"Civilized" Law and "Primitive" Peoples

Leslie C. Green

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Green, Leslie C.. "'Civilized' Law and 'Primitive' Peoples." *Osgoode Hall Law Journal* 13.1 (1975) : 233-249.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol13/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

"CIVILIZED" LAW AND "PRIMITIVE" PEOPLES

By L. C. GREEN*

On July 16th, 1974, Judge King-Hamilton sitting in the Central Criminal Court, London, found Felicia Foluke Adesanya, a Yoruba, guilty of assaulting her sons, Roufemi, aged 14, and Lanre, aged 9, occasioning bodily harm, having cut their faces with a knife. For Mrs. Adesanya it had been pleaded that the boys had agreed to her actions, which after all only involved tribal scarification during new year celebrations. The learned judge felt he was able to take a lenient view of the case and order her absolute discharge, for "this is a test case, the first of its kind, and . . . I am convinced you did not realize you were breaking the law."¹ This case immediately throws into profile a fundamental issue of anthropological jurisprudence — the conflict and the interplay as between 'civilized' systems and concepts of law and the 'primitive' people to whom such systems seek to apply.

In order to avoid unnecessary semantic disputation as to the meaning of words, it is as well that we define how the terms 'civilization' and 'primitive' are being used in this paper. Civilization is a relative term depending upon the ethos, beliefs, culture and background of the person using it, and that person's concept of the primitive condition is formed on exactly the same basis. According to Article 36 of the Statute of the International Court of Justice, one of the 'sources' of international law consists of general principles of law recognized by civilized nations², although the Court has never found it necessary to decide a case on these alone. This inability is by no means surprising, for it would be well-nigh impossible to decide what constituted general principles of law, other than perhaps that unjustifiable homicide constitutes a punishable offence. Moreover, who is to decide which are the civilized nations? Every member of the United Nations, which is automatically also a party to the Statute of the Court, regards itself as 'civilized' and would contend that if it did not recognize any particular legal principle, that principle could not therefore be a general principle of law for if it were, it would obviously be recognized by the state in question since that state is, as the whole world knows, civilized. All that one can say of this concept is that general principles of law recognized by civilized nations are nothing but those principles of law which are generally recognized by us and those nations which we consider to be civilized. For our purposes, therefore, the term civilization will be used to connote a state which possesses a sophisticated legal system in the common and civil law traditions. It is

* University Professor, University of Alberta.

¹ *The Times* (London), 16, 17 July 1974.

² See, e.g., B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens, 1953); G. Herczegh, *General Principles of Law and the International Legal Order* (Budapest: Akademiai Kiado, 1969).

equally difficult to define 'primitiveness', and we will use the term to connote a people which is not sophisticated in the above sense, which is regarded as primitive by the ordinary lay person, and which has found itself in a special relationship with one of the more sophisticated groups which latter has attempted to impose, graft or adapt its system of law on to such primitive society.³

The interplay between a civilized and a primitive people requiring some examination of the legal framework may arise in one of two ways. On the one hand, the sophisticated may arrive and take over the territory inhabited by the primitives, establishing themselves and their own government, making the territory in question their own country, as happened in such places as Australia, New Zealand, North America and South Africa. In other places, the invaders took the territory but did so only as a colony or a protectorate, establishing their alien order, but not intending to make the land their own home, for they sent their children 'home' to school and themselves hoped to 'return home to die'. In the former case, there was no hesitation about imposing their own system of law, especially when the settlers were English, for an Englishman took his law with him: "Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, . . . the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to revision and control of the king in council"⁴.

This comment is only concerned with the rights of the settlers. The reason for this is that, so far as the established states of the time were concerned, newly-discovered territories were considered uninhabited, regardless of the size of the aboriginal population, and therefore there was no existing legal system which could conflict with that known to the settlers and which they took with them. In those cases where there was already an established state which had been conquered or ceded, the newcomers recognised that the already-existing law prevailed until such time as it was amended by the new sovereign. This was a matter of necessity and convenience, for if the existing law were abrogated immediately anarchy would probably ensue. At the same time, it was recognized that the local population would not be any more familiar with the new law being introduced than the conquerors would be with the already existing one. Sometimes this meant that the two systems could, for a time at least, continue to survive side by side, operating independently with each controlling its own community. This is, for example,

³ See, e.g., L.C. Green, *Native Law and the Common Law: Conflict or Harmony* (1970), 12 *Malaya L. Rev.* 38.

⁴ 1 Blackstone, *Commentaries on the Laws of England* 108.

what happened in the case of the North American Indians in the United States, but not in Canada. As Chief Justice Marshall pointed out⁵:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

The importance of this fact became clear some fifty years later, when the Supreme Court held⁶ that an Indian who had murdered another Indian on a reservation was not amenable to federal criminal law, but only to tribal law. This situation, however, was terminated by statute two years later.⁷

In some instances attempts have been made not merely for the two systems to exist side by side independently, but for them to work cooperatively, although this may produce the most incongruous results. This is illustrated by the trial of a 'crocodile man' in Nyasaland in 1962.⁸ Elland brought an action before a Native authority court seeking payment from one Odrick who had contracted to pay him £4.10s. if he killed a girl suspected of witchcraft. Elland, assuming the guise of a crocodile, carried out his part of the arrangement, but only received 10s. from Odrick, whom he therefore sued for non-payment of debt. The court ordered Odrick to pay £2.10s. into court in settlement and issued a receipt. Subsequently, both men were indicted before the Nyasaland criminal court for murder.

