

COLIN HOWARD, *THE CONSTITUTION, POWER AND POLITICS*,
Fontana/Collins, Melbourne, 1980, pp. ix + 249.
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Reviewed by John Uhr*

In Australia over the last decade there has been a continuous stream of argument over constitutional change. Although much of the argument has been among constitutional lawyers, many of the larger issues have received sustained public discussion. If a week is a long time in politics, then a decade is a long time in law: is there really anything more to be said about constitutional reform? Colin Howard certainly believes so. His most general contention is the negative one that a great deal of the recent analysis has missed the whole point of constitutionalism. More positively, his book promises to be a model of how to think about constitutionalism in Australia.

Howard has a lot to say. His six chapters cover an enormous range of topics, many political, most legal, all constitutional. The chapters fall into three areas. Howard begins with two on the political bearing of the Constitution; moves across another two on the specifics of changing the head of state; and concludes with two in praise of a bill of rights. The book is not designed solely to capture (and torture) the office of the governor-general, although it successfully does this. Howard's heavy, sometimes cumbersome machines of legal warfare are superfluous to that one task; he has greater prizes in mind.

This book complements Howard's earlier, more descriptive study of *Australia's Constitution*.¹ Whereas the earlier book studied the parchment provisions, the new book studies the wider constitutional framework - evaluating the political purposes served by the document, considering alternatives, and proposing changes. "Power" is a prominent word in the title and in the argument of the book. Its prominence

*Commonwealth Parliamentary Library.

¹Penguin Books, 1978.

indicates something of Howard's intention - to redirect attention from legal chatter to political philosophy. This attempted redirection is the book's real claim to merit.

Howard's orientation is fundamentally different from that of most previous contributors to the topic. It is a political rather than legal orientation, although Howard does not write as a party political activist. His purpose is to show that constitutions are necessarily political in the sense that they reflect and support the general political regime of the nation. In free societies, that regime should itself reflect the predominant social consensus on the deeper political questions concerning the makeup and purpose of the nation. Howard claims that this is not so in Australia. His supporting argument illustrates what he means by constitutionalism properly understood.

Howard asks us to set aside the orthodox approach to constitutional reform - which merely tinkers with the machinery of government - and to ask 'what sort of a society we want to be or become.' Only when that question is answered satisfactorily to all can we frame a document guaranteeing the fundamental political processes. To those who would argue that political questions are not the proper concern of lawyers, Howard retorts that constitutions are not the proper concerns of lawyers.

Is there a mean ground between strict legalism on the one hand and party political thought on the other? Howard says there is; he is just as firm in his rejection of party-ness as of legalism. What the noble cause of constitutionalism lacks in Australia is a tradition of political *philosophy*, which Howard distinguishes from everyday political *thought*. Now because constitutions are inherently political devices, constitutional reform will necessarily be accompanied by party division and defended by party political thinking. In Australia, this dissensus is exacerbated by the absence 'of any tradition of political philosophy... and of any well thought out and generally accepted principles of community action' (p. 7; cf pp. 13-14). Yet one might reply that Australia is not as obviously rent by factions as many other countries. It is true that we lack a public philosophy (and if, despite Plato and

Rousseau, that is not a contradiction in terms), so what? Howard seems to be in a dilemma. On the one hand, he asserts that there is no social consensus, no coherent, publicly accepted sense of what makes Australia a political community. Yet on the other hand he can not help noting that there are few disturbing social discussions. He complains that we have 'no public debate about great principles of social organization (pp. 7-8). Yet he also admits that we are 'not a diverse society', that we possess, in fact, 'an extraordinarily high degree of homogeneity' (p. 8). Could this not indicate that Australia does have a social consensus, albeit largely implicit, and that it is really one that Howard finds difficult to respect?

