

## BOOK REVIEW:

### *Review of Matthew SR Palmer and Dean R Knight, The Constitution of New Zealand: A Contextual Analysis* (Hart, 2022)

REVIEWED BY W JOHN HOPKINS\*

This book fills a significant and important gap in current public law offerings in Aotearoa New Zealand. Since the publication of the 4th and final edition of *Bridled Power* (also co-authored by Palmer),<sup>1</sup> there have been no generalist texts published to provide an overview of the New Zealand constitution. As a result, as *Bridled Power* (last published in 2004) has begun to show its age, there has been nowhere to turn for an accessible and current understanding of the New Zealand constitutional model. That unfortunate lacuna has been remedied by the publication of this text and as such it should be warmly welcomed.

The text itself, co-authored by Matthew Palmer and Dean Knight, is published as part of Hart's Constitutional Systems of the World Series, which provides contextual introductions to various (currently 30-plus) constitutions from across the globe. This work is thus intended to be accessible both to local and overseas readers wishing to understand the peculiarities of the constitution of Aotearoa. The explicit "contextual" approach of the series encourages contributing authors to provide studies on the constitution "in action" rather than the texts themselves.

The authors' approach to the concept of "contextual" in their study of the New Zealand constitution is made plain very early on, with the first chapter exploring the concept of "constitutional realism". This is a refreshing change for a New Zealand legal text, many of which tend to launch into their content with little consideration of their theoretical base, generally assuming a strongly formalist approach, although not explicit in doing so and thus failing to recognise alternatives.

However, there are problems with the theoretical approach taken. Firstly, the choice of term is a little strange, perhaps, as although the authors cite "constitutional realism", linking directly to the realist school so popular in the Law Schools of the United States, what they actually describe is perhaps better understood as a functional definition of law, from whence the realist school evolved. In either case,

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<sup>1</sup> Matthew Palmer and Geoffrey Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Oxford, 2004).

while it is refreshing to see authors provide an explicit theoretical basis for their approach, as the book progresses the approach is, in fact, rather conservative, at least in the context of a New Zealand text.

The content of the book is divided into relatively traditional constitutional subjects over 12 chapters. There is no formal collation of the chapters themselves, but they can be divided into three broad sections. The first four chapters provide a theoretical, historical and political overview of New Zealand constitutionalism. This begins with a theoretical discussion (as described above), followed by an essential (but necessarily brief) historical discussion of the bi-cultural state which the Treaty of Waitangi | Te Tiriti o Waitangi established. The text then turns to two key constitutional/political concepts essential to understanding New Zealand's constitutional framework, namely the Crown (within which the chapter also covers the Head of State) and the operation of the electoral/political system. While it is clearly important to provide this wider context, there is a bit of a chicken and egg issue in this section of the text, particularly in chapter four which deals with the democratic process. There is a risk that the reader, having yet to be introduced to the New Zealand institutions that these sections discuss, will find this section confusing (there is certainly a degree of repetition). In effect, the authors appear to assume a degree of prior knowledge of the New Zealand model and its United Kingdom counterpart. For example, the authors refer to the lack of an independent "backbench" of government MPs in contrast to the United Kingdom Parliament "like that in Westminster", without explaining what "Westminster" is. The result is a little Anglo-centric and risks confusing a reader unfamiliar with the New Zealand context. This Anglo-centrism is something that crops up to a lesser extent during the entire text.

Chapters five to seven follow a relatively traditional institutional path, discussing the operation of the New Zealand Executive, Parliament and Judiciary. The order is important given the dominance of the executive in the New Zealand model and is to be welcomed (following a tradition established by *Bridled Power*). The final substantive group of four chapters comprises an analysis of specific themes that cut across the New Zealand constitutional model.

