BOOK REVIEWS

Peace-Keeping in a Democratic Society, by ROBIN EVELEGH, (London: C. Hurst & Company 1978) pp. 1-174.

> "It is no longer a credible position for a civilised society to take that a soldier in time of urban guerrilla warfare should be regarded as a special constable and in time of conventional warfare as an extra-legal being. A soldier is a soldier is a soldier."
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> — D. B. Nichols, "Untying the Soldier by Refurbishing the Common Law" [1976] *Crim.L.R.* 181, 190.

Evelegh's book is of great importance to those who are concerned with the maintenance of public order within a democratic framework. The author's personal experience as an infantry battalion commander in the British Army in riot-torn Northern Ireland culminated in this book after his retirement from the British Army. The author, deeply perplexed by the lack of success of the Government in maintaining a peacetime level of order in that country, has made available his thoughts on some of the problems which, if resolved, would contribute extensively to a more efficient prosecution of the campaign to control and curb widespread terrorist activities. The book focuses largely on the contradictions which arise within the constitutional framework when the Army is employed to aid the civil power, and the dilemma of the soldiers who have been entrusted the task of containing what Lord Diplock in *Attorney-General for Northern Ireland's Reference* ([1977] A.C. 105, 136) has described as "a state of armed and clandestinely organised insurrection against the lawful government of Her Majesty".

The book will prove to be of particular value to the authorities in Australia when considered in the context of the bomb blast at the Sydney Hilton Hotel on 13 February 1978 (See *The National Times*, 20-25 February 1978). In the wake of that incident, the Commonwealth Government appointed Mr Justice Hope, a judge of the New South Wales Court of Appeal, to review domestic security. Mr Justice Hope's inquiry will cover, *inter alia*, the "relationship between the Defence Force and civilian authorities in the matter of civilian security". (See Cth. Parl. Debs., H.R. 23 February 1978, pp. 154-5.)

Evelegh discusses the shortcomings in the constitutional structure for suppressing civil disorder and terrorism. In particular, he points out the existence of the gulf between theory and practice in the constitutional control of the military when required to help in suppressing civil disorder within the United Kingdom, and gives two main reasons why this gulf matters. "The first reason", he says, "is that it is wrong in itself to permit such a divergence between theory and practice. The second is that this gulf leads to a situation in which the law and its enforcement become a flexible factor in the overall relationships of the civil disturbance, instead of being the known constant providing a solid framework within which all other parties have to manoeuvre, implicit in the concept of the rule of law" (at p. 19). This gulf similarly exists in Australia as the Australian Military Regulations (A.M.R.) embrace the common law on the matter. Part V of the A.M.R. does not provide a comprehensive regulatory code as it relates to the use of military force during "domestic violence" (suggesting a possible linkage with s. 119 of the Commonwealth Constitution).

Evelegh also examines the shortcomings in the laws controlling counter-insurgency operations. One cogent point which should be mentioned is the lack of appropriate legal powers to make the Security Forces effective in suppressing civil disorder. He levels criticisms at the law which imposes a dilemma on the soldier by invoking the

concept of "reasonable force" and at the lack of guidance to the soldier on what is expected of him in the suppression of riots and disorders. All these criticisms are of relevance to the Australian scene, for the calling out of the Army as a result of the bombing at the Sydney Hilton Hotel has been criticized not so much for the lack of a constitutional source of authority as for the cavalier disregard for the legal position of army personnel (see A. R. Blackshield, "The Siege of Bowral—The Legal Issues", *Pacific Defence Reporter*, V. 4, No. 9, March 1978). In 1974 in England, the army was brought in as a precaution against possible terrorism at Heathrow Airport (see *The Times*, 7 January 1974, 1, 8, February; H.L. Vol. 348, c. 1036 ff. (16 January 1974)). The legal powers invoked by the Government in mounting the operation were discussed in the House of Lords (H.L., Vol. 348, c. 1050 (16 January 1974)). The editor of the *Criminal Law Review*, in commenting on the matter, observed

> "if on a future occasion the legal powers of police and soldier prove inadequate, reliance may, in the last resort, have to be placed on the Royal Prerogative governing emergencies. That power, with its requirement of compensation, may provide an acceptable means of filling in gaps in statutory and common law powers." ([1974] Crim. L.R. 141).

