ADMINISTRATION OF CRIMINAL JUSTICE ON ABORIGINAL SETTLEMENTS.

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In the area of the administration of criminal justice, the Northern Territory is plagued with a number of seemingly insoluble problems. Ranking high in the order of problems that officials in Darwin would like to see disappear, is the question of justice on Aboriginal settlements. Interestingly enough, the issue of justice on Aboriginal settlements not only involves the difficult issues

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of Aboriginal relations but also incorporates the very topical problem of whether human rights should be codified or whether the codification of a Bill of Rights needlessly limits the flexibilty in the common law. What will be attempted in this paper is to set out the deficiencies in the present system of justice on Aboriginal settlements and then go on to show the inherent difficulties in replacing the present system with any other. Finally, by drawing an analogy between this system and the existing system of criminal justice on American Indian reservations and the jurisdictional and procedural restrictions placed on their tribal courts, it will be argued that past and present policies toward Aboriginals and the criminal law generally coupled with the ratification of the United Nations Covenant on Civil and Political Rights and the proposed Racial Discrimination Bill and Human Rights Bill greatly restricts the possible solutions to the problem.

I THE PROBLEM

A. Logistical Difficulties

Criminal Justice in the Northern Territory is a continual battle between man and geography. At the present time within the Northern Territory there is a Chief Magistrate and two Stipendiary Magistrates stationed at Darwin and one Stipendiary Magistrate stationed at Alice Springs. This suffices for an area of 520,280 square miles with a population of about 90,000 of whom approximately 22,000 are Aboriginals. The Darwin Magistrates as well as sitting in Darwin also sit weekly at Katherine whereas the Magistrates sit for two days per fortnight in Gove, two days per month on Groote Eylandt and one day per month at Maningrida. The case loads are approximately 40 per sitting at Katherine, 30 per sitting at Gove, 20 per sitting at Groote Eylandt and 10 per sitting at Maningrida.

The Alice Springs Magistrate travels to Tennant Creek, Warrabi and Hermannsburg. Justices of the Peace sit at Katherine, Nhulunbuy and Tennant Creek to deal with cases between visits by Magistrates. Justices also sit at Alice Springs when the Magistrate is forced to travel outside Alice Springs. But charges involving criminal offences often arise in centres at which neither Stipendiary Magistrate nor Justices of the Peace sit. In some instances, defendants are arrested by police and brought considerable distances to court.[1] Witnesses also have to be brought to court.

If the matter is adjourned it is then possible that the defendant may have to find his own way back home, although usually if the arresting officer comes from the same area and is in attendance at court, the defendant is able to return with that officer. If the defendant is summoned to court, he may then have to travel great distances at his own expense to attend court. Defendants and witnesses are put to great inconvenience and expenses.[2] Also there are instances where some younger tribal aborigines are alleged to have

[1] Some such locations and their distance from the nearest regular court:

Bathurst Island	—	45 miles from Darwin.
Oenpelli	—	231 miles from Darwin.
Elko Island	—	90 miles from Gove.
Pine Creek	—	64 miles from Katherine.
Roper River	—	211 miles from Katherine.
Booraloola	—	414 miles from Katherine.
Hooker Creek	—	369 miles from Katherine.

[2] The situation could worsen, if, as is suggested by many competent and knowledgeable persons in The Territory, Justices of the Peace should be limited to adjourning matters for Magistrates and to signing court processes.

committed minor offences in order to get a "holiday" at a distant gaol.[3] The thought of a plane trip from say Groote Eylandt to Darwin and then six months housing and meals at the Gunn Point Prison Farm coupled with the fact that for many Aboriginals incarceration causes no stigma to be attached to the individuals brings the question to bear on the efficacy of the white system of justice in regard to many offences occurring on Aboriginal settlements. Of course this is in no way intended to mean that all, or even many, Aboriginals consider prison to be attractive[4] but recidivisim figures tend to show that for whatever reasons incarceration is not an effective deterrent.[5]

It is submitted that rather than a system whereby justice is dispensed, as it is on Groote Eylandt, twice per month, what is needed is a system which guarantees minimal remand time for persons awaiting trial, minimal travel by defendants and witnesses to court, minimal delay so that punishment can seem to be responsive to a particular act and a maximum amount of court time to consider each case.[6]

One practical solution would be to return authority back to the Aboriginal tribes to deal with local criminal matters.[7] The solution seems to incorporate a time and labor saving scheme with a scheme that allows for self-determination. In theory the solution appears to be workable, however in practice it is fraught with problems.

B. Cross-Culture Conflicts

It is clear that the present system is expensive and time consuming. Its positive effectiveness is greatly in doubt and in fact, the inherent injustice of white men totally administering criminal justice over Aboriginals has consistently been put forward.[8] In 1947 Professor Elkin made the following comment:

> If the case be a minor one, it is decided by local justices of the peace, friends of the white person in the case, or, at least, members of his colour-group; and in the marginal regions of Australia the latter are much fewer in number than the Aborigines amongst whom they seek their employees. This fact together with the common attitude of the white dominant group that the natives must be "kept in their place" and

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[3] Evidence received in discussions with tribal elders during investigative tour by the author for Australian Government. *See, Reay, "The Background of Alien Impact", also* R. M. & C. H. Berndt (editors), *"Aboriginal Man in Australia"*, (1965), where the author notes, "In some parts of the Northern Territory, an Aboriginal youth who wants to see the world and gain prestige with his fellows as a much-travelled person may deliberately commit a misdemeanour in order to be taken to a distant jail." at p. 387.

[4] Robinson, Michael V., "Imprisonment of Aborigines and Part Aborigines in Western Australia", in Berndt, Ronald M., *Thinking About Australian Aboriginal Welfare* (1969), p. 14-19.

[5] *See, generally,* Hawkins, G. J. and Misner, R. L., *Restructuring The Criminal Justice System in the Northern Territory: Report to the Minister of the Northern Territory* (Tabled in Federal Parliament on 25th September, 1973). See, also, Robinson, *supra* n. 4, p. 17.

[6] During October, 1973, for example, the Magistrates in Darwin considered 1026 charges during 91 hours of sitting or approximately 5.3 minutes per charge. Also during October 1973, the Magistrates heard 117 charges in Children's Court in 6¼ hours or approximately 3.2 minutes per charge. During October there were 173 defended cases heard in 49 hours. Despite the fact that there were many multiple charges, grave doubt is cast upon the ability of the courts to do justice while under such intolerable pressure.

[7] For discussion of the functions of tribal courts generally, *see,* Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (1955), p. 20-23. *See, also,* Gluckman, *The Ideas in Barotse Jurisprudence* (1965), Ch. 1.

[8] *See,* Hawkins, G. J. and Misner, R. L., *supra* n. 5, p. 4 and Misner, R. L., "Aboriginals and Criminal Justice in the Northern Territory", *Aboriginal News,* Vol. 1 No. 3 (October, 1973) p. 4.

> occasionally "taught a lesson," make it very difficult for the local justices to give unbiassed and just judgments, based on the facts of the case before them.[9]

Mr. Justice Kriewaldt who was Judge of the Supreme Court of the Northern Territory from 1951 to 1969 found the opposite to be true:

> It is no doubt that in the past juries have perversely refused to convict whites accused of crimes against aborigines, but today I think the aborigine enjoys complete protection against whites even where a jury is asked to decide the issue of guilt.[10]

Mr. Justice Kriewaldt assumed it was right that the Aboriginal be subjected to the white criminal law for two reasons; firstly because the white criminal law protects the Aboriginals, and secondly, that if the aboriginals are to be assimilated into the white community, it is mandatory that they be punished for their crimes.[11]

And even if the application of the white criminal law to the tribal Aboriginal can be justified, grave doubts are cast upon its present ability to do justice in the individual case. For whites and blacks alike, the case load of the Northern Territory Magistracy causes one to question whether justice is practical in the situation.[12]

It is clear that for many Aboriginals the court room is an extremely oppressive environment. Also in the criminal justice system in the Northern Territory the Aboriginal has only one role. He is not the judge. He is not the policeman. He is not the lawyer. He is not the gaoler. He is not the warder. But he is the prisoner. Until very recently in the Northern Territory, all court personnel except the Magistrate were police and dressed in police uniforms. Thus adding to the image of oppression. For many Aboriginals, the English language is at best a second language and the jargon of the courtroom and the language of the law is incomprehensible. As Wurm has so adequately put it:

> Even in the unlikely event of an aborigine in court arriving at a full understanding of the white man's legal concepts relevant to his case, and achieving the establishment in his mind of the ties between these concepts and the language symbols referring to them, there still remains the problem of the, to him, bewildering and complex procedure constituting the operation of the white man's court. The notions of judge, jury, prosecutor, counsel for the defence, etc., and of their respective functions, are totally alien to his conceptual system, and so are those underlying the court procedures and principles, like, for instance, proceedings directed to ascertain whether the evidence suffices to establish beyond reasonable doubt that he is guilty of a crime alleged against him. Similarly, the significance of pleading guilty or not guilty is outside his world of experience. In the light of what has been said before, it is clear that there can be no symbols in his language system to denote these, for him, non-existent concepts, and that the artificial incorporation of such symbols

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[9] Elkin, "Aboriginal Evidence and Justice in North Australia", 17 *Oceania* (1947) 173 at 194.

