REVIEWS

Garth Nettheim *

MAJAH: INDIGENOUS PEOPLES AND THE LAW

By Greta Bird, Gary Martin & Jennifer Nielsen

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THIS volume of essays is the first of a series to be published by the Faculty of Law and Criminal Justice at Southern Cross University. The volumes will deal with the interface between any area of law and justice. The theme for the first in the series is Indigenous Peoples and the Law, and the volume is published in association with the University's Gungil Jindibah Centre.

It augurs well for future volumes in the series.

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The thirteen separate chapters are by fourteen authors, Indigenous and non-Indigenous. They are grouped around several themes.

The first theme is that of colonialism. Irene Watson in "Nungas in the Nineties"[1] insists that Nungas, in common with other Indigenous Australians, retain "the inherent right to self-determination"[2] notwithstanding its denial by Australian law. She discusses the debates in Geneva on proposals to expressly acknowledge this right in Article 3 of the Draft Declaration on the Rights of Indigenous Peoples. The Draft has now moved from the Working Group on Indigenous Populations into the Commission for Human Rights where the debate continues. She expresses concern in her paper that there would be reduced opportunities for some Indigenous peoples' organisations to participate in the Commission's deliberations, but provision was made for such participation.

Watson describes the experience of Nungas as being one of continuing colonialism in which Australian law continues to define Indigenous rights with limited regard to Indigenous laws. She instances the High Court decision in *Mabo v Queensland (No 2)*,[3] and the *Native Title Act* 1993 (Cth) which impose a concept, alien to indigenous people, that native title is subject to extinguishment. She also discusses continuing deaths in custody. She concludes that the "recognition of Aboriginal Sovereignty should be acknowledged as being fundamental to the survival of Indigenous peoples".[4]

Criminologist Chris Cunneen agrees with Watson's diagnosis that the Indigenous experience at the hands of the criminal justice system is neo-colonial. He draws on much of his own research for the Human Rights and Equal Opportunity Commission, for reports of the Royal Commission Into Aboriginal Deaths in Custody, and other bodies to support the thesis of this chapter that:

> [T]he role of the criminal justice system [is] integral to the systematic and institutionalised use of violence against Aboriginal and Torres Strait Islander people. Its central focus is the use of detention and imprisonment, terror, torture and ill-treatment.[5]

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1 Nungas being the term used for themselves by the Indigenous peoples of southern South Australia.

2 Watson, "Nungas in the Nineties" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, Sydney 1996) p1.

3 (1992) 175 CLR 1.

4 Watson, "Nungas in the Nineties" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p12.

5 Cunneen, "Detention, Torture, Terror and the Australian State: Aboriginal People, Criminal Justice and Neocolonialism" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p14.

He describes "the naturalisation of detention" by which he means that non-Indigenous Australia sees incarceration of Aboriginal people as natural, whereas, at base, it is political. He writes,

> Essentially the historical and colonial relationship between the state and Indigenous peoples has taken on the appearance of a natural relationship: Aboriginal people are dealt with in a certain manner because they are "criminal".
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> ...
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> The essentially political nature of the state and its legal instruments in dealing with a dispossessed Indigenous minority is transformed into the state simply dealing with criminals. Aboriginal resistance to the state is also stripped of its political content. The political relationship is transformed into one of law and order, one of criminality.[6]

Cunneen talks about his research into illegal detentions in Wilcannia police cells, the widespread police disregard of instructions, the 1990 "police raid" on the Redfern Aboriginal community, and even conduct which amounts to torture (as defined in the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) as establishing that the "evidence of state violence against Aboriginal people is overwhelming".[7] He also discusses paramilitary policing and the use of excessive force.

Jeannine Purdy continues the theme in a comparative chapter on "British Common Law and Colonised Peoples: Studies in Trinidad and Western Australia". She traces the different history of both places and finds keys to understanding the current over-criminalisation of WA Aboriginal people and Afro-Trinidadians, in particular economic influences, both past and present.

The next two chapters focus on the theme of the utility of international law to Indigenous Australians.

Lisa Strelein considers whether Australia should ratify the 1989 International Labour Organization (ILO) Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries. She discusses the bases upon which the ILO came to address issues concerning Indigenous peoples (particularly in the earlier 1957 Convention No 107) in light of the ILO's primary mandate and structures, particularly the limited opportunities for input by Indigenous peoples' organisations. While the move to revise ILO Convention

6 At p21.
7 At p28.

No 107 was motivated by concern at its assimilationist character, Strelein finds the same fundamental flaw in the new ILO Convention No 169:

> The power to determine what is acceptable in the treatment of indigenous people lies with the states and has been repeatedly denied to indigenous peoples themselves.[8]

The new Convention has some strengths including recognition of cultural rights, the right of self-identification and the right to own traditional lands, as well as rights, without discrimination, available to other members of the community. But the positive strengths of ILO Convention No 169 are, in the author's assessment, offset by its problems including the firm decision not to include an acknowledgment of the right of Indigenous people to self-determination, and the decision, generally, to require consultation with (but not the consent of) Indigenous people in relation to proposals affecting their interests.

In the following essay, Neil Löfgren explores the value to Indigenous Australians, for "Keeping the Colonisers Honest", of the right of direct communication to international treaty committees, consequent on acceptance of Recommendation 333 of the National Report of the Royal Commission Into Aboriginal Deaths in Custody. The right of individual communication is available under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (Cunneen's essay indicates how this last convention may be of relevance to Indigenous Australians). Löfgren discusses the scope of the three treaties and the processes for individual communication. He also considers Australia's position in regard to obligations under the treaties, in particular the long failure by Australian Governments to enact racial vilification legislation as required by ICERD Art 4(a) to which Australia has long maintained a formal reservation. (The failure has now been partly cured by enactment of the *Racial Hatred Act* 1995 (Cth).)

