REVIEW ARTICLE

STATUTES AND RACIAL DISCRIMINATION IN AUSTRALIA*

Outlawed—Queensland's Aborigines and Islanders and the Rule of Law, by G. NETTHEIM, (Australia and New Zealand Book Co., Artarmon, N.S.W., 1973), pp. 120. $4.95 (hard-bound).

"Any male person, other than a [native], who, not being married to the female [native]

(a) habitually consorts with a female [native]; or

(b) keeps a female [native] as his mistress; or

(c) has carnal knowledge of a female [native],

shall be guilty of an offence."

One could not be blamed for thinking that this section came from Southern Africa; but in fact it is s. 34(a) of the *Aborigines Act* 1934-1939 of South Australia and the word which appears above in the square brackets is, in the original, "aborigine". Happily, this section was repealed in 1962.[1]

All of the mainland Australian States,[2] the Northern Territory,[3] and the Territories of Papua[4] and New Guinea[5] have had legislation dealing with their aboriginal inhabitants. Most of this legislation dated from the early part of this century and was expressed in such a way as to evidence an intention to protect and assimilate the aboriginal people. In the early days of the settlement of Australia, wholesale slaughter of aborigines was widespread, and it persisted far longer than people realize today. Only in recent years have the general run of Australians become aware of this aspect of their history.[6] The physical ill-treatment and economic exploitation

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1 *Aboriginal Affairs Act* 1962, s. 2.

2 N.S.W.: *Aborigines Protection Act* 1909; Vic.: *Aborigines Act* 1929; S.A.: *Aborigines Act* 1934-1939; W.A.: *Aborigines Act* 1905 as amended; *Native Administration Amendment Act* 1940; *Native Welfare Act* 1954-1960; Queensland: *Aborigines' Act* 1971; *Torres Strait Islanders' Act* 1971; repealed the *Aborigines' and Torres Strait Islanders' Affairs Act* 1965-1967; this Act itself replaced earlier legislation of 1939.

3 *Northern Territory Aboriginals Act* 1910 (S.A., inherited by the Commonwealth); this was replaced by the *Native Administration Ordinance* 1940 and the *Aboriginals' Ordinance* 1918-1953.

4 *Native Regulation Ordinance* 1908-1963; *Native Regulations* from time to time made thereunder.

5 *Native Administration Ordinance* 1921-1963.

6 Largely as a result of the publication in three volumes of the research carried out by Professor Charles Rowley: *The Destruction of Aboriginal Society; Outcasts in White Australia;* and *The Remote Aborigines* (A.N.U. Press, 1970). The first of these volumes deals not only with the physical extermination of aborigines but with the social legislative forces which have all but destroyed any remaining aboriginal societies.

of aborigines was replaced with a desire to be, or to appear, charitable towards the aborigines, and this was expressed in statutes for the "protection" and "welfare" of the aboriginal people. Rowley has pointed out that this process was important in destroying the traditions and structures of aboriginal societies, and laws played a part in this process.[7]

The laws relating to aborigines and their administration, including the regulations made under such laws, were paternalistic. They gave "protection" to the aborigine by ensuring that he was prevented from acquiring property, (apart from the fact that aboriginals' claims to land were not recognized by the Courts in Australia, in contrast to claims for rights in land expressed by Maoris in New Zealand[8]) from obtaining work at fair rates and receiving wages, from living in the same areas as whites, and generally from behaving in a way of which white society did not approve. For instance the New South Wales *Aborigines Protection Act* 1909-1943 established an Aborigines Welfare Board which had the function, inter alia,

> "To exercise a general supervision and care over all aborigines and over all matters affecting the interests and welfare of aborigines, and to protect them against injustice, imposition, and fraud."[9]

The legislation of the other States and Territories was based on a similar philosophy.[10] Almost all States and Territories forbade or restricted the supply of alcohol to aborigines.[11] All permitted the removal of aborigines to an aboriginal reserve, though some did qualify this power; s. 8A of the New South Wales *Aborigines Protection Act* allowed this only where the aborigine was found to be living in "insanitary or undesirable conditions".[12] Sexual activities of aborigines were also the subject of legislation;[13] probably these regulations were the result of outrage among sections of the white community at the abuse of aboriginal women. However, in this respect, the experiences of aboriginal women would suggest that they were not very effective.[14]

"Paternalism" was more than a name, as the control over aborigines was very similar to that which the common law permitted a father to exercise over his children. Once an aboriginal was on a reserve, his activities were subject to the authority of an officer of the State and therefore limited to what officialdom thought suitable for aborigines. This attitude often

7 Rowley, *The Destruction of Aboriginal Society*, pp. 115, 194.

8 *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176, where the Privy Council discussed the legislative recognition of such rights. As to judicial recognition of such rights see *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141 and the references therein by Blackburn J. to the law of New Zealand; see also Hookey, "The Gove Land Rights Case" (1972) 5 Fed. L. Rev. 85.