This clash between the two systems often becomes evident when an issue affecting the public policy of the ruler is involved. Thus, when England settled abroad the general tendency was not to interfere with local customs unless these were repugnant to English concepts of morality and *ordre public*. Perhaps the most important instances of England's refusal to recognize local ways are the rejection of *suttee* in India, even though this was a country which the settlers recognized as having its own legal system at least in so far as the personal rights of the Native inhabitants were concerned, and the refusal to recognize the validity of polygamous marriages, even though they might be acceptable locally. But on occasion the concept of public policy⁹ was carried to much greater extremes, particularly when the judge was a member of a colonial legal service whose natural tendency was to look to the concepts of his own system and proved unwilling to accept anything completely alien thereto. This happened in Tanganyika when Wilson, J. held⁹ that

a Turu custom whereby the property of a father might be seized in compensation for a wrong done by his son was so repugnant to British ideas of justice and morality that it would not be endorsed in the High Court. It would, however, almost certainly have succeeded in a local court, to which such ideas of vicarious liability would not be so difficult to accept.

⁵ *Worcester v. Georgia* (1832), 6 Pet. 515 at 542.

⁶ *Ex parte Crow Dog* (1883), 109 U.S. 556.

⁷ (1885), 23 Stat. 385; see now 18 U.S.C. s. 1153.

⁸ *The Times* (London), 25 August 1962.

⁹ *Gwao bin Kelimo v. Kisunda bin Ifuti* (1938), 1 T.L.R. (R.) 403; J.S.R. Cole and W.N. Denison, *Tanganyika, The Development of its Laws and Constitution* (London: Stevens, 1964) at 131.

A somewhat similar approach is to be found in Nigerian judicial practice, even in the field of customary family law. Thus,

in *Joshua Chawere v. Hannah Aihenu*¹⁰ it was held that any native custom to the effect that a wife who committed adultery . . . became the wife of the male adulterer would be repugnant and unenforceable. And in this same field, the English common law concept of "public policy", which would forbid the encouragement of promiscuous intercourse¹¹, has been suggested¹² as capable of striking down the now well-established¹³ customary rule that an originally illegitimate child whose paternity is acknowledged and recognized by its father thereby acquires the same status as a child born legitimate.¹⁴

This peculiar attitude to 'public policy' has also been described as a rejection of barbarism, although the Judicial Committee of the Privy Council has recognized that 'barbarous' habits may become modified by the impact of 'civilization'¹⁵:

. . . the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character of custom . . . so as in that form to regulate the relations of the native community *inter se*. In other words, the court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character, it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.

The importance of the modifying character of the last two sentences is to be seen in a judgment by the Chief Justice of Gambia which makes clear that even a custom which might be rejected by Christian missionaries and would certainly not be tolerated in Europe is not necessarily contrary to 'natural justice'. He held in *Koykoy Jatta v. Menna Camara*¹⁶ that female circumcision "is your custom but can only be your custom in your own tribe and applied to your own people".

When dealing with custom and its creation judges, particularly in English colonial jurisdictions, are likely to apply their own backgrounds rather than have regard for local realities. Thus, the Chief Justice of the Gold Coast held¹⁷ that "according to the principles of English jurisprudence" a local custom must date back to 1189, which is the date at which 'time immemorial' begins at common law, but this view was rejected forty years later¹⁸. It never

¹⁰ (1935), 12 Nigeria L. R. 4 (Div. Ct.).

¹¹ See 'The Ladies' Directory Case', *Shaw v. D.P.P.*, [1962] A.C. 220 (H.L.).

¹² *In re Sarah Adadevoh* (1951), 13 W.A.C.A. 304 (W. African C.A., Nigeria) at 310 (*per Verity*, C.J.).

¹³ *Savage v. Macfay*, [1909] Ren. 504; *Re Sapara*, [1911] Ren. 605.

¹⁴ F. Ajayi, *The Interaction of English Law with Customary Law in Western Nigeria*, II (1960), 4 J. African Law 98 at 104-05.

¹⁵ *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)*, [1931] A.C. 662 (P.C.) at 673 (*per Lord Atkin*).

¹⁶ (1964), 8 *Journal of African Law* 35.

¹⁷ *Welbeck v. Brown*, [1882] Sar. F.C.L. 185.

¹⁸ *Mensah v. Wiaboe* (1925), Div. Ct. Judgments 1921-5, 172; cf. T.O. Elias, *Ghana and Sierra Leone, The Development of their Laws and Constitutions* (London: Stevens, 1963) at 119.

applied in Singapore, for "the history of Singapore began in 1819, more than 600 years after 1189, and that in itself concludes the matter"¹⁹. This problem at least has been avoided in New Guinea, for there custom is regulated by statute, permitting judicial declaration and recognition of recent and altered custom, and since in this case native custom means local custom, it may vary from place to place.²⁰

On occasion, a courageous judge has been prepared to disregard the general law and apply local custom. Perhaps the best known practitioner in this field was Sissons, J. in the North West Territories when dealing with the Inuit,²¹ although it may well be argued that he was doing nothing but applying the approach of his predecessor Witman, J. when determining whether a marriage between Indians in the Territories, contracted in a form which would have been valid before the introduction of English Law in 1870, was to be recognized. In 1885 the latter asked²²:

[A]re the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? I have great doubt if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached save with the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoad* the Indians. The Indians are for the most part unchristianized,²³ they yet adhere to their own peculiar marriage customs and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. . . . [A] marriage between Indians by mutual consent and according to Indian custom since 15th July 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time . . .

