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ABORIGINALS

Hon Justice M D Kirby

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INTRODUCTION

My talk today covers a wide area. But my purpose may be stated shortly: I wish to show generally the importance of an understanding and justification of benign discrimination and specifically the importance of this understanding to the application of the criminal justice system to traditionally oriented Aboriginals.

To accomplish my purpose I have canvassed what I see as the law's role in the elimination of racial discrimination. In addition I have attempted to describe society's interest in the elimination of racial discrimination.

The problems faced are gargantuan - all I propose to do is raise issu

I. PROBLEM WITH DISCRIMINATION

Australia has been slow to deal with the problems of discrimination. We have too often looked outward, to overseas to view problems without examining ourselves. Aboriginals, migrants, women, the poor and the indigent will tell us that our society does not provide the necessary preconditions for Australia to live up to its egalitarian ideals. Examinations of this kind are painful but absolutely necessary. Recent years have witnessed a willingness this self catharsis; today's seminar is an example of this consciousness raising.[1]

Discrimination

It is often said that the problems of discrimination are for the altruistic amongst us. Discrimination is something we can live with; something we can remedy when our society can conveniently allocate its resources to the task. I completely disagree. The elimination of discrimination in our society is imperative. The maintenance of our society demands that we vigorously work to this end. Discrimination has deleterious consequences both on the individua suffering from it and on society imposing the discrimination. This is well put by Bonfield :-

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1. The poverty situation of Aboriginals is Documented in Commission of Inquiry into Poverty : Poverty in Australia. 1st Report.

"The deleterious consequences of a society's failure to assure all its citizens this equality of opportunity are many. For the minority group member who is discriminated against, it means an arbitrary and unjust refusal to allow him to fully develop his potentialities, and share in the fruits of his society. Such people find that even the basic necessities of life are unusually difficult if not impossible to obtain. In addition, when the members of a particular minority group, such as negroes, are denied equal access to the resources of the community, they are stamped with a badge of caste, of unwarranted inferiority, which they have every right to resent. Such treatment cannot help but cause ill feeling among the 'outcasts', dampen their motivations and ambition, and create an attitude of discouragement. Such treatment also subjects members at the excluded group to frequent humiliation, inconvenience, degradation, and added expenses not suffered by other persons in the society.

The community as a whole also suffers from the absence of equal opportunity for all. It loses the contributions that might have been made by minority groups excluded from the main channels of its activities, and also the full potential of a market which would otherwise be in a better position to purchase available goods and services. In short, discrimination retards the growth of the economy. It leads to a dismal and distressing squandering of human resources. It does not allow many persons to fulfil their economic potential, thus making the community as a whole poorer."[2]

Beyond our national interest Professor W.M. Reisman of Yale has agrue that the elimination of racial discrimination is necessary for the "maintenance of minimum world order". He contents that :-

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2. A. Bonfield, "The Role of Legislation in Eliminating Racial Discrimination" 7 Race 102 at 107, 108 (1965).

> "Peace in the sense of continuing expectations shared by all peoples that public order will be maintained by noncoercive means and that the structures of public order will be responsive to the legitimate demands of human beings, necessarily rests on a co-ordinate expectation: that public order structures seek the inherent worth and dignity of all men and are to secure the realization of these values."[3]

This statement must apply even more strongly to the domestic situa It seems clear to me, interpolating from Professor Reisman's policy oriented language, that for our society to function without the application of freedom restricting methods and to be responsive to the demands of our citizenry that our laws must reflect the "inherent worth and dignity of all me Discrimination is a basic denial of the "inherent worth and dignity" of men.

II. THE LAWS' RESPONSE

Society is controlled and regulated by many factors. For instance, common understandings and expectations. The law is but one of these factors. It is however, the most important tool at society's disposal for coercively regulating it. What role can the law paly in eliminating racial discrimination? It has been denied that the law as it operates within our present system can do very much.[4] Others have been more sanguine.[5] I do not want to say more about this controversy but that it is common ground that the law has an indispensible role.[6]

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3. W.M. Reisman, Responses to Crimes of Discrimination and Genocide : An Appraisal of the Convention on the Elimination of Racial Discrimination, 1 Denver Journal of International Law and Policy 29,40 (1971). Reisman forcefully points out the international dimension of racial challenge to the Racial Discrimination Act.

