PROCEEDINGS–Training Project No. 23

THE USE OE CUSTOMARY LAW IN THE CRIMINAL JUSTICE SYSTEM

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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FOREWORD

The speeches and discussions recorded in this publication are self-explanatory. It is necessary here only to place the total exercise which they represent within the wider perspective of the Australian Institute of Criminology's new program of such studies.

Crime prevention and criminal justice are the twin arms of society's struggle for greater internal peace and humanity consistent with the political, economic and social development necessary to provide a better standard and quality of life for all. Efficient crime prevention might be achievable without justice (for example by denying due process and hanging all accused); it might be attained by terror. Similarly, history has demonstrated that the pursuit of absolute justice without charity can lead to the disaffection which the prerogative of mercy is designed to prevent. In our own times the balancing of law and order with human rights reflects this longer-term concern with the reconciliation of justice and order.

Within the criminal justice system legislators, judges, magistrates, administrators and police and correctional officers are seeking daily to translate such principles into fair and effective practice. It is with a view to providing such practitioners at State and Commonwealth levels with the best knowledge and guidance available that the Institute has embarked on a series of 'think-tank' operations such as the one described and reported here. The Institute is trying to bring together the best professional, academic and practical knowledge and experience to bear on those areas of special difficulty in the framing or administration of the law and in the development of the informal controls which prevent crime and which at the same time reduce the flow through the criminal justice system.

The question of how best to approach the problem of accommodating customary law and practice within the framework of enacted or judicially interpreted law has exercised for a long time the Australian authorities at all levels. The expert group meeting of which this publication is an account sought to examine the issues and bring forward conclusions which might be of benefit for people working in this area of the law and its application. The meeting succeeded in affecting the thinking of all participants as they refined their concepts and interests in the cut and thrust of a structured debate. It will have attained its objectives however only if the discussion presented herewith proves to have real value for those who have to make the decisions at all levels.

W. Clifford
DIRECTOR

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PART 1

OPENING REMARKS

The Honourable R.J. Ellicott, Q.C., M.P.

Mr Chairman, Your Excellency, Your Honour, Mr Director, Distinguished Participants, Ladies and Gentlemen.

This is the first occasion on which I have visited the Australian Institute of Criminology and I am particularly pleased to be making my first visit at the same time as His Excellency the Honourable Sir John Kerr, Governor-General of Australia.

The legislative authority under which this Institute operates - the Criminology Research Act - was enacted during a previous Liberal/Country Party Government and my colleagues and I in the present Government have noted the way in which the Institute has grown. The first Acting Director of the Institute, now the Honourable Mr Justice J.H. Muirhead of the Supreme Court of the Northern Territory, was appointed by the last Liberal/Country Party Government and it is a tribute to him and to the present Director that the Institute has already achieved national and international recognition. May I say that I look forward to taking a keen interest in the work of the Institute during my term as Attorney-General. It has a vital, urgent role to play in the life of our nation and I would like to see it develop that role.

From the time of the earliest discussions about the need for an Institute such as this there has been recognition of the principles of 'cooperative federalism' which the Institute expresses. Although crime prevention and rehabilitation has been traditionally a matter for State Governments, the major political parties have agreed in the belief that the Commonwealth Government could make valuable contributions by setting standards in the Northern Territory and the Australian Capital Territory and in providing a coordinating role in research and training in crime control.

The Australian Institute of Criminology came into being as a result of negotiations with State Governments. At a Commonwealth and State Ministry Conference on criminology held in Adelaide in December 1969, the Ministers agreed that a National Institute of Criminology and a Research Council should be established by Commonwealth legislation and that the States would participate in the scheme on a partnership basis. The Institute's Board of Management includes three representatives of State Governments. The Criminology Research Council consists of seven members, six of whom represent State Governments. The Criminology Research Fund, which the Council administers, is jointly supplied by the State and Commonwealth Governments.

In 1971 one of my predecessors, the Honourable T.E.F. Hughes, Q.C., M.P., in his second reading speech on the Criminology Research

Bill quoted the best available figure on the estimated cost of crime in Australia which was $350 million a year. That figure of $350 million had been estimated by a New South Wales Rural Bank study published in September 1968. It was fairly conservative but nevertheless it represented slightly less than one per cent of the then Gross Domestic Product of $36,634 million.

The Gross Domestic Product for 1974-75 was $58,530 million, so that if we applied the same criteria for our crime cost estimates for that period we could say that $600 million a year is a more realistic estimate of the present cost to the Australian taxpayer of those elements of law enforcement and correctional services costs and indirect expenses included in the 1968 calculations.

One of the workshop seminars conducted by the Institute in 1975 considered 'The Economic and Social Consequences of Crime'. Some very interesting information emerged from that seminar - enough to make it quite clear that not least of the major problems confronting the Australian nation at the present time is the enormous drain on scarce resources because of the cost of crime and delinquency. These costs can be roughly expressed in terms of money but not less costly in social terms is the threat which crime poses to the security, happiness and general wellbeing of the people of Australia.

One of the important functions of the Institute is 'to give advice in relation to the compilation of statistics relating to crime'. This is a function in which the Institute is collaborating with the Australian Bureau of Statistics. Statistics alone do not solve problems but they are necessary for any worthwhile management in government, business and also in crime control. I am informed that the Standing Committee of Australian Attorneys-General has asked that high priority be given to this particular aspect of the Institute's programs and that, in cooperation with the Bureau and officers of State Government Departments, there is an Institute Working Party presently engaged in the preparation of a comprehensive paper on each of the areas of statistics in the criminal justice field.

We should be able to make greater advances in crime control if we know the real extent of the problem and can shape our policies on scientifically acceptable facts rather than on guesswork, emotions and short-run expediencies.

There is never any shortage of panaceas proposed for the treatment of offenders and the prevention of crime but none of those so far tried have been conspicuously successful. In the light of reported increases in the number and seriousness of offences, the growth of organised crime, terrorism, crimes of violence and unmitigated cruelty often against defenceless women, children and frail aged persons, it is clear that both research and training must be vigorously and efficiently pursued in the field of crime control.

Research is essential if we are to apply the reliable and valid principles of scientific enquiry in criminological projects. Likewise training is essential if we are to provide the criminal

justice system with the human resources it needs and equip officers with the results of modern research, the knowledge already available about human behaviour, and the facilities offered by modern technology.

One further function of the Institute which deserves special mention is its role in the dissemination of information. The Institute has built up a good, specialised library and it is unique in its publications activities through which it disseminates information speedily to legislators, administrators and students so that they can be kept in touch with developments in the crime prevention and treatment field.

Like every other organisation, the Institute has had to face up to restrictions on its resources - a measure which is essential if we are to come to grips with the economic difficulties confronting Australia at the present time. These cutbacks are inevitable but I have noted the enthusiasm and dedication of the Institute staff and I know that they will continue to give of their best in a cause in which they believe.

The Experts' Study Group, which is to commence a consideration today of 'The Use of Customary Law in the Criminal Justice System', has a formidable task ahead of it. The question is a significant one in our own country. I believe our judges in the Northern Territory are constantly confronted with the problems of custom in the administration of criminal justice among the Aboriginal people. I think we are fast learning that we cannot hope to do justice to them unless those administering criminal justice have a deep understanding of this subject. The experts will, to a very considerable extent, be breaking new ground and many of us will await with interest the findings reached by the group.

In conclusion, I bring to the Institute, and to the Experts' Study Group in particular, the good wishes of the Prime Minister and the Commonwealth Government for the success of this particular venture.

THE USE OF CUSTOMARY LAW FOR CRIME PREVENTION

W. Clifford

Your Excellency, Honourable Minister, Mr Chief Justice, Members of the Board, Distinguished Guests, Ladies and Gentlemen.

It is my pleasure to extend a very warm welcome to those of you who are with us for the first time, and to say how pleased and privileged we feel to have so many of you from the various States of the nation and the region joining us as unrepentent recidivists!

Since I arrived in Australia a year ago, I have been urged by all kinds of authorities, agencies and private individuals - including some of you here today - to involve the Australian Institute of Criminology in the quest for a solution to the legal, social and, by now, the distinctly political problem, of legislating for and applying the law in those areas of this country where the customary modes of life still, largely, obtain and where there is an obvious conflict of ideas and practices - where, in fact, the local expectations and standards do not fit really into a criminal justice system which is more industrial and urban, more individualistic and technical than it is rural, communal or traditional. Of course, it never did fit really, but we work today with increased education, deeper knowledge and a heightened respect for human rights - all of which serve to silhouette such problems with sometimes as much heat as light.

Frankly, I have been reluctant to do this. I had no wish to rush the Institute into this kind of arena without the most careful preparation. It seemed to me that in both the popular approaches which were being advocated and the unpopular suggestions being aired, there was a tendency to over-simplify a very complex situation. However, I should explain that my reluctance was by no means due to any unwillingness to become involved in controversy. Nor was it due to any academic or professional proclivity for judgmental fence-sitting. This might have been justifiable if not entirely defensible. But my hesitation derived rather from a more direct personal experience of this kind of thing in Africa and Asia - experience not merely of studying, but also of trying to find and apply solutions to the customary and penal law confrontation in many parts of the developing and developed world, where compensation can pay for murder; infanticide may be necessary to avoid taboos; and where prisons satisfy no one as a solution.

About 14 years ago, I had the privilege of conducting for the United Nations the first studies of customary and penal law in relation to juvenile delinquency in Africa. I had been associated with the first excursions into this subject by the School of Oriental and African Studies of London University and I had worked on the different conceptions of law and justice in Laos, India and Japan where, quite obviously, social sanctions are a good deal more important than penal

law in moulding behaviour. I had every reason to understand the complexity of a situation in which even custom itself was being affected by change.

It seemed to me therefore, that if this Institute was to make a substantial, a meaningful and a really positive contribution in this marginal area of the law and its enforcement, it should begin by first getting the subject studied into a wider perspective - allowing Australia thereby to benefit from all the knowledge already gathered, from all the experiments already tried and from all the mistakes made elsewhere in countries with similar problems. More than that, it seemed that there should be a recognition that whatever progress we might be able to make in this direction in Australia, would be of great interest for neighbouring states.

This week's workshop is our first move in that direction. We have sought to assemble Australian expertise - not only in the specialised area of customary law but in the more general studies of social controls and customary styles of living. And with that kind of experience we have joined the experience and the expertise available to us from surrounding countries with comparable problems. We hope that this sharing of knowledge and practice will launch us into the development of a project which will have direct and practical value for those charged with the difficult decisions - not only at the levels of legal drafting and adjudication, but at the level of action in the streets and in the villages, settlements or camps. We do not approach our study with any preconceptions as to the status, superiority or inferiority of one law as against another. We are seeking the kinds of informal controls which will make for greater peace, cooperation and understanding between peoples and which will reduce the numbers at present finding their way into the criminal justice system.

We are indeed honoured, Your Excellency, that you have considered the task which we have before us as being sufficiently important to merit your personal attention. We are deeply conscious of the many demands on your time and we are therefore all the more appreciative of your decision to grace this occasion with your presence. It is now my privilege to invite you to formally open the week's proceedings.

THE USE OF CUSTOMARY LAW FOR CRIME PREVENTION AND CONTROL

His Excellency the Honourable Sir John Kerr, A.C., K.C.M.G., K.St.J., Q.C.

Mr Attorney, Distinguished Participants, Ladies and Gentlemen.

There are some of my public engagements I fill as a matter of protocol or in accordance with the demands of my office. Others appeal to me personally or, like this opening today, arouse my professional interest; because after so many years at the bar and on the bench I am too deeply dyed in precedent and the common law not to recognise the dilemma which confronts you in reconciling the basic principle of equality before the law with the special needs of those for whom richer but different traditional imperatives have more meaning - and much more influence in shaping behaviour. Furthermore my own past deep interest in this very problem in relation to Papua New Guinea has contributed to my eagerness to follow what happens at this workshop.

Philosophers have stressed custom as an important guide to human life; and it was Francis Bacon, I am told, who thought custom was man's 'principal magistrate'. We do not have to commit ourselves perhaps quite so far in acknowledging the importance of established custom for our own legal system - remembering its overlay by the modern mountain of statute and comment. I am sure that you do not approach your task with any preconceptions as to the status of custom. Customary law is no more conceivable as being a kind of undeveloped statute law than a village is to be thought about as a kind of undeveloped metropolis which would be an improvement upon it. It all depends upon your point of view - and upon what you are looking for; but having 'progressed' from village to urban life there are many of us sorry we have lost irretrievably the happiness and tranquility of simpler and less technologically complicated ways of life.

By any test of its ability to establish peace, order and the rule of law, customary law stands unsurpassed by anything we have devised for larger and more complex societies but in such societies we cannot go back to custom as the sole principle of regulation.

As I understand it, the real problem to which you will be addressing yourselves is that of the juxtapositioning of these different systems - the customary and the modern. When we have a plural society where modern and older cultures exist side by side, the interrelationships between written and unwritten determinants of behaviour, that is, between the law and conduct decreed and the force of a deposit of tradition, become crucial - not only for those who analyse them in books, but for those who have to live and work with the dichotomy and who have to contend with all the misunderstandings and conflicts.

In 1968 I delivered the Roy Milne Memorial Lecture for the Australian Institute of International Affairs. My title was 'Law in

Papua New Guinea'. In it I quoted from a paper prepared earlier by Mr David Fenbury. He said

> It is a disquieting fact that the indigenous community of T.P.N.G. has for many years been operating a widespread, completely unsupervised, and technically illicit legal system which has no contact with the Territory legal system. This development has dangerously reinforced the concept of legal separatism in indigenous thinking, which can be briefly illustrated by two common Melanesian Pidgin expressions: the Territory Courts are 'kot bilong Gavment' (Government Courts) - the unofficial village tribunals are 'kot bilong mipela' (our Courts).

and also

> The need for haste which now characterizes all aspects of primative dependency administration promotes a very real and constant risk of the evolution of judicial procedures outstripping the evolution of indigenous society. When this occurs, a serious and paradoxical situation results. The very refinements in legal procedure whose introduction was intended to provide additional safeguards to individual liberties, to demonstrate that justice is above and quite separate from government, that before the law all men are equal, tend to lower the prestige of the courts and to decrease respect for the law.

My paper also made the following point

> Mr Fenbury in his I.C.J. paper said that the problems involved in achieving acceptance by the emerging people of the Territory of our version of parliamentary democracy are closely analogous to those involved in winning their acceptance to the Rule of Law. If we do not simplify the procedure and the rules of evidence the chances of the bulk of the indigenous people understanding and accepting our legal system are dim. Mr Fenbury believes that 'the legal profession in promoting the Rule of the Law in emerging societies . . . has been too conservative, too inflexible, too much the captive of its own hallowed traditions'. There is a connection between the two areas of policy and similar difficulties arise in respect of Rule of Law and the establishment of parliamentary democracy.

I revive these points from what I said in 1968 to illustrate my interest in your subject and some of its problems.

It is both appropriate and timely that the Australian Institute of Criminology should channel the knowledge and experience in this field for the benefit not only of practitioners, but for future research and training in this difficult but important area.

Relating the conflict of law problems to crime might make it less easy to theorise but it will make the study realistic and of more immediate value. It is our laws which define crime but it is customary values which inform the law. There was a time when we could think

of these as relatively stable. Now times have changed and values have changed with them so that, not only law, but custom itself is facing a crisis of relevancy. The way in which behaviour is regulated or tolerated whether in a complex or customary situation needs careful monitoring if we are to preserve, understand and, if necessary, restore the things we have valued most in our cultures - and which law has always been designed to protect.

