interpretive Anthropology* New York: Basic Books, 1983; Burman. S.B. and Harrell-Bond. B.C. *The Imposition of Law* New York: Academic Press Inc., 1979.

norms.[313] These various definitions may be accurate to a point, but unfortunately they do not progress the discussion. For present purposes it is important to highlight one crucial difference between the various uses of the term. Some scholars argue that the state is always the only source of law and that when a situation is described as one of legal pluralism it means simply that the state has somehow validated other norm-making systems either by delegation, by creating them anew or by endorsing pre-existing systems. In the event of a conflict between normative orders the state will always prevail. Others maintain that the concept of legal pluralism refers to a situation where the state is not viewed as the only or ultimate source of law: that there are other bodies or institutions or systems which can make law and that ability is not dependent on the state.[314] Griffiths refers to the first meaning as a "juristic" view of legal pluralism and the second as a "social science" view[315] and Bentzon, et al. write of "lawyer's legal pluralism" and "anthropologist's legal pluralism"[316]. The two views are variously categorised[317] and differ in detail, but the overall features are clear. The Australian judiciary will, of course, endorse the first view.

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[313] For a useful overview of the area, see Allott. A. and & Woodman. G.R. (eds.) *People's Law and State Law: The Bellagio Papers* Dordrecht: Foris Publications, 1985.

[314] This, of course, gives rise to debate over the nature of law itself. For an overview of this position see: Merry. S.E. *Legal Pluralism supra* n 312.

[315] Griffiths. J. 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism and Unofficial Law*, 1986, 1-55, at 5, 8.

[316] Bentzon. A.W., Hellum. A., Stewart. J., Ncube. W. and Agersnap. T. *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* Harare: Mond Books, 1998, at 30.

[317] Thus, Merry. S.E. 'Legal Pluralism' in *Law and Society Review* (1988) Vol. 22, No. 5, 1988, 69 writes of classical and new pluralism; and Griffiths. J. *supra* n 315.

Whatever the relationship between these forms of pluralism, the present Thesis is primarily concerned with the first form: whether formal recognition should be given to non-state normative orders. No doubt all states, including Australia, in which such a multiplicity of normative systems exists, acknowledge their existence in some degree or other.[318] Some factors and norms influencing members of society may be individual and some may be determined by, *inter alia*, religion, ethnicity or indigeneity.[319] Moore's concept of semi- autonomous social fields is useful here.[320] She argues that in any given situation any person is influenced by many different normative orders. Indeed these situations - social fields - are defined by having the capacity both to generate rules and to influence compliance. Each of these fields has its own sphere of operation but they are all influenced by each other: thus, semi-autonomous. Depending on whether one adopts a social science or a juristic view, these normative systems may or may not be viewed as law. For the state and its organs they will not be, except in so far as they derive power from the state.[321]

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[318] Detailed discussion of the position in other jurisdictions is beyond the scope of the Thesis. It is, however, worth citing, by way of example, the extensive literature originating in the Pacific area. See, for example: Corrin Care. J. 'Conflict between Customary Law and Human Rights in the South Pacific' Paper presented at the 12th Commonwealth Law Conference, Kuala Lumpur, September, 1999; Brown. K. 'Customary Law in the Pacific: An Endangered Species' *Journal of South Pacific Law* Article 2 of Volume 3, 1999; Fraser. I. 'Pluralism? Dualism? Pluralism *Long* Dualism?' *Journal of South Pacific Law* Article 3 of Volume 3, 1999; and Demian. M. 'Custom in the Court Room, Law in the Village: Legal Transformations in Papua New Guinea' *Journal of the Royal Anthropological Institute* 9, (2003) 97-115.

[319] On these points, see: Australian Law Reform Commission *Multiculturalism and the Law supra* 53.

[320] Moore. S.F *Law as Process: An Anthropological Approach* London: Routledge and Kegan Paul, 1978.

[321] This view is clearly elaborated in Galanter. M. *supra* n 1. It is perhaps worth noting that whilst Australia undoubtedly does take this view, not all states adopt a position of legal centralism. Some states may be prepared to accept the operation of another legal system within their boundaries. In such cases, the state does not claim that the other system operates by its permission, that it derives its validity from recognition by the state, but accepts the system as valid on its own terms. This

Given that the Australian state takes the juristic view, can legal pluralism posit any solutions when norms conflict or does it simply define the problem? The juristic view would allow customary law to operate within a certain field but there could only be one result if there were to be a clash: the state must prevail.[322] There are, of course, arguments against this position, both conceptually[323] and pragmatically[324]. The most persuasive argument in favour of legal pluralism is that centralist models have proved ineffective in subduing and replacing other forms of law: if the state has not managed to subdue all other normative orders, it can be assumed that the attempt to do so is mistaken and the case for legal pluralism is proved. There is some strength in this argument, but it is not conclusive. First, any theoretical case for legal pluralism must rest on more than the practical failure of the opposite position. Second, whilst there is room for debate about the extent, it can hardly be denied that the Australian legal system had effectively subdued and replaced[325] much of Aboriginal customary law for many years. Indeed, it is arguable that it is the very success of that subjugation which has helped to create the moral climate which now sees some form of recognition as desirable in reparation. Moreover, whilst the argument on ineffectiveness does have some merit, it might also be argued that

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could be argued to be the case in Papua New Guinea where customary law is part of the underlying law: s.3 The Underlying Law Act 2000. Such customary law can be overridden in certain circumstances, most notably by the enactment of an inconsistent statute, but in the event of a clash with common law, custom prevails.: s.4.

[322] The judiciary may be creative in its application of the law, but it is not empowered to grant full independence to other normative systems.

[323] On these points see: Moore. S.F. *supra* n 320 and Allot. A. *The Limits of Law* London: Butterworths, 1980

[324] For example, it is simply not realistic, other bodies continue to create "law".

[325] Although customary law was not destroyed - and the more remote the area from the towns, the less effective the subjugation.

it does not prove a theoretical case for legal pluralism, but merely demonstrates the strength of an extra-legal code of behaviour which it might be sensible to validate at least to some extent. In other words, there might be a pragmatic case for a degree of legal pluralism, but this could be accommodated within a juristic view. Thus, the challenge faced by the Australian legal system is to address the continued existence of alternative, non-statist, non-legal (in its view) regimes - under conditions of non-recognition - and the relationship between those systems and the state systems. The Australian Courts cannot view customary law as a legal system on for the reasons already examined in Chapter 1. From their perspective, the customary legal system did not survive settlement as a binding legal system and, as it has not since been recognised, – i.e. validated – as such, it can have no force. The Courts could, of course, validate an extra-legal norm within the normal process of developing the common law and this would render the norm legally binding. In terms of outcome on any given point, it may not matter whether the Courts consider a customary norm to be *per se* legally binding or whether they choose to validate it and thus render it binding.[326] It is, however, of considerable theoretical importance, and, of course, of great significance to Aborigines, most of whom would presumably prefer their systems to be recognised as valid *per se*. The question here is whether there is any basis in the theories of legal pluralism upon which the Australian state and legal system may give some recognition to a system which it has both practically excluded and, more importantly in this context, theoretically denied

[326] Although if the norm derives its validity form the Courts' recognition, the choice about when and how that recognition should be extended is exercised outside the customary system.

as a legal system over many years.[327] It seems that, as suggested above[328], legal pluralism – or rather, juristic legal pluralism - is essentially multiculturalism and, therefore, the arguments for its usefulness in justifying a call for the recognition of customary law are very similar.

2.4: Conclusion:

It has been demonstrated that from the perspective of the Australian state, including the judiciary, Aboriginal customary law has no legal validity of itself and can, therefore, unless incorporated in some way[329], only be used as an extra-legal social code which may be considered as background information and may be used within the analysis and interpretation of the state law. It has also been shown that the arguments as to why some recognition should be granted to customary law are persuasive. The wholesale incorporation of customary law[330] is both impractical (for reasons which will be discussed below) and, many would argue, undesirable. It seems unlikely that the state would ever be prepared to sanction all of customary law in terms of content. It might, for example, be prepared to sanction some degree of corporal sanction but is unlikely to do so if it results in death or severe maiming. However, it is possible

[327] For a useful overview of the state's options, see: 'Introductory Essay: The State's Options' in Morse. B.W. and Woodman. G.R. (eds.) *Indigenous Law and the State* Dordrecht: Foris, 1988, 5-24.
[328] *Supra* 157.
[329] Of course, even in the event of incorporation the legal validity of such customary law is derived from the state.
[330] It needs to be borne in mind that whilst customary legal systems share some features – all Aboriginal systems, for example, trace creation to the Dreamtime – they also contain differences. Thus, it would not be a question of incorporating one system but many in different areas of the country.

to posit a number of positions between these two extremes, ranging from granting recognition to a few elements of customary law which will operate in a dominant state system to almost total incorporation. This might appear to be the way forward and these possibilities will be briefly outlined below together with some of the issues and difficulties which would arise in implementing them. The proposals will then be examined in the context of the criminal law and the role of the judiciary in the next three Chapters. Of course, if the state voluntarily recognises customary law, then the role of the judges will be to apply it. However, it is likely that there would still be ambiguities and room for interpretation and so the attitude of the judiciary is crucial. *A fortiori*, if the state has taken no such action, the decisions of the judges will shape the law. It will be seen that the judiciary have often taken an *ad hoc* approach which has amounted to informal acceptance of at least certain aspects of customary law and there seems to be no reason why this should not continue. It should be noted that many of the proposals outlined below have been tried in one form or another in Australia and these attempts will be discussed at the relevant points in the next three Chapters.

The question, therefore, next arises as to the best way to achieve such an outcome. This involves consideration of content, jurisdiction, *fora* for adjudication and choice of legal system.[331] The main issues will be outlined in this section and then discussed more fully as and where they arise in the Thesis.

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[331] See *infra* n 335.

Content:

With regard to content, there is an almost infinite variety of possible options. It is neither possible nor useful to attempt an exhaustive discussion of the possibilities. For present purposes it is sufficient identify the issues and make some preliminary comment.

Who should decide the content, that is, which parts of customary law are to be recognised? There are various possibilities. The state could decide by action of the legislature. If it did so, it would be necessary to take advice from relevant sources – most importantly the Aborigines concerned, but perhaps also anthropologists, linguists, psychologists, police, and any other parties with some relevant expertise. Another possibility would be for a panel of Aborigines to decide. There would need to be careful procedures for the selection of members of this panel and matters such as fair representation would have to be taken into account. Moreover, the state would certainly retain a veto over the content. Any body of law decided on by any method would need to take account of and allow for the differing traditions of Aboriginal people. Thus, there might need to be regional or local state laws and panels. The requirement of accommodating differing traditions would be likely to prove a difficult to meet. How is it decided which group is entitled to differential law? Is it simple a question of size – how large must a group be before it has such an entitlement? In the case of a

panel decision, what if some groups disapprove of the traditions of other groups? The bodies deciding which traditions or laws should be recognised, whether the state or a panel, would be faced with all the problems raised in connection with the recognition of any customary law by the state, though admittedly in a less acute form. In reality, such decision-making by a panel of Aborigines alone is almost certain to prove problematical, both conceptually and practically; much more likely is that the state would decide, but seek advice for such a panel.

A further consideration is the pedigree of such content. What is being proposed is the recognition of customary law, not simply of a differential system. It would be impossible to reconstruct accurately the systems which prevailed in 1788, both because customary law evolves organically and due to hybridisation. Thus, the best that could be achieved would be a system which could either somehow trace direct descent from the pre-1788 systems or could claim to be authoritative on grounds of current practice and acceptance. Either of these would be very difficult to establish. It might – indeed would – be possible to obtain evidence from Aborigines, from anthropologists and historians and, subject to very real difficulties over translation of concepts and evidence and fluidity, to construct some kind of system. However, customary law is not like the positivist law of the state. There is no clear set of sources from which the whole authoritative law can be ascertained. Moreover, once the content was decided, there would need to be some provision for updating to allow for development.

It is important to note that depending on the method of implementing recognition, the content will need to be more or less strictly defined. If, for example, it were decided to recognise certain elements of customary law by legislation, it is likely that the content of that recognition would need to be precisely defined. If recognition were to be implemented by the establishment of particular *fora,* - by for example, the establishment of some variant of tribal courts – this would essentially be an exercise in delegating powers and, whilst some detail would be given of the content of the customary law which such courts could apply, this content would be defined as a component part of the court's jurisdiction. If recognition is accorded by the judiciary, there is much less need for precision. The judges operate within the parameters of the state legal system and exercise discretion in applying such elements of customary law as are relevant in a given case and can be accommodated within the overall legal system. This is the most effective way of determining content and granting recognition as will be established by the analysis in the next three Chapters and the Conclusion.

Jurisdictional base:

The next point to consider is the *criterion* for differential application, the jurisdictional base. This may be territorial, personal identity or subject matter.

It is perfectly possible to have a system under which a distinct legal system operates in a particular geographical area – federalism would be the clearest example of this. By definition, in a federal system the central authority retains some power over the component parts. This may be a residual power, or it may be over certain matters, for example, the right to declare war. Similarly, delegated power to legislate may allow for a variety of systems within a state border and this is common, for example, in the case of local authorities. Thus, customary law could be applicable on Aboriginal land or in a certain area where the population is wholly or mainly Aboriginal. This has been done in, for example, the United States and Canada where domains or reserves have independent legal systems, in many cases amounting to virtual self-government with only such matters as foreign relations being reserved to the state. Precedents can also be found in the nineteenth and early twentieth century arrangements in leased territories in China based on the principle of extraterritoriality. Under this system the foreigners residing in the leased territories were subject not to the Chinese law and Courts, but to special courts which applied their own law. This system of differing territorial jurisdiction will usually require rules relating to rights of habitation and access to the land and restrictions on outsiders. It should be noted that in both the examples cited above, the jurisdiction might equally have been based on membership of a group, i.e. on personal identity. It would be difficult to make a case for differential law based on territory unless the population of that territory was fairly homogenous.[332] Whilst

[332] The identification of the territorial base is problematic outside of 'reserved' lands. What is the position of non-Aborigines living in that area? If a non-Aborigine takes up residence on Aboriginal land for example, in the case of marriage - there is an argument that s/he has elected to accept the prevailing legal system. The situation is rather different in, for example, areas of cities where the

territorial application has many advantages, there are also disadvantages. In such a system, how would the cultural identity of those who live outside the area be protected? Presumably they would be subject to the ordinary state laws. This would create a division in the community where members of the same group enjoyed differential rights according to where they lived. This may not be acceptable. There is moreover another disadvantage in that the creation of reserves or domains may lead to ghettoisation. Moreover, territorial application of this type appears antithetical to the notion of multiculturalism. What it, in fact, does is to divide the state into a number of monocultural regions of varying sizes.

The second possibility is incorporation on this base of personal identity: that is, certain people – who may or may not be geographically dispersed throughout the rest of the population - are subject to a differential legal system. Perhaps the most widely known example of this type of differentiation is the millet system in the Ottoman Empire. Millets were distinct communities within the Empire, the term initially covering religious groups, but later expanding to include groups defined by nationality. The millets enjoyed a considerable degree of autonomy in various spheres of life, including making and applying their own laws in their own Courts. However, the example of the millets does not really provide an answer to the present dilemma. First, they enjoyed considerable freedom because it suited the Ottoman Empire to allow it. There is little doubt that it would have been revoked in the event of a clash. Second, the members of the millet were in many ways less

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Aboriginal population forms the majority in a given area. What of the non-Aboriginal population there? How are the boundaries of such territorial bases to be delimited? What if there is an area of three square miles inhabited entirely by Aborigines situated in the centre of a city?

favoured than the ruling Muslims – for example, they could not proselytise. Third, there was no attempt to engage with the problem of oppressive minority groups and their treatment of individual members.[333] Even if these disadvantages are ignored, there are obvious difficulties in incorporating customary law on the basis of personal jurisdiction. First, in terms of membership of the relevant group. What *criteria* would be used to establish whether or not a particular individual was subject to the customary legal system? The usual tests for membership of an indigenous group are a combination of acceptance by the community, descent, and self-identification.[334] How would disputes about membership be resolved? What if the three elements conflicted with each other or the persons involved disagreed as to whether or not the tests were met? Second, there would need to be a procedure by which an individual who was part of the relevant group could opt in or out of the customary system. This would be essential. All principles of equality and non–discrimination would be violated if an individual were subject to a different legal system from that of the majority of the population without her/his consent.[335] Third, there might be substantial difficulties in community relations if neighbours received different treatment for the same behaviour, possibly to the extent of one being sent to prison and the other not being liable for any offence.

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[333] Kymlicka discusses the millet system in some detail and concludes that it is inadequate as a model for a liberal theory of minority rights. See: Kymlicka. W *supra* n 292 at 156-158.

[334] See, *supra* n 233 for discussion of the difficulties in defining indigenous and Aboriginal.

[335] It should be noted that whilst the state may provide a mechanism of choice by which a person may opt in or out of the customary system, many such systems have means of coercion or persuasion in order to ensure that their members remain within the system and obey the laws. Even of such pressures are absent, it is likely that members have been socialised into belonging to the group. The 'choice' offered by the state is likely to prove illusory.

Finally, it is often possible to incorporate customary law into statutes governing certain subject matter – for example, inheritance[336] or adoption[337]. This has already been done to a certain extent both in Australia and elsewhere. The acceptance of non-state legal rules in relation to civil law, especially family issues, is less contentious than in criminal law. Criminal law is the 'hard case' in this debate for a number of reasons. The state and the population at large have a greater stake in the administration of the criminal law than in civil matters which affect only the parties. The adequate functioning of the criminal law is essential to the maintenance of law and order. Similarly, given that the sanctions for breach of criminal law are greater than for civil wrongs, the arguments for a unified system – in the interests of both the defendant and society - are stronger.

Fora:

Once the subjects and content of the differential legal system are established, the question of *fora* for adjudication needs to be addressed. Essentially the options will be that the ordinary state courts adjudicate, that special bodies – judicial or non-judicial - are set up for the purpose, or that there is some combination of the two. The relationship between the two bodies of law would also need to be considered. Customary law might add to state law, for example, by the addition of new offences such as taboo sexual relationships which do not fall within state incest laws. It could also subtract from state law, i.e. some matters, for example,

[336] For example, the Administration and Probate Act, 1979 (NT) takes account of customary marriages.
[337] For example, s.13 of the Adoption Act, 1994 (NT) takes account of customary marriages.

under-age consensual sex, could be decriminalised. Both positions are problematical. In the first, Aborigines will be criminalised for actions which the remainder of the population could carry out with impunity. In the second, the reverse. A final suggestion might be that state law would continue to apply, but that it would be applied differentially, for example by systematising differential procedures and sentencing practice in order to take into account considerations of customary law.

Choice:

Finally the question of choice of jurisdiction arises.[338] One way of managing some of the above problems might be by offering individuals a choice as to the law to be applied. A person who comes under one of the differential bases for jurisdiction would need a right to choose the state system if s/he preferred it and thus there would need to be an opt in or opt out provision. To leave no such choice would be almost certainly be contrary to human rights norms and equality before the law if it resulted in an individual being treated in a discriminatory manner, i.e. differently for the majority of the population. However, the possibility of opting in would only be available to certain individuals and this too would seem to be contrary to equality before the law as it would mean that some individuals had a choice of two legal systems and others had no such choice. There would also be practical difficulties. How

[338] An interesting overview of various possible jurisdictional arrangements can be found in Shachar *supra* n 294 at 88-116.

would this be administered? Would it be a one-off choice? Could an individual choose to be governed by state law on some issues and customary law on others? Could it be revoked? Could a person choose the state system on one occasion or in one circumstance and the customary system in another? Does the choice have to made in advance of, for example, the commission of a crime? As well as practical difficulties the issue of the reality of the freedom of an individual to choose state over custom would arise. This has been discussed above.

The problem is how best to advance at a time when the moral and political climate seems to desire ever greater recognition of indigenous rights, including legal systems. The difficulties inherent in the incorporation of customary law in respect of criminal matters have been discussed and the scope for such incorporation appears limited, yet the arguments remain that it is desirable to take it into account in some way. Given the above, it is clear that the most appropriate way for the Australian legal system to achieve such recognition is to apply uniform standards, thus dealing with many of the objections to differential systems[339], but to apply them with flexibility thus allowing cognisance to be taken of many relevant factors. This is what the judiciary have done for many years and it is argued that it remains the best way to proceed, though possibly

[339] It goes without saying that many Aborigines would not object to differential systems, but would welcome them. However, the focus of the Thesis is the approach of the state, in particular of the judiciary, to the incorporation of customary law and for state organs the objections to differential treatment are substantial and cannot be dismissed without reason.

combined with some measure of incorporation.[340] This argument will be examined in detail in the next three Chapters which will examine the ways in which the judiciary have attempted to give some recognition to customary law through flexibility and discretion in reasoning. Two preliminary points need to be made.

First, in many cases involving Aboriginal defendants the judiciary appears to employ differential tests or standards. However, these are frequently based on social disadvantage and are largely indistinguishable from the use made of such devices in relation to other disadvantaged groups. This social disadvantage is often considered by the use of the concept of 'factors associated with Aboriginality'. The precise meaning of this term in each context – and its relationship to customary law - will be considered at the relevant points in the Thesis.

Second, it must be noted that whilst the Thesis concentrates on the consideration of customary law within the Court system – on judicial activity – such consideration, and indeed the use of discretion, may also arise at other stages in the criminal justice process. Moreover, these 'other stages' may themselves become subject to judicial consideration. A clear example of this is the taking of

[340] Demian discusses the interaction between law and custom and the way in which they can mutually inform each other in both Village and High Courts in Papua New Guinea. Whilst the context is different – customary law enjoys constitutional status in Papua New Guinea – there are instructive points on the way in which decision-makers can make use of both sources. Demian. M. Custom in the Courtroom, Law in the Village: Legal Transformations in Papua New Guinea *Journal of the Royal Anthropological Institute* (N.S.) 9, 97-115 (2003)

confessional evidence. This obviously takes place at the stage of police investigation. However, both the procedure involved in the taking of evidence and the consequences in terms of admissibility if these procedures are ignored, are subject to consideration by the Courts.[341]

[341] See Chapter 3 on these points.

Chapter 3: Judicial use of customary law in the rules on evidence and procedure:

3.1: Introduction:

One area of the criminal justice process[342] in which the judiciary have been able to give some recognition to customary law is in the rules of procedure.[343] This practice is neither as conceptually difficult nor as controversial as taking it into account in sentencing or, even more so, in the substantive law. However, many of the measures adopted by the judiciary have only tangential relevance to customary law and are of much less significance[344] than judicial practice in relation to the substantive law and sentencing.

The Australian Law Reform Commission identified various areas of concern in respect of the procedures adopted when dealing with Aborigines. The areas identified by the Commission – though not in this order – are: jury trial; the provision of interpreters; the right to silence and the taking of confessions or

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[342] For an interesting overview of Aborigines and the criminal justice system, see: Broadhurst. R. 'Crime and Indigenous People' in Graycar. A. and Grabosky. P. (eds.) *The Cambridge Handbook of Australian Criminology* Cambridge: Cambridge University Press, 2002, at 256-280.

[343] It is possible for some recognition to be given to customary law at other points within the criminal justice system: for example, by non-prosecution of strictly 'traditional' offences, by prosecution for a lesser offence, by the entry of a *nolle prosequi*, and by the implementation of various pre-trial diversion schemes. As none of these fall within the remit of the judiciary, they will not be discussed in detail. Similarly, police practice will not be discussed, except insofar as it is relevant to judicial decision making.

[344] The procedural measures discussed in this Chapter are of 'less significance' in terms of the use of customary law by the judiciary. However, some of them - such as, for example, the Anunga rules: R. v. Anunga and Others; R. v. Wheeler and Others (1976) 11 ALR 412 - might be of greater significance in terms of the overall impact on the experience of Aborigines within the legal system.

statements; comprehension of the proceedings and fitness to plead; identification evidence; the taking of Aboriginal evidence, especially in relation to unsworn statements, dying declarations and the compellability of traditionally married Aboriginal spouses; and the proof of Aboriginal customary laws.[345] Customary law is of little particular relevance to the first five areas and so they will be mentioned briefly and only insofar as they may involve considerations of customary law. Whilst the sixth area necessarily involves such considerations, the problems are of largely historic importance and, therefore, they will not be analysed in detail. The final area, the proof of customary law, is the most significant in terms of the subject matter of the Thesis. The questions of expert evidence and the problems raised by secret material will be discussed in this Chapter; the conceptual issues involved, already discussed to some extent in Chapter 2, will be mentioned and then analysed in the Conclusion in the context of possible future developments. It should also be noted that whilst some of these concerns are genuinely procedural and discrete, such as the relevance of dying declarations, others are not so much strict matters of procedure as concerns about, for example, the general level of understanding. Moreover, many of these latter issues – such as the need to provide interpreters - arise not only in relation to Aborigines, but also in relation to other groups.

3.2. Jury trial:

[345] Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, paras. 543 and 574.

Jury trials give rise to three main difficulties in relation to customary law. First, it is unlikely that any member of the jury will be an Aborigine, and even more unlikely that s/he will be traditionally-oriented, and thus questions arise as to the representativeness of the jury and the defendant's right to be tried by a 'jury of his peers'. Second, a non-Aboriginal jury is unlikely to be able to understand the substance and importance of customary law and its relevance in judging the actions and state of mind of a defendant. Third, it may be that the elements of customary law in the case are such that the jury is prohibited from hearing the details and is thus impeded in its decision-making.

The principle of trial by one's peers is, to a certain extent, undermined by the under-representation of Aborigines on juries. This point, *inter alia*, was argued by the Aboriginal defendants in the New South Wales case of Binge and Others v. Bennett and Another[346]. However whilst the Court acknowledged the under-representation, they rejected the argument that a fair trial was consequently impossible.[347] There may be some opportunity to seek Aboriginal representation by exercising the right to challenge prospective jury members, but this right is limited. The Courts have been more sympathetic to the difficulties raised by customary law considerations and have been willing to accommodate these requirements where possible by the admission of expert evidence and by, for example, allowing the empannelling of juries composed of persons of a

[346] (1989) 42 A Crim R 93. This argument was also rejected in R. v. Walker *supra* 97.
[347] On the ethnic composition of juries, see: Israel. M. 'Ethnic Bias in Jury Selection in Australia and New Zealand' *International Journal of the Sociology of Law* (1998) 26, 35-54.

particular sex where the nature of the customary law at issue requires such a limitation and the parties agree.[348]

3.3: The provision of interpreters: [349]

The need for interpreters is not peculiar to Aboriginal defendants but arises in any case where the defendant has difficulty in coping with the language of either the investigative procedures or the Court proceedings. The Thesis will concentrate in the issues insofar as they affect Aborigines in particular.[350] Various common law and statutory guidelines or provisions relating to the taking of evidence have addressed the need for interpretation at the stage of police involvement and these will be discussed below[351]. The need similarly arises at the judicial stage of criminal proceedings.[352]

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[348] See, for example: R. v. Sydney Williams (1976) 14 SASR 1.

[349] For detailed consideration of the role of interpreters in the legal system, see: Laster. K. and Taylor. V.L. *Interpreters and the Legal System* Leichardt, NSW: The Federation Press, 1994. See especially, the discussion of the 'right' to an interpreter at 77-83, and of the importance of interpreters in the criminal investigation process at 131-160.

[350] There is an extensive literature on interpreting and Aborigines. See, for example: Goldflam. R. '"Silence in Court!" Problems and Prospects in Aboriginal Legal Interpreting' *Australian Journal of Law and Society* (1997) 13, 17-53; See also: Walsh. M. 'Interactional Styles in the Courtroom: an Example from Northern Australia' 217-233, and Eades. D. 'A Case of Communicative Clash: Aboriginal English and the Legal System' 234-264, both in Gibbons. J. (ed.) *Language and the Law* Harlow: Longman, 1994.

[351] *Infra* 187.

[352] See: Australian Law Reform Commission *Multiculturalism and the Law* Sydney: Report 57, Australian Law Reform Commission, 1992 *supra* 53. The Report deals with the difficulties faced by non-English speakers and eight of its recommendations refer to the need to improve access to interpreters: Recommendations 6-13. The Recommendations follow, to some extent, those made in the Commonwealth Attorney-General's Report *Access to Interpreters in the Australian Legal System* Canberra: Australian Government Publishing Service, 1991. Both these Reports sought to bring about change by procedural requirements and administrative measures. See also: Dietrich v. R (1992) 109 ALR 385.

It is important to note that interpreting for Aborigines - especially traditionally-oriented Aborigines – is more problematic than translating from, say, French to German. In the latter case, interpreting is more or less a case of providing an alternative vocabulary for the same concepts. However, interpreting across very different cultures is more difficult. There may not be an exact translation. Concepts may be either quite differently understood or non-existent. Cultural considerations and norms may make word for word translation inappropriate, may mean that certain matters may not be disclosed or that relationships between the client and the proposed interpreter render the latter an inappropriate appointment.[353] These difficulties, combined with the practical considerations of a large number of languages and a relatively small number of competent interpreters for each, mean that it is often difficult to provide an adequate service. For all these reasons, whilst the provision of interpreters for (some) Aborigines is necessary if justice is to be done, it may not be possible or sufficient.[354] There may be a need for further 'translation' in the form of evidence from linguistic or anthropological experts.[355]

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[353] For an interesting overview of the difficulties, see Cooke. M. *Caught in the Middle: Indigenous Interpreters and Customary Law* Background Paper No. 2 Perth: Law Reform Commission of Western Australia, March 2004.

[354] In the Northern Territory the Northern Territory Aboriginal Interpreter Service, established in April 2000, is the main provider of interpreters, and serves not only the Courts, but also other public services including health and community organisations. For an overview of its work so far and of plans for the future, see: Australian Government Attorney-General's Department *Evaluation of the Northern Territory Agreement* Canberra: 14 April 2004. It is worth noting that much of the literature on these points was written prior to the establishment of this service and so deals with the need for such a service as well as the problems outlined above.

[355] On these points, see: Eades. D. *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* Brisbane: The Continuing Legal Education Department of the Queensland Law Society Incorporated, 1992. The question of expert evidence is discussed below at 196-198.

3.4:The right to silence and the taking of confessions or statements:

This area has given rise to a significant amount of discussion and caselaw.[356] The majority of the cases in which these issues arise have no connection with customary law: they generally relate to matters such as the suspect's imperfect grasp of English or the difficulties caused by differing norms which are not part of customary law.[357] However, customary law is sometimes relevant and so the matter will be discussed in some detail.

