PARADISE LOST?
The Threat to Constitutional Democracy in New Zealand

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INTRODUCTION

> *'New Zealand is sane, and as close to being a physical and political paradise as any country on earth. We are already mushily sentimental about leaving - and departure is four months off.'*

So wrote an American couple of their intention to leave New Zealand and fight the battle in their homeland in the turbulence of the late sixties. The quote is taken from an essay entitled 'Expatriates in Paradise: But We're Coming Home' which appeared toward the end of a volume bearing the title 'The Rebel Culture'.[1] It included contributions that were *'thumb-nosing, anti-establishment writings by some iconoclasts of our time, such as Malcolm X, Leroi Jones, Leonard Cohen, Allen Ginsberg and Abbie Hoffman'.* To read the essay in the late seventies with a focus upon New Zealand is both an amusing and a sobering experience. t is amusing because of the fairy-tale unreality with which both New Zealanders, and others have often viewed this small corner of the globe. It is sobering because of the many reversals that have taken place since it was written.

Within the New Zealand of 1978 many are leaving - but for quite different reasons. New Zealand can no longer claim (if it ever could) to have *'one of the world's three highest standards of living'*, to have *'only five murders a year'*, to have race relations that are *'probably healthier than in any other biracial society'*. Moreover the drop in standard of living is accompanied by a degree of strike action and of industrial discontent that was unheard of ten years ago. In addition it has the largest unemployment situation since the 1930's. For these and many other reasons, people are leaving New Zealand. Another American family shortly to return has put it in these words:

> *'I first visited New Zealand while on holiday in 1974. Having sampled the Kiwi way of life, and having grown tired of the pace and strain of American society, we decided to give New Zealand a try. So when the editorial job at Consumers' Institute became available, I quickly uprooted my family and headed for what I thought might be a whole new mode of existence. Perhaps the tourist's eye is never to be trusted. Certainly the tension and acrimony of New Zealand in 1978 makes one wonder whether the seemingly relaxed attitudes of 1974 were merely a visitor's pipe-dream. In retrospect, however, the earlier experience still seems valid and many New Zealanders agree that the last four years have seen the country change dramatically for the worse. And this change is not entirely the product of economic hard times;*

although it is undoubtedly true that whatever is bad has been worsened by the increasing distress of Kiwis desperately trying to make ends meet'.[2] {1}

A Marxist analysis of this situation, would, no doubt, see underlying it all a crisis of the capitalist ownership of the means of production, seeing the future auguring well for an overthrow of the system in favour of a socialism under State control. Whilst we have a long way to go before the economic conditions are anything like those of the 1930's, there can be little doubt that the present situation is one that can breed party and sectional strife in a way that could be harmful to all. There are those who seek to lay the blame at the feet of the 1975-78 National Government, and to the Prime Minister in particular. There are those who seek to blame the Unions and 'the dissidents'. Then again there are those who blame the overseas conditions affecting 'the economy'. Whilst not trying to exempt anyone from blame, my purpose is not one of trying to set one party over against another in this way. It is rather one of trying to analyse the threats which the situation as a whole poses to what people rather vaguely refer to as 'democracy'.

Whilst these problems are not unique to New Zealand there are, I believe, some unique features to the way they are surfacing in New Zealand. The particular features I refer to, and which form the focus of the present essay, are of a political-legal nature, and whilst I believe these to be irreducible to the economic and social problems already alluded to, I believe the latter problems render the former all the more vulnerable. Let me assure any Marxist who might suspect me of attempting 'to protect the system' by bolstering the ailing capitalist economy that, whilst I am not an advocate of individualism or of capitalism, I am equally not advocate of attempts that begin by reducing life to its economic basic, and end up by reducing it to a political base founded upon a party-State apparatus. I believe that whilst there are far-reaching reforms needed in both these spheres of life, and an undoubted interpretation between them, they may not be reduced one to the other. I therefore make no apology for focussing upon the legal-political problems in a way that does not go into any detailed consideration of the economic problems.

Moreover, whilst I am aware that there are political dimensions to the problems of industrial relations, welfare, race-relations, education etc. my discussion of them will be in keeping of. the central topic under review. In this and in other respects, my use of the word 'political' may need some definition. The use of this word in such expressions as 'party politics', 'student politics', 'university politics', 'trade-union politics' and the like is very largely analogical, derived from that feature of the life of the State that we identify as the jockeying for and the exercising of controlling power. With this in mind I shall use the word 'politics' to refer to the ways and means by which power is exercised by the State with no special reference to political parties, registering my dissent from the view that equates something being 'political' by virtue of its being 'party political'.

In my first chapter I attempt to give a brief analysis of some of the events in New Zealand political life over the past three or four years, attempting thereby to expose what may be called their 'constitutional significance'. In the second I try to develop a theory of constitutional democracy in a way that seeks to identify the major political issue of our times in as sharp a relief as is possible. In its light I attempt, in the third, to analyse the threat to constitutional democracy in New Zealand, comparing it with similar problems in Britain, France and elsewhere. In this connection I argue that the New Zealand form of Western democracy is at a cross-roads: it has the possibility of developing increasingly authoritarian and totalitarian features, or of incorporating some reforms that would enable it to move in a more constitutional direction. In my fourth chapter I seek to place these problems in the perspective {2} of the British constitutional tradition in a way that appreciates its strengths

and weaknesses, thereby giving a background for some suggested ways of moving toward a new constitutional settlement.

This essay is written for an audience of wide-ranging abilities. For this reason it seeks to take its starting point from events and conditions with which most people would find familiar. At the same time it goes on to discuss some contentious issues of significance for legal and political theory in a way that can be comprehended by those who have struggled with the earlier material. Whilst I thereby run the risk of falling between a number of conventional stools, it would seem to me that a serious discussion of the issues at stake demands a treatment of this sort. I only hope that the contribution of a layman's appreciation of constitutional law combined with a more informed historical and theoretical background that I have sought to bring to the subject will be appreciated for what it was intended to be: a sincere attempt to get to grips with the basic non-party, non-technical issues that confront the fabric of New Zealand political life. {3}

Chapter 1

SOME SYMPTOMS

The last three or four years have been full of interest and of activity in more than one respect. For whatever cause, the Government have had many difficult situations to handle, and, whilst they have come in for much criticism, have demonstrated what can only be described as an astute pragmatic adroitness in the handling of their policies. It has been a time during which shop-assistants, teachers, broadcasters and public servants have been joining Trade Unionists and young Maoris in the adoption of 'more militant' stands. The following short-list would qualify for a resume of some of the more significant events and observations.

A Parliament commanded by a 63% majority on the basis of only 47% of the votes cast; a Parliament that has difficulty gaining access to the information relating to the rurning of the country's administrative machinery; an executive which brought an end to the previous government's legislation by its own decree; a Prime Minister holding the finance portfolio taking it upon himself to form a department that effectively fuses the two; political parties that have rejected sitting members from representing their constituencies; accusations of treason toward groups of citizens following the tense situation occasioned by the walk-out of black athletes from the Olympic Games, and its aftermath at the Commonwealth Games; the ugliness of the Moyle Affair; the overstayer's dispute; the appointment of Sir Keith Holyoake as Governor General; the SIS Bill; the Broadcasting Bill; New Zealand amongst the fastest legislators in the West; Maori land marches and the Bastion Point protest; the rush to put through controversial abortion legislation; handouts and strong-arm tactics to unions; accusations of Fascism by unions; counter-accusations of attempts to bring down the Government by the Prime Minister.

These are just some of the more controversial issues that have surfaced in the on-going cut and thrust of New Zealand life during the period from 1974 to 1978. They are events which have many sides to them, and it is not my purpose to enter the domain of party politics for or against any particular party. Rather I wish to focus upon them as they reveal certain pressure points within the constitutional fabric of New Zealand life. Because the events have taken place under the jurisdiction of a particular Government, criticism is all too easily construed as direct criticism of that Government. I do not think that needs to be so. In this respect it is of some importance to realize that my aim is not party political. If my comments fall adversely upon the party that has been in government, then it does not necessarily mean that I am seeking to champion another party. My focus is primarily that of the constitutional preconditions for party politics. Hence, any criticism of particular New Zealand Governments is to be construed as much a criticism of the constitutional arrangement that allows them to exercise the power in the way they do as of the actual things they have done. The pressure points I refer to in this connection are as follows: {4}

- the question of sovereignty
- the unrepresentative character of Parliament
- the loss of dignity in Parliament
- the loss of civil liberties the uncertainty of government intervention

In what follows I shall seek to indicate some of the ways in which the cited events of the last four years bear upon each of these points.

