individual interact. This book is unquestionably one of the most important Australian legal texts ever published.

G. D. WOODS*

Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law, by GARTH NETTHEIM, Professor of Law, University of New South Wales. (Australia and New Zealand Book Company Pty Ltd, 1973), pp. 1-137. ($4.95. ISBN: 0 85552 012 4.)

Writing of the Queensland Aborigines and Torres Strait Islanders Act of 1965, Charles Rowley concluded a chapter thus: "One can only account for the fact that it has not attracted the attention of the International Commission of Jurists by assuming that Australian lawyers have not yet much interest in legislation for Aborigines". Rowley's judgment was perfectly valid when it was made in 1971 and only marginally less so today — Nettheim's book notwithstanding. When an analysis of the 1939 Act was published by five Queensland reformers in 1958 none of them had a law degree. In South Australia, it needed an historian, Ken Inglis, to unravel the Stuart Case. Before criticizing lawyers for their indifference, and before lawyers start to feel too virtuous about the present state of their professional concern, it is important to recognize the fundamental reason for past neglect. It is not simply because lawyers were reactionary and insensitive. It is because the Law and Aborigines lacked a common denominator: because the latter lacked property. The Law is quantatively dominated by concern with property: its sale and purchase; its theft; its transference; its inheritability. Because most Aborigines were not permitted control even of their labour power they had little to say to the Law, or it to them. If lawyers are now more interested in Aborigines it is for personal reasons, not because the Law itself has changed.

This preamble will stand as a useful introduction to Nettheim's study of the 1971 Aborigines Act and Torres Strait Islanders Act, as several of the flaws in his book stem from the sources outlined above.

Almost apologetically Nettheim begins by announcing that he will be attempting more than a narrow legal analysis by taking into consideration historical, political, factual and philosophical matters regarding what laws ought to be, not just what they are (pages 1-2). But eight pages later in a discussion of black separatism he bows out, claiming that because the issue is political the International Commission of Jurists can contribute little to its resolution. This abnegation is remarkable on two counts. Firstly, it overlooks entirely the charge that assimilation is genocide in terms of the 1946 United Nations definition and therefore very much the concern of the I.C.J. Secondly, it makes nonsense of his opening claims about the necessity for a wider than legalistic approach to the issues of Aboriginal justice. It is surely one

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thing to point out that the inherent bias of the Law can contribute little, and another to claim equal impotence for legal practitioners. It may be that factually Nettheim is right to make this parallel. But he should come straight out and say so.

Another continuing dilemma for Nettheim is what to do about laws which discriminate in favour of underprivileged minorities. By and large he favours their existence (page 5) though he believes that they should be available, not mandatory. This is beside the point on every count. To show why, consider the following permutations:

(a) favourable discrimination available but not mandatory: for this to work the oppressed minority has to be in a sufficiently strong position to exert its claim for positive legal discrimination. But if it is as strong as this it will be strong enough to do without discriminatory legislation.

(b) favourable discrimination available and mandatory: this is the present situation and falls victim to all the charges which Nettheim brings against it, in a word, it becomes a net in which the oppressed remain trapped. It becomes yet another vehicle for oppression.

(c) strengthening the general law to prevent all abuses: Nettheim seems to favour this solution in the longer term (page 82) and moves towards it more forcefully the further his analysis of the 1971 Acts strengthen his objections to them. The more he sees of these particular pieces of discriminatory legislation, the less he can endorse the whole concept. (In general, it is difficult to believe that the author of the first few pages also wrote paragraphs like those on pages 101-102 and 114).
It should be noted that all plans for positive legal discrimination run counter to the basic assumption of bourgeois equality before the Law which grew out of the need to suppress feudal privilege. Carried to its logical conclusion positive discrimination should extend to voting rights: Aborigines should get a hundred votes to a professor's three and a judge's one. This indicates the impossibility of altering the entire body of laws to prevent all abuses without drastically altering the social system.

(d) removing the social sources of the inequalities and abuses: This is a solution which Nettheim does not consider at all. It is of course more than "political" since it would involve a challenge to the capitalist system, to the system from which the Law derives and which the Law is pledged to maintain. But it is on this point that the fate of all of us turns. For the Aborigines the problem is presently posed in an acute form: as long as the capitalist class dominate the state apparatus can there be any lasting answer to questions of land rights? If land rights are to be secure, will it not be necessary to establish a separate Aboriginal state apparatus? If so, is it likely that such a separate state apparatus could come into existence except as part of a total re-constituting of the state apparatus of white society in Australia into a socialist one? Avoid-

ance of this issue by Nettheim is simply a continuance of the totally inadequate and Idealist assumptions about the state which underly all bourgeois thinking about the Law.

Despite these flaws, Nettheim's study is valuable for its detail, and this presumably is why it is already out of print. Since the book is difficult to obtain, this review will spend more time than is usual outlining its contents and more space than is usual in longish quotations. Nettheim conveniently sums up his objections to the Acts under three headings:

1. Lack of consultation with people most directly affected;
2. Excessive delegation by Parliament of legislative and other powers to the Administration;
3. A series of major and minor violations of fundamental human rights as formulated in the Universal Declaration of Human Rights.

It will be useful to proceed by following each of these three areas in turn.