Whereas the focus of the present paper is on the treatment of Aborigines by the Courts and not by the police, the methods of police interrogation and investigation are clearly of considerable importance as they may affect the admissibility of evidence, especially confessional evidence, in the Courts. The general principle underlying the rules on the admissibility of confessional evidence is that confessions made in the course of police investigation are admissible provided that they meet the evidential rules designed to ensure voluntariness, fairness and compliance with public policy. This principle informs both the common law and the legislative positions on confessions. In an

[356] See, for example: R. v. Anunga and Others; R. v. Wheeler and Others (1976) 11 ALR 412; Coulthard v. Steer (1981) 12 NTR 13; Gudabi v. The Queen (1984) 12 A Crim R 70; Collins v. The Queen (1980) 31 ALR 257; MD (A Child) v. McKinlay (1984) 31 NTR 1; R. v. Weetra (1993) 93 NTR 8; R. v. Butler (No. 1) (1991) 102 FLR 341; Fry v. Jennings (1984) 25 NTR 19; Dumoo v. Garner (1998) 7 NTLR 129; R. v. Ninnal (1992) 109 FLR 203; R. v. Jabarula (1984) A Crim R 131; R. v. Anderson (1991) 1 NTLR 149; R. V. Martin (1991) 105 FLR 22.

[357] See *supra* 39-43 for discussion of the nature and content of customary law. It should be noted that certain norms which would not be part of a state legal system – for example, the prohibition on direct eye contact between people standing in a particular relationship to each other - are part of customary law. There are, however, some 'norms' even within customary systems which do not have the force of law. The lack of a clear distinction between law and culture in customary systems, as well as the differing details between such systems, makes it impossible to give a definitive list of such norms.

attempt to ensure that these requirements are met, guidelines for the conduct of police officers when conducting questioning have been laid down in various sources. The earliest such attempts at common law were the English *Judges' Rules*, laid down by the King's Bench Division in 1912 and 1918. These *Rules* were subsequently supplemented, amended and clarified and eventually in 1964 replaced by a new set of *Rules*. The pre-1964 *Rules* apply in one form or another in most Australian jurisdictions[358] although they do not have the force of law as they do in England. They serve simply as a guide on the relevant issues.[359] The *Judges' Rules* are not an entire statement of procedure but are aimed largely at ensuring that suspects are correctly cautioned and are thus aware of their right to keep silence, an inescapable consequence of the requirement that the confession be voluntary. As well as the general common law rules on the admission of confessional evidence, there are extra guidelines laid down for groups which are considered to be especially vulnerable to the making of confessions which do not meet the *criteria* of voluntariness, fairness and compliance with public policy. These groups are young people, persons suffering from a mental or intellectual disability and Aborigines. The general rules relating to young people and persons suffering from a mental or intellectual disability will, of course, also apply to any Aborigine who falls within those groups. However, it is the specific provisions relating to Aborigines which may raise issues of customary law.

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[358] The 1912 and 1918 Judges Rules may be found in Gillies. P. *The Law of Criminal Investigation* Sydney: Law Book Company, 1981, at 121-122. The 1964 Rules may be found at (1964) 1 All ER 237. Gillies contains detailed discussion of the Judges Rules in Australia. See, also: Australian Law Reform Commission *Criminal Investigation* Report 2 Interim Canberra: Australian Government Publishing Service, 1975, para. 139; The. G. 'An Examination of the Judges' Rules in Australia' (1972) 46 *Alternative Law Journal* 489.

[359] See: Van der Meer v. The Queen (1988) 62 ALJR 656, *per* Mason CJ at 659.

Admissions by Aboriginal defendants are subject to all the general common law requirements and also to particular rules and guidelines which vary from one jurisdiction to another. The situation in the Northern Territory is governed basically by the guidelines set out in the case of Anunga[360]. The case is primarily concerned with the way in which Aboriginal suspects in criminal matters should be interrogated, but also discusses other procedural issues which arise in relation to Aborigines and contains comment on some of the problem areas. Moreover, whereas its focus is police action, it has given rise to considerable caselaw[361] and can be seen as an example of the way in which judicial activism has affected the wider area of the treatment of Aborigines, not only before the Courts but throughout the criminal justice system.

The case came before Forster J. in the Northern Territory Supreme Court in 1975 as a trial of two Aborigines suspected of various offences. At that hearing Forster rejected the Crown's tender of records of the police interviews of the accused. He gave *ex tempore* reasons and indicated that he would give full reasons for the rejection at a later date. These reasons were delivered in April,

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[360] R. v. Anunga and Others; R. v. Wheeler and Others (1976) 11 ALR 412.

[361] See above n 356. For an examination of the early caselaw on the guidelines, see: Bates. F. 'Interrogation of Australian Aborigines.' (1984) 8 *Criminal Law Journal* 373; and Coldrey. J. 'Aborigines and the Criminal Courts' in Hazlehurst. K.M. (ed.) *supra* n 12. For more recent caselaw, see: Douglas. H. 'The Cultural Specificity of Evidence: The Current Scope and Relevance of the *Anunga* Guidelines' *University of New South Wales Law Journal* Vol. 21(1) 1998, 27-54. It is beyond the scope of the Thesis to analyse this caselaw in detail. In the main it consists of decisions on whether particular guidelines were or were not met on the facts of a particular case though it does, of course, provide some development of the concepts behind the Anunga guidelines. However, these decisions and developments are not relevant for present purposes.

1976.[362] By the time he came to give the reasons, Forster conceded that the matters themselves were stale, but still thought it important to put on record general guidelines for the police when conducting interviews with Aborigines[363] and the fact that failure to observe these guidelines would likely result in the evidence of the interrogation being rejected. As a preface he makes two points. First, he refers to the difficulty which many Aboriginal people have in understanding English. This difficulty is not simply a question of vocabulary, but also of the translation or comprehension of concepts, and cannot always be solved even by the provision of interpreters as there is no equivalent word or concept. He makes particular reference to differing concepts of time. He points out that he is making no adverse comment on Aborigines' intelligence:

> "In case I may be misunderstood, I should also emphasize that I am not expressing the view that Aboriginal people are any less intelligent than white people but simply that their concepts of certain things and the terms in which they are expressed may be wholly different to those of white people."[364]

Second, he states that difficulties can arise because Aboriginal ideas of courtesy and politeness often lead them to reply in the way which seems to them to be desired by the questioner rather than in a way which is to the 'white' mind an accurate answer to the question. Moreover, even if this is not the case, Aboriginal deference to an authority figure, which is partly a matter of culture

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[362] The delay was occasioned by Forster's illness.
[363] Much of what Forster said would, as he acknowledged, also be applicable to migrant communities.
[364] At 414.

and partly a matter of the experience of colonisation, will lead them to answer as they think is required. Forster illustrates this point by the example of the caution:

> "Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because if they do not have to answer questions, then why are the questions being asked?"[365]

The guidelines, which apply to the interrogation of Aboriginal suspects, then follow. They deal with many of the points which cause procedural difficulty: the provision of interpreters; the availability of a prisoner's friend; rules designed to ensure the correct administration and understanding of the caution; guidelines as to neutral questioning in order to avoid the suspect being led; the requirement that the police seek corroborative evidence even if a confession has been made; the provision of physical comforts to the suspect; a prohibition on interrogating a suspect who is drunk, ill or tired, to such an extent that s/he is disabled; the requirement to take reasonable steps to obtain legal advice for the suspect if requested; and the provision of substitute clothing if the suspect's own clothing is removed for forensic purposes.[366]

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[365] At 414.

[366] The guidelines are:

"(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding.

(2) When an Aboriginal is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combination of persons and situations are variable and

Whilst Forster concludes by saying that the guidelines are not absolute rules, such that failure to follow them would automatically lead to evidence being excluded, he points out that police should be aware that if they depart from them without reason are likely to find the evidence excluded. The importance of the guidelines in police practice has been affirmed by the Northern Territory Police in various departmental documents and guidelines.[367]

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the categories of persons I have mentioned are not exclusive. The important thing is that the 'prisoner's friend' be someone in whom the Aboriginal has confidence, by whom he will feel supported.

(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say "Do you understand that?" or "Do you understand you do not have to answer questions?". Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear that the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a 'prisoner's friend' or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

(4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probitive *(sic.)* value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.

(5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.

(6) Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.

(7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.

(8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.

(9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing." at 414-415.

[367] See, for example: Police General Orders Q2: *Questioning People Who have Difficulties With The English Language – The "Anunga" Guidelines*, May 1992, unpublished, cited in Goldflam. R. *supra* n 350 at 27.

Forster specifically addresses the question of equality before the law and makes it clear that the guidelines are designed to achieve substantive equality not mere formal equality:

> "It may be thought by some that these guidelines are unduly paternal and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police."[368]

This case is critically important in the Northern Territory[369] and has also been cited with approval and used as a guide in other jurisdictions.[370]

In many jurisdictions, including the Northern Territory, legislative schemes have been adopted which set out the powers of the police and the rights of suspects during criminal investigation. The relevant statute in the Northern Territory is the Police Administration Act 1978 (NT), Divisions 6, 6A, ss. 136-143. These provisions set out the information which must be given to a suspect before questioning - that s/he has a right to silence, the right to contact a relative or a

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[368] At 415.

[369] There was some early reluctance, on the part of both police and Courts, to apply the guidelines, though this was short-lived. For discussion of this point, see: Foley. M. 'Aborigines and the Police' in Hanks P. & Keon-Cohen B. (eds.) *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston* North Sydney: George Allen & Unwin, 1984, 176; and Goldflam. R. *supra* n 350 at 23-31. However, in the overwhelming majority of cases, the guidelines have been applied and the Courts have ruled inadmissible any evidence obtained in breach.

[370] See, for example: Gibson v. Brooking (1983) WAR 70; Webb v. The Queen (1994) 74 A. Crim. R. 436; R. v. W. (1988) 2 Qd. R. 308; R. v. Clevens (1981) 55 FLR 453; McKellar v. Smith (1982) 2 NSWLR 950.

friend and the right to communicate with a lawyer[371] - and the contents of the caution to be administered. There is also provision for discussion between police and suspect to be recorded. The effect of such provision is that if confessions are not tape-recorded, they will be inadmissible unless the Court is satisfied that in the circumstances the admission of such evidence would not be contrary to justice.[372] Commonwealth and Australian Capital Territory legislation[373] also make special provision as to the access to legal advice and attendance of an interview friend when the suspect is an Aboriginal or Torres Strait Islander person, but there is no such provision in the Northern Territory legislation. Similarly whilst some jurisdictions make specific provision for interpreters in their legislative schemes,[374] there is no such provision in the Northern Territory statute.

Interrogation of suspects and the admissibility of such evidence are not, of course, primarily matters of customary law. However, such matters may arise in the course of interrogation and the provisions outlined above – especially the

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[371] On legal aid for Aborigines, see: Royal Commission into Aboriginal Deaths in Custody, *National Report, Vol. 2* Canberra: Australian Government Publishing Service, 1991, at 377-424; Aboriginal and Torres Strait Islander Commission *Assessment of the Funding Base of Aboriginal Legal Services* Draft Report Canberra: Aboriginal and Torres Strait Islander Commission, 1992; Aboriginal and Torres Strait Islander Commission *Evaluation of the Law and Justice Programme*, Final Report Canberra: Aboriginal and Torres Strait Islander Commission, 1995; Attorney-General's Department *The Justice Statement* May, 1995. On legal aid availability in the Northern Territory, see: Legal Aid Act 1990 (NT) and Northern Territory Legal Aid Commission *LACNT Guidelines* Darwin: Northern Territory Legal Aid Commission, 1991.

[372] On this point, see: R. v. Maratabanga (1993) 3 NTLR 77.

[373] See Crimes Act 1914 (Cth) s. 23, applicable in the Australian Capital Territory by virtue of S23A(6) of the *Act*. The Anunga guidelines have been given statutory force by the Crimes (Investigation of Commonwealth Offences) Amendment Act, 1991. However, this deals only with Commonwealth offences and few Aborigines are charged with such offences.

[374] See, for example: Crimes Act 1914 (Cth) s.23N, applicable also in the Australian Capital Territory; Summary Offences Act 1953 (SA) ss.79A(1) (3); Crimes Act 1958 (Vic) s464D.

first four Anunga guidelines may be applicable. In any communication with an Aborigine, especially if s/he is from a traditional background, there may be customary law ramifications – for example, as to material which may only be revealed to one sex, as to the difficulty of translating differing concepts, and as to the compulsion likely to be felt by some Aborigines to make a statement regardless of the caution - and these should be taken into account.

3.5: Comprehension of proceedings and fitness to plead:

The general rules on comprehension of the proceedings and fitness take account of mental and physical incapacity and apply to Aborigines as to everyone. As such, they generally raise no particular issues of customary law. The mere fact that an Aboriginal defendant cannot speak English, and so cannot understand the proceedings directly, does not render her/him unfit to plead provided that an interpreter is provided. Similarly, a lack of understanding of the nature or process of the law and the trial proceedings which is caused by cultural difference rather than by mental incapacity will not be deemed to be cognisable incomprehension.[375] However, if the cultural difference is so great that the defendant lacks understanding of the notions of 'guilty' and 'not guilty' or of a concept such as 'unlawful' that lack may be cognisable and may invoke the procedural protections offered by the rules.[376] To that extent, the fact that a

[375] On these points, see: Ngatayi v. R. (1980) 147 CLR 1; R. v. Maratabanga (1993) 3 NTLR 77.
[376] On these points, see: Ngatayi v. R. (1980) 147 CLR 1; R. v. Grant (1975) WAR 163.

defendant's understanding of laws and legality is within the framework of a customary system may be relevant.

3.6: Identification Evidence:

The Commission itself acknowledges that this matter has no customary law ramifications and is concerned simply to avoid racial generalisations in eye-witness identification.

3.7: The taking of Aboriginal evidence[377]:

Various problems arise in relation to the taking of Aboriginal evidence. Some such difficulties are related to other procedural matters – for example, the inability of an Aboriginal witness to speak English or to understand the nature of the process of giving evidence. However, three matters are of particular relevance with regard to the possible recognition of customary law within the legal system: the effect of unsworn statements, dying declarations, and the compellability of Aboriginal spouses.

i. Unsworn statements:

[377] For an overview of the problems connected to Aboriginal testimony, see: McCorquodale. J. 'Judicial Racism in Australia?' in Hazlehurst. K.M. (ed.) *supra* n 12, at 32-34.

In the early days of the Northern Territory's legal system the question of the value which could be placed on Aboriginal testimony or evidence was problematic, primarily because Aboriginal evidence took the form of unsworn statements. Such statements had two characteristics which meant that they were regarded as less reliable evidence than sworn statements. First, they were not on oath, and second, they were not susceptible to cross-examination.

Kriewaldt[378] often made reference to the status of such evidence, especially with regard to the absence of an oath, when summing up for the jury and his comments demonstrated the perceived difficulties. In R. v. Aboriginal Wally[379] he said:

> " .... Now I turn to some general comments on the native evidence. In weighing the evidence of the natives remember first of all that they have a very limited vocabulary ... generally speaking their intellect is of a comparatively low standard. ... because their evidence is given without the sanction of an oath .. it is only entitled to such weight as you think it deserves."[380]

This summing up raises several points with regard to Aboriginal evidence, some of which retain some validity even though they may be couched in unfortunate language. The comment on limited vocabulary, if read alone and without the

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[378] Kriewaldt was immensely influential in developing the law in relation to its application to Aborigines. His main contributions were in the areas of provocation and sentencing and his work will be further discussed at the appropriate points in the Thesis. For now, it should be noted that whilst some of his comments seem offensive today, they must be understood in context.
[379] (1951-1976) NTJ 21.
[380] *Supra* n 380.

pejorative reference to intellect, may simply be the ever present difficulty of dealing with witnesses or defendants whose language is not that of the proceedings. However, taken in the context and linked to the assertion about low intellect the statement becomes more objectionable. The second issue which is raised is the question of the weight to be given to such unsworn evidence. Kriewaldt appears to be implying that as the evidence is unsworn it may be less reliable than sworn evidence would be.[381] This view is further expounded in the case of R. and Willie[382]. In that case Kriewaldt reminds the jury that, in assessing the value of unsworn evidence given by Aborigines, they must remember that the absence of an oath removes the spiritual sanction to tell the truth. The argument is difficult to follow: presumably a witness will only feel compelled to tell the truth under oath and at liberty to lie when not under oath if he or she understands and believes the alleged consequences of breaking the oath. If, as in the case of the Aborigines to whom Kriewaldt is referring, there is no belief in the binding force of such an oath it is difficult to see why its presence or absence should make any difference to the truthfulness of the witness. The threat of the imposition of a sanction only works if the person is aware of and attaches some significance to the sanction.[383]

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[381] The Northern Territory Evidence Ordinance, 1939, provided that unsworn evidence given by Aborigines should be given as much weight as the jury, or the judge in the absence of a jury, considered appropriate.

[382] R. v. Willie No. of 1955. Unreported, no case number recorded on Court record. Northern Territory Supreme Court archives. See, also: R. v. Aboriginal Smiler Unreported. Northern Territory Supreme Court archive

[383] It should be noted that both in the case of evidence not given on oath and also of the significance of dying declarations there seems to have been no investigation as to the actual beliefs of the witnesses involved.

The second problem with unsworn statements is that they are not subject to cross-examination. Today, alternative provision being available for those who do not wish to take an oath, these statements are usually made – where permissible - by those who are not easily able to make a dock statement or sustain cross-examination. However, the fact that the evidence cannot be subjected to cross-examination impacts adversely on the credibility of those who make such statements. In many jurisdictions, including the Northern Territory, the provision for the making of unsworn statements has been abolished[384], although it is arguable that they should be retained in the case of Aborigines, especially traditionally-oriented Aborigines, for whom the process of giving sworn evidence and being examined and cross-examined poses extreme difficulties. The Australian Law Reform Commission came to the unanimous view that this should be the case.[385]

ii. Dying declarations:

Dying declarations – statements made by a person in expectation of imminent death – are admissible and constitute an exception to the rule excluding hearsay evidence. The original rationale for this exception was that a person was more likely to speak the truth when faced with imminent death and possibly some

[384] The provision was abolished in the Northern Territory in 1984.
[385] Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, para. 604.

form of judgement.[386] This rationale meant that dying declarations made by those who lacked belief in a deity or an after-life could be understood to fall under the usual hearsay rules. Thus, in the case of R. v. Wadderwarri[387] Kriewaldt, in summing up for the jury, said:

> "If the accused had been a white person, and if the deceased had been a white person, it is almost certain that the evidence ... of what the deceased had said when he was about to die would have been admitted, but because I have to apply the same rules to Aboriginals and whites I did not admit that evidence on the basis that the reason for admitting the evidence in the case of a white person is that he *(sic.)* has a belief that God will punish him if he tells a lie just as he is about to die. So far as the Aboriginals are concerned, we know that they have not that type of belief in the hereafter and therefore ... I excluded any statement the deceased might have made shortly before his death."[388]

This approach is unsatisfactory and, whilst it has never been directly overruled, it is unlikely that it would be followed today. There has been no decision of a higher Court, but cases from other jurisdictions[389] have found that dying declarations made by anyone, regardless of religious belief – so presumably including traditional Aborigines - are admissible.

iii. The compellability of Aboriginal spouses:

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[386] See, for example: R. v. Hope (1909) VLR 149, *per* Madden. CJ. at 157.
[387] (1958) NTJ 516.
[388] At 517.
[389] See, for example: R. v. Savage (1970) Tas SR 137.

Another issue arising in relation to Aboriginal evidence is that a traditional marriage will not serve to found a claim for the non-competence or non-compellability of spouses[390]. This provision placed Aborigines in an unfavourable position in comparison with non-Aboriginal witnesses, which disadvantage would be removed by the recognition of customary law marriages. However, the rule that spouses are not compellable in criminal trials has been abolished in many jurisdictions, including the Northern Territory, and therefore spouses in all forms of marriage are now in a position of equality.[391]

None of the three issues discussed above are of great significance today. Unsworn statements could be beneficial to Aborigines provided that they were used simply as a means of allowing an alternative method of giving evidence – not based on a judgement of the beliefs of the witness – and that such evidence was accepted as carrying the same weight as sworn evidence.[392] However, the difficulties faced by Aborigines, even traditionally-oriented Aborigines, in giving evidence have been reduced over time by specific measures such as, for example, the provision of interpreters and by a greater overall familiarity with the legal system and its concepts. The unequal treatment of dying declarations made by Aborigines no longer occurs. As non-compellability of spouses in criminal matters has been abolished, there is now no argument for the

[390] See, for example: R. v. Neddy Monkey (1861) 1 Wyatt and Webb Reports (L) 40; R. v Cobby 4 LR (NSW) 355.
[391] The compellability of spouses in criminal trials in the Northern Territory is governed by s.9 of the Evidence Act as in force at 1 January 2004.
[392] Detailed consideration of the advantages and disadvantages of such a proposal are beyond the scope of the Thesis.

desirability of the recognition of customary law marriages on this ground. Thus, the difficulties faced by Aborigines in these three areas are now largely of historic importance.

3.8: Proof of Aboriginal customary laws[393]:

The question of the proof of customary law recurs throughout the Thesis and the conceptual issues behind the question have been considered in Chapter 2 and will be so again in the Conclusion. This Chapter is concerned with the technicalities of proof.[394] Obviously if Courts are to take cognisance of customary law, there must be some evidence before them as to both the existence and the content of that law. Thus, in Mamarika v. R[395], a case involving payback[396], the Court said:

> "It is of course a fact, and one that cannot and should not be disregarded, that the appellant did suffer serious injuries at the hands of the other members of the community. But, if it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of the Aboriginal community or tribal group ... there should be evidence before the Court to show that this was indeed the case and that what happened was not simply the angry reactions of friends of the deceased,

[393] For an overview of the issues which arise in relation to the proof of customary law, including some comparative material, see: Sheleff. L. n 55, 377-395.
[394] This issue is not peculiar to Australia but arises in any jurisdiction where customary law remains a force. See, for example: Zorn. J.G. and Corrin Care. J. '"Barava Tru": Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' *International and Comparative Law Quarterly* July 2002, 51.3 (611).
[395] (1982) 42 ALR 94. Similar comments were made in Jadurin v. R (1982) 44 ALR 424 at 425-426.
[396] The particular problems raised by payback cases will be discussed below at 271 ff.

particularly when the killing of the deceased and the injuring of the appellant occurred at a time when some, if not all, of those participating had been drinking."[397]

There are many instances of Courts refusing to accept a submission on behalf of an aboriginal defendant which alleges some element of customary law for which no evidence is brought.[398]

It should be stressed at the outset that the proof required here is, of necessity, a matter of fact. The evidence is required in order to establish the veracity of a factual account being laid before the Court. The evidence required is of those facts, not of the status of customary law or the desirability or otherwise of its recognition. Two main difficulties arise. First, how is the customary law to be proved? This is essentially a question about the nature of the evidence required. Second, more specific problems may be raised by the nature of some customary law matters which are necessary evidence to adduce proof of the law.

The main problem in relation to the type of evidence acceptable in proving customary law is that the common law rules of evidence differentiate between matters of fact and matters of opinion. Customary law is contained within, and passed on by, oral traditions which are generally classified as matters of opinion and, therefore, may only be deposed to by experts. The rule excluding the admission of hearsay evidence means that a witness who is not an expert may

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[397] At 97.
[398] See, for example; Mununggurr v. The Queen (1994) 4 NTLR 63.

only give evidence of matters of fact within his/her personal knowledge. It may be, on occasion, that a non-expert witness has personal knowledge of the relevant issues and so may give evidence as a matter of fact, but this is unusual and gives rise to problems as to the status and authority of an individual to give an authoritative view of a community's tradition.[399] Expert evidence as to the nature and content of the customary law at issue, usually given by anthropologists, will be allowed.[400] This practice is governed, of course, by the general law on expert evidence[401]. It is not proposed to discuss the details of such law, but it is worth noting that the rules have been applied more flexibly in the Northern Territory than in other parts of Australia and this has been so not only in land claims hearings (which, as administrative inquiries, are not bound by the same laws of evidence) but also in ordinary criminal courts, though admittedly primarily in magistrates' courts and at the sentencing stage[402]. In addition to evidence given by experts, it is also possible, in the absence of objection, for those with some knowledge, but no formal qualifications, to give such evidence. This has been allowed, for example, in the case of community

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[399] One possible solution to the problem of authority to speak is the use of group evidence. It may be that one person alone has neither sufficient knowledge nor sufficient authority to give evidence on a particular matter, but that the collective evidence of several witnesses is sufficient. Group evidence is not widely employed in Court proceedings , but it has been accepted on rare occasions: see, for example, Police v. Isobel Phillips Unreported. Northern Territory Court of Summary Jurisdiction (Nos. 1529-1530 of 1982) – 19 September 1983, cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p 482, n16.

[400] On these points, see: Milirrpum, *per* Blackburn J. at 160.

[401] For a brief overview of the general law on expert evidence, see: Gans. J. and Palmer. A. *Australian Principles of Evidence* Coogee, NSW: Cavendish Publishing Limited, (2nd ed.) 2004, at 243-265. For more detailed consideration, see: Freckelton. I. and Selby. H. *The Law of Expert Evidence* Pyrmont, NSW: Law Book Company Information Services, 1999, and *Expert Evidence in Criminal Law* Pyrmont, NSW: Law Book Company Information Services, 1999.

[402] On this point, see: Freckelton. I. 'The Anthropologist on Trial' *Melbourne University Law Review* Vol. 15, December 1985, 360-386.

advisers.[403] A general exception to the hearsay rule may also be applicable and allow Aboriginal witnesses to give evidence of matters which, but for the exception, would be excluded. The 'reputation evidence' rule admits evidence of statements made by deceased persons relating to public rights or customs. Aboriginal witnesses have been able to give evidence of Aboriginal law and traditions under this exception.[404]

Further problems may arise in relation to the nature of some of the evidence which is necessary to prove the customary law. Some evidence will raise issues which for a variety of reasons - such as taboo relationships, kinship obligations, feelings of shame – may not be spoken of either by a particular person or persons or to a particular person or persons. The requirements of customary law on the secrecy of these issues pose a problem when their disclosure is relevant to the case before the Court. There will be occasions when an Aboriginal person is faced with a stark choice: either to observe the restrictions of customary law and not disclose the matter, thus losing whatever benefit would be granted by the general legal system if it were disclosed; or to disclose, gain the benefit from the general legal system, but be exposed to censure and possible sanction by the community for breach of customary law. This is a difficult position for the individual, but there is no way that it can be avoided. However, there are other occasions when the Courts may be able to assist by restricting the publication of,

[403] See, for example: R. v. Davey (1980) 50 FLR 57.
[404] See, for example: Milirrpum, at 154-157.

and access to, the secret material in such a way that it is possible for it to be disclosed.

The issue of secrecy has arisen most frequently in relation to land claims[405] which, of their very nature, usually require evidence of the spiritual traditions of a particular people and their connection to the land being claimed. The decision of Maurice J. in the Warumungu Land Claim[406] exemplifies the difficulties involved in such claims. He rejected the claims for professional privilege made by the anthropologists and linguists who were advising the claimants and ordered the disclosure of their field and research notes.[407] The decision caused dismay[408] as it seemed likely that future claimants would be reluctant to discuss secret material with their advisers if they could not be assured of its privilege. Maurice, however, took the view that given the importance of land claims, it was necessary for him and all parties concerned to be aware of the evidence. Moreover, the disclosure was to take place *in camera* and publication for purposes not connected with the claim was prohibited. The alternative was simply to reject the claim.

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[405] For a discussion of the ways in which the Federal Court has adapted and developed its procedure to facilitate the making of land claims, see: Anderson. L. 'The Law and the Desert: Alternative Methods of Delivering Justice' *Journal of Law and Society* Vol. 30, No. 1, March 2003, 120-36.

[406] Warumungu Land Claim Reasons for Decision 1 October 1985, cited in *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, at 485 n 30.

[407] For discussion of the significance of the decision for the experts involved, see: Freckelton. I.R. *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* Oxford: Oxford University Press, 1987, at 254-258; and Simpson. J. 'Confidentiality of Linguistic Material: the Case of Aboriginal Land Claims' 428– 439, in Gibbons. J. (ed.) *Language and the Law* Harlow: Longman, 1994.

[408] The decision was, however, upheld on appeal to the Federal Court: Attorney-General for the Northern Territory v. Maurice in the Matter of the Warumungu Land Claim (1986) 65 ALR 247. A further appeal to the High Court produced the same decision.

The most important case – or rather series of cases – in which secrecy was a crucial factor is that concerning the Hindmarsh Island Bridge.[409] The facts of the case were, briefly, as follows[410]. Developers sought permission to expand their marina which was situated on Hindmarsh Island at the mouth of the Murray River. The development was opposed by environmentalists and by the local Aboriginal people, the Ngarrindjeri, who claimed that the area concerned was of particular cultural significance. Permission was given for the development under s.23 of the Aboriginal Heritage Act, 1988 (SA). The Minister for Aboriginal and Torres Strait Islander Affairs then made a Declaration under s.9 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)[411] - relying on the evidence contained in the required Report prepared by Professor Saunders[412] - prohibiting the building of the bridge. The developers appealed to the Federal Court where O'Loughlin J. allowed the appeal[413] on two procedural grounds, only one of which is relevant for present purposes: that the Minister

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[409] For a detailed study of Ngarrindjeri society, including some treatment of the Hindmarsh Bridge cases, see: Bell. D. *Ngarrindjeri Wurruwarrin: a world that is, was, and will be* Melbourne: Spinifex Press Pty Ltd., 1998.

[410] The full facts of the case and a detailed account of all stages of the legal proceedings are not relevant for present purposes.

[411] The Act contains a federal power to intervene to protect significant Aboriginal sacred sites from desecration where, as in this case, the State or Territory concerned has failed to do so. The Aboriginal Land Rights (Northern Territory) Act, 1976, contains similar provisions as to the protection of sites of Aboriginal cultural significance. For a comparison of the two Acts with regard to evidence of secret material, see: Hancock, N. 'How to Keep a Secret: Building Bridges between Two Laws' *Aboriginal Law Bulletin*, Vol. 3, No. 77, December 1995, 4-9. For an overview of the issue of gender restricted evidence under the Northern Territory Act, see: Keely. A. 'Women and Land: the Problems Aboriginal Women face in providing Gender Restricted Evidence' *Aboriginal Law Bulletin* Vol. 3, No. 87. December 1996, 4-7.