[10] Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia", 5 *Western Aust. L. Rev.* 1 at p. 10-11 (1960).

[11] *Id.* at p. 15.

[12] *Supra* n. 6.

into his language system can only be the first step towards the integration of the relevant notions into his conceptual system in the dynamic process of the alteration of his language-culture nexus. This again would call for prolonged explanatory effort by an exceptionally qualified person who is unlikely to be at the disposal of the court.[13]

But the issue has been more simply put by Jimmy Lester, an Aboriginal who has served as an interpreter in the courts of the Northern Territory for many years. His comments are worth citing at some length:

Aboriginal people have many difficulties in understanding and coping with the courts.

1. *Language Problems*

(i) People don't understand court language and procedures, and they make mistakes and have to be corrected, which then makes them embarrassed. I have heard the magistrate say, "Take your hat off when you come into court". The people then become confused and afraid.

(ii) Aboriginal people are severely limited in their understanding of English. Court language is very hard to understand, and most of the people don't understand the charges against them. Sometimes it is hard even for the interpreter to understand, or to put in the Aboriginal language. The same problem applies in the police station. This lack of understanding of what is going on leads to considerable fear.

(iii) Aboriginal languages are very different from English. This makes it very hard for the people to understand the English. They use the negative differently. If they are asked "Did you or did you not do that", they will say, "Yes", meaning, "Yes, I did not do it".

The people have no understanding of connecting or qualifying words like "if", "but", "because", "or". In our languages these are part of another word, or they don't exist. We have no word for "because". The same with words like "in", "at", "on", "by", "with", "over", "under" and so on. For these there is one ending that goes on other words. Most of the people when they speak English leave out those words. When they hear them they don't understand their meaning.

We have a different sense of time, and people just don't understand when they are asked "How long were you there?" "Was it about one hour?" "Was it ten minutes?"

The same applies to number. Aboriginal people have a different idea of number, and don't understand 20 or 50, or 100, or 1,000.

They are confused about place. If asked, "Did you go into his house?", they will say "yes". It may have been only in the driveway, or inside the fence, but that means "in the house" to them.[14]

The issues are clear and their resolutions are mandatory. Yet there are many other pressing problems. One perennial issue of controversy has been the proper role tribal law should play when Tribal Aboriginals are tried in white courts. Kriewaldt has noted that "(t)he Australian courts have con-

[13] Wurm, "Aboriginal Languages and the Law" 6 *West. Aust. L. Rev.* 1 at p. 9 (1963).

[14] Lester, "Aborigines and The Courts", Paper delivered at a Seminar on Aboriginals and The Law held at The University of New South Wales on June 16-17, 1973, conducted by The International Commission of Jurists, p. 1.

sistently held that the whole of the law at any given time applies to aborigines and whites alike, except to the extent that the legislature has seen fit to make differences or to allow exceptions."[15] In practice however, it is clear that tribal law has been taken into account by judges and magistrates as a factor used in mitigation of the sentence.[16] But as Eggleston notes:

> These cases have generally occurred at first instance and have not been reported, so that they have not constituted precedents for the future.[17]

The often conflicting demands of the two systems again argue for a return of some jurisdiction to the tribes.

Although "Aboriginals can be truthful and reliable, observing what we would call an objective standard of truth in presenting and analysing data"[18] there are often conflicting loyalties[19] which in some instances will result in the Aboriginal deliberately lying to the Court.[20] But the opposite is also true. An Aboriginal may plead guilty to a crime he has not committed or give evidence that is not true because he feels that this is what the authority wants to hear and this is the way he can most quickly get out of the courtroom.[21]

There are some instances where an Aboriginal may want to keep the circumstances surrounding a crime secret. For example in *R.* v. *Gibson*,[22] Mr. Justice Bright of the South Australian Supreme Court banned from publication secret tribal rites revealed in evidence and also granted the

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[15] Kriewaldt, *supra* n. 10, p. 17.

[16] Eggleston, *Aborigines and The Administration of Justice—A Critical Analysis of the Application of the Criminal Law to Aboriginals*. Thesis in fulfilment of the requirements for the degree of Doctor of Philosophy in Monash University, p. 394.

[17] *Ibid.*

[18] Elkin, *supra* n. 9, p. 179.

[19] Lester, *supra* n. 14, "Fear of payback also affects the people in court. In their own culture anyone who tells tales is likely to get into trouble. The one he tells about has the right to fight him, or take his spears to him, and the tale teller could be injured. This makes the people afraid sometimes to be a witness against another man. In court it might make them afraid to tell of any wrong treatment by a policeman, for fear that policeman gets back at them sometime." at p. 2.

[20] Elkin, *supra* n. 9, p. 187.

[21] Evidence received in discussions with Aboriginals during investigative tours by the author for the Australian Government. Also Lester, *supra* n. 14, notes:

> As soon as Aboriginal people enter the courtroom, they feel different, they become afraid. I have seen old men shaking with fear. When I ask them, "What is the matter?", they say, "I don't know what is going on".
>
> The people are afraid of authority. There are so many uniformed police and figures of authority in the court. Even while waiting for court to begin people are reluctant to talk, and often they will say, "Sssh, don't talk, policeman coming."
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> Many of the people when asked why they said "guilty", will reply, "The policeman told me when I go in court I have to say 'guilty' ". The authority of the policeman, and their fear, would make them do as they are told.
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> When the magistrate asks, "Do you want to tell me anything?", the people stand silent. They are frightened to speak.
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> Cross questioning confuses the people, especially about details of time and place. They can't understand the importance of such things. They think, "Why are they asking me all this". They then become afraid, and they might agree with anything, or forget what they just said. . . .
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> People who are frightened of court will often plead guilty, even when they are innocent, so as to get finished and out of court quickly. They can also plead guilty because they don't know what's going on. One old lady from Maryvale station was picked up on a "drunk" charge. She doesn't drink at all. She went to the hotel looking for her daughter; she was worried about her. I said, "Why did you say 'guilty'?" She said, "I didn't understand what was happening, so I said the same as the woman in front of me."

[22] Decided Nov. 13, 1973.

defendant's request for an all male jury. It is clear that culture ties may prohibit all relevant information from surfacing.

There is only anecdotal evidence regarding the relationship of police, prison officers and Aboriginals in the Northern Territory,[23] and no firm conclusions can be reached as to whether the administration of the criminal law before and after the ordeal of the courtroom is in need of reform. It is clear, however, that as long as public drunkenness remains a crime in the Northern Territory opportunities for harassment and abuse are clearly present.[24]

Finally in a number of instances the application of the criminal law is used as a facade to lull people into believing that the white society is interested in raising the standard of living of Aboriginals. The infamous case of Nancy Young clearly exhibits such a situation. Nancy Young was convicted of manslaughter of her four month old child on the grounds that she failed to provide her with adequate food and medical attention. The grim story of Nancy Young and the environment in which she lived and grew up goes a long way toward showing the futility of using the criminal justice system to serve functions completely beyond its scope.[25]

Whether or not one believes that it is inherently unfair to apply a system of justice to a people who have had no part in the creation, administration and execution of that system,[26] the fact remains that the system is being administered in a basically discriminatory way. Firstly, a greatly disproportionate number of Aboriginals appear in court and are sentenced to prison. As the Minister for the Northern Territory noted during debate in

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[23] The issue of whether there exists discriminatory police practices was not within the terms of reference for either Hawkins and Misner in the study of the criminal justice system in the Northern Territory nor within the terms of reference of Brigadier J. G. McKinna, formerly South Australian Police Commissioner in his *Report of the Inquiry into the Northern Territory Police Force* 1973 (herein cited as the *Police Report*).

[24] *For example*, in *The Sydney Morning Herald*, January 21, 1974, the following article appeared:

ADELAIDE, Sunday.

Aborigines at Alice Springs were discriminated against by being charged and jailed for drunkenness, the Minister for Aboriginal Affairs, Senator Cavanagh, said today. He will refer the matter to the Attorney-General, Senator Murphy. Senator Cavanagh returned to Adelaide on Saturday night after touring Aboriginal settlements in the Northern Territory. "Going by the number of Aborigines arrested for drunkenness in Alice Springs, I would say they are being greatly discriminated against," he said. "There are always about 20 Aborigines arrested and charged with being drunk each day. But when I arrived on Wednesday there were no arrests, on Thursday there were four and on Friday there was one. The average was broken down because of the attendance of a minister. Aborigines are virtually sentenced to life in prison when they are picked up time and again on a drinking charge and put in jail. But there is no arrest of white men in public bars."

[25] Robinson and Carrick, "The Trials of Nancy Young", 42 *The Australian Quarterly* 34 (1970).