Witman, J. could have reached the same conclusion by holding that a common law marriage had been created by repute, but he preferred to apply the native law, while insisting on monogamy. Some thirty years later a United States court also recognized an Indian customary marriage, although polygamous²⁴.

In the case before Sissons, J. the issue was not directly that of the validity of a marriage. *Re Noah Estate*²⁵ turned on the application of the Northwest Territories *Intestate Succession Ordinance* which depended on whether the claimants were in fact the 'widow' and 'issue' of the deceased. To decide this the Inuit marriage in question had to be examined to see

¹⁹ *Anguilla v. Ong Boon Tat* (1921), 15 S.S.L.R. 190 at 193.

²⁰ Native Customs (Recognition) Ordinance 1963, s. 4.

²¹ J.H. Sissons, *Judge of the Far North* (Toronto: McClelland & Stewart, 1968).

²² *Reg. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L. R. 211 (N.W.T. Sup. Ct.) at 215.

²³ It is perhaps worth mentioning that Mrs. Adesanya, the defendant mentioned in n. 1, was formerly a Muslim who had become a Christian.

²⁴ *Kobogum v. Jackson Iron Co.* (1889), 43 N.W. 602 (Mich. S. Ct.).

²⁵ (1962), 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.) at 197-99, 202-03, 205-06 (It was in connection with this case that Sissons, J. is alleged to have said: "I am not going to have a lot of bastards in Ottawa tell me that my people here are a lot of bastards.").

whether it satisfied the conditions of a 'Christian' marriage as required by English law. The suggestion that Eskimo cohabitation and marriage in accordance with Inuit custom was mere concubinage was dismissed by the judge as 'fanciful and scandalous', since "marriage according to Eskimo custom is not 'the Eskimo custom of concubinage'." He considered that the Inuit system of trial marriage was as separate from marriage proper as is the Western system of 'engagement' or 'going steady'. He pointed out that the relationship in question complied

in every respect with the requirements of what was known, according to the old law of England, as a consensual marriage, that is formed or existing by mere consent. The old law of England recognized a consensual marriage. The general law of Europe apparently also recognized a consensual marriage as being in all respects perfect The *Marriage Ordinance* . . . has no provision stating that a native marriage is invalid and no statement that a marriage carried out on the basis of common law is null and void. . . . This Ordinance is misnamed. In spite of its title, this is not a *Marriage Ordinance* but a *Solemnization of Marriage Ordinance* I think there was considerable solemnization of this marriage, even if tinged with irregularity.

The solemnization of an Eskimo marriage follows pretty well that of the Anglican Church, or rather the Anglican Church's solemnization seems to follow that of the Eskimos. In Christian countries marriage did not become a religious ceremony before the 9th century, when newly-wed couples began coming to the church door to have their union blessed by the priest. The marriage had already taken place and was generally a family and community affair

as was the case with the instant marriage, where everybody knew of the union and accepted it.

The marriage custom of the Society of Friends (Quakers) seems very much like that of the Eskimos. The Friends marry at a special meeting called for the occasion, the only formality being a public declaration of the marriage by the couple and the signing of a certificate by all present as witnesses [As for the *Interstate Succession Ordinance*, this Ordinance does not apply to Indians. The *Indian Act* . . . has its own provisions for intestate succession The rights and customs of the Indians have not been completely ignored. They have their treaties and their *Indian Act*, codifying some at least of their rights and customs. The Eskimos have no treaty. They have not given the covenant appearing in the Indian treaties, whereby: "They promise and engage that they will, in all respects, obey and abide by the law." They have no *Eskimo Act*. . . . [T]hey have no one to represent them in Parliament. They have no representation on the Territories Council of the Northwest Territories. This Court must guard their rights, when it can, and sometimes must write upon a clean slate.

While I think that generally the *Intestate Succession Ordinance* has no application to Eskimos, I think there are times and circumstances when these provisions are applicable to an Eskimo estate

and among such circumstances was the instant case where the deceased had gone to live in white society and had become part of that society and economy.

As an instance of a situation in which colonial judges thought they were applying native customs of marriage and concubinage one might cite the *Six Widows* case²⁰ in Singapore. Here, English judges introduced into Singapore a concept of Chinese law not previously known and still not

²⁰ (1888), 12 S.S.L.R. 120 at 187, 209.

recognized in China²⁷. The case concerned the status of Chinese 'concubines', and Hyndman Jones, C. J. accepted that

the evidence is very contradictory, but I am disposed to think that when it is intended to take a woman into a man's household as a concubine for the purpose of securing a succession, or at all events as more than a temporary mistress, there is some sort of ceremonies; although these ceremonies, in some districts and among some classes are of a more or less perfunctory character, and always much less elaborate than those adopted in the case of a *t'sai* [principal wife].

Braddell, J., whose knowledge of Chinese law was no better than that of the Chief Justice, declared

I entirely adopt the exposition of the Chinese law given in the judgment of the Chief Justice and concur with him in the conclusion to which he has arrived, namely, that concubinage is recognized as a legal institution under the law, conferring upon the *t'sip* [secondary wife] a legal status of a permanent character.