4. B. Kelsey, A Radical Approach to the Elimination of Racial Discrimination. 1 U.N.S.W.L.J. 56, 71 and 72 (1975).

5. See Bonfield "..." op.cit.

6. See Bonfield, "the law with reactive, physical, moral and economic force of the State behind it, in fact a highly efficacious and demonstrably successful means by which to control behaviour" at p.

III. THE AUSTRALIAN LEGAL RESPONSE TO RACIAL DISCRIMINATION

Until recently Australia's performance in the elimination of racial discrimination, in the light of the ideals of this country, has been dismal. Aboriginals have particularly suffered; their land has been taken, their society has been destroyed.[7] At one time we basked in the comfortable notion that our "aboriginal problem" would literally die off. White Australia deserves little credit for the non-fulfillment of this prediction.

In regard to other disadvantaged groups, Mr Grassby will know of the very real discrimination suffered by many migrants.[8]

(a) Precedents

The Common Law has proved a poor champion in protecting people from discrimination.[9] Some nations have seen salvation by entrenching a Bill of Rights in their Constitutions. The United States experience demonstrates that this is not a panacea. The Civil War Amendments, the 13th, 14th and 15th of the U.S. Constitution, did not prevent a widespread, legally enforced system of segregation in the South of the United States; a system which received the imprimatur of the Supreme Court in the Plessy v. Ferguson case. This case was not overruled until Brown v. Board of Education of Topeka in 1954. However, since that case these Amendments have enabled the Negro to accomplish major changes in American society.

The possibility of an entrenched Bill of Rights in the Constitution has been raised from time to time in Australia.[10] Indeed the following section was suggested at the time of Federation :

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7. C.D. Rowley, Outcasts in White Australia, Passim.

8. See Sackville Report : Law and Poverty in Australia

9. See Lester and Bindman, Race and the Law; Dicey "Now, most foreign constitution makers have begun with declaration of rights. For this they have been in no wise to blame".

10. The first suggestion was before the Constitution came into being. Inglis Clark, an architect of the Constitution, pressed for the following clause which was adopted in the 1891 Draft, Chapter IV, s.17 -
"A state shall not make or enforce any law abridging any privileges of citizens of other States, nor shall a State deny to any person within its jurisdiction the equal protection of the laws". He later suggested a more elaborate hold-all clause :- (see p.22.23.).

"The citizens of each state and all other persons owing allegience to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the priviledges and immunities of the citizens of the Commonwealth in several states, and a state shall not make or enforce any law abridging any priviledge or immunity of the citizens of the Commonwealth, nor shall a sta te deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws."[11]

It is worth noting that a major reason for rejecting this provision was to leave in tact existing discriminatory laws. Under these laws the rights of Chinese and coloured aliens were severely trammelled.

(b) Course Adopted

There is a middle course between leaving matters in the hands of the Common Law and having a Constitutional Bill of Rights. This is to enact ordinary legislation to alleviate apparent problems. This is the course which has been adopted in this country.

The legislation which immediately comes to mind is the Racial Discrimination Act, 1975.[12] This legislation is to be distinguished from a constitutionally entrenched Bill of Rights because it can be amended, or repealed by ordinary Parliamentary processes. The Human Rights Bill would have shared the same characteristic. Although this Bill has now lapsed, the Attorney-General in a speech to Women Lawyers on Friday, 11 June indicated that the Government was now looking into the establishment of a Human Rights Commission. One of its tasks would be to review proposed legislation from the point of view of human rights. Such a body could perform a valuable service in this direction. But the Law Reform Commission itself has an appropriate function here.

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11. La Nauze, "The Making of the Australian Constitution (1972) at 165.