[26] "It seems unjust to an Aboriginal defendant who is ignorant of white law and acts in accordance with tribal law to subject him to criminal justice in the ordinary courts. It seems equally unjust to convict an Aborigine who acts under the compulsion of tribal law, even though he knows that his action is contrary to white law. He may have no real choice but to act in accordance with tribal law." Eggleston, *supra* n. 16, at p. 411.

Federal Parliament, "Aborigines constitute only 26 per cent of the population of the Northern Territory but make up 56 per cent of the gaol population."[27]

Secondly, the limited population in the Northern Territory coupled with the great distances involved and the difficulty in personnel recruiting cause delays, and logistic problems of rather large proportions.

Thirdly, none of the personnel responsible for administering the criminal law in the Northern Territory, police, judges, lawyers, prison and gaol officers, are Aboriginals or from Aboriginal descent.[28] Fourthly, the present system of criminal law appears to be ineffective in deterring Aboriginals from commit-

[27] The Honourable K. Enderby, *Hansard*, September 25, 1973, p. 1450. A very similar phenomenon has been noted in both South Australia and Western Australia. The Criminal Law and Penal Methods Reform Committee of South Australia (The Mitchell Committee) in their First Report noted at p. 202-3:

> The total population of South Australia in 1971 is given in the South Australian Year Book for 1972 as 1,172,774, from which is may be inferred that the present population is approximately 1.2 million. The aboriginal component is estimated to be about 9,100. This means that aborigines are less than 1% of the population of this State. Three-quarters of one per cent is a fair estimate. We emphasize that figure. Of all male prisoners admitted to South Australian prisons in 1965, aborigines comprised 5%. By 1968-69 this proportion had risen in a steady progression to 25%. During this time the largest single annual rise was in 1964, when the proportion climbed from 10% to 14%. There have been no significant falls. The present situation is that this single segment of the community, three quarters of one per cent of the whole, supplies upwards of 25%, or one quarter, of male offenders admitted to prison, and that that proportion, on the latest available figures, continues to rise. The proportionate picture for female offenders is even more startling. Owing to the relatively small absolute numbers involved, because there are far fewer female than male offenders, the rate of increase over the same period shows sharp variations both up and down, but the overall progression is the same. In 1956 the proportion of aboriginal females admitted to prison was 18% of all female prisoners. By 1968-69 this figure had risen to 43%, having reached a peak of 57% in 1965-66. Having regard to these figures it is safe to assume that at the present time not less than 25% of all persons admitted to prison are aborigines and that unless some ameliorative steps can be taken that proportion is likely to continue to increase.

Robinson, *supra* n. 4, notes at p. 17:

> If we can take recidivisim rates as an index of the effectiveness of treatment programmes, it would appear that the problem of the Aboriginal crime is not being solved in the prisons. Figures from the Annual Reports reveal that there is a significant difference between recidivisim rates for Aboriginal and other prisoners. The majority of Aborigines in prison are serving at least their second term in gaol, and some have convictions numbering into the hundreds. Of 1,284 Aboriginal male prisoners received in 1966, 1,038 had served at least three other terms in prison.

[28] Allegations have been made that this is a purposeful and premeditated policy of racial discrimination. *See*, Hawkins, C.J. and Misner, R. L., *supra* n. 5, p. 4. Opposing views base the fact upon there being no qualified Aboriginals or part-Aboriginals for the positions or that no Aboriginals or part-Aboriginals want the positions and therefore none have applied.

ting criminal offences.[29]

Finally, the present system of criminal law is confronted with problems of culture-conflicts which may well be unconquerable. It is obvious that a change in policy is urgently needed. However it is much more difficult to propose an alternative.

II A POSSIBLE SOLUTION: TRIBAL COURTS AND/OR TRIBAL POLICE

A. *The Inherent Problems*

Talk about "justice on an Aboriginal settlement" or about "tribal courts" conjures up a notion of returning to a system which is part of tribal culture and which has developed over a long period of time.[30] Such a concept is probably an "Anglicization" of Aboriginal history.[31] Any inquiry into justice

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[29] Figures to measure effectiveness through recidivism rates are not available for the Northern Territory. All sectors of the population, however, stated that they greatly doubted the deterrent effect of imprisoning Aboriginals. In the Northern Territory, however, it must be remembered that approximately 75% of all prisoners in the Northern Territory are in prison for public drunkenness and an additional number are imprisoned for drunk-related crimes such as disorderly behaviour, Hawkins, C.J. and Misner, R. L., *supra* n. 5, p. 1, 23-26. In 1966 the Northern Territory had 557.0 convictions for drunkenness per 10,000 population compared to 104.6/10,000 in Western Australia, 170.4/10,000 in Queensland, 131.4/10,000 in New South Wales, 56.8/10,000 in Victoria, 66.3/10,000 in South Australia and 12.3/10,000 in Tasmania. It is clear, however, that there is a greatly disproportionate number of Aboriginals in prison in the Northern Territory (see text at footnote 27). Finally it has been noted that in Alice Springs with a population of around 12,000 there were 4,000 convictions for drunkenness in 1972. In the experience of the Alice Springs Magistrate these figures were misleading because in his experience there was a hard core of about 80 habitual drunks 95% of whom were repeaters. *Report of the Board of Inquiry appointed to Inquire Concerning the Liquor Laws of The Northern Territory*, 1973 (herein cited "Liquor Report") at p. 5. The point should be made: that, there is no breakdown in statistics distinguishing between tribal Aboriginals and urban Aboriginals and, therefore, any conclusions one reaches concerning the effectiveness of using the white criminal justice system on tribal Aboriginals must be based on the type of crime tribal Aboriginals are involved in, the available statistics, the statements of tribal Aboriginals and the Aboriginal culture.

[30] There has been among anthropologists dispute concerning the existence of formal legal institutions within the Aboriginal community. Meggitt, *Desert People* (1962) and Hiatt, *Kinship and Conflict* (1965) deny that the elders exercised authority over the whole community. Whereas Berndt "Law and Order in Aboriginal Australia" in *Aboriginal Man in Australia*, Berndt, R. M. and C. H. (editors) (1965) quotes Elkins and makes the argument that Aboriginals did have recognisable legal institutions. Also Berndt, R. M. and C. H. in *The First Australians* (1952) the authors comment at p. 115:

> "Aboriginal Australia has had, as a rule, no formal gatherings in the nature of law courts. Only the almost extinct Narrinyeri tribes at the mouth of the River Murray had organized meetings, in which old men and women always took the lead. In most cases, everyone is free to voice an opinion; talking and arguments may go on for weeks before any definite action is taken. But in serious ritual offences the main ceremonial leaders may decide on the punishment, and carry it out in secret, without consulting anyone else or describing what they have done."

[31] The Indian Justice Planning Project 1971 in regard to the experience of the American Indian as funded by the U.S. Department of Justice, Law Enforcement Assistance Administration and by the Arizona State Justice Planning Agency, Colorado Law Enforcement Assistance Administration, New Mexico Governor's Policy Board for Law Enforcement and the Utah Law Enforcement Planning Council in its *Report* (herein cited "*Indian Report*") stated:

> "The very title 'Tribal Court' brings to mind a system of traditional justice embodying the law—ways of a distinct culture—a dispute—resolution system which is an outgrowth of the cultural needs of a people evolved through time immemorial. Nothing could be further from the truth. Tribal courts are in only a superficial sense 'tribal'. . . . It is sufficient to say that the tribes were not characterized by a system of central government, and there was no single leader whose decisions were regularly utilized as a means of resolving intra-tribal disputes. Thus, there was no room for the traditional growth of courts whose enforcement powers were natural modifications of a chief's power—as King's Bench and Chancery were outgrowth of a royal power in England". at p. 141-42.

on Aboriginal settlements must concern itself with authority structures in the tribe but the old methods of resolving disputes will not necessarily be able to cope with all of today's problems and in some ways might prevent the issue from being resolved.[32] Firstly, there are many types of behaviour which are not traditionally proscribed yet are disruptive of tribal life. Generally, Aboriginals do not have any tribal methods with which to deal with persons committing disruptive acts while under the influence of intoxicants. Yet within the Northern Territory, drunkenness among Aboriginals is an extremely serious problem.[33] Secondly, many Aboriginal settlements are a mixture of tribes. There is no one authority structure that can be expected to act in dealing with disruptive persons. Thirdly, a percentage of Aboriginals either have lived in white communities or live a part of the year in or around white communities and may have come to expect justice to be meted out in certain ways by certain people. And fourthly, tribal punishment is often "unorthodox" by white standards and it is naive to assume that an Aboriginal community can exist totally outside of the white environment. For example, some offences against tribal laws such as wife stealing may result in the offending party being speared through his thigh. Also some actions proscribed by white laws are not only lawful in Aboriginal communities but are in fact actually required by the tribe. This is especially true in types of required actions of revenge.[34] Again, some actions which are not only unlawful in white society but are also repugnant to whites are a part of Aboriginal culture. Extremely young Aboriginal girls are often married by their parents to old men.[35] The difficulty is the ethical question of whether there are limits to what "justice" can order. Do such concepts as "natural justice",[36] "due process"[37] and "human rights" apply in the situations where Aboriginals judge Aboriginals or are these paternalistic notions which have no place in the context of Aboriginal justice? But it would appear that this issue might be moot and that any system of justice on Aboriginal settlements must include certain procedural common law guarantees. These issues will be discussed later.