For me, your workshop provides the opportunity that I have been waiting for - the opportunity for me to accept an invitation, extended to me some months ago by the Director of this Institute, not only to visit the establishment, but to associate myself more closely with the work in which, incidentally, I have been interested since its inception.

Crime knows no politics - or perhaps it would be more accurate to say that crime is rather indiscriminate in its politics. In one form or another it presents itself as a serious problem for all shades of government and ideology. It is not surprising therefore that this institution for research and training in crime prevention was a bipartisan creation. The fact is that no government, no authority, in these days of rising crime can be complacent before the challenge of crime. The six years of patient federal and interstate negotiation which gave life to this organisation were designed to establish an Institute to serve all States and avoid waste and duplication in dealing with a problem which respects no territorial frontiers. We face a future in which criminal justice systems are obliged to revise and reform to measure up to the crime challenge of the next quarter of a century. Australia, by means of the work being undertaken here, will have the tools for its State and Federal Governments to use to streamline and invigorate not only their law enforcement but their criminal justice, not only their efficiency but their humanity in dealing with crime and criminals.

In all the countries represented here, there are serious issues raised by the problem of applying modern penal laws to complicated traditional societies in situations which the legal draftsmen could not possibly have had in mind when they framed the statutes. The challenge then is to develop both the law and its application to modern plural complexity.

I realise that you could short-circuit all this by refusing to acknowledge inconvenient differences. We could say, simply, 'one law for all', ignore the problems and we could dragoon people into conformity regardless of local cultures and customs not shared by the majority. This has happened in the past; and sometimes it has to be done with offences like murder, arson or infanticide which different beliefs cannot legally justify. However we have lived to see some of the consequences of riding roughshod over informal controls in this way. We have daily, distressful evidence in our cities of the real costs of losing the informal controls, so many of which were customary, and so many of which bolstered and gave meaning to law enforcement and made it, thereby, more efficient. We are making no concessions therefore in reconciling law enforcement with customary practices. As I see it therefore, you have an opportunity to evolve a much deeper understanding

than we have had before of the involved processes by which modern society has produced its own confusion in relation to crime.

With that thought and no small measure of anticipation - because I will look forward to reading your report - I have great pleasure in declaring this workshop on the use of customary law in crime prevention both a welcome occasion and open.

THE USE OF CUSTOMARY LAW IN THE CRIMINAL JUSTICE SYSTEM

The Honourable Sir Sydney Frost, Kt.

As an Australian barrister until 1964 I could not have advanced any useful views upon the use of customary law in the criminal justice system. It is only my experience since then as a Judge of the Supreme Court of Papua New Guinea upon which I can draw. I trust that what I have to say may be of assistance in other jurisdictions.

The foundation of any discussion upon customary law in Papua New Guinea must be the masterly paper of Professor Peter Lawrence - 'The State v. Stateless Societies' (*Fashion of Law in New Guinea*, B.J. Brown, 1968, at p.15), upon which the first part of this paper is based. Lawrence's presentation conforms with the ideas on the aims and operations of customary law which have been developed by several anthropologists - among them Lucy Mair, Max Gluckman, Paul Bohannon and Andrew Lyall. It is essential to remember that the colonising powers in Papua and New Guinea did not take over areas which had previously known only anarchy and lawlessness. There were societies with their own institutions and quite different bases of social control. In these societies - which still function - there is not any central authority exercising legislative or administrative powers or courts of law in which there are persons in the position of judges. Their processes of social control are not based on leadership or authority although there are leaders, the fight leaders whom it was thought were dying out, and those who organise and set in motion within their own social group the processes of agriculture, dancing, sorcery, feast exchanges and trade, all of which are well known to the people and are prescribed by tradition. But these men have no power to give legally binding decisions. They influence but play no special part in the settlement of disputes.

Lawrence divides into two categories the actions generally considered wrong with which these societies have to deal. The first consists of offences against the religious code which include failure to observe initiatory taboos and rituals, most breaches of which it is left to the dieties and ancestral spirits to punish by bringing ill-luck on the offenders.

In his treatment of the second category of offences against human beings, Lawrence rightly stresses the self-regulatory forces which tend to prevent wrong action. These include socialisation or the bringing-up of children to follow correct behaviour and to respect their kinsmen and their property, and the strong sanctions of public opinion and shame. These sanctions are powerful indeed and my experience supports Lawrence's statement that shame can lead to suicide or voluntary exile.

The moral code so enforced is supported by the rule of reciprocity. Social relationships are primarily materialistic from which if observed each party derives material advantages from the other.

> But where they are ignored by one party, the other will at once withdraw cooperation. The man who does not share the meat of the pigs he kills at feast-exchanges receives no share of those killed by others. The man who does not help his clansmen or kinsmen clear land for gardens or build houses will find himself without a labour line when he wants similar tasks performed for himself. The man who does not attend the funerals of his kinsmen will have nobody to mourn at his own. (*op. cit.* at p.27).

When these processes fail, and also in cases outside the range of self-regulation as between persons subject to no common social or moral obligations, wrongs of commissions occur such as homicide, theft, rape, incest and adultery which in western societies, with the exception generally of adultery, are dealt with by the criminal justice system.

In the absence of any such system the individual or clan wronged was compelled to seek self-help, relying on the support of his kin or allied clansmen. Those wronged make a demand for compensation which is dealt with by an assembly or informal gathering of persons interested in the dispute including of course the kinsmen of the parties involved. It is not a court in the western sense; decisions are reached by an eventual consensus of opinion. The 'big men' of a village can merely exercise their influence, especially in the Highlands where they are noted for their oratory. In cases such as killing of domestic pigs or adultery, similar retaliatory action would also be likely. Cases of homicide, adultery and marriage with proscribed persons would inevitably lead to a resort to violence or payback by killing or maiming, or sorcery. The hard game of village football in which both sides let off steam, which Lawrence refers to as a later substitute for retaliatory violence, probably still occurs.

But these village assemblies never purport to administer the impartial justice of a court of law. The conduct of a dispute depends not only on the closeness of kinship or affinal ties but also

> more practical considerations: the extent to which a man knows and associates with his kin; the extent to which they are 'true men' willing and able to support him or nonentities whose support is worthless; and - especially in cognatic societies with fluid local organisations - the extent to which they live within striking distance of him. (*op. cit.* at p.32).

In disputes which involve persons of the same or related clans a harsh settlement is undesirable, for it may impair their relationships involving reciprocal advantages and some feeling of moral obligation to each other. It would also weaken the group's solidarity against outsiders. As will be seen in a customary case to which I shall refer later the other members of the group have also an interest in compelling a settlement to avoid bloodshed.

But where disputes occur between members of different groups between whom there are no such reciprocal arrangements there is no reason for restraint against resort to extreme violence. The people interested form two opposing bands, leading to a limited blood feud or

unrestricted warfare. Thus group and not individual retribution is sought. There may be some limitation of a conflict where there are neutral kin groups related to both parties who have an obvious interest to restrict it, for instance, by cutting down casualties. Indeed it is only this feature which has served to lessen the impact in the increase in the level of tribal fighting which has occurred in recent years.

This analysis leads Lawrence to his final distinction between western law and the system of social control in Papua New Guinea societies. It is the difference in aim of the settlement of disputes. In the west the aim is impartial justice between each citizen-isolate or citizen-unit, a term used by Lawrence to mean a person who is 'guaranteed reciprocal rights and privileges equal to those accorded all other persons who accept the State's authority in this way'. (*op. cit.* at p.18).

In Papua New Guinea societies the aim in settling a dispute is very different. It is

> to restore the social order, or to patch up relationships that have been broken or damaged. Somehow, for the good of all, plaintiff and defendant must be made to resolve their quarrel. Far from there being abstract, impartial justice, the forces of self-regulation, which Europeans dismiss as irrelevant - even inimical - to court procedures, cannot be divorced from self-help or retaliatory action, which must, therefore, vary with each situation. They are its governing or limiting principles, determining its nature and severity in accordance with the social range of the dispute and, in most cases, preventing it from overstraining the social order. (*op. cit.* at p.34).

The fundamental point to be made in this context is that in these societies the content of native custom relating to wrongdoing is of the most rudimentary nature, and is secondary in importance to the processes of dispute settlement.

All these considerations demonstrate the difficulty of introducing the Australian legal system, which itself evolved in the specific conditions of Britain, to societies whose type of social control is geared to a completely different kind of social structure. However, in the decade which has elapsed since Lawrence's paper was written, social changes have occurred which Lawrence himself foresaw and which are reflected in the increasing work of the Supreme Court. They are the growth of towns with the influx of immigrant workers between whom there is no common system of traditional control, the growth of commerce and the public service with men and women from different provinces spread throughout the country, and the economic development of the rural areas. Conditions thus exist which justify the hopes of the makers of the Constitution that a truly national legal system will take root.

I propose now to turn to the position of custom in the Papua New Guinea legal system. Under the Constitution, custom is adopted and is to be applied and enforced as part of the underlying law, which

together with what may be termed the written law is part of the law of Papua New Guinea (Constitution, ss.9, 20, and Schedule 2.1(1) and (2)). (The underlying law also includes the principles of rules of common law and equity in England).

But this provision does not apply in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional law or a statute or repugnant to the general principles of humanity - Schedule 2.1(2). Further provision for the proof and application of custom may be made by an Act of Parliament - Schedule 2.1(3). Until such legislation is enacted the *Native Customs (Recognition) Act* 1963 remains in force. Under that Act native custom is defined as the custom or usage of the Aboriginal inhabitants of Papua New Guinea obtaining in relation to the matter in question at the time when and the place in relation to which that question arises, regardless of whether that custom or usage has obtained from time immemorial. (Section 4). Thus the varying and changing nature of native custom was recognised. Indeed, a custom which is shown to have existed for a period of 10 years is now regarded as of long-standing having regard to the rate of social change.

In the proof of custom which is ascertained as a matter of fact the requirements of proof are relaxed, for a court is not bound to observe strict legal procedure or apply technical rules of evidence and it may admit hearsay evidence such as books, reports and statements of Local Government Councils. (Section 5). Express provision was also made that native custom is to be recognised and enforced in all courts subject to certain negative tests. Thus a custom must not be

(a) repugnant to the general principles of humanity;

(b) inconsistent with an Act or subordinate enactment;

(c) such that its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest; or

(d) in the case affecting the welfare of a child such that its recognition or enforcement would not be in the best interests of the child. (Section 6(1)).

In criminal cases the purposes for which native custom is to be taken into account are specifically defined as follows

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

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

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

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

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

or where the court considers that by not taking the custom into account injustice will or may be done to a person. (Section 7).

The provision contained in sub-paragraph (d) refers to the power given to magistrates of the District Court not to proceed to conviction if extenuating circumstances exist. The wide discretion conferred by the final provision has not been the subject of any decision by the superior courts, but it has never been suggested that it goes so far as to confer a general dispensing power.

In the case of a conflict of systems of native custom, the court may adopt that system which it is satisfied the justice of the case requires. (Section 10).

I should now refer to the effect given to custom in the interpretation of the Queensland Criminal Code which was introduced by the Australian Administration in Papua in 1902 and later in New Guinea in 1921. The Code has been regarded as applicable to all persons, indigenous and expatriate, and has been applied subject only to the Native Customs (Recognition) Act.

Except in cases under the Native Customs (Recognition) Act, it can be said that the Supreme Court (now the National Court) has given effect generally in sentence only to indigenous beliefs and adherence to the blood feud, despite the fact that in the minds of the people the deeds for which the accused persons are brought before the court may be justified under tribal custom which precludes consciousness of moral guilt. *R.* v. *Kauba-Pariwo* (1963 P. and N.G.L.R. 18). In payback killings the enforcement of the Criminal Code in this way has the fullest support for in recent years the attitude of both Members of the House of Assembly (now the National Parliament), Local Government Councillors and also responsible villagers, has been one of strong condemnation of this type of crime, with a demand for greater severity in sentences. It is in cases involving the widespread belief in sorcery which has led to the killing of a sorcerer, either in purported defence of the individual or the clan, or vengeance, that the most strenuous arguments have been made for indigenous beliefs to be assimilated in defences going to criminal responsibility.

These decisions have been fully discussed and lucidly analysed by Professor R.S. O'Regan in his paper 'Sorcery and Homicide in P.N.G.' (1974, 48 A.L.J. 76). As the learned author says, the court has consistently rejected arguments in such cases to found defences on the basis of insanity, honest and reasonable mistake of fact or self-defence (*op. cit.* p.77). With the substitution of a mandatory life sentence under the new Criminal Code these arguments may be renewed. But an act contrary to native custom may, according to the circumstances, constitute a wrongful act or insult sufficient to amount to provocation, reducing wilful murder or murder to manslaughter. Thus provocation may avail an accused who, for instance, comes upon his victim performing an act commonly believed in the area to be an act of sorcery (*op. cit.* p.80).

That an act of sorcery falls within the defence has been expressly confirmed and the ambit of the defence otherwise widened in the *Sorcery Act* 1970, s.20. This provision extends the operation of the definition in the Code to include acts not done in the presence of the accused, and to acts directed at persons outside the defined relationships in the Code. It has also been held that a mistaken belief that an act of sorcery was being committed is sufficient to constitute provocation, reducing wilful murder or murder to manslaughter. *R.* v. *K, J. & Anor* (unreported). However, the defence would not cover the killing of a sorcerer in an act of vengeance perpetrated sometime after the act of sorcery, leaving time for the accused's passion to cool. (O'Regan, 48 A.L.J. at p.81).

In these circumstances the effect of indigenous beliefs in sorcery has been mainly confined to the sentencing process.

The application of the provisions of the Native Customs (Recognition) Act can be illustrated by several cases in the Supreme Court. In *R.* v. *Noboi-Bosai* ((1971-72) P.N.G.L.R. 271) the Court was concerned with a case of cannibalism from a remote and primitive area of the Western District where the practice was found to be not uncommon.

The offence was alleged to have been committed in respect of the body of a man from another village recently killed in payback for a murder committed by him. The seven accused were jointly charged that each had (1) improperly interfered with, and (2) indecently interfered with, a dead body, contrary to s.236(2) of the Criminal Code. The main ground of decision was that that section was not designed to apply to acts of cannibalism and does not on its correct interpretation apply to such acts. Prentice, J. (as he then was) held that on a consideration of the Criminal Code as a whole and the setting of the sub-section the mischief aimed at was of a minor order such as necrophilic perversion, indecent exposure, and subjecting the body to indignity by way of mockery and the like. The Judge considered that having regard to the many bizarre funerary customs of the people, such as smoking of the dead, their subsequent disposition in public places such as a shelter or a cave, the legislature did not intend to make such practices indecent or improper. This ground was sufficient for the acquittal of the accused.

However, although it was not necessary for his decision, the Judge went on to consider other defences based upon the local addiction to this practice. It was held that even on the assumption that the section of the Code applied to acts of cannibalism, such acts are not necessarily improper or indecent, that the standards of impropriety and indecency to be applied in the case were not those of the community generally but of the ordinary person in the same environment as the accused, and that, among the primitive villagers of the accuseds' own area at the relevant time, the acts of cannibalism proved were in accordance with native custom and neither improper nor indecent, and accordingly the accused on that ground also should be acquitted. His Honour had this to say

> Concepts of decency and propriety (and obscenity), appear in many places of the ordinances and laws of Papua and New Guinea. Having regard to the multifarious customs, languages, dress, beliefs,

> degrees of civilisation, and social organisations among the peoples who live in remote wildernesses, some where Europeans have yet walked only on a few occasions, one cannot conceive that the legislature would have intended to impose uniform blanket standards of decency and propriety, on all the peoples of the country. The wearing of no more than a phallocrypt (or penis gourd) by an Australian in Port Moresby, might well rank as indecent. It is perfectly normal dress for a villager not only in his remote hamlet, but when he is working on the labour lines in the Patrol Post of Telefomin, among the educated missionaries and Europeans of both sexes passing him throughout the day. It would be no doubt indecent (as well as contrary to other regulations), for an Australian in Lae to place his deceased father's body on a platform outside his house, and later to collect his bones and place them in a corner of his bungalow. It would be normal practice still in many parts of the Papuan deltas . . . Such divergencies would extend through a whole range of Papuan and New Guinean customs and social institutions. (at p.283).