9 S. 7(1)(e).

10 Rowley, above, chs 6, 7, 8-12.

11 N.S.W.: *Supply of Liquor to Aboriginals Prevention Act* 1865; S.A.: *Licensing Act* 1932 s. 173; Queensland: *Aborigines' Act* 1971 s. 34.

12 Comparable legislation: S.A.: *Aborigines Act* 1934-1939, s. 17; W.A.: *Native Welfare Act* 1905-1960, s. 9; Queensland: *Aborigines' and Torres Strait Islanders' Affairs Act* 1965 s. 34(a); Victoria: *Aborigines Act* 1929, s. 6(1) (regulation-making power).

13 S.A. *Aborigines Act* 1934-1939, s. 34(d): See also fn. 19, below.

14 See B. Sykes in Nettheim, ed., *Aborigines Human Rights and the Law* (A.N.Z. Book Co., 1974) at 153-4.

masked exploitation. Although many "station" aborigines were employed as stockmen, etc., few were paid award rates, and many of them did not actually receive their wages because they were paid to a State official.[15]

The effect of the legislation was that aborigines, in fact and in law, were confined to reserves and settlements; they could be removed from towns[16] and they were always subject to the control of officials who were sometimes unsympathetic and, by present-day standards, frequently misguided.

In Australia's principal colony, Papua New Guinea, there was legislation permitting the making of regulations controlling the life and activities of the people who were in a majority. Different attitudes prevailed in Papua from New Guinea until the administration of the two Territories was unified,[17] but in both cases the assumption was that black people were inferior, and the difference was in essence whether there was a Christian and paternalistic duty on the whites to assist and protect the blacks, or whether the blacks were simply a source of cheap labour.[18] There were aberrations such as the *White Women's Protection Ordinance* 1926-1934, based on the sexual fears and fantasies of the whites of Port Moresby, but this disappeared even before World War II.[19] The Native Regulations were repealed in 1963, and in that year the *Discriminatory Practices Ordinance* was enacted to outlaw some forms of racial discrimination. The *Transactions with Natives Ordinance*, designed to protect Papuans and New Guineans from exploitation by European traders and financiers still exists, but is of little real effect because most of those who would benefit from it are unaware of its existence. The *Native Employment Ordinance* and *Regulations* also survive, but, while they provide minimum standards of pay and living conditions for indentured plantation labour, they have enabled the plantation system to continue by permitting the employment of cheap labour. This consequence may or may not have had an overall beneficial effect; certainly the system has fostered some feelings of unity amongst the people, and has forced indentured labour to learn one of the *linguae francae*, but this may have been at the cost of economic modernization and mobilization of economic resources.[20]

Not all Australian legislation relating to aborigines has been repealed. Most States had an elaborate system of reserves and welfare agencies, and the preservation of these could possibly be justified by the position of

[15] E.g. s. 13C of the N.S.W. *Aboriginals Protection Act* 1909-1945 provided that an employer of an aborigine was required in certain cases to pay the wages earned by the aborigine, not to the aborigine, but to an official called a Superintendent. Similar abuses existed, and may still exist in Queensland under the 1971 legislation; this is one of the areas criticized by Nettheim in the work under review.

[16] E.g. N.S.W. *Aboriginals Protection Act* 1909-1945, s. 14.

[17] This is the subject of a long article by E. P. Wolfers, "Trusteeship Without Trust" in F. Stevens, ed., *Racism, The Australian Experience*, Vo. III, *Colonialism* (Sydney, 1972).

[18] Ibid.

[19] A. Inglis "The White Women's Protection Ordinance, A study in the History of Papua, 1926-1934 (Unpublished M.A. thesis, A.N.U., Canberra). A version of this is now published as *Not a White Woman Safe* (A.N.U. Press 1974).