THE QUESTION OF SOVEREIGNTY

New Zealand has a Parliamentary, as opposed to a Monarchical or Presidential system of government. This supposedly means that sovereignty is invested in the institution of Parliament inherited from Great Britain. As such Parliament is deemed to be a body representative of the people at large, chosen by popular elections, and charged with the

responsibility of making statute law. Moreover, by contrast with the Presidential system, in which the Executive branch of State is appointed by independent elections, the modern Parliamentary system has the Executive drawn directly from the benches of Parliament. To this end Parliamentary support is necessary if an executive is to continue in office. By contrast an executive power in the Presidential system need not enjoy the support of the legislative power to be able to carry through much of its programme. It can be dismissed prior to the termination of its period of office solely on the grounds of an illegality, a feature that is frequently difficult and time-consuming to achieve.

Many of the events within New Zealand in recent years reveal that there has been a de facto shift in the matter of sovereignty, one which, in many respects, brings it within the orbit of the Presidential system, but without its advantages. Sovereignty, although de jure resting in Parliament, de facto rests in the complex: Prime Minister-Majority-Party-Cabinet-Administrative Bureaucracy. In short, the Government.

In December, 1975, the incoming Prime Minister waived the Superannuation Act that had been passed by the third Labour Government. Without calling Parliament together, he instructed employers and the Superannuation Corporation not to follows its provisions. This was followed in April 1976 by an action on the part of the Attorney General stopping prosecutions brought against an employer for failing to comply with the Act as it existed on the Statute books. A vigilant citizen filed a writ to the effect that the actions of the Prime Minister and the Attorney General were a contravention of the constitutional principles of the 1688 Glorious Revolution and the 1689 Bill of Rights. The Chief Justice, whilst making his judgment unequivocably in the favour of the plaintiff yet effectively recognised the de facto constitutional state of affairs that I have referred to by adjourning the proceedings for six months. The Labour Opposition have subsequently criticised the Government for acting illegally and National spokesmen have sometimes replied that the original source of action was taken upon the advice both of the Solicitor-General and the Auditor-General in a way that was apparently considered by both to be a legal and proper course of action[3]. {5}

Whether it is deemed illegal by certain members of the legal profession or not, the fact remains that New Zealand is no stranger to retrospective legislation. It has become a fact of life under both Labour and National Administrations. The reason for this is quite simple. The Government has effective control of both executive and legislature, and knows that it is a mere formality in carrying its polity decisions into law. It is therefore more efficient and economic to proceed with such changes in as smooth and quick a fashion as possible. Indeed in the case cited above, the defence argued in exactly these terms. In other words, we have a de facto situation in which a political party, by virtue of possessing a majority of seats in Parliament, has effective control of both executive decisions and of any legislative programmes needed to carry them through, with the whole procedure being justified by virtue of the matter being an item on the party's election manifesto. The judiciary, acting in terms of its present subservient constitutional position, may be able to declare a guilty verdict in one particular instance. However, it is powerless to redress a de-facto constitutional state of affairs which made the action leading to that particular instance cited to be almost a matter of course.

During 1977, Sir Keith Holyoake was appointed to the position of Governor-General. This was an appointment that took him directly from the Government benches in Parliament into residence at Government House. For this reason his appointment revived a great deal of criticism from opposition Members of Parliament, from Newspapers and from Church leaders. However, surely the main criticism should be the constitutional one[4]. In this respect it is not only a matter of who occupies the post, but also one of who appoints him to the post

that is of constitutional significance. According to the conventions that we have adopted, the Monarch of Great Britain appoints the Governor-General of New Zealand upon the basis of 'the recommendations of her ministers'. Now it cannot be denied that the appointment of Sir Keith was in conformity with these conventions. However, we should not permit the following of the outward form to be our only guide in such matters. The de facto situation that now operates is one in which Cabinet has well-nigh complete control over the appointment of the Governor-General. This was well illustrated by the reaction of some Labour Party M.P.'s to the appointment of Sir Keith. The Deputy leader made a public statement to the effect that a future Labour Government would dismiss him from office. However, the de jure constitutional convention has the boot on the other foot. The Governor-General is still the one with constitutional power to call and dismiss Cabinet! Admittedly, there is now a convention to the effect that this is operative only in situations in which a Cabinet is unable to command a majority in Parliament. However, it does serve to focus upon a constitutional anomaly in the present situation. Moreover, the possible deep divisions that can ensue from a Governor-General's exercise of his constitutional power in this situation have been well illustrated in the Australian constitutional crisis involving Sir John Kerr in 1975, Appointed by the Whitlam Government he subsequently made the constitutional decision against those who appointed him[5]. {6}

Disregarding the rightness or wrongness of the decision, its aftermath should serve as a warning that the ambiguity surrounding the manner of appointment of the Governor General in relation to his constitutional power is one that should be resolved. As it stands he would appear to be the victim of great changes in the nature of sovereignty, of constitutional power and of allegiance to the British Monarch that have taken place during the course of the past century.

The constitutional tradition to which New Zealand is heir would appear to have no effective precedent for the situation in which it now finds itself on this matter. Within Britain itself, the appointment of the Monarch is a matter which is settled by the line of succession; Parliament is only rarely involved in the matter. When it is, however, Parliament as a whole, not only the Ministers in Cabinet are involved in the decisions. New Zealand and Australia are sovereign States, with their links with Britain growing weaker by the day. Despite continuing popular affection for the Queen and her continued de jure constitutional power in New Zealand, any effort on her part to act against 'the advice of her ministers' in such matters must be considered extremely unlikely. Thus the question arises: does not the present mode of appointment of the Governor-General place another one of the constitutional positions of the system in the effective hands of the Government in a way that opens the possibility for party interest, and thereby threatens the constitutional fair-dealing for the life of the nation as a whole?

Another feature of the supremacy of Government power is to be seen in connection with the relation of the Executive to the Administrative Branches of State, especially when this is taken in conjunction with the Official Secrets Act. The constitutional convention has it that officers in the various administrative departments are themselves 'politically' neutral, being subject to the Executive policy of the day by means of Cabinet decisions and Ministerial responsibilities. On the other hand, the Administrative branches, along with Cabinet itself are accountable to Parliament by way of 'ministerial account-ability'. However, the 1978 controversy over the import licensing system administered by the Department of Trade and Industry has brought some far-reaching questions as to the de facto effectiveness of this procedure. It would appear that when necessary the Official Secrets Act is able to maintain an effective seal upon collusion between Executive and Administrative Branches of State in a way that neither public nor Parliament find it easy to break.

The action of the Prime Minister taking initiative to form his own department of administrative assistance also impinge upon this matter in a way that deserves more critical scrutiny than it has hitherto received. There are two major points at issue. First, the fact that the Prime Minister also has the Finance portfolio implies that his department must in many ways be predominantly concerned with the question of economic management in a way that can only further influence the way in which the predominant concern of the State is with financial efficiency rather than distributive justice. This is especially so in view of the way in which the Prime Minister's department has taken over some functions that were formerly assumed by Treasury. The second has to do with the way in which the Prime Minister's department influences or interferes with the authority of Ministers of other Departments. I am not accusing anyone of blatant interference at this point; simply pointing out that it is not clear just what authority the members of the Prime Minister's do in fact possess. In countries which have the practice of inviting non-elected persons on to its Executive Council, for example, the task and authority they have by virtue of their appointment is quite clear - it is either that of being actual members of the Council, or else one of being an advisor to Cabinet, not simply to the Prime Minister. {7}

There are a number of other sides to this same state of affairs. As examples I cite the first as relating to the way in which the Prime Minister was able to gain information from the Police file of Mr. Moyle in 1976; the second the way in which the names of Dunedin electricity consumers have been sold to the National Party for electioneering purposes in 1978. These and other examples would appear to suggest that what is secret and what is not secret is a matter that can all too readily be determined by the decree of the Executive or the administrative arm of Government.