Greta Bird writes of Indigenous Australians' struggle to reclaim control over their cultural heritage. She argues that there are

> three periods in the imposed legal system's interaction with Koori Cultural Heritage. These are the 'Iconoclastic' (or 'smash and grab'), the 'Academic', and the 'Commercial'. In each period Koori communities have struggled against white interpretations of their culture and white control.[9]

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8 Strelein, "The Price of Compromise: Should Australia Ratify ILO Convention 169?" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p71.

9 Bird, "Koori Cultural Heritage: Reclaiming the Past?" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p105.

Bird provides a brief overview of Commonwealth and State laws for protection of cultural heritage, and considers current pressures in relation to Indigenous art and the limit to the law's protection through copyright. She notes the increasing relevance of international law standards to the Indigenous struggle to regain control of their cultural heritage.

Shelley Wright's related paper critically explores the concept of "Aboriginality" in the minds of non-Indigenous Australians. She argues that

> The debate over Mabo has never acknowledged the debt that the Australian economy and Australian nationalism owes to the appropriation, manufacture and sale of Aboriginal culture, let alone the dispossession of the continent from Indigenous ownership.[10]

Maori lawyer, Nin Tomas, continues the theme of cultural rights with an informative account of the struggle for the rightful place of the Maori language in New Zealand, which is intimately related to "the struggle for Maori sovereignty/self-determination"[11] particularly through the differences between the English language and Maori language documents from 1840 - the Treaty of Waitangi and Te Tiriti o Waitangi.

Mark Harris considers the Royal Commission into Aboriginal Deaths in Custody (RCADIC) or, rather, Commissioner Wootten's Regional Report for New South Wales, Victoria and Tasmania. In particular he sets out to examine the images of Aboriginality in the report (and in reports of some twelve other Royal Commissions into Aboriginal Affairs). For the RCADIC Harris sets out to explore whether there is any "real presence of Aborigines or Torres Strait Islanders".[12] Despite noting the involvement of Indigenous Australians in the work of the Commission, he reaches the harsh conclusion "that the RCADIC was ultimately an expensive exercise in recording data".[13]

The next major theme is whether the *Mabo (No 2)* decision can have any impact on the operation of the criminal justice system. In a joint paper Jenny Blokland and Martin Flynn identify "Five Issues for the Criminal Law after Mabo". The first is the old question whether Indigenous Australians are subject to the Criminal Law. The second is whether criminal statutes can be subject to native title holders' rights - this issue typically arises in prosecutions relating to hunting and fishing. A third issue is a broader "native title defence". The authors also suggest a possible line of defence to a charge of larceny of

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10 Wright, "Intellectual Property and the 'Imaginary Aboriginal'" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p142.

11 Tomas, "*Te Reo Maori - Te Reo Rangatira o Aotearoa - Te Okeoke Roa*: The Maori Language - The Chiefly Language of Aotearoa - The Long Struggle" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p154.

12 Harris, "Deconstructing the Royal Commission - Representations of 'Aboriginality' in the Royal Commission into Aboriginal Deaths in Custody" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p198.

13 At p212.

produce of the land. There is also the "claim of right" defence exemplified by *Walden v Hensler*.[14] Other possibilities are suggested and the conclusion argues that recognition of native title based defences to criminal liability would not cut across the ideal of equality under the law.

Stanley Yeo explores Aboriginality in the different context of specific recognised defences to criminal liability such as duress, self-defence and provocation. Like Blokland and Flynn, he argues that recognition of Indigenous cultural difference is not, as such, contrary to standards of equality before the law. He also reiterates the need for more information about Aboriginality to be made available to "judges, legislators, lawyers, the police and other people engaged in the criminal justice process",[15] both through formal evidence in court proceedings and through wider "cultural awareness" training.

Marie Brooks writes about "The Incarceration of Aboriginal Women". She presents data for New South Wales which indicate that the incarceration rate for Aboriginal women is increasing faster than for Aboriginal men, in a context where the overall disparity between Indigenous and non-Indigenous incarceration is also worsening. She notes the combined influences of race and gender, and also establishes that most of the offences for which Indigenous women are convicted are relatively minor, particularly "street offences". She, too, sees a need for cultural awareness training. She also recognises a need for better representation of women by Aboriginal Legal Services; others have argued the need for Indigenous women to have their own separate Legal Service organisations.[16]

The final essay, by Wayne Atkinson, is entitled "The Yorta Yorta Struggle for Justice Continues". It places the current native title claim (now before the Federal Court) in the context of the long history of the people's assertions of their rights to their country, involving some of seventeen separate attempts between 1860 and 1993 to claim land and compensation.

The chapters that make up this collection are strong and hard-hitting. To readers new to this area of law they may seem extreme, but to those reasonably familiar with the various reports and studies - and with more direct acquaintance with the histories and experiences of Indigenous Australians - they are balanced, well-based and even moderate.

The volume is a stimulating collection and useful addition to the literature at a time when the goal of reconciliation for the start of the next millennium appears to be increasingly elusive.

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14 (1987) 163 CLR 561.

15 Yeo, "The Recognition of Aboriginality by Australian Criminal Law" in Bird, Martin & Nielsen (eds), *Majah: Indigenous Peoples and the Law* p259.

16 See, for example, Thomas & Jowett, "Aboriginal Women's Legal Resource Centre Inc" (1994) 70 *Aboriginal L Bull* 15.