Howard's invigorating exercise in political philosophy easily works itself into slipshod sociology: one might feel better after the experience, but is one really fitter, better able to cope with the demands of constitutional reform? His intention is admirable: he wants to moderate the potential divisiveness of our society and to give Australia a sense of unity and wholeness through the elaboration of those minimal, basic political principles to which all citizens ought to subscribe. Every successful constitution 'must accurately reflect a widespread consensus in the community' and thereby provide 'a test to which people can point if and when any of the basic values for which their society stands come under attack' (p. 14, p.23). Sound sociology perhaps; but how is this relevant to Australian constitutional reform today?

More often than not, what he actually does is simply to 'articulate the sentiments of Australians at large about how life ought to be lived' (p. 5). The rigour of Howard's philosophizing is often compromised by confining itself to articulating existing public sentiments - straightening out the kinks, as it were, in public opinion.

Howard's energetic romp through the maze of parliamentary reform lacks focus. In Canberra, parliamentary affairs are indeed seriously out of order; ministerial responsibility is now more honoured in the

breach; the executive dominates the business of Parliament. Although these conditions are permitted by the Constitution, Howard knows that the remedy, if there is to be one, will be political rather than legal. He presents a shopping list of Parliament's ills; the reader is left to separate effect from cause, periphery from centre.

The difficulties inherent in Howard's approach emerge quite clearly in his thematic discussion of a bill of rights. The Australian Constitution lacks 'a comprehensible set of principles of the decent life' (p. 25), and he sees the absence of such a bill of rights as the fundamental weakness of the document. Related to this is his view of the errors of current Australian constitutionalism, in which the most daring and radical proposal substitutes a republican for a monarchic head of state. Howard locates his discussion of the office of the governor-general between his initial political analysis of power and his concluding analysis of rights. Like many others, Howard leans toward republicanism; yet unlike most other Australian republicans, he does not focus solely on the great debate over monarchic v. republican head of state. Republicanism is a political philosophy and, in his view, its constitutional aspects should be seen as effects of a deeper political argument concerning self-government.

The United States is the oldest modern republic and Howard relies upon it as the standard for an invigorated Australian constitutionalism. The United States is, after all, the first new nation - the first polity to be fashioned on the modern doctrine of rights - and its history can illustrate much about the theory and practice of constitutionalism. To Howard, the U.S. Constitution with its bill of rights is 'the most successful constitutional innovation that the world has ever seen.' (p. 111; cf. pp 61, 90, 134-6, 148)

But what is the political purpose served by a bill of rights? Howard's answer exemplifies his view of politics as essentially *community* affairs, as distinct from party or partisan measures. For him, a bill of rights can help elevate political affairs from the mundane level of party to the higher level of community. A bill can

represent 'a conscious public commitment' to 'certain ethical standards' (p. 153), it can thereby reinforce what were once called the better angels of our nature and 'influence the entire outlook of a nation' (p. 152).

Howard's constitutionalism reveals its roots in the perennial issue of political education, where the law 'exercises an educational and habit-forming function' and enforces those 'standards of conduct (p. 172, p. 188) which are the essential 'principles of social action.'²

The actual principles depend, of course, upon the type of society one wants: law is always surrounded and supported by political principles. Howard is refreshingly explicit. He is excited by the vision of modern republicanism and his political standards echo those liberties that ring in the U.S. bill of rights: free speech, free assembly and the other specific instances of the general commitment to the privacy associated with the liberal's cherished pursuit of happiness.

Yet something fundamental is missing from Howard's restatement of the liberal view of self-government. When one digs into *The Constitution, Power and Politics* and attempts to trace through any particular issue, one easily loses one's way. There is no clear articulation of the various components of liberal constitutionalism. There is, admittedly, a vigorous and praiseworthy reminder of the political dimension to constitutionalism. But what is central and what is peripheral? To be sure, it is refreshing to see the debate over the head of state in its proper context, and to see the issue surveyed from the solid ground up instead of from the wobbly head down. In the final account, however, Howard's book is not that of a true surveyor of the constitutional ground. It may be the best survey yet undertaken, but for all its virtues (and they are many) it is only provisional.

²Howard's recommendation would be sounder if he had not cited the ninth U.S. amendment (i.e., the ninth of the bill of rights enumerated) as the eleventh (p. 142) and the eight as the tenth (p. 150).