UNBRIDLED POWER? — by Geoffrey Palmer. Wellington. Oxford University Press, 1979. 185 pp. Price NZ$8.95.

Geoffrey Palmer was a professor of law at Victoria University of Wellington when this book was published in July 1979. A few weeks later he was elected to the New Zealand parliament as the member for Christchurch Central. He has long been an outspoken critic of the structure and functioning of New Zealand government and *Unbridled Power?* is the synthesis of these criticisms into one comprehensive work. The New Zealand public is now waiting to measure the man's performance in power against his published ideals.

Unbridled Power? is not a treatise on New Zealand constitutional law. Rather, in the words of the preface, it is an explanation of "how the system works and how it should be changed". The description of the New Zealand constitution and its working which the book presents is designed for the lay reader and will not satisfy the inquisitiveness of the constitutional scholar. The thrust of the book is in its criticisms of the existing system and the related suggestions for reform. Again the criticisms and suggested reforms are floated with the lay reader in mind, the theoretical basis in constitutional principle for the suggestions often being left largely undeveloped.

The book is easy and interesting reading. Ample use is made of recent examples of the functioning and malfunctioning of New Zealand government. Informative tables are sprinkled through the text to present statistical information and expose trends. The ease of reading is aided by the absence of footnotes, although their presence would have enhanced the value of the book to more earnest scholars of constitutional law.

The chapter presentation is an orthodox organisation through the institutions of government according to the traditional executive, legislature, judiciary classification. The final five chapters are concerned more directly with alternatives to the present system of New Zealand government: "A written constitution and/or a bill of rights?"; "A second house of parliament?"; "Electoral law"; "Access to official information". The final chapter is an eight-page summary of the recommendations for constitutional reform contained in the book.

The object of Mr Palmer's recommendations is the bridling of executive power. The author, along with many other informed New Zealanders, believes that the elected government has too free a hand in New Zealand. There are numerous reasons for this. This reviewer sees the combination of a sovereign parliament with a rigid system of parliamentary party discipline as the main reason. The New Zealand parliament can do anything by a simple majority of one. The New Zealand parliament could even abolish itself, should it so wish, by repealing s 32 of the New Zealand Constitution Act 1852. This section, which constitutes the New Zealand General Assembly, has no greater legal status than s 3 of the Dogs Registration Act 1955 which provides that all dogs over three months old must be registered. Party discipline is strict. This means that the governing party, even if its majority is small, can initiate legislative proposals assured of their eventual manifestation in law. There is no second chamber to reject or delay legislative proposals. There is no written constitution or bill of rights against which legislation can be

measured by the courts. The governor-general's power to refuse assent is academic. Only the force of public opinion and the triennial ballot box exist as practical restraints upon what are really the legislative powers of the executive.

The executive, or elected government, is also blessed with avenues of law-making which initially avoid parliament. Some statutes confer broad powers upon the executive to make regulations (see eg s 11 of the Economic Stabilisation Act 1948). Regulations are not always confined to providing for the technicalities which allow statutes to be implemented, but often are rather capable of being employed as vehicles for transporting major policy decisions into law. Subsequent to the completion of this book an energy conservation scheme involving carless days was instituted in New Zealand. This major policy decision has been implemented as law not through parliament, but rather through the mechanism of statutory regulations, thus avoiding the scrutiny of parliamentary debate and select committees. (See the Economic Stabilisation (Conservation of Petroleum) Regulations (No 2) 1979.) It is interesting that, subsequent to promulgation, the regulations were put before a parliamentary select committee which recommended changes. Appropriate amendments have consequently been made to the regulations. (See the Economic Stabilisation (Conservation of Petroleum) Regulations (No 3) 1979.)

