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THE RULE OF LAW IN A PENAL COLONY: LAW AND POWER IN EARLY NEW SOUTH WALES

by David Neal

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THIS book is good reading for any person interested in law and politics, or the early history of New South Wales. It helps place the law, and in particular the criminal justice system, in a historical setting, which is useful to teachers and students. From a personal point of view, I have always found that even a basic introduction to the history of any aspect of the law tends to breathe life into it, and makes learning and teaching it all the better and more enjoyable. For this reason alone, I find David Neal's book valuable and would recommend it.

In the preface to his book, Neal states that he means to answer the question "What would the rule of law mean in the circumstances of a penal colony?"[1] The argument he develops is that the rule of law played a prime role in changing NSW from a penal colony to a free society. He argues that the colonists used the imported ideology of the rule of law to settle the terms on which authority would be exercised in the colony and to force the colonial power to grant its penal colony the institutions and conditions of a free society.

In the first two chapters, Neal evaluates the position of NSW as a free society, slave society, prison colony and penal colony. He concludes that NSW was, at the outset, a penal colony because the people were sent there for punishment, and the nature and extent of punishment in NSW reflected that characteristic.[2] Several factors contributed to its change in status from penal colony to free society, including the growth and changing composition of the population, the conflict between economic development and English penal interest, the distance between NSW and England which

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1 Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (CUP, Melbourne 1991) pxii.

2 As above p46.

increased the autonomy of the colonial governors and thus reduced control by England, and the emancipation of convicts.[3]

However, the main reason for change from penal to free society, which is identified by Neal, but sadly not developed in any great extent, is the fact that NSW was almost entirely populated by convicts, and that to continue to deny them rights and status as free people would mean that the colony simply could not survive:

> For the situation to have been otherwise in a colony overwhelmingly composed of convicts and former convicts would have created enormous difficulties in the conduct of the colony's commercial and legal affairs.[4]

Neal points out that convict status in NSW differed substantially from convict status in England. In England, convicts were an isolated group, stripped of legal rights and freedoms, and isolated from the general community that had the capacity to administer its affairs and continue trade. In NSW the convicts were, for practical purposes, the general community. To deny members of such a community rights and duties was unrealistic. The transition from penal colony to free colony was inevitable. The only question was how the transition would be accomplished.

Neal describes this process and argues that the transition was made possible through the application of the principles embodied in the rule of law. However, he does not address the complexities in the application of the rule of law doctrine. Nor does he avert to the possibility that the rule of law may have been merely a rhetorical foundation for claims of political rights before representative democracy. Indeed, he may have overstated the significance of the rule of law in NSW. As Professor Alex Castles has stated, "[i]n practice ... the niceties of constitutional principle often meant little, if anything, in an outpost of Empire, halfway around the world from its mother country."[5]

THE RULE OF LAW IN NEW SOUTH WALES

According to Neal, the first evidence of the rule of law in action in NSW was a suit in 1788 by two convicts, Henry and Sussanah Kable, against the captain of the ship that had transported them to NSW. This first civil suit in

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3 As above pp15-16.
4 As above p6.
5 Castles, *An Australian Legal History* (Law Book Co, Sydney 1982) p35.

the colony signalled the establishment of the rule of law in the penal colony and imported a configuration of power that proved to be "a most important source, and the most important *medium* of change in the transportation period".[6]

Neal uses this example as the point of reception of the rule of law in NSW. However, he does not deal with the legitimacy of this importation of the rule of law in the colony. From a positivist point of view, and Neal openly subscribes to this stance,[7] it would have been impossible for the Kables to have had standing to sue. Blackstone did not mince words when he said that convicts are "no longer fit to live upon the earth, ... [they are] to be exterminated as [monsters] and a bane to society, ... [they are] already dead in law".[8] Neal does not explain the contradiction, of how a convict in a penal colony could suddenly have standing to sue. Had he made an attempt to address that issue in greater detail, the book would have been more complete.

Yet the book has a lot to contribute to our understanding of the role of the rule of law in early NSW. Neal argues, for example, that most writers have ignored the fact that law and politics were intrinsically mixed in NSW.[9] In Chapters Four, Five, Six and Seven, Neal demonstrates the inter-relation between the rule of law and politics.

The Varied Roles of the Rule of Law in NSW

In Chapter Four, Neal explores the role of the rule of law in practise in the court system. He shows how the rule of law was used as a political tool to expand or curtail the powers of the colonial courts. Political leaders and members of the judiciary all used the rule of law to further their own goals. There were two major classes of people in NSW: the Emancipists, made up of convicts, ex-convicts, their children (the currency) and the poorer free settlers; and the Exclusivists, composed of those in authority and the wealthy free settlers. However, at various times there were cross-overs, and the rule of law was used as justification for a political stance. Even those in the highest offices were at odds over this difference of opinion. For example, Governor Macquarie was an Emancipist while the courts at

6 Neal, *The Rule of Law in a Penal Colony* p22.

7 He states in the context of a discussion on the morality of law, "For present purposes I simply want to declare my legal positivist stance on this point": as above p68.