Half way through the twentieth century, judges were still anxious to uphold domestic arrangements of Singapore citizens if they possibly could. This is clear from the attitude of the Privy Council in upholding a local decision recognizing as a marriage a ceremony conducted by a Chinese between a Chinese Christian woman and a Jewish man in a house before witnesses, with each party offering prayers in his own way²⁸:

[While] it is not suggested that either party to the marriage in question was a Christian [...] the evidence as it stands sufficiently proves a common law monogamous marriage. The wishes expressed by the respondent and her mother for a Church marriage, the reason why a modified Chinese ceremony was substituted, . . . the words spoken by the Chinese gentleman who performed the ceremony as to a life-long union, the cohabitation as man and wife which followed and continued until the husband's death, and the introduction by the deceased to a Christian pastor of the respondent as his wife, and last, but not least, the baptism of their children as Christians with the approval of their father, all indicate that the spouses intended to contract a common law monogamous marriage.

Although it may be true that the parties did intend to effect a lifelong marriage which was rendered respectable by the introduction of the common law to modify the rigours of the local law, a similar result might have been obtained if the court had adopted the words of Lord Phillimore in an earlier case involving Chinese parties²⁹:

In deciding upon a case where the customs and the laws are so different from British ideas a Court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married.

The need to recognize potentially strange jural conceptions because of basic deviations from the British way of life is to be seen in the memoirs of Austin Coates, a former Special Magistrate in Hong Kong who never qualified legally and perhaps, therefore, found it comparatively simple to apply rough

²⁷ Information imparted to the writer by senior Chinese judges in Singapore and Malaysia.

²⁸ *Penhas v. Tan Soo Eng*, [1953] A.C. 304 (P.C.) (Singapore) at 318-20.

²⁹ *Khoo Hooi Leong v. Khoo Hean Kwee*, [1926] A.C. 529 (P.C.) (Straits Settlements) at 543.

justice in accordance with local Chinese custom³⁰. In fact there may be much to be said for appointing non-home trained personnel or non-lawyers to deal with issues among 'primitive' peoples, for even though the 'case' may appear as a formal legal process, the person hearing it has often to act as a 'Dutch uncle' or a mediator rather than as a judge. Such mediation is likely to be far more successful if the officer is aware of or amenable to native susceptibilities, reactions and habits. Such a case came before a native 'specialist' local court magistrate in Wewak, New Guinea in 1967³¹. Joana claimed that Anton had married her at Rabaul, having paid the required bride-price. She contended that the custom of her people was 'one man one wife', and although a child had been born she sought dissolution on the ground that Anton had become interested in Agnes, whom he regarded as his second wife, and had told Joana to return to Rabaul. Anton complained of Joana's conduct towards him and his relatives, and pointed out that she could not work because of the child, and so he had to get another wife, but

I have not paid Agnes's bride price yet. However, since she has been in my village for one week, we claim it is a marriage by native custom. I believe her parents would not dispute her marrying me.

The magistrate advised them that in his view

a valid marriage obtained between Joana and Anton by native custom, bride-price having been paid; the 'marriage' between Agnes and Anton was not a valid marriage according to native custom, no bride-price having been paid to Agnes's parents and no celebrations held by way of recognition of marriage in accordance with the local custom; Joana would be entitled to have her marriage dissolved by native custom since in her community there should be only one woman and one man in a marriage.

Joana thereupon agreed to withdraw her suit, provided Anton would send Agnes away, and to this Anton agreed. We have here, therefore, an instance of a magistrate preserving a marriage when, had there been a formal local court hearing, he would almost certainly have found it necessary to issue an order for dissolution in accordance with the Local Courts Ordinance, 1963, s. 17.

As long ago as 1919 Lord Sumner recognized the need to acknowledge the existence of native institutions of law and the limitations inherent in seeking to impose 'civilized' law upon 'primitive' people³²:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of [e.g.] transferable rights of property as we know them On the other hand, there are indigenous peoples whose legal conceptions, though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

³⁰ A. Coates, *Myself a Mandarin* (London: Muller, 1968), esp. at 22-25, 204-12.

³¹ *Joana-Vapor v. Anton Susami and Agnes-Daporobu* (cf. B.J. Brown, ed., *Fashion of Law in New Guinea* (Sydney: Butterworths, 1969) at 209).

³² *In re Southern Rhodesia*, [1919] A.C. 211 (P.C.) at 233-34.

Unfortunately, however, judges from the colonial powers or from among settlers who have become the establishment are rarely prepared to study or understand such local legal systems.

On the other hand, recent trends in the recognition by the law of the significance of psychology have often resulted in local judges taking a special — and often more lenient — view of the law when a 'primitive' is involved. Evidence of this is to be found in as widely separate jurisdictions as South Africa, Papua and New Guinea and Australia. In 1951 the Appellate Division of the South African Supreme Court heard the appeal of Mrs. Mkize³³ who had been found guilty of murder, having placed arsenic, which she believed to be a love potion, in her husband's beer. In substituting a finding of culpable homicide for the murder conviction, the Court stated:

The belief which the accused says she had in the results of administering the potion . . . may appear to educated minds to be absurd but it must be borne in mind that the accused is an illiterate native woman living in a native kraal and that it is well known that natives genuinely believe in magic and witchcraft.