[412] Saunders. C. *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the significant Aboriginal area in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island* Adelaide: South Australia Government Printer, 1994, cited in Bell. D. *supra* n 353 at 4 ff.

[413] Chapman v. Tickner (1995) 55 FCR 318.

failed to consider all the material in the Saunders Report, in particular material which was contained in sealed envelopes, which envelopes were marked on the outside with a warning that the enclosed material was not to be seen by men. The s.9 Declaration was quashed. The Minister and two of the Ngarrindjeri then appealed to the Full Court which dismissed the appeal[414]. In the interval between the two hearings rumours began to circulate that part of the evidence in the original application was fabricated. The material contained details of the significance of the area where the development was to take place to 'women's business'. Some Ngarrindjeri women said that there was such a connection, others that they knew nothing of it. The State Government appointed a Royal Commission to investigate the claims of fabrication and the Minister announced that there would be an independent inquiry once the result of his appeal was known. The Royal Commission announced its findings shortly after that result was published and it found that there had been fabrication[415]. Then the Minister made the s.10 Declaration. The Ngarrindjeri lodged a fresh application and the process began again with new Report being commissioned from Justice Matthews and the eventual appointment of a female Minister to examine it. The history of the dispute after this point is not relevant for present purposes - it continued to run until eventually, after the passage of special legislation to allow it[416], the bridge was built.

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[414] Norvill and Milera v. Chapman and Others; Tickner v. Chapman and Others Unreported., but see casenote in *Aboriginal Law Bulletin* Vol. 3, No. 78, February 1996, 24-28.
[415] Stevens. I. *Report of the Hindmarsh Island Bridge Royal Commission* Adelaide: South Australia Government Printer, 1995.
[416] Hindmarsh Island Bridge Act (SA) 1999.

The importance of the Hindmarsh Island cases for the present work is that the Courts essentially ruled that the secret evidence must be disclosed, at least to the concerned parties, and that not to do so risked decisions being overturned. Whilst this outcome is understandable in terms of due process and rational decision-making[417], it gives rise to difficulties. Justice Evatt in her 1996 *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984*[418] made a number of recommendations to make the Act more effective, including a warning that requiring the disclosure of confidential information would make Aboriginal people more reluctant to use the Act.

Both these cases turned on the fact that crucial evidence was not before the decision-maker. However, as long as the evidence is available to the judge, the judiciary has shown itself willing to be flexible in dealing with the issues raised by secret material in various ways. Thus, a Court may sit *in camera*[419] or restrict publication.[420] It may empanel juries of a single sex.[421] In certain circumstances a Court may take notice of well-known facts of Aboriginal culture[422] or refer to well-known publications for assistance[423] thereby obviating the necessity for the witnesses to disclose such information. However in all cases, the judiciary are obliged to balance the various interests involved. The principle of natural justice

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[417] On the balancing process involved, see: Hancock. N. 'Disclosure in the Public Interest?' *Alternative Law Journal* Vol. 21, No. 1, February 1996, 19-23.
[418] Canberra: Australian Government Printer, 1996.
[419] See, for example: R. v. Sydney Williams (1976) 14 SASR 1, where all inappropriate persons were excluded from the courtroom.
[420] See, for example: R.v. B (1992) 2 NTLR 98, where an order was made to suppress publication of the name of a dead person.
[421] R. v. Sydney Williams (1976) 14 SASR 1.
[422] See, for example: R. v. B (1992) 2 NTLR 98.
[423] See, for example: R. v. Shannon (1991) 57 SASR 14, *per* Zelling at 19

is paramount and that principle would usually be interpreted to provide that each party should have access to all the material which is relevant to the matter at hand. There may, however, be circumstances in which the principle requires a different interpretation: protecting the secrecy of Aboriginal material has been held to be such a circumstance[424] although each case will need to be considered on its merits.

Moreover, there are several cases in which the judiciary has been the agent of protecting the secrecy of such material in circumstances unconnected to the judicial process. In the case of Foster and Others v. Mountford and Rigby Limited[425], for example, the Pitjantjara Council sought, on behalf of the Aboriginal people concerned, an injunction restraining the publication in the Northern Territory of a book containing details of secret ceremonies disclosed in confidence to Mountford, the author, many years previously. The book contained a *caveat* that as far as Aborigines were concerned, it should be used only with the permission of local male tribal leaders. Muirhead J. granted the injunction.

The judiciary has attempted to be flexible in relation to the proof of customary law. The rules of evidence have been interpreted as generously as possible, but the position still remains unsatisfactory. The most appropriate person to give

[424] See, for example: Daly River (Malak Malak) Land Claim 86-89, per Toohey. J., cited in in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p 488, n 56.
[425] (1976) 14 ALR 71.

evidence of Aboriginal customary law would seem to be a person who lives under that system. It may be possible to amend the rules on expert evidence or to increase the use of group evidence in order that more Aborigines could testify to their law. However, the rules of evidence should not be lightly dismissed and the acceptance of inadmissible evidence should not be encouraged. In relation to the issue of secrecy, the judiciary have made attempts to protect such material where possible, and with some success, but there are occasions when this is not possible and the witness must decide her/his course of action. There is adequate caselaw, some of which is referred to above, to show that in criminal trials, the existence of a relevant customary law is often asserted with absolutely no evidence to support it. This is obviously unacceptable. The present system may not be perfect, but it appears to be a reasonable one, given the necessity to balance various interests and considerations.

3.9: Conclusion:

Many of the issues raised in this Chapter are not specifically related to customary law and it is argued that they can be addressed relatively easily within the legal system as it currently stands. This is the argument made by Mildren[426] who maintains that the police could make fairly minor adjustments which would help and that the trial judge also has scope including by giving a direction to the jury – a draft form is in the Appendix to the article - on the main

[426] Mildren. D. 'Redressing the Imbalance against Aboriginals in the Criminal Justice System' *Criminal Law Journal,* Vol. 21, February, 1997, 7-22.

areas of concern within Aboriginal evidence. For reasons discussed above, it is impossible for Australian courts simply to apply different laws to Aborigines from those they apply to the rest of the population unless such differentiation is legally justified.[427] It is, therefore, not open to the judiciary simply to alter or ignore the rules of procedure when faced with a matter of applying customary law. However, they may assess the impact and relevance of customary law on Aboriginal witnesses and defendants and be as flexible as possible within the rules.

[427] Such differentiation would be justified by, for example, legislation on native title and land rights schemes. This is, of course, the perspective of the state legal system, premised on the understanding that Australia was acquired by settlement and on the consequences of that understanding for the recognition of customary law. For discussion of these points, see Chapter 1.

Chapter 4: Judicial use of customary law in the establishment of the elements for an offence or a defence:

4.1: Introduction:

The judiciary has shown itself willing to make use of customary law in the substantive areas of the criminal law as well as in relation to evidential and procedural requirements. The general position is, of course, that the same law must be applied to everyone and thus there might seem to be little scope for recognition of alternative systems in establishing the elements of offences or defences. With regard to offences this perception is broadly correct, although there has been some consideration of customary law in determining intent. However, the Courts have given extensive consideration to such law when deciding whether defences, primarily provocation, have been made out. Indeed the establishment of provocation has been the most common *locus* of judicial use of customary law apart from sentencing. The question of whether objective or subjective[428] standards are applied is of crucial importance in relation to the establishment of offences and defences. The precise nature of, and difference between, objective and subjective tests is controversial and imprecise. It may be more accurate to say that what is important is whether any required standard or

[428] The terms 'objective' and 'subjective' will be used throughout the Thesis as they are employed in the caselaw and the secondary literature, but any such use is subject to the reservations here expressed. For an overview of differing concepts of criminal responsibility, including the interpretation and application of objective and subjective tests, see: Findlay. M., Odgers. S. and Yeo. S. *Australian Criminal Justice* Melbourne: Oxford University Press, (2nd ed.) 1999 pp. 15-20.

test *explicitly* allows for differential application. Objective standards are, of course, only the most commonly held subjective standards. It follows that if 'objective' standards are applied to people from minority groups or cultures they will be judged by the standards of the majority which may be quite different from their own. This is relevant in many areas and is an issue which will recur throughout the Thesis.

4.2: Offences:

The question of whether the required elements for an offence are present most frequently arises in connection with intent. Intent is a necessary element of many offences, including murder and rape. In assessing the presence or absence of intent, the common law concentrates on the actual state of mind of the defendant rather than imposing standards which may be described as objective. There is no presumption that the accused intended the natural and probable consequences of her/his actions; rather the test is one of fact in each case: did the accused *actually* intend what happened?[429] However, the defendant's actual intention is not established by psychological investigation, but is deduced from her/his actions. So the test is subjective in that it is the defendant's state of mind which is relevant - and there can be no assumption that s/he intended what seems to most people to be the natural or probable consequence - but objective

[429] Until the mid 1950s there was such a presumption but it was repeatedly disapproved of by the High Court - see, for example: Smyth v. R. (1957) 98 CLR 163 at 166-167 - and it is clear that it no longer exists. The modern common law position and the difficulties involved in the use of the terms 'objective' and 'subjective' are set out clearly by Burt CJ. in the case of Schultz v. R. (1982) WAR 17 at 172-173.

in that the required state of mind will be deduced by others from the actions done even if s/he denies that such was her/his intention. Inevitably these deductions are based in the culture, *mores* and intellectual framework of those doing the deducing. This may result in the imputation of states of mind to Aboriginal defendants which were not, in fact, present due not to individual peculiarities, but to differing thought patterns amongst different cultures.[430] The position under s.31 of the Northern Territory Criminal Code, which sets out the Code position on intention and covers unwilled acts, is rather different. The section provides that there is no criminal liability for non-intended acts. It does not, however, apply in the case of self-induced intoxication which is covered by s.7 of the Code, or to dangerous acts/omissions or failure to rescue which fall under ss.154 and 155.[431]

There are very few cases where the defendant has sought to escape criminal liability on the grounds that her/his Aboriginality and the cultural norms and laws associated with that status meant that s/he lacked the necessary criminal intent. There are no reported Northern Territory decisions on the point, but the

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[430] The Australian Law Reform Commission has summed up the position thus:

> "There is a danger that inappropriate monocultural or ethnocentric assumptions may be made, to the possible detriment of persons of ethnic minority background. The magistrate or jury may not take into account differences in behaviour and belief that derive from adherence to different cultural and religious values. In working out what was an accused's state of mind, a judge or jury are likely to apply their own cultural logic and may make the wrong inferences from behaviour unless they have evidence of the customs, practices and beliefs prevalent in the accused's community. This is particularly so if it is a minority community". *Supra* 53, para. 8.30 and Recommendations.

[431] Ss. 31, 154 and 155 – and s.7 - were considered in a recent review of the Code and various recommendations were made for reform: Fairall. P. *Review of Aspects of the Criminal Code of the Northern Territory* Darwin: Attorney-General's Department of the Northern Territory, March 2004. Detailed discussion of the Review and its recommendations is outside the scope of the Thesis.

Queensland case of Glen Maurice Watson[432] provides an illustration of the way in which the issues may arise. However, as the defendant's arguments were rejected on the facts, it provides little indication of the likely reaction of the Courts to such arguments when put before them. The accused killed his *de facto* wife by stabbing her and was charged with her murder. He sought to bring evidence that such a stabbing was recognised by his community as a form of domestic punishment and argued, moreover, that the community did not regard such wounds as serious. If accepted, these arguments would have meant that he lacked the necessary intent for murder as he considered that he was inflicting a relatively minor and widely used form of punishment which was not intended to result in death, nor was he reckless as to such a possibility. To the extent that Watson's argument that his state of mind, and therefore his intent, was shaped by his community's attitudes, it amounted to an assertion that he should be treated differently from a white offender (or possibly from an Aboriginal offender from another community whose *mores* differed) and that his Aboriginality and cultural background were relevant in establishing intent. The trial judge refused to allow such evidence to be brought and Watson, having been convicted, appealed. The Court of Criminal Appeal rejected the appeal and the submissions on several grounds of fact. They were, therefore, not required to express a view as to the relevance or effect of the appellant's assertions had he been able to substantiate them, though *obiter* remarks suggest that they would have reached the same decision.[433]

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[432] (1986) 22 A. Crim. R 308

[433] See, for example, McPherson J's discussion of the applicability of the Racial Discrimination Act 1975 at 312.

In the unreported Northern Territory case of R. v. Old Barney Jungala[434] the defendant sought to establish the defence of duress. This failed as there was no external threat, but the defendant was convicted of manslaughter instead of murder on the grounds that he lacked the intent to kill. It is difficult to assess how frequently such decisions may be made, but not reported. However, it seems unlikely that this case is the only one where such an analysis has been used, and it is not unreasonable to speculate that the judiciary may make more allowance for customary law in determining intent than is evident from the reported jurisprudence.

4.3: Defences:[435]

The same issues of differential treatment and of objectivity and subjectivity arise with regard to the relevance of 'unusual'[436] states of mind to the establishment of criminal defences. There are four defences where this most commonly occurs- provocation, duress, intoxication and diminished responsibility - and these defences will be discussed in some detail. However, it should be borne in

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[434] Unreported. Northern Territory Supreme Court (Muirhead J.) 8 Feb 1978 cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, Vol.1, p.308. n81.

[435] On defences generally, see, for example: O'Connor. D. and Fairall. P.A. *Criminal Defences* North Ryde: Butterworths, (3rd ed.) 1996 and Yeo. S. (ed) *Partial Excuses to Murder* Leichardt, New South Wales: Federation Press with the assistance of the Law Foundation of New South Wales, 1990. On defences and customary law, see: Eames. G.M. 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H. & Gerull. S-A. (eds.) *Homicide: Patterns, Prevention and Control.* Canberra: Aust. Institute of Criminology Conference Proceedings. No. 17 12-14/5/1992.

[436] The term 'unusual' is used to mean a state of mind or outlook not shared by the majority of the population: it is not intended to convey any value judgement.

mind that other defences may from time to time raise the same issues.[437] By far the most extensive analysis and application of such differential *criteria* has been in cases involving provocation.

i. Provocation:[438]

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[437] The other defences most likely to be relevant to the present discussion are automatism, self-defence, necessity and insanity. All these will, of course, also be available to Aboriginal defendants, but have not given rise to any substantial jurisprudence on differential treatment and customary law. Note, however, the less common defences of claim of right and mistake of fact which are governed in the Northern Territory by ss. 30 and 32 of the Northern Territory Criminal Code. It has occasionally been argued - both in the Northern Territory and in other jurisdictions – that these defences can be raised to avoid criminal responsibility for actions which are justified under Aboriginal customary law, but contrary to state law. Such arguments have almost always failed. See, for example: Walden v. Hensler (1987) 29 A. Crim. R. 85; Colin Goodsell v. Galarrwuy Yunupingu (1999) 4 AILR 29; Director of Public Prosecutions Reference No. 1 of 1999 (1999) 128 NTR 1; (2000)134 NTR 1.

[438] For a general account and discussion of the law on provocation: see any criminal law text, for example, Bronitt. S. and McSherry. B. *Principles of Criminal Law* Pyrmont, NSW: Law Book Company Information Services, 2001. On the historical development of the doctrine: see Horder, J. *Provocation and Responsibility* Oxford: Clarendon Press, 1992. For academic debate on the 'ordinary person' requirement for the establishment of provocation: see the series of articles by Yeo. S. 'Provoking the 'Ordinary' Ethnic Person: A Juror's Predicament' (1987) 11 *Criminal Law Journal* 96; 'Ethnicity and the Objective Test in Provocation' *Melbourne University Law Review* Vol. 16, June 1987, 67; 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3; 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' 18 *Sydney Law Review* (1996) 304; see also Leader-Elliott. I. 'Sex, Race and Provocation: In Defence of Stingel' 20 *Criminal Law Journal* April 1996, 72; Detmold. M.J. 'Provocation to Murder: Sovereignty and Multiculture' 18 *Sydney Law Review* (1997) 3. For consideration of what conduct is sufficiently grave to establish the defence: see the expanding literature on women who have allegedly provoked their male partners into killing them or who have killed male partners who have battered them: for example, Tolmie. J. 'Provocation or Self-Defence for Battered Women who Kill?' in Yeo. S. (ed.) *supra* n 301; Greene. J. 'A Provocation Defence for Battered Women who Kill' (1980) 12 *Adelaide Law Review* 145; Horder. J. 'Sex, Violence and Sentencing in Domestic Provocation Cases' (1989) *Criminal Law Review* 546; Sheehy et al. 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369; Morgan. J. 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' *Melbourne University Law Review* Vol. 21 (1997) 237; Bradfield. R. 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' *University of Tasmania Law Review* Vol. 19, No. 1, 2000, 5-37; and the Report of the Law Reform Committee of the Northern Territory *Self-Defence and Provocation* October 2000. See also the relatively recent debates over whether non-violent homosexual advances can amount to provocative behaviour of sufficient gravity: for example, Howe, A. 'More Folk Provoke their Own Demise (Homophobic Violence and Sexed Excuses - Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' 19 *Sydney Law Review* (1997) 336, and 'The Provocation Defence: Finally Provoking its own Demise?' (1998) 22 *Melbourne University Law Review* 466. See also the New South Wales Attorney-General's Working Party on the Review of the Homosexual Advance Defence *Homosexual Advance Defence: Final Report of the Working Party* September, 1998.

a. General development of the law:

The Courts have engaged in some of their most forward-looking and creative thinking in interpreting the requirements for the doctrine of provocation in such a way that weight may be given to considerations of customary law. Provocation in common law is a partial defence to a charge of murder in that, if made out, it reduces the charge to manslaughter.[439] For this to be established, not only must the accused have lost control but the provocation must be so grave that it would have caused an ordinary or reasonable[440] person to lose self-control[441]. These requirements have been the subject of much judicial and academic[442] comment both in England and Australia. Only the latter is strictly relevant although the influence of English law has been such that some mention of it is inevitable. Discussion has largely centred on the definitions of 'grave' conduct and 'ordinary person' or 'reasonable person' and whether these should be assessed by an objective or subjective test or by a test which combines both approaches. Although there has been more frequent recognition of both Aboriginality *per se* and of factors associated with Aboriginality[443] in sentencing than in relation to

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[439] In all other offences provocation at common law goes to mitigation and not to liability, although under some Code provisions it may serve as a defence to other charges.

[440] The test of the 'reasonable man' in relation to provocation was first expounded in R. v. Welsh (1869) 11 Cox CC 336 *per* Keating J. at 338 and this is generally treated as the starting-point of the modern law on the subject. There has been much discussion in the Australian jurisprudence about the shift from the requirement that the test be that of the 'reasonable man' to that of the 'ordinary person'. Such a change is not significant for present purposes.

[441] For interesting explorations of the psychological dynamics of 'loss of self-control', see: Finkel. N 'Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction' (1995) 74 *Nebraska Law Review* 742; Kahan. D. and Nussbaum. M. 'Two Concepts of Emotion in the Criminal Law' (1996) 96 *Columbia Law Review* 269; and Reilly. A. 'Loss of Self-Control in Provocation' in *Criminal Law Journal* Vol. 21 Dec. 1997 320.

[442] *Supra* n 438.

[443] These concepts are discussed in Chapter 5.

provocation, the consideration of such matters in the application of a substantive legal doctrine is a more controversial undertaking. The extent to which cultural differences may or should be taken into account in deciding whether the elements of the defence of provocation are established has been widely debated and will be discussed below.

The origins of the doctrine lie, of course, in English common law though the test has since been given statutory force. From the mid-nineteenth century on, the test was an entirely objective one: how would a reasonable man (*sic.*) have reacted to this situation? All characteristics peculiar to the offender were ignored. This was so not only of truly individual characteristics, such as being unusually hot-tempered, but also of broader characteristics which were shared with other members of society, such as racial, ethnic, and cultural attributes and attitudes. Given the impossibility of true objectivity and the inevitability of those judging using their own standards and experience to assess reasonableness, the reasonable person was seen, in reality, as an Anglo-Saxon, middle-class male; that is, as the same type of person as the judges.[444] The

[444] Whilst it is for the judge to decide whether there is sufficient evidence to raise the possibility of the defence of provocation, it is for the jury to decide whether it is actually established. It follows therefore that there will actually be two agencies applying the 'reasonable man' test: the judge as a matter of law and the jury as a matter of fact. Both must try to imagine how an Aborigine would feel about a particular act and how s/he would react to it. Whilst the jury will not necessarily be male or middle or upper class they are likely, even today, to be white and of Anglo-Saxon origin. However, no evidence may be called to assist them. This is clearly an absurd position as was recognised in the case of R. v. Dincer (1983) VR 460. This case in fact involved a Turkish Muslim, but the point holds for all minority groups not represented on juries. In this case the judge, Lush J., recognised the absurdity of the position when he said to the jury:

> "You may be asking yourselves, 'how are we to know what an ordinary conservative Turkish Moslem might have done in these circumstances?' There is no answer to that question ... the law does not allow the calling of evidence to assist the judgement of the jury on a question like that. It is your problem." at 468.

objective test thus understood is clearly unsatisfactory when applied to whole sections of society who were thereby judged by their non-adherence to standards which may be entirely alien – and possibly unknown - to them. This was recognised as early as 1946 when the Privy Council in the case of Kwaku-Mensah v. R.[445] - a case on appeal from the West African Court of Appeal (Gold Coast Session) - found that the test was not sustainable when judging people from backgrounds very different from the stereotypical English one and held that it was the characteristics of the "ordinary West African villager"[446] which were relevant in assessing whether or not a reasonable or ordinary person would have lost self-control in the circumstances.

Australian law on provocation closely followed the English law. Whilst some Australian Courts and judges followed the strict objective test,[447] others, especially Kriewaldt J. in the Northern Territory Supreme Court[448], were prepared to show flexibility and adopt a line of reasoning similar to that in Kwaku-Mensah. A considerable amount of the case-law and much of the academic debate surrounding the issue of provocation relates to the possibility of establishing the defence where members of particular cultures have reacted to behaviour which clearly would not have amounted to provocation if the defendant had been the traditional 'white, Anglo-Saxon male'. Whilst the focus of the Thesis is the application of the doctrine in the case of Aborigines and

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[445] (1946) AC 83.
[446] At 93.
[447] See, for example: R. v. Young (1957) Qd. R. 599
[448] *Infra* 223 ff.

customary law, it is necessary to examine briefly the evolution of the doctrine and the debates surrounding it in more general terms in order to provide a background to more specific considerations.

In England the strict objective test remained the law until 1978 when in the case of Director of Public Prosecutions v. Camplin[449] the House of Lords declined to follow its own previous decision in Bedder v. Director of Public Prosecutions[450] and held that all the characteristics of the defendant (except his or her personal capacity for self-control) were relevant in assessing whether a reasonable person would have been provoked. This included age, race and ethnic origin.[451] Australian Courts remained bound by English precedent until 1986[452] and the Camplin decision thus resolved the position in Australia, where some uncertainty had remained[453], and established the law as it was to stand until 1990.

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[449] (1978) 2 All ER 168

[450] (1954) 2 All ER 801. The Homicide Act, 1957, had been passed in the period between the decisions in Bedder and Camplin and one of the questions which the Court in Camplin considered was the effect of that Act on the common law including, in particular, Bedder.

[451] Thus Lord Diplock says:

> "To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the persons addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into account all those factors which in their opinion would affect the gravity of taunts and insults when applied to the persons to whom they are addressed." at 174

[452] The Privy Council remained the highest Court of Appeal for Australia until 1986 when that role was taken over by the High Court of Australia: Australia Act, 1986 (Cth.) and Australia Act, 1986 (UK). Pre-1986 English jurisprudence was, therefore, of considerable influence in Australia.

[453] Thus the year before the Camplin case produced a decision supporting the flexible approach - Moffa v R. (1977) 13 ALR 225 - and a decision based on the strict objective test - R. v. Webb (1977) 16 SASR 309.

In 1990 the case of Stingel v. R.[454], which originated in the Code state of Tasmania, came before the High Court. The Court took the opportunity to re-examine and restate the law on provocation, now no longer constrained by English precedent.[455] The Court held that particular characteristics, including ethnicity, could be considered in assessing the gravity of the act alleged to constitute provocation:

> " ... the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. ... In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult."[456]

However, such characteristics, with the exception of age, could not be considered in assessing the required standard of self-control:

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[454] (1990) 171 CLR 312. A *proviso* needs to be made about the influence this judgement. The Court states that although in the area of provocation "the common law, the Codes and other statutory provisions, and judicial decisions about them, have tended to interact and reflect a degree of unity of underlying notions" (at 320) and that the Court shares this perception, nevertheless they intend in the present case, to focus entirely on the relevant provisions of the Tasmanian Criminal Code. It is thus not clear to what extent the judgement is intended to apply to other Codes or to common law. However, the point on which most stress seems to be laid on the particularities of the Tasmanian Code is not the one which is relevant to the present work and there seems to be no reason why the Court's views on the test for provocation to be established should not be taken to apply to both Code and common law in all jurisdictions.

[455] Camplin is no longer good law in England. See: R. v Morhall (1995) 3 All ER 659 where the House of Lords held that the reasonable man against whom the actions of the defendant were to be assessed could be held to share the characteristics of the defendant not only in terms of age, but also in terms of his addiction to glue sniffing; R. v. Smith (2000) 3 WLR 634 where the House of Lords held that in assessing the reactions of the defendant to the provocation any characteristic which affected her/his ability to exercise self-control should be considered (though the judge should direct the jury that certain characteristics, such as being unusually bad-tempered, should be ignored).

[456] At 326

> "No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. ... The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized (*sic.*) as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community. There is, however, one qualification which should be made to that general approach. It is that considerations of fairness and common sense dictate that, in at least some circumstances, the age of the accused should be attributed to the ordinary person of the objective test."[457]

Thus, Aboriginality and customary law may be taken into account in assessing whether the provoking act is sufficiently grave to found the defence, but not in assessing whether that degree of provocation would lead an ordinary person to lose control of her/himself. At first sight, this appears to be a return to a more objective test. However, there is still scope for taking cultural factors into account. The first stage in establishing the defence is to prove that the conduct is sufficiently grave to provoke: at this stage such factors may be taken into account. Thus, the improper display of taboo objects may be extremely offensive to an Aboriginal person – and thus meet the test - but be of no concern at all to a white person. The second stage requires that the person provoked exercise the same degree of self-control as an 'ordinary person' would when

[457] At 329.

faced by a provoking act of that gravity. Thus, the Aborigine must exercise the same degree of control in relation to a very serious act of provocation as would an 'ordinary person'. Essentially this stage requires that all people are required to withstand the same degree of provocation and exercise the same degree of self-control. There is, however, scope for differentiation in assessing what amounts to that degree of provocation.

The issue came before the High Court again in 1995 in Masciantonio v. R.[458] The appeal to the High Court was on the question of whether the trial judge had incorrectly withdrawn the issue of provocation from the jury and the discussion of this point is not relevant for present purposes. However, in the course of its judgement the Court made remarks on the general issues surrounding the law on provocation. It reaffirmed its earlier decision in Stingel and again held, in language very similar to that used in Stingel, that whilst the characteristics of the accused were relevant in assessing the gravity of the alleged provocation, they were not, with the exception of age, relevant in deciding whether the accused had shown the degree of self-control which would be shown by an 'ordinary person'. Thus Brennan, Deane, Dawson and Gaudron who issued a joint judgement allowing the appeal, stated:

> "The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-

[458] (1995) 183 CLR 58. As Victoria, where the matter originated, is a common-law jurisdiction, the Court was here dealing with the common-law doctrine of provocation. However, it reiterated that, as was pointed out in Stingel, there is a good deal of convergence between common law and Code provisions on the matter of provocation and thus it could follow the principles of Stingel even though that case was dealing with the Tasmanian Code and even though the Court there had pointed out that it was dealing specifically with that Code.

> control required by the law. Since it is an objective test, the characteristics of an ordinary person are merely those of a person with ordinary self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age.
>
> However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. ... But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions."[459]

McHugh delivered a dissenting judgement, taking a different view of the law - or, more accurately arguing what the law should be - a view more in accordance with the judgements of Kriewaldt and the pre-Stingel cases. He reiterates the commonly held view that the characteristics of the accused are relevant in assessing the gravity of the provocation and argues that this is the necessary consequence of the very rationale of the doctrine of provocation: to make allowance for human frailty. However, he goes on to argue that neither the common law nor the Codes or statutes have been able to pursue this rationale to its logical conclusion, that is, to make the same allowance with regard to the loss

[459] At 66-67

of self-control. The 'ordinary person' test employed with regard to the self-control element departs from the rationale of provocation. It is, in fact, a policy-based test employed to preserve the principle of equality before the law and to ensure that all who seek to establish the defence of provocation are treated according to the same standards. Thus, the law as stated in Stingel is logically inconsistent in applying one type of test for the gravity of the provocation and another for the self-control element. McHugh concedes that to resolve the logical inconsistency by allowing all the characteristics of the accused to be taken into account at both stages would in fact be to abolish the ordinary person test.[460] However, he maintains that this should be done. Paradoxically, McHugh's main concern is the same as that of the majority: the preservation of equality before the law. He states that he had been a party to the judgement in Stingel and had then believed that the maintenance of equality before the law justified rejecting the incorporation of any attribute of the accused save for age. However, he now believes that unless the ethnic and cultural background of the accused is taken into account the result is in fact inequality before the law:

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[460] "The 'ordinary person' standard would become meaningless if it incorporated the personal characteristics or attributes of the accused on both the issue of provocation and the issue of self-control. In so far as the Courts have incorporated those characteristics and attributes in respect of the issue of provocation, they have acted inconsistently with the rationale of the objective test. To go further and incorporate them in the self-control issue would require the abolition of the objective test, and that test is too deeply entrenched in the common law to be excised by judicial decision. Besides, the Codes and statutory substitutions for the common law of provocation contain objective tests of self-control. It would defeat the considerable unity that exists between the common law and statutory regimes of provocation if the common law rejected its own doctrine and became inconsistent with the statutory regimes." At 73. An entirely subjective test has in fact been suggested: see Murphy J. in the Moffa case: "The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances." At 626. However, Murphy's view was rejected by the majority.

"Without incorporating these characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction... Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar."[461]

and again:

" .. I have concluded that, unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.

