BOOK REVIEWS

Civil Procedure—Cases and Text, by GERARD NASH, (The Law Book Co. Ltd, 1976), pp. xxi and 458.

Litigation—Evidence and Procedure, ARONSON, REABURN AND WEINBERG, (Butterworths, 1976), pp. xl and 721.

Principles of Practice and Procedure, O'LEARY AND HOGAN, (Butterworths, 1976), pp. xxxi and 328.

In very recent years, the more modern law courses at Australian universities have at last recognised Civil Procedure as a subject worthy of academic study. Previously, it had been relegated to an appendage short course, usually completely rule-oriented, and taken by a young law graduate prior to his admission.

The extremely conservative approach of the academic to what he regarded as "proper courses of study" has received rather a jolt recently. This has resulted not only in the development of procedure courses, common place in American law schools for many a long day, but also the further step has begun to be taken integrating within the law courses distinct practice courses together with a move towards courses designed to study and question the organization and ethics of the profession.

Such changes will result necessarily in new areas of academic writing. And so it is not to be wondered that, in 1976, three publications have appeared in Australia, designed to cope with the new procedure courses. Each of these publications has its distinct character, primarily due to the course for which it is designed.

A mundane and fairly pedestrian approach is followed in the volume by O'Leary and Hogan. Significantly, the book is entitled *"Principles of Practice and Procedure"*, but it appears rather short on principles and strong on a strictly rule-oriented course. It is fairly barren of discussion, and the student would find it a volume of singular boredom. It has not the lightness of touch of Odgers and should not be classed as an Australian equivalent even if meant to be. It could not be recommended as a text for teaching purposes. At the same time, there is contained in it information which is not otherwise easily obtainable.

One of its more valuable parts is the section on Notices Before Action, which contains some useful precedents. Appendix A on N.S.W. enactments requiring Notice Before Action, or prescribing special periods of limitation, is particularly useful and would be a source of great comfort to the new law graduate, for this is an area that perennially throws up odd limitation problems. Generally, one may sympathize with the authors in their problems of tracing out the difficulties of writing a new text. But it is far from being a good teaching tool which must be assumed as its object. After all, in the area of practitioners' handbooks, there are many available which cover most of this ground and far more copiously.

The other two volumes look at the teaching problem of Civil Procedure in a rather different way. Nash is concerned with developing a full course on Civil Procedure with extensive work in Pleadings, Execution and Costs. Aronson, Reaburn and Weinberg have developed a materials volume for the purpose of an integrated "litigation" course on Evidence and Civil and Criminal Procedure. To be frank, whilst one may appreciate and applaud the concept of integration of these legal areas, unless it is an extremely carefully devised course which extends beyond the single academic year, then procedure will be inevitably sold short for evidence. Melbourne

University is about to undertake teaching a course in litigation but on its present suggested format it represents a comparatively insignificant study in so far as civil and criminal procedure are concerned. And this can be demonstrated in Aronson, Reaburn and Weinberg when one turns to the material on After Trial which cannot but be described as inconsequential. Enforcement and costs are the forgotten areas of procedure, simply because they do come at the end of an action and most courses, through lack of time, just do not reach them. Yet it would be a brave teacher or practitioner who could idly dismiss this area with the carefree nonchalance of pp. 706-10 of Aronson, Reaburn and Weinberg.

With the rather unattractive decimalization of paragraphs that has become a feature of modern text book writing there has followed in its train an equally unattractive literary style. What, for example, could be more unattractive than 2.8.1 and following on Inspection of Property. Even if the argument is advanced that the book is merely a student text and not meant for the "professionally literate" public, this does not help. The student is equally, or even more, put off by this sort of approach. Unfortunately, the modern casebook has moved further and further away from any semblance of literary style. It has, however, rather more significantly had the effect of moving the student away from the law library. To the reviewer, case and materials books fail if they give to the mildly idle student a sufficient sense of security in the book itself. On this point, see the short, trenchant criticism by D. St.L. Kelly of another casebook in (1976) 3 *Mon.L.R.* 177. In no subject is it more important than procedure for the student to go back to the report itself to understand fully the nature of the action.

In a way, this is the sustaining virtue of Nash, *Civil Procedure—Cases and Text.* The method he employs is to push forward a problem, ask the question, and pointedly refuse to give the answer, with the result that the student, hopefully bemused and tantalised by the problem, must find the answer by his own researches. The student thus constantly should be forced back to the reports. To the reviewer, this is a discipline of paramount importance in procedure where the student must read the whole case to understand the procedural nuances. Unashamedly, Nash, through his choice and treatment of cases, expects his students to be au fait at least with the ambit of the common law and understand the rudiments of conflicts. It is, in other words, to him a typical subject of the final year which will draw together the threads of much that has gone before.

At Monash University, where the text is used, students have found the course difficult for this very reason, together with the further fact that pleadings are taught practically by a full tutorial programme running concurrently with the substantive work. It, nevertheless, has been popular as an option. In the new programme for Procedure at Monash commencing in 1977, sufficient time will at last be given to enable a study embraced by chapters 8 and 9 on Costs and Enforcement.

Each of the books reviewed is in its first edition. Each bears the hallmarks and pitfalls of first editions to which readers of these volumes will readily attest. O'Leary and Hogan does not appear to meet requirements either as a student text or a practice handbook. The other two publications as student texts, for that is what they are, are distinctive for the approach each adopts. Unless the integrated litigation approach is to be spread over a more leisurely two years it is very likely to develop into a hotch-potch or, in the alternative, a course in evidence with some civil and criminal procedure thrown in for good measure. In whichever case, the result for a proper study of procedure seems disastrous. The approach adopted by Nash is more disciplined and at the same time developed more intellectually. On this latter point, there may be room in Nash for the development of more comparative material outside of Australian State and English jurisdictions.

