BOOK REVIEWS

A Matter of Justice by C. D. ROWLEY. (Australian National University Press, 1978), pp. 1-249. Cloth, recommended retail price $13.50 (ISBN: 0 7081 06587); Paperback, recommended retail price $6.95 (ISBN: 0 7081 0659 5).

Dr Rowley has given us in *A Matter of Justice* an up-to-date summation of some of the themes contained in his superb trilogy *The Destruction of Aboriginal Society* (1970), *Outcasts in White Australia* (1971) and *The Remote Aborigines* (1971). This trilogy marked a watershed in scholarly and insightful writing about Aborigines in our society. *A Matter of Justice* joins them in importance. This book is less rigorous in a scholastic sense than those previous works. In drawing on them, Dr Rowley makes incisive points about the conditions of Aboriginals and Aboriginal society in Australia. There are no new insights for the well versed reader; it is the synthesis of materials that makes for the book's importance. It is a social and political commentary, in that the author constantly points up injustices and makes observations on past and present Government policies as well as constructive suggestions on remedies.

This review focuses upon substantive aspects of Dr Rowley's book. However, it should be acknowledged that the force of themes, arguments, conclusions, and suggestions for reform is reinforced by the author's particularly lucid style. There is an absence of sociological jargon and other obstructions to understanding in expression which often make the writings of social scientists inaccessible to the general reader.

General Themes

The Aboriginal Embassy established for some time outside Parliament House in Canberra is used in Chapter 1 to counterpoint the Aboriginal condition; a pocket of black poverty in an affluent white society. This symbolises a theme of the book—the stark comparisons in living, working, learning, growing up and dying between Aboriginals and white Australians.

In Chapter 2 the author points out the vast differences in the Aboriginal and European cultures, the reasons for the uniqueness of Aboriginal culture and the violent abuses that were suffered in the face of the worst elements of industrial revolution European culture.[1]

At this point the differing notions of justice are shown. In the Platonic idea of "balance in human relations, between groups and individuals . . ." the Aboriginal system of justice had its role in the restoring of a just balance between members of the Aboriginal group.[2] No bureaucratisation of the law took place. There were none of the peculiarly individual rights that became embedded in the common law.[3] The common law with its

[1] Rowley, "A Matter of Justice" (1978) (hereinafter referred to as "Rowley") 33.
[2] *Id.* 34.
[3] *Id.* 22.

sophisticated bureaucracy and emphasis on the individual was incomprehensible to the Aboriginals. Startlingly for the common law lawyer imbued with ideas of individual freedom, Rowley states at page 48:

> The idea of individual liberty has, I think, been one of the most unsettling influences arising out of the imposition of the Western legal systems.

This common law notion has aided in a breakdown in harmony of the Aboriginal group. As the group was the fundamental unit of Aboriginal society this, in turn, has led to a disintegration of traditional society.

The destructiveness of the common law, especially in its criminal enforcement with its innate discrimination against Aborigines, is well illustrated, as Rowley acknowledges, in the late Dr Elizabeth Eggleston's, *Fear, Favour or Affection* (1976).

Rowley strikes a very significant chord in his reference to the Platonic notion of justice: Plato remains the most profound opponent of liberalism. Individualism is destructive of social harmony.[4] Platonic justice can justify the Indian caste system.[5] The incompatibility of the common law with Aboriginal society may thus be perceived. Although the common law in practice often loses its philosophical basis, it is as Rowley well demonstrates grounded on individualism—on liberal philosophy. Current Western ideas of justice have grown beyond and do not accord with Plato's. Aristotle is the basis of the Western tradition in the concept of the golden mean and distributive justice.[6] In ideas of justice Aboriginal and white society are antithetical, and so the common law carries the seeds of disintegration of Aboriginal society.