The book contains many exposures of the poor functioning of the present system of New Zealand government. The sad story of the enactment of the Town and Country Planning Act 1977 is clearly presented (see pp 93-94). This statute was rushed through the parliamentary process at the end of the 1977 session of parliament. The parliamentary select committee reviewing the bill heard only 40 of the 237 submissions received before the government decided the bill could remain with the committee no longer. The government took urgency with respect to the second reading of the bill. The opposition was given the substantially amended 159 page bill only ten hours before the second reading debate. The debate of this substantial piece of legislation was allowed to last for less than three hours. The opposition wanted the bill deferred so it could be the subject of recess study and many individuals and groups outside parliament wished to be heard, particularly with respect to the amendments. However the committee stages and the third reading under urgency followed a week later. The Act is a major piece of legislation affecting the everyday lives of all New Zealanders. The parliamentary passage of this legislation reveals the executive's attitude to the parliamentary process. The reader is invited to wonder what parliament can do about such abuse of its processes when the executive dominates parliament.

The recent instances of abuse of the Bill of Rights 1688 are discussed (see p 110ff). In *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615 the Supreme Court declared the Prime Minister's action of suspending the operation of an operative parliamentary enactment to be contrary to s 1 of the Bill of Rights 1688 and thus illegal. Although the system of government allowed its own malfunctioning to be formally recognised, that malfunctioning was not, in the reviewer's opinion, corrected by the judgment of the Court. Even the Supreme Court by issuing a declaration and exercising its discretion not to issue an injunction deferred to the executive's domination of parliament. The Court anticipated that the execu-

tive, when parliament was reconvened, would use its majority to retrospectively validate the Prime Minister's actions.

The book discusses other recent examples of the executive's trespassing upon the sovereignty of parliament which have not been pronounced upon by the courts. These include the government's collecting of increased licensing fees for motor vehicles prior to the enactment of appropriate authorising legislation in 1977. Such action was arguably in contravention of s 4 of the Bill of Rights 1688 which deems the levying of money by the government without parliamentary authority to be illegal. The attempt to merge Air New Zealand and NAC by executive directive, while the existing statute law (s 13 of the New Zealand National Airways Act 1945) provided that NAC had to "satisfy the need for air services within New Zealand", was also arguably contrary to s 1 of the Bill of Rights 1688. One must ask what do such ministerial actions in advance of parliamentary authorisation reveal about the executive's attitude to parliament? What does parliament's retrospective validation of such actions reveal about the relationship between parliament and the executive?

The use of the rule of law to overcome the rule of law, in the sense of the executive's use of parliament to overcome undesirable decisions of the courts, is well discussed (see pp 120-121). The author discusses an appropriate example emanating from the review by the Supreme Court, on appeal, of a decision of the Department of Social Welfare. Parliament, within two days of the judgment, amended the legislation to overcome the effect of the court decision. The amendment appeared to be enacted by parliament with "no explanation of the purpose of the amendment, no reference to the decision of the court, no discussion and no debate" (p 121). One must ask what does such legislation reveal about the relationship between the executive and the courts through parliament?

Mr Palmer puts forward many feasible suggestions as to how greater control of executive power could be achieved, including, inter alia: a greater freedom of access to government information, a greater access to and participation by the public in government decision-making, a reduction in the ministerial power concentrated in the prime minister, a greater public responsibility to replace the traditional ministerial responsibility for the actions of public officials, a reduction in the number of quangos (quasi-autonomous national governmental organisations), greater parliamentary debate of the reports of the public expenditure committee, greater public access to the functioning of the Public Expenditure Committee, strengthening of the functioning of parliamentary select committees, a more thorough and controlled law-making system with greater public participation, reduced use of statutory regulations, more potent parliamentary review of statutory regulations, and an improved electoral system which would allow better representation of third parties and an expansion of the number of seats in the House of Representatives.