The prosecution relied on the provisions of Section 6 of the Act (*supra*) but the view taken by the learned judge seems to have been that the interpretation of what was indecent or improper overrode the objective issues as to whether the native custom was repugnant to the general principles of humanity, or would not be in the public interest. The decision has been criticised - see *Melanesian Law Journal* Vol. 1, No. 2, p.79.

The applicability of village medical practices was dealt with in *Prosecutor's Request No. 2 of 1974* [(1974) P.N.G.L.R. 317] which was a reference of questions of law for the decision of the Full Court, arising out of the acquittal of two accused persons upon indictment on a charge of manslaughter. The charge arose out of the death of a man whose chest had been opened, as the prosecution alleged, without asepsis and by means of a bamboo knife, by the two accused who in the past were said to have acted as unqualified village doctors. To the trial judge it appeared that the deceased had been suffering from an illness which he attributed to a blow from a stick received about one year before his death. In that year he had on a number of occasions sought medical attention at three hospitals which were staffed by qualified European doctors, one of them 60 miles from his village. But apparently he did not obtain any treatment which alleviated his condition. Immediately before his death his condition worsened; he did not eat or move from his house. At this stage he called on the two accused who were said to be surgeons in the village, who claimed that they had performed many operations successfully and offered to produce their patients to the court. After the operation the accused bound up the deceased's chest and helped him to his house where he remained until his death some three days later. On post mortem it was found that death was due to massive infection. The questions put to the Full Court were as to whether the trial judge had misdirected himself in the test adopted for manslaughter by criminal negligence, and also in stating that his duty was to ask himself whether 'a jury of Enga villagers would find that the Crown had proven beyond reasonable doubt that the accused had acted with the grossest ignorance'.

The relevant section of the Criminal Code provided that it was the

> duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty. (Section 288).

In his judgment the Judge went on to find that all the evidence led him to answer the question posed to the contrary, and that in fact the accused were accepted by the villagers as men of reasonable skill. Although the main issue concerned the reference to the jury, both Prentice J., with whom Raine, J. agreed, and myself stated views relating to the application of Section 288 to the employment of village doctors.

After criticising the reference to the jury for which no provision is made under Papua New Guinea law, Prentice, J. continued as follows

> There is no escape from a judge as a judge expatriate though he may be, deciding questions of fact as well as law. Even if he were to compare himself to a group of presumably instructed Engas of the future, he would I consider, be required to assess the facts in the light of the directions of law required by s.288 and other sections of the Code. Whether sociologically to the good or not, s.288 imposes duties and responsibility for consequences, upon persons undertaking surgical treatment. The section seems to me to require the conclusion that uneducated villagers undertaking thoracic surgery with a primitive bush instrument in conditions lacking in asepsis, on a man not in a state of necessity and who is within reach of hospitals, are acting without the reasonable care and skill positively required of them by the imposed law. That any degree of punishment would probably be minimal and of an educative and deterrent nature only, would not in my opinion, detract from their liability in crime for their statutory negligence (which in my consideration amounts to recklessness), if death resulted therefrom.

The view I took was that the judge was not speculating as to the likely verdict of jurymen from the Enga district where the crime was alleged to have taken place. He was well aware of his responsibility to decide the case sitting alone. It seemed to me that the question which the judge was adverting to was the standard of conduct required by Section 288 which is that of a reasonable man, and that he decided for the purposes of the case to treat the Enga villager as the equivalent of a reasonable man. These were the words I used

> The trial judge took for his 'man of ordinary prudence' the Enga villager. But the Enga villager has been subject to Government and Mission influence for two decades. He votes for his candidates

> in the House of Assembly elections and has his Local Government Council. He has available medical treatment at hospitals which are conducted by the Government and Christian Missions, and are provided with trained medical staff and equipment. In the case of a very considerable proportion of families, he sends his children to primary and secondary schools, and, certainly in much smaller numbers, may have a son or a daughter at one of the tertiary educational institutes, including the two universities. In all the districts of Papua New Guinea the population varies from the primitive villager who has not entered the cash economy to the town or city worker. But for the purposes of the law some mean must be taken, and just as certain mental attitudes are presumed . . . so also is some standard of knowledge to be presumed. It is sufficient, in my opinion, to state that the reasonable man is, for the purposes of this case, to be presumed to be one whose state of knowledge and prudence is such that he appreciates the difference in training and skill between the qualified doctor and 'the village surgeon' without any medical qualification. (pp. 6 and 7, unreported Judgment FC73). (See also *The 'Clapham Omnibus' in Papua and New Guinea*, J.F. Hookey, *Fashion of Law in New Guinea (supra)*, p.117).

Thus the view taken by all the judges was that an objective test was to be applied irrespective of the traditional acceptance in Enga society of the village doctors.

In the case of *R.* v. *Tabuta Nosei & 5 Ors* (unreported), which I heard in September 1968, the Court was concerned with a specific native custom. The six accused were charged under Section 227 of the Criminal Code of wilfully and without lawful excuse doing an indecent act, that is to say, of exposing and bringing into contact their genitals in a place to which the public were permitted to have access. The facts were that a sing-sing was held on Buka Island at Basbi Village which was under the influence of the Hahalis Welfare Society. Some of the opposing faction on the island, which consisted of supporters of the Buka Local Government Council, were also invited. Many children were present. The person to be honoured was the leader of the Hahalis Welfare Society who was a *Tsunon* or one of the headmen in Buka societies. During the ceremony the *Tsunon* was lifted up above the heads of the crowd which was singing and dancing. Men were playing the Pan-pipes, as the bamboo flutes are called. A circle was formed around the *Tsunon*, and three of the accused, who were middle-aged women decorated with flowers, then removed their clothing and lay down on the ground, spreading their legs apart. One of the men in charge of the ceremony then said to the remaining three accused, who were all middle-aged males and also *Tsunons*, 'What are you waiting for?' These accused, also naked, then placed themselves one lying on top of each of the women, their genitals touching. The women were observed to be crying. They kept up this position for some minutes before resuming the dancing.

An agreement that the matter would not be reported to the Administration was apparently broken by some of the Local Government Councillors who had for several generations been under strong mission influence.

Evidence was elicited of a native custom for a *Tsunon*, or a *Teiahal* as a female chieftain was called, being so honoured at various transitions of life, such as initiation or first menstruation, marriage, or occasions such as the building of a new house. The ceremony, which is performed only by elders of the village, did not go so far as simulated intercourse. The purpose of it is to demonstrate to the *Tsunon* being honoured the act which gave him being. One reason given for the women crying was that their thoughts were centred on their ancestors.

An Australian anthropologist, Mr M.R. Rimaldi, who was then on Buka and who was called as a witness by the defence, explained the ceremony as a type of *kato-kato* or symbolic mime performed by *Tsunons* who in that way identified themselves with the one being honoured. The manifestation of tears in the women, he explained, was to make the people feel sorry for the *Tsunon* and his family because of the risk of sorcery attracted by so important a man. The silent mime also symbolised the joint support for the leader of the two hostile main clans or pseudo-moities in Buka society: the *Nakarib* whose totem is the fowl, the leader's moity, and the *Navounin* whose totem is the eagle, for on the day in question a *Navounin Tsunon* was lying upon a *Nakarib* woman, and vice versa in the case of another couple. According to Mr Rimaldi, it was a special ceremony performed at long intervals and only in the case of distinguished *Tsunons*. It seems to have been last performed in 1949. With the pace of social change he considered that the custom was on the way out although no decision had been made to abandon it.

On the whole I was satisfied with the proof of the native custom which was relevant as to whether the acts charged were done without lawful excuse under Section 7(c) of the Native Customs (Recognition) Act, but the view I took was that the recognition of the custom would not be in the public interest under Section 6. I thus convicted the accused but imposed a nominal sentence only of imprisonment until the rising of the Court.

If the case had been tried in the seventies, I am not sure that I would have placed so much weight on the evidence of the Council witnesses who spoke of the shame it caused them for the sake of their children, and I may have been more influenced by the innate beauty of the custom and the rarity of its performance.

This brings me to two cases illustrating the Courts' approach to sentencing, having regard to indigenous beliefs.

As Minogue, C.J. explained in *Seki Wanosa & Ors* v. *The Queen* ((1971-72) P.N.G.L.R. 90), 'killing brought about by a belief in sorcery will for some time to come need special and individual treatment' - at p.96. The approach of the Court has also been described as follows

> It seems that in all Papua New Guinea societies the killing of an acknowledged sorcerer who has repeatedly been responsible for or has boasted of causing deaths, has been regarded as a benefit to society (unlike the payback which rebounds not on the offender personally but with cruel uncertainty, possibly on some innocent member of his line). The punishment of sorcerer killers has

> always been comparatively light. The Judges imposing it have no doubt been conscious they were administering an imposed law which in this aspect receives little or no approbation from primitive villagers, comparable to the relief which many of them would receive from the elimination by that law of the payback. Per Pentrice, S.P.J. (as he then was), *Secretary for Law* v. *Uleo Amantasi & 9 Ors*, (FC81, unreported).

In *Wanosa & Ors* v. *The Queen (supra)* sentences of 10 years' imprisonment imposed on prisoners convicted of wilful murder of a man who on the evidence was a sorcerer (or *sangguma* man) killed by them in what the prisoners believed in the custom of their society to be proper and necessary defence of the villagers against a real and murderous enemy, were reduced to six years. But judicial opinions have varied as to the degree of leniency which is justified in this kind of case.

In the recent case of *Secretary for Law* v. *Uleo Amantasi & 9 Ors* (*supra*) appeals were brought on the ground of insufficiency of sentence of 12 months' imprisonment for wilful murder, the accused having been in custody for five months, a consideration which it is the practice of the Court to take into account. This was a case of the murder by primitive men from the Upper Sepik of a reputed sorcerer in a desparate attempt to prevent the feared destruction of a small tribe of only about 100 persons in all. A tribe of this size would of course be greatly weakened if the prisoners - ten of them - were confined for a long period. The sentences were upheld, the judges in the majority taking the view *Wanosa & Ors* (*supra*) was an exceptional case, and concluding that although they would have imposed somewhat longer sentences there was no error in the exercise of the trial judge's discretion.

However, in a strong dissenting judgment Saldanha, J. held the sentences were so light as to be derisory. His Honour said that he did not

> see the need as far as deterrence is concerned to distinguish between the typical payback killing in the stone-age tradition and the killing of reputed sorcerers, women and children. So-called sorcerers are not always what they are reputed to be and are entitled to what little protection the law can afford them. And offenders and like-minded people who look upon women and children as chattels that can be disposed of at will and almost with impunity must be equally deterred.

In His Honour's opinion sentences of five years seven months should have been imposed which would have been more in line with the previous decisions.

The official legal system has, as may be supposed, a limited impact upon the lives of the people of Papua New Guinea. The work of the Supreme Court so far as the villagers and indigenous townspeople are concerned has been largely confined to violations of the Criminal Code in the enforcement of which the Supreme Court has been, to use the words of Professor O'Regan, 'an instrument of social change'. With the general development of the country there has been an ever-increasing spate

of offences not arising out of tribal pressures. These include offences such as breaking and entering, embezzlement of funds, fraud and also dangerous driving offences. But, except for serious criminal offences, which it is generally accepted must come before the National Court, and on the civil side, claims for damages for personal injury arising out of the use of a motor car and occasional matrimonial and commercial matters, the regulation of the lives of the indigenous people takes place outside the present legal system. For the system of dispute settlement by village meetings in accordance with customary legal procedures has continued. It is availed of in relation to civil matters such as marriage, divorce, both of which are mainly customary, adultery, devolution of property and disputes over land and pigs, and also to quasi-criminal matters in which the sanction is the award of compensation.

An interesting account is given of four customary law cases heard by such unofficial courts in a paper by four law students - Yak, Tibu, Mionzing and Kara, in the *Melanesian Law Journal*, Vol. 3, No. 1, 1975 at p.151. One of them, a public trial in 1968 of an adultery allegation upon the Gazelle Peninsula, where the offence is seriously regarded, makes it easy to understand that since then no other case has come before the village elders.

The case entitled 'The Theft of a Pig' (*op. cit.* p.151) illustrates very well the features of this type of dispute settlement as described by Lawrence. The case involved two clans living near Mount Hagen in the Western Highlands Province who were traditional enemies, but under the influence of the Government had cooperated in the use of rivers and hunting grounds. The account of the case is an interesting one.

> Wama had lost a pig, and he suspected that Waka, the defendant, had been in the area where the pig usually roamed. Searching for the lost pig, Wama noticed that Waka had been there and that Waka's movements in the bush were irregular steps. The footprints went to and fro, followed the pig's paths, and went along the creek, in order Wama said to avoid staining the bush with the pig's blood. Wama also found that wood had been chopped, to make a spear he believed. Although Wama could find no evidence of the pig itself the major element which supported his suspicion of Waka was Waka's previous record of being a thief. Waka had stolen a pig from Wama's clan a few years ago.
>
> On the appointed date, the two clans gathered on the Paliga clan's singsing ground to talk out whether the defendant had stolen the pig. All of the clansmen of each side sat opposite each other with the councillors and *komitis* in the centre to question Waka and Wama. The clans exchanged no words of greeting, except with some elders. (*op. cit.* p.151).

When everyone was settled Waka's councillor stood up and gave a speech about law and order and the necessity for people to work together and not to fight. He concluded by saying that he would like Waka to admit the theft so that all could go back to their work.

Wama produced his evidence, first describing what he had seen in the bush. He concluded, 'a thief cannot be innocent when he is being suspected. The pig was born in that particular area and cannot just wander out of the area as if it does not know the area'. It was then the defendant's turn to produce his defence. He said, 'I went to that area searching for wood to make a spade handle. Since the day was hot, I followed the creek and came home. Here is the wood I chopped for the spade handle'. This did not impress the court because the spade handle looked older than it should. Further, from the way he spoke and his demeanour all knew that he had done it.

Waka's councillor then took Waka aside to ask him if he had stolen the pig. In the meantime the meeting went on and many speeches were made, the theme being that the law of the Government should be observed. But Waka did not admit the theft, and Wama's clan still pressed for compensation. By this time it was late in the evening so the case was adjourned until the next day. It was hoped that when his clan got Waka in the men's house overnight he would confess.

The next day when the men assembled again, Wama's clan looked angry and made speeches which the elders on the other side found hard to bear, but in the absence of a confession there seemed that nothing could be done but to have the case taken to the Local Court to be heard by a magistrate. Then a big man from Waka's clan arose to speak. He said he had not thought that the case was as difficult as it had turned out to be. Wama still believed that his pig was stolen by one of the other clan and he thought the case had gone far enough. Both clans could see that from the way Waka was speaking it did not seem he was innocent. They did not know the full facts of the case but since the men in his generation had stopped their tribal differences he ordered his clan to give two pigs, one for compensation and the other for a feast for the men of both clans.