There are two or three matters, not necessarily of great consequence yet of passing interest, that may be mentioned. After reading these three publications one wonders whatever has happened to the High Court and its rules? Properly, all three base themselves on the Supreme Court rules in the state for which they are primarily written, with comparisons from time to time of other state Supreme Court rules. Then, indulgently, each concerns itself where required with variations in County or

District Court rules and those of the Magistrates Courts. But nowhere, so far as the reviewer can see, do the High Court rules rate a mention!

A small point, but an interesting one, as it may indicate some of the "covering of the field" difficulties faced by the Aronson, Reaburn and Weinberg text and its approach: on p. 15 comment is made under an odd title, "Interstate References" to the jurisdiction of the Victorian County Court. "Other actions" in the text is misleading as it really should be "other personal actions" as prescribed under s. 37(1)(a) of the *County Court Act* 1958 (Vict.). The limit in the text for this is said to be $5,000 whereas the figure is $6,000. Limits in Replevin, Ejectment and the general equitable jurisdiction are quite different and at a much lower figure. The authors, however, go on to make a very unusual statement, namely "It is therefore practically impossible to transfer a case from the County Court to the Supreme Court simply on the ground of the size of the former's jurisdictional limit". The meaning of this is illusive, and seems to have misunderstood the nature of the judgments both in the Supreme Court of Victoria and the High Court in *Donelan's* case. For good measure, the authors fail to comment on the purpose of s. 37A of the *County Court Act* which forensically is important and is a quite valuable teaching point. It does represent, after all, the Victorian Parliament's interesting attempt to overcome the log jam of personal injury cases in the Supreme Court which has resulted in some plaintiff hardship and some strains on the administration of justice, particularly in the Supreme Court. (As an aside, Nash, in dealing with this very same question, has erred slightly in so much that his references (pp. 7 and 32) to the Supreme Court Judgment of Newton J. are in fact to the judgment of Smith A.-C.J.).

As a final passing shot, if writers are keen to include diagrammatic material in student texts, it must be simple in construction or else it loses its impact as a teaching tool. Both Nash and Aronson, Reaburn and Weinberg are at fault here (see p. 11 Nash, and pp. 354, 355 and 356 of Aronson, Reaburn and Weinberg). The charts of the latter authors look like a complex Monopoly board and it isn't even clear to the players when you go to jail whether you pass Go or even whether you are to collect $200 or not!

Necessarily, a number of changes will need to be made to the first chapter of Nash once the *Judiciary Amendment Act* 1976 (Cth) and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) are proclaimed.

One must feel a sense of encouragement, however, by the new found endeavours in this very important, yet so far neglected, field of legal writing in Australia. All three volumes represent brave attempts in aiming to develop an intelligent grasp by the apparently ever-growing law student community of the intricacies of procedural law. The reviewer, however, leans markedly towards Nash in that it seems to provide the most promising starting-point for the student to gain a full, ample, and intellectually satisfying study of civil procedure. It is predicted that it will be the first of a number of editions.

H. B. CONNELL

A Bill of Rights?, by MICHAEL ZANDER, (Barry Rose, Chichester and London, 1975), pp. 68.

Michael Zander's 68-page booklet is a readable and highly concise contribution to the debate on the pros and cons for the enactment of a Bill of Rights. Although the booklet deals with the debate in England, it is of value and interest to the Australian reader, as the issue of a Bill of Rights has been the subject of much lively debate in Australia. This was particularly so during the brief span of the Whitlam Labor Government when it introduced into the Senate on 21st November 1973 the "most spectacular and far-reaching of all the Labor Government's legislative initiatives". The *Human Rights Bill* 1973, which adopted in the main the provisions of the *International Covenant on Civil and Political Rights* of 1966 was hardly debated

when Parliament was prorogued on 14th February 1974. The Bill was not subsequently re-introduced with the change of government. The present Liberal Government has opted for the creation of a Human Rights Commission. The *Human Rights Commission Bill* 1977 will probably dismay the proponents of a Bill of Rights. It is hoped that the debate should be revived as the question of a Bill of Rights is a topic of great social importance which requires in-depth deliberation.

Michael Zander opens his account with a brief commentary on how the interest in such a bill snowballed. Quite rightly, he attributes the credit to Sir Leslie Scarman for providing the widely publicised impetus to the "simmering" debate. Sir Leslie Scarman, the first chairman of the English Law Commission, had delved at length into this matter in his Hamlyn lectures in December 1974 (Leslie Scarman, *English Law—New Dimensions,* Stevens, 1974).

After tracing the various stages in the "build-up of interest" for a Bill of Rights, Zander summarises his observations as follows:

> "There is a consensus that the individual citizen lacks protection which, in a civilised modern community, he needs. The state and all its manifestations become more and more powerful, whilst the individual, by the same token, is increasingly impotent. The existing network of remedies and safeguards is defective. A Bill of Rights, or some approximation to one, might redress the balance and restore to the individual a measure of control over his fate." (p. 18)

Zander devotes half his booklet to marshalling all the arguments for and against a Bill of Rights. Those arguments run parallel to many which have been involved in the context of the Australian debate. (E.g. see G. J. Evans, "An Australian Bill of Rights?", (1973) 45 *Australian Quarterly* 4-34; Peter Brett, "The Pros and Cons of a Bill of Rights for Australia", (Paper delivered to I.C.J. Conference, Melbourne 1968); Campbell and Whitmore, *Freedom in Australia,* Ch. 23).

