BOOK REVIEWS

ESSAYS ON THE CONSTITUTION

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*Reviewed by A H Angelo**

This collection of essays by 15 distinguished authors does, as the Preface states, provide "a unique record of our constitutional and political life".[1] In dealing with the issues of Maori sovereignty claims, proportional representation, republicanism, the abolition of appeals to the Privy Council, the New Zealand Bill of Rights Act, CER, and judicial control of Parliament, the book clearly illustrates the richness of New Zealand constitutional developments in the 1990s. From the reviewer's point of view, the only comment on the coverage of the essays is that there is nothing on pre-Treaty New Zealand constitutional law. That area has been much in focus, particularly during the writing of this book, and would have given background to the material on Maori sovereignty claims. Few of the essays are purely descriptive. Most present a new view, and most propose or indicate reforms for the future; importantly, in the case of public figures, most tell as much about the author as about the chosen topic. The essays are certainly stimulating, if not provocative. The style is mostly measured, but includes the more vigorous polemics of McHugh in the chapter on the historiography of New Zealand's constitutional history.

The authors have their views and present them strongly. Their eminence and experience ensures that there is little, if anything, of a factual or legal nature with which one could take issue as a matter of correctness. This is not to say that there are not many matters with which the reader would disagree. There is much to argue with as a matter of policy. For

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1 The Preface also states that we are living in interesting times. That was in May 1995. An interest of the times was the Moutua Gardens in Wanganui, and at that stage New Zealand was sharing interesting times with the inhabitants of French Polynesia as a result of the resumption of French nuclear testing in the South Pacific. Not many months later the editor of *The Capital Letter*, with uncharacteristic vagueness, wrote that he was unsure if the related salutation (may you live in interesting times) was of Yiddish, Canadian, or Chinese origin! 18 TCL 32 (832) p 1 and 18 TCL 33 (833) p 3.

instance, the Attorney-General's statements about the desirability of an inner bar[2] assert a view with which many would disagree. Equally, it is the Attorney-General's opinion that New Zealand is fortunate to have an unwritten constitution.[3] And there is the Chief Justice's piece on the role of the Privy Council in New Zealand's past and whether or not it has been an inhibiting factor on the development of a New Zealand law.[4] As the Chief Justice indicates, not everybody would agree with his assessment or indeed with a Law Lord's reported assessment of the Privy Council's role in New Zealand law.[5] In particular, it is possible to query the interpretation the Chief Justice gave to the Privy Council's decision in *Haldane v Haldane*,[6] especially when it is compared with the later decision in *Reid v Reid*.[7]

The chapter by Professor Taggart provides most timely material for all interested in the role of the State-Owned Enterprises in New Zealand and their future as providers of monopoly or near-monopoly services.

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2 Pages 202-203.

3 Page 212.

4 Page 112.

5 Page 128. The Law Lord is reported to have remarked that "from time to time the Privy Council had saved New Zealand law from going off the rails."

6 [1976] 2 NZLR 715, cited at page 122. The Privy Council held that by virtue of ss 5(3) and 6 of the Matrimonial Property Act 1963 there was a discretion to award a share of the capital assets of either the husband or the wife to the other party and that non-financial contributions could be considered in exercising this discretion. The non-financial contributions of the wife were held to have freed the husband to do the work that increased his assets and she was awarded a share on this basis. In England at the time it was common to use one third of the capital assets as a starting point for deciding what share should be awarded to a spouse (see *Wachtel v Wachtel* [1973] Fam 72). The New Zealand statutory provisions appear, if anything, to have given a wider discretion than those in England (ss 24 and 25 of the Matrimonial Causes Act 1973). The share awarded to the wife by the Privy Council in *Haldane v Haldane* amounted to less than one fifth of the husband's assets, ie less than the English starting point, and less than the equal sharing proposed by the New Zealand Matrimonial Property Act 1976, which was at that time before Parliament. Although an improvement on the amount awarded in the Court of Appeal, this decision could be argued to be something less than "correctly in tune with the ultimate direction taken regarding assessment of spousal contributions".