As the authors of the article state, there was no conclusive evidence of guilt, but both clans believed that Waka was guilty. He had a record as a thief. For the case to be taken to the Local Court was not desired because in the absence of evidence the defendant would be allowed to go free and this would have been unsatisfactory to both clans. Compensation was paid for the sake of the reputation of Waka's clan and it was equally important to preserve the clan's right to compensation if the positions were reversed in the future. But it was the need to preserve amity between the clans which ensured the settlement of the dispute.

The process of decision-making in this way has been called a process of conciliation and arbitration, 'Legal Development in Papua New Guinea: The Place of the Common Law', Peter Bayne, *Melanesian Law Journal*, Vol. 3, No. 1, 9 at p.33. On this view the customary settlement of disputes is not concerned with the administration of law. Epstein takes a different view. 'Procedure in the Study of Customary Law', *Melanesian Law Journal*, Vol. 1, No. 1, 51 at p.55. The author, who had had on the Gazelle Peninsula the experience of listening to many disputes amongst the Tolai people, concluded that specific legal arguments did play their part, and 'the hearing of these disputes

resolved itself into a dialogue of norm and counter-norm'. (*op. cit.* at p.56). He thus stressed that the strength of custom consisted in its concepts and underlying assumptions which are capable of flexibility when applied to changing situations. However, in the traditional hearing of criminal cases it seems likely that political considerations would be of greater importance.

Even so, these traditional procedures play such a dominant part in the decision as to justify the statement that 'the customary law of Papua New Guinea is not just a system of rules, but a process of dispute settlement adaptable to social change' - Bayne (*supra*) at p.27. It is this aspect of customary law, despite its deficiencies by western standards, which the House of Assembly was concerned after self-government to incorporate into the official legal system mainly by the establishment of a new system of village courts.

The enactment of the *Village Courts Act* 1974 can be seen as a recourse to those traditional procedures to supplement the introduced legal system, although the Local Courts have an express power of mediation and the magistrates of both the Local and District Courts are now mainly Papua New Guinean citizens.

The passing of the Act followed prolonged requests for a tribunal with both mediatory powers of enforcement, more attuned to the rural environment, providing opportunities for local leadership and participation, and able to impose adequate locally-orientated sanctions. The primary function of the village court as stated in the Act is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes.

There are no prescribed qualifications for village magistrates. The men appointed to date have been village elders, mostly illiterate. They are paid a small annual stipend, in the case of the chairman, K107-00. The court is constituted usually of three magistrates and the decision is by majority vote. A village court clerk is provided. There is a preventive jurisdiction if a breach of the peace is threatened. In the civil jurisdiction the award of compensation is limited to K100 except in matters relating to custody of children, bride price or compensation for death. That jurisdiction does not extend to matters involving ownership of land or the driving of a motor vehicle. Work orders may be made for the benefit of an aggrieved party.

The criminal jurisdiction is confined to prescribed offences such as theft, striking a person, using insulting or threatening words, damage to property, making of false statements, acts of sorcery and drunkenness. Penalties provided consist of a fine up to K50 or performance of work over a maximum of four weeks. Failure to comply with an order may be enforced by imprisonment, but the order requires endorsement by a magistrate of a Local or District Court. There is provision for village peace officers to assist the court and to enforce its decisions and orders.

The law to be applied consists of native custom in accordance

with the Native Customs (Recognition) Act. It may be applied irrespective of any Act or subordinate enactment. The village court is not bound by any law other than the Village Courts Act itself which is not expressly applied to it. So custom in general overrides the written law. Matters before the court are to be decided in accordance with substantial justice, subject only to any native custom which is applicable, and one cardinal rule, which is that a person charged with a criminal offence is to be presumed innocent until proved guilty. The court is not bound by technical rules of evidence. There is no procedural distinction between civil and criminal jurisdiction; indeed in practice most criminal cases are disposed of by both fine and award of compensation. There is provision for group responsibility, but the liability of any one member of the group is restricted to the limits of individual responsibility. A right of appeal lies to a magistrate of a Local or District Court. The control of the Supreme Court, however, is limited to the issue of a writ of *habeas corpus*.

At present 107 village courts have been established and approximately 550 magistrates appointed. The system is considered to be operating successfully. The only public criticism has been that directed to the decisions of one village court imposing fines upon women for smoking.

Once a court is established the tendency has been for it to proceed busily to hear disputes which have accumulated over the years, for there is no limitation of time, and also at the outset to impose comparatively heavy fines. But after two or three months the court settles down to its task. Gambling upon playing cards is a common charge. The requirement that a court should be constituted of three magistrates seems to have minimised the risk of *wantok* influence and corruption. In some long-settled provinces, such as Madang, there has been no demand for village courts. 'What would the court do?', has been the answer to enquiry. In other provinces where unofficial village courts were set up after the legislation was proposed it has been found that the younger people have defied the elders' authority, which has led to demands for official establishment of the court.

Two observations can be made on these new courts. Firstly, if the system can prevent minor disputes erupting into violent crime they will perform a useful function, and secondly, with the spread of education and general development the system of administration of law by the Local and District Courts may after a transitional period be preferred.

The use of custom in the criminal justice system would seem to require an appropriate comprehensive record. Where a record in fact does not exist, as in Papua New Guinea, reference has to be made mainly to anthropological writings. However, the pace of social change which is reflected in the people's behaviour lessens the disadvantage. Further, as Barnett says

> To record native customs as rules to be applied inflexibly would not only miss the point but would fossilize customs which will rapidly become less and less acceptable as a guide to behaviour as

> people's attitudes change. Even the act of recording customs as a mere guide to court decisions can have the same effect. (*Law and Justice Melanesian Style*, T.E. Barnett, 'Alternative Strategies for Papua New Guinea', 1973, 59 at p.65).

A greater weakness in the legal system arises from the absence of participation as yet of Papua New Guineans in the administration of justice. This system is likely to continue for some time until sufficiently experienced and able counsel are qualified to be appointed to the Bench. There is provision however in the *Supreme Court (Assessors) Act* for the use of assessors, which - enacted in 1925 - has long since fallen into desuetude. However, a new government policy to reintroduce the procedure of trial with the aid of assessors was announced last year and new regulations have been proclaimed to effectuate it.

The function of assessors is to give their opinion on any matters of fact, custom or usage, or any other matters, arising out of the evidence given at the trial, but they are not to adjudicate in any cause before the court. Not more than two assessors are to be appointed. It is expected that this procedure will this year be available in criminal trials held in the New Guinea islands. It will certainly facilitate the proof and application of custom in the criminal justice system.

Having reviewed the use of customary law in Papua New Guinea I should wish to make the general observations that the subject of this paper requires.

Scope for the use of custom exists in countries still in the course of development from subsistence economies and plural societies such as Australia where there are substantial Aboriginal communities.

It is fair to say that in Papua New Guinea native custom has not played a major part in formal court decisions - Barnett (*supra*) at p.60. This position it seems will obtain generally for a variety of reasons.

To the extent that custom permits physical violence to the person its recognition would be plainly contrary to the principles of humanity. No civilised country would wish custom to prevail to the extent that conduct generally regarded as requiring the sanctions of the criminal law could be condoned. In enforcing the criminal law the courts in undeveloped societies thus have a positive effect in discouraging traditional practices such as infanticide. ('The Future of Traditional Law', Peter Bayne, *Melanesian Law Journal*, Vol. II, No. 2, 276 at p.280). The establishment of civilised standards within the criminal justice system is seen also in relation to the application of certain basic concepts of the criminal law. Thus in English law the concept of joint responsibility applies to cases where there is on the part of the accused mere presence at the scene of the crime from which encouragement can be inferred. In Papua New Guinea this rule has been applied, although according to tribal custom generally acts of lesser participation such as holding a victim about to be killed by another, or presence accompanied by spear thrusts upon the dead body, would not

make the accused a principal offender. Further, in Papua New Guinea and other Melanesian traditional societies, no distinction is made between intentional, negligent or accidental acts causing harm for the purposes of responsibility. The exculpation from criminal responsibility for accidental harm within the criminal justice system is thus an amelioration of the traditional attribution of guilt.

Circumstances of course exist in which custom should properly be given an exculpatory operation, for which the Native Customs (Recognition) Act of Papua New Guinea can be taken as a useful guide. In addition, in the transitional period of development there is much to be said for particular problems, such as sorcery killings or crimes committed under tribal pressures, to be dealt with by an amendment of the law as suggested by Professor O'Regan, to incorporate a qualified defence of diminished responsibility.

The application of custom has two aspects: the content of the rules and also customary procedures for dispute settlement. The opinion has been expressed that traditional Papua New Guinea law 'applies broad and flexible principles to individual cases instead of trying to typify cases in order to bring them under precise and firm rules'. (*Traditional Law in Papua New Guinea*, Potter, Introduction by Sack, p.1). The learned author goes on to suggest that there is a tendency for such an approach to be substituted for the existing technical administration of the law in western societies. This is not the place to debate the degree of certainty desirable in the criminal law. Customary rules are likely to be few in number and of a simple nature. The view that Sack is expressing is that the content of those rules does not lack underlying assumptions or 'notions and values' which might well be incorporated in the existing law.

Customary notions which have been mentioned in Papua New Guinea as worthy of consideration are greater use of the award of compensation to the victim of the crime and group responsibility. In cases such as rape committed in rural areas, for example, according to the circumstances compensation might well be regarded as the only sanction, accompanied possibly by a fine. As it is not likely that the accused's means will be sufficient to provide just compensation, the question arises whether responsibility should be extended to the whole clan or group, a notion which is basic to Melanesian customary law. Orders of this nature would have a strongly deterrent effect and lead to stricter control being exercised over the male members of the group; but the consideration of individual justice is ignored, particularly in respect of those absent from the village and working in the distant towns. (See Barnett (*supra*) pp.75-77).

Resort to customary procedures is appropriate only for a transitional period. At the Second South Pacific Judicial Conference held in 1975 in Honolulu, it was generally agreed that trial by jury had no customary basis in Pacific countries. However, the procedure, wherever it exists, of trial by a judge alone in which questions of guilt and innocence are left to the decision of a single mind, must be only a temporary procedure. The mode most adapted to take account of traditional law and concepts may well prove to be trial by a judge sitting either with assessors or lay magistrates.

The real limitation upon the use of custom in the criminal justice system is, of course, the extent of social change which seems to be proceeding apace in most traditional societies. Custom tends to be in a state of flux, and its authority questioned by the educated young. For them custom has decreasing relevance as they pass into the wage economy and outside the range of traditional influences. An exception is to be made in the case of the more isolated and cohesive communities, and of certain types of custom such as those applicable to land.

COMMENTARY ON KEYNOTE ADDRESS

Professor R.S. O'Regan

It gives me great pleasure to follow Sir Sydney Frost and to comment upon his paper. On many occasions in the past my observations on customary law preceded his - when I appeared as defence counsel in criminal trials before His Honour in Papua New Guinea. Usually the learned judge rejected my submissions and I say with respect, rightly so, because in those days, in the mid-sixties the fervour of my youthful advocacy was not always accompanied by a modicum of common sense. One thing we always agreed upon, however, was the importance of integrating customary law into the criminal justice system of Papua New Guinea.

My remarks, like Sir Sydney's, relate mainly to Papua New Guinea because that is the customary law jurisdiction I know best. But I think they apply more or less to other pluralist legal systems in which the criminal law comprises the colonial inheritance of the common law and the local indigenous law. In such countries customary law has an impact on the criminal justice system at three stages - in the prevention of crime, in determining the guilt or innocence of the alleged offender and in deciding what punishment should be imposed on the convicted criminal.

Customary law prevents crime for the simple reason that it is a force for order and stability in the community - at least where the community is relatively homogeneous. I have no doubt, for instance, that the bride price system among the Motuans of Papua New Guinea has the effect of reducing the incidences of violent crimes among these people. This is the system in which the groom and his relatives combine to contribute cash and kind to the parents and other relatives of the bride before marriage. If the marriage fails the bride price or part of it is returned. Thus both families have a vested interest in the stability of the marriage. Social cohesion within the groups is increased and the prospect of violence so often associated with domestic discord is reduced.

Another example relates to the offence of incest which in Papua New Guinea is proscribed by the Criminal Code - a piece of legislation imported from Queensland. In many parts of Papua New Guinea incest is also proscribed by customary law although the prohibited relationships are often more extensive than under the Code. When an incest case comes before the court it is the law under the Code which is applied but this happens very rarely. So great is the respect of the people for their own customary law on the matter that the crime is seldom committed or seldom detected. In this context, therefore, the customary prohibitions against incest reinforce the presumptions of the Criminal Code.

On the other hand some customary rules operate the other way, that is, to increase crime, especially violent crime. The practice of payback killing in the Highlands is an example. If a member of A's clan kills a member of B's clan then B under customary law may be obliged to kill A even if A had nothing whatever to do with the original matter. Obviously no system of criminal justice which purports to protect innocent individual citizens would recognise customary payback as a defence to murder although it is, of course, relevant in fixing sentence.

However there are other contexts in which local customs and local beliefs clearly should affect criminal responsibility. Sir Sydney Frost has adverted to some of these. As to provocation I merely add that in the Northern Territory the late Mr Justice Kriewaldt, in cases where Aboriginal people were accused of murder, moulded the common law in much the same way as the judges have moulded the Criminal Code in Papua New Guinea.

His Honour also mentioned belief in sorcery as a defence. The Sorcery Ordinance provides this to some extent. Perhaps however there is room for a more generalised defence. If the accused killed a person under the belief that his victim was a sorcerer who has killed by an act of sorcery or intended to kill by an act of sorcery the accused himself or a member of his clan, then he should be found guilty not of murder but of a lesser offence such as manslaughter. This at least would reduce the gap between the accused's moral fault and criminal guilt.

The third point of impact of custom on the criminal justice system is at the time of imposing sentence. In Papua New Guinea this has always been recognised but one judge frankly admitted some years ago that to regard local circumstances as relevant only to punishment and not to criminal responsibility was to use a judicial blunt instrument. Mr Justice Smithers said

> It is certainly undesirable that conviction for a crime normally associated in men's minds with a high degree of moral blameworthiness should be recorded against a man whose conduct involved but little fault. Although it is true that upon conviction the Court, in the same breath, either extends or recommends clemency the stigma is undeserved and the range of possible penalties is too wide.

How then is customary law to be given its rightful place in the criminal justice system? An obvious first step is to recognise custom as a source of law. This, as Sir Sydney pointed out, has been done in Papua with the enactment of the Native Customs (Recognition) Act. However this does not take matters very far. Indeed I suggest that all of the cases mentioned by Sir Sydney would have been decided the same way even without the Native Customs (Recognition) Act. I remember in 1963 when this enactment was first introduced in the Legislative Council, talking to Mr Ivan Champion, a member of the Council. He was a famous pre-war explorer and a very distinguished field officer in Papua New Guinea and he said that he wondered what all the fuss was

about. He remarked that the courts had been applying the customary law for years without any legislation to back them up.

No doubt various answers will be given to the problem of recognition of customary law as this conference proceeds. I do not anticipate these answers but I suggest one profitable line of enquiry. This is to take account of one key difference between Western and customary law. In an article I published last year in the *Australian and New Zealand Journal of Criminology* I described it as follows

> English law (or its Australian derivative) is concerned primarily with the punishment and, less frequently perhaps, the reform of the individual offender. The object is to deter the offender and others from committing offences. Melanesian law, on the other hand, is concerned with restoration of the social equilibrium disturbed by the individual's transgression; it generally accomplishes this not by punishment but by insisting upon the payment of compensation to those injured by an offence. As the Chief Minister of Papua New Guinea, Mr Somare, has recently said:
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> > 'The present legal system has ignored traditional dispute-settling techniques. Whatever the impression in Australia is I want to point out that it was not just "fight and pay back" before. There was a very subtle mechanism manipulated by elders based on the self-interest of kindred groups and the payment of compensation.'