1. *Lack of consultation*

The Aborigines Bill was debated for less than four and a half hours. It had been circulated less than a week before. Not even Senator Bonner saw the final draft although he and some Aboriginal Reserve Councils, had been consulted over particular sections. Nettheim concludes that "the enactment of the 1971 legislation appears to have been characterized by elements of rush and of secrecy for which it is difficult to understand reasons" (page 22).

2. *Excessive delegation of powers*

This is a particular problem in Queensland's unicameral system. The most dangerous areas of delegation are those relating to management of property, access to reserves and working conditions. Referring to the management of property, Nettheim points out that while procedures have been streamlined the effective decision of cessation of management lies with the Director, subject to reference to a Stipendiary Magistrate. The freedom of choice introduced by the new Acts is prospective only it does not extend to persons whose property is managed under the earlier provisions, nor to any person who wishes to terminate the management of his property (page 71).

On the issue of access to Reserves Nettheim observes that whilst residence on a reserve is no longer a duty, no longer a punishment, it is not a right. "There is a danger that any past sense of repression in this matter may be superseded by a sense of insecurity" (page 34). An aspect which Nettheim does not raise is that this power of exclusion is directed at militants. In general, it will intensify the drive from slums like Cherbourg to slums like Redfern.

Related to this question of access to Reserves is the entire issue of their government.

> The administration of Aboriginal reserves in particular has in the past created, not independence, but a repressive and demoralised dependence. The laws may have been not only unjust, discriminatory and wrong, but also ineffective to achieve their declared goals. The new legislation offers some improvement, but only marginally. *It seems predictable that administrators will proceed in much the same way as they have done in the past, and that residents of Reserves will respond accordingly* (pages 101-102, emphasis added).

In this connection it is worth noting that a 1969 survey showed that Reserve managers included amongst their number several from the army, one South African, one plantation manager from Ceylon, a pastrycook and an ambulance driver. While these backgrounds are not necessarily disqualifications, they are dubious in the absence of other positive qualifications or training.

On questions of property management and access to Reserves appeals can be made to a Stipendiary Magistrate who is "not bound by rules of evidence or practice of any court" and against whose decision no further appeal is permitted, or possible. To which Nettheim adds,

> Magistrates have been known to act unfairly even where the rules of evidence or practice are supposed to apply —it is dangerous to assume that some may not do so when given virtual *carte blanche* in the matter (page 89).

Another suspicious feature of the Aborigines Act is the section which says it "shall not be necessary to prove the limits of a reserve" in disciplinary and certain other legal proceedings. This could be handy for mining companies and dangerous for Aborigines (page 96).

With regard to working conditions it is sufficient to cite Nettheim's comments:

> Parliament has thus vested in the Executive a power which is capable of being used so as to place *all* Queensland's Aboriginal and Island employees (and apprentices) beyond the scope of its system of industrial law, and has laid down no other criteria for the exercise of the power than the fact that the persons concerned be Aborigines or Islanders. Of course it is absurd to suppose that the Queensland Government would employ its powers on such a scale — if so, it is absurd that it should be delegated power of such scope (page 63).

3. *Infringement of Rights*

Most infringements refer to the three areas discussed in the preceding segment on delegation of powers but often arise from provisions of the Act itself. Nettheim identifies eleven articles of the Universal Declaration which are apparently infringed. These include Articles dealing with arbitrary arrest, free movement, rights to property, democratic government and working conditions.

Most infringements refer to the three areas discussed in the preceding segment on delegation of powers but often arise from provisions of the Act itself. Nettheim identifies eleven articles of the Universal Declaration which are apparently infringed. These include Articles dealing with arbitrary arrest, free movement, rights to property, democratic government and working conditions.

In addition there are several very useful Appendices extending over thirty pages, including some material on past administrative realities. The final two Appendices tabulate the Acts' deviations from the Commonwealth-State agreement as well as apparent infringements of the Universal Declaration of Human Rights. Unfortunately there is neither bibliography nor index, although the latter absence is partly compensated for in a special column of the Tables. One can only hope that this study of the 1971 Acts becomes redundant as quickly as possible.

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Federal Conflict of Laws, by MICHAEL PRYLES and PETER HANKS, both of the Faculty of Law, Monash University. (Butterworths Pty Ltd, 1974), pp. i-xxviii, 1-212. Paperback $10.00. (ISBN 0 409 43795 6); Cloth $16.00. (ISBN 0 409 43794 8.)

This book is to be welcomed for a number of reasons, not least of which is that it indicates that legal publishing in Australia is moving into what may be called a second generation. Both academics and practitioners in this country now have locally written books, or Australian adaptions of English books, in virtually all the major areas of the law. The development from this, which is epitomized by the work under review, is the appearance of smaller monographs which explore in greater detail specific topics within the major areas of the law. A further reason for welcoming this book is that it deals with a topic which does not fall neatly within any of the accepted areas of study or practice. As the authors point out in their preface, federal conflict of laws is a subject that relates both to Private International Law and to a study of the Australian Constitution. But it is commonly regarded as but an adjunct to either of these areas of study, and so has not received the attention given to the major principles of Private International Law or of the Constitution.

The matters dealt with in this work are all those in which the normal rules of the Conflict of Laws are affected by the fact that Australia is a federation; that is, jurisdiction and enforcement of judgments under the Service and Execution of Process Act; full faith and credit; jurisdiction and choice of law in federal diversity suits; and the problems of

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