continuing deprivation which hinders social equity, this argument will seem like
music to the ears of those who wish to abolish separate legal domains altogether on
the proviso that they support a privileged ‘Aboriginal industry’. Couching such an
argument in today’s extremely reactionary political climate, a condemnation of
cultural relativism at this juncture may add undue philosophical weight to the view
that separate Aboriginal legal domains are inherently discriminatory. While the
author points out that the historical conditions underscoring our definition of the
term ‘relativism’ have radically changed since the 1970s, and that we desperately
need new categories of Aboriginality, a new agenda for social change is not entirely
clear. Instead, the anti-relativism of the right often meets the anti-relativism of the
left in a rhetorical convergence that is not always easy to politically disentangle.
While the saccharine ‘niceness’ of those who defend customary law may irritate the
author, the nastiness of assimilation is never too far from the surface, all too eager
to replace it.

Cultural Imperialism in the Name of Common Values: Response to Peter Sutton,
Customs Not in Common?

ARCHANA PARASHAR*

The tone of Sutton’s article is that cultural relativism is on the decline, with good
reason, and it could be no other way as there is repugnance in the values of the
customary and state legal system. The burden of Sutton’s argument is that
everybody agrees that certain values or behaviors are bad. But from this assertion
does it follow that whatever the majority’s values are they have to be followed by
everyone?

The difficulty in reaching consensus about moral values is played out regularly in
the jurisprudential debates between the positivists and natural law theorists. Despite
the valiant efforts of the modern natural law theorists there is enough unease about
any implication that everyone has to live by a common standard. The issue is not
whether we can live without values but how to reach agreement about common
values that are to be imposed upon everyone – whether for ‘common good’ or
‘coexistence’ or maintaining ‘law and order’ or some thing else. The legal
positivists’ slogan that we have an obligation to follow the law because it is the law
surely must ring hollow to the indigenous peoples. Therefore, if the argument is that
‘we’ are entitled to feel repugnance at some practices is to be taken seriously, the
responsibility lies with the author to establish what those common values are and
how we reach a consensus about them. This responsibility is not discharged by
listing a number of practices as obvious evidence of the common sentiment, or by
arguing that cultural pluralism allows the dominant sections of a cultural
community to silence and disempower the less dominant sections of the same
community. Therefore, what is repugnant and why has to be the major focus of
discussion which is totally missing from this article.

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But even if it is conceded for the sake of argument that ‘our’ values are to be imposed on ‘others’ one at least needs to establish why this may be so. The author assumes rather than establishes that the state legal system by definition is the better system that ought to operate unfettered and unrestricted. Moreover, to even imply that the Indigenous peoples are similarly situated to non-indigenous peoples and therefore the law can only ever give them the ‘same’ rights and entitlements is either to admit huge ignorance or to show bad faith.

Furthermore, when the state legal system allows some customary practices to be enforced it does so in the most paternalistic manner. Contrary to Sutton’s assertion this is not an instance of one legal system propping up another legal system. Instead it is the state legal system trying to gain some legitimacy for itself in the eyes of the still colonized people. The state legal system assumes that it remains the only source of valid use of force and it, in its magnanimity, has decided to allow some customary rules to operate. But by the very nature of this grant of largesse, it is susceptible to be withdrawn anytime. This is not cultural relativism but cultural imperialism continuing as ever before.

**SIMON RICE*

Peter Sutton is concerned about the courts’ preference, in native title proceedings, for the evidence of aboriginal witnesses over that of anthropologists.

His concern arises from his own experience of the native title court process. When he says ‘[i]t can be argued that the anthropological reportage is a parallel inquiry greatly inferior to that of the court itself’ Sutton is referring in fact to the very argument that was put against his own ‘anthropological reportage’ – and agreed with by the Federal Court – in the case of *Jango v Northern Territory of Australia*.

Despite his being aggrieved by this criticism and the many other comments on his own evidence, Sutton does identify the role of the anthropologist as an important issue in native title claims. His first and lesser point is that an anthropologist’s role in preparing a claim compromises their later role as an expert in the hearing of the claim. This concern was allayed in *De Rose*, although O’Loughlin J did caution that some factors may dictate otherwise, such as ‘the witness [having] become an advocate for a party rather than a neutral observer’.

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1. [*Jango* (No 2) [2004] FCA 1004 (Unreported, Sackville J, 3 August 2004) [30]-[67], and in *Jango v Northern Territory of Australia* (No 4) (2004) 214 ALR 608, [20]-[22], [32]-[35] and [41]-[42].