Another respect in which the matter of sovereignty belongs to Government is reflected in the fact of a single chamber Legislature under the leadership of the Prime Minister. The convention that the leadership of the House of Commons be under the direction of the Prime Minister is a carry-over from the time in which executive power was in the hands of the Monarch or the Monarch's representative. Even then the situation of a double chamber allowed different procedures to be brought to bear upon legislation. The present situation in New Zealand is one that has the reputation for passing more legislation more quickly than almost any other country in the West[6]. I would suggest that this state of affairs is not unrelated to the way in which the Government is able to use the power of its majority to call the tune in the matter of Parliamentary procedure.

Finally, and in many ways, most importantly, it is of some significance that every three years the electorate thinks and speaks of electing a Government, rather than a Parliament. What it does elect, of course, is a Parliament, from which the majority party automatically takes up the reigns as the Executive power of State. It is therefore a significant commentary upon the nature of the de facto sovereignty that exists in New Zealand that the whole discussion of Parliamentary elections is conducted as if the all important thing were to elect a Government. It means, in effect, that Parliamentary elections function in the first instance to elect the Executive power of State. Only in the second instance do they serve the de jure constitutional purpose of electing a Parliamentary legislative body. Thus the leaders of the respective political parties are viewed very much as Presidential candidates and assessed according to their ability to exercise the executive power involved in 'leading the country'. However, the advantages of a Presidential system - namely a separate election for Legislature that thereby is able to place some limits upon the exercise of executive power - is absent from the de facto constitutional procedure in New Zealand. 'The President' is not only head of the Executive, he also leads the Legislature in a way that gives him a monopoly control over its legislative

programme.

I submit, therefore, that the advantage that the Parliamentary system used to have - a sovereign legislative assembly called upon to keep a day-to-day check upon the use of executive and administrative power in a way that did not enable a Government to take its prerogative for granted - has largely disappeared from New Zealand politics. All these features have been well summed up in the following words by Tony Reid.

> *'For many years Cabinet and the public service have effectively decided the content of legislation and Parliament has operated as a talking shop - the 'Think Tank' has tightened this centralising process. Though plenty of exceptions could be cited, Parliament has become a rigidly controlled system in which real power lies not even with the Government but in the few hands of the Executive. Elections may change the people at the top, but not the method of government they practice"*[7] {8}

THE UNREPRESENTATIVE CHARACTER OF PARLIAMENT

Within the constitutional settlement that New Zealand inherits from Great Britain, Parliament is the political institution in which de jure sovereign power resides. According to the same tradition, for over seven hundred years, Parliament, as the Great Council of the Realm, has been the body that represented the estates of the Realm: the Monarch; the Lords, temporal and spiritual; the Commons. Representation of the latter was upon a constituency basis. However, quite clearly such representation alone has not been considered an adequate representation of the nation until very recent times. Given the nature of its power, it is not surprising that the mode of representation in Parliament has been a contentious issue in modern times. It was only early in the twentieth century that the question of franchise came to be considered a matter that was not somehow bound to males who had some property holding. During the nineteenth century the issue of franchise was a contentious one. Those who supported its universality saw their opponents as having a vested interest because of the power they already possessed. Those who opposed it did so on such grounds that the exercise of a vote was a matter that demanded insight and responsibility, attributes that belonged 'only to the ruling upper classes '.

New Zealand was one of the earliest countries to have universal suffrage. This, together with the abolition of the Upper House concept by the National Government in 1951, has left it with an electoral system of just under 100 seats, elected by a universal suffrage on a first-past-the-post basis. As such it is considered by many to be the very epitome of democracy. Every eligible and able bodied citizen has the vote, and all vested interests have been abolished with the Upper House. Such rhetoric can sound very convincing until the following question is posed: is it possible for political parties to have vested interests? In answering this question it is well to remember that political parties, in the modern sense, date from the late nineteenth century, and, in part are connected with the development of the franchise. Prior to that time there were undoubtedly loose groupings associated with the differing standpoints. However, they were not power organizations geared up to secure the popular vote in the way that they are today. Moreover, successful candidates have, for some considerable time, needed to enjoy the backing of a political party. The reason for this is directly linked with the matter that I have just discussed. Political parties are geared toward the exercise of executive power, and, to this end they seek to 'win' constituency seats, in order that they might have the necessary majority to form the Government. Modern political parties therefore have a very definite vested interest in the electoral procedures - they are geared to the winning of executive power, and, with this in view, are in many ways loathe to give away an electoral mechanism that is to their advantage. If they are on the Government benches with a big majority then they moreover have sovereign power over the election procedures themselves.

The result of this situation is clearly indicated by the results of the 1975 election. Then the National Party obtained 63% of the seats on the basis of only 47% of valid votes cast. The Labour Party obtained 37% of the seats on the basis of nearly 40% of the valid votes cast, whilst, over 12% of the valid votes cast were for minor parties that remained unrepresented in Parliament.

The result of this situation is a two-fold injustice to the representation of the people in Parliament. The first arises in respect to the minor political parties. Because of the steadfast adherence to an unmodified constituency basis of representation in a situation in which the central polical realities have to do with party-power, national support for a political party is no {9} guarantee whatever of Parliamentary representation. Indeed it would not be inconceivable for a political party to command 20% of the national vote and to remain unrepresented in Parliament. The second arises with regard to the constituencies. When the national (not the National) party apparatus over-rules the choice of a candidate for a local constituency, or when the Parliamentary party interprets the election of their candidate as having the right to bind them by party decisions taken in caucus meetings behind closed doors, then political parties are guilty of an injustice to the constituencies and their right of representation. Both of the aforementioned injustices are illustrated by the events of New Zealand political life. The first in regard to the Social Credit League and the Values Party; the second in regard to the case of Gerald O'Brien in Island Bay in 1977. The case of Gavin Downie of Pakaranga, whilst being different in many respects, is related to the same issues.

The question arises as to how the system of representation might be redressed in such a way as to more equitably represent the people. The Social Credit League and the Values Party have both advocated some form of proportional representation to Parliament, pointing out that along with Britain, New Zealand is almost the only country in the Western world not to have done so[8]. If the present major parties have not responded positively toward these overtures the reason is not hard to find. They would appear to be protecting the power they already possess rather than seeking to deploy it for justice and liberty for all in a manner that included the development of a more equitable and representative Parliament.

THE LOSS OF DIGNITY IN PARLIAMENT

My purpose here is not to rehearse the woes of endless party bickerings to which the New Zealand Parliament has become subject. It is rather to consider certain procedural defects which aided and abetted what has been, by common consent, the worst example of this for many years. I refer, of course to 'the Moyle Affair'.

This was sparked off by a bout of mudslinging, much of it directed toward the Prime Minister, who, finally responded with an attack upon Mr. Moyle alleging his being picked up by the police under suspicious circumstances, suspected of homosexual activities. After the furore that erupted from this incident, Mr. Moyle gave a subsequent account of the alleged incident to Parliament. The source of the Prime Minister's information would seem initially to have been a rumour from the Parliamentary Press Gallery. However, he apparently sought to use his powers as Prime Minister to consult the Police Files on the incident. The Police surrendered some information, apparently against the advice of the Solicitor-General. The information gained was then used by the Prime Minister as a means of exposing some conflict between the Police Files and Mr. Moyle's account to Parliament. Consequent upon the allegation of lying to Parliament, an enquiry was ordered into the incident - the terms of which were set by the Prime Minister, acting this time in his capacity as leader of the House of Representatives. The way in which Sir Alfred North conducted the enquiry was such as to deny legal representation either to the Police or to Mr. Moyle and the result was that he made a judgment that had the effect of accusing Mr. Moyle of misleading Parliament in his original

account of the incident. In the face of this situation pressure was placed upon Mr. Moyle to resign, an act which he apparently took with a view to seeking a further mandate from his constituency.

However, this failed to materialize, and Mr. Moyle's continued affirmation of innocence, together with accusations brought by him against Sir Alfred prompted the Prime Minister to threaten the release of the full text of Sir Alfred North's report. It was apparent that his motives in doing so were as much an act against the Labour Party as against Mr. Moyle personally.