I suspect that the people of Papua New Guinea understand very well the negative content of Western law. It forbids murder, woundings, rapes and so on and punishes people who perpetrate these things. But where is its positive content, its contribution to the resolution of disputes (which otherwise precipitate violence) to the restoration of social order? Probably what Western law lacks in this regard customary law can provide, as the theft of the pig case illustrates. This is because of its emphasis on compensation to the victim not punishment of the offender. It is a humane and practical concern which other criminal justice systems might well adopt.

PART 2

SUMMARY OF DISCUSSIONS

W. Clifford

INTRODUCTION

The discussion was designed to explore the problem of Aboriginal customary law in Australia and the complications presented by customary law having no recognition in the general law of the land - and yet having a very real meaning and effect on so many people for whom the statute law was something alien and difficult to understand. Above all the aim was to reach practical conclusions which would take account not only of the reality of customary law and the established courts but of the way in which both were changing with effects of culture contact and the influences of political, economic and social changes in the different communities.

The participants held unstructured morning and afternoon sessions from Monday to Friday and afterwards all expressed themselves as having gained tremendously from the opportunity to share their experience and expertise. There were disagreements and cleavages of opinion but the practical end of the meetings was kept clearly in view and the attempt was made to reach conclusions which would accommodate most of the learned and considered opinions expressed. Participants were at all times conscious of the need to develop recommendations which would not merely dwell on the complications of the situation but would acknowledge the need of administrators, legislators and the courts, police and corrections for guidelines in actual decision-making. It was recognised that they were the ones who faced daily the difficult problem of accommodating the reality of customary law. There was a lively appreciation of the need to take into account the vast amount of experience gained by the different States in seeking to deal with this problem.

The discussions were also concerned with crime prevention so that the issues were conceived by the group within a broader context of informal social controls. Participants were interested in the informal relationships which motivated behaviour and which could prevent crime before a person entered or was brought into the formal criminal justice system of police, courts and corrections. In this sense it was observed that modern statute law, however important in principle and precept, still had a great deal to learn from custom and tradition about preventing crime. The formal statute law, however firmly applied, was not proving all that successful in preventing crime in the cities - probably because it suffered from the erosion of the informal customary social controls of family, neighbourhood and peer groups which are needed to support formal law and to make it effective. In the cities there was often a formal law and a legal protection of rights without informal social or customary support. In the remoter areas of the

country, where custom prevailed, quite the opposite obtained: there was customary control unrecognised by formal law. It seemed therefore that both customary law and modern forms of legislation had a great deal to learn from each other.

THE BACKGROUND

Customary law was not peculiar to Australia or the other countries represented. Africa, Asia, North and Latin America had had the problem of coming to terms with difficulties between indigenous and imported systems of law. The four countries from which the participants came, Australia, Papua New Guinea, Fiji and New Zealand, were examples however of different approaches to, and of different levels of development of, an accommodation between an English derived law and local customary law.

Fiji and New Zealand had either practically assimilated local customary law to the general Anglo-Saxon type law of the land or had rejected customary law outright. In Papua New Guinea however the principle from the outset had been to preserve local custom, to interfere with it as little as possible and to recognise and apply customary law whenever this could be done without a serious conflict of standards. Thus in Papua New Guinea, the Native (Customs) Recognition Ordinance of 1963 enacted that

> ...native custom shall be recognised and enforced by and may be pleaded in, all courts, except when
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> (a) it is repugnant to the general principles of humanity;
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> (b) it is inconsistent with an Act, Ordinance or subordinate enactment;
>
> (c) its recognition or enforcement would result in the opinion of the court in injustice or would not be in the public interest; or
>
> (d) in a case affecting the welfare of a child under the age of sixteen years, its recognition or enforcement would not in the opinion of the court, be in the best interests of the child.

This Ordinance continued a policy of acknowledging custom. Native customs had always been recognised 'tacitly in Papua and explicitly in New Guinea... unless they were against public policy or in conflict with legislation'.[1] And, more recently Papua New Guinea had legislated for village courts to allow indigenous communities their own courts.

In Australia while the tendency throughout the past 200 years or so had been to follow the New Zealand and Fiji pattern the reality of

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1. T. E. Barnett, 'Law and Justice Melanesian Style', in A. Clunies Ross and J. Langmore (edd.), *Alternative Strategies for Papua New Guinea* (Melbourne, Oxford University Press, 1973), p.60.

enforcement had been different because of the vast regions governed. The trend had been towards an assimilation of Aboriginal custom to the general law but in fact there had always been a form of customary law actually operating beyond the reach of the regular formal system.

Legally in Australia there had always been the possibility for action dictated by customary rules to be taken into account in mitigation of a sentence but not usually in determining responsibility. In the case of *R. v. Jack Congo Murrel* (1836) it had been argued that the fact that natives were not protected by British law meant 'they are not therefore bound by laws which afford them no protection'. The court held, however, that Aboriginals had no sovereignty and were therefore subject to the general law. In 1860 in *R. v. Jemmy* it had also been held that 'the jurisdiction of the courts is supreme... throughout the colony', however, there was an important qualification to this when the Chief Justice said in the same case

> it is not intended to decide that in no cases might there be a concession to a subject race of immunity from the laws of the conquerors living among them.

The range of cases in which customary law has been considered by Australian courts is much wider than this and has been covered by a number of publications.[2] But the group considered the above quotation to be a suitable statement from which to begin its consideration of the issues involved.

THE CRIME SITUATION

The fact that offences by Aboriginals are not always distinguished in published statistics, made it difficult for the expert group to be presented with a detailed account of the crime situation either in customary areas or in other areas where Aboriginals were involved. However attention was drawn to the figures provided in several publications.[3] There seemed to be no doubt of two things however, which were confirmed in both statistics and experience, namely the very high proportion of Aboriginals in the prison populations - proportions exceeding those of Aboriginals to total populations - and the great problem of drinking and drunkenness amongst Aboriginals. Incidentally it emerged that these were problems with customary minorities which Australia shared with neighbouring countries represented.

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2. For example see: Dennis Harley, Should English Criminal Law be Applied to Tribal and Traditionally Oriented Aborigines? (mimeograph, Sydney University Law Library). Mary W. Daunton-Fear and Arie Freiberg, Gum Tree Justice: Aborigines and the Courts (to be published.)

3. For example, C. D. Rowley, *Outcasts in White Australia* (Canberra, Australian National University Press, 1971), pp.352-357. Elizabeth Eggleston, *Fear, Favour or Affection* (Canberra, Australian National University Press, 1976), Appendices 1, 2 and 4.

The group was informed that in the Northern Territory, killings in clan brawls were now rarer than a decade or so ago; and despite allegations of deaths caused by sorcery the coroner was usually able to establish a natural cause of death. Even where the cause of death was unknown and could not be established readily by medical examination, sorcery, if alleged, was not usually reported to the coroner.

Drinking - and offences committed under the influence of drink - was recognised as constituting a complex and highly controversial subject not amenable to the simple expedients of harsher punishments or wholesale permissiveness. The criminal and legal aspects of the situation were only reflections of a deeper seated social problem which is still inadequately studied or understood. Drinking habits of people in any part of the world were related to their styles of life - to beliefs and customs, ritual, economic and social imperatives. This was evidenced by the fact that crimes attributable to the influence of alcohol were serious not only in certain areas of the Pacific but in countries widely diverse in forms of political and economic or social organisation - in countries without the same customary background or the levels of poverty and culture conflict found in the Pacific. It was observed that certain Communist countries had 40 per cent of total crime attributable to excessive drinking and it was noted that the past experience of nineteenth century Ireland or some of the African countries, as well as the situation in Switzerland and Scandinavia, was relevant to any analysis of the role of drinking in the customary areas of the Pacific.

One participant made the point that it had been much better in Australia when not everyone was allowed to drink - when Aboriginals were licensed. A Royal Commission looking into crime in Fiji had very recently recommended that a drinking licence should be issued to persons over 18 years of age who wished to purchase or consume liquor; the licence could then be withdrawn like a driving licence if it was abused. The general experience of the group however was that this had not been very effective in Australia because when only some persons were permitted to buy or consume alcohol these licencees had usually been obliged by custom to share their right with others. Customary obligations had meant that they had to buy for others so that the effect on general drinking habits had not been very noticeable.

It was observed by some participants that the decriminalisation of drunkenness and vagrancy in some areas of Australia had reduced the powers of the police to deal with troublesome individuals. The decriminalisation had not reduced the social problem: there were still drunks and vagrants to be dealt with but now the police powers were reduced and the earlier methods of dealing with such problems had not been replaced by effective social services.[4]

As regards the disproportionate numbers of Aboriginals (or, in other countries, native peoples) in the prisons, this not only reflects

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4. But it was noted that some initiatives in this direction (that is, pick-up services, 'drying-out' and rehabilitation services) were being taken in some parts of the country.

the styles of law enforcement but also the legal system and styles of living. As one policemen said, in one country of the Pacific it was not the middle classes or the people in regular work who were on the streets at night so that police charges were obviously more numerous against those who committed street offences. Police were engaged to patrol the streets so that they were more in contact with the lower classes or the native peoples who were to be found there. It did not mean that these people were more criminal - only that they were less sophisticated in offending and their styles of life had not yet developed a reduced contact with police on patrol.

The group noted other factors at work too like the lack of alternative problem-solving procedures usually available to those more accustomed to non-literate or group oriented ways of acting out internal problems. The law could be changed and law enforcement altered but life styles would also need to develop differently to reduce the numbers now being arrested.

CRIMES AND THE COURTS IN CUSTOMARY AREAS

As already observed there were, in Australia, forms of customary law actually being applied by groups generally beyond the regular range of formal law enforcement. A corollary was that in areas where, in reality, customary law held sway there were forms of internal behavioural control which were effective and which prevented crimes which might otherwise be committed. It was known that in such areas crimes might well be committed which would never be reported to the authorities.

The magistrates' courts already acknowledged the influences and effect of such systems, not only by taking them into account in the awarding of sentences but frequently in the sending of young offenders back to their own areas or to their own relatives to be controlled. Sometimes magistrates suspended a penal law sanction to send an offender back to the supervision of their tribes. If such offenders behaved themselves in their tribal setting they would not be brought back to court. If they did not behave themselves they might be brought back to the court and sent to prison. It was said that in such cases there had been no recidivism in the experience of those participating in this meeting.

The meeting also took note of a report published in the *Canberra Times* on Wednesday 3 March in which the Aboriginal Legal Aid Service had investigated car stealing by young Aboriginals. Young Aboriginals were being gaoled for a month or so for what was considered by the courts to be 'joy riding'. However the Legal Aid Service discovered that the reason for the car stealing was that the young people in the area were running away to avoid initiation. By running away, taking a car and being gaoled they avoided the initiation. Once this was known the courts began to send the young offenders back to their tribes. This was counted a success for recognition or at least consideration of tribal law and behaviour by European courts. However there was no information as to the effect of this modified court action on the incidence of car stealing in that area.

In sentencing then, although the larger numbers in prison showed a discordance, there was an accommodation being slowly achieved as between the customary and statutory systems. There was in fact, if not in law, an adaptation to the real situation. A formal legal sanction was being used in some cases to support customary controls. This mutual accommodation was particularly clear where, as actually happened, the magistrates were consulting with customary councils and magistrates' courts were being held in the settlements even though they applied the general law.

In seeking to reach practical recommendations therefore the participants in the expert group meeting had to take into account the extent to which the customary law was at present actually in operation in Australia despite the obvious complications and conflicts, not to mention the contradictions which emerged in practice. These it seemed were most in evidence when the formally constituted authorities considered that they had to intervene in the interest of justice or where the Aboriginals themselves sought the aid of the authorities by laying a complaint or calling in the police. Apart from this however there were customary rules being applied and social life was being governed by custom in a way which was both internally effective, maintaining peaceful relationships and preventing crime.

To admit such a statement, however, was in no way to overlook the problems which still remained and which derived to no small extent from the way in which customary rules differed as between the different customary groups. These differences could give rise to occasional inter-group conflicts. Nor did the acknowledgement of existing customary law in practice ignore the very great problems of a number of 'fringe' areas where people of varying degrees of Aboriginal descent were living apart from customs - either between two systems or so Europeanised as to be barely distinguishable from others of quite different backgrounds with social problems in the urban areas. In Australia there were different levels and intensities of the problem therefore and the types of legal administration or law enforcement to be adopted would need to be appropriate to this uneven and diverse situation.

THE CONFLICT OF SYSTEMS

The participants, in seeking the evidence for an accommodation of systems, did not underestimate the seriousness of reconciling the principle of equality before the law with the need to allow for the social persistence of local custom and different ways of life. This was a situation which applied more seriously to penal law than to civil law. In countries which had allowed great scope for a local set of customary laws to operate, nine tenths of the work of such courts had been mediation in quarrels or assaults and the resolution of civil cases such as might arise from marriage or divorce problems, property disputes or stock trespassing. In criminal law the principle of equality before the law had largely applied and any cases of real seriousness had never been confided to customary courts which might have led to a person being tried differently or placed in varied forms of jeopardy for the same offence. Customary courts in such countries had been entrusted only with the administration of the law in relation to minor infringements of

the statutory penal code. This had not had the implication of conflict that at first appeared since studies of the relationship between customary law and penal laws imported to African countries had revealed divergence in only six very minor respects. The conflict had been more in the methods of dealing with offences, customary thinking having little place for a penalty such as imprisonment which relieved a tribesman of the need to fend for himself, left his family unprovided for and which left the victim entirely unsatisfied and uncompensated for his loss.

In Australia there were many forms of conflict between the systems which required full recognition in any search for a reconciliation of the methods of exercising social and legal control.

In the first place the marrying of young girls to old men might well be actionable in the statute law despite its vital importance in Aboriginal affairs as part of the development of kinship relations essential to the social structure of a customary group. A conflict could also arise where the father of a girl for whom a bride price had already been paid (and she was therefore already promised) might, in accordance with his own custom, fiercely resent any attention being paid to her by another man; if it continued despite his protestations and he then speared the offender (as he would be entitled to do under his own law), he would be liable to conviction and punishment under the general law - that is without sufficient attention being paid to his own customary obligations, except in mitigation.

There could be the kind of conflict of laws reflected in an example provided by the Papua New Guinea representatives. In that country there was a statutory legal requirement for all motor cyclists to wear crash helmets. On one occasion patrol officers on motor cycles wearing such helmets had driven into a village which was in mourning for the death of a person. The mourning custom required the uncovering of heads by everyone in the village and notices to this effect had been posted outside the village for the benefit of everyone who may have to pass through. The officers on motor cycles had either not seen the notices or had ignored them - perhaps because they were obliged when mounted to wear the helmets. The young men of the village had stopped the motor cyclists and for their disregard of the mourning custom had extracted a fine of $2 each - to be paid to the bereaved wife. This the officers were prepared to pay - until the chief had arrived and had also demanded an extra payment for himself because the deceased had been from his clan. The officers had refused this additional penalty upon which the young men had slashed their tyres and the patrol officers had then to wait until they could be picked up by a motor vehicle. Later the patrol officers laid charges against the young men for malicious damage to their cycles. The magistrate hearing the case had convicted the young offenders but had at the same time warned the patrol officers to be careful to observe such public notices of village customs in the future.