If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood. Moreover, to a large extent a regime of different laws already exists because the personal characteristics of the accused including attributes of race and culture are already taken into account in determining the effect of the provocative conduct of the deceased on the ordinary person."[462]

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[461] At 73
[462] At 74

The law in relation to provocation was extended on two points, both of which have given rise to debate, in the case of Green v. R.[463]. Green's appeal against a conviction for murder went to the High Court on the grounds of a misdirection of the jury on the availability of the defence of provocation and on the admissibility of evidence. The facts of the case are unimportant. Essentially Green killed a man who made persistent homosexual advances to him and argued that this behaviour was particularly traumatic for him as it recalled to mind his father's sexual abuse of his sisters. The High Court, by a bare majority, allowed the appeal, directed a new trial and Green's conviction was reduced to manslaughter. Much of the argument in the case turns on the interpretation and application of s. 23 of the Crimes Act, 1900 (NSW) which sets out the requirement for provocation to be established in New South Wales. However, some of the judicial comment is of wider application.

First, Green establishes beyond doubt that persistent non-violent homosexual advances are sufficiently grave conduct to allow the defence of provocation to be raised. This conclusion gave rise to great unease as it seems unlikely that comparable heterosexual advances would be viewed in the same way.[464] The second point of controversy was that Green's history, and his unusual sensitivity to matters of sexual interference, were factors which could be take into account in the 'ordinary person' assessment. Whilst this analysis concerned individual characteristics and not cultural factors, it seems to support the view taken by

[463] (1996-1997) 191 CLR 334
[464] See *supra* n 438.

Kriewaldt, the pre-Stingel cases and McHugh in Masciantonio. It remains to be seen whether this analysis will prevail and whether it will be applied to the cultural and ethnic characteristics of any future defendant.

b. Northern Territory:

Having examined the general development of the law of provocation it is now necessary to examine the reactions of the judiciary of the Northern Territory and their ability to use the law of provocation to give some recognition to customary law. Any study of judicial activity in the early days of the Northern Territory, particularly with regard to Aborigines, centres largely on Kriewaldt's judgements[465] and, therefore, before examining the caselaw on provocation, it is useful to make some general comments about him. His judgements are important in virtually every area of law affecting Aborigines in the Northern Territory and are still cited, and on many points still regarded as authoritative.[466]

Kriewaldt sat as the sole Judge in the Northern Territory Supreme Court from 1951 until his death in 1960. His influence was immense not only because he was the sole judge, but also on account of the contents of his judgements. Although the tone of some of his judgements seems offensive today, sounding at

[465] There was no systematic record-keeping under Kriewaldt's predecessors and, therefore, analysis of the caselaw can only be carried out from the date of his appointment.
[466] See, for example: Jabarula and Others v. Poore; Jabarula v. Bell (1989) 68 NTR 26

best patronising and at worst 'racist'[467], it must be understood within the context of the time. The argument today may be about the best way to accommodate cultural pluralism and how to take account of the economic and social disadvantages under which many Aboriginal people live, but in the 1950's the problem was a different one. The outcome to be sought at that time was basic equality. Kriewaldt understood 'equality' against the background of the then almost universally held liberal presuppositions inherent in the concept of the rule of law. He therefore argued that Aborigines must be treated in the same way as white people: they must be accorded formal equality and must be tried according to the same law.[468] Whilst this might involve ignoring or denying cultural differences, he was intent on gaining for Aborigines recognition that they were equal. Much public opinion in the 1950's would have seen 'different' as 'inferior' and differential treatment in this context would inevitably have meant worse treatment. Against this background, Kriewaldt's remarks seem less objectionable. His refusal to admit of difference appears to have been based on the right desire, however paternalistically expressed, to see that the Aborigines

[467] It is beyond the scope of this paper to examine in detail the debates surrounding racism. The words 'racist' and 'racism' are used here in an everyday sense as describing views or attitudes about other races or ethnic groups which views are derogatory and ill-founded. It does not necessarily imply hostile intent.

[468] See amongst others: R. v. Wogala (alias Dick) No. of 1951 (unreported); R. v. Willie No. of 1955 (unreported); R. v. Aboriginal Billy Marikit No. 30 of 1958 (unreported); R. v. Aboriginal Sandy Nitjenburra No. 32 of 1958 (unreported) and R. v. Aboriginal Jack Wheeler No. 36 of 1959 (unreported) and R. v. Aboriginal Timmy (1959) NTJ 676 in all of which Kriewaldt insisted that Aborigines must be treated and tried in the same way as white people. Nor should judicial decisions be seen in isolation. The assimilation policy of the Northern Territory commenced in 1951 and thus most of Kriewaldt's judgements were delivered in its early years. This is not to say that he formulated the judgements with that policy consciously in mind, but presumably he was affected by the general climate of opinion. At least some academic opinion took a similar line. Thus, Tatz writing in 1964 said: "There can be no perfect formula for applying the criminal law to Aborigines ... In view of the assimilation policy it seems wrong to introduce codes of tribal law and exempt Aborigines from the criminal law". Tatz. C. *supra* n 85 at 261.

were not treated as inferiors. Moreover, even though cultural pluralism was not a live debate in the 1950's and Kriewaldt still spoke the language of superiority, he did try to show sensitivity and to take account of differences as he perceived them.

Not surprisingly, Kriewaldt's attempts to insist on equal treatment led him into difficulty. There were many occasions, such as in the cases discussed below, when the justice of the matter seemed to demand that the Aboriginal offender be treated differently. Kriewaldt's very insistence on equality, an equality which seemed to include the application of objective standards and which was aimed at defeating harsher treatment for Aborigines, then posed a problem when he wanted to accord them apparently more lenient treatment. His attempts to obtain a just solution, recognising both equality and disadvantage, often led to him asserting that Aborigines - or at least traditional Aborigines - were somehow less civilised, less adult, subject to different (or less easily controlled) desires and passions. Sawer says in his foreword to Kriewaldt's article (which he edited for publication on the author's death) that he had formed the impression that Kriewaldt had come to believe that:

> " ... aborigines as a whole, or at any rate a considerable number of 'pure-blooded' aborigines, had a slightly different mental make-up from the white man or the mixed blood, and this created inherent and inescapable difficulties in applying our legal

> concepts to their affairs, even after they had had considerable contacts with white society".[469]

If Kriewaldt had reached such a conclusion, it might reveal a racism which is unacceptable or it might display a real, if embryonic, understanding that Aborigines do have very different concepts of, for example, time. This dilemma of reconciling insistence on equality with differential treatment is a recurrent theme in Kriewaldt's judgements on many areas of law and also throughout the Thesis.

One of the ways in which Kriewaldt sought to achieve equality whilst recognising difference was by extending the meaning of the provocation *criterion* of 'ordinary' to include the ordinary Aborigine. Whether provocation is *actually* established is a question of fact for the jury. Kriewaldt, as judge, was required to direct the jury on the law and when doing this he explained that they were on occasion entitled to treat Aborigines differently, i.e. that it was legally possible to find provocation in situations where it would not be so if the defendant were white. However, the jury were the judges of fact. Thus, Kriewaldt stated that it was possible to argue that Aborigines lost self-control more quickly than would a white person and that on that basis provocation could be established, the jury had to agree that as a matter of fact firstly, that

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[469] Kriewaldt. M. 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia'. *University of Western Australia Law Review* Vol. 5, No.1 (1960-1962) 1-50 at 1.

Aborigines did have less self-control and secondly, that the individual concerned had lost self-control. If they did so agree, then it was possible to establish the defence. However, they were entitled to say that these requirements were not met in fact. If they did not agree that Aborigines lost self-control more quickly, then they must apply the same test as if the defendant were white.

Kriewaldt's[470] approach to assessing whether provocation *could* be established in cases involving Aborigines, especially those who were of traditional orientation or from remote communities, was similar to that used in the Kwaku-Mensah case. In a series of cases,[471] he set out clearly that the elements of the defence could, and indeed should, be established by reference to the standards prevailing at the time and in the place where the offender was living.[472] In R. Aboriginal v. Muddarubba[473] he explains that the standards of provocation are not fixed and argues that just as they may alter over time so they may differ from community to community:

> "In my opinion, in any discussion of provocation, the general principle of law is to create a standard which would be observed by the average

[470] The focus of the Thesis is the Northern Territory, but there were some – though far fewer - attempts in other jurisdictions to use such an approach: see, for example, the later Queensland case of R. v. Rankin (1966) QWN 16 "I propose to direct the jury that the question which they must consider is whether the provocation was sufficient to deprive an ordinary aboriginal who lives in an aboriginal settlement of his power of self-control." *per* Campbell J. at 17

[471] See, for example: R. v. Aboriginal Patipatu (1951-1976) NTJ 18; R. v. Aboriginal Johnny Scott MacDonald (1951-1976) NTJ 186; R. v. Aboriginal Muddarubba (1951-1976) NTJ 317; R. v. Aboriginal Nelson (1951-1976) NTJ 327; R. v. Aboriginal Jimmy Balir Balir (1951-1976) NTJ 633; R. v. Aboriginal Timmy (1951-1976) NTJ 676.

[472] There is little contemporary academic writing on the precise point. See: Marsack. C.C. 'Provocation in Trials of Murder' (1959) *Criminal Law Review* 697; Howard. C. 'What Colour is the 'Reasonable Man'?' (1961) *Criminal Law Review* 41; Brown. B. 'The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen'' 13 *International and Comparative Law Quarterly* 203 (1964).

[473] (1951-1976) NTJ 317

person in the community in which the accused person lives. It is clear from the cases decided by Courts whose decisions bind me that in white communities matters regarded as sufficient provocation a century ago would not be regarded as sufficient today. This suggests the standard is not a fixed and unchanging standard, it leaves it open, and I think properly so, to regard the Pitjinjara tribe as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjinjara tribe ... would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter. If provocation sufficient for the average reasonable person in his community to lose his self-control exists, then the unlawful killing is manslaughter and not murder."[474]

The 'ordinary' or 'reasonable' person to be considered for the purposes of establishing the defence was an ordinary Aborigine in similar circumstances to the offender. Thus in R. v. Aboriginal Patipatu[475], the earliest reported case on the point, he said:

"Provocation consists of anything or any action which will cause a normal ordinary reasonable person to lose control of himself ... If you think that in the circumstances prevailing in that particular locality the abandonment of a young child .. by the person appointed to look after it ... would cause an ordinary reasonable person in that vicinity and of that description, so to lose control of his emotions as to retaliate with a spear then you would be entitled in this case to find a verdict of manslaughter."[476]

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[474] At 322
[475] (1951-1976) NTJ 18
[476] At 20

It follows from this that something which does not amount to provocation in one community may nevertheless do so in another. He says in R. v. Aboriginal Jimmy Balir Balir[477] that "something a white man might not regard as provocation might be so regarded as an Aboriginal"[478].

In all the cases Kriewaldt stressed that Aborigines and whites must be tried by the same law and the same procedure.[479] He is very clear that this must be so whatever a person's private views about Aborigines before the Courts.[480] However, he draws a distinction between the law and its application and it is this distinction which enables him to justify his stance of differential treatment in relation to the possibility of establishing provocation: the law must be the same but its application may differ.[481] It is when Kriewaldt attempts to explain what the difference in application should be, or more accurately why there should be such a difference in cases involving Aborigines, that he begins to get into

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[477] (1951-1976) NTJ 633

[478] At 637

[479] Subject to the sentencing discretion then allowed for in cases of murder

[480] In his remarks to the juries it is clear that he feared two things: first, that the juries would be much harder on Aborigines considering them as somehow less valuable or important than white people and, therefore, less worthy of justice; second, that they would be more lenient for one of two reasons, either a genuine belief that it was unfair to try Aborigines by white law or a belief that it was best to 'leave them to it' so that they 'killed each other off'.

[481] Kriewaldt clearly realised that he was adopting a rather unusual approach to the question of provocation and frequently says that he may be wrong. See, for example: "I may be wrong. I do not know, because there is no decision of which I am aware" R. v. Aboriginal Johnny Scott MacDonald (1951-1976) NTJ 186 at 189; "I mentioned to you earlier that the same rules apply in the trial of a white person as in the trial of a native. The rules relating to provocation have given me some worry in native trials. After much thought I have when summing up to a jury in cases where a native is on trial perhaps departed somewhat from the strict rule applied in trials of white persons. Perhaps my view is not correct, perhaps the white rule should be applied strictly to natives .." and "I may be wrong but until put right by a higher court I shall continue to tell juries that the members of the Pitjinjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation. I shall not apply to them the standard applied to the white citizens of the Northern Territory." R. v. Aboriginal Muddarubba (1951-1976) NTJ 317, both at 322.

difficulties. Even if it is so that the law allows of differential treatment in application, there must be some explanation of why particular circumstances or an offender from a particular background require differential treatment. His explanations as to why differential treatment for Aborigines was legitimate are, by the standards of today's judiciary – drawn almost entirely from the white population - unacceptably racist. They would, of course, always have been objectionable to Aborigines. Thus, in R. v. Johnny Scott MacDonald[482], having pointed out that the reasonable man to be considered was "a reasonable native inhabitant of Australia"[483], he went on to explain why it was important to use that definition. According to him, Aborigines, at least arguably, had a lower standard of self-control:

> "You may draw a distinction between the amount of provocation which is needed before the ordinary reasonable human being, such as you are, would lose his self-control, and the lesser, if you think it applies, the lesser degree of provocation needed before an Aboriginal of Australia loses his self-control. ... You will apply the law in this case that you may adopt a lesser standard as amounting to provocation where a native is charged with murder than you would be entitled to draw where a white person is charged with murder."[484]

[482] (1951-1976) NTJ 186
[483] At 189
[484] At 189-190

Moreover, not only were Aborigines more likely to lose self-control than whites, but Kriewaldt argued in R. v. Aboriginal Nelson[485] that it might also take them longer to regain their equilibrium after any dispute:

> " ... if you think that the ordinary, average native would have cooled down by the time Nelson hit Dann on the head with the boomerang, than the defence of provocation is not open. But if you believe the average native of the northern parts of this Territory would still have been smarting from the effects of that wound and would have been likely to retaliate, then that defence is open. To that extent the law may be regarded as more favourable to native than white people. ... We all know a white person cools down comparatively quickly. ... In the case of a native you may think it right to say the effect of provocation lasts longer than in the case of a white person."[486]

and again in R. v. Aboriginal Jimmy Balir Balir[487]

> "On this aspect of cooling down, the law as regards Aboriginals[488] may be applied more leniently to Aboriginals than to whites. ... I see no objection to a jury taking the view that a white person will recover from the effect of provocation more quickly than an Aboriginal. I think it is right in law for a jury to say, from their knowledge of Aboriginals, that whereas a white man perhaps might have cooled down, an Aboriginal would not."[489]

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[485] (1951-1976) NTJ 327
[486] At 335
[487] (1951-1976) NTJ 633
[488] This would seem to be a mistake in the text of the Report: it should presumably read 'provocation'.
[489] At 637

Despite the unfortunate tenor of some of Kriewaldt's remarks, there was much to be said for his approach, which was similar to that of the Privy Council in Kwaku-Mensah and thus not without some precedent. However, during the years when Kriewaldt was on the bench, the Australian judicial system was still relatively fragmented, distances were great and communications poor, and the Northern Territory especially operated, to some extent, in isolation. This is not to say that there was no contact – and clearly if a case went on appeal the wider system became involved - but in general, and certainly in criminal matters at first instance, Kriewaldt operated alone. This meant that his approach had little influence outside the Northern Territory. Thus, the law on provocation in Australia as a whole was somewhat confused and unclear and different decisions would be reached in different jurisdictions to a far greater extent than would be likely today.

There are no reported cases showing any substantial development in the law of provocation in the Northern Territory from Kriewaldt's death in 1960 until 1989. The absence of such cases would seem to suggest that Kriewaldt's approach was followed throughout that period – any departure from the established approach would surely have been reported - and this inference is supported by the approach of the Court in the next important case on provocation. In 1989 the case of Jabarula and Others v. Poore; Jabarula v. Bell[490] came before the Supreme Court of the Northern Territory[491]. Whereas

[490] (1989) 68 NTR 26.
[491] By this time, the Court was concerned only with Australian jurisprudence.

Kriewaldt's decisions had been based in common law, by 1989 the Northern Territory Criminal Code[492] was in force and that was the governing law where applicable. The relevant Sections of the Code were Section 1 which defines provocation as:

> " .. any wrongful act ... of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control"

and Section 34(1) which deals with the establishment of provocation in cases where there has not been a fatality:

> "34. PROVOCATION, &c.
> (1) A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person ... who gave him the provocation provided -
> (a) he had not incited the provocation;
> (b) he was deprived by the provocation of the power of self-control;
> (c) he acted on the sudden and before there was time for his passion to cool;
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
> (e) the act was not intended and was not such as was likely to cause death or grievous harm; and
> (f) the act did not cause death or grievous harm."

The case involved various aspects of the law of provocation. The only part of the judgement which is relevant to the present discussion is that dealing with the meaning of the words 'ordinary person'. In discussing the concept, Kearney J. made extensive reference to Kriewaldt's judgements and clearly considered them to be the guiding principles in assessing the meaning of the Code

[492] It should be noted that the Code provisions on provocation reflect the common law position in relation to a charge of murder, reducing the verdict to manslaughter, but makes the defence available for other offences and in these cases results in an acquittal: s.34.

provisions. He refers to and quotes from Kriewaldt's judgements in the cases already discussed and says:

> "While Aboriginal communities in the Territory remain as distinct communities possessing a separate culture and identity and a degree of physical separation from the wider community, so the standard of the 'ordinary person' will vary in its application in the Territory."[493]

He concludes:

> "Following Kriewaldt J, I consider that an 'ordinary person' for the purposes of s.34(1)(d) of the Code means, in the circumstances of this case, an ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement, such as Ali Curung. He is neither drunk not affected by intoxicating liquor, does not possess a particularly bad temper, is not unusually excitable or pugnacious, and possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have."[494]

The issue came before the Northern Territory Supreme Court again in the case of Mungatopi v. The Queen[495], one year after the decision in Stingel. The governing law here, as in Jabarula v. Poore, was the relevant provisions of the Northern Territory Criminal Code, but the question arose of the effect of Stingel on the interpretation of these provisions. The provisions at issue were s.1, which, as stated above, defines provocation, and s.34(2) which sets out the

[493] At 34
[494] At 34
[495] (1991) 105 FLR 161

conditions for establishing the defence of provocation where there has been a fatality and states:

> "When a person who has unlawfully killed another under circumstances that, but for this sub-section, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided -
> (a) he has not incited the provocation;
> (b) he was deprived by the provocation of the power of self-control;
> (c) he acted on the sudden and before there was time for his passion to cool; and
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way."

There was some dispute over whether the behaviour of the deceased, the wife of the accused, amounted to a wrongful act or insult within the meaning of s.1. The Court stated, following Stingel:

> "In our opinion, in determining whether the deceased's actions or words could have amounted to provocation in law, it is appropriate to consider those actions and words against the background of what is acceptable conduct in the Aboriginal community to which the appellant and the deceased belong."[496]

They went on to say that in the present case they were prepared to assume, though without finding to that effect, that the behaviour in question could meet the requirements of s.1. It is with regard to the second part of the test that the case is interesting. Despite the ruling in Stingel, the Court found that in assessing the loss of self-control in the face of the provocation, they were

[496] At 165.

entitled to consider an 'ordinary person' with similar characteristics and circumstances as the accused. The Court referred with approval to the judgement of Kearney J. in Jabarula v. Poore discussed above. Jabarula. v. Poore was, of course, decided before Stingel, but the Crown in this case did not argue that it was no longer good law or that Stingel required that, in interpreting the Criminal Code, the only characteristic which could be taken into account in deciding whether an ordinary person would have lost self-control was age. They went on to point out that the High Court in Stingel had stressed that its consideration was focused on the Tasmanian Criminal Code and that it was aware that the Codes of Queensland and Western Australia were very different. The Court here pointed out that the Northern Territory Code was also very different. The Northern Territory Code in both 34(1)(d) and 34(2)(d) refers to "an ordinary person similarly circumstanced" and this would seem to be authority for taking into account factors other than age when looking at the ordinary person. The Court therefore assumed, though again without deciding, that the law stated by Kearney in Jabarula v. Poore was still correct.

The evolution of the doctrine of provocation in the Northern Territory clearly demonstrates the effectiveness of judicial activity in taking account of customary law. During Kriewaldt's time, the concept of pluralism was virtually unknown in the Northern Territory.[497] Legislating to ensure the rights of an underprivileged culture, especially an indigenous one, would have been

[497] However, in many other jurisdictions, particularly in Asia and Africa, 'pluralism' – although possibly not referred to as such -was both known and practised. See, for example, the discussion of the recognition of indigenous legal systems at *supra* 42-43.

unthinkable. The innovation of Kriewaldt's judgements should not be underestimated. It is true that the Privy Council in Kwaku-Mensah had adopted a similar line of reasoning, and some ten years earlier, but their situation was very different. The Privy Council was the highest Court in a long-established legal system, sitting in London, many miles from the people in West Africa on whose rights they pronounced. Kriewaldt sat in the Northern Territory, the sole judge in a relatively new legal system, in a frontier situation amidst a large Aboriginal population and ruled day in and day out in ways which established the use of customary law within the state legal system. There was the occasional judgement from elsewhere – Queensland, for example[498] – but the Northern Territory led the way.

After Kriewaldt's death there was a long period with little or no development of the law on provocation. However, whilst there was no further evolution in the law, nor was there any retreat from Kriewaldt's position and the same law continued to be applied consistently. When the Supreme Court came to rule in Jabarula v. Poore, even though the Criminal Code was by then in force, the precedents were followed. In Mungatopi, despite the ruling of the High Court in Stingel, the Supreme Court again followed the same line of analysis in interpreting the Code. The Code itself incorporates the same line of thinking. Ss.34(1) and (2) speak of "an ordinary person similarly circumstanced". The Courts are now faced with interpreting and applying a Code which in any event

[498] See, for example, the later case of R. v. Rankin (1966) n 342

reflects judicial thinking. The achievement of the judiciary in relation to the doctrine of provocation has been substantial. The other defences have proved less amenable to such development.

Kriewaldt's achievements were substantial and he was, in a sense, responsible for much of the development of the law of provocation in the Northern Territory. However, it should not be thought that he is the only judge to show creativity and use his discretion to give some recognition to customary law. The major *locus* of judicial activity in this respect is sentencing which will be discussed below. In this area there has been almost continuous development and the judiciary as a whole has made a significant contribution to the acceptance of customary law as a factor in sentencing.

ii. Duress:[499]

The defence of duress is available if the accused can show that s/he committed the offence under pressure which would cause a person of 'ordinary firmness'[500] to do the same. The same issues arise as in provocation: the gravity or seriousness of the pressure and the means of assessing the likely reaction of the 'ordinary person'. However, there has been very little judicial consideration of

[499] For a general account and discussion of the law on duress, see any criminal law text, for example, Bronitt. S. and McSherry. B. *Principles of Criminal Law* Pyrmont, NSW: Law Book Company Information Services, 2001. See also, for example: Ashworth. A. 'Reason, Logic, and Criminal Responsibility' 91 (1975) *Law Quarterly Review* 102; Yeo. S. 'The Threat Element in Duress' (1987) 11 *Criminal Law Journal* 165, 'Private defences, duress and Necessity' (1991) 15 *Criminal Law Journal* 143.

[500] R. v. Abusafiah (1991) 24 NSWLR 531 at 545.

the relevance of Aboriginality and/or customary law to the establishment of the elements of the defence. The same kind of considerations might be assumed to be pertinent, but the issues have rarely come before the Courts. It is, therefore, unnecessary to consider the doctrine in detail.

Under common law duress is established if the defendant can show that the offence was committed because of a threat of serious violence to the defendant or a third party. However, the defence is not available for murder. The position in the Northern Territory under the Code is more restrictive. The relevant section is s.40 which reads:

"40. DURESS

(1) A person is excused from criminal responsibility for an act, omission or event if it was done, made or caused because of duress provided -

(a) he believed the person making the threat was in a position to execute the threat;

(b) he believed there was no other way he could ensure the threat was not executed;

(c) a reasonable person similarly circumstanced would have acted in the same or a similar way; and

(d) he reported the threat to a police officer as soon as was reasonably practicable, unless the nature of the threat was such that a reasonable person similarly circumstanced would not have reported that threat.

(2) The excuse referred to in sub-section (1) does not extend to an act, omission or event that would constitute murder, manslaughter or a crime of which grievous harm or an intention to cause such harm is an element; nor to a person who has rendered himself liable to have such a threat made to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act."

It should be noted that under the Code, as well as the restrictions on the circumstances when the defence may be raised, there is also a limitation on the type of offence for which it is available: the defence may not be pleaded in relation to murder, manslaughter or crimes which involve grievous harm or an intention to cause such harm.[501]

It is unclear whether the test for establishing duress under either the common law or the Codes is subjective or objective, but it seems likely that it would be analysed in the same way as provocation. There has been no comparable detailed judicial consideration of Aboriginality as a characteristic to be taken into account in making such an assessment. However, there has been occasional caselaw on the possibility of establishing a defence of duress with regard to actions committed under the obligations of customary law[502]. Such obligations may be accompanied by overt threats of death or physical harm if they are not met, the defendant may be aware that such actions are likely even though not overtly expressed, or s/he may be acting out of a belief that s/he is compelled to do so by customary law without adverting to the possibility of sanctions in the event of non-compliance. Opinion is divided on the availability of the defence in each of these circumstances. Eggleston[503] argued that duress might be available where the defendant acts in accordance with customary law out of fear of the consequences – whether or not overtly threatened – if s/he fails to do so. She

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[501] Note, however, the provisions of s.41, *infra* 243-244.
[502] This will be discussed below.
[503] Eggleston. E. *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* Canberra: Australian National University Press, 1976.

cites, *inter alia*, the case of Skinny Jack[504]. In this case several Aboriginal men were exhorted to kill another who had offended against customary law by selling a sacred item. The men were told that they would be killed if they refused to carry out the orders. There are, however, several difficulties with this argument as a support for the availability of duress in cases involving customary law matters. First, the main thrust is that duress may be established if the men acted because of the physical threat. However, this would be so even if the threat were made in circumstances unrelated to customary law. Eggleston maintains that duress would not usually be available in cases of offences committed because of the perceived legitimacy of customary law requirements alone, independent of any fear of sanction. Second, which Eggleston concedes, in such a case the defendant often acts under a variety of motives - fear, but also some belief in the rightness of the action, the legitimacy of the customary system - and it will be almost impossible to discern the relative weight of the pressures acting on the defendant's mind, such discernment being a pre-requisite to deciding the availability of the defence if the foregoing analysis is accepted.

There is little caselaw on the point, but the few decisions that exist tend to reach the same conclusion as Eggleston: if external pressure is present, expressed or not, duress is available; in the absence of external pressure, the persuasive or compelling effect of a belief system on a person's mind will probably not amount to duress under either common law or the Northern Territory Code.

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[504] At 289-292, 296-297.

Thus, for example, in the case of R. v. Isobel Phillips[505] the defendant, a Warumungu woman, was required by customary law to fight the woman involved with her husband. Anthropological evidence was called to substantiate the claim that she acted as required and that not to have so acted would have exposed her to possible sanctions of death or serious injury. The Magistrate commented that:

> " .. a Warumungu women of ordinary firmness would have carried out the instructions she was given .. as the defendant did ... The threats ... are backed up by the sanctions of the Warumungu law, and she cannot, as she remains in a Warumungu environment, evade these consequences."[506]

In this case the charges were dismissed because the defence of duress was made out. Similar views were expressed in the more recent South Australian case of Gregory Warren, Anthony Ross Coombes and Percy Gordon Tucker[507]. The case came before the Court of Criminal Appeal which found on the facts that the appellants had not acted out of fear of the customary law sanctions which were applicable in the case, but for other motives entirely unconnected to customary law. For that reason, it was unnecessary to rule on the point and two of the judges expressed no opinion on the issue of customary law and duress. However, Doyle CJ. took the opportunity to comment and argued that it was perfectly possible for

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[505] Unreported. Northern Territory Court of Summary Jurisdiction (Murphy SM) 19 September 1983, cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, Volume 1, p.308, n 82.
[506] *Supra* n 505 at p.308, n 82.
[507] (1996) 88 A Crim R 78

the real fear and consequent lack of freedom engendered by the threat of customary law sanctions to amount to duress.

However, in the case of R. v. Old Barney Jungala[508], the defendant had acted as he did merely because he believed himself compelled to do so by customary law and not because of fear of sanction. Muirhead J. said:

> "There is no suggestion that (the defendant) intended to cause the death of this young woman, and I accept that he acted as he believed the law which he respected compelled him to do."[509]

Despite the element of customary law compulsion, the defence of duress was not available and the defendant was convicted of manslaughter on the grounds of lack of intent to kill.

The idea that the defence of duress should be generally available in all customary law cases, including those where the only 'coercion' is belief in the legitimacy of the customary system, has enjoyed some support.[510] However, it does not seem to command general acceptance. It may be possible to achieve a similar[511] outcome, though in strictly limited circumstances, by the use of s.41 of the Northern

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[508] Unreported. Northern Territory Supreme Court (Muirhead J.) 8 Feb 1978 cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, Vol.1, p.308. n81.

[509] *Supra* n 508 at p. 308, n 81.

[510] See, for example: Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, 'Submissions' p.308, n80.

[511] Similar, not the same. Duress is a defence, coercion reduces murder to manslaughter.

Territory Criminal Code, which allows a defence of coercion to murder. The section reads:

> "41. COERCION
>
> (1) When a person who has unlawfully killed another under circumstances that, but for this sub-section, would have constituted murder, did the act or made the omission that caused death because of coercion of such a nature that it would have caused a reasonable person similarly circumstanced to have acted in the same or a similar way, he is excused from criminal responsibility for murder and is guilty of manslaughter only.
>
> (2) The excuse referred to in sub-section (1) does not extend to a person who has rendered himself liable to have such coercion applied to him by having entered into an association or conspiracy that has as any of its objects the doing of a wrongful act."

It has been contended that this could be used in cases where Aborigines are compelled to act simply by their belief in the legitimacy of the customary system.[512] However, there is no reported case of such an argument being raised. It is difficult to predict with any certainty what the outcome would be, but the fact that such an argument has never been made suggests that it is not generally thought that it would succeed.