12. Act No.52 of 1975.

Other legislation concerns Aboriginal Land Rights. This is a major advance because of the importance of land to the Aboriginals and the harnessing of the land so that some may escape the yoke of dependence on the white man.[13] On an extra-legislative basis the Committee on Discrimination in Employment and Occupation has done a valuable job in the employment situation: perhaps the most difficult area to rid discrimination of, but the most important for the person discriminated against.[14]

IV. THE INTERACTION OF REAL AND BENIGN DISCRIMINATION

The Racial Discrimination Act, 1975, is legislation designed to give access to redress. Amongst other things, it proscribes activities which are racially discriminatory. It does not purport to give minorities rights which would not be available to other citizens. It purports to ensure that no barriers are maintained or raised to deny access to power positions in our society: positions which are now basically the province of the white community. To be distinguished from such "access-giving" legislation, is legislation granting positive benefits to a minority group not given to the majority group. Land Rights legislation is an example of this. This legislation is often designed to provide the necessary environment so that people who have been discriminated against in the past can take full advantage of the "access giving" provisions of the Racial Discrimination Act. What is the use for instance of giving equal access to Aboriginals to enter law school, if the conditio prevailing in society prevent most aboriginals from finishing High School?

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13. Aboriginal Land Rights (N.T.) Bill, 1976 (introduced 4 June 1976); Aboriginal Councils and Association Bill, 1973 (introduced 3 June 1976).

14. See the 1st and 2nd Annual Reports of the National Committee on Discrimination in Employment and Occupation. 1973-1974: "Towards Equal Opportunity in Employment. 1974-1975 : "Equality in Employment". The Committee was established upon the ratification by Australia of the International Labour Organisation Convention No.111. The National Committee in both its first and second reports expressed concern about the lack of use of the Committees by Aboriginals. The National Committee has attempted to bring the Committees to the Aboriginals through the vocational officers of the Department of Employment and Industrial Relations (p.15).

It seems to me that both types of legislation are necessary. In a way the Racial Discrimination Act is legislating for a more perfect society than we have; positive legislation, social programmes are necessary to bring minority groups to a base level.

The Racial Discrimination Act, wisely provides for this type of positive legislation. It provides in section 8(1) that Part II of the Act does not apply to the application of "special measures to which paragraph 4 of Article 1 of the Convention applies". Without going into the exact wording, the section provides that the type of positive program discussed will not fall foul of the Act. Parliament recognized that to eliminate discrimination positive programs of benign discrimination would be necessary.

The New Zealand Race Relations Act 9 includes a broad provision exempting from the effect of the Act any activity which otherwise constitutes a breach where it :-

> "(a) ... (I)s done or omitted in good faith for the purpose of assisting or advancing particular persons or groups of persons or persons of a particular race, colour, or ethnic or national origina; and
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> (b) (Where) groups or persons need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

The United Kingdom Race Relations Act, 1968 and the Ontario Human Rights Code do not include any such general provision saving the operation of the respective Acts in situations conferring benefits.

V. THE NEED FOR BENIGN DISCRIMINATION

Benign discrimination[15] may be defined as discrimination of a kind which

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15. Benign discrimination has recently arisen judicially in the United States. In De Funis v. Odegaard 82 Wn.2d, the plaintiff, a white challenged the admission program of the University of Washington, School of Law. The contention was that the program gave some preferences to minority students over academically better qualified candidates and accordingly that this violated the equal protection provision of the 14th Amendment of the U.S. Constitution. The Supreme Court of Washington held that the program was not violative of the 14th Amendment. Unfortunately, the Supreme Court (U.S.) did not decise the point.

confers benefits on a group usually discriminated against in a real sense.

It is often stated that discrimination whether it is real or benign is per se bad. It is said that the law should be completely "colour-blind".[16]

Gareth Evens has said -

> "... complete colour-blindness is not necessarily a good thing, any more than age blindness or sex blindness or handicap blindness are always good things".[17]

In other words, would any of us contend that old age pensions and schools for handicapped children were discriminatory and per se bad? In answering the contention in relation to Aboriginals Dean Wootten now Mr Justice Wootten of the N.S.W. Supreme Court, eloquently stated :-

> "This argument seeks to perpetuate the effects of past handicaps to the advantage of those who did not suffer them. For the past 180 years Aboriginals have suffered enormous handicaps in Australian society by comparison with whites, commencing with violent dispossession from their land and destruction of their social fabric, and continuing through various forms of legal, social and economic discrimination. It would be the height of hypocrisy for white Australians now to say to Aborigines that from here on the race must be on equal terms, without taking into account the 180 years start which white Australians have given themselves. This is particularly unfair when one considers how much power, prestige, affluence and education in the white community has been built on the exploitation of land from which whites ousted blacks.[18]

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17. G. Evans, Benign Discrimination and the Right to Equality, 6 F.L.Rev.26,33 (1974).