Many of the recommendations for change are attractive and well thought out. Obviously a book review does not allow room for discussion of all the positive suggestions floated. However Mr Palmer's ideas for reform of parliament are central to the author's thesis and deserve mention. The object of the reform of parliament would be "[t]o enable parliament to scrutinise legislation better and act as a more efficient brake on the executive . . ." (p 169). He argues that the real power of parliament should be increased in the following ways: the numbers of

members of parliament should be increased from the present 92 to 120; the speaker should be chosen by a free vote in parliament; select committees should be strengthened; more time should be provided in the parliamentary process for the meeting of select committees—"[p]arliament should sit three days a week, three weeks a month, ten months a year" (p 169); select committee hearings should be open to the news media except where the public interest requires otherwise; parliament should be broadcast at all times; excerpts from debates should be broadcast in news programmes; parliament should not sit beyond midnight; read speeches should be discouraged by the removal of desks from the debating chamber; parliamentary privilege should be reformed to prevent its being used as a political weapon; the Public Expenditure Committee of parliament should be strengthened.

Mr Palmer further suggests that the legislation which parliament enacts would be improved: if all bills other than money bills were referred to select committees; if select committees sat throughout New Zealand and their sittings were widely publicised; if all bills were to remain with select committees for three months before they were brought back to the debating chamber; if a copy of every bill were to be sent to every public library in New Zealand upon its being introduced, and if every bill were accompanied by a document setting out its background and context in detail. Mr Palmer condemns the quantity of legislation passed and the rapidity of the enactment process. That rapidity increases the volume of legislation because of the frequent need for amendments.

The core of the proposed reforms is the suggested enhancing of the role that select committees, ie committees of parliament, should play in the parliamentary process. While not everybody would share Mr Palmer's faith in select committees, they do allow bills to be subject to more concentrated scrutiny than the debating chamber often affords and they provide a useful mechanism for public input into legislation. Public access to the functioning of these committees, except where the public interest warrants secret deliberations, would inevitably improve their performance and allow greater public involvement in law-making.

There is one recommendation with which this reviewer disagrees. The final paragraph of the chapter on the Queen and the governor-general states (at p 21):

> Except in the exceptional situations discussed, the governor-general should act on the advice of his ministers. In fact he invariably does so. But the 1917 Letters Patent and Royal Instructions from which the governor-general derives many of his powers suggest otherwise. The instructions provide that he may reject the advice of his ministers "if he shall see sufficient cause to dissent" from the opinion of his ministers. The power has never been exercised and should be removed. Indeed the Letters Patent and Royal Instructions are, in the words of D L Stevens, the most recent scholar on the question, "in dire need of revision". For similar reasons a provision in the Constitution Act which suggests that the governor-general, in his own discretion, may refuse to assent to bills passed by parliament should be altered.

The general discretion which the governor-general has to refuse the advice of his ministers and the specific right he has to refuse assent to bills passed by parliament should be preserved. This discretion is one of the few potential safeguards against arbitrary government. Should the unlikely event occur of ministers giving unlawful advice or advice intended to subvert the constitution, the governor-general should be free to refuse to follow the advice. In such circumstances of refusal the government would have to either change its advice, resign, or advise the Queen

to recall the governor-general. All options would excite public opinion. The refusal would thus activate the ultimate New Zealand constitutional safeguard. Mr Palmer fails to acknowledge the importance of the governor-general as a constitutional safeguard. The changes the author advocates are in conflict with one of the expressed themes of the book: "In New Zealand the direction of change should be towards the provision of more checks and balances against the exercise of power by government" (p 16).

An improvement to this safeguarding function would be the clarification and formalization of the residual powers of the governor-general. This would allow the governor-general to know exactly what his powers are and therefore he would be able to exercise them with confidence. Such a formalization should specify and limit the governor-general's powers while at the same time preserve a broad freedom of discretion within the defined powers. In other words the specification should be of what the governor-general *can* do rather than what the governor-general *should* do. Despite Mr Palmer's reservations (at p 20), the reviewer believes that this jurisdiction could be reviewed by the courts in the sense that the courts could see that the governor-general was acting within his authority. However the courts should be guarded in reviewing the exercise of the governor-general's discretion.