Thus, it is reasonably clear that duress will only be available in customary law cases where there is some fear of sanction. This does not seem unreasonable. Duress is only available to anyone – Aboriginal or white – as a result of some threat, whether expressed or not. Mere conviction of the rightness of certain behaviour is never enough to found the defence unless there is a sanction in

[512] See: Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p.308, n83.

view. It would be stretching discretion too far to allow mere adherence to one type of belief system to be a basis for the defence without the other elements being present. However, in the acknowledgement that customary law is a system which operates in the minds of its adherents and which they perceive to be able to impose sanctions, the Courts are according some recognition to that law.

iii: Intoxication:

The defence of intoxication is available to all defendants, including Aborigines, on exactly the same terms. There is no scope here for introducing cultural factors such as customary law. It is, however, important to note the position as the serious alcohol problem faced by large sections of Aboriginal communities in the Northern Territory means that many Aborigines come before the Courts for offences committed when intoxicated. There is a voluminous literature[513], including extensive judicial comment[514], on this point, detailed study of which is beyond the scope of the present work.

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[513] See, for example: Broadhurst. R.G. 'Aborigines, Cowboys, "Firewater" and Jail: the View from the Frontier' *Australian and New Zealand Journal of Criminology* Vol. 27 (1994) 50-56; Brady. M.A. & Palmer. K. *A Study of Drinking in a Remote Aboriginal Community* Adelaide: Report prepared for Australian Associated Brewers, Western Desert Project, School of Medicine, Flinders University, Adelaide, South Australia, 1982, *Alcohol in the Outback: Two Studies of Drinking* Darwin: Australian National University North Australia Research Monograph, 1984; d'Abbs. P. 'Restricted Areas and Aboriginal Drinking' and Brady. M. 'Alcohol Use and its Effects upon Aboriginal Women' both papers presented at Australian Institute of Criminology *Alcohol and Crime* Canberra: Proceedings of a Conference held 4-6 April 1989, Australian Institute of Criminology, 1990. On alcohol and indigenous peoples, see: Saggers. S. and Gray. D. *Dealing with Alcohol: Indigenous Usage in Australia, New Zealand and Canada* Cambridge: Cambridge University Press, 1998.

[514] See Chapter 5.

The common law position in Australia is that intoxication, whether or not self-induced, is relevant to criminal responsibility in that the defendant may, under its influence, have acted involuntarily or without the necessary intent.[515] However, under the common law in England[516] and under the majority of the Criminal Codes intentional intoxication is irrelevant to offences of basic intent, though relevant to offences of specific intent.[517] The Northern Territory Criminal Code as enacted stated under s.7:

> "7. INTOXICATION
> In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence, until the contrary is proved, it shall be presumed that -
> (a) the intoxication was voluntary; and
> (b) unless the intoxication was involuntary, the accused person foresaw the natural and probable consequences of his conduct and intended them."

As amended , with retrospective effect, it reads:

> "(1) In all cases where intoxication may be regarded for the purposes of determining whether a person is guilty or not guilty of an offence -
> (a) it shall be presumed that, until the contrary is proved, the intoxication was voluntary; and
> (b) unless the intoxication was involuntary, it shall be presumed evidentially that the accused person foresaw the natural and probable consequences of his conduct."[518]

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[515] O'Connor v. R. (1980) 29 ALR 449. See, also: Herbert and Others v. The Queen (1982) 62 FLR 302. For discussion of this case, see: Bell. D. 'Exercising Discretion: Sentencing and Customary Law in the Northern Territory' in Morse. B.W. and Woodman. G.R. (eds.) *Indigenous Law and the State* Dordrecht: Foris, 1988, at 367-394.

[516] See: Director of Public Prosecutions v. Beard (1920) AC 479; Director of Public Prosecutions v. Majewski (1977) AC 443

[517] Manslaughter and assault are crimes of basic intent. Offences of specific intent - wounding with intent, theft and murder - are those crimes where the intent to cause a specific result is an element of the offence. The status of rape is uncertain.

[518] For discussion of the drafting history, see Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, para. 439.

Thus, self-induced intoxication is irrelevant to intention.

Whilst there is widespread recognition of the effect of alcohol on Aboriginal criminality, it appears to be beyond the ability - or indeed the jurisdiction - of the Courts to deal with the problem. Muirhead summed up the dilemma of the Courts in R. v. Douglas Wheeler Jabanunga[519]:

> "The courts cannot effect a cure or diminution of the incidence of alcohol induced violence, but the situation cries out for community concern, intelligently planned programs and action rather than words. All the courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil."

and again in The Queen v. Steward Colin Mugkuri and Simon Nyaningu (aka Peter Roger):[520]

> "As is usual in this depressingly frequent type of offence, the root cause was alcohol. For over ten years sitting in this Territory, I have endeavoured to draw attention to the need for something to be done about the marketing, the regulation and supply of alcohol, particularly to our Aboriginal community, the need for detoxification units, modern treatment and rehabilitation centres. I have not been alone in this exercise but it's been entirely fruitless. The Courts can achieve little, if anything. The Aboriginal councils appear to recognise the problem and it is the

[519] Unreported. Northern Territory Supreme Court, 16 October 1980, transcript of proceedings, 27-8, cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p.313, n111.
[520] (1985) 12 *Aboriginal Law Bulletin* 11

> Aboriginal people who almost entirely suffer its consequences. One can only keep hoping that at national level there will be recognition of the seriousness and complexity of the problems coupled, I hope, with some action."[521]

There is considerable judicial authority for treating intoxication in Aboriginal defendants differently from that in white defendants, but this intervention takes place at the sentencing stage and will be discussed below.

iv. Diminished Responsibility:

The defence of diminished responsibility may only be pleaded in response to a charge of murder. If made out, it reduces the offence to manslaughter and thereby attracts a sentencing discretion in those jurisdictions which carry a mandatory life sentence for murder. It was established specifically in order to overcome the strict limitations on the availability of the defence of insanity, which were such that a person who was mentally ill but understood their actions would be convicted of murder.

There are three elements to the defence: first, an abnormality of mind; second, the abnormality must have arisen from a condition of arrested or retarded development of the mind or inherent cause or have been induced by disease or an injury; third, the abnormality of mind must have substantially impaired the defendant's mental responsibility for his conduct. The defence is not available at

[521] *Supra* n 520 at 11

common law in Australia and is, therefore, only mountable in Code states which make provision for it. The relevant section of the Northern Territory Criminal Code is Section 37 which reads:

> "37. DIMINISHED RESPONSIBILITY
> When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not to do the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only."

The scope of "abnormality of mind" as described in the Code is unclear. It is, however, both wider and more flexible than is required to make out a plea of insanity. The scope of the notion in English common law, no longer binding in Australia but still instructive, has been described thus:

> "'Abnormality of mind' ... means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgement. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts

which must include a consideration of the extent of his ability to exercise willpower to control his physical acts."[522]

The defence of diminished responsibility has little particular relevance to Aborigines or to customary law. However, it has been argued that it may be applicable in cases where Aborigines have suffered stress on account of cultural dislocation and being subject to differing, often conflicting, cultural expectations. There is no direct caselaw on the point. The defence was raised in the case of R. v. Alwyn Peter[523], but a plea of guilty of manslaughter on the grounds of intoxication was accepted and so the point was not argued. The argument in that case was not that mere adherence to Aboriginal customary law is evidence of abnormality of mind, but that the strain caused by cultural conflict may lead to psychiatric disorder which is sufficient to make out the defence.[524] However, it is also possible that the mere adherence betokens an abnormality of mind.

Whilst this analysis might be unacceptable on the ground of insensitivity to cultural difference, it is nevertheless possible. It requires the judiciary to take the opposite line to that taken in relation to provocation. There they established that the

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[522] R. v. Byrne (1960) 2 QB 396 at 403 *per* Parker LCJ.

[523] Unreported. Queensland Supreme Court, 18 September 1981, reasons for sentence, 2, cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p.316, n 133.

[524] See: Hellon. C.P. 'Legal and Psychiatric Implications of Erosion of Canadian Aboriginal Culture' (1969) 19 *University of Toronto Law Journal* 76, cited in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986, p.316, n 132.

concept of 'ordinary' should be understood to mean ordinary for someone in the circumstances of the defendant, i.e. in this case, subject to customary law. To establish diminished responsibility in the same circumstances, it would be necessary to argue that 'normal' was a fixed concept, from which anyone who adhered to customary law was departing. If the concept of 'normal' were understood to mean normal for someone in similar circumstances, it would be impossible to establish the defence. Whilst there is little indication that the judiciary generally interpret the requirements of the defence in these terms, such interpretation would not be without precedent. As already discussed[525], 'customary law' includes many matters which would not be part of a modernist legal system, matters which in such a system would be understood to belong to the realm of religion or spirituality. One such matter is 'spirit killings' or sorcery which remained, at least until relatively recently, quite common in some Aboriginal societies and are governed by customary law.[526] In the case of R. v. Gibson[527] Forster J. explicitly analysed such a belief in sorcery in terms of diminished responsibility:

> " .. I accept that you felt yourself in danger from spirits who would take your kidney fat while you were asleep. Your behaviour has be to a considerable extent irrational and although you neither were nor are insane

[525] *Supra* 39-43.
[526] The issue of Aboriginal belief in sorcery was raised in the Alwyn Peter case though it was not relevant to the decision.
[527] Unreported. Northern Territory Supreme Court, 19 November 1974, cited in Australian Law Reform Commission *Appendix: Cases on Traditional Punishments and Sentencing* Sydney: Research Paper 6A, Australian Law Reform Commission, 1982, at 4. See also the discussion of sorcery in Lemaire. J.E. *The Application of some aspects of European Law to Aboriginal Natives of Central Australia* .LL.M. Thesis, University of Sydney, 1971, at 118-126.

in any legal sense, you would, I think, clearly come within the concept of diminished responsibility (as it is) known to our law."[528]

However, there are very few cases where such an argument is employed, none of recent date, and it seems unlikely that it will be used extensively, if at all, in the future.

4.4: Conclusion:

The practice of according recognition to customary law in the substantive law doctrines of offences and defences is both difficult and controversial. It is difficult because the elements of offences and defences are relatively clearly defined and there might seem to be little scope for discretion or flexibility. It is controversial because the differential application of substantive doctrines seems to erode the principle of the rule of law on which the Australian legal system is based. The judiciary has shown considerable creativity in fitting customary law considerations into these doctrines without undermining the integrity of the system. Whilst the defence of provocation has been much the most amenable to such developments, there have been some developments in the other areas and issues have been identified which might give rise to future recognition. As well as an evolving understanding of the interpretation and application of the discrete offences and defences,[529] it might seem desirable to introduce a specific

[528] At 4.

[529] In customary law cases where both the defendant and the victim are operating under the requirements of that law, it might be possible to raise the defence of consent. However, the

customary law or cultural defence. Such a defence has been suggested at various stages, but never developed. The advantages and disadvantages of the proposal will be discussed in the Conclusion.[530]

availability of such a defence is limited: it is not available in cases of homicide or bodily harm. There has been very little caselaw on the issue, but see: R. v Barnes (1997) 96 A Crim R 593, R. v. Minor (1992) 79 NTR 1, R. v. Jungarai (1981) 9 NTR 30. The general law on consent is, in any event unclear. The possible extension of the defence of consent to include indigenous punishment on the grounds of public policy is analogous to the introduction of a customary law defence and will be discussed in the Conclusion.

[530] *Infra* 330-331.

Chapter 5: Judicial use of customary law in sentencing:

5.1: Introduction:

It is in the area of sentencing[531] that the judiciary has been most active in furthering the recognition and use of customary law within the state legal system. There is a variety of reasons for this. First, sentencing is, in any event, the stage of the criminal justice process at which the judiciary has the most discretion. Whilst there are several accepted aims of sentencing – retribution, deterrence, rehabilitation and the protection of society being the most commonly held – there are very few limits on the way in which the judiciary seeks to further those aims within the context of each individual sentence. Generally, the legislature provides no guidance, although the permissible range of penalty for a given offence may be laid down. However, within the permissible range, a judge is free to impose any penalty s/he wishes. This possibility has both disadvantages and advantages.

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[531] For an overview of the law of sentencing, see any general text, for example: Findlay. M., Odgers. S. and Yeo. S. *Australian Criminal Justice* Melbourne: Oxford University Press, (2nd ed.) 1999, 237-277. There is a great deal of literature on the sentencing of Aboriginal offenders, see, for example: Nicholson. J. 'The Sentencing of Aboriginal Offenders' *Criminal Law Journal* Vol. 23, April 1999, 85-89. There is surprisingly little literature specifically on the effect of customary law on the sentencing, but see, for example: Coles. G. *A Matter of Principle and Practice: The Sentencing of Australian Aborigines in the Northern Territory Supreme Court 1974-1982* B. Litt. Thesis. Department of Anthropology, Australian National University. Canberra, 1983; Sarre. R. *Sentencing in Customary Australia* in Sarre. R. and Wilson. D. *Proceedings of Roundtable on Sentencing and Indigenous Peoples* Griffith, ACT: Australian Institute of Criminology Research and Public Policy Series No. 16, 1998, 7-14.

The first major disadvantage is the possibility of inconsistency. The principles of natural justice would seem to require some consistency in sentencing, that two defendants convicted of the same offence in similar circumstances and with similar personal profiles ought to receive similar sentences. For it to be otherwise is manifestly unjust.[532] The second disadvantage is that there is no clear policy on the question of *quantum* of punishment. Whilst consistency might be said to involve attaining an appropriate 'match' of defendants, *quantum* is concerned with the 'match' between the severity of the offence and the sentence imposed: a serious offence should, in general, receive a severe penalty. However, it is submitted that neither considerations of consistency nor of *quantum* require that the judiciary's discretion be fettered. The major advantage to the discretion enjoyed by the judges is the ability to impose a sentence which is appropriate to the defendant before them. The exercise of this discretion is a difficult undertaking, not least because the aims described above, which the sentence is intended to further, may often be in conflict. The judge then, must weigh up all the factors in a given case, consider any statutory restrictions which are set in respect of the range of penalties for the offence involved, balance the relevant sentencing aims and come to a decision as to the appropriate sentence. The complexity of the process is one of the strongest arguments for the maintenance of the widest possible area of discretion for the judiciary. Of course there are occasionally aberrant decisions, but remarkably few. The most important factor in the judicial process of sentencing is, for the

[532] The importance of consistency was stressed in the case of R. v. Lowe (1984) 154 CLR 606 where Mason J. spelled out clearly that inconsistency offended against the principles of equality before the law, at 610-611.

purposes of the Thesis, the way in which facts about the defendant – and possibly the circumstances of the offence - are taken into account.

The rules on sentencing do not provide for differential treatment of Aborigines.[533] In the absence of such specific provision, any differential sentencing must be justifiable under the general rules. Whilst the basic position is that everyone should receive equal treatment under the law, the judiciary is able to use the discretion outlined above to take into account that the defendant is an Aborigine. However, judges may not, even when exercising discretion, act arbitrarily and, therefore, the use of customary law would seem to require a coherent and consistent explanation and an at least basic framework within which decisions can be made. The judiciary has devised various rationales for such a use: the rationales, and indeed the methods of putting them into practice, have differed from time to time apparently in response to prevailing political and cultural *mores*. There are essentially three bases[534] for using customary law in this way. Two of these rationales involve using different *criteria* in sentencing an Aborigine from those used in sentencing a white person for the same offence.[535] This may be done by using either Aboriginality *per*

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[533] There has been such provision in the past. See especially the Northern Territory *Crimes* Ordinance, 1934, and The Criminal Law Amendment Ordinance, 1939, which abolished the mandatory death penalty for Aborigines convicted of murder and allowed for differential sentencing by the provisions of s.6A. This was repealed in 1983 by the Northern Territory Criminal Code Act.

[534] It should be noted that there are many possible frameworks within which the judgments of the Courts can be analysed. Many of the factors involved in the different rationales overlap and frequently more than one is present in the same case.

[535] Whilst the focus of the Thesis is on the Northern Territory, it should be noted that other Australian jurisdictions have encountered the same difficulties in making sentencing decisions in respect of Aboriginal offenders. This is particularly so in Western Australia and Queensland which also have a large number and, at least in the case of Western Australia a high percentage, of traditionally oriented peoples. Reference to these decisions will be made where relevant. The same issues have also arisen in jurisdictions outside Australia: see, for example: Newton Cain. T.

se or 'factors associated with Aboriginality' as *criteria* in deciding a sentence. The third is to take account of customary law as a relevant factor in itself (rather than as a factor associated with Aboriginality) in the sentencing process.[536]

5.2: Aboriginality *per se* in sentencing:

The consistent use of Aboriginality *per se* as a factor in sentencing in the Northern Territory began with Kriewaldt J. It is clear that from the earliest point of European settlement of the Northern Territory until at least the 1940's, Aborigines had received harsher treatment from the Northern Territory judicial system than did white people.[537] Wells J. was appointed to the Supreme Court in 1933 and remained on the bench until succeeded by Kriewaldt. The jury system had been suspended[538] in all but capital cases prior to his arrival, and, therefore, his remit and influence were immense. Wells had little understanding of, or sympathy with, Aborigines.[539] This was amply demonstrated in two notorious

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'Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region' *Melbourne Journal of International Law* Vol. 2 (2001) 48-68.

[536] It is possible to analyse the caselaw in various ways. Thus, customary law may be treated as a factor to be taken into account in sentencing *per se* or it may be treated as a factor associated with Aboriginality. In one sense, this is not a question of differential *criteria* as a white person will not be subject to customary law. However, it could be argued that in taking into account a non-state normative system which weighs upon a defendant, the judiciary is treating an Aborigine who adheres to customary law differently from, say, a Muslim who follows the tenets of Islamic law.

[537] See: Markus. A. *Governing Savages* North Sydney: Allen & Unwin, 1990, especially Chapter 7 'The Judge'.

[538] Criminal Procedure Ordinance 1933 (NT)

[539] The lack of complete reports for this period makes it impossible to deal with Wells' judgments in a systematic manner, but his decisions in two particular cases are widely known . Whilst these two cases are not sufficient in themselves to draw any definite conclusions about his attitudes, they are presumably indicative. There are no *verbatim* reports of the proceedings of the Northern Territory Supreme Court available for the period 1933-1938. The only accounts, therefore, are from newspaper reports and the judge's notes. On the career of Wells generally, see: Markus. A.'The

cases. In the Borroloola case Constable Stott was charged with common assault on an Aboriginal woman who had been in his custody and who had subsequently died. The prosecution came as the culmination of a long saga over Stott's treatment of Aboriginal prisoners, including a previous prosecution and acquittal, and there was considerable evidence against him. Moreover, the Aboriginal evidence was accepted by a number of prominent white people. Due to the public concern at the apparent unwillingness to investigate, and if necessary punish, Stott's activities, the Minister for the Interior had given instructions to the Administrator of the Northern Territory that every witness who could testify against Stott should be called. Wells, however, stopped the trial and declined to receive all the evidence. In the Tuckiar case the defendant was convicted of murdering a police constable. There appear to have been a number of irregularities in Wells' conduct of the trial which led to the Crown appealing to the High Court on behalf of Tuckiar. The High Court ruled unanimously[540] that the verdict should be overturned.

These cases demonstrate the inadequate standards of justice offered to Aborigines prior to the appointment of Kriewaldt. As already discussed, when Kriewaldt was appointed to the bench he attempted to ensure that Aborigines were given fair treatment and showed an understanding, however unfortunately expressed, that real equality might require differential treatment. An

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Impartiality of the Bench': Judge Wells and the Northern Territory Aborigines 1933-1938' in Kirby. D. (ed.) *Law and History in Australia* Vol. VIII .1987, at 109-122, from which the following accounts are substantially taken.

[540] Tuckiar v. The King (1934) 52 CLR 335.

examination of his judgments reveals his basic thinking. At that time, many people – including some of the judiciary, as has been demonstrated in the case of Wells – were not concerned about equality before the law in relation to Aborigines. Kriewaldt repeatedly asserted that they were entitled to the same treatment as white defendants. This understanding informed his sentencing practice, as it informed his application of the doctrine of provocation, and the same issues arise. Thus, when he wanted to use different *criteria* in sentencing Aborigines, either generally or by taking customary law into account, he encountered problems in justifying the practice. This led him to use the same type of reasoning as that which he had used in relation to provocation: essentially, Aborigines were not as 'civilised'[541] as white people and, therefore, allowance must be made until they reached the same standards. The reasoning is analogous to applying differing standards and requirements to children in legal matters: this practice is not considered to breach equality before the law principles, but as the children grow towards adulthood they will progressively be judged by the same *criteria* as other adults. In making this argument Kriewaldt was taking account of the fact of Aboriginality *per se*, that is, the defendant was to be treated differently simply because s/he was an Aborigine.

Having justified differential treatment in principle, the question arose of how to assess whether an individual Aborigine had need of such treatment. This was done

[541] The notion was common in various areas of life, but perhaps most commonly held in the beliefs that Aborigines were more sexually promiscuous and more prone to violence than were white people. The combination of these two beliefs has often led to the unfortunate belief that domestic violence and even rape are less serious matters in Aboriginal society than in white society.

by reference to a *continuum* of contact with white society. The more contact the Aborigine had experienced, the less likely that s/he would be treated differently or the less the permissible difference in treatment. Conversely, the less contact, the greater the likely differentiation in treatment. The first reported case in which Kriewaldt sets out clearly the *continuum* approach was R. v. Anderson[542] in 1954. Anderson was convicted of various sexual offences perpetrated against a white woman. The interest of the case for present purposes lies in the sentencing remarks. Kriewaldt pointed out that the Criminal Law Amendment Ordinance, 1939, which required judges to take cognisance of the fact that a defendant charged with murder was an Aborigine and to hear any relevant native law and custom, gave him authority in such a case to impose any penalty which seemed to him to be just and proper. Apart from that instance, the law drew no distinction on the grounds of colour or race as to guilt or punishment. In other words, there was no authority in the present case, which was not one of murder, for differential treatment. However, Kriewaldt said that he had always taken account of such evidence whatever the charge before him:

> "In every case where I have been under a duty to pass sentence on a native, irrespective of the charge, I have heard such evidence as has been available throwing light on the background and upbringing of the native. Where tribal law or custom might possibly be relevant I have in every case endeavoured to inform my mind on these topics either by hearing

[542] (1951-1976) NTJ 240.

evidence in Court or perusing any material available to me which seemed to bear on the point."[543]

In the present case, Anderson had been described as 'sophisticated' and 'substantially civilised'[544] and the only mitigating factor deemed to be present was his consumption of alcohol. Kriewaldt also pointed out that it had generally been his practice to impose a lesser sentence on an Aboriginal offender than if s/he had been white. This was so even when, as in the present case, there was no element of customary law and the consideration of Anderson's Aboriginality appears to be of his Aboriginality *per se.* However, in all the cases which had come before Kriewaldt prior to the present one, the victim had also been wholly or partly Aboriginal. The present case raised the question as to whether the practice should be followed when the victim of the offence was white. In reply to that question Kriewaldt enunciated two general principles for sentencing Aborigines:

1. an Aborigine, by reason his (*sic.*) colour, should never receive a heavier sentence than would a white accused; his colour may work to his advantage but never against him
2. the extent to which the accused has adopted white manners and customs is relevant in sentencing; the nearer he is to living as a white, the nearer

[543] At 248.
[544] At 249.

his sentence should be to that which would be imposed on a white accused.[545]

These principles provided the baseline for many of Kriewaldt's subsequent judgments, for example, in R. v. Aboriginal Roy Pananka[546]. In this case Kriewaldt took the opportunity to apply them to a case where the victim was also an Aborigine. He stressed that in this case both the defendant and his community had a sufficient understanding of what he had done and why he was being punished. The matter could, therefore, be dealt with in the same way and sentence passed as if the defendant were white, but subject to the *criteria* in Anderson. Kriewaldt pointed out that although the injuries inflicted were of the type which would be inflicted in a case of payback, there was no element of customary law involved and the motive was simply ill temper, aggravated by alcohol. Nor was there any element of background sufficient to mitigate sentence.[547]

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[545] At 249.

[546] (1951-1976) NTJ 453.

[547] Kriewaldt also made some interesting remarks about the Aboriginal concept of time and how this affects the question of sentencing: at 454. He acknowledged that as the Aboriginal concept of time was different, a short sentence is probably as useful as a long one. On this point, see also: The Queen v. Nadiji Tjalpaltjari, Supreme Court of the Northern Territory, Alice Springs, Blackburn J., No. 3223 of 1969, 17-18 September, 1968. Unreported. Cited in Lawrence. J. *The Sentencing of Aboriginal Offenders in the Northern Territory* Unpublished, undated paper, at 11. In this case it was submitted that to impose a custodial sentence on the defendant was, in reality, to impose a sentence of solitary confinement as he would be unable to communicate with anyone and because of the distance from his family and community. The argument that, certainly in the case of traditionally-oriented Aborigines, a long sentence is not necessarily more effective than a short one is now widely accepted.

As the concept of equality of races became more commonly accepted, Kriewaldt's *continuum* of civilisation became, in its turn, unacceptable. It was increasingly argued that there should be no difference in treatment: equality was understood to mean uniformity.[548] This led to the conclusion that Aboriginality *per se* should not be taken into account when dealing with a defendant. Indeed the consideration of Aboriginality *per se* could itself be a breach of the law.[549] It was, and to an extent still is, widely believed that, in general, race, sex and class should not be taken into account in sentencing for the obvious reason that unacceptable discrimination may result. This approach has been called "deceptively simple"[550] and it certainly needs qualification otherwise it fails to take account of structural injustice and racism.[551] As the unease with taking account of Aboriginality *per se* increased, the judiciary began to develop the second basis for the use of customary law in sentencing: the consideration of 'factors associated with Aboriginality'.

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[548] See Chapter 2 for discussion of the rule of law, equality, and the circumstances in which discrimination and/or affirmative action are permissible.

[549] See Mark Rogers and Albert Murray (1989) 44 A Crim. R 301 *infra* 247-248.

[550] Zdenowski. G. 'Contemporary Sentencing Issues' in *The Australian Criminal Justice System: The Mid 1990's* Chappell. D. and Wilson. P. (eds.) Sydney: Butterworths, 1994, 171-212.

[551] Zdenowski points out that this approach has been favoured by the Australian Law Reform Commission, albeit with qualification, at least in relation to sex and race: see: *Sentencing* Canberra: Report 44, Australian Law Reform Commission, 1988. The Discussion Paper 30 had argued in favour of Aboriginality as a mitigating factor in sentencing, but this argument was rejected in the final Report. The reasoning behind the suggestion was that such an acceptance was the only way of recognising the unique position of Aborigines and the inherent differences in thought, action and motivation, and that its acceptance as a factor to be considered specifically draws these problems to the attention of a sentencing body, and, moreover, that it is an attempt to redress two hundred years of negative discrimination, cited in Zdenowski. G. *supra* n 550 at 179-180.

5.3: Factors associated with Aboriginality:

The most frequent rationale for the use of differential sentencing *criteria* in recent years has been that many Aborigines come from situations of economic and social disadvantage. In this respect they are in the same position as any group suffering similarly. Taking account of such disadvantage, often by explicit reference to ethnicity or culture, enables the judiciary to make partial redress for, or at least to mitigate, systemic injustice. In this way something approaching justice may be done whilst the integrity of the principles of the rule of law are preserved. This rationale will be applicable to any defendant from an ethnic or cultural background which is perceived to be less advantaged than that of the majority.

This shift in emphasis from Aboriginality *per se* to factors associated with Aboriginality was discussed in Neal v. The Queen[552]. Neal was convicted of unlawful assault and unlawful entry on to property and eventually appealed to the High Court of Australia. Whilst the greater part of the judgments deal with technicalities which are not material here, they also contain discussion of 'factors associated with Aboriginality' and the effect of such factors in sentencing. The Court found that the original sentence had failed to take account of the conditions on Aboriginal reserves and the general climate of race relations

[552] (1982) 42 ALR 609 This case is of particular importance as it went to the High Court, the highest Court in Australia. Comments made by that the High Court will be of general applicability, unless on a matter peculiar to one jurisdiction. For discussion of the political context of the case, see: Chesterman. J. and Villaflor. G. 'Mr. Neal's Invasion: Behind an Indigenous Rights Case' *Australian Journal of Law and Society* (2000-2001) 15, 90-100.

which constituted a "special mitigating factor"[553]. However, Brennan J. stressed that whilst factors associated with Aboriginality could, as in the present case, be mitigating factors[554], Aboriginality *per se* was no ground for differential treatment:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group."[555]

Neal was applied in the case of Rogers and Murray[556] in 1989. This case involved applications by Mark Rogers and Albert Murray for leave to appeal against sentence. They had committed separate offences, but the applications were heard together as they raised similar issues relating to the treatment of Aboriginal offenders from remote areas. The Court accepted that the racial origin of the applicants – i.e. Aboriginality *per se* - was irrelevant, but that there was the possibility of special mitigating factors which operated by reason of their Aboriginality. Malcolm CJ. made very similar points to those made in Neal:

> "It follows from this that the sentencing principles to be applied in relation to a sexual offence committed by an Aboriginal must be the same as those in any other case. It is apparent, however, that there may

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[553] *Per* Murphy J. at 617, citing R. v. Alwyn Peter *supra* n 523.
[554] "But in imposing sentences Courts are bound to take into account, in accordance with those principles, all material factors including those factors which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice" at 626.
[555] At 626.
[556] (1989) 44 A Crim. R. 301. This is a Western Australian case but has been referred to and followed in several Northern Territory cases.

well be particular matters which the court must take into account, in applying those principles, which are mitigating factors applicable to the particular offender. These include social, economic or other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race."[557]

Rogers had pleaded guilty to aggravated sexual assault. He was a young man of eighteen and a full-blooded tribal Aborigine with little education or experience of town life. It was accepted that he was unused to alcohol and that the fact that he was influenced by alcohol at the time of the offence was relevant. Drunkenness will not usually serve to mitigate.[558] It can, however, be relevant in the case of Aborigines in that the circumstances which lead to the widespread misuse of alcohol in some Aboriginal communities may themselves be mitigation.[559] Rogers' sentence was reduced. The case of Murray was considered by the Court to be of a different order. He was a twenty-six year old Aboriginal man who had committed a sexual offence after consuming a great deal of alcohol. He pleaded guilty to sexual assault. In his case, although leave to appeal was granted, the appeal was dismissed.

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[557] At 307.

[558] See *supra* 245-248 on intoxication.

[559] Malcolm cited, *inter alia*, Campbell C.J. in the Court of Criminal Appeal in Queensland in Ellen Dawn Friday (1985) 14 A Crim. R 471. In that case, the respondent had stabbed her brother and been convicted of manslaughter. Both parties were under the influence of alcohol. Campbell said:

> "Crimes of violence by Aborigines, when they occur on Aboriginal reserves and after the consumption of alcohol, have been dealt with by the courts in this State more leniently or sympathetically than has been the case with offences of a similar nature committed by Europeans and people of non-Aboriginal extraction." at 472.

