The Racial State as Legal Person

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I. Introduction: Money, Power and Politics

Ngaire Naffine's[1] first question is 'Who is Law for?' Historically, the answer to this question has been shaped by those with sufficient resources to pursue their rights juridically. The state itself, which has deep pockets, may attract legal personality from which political rights and duties flow to citizens, or are denied, additional to those emanating from its political qua governmental role. For example, relations between the state and Aboriginal people changed in Canada when the Supreme Court held that the Crown owed them a fiduciary duty.[2] In contrast, when the Australian state assumed the mask of legal personhood, it successfully resisted allegations of breach of fiduciary duty in respect of the Stolen Generations.[3] Naffine acknowledges the volatility of the legal community through stereotyping and exclusion,[4] but backs away from the essentially political and ideological role of legal personhood. I was left wondering whether the religious, philosophical and scientific ideas she identifies go far enough in facilitating our understanding of who law is for. Has she been seduced by the dominant Legalist position in the process of critiquing it?

Not only does the (invisible) state play a key role in the constitution of the legal person as a wearer of the mask itself from time to time, it also acts as the arbiter of legal personhood for others, as may be clearly seen in the case of Indigenous people, whom as I shall use as my touchstone. Furthermore, Naffine's study is focused on the common law world,[5] but we inhabit an age of statutes and state regulation from which judges take their interpretative cues. Indeed, it would seem that the symbiosis between legislature and court has served to instantiate the less than full legal

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1 Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009) ('Naffine').

2 *Guerin v R* (1984) 13 DLR (4th) 321.

3 *Cubillo v Commonwealth* (2000) 174 ALR 97.

4 Naffine, above n 1, 12.

5 Naffine, ibid, 14-15.

personality of Indigenous people. The political would seem to obtrude itself at every turn and cannot easily be ignored.

Naffine's paradigmatic legal person – 'adult, rational, autonomous, non-pregnant human' – is conceptualised in universalised and individualistic terms.[6] She acknowledges that 'law's idea of "man" can be discriminatory and arbitrary' and is susceptible to change over time, but there are problems in universalising the legal person – from whatever perspective – when it is so variegated and politically contingent. There is an inevitable slippage between the legal person as pure abstraction and the person, class of persons or corporate entity behind the mask. The very nature of *the human* universalises the legal person and erases differences that may be crucial markers of identity. None of the perspectives considered by Naffine pay particular attention to alterity, other than in the case of diminished reason, which is a very specific manifestation of difference. Deconstruction of the claimed universal reveals that the legal person is a culturally specific artefact, from which it is not possible to extrapolate meaningfully to another set of variables. As Aristotle acknowledged, to treat the same those who are differently situated can only ensure unjust outcomes. Most significantly, recourse to universals ensures that power disappears from the equation. Thus, the power imbalance between the legal persons in *The State v Individual X* is occluded and they are assumed to be evenly matched so that the skewed disposition of justice is legitimated.

The power behind the constitution of the legal person is very clearly illustrated in the area of discrimination law. Individual complainants rarely pursue unconciliated complaints to the courts and appellate hearings are dominated by wealthy respondent corporations and state entities.[7] The reality is that active legal personhood is beyond the means of most ordinary people, however deserving. Who law is for is invariably shaped by constructions of normativity that are facilitated by wealth and power.

II. The Case of Indigenous People

Legal personality was denied Indigenous people from the time of white settlement, supported by the prevailing theories of the Enlightenment. Law was certainly not for them. Rationalists, such as Kant, identified freedom, equality and independence as the characteristics underpinning civil personality, which constituted men of property as active citizens who were able to pursue their rights juridically.[8] Their power enabled them to create

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6 Naffine, ibid, 181.

7 E.g., Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

8 Immanuel Kant (Mary Gregor tr.), *The Metaphysics of Morals* (1996).

the mythic legal person in their own image. Women, men without agency and minors were assigned to the passive category, and Indigenous people to an inferior category of sub-citizenship, underscored by the myth of terra nullius (in the case of Australia). As 'indigenous subjects' under colonial rule,[9] legal personality was denied, other than in a criminal setting, and non-rationality perpetuated by recourse to demeaning epithets such as 'uncivilised', 'primitive' and 'childlike' within legal contexts.[10] Dependency was accentuated during the protectionist era when the disabling practices of wardship and welfare necessitated the consent of a guardian in respect of all decision-making. In addition, education was denied and wages withheld.[11] Non-rationality and dependency that were invoked to deny legal personhood was neither a product of infancy nor of mental defectiveness, but politically and juridically constructed.

