

purposelessness and feelings of personal worthlessness. Such a condition has an inevitable result: people become violent towards others and themselves.⁵

One critical factor in the fragmentation of Aboriginal culture and the lowering of personal dignity of the Aborigine in his own eyes and those of white Australians is the endemic alcoholism on reserves. The House of Representatives Standing Committee on Aboriginal Affairs found that 90 per cent of men and 80 per cent of women on some Aboriginal reserves were heavy drinkers. By 'heavy' drinking most of the research conducted assumes an intake of at least ten bottles of beer or six bottles of wine a day. This is a drinking problem on a collective basis which few white Australians could comprehend. The role of the law in this problem has not been beyond reproach and the generally prescribed treatment for drunkenness has been imprisonment for periods and on a scale that the white community would simply not tolerate.

Where lie the solutions to these massive problems? Wilson rejects anything which smacks of white paternalism, for this only further reduces Aboriginal self-esteem and sense of purpose. Aboriginal self-control and self-management of his own land and his own destiny are the only way out of the maze of despair and violence the author's research chronicles. Wilson says that white Australians have no part to play in this regeneration process and even though they may be well-meaning they should keep out. Given the large degree of Europeanisation that has already taken place a reader might justifiably query how realistic this stand is. After all, we cannot revert to a pre-1788 scenario. The problems which the Aboriginal people face as 1988 approaches are vastly more complicated than ever before. Given their current plight, the capacity of black Australians to determine their own future, even if they could, remains doubtful.

Wilson's belief that the Aborigine can solve his own problems if given the opportunity is a refreshing note on which to conclude a commentary filled with distressing and depressing factual material. The book is an honest and deeply felt plea to all Australians to look beyond the superficial aspects of Aboriginal degradation and try to understand why it exists and what can be done to provide constructive solutions.

MARK DARIAN-SMITH*

The Constitutional Challenge edited by Michael James (Centre for Independent Studies, Sydney, 1982) pp. i-viii, 1-163, Index 165-166. Price: \$7.95, ISBN 0 949769 01 0.

This book is subtitled *Essays on the Australian Constitution, Constitutionalism and Parliamentary Practice*. In the preface, Greg Lindsay, executive director of the Centre for Independent Studies (CIS), comments that '[i]n Australia today, the Constitution is no doubt under more informed discussion than for decades'. Amongst other things he probably had in mind regular contributions on the topic from the left side of politics which have been relatively plentiful. An early and important work in the contemporary debate was *Labor and the Constitution*¹ and the regular appearance since of *Labor Essays*² continues the process begun by the former publication whilst reviewing numbers of other issues as well.

The CIS represents an important focus for academics and intellectuals tending towards and of the political right in Australia. *The Constitutional Challenge* is a welcome monograph if only because such written works putting constitutional views

⁵ *Ibid.* 21.

* B.A. (Hons), LL.B. (Hons).

¹ Evans G. (Ed.) (1977).

² *Labor Essays 1980*, Evans and Reeves (eds); *Labor Essays 1981*, Evans, Reeves and Malbon (eds); *Labor Essays 1982*, Reeves and Evans (eds).

from this side of politics have not been encountered to date as frequently as they have been from the left. It is worth remembering that it is only through debate in all possible forums that any progress is likely to be made in solving constitutional difficulties.

The book is a loose collection of seven essays dating back to 1979, some of which have been updated, together with an introduction written by the editor and author of the lead essay, Michael James. The themes covered are liberal constitutionalism (the James essay), the operation and independence of Parliament (the essays by G. S. Reid, D. J. Hamer, Anthony Rutherford and John Hyde and to a lesser extent Campbell Sharman) and constitutional limitation of governmental activity, especially with respect to government spending (the essay by James M. Buchanan) and government interference with private property rights (the essay by G. de Q. Walker).

If the essays have been written to fit a formal framework, this did not become apparent to the reviewer. Certain themes recur in several essays but the main impression is of seven individual contributions rather than of a collective commentary. Given the concern of the CIS with the protection of strict liberal or libertarian individual rights, this should perhaps come as no surprise.

There is another initial comment which can be made about this book. Though the events of and leading up to late 1975 were the catalyst for the unprecedented level of constitutional discussion which has taken place in the last decade, *The Constitutional Challenge* does not have one essay devoted to the fundamental issue raised in 1975 of whether or not a government requires the confidence of both Houses of Parliament before it can truly call itself the government. At most, this matter receives passing reference at various points throughout the book. Interestingly, James begins his introduction thus: 'The constitutional crisis of late 1975 raised issues which are fundamental to Australia's Constitution and the operation of the political system'. The substantial neglect of these fundamental issues throughout the balance of the book is all the more disappointing in the light of this acknowledgment.

The book still provides some stimulating reading notwithstanding these reservations but it must be said that the standard of the contributions is varied.

The editor's essay is entitled *The Constitution in Australian Political Thought*. It gets the book off to a provocative start. The issues raised by the events of 1975 are skirted around as a preliminary to James mounting a criticism of the radical opponents of the Constitution based on the alleged incompatibility of a consciously social ordering Constitution with concepts of liberty. As part of this argument, the Constitution is cast in the role of a policeman of government whose primary function is to protect the individual from the State. This leads the author to advocate a limited bill of rights. In so far as such a document would result in a diminution of government power, James finds common ground with the radical reformers. However, measures in a bill of rights implying greater government intervention are characterized as devices for legalizing a massive extension of State powers. James' reliance on the alleged spontaneity of capitalism as a hallmark of its ideological superiority at this point represents an unworthy simplification of a complex political argument.