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[32] *See*, Berndt, "Law and Order in Aboriginal Australia", supra n. 30, at p. 177.

[33] Again because official statistics of the Northern Territory do not distinguish between white Australians and Aboriginal Australians it is very difficult to determine the precise level of Aboriginal participation in the Northern Territory drunkenness problems. But the Liquor Report, 1973, at p. 6, concluded that "The evidence therefore suggests that the overwhelming majority of people who are convicted of drunkenness are Aboriginals or part-Aboriginals". It must also be remembered that the Commonwealth Year Book figures show that the drunkenness conviction rate in the Northern Territory is eight times that of the national average.

[34] *See, e.g.* Berndt, *Law and Order in Aboriginal Australia, supra* n. 30.

[35] *See*, Minister for Aboriginal Affairs, Mr. Bryant's discussion of the Nola Banbiaga incident and the Aboriginal custom of betrothal of young girls for eventual marriage in *Hansard*, 25 September 1973, p. 1444-1447.

[36] "There are two rules of natural justice clearly recognised in our law; and a third may be emerging. The first rule is that a citizen should have an opportunity to be heard before a decision is reached affecting his rights (audi alteram partem). The second is that hearing given should be free of bias (nemo debet esse judex in propria sua causa). The third rule which may be emerging is that after a hearing there is a right to a reasoned decision. Naturally enough the rules tend to run together".

Campbell and Whitmore, *Freedom in Australia* (1973) at p. 417.

[37] A widely quoted definition of "due process" is that of Judge Cooley who stated that due process in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *U.S.* v. *Dukich* 3 F.2d 302 (D.C. Cir., 1925).

B. *Jurisdictional Difficulties*

Putting to one side, for the moment, the issue of procedural guarantees, there remain numerous problems of returning to the Aboriginal settlements the authority to try criminal matters. If autonomy is to be returned to the Aboriginal community to deal with its own offenders, questions of jurisdiction arise. Jurisdiction becomes an issue in three separate ways: *in personam* jurisdiction, subject matter jurisdiction and geographical jurisdiction.

1. In personam jurisdiction

a) Extent of jurisdiction

Over whom should a tribal court have jurisdiction? There would appear to be many possibilities. Firstly, the tribal court could have jurisdiction over all persons *living* on the settlement—black or white. Secondly, the court could have jurisdiction over all Aboriginals *living* on the settlement. Thirdly, the court could have jurisdiction over members of certain tribes who *live* on the settlement. Fourthly, the court could have jurisdiction over Aboriginals *found* on the settlement. Fifthly, the court could have jurisdiction over all persons *found* on the settlement. Finally, the court could have jurisdiction over all persons who have committed certain types of tribal offences.

The question of jurisdiction over the person appears to be a potential source of grave conflict. It has been said that the function of the criminal law is: ". . . . . to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others. . . ."[38]

It can be argued that the society which is to be protected or the public order to be preserved here is that of the Aboriginal community and consequently the Aboriginal community should have the power to try the person involved. However, it seems that this is neither acceptable to the white community nor desired by the Aboriginal community.[39] In fact this issue could get in the way of a fair and realistic consideration of the underlying problem—the return of certain decision-making functions to the tribe.

If the tribal court were to exercise jurisdiction over all Aboriginals found on the settlement, then this would make subject to that jurisdiction persons who may have only the colour of their skin in common with their accusers.[40] This may actually undercut the rationale for returning autonomy to the settlement; the ability of the group to deal with its own. It can be argued that if someone agrees to live on a settlement, that he has also agreed to be subject to the jurisdiction of the tribal court. The main objection to this is that it might, theoretically, deter whites from agreeing to live on the settlement.

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[38] Home Office, Scottish Home Department Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report), 9-10.

[39] There is much controversy in this area and much disagreement among Aboriginals as to what they desire. It is very hard to dissect the rhetoric from the belief. For example Burrud, an elder in the Lardil Tribe stated in The National Times Magazine, April 1, 1974:

> "If we had our own land again, and were allowed to have our own laws again, this would be the law for European-Australians as well as Aborigines in Lardil country" at p. 18.

On the other hand elders on Groote Eylandt thought that this issue could be used as a reason to refuse to consider the more pressing issue—involvement of Aboriginals in the criminal justice system.

[40] In fact Aboriginal cultures vary tremendously and as *Strehlow*, "Culture, Social Structure and Environment in Aboriginal Central Australia" in Berndt, R. M. & C. H. (editors) *Aboriginal Man in Australia*, *supra* n. 3, at p. 121 noted ". . . it must not be forgotten that any two Aboriginal cultures in turn may show considerable divergences from each other even when they happen to occur in a closely similar geographical environment."

The problem, however, would appear to be minimal and whichever way the issue is to be resolved should not in itself prevent a scheme of local autonomy from being introduced. In terms of numbers the question of whether all Aboriginals or just members of certain tribes who live on the settlement are to be within the jurisdiction of the tribal court is somewhat more significant. The strongest argument appears to be that if the person has intentionally "adopted" the tribe, then he should be subject to its jurisdiction.

b) Relationshsip of tribal courts to white courts

Whatever the possible scope of jurisdiction of the tribal court the issue of the interrelationship of tribal courts to the civil and criminal courts of the Northern Territory still exists.

The issue is whether the decision of the tribal court is subject to review. Does western jurisprudence with its inclination toward "certainty" as opposed to "finality" have any place in a totally Aboriginal environment? If, in fact, a tribal court has jurisdiction over many of the same offences that the Territory Court has, can a claim of racial discrimination be made out if, for the white defendant, counsel is appointed, a transcript of the proceedings is made, rules of evidence are rigidly followed and an appeal is lodged in the High Court while the Aboriginal defendant is tried in a situation where the "traditional" safeguards are absent? Does the fact that the court is being conducted by Aboriginals negate the issue of racial discrimination or should the policy of anti-discrimination in an abstract sense be made subservient to the notions of self-autonomy and self-determination? It could be argued that if the value of an appeal is that it allows for detached consideration of a situation by a disinterested party or parties, then a separate body outside the settlement could be established to hear Appeals from the tribal courts. This solution presents a number of difficulties. One of these is whether, even if the appellate tribunal were composed wholly of blacks this would not be surrendering some tribal autonomy to an "alien" group. Also, to make up the appellate tribunal from representatives of many Aboriginal tribes throughout the Northern Territory would be to assume that an Aboriginal from the Centre is in a good position to sit in judgment on matters concerning decision of tribal courts from the Top End. In fact with traditional Aboriginal societies, decisions of one group were not binding and had little or no effect upon others. As the Berndts noted:

> In every case, the means of maintaining law and order is more or less localized in scope. Sanctions and decisions valid within a clan, a tribe, a linguistic group, have no binding force outside it. Only when a number of groups are linked in a common culture pattern or trading alliance, or acknowledge a common sacred and ceremonial bond, do they have any wider application. Religious cults, faith in the Beings who set the pattern of living—these carry with them their own ethical codes, their conceptions of right and wrong. But they are not universal. Even the Ancestral Beings themselves have authority only in regions where their rites are performed, where people believe in their power and their sacred origin.[41]

Finally, it would seem that it would be virtually impossible to expect that a separate group within the tribe could serve as an appellate body especially

[41] Berndt, R. M. & C. H., *The First Australian*, *supra* n. 30 p. 116.

if the original judges were the elders of the tribe or those appointed or approved by the elders.[42]

If it were determined that the tribal court would exercise jurisdiction over lesser offences such as drunkenness and disorderly behaviour, the possibility of appeals to the Magistrate arises.[43] This would entail the Magistrate making frequent visits to the settlements, and considering the present workload of the Northern Territory Magistrates, a number of additional Magistrates would need to be appointed.[44]

It would also require clear guidelines as to the role of the Magistrate in the review process: would he review each case or review cases only at the instigation of one or both parties. This question itself gets back to the basic question of the degree of autonomy which is to be given to the Aboriginal community. Within the Aboriginal community the aspect of review would lend more "authority" to the decision of the tribal court. The fact that the decision was to be sanctioned by the whites would, in most places, give additional weight to the court's opinion.[45]

c) Tribal police

Finally, it might be concluded that some settlements might be able to function with tribal police yet would rather have the Magistrate retained as the trier of fact. This approach may be the one that would be easiest to administer both in terms of personnel and in relation to existing and proposed federal laws and policies. But there has always existed considerable controversy whether the family loyalties within a group and the existence of many different tribes on a settlement make the operation of a tribal force impossible.[46] The issue

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[42] This statement is buttressed by the experience of Aboriginal communities who have attempted to exercise some police functions. Where the tribal police were not sanctioned by the elders, the result almost invariably was failure.