[20] For a description of this system and its effects, see C. D. Rowley, *The New Guinea Villager* (Melbourne 1965).

aborigines as a minority group suffering particular deprivations. It is probably for this reason that some paternalistic and potentially bad legislation remains, for instance in New South Wales, where the 1963 amendments to the 1909 *Aborigines Protection Act* repealed only the most blatantly discriminatory provisions of the Act. The provisions that do remain would seem to be, if required at all, better placed in legislation dealing with social welfare. In fact, the remaining legislation on aborigines in South Australia is now to be found in Part V of the *Community Welfare Act* 1972. In the Northern Territory, it is the Director of Welfare who has the responsibility for aborigines.[21] The possibilities of paternalism and discrimination remain existent while such legislation remains on the statute book, but at least the discrimination is *de facto* and not statutory and it is capable of remedy by administrative means. It is no longer a procedure forming part of the law. Except in Queensland, the worst discriminatory legislation has now been repealed.[22]

The Australian Government has shown a commitment to the concepts of human rights and anti-racism. It has introduced legislation (so far frustrated in the Senate) to give the force of law to international conventions against racial discrimination and to establish basic social and political rights;[23] it has made significant gestures to mark the 25th Anniversary of the Universal Declaration of Human Rights and the United Nations. Year to combat racism (which began in December 1973). From this one would be led to the conclusion, even given that Australia is a Federal State, that racism and racial discrimination no longer are the law in any part of Australia. Of course, there is a great deal of *de facto* discrimination against aborigines[24] as there is against other minority groups and against women. It is in the elimination of such *de facto* discrimination that the greatest efforts are required.

Yet in Queensland, while other States and Territories removed the most offensive parts of their legislation dealing with aborigines, the legislature chose to "revise" its laws dealing with aborigines and Torres Straits Islanders in a manner which embodies attitudes of racial discrimination. It was this which prompted Professor Garth Nettheim to write *Outlawed —Queensland's Aborigines and Islanders and the Rule of Law.*

Outlawed is not a trendy popular account of harsh treatment of aborigines by the police and the courts. It is a work showing by thorough legal analysis how the laws of a community are used by Government to obstruct rights and opportunities of a section of that community.

21 *Social Welfare Ordinance* 1964-1972, ss 10, 12.

22 N.S.W.: *Aborigines Act* 1967; Vic.: *Aboriginal Affairs Act* 1967; A.A.: *Aboriginal Affairs Act* 1962; W.A.: *Native Welfare Act* 1963; N.T.: *Native Administration Ordinance 1940 Repeal Ordinance* 1964; Papua: *Native Regulation (Papua) Ordinance* 1963; New Guinea: *Native Regulation (New Guinea Ordinance)* 1963.

23 *Racial Discrimination Bill* 1963; *Human Rights Bill* 1963.

24 E. M. Eggleston, "Aborigines and the Administration of Criminal Law" in F. Stevens ed. *Racism, The Australian Experience,* Vol. II *Black Versus White* (Sydney 1972) (Based on her unpublished Ph.D. thesis, Monash University); J. L. Goldring, "White Laws, Black People" (1973) 45 *Australian Quarterly* No. 3, p. 5.

The book is published in conjunction with the International Commission of Jurists, a body formed to maintain and protect the Rule of Law—something which is seldom defined, but which is certainly concerned with the protection of the rights of the individual. Because the law leaves them very few rights, the legal position of Queensland's aborigines and islanders should concern those interested in basic human rights, whether that is described as the "Rule of Law" or in some other way.

Professor Garth Nettheim is a lawyer who for some years has been disturbed by racism, particularly in Africa. In this book he examines the effect of the Acts relating to aborigines and islanders passed by the Queensland Parliament in 1971.[25]

These Acts were passed in haste, following pressure brought to bear on Premier Bjelke-Petersen by Mr John Gorton while he was Prime Minister of Australia, and later, somewhat ineffectually, by Mr McMahon. In April 1971, McMahon and Bjelke-Petersen met and produced a memorandum dealing with nine specific areas in which the Commonwealth and the State of Queensland were to cooperate to improve the position of aborigines and islanders in Queensland. Even without the arguments and evidence provided by this book, it is apparent that the Queensland Government has done little to assist aborigines; for this it has been criticized by the Australian Government. Professor Nettheim provides evidence that Queensland has not even honoured its undertaking to the McMahon government.

The 1971 legislation, though it leaves a lot to be desired, is a great improvement on the previous law, and Professor Nettheim concedes this. Like the laws which formerly dealt with aborigines and non-Europeans in other parts and Territories of Australia, these laws were racist, discriminatory, inconsistent with any idea of civil liberties (for aborigines) and completely ignored that aborigines were human beings with individual personalities.