Rowley is throughout the book a realist and he concedes that the law, although an engine of destruction and discrimination, must be used by Aboriginals:

> The hope of justice for Aborigines rests on their own political action, their success in establishing new institutions to press for equality.[7]

The book is entitled *A Matter of Justice*: it is concerned with Aborigines' strivings for a right to justice. But what is "justice"? Rowley does not inform us. It is defined in Plato's terms but this cannot be the ultimate measure of justice. Rowley seems to view justice in Western terms; he uses Plato's concept for the limited purpose of showing the harmony of pre-white Aboriginal society.

Clarity would have been enhanced by some exploration of "justice". Professor John Rawls has provided an analysis of "justice", upon which Dr Rowley could well have drawn.[8] Rawls recognises a division between formal justice and substantive justice. The common law in a formal

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[4] *Cf.* Stone, *Human Law & Human Justice* (1965) 13.
[5] *Ibid.* n. 15.
[6] *Id.* 14.
[7] *Id.* 46.
[8] Rawls, *A Theory of Justice* (1973).

sense may be just in treating like cases alike[9] but it may be unjust with respect to Rawls' two principles of substantive justice.

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[10]

Rawls develops this into a concept of justice as fairness. In these terms Rowley could show that white society and the common law have failed to accord justice to Aborigines.

Rowley proceeds to view the quotient of justice accorded to Aboriginals in different conditions and areas in which they have found themselves. These are the country, mainly encompassing land rights (Chapter 3); wages (Chapter 4); outcasts and the country town (Chapter 5); Aboriginal settlements and stations (Chapter 6); the Christian missions (Chapter 7); secular institutions (Chapter 8); and the dark child's chances of justice (Chapter 9). In each of these, he traces how white society, usually in collusion with the law and the arms of administration of justice, police and the courts, have worked to deny justice to Aboriginals. In Chapter 3 is discussed the crucial question of land rights. There is a sensitive setting forth of the relationship of Aborigines and the land, and an informed statement of Government steps to date on this question.

In these chapters, the author brings home forcefully the plight of Aborigines on the reserves, missions, fringe dwelling communities and the cities. He accords special condemnation to the policies of the Queensland Government.

Legal themes

Of special interest to lawyers is Chapter 8—"Secular Institutions for Justice". The common law failed to protect Aboriginal land rights. In this context *Milirrpum* v. *Nabalco Pty Limited* (1971) 17 F.L.R. 141 is discussed in a useful and intelligent way.[11]

Dr Rowley recognises that formal legal institutions cannot guarantee rights. People must know how to use those institutions. Aborigines have been cut off from legal services; they have been at the mercy of unbridled power of police and protectors. This has been exacerbated by lack of education and the hopelessness of a rootless life.

Use of present structures: a conservative view

Rowley, at page 176, makes the point that the growth of the Aboriginal Legal Service and a small Aboriginal educated elite are positive signs of change. Moreover, a fundamental point is made in

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[9] *Id.* 56-59.
[10] *Id.* 60.
[11] Rowley, 176.

seeing that Aboriginal lawyers are indispensable in opening the doors of equality to their brothers. He says:

> There can be no more important contribution to Aboriginal bargaining power and political effectiveness than a group of trained Aboriginal lawyers.

This observation highlights a constant theme of this book. The book does not preach revolution; it does not argue a restructuring of the industrial capitalist society. Rather, Rowley is content to bend established societal institutions to the needs of Aboriginals. As a further instance of this, he sees that it is important for the law to guarantee group rights, when the common law has been content in the past to focus on individual rights. He does not posit this change on a fundamental departure from the legal bureaucratic structure of the system, rather he sees that the goal may be accomplished by the Aboriginal Councils and Associations Act 1976 (Cth). Perhaps in this context it would also have been apposite to mention the proposals on class actions under the Racial Discrimination Act 1975 (Cth), at present being considered by the Australian Law Reform Commission.

It is ironic that Brian Kelsey whom Rowley quotes in support on the question of group rights, sees the absolute necessity of departing from the present political and social system before equality can be realised.[12]

The Racial Discrimination Act

The Racial Discrimination Act 1975 (Cth), is briefly mentioned. (Incorrectly, at page 128, as a 1976 Act; the mistake is also reflected in the index.) This Act, Rowley says, may have offered more hope if,

> two assumptions of our political system were more applicable. The first is that rich and poor have equal access to the courts. The second is that the individual has a basically competitive relationship with other citizens, and a direct relationship to, and line of communication with the Government.