The question of native beliefs was equally important in an earlier case in which a murder verdict had been reduced to culpable homicide. Some Native children thought they had seen a *tikoloshe* in a hut, and since it would be fatal for humans to look such an evil spirit in the face they summoned the accused, a Native youth of 18, to deal with it. Like them, he thought it was a *tikoloshe* and struck it with a hatchet. When he dragged the *tikoloshe* from the hut, he found that he had killed his nephew who had been sleeping there. In the course of its judgment, the Appellate Division held³⁴ that the standard of reasonableness in such a case was "not that of an ordinary 18-year-old Native living at home in his kraal, but that of a reasonable person of his age."³⁵

A somewhat more reasonable approach to the idea of legal reasonableness has been adopted by judges dealing with Papuan Natives and Australian aborigines. It is a well-established rule of 'civilized' law that words alone are not sufficient to ground a defence based on provocation. Brennan, A. J. of the Supreme Court of Papua and New Guinea had to decide whether insulting words could provoke a killing³⁶. The words had been spoken by a woman to a man who had himself used a coarse expression to the woman's daughter: she said 'You cannot find a woman to marry, and if you talk like that to a girl child you will die still unmarried.' The judge pointed out that in

western communities which apply common law principles, the view that words alone cannot be relied upon as a provocation has hardened since the seventeenth century. As a general proposition that thesis is hardly open to dispute, but it does not necessarily follow that the same principle should apply in a native

³³ *R. v. Mkize*, [1951] 3 S. Afr. L. R. 28 (App. Div.) at 33 (*per* Centlivres, C.J.).

³⁴ *R. v. Mbombela*, [1933] S. Afr. L. R. (App. Div.) at 271 (*per* de Villiers, J.A.).

³⁵ For consideration of the concept of the 'reasonable man' in relation to the armed forces, see L.C. Green, *Superior Orders and the Reasonable Man* (1970), 8 Can. Y. B. Int. Law 61.

³⁶ *R. v. Awaba* (1960) unreported (cf. Hookey, *The "Clapham Omnibus" in New Guinea*, in Brown, *op. cit.*, fn. 31, 117 at 126).

community where sophistication does not approach to that of, say, seventeenth-century England, where a type of insult such as the one here in question is calculated and not infrequently intended to throw a man into an ungovernable rage.

This seems to be a not unusual attitude for judges in that part of the world to adopt and in *R. v. Zariai-Gavene*³⁷ the judge expressly took into consideration the effect of the words spoken upon a Goilala villager, of whom the accused was one. Equally aware of the realities in that jurisdiction was the comment of Smithers, J.³⁸ that "for the exemplification of the ordinary man [in the Territory] one must take the ordinary native living the rural life of low standard led by the accused and his relatives and similar lines. . . . The man in the *lap lap* takes the place of the man on the Clapham omnibus."

Perhaps one of the most enlightened judgments in this field is that of Bright, J. of South Australia in *R. v. Gibson*.³⁹ The accused, an aborigine living on the Yalata reserve, was charged with killing another aborigine, and as soon as the case came for trial the judge was faced with a problem that is more likely to affect 'primitive' rather than 'civilized' defendants. It was argued on behalf of the defendant that the case concerned 'men's secrets' and therefore no woman should be allowed on the jury or in the courtroom, for if any were present witnesses would refuse to give evidence and the defendant would be denied the opportunity of a fair trial. This request was acceded to by the learned judge, and one cannot help but wonder what might have happened in a similar case in Canada affecting an Indian or an Inuit in view of the Bill of Rights and the ban on discrimination against women — although it must be remembered that a Canadian judge has the right to order a hearing in camera if he considers that justice so demands. The killing arose out of a quarrel occasioned by insulting remarks concerning aboriginal circumcision at a time when both the deceased and the accused were somewhat the worse for liquor. During his judgment, Bright, J. soon made it clear that he was aware of the peculiar problems confronting him because aborigines were involved, for one of the preliminary issues related to the accused's statement to the police. It was pleaded that Natives tended to say what they thought the authorities wished them to say, and while the judge agreed

. . . that there is a distinction to be made between white persons who have been brought up in the concepts of society and ideas (including the idea of independence of authority) prevalent in Europe and Australia on the one hand, and indigenous persons who not only have a limited command of English but whose whole culture differs radically from the white culture [. . . and] if the accused had been able to express his state of mind he might have said,

"Yes, I know that you have told me that I don't have to answer, but I am an uneducated black man from my tribe and you are white men in authority over me and I am frightened of you; so when you ask me a question I answer you because I can't exercise my right to keep silent when people like you ask me questions."

³⁷ [1963] P. & N.G.L.R. 203.

³⁸ *R. v. Rumints-Gorok*, [1963] P. & N.G.L.R. 81 at 83.

³⁹ Judgment No. 1810, delivered 12 November 1973. The writer is indebted to Bright, J. for having supplied him with a transcript of the judgment (italics added).