While categorically stating his preference for a Bill of Rights, Zander also considers the various "alternatives" which have been mooted. In the case of England, the author poses the choice (should his preference prevail) between a simple incorporation of the *European Convention of Human Rights* into English Law, and the construction of a new Bill of Rights. In so far as Australia is concerned, the reader should note that the legislative implementation of a Bill of Rights faces far more pitfalls. In the first place, we have a written constitution, and secondly, we have a strong federal system where the Commonwealth Parliament is a parliament of enumerated powers. The "safest" way of shielding a proposed Bill of Rights from constitutional challenge to its validity would be to amend the Commonwealth Constitution via the amendment process as embodied in s. 128 so as to incorporate the Bill of Rights within the constitutional framework. In view of the long-established and conservative attitude to constitutional referendums (see J. E. Richardson, "Reform of the Constitution: The Referendums and Constitutional Convention", in Gareth Evans (ed.), *Labor and the Constitution 1972-75,* Heinemann, Melbourne, 1977), the prospects of such a Bill obtaining the requisite majority votes in the Commonwealth and a majority in four of the six States seem dim. The proposed *Human Rights Bill* of the Whitlam Government had sought to tread the less arduous but more dangerous (from the viewpoint of constitutional validity) path by purporting to anchor its constitutional base predominantly to the s. 51(29) external affairs power (see Evans (ed.), *Labor and the Constitution 1972-75,* pp. 47-51). How the Australian High Court would receive such a legislative measure is anybody's guess!

The author also canvasses various other issues—whether the task of interpretation of the Bill of Rights should be entrusted to a specially constituted, expert court; whether there should be a Human Rights or Civil Rights Commission to function as a focal point for human rights concern; and whether the Bill of Rights should affect existing law. It is to be noted that the Human Rights or Civil Rights Commission as envisaged by Zander differs from the Commission proposed by the Australian Government in that the former was supplementary and devoted to the objectives of a Bill of Rights, whilst the latter was intended primarily to be an administrative agency of the government with limited functions.

Zander sums up his viewpoint with the succinct statement that "the case for a Bill of Rights rests rather on the belief that it would make a distinct and valuable contribution to the *better* protection of human rights". The Australian reader who may still be uncertain of his reaction to a Bill of Rights for Australia will find much enlightenment from this booklet.

H. P. LEE

Limits to Medicine, IVAN ILLICH, (Marion Boyars, London, 1976), pp. viii and 294.

In this expanded version of *Medical Nemesis,* Illich documents the fact that modern health care not only fails to cure but positively harms many. He divides this phenomenon of physician-created illness (iatrogenesis) into three types: clinical iatrogenesis, the adverse effects of specific treatment on individuals such as the side effects of drugs, malpractice by physicians or non-medical hospital accidents; social iatrogenesis, the professionalisation of health care and increasing medicalization of life; and cultural iatrogenesis, the resultant societal inability to deal with illness, pain and death.

Illich recognises the great contributions made by medicine but views some advances such as improvements in diet and hygiene as largely non-medical innovations which merely happened to be discovered by doctors. He also credits physicians with two important medical breakthroughs, immunization and the discovery of antibiotics. He argues convincingly that further research has contributed little if at all to an overall increase in the health of the modern populace.

The mystification of the layman by medical terminology, the relegation of disease to the exclusive realm of health care professionals, and the shift of emphasis in medicine from the art of healing to the science of disease control all contribute to the individual's belief that he is no longer capable of dealing with even simple health problems by himself. This abdication of control over one's health is aggravated further by the practice of segregating the ill, aged, and pained from society. Thus, individuals and society are no longer confronted, and consequently incapable of dealing with, illness, pain, old age, and death as normal phenomena of biological reality.

Illich sets out this general description in a logical but highly arcane manner. His vocabulary and form of presentation are sufficiently technical to bewilder the lay reader and unorthodox enough to upset the classical academic. However, battling through the book is well worth one's effort. Much fascinating information from many disciplines is marshalled in rather unusual footnotes to support seemingly radical statements.

Illich suggests that the answer to the vast adverse cultural effects of the modern medical industry is not to be anti-doctor, but rather to demedicalize health care in general. Teaching the general populace to care for its own health problems rather than relying entirely on others; redirecting financial resources to sanitation, diet improvement and supply of basic medical services which benefit all and away from research into such expensive areas as organ transplant which benefit few; training of nonprofessional health personnel such as the barefoot doctors of China; and asserting lay control of health care professionals are the major solutions proposed. He rejects other solutions as merely improving the efficiency of the present system without attacking the underlying problem of cultural iatrogenesis.

The law has been an active accomplice in the perpetration of cultural iatrogenesis by enforcing the medical monopoly. By abdicating powers which should rest in the public and be administered via government, the law establishes bodies composed solely of health care professionals to regulate the health care industry (e.g. medical practitioner registration boards).

Throughout the book, the parallels between the health care and legal services industries are obvious. Lawyers and judges have bewildered the layman with technical language, taught that only professionals are competent not only to deal with, but also merely to ascertain, many simple legal problems, and employed the fiction of self regulation to the detriment of the general public with the result that few feel they can adequately deal with legal problems without professional help.