[43] Reverend Jim Downing in "Submission to the Northern Territory Committee of Enquiry on the Sale and Consumption of Intoxicating Liquor, March 1973" noted the following anecdote:

> "On Jay Creek Reserve some 6 or 7 years ago, an elder said in Aranta to Pastor Paul Albrecht, "The government is trying to destroy our people". "Why?" he was asked. "Because we didn't ask for drink, you gave it to us and changed the laws. It's destroying our people, and we have asked and asked for authority to be given to us to deal with our own people and what it is doing to them, and the government won't listen. So it must want this to happen"."

[44] *See* Hawkins and Misner, *supra* n. 5.

[45] This attitude was put forward by a number of tribal elders and is in line with what Gluckman *The Judicial Process Among the Barotse of Northern Rhodesia, supra* n. 7, at pp. 244-45 noted that under Section 12(a) of the Barotse Native Courts Ordinance that:

> "a native court shall administer the native law and custom prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order of the King in Council or with any other law in force in the Territory".

But there was no evidence that the provision had ever been used. "But Lozi courts constantly support their decisions by saying that the whites agree with what they rule, and they also in other cases state that the whites disapprove of and do not allow certain things". At p. 244-45.

[46] *See Police Report* Para. 14.1:

> "A considerable amount of time was spent in endeavouring to ascertain whether the Aborigines themselves wished to have police stationed at settlements and the consensus of opinion was that this was necessary. Some of the younger men were opposed to it, but the majority of Aborigines whom I contacted were in favour of having a police station on the site. In reply to my suggestion that selected Aboriginal men could be trained to keep order at the settlement, a Village Council pointed out that where there were members of several different tribes at the one place, it was better to have a "neutral" policeman than a member of their own community who would be inclined to favour his own tribe".

Such an attitude was also expressed generally by Elkin, "Aboriginal Evidence and Justice" *supra* n. 9 at p. 179.

is real and should not be dealt with lightly. At best the evidence is contradictory but there are a number of Aboriginal settlements such as Hermannsburg where such a scheme is presently working well. In other settlements such as Amoonguna the scheme has failed or does not command the respect of the elders to operate effectively—they have no "authority". If the problems can be overcome, any program which used tribal Aboriginals as tribal police would have to include within it a training course. A training course would lend them authority,[47] give them qualifications for decent wages[48] and also give them some assistance as to operating as peace-keepers within their own communities.[49] Also any system which included tribal judges within it might benefit from conduct in judicial assistance programs to educate and assist the tribal judges.[50] The probability that tribal judges would benefit from the opportunity to talk to others who are fulfilling the same function as themselves and also benefit from some type of training should not be ignored.

The concept of an appeal may also introduce administrative duties, such as summonses or transcripts of evidence and written reasons for judgments, which might greatly hinder the traditional decision-making process.

2. Subject matter jurisdiction.

Perhaps this problem can best be approached by defining those actions over which the tribal courts do not have jurisdiction. This approach will demonstrate areas where white law and Aboriginal law do not coincide in their definitions of what is an offence and, further, this approach assumes that there are actions, such as infanticide and maiming that must be punished even if they do not offend the group in which they were committed. This method also assumes that jurisdiction is best determined by the action itself and not the punishment to be meted out.[51]

In the United States, initially the tribal jurisdiction was complete. In 1881, Crow Dog, an Oglala Sioux Chief, shot and killed Spotted Tail, a Brulé Teton Sioux Chief.[52] The feud originated because Spotted Tail had seduced the wife of Medicine Bear, a crippled friend of Crow Dog. Settlements were made in Indian law but Crow Dog was also tried in the Federal court and sentenced to be hanged. The United States Supreme Court ordered Crow Dog discharged from custody holding that the tribe had exclusive jurisdiction over crimes between Indians and no federal law had limited the tribal authority. In 1871 statutory inroads on Indian sovereignty began in earnest.[53] Then the "Major Crimes Act" of 1885 followed and first limited the criminal

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[47] In the United States very elaborate training courses are operated for Indian policemen at the Indian Police Academy in Roswell, New Mexico and The Navajo Police Academy at Window Rock, Arizona. *See Indian Report* p. 141-269.

[48] For example salaries of the Navajo Police Department range from $15,000 for the superintendent to $5,096 as starting pay for patrolmen. *Indian Report* p. 208.

[49] This should not be taken to mean that the tribal police could operate outside the traditional authority structure.

[50] "Perhaps one of the most significant developments in the area of Indian Tribal Legal Systems in the past few years has been the creation of the National American Indian Court Judges' Association composed of all the Indian Tribal Judges in the United States. This Association has moved forward positively to provide an unusually competent continuing education program for the Tribal Judges".
Johnson Ralph W. *The Jurisdictional Impact of Public Law 280* (School of Law, University of Washington). At p. 62.

[51] *See*, e.g. *Frank* v. *United States*, 395 US 147 (1969) in which Mr. Justice Marshall stated in the majority opinion that: "The most relevant indication of the seriousness of an offence is the severity of the penalty authorized for its commission". At p. 148.

[52] *Ex Parte, Crow Dog*, 109 U.S. 556 (1883).

[53] *See, infra* note 85.

jurisdiction of the tribal court by taking from the tribes jurisdiction over murder, manslaughter, rape, assault to kill, arson, burglary and larceny.[54] Then in 1969 the Civil Rights Act put greater limits on the tribal court's jurisdiction. The Act says in part that:

> No Indian tribe in exercising powers of self-government shall—
> (7) require excessive bail, impose excessive fines and unusual punishments, and in no event impose for conviction of any one offence any penalty or punishments greater than imprisonment for a term of six months or a fine of $500, or both.[55]

The issue of the scope of subject-matter jurisdiction is extremely complex and makes for strange bedfellows. On the one extreme are those who would give total subject-matter jurisdiction to the tribal courts arguing that the Aboriginal should be the sole judge and guide of his own destiny. Such a person might also subscribe to a theory of separate development. Aligned with this attitude is a group which is somewhat less altruistic, as Kriewaldt noted:

> There is a substantial body of opinion in the Northern Territory, especially in the Alice Springs district, to the effect that whites should not concern themselves with crimes committed by one aborigine on another, whether those crimes have any connection with tribal laws or customs. 'It is no concern of ours what they do to each other' is how it is put.[56]

On the other extreme are those who believe that the Aboriginal should not exercise any jurisdiction over any offences and this extreme is presently the position. On a number of Aboriginal settlements where the issue has been specifically raised, consensus has been that at a minimum, the tribe should have some police powers on the settlements.[57] Whereas at least one settlement, and probably a number of others, wish to assume the adjudicatory function in regard to what basically are the street offences.[58]

What is clearly needed is an inter-disciplinary team to investigate what subject-matter jurisdiction is desired by the Aboriginals and what administrative problems would have to be overcome. There remains the question of what would be politically acceptable to the white community. It would appear that what is likely in the long run is a compromise. Certain Aboriginal communities should be given the power to administer police functions within their own settlements and a few communities be given jurisdiction over what are basically street offences. The benefit of this approach is that it realizes that there are great discrepancies among Aboriginal communities as to what they want and could handle. It is also more politically feasible and begins to involve Aboriginals in the criminal justice system. Furthermore, it takes into consideration the logistical problems of administration of criminal justice in the Northern Territory and takes cognizance of some of the practical problems mentioned above concerning the ability of the traditional tribal authority structure to cope with the present situation. It lessens the problems of tribal punishment and tribal incarceration.[59] On the other hand such a compromise does not fully respect the Aboriginal culture and perhaps the inherent right of Aboriginals to deal with Aboriginals. Also it does not resolve the problem

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[54] 23 Statute 385 (March 3, 1885).
[55] 25 U.S.C.A. 1302 (1973 Supp.).
[56] Kriewaldt, *supra* n. 10, p. 16.
[57] Tribal elders on Groote Eylandt expressed this point of view.
[58] The opinion expressed by Tribal elders at Hermannsburg.
[59] See text accompanying n. 64 infra.

of what effect tribal law should have upon the courts of the Northern Territory when an Aboriginal is tried in the courts of the Northern Territory for offences other than the street offences.[60] In other words, the toughest cases still remain.

3. Geographical jurisdiction.

Over what area will the tribal court have jurisdiction? The simplest answer to this problem is to assume that the court has jurisdiction over set boundaries as set out in the authorizing statute. But an argument can be made that it may be more beneficial in many cases to allow a tribe to deal with one of its members even though the crime took place away from the settlement, perhaps in town.[61]

C. *Expectations of success*

Despite what type of system of justice is established on Aboriginal settlements, it would be naive to expect it to be any more effective than a criminal justice system anywhere else. In the criminal law there are many problems which refuse either to be solved or to dissolve. Three of these problems are drunkenness, gaols and police misbehaviour. In the last decade many have come to believe that alcohol problems should not be dealt with by the criminal law. The ineffectiveness of dealing with alcohol problems through the criminal law has been well documented[62] and it is clear that the Aboriginal is no exception to this general proposition.[63] It would not be surprising, therefore, if tribal courts also failed to effectively control alcohol problems through punishment. If effective programs are developed to deal with alcohol problems, these programs or modifications of those programs perhaps can be adapted to the settlements. This comment, however, should not be taken to mean that punishment for those who bring alcohol onto the settlements might not be effective. Secondly, much has been written recently on the problems of incarcerating individuals and the necessity for alternatives to incarceration.[64] If some settlements sought to build local gaols it would appear that they must be placed where human dignity is upheld and where physical and mental health is not ignored.[65] One must also be mindful of the United Nation's Standard Minimum Rules for the Treatment

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[60] For a discussion on the role of tribal law upon the white courts *see*, Eggleston, *supra* n. 16, p. 387-407.