The result of all this was a blackening of the public image of the former Minister of Agriculture. Party as a result of this and partly out of a desire to get at the truth of the matter from Mr. Moyle's side, a journalist from 'The Listener', Mr. Peter Trickett, took it upon himself to interview Mr. Moyle, and upon the basis of this interview, he wrote an article that sought to investigate the integrity of Mr. Moyle's story. This article, entitled "In Perspective: The 'Moyle Affair'"[9], was, in many ways, the first extensive attempt to give a public statement to Mr. Moyle's side of the case. It was followed by a further attempt to establish Mr. Moyle's guilt on the part of the M.P. for Kapiti, Mr. Barry Brill, followed by a subsequent reply pleading for justice to be done to Mr. Moyle by Mr. Trickett[10].

I do not wish to enter into a discussion as to whether or not Mr. Moyle is guilty. I would suggest that this is only part of a matter that has much wider constitutional significance. Whatever else that can be said about this incident, it is obvious that some sort of trial has been conducted. Moreover its form has been such as to enable no firm conclusions to be drawn as to whether or not 'justice has been done'. I would suggest that the main reason for this has to do with the basic misuse of power on the part of a number of people in high places. In the first place, a lot more attention should he given to the way in which the Prime Minister used his powers to gain access to the content of the Police Files, and to the way in which he was permitted to set the terms of an enquiry into a matter in which he could in no sense be said to have been an unbiased party[11]. Then again there is the whole question of the way the Prime Ministerial powers were used in regard to the release of the text of the North Report. In the second place, a lot more attention should be focused upon the Police Commissioner and his Deputy.

How is it that they were willing to divulge information to the Prime Minister in a situation in which they must have known that their action could result in its use in a manner having the quasi-legal force to damage Mr. Moyle in a way that could give him little opportunity for legal redress? If they had any grounds to believe that Mr. Moyle's actions warranted public scrutiny, then they had ample opportunity and power to carry it out. To be party to the way 'the trial' was carried out must surely be judged a misuse of their powers, and would apparently have been seen to be have been so by the Solicitor-General before their interview with the Prime Minister. Finally, there is the action and re-traction of the decision on the part of the Attorney General to give public access to the verbatim transcripts of Sir Alfred North's investigations. It would appear, on the face of it, that the retraction was taken after the transcripts had been seen by the Prime Minister's Department, and thereby to constitute a case of interference in the independent decision of a senior Cabinet minister. {11}

If it is indeed the case that Mr. Moyle is guilty of lying to Parliament, then his guilt would be one most aptly described as failing to carry out his public duties faithfully. However, if there is any substance in the matters that I have just outlined, then they must surely be described in the same terms. The fact that as far as the Prime Minister, the Police, and the Attorney General are concerned, the whole matter is closed, does not exactly encourage public

confidence in them. If there is guilt in high places, the last thing they should be satisfied with is the finding of scapegoats.

It is precisely for reasons such as these that I would suggest that the view typical of New Zealand Newspaper Editors on the whole matter has been quite insufficient. Generally, they have tended to view the matter simply as an exhibition of dirty washing that should not be repeated. I suggest there are two points that make it of far greater import. The first has to do with the whole history of Chapter 39 of the Magna Carta, guaranteeing every free man the right to a trial according to the law of the land, a clause that played a very significant part in the conflict between the King and Parliament in the seventeenth century. The second has to do with the range and extent of the powers that are now built in to the office of Prime Minister. Although going on to qualify what he says in some very important ways, H.R.G. Greaves gave the following assessment of the constitutional power of the Prime Minister in the Westminster-type Parliamentary system:

> *'The Prime Minister is far the most powerful man in the country. He is sometimes, and not without reason, likened to a dictator. His formal powers, at least, resemble closely those of an autocrat. The prerogatives lost by the monarch have fallen for the most part into his hands, as the chief responsible adviser of the Crown. Those which have not been inherited by him direct have gone to the Cabinet; but he is its leading member; he forms it. He can alter it or destroy it. The Government is the master of the country and he is the master of the Government. In addition he is the chief Member of Parliament, being normally 'leader of the House of Commons'. His party, having a majority in the House, determines the action of Parliament, and he controls his party. Parliament can legally do anything and can actually do many things, and the Prime Minister decides its time-table, and can summon, prorogue, or dissolve it*[12].

Had there been, for example, a greater differentiation in powers, whereby the power of the Prime Ministerial office had been curtailed, then 'the trial' of Mr. Moyle might have had a more satisfactory outcome, and, who knows, the tone of debate in Parliament might not have reached the muddy depths that promoted it.

THE LOSS OF CIVIL LIBERTIES

In 1941 the former Trotskyite James Burnham wrote a book entitled 'The Managerial Revolution[13]. In it he argued that capitalism had collapsed not only in Russia and Germany, but also in America! However, it had not given way to socialism, but to what he called the managerial form of society, with the differences between Stalinism. Nazism and the New Deal being important, but largely of an 'ideological' character (in the Marxist sense). Doubtless he would have described the Welfare state in somewhat similar {12} terms. Basically speaking the managerial form of society has two main features: it is not individualistic but organizationalistic; and the effective control of the 'means of production' is neither in the hands of those who own capital or those who offer their labour, but in the hands of the managers. The latter include technicians, economists and experts of all kinds. Now, whilst there are many points at which I would disagree with Burnham's analysis, the feature of 'organizations controlled by experts' as a major feature of the Society that we now inhabit is a thesis with which I concur. To put it slightly differently. It is thatfeature which brings to mind everything that is involved with the bureaucracy - whether it be found in State, School, Church, Trade Union, University or Multinational. The major problem with it is that the organizing principle of social life goes no deeper than the technical no-how necessary to keep it going. Thus, insofar as organizations are directed according to what might be called a Life-principle, it is that of secularized Technique[14]. With regard to New Zealand educational and economic life, for example, largely because of the legal provisions, it has become extremely

difficult for people to organize in ways that are not dictated by such terms. For these and other reasons I would suggest that New Zealand has increasingly become part of the managerial form of society.

The other major feature of modern life - the need to protect the free society from terrorist violence and subversion - has produced, in its turn, the need to maintain the security of the State in ways that are now showing an increasingly technological sophistication. With the development of the Wanganui Computer Centre, and the legalisation of bugging procedures for the SIS and for drug traffic detection, New Zealand is moving into the new era. This era - variously portrayed in Orwell's "1984" and in Huxley's "Brave New World" - is characterised by a highly organized, well-defended and highly technological form of society in which the liberty to organize according to countervailing principles has all but disappeared. Whilst New Zealand may have a long way to go before it reaches the bottom in those respects, it has increasingly come to experience the dominant features.

Insofar as these features apply to the New Zealand situation, the most obvious example in which people have felt their liberties to be endangered and have said so, was in connection with the SIS Bill before Parliament in 1977. This was construed by many as giving powers which infringed upon civil liberties. Whether or not this was the Government's intentions is for the moment beside the point. In the absence of adequate constitutional safeguards to protect such liberties and to define the meaning of the subversion of the State in a way that clearly places it beyond the whim of the Government of the day, many principled people have begun to realize that the constitutional guarantee of liberty is a matter that can no longer be taken for granted. This is especially relevant in a situation in which HART and CARE have been called traitors and warnings have been given to the effect that the Socialist Unity Party could be outlawed[15].

The Cabinet's ruling in not permitting Mr. Horta of Fretilin to speak on the conditions in his country as he sees them must constitute a ruling that withdraws Civil Liberties from the New Zealand organization which invited him {13} to this country. The issue is fundamental because, although the Government is entitled to its own foreign policy, attempts to deprive groups of the ability to be able to present alternative viewpoints from informed personnel, in a peaceable manner, constitutes an attempt to control the ability of the nation to make up its mind, and, as such is a denial of what used to be considered 'basic democratic liberties'. There are other examples of a similar kind that could be quoted.