Leaving aside the problems of a "division" of the prerogative between the Commonwealth and the States, it is questionable whether the prerogative can really provide an acceptable *unambiguous* framework of emergency powers. The very doctrine of "martial law" is enveloped in a "haze of uncertainty". Evelegh gives examples of the lacunae in the powers of the soldier and of the futility of deploying troops in aid of the civil power without giving them the necessary legal authority, and says: "If a duty is imposed on Her Majesty's forces to act as though they were constables, then they should be given the legal powers of constables" (p. 81). The imbroglio of the Australian soldier is made worse by the diversity of laws concerning powers of arrest, search and seizure, and detention which exist in the various States. "To ask a soldier", Blackshield acidly remarks, "to adjust his behaviour not only to the exigences of a volatile situation, but to the law of the particular State to which he happens to be assigned, is surely asking too much—even if we ignore the nightmare of a border-hopping guerilla campaign along a State boundary". (A. R. Blackshield, op. cit. at p. 10). These are problems with which the Australian authorities must grapple, and *Peace-Keeping in a Democratic Society* is a book they can ill-afford to ignore.

In the final part of his book (Part III), Evelegh proffers various proposals for improving the laws that govern the operations of the military, such as the enactment of dormant emergency legislation for combatting disorder and terrorism. Many of the proposals are of greater applicability to a situation of large-scale terrorist activities as obtained in Northern Ireland. In evaluating the merits of the various proposals in relation to Australia, one essential difference should be borne in mind, namely the *federal* nature of the Australian constitutional framework. The division of legislative powers between central and local governments can pose some problems (not necessarily insurmountable) to the adoption of some of these proposals, especially when s. 51 of the Commonwealth Constitution does not expressly confer legislative power on the Commonwealth Parliament to make laws with respect to crimes.

Overall, the author has made a valuable contribution to a better understanding of the problems arising from the invocation of military aid to assist the civil power, and has produced a useful guide for the refurbishing of the law to meet the exigencies of contemporary crises.

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The Australian Law of Theft, by M. S. WEINBERG and C. R. WILLIAMS, (Sydney: The Law Book Company Ltd. 1977) pp. i-xxxiv, 1-374.

The authors state, in the preface to the book, that

"The primary purpose of this book is to meet the clear need for a detailed exposition of the law as it exists in each of the Australian jurisdictions. A secondary aim is to make a call for the reform of the law" (p. v).

At present, when numerous Law Reform Commissions are reporting on the confusions, inadequacies, and need for reform of the law as it exists throughout Australia, this book appears as a timely reminder of the lack of uniformity amongst the Australian States with respect to one genus of offences within the criminal law.

With the passage of the *Crimes (Theft) Act* 1973 (Vic.) a new legislative basis was added to the existing framework, thereby bringing to three the number of different systems operative within Australia: two States retaining the inherited common-law, three relying on differing Codes, and one State with a modern piece of legislation as a basis from which to work. A book which draws these three systems together and presents them on both an explicative and comparative basis, is most welcome.

Judged in the light of stated objectives, the book successfully achieves its aims. As a "detailed exposition of the law as it exists in each of the Australian jurisdictions", each separate offence, subsumed under the general heading of "Theft", is presented and dealt with on a jurisdiction by jurisdiction basis. Of particular methodological value to students of the criminal law is the manner in which the authors have taken each offence, presented the individual components of that offence, and have exhaustively discussed each component, including in their analysis an abundance of illustrative examples derived from both reported cases and hypothetical situations. Reported cases are dealt with in a lucid and comprehensive manner, and hypothetical situations posited reflect the type of situation that students most often raise in class-room discussion.

Hypothetical problems and argument by analogy are well used, particularly when dealing with the Victorian provisions. Based on similar English provisions, the Victorian legislation has not as yet attracted any substantial judicial comment and any attempt at detailing the law must suffer from this lack of local authority. The Victorian provisions are more than adequately presented and discussed, by using the English experience as a guide.