Concern was expressed in Friday, as elsewhere, that leniency for the Aboriginal offender might result in injustice for the Aboriginal victim. See also, for example, Kathleen Jean Bulmer and Others (1987) 25 A Crim. R 155, *per* Derrington J. at 162.

The list of factors which may be taken into account is not closed, but it certainly includes[560] abuse of alcohol caused by deprivation[561], the background of the defendant[562], the remoteness of the defendant's place of residence[563], the prevalence of violence in Aboriginal communities[564], that the effect of a custodial sentence would be unduly harsh given the background of the defendant[565], and most relevant for the purposes of the Thesis, Aboriginal customary law. The last factor will be considered in detail in this Chapter. However, it should be noted at this point that there are difficulties in the inclusion of a defendant's adherence to customary law on such a list. Such adherence is not a disadvantage, it is simply a difference. Moreover, the use of customary law in mitigation, a frequent practice in colonial territories, is premised on the right of the state legal system to determine the nature of offences and consequent sanctions. Many of those governed by customary law would not accept this premise. The Papua New Guinea Law Reform Commission, for example, rejected such use and argued for a customary law defence:

> "We reject this solution because we believe it unacceptable that a person who is innocent in the eyes of his people in his community

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[560] The caselaw of the Northern Territory is very similar in this respect to that of the other jurisdictions in Australia and, therefore, caselaw from those other jurisdictions will be cited where appropriate.
[561] R. v. Jabanunga *supra* n 519; R. v. Sampson (1984) 68 FLR 331.
[562] R. v. Herbert (1983) 23 NTR 22; R. v Sampson (1984) 68 FLR 331; Neal v. The Queen (1982) 149 CLR 305; Houghagen v. Charra (1989) 50 SASR 419; R. v. Yougie (1987) 33 A Crim R 301.
[563] Leech v. Peters (1988) 4 A Crim R 350.
[564] R. v. Yougie (1987) 33 A Crim R 301.
[565] R. v. Fernando (1992) 76 A Crim R 58; R. v. Tjami (2000) 77 SASR 232; Ingomar v. Police (1988) 72 SASR 232.

and well believes he is doing right should be convicted of an offence."[566]

It should be noted, however, that whilst the usual effect of taking account of factors associated with Aboriginality is to mitigate, this will not always be so. Such factors will not mitigate if, for example, the Court considers that a deterrent sentence is necessary. The most frequent reason for such a sentence is to discourage violence, usually aggravated by alcohol and often inflicted on members of the defendant's own family, particularly women and, more rarely, children. The fact that the need for deterrence will defeat the otherwise mitigating effect of many of the factors associated with Aboriginality has frequently been recognised by the Courts.[567] In

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[566] Papua New Guinea Law Reform Commission *The Role of Customary Law in the Legal System* Report No. 7, Waigani, 1977, at 60. See Conclusion on customary law defences.

[567] See, for example: R. v. Wurramara (1999) 105 A Crim R; R. v. Daniel (1998) 1 Qd R 499; R. v. Friday (1984) 14 A Crim R 471; R. v. Bulmer (1986) 25 A Crim R 155. There is a serious problem of domestic violence in many Aboriginal communities in the Northern Territory. Any study of the Sentencing Remarks of the judiciary will demonstrate the frequency with which such violence occurs: see, for example: R. v. Ronald Patrick Campbell Transcript of Proceedings, Supreme Court of the Northern Territory, SCC No. 20107500, Martin CJ., 10 May 2002; R. v. Basil Jurra Transcript of Proceedings, Supreme Court of the Northern Territory, SCC No. 20214870 and 20307902, Mildren J., 14 October 2003; R. v. Joshua Edwards Transcript of Proceedings, Supreme Court of the Northern Territory, SCC No. 20215110, Bailey. J., 19 December 2003; R. v. Tony Connelly Transcript of Proceedings, Supreme Court of the Northern Territory, SCC No. 20325778, Olsson AJ., 9 September 2004. On domestic violence, see: Larsen. A-C. and Petersen. A. 'Rethinking Responses to 'domestic violence' in Australian Indigenous Communities' *Journal of Social Welfare and Family Law* 23(2) 2001, 121-134; Greer. P. 'Aboriginal Women and Domestic Violence in New South Wales' in Stubbs. J. (ed.) *Women, Male Violence and the Law* Sydney: Institute of Criminology Monograph Series No. 6, Institute of Criminology, Sydney University Law School, 1994, 64-78; Atkinson. J. 'Violence against Aboriginal Women: Reconstitution of Community Law – the Way Forward' (2001) *Indigenous Law Bulletin* 62; Rogers. N. 'Bush Women confront Male Violence' *Alternative Law Journal* Vol. 22, No. 2, April 1997, 99-101; Spowart. H. and Neil. R. 'Stop in the Name of Love: Reality and Rhetoric in the Domestic Violence Debate' *Alternative Law Journal* Vol. 22, No. 2, April 1997, 81-85; Randall. M. 'Domestic Violence: Uniting Law and Community-based Strategies' *Alternative Law Journal/Aboriginal Law Bulletin* Vol. 20, No.1/Vol. 3, No.72, February 1995, 3-6; Upton. J.C.R. 'By Violence, By Silence, By Control: The Marginalization of Aboriginal Women under White and 'Black' Law'' *Melbourne University Law Review* Vol. 18, December 1992, 867-873; Thomas. C. and Selfe. J. 'Aboriginal Women and the Law' *Aboriginal Justice Issues* Canberra: Conference Proceedings 21, Australian Institute of Criminology, 1992; University of New South

rare cases, the fact that the defendant is an Aborigine will not only not mitigate, but may result in the imposition of a more severe sentence on the grounds, at least partly of her/his Aboriginality.[568]

It would be interesting to see how the Anderson and Pananka cases decided by Kriewaldt would be decided today, or perhaps more accurately how the decisions would be reached as there is no reason to believe that the result would be any different. The obvious way would be to argue that the lack of 'education', or in Kriewaldt's terminology, 'civilisation', would amount to the factors mentioned by Malcolm in Rogers and Murray. However, it is not easy to determine the dividing line between Aboriginality *per se* and factors associated with Aboriginality. Moreover, the difference between the two concepts is not

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Wales 'Forum: Family Violence in Indigenous Communities: Breaking the Silence' *University of New South Wales Law Journal* Vol. 8, No. 1, 2-23; Paxman M. & Corbett H.'Listen to Us: Aboriginal Women and the White Law' *Criminology Australia* Vol. 5, No.3, Jan/Feb.1994, 2-6; Bolger. A. *Aboriginal Women and Violence: Report for the Criminology Research Council and the Northern Territory Commissioner of Police* Darwin: Australian National University, North Australia Research Unit, 1991; Cunneen. C. and Kerley. K. 'Indigenous Women and Criminal justice: Some Comments on the Australian Situation' in Hazlehurst. K.M. (ed.) *Perceptions of Justice: Issues in Indigenous and Community Empowerment* Aldershot: Avebury, 1995, 71-93, at 86-88. On the role and position of women in Aboriginal society, see: Bell. D. 'Aboriginal Women and the Recognition of Customary Law in Australia' in Morse. B.W. and Woodman. G.R. (eds.) *Indigenous Law and the State* Dordrecht: Foris, 1988, at 297-313, and 'Considering Gender: Are Human Rights for Women too? An Australian Case' in An-Na'im. A.A. *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* Philadelphia: University of Pennsylvania Press, 1992, 339-362; Burbank. V.K. *Fighting Women: Anger and Aggression in Aboriginal Australia* Berkeley: University of California Press, 1994; Payne. S. 'Aboriginal Women and the Law' in Easteal. P.W. & McKillop. S. (eds.) *Women and the Law* Australian Institute of Criminology Conference Proceedings No. 16, 1991 at 65-74.

[568] In this context the case of Jabanunga v. Williams (1980) 6 NTR 19 is interesting. The appellant had been convicted of possession of two cans of beer at Warrabri, a restricted alcohol area. On appeal Muirhead J. cited with approval the remarks of the Magistrate on sentencing:

> "'This community has chosen to have that legislation incorporated to protect the Warrabri community. It is very special in that regard. It is very important that courts are seen to apply this legislation strongly. ... I propose to impose very heavy fines, fines higher than I would normally impose, but I feel that this legislation is of a special character. The courts have to give it every possible chance of succeeding.'" at 21.

always made clear and terms are used loosely and interchangeably. Thus, for example, Toohey J. says[569]:

> "Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases it may be the very reason why the offence was committed. It is demeaning to Aborigines to suggest that somehow their Aboriginality is necessarily a mitigating circumstance."[570]

In making this argument he does not distinguish between Aboriginality *per se* and factors associated with Aboriginality. However, it is undeniable that the use of Aboriginality or factors associated with it in sentencing considerations usually either has no effect or operates to mitigate. It is interesting to note that most of the recent cases attempting to expound and list the grounds for differential treatment of Aborigines come from jurisdictions other than the Northern Territory. In the Northern Territory the position has seemingly been accepted for so long that it no longer requires explanation or justification. Thus, Mildren J. in Gadatjiya v. Lethbridge[571] in 1992 says quite simply:

> " .. the appellant is an Aboriginal and is a member of a section of the community for whom special leniency has always been shown".[572]

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[569] Toohey. J. *The Sentencing of Aboriginal Offenders* Paper given to 2nd International Criminal Law Congress. June, 1988.
[570] At 21.
[571] (1992) 106 FLR 265.
[572] At 273.

5.4: Customary law *per se* as a factor in sentencing:

The relevance of the defendant's adherence to customary law to sentencing arises in various ways, most frequently in connection with the administration of payback. Customary law punishment, payback, is essentially retribution for a tribal wrong. It may be executed by the relatives of the victim or by other members of the community. In most, if not all, cases it is discussed and takes a particular form. Until it is administered the matter remains unresolved. Once administered, the matter is finished and harmony restored to the community. The issue of the relevance which payback should have for sentencing gives rise to several different issues: first, if payback has already been undergone, should it be taken into account in the sentencing process in order to avoid double punishment?; second, if it is still to be undergone, should it be taken into account?; third, if the act of payback is illegal, are the Courts condoning illegality by taking it into account?; fourth, should the perpetrators of the payback be prosecuted if it is an illegal act?; fifth, which factors should be considered in deciding how and whether it should be taken into account – for example, the views of the community?; how can the Court be certain that a prospective payback which has been taken into account will happen? Each of these questions is considered in the caselaw which will be discussed in some detail. There will inevitably be some overlap in the analysis of the various issues as the cases often raise more than one.[573]

[573] The issue of payback is not, of course, peculiar to Australia. It is of particular importance in Papua New Guinea. However, consideration of that jurisprudence and literature is beyond the scope of the Thesis.

The beginnings of systematic judicial consideration of the relevance of payback to sentencing in the Northern Territory are to be found, unsurprisingly, in Kriewaldt's judgements. In this situation, the question is not should different standards be used when - in the application of the same law - sentencing Aboriginal defendants from those used when sentencing white defendants, but whether a law which is not part of the state system may be considered at all within that system. Kriewaldt was prepared to consider payback at the stage of sentencing, but was clear that it was not relevant to the verdict.

i. Payback administered by the defendant:

The situation where the defendant is being sentenced for an offence the substance of which was the administration of payback, is relatively straightforward. According to statute[574] the only way in which customary law could be taken into account in Kriewaldt's time was by considering it as evidence in deciding on a sentence for a charge of murder. He was apparently prepared to take it into account in circumstances other than those authorised by the statute. Thus, he was prepared to hear evidence as to the customary law on payback in order to make decisions about sentence, but, in accordance with the substantive law discussed in Chapter 4, he considered that it was unlikely to be relevant in the determination of an offence or defence. This is spelled out very clearly in R. v. Aboriginal Timmy[575] and reiterated in R. v. Aboriginal Jack

[574] Criminal Law Amendment Ordinance *supra* 533.
[575] (1951-1976) NTJ 676 at 677.

Wheeler[576] where he again stated that customary law, in this case payback, does not provide a defence.[577]

The difference between what may be taken into account at the stage of verdict and what may be taken into account at sentencing was clearly demonstrated in the 1953 case of R. v. Aboriginal Charlie Mulparinga (No. 2)[578]. The defendant had, at the order of the tribal elders, killed the deceased for a breach of customary law. Kriewaldt held that, as an Aborigine must be tried under the same law as a white person, the fact that the killing had taken place at the order of the elders was no defence as it would not be a defence for a white person. Nor

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[576] No. 36 of 1959. Unreported.

[577] However, in this case he points out that payback may be relevant to a verdict not because it is a defence in itself but because it may be relevant in establishing the elements of an offence or defence. Here, the state of mind of the accused was relevant in determining whether he was guilty of murder or manslaughter. In his summing up, Kriewaldt says:

> "I would also suggest that you may take another view entirely, namely that the accused did not intend to do any more than inflict a wound of the type commonly inflicted by natives when there is a payback. ... If ... you ... think it more likely that the intent was merely to inflict a wound within the limits permitted by native custom then you are up against a problem. You may say, with perfect fairness, that even a wound of that kind falls within the concept of grievous bodily harm. If you do take that view, the proper verdict is one of murder. Equally fairly you may say a wound of that kind among Aborigines is so commonly inflicted, and has so little effect, that it is not fair to regard a wound of that description as amounting, amongst Aborigines, to grievous bodily harm. In those circumstances, the proper verdict is not murder but manslaughter."

Kriewaldt is saying that action which may be assumed to display the necessary elements of intent to establish murder if carried out by a white person, or by an Aborigine when not sanctioned by customary law, need not necessarily be taken as establishing the same intent when carried out by an Aborigine as an act of payback in accordance with such law. It goes without saying that this analysis may only be applied when the defendant is acting under customary law and not simply to any violence between Aborigines. This point is reaffirmed in other cases. See, for example: R. and Wogala (alias Dick) unreported; R. v. Aboriginal Nelson (1951-1976) NTJ 327. The argument to be made in the cases where he appears to have taken it into account in terms of establishing offences or defences is, of course, not that he considered different elements - such as customary law - in the application of the substantive law, but that the presence or absence of elements were judged by different standards, i.e. the *mens rea* for murder is the same for an Aborigine acting under customary law as it is for a white person but the presence of customary law constraints may enable a different interpretation of facts in establishing the presence of *mens rea*. Would the outcome have been different if Aboriginal Timmy had said "I meant to kill"? See Chapter 4 on this point.

[578] (1953) NTJ 219.

was it a defence[579] that had he not obeyed the orders of the tribal elders he would himself have been killed. It was, however, relevant to sentencing. The jury found the defendant guilty of murder and Kriewaldt sentenced him to imprisonment with hard labour for eighteen months. His remarks on passing sentence are instructive as to the principles to be applied in fixing sentence in such cases. He states that he has received evidence from two expert witnesses since the verdict and he has taken this into account. He asserts that the main objects of punishment are retribution, reformation and deterrence, but that he considers that the facts of the present case make punishment on the first two grounds unnecessary. However, he does believe that there is a ground for punishing in order to deter others from similar acts.

ii. Payback suffered by the defendant:

Payback either undergone or to be undergone by the defendant was, according to Kriewaldt, also irrelevant to the verdict. He spells this out clearly in several cases. In R. v. Aboriginal Wally, for example, he says in summing up to the jury: "The second matter you are to disregard is this: that the accused has already been punished or that he will be punished by his tribe if he ever returns to it."[580]

[579] There was no argument on the possibility of establishing duress.
[580] R. v. Aboriginal Wally (1951-1976) NTJ 21; see also R. v. Aboriginal Patipatu (1951-1976) NTJ 18.

After Kriewaldt's death there was a considerable period with apparently almost no caselaw – or at least no reported caselaw - in this area.[581] A major factor was almost certainly the inadequacy of the record keeping of the Northern Territory Supreme Court during the relevant years which means that there may have been some cases which it was impossible to trace. Whatever the reasons, there is little or no available jurisprudence on the issues until the mid to late 1970's.[582]

Kriewaldt's position was clear and largely consistent. There was one law which was to be applied to all, though application may involve differential treatment. Payback may be relevant in considering the application of the law, but only with

[581] It has been suggested that the judges who followed Kriewaldt were not only less interested in Aborigines than was he, but also less interested than they should have been. Interview with Jon Tippett, Northern Territory Bar. 2 September 1994.

[582] The work done by the Australian Law Reform Commission in preparation for the *The Recognition of Aboriginal Customary Laws (Summary Report, Full Report 2 Volumes), Final Report No. 31* Canberra: Australian Government Publishing Service, 1986. The research undertaken on the caselaw relating to traditional punishments and sentencing published in September, 1982 - *Appendix: Cases on Traditional Punishments and Sentencing* Sydney: Research Paper 6A, Australian Law Reform Commission, 1982 - covers a selection of cases from the period 1974-1982. The forty-seven cases are overwhelmingly from the Northern Territory, although there are two from South Australia and three from Western Australia; only four of the cases are from lower Courts, i.e. Courts of Summary Jurisdiction; only cases where there has been some substantial discussion of the issues are included; and the cases are all from the period 1974-1982, except one Western Australian case from 1965. The Commission explains how the cases were selected. The fact that the preponderance of cases is from the Northern territory does not mean that there are no other cases in other jurisdictions, simply that the Commission has not been made aware of them. It had had access to the transcripts of all Northern Territory Supreme Courts cases (reported or unreported) whereas it had not had the same access to the transcripts from other jurisdictions. There is no explanation of why this was so. The Commission says that it has had access to such Northern Territory transcripts "in recent years" (at 2), but there is again no indication of what is meant by "recent" nor indeed why that is so. It is possible, of course, that there were an equal number of cases in the years before 1974 and the Commission did not have access to them but this seems unlikely. The only other point which they make in terms of the period covered is that they have chosen to concentrate on this period because such decisions as are available from earlier periods are based on outmoded thinking and attitudes towards Aborigines, such as assimilation. They therefore considered that those decisions were not relevant to the inquiry which should be against the background of current thinking on Aborigines' rights. However, the fact that they say: "earlier cases - for example, decisions of the Northern Territory Supreme Court in the 1950's - are sometimes available" (at 2) suggests that the earlier decisions which were available to them and which they chose not to use were those of Kriewaldt. It is true that they do not actually state that there is nothing available between 1960 and 1974, but this does not seem an unreasonable inference.

regard to sentencing not, in general, with regard to verdict. On the whole, that has remained the position of the Courts who will still not apply customary law in preference to state law except in very limited cases. However, it is arguable that they have so far extended the ways in which customary law in general, and payback in particular, are taken into account that this amounts to at least partial recognition of the law. If sufficient weight given is given to a customary law factor in sentencing, the result may be that the application of the state law has little or no effect on the defendant. If this is so, whilst the theoretical position of one law applicable to all is maintained, the reality is that two are laws operating even though one does so only by the 'permission' of the other.

iii. Recent developments in the practice of the Courts in assessing the relevance of payback:

By the early 1980's payback was again coming to prominence before the Courts[583] but against a very different political and social background. There are relatively few reported cases, but they - and the unreported decisions and sentencing remarks - show attitudes and reasoning significantly different from those displayed by Kriewaldt in the 1950's. One difference is that the Courts began to show concern with three issues when making sentencing decisions: discrimination, the purposes of punishment and the views of the relevant Aboriginal community. On the whole,

[583] It might be thought that payback is a practice which is gradually falling into disuse. This is not the case, especially in the Northern Territory where it is still practised widely. For an overview of its continuing prevalence, see: Finnane. M. 'Payback', Customary Law and Criminal Law in Colonised Australia *International Journal of the Sociology of Law* 2001, 29, 293-310.

Kriewaldt had been concerned only with the first. Various views on the purpose of punishment have been outlined above and it has been demonstrated when considering the various factors which may be considered to be associated with Aboriginality that there is often a need to balance these aims. The views of the Aboriginal community are today considered to be extremely important[584], although not determinative[585].

However, the major change is that Courts today are bound – not merely able, but bound - to consider evidence relating to payback in determining a sentence even

[584] See: R. v. Davey (1980) 50 FLR 57; Robertson v. Flood (1992) 111 FLR 177; Mununguri v. The Queen (1994) 4 NTLR 63; R. v. Miyatatawuy (1996) 6 NTLR 44; Joshua v. Thomson (1994) 119 FLR 296; Putti v. Simpson (1975) 6 ALR 47; Mamarika v. The Queen (1982) 63 FLR 202. Moreover, the Royal Commission on Aboriginal Deaths in Custody recommended that Aboriginal communities should be consulted on the appropriate range of sentencing in general and, where permissible, in relation to individual cases, and that there should be a range of non-custodial sentencing options available in areas where there is a significant Aboriginal population and that the communities should be involved in the administration of community service orders: Royal Commission into Aboriginal Deaths in Custody *National Report of the Royal Commission into Aboriginal Deaths in Custody* (5 Volumes) Canberra: Australian Government Publishing Service, 1991-1992, Recommendations 104, 109-115. On the Royal Commission's *Report* and subsequent consideration of the issue, see: McDonald. D. and Whimp. K. 'Australia's Royal Commission into Aboriginal Deaths in Custody: Law and Justice Issues' in Hazlehurst. K.M. (ed.) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* Aldershot: Avebury, 1995, 187-215; Harding. R.W. 'Prisons are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody' *The Australian and New Zealand Journal of Criminology* Vol. 32, No.2, 1999, 108-123. See also, various papers in the Australian Institute of Criminology: *Trends and Issues in Crime and Criminal Justice series* Canberra : *Walker. J. and McDonald. D. The Over-Representation of Indigenous People in Custody in Australia* No. 47, August 1995; Dalton. V. No. 131 October 1999; Carcach. C., Grant. M. and Conroy. R. *Australian Corrections: The Imprisonment of Indigenous People* No. 137, November 1999; Williams. P. *Deaths in Custody: 10 Years on from the Royal Commission* No. 203, April 2001. On the general issue of Aborigines in prison, see: Hogg. R. 'Penality and Modes of Regulating Indigenous Peoples in Australia' *Punishment and Society* Vol. 3(3) 355-379; Eddey. R. 'Indigenous Punishment in Australia: A Jurisprudence of Pain?' *International Journal of the Sociology of Law* 30 (2002) 219-234.

[585] R. v. Minor (1992) 79 NTR 1; Mununguri v. The Queen (1994) 4 NTLR 63.

if that payback itself constitutes an offence. This has been stated and reaffirmed in numerous cases[586], the most important of which will be considered in detail.

The first case of significance was The Queen v. William Davey[587] which came before the Federal Court on appeal from the Supreme Court of the Northern Territory. Davey had pleaded guilty to manslaughter, an offence punishable by a maximum sentence of life imprisonment, before Gallop J. There was some dispute about the facts, but evidence had been called which showed that there had been a considerable degree of provocation, that the community to which the deceased belonged considered that the trouble was the fault of the deceased and that, should the Respondent return to his home, there would be no payback. Apart from one minor conviction, the Respondent had no prior criminal history. The Crown appealed to the Federal Court on the grounds that the sentence imposed by Gallop was manifestly inadequate. It argued, *inter alia*, that the trial judge failed to give proper consideration to the retributive and deterrent aspect of sentencing and that he had erred in taking into account that the actions of the Respondent were such as laid down by traditional law. Muirhead commented:

> "In the exercise of its criminal jurisdiction the Supreme Court of the Northern Territory concerns itself with many aboriginal people. Of these, a number live under tribal culture and tradition and come from areas remote from the court. The court has for many years now considered it

[586] R. v. Miyatatawuy (1996) 6 NTLR 44; R. v. Wilson (1995) 81 A Crim R 270; R. v. Minor (1992) 79 NTR 1; R. v. Anderson (1954) NTJ 240; Namatjira v. Raabe (1958) NTJ 608; R. v.Jungarai (1981) 9 NTR 30; Mamarika v. The Queen (1982) 63 FLR 202; Jadurin v,. The Queen (1982) 7 A Crim R 182; Atkinson v. Walkely (1984) 27 NTR 34.
[587] (1980) 50 FLR 57.

should, if practicable, inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible."[588]

Muirhead considered that the evidence leading the trial judge to assume that there was traditional provocation was slight, but it had not been challenged by the Crown at the time and it seemed to him a reasonable *hypothesis*, and proper to be taken into account. The trial judge had also, correctly in Muirhead's view, paid attention to the views of the Aboriginal community that the Respondent should be returned to his home. The Crown had contended that the respondent had had contact with white society having worked in a leprosarium and as a stockman. Muirhead pointed out that such contact did not necessarily "erase deep-rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate".[589] The appeal was dismissed. This case is important because it demonstrates the evolution of the judiciary's approach to the consideration of payback. The fact that the Court attached so much weight to the opinion of the community, part of which was based on the nature of the traditional provocation and its consequences in terms of the imposition of payback, is a clear indication that payback is held to be cognisable and an important factor in sentencing.

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[588] At 60-61.
[589] At 61.

The following year the case of R. v. Jungarai[590] came before the Supreme Court of the Northern Territory. It has proved to be one of the most controversial cases in this area as it appears that the accused was released with the intention, certainly with the knowledge, that he was to undergo tribal punishment. This decision, taken at a still relatively early stage in the present phase of decisions on payback, signals just how far the courts had moved from the views of Kriewaldt. The accused applied for bail pending trial for murder and, when this was denied by the committing Magistrate, he appealed to the Supreme Court. Evidence was brought in support of the bail application that the accused would be held responsible for the killing by Aboriginal law and custom and would be punished by the community, which punishment he was willing to undergo. Forster C.J. accepted the evidence as to the likelihood of punishment by the community and of continuing unrest in the community until that punishment was administered. He granted bail giving the following reasons:

> " ... it is plain that according to Aboriginal law and custom the accused is held responsible for Jackson's death and must accordingly be punished. The precise tribal punishment appropriate for the accused is not absolutely certain
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> .....
>
> Since the accused has to come to court in August to be tried, it will not be possible for his banishment to be effected by the community. As a result of the court proceedings the accused will either be convicted of murder or manslaughter or will be acquitted. If he is convicted, it is likely that he will be in prison for a period which will satisfy the banishment requirement, even though this is as a result of the court's

[590] (1981) NTR 30.

action rather than the community's. If he is acquitted, or, having been convicted, is dealt with in such a way that he is not in prison, the accused will return to the community and may then be banished if it is thought necessary to do so to avoid trouble. Whatever may happen as to this aspect, it is almost certain that until the spearing has taken place the matter of retribution or payback in Aboriginal terms will be unresolved and the community will be ill at ease and serious trouble may flare up at any time. It is equally certain that once the spearing has occurred, the unease and the probability of serious trouble arising out of the killing will be at an end.

... This should not be regarded as a precedent in the sense that the mere assertion of similar facts from the bar table will be sufficient, in my view at least, to justify a similar order in every case. There must be credible evidence to support such a course being taken. As is well known, at least to the people of the Northern Territory, Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings may differ. What may be almost certain to occur in one place with respect to the circumstances of one killing may be unlikely to happen in another with respect to the circumstances of another killing.

I should also say for the purpose of dealing with the application for bail I express neither approval nor disapproval of the course proposed to be taken by the family of the deceased, endorsed as it is by the community - including the family of the accused. Whether or not the proposed action constitutes an offence under the law of the land seems to me, for present purposes, to be irrelevant. The order for release on bail should not be interpreted as necessarily involving approval of what will happen nor, of course, should my failure to approve it be interpreted as disapproval. What will almost certainly happen is simply, for present purposes, an important fact to be considered."[591]

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[591] At 31-32. Forster makes it quite clear that it will not be sufficient merely to assert that payback either has been or will be administered, there must be evidence. This requirement has

The matter finally came before the Federal Court of Australia[592] on Jungarai's appeal against the sentence imposed at the eventual trial. The appellant was described in the proceedings as:

> " .. an Aboriginal of full blood, aged about forty, with no formal education. He has five children. His usual occupation is that of stockman or ringer but during the last five years he has been doing labouring work at Ali Curung. It was said by his counsel that he 'has lived a tribal type of existence for most of his life', a statement that was not elaborated. He has a substantial record of convictions between 1964 and 1979, including crimes of violence (though none since 1972) and offences relating to alcohol."[593]

The appeal was dismissed and the Court had the following to say on the sentence:

> "There is no doubt that, in sentencing the appellant, his Honour had regard to the fact that, after his release on bail, the appellant returned to Ali Curung where he was beaten by members of the community with nulla nullas and boomerangs until he was unconscious.
>
> .....
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> ... the case that the sentence was excessive was based upon the proposition that insufficient weight had been given to the actions of the community at Ali Curung. Counsel expressly conceded that if the matter were viewed without any of the overtones arising from the notion of

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been repeatedly stressed in later cases: see, for example, Mununguri v. The Queen (1994) 4 NTLR 63; R. v. Wilson (1995) 81 A Crim R 270. It has similarly been stressed that the Court must have sufficient evidence to be able to assess the view of the community as to appropriate sentencing if it is to take that view into account: see, for example: Robertson v. Flood (1992) 111 FLR 177; Mununguri v. The Queen (1994) 4 NTLR 63.

[592] (1981) 5 A. Crim. R 319.

[593] At 320. For discussion of this case, see: Fisher. M. & Hennessy. P. 'Aboriginal Customary Laws and the Australian Criminal Law in Conflict' *Law and Anthropology* Vol. 3, 1988, 83.

tribal punishment, neither the head sentence nor the non-parole period would be open to challenge."[594]

Thus, the payback which had been taken into account in the bail application when it was prospective, was also take into account in the imposition of the sentence once it had been undergone.

In the 1981 case of R. v. Moses Japonia Mamarika[595] the accused pleaded guilty to a reduced charge of manslaughter. Muirhead J. sentenced him to imprisonment for seven years and six months. The charge related to an incident in the course of which the accused had fatally stabbed a tribal brother. After the incident the accused was attacked and speared as payback, but the anger in the community was not satisfied. Counsel for the defence argued that the Court should accede to the views of the accused's community, expressed in a letter addressed to the Court, that he should not be imprisoned, but sent to a mainland outstation for at least three years, and that this banishment taken together with the physical reprisals already suffered constituted a serious enough punishment without imposing a custodial sentence. However, Muirhead J. took the view that a custodial sentence must be imposed both as a punishment and by way of deterrent although he admits that it may not be the best method. He says:

"The reasons are these. There are too many cases involving killing of Aboriginals by Aboriginals coming before this court. Most are liquor

[594] At 320.
[595] Supreme Court of the Northern Territory, SCC No. 293 of 1981. Unreported. Transcript of Proceedings. 22 December 1981.

induced killings. People who have been drinking become careless of each other and lose tolerance to insult or wrong doings. Only in exceptional circumstances, so far as I am concerned can a sentence for manslaughter result in immediate conditional release.