[But i]f I were to exclude the statement on that ground I should be creating a different law for Aborigines from the law applicable to white men. And I should be overlooking the fact that many white accused persons who are cautioned are ignorant, simple minded and scared

In the course of his address to the jury, Bright, J. constantly indicated his awareness that the accused was an Aborigine:

The accused, like the deceased, is a member of the Pitjantjara tribe living in a tribal environment. From the foundation of the Province of South Australia black people and white people have lived under the same laws of the country. The tribesman is more immediately aware of the laws of the tribe which preserve his culture and ensure his survival in the arid conditions of outback Australia. In the same way a nun in a convent may be more aware of the laws of the convent. I must hasten to add that I should regard a nun as being much less remote from the general white culture than a Pitjantjara tribesman. Perhaps it is unnecessary for me to add that I am in no way talking of relative intelligence. Indeed, I do not know what is the measure of intelligence. If it be an ability to survive and to thrive in the environment in which one finds oneself, and I would think that this is the proper test, then the Pitjantjara Aboriginal displays an ability to do both, according to his own lights, in his own environment. I am not prepared to say that white persons in general, display a greater ability to thrive according to white concepts in a white environment than black persons, in general, do according to black concepts in theirs. In each case one must apply not absolute standards but standards of achievement capable of attainment in the particular environment.

. . . What the rules of a convent or a tribe may do by way of retribution to a member who broke the criminal law is no concern of ours at present. . . . [A] nun might be shocked more readily and more deeply than many members of the general public by a blaspheming of the Christian faith. And a tribesman would be more shocked, disturbed and aroused by an improper disclosure of the sacred mysteries of tribal lore than you or I would be. The law is not foolish. It takes account of these matters.

. . . We shall often have more difficulty in understanding black men's ways than white men's ways for we are ignorant in these matters. . . .

Your task is to determine whether it is reasonably possible that a tribal Aboriginal who took a reasonable view of the matter — if you like, *a reasonable tribal Aboriginal* — might have been so provoked by the things that the deceased said and did, that when he struck . . . the deceased he was so carried away that he was not the master of his mind but had lost control of himself, that at the most he is guilty of manslaughter. . . .

. . . It is true that the blows were heavy, but we are not dealing with dainty members of society. We are considering tribal Aborigines living in the desert . . .

. . . [H]e had been provoked by violence himself and by the insulting and terrifying use of ritual references. These ritual references, if he heard them without protest might expose him to punishment, and punishment in the tribe might go as far as death.

. . . Not every form of provocation is of effect in the criminal law. The provocation is usually said to be such as would cause a reasonable man to lose control of himself. Where tribal lore in a tribal setting is improperly referred to by an initiated tribesman to an uninitiated tribesman it is *useless to think of a reasonable white man*. One must think of a reasonable man having the awareness, the timidity, the ordinary reactions of a Pitjantjara tribesman, viewing the tribe as a social group and the accused as a member of the group

In fine, the jury found the accused not guilty of murder or manslaughter.

Even when courts in 'civilized' countries have had to deal with 'primitive' people, not aboriginals or other indigenous groups, but alien persons coming

from less sophisticated cultures, they have in recent years adopted a more reasonable attitude than was formerly the case. Marriage is probably as good an example as any to take. The general rule of the common law is that marriage as understood by Christendom is monogamous and *Hyde v. Hyde*⁴⁰ has been generally accepted as establishing that rule, although in Canada this seems not to have been the case, at least in so far as Indian marriages were concerned, for as was pointed out by Monk, J. in *Jones v. Fraser*⁴¹

It has been said that polygamy existed among the Indian tribes of the North-West, and that the marriage invoked by the respondent could not therefore be supposed to possess the character required for marriage in all christian countries, that is unity and perpetuity. . . . [P]olygamy did not exist, as a rule, among those who married Indian women, but only among the Indian tribes. A marriage which took place there according to the local usage was considered as an ordinary marriage.

Today, even jurisdictions which applied *Hyde* rigorously have moved away from so narrow an approach. An example is *Ochochuku v. Ochochuku*⁴². The parties, though Christians, had entered into a marriage in accordance with Native custom in 1949 in Nigeria, at which time Nigeria permitted polygamy. While in England they went through a register office marriage and subsequently the wife sued for divorce, which was granted. However,

[W]hatever might be the effect on the marriage for other purposes and in other courts of the parties being Christians, in this Court and for this purpose the Nigerian marriage must be regarded as a polygamous marriage over which this court does not exercise jurisdiction.

I therefore pronounce a decree nisi for the dissolution not of the Nigerian marriage but of the marriage in London. I am told that, in fact, that will be effective by Nigerian law to dissolve the Nigerian marriage; but that forms no part of my judgment. That is for someone else to determine and not for me.

By 1968, in *M. v. K.*⁴³, the English courts were adopting a far more liberal attitude to what were potentially polygamous marriages. Justices had committed a fourteen-year-old Nigerian girl to the care of a local authority as being exposed to moral danger. Some five months earlier she had gone through a potentially polygamous marriage with a Nigerian male of 25 in Nigeria where they were both domiciled. The magistrates in making the order for care, protection and control held, wrongly, that since the marriage was potentially polygamous it could not be recognized in England. The Queen's Bench Divisional Court held, however, that in so far as the girl's

⁴⁰ (1866), L.R. 1 P. & D. 130.

⁴¹ (1886), 12 Q.L.R. 327 (S.Ct.) at 335. See also his decision in *Connolly v. Woolrich* (1867), 11 Lower Can. Jur. 197 (Sup.Ct.), and G.W. Bartholomew, *Recognitions of Polygamous Marriages in Canada* (1961), 10 *Int. & Comp. Law Q.* 305. See, also, *Kaur v. Ginder* (1958), 13 D.L.R. (2d) 465 (B.C. S.Ct.) in which the court upheld a valid polygamous marriage in India by an East Indian domiciled in B.C. to an Indian woman domiciled in India, as barring a subsequent monogamous marriage.