In presenting their material, the authors have been prepared to criticize decisions which are either patently or logically incorrect. Constructive criticism of judicial reasoning is an essential element of any expository work, and is here used in a considered manner. It would be an unsatisfactory exercise to point to particular passages in the text as illustrative of this and other points. It is sufficient to say that in both presentation of material and criticism of various reasonings and decisions, the book maintains a consistently high standard.

To those involved in research as either student, academic or practitioner, one commendable feature of this work is its abundance of footnotes offering a wealth of references and cross-references to numerous cases, books, articles, papers and historical sources.

By its very presentation, the book begins to fulfil its second stated objective of calling "for the reform of the law". This is achieved through presentation of what can only be described as a "hotch potch" of common-law, code and legislation in a manner displaying the lack of consistency and uniformity existent throughout Australia. The archaic background to the present application of the law is exposed, and the authors call for reform by way of a uniform piece of legislation based, in the main, on provisions currently in force in Victoria.

In the final chapter of the book the authors reiterate and stress the various inadequacies and inconsistencies that exist throughout Australia, as well as indicating specific criticisms and recommendations with respect to current Victorian legislation.

The book is to be commended as a well presented, detailed and critical account of the law(s) of theft in Australia.

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A Matter of Justice by C. D. ROWLEY (Canberra, Australian National University Press, 1978) pp. 1-249.

Rowley's book describes the psychological and social devastation wrought by two hundred years of mindless discrimination against aborigines. A strict chronological approach would belittle its theme and is not attempted. Instead, Rowley uses an eloquent, wide ranging and personalized presentation that allows brief and effective sketches drawn from diverse geographies and experiences. The order of the book follows Aboriginal life situations: tribal, pastoral, urban, and mission Aborigines are given separate chapters. The final chapter canvasses solutions to Aboriginal problems. Of all the chapters, "The Dark Child's Chance of Justice" has the most impact.

The jacket, with its front picture of aborigines "at home" in an unrelenting vastness, sets the theme—how did things get this bad? Rowley suggests (and sometimes gets close to saying it) that white Australians have maltreated our native population worse than whites have treated other indigenous populations throughout the world. By destroying any pretence of an ego-sustaining culture for Aboriginals, Australian whites have created problems of major proportions that can, paradoxically, be solved only by Aborigines themselves. Rowley's basic solution is an increased arrogation of power by the black minority through development of their interaction with, and consciousness of, the machinations of bureaucracy. Black power will do more than anti-discrimination legislation. Though he appreciates the white backlash that a shift of power would engender, Rowley tends to undervalue its significance. Whites in Australia are particularly ungenerous about racial equality. Racism, pure and simple, is at the back of our treatment of Aborigines, and it will continue despite our attempts, doubtfully appropriate, at reverse discrimination. It is Rowley's hope that black consciousness will encourage Aborigines to develop their own groups, corporate and cultural, in a cushion of protective laws. I can appreciate the force of this argument, mounted gradually in the book, and building to the crescendo of the last chapter. To Rowley it is not a choice between two ways of life; rather both sides must compromise (212). A new institutional framework and an Aboriginal experience of working the system must develop: bureaucracy is central and is here to stay. Reciprocal changes in bureaucratic attitudes include flexible audits, less secrecy, integration of the very radical concept of group decision-making, and creation of new bureaucratic hierarchies in which field officers would be the highest rank not the lowest (218). Rowley even suggests an aboriginal folk high school (204).