18. Statement before the Senate Standing Committee on Constitutional and Legal Affairs. August 1972. Commonwealth Parliamentary Papers-Senate.

Benign discrimination when applied to racial or ethnic groups usually results in a strong majority group backlash. This is not a phenomenon always confined to the bigotted but can be observed also amongst some of the more enlightened. I agree with Gareth Evans that this response can be attributed to three attitudes.[19] First, a feeling that discrimination in favour of a group is individually unfair. A white who misses out on a University place because of an Aboriginal has been given preference will naturally be embittered. He will plead that it is unfair that he should suffer in order to giv an opportunity to an Aboriginal, when personally he is not guilty of racial discrimination.

A second reason is that benign discrimination may be overinclusive, i.e., it may include Aboriginals who are well off and do not need special privileges granted.

A third reason is that benign discrimination may be underinclusive in that it does not include in the group advantaged others who are as badly off. There are undoubtedly some whites who are as disadvantaged as Aboriginals. This group may well argue that they too should be afforded the advantages given to the Aboriginals. I expect that arguments raised in the initiatives being taken by the Government on Aboriginal housing will yield to this classification.

I do not want to discuss these criticisms of benign discrimination. Gareth Evans has ably done this. I think the criticisms can best be countered by pointing out that the most we can hope to accomplish is substantial justice; perfect justice in this imperfect world of limited resources does not exist. Benign discrimination programs are designed to give substantial justice, not perfect justice. It seems to me that an understanding of this classification would aid in clarifying the thinking of many who now criticise benignly discriminatory programs.

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19. G. Evans, Benign Discrimination and the Right to Equality, op.cit. at 43,44.

VI. DISCRIMINATION IN THE ADMINISTRATION OF JUSTICE

Discrimination in the administration of justice poses difficult problems. The Racial Discrimination Act, 1975, sections 9 and 10, make unlawful, inter alia, discrimination on the basis of race, colour or national or ethnic origin, in the administration of justice.[20]

That discrimination against Aboriginals exists in the criminal justice system was forcefully pointed out by Elizabeth Eggleston in her path-finding work in this area.[21]

The Sackville Report on Poverty[22] contains a study of "Disadvantaged People and the Law".[23] The relevant Part is divided between "Migrants and the Legal System" and "Aboriginals and the Law". The study shows clearly the discriminatory aspects of the administration of justice as applied to these groups. The discrimination runs from the initial contact with police, in respect of the criminal law to the nature of court proceedings.

Australia is not alone in having the criminal justice apply harshly in respect of aboriginal peoples.[24] It is generally in the criminal justice system that it is most visible. However, other areas of law also can work to the disadvantage of Aboriginal peoples.[25]

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20. Note that s.9(2) refers to Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination. Article 5(a) reads: "The right to equal treatment before the tirbunals and all other organisations administering justice. This discrimination as to this right is expressly prescribed."

21. Elizabeth Eggleston's Ph.D thesis on this area has now been published : E. Eggleston, Fear, Favour or Affection, A.N.U. Press.

22. Law and Poverty in Australia, 2nd Main Report, October 1975, Commissioner Professor Ronald Sackville.

23. Id. Part IV.

24. The Report of the Law Reform Commission of Canada, The Native Offender and the Law, 1974.

25. See Background Paper of Law Reform Commission of Canada, Family Law and Native People, 1975. See Generally, Aborigines Human Rights and the Law (ed. Gar[illegible] Nettheim) 412-480.