⁴² [1960] 1 W.L.R. 183 (P.D.A.) at 185 (*per* Wrangham, J.). See, also, T.C. Hartley, *Polygamy and Social Policy* (1969), 32 *Modern Law Rev.* 155.

⁴³ *The Times* (London), 29 March 1968; reported as *Mohamed v. Knott*, [1968] 2 W.L.R. 1446 (Q.B.) at 1456 (*italics added*).

status was concerned, the marriage would be recognized and she would be a wife. Lord Parker, C. J. pointed out:

. . . the question was whether the evidence justified such an order [of protection]. The justices had found that before the marriage the [man] had lived with a woman and had had three illegitimate children, and that after the marriage, at a time when the wife had almost certainly not reached puberty, he had had intercourse with her. After the marriage he had contracted gonorrhoea from a prostitute, but he was now cured and intended to resume intercourse with his wife. The justices had found that the continuance of the association between the girl and the appellant would be repugnant to any decent minded English person. . . . They had misdirected themselves and were considering the reactions of an Englishman regarding an English man and woman in the western way of life. *A decent Englishman realising the way in which a Nigerian man and woman were brought up would not say it was repugnant.* They developed sooner and there was nothing abhorrent in a girl of 13 marrying a man of 25. To say the girl was in moral danger would be *ignoring the way of life in which she and her husband had been brought up.* It had been suggested that every time that the appellant slept with his wife in England, he was committing a criminal offence under the *Sexual Offences Act, 1956*, s. 6 which made it an offence for a man to have unlawful intercourse with a girl between 13 and 16 . . . [The Lord Chief Justice did] not think the police could properly prosecute cases where a foreign marriage was recognized in England. . . . Intercourse between a man and wife was lawful. . . . Where a husband and wife were recognized as validly married according to the laws of England, His Lordship would not say the wife was exposed to moral danger because she carried out her wifely duties.

Within the last ten years or so a new issue as between 'civilized' law and 'primitive' people has arisen in some countries possessing indigenous populations. This concerns the meaning of the relationship established between the original inhabitants and the invaders on the basis of treaties drawn up between them. This is not the place to discuss whether these documents are 'treaties' in the technical sense of that term or what their exact legal significance and import may be⁴⁴. What is important, however, is that these documents were drafted by sophisticated lawyers operating within their own legal *milieu* and that the terms they used were the technical terms known to them and probably impossible of translation into the language of the aboriginals with whom they were negotiating. This is largely true whether the invaders were government spokesmen or the representatives of such trading companies as the British and Dutch East India Companies or the Hudson Bay Company, or whether the Natives with whom they were dealing were North American Indians, Malay or east Indian princes, Australian Aborigines, Javanese or Sumatrans, or New Zealand Maoris. In none of these cases could it be said that the parties were operating on a basis of true equality and it is doubtful whether the Native negotiators were at any time really *ad idem* with the westerners. Problems therefore arise with regard to the interpretation of these documents which were held out to be legally binding arrangements and requiring legal interpretation. Recognition of this

⁴⁴ See L.C. Green, *Legal Significance of Treaties Affecting Canada's Indians* (1972), 1 Anglo-American L. Rev. 119.

fact is to be found in the judgment of the United States Supreme Court at the end of the nineteenth century, when Justice Gray commented⁴⁵:

In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

When looking at the treaties made with the Canadian Indians it is equally necessary to bear this comment in mind, particularly in the light of the historical background of the treaties. Thus, in a despatch relating to the North-West Angle Treaty negotiations, 1873, Lieutenant-Governor Morris reported⁴⁶ that

The principal [Indian] spokesman, Mawedopenais, came forward and drew off his gloves, and spoke as follows: "Now you see me stand before you all. What has been done here today, has been done openly before the Great Spirit, and before the nation, and I hope that I may never hear any one say that this treaty has been done secretly. And now, in closing this council, I take off my glove, and in giving you my hand, I deliver over my birthright, and lands, and in taking your hand I hold fast all the promises you have made, and I hope they will last as long as the sun goes round, and the water flows, as you have said." To which I replied as follows: "I accept your hand, and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white man together as friends forever".

The Manitoban, in reporting the meeting, stated ⁴⁷ that Morris also told the Indians:

. . . you ought to see by what the Queen is offering you that she loves her red subjects as much as her white . . . [T]hat what I offer you is to be while the water flows and the sun rises. You know that in the United States they only pay the Indians for twenty years . . . I only ask you to think for yourselves, and for your families, and for your children and children's children . . .

Again, when negotiating with the Cree at Forts Carlton and Pitt⁴⁸, Morris gave assurances:

I told you that what I was promising was not for today or tomorrow only, but should continue as long as the sun shone and the river flowed. My words will pass away and so will yours, so I always write down what I promise, that our children may know what we said and did. Next year I will send copies of what

⁴⁵ *Jones v. Meehan* (1899), 175 U.S. 1 at 10-11.

⁴⁶ A. Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke, 1880) at 51.

⁴⁷ 18 Oct. 1873 (cf. Morris, *op.cit.* fn. 46 at 61).