However, it should be acknowledged that this problem is not all one way. The social and moral climate that exists in many quarters within New Zealand today is one that is very serious, promoting very many problems for social workers and educationists. Groups like the Society for the Promotion of Community Standards have been saying this for a number of years. However, there has been a gathering tide of official acknowledgment as to this state of affairs over recent years, and the Education Department, for example, have sought to come up with some proposals to do something about the problem. In their 1977 publication, entitled 'Growing, Sharing, Learning' there has been an official acknowledgment that many traditional values, previously considered to be the responsibility of the Church and the Home, are no longer being adequately nurtured by these authorities for the majority of children. Moreover, there has been a growing disrespect for authority, rooted, I would suggest, in false expectations of individual -liberty and licence that has been a powerful factor in the development of the prevailing national outlook. Police Commissioner Burnside, for example, has been reported as claiming that *'decadence masquerading as liberalism was leading to a disintegration of New Zealand society*' with the result *'that the resultant anarchy could force policemen, to become militant to protect their position. We are all oblivious to the fact that*

we are allowing the sludge of social anarchy to be trampled into our lives - and society - on the boots of less than justified liberalism"[16].

It is important to realize that these issues are not simply of a technical nature; issues of the rightness and wrongness of the exercise of power, of the nature of authority and of liberty derive from some Life-principle in a way that has more than simply an individual significance. For that reason it poses the terrible dilemma of anarchy and totalitarian control in a way that the organizing principles inherent in the pseudo-life principle of secular-technique finds it extremely difficult to handle.

THE UNCERTAINTY OF GOVERNMENT INTERVENTION

In April 1976, the Attorney General intervened to prevent the carrying out of prosecutions connected with Statute provisions that had been passed under the previous Labour Government, and were to be revised by the National Government in accordance with its election manifesto. In April 1978, {14} within an admittedly difficult industrial and economic situation, the Government pursued a course of action that involved a direct handout of Government funds to meatworkers, over the heads of their Employers, and justified in terms of relief to farmers! In August 1978, the Attorney General intervened in such a way as to stay the proceedings of the great majority of those who had been arrested on the occasion of the clearance of Bastion Point, with the result that those already prosecuted have been treated in a manner that is manifestly different from those for whom the stay-of-proceedings order applied. In September 1978 the Secretary of Labour, apparently under no direct order from Cabinet or the Minister of Labour, acted in such a way with respect to the legal proceedings then being taken against certain Southland Freezing Workers as to have the effect of having the charges withdrawn. Although much of the criticism of this particular action has been directed at the point as to whether or not there was political (i.e. party political) interference in the matter, it would seem to me to miss the crucial point. The Minister of Labour is responsible to Parliament for all the actions of his department, whether he initiates them or not, and accordingly, criticism should have been levelled directly at the propriety of the action taken.

On each of the occasions mentioned the Government was subject to considerable criticism - both from the Labour opposition and from elsewhere. Without wishing to venture too far into the matters of party politics, and without trying to question the Government's responsibility to act, on occasions, with decisiveness, I would simply like to suggest that the principles upon which these actions were predicated, were, to say the least, of highly debatable constitutional propriety, and, as such tend to have a combined effect, on the part of the public, of building up an expectation that the Government might indeed act anywhere, anytime, but are not at all sure precisely how or when it will do so. Upon what grounds, for example, should the Attorney General stay court proceedings? The grounds of a large number of similar cases to be handled would surely not constitute adequate ground for such actions. Upon what grounds should the Labour Department seek to act in regard to judicial proceedings affecting Industrial Relations. Surely the grounds of threatened disruption in the event of an unfavourable outcome to one party is itself a long-term threat to the rule of law. Again, whilst the decision to pay the meat-workers directly from Government funds may have had the virtue of providing a solution to a difficult problem, it does raise some fundamental points of principle as to the extent and limits of State power. All in all it would seem that the ruling principle in each of the cited in-stances was less that of 'the rule of law' and more that of 'economic efficiency' on the basis of Government intervention. This is significant if for no other reason than it is the hallmark of 'the managerial form of society', in which the supreme task of the State is that of an Economic manager, with the law being directed toward such ends, rather than toward the securing and maintaining of justice and equity. It is because 'the

rule of law' is sometimes deemed to be one of the pillars of the constitutional settlement that we inherit, that I believe these matters to have constitutional significance. {15}

SUMMARY

Although the general state of affairs that I have been seeking to analyze in this chapter has not received the attention it deserves, it has certainly not gone unnoticed. I shall therefore conclude it by quoting from two persons who, from their respective positions of responsibility, have an immediate grasp of the issues that I do not possess.

In the first place we have had from within the Government ranks itself a consistent campaign coming from the figure of Michael Minogue of Hamilton West.

> *Whether or not New Zealand can survive as a liberal democratic island in a world which manifests increasingly authoritarian trends in government is to me the key question to which all others are secondary. The liberal/democratic society clearly cannot survive unless the law becomes increasingly clear and positive in the checks it imposes upon the exercise of arbitrary arrest or imprisonment or from harrassment by officialdom*[17].
>
> *An 'elective dictatorship' has emerged in New Zealand in which increasingly decisions are made without reference to Parliament. Of necessity the area of executive initiative and decision-making will continue to expand. The problem is to define its limits and the constraints which must be accepted, if government is to be assured of retaining a democratic character. If there are to be* no *limits and and* no *positive constraints, the elective dictatorship clearly has the capacity to act without effective scrutiny and to finally reduce Parliament to a ritual farce - which some indeed believe it has already become. The question, therefore, is what can be done about defining the safe-limits to and the necessary constraints upon the exercise of executive power - and making them effective*[18].

Secondly, Sir Guy Powles, the former Ombudsman, has written in a 'Listener' editorial giving warnings of a similar kind:

> *We have no written constitution. We have a single chamber legislature. We have no Bill of Rights. Under precedents derived from Great Britain, Parliament is supreme. We have two main parties, with a first-past-the-post system for electing members.*
>
> *The Prime Minister, the political leader of the majority party, is also the Leader of the House. Historically, political philosophy distinguishes between legislature, executive and judicial branches of government (each supreme in its own field and subject to checks and balances to preserve the stability of the state and rights of citizens). But this is not the New Zealand situation, where executive power is supreme.*
>
> *Such exultation of executive power has unpleasant consequences. The authority and even the role of courts of law become progressively diminished. The executive secures the passage of laws to negate decisions of the courts and prevent access to them by aggrieved* {16} *citizens. A wide range of special tribunals is created to cover matters which intimately affect the lives of citizens. This tribunal, too, becomes increasingly subservient to the executive.*
>
> *Another unpleasant consequence, perhaps also a cause, of the growth of power of the executive, is the development and growth of an extensive bureaucracy. Even the*

Prime Minister now has to have his own special bureaucrats. A strong executive builds up a strong bureaucracy to cater to its needs, and a strong bureaucracy provides the expertise and the driving force for the executive.

The increasingly powerful executive has less concern for the dignity and prestige of Parliament, which falls in public esteem as it becomes more the executive's tool than the deliberative seat of the people's sovereignty. Some people are heard to openly say they will not obey the laws which do not please them. Respect for law diminishes at all levels of the social scale. Again, Parliament's influence diminishes other bodies, representative of various interests, grow up with increasing powers, some given to them by Parliament itself.

Our grandchildren's great worries may not be economic but constitutional and political[19]. {17}

Chapter 2

THE MAIN POLITICAL ISSUE OF MODERN TIMES

To talk of the main political issue of modern times is obviously fraught with dangers. It is all too open to the accusation that every other political issue is of secondary importance. I do not want to imply this. I would want to say that the all-important political principle of every time and every place is justice. However, in saying this I am only too well aware that there are far too many views as to what this means for it to be left at that. Suffice to say that I view the positive task of the State as one that should always be seeking for justice to be done: between one man and his neighbour; between different social and cultural groupings; in regard to economic as well as other areas of life. I do not believe that justice and liberty are mutually exclusive. In fact, I think that there is considerable evidence to suggest that when justice is pursued at the expense of liberty, then neither is achieved. Thus I take it for granted that justice and liberty are always the main political issues. What concerns me here is more the means by which such ends may or may not be achieved within the institutions of modern times. A Marxist revolutionary would undoubtedly have strong objections to my analysis of the issue at stake. The reason for this would, in my view, be primarily due to the confusion that exists between the political and economic dimensions of life within the bulk of Marxist thought. I am as concerned as anyone for economic justice, and would like to see some important changes to the present order of things in these respects. However, I am far from convinced that that implies a solution in the terms of 'the people's ownership of the means of production' that boils down to nothing but the bureaucratic nightmare of the State control of everything. Although I do not wish to appear specifically pro-Western in my discussion, I do wish to focus upon the recognisable distinction which, for all its imperfections, sets West Germany off from its Eastern counterpart. However, in doing so I would not wish to imply that I consider everything in the West to be good and everything in the East to be bad. What I do wish to imply is, that whilst there is good and bad in both, the basic issue which maintains a wall between them is the substance of the main political issue of our times.