[61] It should be noted that here we are only concerned with the issue of criminal jurisdiction for the tribal courts. The issue of civil jurisdiction is outside the scope of this article. American tribal courts have virtually unlimited civil jurisdiction over Indian defendants. Also in cases where an American Indian tribe has not established its own court and its own criminal code, the equivalent jurisdiction is exercised by a court of Indian Offences established by The Secretary of the Interior under the authority of 25 C.F.R. Part II.

[62] *See, e.g.* N.S.W. Bureau of Crime Statistics and Research, Report No. 7: *City Drunks—A Possible New Direction* (1973), *Also see, Liquor Report*, Paragraph 211 which states:

> "We see a need to curb and treat the problem drinker and the alcoholic. We are of the opinion that gaol is no deterrent and offers no cure for drunkenness. In our view drunkenness *per se* should no longer be a crime".

[63] *Supra* n. 29.

[64] Hawkins and Misner, *supra* n. 5.

[65] The following comments have been made concerning gaols on Indian reservations:—

> "Old, unsanitary buildings, poorly qualified and constantly changing personnel, intermingling of all types of prisoners—sick and well, old and young, hard-core criminals and misdemeanants with petty offenders in overcrowded cells and tanks and the complete absence of even the most rudimentary rehabilitative programmes; and the failure of most jails to provide adequate supervision and services of a jailer at night are but a few of the more glaring deficiencies noted among the correctional facilities on Indian reservation. . . ." *Indian Report*, p. 173.

of Prisoners and their possible effect upon tribal gaols.[66] The Standard Minimum Rules are not meant to be of total application in all situations[67] but it is clear that they set a tone for what is acceptable in relationship to incarceration and other forms of punishment.[68] It is clear that tribal incarceration and/or tribal punishment may be totally alien to the spirit of the Standard Minimum Rules.[69]

D. *Some past attempts at a solution*

The call for a reconsideration of the problem of Aboriginals and the administration of the criminal law is not new. Elkins notes that a concerted drive for change began as early as 1931 and culminated in 1946 when the *Native Administration Ordinance* 1940 authorised the Administrator of the Northern Territory to establish special courts for "native matters". The jurisdiction of the special court was limited to matters arising between Aboriginal and Aboriginal or between the government and an Aboriginal, however the courts were never established.[70]

Western Australia, from 1936 to 1954 operated a system of courts of native affairs. The courts had jurisdiction only in cases where an offence was committed by an Aboriginal against another Aboriginal. The court was composed of a special magistrate and a person nominated by the Commissioner of Native Affairs,[71] and the court could call a "headman" of the tribe for assistance.[72] Eggleston in her thesis admirably demonstrates the deficiencies in the terms and administration of statute.[73] In fact the involvement of Aboriginals in the judicial process under the Act appears to have been minimal.[74] A system similar to the one in Western Australia was also tried in Queensland.[75]

Indeed the call for courts to be constituted by Aboriginals is not new. In 1947 Elkins noted:

> Experiments along these lines (courts constituted by Aboriginals) should be continued and developed. They are in keeping with the Aborigines

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[66] By resolution 663C (XXIV) of 31 July 1957, the Economic and Social Council approved the *Standard Minimum Rules for the Treatment of Prisoners* as adopted by the First United Nations Congress on The Prevention of Crime and the Treatment of Offenders held at Geneva in 1955.

[67] *Ibid*, Section 2:

"In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations".

[68] *Ibid*, Section 1:

"The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions".

[69] Although Australia is not "bound" by these *Minimum Rules*, there would seem to be some pressure for Australia to comply with the United Nations Standards. The Honourable J. C. Maddison, M.L.A. Minister for Justice New South Wales in his Report as leader of the Australian Delegation noted the need for an objective report representing Australia as a whole to be furnished to the United Nations on the implementation of the Rules in Australia.

[70] Elkins, *supra* n. 9 at p. 199-204.

[71] Aborigines Act Amendment Act, 1936 (W.A. No. 43 of 1936).

[72] *Id.* s. 59D (2)(c).

[73] Eggleston, *supra* n. 16 at p. 387-92.

[74] *Id.*, p. 388-89.

[75] Elkins, *supra* n. 9 at p. 208-09.

own 'councils' of headmen and elders for matters concerning the welfare order and ceremonial life of the tribe.[76]

What is apparent is that Elkins' cry for a change is still unheard twenty-seven years later. It is imperative that a start be made toward solving this quixotic problem. That start should be the formation of an interdisciplinary body to discover what changes should be made to the present system of criminal law in respect to justice on Aboriginal settlements, what responsibility the Aboriginal communities desire and what responsibility the communities may realistically be expected to bear.[77] However, there is grave doubt whether, except in cases where only a minimal jurisdiction is given over to an Aboriginal Court or where only police functions but no judicial function are performed by Aboriginals, any new approach to the problem of justice on Aboriginal settlements is possible.

III NATIVE JUSTICE WITHIN A DOMINANT SYSTEM

A. *The American Experience*

Unlike the situation with the American Indian, the Australian Aboriginal has never been considered to have retained any sovereignty after Britain entered Australia.

The American courts have always found some difficulty in determining just what status the Indian tribes maintained. In *Cherokee Nation* v. *Georgia*,[78] the Cherokee Nation sought an injunction to prevent the execution of certain acts of the Legislature of the State of Georgia. The plaintiff attempted to proceed under a constitutional provision which gives the Supreme Court jurisdiction where the United States or its citizens and a foreign state or its subjects are parties.[79] Here the Cherokee Nation attempted to classify itself as a "foreign nation". In denying the motion for an injunction, Chief Justice John Marshall stated what has become the classic statement as to the position of the American Indian vis a vis the federal government. After noting where his sympathies lay,[80] Chief Justice Marshall stated:

> They (Cherokee Nation) have been uniformly treated as a state, from the settlement of our country. The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in the political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their

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[76] *Id.*, p. 210.

[77] In no way should this be interpreted to mean that all Aboriginal communities will be willing or able to adopt the same program.

[78] U.S. (5 Pet.) 1 (1831).

[79] U.S. Constitution, Art. III, S2:
"The judicial power shall extend to all Cases . . . between a State, or the Citizen thereof, and foreign States, Citizens or Subjects".

[80] "If courts were permitted to indulge their sympathies a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands, by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made".
Id., at p. 14-15.

> community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.[81]

Marshall then went on to consider whether the Cherokee Nation could be seen to be a "foreign" nation within the constitutional meaning:

> They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating trade with them, and managing all their affairs as they think proper . . . . they may, more correctly, perhaps, be denominated domestic, dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession then their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[82]

Justice Johnson concurred with an analogy:

> Their condition is something like that of the Israelites when inhabiting the desert . . . their right of personal government has never been taken from them.[83]

Even in dissent Justices Thompson and Story agreed that the Cherokees were in fact a nation but for the dissenters they were also a "foreign" nation.[84]

Again, a year later in 1832, the United States Supreme Court dealt with the issue of status of Indian Tribes under the Constitution. In *Worcester* v. *Georgia*[85] the defendant entered upon the lands of the Cherokee Nation without having first obtained an entry permit as he was required to do under Georgia law. He was convicted in a Georgia court and sentenced to four years at hard labour. In overturning the conviction the United States Supreme Court found that the act of Georgia Legislature interfered with the relations between the United States and the Cherokee Nation, which, under the Constitution, were under the exclusive jurisdiction of the federal government.[86] Again Chief Justice Marshall wrote for the Court:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistable power, which excluded them from intercourse with any other European potentates imposed on themselves, as well as on the Indians.[87]

The expansion into the West and the cry of "manifest destiny" culminated in Congress taking from Indian tribes the power to enter into treaties, Congress was determined to govern the Indians, not through treaties, but by

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[81] *Id.*, at p. 15.
[82] *Id.* at p. 15-16.
[83] *Id.* at p. 26.
[84] *Id.* at p. 52.
[85] 31 U.S. 515 (6 Pet. 515) (1832).
[86] U.S. Constitution, Art. 1, S.8(3):
"Congress shall have Power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes".
It was after *Worcester* v. *Georgia* that President Johnson refused to implement the Court's opinion in *Cherokee Nation* v. *Georgia supra* and *Worcester* v. *Georgia*. Johnson is reputed as saying "John Marshall has made his decision, now let him enforce it". *See* Kelly and Harbison, *The American Constitution: Its Origins and Development*, Third Edition, p. 303.
[87] *Worcester* v. *Georgia*, *supra* n. 85 at p. 559.