Outlawed measures the 1971 legislation against ideas of the Rule of Law, the Universal Declaration of Human Rights and the McMahon-Petersen memorandum.

It does not take a lawyer to see that in Australia's "Deep North" aborigines are still maltreated and patronized by the government. Perhaps there they are trapped even more in the vicious circle of poverty and social isolation than they are in other parts of the country. *Outlawed* indicates the depth to which this discrimination (which can only be called racism) is institutionalized, by an analysis of the laws in a way that a layman can understand.

Professor Nettheim looks at the parts of the Acts which subject aborigines and islanders to discrimination, and asks how consistent each of these provisions is with basic ideas of human rights.

Even after the repeal of most of the discriminatory State legislation in the late 1960s Professor Charles Rowley published three books showing

[25] *Aborigines' Act* 1971; *Torres Strait Islanders' Act* 1971.

how aboriginal society had been systematically eliminated by white men.[26] Other studies, by the same group, showed the plight of urban aborigines.[27] Aborigines themselves began to take active steps to protect themselves from abuse and discrimination by whites, to further their own cause, and to seek assistance from governments. The 1971 referendum and the 1972 election showed a growing awareness of the problems of aborigines by the people of Australia. It was this trend which led to Prime Minister Gorton's action, and ultimately to a complete revision of the laws of Queensland relating to aborigines and islanders. Yet the revision seems to reflect only the fact of this growing consciousness and not its content. Revision there was, but, as Nettheim shows, little consultation with aborigines and islanders, and little debate in Parliament. Even the Liberal Senator Neville Bonner, himself an aboriginal, knew of the revision only in vague terms. While some of the legal forms changed, Nettheim's examination shows that much of the discriminatory content remained, either in fact, or potentially though use of the wide power given to the government to make regulations. In this "background" to the 1971 legislation, Professor Nettheim draws attention to such questions. He avoids the obvious temptation to speculate about the political and other motives of the Bjelke-Petersen government, and simply gives a minimum of fact necessary to show how the new laws, so far as aborigines and islanders in Queensland are concerned, fit into a pattern of policies of racism and deprivation of human rights.

One of the main criticisms which Nettheim makes of the new laws is that virtually all the substance of the law is not contained in the Acts, but is left to be prescribed by regulation. The Acts simply give the government the power to make regulations dealing with various subjects, including local government, aboriginal courts and other highly important matters. Nettheim asks why the Department of Aboriginal and Island Affairs should be given a virtually free hand to control the lives of a significant part of Queensland's population. Queensland has only one House of Parliament, and though the Parliament is able to disallow regulations, it is highly unlikely that, at least while the Bjelke-Petersen government manages to maintain itself in office, any regulations relating to aborigines or islanders would be disallowed. No matter in which context it occurs, this type of government by departmental regulation is, says Professor Nettheim, inconsistent with basis ideas of responsible government and the rule of law. In an Appendix he sets out what he considers to be excesses of delegation by the Parliament with relation to the 1971 legislation.

Many objectionable parts of the earlier laws applied only to "assisted" aborigines and islanders. As a concession to charges of paternalism, this category no longer exists. Instead, the Acts apply to all "aborigines". Fortunately, there is no reference to blood or race in the Act's definition of "aborigine", and any person who is descended from an indigenous inhabitant of Australia falls within the definition. Among aborigines themselves

[26] Fn. 6, above.
[27] Fay Gale, *Urban Aborigines* (Canberra 1971).

there seems to be some difference of opinion as to exactly who is an aborigine, but it is clear that the one common element that all insist on is descent from an indigenous Australian. To this extent, the definition is a great improvement but, as Nettheim has shown, the effect may be to bring within some of the more restrictive provisions of the laws people who, under the old laws, would have been treated as ordinary members of the community.

Various provisions of the 1971 Acts are, even though an improvement on earlier legislation, still highly objectionable on the grounds of paternalism and inconsistency with fundamental human rights. Nettheim deals with the most significant of these: access to aboriginal and island reserves is subject to the veto of the Director of Aboriginal Affairs and not controlled by the people who live on the reserves, the possibility that an aborigine or islander who refuses to conform with standards of behaviour laid down by the Department may be deprived of the right to return to his home on the reserve simply by determination of an officer of the Department, etc. Professor Nettheim argues convincingly that these provisions may constitute the imposition of exile and certainly prevent freedom of movement.

Among the provisions of the Act which are examined in detail are those dealing with local government of aboriginal and island reserves; and the bodies of aborigines and islanders which, by regulation, the government may appoint to "advise" the government and specifically not to legislate in any way.