I shall argue that this issue - whether it occurs in Europe, Africa, America, Asia or Australasia - is to be described in the terms of a Totalitarian as opposed to a Constitutional State. I realize that even Totalitarian States have constitutions, and that I will therefore have to define what I mean. However, I would point out that terms like 'democracy' or 'liberal democracy' are equally problematic in trying to distinguish between East and West Germany. East Germany calls itself 'The Democratic People's Republic of Germany' and West Germany has

maintained its modern form of 'Western Democracy' largely through the efforts of political parties espousing 'Christian Democratic' or 'Social Democratic' political philosophies, creeds which they both wish to distinguish from Liberal[20] {18}

'DEMOCRACY' and 'LIBERTY'

Most people recognise that modern political life has given a great deal of attention to 'democracy' and to 'liberty'. But as I have already pointed out, there is usually a great deal of confusion as to what these things mean, There are many, for example who believe that our modern form of 'democratic society' is under grave threat. Whilst I'm in general agreement with the substantive claim, I believe that it is necessary to be careful in defending it by the usage of terms like 'liberty' and 'democracy'. To illustrate the point. When Communist countries describe themselves as 'democratic', there are many ways in which, historically, they have a stronger case then the West for describing their system in these terms. The character and practice of democracy was one that was well known and discussed amongst the Greeks. Nonetheless both Plato and Aristotle considered it an inferior form of Government. In the case of Plato this judgment was undoubtedly influenced by the ruling of the people in administering the capital crime upon his beloved Socrates for *'not believing in the gods in whom the city believes, introducing other new divinities'* and *'corrupting the young'* with his unheard of ideas[21]. Both the 'religious' nature of this 'crime' and its punishment is closely related to the way in which anyone in a 'people's democracy' who teaches or publicly criticises the ideology upon which the whole way of life is founded is subsequently 'reprimanded', 'socialised', imprisoned or executed. The reason for the similarity is that in both situations the State nurtures and controls the whole of life upon the basis of a common ideology or religious worldview. In such a situation whether it be democracy, oligarchy or monarchy, there is no liberty for those people who differ with the dominant outlook to live according to their convictions.

To appreciate the character of what we generally associate with the ideal (if not the actuality) of Western 'democracy we need to appreciate its relation to liberty and to the limitation of the State. The Liberal creed has generally identified this with a view of liberty as individualistic. In recognition of the historical links of this sense of liberty with oligarchic property rights, the more Socialistic creed has emphasised a view of liberty that is associated with an equality of economic opportunity for the economically disadvantaged. In the more distant past the view of religious liberty has played an important part in the development of the West. The first significant break with the view of society being ordered according to a Church-State establishment was made in England under Cromwell, who, whilst retaining many of the old restrictions, nonetheless did not follow the Presbyterian, Anglican or Roman examples of seeking to establish a way of life based upon such Church-State establishments. The eighteenth century Enlightenment transformed the idea of religious liberty into one that was identified with churchly matters with the result that modern life has come to identify the separation of Church from State with a separation of secular from religious. Over against this Christian democracy has emphasized a view of liberty founded upon a plurality of world and life views being brought to bear upon the organization of society[22], and as such I would suggest that it is a feature of life that needs to be rediscovered in New Zealand if it is to see its way through to a new found liberty. Religious liberty is one that is as much closely bound to the freedom for people to associate and live out principled convictions as it is to the freedom to worship according to convictions. This has much relevance to a society organized upon the basis of secular technique, and its encumbent exercise of bureaucratic and monopolistic power. {19}

The ideas of liberty that I have just cited are thus precisely those associated with the three great modern traditions of democracy in the West - Liberal Democracy, Social Democracy and Christian Democracy. Moreover, in this respect, what F.A. Hayek has said regarding Liberal Democracy *'Liberalism is a doctrine about what the law should be, democracy a doctrine about the manner determining what will be the law'*[23] is a dictum that might also be applied to the other two. In this sense, whilst 'liberty' in all three traditions is concerned with the extent and exercise of State power both in relation to political and non-political areas of life, 'democracy' is concerned with a means of appointing people to positions of authority, and to the way in which such authority is exercised.

TWO IDEAS OF DEMOCRACY

From the analysis that I have tried to present thus far, I think that it is apparent that democracy may or may not be associated with liberty and liberty may or may not be nurtured by a Liberal emphasis upon the individual. It should therefore not be surprising that there are a number of different ideas of democracy acting as banners both to justify and to criticise the politics of a nation. With reference to the fundamental significance of these different views, J.L. Talmon, in his important study 'The Origins of Totalitarian Democracy' writes "that

> *'With the liberal type of democracy there emerged from the same premises in the 18th century a trend towards what we propose to call the totalitarian type of democracy. The two currents have existed side by side ever since the 18th century. The tension between them has constituted an important chapter in modern history, and has now become the most vital issue of our time. It would of course be an exaggeration to suggest that the whole of the period can be summed up in terms of this conflict. Nevertheless it was always present, although usually confused and obscured by other issues, which may have seemed clearer to contemporaries, but viewed from the stand-point of the present day seem incidental and even trivial. Indeed from the vantage point of the mid-twentieth century, the history of the last hundred and fifty years looks like a systematic preparation for the head-long collision between empirical and liberal democracy on the one hand, and totalitarian Messianic democracy on the other, in which the world crisis of today consists.*[24]

Despite the confusing way in which Talmon identifies the ideal of democracy in the West as 'liberal' or 'empirical' here, he goes on to elaborate his main point as follows:

> *'The essential difference between the two schools of democratic thought as they have evolved is not, as is often alleged, in their affirmation of the value of liberty by one, and its denial by the other. It is their different attitudes towards politics. The liberal approach assumes politics to be a matter of trial and error, and regards political systems as pragmatic contrivances of human ingenuity and spontaneity. It also recognises a variety of personal and collective endeavour, which are altogether out-side the sphere of politics.*
>
> *The totalitarian democratic school, on the other hand, is based upon the assumption of a sole and exclusive truth in politics. It may be called political Messianism in the sense that it postulates a pre-ordained, harmonious and perfect scheme of things, to which men are irresistibly driven, and at which they are bound to arrive. It recognises ultimately only one* {20} *plane of existence. It treats all human thought and action as having social significance, and therefore as falling within the orbit of political action. Its political ideas...are an integral part of an all-embracing and coherent philosophy. Politics is defined as the art of applying this philosophy to the organization of society, and the final purpose of politics is only achieved when this philosophy reigns supreme*

over all fields of life.[25]

Thus, it is an essential feature of the kind of democratic tradition that has gained a foothold in the West that the State be limited, that politics recognise spheres of personal and organizational life whose integrity it is to protect not to direct. It is also the case that the Totalitarian form of democracy may not be equated with any one variety. Nazism as much as Communism embodies the practice of a form of life in which a Totalitarian ideology is brought to bear by the State in all spheres and on all levels of life. There is no freedom for an alternative vision of life to gain expression. Why do both traditions describe themselves as " democratic'? The word 'democracy' derives from two Greek words - 'demos' meaning 'people' and 'kratos' meaning 'strength'. As such it is easy to see how the word 'democracy' can either have connotations like 'ruling in a manner' that takes into account 'the consent of the people' or like 'the direct exercise of power by the people'. These different renderings relate to the way in which the word gained its meaning during the eighteenth and nineteenth centuries in two distinct ways. The first continued to recognise the legitimacy of authority in society - in the State as well as other spheres and sought to extend the franchise in a way that enabled more people to have a say in the election of those who were appointed to positions of authority, thus providing an important way of checking the power of those in office. In this sense democracy is a method for choosing and removing people in authority (in Parliament, in political parties or whatever sort of organization you care to name) that considers the opinion of the whole body of the membership of the articular social community under consideration. As such it is neither 'a way of life' nor 'a way of government'. It may be a way of choosing a government. However, as such, it is not clear that a government chosen in such a way need be representative, just, fair or non-dictatorial in the sense that it consults the citizenry in taking measures and passing legislation that concerns them. Nevertheless, I shall use the word 'democratic' in this particular sense to describe both a way of appointing a government and a way in which a government consults the citizenry with regard to the measures it takes.