The book has other purposes. Rowley tries to map Aboriginal experience of discrimination in its full psychological dimensions. For instance, he is able to explain the popularity of Pentecostal missions because their special form of evangelism offered Aborigines the justice in later life that they could not obtain in this (122). He chronicles the dispossession of Aborigines in its fullest impact—whites took their ego, their culture, their children, their sexual integrity, their wages, their land—their very lives, in fact. Then he delivers a critique of recent Aboriginal aid which lately has verged on tokenism. He sets his description in the familiar rhetoric of western ideas of justice, so long an empty word for Aborigines. That he is successful in his description is due to his eloquence, his personal involvement and to the richness of the historical experience he relates. Such is the Australian reality that the perennial debate about the meaning of justice is irrelevant. Whatever justice means, it is clear Aborigines have nought of it. Thus Rowley can start with the Greeks, and with amorphous definition: "Justice involves an accepted *balance* in human relations" (20). It "is something men demand in their lives" (62). Whether or not we have read Nichomachean *Ethics*, the Greek approach to justice is part of western attitudes. And who can deny it is something that men demand? While Rowley's book makes no contribution to philosophy, it does establish once and for all that we have failed to develop a satisfactory philosophical basis for our treatment of Aborigines, and that, if our white standards mean anything in human terms, any philosophic underpinning of our treatment of them is impossible. This is a twentieth century development; as Rowley points out, not so long back Australian whites thought they could give a philosophical and religious basis for their treatment of blacks. For instance, a confused use of Darwinism enabled whites to desecrate aboriginal culture with

absolute impunity for their consciences (159). And we were not without double standards: "Having taken all aboriginal real property [the whites] would censure them for apparent disregard of small items of personal property" (160).

The book emphasizes land rights, especially in the chapter "Justice and the Country". Land rights symbolize not only the loss of Aboriginal culture, but an avenue for "symbolic compensation—return of the country or some negotiated compensation" to remove the sense of injustice that will debilitate Aborigines while it continues. Money compensation to Aborigines for land long gone (82) could be attacked as tokenism and initiate backlash. It could be as trite as the reburial by Truganini by the Tasmanian government in 1974, but Rowley is of the opinion that it would remove "the essential injustice of ignoring the present predicament of my Aboriginal fellow Australian" (83). His concept of "reconciliation aid" is a good one and saves the chapter from being a mere account of the past concluding with a question of what we should do now (83).

Aurukun, so crucial in the modern Aboriginal fate, is fleetingly referred to (63), but the reference leaves no doubt about the significance of bauxite. This is clever crystal-ball gazing on Rowley's part: he could not have forseen the exact timetabling of Queensland's takeover. His prediction rings a sour note for those who look for vindications of the aphorism that history repeats itself. *Millurpum* v. *Nabalco* (1968) 17 F.L.R. 141 is discussed in the context of land rights and instrumental support for Aborigines (64-70). He surveys the Woodward Report and Aboriginal Land Councils which "marked the end of aboriginal affairs as a purely welfare matter", but his comments are tempered in the light of the change of national government—it is not surprising that his predictions here show some fallibility. In a clever use of irony, Rowley deals with the Australian Mining Industry Council and its use of land rights rhetoric in reverse—to protect "the alleged needs of traditional Aboriginal culture" (79), which, by implication, requires entrenchment of the status quo of no land rights. Later he demonstrates that the creation of reserves and government support for the Aboriginal operated to subsidize the pastoral industry, even while wages for Aborigines in Queensland were officially high and controlled, at least when compared with those in other states and the Northern Territory (97).

In the chapter on "Wage Justice", Rowley shows that the nomadic, close-to-the-land, existence of the Aborigines made them particularly vulnerable to white exploitation in a variety of ways, the chief being the destruction of viability of nomadic existence by stocking of the land. We undermined their tribal culture (88), yet we still refused to offer them shelter, education and health care because they were nomads who did not need it. "Tea, sugar, bread and especially liquor formed the mess of pottage offered in place of freedom with physical and mental health" (90). One of the better sections of the book is where Rowley draws the deeper psychological significance of this lack of permanence (102-3).

When Aboriginals were integrated into the cash economy, they were paid so little that slavery was ensured. And, in the repeated pattern of capitalism, the poor wages destroyed the labour that was the system's major resource. (Aborigines are still not paid white wages.) Even Aboriginal magnanimity, "the reluctance deep-seated in the culture to condemn and a realization that people act the way they do because of their own natures" (100), became a weapon of exploitation. The rationalizations whites gave for this economic exploitation are critically examined (112-15).