Let us as legal practitioners and academics read *Limits to Medicine* with care. Few of us would argue that our legal system has simplified rather than complicated ordinary day to day legal problems such as divorce or sale of property. Illich has chosen to concentrate on medicine, but his criticisms are equally valid to us.

ANN PEARL OWEN

Australian Law, edited by P. BISKUP, (McGraw-Hill, 1974), pp. 136.

At a recent interview in Canada, the Chief Justice of the Supreme Court of Canada, Bora Laskin, commented: "I'm very much concerned about the lack of education in the legal process in our schools, up to and including universities. It's very important to have a citizenry that is socially literate and social literacy to me involves some appreciation of the legal system. There isn't a single act that any government can do that does not have to find its authority and its source in the legal system. It's just as important that our people have some appreciation of law, as they should of English or French literature or economics. I hope that our educational authorities will pay special attention to this. It's terribly important especially at this time when there is some concern with what loosely might be called disrespect for law."

In Australian states which have introduced legal studies into secondary school curricula, schoolteachers are to be commended for their initiative to educate members of the public about the nature of the legal system and about their legal rights and responsibilities. These innovative courses face two serious problems: the lack of information available to teachers, and the tendency to impart information from law materials which are too technical. *Australian Law* is an ideal book to correct both deficiencies. Written by a distinguished array of academics, this text contains a comprehensive coverage of the legal system at a level of generality desirable for senior secondary students. Indeed the text sets a standard of education to which the under-informed teacher and the over-ambitious curriculum planner should aspire.

C. W. O'HARE

Cases and Text on Insurance Law, by P. LATIMER, (Butterworths, 1977), pp. xx and 216.

There is little doubt that this compendious work is written by a competent author conversant with insurance law. It is equally clear that the publishers have directed it to the lucrative non-legal market in which it will prove a valuable teaching tool. It certainly provides a wide coverage of information and is more elaborate in legal principle than is usually demanded by commerce and in-service training courses. Yet, with this audience in mind, the author could have been more ambitious and discussed the economic and social implications of insurance. Who better than economics students and insurance employees to explore the role of insurance in reallocating legal risk and to investigate the optimal use of the insurance industry's resources?

If the book were to be promoted as a model case-book for law school courses, I would have more serious reservations about it, quite apart from my growing disenchantment with the case-book as a teaching tool. The book sacrifices case facts and judgments for descriptive principles and favours "learning" to analysis. The book is a handbook for non-lawyers and a very efficient one at that.

C. W. O'HARE

The Judgement, by KULDIP NAYAR, (Vikas Publishing House, New Delhi, 1977), pp. 228.

12th June 1975 will always remain a momentous occasion in Indian history. On that fateful day, Justice Mohan Lal Sinha of the Allahabad High Court rendered his judgment on a petition which had been filed in 1971 against the election of Mrs Indira Gandhi, Prime Minister of India, to the *Lok Sabha* (Lower House) by her political opponent, Raj Narain. Justice Sinha (reportedly ignoring contemptuously a Rs.500,000 bribe and promises of possible elevation to the Supreme Court) found Mrs Gandhi guilty of two corrupt election practices. Even though they were comparatively minor improprieties, the judge had no discretion but to debar her from holding any elective post for six years.

Starting from that electrifying moment the author, with lively tempo, takes us through the various steps that were devised to undermine the world's biggest democracy. The value of the book lies in the "inside" perspective of the main characters and the measures adopted to circumvent the judgment. The book also focuses on Sanjay, Mrs Gandhi's son, who, with the aid of a few henchmen, had manipulated the entire government machinery to build up his own power even though he was not a member of Parliament. The impression one obtains from reading the book is of a Prime Minister who was pinning her hopes of political salvation on her son. Her fountain of strength subsequently became the main cause of her downfall and that of the Congress Party.

As the opposition and press chorus calling for her resignation increased stridently, the temptation to resort to the emergency provisions of the Indian Constitution became too irresistible. On 25th June 1975, a state of emergency asserting a threat to the national security by "internal disturbances" was proclaimed. With this simple act, the whole country was plunged into the penumbral region of dictatorship. The book furnishes many startling accounts of the extreme hardships perpetrated under the camouflage of emergency rule. *M.I.S.A.* (short for *Maintenance of Internal Security Act*) was wantonly employed for the mass incarceration of political opponents and of those suspected of opposing emergency rule. The author of the book was one of those detained. Stories of hitherto untold sufferings and torture are revealed. Not content, the government amended *M.I.S.A.* to totally preclude judicial review of any detention order. As the "murk thickens", and as the tentacles of emergency rule spread, we read of innumerable instances of blatant violation of fundamental rights, of outrageous tactics used to silence the articulate, of high-handed action to muzzle the press, and of attempts to intimidate the judiciary. The censorship was so tight that those who were in fairly close touch with Delhi (such as the Chancellor of Monash University, the Hon. Sir Richard Eggleston) did not appreciate the full extent of the interference with civil rights. The reviewer understands from Sir Richard that his daughter in Delhi quite obviously could not write about what was going on and even when Sir Richard was there in December-January 1977, he was not informed of the things detailed in the book as these were, in all probability, known only to a few people.

Despite the tight press censorship, news spread of abuses which further alienated the people from the government. Disclosures of corruptions and of Sanjay's ill-conceived "people's" car venture (the "Maruti" venture), the horrifying ramifications

of the sterilization campaign where terror-stricken villagers were simply picked up and forcibly sterilized, and the "beautification" of Delhi campaign which rendered many long-settled families homeless, hardened the people's attitude against the emergency. On the legal scene, attempts were made to tamper with the Constitution, including a measure to invalidate retroactively the ruling of the Allahabad High Court.