direct legislation.[88] By 1971 the status of Indian tribes could be summarized by the United States Court of Appeals for the Tenth Circuit in *Groundhog* v. *Keeler* as:

> The Indian nations or tribes are dependent political nations and wards of the United States. They possess the attributes of sovereignty, insofar as they have not been taken away by Congress. They are quasi-sovereign nations.[89]

The United States Congress has taken away certain attributes of sovereignty[90] but, in fact, the tribes do retain certain powers. For example, sovereignty bars an individual wishing to sue an Indian tribe.[91] Tribal criminal jurisdiction is over those acts prohibited by tribal codes but punishment is limited for any one offence to $500 fine or six months imprisonment, or both.[92] Extradition from reservations is arguably under the control of the tribe.[93] Tribes have total civil jurisdiction for civil wrongs, even if a non-Indian wishes to bring a civil action against an Indian based on a claim arising on the reservation.[94] However, in situations where an offence is committed on reservations between persons who are not Indians, or an offence by one who is not an Indian and one who is an Indian, the United States courts have jurisdiction.[95]

Even though it is clear that there are remnants of autonomy remaining with the Indian Tribes, the method of dispensing justice is of the Anglo-American variety. For example, near the city of Roswell, New Mexico there

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[88] "In the opinions in these cases they are spoken of as 'wards of the nation', 'pupils' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in s. 2079 of the Revised Statutes".
United States v. *Kagama*, 118 U.S. 382 (1886).

[89] 442 F.2d 678 (1971).

[90] *See*, e.g. 18 U.S.C.A. 1153 (Supp. 1973) whereby Congress assumed jurisdiction over the major crimes committed by Indians in Indian country: murder, manslaughter, rape, carnal knowledge, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, larceny. In 1956 it became a Federal crime to steal or embezzle from a tribal organization, 18 U.S.C. 1163 (1934). In 1964 the Assimilative Crimes Act, 18 U.S.C. 13 (1964) includes as federal crimes those crimes defined to be such by the state in which the reservation lie—if not inconsistent with Federal law.

[91] 25 U.S.C.A. 1302 (Supp. 1973) and see also *U.S.* v. *U.S. Fidelity and Guarantee Co.*, 309 U.S. 506, 60 S. Cth. 653, 84 L. Ed. 894 (1939).

[92] *Supra* n. 90.

[93] *Indian Report*, p. 112.

[94] *Williams* v. *Lee*, 358 U.S. 217 (1959). *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1945). Professor Ralph Johnson, *The Jurisdictional Impact of Public Law 280*, a paper prepared for the Yakima Tribe and National American Indian Court Judges' Association, noted at p. 69:

> Historically, Indian Tribal Courts have seldom exercised jurisdiction over NonIndians although no federal statute prohibits them from doing so. BIA [Bureau of Indian Affairs] policy has undoubtedly played a part in this decision for in the BIA reviews of tribal ordinances, the BIA has discouraged ordinances which covered NonIndians. Secondly, some tribes adopted Constitutions which denied the tribal courts jurisdiction over NonIndians. Lastly, even if the tribal law was phrased broadly enough to cover NonIndians, if a NonIndian was involved, tribal police seldom arrested such persons, preferring to call state or local police.

Professor Johnson goes on to comment that:

> this practice is now changing. For example the Colville Tribe recently enacted an ordinance (for which it did not seek BIA approval) which covers NonIndians as well as Indians who violated Colville hunting and fishing laws.

Also, *see*, *Quechan Tribe* v. *Rose*, 350 F Supp. 106 (S.D. Cal., 1972) which lends support to Professor Johnson's conclusions.

[95] For a concise history of Indian affairs and the role of the State *see Indian Report* p. 58-87.

is situated the Indian Police Academy which as of 1971 had graduated 200 Indian Police Officers. The course is a ten week session covering 380 hours of police-related subjects. The curriculum covers most aspects of police administration from Crowd Control to Fingerprinting, Laws of Arrest to Drug Abuse. It is clear, however, that although the candidates are Indian, the curriculum is not.[96] Very similar observations can be made concerning tribal judges. Indian judges are called upon to rule on, among other issues, admissibility of evidence, jurisdiction of the court and illegality of arrests.[97] To assist the tribal judges and court personnel working for Indian judicial systems, the American Indian Trial Judges Association was established in 1967 to provide training and materials on administration of justice on reservations. Other training efforts for judges have also been made especially through the Bureau of Indian Affairs.[98] The point, however, is that the system which the tribal courts and tribal police are administering is not a traditional system of tribal justice. Historically the system of justice on Indian reservations during the last half-century has been a white system implanted on the reservation. This fact was recognised in the debates in the United States Senate which led to the passage of the 1968 Civil Rights Act[99] which, but for a few exceptions, made all tribal authorities subject to the provisions of the United States Bill of Rights. As Senator Sam Ervin, Jr. stated as Chairman of the Senate Judiciary Committee:

> The proposed Indian legislation, a result of the sub-committee's 6-year study, is an effort on the part of those who believe in constitutional rights for all Americans to give "the forgotten Americans" basic rights which all other Americans enjoy. These measures will not cure all ills suffered by the American Indians, but they will be important steps in alleviating many inequities and injustices with which they are faced. These rights, fundamental to our system of constitutional freedoms, are not now secured by laws respecting the American Indian.[100]

Although historically the United States Federal Courts had refused to impose constitutional standards on Indian tribal governments on the theory that such standards apply only to State or Federal governmental action, and that Indian tribes are not States within the meaning of the 14th amendment, the Senate Committee noted serious abuses which they felt necessitated the passage of 'Title II—Rights of Indians' of the 1968 Civil Rights Act. Senator Ervin noted that:

> Tribes have been permitted to impose a tax without complying with due process requirements, tribal membership rights can be revoked at the will of tribal governing officials, and Indians have been deprived of the right to be represented by counsel.[101]
>
> Other abuses regarding administration of justice were also noted.[102]
>
> The bill as signed into law stated the following:
>
> "Sec. 202. No Indian tribe in exercising powers of self-government shall—

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[96] *Indian Report* p. 178-194.

[97] *See*, e.g. "Trial and Appellate Court Procedures", prepared for the National American Indian Court Judges' Association, by R. Johnson and J. White.

[98] *Indian Report* p. 198.

[99] Public Law 90-284; 82 stat. 73, 25 U.S.C.A. 1302, April 10, 1968.

[100] 1968 U.S. Code Congressional and Administrative News Vol. 2 p. 1863. At 1867.

[101] *Ibid*, p. 1864.

[102] *Ibid*, p. 1865.

(1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances:

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offence to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offence any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offence punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Sec. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States to test the legality of his detention by order of an Indian tribe".[103]

It is clear, therefore, that in the context of the American experience with native justice, that the ultimate system that evolves is one in which the administrators of the system—police, judges and executives—are members of the native group but that the system itself is foreign.[104] The tribes do not have the authority to legislate against or punish serious offences[105] and that since the tribes cannot impose a sentence more severe than six months imprison-

[103] For a valuable discussion of the 1968 Civil Rights Act and its effect upon Indians and for a lucid discussion of the problems of codification of rights in regard to native courts. *See* Reiblich, "Indian Rights Under the Civil Rights Act of 1968", *10 Ari. L. Rev.* 617 (1968).

[104] One merely has to glance over "Trial and Appellate Court Procedures" prepared for the National American Indian Court Judges' Association by Johnson and White to see how sophisticated in western jurisprudence are Indian tribal courts. The lessons for the tribal judges contained therein deal with such topics as "Voirdire", "Should Written Briefs Be Required?" and other such topics.

[105] *Supra*, n. 88.

ment and/or a $500 fine for each offence,[106] any offence solely in contravention of tribal culture or laws is by definition a minor offence.

Although the Australian experience need not follow the same path, the American experience can be used to help draft the blueprint for the inevitable changes that need be made to the criminal justice system of the tribal Aborigines.[107] Undoubtedly the United States arrived at its present relationship with the American Indians for a number of historical, jurisprudential, anthropological and social reasons. It is clear that the United States resiled from a situation in which different standards of justice were to be applied to its citizens. It was assumed that there were inherent in all men certain rights which are fundamental and are required wherever and whenever justice is administered. Thus in major offences the policy has been to take the jurisdiction over criminal matters out of the Indian's hands. The issue for Australia is whether the American compromise is a workable precedent from which Australia may arrive at the correct policy to deal with native justice. It will be necessary to guard against paternalistic attitudes such as certain statements of the United States Supreme Court in *United States* v. *Sandoval*:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its border.[108]

B. *The Aboriginal Experience*

Unlike the American experience, the Australian Aboriginal did not and does not retain any autonomy to try any criminal matters. In the 1836 case of *R* v. *Jack Congo Murrell*[109] an Aboriginal was indicted for the murder of another Aboriginal. In overruling the argument that the court had no jurisdiction it was held:

> That although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.