Migrants too suffer from the administration of justice in our courts.[26] Mr Grassby has pointed out, for instance, the difficulties encountered by migrants who have little or no command of English; often it seems justice is denied them. I acknowledge the problems faced by migrants but I wish to confine my concluding remarks to traditionally oriented Aboriginals; those Aboriginals who still live within a traditional system[27] or motivated by traditional beliefs.[28]

VII. THE CASE FOR BENIGN DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

(a) The Aboriginal System of Law

In a case, sometimes seen as the highwater mark in the denial of Aboriginal Rights, Milirrpum v. Nabalco Pty Ltd 17 F.L.R.141[29] Mr Justice Blackburn of the Northern Territory Supreme Court recognised that "natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence. The system was recognized as obligatory by a definable community of

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26. See Sackville Report, op.cit.216-243.

27. Professor Elkin in "The Australian Aborigines - How to Understand Them" 3rd ed. (1954) identified four main groups of Aborigines. The first group consisting of several thousand full-blood remain, living all or part of their time in their former traditional, semi-nomadic way, mainly in Arnhem Land and the West

The second group consists mainly of full-bloods, who live or work on stations or around towns and mines. "Though ... relatively detribalized they still speek their own languages and observe as far as possible their social rules."

A third group is made up of full-blood remnants and part Aborigines scattered and completely or almost completely detribalized.

A fourth group consists of wholly mixed bloods, mainly quadroon and lighter. These are usually assimilated in one way or another in urban life.

C.D. Rowley differentiates between traditionally oriented Aboriginals and fringe and city dwellers, by treating the two groups separately; the former in "The Remote Australians", and the latter in "Outcasts in White Australia".

My concern is basically with the first two groups, although there may be some instances where Aboriginals in the third group may commit an offence by following traditional customs.

28. The Sackville Report. op.cit. at 280 describes some of the particular difficulties of "Tribal Aboriginals".

29. See Nettheim (ed.) Aborigines, Their Rights of the Law. op.cit. at 85ff.

Aboriginals which made ritual and economic use of the areas claimed (i.e., the Gove Peninsula). Accordingly, the system established (could be) recognised as a system of law.[30]

Thus, the starting point is that Aboriginals with a traditional system do have binding customary laws to which strict adherence is demanded. It was into a well-developed, pre-existing system that English Common Law intruded.

(b) The Application of the English Criminal Justice System

There are many cases demonstrating the disastrous application of the English Criminal law to Acts of Aboriginals which have been done pursuant to customary law; where an act regarded as a minor infringement of customary law would be treated as grave by the Common Law. The long line of cases goes back to R. V. Jack Congo Murrell (1836 1 Legge (N.S.W.) 72). The case of R. v. Willie Wheelbarrow illustrates my point.[31]

> "On 6th September 1964 at the Port Augusta Circuit Court, Chamberlain J. sentenced six full-blood aborigines, including Willie Murray 'sometimes known as Willie Wheelbarrow', Skinny Jack and Johnny Allsop, 'sometimes know as Left Hand' for conspiracy to kill and murder one Chimney Evans. It appeared that some five years previously the deceased had stolen sacred relics of his tribe and sold to them a tourist. This was a serious offence for which, under tribal customary law, the offender was liable to be put to death. Chimney Evans was well aware of this fact, and for a long period of time kept out of the reach of the tribal executioners by living under white protection. Some time later, he reappeared and after an incident, the defendants met in solemn conclave and decided that the execution of Chimney Evans must take place for his breach of tribal law. Evidence was given that once this

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30. Id, at 267. See also R.M. and C.H. Berndt, The World of the First Australians, (1964) at 446.

31. Unreported : cited by Mitchell J. "Aboriginals and the Law" 1969 Australian Quarterly Review 156. Other examples may be found in L.R. Hiatt, Kinship and Conflict (1965) Sydney U. Press. 75, 147ff.

> decision had been taken it was absolutely imperative that the defendants carry out the sentence. The execution duly occurred and the defendants were duly tried and found guilty of murder.
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> Chamberlain J. in sentencing said: "I have been urged to impose more or less nominal sentences for a number of reasons. The first I accept, namely that the accused are all respectable ordinary law-abiding people. But the main contention is that they acted in accordance with tribal law and that particularly the younger ones may have been in a serious position if they had refused to agree to a decision of the elders of the tribe. This may be true enough, but there is a limit to which the Court can accept it as an excuse for what is after all a very serious crime. No doubt tribal justice may be administered among the tribes and in their native habitats, in ways in which white authorities may be well advised not to interfere. But where the Aborigine comes within White influence he must learn to obey white man's laws and if the tribal leaders do not understand this they must be taught it in no uncertain terms. They must learn that whatever their own customs they must obey first and foremost the law of the land. Those most anxious to see the Aborigines assimilated into our civilization should be the most ready to acknowledge that their first lesson should be to obey our laws."