On 18th January 1977, Mrs Gandhi announced her "bombshell'. She had decided to dissolve the *Lok Sabha* and have fresh elections. The book focuses on the various factors underlying the surprise decision. One which stands out predominantly was the grooming of Sanjay to step into her shoes. Another factor was the intelligence reports of favourable public opinion. Little did she realize that the system which she had perpetrated had resulted in harnessing sycophants around her. Their opinion, advice and reports were all doctored to her wishes!

Once the election was underway, the "end of the tunnel" was in sight. Much to the credit of the opposition parties, the instinct for survival forced them to sink their differences and to merge into a united front. Out of this merger the Janata Party was born. While the government's rallies were poorly attended, the masses flocked to listen to the leaders of the Janata Party. A big blow that deflated the expectations of Mrs Gandhi was the resignation of Jagjivan Ram, a Congress Party stalwart. Another booster to the Janata Party was when Mrs Vijayalakshmi Pandit, Mrs Gandhi's aunt, threw in her lot against her niece. Contrary to predictions in the West, the Janata Party romped home with a "thundering" victory. Both Mrs Gandhi and her son were defeated at the polls. The slogans "Dictatorship v. Democracy" and "Dynasty v. Democracy" had struck the right chord.

In all, the book is highly absorbing and at the same time deeply disturbing. Written in a racy style, it pulsates with excitement. It is a must for all those who are concerned with the problems of constitutional democracy. In the context of Australia, the lawyer who airily dismisses any possibility of such an occurrence should cast his mind back to the constitutional crisis of 1975. The ill-defined concept of martial law may also provide some food for thought. Finally, the book should be of delight to lawyers for, unlike the Watergate affair where the American legal profession's image was badly tarnished, the standing of the Indian legal profession was enhanced. Many lawyers and judges, unmindful of the consequences, sought to mitigate the excesses of emergency rule, whilst people from other walks of life had more or less begun to accept the emergency as a way of life (some even praised the "peace and discipline"). In fact, the Delhi High Court Bar Association had so incensed Sanjay that he ordered the destruction of nearly a thousand chambers of district and session's court lawyers! The whole emergency episode can be neatly summed up in Lord Acton's aphorism: "power tends to corrupt, and absolute power corrupts absolutely".

H. P. LEE

Equality and Freedom: Some Third World Perspectives, by C. G. WEERAMANTRY, (Hansa Publishers, Colombo, 1976), pp. ix and 193.

Professor Weeramantry's book grew out of a paper he presented to the World Congress on Equality and Freedom at St. Louis, which celebrated the bicentennial of the American Declaration of Independence. His brief was to present the issues of freedom and equality from the perspective of the Third World, complementing two other presentations from the Western World and the Communist World respectively. Since the Third World covers about 100 countries, Professor Weeramantry's task was a formidable one, and, as he acknowledges, it was impossible to study in depth specific problems. It was only possible to draw attention to some problems which stand out because of their general applicability to these countries. Within the severe constraints imposed on him by the topic, Professor Weeramantry has done a good

job. He draws on his considerable learning and experience, and his familiarity with both Eastern and Western ideas, institutions, customs and traditions. The result is a book that is informative and very readable.

He argues that the social life of many Third World countries centres round the hierarchical structures of traditional societies with their emphasis on the group rather than the individual. Group membership provided a stable environment where individuals felt secure, and were shielded from some of the harsher pressures of competitive modern life. In competitive life, failure brought with it unemployment, poverty and misery, and even success often threw one into a strange, lonely and friendless world. Again, in traditional societies, the methods of settling disputes were informal and efficient, unlike the slow-moving and expensive formalized Western system of justice that was introduced later on. The sudden impact of Western individualism on traditional societies produced disruptive effects.

Professor Weeramantry sees many of the problems facing the Third World countries as having their origins in colonial rule. The arbitrary drawing of national boundaries caused not merely border disputes but also serious internal dissensions. Very different groups were brought together into one artificially created nation. The colonial powers foisted foreign languages and institutions on the local population with far reaching destructive effects on native customs, cultures and ways of life. The educational systems of the Third World were tailored to the administrative interests of the colonial powers rather than to the development of much needed skills in commerce, agriculture and industry. Local economies were geared to serve the interests of the "home countries" and large numbers of peasants were dispossessed.

However, Professor Weeramantry does not regard colonialism as an unmitigated evil. Colonial rule brought in Western medicine which reduced mortality rates and wiped out many endemic diseases; it opened up countries with roads and railways; it introduced notions of human rights, and systems of justice which, though not all suited to the new circumstances, cultivated a fidelity to the rule of law. Again, life in traditional societies was not all a bed of roses. Colonialism, by loosening up some of the hierarchical structures of these societies, rescued men from positions of inferiority to which they would otherwise have been condemned. It is important to remember this small section of Professor Weeramantry's book, because otherwise one is likely to get the impression that, for him, all would be fine if only the Third World countries had been left on their own.