The draftsmen of the Racial Discrimination Act attempted to take account of both of these shortcomings. There is a realisation in the terms of the Act that those most affected by discrimination are the poor and inarticulate in our society; those who are likely to be completely divorced from the usual legal and political processes. Consequently, the Commissioner for Community Relations is empowered under the Act to investigate on his own initiative situations where discrimination may be practised.

The Act has had very little success in my view in reaching the core of discrimination against Aborigines. This stems more from the inadequacies of the Commissioner's office; inadequacies which are caused in the main by lack of Government support, especially in funding.

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[12] Kelsey, "A Radical Approach to the Elimination of Racial Discrimination" (1975) 1 University of New South Wales Law Journal 56.

The white blacklash: benign discrimination

Special support for Aborigines in education, housing, employment and other matters in Rowley's view immediately brings in its train the "white backlash". As I think most concerned people will concede, there needs to be a significant investment of our nation's resources in alleviating the conditions of Aborigines and providing them with the realities of equal opportunity.[13] The *Bakke* case[14] recently decided by the United States Supreme Court, perhaps delimits the area of benign discrimination in that country. In Australia the tolerances for benign discrimination in my view will probably be less than in the United States. Australians are not accustomed to the workings of a Bill of Rights. This lack of tolerance for beneficial programmes may be a significant brake to Aboriginal advancement. It is easy to perceive the political exigencies in the face of widespread white protest. Rowley does not address the implications of, or propose remedies to, the "white backlash". This is surprising considering his recognition of the problem. In my view, the only feasible way is to educate the Australian public. The means are available to take the shanty town of the fringe dweller into the middle class television room; as are the means to educate white Australians about the deprivations practised upon Aborigines now and in the past. Dr Rowley's book should be compulsory reading for this purpose.

Reform and changes

The lack of suggestions upon the "white backlash" fear is one of the few occasions in which Rowley fails to propose reforms and restructuring upon isolating problem areas. It is a generally pleasing aspect of this book that the author is not merely content to catalogue wrongs and problems but also sets himself the task of making constructive suggestions of reform and changes.[15] His theme here is taken from his book, *Outcasts in White Australia* (1971):

> [P]erhaps Australian Governments have begun to realise that past efforts have been mainly futile because they have been attempts directly to reshape people; and that the best chance for equality for the Aboriginal will come by making it possible for him to make his own adjustment through the establishment and use of free institutions.[16]

In short, Aborigines must be able to run their own lives and Government efforts should be directed to this end. Rowley sees some hope in recent Government initiatives; for instance the National Aboriginal Consultative Committee.[17] He draws on legislation and administrative actions to be cautiously optimistic that "instead of waiting for justice, Aborigines can do something to win it".[18] Perhaps, Dr Rowley's caution

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

[14] *Regents of the University of California* v. *Allan Bakke* 57 L.Ed. 2d 750.

[15] Rowley, generally Chapter 10.

[16] Rowley, *Outcasts in White Australia* (1971) 450 cited Rowley, 220.

[17] Rowley, *op. cit.* 226-227.

[18] *Id.* 234.

would have been even greater if he had been able to include the recent uranium negotiations with the Northern Land Council.

Some criticisms

In a book of this moment it would be petty to make nitpicking criticisms, especially of a legalistic nature. However, I should comment on a few matters.

In the first place, it is misleading for Rowley to state, as he does at page 176, that Aborigines could not be heard in evidence, "since a non-Christian could take no oath". It has been established since 1744 in *Omychund* v. *Barker*[19] that in order to take an oath a person need not be a Christian, so long as there is a "belief in a God as the Creator of the universe and that He is the rewarder of those who do well, and an avenger of those who do ill . . ." (*per* Willes C.J.). In this case certain persons of the "East Indies" professing the Gentoo religion were examined on oath.