His examination of the British experience is the most sure-footed part of the essay. In this segment we are presented with a graphic picture of a democratic government operating without the benefit of constitutional limitations becoming hopelessly besieged by pressure groups demanding special treatment. As Britain possesses only an informal Constitution, problems associated with the sovereignty of Parliament being asserted at the expense of the rule of law are very real. Other leading British commentators including Ralf Dahrendorf in his book *On Britain*³ are voicing similar concerns.

Following the James essay are two of the weaker links in the book. Notwithstanding editorial assurances that the essay by G. S. Reid, *The Parliament in Theory and Practice* was one of those revised for the collection, the essay text seems to give the lie to this, referring as it does to House of Representatives committee operations up until 1979 only. The concern raised by the author over the almost complete slippage

³ (1982).

of effective law-making power from the hands of Parliament into those of the executive is of course a valid one. Senator David Hamer's *Towards a Valuable Senate* similarly canvasses the legislatively unhealthy results of executive control of the Lower House in particular. Hamer pinpoints the prime cause of the problem as being the use of the Westminster model in Australian Parliaments. He then rejects the best-known constitutional solution (as in the United States — separation of executive and legislature) as impractical. This allows him to posit a doubtless well-intended but bizarre solution of his own. All hope of remedying the ills of the House of Representatives is largely abandoned. Faith is then placed in a scheme whereby the Senate is to be cut free of government contact, thus allowing it to flower as Australia's bastion of real legislative power.

After reading the fourth essay, *Choosing the Lesser Evil* by Anthony Rutherford and John Hyde, one can understand some of the regret expressed at John Hyde's departure from Parliament at the 1983 Federal election. This well-written criticism of parliamentary practice is both candid and incisive. In all relevant areas including review of legislation, review of revenue and expenditure and review of administration and delegated legislation the authors identify the central problems with clarity. Predictably, much of the blame for these problems is attributed to the modern proclivity of governments to regulate economic activity more and more. Equally predictably, the solution is seen in leaving that regulation to the market place, although the theoretical arguments to sustain this approach are not brought to bear. However, as a review of the prime problems confronting the operation of Parliament as a legislative institution, this is a valuable article. A full exposition of the new conservative theoretical economic justification for small, some would say hobbled, government is contained in the sixth article, *The Limits of Taxation* by James M. Buchanan. In contrast to all the other essays, Professor Buchanan is writing not in an Australian but an American context. Much of the material is highly theoretical, but the piece concludes with a forthright endorsement of the United States tax revolt of the late 1970s. When the author speaks of freedom, which he often does, it quickly becomes apparent that he means commercial freedom. (Is there any other kind, he might well ask.) For example, he draws the article to a close with the following sentence (printed in heavy type for extra emphasis):

A constitutionally imposed and defined fiscal and monetary framework is a necessary requirement for the viability of a tolerably free society.

An appendix to Buchanan's article, *Australian Commonwealth and State Fiscal Powers* by Phillip Clark is not terribly helpful and is misleading in some of its comments. For instance, to describe the States as having been 'persuaded' not to use their income tax powers during the war is a rather quaint way of summarizing the legal battle conducted between the States of South Australia, Victoria, Queensland, Western Australia and the Commonwealth in the *First Uniform Tax Case*.⁴ Furthermore, no distinction is drawn between private and public corporations, as it should have been, when corporate taxation is being briefly discussed.

Another contribution which relies heavily on theoretical economic analysis is *The Constitutional Protection of Property Rights: Economic and Legal Aspects* by G. de Q. Walker. This essay subjects section 51(31)⁵ to some unaccustomed scrutiny following its first judicial consideration for some time in *Trade Practices Commission v. Tooth & Co. Ltd.*⁶ The writer critically examines that case with an unusual blend of Chicago School economics and realist jurisprudence in the process of leading to a conclusion that the law's protection of property rights is essential, not because it is in the interests

⁴ (1942) 65 C.L.R. 373.

⁵ S. 51 reads: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(31) The acquisition of property on just terms from any State or person for any purpose in respect of which the parliament has power to make laws'.

⁶ (1979) A.T.P.R. para. 40-127.

of property holders but because it is in the interests of maintaining the most efficient economic system for society.

Section 51(31) as interpreted in *Tooth's case* is seen as endorsing this thesis. Actions by State Governments, for example the Queensland Government's policy against transferring freehold land, especially to Aborigines, and the N.S.W. Government's attempts to expropriate privately owned coal are argued to highlight the need for similar constitutional protection at the State level.

The final essay left for consideration is the fifth in the book, *Diversity, Constitutionalism and Proportional Representation* by Campbell Sharman. If the study of electoral systems arouses your interest at all this article alone makes the book worth having. A comprehensive review of the two types of proportional representation (the list system and the single transferable vote system) reveals, *inter alia*, the profound representational changes that can be effected by seemingly innocuous procedural variations in the implementation of proportional representation. His comparison of the Tasmanian Lower House experience with the Senate experience is at once illuminating and fascinating. The paradoxical role of the Australian Labor Party in the introduction of proportional representation into Australia is also examined.

In summary then, the book suffers from a lack of priorities. Individual writers have been permitted to pursue their own prime interests with a resultant neglect of some fundamental issues; and this does not appear to have occurred in the interests of conforming to some overriding theme. Nevertheless some of the articles stand up well in their own right as stimulating, often provocative reading. The index is brief but the book has benefited from good proof-reading and type-setting. The layout is uncluttered and helpful use has been made of different type styles to provide clear headings and a general easy readability.

RICHARD CULLEN*

* LL.B. (Hons).