Many problems confronting Third World countries spring from the fact that they are plural societies with different languages, races or tribes, and religions. Some of these problems were exacerbated by colonial rule, but many of them would have been there with or without colonialism. Professor Weeramantry seems to disagree, but he is a trifle optimistic in suggesting that in the absence of colonial rule, the countries of the Third World would have "worked out their own principles of national consolidation or broken up into units which had sufficient cohesiveness to form a nation state" (p. 45). But the units would in many cases have been too small and too close to one another to survive as homogeneous units in the wake of modern developments. Modern communication would have brought the rest of the world to their doorsteps, and whether foreigners come as conquerors, traders, or only as curious tourists, the impact on local life and manners would still be enormous. Just as the young in the villages are attracted to the bright lights and apparent job opportunities of the cities, so too many members of one group will just drift away to another nearby group or to more distant lands, thereby breaking up the cohesive homogeneity of traditional social units. The geographical distribution of natural resources between neighbouring nation states would also have been too unequal for there to be perpetual peace and absence of friction.

But Professor Weeramantry is right that colonialism created great inequalities between those from the "home country" who held executive positions in commercial enterprises, and the local employees. A similar situation obtained in government and bureaucracy where the colonial administrators enjoyed privileges denied to the local population. He points out that after political independence the new, local rulers often tried to take over and entrench these privileges. The result was resentment among

the masses, and this led to social revolutions. Professor Weeramantry discusses many other problems facing the post-independent Third World countries, and these include the activities of multi-national corporations, the inadequacy or irrelevance of foreign aid, the ideological competition among the global powers for spheres of influence, and unfavourable commodity prices. He uses telling facts and figures to back up his comments. The present terms of international trade favour the rich, developed countries at the expense of the Third World countries. The poor Indian farmer has to compete in the open market with rich Americans buying fertilizers for golf courses and lawns. A great deal of foreign aid ultimately brings back more to the donor countries than what it gives away. For example, a gift of a tractor commits the donee to the purchase of spare parts from the donor country. Advanced technology is not needed in the Third World. What is needed is a technology that does not consume much capital or energy but is instead labour-intensive. Professor Weeramantry prefers buffaloes to tractors for tilling the soil.

Professor Weeramantry also examines some of the institutions of the Third World and certain undesirable trends that have developed. Many of these trends are in the direction of promoting the power and prestige of the government, and especially of the person who heads the government.

Informal courts have been established in some Third World countries, but these courts differ from the informal traditional tribunals. The latter were presided over by respected members of the tribal or social group in which the dispute arises. But the present day informal courts are manned by political appointees of the government who cannot be expected to be impartial when the government's interests are at stake. On the other hand, the operations of the formal courts have often brought them into conflict with the government. A government wishing to implement its policies in a hurry finds the courts' attempts to defend individual rights a hindrance. It therefore tries to by-pass the courts, or to interfere with the normal legal procedures ensuring a fair trial, or even to interfere more directly with the judiciary to the extent sometimes of removing politically undesirable judges from office.

Political parties tend to be based on racial, communal or religious interests. The party in power is usually headed by a dominating figure who tries to wipe out dissent within the party and to stifle opposition parties. The strong leader often uses the legislature as a mere rubber stamp. The leader also gathers round him a group of people who enjoy great power and privilege, and whose activities are immune from scrutiny by a suppressed press. But even where the press is free, it cannot effectively compete with the government-controlled radio and television stations in the moulding of public opinion. Political indoctrination is conducted through history and civics courses in the schools.

Although Professor Weeramantry discusses the role of various groups in society, there is one important group that he omits—the army. Recent events in Pakistan and Thailand have reminded us once again how crucial the army is to the political life of many Third World countries. Elsewhere in the book, Professor Weeramantry makes some passing references to the army, but unfortunately there is no detailed discussion of its power and influence. Yet surely the army merits at least as much attention as the judiciary.

Although Professor Weeramantry deplores some of the developments in the Third World, he is careful to emphasize that we must not indiscriminately apply concepts and institutions which have their natural home in the developed countries of the West. One example he mentions is the institution of private property. He argues that other freedoms—of assembly, of speech, of religion, of travel, etc.—are more important than the freedom to own private property. Indeed, he claims that the freedom to own private property endangers these other freedoms. But the argument here is rather abstract, and it is not clear how far state ownership is to spread, or what the specific objectives are, and why they cannot be realized through alternative arrangements. He suggests that the right to own private property should "at any rate" not extend to "ownership of earth resources and means of production" (pp. 141-2), or to ownership of "broad acres, or quantities of earth resources or means of employment of others" (p. 176). But to retain personal incentives, he apparently

wishes to allow private ownership of small businesses, factories and farms. What about large printing presses and newspapers, and large foreign firms and companies?

Professor Weeramantry is so deeply moved by the poverty and inequalities that exist in the Third World that he sometimes thinks of individual freedom as a luxury. Thus he says, "Faced with a choice between food and the distant luxury of individual freedom there seems little doubt which way the decision will fall" (p. 144). But there is an assumption here that we are faced with a *choice* between starvation, or very little food, and freedom. This assumption is widespread, but is it always, or even often, correct? Professor Weeramantry also refers to "Third World tensions between equality and freedom" (p. 144). Some tensions no doubt exist, but it needs a lot of argument to show that one cannot often have *both* food and a wide range of individual liberties, or to show that the sacrifice of freedom will give us food and equality. Indeed, earlier in the book Professor Weeramantry himself gives an example of how the loss of freedom does not necessarily remove inequalities but merely replaces one form of inequality with another. He argues that in the presence of vast inequalities of income, wealth and opportunities, such as exist in the Third World, the ideal of rewarding each person according to his deserts merely perpetuates these inequalities. It was therefore regarded as a hollow ideal, and was replaced by a radical egalitarianism which sought as far as possible to iron out existing inequalities. But the pursuit of radical egalitarianism led to vast invasions of individual freedom, and in turn resulted in a new form of inequality between the rulers and the ruled. A new privileged class sprang up, centreing around those who exercise power.