This first of these, accountability and transparency (chapter 8), as in *Bridled Power*, chooses to cover dispute resolution and accountability mechanisms holistically. In doing so, it provides a general overview of complaints' mechanisms and explicitly avoids emphasising the judicial review process. This encourages readers to consider judicial review, in particular, as part of a wider system rather than the tendency in some texts to reify court processes at the expense of those elements of the system which are of far more practical importance to individuals. This chapter also covers

the OIA regime and, like the discussion of accountability mechanisms, places this in the context of the wider legal framework, in this case including the duty to give reasons and the statutory framework relating to public records.

The Human Rights chapter is relatively straightforward although, in keeping with the theme of the book, discussion moves beyond the Bill of Rights Act and includes discussion of other statutory and Common Law rights (including privacy and non-discrimination). The text then turns to Te Tiriti o Waitangi and provides an interesting and broad discussion of its role in the current constitutional framework. However, interesting though this is, there are some idiosyncrasies, which seem out of place in a generalist text such as this. For example, the use of Palmer's self-definition of the meaning of the Treaty (published in a previous text) is particularly strange and does not seem to add much to the overall text.

The final substantive chapter addresses two somewhat different issues (local and "global" governance) and, despite the attempt by the authors to address these topics holistically, they make for uncomfortable bedfellows. One cannot help but feel that the topics covered here are collated in this fashion more out of textual convenience than any theoretical coherence. This group of "other" elements of the system perhaps deserves better. The discussion of international law in particular is very generalist and only provides a limited Aotearoa New Zealand context. Nevertheless, the authors are to be particularly commended for including a section on Māori governance, something that is often neglected in constitutional texts. It is perhaps a little bit unfortunate that they did not find space to explore the role of this element of New Zealand's constitution in a little more detail, particularly given the comparative nature of the series in which the text is published.

The text concludes with a brief conclusion, which offers some personal views of the authors on the future of the New Zealand constitution. This starts with a discussion of Geoffrey Palmer and Andrew Butler's campaign for a written constitution which, although an interesting activity, did not gain significant traction and one must wonder whether it really deserves a place in a book such as this. In many ways, the reference to this somewhat niche project of Palmer and Butler's is symptomatic of the text as a whole. Regularly throughout the text, the authors add their own views and comments without sufficient evidential support in ways that feel journalistic rather than academic. At times, the work feels less like a contextual analysis and more of a personal one. This feeling is enhanced by the tendency of the authors to self-reference throughout the text, particularly with the term, "one of the authors ...". Although this tendency is not fatal to the work as a whole, one may question whether the level of personal view is appropriate for a work which purports to be an academic introduction to a topic, particularly as in the preface the authors state

that their aim is to “explain not advocate”. It also creates a degree of frustration for the reader. A text like this is always a balancing act between breadth and depth, but one cannot help but feel that the limited space available could have been better used.

There are two other issues which make the text perhaps less effective than it could have been. The style of the text varies dramatically between chapters, with some using language which, while elegant, is unnecessarily complex for a book such as this. Given that the authors claim that a key reason for writing this book was the need to ensure that as many New Zealanders as possible understand their own constitution, this is perhaps unfortunate. In contrast, in other parts of the text, the style is somewhat staccato, delivered with all the elegance of a shopping list. This perhaps suggests that the authors could have collaborated better in delivering a more holistic and readable text.

This issue of audience is perhaps the biggest problem with the text. As a New Zealand academic, I will have no hesitation in recommending this to my undergraduate students, something that the authors in their preface, clearly envisage. However, given that this text is published in a series which purports to introduce scholars, practitioners and other interested individuals to jurisdictions outside their own, the prosaic nature of the text is slightly problematic. There is much reference to local idioms, language and contexts, which I think would cause significant confusion to a non-native reader. This is unfortunate as the New Zealand constitution has much of interest to the overseas reader and, like this book, deserves to be more widely read and understood.

Despite these small idiosyncrasies, the text remains an excellent piece of work and is to be recommended for all those wishing to gain an accessible insight into the constitution of Aotearoa New Zealand. As such, this book fills a gap in the literature that has for far too long been left empty and the authors must be commended for taking up the challenge to fill it.