In light of this history, the issue of Indigenous rights is a continuing site of contestation and we see the constitution and reconstitution of Indigenous people as not-quite-legal-persons. The legal person has a unique history in the context of Indigeneity that simply cannot be sloughed off. Naffine's book hints at the endorsement of liberal progressivism, suggesting that the historic struggles [of slaves] from property to persons have been overcome,[12] just as the struggle by women to secure legal personhood to and enter the public sphere at the turn of the 20th century have been overcome.[13] It is notable, however, that new forms of sexual slavery are now being recognised, and it has been recently argued that the Aboriginal experience of stolen wages in the 19th and 20th centuries constituted evidence of slavery.[14] I briefly consider the contemporary Northern Territory Intervention and resulting litigation that not only challenges the progressivist teleology but also tests Naffine's perspectives.

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9 Nicolas Peterson and Will Sanders, 'Introduction' in Nicolas Peterson and Will Sanders (eds.), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998), 7.

10 Margaret Thornton, 'Citizenship, Race and Adjudication' in Tom Campbell and Jeffrey Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism* (2000), 341.

11 Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (2006).

12 Naffine, above n 1, 13.

13 Naffine, above n 1, 13.

14 Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11 *Australian Indigenous Law Review* 30. It is notable that the High Court has recently upheld a conviction for sexual slavery. See *R v Tang* (2008) 249 ALR 200. In addition to sex trafficking, the argument has also appeared in respect of foreign workers brought to Australia on temporary Subclass 457 visas. See Miriam Cullen and Bernadette McSherry, 'Without sex: slavery, trafficking in persons and the exploitation of labour in Australia' (2009) 34 *Alternative Law Journal* 4.

Following release of the *Little Children are Sacred* report, which documented the sexual abuse of Aboriginal children in the Northern Territory, the Commonwealth Government decided to intervene and declare an emergency situation, relying on the Territories Power (Constitution s 122). Additional problems related to alcohol and drug abuse, pornography and gambling. A package of legislation was enacted that authorised direct intervention, changes to welfare and the suspension of the Racial Discrimination Act.[15] The Intervention was widely criticised as an erosion of autonomy,[16] and Aboriginal people have been reported as saying that they felt humiliated and ashamed for being considered less worthy of protection than other Australians.[17] When the legislation was challenged in the High Court, the respondent Commonwealth successfully demurred on the grounds that the prescribed areas were not property subject to just terms requirements under Constitution s 31.[18] In *Warridjal*, we see the legal personality of the state (the Commonwealth) being invoked to resist once more the independence and autonomy of Aboriginal people.

III. Disturbing the Masquerade

All four categories of thinkers posit ideas that are ostensibly compatible with the diminution of the legal personhood of Aboriginal people, although there are some ambiguities and overlaps. In *Warridjal*, however, it appears that Legalism is untouched by other perspectives.

(i) Legalists

As Naffine says, the legal person may represent the assumption of a mask for Legalists, for the real person or class of persons behind the mask is not

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15 At the centre of the legislation was the *Northern Territory National Emergency Response Act 2007* (Cth) (ERA) s 132(1), which excluded the operation of the greater part of the *Racial Discrimination 1975* (Cth) (RDA), and declared the ERA authorising the intervention to be a special measure under the RDA.

16 E.g., Jon C. Altman, 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (2007) Centre for Aboriginal Policy Research 16/2007; Rebecca Stringer, 'A Nightmare of the Neocolonial Kind: Politics of Suffering in Howard's Northern Territory Intervention' (2007) 6 *Borderlands e-journal*; Sarah Maddison, 'Indigenous Autonomy Matters: What's Wrong with the Australian Government's "Intervention" in Aboriginal Communities' (2008) 14 *Australian Journal of Human Rights* 41.

17 Northern Territory Emergency Response, *Report of the NTER Review Board,* Commonwealth of Australia, Canberra, 46.

18 *Warridjal v Commonwealth* [2009] HCA 2.

clearly discernible.[19] The perennial attempt to slough off historical and social context is a convenient way of depoliticising law and representing it as neutral and innocent, as though it had not played a significant role in constructing Aboriginal people as Other to its paradigmatic legal person, as well as authorising acts of violence and dispossession.

The harshness of the Legalist position may be leavened by other perspectives, which cannot be prevented from intruding from time to time.[20] This may not only be because a tight carapace cannot be maintained around law indefinitely, despite its best endeavours, but for the politically pragmatic reasons identified by E P Thompson, that law loses its credibility if it appears to be perpetually unfair.[21] Naffine acknowledges the difficulty of retaining legal personality as a 'strictly legal abstraction'.[22] One of the reasons I would suggest for this is because it is perpetually shadowed by the political. Indeed, the essentially applied and pragmatic nature of law-in-action tends to be impatient with abstractions and wishes to slough them off as quickly as possible.