A constant theme of Professor Weeramantry's book is the extent to which Western values, concepts and institutions are desirable in the Third World. On the whole, he discusses these issues with skill, understanding and moderation. In the 1960s a similar debate was conducted on Africa and democracy, and in particular on whether a one-party system was democratic or desirable. There were important essays on the subject by Arthur Lewis and Rita Hinden. These essays do not feature in Professor Weeramantry's book, but they cover some of the same ground as he does, and there is still something to be learnt from them.

In her *Encounter* pamphlet, "Africa and Democracy", Rita Hinden distinguishes between democratic *values* or principles, and the *institutions* in which those values are embodied. She argues that, "The values of democracy are permanent and universal, but the institutions may, and do, vary widely according to place and time." For Hinden these values ultimately rest on "respect for the dignity of man", and she thinks that this respect demands that men be given various personal freedoms, like freedom of expression, freedom to criticize the government, and freedom from arbitrary action by the government. On the other hand, the party system is, for her, an institutional arrangement that can vary from one democracy to another.

Most of the time, Professor Weeramantry's attack is directed at Western institutions rather than at the basic values of equality and freedom themselves. Perhaps there is a hard core to the values of equality and freedom which is universally valid, not in the sense that as a matter of fact it is universally accepted, but in the sense that it *ought* to be universally accepted. The denial of these values by anyone, anywhere, will then be a reason for condemning him, unless it is shown that such denial is necessary to promote a greater realization of the same values, or of other equally cherished values. Professor Weeramantry himself regards some values as universally valid in this sense, for he refers to the importance of upholding "human dignity". But he does not spell out how the ideal of human dignity is to be characterized, and specifically whether it is intimately and inseparably linked with the ideals of equality and freedom. If it is, then some aspects of equality and freedom will also be universally valid. Institutional arrangements can be evaluated in terms of their contribution to these universal values. A failure to make the kind of distinction Hinden made will tend to encourage the view that not only are there no universally desirable institutions, but that there are also no universal values. Then we will be left defenceless before those who repudiate individual liberty as an alien value, and in the name of national solidarity, imprison and oppress, and try to wipe out every trace of independence and dissent.

Finally, Professor Weeramantry attacks the Western "materialist framework of thought" and hopes that eventually the world will turn to what he regards as the more spiritual and gentler values and the simpler forms of life to be found in the Third World. A small example from Barbara Wootton's autobiography, *In a World I Never Made,* will illustrate the odds against his hopes being realized. On her trips abroad, Wootton observes "the incongruous mixture of cultures which is so characteristic of our time". Then she reports the experience of her friend Professor Ilya Neustadt whose first port of call on his first trip to Africa was at Freetown in Sierra Leone. "Ilya made his way without significant adventure to the post office in order to send a cable home. There he was thrilled to see an obviously neo-literate African painfully printing letter by letter the address on an envelope. Ilya could not resist the temptation to look over the man's shoulder in order to see for whom the missive was intended; and the address that he read was 'Littlewoods Pools Ltd, Liverpool'."

C. L. TEN

Constitutional Law, by CHRISTOPHER ENRIGHT, (Law Book Company Ltd, 1977), pp. xlviii and 374.

The events of the past few years have shown that constitutional law is very much a living and topical subject in Australia. Prior student cries of lack of relevance can hardly be sustained today. The activities and legislation of the previous Labor government were fertile sources of constitutional controversy, and the events surrounding the dismissal of that government raised heated debate. Under the present government, which is indisputably more conservative, the pace of change has slackened considerably and the constitutional debate has shifted from the activities of government to the broader questions of constitutional reform and the republican issue. These matters are inextricably bound up with reposition and distribution of power both in terms of realities and formalities. Both aspects are important. Hovering above all is the sobriety of politics.

To the campaigner for constitutional reform and to the humble practitioner whose pretentions are more modest, a sound knowledge of the existing constitutional structure of Australia is indispensable. It is impossible to build upon or improve a system in ignorance of it, nor is it possible to effectively administer law or the institutions of government without a sound knowledge of the basic structure underlying all.

Australia is well served by a number of books on the federal aspects of constitutional law. There was, however, a gap in terms of a text examining the entire spectrum of constitutional law from the Australian viewpoint. The book by Mr Enright fills that gap and fills it well. Written primarily for law students studying law and constitutional law for the first time, it succeeds within a comparatively modest compass in covering almost every point relevant to constitutional law. Being so comprehensive, it is necessarily superficial in parts and Mr Enright tells us that in determining priorities he has been influenced by the content and presentation of other material. Nevertheless, nowhere is the coverage so shallow as to inhibit it fulfilling its stated aim. Indeed, not only is it an excellent background work for a basic constitutional law course but it would also be of use in an introductory legal system subject. This is particularly true of chapters 5 and 9.

It is difficult to fault the book, particularly in view of its nature. One can perhaps take exception to the tendency to divide the material into too many compartments, often resulting in multiple treatment of the same subject. The book would also have been improved by the inclusion of more suggestions for further reading throughout the text. On the whole though, the conclusion on reading the book is that Mr Enright has succeeded very well in writing an accurate and very comprehensive introduction to Australian Constitutional Law.

MICHAEL PRYLES

Pursuing Justice for the Child, edited by MARGARET K. ROSENHEIM, (University of Chicago Press, 1976).