Your community may regard what is virtually temporary banishment from your home land as adequate sanction and that I understand. I doubt whether imprisonment has ever made sense to your people. Traditional punishment methods were probably far more effective, if at times salutary. But imprisonment is now well understood as a punishment handed out by the courts of this territory and my experience is that an order for conditional release is too often misunderstood or ignored ..

..

I take these matters very much into account, and if they were not so significant, I can only say that the punishment would have been heavier.."[596]

He sentenced Mamarika to imprisonment with hard labour for seven years and six months with a non-parole period of two years.

Mamarika appealed arguing, *inter alia*, that the sentence was too severe. The matter came before the Federal Court which allowed the appeal[597] and reduced the sentence. The basis of the argument that the sentence was too severe was that the trial judge had not paid sufficient attention to the traditional punishment which the appellant had undergone, nor to the wishes of the community and that he had failed to give sufficient emphasis to the isolated and tribal nature of the Umbakumba community. The Federal Court stated that there has been no

[596] Sentencing Remarks of Muirhead J. Unreported. 22 December 1981. At 73.
[597] (1982) 42 ALR 94.

suggestion by either side that these matters should not be taken into account the only point of disagreement was whether they were given sufficient weight. The Crown, in seeking to defeat the appeal, argued that there was no real evidence that the appellant had suffered payback. The physical injuries could not be denied but the Crown sought to draw a distinction between injuries incurred admittedly in customary tribal manner and injuries incurred as a result of the application of customary law. In other words, just because the injuries were of a type which would be used in the infliction of payback does not necessarily mean that their infliction in this case was payback. To support their argument, they asserted that there had been no time for a meeting or discussion of the appropriate penalty and thus the injuries had in fact been retributive in nature. The Federal Court avoided deciding whether or not the violence had actually been payback, though the tenor of their comments seems to suggest that they thought not, but stated that even if it were simply retribution it could be taken into account:

> "It is of course a fact, and one that cannot and should not be disregarded, that the appellant did suffer serious injuries at the hands of other members of the community. But, if it is to be asserted that conduct of this sort should be seen as a reflection of the customary law of an Aboriginal community or tribal group, we are of the opinion that there should be evidence before the court to show that this was indeed the case and that what happened was not simply the angry reaction of friends of the deceased ..
>
> In the circumstances we are of the opinion that this court should approach the matter on the basis that, by reason of his action, the

> appellant brought on himself the anger of members of the community and that, as a result, he received severe injuries... So seen, it is a matter properly to be taken into account in determining an appropriate sentence, without giving any sanction to what occurred."[598]

Given these injuries,[599] the time already spent in hospital or prison and general sentencing considerations, the Court allowed the appeal. In fact whilst the outcome of the appeal may have been satisfactory for Mamarika, the Court avoided deciding either the status of the relationship between traditional law and Australian law or the status of the wishes of the community.

Shortly after the Mamarika case came Jadurin v. R[600]. This case came before the Federal Court on appeal from the Supreme Court of the Northern Territory. The facts were as follows. The appellant was convicted of the manslaughter of his wife and was sentenced to four years' imprisonment with a minimum non-parole period of twelve months. He appealed against the severity of the sentence, arguing that he had already undergone some tribal punishment - and would undergo further - and that the sentence should be reduced to a suspended one to avoid his being punished twice for the same deed. The Federal Court made several pertinent comments in dismissing the appeal.

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[598] At 97.
[599] The three men who speared Mamarika were prosecuted in connection with the attack and two were convicted.
[600] (1982) 44 ALR 424

First, and as a side issue, it was suggested on behalf of the appellant by way of explanation and not by way of justification, that it is not unusual in Aboriginal society for men to beat their wives if they consider that they have not been obedient. The Court was of the opinion that the evidence proffered simply established that this might sometimes occur and certainly did not establish that it was an accepted feature of Aboriginal society.[601] It is clear that the Court considers that this argument is too simplistic and too easily advanced in circumstances where it has no real basis in Aboriginal culture or law:

> "The suggestion overlooks the fact that, at least in the experience of the courts, when such beatings take place it is usually after a great deal of alcohol has been consumed. It also ignores the very complex web of relationships between men and women in Aboriginal society. In the present case we are of the opinion that the court should approach the matter on the basis that the appellant beat his wife in anger when they were drunk, and that this brought about her death."[602]

The main argument advanced on behalf of the appellant was that he had already undergone some traditional punishment - and was likely to undergo more – and that if he received a heavy sentence which did not take account of that fact, he would thereby be being punished twice for the same offence. The Court considered that there were three questions to be considered: was there evidence for tribal punishment undergone and to be undergone?; did the sentencing judge take it into account?; if he did not, was the sentence imposed in consequence

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[601] For literature on domestic violence, see *supra* n 567.
[602] At 426.

excessive? The Court reviewed the evidence which had been tendered as to what had already happened and as to what would be likely to happen in the future. It held that the trial judge had clearly been aware of such evidence and had given due consideration to the question of tribal punishment, but was still of the opinion that such matters were not sufficient to lessen the seriousness of an unlawful killing. Moreover, the Court held that it was clear that the trial judge had taken them into account because the sentence set was in fact already a very lenient one. They went on to say that once it was clear that the tribal factors had been taken into account then the argument that he was being punished twice lost much of its force: the punishment meted out by the Courts had in fact been mitigated by that meted out by the Aboriginal community. However, the point of the possibility of double punishment always needs to be considered and the extent of the mitigation can only be decided on a case by case basis. The Court was very clear that what was definitely not possible, and indeed had not been argued, was an abdication of the right or duty to punish by the state courts to Aboriginal communities:

> "It was not suggested on behalf of the appellant that he, *(sic.)* being an Aboriginal, the court should in any way abdicate its function of dealing with him. It was submitted that the court should arrive at a penalty which reflected matters in mitigation arising from the appellant's personal situation and which recognised the structure and operation of Aboriginal society. This would avoid a situation in which the appellant was punished twice for what he had done, thereby producing in him

> resentment against a system of law of which he had little understanding."[603]

The Court then made reference to the judgements in both Mamarika and Neal discussed above. In the first case the Court was not convinced that the injuries suffered had truly been payback, but still felt entitled to take into account the fact that the accused had been seriously injured as a result of his actions. The Court in the present case quoted from the Mamarika judgement - "So seen, it is a matter properly to be taken into account in determining an appropriate sentence, without giving any sanction to what occurred."[604] - and considered that the same considerations applied with regard to the punishment already undergone by the appellant. With regard to the Neal case the Court quoted the judgement of Brennan J. in which he said:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice."[605]

One of the factors which is likely to arise solely because of the membership of particular ethnic group is of course traditional law and payback. The Court

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[603] At 428.
[604] At 97.
[605] At 626.

argued that this should be taken into account and that to do this is not in any way to sanction unlawful violence:

> "In the context of Aboriginal customary or tribal law question will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognize itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognize certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account."[606]

However, the Court concluded that in the present case there was no need to explore the issues any further because the sentencing judge had clearly taken the matters into account and given that he had a wide discretion it was not possible to argue either that there was an identifiable error in his reasoning or that error could be inferred form the sentence. The appeal was therefore dismissed.[607]

Three years after the Mamarika case two more cases came before the Courts within a few days of each other. Both involved defendants from traditional

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[606] At 429.

[607] Jadurin later killed his second wife. Interview with Colin McDonald. Northern Territory Bar. 1, 2 September 1994

backgrounds. The first was R. v. Jacky Jagamara.[608] The case resulted from Jagamara having been speared in the thigh by the man he then killed. This spearing was highly improper as the deceased was Jagamara's son-in-law. He therefore speared the deceased who died as a result of that injury. Jagamara was then speared by relatives of the deceased on three separate occasions. In this case, O'Leary J. sentenced the accused to the rising of the Court, recognition being given to the punishment already meted out by the community and seemingly incidentally to the time already spent in custody:

> "The prisoner is about 40 years of age, he is a full-blood Aboriginal, a Pintubi, and one of the last Pintubis to come in from the desert in 1966. He has had no education, and has virtually no command of the English language.
>
> He has been married for some 15 years, and since 1979 has lived with his wife and son at Warakurna in Western Australia. I have been told that he is well-regarded as a useful member of that community. He has no other convictions either before or since the present offence. It was an offence that was committed in an entirely tribal and traditional Aboriginal setting, and the prisoner has received very severe traditional punishment by way of pay-back at the hands of the deceased man's family.
>
> In my opinion it is not an offence that calls for any deterrent or retributive punishment by this court. ... I think that in all the circumstances he ought not to be subjected to any further punishment beyond the very severe punishment he has already received."[609]

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[608] Supreme Court of the Northern Territory SCC No. 292 of 1979. Unreported. O'Leary J. 25 May 1984.

[609] Sentencing Remarks of O'Leary J. Unreported. 25 May 1984.

However, it is worth noting that the facts of this case are somewhat unusual in terms of the characteristics of the accused and the offence. Indeed O'Leary said that on "any score this is quite an exceptional case"[610].

A few days later the case of R. v. Charlie Limbiari Jagamara[611] came before the same Court. The accused was an old man from a traditional background who had speared the deceased thus causing his death. The accused had then undergone particularly severe traditional punishment, being speared, cut, beaten and hit.[612] He had also been banished from his birthplace. The dispute arose from a suggestion that an improper liaison had taken place between the deceased and Jagamara's wife. Anthropological evidence was called[613] which established the following: that the accused followed traditional law and was traditionally married; that the accused's wife had behaved in a way which could lead to the belief that she was engaged in a relationship with someone who stood as a son-in-law to her, one of the most taboo relationships; that the accused would see his wife's actions as involving a very serious transgression which required a response from him; that the accused intended merely to teach the deceased a lesson; and that the accused held an important position within the community and that his presence was critical for the continuance of certain ceremonies. The

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[610] Sentencing Remarks.
[611] Supreme Court of the Northern Territory SCC No. 22 of 1984 Unreported. Transcript of Proceedings. 28 May 1984.
[612] No-one was ever charged with the infliction of the traditional punishments. It is interesting that according to the submissions of Jagamara's counsel at the sentencing hearing the police offered Jagamara the choice of remaining in custody or accepting bail. She alleged that he had been offered that choice as the police knew that he would undergo payback if he left custody. He accepted bail and did indeed undergo payback.
[613] Transcript of Proceedings. At 8-18.

Crown accepted that there had been no intention to kill but merely to wound which would satisfy his traditional views as to the correct response to the situation. Jagamara was sentenced to imprisonment until the rising of the Court. Muirhead placed stress on the importance of traditional law to Jagamara and his importance within the community. He stated that the situation had caused difficulties in the community which was attempting to resolve them and to avoid further disturbance or bloodshed.[614] In those circumstances, the Court should not intervene. He went on to say:

> "I am satisfied that if I impose a sentence of imprisonment, and in this case I have no wish to do so, the problems of the Aboriginal people would probably be exacerbated, and his withdrawal from Aboriginal society would increase the difficulties. In all these circumstances I propose to treat this matter as a somewhat exceptional matter. Many cases that come before this Court which involve the killings of other people, especially where alcohol comes along and serves to confuse the issues, may have a cultural or traditional basis and at times it is necessary, or at times I have considered it necessary, that punishment

[614]It is clear from the transcript of the proceedings that Muirhead was concerned firstly about the encouraging effect which leniency might have and secondly about the role of the defendant in the community. In his questioning of Bell, the anthropologist:
"His Honour: The disposition of this matter by this court is not relied on in any way as a matter of - as a solution towards any residual problems that may arise? --- No. I think, in a sense, this court is running very peripherally to ..
The exercise of leniency won't stoke the fires of pay back in many of the communities? --- I don't think so, Your Honour, because that has been taken in hand by very senior persons who wish to continue the process.
Ms. Ditton" If, in fact, he were to receive a custodial sentence - what effect do you believe that would have within the relevant Aboriginal community? --- Well, it would create enormous hostility from his family, who feel that he faced pay back in the way in which he should have.
His Honour: It also makes him unavailable for some of the responsibilities? --- Exactly. On the wider community level, it would make it very difficult for them to continue the procedures. And in terms of his future input into Warlpiri society, it would mean that a very important knowledgeable person has been removed, so they would have lost a resource."' at 16.

provided by the law that we administer must be imposed for the general protection of Aboriginal people, and to prevent larger areas of misunderstanding.

But in this event, this is truly a cultural matter which has been tackled energetically by the people. The accused has already suffered punishments far more severe than any that I would be authorised to inflict, and beyond the physical matters that I have adverted to, he has also the continuing knowledge that he is no longer welcome in his birthplace and his future in the Aboriginal society is by no means yet on a fixed course."[615]

He went on to make a very clear statement that there are some cases in which traditional law should prevail completely:

".. There are cases, I don't say necessarily many of them, but there are cases where I consider complete regard should be had for Aboriginal custom and tribal law. This is one of them."[616]

The two Jagamara cases are unusual and shared several relevant characteristics: both defendants came from a traditional background and still lived that lifestyle; in both cases the acts which were the substance of the offences were committed for no reason other than adherence to customary law; and in neither case was any complicating factor – such as excessive alcohol consumption. In both cases the Court stressed that the nature of defendants and the circumstances of the offences were crucial to the apparent leniency of the sentence. Such

[615] At 20-21.
[616] At 21.

uncomplicated cases are rare, but it is clear that when they arise, the judiciary is prepared to give very considerable weight to the fact that payback is involved.

In the same year the case of Atkinson and Another v. Walkely[617] came before the Supreme Court of the Northern Territory and was heard by O'Leary J. The matters were appeals on the grounds that the sentences were manifestly excessive. The appellants had pleaded guilty to indecently assaulting a young Aboriginal girl. After the offences the men had been banished by their local community for a year, but had been allowed to return after five or six months. For some time after the assault the girl's relatives threatened the men with retaliation and O'Leary considered that the banishment was probably aimed at preventing further trouble as well as being a punishment and a sign of disapproval. O'Leary found that in fixing the sentence the Magistrate had failed to give the requisite weight to the fact that the offenders had already been punished by their community. It is clear from the transcript of the Magistrate's reasons for sentence that he did consider the issue but it is not clear what weight he gave to it. The main thrust of his comments seems to be that he considered the community punishment too light. O'Leary goes on to consider the authorities:

> "It seems to me that what the learned magistrate is here considering is the degree of seriousness which the local community attached to the offence - which he seemed to think was 'a most lenient view' - and what he then says is that that view cannot, in this kind of case, be allowed to

[617] (1984) 27 NTR 34.

prevail over the view taken by the community at large which would regard it as a serious offence. He does not seem to be directing his attention to the fact that both prisoners have been banished by the community for the purpose of taking that into account in fixing the appropriate penalties.

I think it is clear on the authorities that, in fixing penalty, a court should take into account the fact that the offender, by his actions, has brought on himself the anger of members of his community and that, as a result, he has received, or is likely to receive, punishment of some kind or other at their hands: see Mamarika v. R (1982) 42 ALR 94; Jadurin v. R. (1982) 44 ALR 424. That, of course, as was pointed out in those cases, is not to be seen as necessarily giving any sanction to the punishment or retribution imposed."[618]

He disagrees with the Magistrate that the sentence imposed by the community was very lenient and also considers that in fixing the sentence the Magistrate did either fail to take the banishment into account or if he did take it into account did not give it sufficient weight. The appeal was therefore allowed and the sentences reduced. There is little development of judicial thought in relation to payback in this case. However, it demonstrates clearly that the Courts consider themselves obliged to take account of payback.

In 1990 the case of The Queen v. Phillip Daniel Berida[619] came before the Supreme Court of the Northern Territory. In his remarks on passing sentence Angel J. dealt with the question of traditional law punishment. Berida had

[618] At 37.
[619] Supreme Court of the Northern Territory. Unreported. Transcript of Proceedings. 30 March, 4 and 5 April 1990.

pleaded guilty to unlawful killing. The judge accepted that the accused had brought shame on his family and he took that into account in accordance with the principles in Jadurin v. R. Moreover, there was a real risk of payback and that risk would last for a very long time. It was unlikely that the accused would be able to return to Port Keats in the near future, possibly never. Angel does point out the necessity for fixing a sentence which will serve as a deterrent both to the accused and to the community at large. He concedes that the deterrence aspect must be set against the background of the accused and quotes the comments of Derrington J. in the case of Yougie:[620]

> "Of highest importance is the deterrent effect for the protection of potential victims and the turning of the court's face against violence as a general proposition is justifiable. At the same time it would be wrong to fail to acknowledge the social difficulties faced by Aboriginals in this context where poor self image and other demoralising factors have placed heavy stresses on them leading to alcohol abuse and consequential violence."[621]

However, whilst he appears to be prepared to take account of general factors relating to Aboriginality he makes no further mention of the question of customary law or payback other than as contained in general comments about the factors taken into account in reaching the sentence:

> "In fixing penalty, it is for me to have regard to, and I have regard to, the background I have mentioned, the nature and circumstances of your

[620] (1987) 33 A. Crim. R. 301
[621] At 304.

offence, your previous criminal record and your personal circumstances and general considerations of retribution, deterrence and your personal rehabilitation."[622]

He sentenced Berida to seven years imprisonment and directed that after three years the remainder of the sentence be suspended on condition that he reside at Pareda Outstation for the balance of his sentence. The judge does seem to have taken into account in reaching his decision that Berida would be safe from retribution at the Outstation. The interest of this case for the present discussion lies in the fact that comparatively little attention is paid to the payback point and it appears simply to be subsumed into the consideration of the other factors related to the individual defendant and his Aboriginality.

The next case of significance was R. v. Minor[623]. This case came before the Northern Territory Court of Criminal Appeal on appeal by the Director of Public Prosecutions against the decision of the trial judge. Evidence had been presented to the sentencing judge that the accused would inevitably be subjected to payback, which his community had decided would take the form of being speared in the thigh and the accused had consented to that punishment. The trial judge sentenced Minor to ten years' imprisonment but he was to be released on a three year good behaviour bond after serving four years. The Director of Public Prosecutions appealed on various grounds, two of which are relevant here: that by taking into account the payback in setting automatic release after

[622] At 197.
[623] (1992) 59 A. Crim. R. 227.

four years, the judge erred first, by sanctioning unlawful violence, and second, by having regard to an irrelevant consideration, i.e. the judge took account of the interests of the respondent's community rather than those of the respondent and the community at large. The Court held allowing the appeal in part: first, the sentencing judge by merely taking into account the fact that the respondent may be subject to payback did not sanction unlawful violence; second, that the sentencing judge is entitled to have regard not only to the interests of the wider community but also to the special interests of the community of which the respondent is a member. Mildren J. delivered the leading judgement which included observations on the extent to which the Court is entitled to take account of payback. It was, Mildren said, clear from the trial judge's remarks that he knew that the sentence which he was imposing was unusual. The trial judge had said:

> "The tribal factors affecting these crimes, payback, which according to the evidence will almost inevitably follow the prisoner's release from gaol, and the fact of the prisoner's otherwise good character, have persuaded me in this case to take the unusual course of ordering that he be released after serving a specific portion of his sentence.
>
> ...
>
> The fixed release date will give special recognition to the factors to which I have referred. I have particularly in mind that desirability that payback - not condoned, but recognised as inevitable - should be given effect as soon as possible on order that the community may put the

whole episode behind them and get on with the more positive aspects of their lives."[624]

The trial judge had clearly given special consideration to payback and the Director of Public Prosecutions did not suggest that he had erred in taking into account the possibility or the likelihood of future payback. Mildren went on to point out that the Northern Territory had a long history of taking tribal law into account when sentencing a tribal Aborigine.[625] There was therefore ample support for the trial judge in considering the matter. After reviewing the authorities, some in considerable detail, he explained that he had examined previous caselaw in order to demonstrate that the trial judge had not in the present case sanctioned unlawful violence by the way in which he structured the sentence: firstly, because he was acting in accordance with the authorities discussed; secondly, because there was not in any event any evidence that the payback would consist of unlawful violence: an assault is not unlawful if consented to unless it is intended to kill or to cause grievous harm and there was no evidence to suggest that the payback was intended to have such an effect; and thirdly, even if the payback spearing were unlawful, it should still be taken into account on the principles of Mamarika. He went on to stress that it is one thing for the court to take into account the likelihood of future retribution, lawful or

[624] At 10.

[625] At 10-11. He points out, citing Elder. P. *Northern Territory Charlie* Unpublished Thesis, University of Adelaide, at 71, that the earliest recorded example of such consideration is in 1900 when Dashwood J. sentenced an Aborigine to three months' imprisonment for the manslaughter of another Aborigine. There had been earlier examples, but they reveal no consistent pattern as record-keeping was intermittent.

unlawful, it is another for the Court to facilitate the imposition of unlawful punishment. A sentencing judge may not structure his sentence so as to facilitate an unlawful act. He then referred with approval to the decision in R. v. Sydney Williams[626] where Wells J. imposed as a condition of a bond that the accused should be for a period of one year "ruled and governed by the tribal elders and shall in all things obey their *lawful*[627] orders and directions". Mildren then went on to say that to the extent that the contrary might be implied in the judgement of Forster J. in R. v. Jungarai[628] he disagreed with that judgement. However, there was no facilitation of an unlawful act in this case. He then turned to the second ground of appeal: that the trial judge had taken into account an irrelevant fact in sentencing, i.e. the wishes of the tribal community. He also rejected this ground saying that a judge was entitled to take into account the interests and needs not only of the community as a whole but also of the particular community of which the accused is a member provided that the wishes of the narrower community did not, as they had not done here, prevail over what would otherwise be a proper sentence:

> " ... the sentencing judge was called upon to exercise a degree of ingenuity to give proper effect to all of the competing interests and factors which were necessary for him to take into account. This was no occasion for blindly following an unthinking conservative path; it required, as this court often has in the past been called upon to do when dealing with the approach to Aboriginals and the criminal law, to find a

[626] (1976) 14 SASR 1.
[627] Emphasis placed by Mildren at 14.
[628] R. v. Jungarai (1981) 9 NTR 30

solution by means which ensured that justice was done, even if the means adopted were unusual or novel."[629]

Asche CJ. and Martin J. concurred with Mildren that the judge was entitled to take account of the wishes of the narrower community as well as the wider one and that payback was a relevant sentencing consideration although Martin wished to reserve for further consideration in the light of the facts of a particular case whether such action is unlawful. The appeal was partly allowed on the shortfall period of the bond.

Minor is an important case as it contains a thorough review of the authorities by a superior Court. The judges make it clear that the fact that a defendant is released in the knowledge that s/he is likely to undergo payback does not mean that the Court is sanctioning an illegal act. The case also raises the issue of whether a form of payback which is *prima facie* illegal can be rendered legal by the consent of the person undergoing it. This point is argued more fully in the later case of Steven Barnes v. R.[630].

In 1993 the case of Munungurr v. The Queen[631] came before the Court of Criminal Appeal of the Northern Territory on appeal against the sentence imposed by Kearney J. in the Supreme Court. The Court in discussing the background of the accused, pointed out:

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[629] At 14.
[630] (1997) 96 A Crim R 593. *Infra* 309.
[631] (1994) 4 NTLR 63.

> "The applicant has a strong traditional background and plays an important part in traditional ceremonies ... His youngest son had just been initiated and there was evidence that the applicant was needed to pass on to his son the traditional and cultural skills and learning he would need for the future. He was acknowledged as a respected leader of the Djapu clan."[632]

When the matter came before Kearney J. for trial there had been various submissions made by the appellant's counsel and a letter from the local community had been tendered which stressed the appellant's importance in the community and his good character. The community did not wish the appellant to be sent to jail, but wanted him returned home to be dealt with in the traditional manner. The letter also contained a general plea that the judicial system should take more account of traditional or customary law and should return Aboriginal offenders to their communities for punishment. The letter contained errors, but it was not much relied on or discussed by either counsel at the trial. The appeal was based on various grounds. The argument that the sentences were manifestly excessive was rejected. However, the Court considered that the trial judge had been in error in the way he had dealt with the letter from the community. They were not persuaded by the argument about the need for the appellant to advise his son: loss of parental guidance is common when fathers are imprisoned and is in any event only delayed. However, the broader issues of the appellant's place in the community and preservation of the traditions should have been taken into account:

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[632] At 3 of Transcript of Proceedings.

> "The applicant ... played an important role in the ceremonies of his people generally. He was a clan-leader, a non-drinker, and strongly attached to traditional culture. This term of imprisonment was likely to have an effect upon his community as a whole - a community, be it noted, which was experiencing difficulty with the harmful effects of alcohol and the consequential breakdown in traditional tribal discipline. These were matters which should have been taken into account. It appears from his Honour's sentencing remarks that they were not given any weight at all.'[633]

The views of the community as to traditional punishment and the anticipated nature of that punishment should also have been taken into account:

> "In view of the applicant's importance to his community, and the likely effect that imprisonment would have on the community as a whole, we consider that the expression of this view by the applicant's community ought to have been given considerable weight by a sentencer, particularly as the letter also stated that a 'reconciliation' ceremony had already taken place and 'there was no bad feeling in the community'. The views, wished and needs of the community of which the applicant is a member are clearly relevant considerations, although they cannot prevail over what is a proper sentence"[634]

Counsel for the Director of Public Prosecutions argued that Kearney had been entitled to place little or no weight on the letter because the facts were in error, there was no explanation of the proposed nature of the traditional punishment and the assault on the police raised the question of protecting the wider

[633] At 10 of Transcript of Proceedings.
[634] At 11 of Transcript of Proceedings.

community. The appellant's counsel argued in response to the objections on the form of the letter that because of the difficulties of putting the views of Aboriginal communities, especially remote ones, before the Supreme Court it was necessary to accept as evidence information which might strictly be inadmissible. This need had been clearly expressed by the Court in The Queen v. Davey[635]:

> "The court has for many years now considered it should, if practicable, inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself of the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on consultation with aboriginal communities in remote areas."

The Court here accepted the principle but pointed out that conditions had changed since 1980, both education and facilities have improved and the format and content of the letter were not satisfactory. Further attempts should have been made and the presentation of evidence in proper manner is vitally important. However, the Court went on to say that this should not have been resolved by ignoring the letter but by asking for further information. The Court therefore considered that there had been error on the part of the judge on this ground and for that reason as well as others, the sentences should not stand.

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[635] (1980) 50 FLR 57, *per* Mildren J. at 60-61.

During the course of the appeal further evidence was admitted as to the nature of the tribal punishment which the applicant would undergo. The answer in the form of a statement from a leader of the community was that the punishment would be a traditional meeting with the possible undertaking of mutual responsibilities which would seal the peace. The court therefore imposed a sentence of four and a half years for the grievous harm and six and twelve months respectively for the assault charges all to run concurrently. It was ordered that the applicant should serve three months which had already happened and then the rest of the sentence should be suspended. The Court also imposed a good behaviour bond with conditions including that the traditional meeting should take place and the applicant should abide by its proceedings and keep the peace. The Director of Correctional Services was required to make a report as to whether the meeting had taken place and if not the court would reconsider the matter.

Munungurr highlights the importance of the views of the Aboriginal community from which the defendant comes and of her/his place in that community. To some extent, this case raises less difficulties than many of the previous ones because of the non-corporal nature of the payback. However, it could be argued that the importance of avoiding double punishment – one of the main arguments for taking account of payback – reduces as the severity of the payback reduces.

The case of R. v. Wilson Jagamara Walker[636] caused great controversy. Walker was originally charged with murder and pleaded not guilty. After four days of evidence he pleaded guilty to manslaughter. In his remarks on sentencing Martin CJ addressed the accused's circumstances:

> "You are a 23-year-old Aboriginal man. You have lived in the Yuendumu area all your life and, in common with most people of your race, living in that area you had little education, there is no employment available to you and thus you have not had a job. You come from a socially deprived class of people of whom we have spoken so often in the territory and who, through circumstances, find themselves in the situation where they have no prospects of self-esteem and get on the grog and commit crimes, including all too often enough unfortunately crimes such as this."[637]

He goes on to say that he has been told that it is likely that Walker will suffer payback for the killing, that he required evidence of that (which had been proffered) and that whilst the Court takes it into account it does not condone it:

> " .... it was likely that you would suffer a form of pay-back when you were available to the people involved for that to be done. I will say it again, as I have said before, that when such an issue is raised this court will henceforth, as it has done in recent times, require evidence about it. I make it clear, as has been made abundantly clear in the last, that although the court must take into account the fact that a person is to be punished in whatever manner it hears about, it does not condone it. It

[636] Northern Territory Supreme Court No. 46 of 1993. Unreported. Transcript of Proceedings, Martin CJ. 10 February 1994.
[637] At 5.

must be understood that just because the court is told and takes into account the fact that a person is to suffer punishment in another way, is not to indicate that it in any way condones the use of violence upon people at all; in particular, in the quite deliberate way in which pay-back is apparently administered.

I say no more about it. It is a fact of life and the courts have adopted that view of the Territory for some time past. I might say that so far as I'm aware, notwithstanding that it has happened, nobody has ever been charged with administering payback, so far as I'm aware."[638]

Martin sentenced Walker to three years' imprisonment backdated to take account of the time already spent in custody. The sentence was then suspended forthwith upon the entry by the defendant into a good behaviour bond on his own recognisance in the sum of one thousand dollars. A condition of the bond was that the accused return to Yuendumu immediately and that he be subject to the supervision of the Director of Correctional services and obey all reasonable directions.[639]

The decision in this case attracted much attention on the grounds that the judge had released Walker in order to undergo payback. However, in reality, Martin was doing nothing that had not been done before, and done frequently. Apart from the Jungarai case it had perhaps never been expressed so openly that the

[638] At 6

[639] Walker subsequently appeared before the Court again in respect of a breach of the bond: Northern Territory Supreme Court No. 46 of 1993 Unreported. Transcript of Proceedings. Martin CJ. 1 September 1994.

release was in order to undergo payback, but in many other cases the judges were clearly aware of the likelihood of payback and so the result was the same.

The recent case of Barnes v. R[640], before the Supreme Court of the Northern Territory, is significant. The defendant was in custody, awaiting trial on a charge of murder. He applied for bail in order to return to the community to undergo payback. His counsel argued that the facts of the case were similar to the Jungarai case in which Forster granted bail to a defendant for such a purpose. Bailey distinguished the case on various grounds, two of which are relevant for present purposes: first, in Jungarai the payback was likely to put an end to prevailing community unrest, in the present case there was no such unrest; second, the payback in Jungarai was much less severe in physical terms. In those circumstances he did not think that the defendant could give valid consent to the infliction of such a punishment. To the extent that this finding was incompatible with that of Forster in Jungarai, he dissented from the latter. Bailey cited with approval the remarks of Mildren in Minor[641] that there was a difference between releasing a defendant on bail knowing that payback might occur and actually structuring the Court order to facilitate it. The latter was not permissible. Bail was refused. Similar facts arose in the recent bail application of Jeremy Anthony v. R.[642] which came before Martin CJ. in the same Court and was decided in the same way.