(ii) Rationalists

The arguments of the rationalists have not assisted Aboriginal people in the past. If anything, they were detrimental, particularly the Enlightenment views that Aboriginal people were childlike and incapable of high level reason. Furthermore, the cultural specificity of the 'Man of Reason',[23] who eschews relationships with others and epitomises autonomy and individualism does not comport with the inhabitant of many Aboriginal communities. While cultural specificity is acknowledged by Naffine so far as the role of choice in life's trajectory is concerned,[24] the concept of choice is even more elusive in the case of Indigenous people whose lives have been so severely circumscribed under colonial rule.

Naffine draws on the work of Dena Davis to highlight the rationalist argument in regard to the rights of the child in the *Yoder* case, which clashed with the right of the parents to freedom of religion.[25] This case resonates with the Intervention because of the competing rationalist values surrounding *Warridjal*. On the one hand, the Intervention is represented as a

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19 Naffine, above n 1, 30.
20 Naffine, ibid, 46.
21 E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975).
22 Naffine, above n 1, 55.
23 Ably deconstructed by Genevieve Lloyd, *The Man of Reason*: *'Male' and 'Female' in Western Philosophy* (1984).
24 Naffine, above n 1, 78.
25 Naffine, ibid, 88-90.

manifestation of neo-colonialism as the troops are brought in, conditions are attached to welfare and Aboriginal people are not consulted. A Legalist would have no trouble with the enactment of such legislation by a sovereign legislature, but would the Rationalists stand up for the protection of the rights of children if it meant that Aboriginal people themselves were also reduced to childlike status? The collision of values is not easily resolved and Aboriginal people themselves are divided over the issue. Are the Intervention and the *Warridjal* case for Aboriginal communities as a whole, for Aboriginal children – the hope of the future – or is it an instrument of control by the modern state, which Goldberg terms 'the racial state'?[26]

In *Warridjal,* the majority of the High Court in best Legalist fashion bypassed abstruse questions of morality, together with the merits of the Intervention altogether, focusing on the demurrer as a pragmatic issue of procedure. In contrast, Kirby J, in his swansong dissent, condemned the Intervention because of the absence of consultation and because he claimed it was aimed specifically at Aboriginal Australians by virtue of their race, a suggestion that was peremptorily dismissed by French CJ.[27] Can the Rationalist position throw any light on the dilemma or is this another example of the unevenness of its application to which Naffine adverts?[28] It seems that compelling arguments can again be made for the good of Aboriginal people and the good of Aboriginal children, but hardly for the good of the (racial) state.

(iii) Religionists

The role of (western) religion in the lives of Aboriginal people could not always be described as a force for good, based on the history of the Christian missions. While 19th century Religionists might have conceded that Aboriginal persons possessed a soul along with all other humans, their belief in a childlike capacity to reason on the part of Aboriginal adults justified paternalistic and less favourable treatment. The belief in the superiority of Christianity over Aboriginal religious practices is likely to be condemned in an age of pluralism and tolerance.

However, the discourse of human rights has undoubtedly been invaluable in the struggle by Aboriginal people for equality and autonomy. The inclusion of Aboriginal people within the human family has allowed them to be grouped with white people in a way that was formerly denied. On this basis, *Warridjal* might be criticised for upholding blatantly

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26 David Theo Goldberg, *The Racial State* (2002).

27 *Warridjal,* § 14.

28 Naffine, above n 1, 94-96.

discriminatory treatment, but the Religionist stance would seem to offer little help in the case of the clash of values.

(iv) Naturalists

The naturalist argument would also seem to cut both ways for Indigenous people. It was long argued that the application of Darwinism, or a sociobiological interpretation of Darwinism, placed Indigenous people on a lower rung in the evolutionary chain than white people. Naturalism possesses ideological underpinnings no less than that of Rationalism or Religionism.

Corporeality may be invoked to draw attention to the racialised Other and to emphasise the distance from the rationality and normativity of Benchmark Man. In this way, Aboriginality is invoked to enhance the idea of Benchman Man as the high point of evolutionary creation in the same way as the pregnant or lactating woman is constructed as non-normative and deviant in the workplace.

Recently, however, naturalism has been deployed more positively as a levelling device through universal human rights discourse but, as with the Religionist stance, it would not seem to be helpful in resolving the clash of values.

IV. Conclusion

Since the concept of the legal person is unstable and susceptible to different meanings, as Naffine notes,[29] its political and ideological underpinnings, including the reality of wealth and power, are crucial but they are downplayed in Naffine's book. It seems to me that the conflation of legal persons and real human beings is inevitable and has to be acknowledged and explored. In a sceptical postmodern age in which difference is lauded, universals fail to carry the weight they once did. However, despite acknowledgement of the porosity of the legal person, universalism seems to exert a centripetal pull for Naffine. The limitations of universalism are glaringly apparent when we turn to the contemporary experience, not just the historical experiences of Indigenous people. Rationalists, Religionists and Naturalists simply do not go far enough in deconstructing and explicating the contradictions that go to make up the legal person, or should that be legal persons?

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29 Naffine, above n 1, 10.