An abrupt turn from this application of white man's law is the recent South Australian Supreme Court case of Williams. Wells J. suspended the two year manslaughter sentence of Williams, an Aboriginal who had killed his wife. Williams had hit his wife on the head after she had shouted words relating to secret tribal rites intended only for adult tribesmen. The sentence was suspended on condition that Williams be dealt with "lawfully" by the elders of his tribe. The action of Wells J. has created much public debate. One newspaper editorial dubbed it "a reversion to barbarism".[32]

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32. Editorial, The Australian 18.5.1976.

The decision was the subject of a question in the House of Representatives in Canberra. Much of the criticism was made without reading the judgment.

Interest has been stirred in legal circles. According to a newspaper report a solicitor in a case last Tuesday in which an Aboriginal was charged with murder claimed that the Court had no jurisdiction because of the man's race. The Article reports that the defence contended that "Aborigines could constitute a Court that would try [the accused] according to their own customs."[33] The submission was rejected.

These examples point out some of the problems encountered in the area. They show that the law must be wary about recognizing customary laws. However, it seems that the path will be clearer if several points I have raised earlier are borne in mind.

(c) Delimiting the Group

It seems to me necessary that any recognition of customary law must be confined to traditionally oriented Aboriginals. That is mainly to groups one and two described above. The urban Aboriginal would clearly have no claim to recognition of customary laws. The others may have a different claim.

(d) Recognition as Benign Discrimination

Any recognition of customary laws can be viewed as benign discrimination, in that traditionally oriented Aboriginals are being treated in a different manner than Whites. One would not expect to find the white backlash as discernable as in the usual benign discrimination situation, because by defining "traditionally oriented Aboriginals", the over and under inclusion problem is obviated. This leaves only the first basis for the backlash, that the different treatment of Whites and traditionally oriented Aboriginals is unfair.[34] In the criminal law context the proposition that this is unfair may be groundless when one looks at the purpose of the criminal law. The basis of English Criminal Law is that to be guilty of a crime the accused must be proved to have possessed a criminal intent at the time of the commission of the crime. The defence of insanit

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33. Sydmey Morning Herald 16.6.1976.

34. See above p.

for example is based on the notion that an insane person is incapable of having his intent. A traditionally oriented Aboriginal, acting pursuant to customary law or conceiving his action to be justified within the tribal framework, may no possess the same blameworthy mind as the ordinary citizen.

Moreover, a basic rationale for the application of criminal sanctions in English law is that the motivation to do certain of these acts of a socially destructive nature will be dampened. The application of the English Law to the traditionally oriented Aboriginals is without this rationale. These people operate within a different frame of reference.

Viewing the problem in terms of benign discrimination clarifies thinking on the justifiability of the application of customary laws, and provides guidelines on the hard problem I do not pretend to solve at this time - how should it be done?

(e) How it Should be Done

I think most will have agreed with me so far. However, the crunch point is: how customary law will be recognized. For instance, should a discretion be given to judges to take customary laws into account when sentencing? [35] or should the customary law penalty automatically apply. Should customary law be available as a defence; or should separate courts be established to deal with these cases? Ancilliary problems are present; what will constitute proof of a tenet of customary law; will limits be drawn where a customary law may be said to be contrary to the basic tenets of the Common Law? Are some such tenets just unacceptable in modern Australia?

I make no pretence at suggesting solutions. I do say that this an area of law that bears close examination.

My talk has, I hope, established a framework in which proposals can be weighed. Perhaps this Seminar will make some headway towards a solution of this thorny problem. It certainly comes at an opportune time.

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35. See Eggleston, Fear, Favour or Affection, op.cit.