Other conflicts in practices were reported such as the use of statutory law to prosecute tribesmen for the infliction of 'sorry-cuts', that is, cuts inflicted by fellow tribesmen where a member of the group in mourning had not in their opinion cut himself sufficiently to express

sorrow. When these had to be treated at hospitals or clinics they might be reported and the offenders punished for assault because if cases of assault came to official notice the criminal law permitted no consent by the victim. The person cut had no redress in customary law and might not wish to institute proceedings against those who had cut him since he fully understood their rights to take such measures in custom. He might have sought no more than treatment for his wounds but this frequently led to prosecutions he had not sought. Interestingly enough, participants from the areas which this occurred could recall no similar cases of statutory prosecution following from the infliction of cuts for circumcision, subincision or the cicatrice cuts possibly inflicted at the time of initiation.

A second large area of conflict arose from the difficulties of sending back to their families in tribal areas girls who had been sent for education to missions or to boarding schools in the more urban areas. Such a return to their parents was in accordance with western law but often the girls did not wish to return and might be 'ruined' by being returned since they may have to submit to forms of initiation or marriage to older men in accordance with older custom. Similarly problems arose where Aboriginal children brought into care by the statute law and placed in children's homes, perhaps because they had evaded initiation or because they were psycho-socially disturbed, did not fit any longer into either system. There was a serious danger of such children leaving a broken social structure of their own and falling onto the wrong side of western society. This was complicated by the fact that such cases might belong to the 'fringe' areas where customary law was no longer fully operative yet where western law was still largely ineffective.

With respect to the practice of sending young people back to their tribal areas for submission to customary control, which has been described above, one participant made the point that thought should be given to the fact that this implied the acceptance of a total package of values. One was in effect accepting all the customs, even where some of them might be repugnant to basic human rights and freedom or contrary to the precepts of natural justice. If tribal control and custom was good for controlling the young it must be carefully distinguished from the condoning of harsh penalties beyond anything to which a person in a western society might be liable for similar conduct or from the countenancing of the marrying of young girls to older men against their welfare as this might be perceived by the statutory law which protected them from such treatment. It was noted however that all this had been provided for by the reservations of the Native Customs (Recognition) Ordinance of 1963 (see above) and that in countries which had granted recognition of customary law or the setting up of special customary courts there had typically been reserved rights for the general law to intervene to prevent serious crimes or to inhibit action which, however customarily sanctioned, could amount to murder, infanticide, ritual killing, the killing of sorcerers, etc. Moreover the customary councils given power to apply their own law usually understood that they did not have absolute rights and that there were such limitations on their freedom of action.

A third area of conflict occurred because there were great

differences in customary law between the customary groups. In Kimberley for example, Aboriginal groups were splintered and the customs differed between the local groups. Frequently in such areas there are many people brought up at missions or stations so that the customary law had varying degrees of relevance for them. The fact that some people subject to customary controls and customary imperatives now moved freely between rural and urban areas and that in the spiritual life of Aboriginals the rights to territory extended far beyond recognised geographical limits - even to areas where towns now stood obviously made this conceptual conflict of systems a problem with very complicated legal effect - no matter how it might be handled by legal change and the recognition of local custom.

CUSTOMARY LAW AND THE MAGISTRATES

Participants felt that crucial to the development of any system for the recognition of customary law and its use as a crime preventative was the role of the magistrate. Magistrates needed to understand the way in which custom operated just as the customary bodies needed to appreciate the limits likely to be placed on their freedom of action because of the requirements of human rights and natural justice. The length of time a magistrate served in such areas and the extent to which he gained experience in managing the system were vital to a reconciliation of expectations. The participants were impressed by the extent to which magistrates had in practice proved able to make allowances for the operation of local custom in their daily work.

The possible complication of having indigenous people appointed as magistrates or assessors who were either likely to be in possession of all the facts before being asked to pronounce upon them, or who might be related to the persons before the courts was given careful consideration. The question of this being repugnant to natural justice was thought to be unlikely since

(a) customary tribunals or customary magistrates or assessors could not be constituted at all without there being such inter-relationships - if only because of the existing clan links and relationships. In a customary structure everyone was related to others in this way and the customary concept of justice relied greatly upon the arbitrators being in personal possession of the facts even before a hearing;

(b) there was no real difficulty about interpreting natural justice to incorporate the mediation role of the magistrate or customary tribunal.

Participants fully acknowledged however a difficulty created by applying alien concepts for political reasons to customary conditions. It could be complicating and sometimes self-defeating to try to make a formal link between European conditions and the customary situation, for example, by appointing Aboriginals to positions of western authority or by delegating legal powers not to be found in customary law. It was observed that the very act of conferring official status on local Aboriginals often resulted in a weakening of their status and importance

amongst their own people. Thus, Justices of the Peace appointed in the Northern Territory ought to sit with the magistrate but often the magistrate had been asked by the customary councils not to have the indigenous Justice of the Peace sit with him. Having been given a formal western appointment such persons had lost local confidence. Similarly, the appointment of customary healers as health officials had frequently undermined their customary status. There was a great need for those devising solutions therefore to understand customary conditions - to acknowledge the reality of customary leadership and to appreciate the possible negative effect of trying to formalise it along western lines.

CUSTOMARY LAW AND LEGAL AID

The significance of introducing legal aid into the complex situations described above required consideration. Interesting points arose in relation to the feedback which legal aid now had in educating customary oriented people to their legal rights and to the requirements of statute and penal law. More and more they understood that they had redress if they were injured or suffered loss in customary law and they could take action in the ordinary courts if they did not wish to submit to the implications of their misbehaviour in their customary groups.

Obviously any recognition of existing customary law would be unlikely to have effect if the individuals subjected to such laws in a tribe could readily obtain legal aid to sue the elders in the ordinary courts for their customary decisions and actions. This would deter those with customary authority from discharging their functions. There was already a confusion between the two systems in this respect which could have far-reaching effect. At the same time it was difficult to accept a form of legal administration which however much it allowed for custom deprived the individual of his rights as declared by the general law. Here the group orientation of customary conditions militated against the individualism of western law: in the latter a person could find protection for his rights by individual action. In the customary situation he enjoyed his rights by virtue of his membership of the group and his conformity to its requirements.

It seemed to participants that there was a need for legislation which would recognise customary law in such a way as to avoid individuals escaping its provisions and thereby playing off one system of law against another. Where customary law obtained, the rights of persons electing to stay there could be expressed under the general law as being fully recognised by the local customary law. In this case legal aid officers would also be required to recognise customary law and to take their instructions only from the appropriate customary authority in the areas. Participants appreciated, however, that this kind of accommodation could create its own problems and thus felt that there should be more precise studies of the legislation likely to be necessary - with all the safeguards carefully worked out. To achieve any such marriage of systems, the police, magistrates and the legal aid services were important; but they were only as important as the training and experience of the persons who occupied such offices could make them.

Legal aid was thought by participants to have been a great aid

to the courts in acquiring a fuller understanding of the cases and this combined with the magistrates' contacts with customary authorities helped to develop mutual understanding. However effectiveness, as already noted, was in more or less direct relationship to the length of time a police officer, magistrate or legal aid officer spent in customary areas. If they were constantly changing or entertaining preconceptions of their own about what the local law ought to be, instead of knowing what it actually was, they could be more of a hindrance than a help.

VILLAGE COURTS AND SPECIAL TRIBUNALS

The participants gave special attention to the possible solution of the Australian problem by means of special customary tribunals. It was noted that such approaches had been effective for some years past in African countries and in Papua New Guinea more recently.

The village court system set up in Papua New Guinea was described at length by representatives of that country. These courts consist of elders appointed as magistrates, some sitting at night after their ordinary work. In these courts the elders mediate in disputes as well as sitting as magistrates. They are given a minimum of training to avoid any undue orientation to statute law. Professional lawyers are excluded from these courts with a view to custom being used to settle disputes. There had been some difficulty with educated young people in the beginning but in Papua New Guinea respect for the older person is still very strong so that eventually this difficulty was overcome. It was explained that these were courts which were, in effect, making mediation orders rather than giving judgments. They were based on decisions made according to a fair and equitable set of principles derived from customary law as understood by all those affected. In this respect they were particularly relevant to crime prevention. And it was said that, in Papua New Guinea, petty stealing and car thefts had declined whenever the village courts had been established.

In Australia there was nothing quite like these village courts. There were settlement courts in the Northern Territory which had been very well received by the custom oriented people but these were ordinary magistrates' courts, the only difference being that the magistrate sat in the settlements. There were also reserve courts in Queensland which approximated to the Papua New Guinea village courts but these were under severe criticism for allegedly not making fair judgments or for being no more than a manipulation of white authority. Then in Western Australia there were appointed customary assessors who sat with magistrates on juvenile cases - and the magistrates had expressed satisfaction with the great help they received from assessors. However it appeared that in Australia there was a division between those who called for a greater sensitisation of white law to accommodate Aboriginal requirements and those who were pressing for separate customary courts.

In considering the possible application of the Papua New Guinea village courts system to Australia, the participants took into account the fact that solutions in one country could not always be transplanted to another. In view of the differences subsisting between the Aboriginal

situation in Australia and the position in Papua New Guinea, the participants felt that the Papua New Guinea village court systems would not be appropriate at this particular time in Australia except possibly in the very special 'fringe' localities. It was observed that there were conflicts and divisions as well as geographical complications in Australia which were not found at the present time in Papua New Guinea. One participant who had worked in both countries said that he had been struck by the fact that (as the Governor-General had pointed out in his opening address) the Papua New Guineans had never regarded themselves as Australian. Whereas the Aboriginals were Australian and regarded themselves as such. The participants therefore commended the innovation of village courts in Papua New Guinea and thought that the experience could be of great value for societies at similar stages of growth and legal development. However they rejected the idea of village courts on the Papua New Guinea model as suitable for Australian conditions at the present time. It was felt that the history and culture as well as the geographical residential patterns of the two countries was different. Moreover the introduction of such courts might well institutionalise an effective customary system already operating in Australia and so destroy its local standing and authority - as had happened with the appointment of justices of the peace and medical orderlies.

At the same time participants did not rule out the possible application of something like a village court system in the 'fringe' areas where Aboriginals were not in cohesive groups but living in or around the towns or were perhaps sufficiently mobile to move between the two areas. In such circumstances the customary law could not properly apply and the ordinary statute law might not be sufficiently flexible to take account of the persistent overlay of customary social relationship styles of living or continuing obligations. Here some adaptation of the ordinary courts might be necessary: but, even then, participants did not see such adaptation as following the Papua New Guinea model which had relevance for quite a different and less fragmented or confused background of customary law.

Great care was necessary, participants thought, to distinguish in Australia between the areas where customary law was viable and areas where it was not - even if Aboriginals were living there. It was also important to take account of the methods in use already in some areas of the country to deal with the practical problems. These have already been reviewed above, for example, settlement courts (that is, ordinary Petty Sessions Courts being held in the settlements in the Northern Territory), reserve courts in Queensland which were also not customary courts but courts with special justices and peace officers administering by-laws and dealing with minor offenders; and the use of assessors or juvenile court magistrates in Western Australia. All these were very different from the Papua New Guinea village court concept since they did not go so far in putting the judicial authority in local hands - and they were designed to make the statute law more sensitive rather than to allow scope for customary decisions. Nevertheless, as already illustrated in this account of the discussion, they had achieved something of an accommodation and had acquired experience in dealing with the conflicts of system which should not be overlooked.

CUSTOMARY LAW AND INFORMAL SOCIAL CONTROLS IN GENERAL

In dealing with the issues presented by the need to take account of customary law for crime prevention, the participants were conscious of the relevance of their discussions for the wider urban problems of developing informal social controls to make the law either more effective or unnecessary for behavioural control in certain cases. In modern times there was a world-wide review of criminal justice systems with a view to decriminalisation where possible and there was a desire to rely more on community or neighbourhood controls of a friendly or informal nature than on the weight and formality of a criminal justice system. Customary law where it operated provided this kind of informal regulation of behaviour using social obligations and intra-relationships to achieve a non-formal control and mediation based on family, clan or tribal obligations to mediate when something had gone wrong. In the more economically developed and technologically advanced urban areas however such informal controls as had existed in the home, the neighbourhood or the work places had been progressively undermined by the economic and social changes - stripping the law of its natural supports and leaving it more formal and less effective. In terms of crime prevention by behavioural control therefore, it was not just accommodating customary principles within statute law but improving statute law itself by borrowing such principles from customary law if these could help to develop the more reliable informal controls of behaviour on which the law must depend. Such informal supports were needed by any law - not only for its effectiveness but for its containment in operation to only those cases where legal intervention was unavoidable.

The possibility of adjusting statute and penal law in urban societies to strengthen rather than destroy the informal social controls - and using, for this, the evidence of the effectiveness of customary law, had been raised by the Governor-General in his opening address. The group thought that this was an important move - perhaps long overdue - and it considered ways in which in the urban areas the law could be made more effective by involving the community more - and building up informal controls to support the modern law.

It was suggested that the community concept of informal controls belonged to a group with a consensus of values and that it could not work in a plural society: that a society needed the support of a common philosophy with clear basic moral principles and that this was a situation which did not obtain in modern urban conditions with varied value systems.

On the other hand it was indicated that studies of the relationship between moral instruction and offending in other countries had shown that where a church was a real community its moral effectiveness in controlling behaviour was greater. This might imply the possibility of the individuality of a great deal of modern law having actually undermined existing basic social institutions like the family and having developed a mountain of impressive legislation without practical effect - so that crime continued to increase and much of the formalism of modern law had only peripheral relevance to social dynamics, human behaviour or social institutions. If this were so, then measures should be taken, even in the

modern urban areas, to study the existing and underlying social controls of an informal nature and to use them to improve the law and its application.

The bases of modern law were certainty and individual responsibility. Therefore it could not readily accommodate the group thinking and group orientation which was the basis not only for customary law in rural areas but for many of the social controls of an informal nature which could be used to control behaviour in towns. There was, for instance, a feeling that group responsibility for offences was repugnant to the development of a just and equitable law. But, just and desirable as they were, these were principles which did not necessarily help to support group cohesion which is the strongest influence on human behaviour. If informal controls were therefore to be fostered there may be need for a balance to be struck at different levels. It was noted for example, that a whole series of administrative tribunals were allowing more flexibility in receiving evidence and dealing with special situations: the juvenile courts and the juvenile panels (as in South Australia) showed a readiness to move into problem situations by more informal methods before a situation reached the stage of a formal court hearing.

In a wider context, the need for a broader recognition of the diversity which existed in both society and its laws, and in particular, the need for an acknowledgement of the variations of customs in a community, was stressed. It seemed that there were different levels to be considered. In a modern society the right to be different was being stressed, which implied the unsuitability of the law being used to impose conformity. Against this, it was clear that within the diversity was a common ground of consensus on intolerable behaviour which helped to determine the viability of a society. Thus murder, robbery, rape and theft were usually disliked and inhibited even if they may be sometimes varied in interpretation.

The distinction was drawn between custom (which it may not be possible to codify because of its diversified and changing character) and an ideology of social values, for example, an abstracted unity drawn from customs and which could be reflected in a code.