The second way in which 'democracy' gained currency during the 18th and 19th centuries was to strike at the very roots of the legitimacy of authority in society. For this the philosophy of Rousseau was central. According to him all forms of intermediary authority between the individual and the 'general will' of the collective were considered an illegitimate way of thwarting the freedom of man from realizing 'natures right' as declared in the 'general will'. The idea of 'the people' in this connection is bound up with an absolute sovereignty given to the collective humanity acting out the 'general will'. As such it was a part of a Utopian vision of life in which all men would be on equal terms, simultaneously expressing their own freedom and fulfilling the universal law of love as declared by 'the general will'. Historically, this view of democracy articulated by Rousseau was first experimented with during the French Revolution. Its religious character, its totalitarian tendency, as well as its link with future revolutions has been discussed at length in a number of places.[26] J.L. Talmon's summary to this effect may be quoted as typical in this respect: {21}

> *'The postulate of some ultimate, logical, exclusively valid social order is a. matter of faith, and it is not much use trying to defeat it by argument. But its significance to the believer, and the power it has to move men and mountains, can hardly be exaggerated. Now, in Europe and elsewhere, for the past century and a half, there have always been men and movements animated by such a faith, preparing for the Day, referring all their ideas and acts to some all-embracing system, sure of some preordained and final denouement of the historic drama with all its conflicts into an absolute harmony. Jacobins may have differed from Babouvists, the Blanquists from many of the secret societies in the first half of the nineteenth century, the Communists*

from the Socialists, the Anarchists from all others, but they all belong to the one religion. This religion emerged in the second part of the eighteenth century....the most difficult problem of the secular religion was in the antinomy of freedom and the exclusive Messianic pattern. (emphasis added).[27]

Talmon argues that all the elements of this secular humanist religion masquerading as political creed had emerged during the period of the French Revolution. His argument is a telling one. What he refers to is a definitive vision that powerfully leads men and women in the way they give form to their social arrangements. In this connection, a sketch of the historical manner in which this vision has been brought to bear upon the social form of modern life is nowhere better presented than in Albert Camus's 'The Rebel'[28], a book which discusses the theme of Revolution in the Anarchists, Communists and Nazis in a way that roots them all back to the vision of life enunciated during the French Revolution.

In this vision the idea of democracy promises a hope in which no one will be exploited and all will be free to live in bonds with his or her fellows. In actuality, however, it has always polarised between an anarchic individualism that would immediately do away with authority and a rigid totalitarianism that will tolerate no ideological opposition and conforms every one to the will of the party. The problem, with Rousseau's political philosophy and with all its descendants (including Marx) is that the relationship of 'the people' to 'the State' and of 'the general will' to 'the majority vote' is far from clear. As such the vision for a new man and a new world may have great religious power, but the consequences of this radical humanism that would seek to bring in the Kingdom of God by abolishing the rule of God over creation has simply led to bad political philosophy. It does not account for our empirical experience of the State in a coherent manner.

There are three reasons why ideologists of the Right and Left are bitterly opposed to each other. The first is that those of the Left genuinely have a hope for the abolition of oppressive power, whilst those of the Right make no bones about their attempts; to gain their objectives through the exercise of such power. The second is that ideologists of the Left make their appeal to the whole of humanity (at least in the long run) whilst those on the Right champion a particular race, religion or nation as inherently superior and as such is the vehicle for bringing in the new man in the new world. In practice, however, the fact that many Leftists identify the new man with 'the working class, 'the party' or 'the revolutionary vanguard' tends to minimise this difference. Thirdly, whilst both seek to command absolute power they are both bitterly opposed to its being exercised by the other. {22}

The idea of democracy that has been nurtured and developed in Britain, America and Western Europe has had its origin in a different vision of life, one that has been considerably influenced by the Christian Religion[29]. Within the mediaeval feudal ideal, there was, for all its economic injustice, a strong sense of mutual obligation that set freedom in relation to fealty. As such allegiance was tied to conditions, and in many situations there was the sense of a mixed sovereignty. This was especially so in England, with political power being shared between the King, Lords and Commons. Essential to this view was the idea of a constitutional arrangement that defined the limits of power. In this connection executive power was initially the province of the Monarch in Council, whilst he or she shared legislative and judicial power with Parliament. The development of modern democracy in the West from this background involves essentially the constancy of two things: the maintenance of a limitation upon the power of the State and a division of power within the State itself. In relation to this, the means whereby people are appointed to positions of power within the State has changed from a mixture of Monarchy and Oligarchy to that of a Democracy.

SOME IMPORTANT DISTINCTIONS

At this point I would like to introduce some important distinctions, with a view to seeking to deepen my analysis of the basic political issue of modern times. I refer to

- A LIMITED as opposed to a TOTALITARIAN State
- A PLURALIST as opposed to an ESTABLISHED vision of life, shaping the life of a nation.
- An AUTHORITARIAN as opposed to a DEMOCRATIC mode of appointment to authority.
- A CONCENTRATED as opposed to DIVIDED Sovereignty in the life of the State.

(i) LIMITED and TOTALITARIAN STATES

This distinction has to do with the way in which the authority of the State is exercised in relation to individual citizens and in relation to other organized societal bodies - such as marriage, family, church, trade union, company, school, university. A Limited State seeks to protect these in a way that recognises a freedom for individuals and communal groupings to develop in a way that is in keeping with their own task and character. A Totalitarian State seeks to control such communal groupings in an attempt to maintain some sense of national unity. In this connection, there have been differing stand-points justifying the way in which the State should be limited - expressed in the traditions of Liberal, Social and Christian Democracy, for example. However, the principle of democracy as we have come to know it in the West is definitely related to a sense of a limited as opposed to a Totalitarian State.

(ii) PLURALIST and ESTABLISHED VISIONS OF LIFE

This distinction has to do with the way in which citizens organize themselves in relation to principles that may be said to direct their organized life, and in this sense, I would say that it has a great deal to do with the nature of religious freedom. As I have already pointed out, the latter, has since the eighteenth century, by and large, been interpreted as the freedom to worship {23} according to conscience. It is worth noting that this form of religious freedom is also granted in many totalitarian countries. In China, for example, it forms an explicit article in the Constitution[30]. New Zealand, however, whilst making some provision for a plurality of visions of life to be brought to bear upon political organization, has a situation in which the bringing to bear of a pluralism of principles upon education, upon labour, upon welfare, upon cultural identity is made extremely difficult both by the legal structure and by the extent of state power in these areas. Ironically enough, however, there has been little extension of State power into the actual organization of industry. This situation is due in the main to the ideas of liberty gaining currency in the New Zealand way of life being limited, by and large, to the Liberal and Social Democratic traditions, in which questions of liberty have been strongly individualized and economicized. This stands in contrast to the European continent, which has seen a much stronger contribution from the Christian Democratic tradition, espousing a view of liberty that is strongly linked to individuals working out a common life upon the basis of principles that are held in common. By contrast to the situations of mediaeval and reformation Christendom, however, this view is such that no one such vision of life, or principular standpoint in any particular area of life are established in the sense of enjoying exclusive State protection, and thus has paved the way for a genuine pluralism giving direction to the life of Western Europe.

(iii) AUTHORITARIAN and DEMOCRATIC MODES OF APPOINTMENT

An authoritarian mode of appointment or mode of exercising authority is one in which the people affected by the exercise of such authority are not consulted. This is to be contrasted with the democratic approach in which people affected by the appointment of authority are directly consulted. It is important that this consultation may arise either with respect to the mode of appointment or with respect to the exercise of the authority given by the

appointment. Thus an authoritarian mode of appointment may or may not be accompanied by an authoritarian exercise of power and a democratic mode of appointment may or may not be accompanied by a democratic exercise of the power given by that appointment.