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[640] Steven Barnes v. R. (1997) 96 A Crim R 593.
[641] R. v. Minor (1992) 2 NTLR 183, at 195-196.
[642] Jeremy Anthony v. R. Unreported. Supreme Court of the Northern Territory (2004) NTSC 5, 12, 13 and 17 February 2004.

The same issues arise in the Sentencing Remarks of the judiciary. A study of the transcripts of seven of the most recent sets of Sentencing Remarks which include reference to the issue payback amply demonstrate this point. However, in Sentencing Remarks - as opposed to judgments - the judges rarely explain why they are making a particular decision. They are, of course obliged to give reasons for the sentence being imposed and do so, but the reasons do not usually include an analysis of the legal principles informing the decision.

1. The case of The Queen v. Joshua Bobby Poulson[643] came before Thomas J., in the Supreme Court of the Northern Territory, for sentencing in May 2001. The defendant had pleaded guilty to an offence under s.154 of the Criminal Code which governs dangerous acts. The maximum imposable penalty for the offence was ten years. He had already undergone payback and the Court had received evidence to that effect. When considering the effect of the payback on the sentence to be imposed, Thomas made it clear that although the Court did not condone or sanction the payback – which was of a physical nature – it took note of the fact that it had been of value to the family of the victim. She then considered the other relevant factors such as the defendant's remorse and allowed a twenty-five percent discount.

[643] The Queen v. Joshua Bobby Poulson Supreme Court of the Northern Territory No. 9905624 Transcript of Proceedings 11 May 2001.

2. The case of The Queen v. Sebastian Walker[644] came before Angel J. in the Supreme Court of the Northern Territory, for sentencing in August 2001. The defendant had pleaded guilty to manslaughter under s. 163 of the Criminal Code. The maximum imposable penalty for the offence was life imprisonment. In fixing the sentence, Angel says that he has taken account of all the matters which he has been asked to take account of including the likelihood of future payback.

3. The case of The Queen v. Bruce Dhurkkay[645] came before Bailey J. in the Supreme Court of the Northern Territory, for sentencing in August 2002. The defendant had pleaded guilty to an offence of sexual intercourse without consent. His family believed that he should be sent away to undergo payback and he was agreeable to that. Bailey agreed to take account of some of the factors which had been urged as mitigation and to discount a third from the sentence, but he was not prepared to suspend any part of it as he considered that it was important to impose a deterrent sentence.

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[644] The Queen v. Sebastian Walker Supreme Court of the Northern Territory No. 20005210 Transcript of Proceedings 2 August 2001.
[645] The Queen v. Bruce Dhurrkay Supreme Court of the Northern Territory No. 20011848 Transcript of Proceedings 1 August 2002.

4. The case of The Queen v. Watson Jungarai Corby[646] came before Angel J. in the Supreme Court of the Northern Territory, for sentencing in August 2002. The defendant had pleaded guilty to three offences under the Criminal Code: manslaughter under s.163, unlawful assault causing bodily harm under s. 188(1)(2)(a), (b) and (m), and unlawful use of a motor vehicle under s. 218(1). He had already undergone payback. Angel declined to suspend any of the sentence and stated that the penalty needed to be one of both personal – the defendant had a long criminal record - and general deterrence.

5. The case of The Queen v. Jeffrey Jungala Pollard[647] came before Angel J. in the Supreme Court of the Northern Territory, for sentencing in August 2002. The defendant had pleaded guilty to an offence of manslaughter under s.163 of the Criminal Code, an offence for which the maximum sentence imposable was life imprisonment. The defendant was to undergo future payback. Angel pointed out that the evidence presented about that payback did not make it clear what form it would take, nor when and how it will take place. Nor is there any evidence as to the effect, if any, that the sentence of the Court would have on that payback. He

[646] The Queen v. Watson Jungarai Corby Supreme Court of the Northern Territory No. 20113660 Transcript of Proceedings 23 August 2002.
[647] The Queen v. Jeffrey Jungala Pollard Supreme Court of the Northern Territory No. 20116064 Transcript of Proceedings 23 August 2002.

concludes that he is prepared to take account of the future payback in a general way.

6. The case of The Queen v. Dominic Joran[648] came before Angel J. in the Supreme Court of the Northern Territory, for sentencing in July 2003. The defendant had pleaded guilty to three offences under the Criminal Code: aggravated unlawful assault under s.188(1) and (2)(b), unlawfully entering a dwelling house under s.213(1), (4) and (5), and aggravated assault under s.188(1)and (2)(a) and (b). He had already undergone some payback. Angel accepted that the payback was a mitigating factor. The sentence was suspended.

7. The case of The Queen v. Ivan Jagamara Mark[649] came before Angel J. in the Supreme Court of the Northern Territory, for sentencing in September 2003. The defendant had pleaded guilty to an aggravated offence under s.154 for which the maximum imposable sentence was fourteen years imprisonment. He had already undergone payback. Angel suspended the sentence and stated that the payback was one of the factors he had taken into account.

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[648] The Queen v. Dominic Joran Supreme Court of the Northern Territory No. 20217594 and 20306234 Transcript of Proceedings 4 July 2003.
[649] The Queen v. Ivan Jagamara Mark Supreme Court of the Northern Territory No. 20106731 Transcript of Proceedings 22 September 2003.

It can be seen that in several of these cases the judge expressly states that s/he has taken the payback into account even where it has yet to happen. However, none of them gives any guidance as to what the effect is of having taken it into account. The cases all involve other mitigating factors as well as the payback – for example, remorse shown by the defendant or the presence of alcohol - and it is impossible to calculate the relative importance of each factor. The practice revealed by the Sentencing Remarks is important as these, of course, are given in every case. Very few cases become the subject of the type of judicial consideration outlined above.

It is clear from the above review of the major caselaw and of the sentencing remarks in this area that the practice of the judiciary has been to take account of payback as a factor which in almost all cases will reduce the severity of the sentence imposed by the Court. This appears to be so whether the payback has already taken place or is in prospect, although the latter case has given rise to more difficulty. Two questions arise. The first is whether it is possible to derive any clear principles from the decisions which might give some guidance as to the way the judiciary might analyse a particular case. The second is to ask whether the presence or absence of such a set of principles matters.

In reply to the first question, it seems from the analysis of the caselaw that there are very few guidelines. Only one principle appears to be unassailable – that payback already undergone must be taken into account. None of the caselaw

would argue against this. There is, however, a divergence of views on the issue of prospective payback with some of the decisions arguing that it may be taken into account and others saying that it is not possible to do so. Of course the judges refer to previous decisions, but it is not difficult to distinguish cases in an area such as sentencing where there is a very wide discretion. Thus, the judiciary is able to maintain a coherent framework, but to operate with considerable freedom within it. The second question which arises is whether the lack of clear guiding principles on when and how payback should be taken into account is of any consequence. It appears not to matter and indeed as suggested above, it can be seen as an advantage.

The sentencing process is not like the application of the substantive law: it is a process which requires the freedom to make a decision on the particular combination of factors in a given case. In such decisions, maximum freedom is desirable.

5.5: Conclusion:

It has been demonstrated that the judiciary has made a substantial contribution to the use and recognition of customary law in the area of sentencing.[650] It was argued at the beginning of the Chapter that there were essentially three rationales underlying the decisions. The first, the use of Aboriginality *per se* is

[650] The following remarks are equally applicable to decisions on bail applications.

no longer employed as for the reasons explained. The vast majority of sentences imposed on Aborigines are justified in terms of the second rationale 'factors associated with Aboriginality'. It is usually the case that there will be several of these factors operating in one decision. There is considerable caselaw identifying which factors can be taken into account and, although the list is not closed, the most likely factors are well-entrenched and exemplified. Whilst there is little legislative guidance or control on sentencing - other than the statutory tariff for a given offence – the judiciary is aware of the public policy requirements of consistency and *quantum* and, therefore, seeks to ensure that its decisions meet those demands. As the doctrine of precedent does not operate in sentencing decisions, the judiciary has evolved various sets of guidelines in relation to particular areas of sentencing. These are not, of course, binding, but are indicative of the way in which the judiciary is likely to consider a given case. One such set of guidelines in relation to the sentencing of Aborigines is that found in the Supreme Court of New South Wales case of R. v. Fernando[651]. In this case Wood J. laid down eight principles which should be considered in sentencing Aborigines:

> "(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

[651] (1992) 76 A Crim R 58, at 62-63.

(B) The relevance of Aboriginality in an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to heavy violence when affected by it, the courts must be very careful in pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally and excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have laid heavy stress on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime

within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture or society or his own personality.

(H) That in every sentencing exercise, whilst it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what otherwise might be subjective circumstances, full weight must be given to the competing public interest to[652] rehabilitation of the offender and the avoidance of recidivism on his part."

These guidelines are basically a synthesis of the principles which seem to have emerged from sentencing practice across the various jurisdictions in Australia. Interestingly, they contain no mention of customary law as a factor to be taken into account in sentencing. This may be on account of the origin of the case - New South Wales – or it may be a reflection of the reality that most cases where Aborigines come before the criminal Courts have no customary law connotations. The use of customary law is, of course, the third rationale outlined at the beginning of this Chapter. The judiciary's development of sentencing practice on payback has been considered in detail as it is the paradigmatic case of the difficulties faced by the state legal system in the recognition of customary

[652] This would appear to be a mistake in the text of the Report: it should presumably read " .. public interest in rehabilitation ..".

law. Despite the difficulty in identifying a set of principles analogous to those in Fernando, it is arguable that it is in the use of customary law in sentencing that the judiciary has made the greatest contribution to its recognition. There are relatively few cases where customary law can be incorporated into the state's substantive law, and even fewer where it is critical in – certainly criminal - procedural matters. Much of the judicial effectiveness in the practice of sentencing is due to the very flexibility and creativity which makes that practice difficult to categorise. It is the same flexibility and creativity which make the judiciary the arm of state best fitted to achieve such recognition.

Conclusion:

The proposition agued in the Thesis is that the use of judicial reasoning and discretion is the most effective way of according some recognition to customary law in the criminal justice process in the Northern Territory.

6.1: Overview of judicial reasoning and discretion in the use of customary law to date:

It has been demonstrated that from 1770-1788 onwards, the judiciary has been engaged with this issue. The first considerations of the relationship between the newly–established – or, more accurately, newly-establishing - state law and customary law took place in the years immediately after the arrival of the British. A coherent and fully-functioning legal system was established by about the 1850's and by that date the judiciary had reached a virtually unanimous view that Australia had been *terra nullius* and that, therefore, it had been acquired by settlement. It followed from that finding that no customary law could have survived: there had, on this view, been none to survive. Morally and politically unacceptable though this view is today, it was based on a correct understanding and application of the international law as it then stood: the judiciary would have been unable to come to any other conclusion. When a hundred and fifty years later the High Court in Mabo found that Australia had not been *terra nullius*, it nevertheless declined to overturn the view that the acquisition had been by

settlement, thus inventing a new method of acquisition of territory: settlement of land which is not *terra nullius*. It has been argued that the decision was motivated, at least in part, by political considerations. In any event, the relevance and applicability of Mabo to areas of law other than native title is minimal and any attempts to extend that applicability have failed. Moreover, even if the original finding of *terra nullius* and settlement was incorrect, the alternative understanding of the events of 1770-1788 is that the territory was acquired by conquest. In that event, there would not have been an automatic assumption that no customary law existed, and any which did exist would have survived until extinguished by subsequent incompatible law. However, in the case of criminal law that subsequent extinguishment would almost certainly have been total. There were a few dissenting judicial voices in the early days of the legal system, but, in the main, they did not dispute the findings of *terra nullius* and settlement, and certainly did not deny the acquisition of sovereignty. They were concerned primarily with the question of the extent of jurisdiction, with the perceived injustice of the application of English law to the Aborigines, especially in the case of the criminal law applied for offences committed *inter se*. However, as the received legal system developed, there was less dissent.

The period from the 1850's to the early 1950's yielded little recorded caselaw on the subject, especially in the Northern Territory where settlement and the establishment of the legal system took longer to effect. However, when Kriewaldt

came to the bench, the issues again came to prominence.[653] Despite the reservation expressed above as to some of his views – and certainly as to his language - Kriewaldt was concerned with ensuring that the Aborigines were treated fairly by the legal system and, within the context of his understanding of equality, tried to achieve this. His judgments had relatively little effect in the areas of evidence and procedure or, indeed, in the elaboration of the substantive law relating to offences. However, he almost single-handedly extended the understanding of the requirements for the establishment of the defence of provocation by applying the test of the 'ordinary' Aborigine, a person who was subject to customary law. Kriewaldt was not unique in this interpretation of the law[654], but he was unusual. He also made extensive use of customary law as a factor in sentencing. His consideration of Aboriginality – and of customary law – was of Aboriginality *per se* and reflected the paternalistic attitudes of the time. However, it allowed him to develop, for example, the principles enunciated in Anderson, which laid down that an Aborigine should never be sentenced more severely than a white person for a similar offence. There can be little doubt that Aborigines who came before Kriewaldt received fairer treatment than they would have received in many other Courts of the time. Moreover, he left an extensive body of caselaw which remains influential today.

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[653] For an overview of Kriewaldt's contribution, see: Douglas. H. 'Justice Kriewaldt, Aboriginal Identity and the Criminal Law' *Criminal Law Journal* Vol. 26, August 2002, 204-222.

[654] Kwaku-Mensah and R. v.Rankin, for example, employed a similar analysis, although the extent of Kriewaldt's access to decisions from other jurisdictions is unclear.

The period between the death of Kriewaldt and the mid- to late– 1970's produced little caselaw developing the use of customary law.[655] The only case of significance from this period is Milirrpum. The Milirrpum decision has been much criticised, but rather unfairly. Blackburn J. was a perfectly competent judge. His decision was almost certainly a correct application of the law as it stood. Judicial discretion is not limitless; he could not simply ignore the existing law. Moreover, he acknowledged openly that there had been a customary legal system in existence at the time of settlement.

The judiciary, whilst creative, is, of course, a product of the social and political conditions prevailing at any given time. The 1960's and early 1970's was not a period when the position of the Aborigines and the status of customary law was much considered by wider society. However, by the late 1970's times were changing. A fresh series of legal challenges – inspired largely by the increasing politicisation of Aboriginal communities - was mounted to the categorisations of *terra nullius* and settlement. None were successful, but some of the decisions – for example, Walker and Murphy's dissenting judgment in Coe – began to reveal an unease which was to culminate in Mabo. In the area of criminal law, there was little consideration of *terra nullius* or settlement – and Mabo, when it came, did not change that – but the judiciary displayed an increasing readiness to take account of Aboriginality and customary law in their decision-making. The consideration of such issues was, however, not within the framework of Aboriginality *per se* – this

[655] The reasons for this are unclear, but see *supra* n 581.

was no longer thought to be acceptable – but of factors associated with Aboriginality. Customary law was sometimes treated as one of these factors and sometimes as a separate matter to be taken into account, the result being the same whichever rationale is adopted. The judiciary in the Northern Territory has been especially creative in its development of the law in this area[656], by, for example, the production of the Anunga Rules and by continued development of the rules on provocation. It is, however, in sentencing that the judiciary has been the most ready to take account of customary law, especially in relation to the issues raised by payback. Judicial use of discretion in sentencing is the area which most frequently causes controversy and it will be discussed below.

It is, therefore, clear that the judiciary has engaged extensively with customary law and has made the utmost attempts to recognise it and make use of it where possible. In this it has led the way, often developing the law, and ensured that the issue is considered more widely: for example, the Australian Law Reform Commission Report on customary law was prompted by the decision in R. v. Sydney Williams – and the Native Title Act and subsequent legislation by Mabo.

6.2: The extent and desirability of judicial discretion:

[656] According to Pam Ditton, former Principal Legal Officer with the Central Australian Aboriginal Legal Aid Service, the Northern Territory in the late 1970's and early 1980's was fortunate to have a number of outstanding judges – notably Forster, Muirhead and Nader. Interview with Pam Ditton. 23 August 1994.

The question arises as to whether such extensive judicial discretion and flexibility are desirable. This is, of course, a wider debate and confined neither to the issue under discussion, nor to Australia.[657] It is beyond the scope of the Thesis to discuss the debate in detail, suffice it to say that in both Code and common-law jurisdictions, the role of the judiciary is crucial. However, whilst few would deny in theory that some discretion is necessary, the way it is exercised in practice may give rise to criticism.[658] In general, judicial development and application of the rules on evidence and procedure are not controversial and apart from a few examples -such as the initial reluctance of some police and some judiciary, although mainly magistrates, to apply the Anunga Rules and some concern over the practice in relation to secret evidence – have given rise to little complaint from academics, other organs of the state or the public. Similarly, the use of factors associated with Aboriginality in general and customary law in particular in relation to the substantive law, which is in any event fairly limited apart from provocation, has given rise to little disquiet in those quarters. However, the use of judicial discretion in sentencing is a different matter. Given that sentencing is the area where the judiciary is most able to give recognition to customary law factors, this is a major concern.

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[657] For an interesting overview of role of the judge and the debates in this area, see: Toohey. J. ''Without Fear or Favour, Affection or Ill-Will': The Role of Courts in the Community' *Western Australian Law Review* Vol. 28, January 1999, 1-12; Craven. G. 'Judicial Activism in the High Court – A Response to John Toohey' *Western Australian Law Review* Vol. 28, July 1999, 214-224; Kirby. M. 'Judicial Activism' *Western Australian Law Review* Vol. 27, July 1997, 1-20; Campbell. T. 'Judicial Activism – Justice or Treason?' (2003) *Otago Law Review*, 2.

[658] Whilst most of the criticism of the exercise of judicial discretion made by other organs of the state or by the white population is directed at perceived over-use of that discretion, it is possible that some – including many, if not most, Aborigines – would argue that the discretion is under-used.

The recent case of Hales v. Jamilmira[659] illustrates the difficulties. Jamilmira, a fifty year old man, was convicted of two offences, one of which - and the only one which is relevant for present purposes - was unlawful sexual intercourse with a minor, an offence under s. 129(1)(a) of the Northern Territory Criminal Code. The girl in question was fifteen years old and was Jamilmira's promised wife according to customary law. The intercourse was consensual and was sanctioned, even encouraged, by that customary law and by tradition. Jamilmira was sentenced to thirteen months imprisonment, to be suspended after four months, for this offence. He appealed against the sentence and Gallop J., sitting in the Supreme Court of the Northern Territory, reduced it to twenty-four hours. The state then appealed to the Court of Appeal of the Supreme Court and Gallop J's sentence was found to be manifestly inadequate: too much weight had been given to cultural considerations, and whilst these should be taken into account, the sentence must also reflect the expectations of the wider community. The case caused enormous controversy. Public opinion in both the Aboriginal and the white communities was split: some argued that customary law on promised marriages should be respected and that the eventual sentence was too heavy; others that if the girl had been white, there would have been no question of a sentence as light as that given by Gallop and that Aboriginal minors were entitled to the same protection as white minors. The provisions of the Northern Territory Criminal Code were changed with effect from 17 March 2004. The Code had previously laid down that it was an offence to have sexual intercourse with a minor, a minor being anyone under sixteen years old,

[659] (2003) 142 NTR 1.

unless the parties were married. The Code also laid down that the minimum age for marriage was sixteen except in the case of customary law marriages. The effect of this exception was that sexual intercourse with a minor was lawful within the context of a customary marriage. The Code now lays down a blanket prohibition on sexual intercourse with a minor. The provisions as to the minimum age for customary marriages remain unaltered and thus, as the law now stands, a minor may contract a customary marriage, but there must be no sexual intercourse until both parties are sixteen. Although neither this amendment - nor indeed the original Code provisions - had any application in the Jamilmira case, as the parties were only in a promised marriage relationship, there seems little doubt that the change in the law was prompted by the case. Moreover, the Northern Territory Law Reform Committee Report on customary law recommends the establishment of a consultation process on the issue of promised marriages[660], again presumably influenced by Jamilmira.

However, whatever view is taken of Gallop's sentence, there seems to be little reason to consider that the exercise of judicial discretion in this case was somehow at fault or in need of legislative constraint: it was, after all, the exercise of judicial discretion by the Court of Appeal which found his sentence to be 'manifestly inadequate'. It is arguable that the judiciary itself is the best

[660] Northern Territory Law Reform Committee *Towards Mutual Benefit: An Inquiry into Aboriginal Customary Law in the Northern Territory* Darwin: Northern Territory Law Reform Committee, 2003, Recommendation 5, *supra* 46.

overseer of its exercise of discretion.[661] Certainly too much legislative intervention is undesirable. Of course, the legislature is the primary agent of lawmaking, and, as such, can always overrule judicial lawmaking and practice by legislation. However, this power should be used sparingly. The very purpose of judicial discretion is to allow a careful analysis and interpretation of the law, to be able to distinguish between cases and to make what seems to be the appropriate decision, either in relation to the application of the law in general or to its application to the *instant* case. Legislation is too blunt an instrument to carry out these functions. Moreover, all legislation may ultimately be the subject of judicial application and, unless extremely tightly drafted, of judicial discretion. Too great a use of legislation to constrain or overrule the judiciary would erode the proper purpose of discretion and would lead, in effect, to a dismantling of the separation of powers.

Judicial discretion is not total, of course, even in sentencing, but there are very few limitations. Generally the only legislative constraint is the tariff set for each offence, which usually sets out the range of penalties within which a judge must sentence, but, on occasion, sets a mandatory sentence which has the effect of eliminating all or part of the discretion. The only other limitation on the way in which a judge may sentence is where a guideline judgment has been issued. These are judgments handed down by appeal Courts which set out the range of penalties within which a lower Court is advised to sentence. They are not

[661] There are, of course, occasional aberrant decisions, though remarkably few. Some consider, for example, that Forster was unwise – if not actually incorrect - in the case of R. v. Jungarai. Interview with John Coldrey and Frank Vincent, Justices of the Supreme Court of Victoria. 8 August 1994.

binding – there is no doctrine of precedent in sentencing – but they do give an indication to a lower Court that if a sentence outside the suggested range is imposed, the sentencing judge is likely to be faced with a successful appeal. The use of guideline judgments is not universal, nor is their scope and effect clear. Moreover, there is a sense in which they are not a constraint on judicial discretion. Certainly they limit the discretion of a lower Court judge, but so does the ordinary system of appeal. However, as they are issued by judges, they cannot be said to be a constraint on the exercise of discretion by the judiciary as a whole. In effect, when followed they achieve the same result as a series of appeals, but prospectively rather than retrospectively.

6.3: Alternative or pre-Court criminal justice mechanisms:

Whilst it has been argued – and is maintained - that judicial discretion is the best method of taking account of factors associated with Aboriginality and customary law in the criminal justice process, there are other mechanisms in place which seek to achieve the same aims. Most notable of these is the variety of alternative dispute resolution or community justice processes which are either partly or entirely under the control of the Aboriginal communities involved.[662] It should be stressed at the outset that these are not premised on any separation from the state legal system, but are authorised by that system in an attempt to give Aboriginal people a greater role

[662] For a survey of recent developments in such community justice mechanisms, see: Aboriginal and Torres Strait Islander Social Justice Commissioner *Submission to the Expert Seminar on Indigenous Peoples* 12-14 November 2003, at http://www.hreoc.gov.au/social_justice/madrid/issue3.htm (last accessed 11 April 2004).

in the administration of justice in their communities. These are not customary law mechanisms in the sense that they derive their validity from the customary legal system, nor do they apply only or primarily customary law, but they do, on occasion, employ such law in their decisions. Other methods of achieving greater Aboriginal involvement in the criminal justice system are by increasing the role of community leaders or representatives in the ordinary Court process by, for example, sitting as assessors at hearings or by taking part in circle sentencing.[663] The purpose, detail and experience of these schemes is the subject of considerable discussion[664], but detailed consideration of it is beyond the scope of the Thesis which is, by definition, concerned with judicial practice. It is, however, worth noting that whilst the legal system may be prepared to delegate control over the administration of justice in minor matters, it is very unlikely to do so in the case of major offences such as murder.

6.4: Possible future developments:

[663] As discussed in Chapter 5, it is also the practice of the ordinary criminal Courts to take account of a community's view when sentencing an Aboriginal offender.

[664] See, for example: Lofgren. N. 'Aboriginal Community Participation in Sentencing' *Criminal Law Journal* Vol. 21, June 1997, 127-133; Tyler. W. 'Community-Based Strategies in Aboriginal Criminal Justice: The Northern Territory Experience' (1995) *The Australian and New Zealand Journal of Criminology* 28, 127-142; Brown. K. 'Indigenous forums: laughed out of Court?' *Alternative Law Journal* Vol. 25, No. 5, October 2000, 216-217; Hazlehurst. K.M. 'Australian Aboriginal Experiences of Community Justice' *Law and Anthropology* 6 (1991) 45-65; Marchetti. E. and Daly. K. *Indigenous Courts and Justice Practices in Australia* Trends and Issues Series, No. 277, Canberra: Australian Institute of Criminology, May 2004.

There is virtually no possibility that the state will totally relinquish control over the administration of the criminal law.[665] Indeed, such relinquishment would be, in theory, impossible. Even if the state were to enact legislation to that effect, it could subsequently revoke it. The only way to entrench such an abdication of sovereignty would be by granting powers of self-government analogous to those enjoyed by the domestic dependent nations of, for example, the United States of America. It is unlikely that this will be done in the foreseeable future. Apart from state resistance to the idea, there is little demand for this type of self-determination amongst (at least the majority of) Aboriginal people. More likely is an extension of the types of schemes already in operation. Any such extensions, and any new schemes, would need to take account of the questions raised at the end of Chapter 2 and make decisions on content, jurisdictional base, *forum* of adjudication, and choice of law, all of which raise the difficulties already discussed. There may be some future developments along these lines, but it is suggested that they are likely to be few, certainly in respect of criminal law matters.

In terms of the possible future extension of the criminal law in relation to its use of customary law, there are two specific issues which are often raised. Both are complex. The first is the possibility of the introduction of a cultural or customary law or defence, which would serve either to reduce the offence charged to a lesser one or to relieve the defendant of any criminal liability[666]; the

[665] This option will not be considered in detail as it would, of necessity, remove all power from the judiciary which is the focus of Thesis.

[666] For an extensive study of the concept of cultural defence, see: Renteln. A.D. *The Cultural Defense* Oxford: Oxford University Press, 2004. Renteln's work, like most of the literature on this

second, a limited form of the first, is the extension of the defence of consent to cover indigenous punishment.

The Australian Law Reform Commission Report *Multiculturalism and the Law*[667] rejected the notion of a cultural defence except in extremely limited circumstances.[668] The idea of a general customary law defence was rejected by the Australian Law Reform Commission[669]. It drew a distinction between allowing customary law to serve as a defence to specific offences, such as, for example, traditional hunting and fishing pursued on native title lands, and the provision of a general customary law defence to all offences. The former was justified, the latter was not. The Report did consider briefly the specific question of a customary law defence where the offence in question was the administration of traditional punishment, that is, payback. However, after considering various arguments against allowing such a defence in those circumstances - including the difficulty of translating the concept of payback into something which would fit within the framework of a defence as understood by the state criminal Courts, the fact that such a defence would reduce the protection available to victims, and the necessity thereby caused to

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subject, concentrates on the United States. Moreover, she adopts a wider meaning for the term 'cultural defence' than is usual, employing it to cover not only a substantive criminal defence, but also cultural evidence adduced at any stage of criminal or civil proceedings. On 'cultural defence' as usually understood, see 185-210. On these points, see also: Golding. M.P. 'The Cultural Defense' *Ratio Juris* 15(2), June 2002, 146-158; Torry. W.I. 'Multicultural Jurisprudence and the Cultural Defense' *Journal of Legal Pluralism and Unofficial Law* (1999) 4, 127-161; and Sheleff. L. *supra* n 55 at 262-289.

[667] *Supra* 53.

[668] Supra n 70.

[669] *The Recognition of Aboriginal Customary Laws* (Summary Report, Full Report 2 Volumes), Final Report No. 31 Canberra: Australian Government Publishing Service, 1986, paras. 442-453.

expose customary law to public examination[670] - it recommended against the adoption of such a defence, even in payback cases. It went on to recommend a partial customary law defence, analogous to diminished responsibility, which would reduce murder to manslaughter[671], but considered that, in general, the best way to deal with payback matters was by using the general sentencing discretion of the Courts. It is unlikely that the judiciary could simply introduce a either a cultural or general customary law defence without legislative initiative and even the partial defence would be a substantial innovation. It may be that, over time, the judiciary could evolve a doctrine akin to these, or interpret existing law in a way which would achieve the same results, but it most certainly could not do so immediately.

The second proposal is less radical. It has often been suggested that the existing defence of consent could be extended to situations of payback. The argument, which has already been mentioned, has been considered in several cases including Minor and Barnes. As the law stands, consent is no defence to homicide or to very serious injury, although it may be to more minor injury. There is probably scope for the judiciary slowly to extend the category of injury for which consent is a defence, but it seems unlikely, on the grounds of public policy that it would go too far.

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[670] The Report maintains that such exposure is undesirable because it would tend to impair the flexibility of the law, would remove at least some control over the law from Aborigines, and might require the disclosure of secret aspects of the law in Court: para. 449.

[671] No such defence has been introduced.

6.5: Conclusion:

Whilst the judiciary is unlikely – at least in the near future - to develop the criminal law in relation to either of the matters discussed above, that is not because it is not, in general, the most effective body in terms of developing the use of customary law. It is rather that both matters are controversial, and, arguably, unwise. The legislature is also unlikely to introduce either measure. Much more probable is that the judiciary will continue to develop the law as it has done in the past, piecemeal, by careful reasoning and discretion.

The Thesis has argued that the reasoning of the judiciary is the most effective method of incorporating customary law within the state criminal justice system. It is, therefore, both inevitable and desirable that any future development will involve it. Whilst there are compelling arguments for the further recognition of customary law, on the grounds of multiculturalism and legal pluralism, the best way to achieve this is by minimal legislative incorporation, thus maintaining uniform standards, but with discretionary and flexible application by the judiciary.

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