8 Blackstone, *Commentaries on the Laws of England* Vol IV (Garland Publishing, New York 1978) p380.

9 Neal, *The Rule of Law in a Penal Colony* pp62, 63.

the time were under Judge-Advocate Ellis Bent, an Exclusivist. Later, Chief Justice Francis Forbes, an Emancipist, used the rule of law to expand the power of the colony in relation to Great Britain.[10]

Other examples of the political exploitation of the rule of law are demonstrated by an examination of the workings of the magistracy. Magistrates such as the Rev Samuel Marsden were powerful and self-interested and used the rule of law to fight Emancipist governors like Bligh, Macquarie, Brisbane and Bourke. For example, the Parramatta Magistrates Bench "established a tradition of using the office to demonstrate political opposition to Macquarie's policies".[11] The rule of law is shown to have been virtually an exercise of arbitrary power. Further illustrations of the political nature of the rule of law in NSW are given in the discussion of the policing of the colony and the introduction of the trial by jury system. By the early nineteenth century, Emancipists were convinced of the need for jury trials to curtail arbitrary uses of judicial or political power. Writing of trial by jury, Neal argues that "[t]he rule of law heritage allowed the political argument to proceed subliminally in legal form".[12] The method of relying on the British heritage of trial by jury sidestepped any potential difficulties that would have arisen had convicts alone petitioned for checks on judicial or government power. "For former convicts to have made explicit political claims in a penal colony would have seemed very odd indeed."[13]

The fundamental question, which is not asked by Neal, is: "How far can we take discretionary powers before they breach the rule of law?" Under Neal's approach there seems to be no point where abuse of the rule of law becomes arbitrary power. This was one of Dicey's concerns.[14] Indeed this was the first element of Dicey's conception of the rule of law, that is, that individuals should not be subject to wide discretionary power. Dicey has received trenchant criticism for this wide statement. Sir Ivor Jennings,[15] for example, was a strong critic of Dicey's formulation. Whether Dicey had overstated his principle remains to be debated, but there does come a point when the rule of law can be so exploited as to legitimate arbitrary power.

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10 As above pp108-113.
11 As above p128.
12 As above p171.
13 As above.
14 Dicey, *An Introduction to the Study of the Law of the Constitution* (McMillan & Co, London, 10th ed 1959) p188.
15 Jennings, *The Law and the Constitution* (University of London Press, London, 5th ed 1959) p54.

The Substance of the Rule of Law

Through Chapters Four to Seven, Neal demonstrates that the operation of the rule of law does not always result in equal treatment of all. Yet, earlier he subscribes to the notion that one of the elements of the rule of law is equality before the law. He writes that although "[t]he principle does allow classification of people to whom particular rules apply, within limits of generality; once these are established they apply equally to all those affected".[16] This does not explain how the rule of law can aid convicts since they, by their status, are treated as having forfeited their right to equal treatment before the law.

Further, this conception of the rule of law, emphasising as it does procedural equality at the expense of substantive equality, leads to arbitrary power. People with greater economic or political strength have greater access to the law. It has been said that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has".[17] In the hands of some, the law can become a tool by which control of others is achieved. At the end of the book, Neal concludes:

> The rule of law is a political concept. If refers to a set of ideas about the configuration of political power in which rules, legal reasoning and courts mediate, constrain and legitimate political power.[18]

He accepts, consistently with his positivist view, that arbitrary power is legitimate as long as it can be brought within the rule of law. This view can be explained with reference to Ronald Dworkin's theory that there are two different conceptions of the rule of law.[19] The first one he calls the "rule book" conception. Under this conception, power can be legitimately exercised as long as it is sanctioned by pre-determined public rules. It is a strict procedural approach and takes the stand that "[s]ubstantive justice is an independent ideal, in no sense part of the ideal of the rule of law".[20] As Dworkin goes on to say "[t]he rule-book conception of the rule of law has only one dimension along which a political community might fall short. It might use its police power over individual citizens otherwise than as the

16 Neal, *The Rule of Law in a Penal Colony* pp66-67.
17 *Griffin v Illinois* 351 US (1956) 12 at 19 per Black J.
18 Neal, *The Rule of Law in a Penal Colony* p193.
19 Dworkin, "Political Judges and the Rule of Law" in *MacCabaean Lecture in Jurisprudence,* 13 December 1977 (OUP, Oxford 1980) p261.
20 As above 262.

rule-book specifies."[21] This is amply demonstrated by Neal's chapters on the magistrates and the police.

This was the view held by the Exclusivist governors, judges and others, and later by the wealthy Emancipists. It would also appear to be Neal's view. However, he fails to discuss the second of Dworkin's conceptions of the rule of law. This is the "rights" conception. Under this view it is assumed that

> citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognised in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable.[22]

This is the view of the rule of law embraced by the convicts and common people who had no political power or wealth but desired freedom. It would have been useful if Neal had averted to these two conceptions of rule of law as his book certainly brings them out at various stages as outlined above.

CONCLUSION

The book is well researched. It gives an excellent history of the colonisation of NSW and its transformation from a penal society to a free society. It is fascinating to read, although there is some repetition as Neal tends to traverse the same area when he deals with similar matters especially from Chapter Four to Chapter Seven. The mixing of law and politics in early NSW is balanced and well-presented. However, Neal's conclusion that the rule of law mediates, constrains and legitimates political power may be too broad. At least it appears that the rule of law was predominantly a legitimating tool. It is not used to *constrain* power as much as it is used by political actors to "legitimately suppress" their opponents.

The book is not a complete exposition of the rule of law and its meaning. Neal devotes the book more to the operation of the rule of law in NSW, choosing to "side-step" the legitimacy of the importation of the rule of law and the complexities of the concept. Indeed he does not address whether

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21 As above.
22 As above.

the rule of law is "an unqualified human good"[23] or a tool that "enables the shrewd, the calculating and the wealthy to manipulate its form to their own advantage".[24] However he does answer the question raised in the preface, and he has done it comprehensively.

23 Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, London 1975) p267.

24 Horwitz, "The Rule of Law: An Unqualified Human Good" (1977) 86 *Yale LJ* 561 at 566.

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* Compiled by Thomas Cox and Andrew Parkinson.

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