Experience with white man's laws in Papua New Guinea, suggests that the best solution to the "law and order" problem among the indigenous people of that country may be the establishment of courts operated by the village people, which apply their own customary rules.[28] It may also be true that a solution along those lines might suit aborigines and islanders who live in their own communities. Under the 1971 Acts it would be possible for this to be done in Queensland, as the government has power to establish aboriginal courts and make rules for them by regulation. In fact, courts have been set up for some aboriginal reserves and island communities but, though the members are aborigines, these courts are subject to fairly strict control by the Department of Aboriginal and Island Affairs and appeals lie from them only to or through officers of the Department. It is not clear what substantive laws or rules of procedure apply.

A good deal of attention is given to the economic bodies which are established by the Acts. Professor Nettheim points out that, at first sight, institutions such as the Island Industries Board and the Aborigines Welfare Fund appear to assist aborigines and islanders in Queensland in regaining a position in society where they could have some self-respect. However, the detailed analysis shows that either these institutions are controlled or have

[28] See the statement by Mr J. R. Kaputin, Minister of Justice, Papua New Guinea, Port Moresby, November 21, 1973; P.N.G. Village Courts Ordinance 1973; "The Report of the Committee Investigating Tribal Fighting in the Highlands" Port Moresby, May 1973, esp. paras. 32-34.

funds allocated to them by the Department of Aboriginal and Island Affairs, or by persons who, in name if not in fact, are representatives of the government or the Department, and may not be sympathetic to aborigines and islanders.

The Acts provide that with the consent of the Director, special rates of pay may be allowed to aborigines who are slow or disabled. The evidence shows that similar provisions in the former legislation was used to ensure that many of Queensland's aborigines and islanders were paid at lower rates than white men. This, of course, is a breach of the Universal Declaration of Human Rights, and *Outlawed* suggests that the old practices may continue under the new laws.

For years, aborigines have been in a position of virtual slavery; if they work for a white man, as in most cases where the aborigines were "assisted", their wages were paid not to them but to a "trust account" administered by the Department. Naturally this was a cause of complaint, and, equally naturally, resulted in abuse and corrupt practices by departmental officers. Both complaints and abuses are well documented by Professor Nettheim. While the new acts make it voluntary for an aborigine to submit himself to this system of trusts, they continue the trusts for those aborigines who previously were "assisted", unless those people take action to remove themselves from the paternalistic arrangements. Professor Nettheim points out that because of their illiteracy and other disadvantages, such people are unlikely to know that they have the right to manage their own affairs.

Nettheim concludes that the Aborigines Acts and the Islanders' legislation are inconsistent with the Rule of Law on three grounds: they were enacted without consultation with the people concerned, there is excessive delegation of authority to the department by the parliament, and that there are a number of significant violations of the Universal Declaration of Human Rights.

The book is a convincing legal argument, which is also clear to laymen, and shows how racist, paternalistic attitudes can be institutionalized in a set of laws. It is very easy to sit back and attack a government for attitudes with which one does not agree. It is difficult to obtain evidence to support those attacks. This book does provide evidence for an attack of this type. It is an excellent and thorough report of how the Queensland government, in breach of its obligations to the former Commonwealth government, and contrary to generally accepted views of civil rights and the treatment of citizens by a government, uses the legislative process to continue to abuse aborigines and islanders who happen to live in Queensland.

Recently, some aborigines, impatient or dissatisfied with the failure of the Australian Government to meet all of their demands, and possibly irritated at apparent mismanagement of government departments dealing with aborigines, have taken violent and direct political action. This may have alienated some white support. It would seem, however, that most white Australians are indifferent to the problems of aborigines. However,

it is difficult to believe that white Australians would tolerate laws which prevented aborigines, or any one else, from having a "fair go".

It may be, as Mr Gareth Evans has suggested, that "benign discrimination"s is necessary to achieve real equality for aborigines and other minority groups.[29] However, this seems to connote the use of regulations, and administrative discretions. In some cases the Queensland legislation criticized by Nettheim might provide machinery for such "benign discrimination", but its effect on the aboriginal and island people of Queensland, as Professor Nettheim has shown, is anything but benign in most cases, and it seems that before any start can be made on the problem of giving a real chance to aborigines, the Queensland legislation, like its counterparts in the rest of Australia, should be repealed.

JOHN GOLDRING

[29] Gareth Evans, "Benign Discrimination and the Right to Equality", (1974) 6 F.L. Rev. 26.