7 [1982] 1 NZLR 147. Here the Privy Council upheld the decision of the Court of Appeal on the division of matrimonial property saying "This is essentially the sort of issue where the Courts of the society to which the spouses belong are in a position far superior to that of their Lordships in forming a judgment". Sixty per cent of the matrimonial property was awarded to the husband, essentially on the basis that the amount of money he had made in the course of the marriage was large. Considering the equal sharing principles of the Matrimonial Property Act 1976 and the fact that s 18(2) of the Act says that "there shall be no presumption that a contribution of a monetary nature ...is of greater value than a contribution of a non-monetary nature", the Privy Council seems to have abandoned any progressive stance on matrimonial property that it may have taken in *Haldane* v *Haldane*.

Professor Harris makes a number of strong suggestions about the role of the judiciary in New Zealand, and picks up a theme found in many of the essays which is identified in part at least with the difference of views about the exercise of judicial powers, encapsulated on the one hand by the statements of Sir Robin Cooke[8] and on the other by Sir Michael Kirby.[9] MMP may be a signal which suggests much about the future role of the judiciary and its relation to the community. That indication would appear to be, as Professor Harris states, along the lines of more democratic control rather than judicial fiat.[10] In the same context, one might hope that future Governors-General would be selected and perform their constitutional roles with similar principles in mind. In the publicity surrounding the appointment of Sir Michael Hardie Boys as Governor-General, it was suggested among other things that the appointment reflected the need, with the coming of MMP, to have a distinguished lawyer in the role of Governor-General. In the interests of greater democratic participation in the government of the country, it might on the other hand be hoped that the appointment of Sir Michael Hardie Boys was made on the basis that he was the appropriate person who just happened to be a lawyer, rather than the other way round. The imagined constitutional role of the new Governor-General should be one which proceeds on the basis of sound common sense founded in a deep experience of New Zealand public affairs. The activities of the Governor-General at this level should not be explicable on the basis of the exercise of knowledge of some arcane points of constitutional law. The decision of the Governor-General to exercise the reserve powers should be a decision which pre-eminently and self-evidently is a decision comprehensible as the proper decision by the majority of New Zealanders.[11]

Professor Harris speaks of the "flat rejection of Professor Palmer's entrenched Bill of Rights."[12] That is one assessment of the situation. The Bill of Rights was not a matter of extensive public debate or of public decision. There was undoubtedly a lack of public interest and support for that Bill, but that may well be attributable to other more basic, less

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8 Page 269. Refer to the cases cited in footnote 21.

9 Page 270. See also *Building Construction Employees and Builders' Labourers Federation of NSW v Minister of Industrial Relations* (1986) 7 NSWLR 372, 401-406 per Kirby P. See also the views of Lord Irvine of Lairg in "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1995] Public Law 59.

10 Pages 280-281.

11 On this issue see the article by Dr Andrew Stockley in *The New Zealand Herald* 1 April 1996, p. 6. See also Caroline Morris' article "The Governor-General, the reserve powers, Parliament and MMP: A new era" (1995) 25 VUWLR 345. Happily, for the reviewer, it appears from the report of the Governor-General reported in 19 TCL 19 (867) that the view here expressed is consistent with the view of the Governor-General.

12 Page 275.

particularised, and less legal thought. More pertinent may be the comment about "the apathy of the majority".[13]

The relationship of the work of the judiciary to the quality of legislation passed by Parliament is highlighted both in the chapter by Professor Harris and in that of Sir Ivor Richardson. Those interested in human rights matters will be assisted by the paper by Sir Ivor Richardson. What the chapter indicates indirectly is the relative dearth of information on human rights matters in New Zealand. How much, for instance, is known of the United Nations human rights case law?[14] And how many people know how many cases have been before United Nations Human Rights Committee in which New Zealand has been or is a party? Or what the fate of those cases has been?[15] There is, as Sir Ivor Richardson also points out, the future problem of satisfactorily balancing group and community rights against the selfishness of unchannelled individual rights.[16] In this context, it is interesting to note the balancing provisions of the Universal Declaration of Human Rights[17] and the still present though somewhat muted provision in the International Covenant on Civil and Political Rights[18], and the absence of such a provision in the New Zealand Bill of Rights. In

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13 Page 276.