For fringe dwellers and urbanized Aborigines, the goal of equality proved more illusive (105). Unemployability, unemployment, lack of education, "the refusal of white Australians to concede real equality (107), and the mixture of defiance and dependence on authority" (108) were insurmountable problems. Rowley draws the analogy of the inmates of Solzhenitzyn's Gulag Archipelago. His analysis of the phenomenon of fringe dwelling is one of the best available, since he tries to explain why aborigines are driven to live in towns, knowing it is the last resort, worse than all else, and making for an anomie that they cannot understand or break, but which they feel and react to. He gives a moving account of treatment of Aboriginal children after their admission to schools in New South Wales in the sixties. Their goal of learning was chronically frustrated by the typology of black intelligence used by

other children and some teachers (115), and which eventually brought in the truancy officer (120).

Rowley surveys the changes in Aboriginal consciousness—the adoption of the "black is beautiful" theme. He follows it by an account of harassment by legal means that sanctioned violence as a first resort (119) to keep Aborigines subdued and houses impermanent. He analyses Aboriginal alcoholism and its psychological and escapist sources (192). He describes repression by the multitude of legal and administrative devices: housing regulations, police power, anti-drunkenness rules, truancy laws, and guardianship laws which systematically removed Aboriginal children from their mothers (120). One of the particular contributions of the book is the full documentation of legal repression, though Rowley has some hope that black lawyers will help break the cycle (176). For this reason alone, the book should be compulsory reading for lawyers. There is a long account of Elizabeth Eggleston's documentation of Aborigines as victims of legal repression (187-9, 189-91). Rowley describes Aboriginal reaction to repression as an emotional reaction to perceived injustice (189). Although the Aborigines do not share Greek justice concepts, they realize that the articulated white virtues are not directed towards them; their perception of injustice is spontaneous and reasonable according to these white standards.

In the chapter on settlements, Rowley gives a detailed early history of reserves. Despite the land hungry pastoral industry, reserves are familiar at the end of the twenties. Their impact is devastating. "About half the Aborigines alive now have inherited generation of accumulated tradition as inmates themselves or from parents who were inmates themselves of these centres of squalor and neglect" (131). Queensland's policy of immobilization of blacks without tribal connection and culture meets little favour (133, 136). Rowley suggests that even a South African might condemn the reserves in Queensland: "praise would be embarrassing enough; but condemnation could be more so" (137). Later, Queensland is described as having a "nonsensical racial policy . . . applied with sincere, well-intentioned stupidity" (216). Its reserves were built up to isolate Aborigines with consequences still to be met. The reserves now operate to preserve state autonomy over federal control; taking over Aborigines in Queensland by the Australian government is tantamount to taking over reserves and therefore demands compensation. Rowley asks us to compare the post 1950 Western Australian experience. Western Australia did not invest in reserves as did Queensland, and in the long run this was the better policy (156), even though the rampages of white exploitation have destroyed the environment.

The chapter on missions is predictable in a sense. Rowley contrasts Papua New Guinea and Pacific Islands missions to highlight the plight of Australian Aborigines. He explains why there were few indigenous or native pastors (166-8) and how the missions made it easy for miners (168). Missions were subservient to government and when they developed a philosophy, it either reflected white folklore or was insufficiently conscious of Aboriginal justice to offer any meaningful resistence to white intrusions on Aboriginal life.

Yirrkala and Wave Hill are discussed as if the stories are familiar to all. Readers are also assumed to know the background to the *Land Rights Act* 1976. Perhaps this detracts from the usefulness of the book as an introductory text on Aborigines, but there are enormous compensations, particularly in chapter 8 where Rowley amplifies the peculiarly Australian scene where the gap between the culture of the indigenous natures and the whites was enormous. More importantly, the Aborigines could not "force" the British into any territorial settlements (176).