THE ISSUES

The basic issues for the expert group had already been identified in the speeches and addresses which had been given on 1 March at the opening of the meeting. These could be summarised as

1. The principle of equality before the law being opposed to the recognition of different standards and values by different ethnic groups. Participants did not believe that this was quite the obstacle sometimes supposed. The general law in a number of countries took account of different community or religious beliefs and practices without infringing the principle of equality. Here rights were accorded on a community rather than an individual basis but it had not proved particularly difficult. Although the Northern Territory did not

recognise an Aboriginal marriage and although New Zealand had refused to recognise a Maori customary adoption (except for land inheritance) there had nevertheless been recognition of different forms of marriage by the general law - Christian, Jewish, Moslem, etc. In plural societies different ethnic traditions had legal acceptance. At the same time participants appreciated that it was easier to allow for the diversity in civil than it was in criminal matters. However a common penal code had not been difficult to apply in countries elsewhere with allowances for local custom. Relevant to this was the general coincidence which had been discovered between customary offences and a received penal law. There need be no sacrifice of the principle of equality before the law in criminal matters and customary courts could resolve many disputes which would lead to crime besides dealing with minor offences in a crime preventative way.

2. The complications of the different geographical and clearly socially organised (or apparently disorganised) systems to which the word Aboriginal applied in Australia. The participants acknowledged this to be a difficulty but not completely insurmountable. The discussion revealed areas of clearly Aboriginal authority and it had elicited the main conflicts of transitional conditions. It might be allowed for by a two tier system described below.

3. The changing nature of custom itself. This was obviously a problem but the issue was not that of change and transition. This would occur. The real issue was that of traditional groups being allowed to determine for themselves the pace of change.

   The tendency to regard man and his legal decisions as the determinant of the build-up or disintegration of custom was challenged in the discussions. Mobility, technological change, the advent of radio, television and the contact of different modes of life had served to change customary law, informal controls and community life. Whether or not customary law was recognised, these influences could be expected to continue so that customary law recognised and applied might prove to be only a temporary expedient for people moving rapidly towards modern conditions. There should be no misconception then of a recognition of customary law being a move back to an ideal state, that is, a turning back of the clock.

   Taking this fact into account and noting the situation in New Zealand and Fiji (where no concessions were made to custom in the criminal codes) one view expressed was that there should be no village courts or separately recognised legal systems simply because, as already noted,

with the rate of general economic and social progress these would be temporary expedients only. Gradually all peoples of all communities would wish to be dealt with in the same way and by the same code - so why hold back this development by interposing a customary system which would decline with education and economic improvement.

The group felt that this did not take sufficient account of

(a) the deficiencies of informal controls for the prevention fo crime in our modern law; and

(b) the real conflicts in the present situation, however temporary.

It was decided that there was need to preserve and develop the informal social controls. Western type law may have made insufficient allowance for these in the past and was, in fact, now being asked to make greater accommodation of the right to be different. The workshop had no difficulty in accepting the fact that people should be free to opt out of a system; but opting out often had economic and social implications as well as legal consequences. Economically people could opt out of the rat race - as had many young people and groups in the west; but having opted out the should not expect all the benefits of those who stayed in the race and had become 'rich rats'.

In the customary system this is best exemplified by the Aboriginal who spends all his income on liquor and then expects to benefit from the obligation of his relatives to feed him. The group also took into account the political motivation and political consequences of separatist movements. In recent times in many parts of the world minority groups had learned the value of asserting and maintaining a separate identity. However much assimilation might have been succeeding, groups had now found it politically rewarding and advantageous to refuse to integrate - to hold out as a separate group. This vigorous separativism had usually resulted in increased political representation, greater power for the leaders and it certainly attracted more attention: increasing the political influence of minority groups therefore created a number of vested interests in campaigning for a separate system.

The time factor, the process of change, the difficulty of defining accurately at any given time, both the group and the custom as well as the ultimate objectives of a society were therefore all significant elements in the consideration of whether to introduce separate legal systems, customary courts or special procedures. Participants believed that all these could be allowed for.

4. The possibility of the recognition of the customary law taking the form of

   (a) a statute allowing for custom to be acknowledged if not repugnant to justice and morality;

   (b) allowing customary obligation as a defence in the present law - instead of it being allowed for only in mitigation;

   (c) permitting a wide range of judicial discretion by magistrates sitting alone, aided by assessors, or by special tribunals;

   (d) informal acknowledgement of customary law without statute.

To deal with these matters and others the participants set themselves a number of questions for answer

(i) As a general principle is 'the use of customary law in the criminal justice system' concerned with a special law for minority groups or is it concerned with the wider issue of the informal controls enjoyed by minority groups being preserved and extended to improve the effectiveness of modern law?

This it was felt had been fully answered above in the consideration of the informal support needed by a modern law which was not being too effective in dealing with crime prevention. Participants believed that in customary conditions there were lessons in social relationships which could well be of importance for reducing the atomisation of modern society and contributing thereby to the control of crime.

(ii) Should there be village courts of some kind, even if only temporary or for special areas and even if they deal mainly with civil law or only mediate in disputes?

Having rejected the Papua New Guinea pattern of village courts the participants decided that Australia could allow for its Aboriginal customs most effectively by a two tier system which would make use of existing experience and require a minimum of special legislation.

In the customary areas where groups were still cohesive and operating their own customary systems of law the ordinary magistrates should have the necessary discretion to give recognition to customary law now operating - leaving the groups to deal with their own problems and perhaps encouraging them to do so. In the 'fringe' areas described above magistrates sitting with special assessors might be given the discretion to apply the general law but applying such customs as existed in the development of a local common law which would have community support.

A two level system would mean that at the first level of cohesive, tribal life, where customary law is already operating effectively in that tribal elders do not call in the police or lay a complaint until they feel a case has gone beyond them, a magistrate would be able to give actual recognition by means of an enabling statute. At this level the problem of reconciling general and customary law was being, in fact, resolved; and the only steps needed to support the system were those that could be taken to ensure that law administrators in these areas were sensitised to accept the situation and to refrain from applying the general law of the land except where there were excesses reported - or where they were asked to use their powers by the elders themselves. The statute could give discretion to magistrates to recognise customary law in their areas where it was not repugnant 'to natural justice and morality'. There was a need to provide the support of the dominant law in order to encourage local elders to continue to apply traditional social controls and not to give up an unequal struggle.

At the second level, that is, in the 'fringe' areas the ordinary magistrates' courts could possibly be supplemented by assessors or other suitable persons. Such courts could be allowed by statute to use discretion in receiving evidence and dealing with the case according to the styles of local custom. The need for this was clear not only from the importance of customary law being used for the prevention or treatment of criminal offences but from the confusion of land and visiting rights and the mobility of outsiders creating situations from which crime could arise. With the so called 'fringe' areas being so varied and having different 'mixes' of problems there might be variations of court systems - assessors with magistrates in some and more locally appointed magistrates in others.

(iii) Can the courts or the customs be used to preserve social controls and if so what variation of these can we begin to apply in our own urban areas, for example, volunteers or neighbourhood councils?

It seemed to the participants that there were many ways in which urban societies could benefit from customary experience. In the first place the anonymity of town life made behaviour difficult to control no matter how highly specialised were the crime control services. Therefore, the police, the courts and the correctional services could be given more community significance. The group was impressed with the evidence of patrols of police, clergymen and social workers which have been effective in reducing the numbers of young offenders coming before the courts in Japan and New Zealand (where they were called 'J' teams). Note was taken of the fact that patrols of social workers and ex-

alcoholics or ex-drug addicts had also worked in the United States but these were used as alternatives, separate from the police and the group considered that integrated police/community patrols were better. Neighbourhood policing, local police 'boxes' or stations and greater involvement of the public in controlling illegal behaviour were other measures thought to be desirable as initiatives which had been useful in other countries.

The group also commended the application of special juvenile panels or childrens' boards as in New Zealand and South Australia to divert young people from the courts. Community work orders and other community solutions to penal and correction systems were important. The need to recognise the family or to encourage existing (even though informal) social structures in both legislation and law enforcement in the urban areas was thought to be of increasing importance as alienation spread in the towns.

(iv) Should there be experimentation in the different areas with different types of customary law approaches as a research project?

The group considered that this would be a valuable way of learning about the most appropriate methods in the different districts in Australia.

(v) Are the right people working in rural areas to make better systems work?

The experts thought that training and longer-term appointments were necessary.

(vi) How do we train people for sitting on benches of community courts?

Special courses could be arranged for those involved by using university or educational facilities now available. Pilot schemes might be organised by the Australian Institute of Criminology.

It was agreed that the problem for the future was not only to provide for the traditional needs of Aboriginals or any other special customary groups which could not easily be assimilated to general statute law; it was also the problem of preserving and even extending to urban society the informal social controls which were necessary to support and to strengthen criminal law. Young people in a customary society were sometimes claiming to be free of obligations tribally and at least one Aboriginal group of elders (represented at the workshop) had asked for their customary controls to be recognised so that they could prevent their society being exploited by those who claimed to be free of custom when it suited them. Actually this turned out on closer examination to be a much more complicated case of conflict at a cattle station between those having legally conferred land rights and those having only the general visiting

rights of all Aboriginals. Those with land rights would deal with recalcitrant visitors by their own law but they did not do so because the visitors claimed the protection of the general law for their freedom of movement. The elders of the group with land rights therefore needed the support of the general law to deal with the situation in their own way.

PART 3

SUBMISSIONS BY PARTICIPANTS

D.T. GUNTER

This conference has been discussing the use of customary law and has dealt with many of the problems. The working out of the problems in that detail necessary to give administrative validity will take a considerable amount of care and expertise. However, I should like to make the following observations

(a) Recognition of customary law in Australia involves our recognising the validity of laws and decisions of Aboriginal people and that they have the ability to control an important function. It is a political as well as a legal and administrative problem.

(b) If the ability to control at some levels the legal system is granted, then I believe it must be legislated for in our system and not left to unofficial means of enforcement.

(c) The problems of community control versus individual rights have been only briefly touched on, but I believe it is of the essence of the problem.

(d) If 'customary law' is recognised, it seems feasible to employ a system analagous to the Papua New Guinea village court system, suitably modified for Aboriginal conditions, but having much the same jurisdiction. The primary aim should be to maximise the existing norms of the group for responsibility and control.

(e) Some strong opinion is ventured that such 'courts' should deal with all disputes and crimes even including murder, but I myself feel a more limited jurisdiction is necessary.

(f) Where the community is not sufficiently viable to support 'village court systems' then maximum use must be made of the Aboriginal community by use of assessors, consultation before action, or after conviction and that this should include the use of the community for post conviction control. This is especially necessary where children are involved. I am not attempting to give details of the system, but of the principle which is to maximise the sense of responsibility of the community to its 'offenders' and to use the strength of the community to assist its own people.

(g) I feel a most important element is training. One must have

the 'right' people, but training of all persons dealing in the area must increase their knowledge of the strength and weaknesses of the community they are dealing with. Any system, whether using customary law or not, will fail without well-trained and sensitive personnel. Moves towards customary law systems should not be seen as alternatives to improved training and improved services in the existing administration.

P. ALBRECHT

1. All human societies evolve systems through which they seek to maintain their basic values, norms, institutions, processes etc., and have their members adhere to them. In the main compliance is brought about through

   (a) socialisation (the process of getting a member to internalise the values etc., of his/her society);

   (b) the application of rewards and sanctions.

2. Sanctions and rewards are exercised both at a formal and informal level.

3. Customary law may be defined as that body of unwritten laws which is accepted by a society as having validity and applicability to the whole of that particular society. The term is most often used for the corpus of law of pre-literate societies. As such it would have the same force in traditional societies as would the body of law of a modern society. The term should not be confused with custom, which has less force than customary law/written law, and whose application may be more localised.

4. It is important for the successful working of a society's total system of maintaining compliance to its norms, values etc., (incidentally these are of first importance in making possible orderly and peaceful human interaction), that the whole society accept the system as having validity and legality.

5. It is at this point that pluralistic societies, or societies which have within them minorities adhering to different values and systems of maintaining these values, have difficulties. These arise from the fact that

   (a) areas of behaviour subject to customary law/written law will vary, for example, Aboriginal customary law concerns itself with adultery, our written law does not;

   (b) the values each seeks to protect may and indeed do vary in the Aboriginal/White Australian situation for example, group versus individual;

(c) the methods each uses to bring about compliance vary.

6. To ignore these differences and to seek control behaviour in a minority group through the systems common to the majority group, is usually doomed to failure because in the eyes of the minority group, the systems of the majority group may be seen as illegal, and therefore there is no commitment to them, and there is no social sanction or stigma attached to noncompliance.

7. However, the practice of attempting to control behaviour in a minority group through the systems common to the majority group is not only usually doomed to failure, but is destructive to the functioning of the minority group because

   (a) it provides escape routes for the minority group's deviants who want to exploit their own system while remaining a part of their own group;

   (b) it makes it difficult if not impossible, for the minority group to exercise its own system of social control.

8. Areas in which Aboriginal customary law could be recognised - in those localities where functioning Aboriginal social groups still exist. It would not be applicable - at least so it would seem - in areas where there are a number of different groups in the one locality, for example, settlements.

9. Courts of any type would be inapplicable because of the diffuse nature of authority in Aboriginal societies.

10. Recognition of customary law could be carried out by

    (a) instruction to courts and police that certain specific matters are not subject to resolution through our legal system except if specifically requested;

    (b) learning and becoming knowledgeable about Aboriginal customary law.

11. Areas in which customary law is to operate to be defined. All people living in that area to be subject to customary law operating in that area, unless specifically exempted.

12. Implementation to take place only after the fullest consultation.

13. I see the following benefits flowing from us recognising Aboriginal customary law

    (a) it could become the first step towards having Aboriginals accepting the legitimacy of our legal system;

    (b) it would improve internal Aboriginal social control;

    (c) it would strengthen informal social control;

(d) it would cut down resentment against majority legal systems.

14. No attempt should be made to reduce customary law to writing.

R. McKEICH

Problem of defining who is Aboriginal and thus eligible to claim customary law

for example Tribal full-blood Aboriginals
Non-tribal full-blood Aboriginals
Non-tribal part-Aboriginals.

These are not separate categories but constitute a range with no clear-cut boundaries. Are we talking of social identity, genetic constitution, or geographic locality - each is a variable in understanding the concept of Aboriginality.

Need for those involved in judicial process to understand the basics of Aboriginal culture, for example, kinship loyalties, ceremonial activities, system of beliefs, cosmic views, philosophical orientation, etc. - or to be made aware of these in particular cases.

Many disputes settled at camp level before coming to attention of our courts - this process is not formalised or institutionalised but must at least be recognised as happening. Customary law may not merely represent a way of dealing with social problems but may also be a means of preventing more serious crimes.

Customary law in dealing with conflict may be applicable in geographically isolated areas where tribal Aboriginals still subscribe substantially to their traditional beliefs and practices, but may not be relevant where Aboriginals have more contact with white ways, and certainly is not applicable as 'traditional' among part-Aboriginals in country towns or in urban localities. One needs to be aware of a growing Aboriginal self-identity but this must not be confused with a traditional orientation rooted in myths and a particular 'country', and applicable only to those with spiritual and kinship ties in that locality.

Re collection and use of evidence from accused or witnesses:

Basic question of who is qualified to obtain and assess the validity and reliability of evidence.

Facts in our terms may not be 'facts' in Aboriginal terms - a different system of knowledge based upon a different set of taken-for-granted assumptions about the universe, for example, concepts of time, number, space, truth, justice, religion, etc.