The author is inclined to make the occasional empty generalisation. For example, in the conclusion to the section on the courts, Mr Palmer says (p 122):

> The courts have a vital role to play in prodding government to be fair and checking it when it is not. To the extent we have trusted the courts in the past they have not let us down. The need for an expansion of that role seems called for. We should increase their capacity to review administrative decisions of government and provide new remedies for them to use.

The author does not specify exactly *why* there is a need for an expansion of judicial review of government action, or *how* the courts' capacity to review administrative decisions of government should be increased, or *what* new remedies should be provided for the use of the courts. Such a paragraph may be appealing to the layman, but without detailed recommendations it is of little use to constitutional reform.

Another example of frustrating superficiality is found on pages 128 and 129. Mr Palmer, in discussing the possibility of double entrenching s 189 of the Electoral Act 1956, states:

> Some constitutional lawyers maintain that any effort to entrench the "entrenched" provisions themselves would not be effective. They say it would not be possible to make section 189 itself subject to a 75 per cent majority before it could be changed.
>
> If a written constitution were passed as an act of the New Zealand parliament, containing provisions requiring special procedures to be followed for amendment, the same problems would arise. Could such a Constitution Act be made more difficult to alter than an ordinary act of parliament? If one parliament adopts a statute called the Constitution Act which stipulates it cannot be changed except with the concurrence of two-thirds of the members of parliament (or by referendum or some other procedure) can a later parliament repeal the earlier measure without following the procedure? Some argue that where the supremacy of parliament and the supremacy of the law conflict, then the law must be regarded as supreme where it provides conditions which must be fulfilled to make a law. I think a better view is that parliament as organized at a particular time can lay down particular procedures for the method of amendments of certain acts. And I believe the courts would recognise those restrictions and require that they be observed.

The problems raised in this passage are extremely complex and cannot be regarded as properly resolved by the author's subjective conclusions. Why can parliament "lay down particular procedures for the method of amendments of certain acts"? Why would the courts "recognise those restrictions and require that they be observed"? Such conclusions should not be published without a properly reasoned constitutional justification accompanied by a refutation of established contrary views. The intricacies of the sovereignty of the New Zealand parliament are, with the sophistication of party discipline, the crux of New Zealand's current constitutional inadequacies. The sovereignty of the New Zealand parliament is deserving of more detailed explanation and commentary than Mr Palmer offers.

Explanation and analysis of the concept of parliamentary sovereignty would have also helped the reader's understanding of why and how New Zealand should adopt an effective written constitution as suggested on pages 129 and 130. The author (who is obviously not enthusiastic about a written constitution) suggests that a written constitution could be drafted by a royal commission and then be put to the electorate for approval. Perhaps Mr Palmer could have usefully gone on to explain that the current sovereign parliament would probably have to abolish itself before the new constitution could become effective. This would allow a new legislative body whose powers were limited by the constitution to be created. A less than sovereign legislature is a prerequisite to an effective bridling of executive power in New Zealand. If a new constitution were created by the method suggested then it would be truly autochthonous. The superior authority of the constitution would be rooted in the expressed will of the New Zealand people.

Although the author advocates that a royal commission should be set up to investigate the possibility of New Zealand adopting a bill of rights he is cool in his support for the enactment of such a formal guarantee of rights. The need for such a formalization of human rights could have been more convincingly argued. The greatest problem with human rights in New Zealand is that few people know what rights they possess. Fundamental human rights are not guaranteed or even spelled out comprehensively in our law. They are residual—those freedoms left after the executive through parliament and statutory regulations has flexed its muscles sufficiently. The public is not educated in terms of human rights because there is no definitive list of human rights in New Zealand law. Consequently New Zealanders are slow to realise the trespasses which the executive from time to time perpetrates. Mr Palmer puts forward several examples of such trespasses (see pp 138ff).

This reviewer believes a bill of rights should have the same legal status as the written constitution. All legislation of parliament and executive action should have to satisfy the requirements of the bill of rights. These actions should be subject to judicial review by the courts. Such judicial review should extend beyond the form of legislative and executive action to the substantive content.