In a few cases the opposite point of view was put forward but in general it is clear that Aboriginals were never thought to exercise any of the prerogatives of sovereignty. In fact in *R* v. *Jemmy*,[110] the Supreme Court of Victoria rejected an argument based on *Worcester* v. *The State of Georgia*[111] and *The Cherokee Nation* v. *The State of Georgia*[112] that Aboriginals were immune from the jurisdiction of the Crown's courts. The Chief Justice stated that "the jurisdiction of the Court is supreme, in fact, throughout the colony, and

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[106] *Supra*, n. 92.

[107] *See*, Hawkins and Misner, *Some Specific Proposals: Third Report on the Criminal Justice System in the Northern Territory 1974* submitted to the Minister for the Northern Territory March 25, 1974.

[108] 231 U.S. 28 at 45-46.

[109] (1836) 1 Legge (New South Wales) 72.

[110] Cited in Kriewaldt, *supra* n. 10 at p. 18. Originally reported in *Argus* newspaper of 28th June, 1860.

[111] *Supra* n. 85.

[112] *Supra* n. 78.

with regard to all persons in it".[113]

In *Milirrpum et al.* v. *Nabalco*[114] Mr. Justice Blackburn commented on the fact that on two occasions a judicial attitude was adopted whereby it was held that Aboriginals had some other law other than the criminal law of the colony applicable to them. He stated:

> These views did not prevail. The contrary view, which is beyond question the law, that the criminal law, unless it is expressly provided otherwise, applies to Aboriginals as fully as to white men, had been applied earlier by the Supreme Court of New South Wales in *R* v. *Jack Congo Murrell*. . . . The only significance of these cases . . . . is I think to show that . . . . there were some judicial suggestions that there was a law outside the ordinary common law, which applied to Aboriginals. I do not think they are significant except as curiosities of Australian legal history.[115]

Therefore it would appear that there is no precedent for the exercise by Aboriginals of jurisdiction over criminal matters. However it can also be stated that there are no historical relics that may in some way force the exercise of jurisdiction in some unwanted way. On the other hand there are rather recent developments which at least arguably limit the range of possible solution to the problem of justice on Aboriginal settlements.

C. *The Effect of Proposed "Rights" Codes upon a Solution*

1. The United Nations Covenant on Civil and Political Rights.[116]

The Covenant requires that in the process preceding trial the individual be told the reasons for his arrest and notice of charges against him. He has a right to a preliminary hearing, expeditious trial and bail. He has the right to test the lawfulness of his detention and the right to compensation if his arrest or detention were unlawful. While incarcerated, the individual cannot be subjected to cruel, inhuman or degrading punishment. If unconvicted he must be segregated from convicted persons. If a juvenile, he must be segregated from adults. At all stages, he has the right to court procedures to test the lawfulness of his detention. This is all in keeping with the Covenant's statement that the essential aim of penitentiaries is reformation and social rehabilitation.

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[113] Kriewaldt, *supra* n. 10 at p. 19.

For an opposite view note Justice Marshall's decision in *Worcester* v. *Georgia*, *supra* n. 85 at p. 543-4.

> "Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made, before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood."

[114] 17 F.L.R. (1971) 141.

[115] *Id.* at p. 261-262.

[116] Adopted by Resolution 2200 (XI) of the General Assembly, 16th December, 1966. Signed by Australia on 19th December, 1972.

The Covenant is very explicit as to what procedures are required in criminal matters:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[117]

To achieve this goal of a fair hearing the Covenant guarantees the individual be presumed innocent and that he have adequate time and facilities for the preparation of his defence. He has the right to be tried without undue delay and to be informed in language that he understands of the charges against him. He must be present at his own trial and be able to defend himself either in person or through legal assistance of his own choosing. He has the right to have legal counsel assigned to him where the interests of justice so require. He has the right to compel attendance of witnesses and the right to examine them. He cannot be compelled to testify against himself. Finally, he has the right to have his sentence and conviction reviewed by a higher tribunal. The Covenant clearly does not make any of these rights discretionary—they derive from "the inherent dignity of the human person" and are the "equal and inalienable rights of all members of the human family".[118]

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[119]

It is also extremely important to note here the relevance of the fact that Aboriginals have retained no sovereignty and are in all respects subject to the courts of the Northern Territory: Article 2(1) provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Covenant will come into force upon the ratification of the thirty-fifth country. At that time constitutional questions with regard to the Commonwealth Government's power to promulgate the necessary municipal law will arise. Presently only eighteen States have ratified the Covenant. However, Australia also signed the Optional Protocol to the International Covenant on Civil and Political Rights. Article 9(1) of the Protocol provides that:

> Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

On December 13, 1973, Mauritius became the tenth member to ratify the Protocol. In short the Protocol gives to The Human Rights Committee as established in Part IV of the Covenant, certain powers to investigate and

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[117] *Id.*, Art. 14(1).
[118] *Id.*, Preamble.
[119] *Id.*, Art 26. For a discussion of the United Nations Covenant and its general application to Aboriginals in Queensland, see Nettheim, *Outlawed: Queensland's Aboriginals and Islanders and the Rule of Law* (1973), Appendix 7.

report violations of any of the rights set forth in the Covenant.[120] Under Article 10 the Protocol is extended to all parts of federal states without any limitations or exceptions. Consequently even though contained in the Covenant, a resident of a federal state still may complain to The Human Rights Committee which would investigate the complaint and if founded publish its report.[121]

It is clear that to demand that an Aboriginal tribunal guarantee all of these rights would be to strip from that tribunal most of its "native" characteristics. To demand that these provisions be put into practice is in fact to demand a white system of justice with Aboriginal personnel—a very similar result to that of the American Indian. For many reasons this may be the only practical solution: it takes cognizance of the problems, it allows for an evolutionary process of involvement—it allows different tribes to be involved at different levels. Finally, it corresponds to what the United Nations has deemed to be necessary for "protection of human dignity".

This conclusion which seems to be dictated by the Covenant on Civil and Political Rights also seems to be dictated by the proposed Racial Discrimination Bill, 1973,[122] and the proposed Human Rights Bill. [123]

2. The Human Rights Bill.

The Human Rights Bill has as its express purpose "to implement the International Covenant on Civil and Political Rights, and for other purposes."[124] Under the proposed Bill, in addition to those rights mentioned earlier in regard to rights guaranteed in the Covenant—there are guaranteed safeguards against unreasonable searches and seizures. Also the proposed bill abolished the death penalty for crimes committed by persons against the laws of Australia or of the Territory. Specifically the bill reiterates that:—

> Everyone is entitled without any discrimination to the equal protection of the law.[125]

These additional requirements make it even less likely that a tribal court could operate strictly along traditional lines.

3. The Racial Discrimination Bill.

On the 21st November, 1973 the Government proposed in Senate The Racial Discrimination Bill 1973. Among other provisions the proposed bill makes it unlawful for a person to deny on the basis of race, colour, descent or national or ethnic origin any human right or fundamental freedom in the political economic, social, cultural or any other field of public life.[126] In a separate provision persons are guaranteed rights to equality before the law.[127] Both provisions clearly relate to Article 5 of the International Convention

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[120] Articles 1-7.

[121] But, of course, not until there are enough ratifications to put the Protocol into effect.

[122] *Racial Discrimination Bill 1973* presented and read in the Senate, 21 November, 1973.

[123] *Human Rights Bill 1973* presented and read in the Senate, 21 November, 1973.

[124] *Id.*, Preamble.

[125] *Id.*, Section 8.

[126] *Id.*, Section 8(1):

[127] *Id.*, Section 9(1) states:

> If, by reason of, or of a provision of, a law of Australia or of a State or Territory, persons of a particular race, colour or national or ethnic origin, enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

on the Elimination of all Forms of Racial Discrimination but are not limited, it would seem, to those rights.[128] Unless it can be argued that Section 7 of the proposed bill which allows "special measures" to confer benefits upon Aboriginals[129] has in mind as a "special measure" the trial of Aboriginals by Aboriginals in a setting where traditional criminal guarantees are not available, it would seem that there is a conflict of basic concepts. On the one hand is the belief voiced by a world body of States, including Australia, which requires that the dignity of every individual requires that he be entitled to certain procedural guarantees. On the other hand is the aim that each autonomous group should be able to determine how it will govern itself. This would appear to be an irreconcilable conflict.

IV—CONCLUSION

The problem is clear: due to logistical and cross-culture problems in the Northern Territory, the criminal justice system is an ineffective and sometimes oppressive, tool in dealing with Aboriginals. One possible solution to these problems is the establishment of tribal court and tribal police. It would appear, however, that for many separate reasons the best that one could hope for is the adoption of basically "white courts" onto the settlements which would be staffed by Aboriginals. It should not be assumed that all or any Aboriginal settlements would want to accept or be able to accept this responsibility. What is urgently needed is that the Australian Government commission an interdisciplinary study to inquire into the possible solutions that can be made to this delicate and complex question.

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[128] *Id.*, Section 8(2) states:
The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.

[129] *Id.*, Section 7(1) states:
This Part does not apply to, or in relation to the application of, special measures (including provisions of laws of Australia or of a State or Territory or any acts done under such provisions) conferring rights on, or providing benefits for, Aboriginals or Torres Strait Islanders.