Problems also include

(a) interpreter - qualifications, exact translation of words or meaning, interpreter influencing witnesses or recording incorrect statements;

(b) sacred or secret matters which may not be divulged;

(c) forms of communication other than words: body positions, hand signs, avoiding eye contact, etc.;

(d) kinship obligations to support, protect, avoid relatives;

(e) legal terminology versus customary symbolic meanings of evidence, for example, hitting a person may be assault in one system but payback expectations in the other;

(f) indirect questioning may be the rule rather than direct questioning;

(g) witnesses or accused giving 'yes' or 'no' answer without fully comprehending the question;

(h) time required to establish rapport.

SOME NOTES ON ABORIGINAL LAW

Among tribally oriented Aboriginals who still subscribe to a traditional way of life, loyalties are localised. That is, there are strong emotional ties and consequent obligations regarding the land and the people they know. Shared traditions and rituals unite people within a particular group and identify them to outsiders. However, there may be intertribal trading, shared ceremonies and shared myths.

Mythical beings laid down the law, they created life and the land forms and they instituted ways of living including a basic philosophy and sets of ideals. These patterns were not merely regarded as having been established at an historical point in time but they are 'eternal' because they

(a) continue into the present through re-enactment in ceremonies;

(b) reconstitute the first spiritual essence or power;

(c) are eternal and unvarying.

Dramatising the myth in ceremonies (corroborees) is a collective, not an individual, enterprise and therefore affirms social identity and solidarity.

The mythical beings may not necessarily have followed their own precepts, but their deviance accentuates the 'wrongness' of what is expected; for example, a mythical ancestor, Jirawadbad, kills his betrothed wife and mother-in-law because of an unfulfilled betrothal. The law-makers are above the law; they have sacred power. A warning is given that if people behave in a certain way then particular consequences will follow - a promised girl who refuses to go to her husband is likely to be punished and so is her mother because mothers must see that daughters obey. Taboos must be observed, or else.

Basically, there is close participation by all members in the total everyday culture. Children learn roles and expectations; they learn about the taken-for-granted aspects of life; they all base their behaviour on myths even though women and children may not know some of the myths as such.

Children are reared 'permissively'. There are few restrictions imposed and camp life requires few 'boundaries', such as 'don't touch', 'don't go there', 'don't talk', etc.

For a boy, initiation is the beginning of his formal education in 'the law'. There is a gradual revelation, often accompanied by disciplines such as not looking, endurance tests, and bodily operations. Parental control of childhood is superceded by the stricter control of another relative, often by a mother's brother. Youths are introduced to disciplines through obligations toward those who make it possible for him to 'become a man' (for example, the ones who circumcise or subincise, those who form the 'operating table', blood donors, painters, etc.) A ritual death and resurrection allows

(a) exclusion from alternative influences;

(b) change of identity from child through non-person to adult;

(c) learning of new rules and laws under emotionally heightened circumstances;

(d) relatively long time span (one to four years) emphasises the importance and allows for reinforcement through repetition.

For a girl, breast growth and menarche are sometimes associated with rituals and taboos. Stories teach role expectations, for example, she may not stare or smile at other men, stay with her husband, observe kinship obligations, share the food she collects, care properly for her children, carry appropriate loads, learn and perform women's ceremonies, and so on.

The biography of authority is

(a) child under parent's jurisdiction and under others to a lesser extent;

(b) at puberty authority shifts to special adults, not necessarily the immediate kin but usually closely related. They are tied more closely into the kinship structure, the section, subsection, moiety, generational relationships;

(c) adults are expected to 'know' and there are cross-cutting sanctions with the major authority resting in the elders.

Note the range of authority from parents, to immediate kin, to wider kin, horde, clan, tribe. Note also the range of responsibility rests first of all with parents and finally with the individual himself. Elders have control over others, but only over a certain range of others who stand in particular relationships with them. Authority is gained

by age, grey hair, personality and degree of initiation; also by an ability to manipulate a power-enhancing system such as by the allocation of girls as wives, the possession of several wives, special knowledge, 'ownership' of a myth, sacred site or sacred object.

There are ritual ways of maintaining order, getting rid of conflicts and tensions, and dealing with actual grievances, for example, joking, gossip, acting out idiosyncrasies, ritual taboo breaking, story telling.

Sometimes supernatural explanations are given as reasons for illness, lack of success in food-gathering, death. Spirits are said to have punished the offender or his kin. This has a dual effect

(a) provides an explanation for what cannot be explained in other ways;
(b) it is an encouragement to conformity for fear of supernatural sanctions - a form of non-human intervention in social control.

Sorcery is a human-manipulative means of social control. People fear magical action against them. Also there is fear of being accused of being a sorcerer.

A person may 'dream' about another's offence against himself, for example, marital infidelity of his wife. Of course he may have prior knowledge and have the dream at a politically convenient time.

Actual punishment may be physical, a beating, spearing in the thigh or buttocks, or spearing to death. Such severe measures may be taken in the heat of emotion, or after consultation among elders. More serious than spearing to death is killing and the deprivation of mortuary rituals. All physical punishments are never treated lightly by participants, there are appropriate rituals and degrees of severity for different kinds of offences and offenders.

The concept of Aboriginal justice may be very loosely described as self-help to restore a breach in social relationships. Where the social relationships are kin-oriented, kin are usually responsible to see that appropriate action is taken either directly by themselves or by being delegated to others.

Where there may be inter-tribal fueds or conflicts it is possible for actual or ritual conflict resolution to take place prior to mutual sacred ceremonies - mock battles, verbal abuse, vicarious substitutes, blood letting ceremonies, etc., may ease the tension and allow ceremonies to proceed in harmony.

There are no constituted councils to deal with law-breaking, but conferences among elders are common - not all elders may necessarily participate and frequently there is a senior man (head man) whose authority/power is stronger than that of others who may play a prominent part in proceedings. Elders may carry out their deliberations within the camp (usually uninitiated men and women and children are excluded), on the outskirts of the camp, or 'in the bush', or on the/a sacred ground. There is variation throughout Australia on the exact constitution of 'the court'.

It is very difficult to separate offences against individuals, and offences against the group as a whole. The network of kin is so interwoven (one needs to know the section and sub-section and moiety, etc., systems to appreciate this point) that an individual problem might involve the alignment of kin for and against the accused. Cross-cutting of kin relationships, especially those of marriage or religious ritual obligations may render an apparently individual matter, one that reaches out to many reciprocally involved kin.

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R.S. O'REGAN

The discussion in this Study Group has indicated to me that there is no single way in which customary law might be utilised in the various criminal justice systems which we have considered, except in mitigation of penalty for criminal offences.

Beyond that there is no agreement. Personally I think that in Papua New Guinea customary law should also have an impact on the determination of criminal responsibility for the reason indicated in my comment on Sir Sydney Frost's paper, that is, to close, or at least reduce, the gap between criminal guilt and moral fault. However, I now appreciate that there is no similar need in other countries such as New Zealand and Fiji. Perhaps the Papua New Guinea experience is more relevant to Aboriginals living in traditional societies in Australia.

Perhaps also the village court experiment in Papua New Guinea is particularly relevant to rural Aboriginals in Australia but not

necessary or workable elsewhere. Its main importance is in its recognition of a valid and viable legal system as worthy of respect as its imposed European alternative. However, the concern of such customary law to compensate the victim and his or her relatives and to thereby restore the social equilibrium is one which might engage the attention of persons involved in the administration of other criminal justice systems in which punishment of the offender is a primary consideration.

The discussion has convinced me that the primary importance of customary law in traditional societies is in the prevention of crime, the preservation of social order. Its significance in this report should be recognised.

This might be done by legislation, as in Papua New Guinea. My mind has wavered on the question whether there should be similar legislation in other countries. However, I think there is more to be said for informal, administrative recognition of customary law, that is, recognition by the various officials involved in the Western criminal justice process. Most important of these is the magistrate who should exercise his various discretions in conformity with customary law.

It follows that I do not think the Papua New Guinea village courts (which actually administer customary law) provide an apt precedent for other countries where circumstances are quite different. In those countries there is no need to institutionalise the recognition of customary law by establishing a court system.

J. LEMAIRE

'The Use of Customary Law for Crime Prevention and Control' can be considered briefly at three stages

1. pre-trial, preventative or social control stage;

2. trial stage in respect of criminal responsibility and mitigation (or either of them); and

3. post-trial stage in the treatment of offenders.

Stage 1

Village or community groups or courts can prevent wrong action by community pressure in anticipating trouble, calling the parties before them and laying down courses of conduct after hearing the parties and letting them 'talk it out'.

It may be possible to formulate rules of conduct for the guidance of people likely to be affected by some relevant act.

Stage 2

Perhaps a distinction should not be drawn between civil and criminal cases and instead Brown's classification of big wrongs and

little wrongs preferred (see XLI *Oceania* 244, Outlook for Law in New Guinea). Big wrongs should attract punishment, little wrongs compensation. Big wrongs should be dealt with by the superior courts, little wrongs by, say, village courts or their equivalent. There may be some room for village court compensation orders after superior courts have dealt with the punishment aspects.

In the case of big wrongs, custom should only be a defence to criminal responsibility where an element of the offence is acting without reasonable cause, or where it is necessary to prove that the defendant knew his act was wrong, but perhaps the criminal code could be amended to provide for moral guilt as an element of criminal responsibility. However as much depends on community values and these vary, it would be difficult to state categorically the cases in which this should be done.

Custom may be used in mitigation in two ways

1. by applying the principal of Kriewaldt, J. in *R.* v. *Bobby Anderson* (1954-1955) N.T. Law Reports 130, that is, that the less the Aboriginal has adopted European ways, the more it should go in mitigation; or

2. by applying the principle of racial integrity expressed by Gore, J. in *Justice v Sorcery* (The Jacaranda Press, 1965) at pp.77-78. Racial integrity depends on how seriously the offence is regarded by the native group to whom the offender belongs.

In conflict cases, for example, *R.* v. *Tjapaltjari* N.T. Supreme Court No. 3223 of 1969, where the defendant killed his wife after she had committed what was regarded by his tribe as adultery and incest and his tribe thought it was wrong that he should be punished by the Court at all, this should be a strong mitigating factor. On the other hand, there are offences which the tribe regards much more seriously than Europeans and this should go in aggravation of penalty as regards a member of that tribe.

I prefer the principle of Gore, J. to that of Kriewaldt, J. but perhaps there is room to apply both of them.

Stage 3

In the case of big wrongs, query whether European punishments, for example, prisons have any effect on Aboriginals. Regard should be had to matters that the offender's group would regard as effective penalties. Perhaps banishment, or preventing the offender from going to the pictures, may to some extent be regarded as punishments.

As regards treatment, education is important but this should have regard to tribal culture and custom. Elkin considered the prison system had failed because it was not organised as an educational institution where Aboriginals could learn things of value to them (Elkin, The Aborigines and Flogging - letter to *The Sydney Morning Herald*, 21 February 1938 at p.6).

Restrictions on the Use of Customary Law

As regards Stages 2 and 3 but not Stage 1, it is submitted that customary law should be used in the transitional stage only and should gradually be eliminated.

The problem does not appear to be primarily a question of race but is largely one of economic development and people at the lower end of the economic scale are adversely affected be they Aboriginals or Europeans. Unfortunately most Aboriginals have been a depressed class.

The task should be to improve the educational system, to make it more meaningful to Aboriginals, to give them motivation so that they can hold their own in the economic system. It now may be too late to go back to the old way.

In the struggle for national identity there must be one system of law. Divided systems will frustrate development and encourage isolationism. Moreover traditional custom is not capable of dealing with modern realities like companies, partnerships, road and air traffic, health, housing, fire control and safety regulations which are playing an increasing part in modern society.

Moreover customary law should be, in the main, restricted to settlements. Once it is allowed in the towns, it will be difficult to draw the line between customs of Aboriginals and other races; for example, there is no reason why Kriewaldt, J's theories of provocation should be restricted to Aboriginals, they could be applied say to the case of a Maltese sailor who kills a Greek fishmonger in Melbourne. (See Morris and Howard, *Studies in Criminal Law*, Oxford, 1964, pp.97-98).

Finally I should like to refer to the views of John Goldring in 'Just Law for a Primitive Society' (6 *Sydney Law Review* 371). He says that there are some hundreds of tribal groups in Papua New Guinea, few of whom have a common language. There are few uniform customs.

While ideally it would be desirable to formulate a law which had its base in the customs of the country, it is impossible that the necessary anthropological or necessary legal skill would ever be available for the task, even if tribal rivalries would ever permit a compromise between conflicting customs. For this reason the first alternative (European law) seems to be preferable. (See *ibid* at p.379).

With the increase of travel and communication there is a need for uniformity, and a query whether even the national rules are sufficient because an increasing number of activities have an international character. Is the question simply one of education and social conditioning so that all will come in time to accept common standards of justice, which differ from those handed down by local tradition? (ibid at p. 3801)

Clearly a uniform system of law must be applied to Papua New Guinea both to 'advanced' as well as 'primitive' areas. (See *ibid* at p.381.)

JOHN HOWARD

Major differences regarding customary law situations in other parts of the world emerged from the discussions. Contrasts between the Australian position and those in Papua New Guinea and parts of Africa were shown to be particularly marked. They emphasise that varied approaches to the use of customary law in criminal justice systems are required.

In many ways the Australian situation appeared to be closer to that in New Zealand, where it is understood that the relevance of customary law in this context is limited to being a mitigating factor in sentencing.

Briefly summarised, the following are some of my conclusions tentatively reached in the light of the discussion of the Study Group and my own limited experience.

Every assistance should be given to the recognition and appreciation of Aboriginal customary law; however, statutory recognition might have more deleterious effects on its operation and development than benefits.

Provision of some sort of structured court system with Aboriginal officers is likely to be inappropriate to Aboriginal techniques of dispute resolution. It implies specific people from a community being assigned roles vis-a-vis the rest of the community. Whereas Aboriginals operate on a more fluid basis with different people, depending on the circumstances, appropriately intervening, mediating and influencing.

The diversity of Aboriginal communities: the varied nature of the missions and settlements suggests that without much more idea of what the Aboriginals in those communities think about this aspect, a general conclusion has to be treated very cautiously.

With varying degrees of effectiveness, Aboriginals apply their own solutions. In doing so a difficulty they face is that sometimes their own legitimately applied sanctions contravene the dominant European influenced law; and sometimes there is uncertainty whether they will or not. Here is a problem that is particularly important to treat with much wider understanding.

The position of 'town' Aboriginals should be looked at separately.

Often they are 'in between people' outside the usual Aboriginal controls, and outside the society imposing on them its controls. They live adjacent to the dominant society, mostly in fringe reserves on the edges of towns. Support elements, ancillary controls, available in other circumstances are less available: liquor and motor cars, primary agents contributing to Aboriginal contraventions of 'white' law are relatively readily accessible, and law enforcement operatives are on the spot. Hence, these people of the fringes have especial vulnerability

towards committing infractions against the wider Australian criminal justice system. And the proposition for greatly increased review of their total situation prior to any finding by a court as opposed to looking at aspects of their position simply before sentencing, is welcome.

I have distinct reservations regarding the rather special care (at present anyway) of Aboriginally owned - (that is, white law titled vested) stations. Discussion focussed on the question whether the owners of such stations, who also have Aboriginally recognised rights in the land, should have the power to stop other Aboriginals from

1. traversing and seeking sustenance on the land;

2. remaining there for a period exceeding that of any traditional entitlement.

The practical difficulties confronting Aboriginals trying to run a station, when transitory Aboriginals cause disruptions or remain there for a long period are recognised. But since the title holders are in a relatively fortunate position compared with that of most other Aboriginals, suppression of the latter's statutory rights, to the further relative advantage of those in possession, may, I think, stimulate difficulties, and in real terms I doubt whether the suppression would ease the position.

APPENDIX

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