14 The full reports of the UN Human Rights Committee decisions are held in the Parliamentary Library. Reports are also held by the Human Rights Commission and some public libraries. Little publicity is given to these reports or to the fact that New Zealanders are entitled to take a claim to the Committee. The Ministry of Foreign Affairs and Trade can provide information on request but does not publicise either the work of the UN Human Rights Committee or the Optional Protocol. The Human Rights Commission deals only with claims in New Zealand.

15 The only New Zealand case to have been dealt with by the Committee is 475/1991 (*SB* v *New Zealand*) which was held to be inadmissible. Further cases may be pending but remain confidential until they have been dealt with.

16 Pages 61-62.

17 Article 29 states that "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

18 Para 5 of the Preamble states that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

the 1994 statement of the New Zealand position on the Draft Universal Declaration on the Rights of Indigenous People[19], the matter is presented in a direct form.[20]

And what of polygamy, which Sir Ivor believes could be excluded from freedom of religion in the public interest?[21] Is it outside the realm of s 5 of the New Zealand Bill of Rights Act?[22] The White Paper[23] on the New Zealand Bill of Rights has a similar statement on religious freedom and polygamy. Unexpressed is the already well developed role of polygamy in the New Zealand conflict of law rules[24] and the potential in the obiter dicta in *Hassan v Hassan*.[25]

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19 This declaration emphasises group rights.

20 The New Zealand government's position is that "The new declaration must be in harmony with the existing United Nations human rights instruments" and "The declaration should be compatible with national laws". *Mana Tangata-Draft Declaration on the Rights of Indigenous Peoples 1993 - background and discussion on key issues* (Te Puni Kokiri, Wellington, 1994) 7.

21 Page 78.

22 This section provides for the rights and freedoms in the Act to be subject to "such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society." Does this mean that the values of the majority will always prevail and if so how does that fit in with the provisions for religious freedom and the rights of minorities? For what reason does freedom of religion not include the right to a polygamous marriage, eg for Muslims? Islam is a long established religion in large parts of the world and polygamy is clearly acceptable in Islamic belief. Part IV-3 of the *Koran* (trans A Yousouf Ali, Lahore, 1934) states "Marry women of your choice, Two, or three, or four." If New Zealand is a secular state, it is not apparent why the human rights principles should represent only Christian principles.

23 *A Bill of Rights for New Zealand: a White Paper* (Government Printer, Wellington, 1985) at paragraph 10.61 says "No doubt many other existing limits - such as on polygamy - would be upheld without difficulty against arguments based on religious freedom".

24 The definition of marriage in the Family Proceedings Act 1980 says that polygamous marriages are valid if they were valid according to the law of the domicile of the parties at the time of the marriage.

25 *Hassan* v *Hassan* [1978] 1 NZLR 385. This case upheld the validity of a Moslem Talak divorce (a husband can divorce his wife by saying "I divorce you" three times in the presence of witnesses) performed in New Zealand. At all relevant times the husband was domiciled in Egypt and the wife was probably domiciled in New Zealand (and was a New Zealand citizen). They were married in Athens in accordance with Islamic law. Somers J held that the validity of the marriage could not be decided by the court as its matrimonial jurisdiction did not extend to polygamous or potentially polygamous marriages and the marriage contract signed by the parties included a clause allowing the husband to take further wives. However, he held that the validity of a divorce could be decided even though the validity of the marriage was not proved. He then went on, obiter, to suggest that capacity to marriage could be governed by the law of the intended matrimonial domicile. He believed that the marriage here was not governed by New Zealand law although the wife was domiciled in New Zealand and they spent most of their short married life in New Zealand. He based this belief on the husband's claim that they intended to live in Egypt. If this dictum were to be followed to its logical conclusion it would mean that a New Zealand domiciliary could enter into a polygamous marriage by declaring an intention to be domiciled in a state that allows polygamy and celebrating the marriage in a way would be valid by the law of that state.

A good description of this book is provided by its Introduction.[26] There is little point in repeating that material, suffice it to say for the interested browser that the self-description is accurate. The book itself is compendious and essential reading for those with a special interest in New Zealand political life — constitutional lawyers, political scientists, politicians and public servants alike. The editor and publishers are to be congratulated on another excellent[27] publication.