Secondly, in discussing the Queensland regime of reserves under the Aborigines Act 1971-1975 (Qld) and the Torres Strait Islanders Act 1971-1975 (Qld), Rowley states at page 135:

> The Whitlam Government, in spite of some rhetoric on Aboriginal affairs in Queensland, have found no way politically to use its constitutional power to override the Queensland laws.

It is true that political as well as constitutional law considerations restrained a full abrogation of the Queensland legislation. However, certain obnoxious provisions, which infringed the International Covenant on Civil and Political Rights, were overriden under the Commonwealth Queensland and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth).

Thirdly, in discussing at page 128, Section 12 of the Racial Discrimination Act 1975 (Cth) relating to discrimination in housing, Rowley states that the section creates an offence. This is misleading if read strictly. "Offence" connotes a criminal act; the Racial Discrimination Act 1975 (Cth) has avoided criminal sanctions as counterproductive, and provides that breaches of it shall be unlawful and can be remedied only by the conciliation, or if that should prove unsuccessful, civil court processes.

Lastly, a passage quoted at page 187 from Dr Eggleston's *Fear, Favour or Affection* (1976) has been incorrectly transcribed and conveys the wrong meaning. The word "not" before "guilty" has been omitted. The point is that the vast majority of Aborigines because of, amongst other things, lack of legal representation in Court, plead guilty.

None of these minor trespasses blemish the substance of Dr Rowley's work.

Of contemporary note

There are two matters of significant contemporary importance.

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[19] (1744) Atk. 84; 26 E.R. 15.

The first is the question of recognition of Aboriginal customary law. Rowley does not go into this question at length but does make some limited suggestions and comparisons with the Papua New Guinea situation at pages 180-182. He is probably content to permit the discussion to rest with Dr Elizabeth Eggleston's analysis in *Fear, Favour or Affection* (1976).[20] It is to be hoped that Dr Rowley's deep insight into these questions may be brought to bear by the Australian Law Reform Commission in its reference on Aboriginal Customary Laws.[21]

Second, the most poignant writing in this book is reserved for Chapter 9—The Dark Child's Chance of Justice. 1979 is the International Year of the Child. Perhaps we should ponder this passage at page 202 during this year:

> Imagine the effect of such a realisation (*i.e.* that dark skin is a badge of social inferiority) on the very dark child, boy or girl; and there is no further need for explanation of the youthful alcoholics, the prostitutes of school age, the early addiction to reckless and hopeless defiance of authority, the truancy of the school child; or for the despairing parental love and spoiling of the child while he is still confident and unknowing, with the equally despairing acceptance of an almost innocent youthful depravity when the awareness which puberty brings is accompanied by realisation that one is for all one's life to be condemned.

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Trade Practices and Consumer Protection by G. Q. TAPERELL, B.A., LL.B. (Sydney), LL.M. (London), Barrister of the Supreme Court of New South Wales and R. B. VERMEESCH, LL.M. (Sydney), Senior Lecturer in Law, Australian Graduate School of Management, Solicitor of the Supreme Court of New South Wales and D. J. HARLAND, B.A., LL.B. (Sydney), B.C.L. (Oxon), Associate Professor of Law, University of Sydney, Solicitor of the Supreme Court of New South Wales. (Butterworths, 1978, 2nd Edition), pp. i-xxxiii, 1-732. Cloth, unpriced (ISBN: 0 409 38105 5), Paperback, unpriced (ISBN: 0 409 38104 7).

This second edition of Taperell, Vermeesch and Harland is over twice the length of the first edition which appeared in 1974 and has been rewritten to a considerable extent. It will appeal both to practitioners and to students, particularly those coming to the subject for the first time. As before, it deals in one volume with restrictive trade practices and mergers (Trade Practices Act 1974, Part IV (Cth)) and consumer protection (Trade Practices Act 1974, Part V (Cth)).

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[20] *Op. cit.* 277-305.

[21] Annual Report, 1978, The Law Reform Commission Australia, A.L.R.C. 10 paras. 74-78.

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