

BOOK REVIEW

PUBLIC LAW IN NEW ZEALAND - CASES, MATERIALS, COMMENTARY AND QUESTIONS by Mai Chen and Sir Geoffrey Palmer. Auckland, Oxford University Press, 1993, xxvii and 1016 pp. Price \$ 119.95 (paperback).

Just a few years ago, the student of New Zealand public law seeking a textbook written specifically for this country had only two works from which to choose - *The New Zealand Constitution* by Kenneth Scott, published in 1962, and *New Zealand - The Development of its Laws and Constitution*, edited by J L Robson, and last issued in 1967. The dearth of constitutional law texts was perhaps understandable - this was a field in which there had been very few developments. Indeed, apart from the abolition of the Legislative Council in 1950, the establishment of the office of Ombudsman in 1962, and the country's undramatic move towards independence under the Statute of Westminster Adoption Act 1947, the New Zealand Constitution Amendment Act 1973 and the Royal Titles Act 1974, the institutions of government remained the same as they had been since before World War II.

From the mid-1970's public law has come to assume far greater importance, for a number of reasons. The establishment of the Waitangi Tribunal in 1975 and the litigation that has ensued from Treaty-based claims has brought fundamental questions concerning the origin of existing constitutional authority to the fore. The Treaty has also sparked political debate on the extent to which groups are entitled to self-determination, although there has been surprisingly little written by constitutional lawyers on the institutional form self-determination could or should take. Attention has also been focused on public law by a heightened appreciation of the power that New Zealand's combination of constituency elections, legislative supremacy, unicameralism and parliamentary government places at the disposal of the executive. The ease with which this power was used to manage the economy until the first half of the 1980's and to implement a change in the direction of *laissez faire* since then, revealed how uncontrolled the New Zealand constitution was, and indeed still is. This realisation did not however translate into a widespread demand for institutional change - as the lukewarm reception accorded the New Zealand Bill of Rights Act 1990 attests. Yet there does seem to be a growing realisation that if there is to be fundamental change, it must encompass reform of the institutions of state. The electoral reform debate is indicative of this, although it is difficult to determine whether the desire for change proceeds from dissatisfaction with the electoral system *per se* or is a manifestation of antipathy towards

politicians caused by the often painful changes the country has experienced in recent years.

It is against this background of increasing interest in constitutional issues that a number of books dealing with public law have been published within the last eighteen months: Sir Geoffrey Palmer's *New Zealand Constitution in Crisis*, which appeared in 1992, provides an analysis of contemporary constitutional questions, while Phillip Joseph's *Constitutional and Administrative Law in New Zealand*, published in 1993, is a major constitutional and administrative law text. Chen and Palmer's *Public Law in New Zealand - Cases, Materials and Commentary* is the latest work to appear.

The first noteworthy aspect of Chen and Palmer's book is that it is a collaborative effort. As any co-author soon discovers, the secret to the success of a joint project is effective co-ordination and avoidance of contradiction. To use the analogy of cabinet government, joint authorship requires that participants assume the obligations of collective responsibility and speak with one voice, and in this Chen and Palmer have clearly succeeded. *Public Law in New Zealand* stands as a coherent whole, betraying no unsightly seams to the external observer.

So far as content is concerned, Chen and Palmer's book avoids the traditional format of public law texts and instead follows the materials book model that is popular in the United States, and which many New Zealand law lecturers follow when preparing course outlines. As the authors state in their preface, theirs is not a reference work containing an exposition of the law, but rather a compilation of materials from which students can discover the law for themselves, and which lecturers can use as the basis of Socratic instruction. Commentary by the authors is included, but this has been kept to a minimum. Although the materials are arranged under various subject headings, the book abandons the traditional scheme of beginning with a definition of terms such as "state" and "constitution" and instead plunges into an analysis of *Fitzgerald v Muldoon* [1976] 2 NZLR 615, which is used as a vehicle to introduce students to the three branches of government in one fell swoop. What is particularly attractive about this technique is that the case and surrounding correspondence is dealt with in an almost narrative style, which turns it into a rather gripping story that prompts students to read further. And thus it goes with most of the chapters - an example of the operation of the law or a scholarly article discussing it is followed by a series of questions designed to encourage students to expand upon the principles and think how they might apply in different situations.

Topics that receive particularly good treatment are Parliamentary sovereignty, which includes one of the few extensive pieces of commentary (and one that summarizes the debate succinctly and well), and which is accompanied by excellent problem questions on entrenchment. Another impressive section is that on the Constitution Act 1986 which reveals how a practical problem (in this case the devaluation crisis of 1984) can spark reforms going beyond what was necessitated by the problem itself. The section on contemporary constitutional reform issues emphasizes the fact that constitutional law has become a far more lively subject than it was formerly. A final point to note in this regard is that the authors' predilection is above all for a *practical* approach to public law. This is reflected in the attention given to issues such as how legislation is drafted and passed through Parliament, how a claim is pursued before the Waitangi Tribunal, and how Cabinet government operates.

As anyone who has compiled materials knows, the task of selection is difficult, and one cannot avoid giving emphasis to some topics at the expense of others. Nevertheless, *Public Law in New Zealand* omits some topics that one would expect to have been included. For example, no space is allocated to local government, to the Human Rights Act, or to the important topic of Crown liability in contract and tort and the relevance in that area of executive discretion. The section on the judiciary would have benefited from an inclusion of material on judicial immunity. An issue which it would have been interesting to include in the section on the Treaty debate is to what extent, if any, indigenous status begets an entitlement to special constitutional rights - perhaps comparative material from Fiji could usefully have been included here. One obvious limitation of the book is the imbalance between constitutional and administrative law. Despite the inclusion of the very useful summary of the principles of judicial review by the Crown Law Office, and the step-by-step analysis of the correspondence, litigation and consequent legislative change in the *Daganayasi* case, judicial review is covered in less than 150 of the book's 1016 pages. Granted, the authors warn that space permitted them only an introduction to administrative law, but for this reason alone *Public Law in New Zealand* must be supplemented by a conventional text. A fuller treatment of the issues mentioned in this paragraph would of course have necessitated cuts elsewhere. Possible areas in which this might have been done include the political party constitutions, which did not need to be included in their entirety, and the sections on comparative constitutions and the international law dimension of human rights which, although both relevant and interesting, are arguably not as important as some of the topics that were excluded. An overall space saving could have been achieved by leaving some of the statutes and cases for students to read separately, or by editing

them so as to include only the most important sections of Acts and the kernel of decisions.

But these reservations are minor in comparison with the overall usefulness of the work, and it is clear that *Public Law in New Zealand* provides a valuable compendium of both primary and secondary authorities with which constitutional law students must become familiar. Selection of materials is a difficult business, and the painstaking way in which the authors have done this makes *Public Law in New Zealand* a ready-made materials book that teachers of constitutional law will without doubt find extremely useful.

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