The absence of constitutional and historical explanation in the book will frustrate the overseas constitutional reader. New Zealand has a very unusual constitution, and some knowledge of its technicalities would allow a reader to better appreciate *Unbridled Power?*. There is no written constitution. The rules of the constitution consist of a pot-pourri of statutory laws enacted by the United Kingdom and New Zealand parlia-

ments, rules contained in prerogative instruments emanating from the United Kingdom crown, relics of the prerogative powers of the United Kingdom crown, common law principles developed by the courts of England and New Zealand, and constitutional conventions. Very few people claim to be familiar with the constitutional detail of the New Zealand system of government. Nowhere is there a comprehensive and detailed explanation of the system.

The New Zealand constitution, originally conferred by the United Kingdom, has developed spontaneously—a tinkering here, a tinkering there, as the need has arisen. There has been no overall system to the development of the constitution. The recommendations which Mr Palmer puts forward are again tinkerings, piecemeal reforms. The author may prefer this approach because it is politically more palatable. Constitutional change will only be brought about in New Zealand with the wholehearted support of the major political parties. But constitutional reforms have little electoral appeal. The present system with its wealth of executive power is very attractive to the party in office. It would not want to suppress its self-interest in order to bring about constitutional change. Mr Palmer has written the book to influence change in New Zealand and has possibly confined his suggestions to what the political parties may find acceptable.

New Zealand needs more than the piecemeal updating with its emphasis on parliamentary reform put forward by Mr Palmer. A completely new constitutional structure should be promulgated in an entrenched written constitution. The written constitution, as well as setting up the organs of government with limited powers, should contain a bill of rights and provide for judicial review of legislative and executive action as discussed above. Such reform could readjust the presently distorted relationship between the legislature, executive and judiciary. Further, such reform would allow improved access to the New Zealand constitution in the sense that the rules establishing and regulating the organs of government would be clearly and systematically enunciated in one document. At present they lie hidden behind a barrier of prerequisite constitutional knowledge. New Zealand currently lacks the full effectiveness of the best known constitutional safeguard—a public sufficiently informed to recognise and expose arbitrary government.

The book is largely free from inaccuracy. One error is, perhaps, worthy of note. Dr H V Evatt was never, as Mr Palmer asserts (at p 20), prime minister of Australia. Although he was deputy prime minister of Australia in the government of J B Chifley in the late 1940s, Dr Evatt did not at any stage of his career achieve the ultimate office of prime minister, other than in an acting capacity.

Conclusion

Unbridled Power? is a provocative book. The structure and functioning of New Zealand government urgently needs to be exposed to public criticism and debate. By overseas standards our constitution is undeveloped. Only the traditional low-key stability of New Zealand politics and the relative homogeneity of the New Zealand population have allowed the current system of government to work smoothly. The potential for arbitrary government, which the constitution allows, has fortunately seldom been realised. With the disproportionate development of executive power the time has come for New Zealand to reform its constitu-

tion to better protect against arbitrary exercise of governmental power. A more dramatic formalization of the New Zealand constitution is required than the politically palatable, piecemeal reforms concentrated on parliament which Mr Palmer advocates. However, the book will stimulate needed constitutional awareness in New Zealand and will encourage those who read it to think critically about the existing institutions of government.

The lack of constitutional explanation and analysis will frustrate some readers, especially overseas constitutional scholars who may read the book with its tremendous volume of criticisms and recommendations without having a sufficiently detailed understanding of the mechanics of New Zealand government to fully assess the wisdom of the criticisms and recommendations. It is time a detailed and comprehensive treatise on the New Zealand constitution was written. Such a study would allow better access to and understanding of the myriad of statutory rules, prerogative rules, common law rules and conventions which together make up the New Zealand constitution. Even better would be a new, comprehensive, written constitution collecting in one document the basic rules of government and guarantees of freedom.

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