The book is filled with flashes of wit and irony. It displays a deep commitment to Aboriginal people and contains a much needed argument for more favourable treatment of our minority native race. The law is unequivocally demonstrated to be central to long term discrimination against Aborigines. Since law is supposed to embody justice for citizens amongst themselves, it is time that drastic reversals of policy such as those Rowley explores were set in motion.

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Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth

A Report of a Working Meeting held at Basseterre, St. Kitts, 24-26 April 1978 (published by the Commonwealth Secretariat, London).

One of the fields in which the Commonwealth of Nations can play a useful role is that of law reform and international legal co-operation. At the 1973 Meeting of Law Ministers of the Commonwealth the question of the reciprocal enforcement of judgments was discussed. The 1975 Law Ministers Meeting considered the distinct topic of service of process overseas. At the 1977 Meeting of Commonwealth Law Ministers it was recommended that the Commonwealth Secretariat establish links with the Hague Conference on Private International Law. Soon thereafter the Secretariat set about arranging for observer status to be granted by both the Hague Conference and UNIDROIT.

At their 1977 meeting the Commonwealth Law Ministers had available to them two reports commissioned by the Secretary-General and prepared by Professors McClean, of the University of Sheffield, and Patchett, of the University of Wales. The comprehensive reports examined most aspects of the recognition and enforcement of judgments and orders (money judgments, maintenance orders, arbitration awards, bankruptcy, dissolution and winding-up of corporate bodies and grants of administration) and the service of process *ex juris*. The scheme adopted was to set out the relevant common law rules, existing legislation in the various Commonwealth jurisdictions and international conventions in point, and then in each case to appraise them and make recommendations.

Much of the work of Professors McClean and Patchett was subsequently taken up at a regional Commonwealth meeting held at Basseterre, St. Kitts in April 1978. Nine Commonwealth Caribbean jurisdictions together with Canada were represented. Delegates were drawn from a wide variety of posts including judicial officers, court registrars, parliamentary counsel, legislators and practitioners. The meeting examined existing arrangements and considered future developments in the fields of service of process, recognition of grants of administration, enforcement of maintenance orders and of money judgments.

A summary of the principal conclusions of the meeting is contained on pages vii to ix of the Report. In some areas it was felt that solutions should be found in existing Commonwealth schemes or in new Commonwealth schemes to be devised. This was so, for example, in the case of maintenance orders (see paragraphs 4.4 and 4.5 of the Report) and grants of administration (see paragraphs 3.13 and 3.16 of the Report). However, in other areas the meeting favoured participation in broader international schemes. Thus in the field of service of process the meeting did not recommend a special Commonwealth approach but thought accession to the relevant Hague Convention desirable (see paragraph 2.12 of the Report). An intermediate approach was adopted in the case of money judgments where it was thought that the existing Commonwealth scheme should be retained in the meantime, but that the way should be left open for possible participation in broader international schemes in the future (see paragraphs 5.12 and 5.13 of the Report).

The general approach of the Commonwealth is sensible. It is recognized that in some areas the community of interests and common legal heritage makes a separate Commonwealth scheme desirable. But there has been demonstrated a readiness to participate in broader international schemes, such as those devised by the Hague Conference, where suitable. This non-parochial and internationalist attitude stands in marked contrast to other regional groupings, particularly the European Economic Community, which have tended to look inward in these matters and have somewhat undermined the work of the Hague Conference and other international organizations.

It is recognized that the Commonwealth can play a special role in the field of private international law, particularly for the smaller member States. On their own, such States may lack the resources or expertise to undertake studies into existing schemes and to evaluate new deevlopments and to participate as individual members

of international bodies active in the field. With these considerations in mind the Caribbean, as a region with a large number of small Commonwealth States, was chosen for the regional meeting convened in April 1978.

The published Report amounts to some 350 pages. It contains the conclusions of the meeting together with the various working papers. A wealth of information is contained, including the texts of numerous statutory schemes of various Commonwealth jurisdictions and the texts of international conventions.

Both the official report itself and the earlier reports of Professors McClean and Patchett are available free of charge from the Legal Division, Commonwealth Secretariat, Marlborough House, Pall Mall, London S.W.1, U.K.

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