⁴⁸ Morris, *op.cit.* fn. 46 at 208, 213.

is written in the treaty, printed on skin, so that it cannot run out or be destroyed, and one shall be given to each Chief so that there may be no mistakes.

This was also the understanding of the Indians as is shown by the comment of Chief Mis-tah-wah-sis:

What we speak of and do now will last as long as the sun shines and the river runs, we are looking forward to our children's children, for we are old and we have but few days to live.

Apparently not all the agreements were made in this way, at least in the case of British Columbia:

The practice was to pay the Indians the purchase price against their signature by mark on blank paper to be filled in later as a deed. In 1854 the Saalequun tribe so surrendered their lands on Commercial Inlet, 12 miles up the Nanaimo River. For that surrender no deed was made up but the signatures or marks were obtained on blank paper against payment.⁴⁹

Recognizing the disproportionate relationship between the parties and the peculiarities of language used, as well as the need to uphold the dignity of the Crown in whose name these arrangements were made, Canadian judges have, for the main part, accepted the need for an *uberrima fides* interpretation of the rights of the Indians under these treaties. Thus, when holding that the Alberta Game Act did not interfere with the right to hunt embodied in the relevant treaty, McGillavray, J. A. held⁵⁰ that the latter must be interpreted:

with the exactness which honour and good conscience dictate . . .

It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that the legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent"

as stipulated in the Royal Proclamation of 1763 guaranteeing their rights against encroachment.

A somewhat similar approach is to be found in a judgment of Patterson, Co. Ct. J.⁵¹:

Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. . . . That is a matter of representations to the proper authorities — representations which . . . could hardly fail to be successful.

This view, however, may be regarded as somewhat sanguine, for in 1964 when construing Morris's promises and their interminability, McGillavray, J. A. said that at the time of drafting the legislation being interpreted, and which was alleged to be inconsistent with treaty promises, it appeared "likely that these obligations under the treaties were overlooked"⁵².

⁴⁹ *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613 (B.C.C.A.) at 622 (*per* Sheppard, J.A.).

⁵⁰ *R. v. Wesley*, [1932] 2 W.W.R. 337 (Alta. C.A.) at 351-53.

⁵¹ *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S.Co.Ct.) at 314.

⁵² *R. v. Sikyea* (1964), 46 W.W.R. 65 (N.W.T.C.A.) at 74.

There can be little doubt that the legislative body of any of the countries alleged to be bound by such treaties is competent to pass legislation abrogating, controverting or disregarding these alleged undertakings. However, it should be borne in mind that equity and morality demand a modicum of good faith even, or perhaps especially, in the relations between 'civilized' and 'primitive' peoples. Moreover, the political framework of the present era suggests that one can no longer ride roughshod over the rights of people and that aborigines have their rights as well as others, and that there are plenty of bodies, some truly altruistic and others perhaps with an ideological axe to grind, who will publicize what they consider to be disregard or abuse of such rights. However, there is a limit to the extent to which modern and newly discovered or invented rights can be used in order to interpret documents and undertakings that were entered into before such concepts were even dreamed of. This is true of, for example, aboriginal rights in the sense of continued ownership or independence and self-determination⁵³.

It is perhaps inevitable that difficulties and controversies arise when a 'civilized' system of law attempts to deal with the problems, rights and status of 'primitive' peoples, and it may well be that complete elimination of such confrontation is beyond human reach. However, it may be possible to reduce the *contretemps* and effect a more congenial *modus vivendi*. In so far as arrangements like treaties are concerned, an attempt should be made on both the political and judicial level to recognize the extent to which the 'primitives' were misled into certain beliefs and the 'civilized' took advantage of those beliefs. So far as possible the arrangements should be interpreted in the sense in which the 'primitives' were led to understand them and, in accordance with the principle of normal interpretation, *contra proferentem* the party responsible for putting forward the particular terms or holding out particular promises. When a legislature wishes to abandon its undertakings towards the 'primitives' and effect a state of affairs which appears to be contrary to the anticipations of those 'primitives', care should be taken to ensure that these people are not given the impression that their rights are being disregarded under the guise of 'civilized' legality. Effort should be exercised to ensure that the reason for change is fully explained, some *quid pro quo* extended, and the participation of the representatives of the 'primitives' arranged for.

In so far as the situation relates to the judicial application of 'civilized' law, it is perhaps time that we start teaching the magistrates who will be called upon to judge such cases some of the folk lore and folkways of the people concerned. It might also be wise to encourage the use of mediators rather than judges. Perhaps, best of all would be to encourage members of the 'primitive' community to make themselves acquainted with the requirements of the 'civilized' system of law and enable them to qualify for judicial

⁵³ See, e.g., L.C. Green, *Canada's Indians and Trusteeship* (1975), 4 Anglo-American Law Review.

office or appointment as mediators, recognizing that they will be called upon to temper this 'black letter' law with an equitable understanding of native needs. There is not really any reason why even a sophisticated society should not be willing to recognize the special needs of a particular group, in much the same way as customs of a particular trade are recognized and accepted. It is all very well to say that the law must be obeyed and its grandeur upheld. To do this, however, sometimes entails injustice and denial of the rule of law. Writing in 1851, John Ruskin said⁵⁴:

All things are literally better, lovelier, and more beloved for the imperfections which have been divinely appointed, that the law of human life may be Effort, and the law of human judgment, Mercy.

⁵⁴ *The Stones of Venice*, vol. 2, ch. 6, s. 25.