A common failing of book reviewers is the tendency to review that book which they would have written rather than the book itself. This book is for the cautious observer rather than the ardent reformer. It will please the conservative rather than the radical.

To be fair, the compendium of loosely related articles upon which the editor has attempted to impose order generally fulfils the objective stated in the *Introduction.* The contributors have allegedly attempted to present an analysis of the operation of juvenile courts and related service institutions in America. Setting their sights low, most of the contributors take a "realistic" if not a pessimistic stance. The contents belie the call to action implicit in the title *Pursuing Justice for the Child.*

This ambivalence leaves the reader with a sense of dissatisfaction with the book as much as with the juvenile justice system. The ambivalence however, may be intentional. As the editor points out in the *Introduction,* the book is not intended as a catalogue of current issues, or as a general inquiry into the future of youth in America. Its major focus is the institution of the juvenile court and the service system attached to it. If in the process readers are "inspired to identify crucial questions that are here unasked and to ponder the future of children and the contribution of juvenile justice", then "the authors will feel well satisfied that they have done their job". Analysis does not only stop short of action. In many articles, and in the mind of the editor, it also stops short of the identification and definition of problems. How then can it be effective analysis?

The reader is left with an unanswered question. Where do all these writers stand? Normative judgments are closely entwined with descriptive factual accounts in most articles, but are rarely explicit. Are these academics playing safe?

Some central questions are posed for the "ponderers" whether they are what one writer designates as "bleeding hearts and knee jerk liberals" or "hard liners". The two articles of most technical interest to those interested in judicial procedures are those which open the book: "The Jurisprudence of Juvenile Deviance" by G. Hazard, and "Isolationism in Juvenile Court Jurisprudence" by J. Lawrence and F. Cohen. They approach the problems in a hard-headed "realistic" way. Other articles span several disciplines and would appeal to those readers with more eclectic interests. That by R. A. Burt entitled "Developing Constitutional Rights of, in and for Children" combines legal with historical and sociological analysis. It differs from the first two in a number of respects. It also stands out from the majority of the remaining articles. Whereas most of the authors describe and analyse law, police, and social welfare agencies in a static fashion, Burt adopts an historical, dynamic approach. Writers who accept the present as the present as the status quo are implicitly conservative in their assumptions. This is perfectly legitimate, provided it is acknowledged. Given explicit values, some things are worth conserving. Most of the authors are ambivalent on this point.

It is not clear that they explicitly approve of the situation as it presently exists in the children's courts and related service agencies. Nor is it clear that change is even accounted for in the various situations and institutions they describe. Most of the authors wish to opt out of analysis of possibilities for change, or the offering of guidelines. The admission of impotence is found in the closing paragraph of the book.

> "The marginality as well as the political powerlessness of the child welfare system make the law itself rather unimportant. Change in our society obviously cannot start with changes in child welfare."

Are then these authors admitting to the bankruptcy presently felt amongst "liberals" who have tinkered with the "system", skirting around its edges? If they are, they offer no alternative "system". They refuse to identify with either the reformers or the revolutionaries. They merely try to "describe" what is happening.

The first two articles describing the juvenile courts and their role in the legal structure offer some explanation of the alleged impotence of the child welfare system.

G. Hazard points to the tensions existing in legal controls on deviance which "inevitably" involves programmes with conflicting aims. The courts must elicit conformity while serving an open society; intercept dangerous behaviour while keeping costs down; effectively enforce the law while observing procedural fairness, and so on. He regards the role of the legal profession as auxiliary, exemplary and educative rather than instrumental in programmes for "reform". How, then, one is tempted to ask, can it "pursue" justice for the child?

J. L. Schultz and F. Cohen refer to the no man's land of juvenile justice with its enforced adoption of criminal law processes and rejection of others. Children have the right to *parens patriae* rather than to the adversary system, to custody but not to liberty. As well as summarising various theoretical writings on the subject, the authors identify tensions between salvation and punishment objectives in the legal process. Is a delinquency proceeding an analogue to a criminal proceedings in substance and procedure, or is it at bottom a search to identify a condition requiring treatment or rehabilitation?

A multi-disciplinary approach is taken in the remaining articles. They will attract social welfare workers, probation officers and others involved in children's courts. They would also broaden the perspective of the professional lawyer. Egon Bittner's "Policing Juveniles: The Social Context of Common Practice", combines a legal analysis of the function of police and juveniles in American society with social models owing much to Durkheim's *Division of Labour*. In brief, the argument is as follows: our society regards work as both the source of "wherewithals" and the foundation of order; juveniles are liberated from the necessity to work gainfully, but correspondingly deprived of freedom; police become the final cutting edge of a society which deprives young people of both the means of gainful employment and the "wherewithals".

Other contributors employ sociological models which describe institutional behaviour. These could be of interest to readers involved in probation procedures and institutions for juvenile offenders. The article by L. E. Ohlin, "The New Corrections: The Case of Massachusetts", combines general conceptual models with a particular case study. Amongst other things, it tells an interesting story. The correctional institutions existed mainly for the well-being of their professional staffs and judges wishing to employ them as deterrents to young offenders. They were places of bastardisation and even torture for the young offenders themselves. Changes were engineered, not by members of the legal profession, but by members of the laity.

Perhaps it is left for members of the laity rather than members of the legal or social welfare professions to rush in where angels fear to tread. At any rate, most of the contributors to *Pursuing Justice for the Child* identify with those in the higher regions.

M. J. ELY