

## BOOK REVIEW

CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND, by Philip A Joseph, The Law Book Co, Sydney, 1993, 1vi and 951 pages (including appendix and index). Price \$151 (GST included).

In his Preface Mr Joseph mentions the longstanding and frustrating lack of a basic public law text for use in New Zealand universities. He sees as the “only previous constitutional examination” Hight and Bamford’s long obsolete *The Constitutional History and Law of New Zealand* (1913). To that one should perhaps add K J Scott’s *The New Zealand Constitution* (1962), also now of very limited use. Over the last three decades there has of course been much New Zealand constitutional writing in journals and books of essays (to which Mr Joseph has himself notably contributed). Still, the absence of a text for students in the public law area has left a serious gap in the shelves of New Zealand legal text books. That gap Mr Joseph has endeavoured to fill. It must be said at once that his endeavour has met with considerable success. New Zealand students now have an admirable book to assist them not only through basic Public Law courses of the University Law Schools but through advanced courses as well. There is a great richness of case discussion and citation. Mr Joseph may fairly claim, as he does, that there is enough such richness to furnish relevant arguments and insights for the legal practitioner. Subject to a few qualifications — perhaps inevitable in respect of the first edition of so large a book written by one hand — Joseph should prove a sound guide and a stimulating mentor to student and practitioner alike. Teachers and theorists will also be grateful to him. The gap that lasted so many years has to a large extent been filled.

Mr Joseph’s enormously diligent research extends to numerous unreported cases and (on constitutional matters) to useful newspaper sources. In general he covers the well-known comprehensively and in depth. He also draws attention to little known but significant matters such as (at 608) the report that Sir Cyril Newall, as Governor-General (1941-46), successfully resisted ministerial advice in declining to approve the court martial of soldiers returning from Africa who had refused further overseas service. The error of the widely-held view that the General Assembly had *no* power of constitutional amendment until the passing of the New Zealand Constitution Act 1857 (UK) is (in the light of section 68 of the principal Act of 1852) usefully corrected (at 90-91). One welcomes Joseph’s recording (at 686) of Chilwell J’s robust and constitutionally significant rebuke to the Executive in *Felton v Auckland City* (1977; unreported).

Some parts of the book have of their nature to be largely descriptive. But there is of course plenty of scope for the comment and discussion of conflicting theories which the author provides in abundance. Whether describing, discussing or expounding, Mr Joseph is, with few lapses, clear

and concise and, in expounding his own views, challenging and often persuasive.

I single out a notable example of his challenge to views at present widely accepted. He argues in chapter 3 strongly against the view (dubbed by him as “revisionist”) that the Treaty of Waitangi was a valid treaty in International Law. He strongly prefers the unpopular “orthodoxy” of Chief Justice Prendergast in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78, that the Treaty was a “nullity”. Joseph presents a seemingly strong argument; though the weight of academic opinion against him has been increased by Professor Ian Brownlie’s support of “revisionism” in *Treaties and Indigenous Peoples* (1992; ed F M Brookfield), 8-9.

In Treaty and Maori matters generally, Mr Joseph, though far from unsympathetic to Maori claims, tends not to be a politically correct writer. One may welcome that (though his reference (at 27) to Abel Tasman’s “discovery” of New Zealand will raise many eyebrows). His statement (at 37) that “[t]he elevation of the Treaty is driven by anxiety from broken promises and the quest for national identity” has of course some truth in it but does not sufficiently explain the modern partial “constitution-alizing” of the Treaty. Mr Joseph describes, rather than specifically criticizes, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 but one senses that he is sceptical of the basis for judicial activism (in Treaty and related matters) of which that case is a most notable expression. However, it is the international status of the Treaty itself to which his specific criticism are largely directed.

In this early part of the book, there is one surprising omission: the now large body of radical legal writing (such as the work of Jane Kelsey), in which the Maori claims to tino rangatiratanga are strongly and uncompromisingly asserted, appears to have been ignored. Much of that writing is tendentious and polemical. But the legal debate about the Treaty is incomplete without at least some discussion of it.

To this reviewer the great strengths of the book lie in the author’s treatment of (i) the basic constitutional issues such as the supremacy of Parliament and related matters (subject to a specific criticism made below); (ii) the development of the New Zealand Constitution (the Treaty aside); and (iii) administrative law matters, where case discussion and citation appear to be impressively comprehensive. But there are a few areas where, despite the high standards of research that generally characterize the book, readers need to be wary.

Thus, accepting that *Parsons v Burke* [1971] NZLR 244 seemed to affirm that the Crown for reasons of state may use the ancient writ of *ne exeat regno* to prevent a citizen from leaving the country, one must ask whether that can still be so in light of section 18(3) of the New Zealand Bill of Rights Act 1990.

The apparently quite full section on habeas corpus (pp 799-803) confuses the distinction between habeas corpus in civil matters (where appeal has long been available) and criminal habeas corpus (where, until the New Zealand Bill of Rights Act and *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, it was not). And the uncertainty of whether an appli-

cation for the writ, declined by one judge, may be renewed before another, and if declined again, before another, and so on, is not mentioned. (The Court of Appeal held against the right to go from judge to judge in *Ex parte Bouvy (No 2)* (1900) 18 NZLR 601 but the Judicial Committee upheld the right in *Eshugbayi Eleko v Government of Nigeria* [1928] AC 459, followed by the Supreme Court of South Australia in *Tobin v Minister of Correctional Services* (1980) 24 SASR 389.)

Though the book's treatment of constitutional history and development is on the whole extremely good and will undoubtedly be especially valuable to the reader with little history, there are a few points to query. For example, one cannot without some explanation refer to the medieval king as "an autocrat, ruling with absolute power" (at 518) and three pages later to Bracton's (13th century) dictum about the king being "under God and the law". Before the Constitution Act 1986 parliamentary address to the Sovereign was not (as stated at 164-165, in accordance with a widely-held but erroneous view) the only means of removing a superior court judge, as Prendergast CJ indicates in *Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321, 347. And the statement (at 7) that, with the adoption of responsible government in 1856, "New Zealand became a constitutional monarchy *in its own right*" (emphasis added) seems inconsistent with the discussion at 492 which, surely correctly, would place that event very much later.

A final detailed comment may be made especially appropriately in a journal based in a Scots-founded University. Mr Joseph is unfortunately Anglocentric in his treatment of the sovereignty of the United Kingdom Parliament. The more than locally significant doubts of Scots constitutionalists on that matter, having regard to the entrenched provisions of the Union of 1707, rate no mention and the "Royal Numeral" case (*MacCormick v Lord Advocate* 1953 SC 396) is not cited.

Large as the book is, parts of what is usually included in a Constitutional Law course (though apparently not in the Canterbury public law syllabus) are omitted or slightly referred to. Law teachers and students would have been even more in Mr Joseph's debt if the present material had been shortened somewhat (with, say, rather less case discussion) and more space made for the public order offences (such as sedition, unlawful assembly and disorderly or offensive behaviour) and other matters little dealt with here, such as allegiance and citizenship, and censorship. In respect of the public law offences and censorship, the New Zealand Bill of Rights Act 1990 already prompts a fuller consideration of those matters than Mr Joseph presents; though it must be said that the chapter on the Bill of Rights performs well the essential task of surveying the general principles of the Bill as they are being established by the Courts.

Overall the book is a good one, with a deservedly assured future as a mainstay for teachers, students and practitioners.

— F M Brookfield