Within the version of democracy that we inherit, the democratic mode of appointment is usually associated with the universal franchise and the democratic exercise of power is associated with the freedom of citizens to make submisssions to Parliament in regard to the matters that affect them. When either one of these are withdrawn we may indeed speak of an authoritarian development. However, such developments may occur in other ways, as evidenced by the present exercise of power by major political parties in a constituency mode of election.

(iv) CONCENTRATED and DIVIDED SOVEREIGNTY

Within the life of the State we may readily distinguish four functions or 'types of power' -legislative, executive, judicial and administrative. Except in the life of the small city state we may usually distinguish between a central and a regional exercising of these various powers. Finally we may distinguish various State institutions - such as Parliament, Cabinet, Supreme Court and Government Departments - through which the State power is exercised. The question of sovereignty arises in respect to the way in which these various institutions and functions are subject to one another. A concentrated sovereignty arises when one institution, region or function is supreme over the others; a divided sovereignty with a division between the functions or institutions in a way that subjects them mutually to one another.

The most celebrated statement of the principles of divided sovereignty is to be found in the American Constitution. In this the Congress is given supreme legislative power, the President the supreme executive power and the Supreme Court supreme judicial power. In particular the latter has the task of guarding the way in which the other powers are exercised, basing {24} their judgment upon the constitution and its amendments. These principles were developed by Locke and especially by Montesquieu[31], with the latter considering them to be a fairly accurate analysis of the British system as it existed in the early eighteenth century. Montesquieu considered that a divided sovereignty was the key to liberty. However, without a limited State and a provision for a pluralism in the visions of life being brought to bear upon national life, I would submit that a division of sovereignty, can, of itself be no guarantee of liberty. Coupled with the other features discussed here, however, a division of sovereignty is an important means of limiting the possibilities of corruption, and thus a great contributor to the maintenance of both liberty and justice by providing a means whereby the different powers can balance and check one another.

In America, the guiding light in respect to maintaining a limitation upon the power of the State was John Locke, whose individualism was closely linked to the competitive spirit that has nurtured what has often been called capitalism[32]. Thus, it is to Locke and Montesquieu that the United States of America owes its particular form of Constitutional Democracy. In this respect the form of Constitutional Democracy that exists in the European continent is very different. Having learnt a great deal from both the British and American experience of divided sovereignty, its means of limiting the power of the State has been nurtured far more by Social and Christian Democracy than by the Liberal tradition that has so strongly influenced America, and to a lesser extent Britain and its former Dominions.

Over against the American principle of the separation of powers the British system, at least since the late eighteenth century, has developed according to the organic principle of 'the sovereignty of Parliament'[33]. This has not strictly been a concentrated view of sovereignty in the sense of Parliament being a Dictator. What it has meant is that the executive power had

certain limits placed upon it and that the courts interpreted and adjudicated the law passed by Parliament, but had no power to question its ruling. Thus the Monarch had no power over Parliament in respect to legislative matters and exercised his or her executive powers with the help and consent of Parliament. On the other hand Parliament was called together by the Monarch and exercised power at his or her pleasure. The courts had no power to change the law; Parliament could change the law but had no power to interpret it. We may therefore describe the British system that New Zealand inherits as a partial division of powers with an in built legislative sovereignty invested in Parliament.

In Britain as much as in New Zealand, concomitant with the growth in democracy has been an effective reduction in the executive power of the Monarch and a tremendous growth in the power of political parties. These latter features need to be borne in mind if we are to analyse the de facto way in which sovereignty is exercised in modern political life. {25}

THE FUNCTION OF CONSTITUTIONAL LAW IN THE LIFE OF THE STATE

> *'When we ask whether New Zealand has a Constitution, there are three things we could mean. We could be inquiring whether particular kinds of law and customs exist in New Zealand. The answer would be that New Zealand, like every other civilized country, has a Constitution in the sense of a body of rules determining the organization, personnel, powers, and duties of the organs of government. Second, we could be asking whether some of these rulers are contained in a document or a set of documents bearing a title that contains some such word a 'Constitution'. New Zealand has such a document in the NZ Constitution Act, 1852 (but, this act is not generally known as 'The Constitution'). Third, we could be asking whether there is a document or a set of documents which, however it is entitled is generally known as 'the Constitution'. This is not a question about the nature of politics but one about the linguistic habits of politicians, and journalists, and scholars. The answer would be that New Zealand has no 'Constitution' in this sense. The United Kingdom is probably the only other country of which this is true[34]!*

This statement clearly articulates the two principal features of the constitution of a state: the procedures, institutions, positions and responsibilities of a particular State; and the ways in which these features are written into the Statute Book. However, this statement and the various other accounts of the New Zealand Constitution generally give little insight with respect to the issue as to why such procedures should be written up in the Statute Book and what happens if they are contravened.

In respect to the preceding analysis, the main features of what we may call the ideal (as opposed to the reality) of Western democracy, embody

(i) a limited as opposed to a totalitarian State
(ii) a pluralist as opposed to an established vision of life.
(iii) a democratic as opposed to an authoritarian mode of appointment and exercise of power.
(iv) a divided as opposed to a concentrated sovereignty.

Now, a form of Government that functions in a way in which all of these features are present is exceedingly fragile, especially within the context of the pressures of the modern world. The question arises, therefore, as to the way in which its integrity and encumbent liberties may be sustained against attacks from the various sides that seek to abuse it. The answer, I would suggest, is by means of the constitutional legal framework that sets out the continuing basis

upon which (i) the State relates to the citizenry at large and (ii) the various branches and institutions of State fulfill their functions in relation to one another. If the Constitutional Law is too tight it invariably functions in such a way as to give legal protection to certain groups or institutions. If it is too weak then it readily opens up the way for powerful groups to exercise their de facto power in ways that are unjust. Moreover, it provides a situation in which those in power can all too readily withdraw liberties and exercise unjust rule without adequate opportunity for legal redress, especially when 'law and order' is threatened. For these reasons Constitutional Law is especially important within a society that is deeply divided or threatened with subversive groups. Indeed if a so-called Western democracy is to allow liberties in a situation in which there are deep conflicts then the only way to protect the liberties of all is by means of a constitutional law that sets the framework for all parties to co-operate, and to which changes can be made only with the approval of the great majority of parties concerned.

It is for the reason that the ideal of a Western democracy, as I have attempted to describe it above, is one that is .maintained by such a constitutional arrangement, that I would call it a constitutional democracy, as opposed to a totalitarian one. In a totalitarian democracy, appointment may be by means of popular vote. However the totalitarian character of the State together with its established vision of life make it fundamentally different from the idea of constitutional democracy that I have been attempting to describe here. {26}

THE MAIN POLITICAL ISSUE OF OUR TIME

I would like to begin this section by distinguishing between Totalitarian, Authoritarian and Democratic politics[35]. Totalitarian politics is characterised by being both under the control of a Totalitarian State and supported by an established vision of life. As I've already pointed out it may well have a democratic mode of appointment. If this is the case, the only alternatives in the offing are those in tune with the established ideology. By Democratic politics I mean politics conducted within the context of Constitutional Democracy as discussed above. Authoritarian politics is not democratic in either of the two senses I have discussed. I shall distinguish Authoritarian from Totalitarian politics in two important respects, namely the recognition of a limitation upon the legitimate extent of State power and in the adherence to a constitution that acknowledges this limitation, and thus implicitly, if not explicitly provides for the possibility of pluralism, democratic modes of appointment and a division of sovereignty. For these reasons Authoritarian politics, as I attempt to describe it here, is closer to Democratic politics than to Totalitarian politics, whether or not the latter has democratic or authoritarian modes of appointment.

Thus the British Monarchy during the eighteenth and nineteenth centuries may have been Authoritarian, but because it was Constitutional, incorporating checks and balances of power, it was possible for it to develop into the Constitutional Democracy that by and large it still is today. The same can in no way be said for Hitler's Germany or for Russia since 1917. Indeed pre-revolutionary Russia, for all its Tsarist autocracy, probably had a greater possibility of developing into a Constitutional Democracy than modern Russia. The State that is supposed to 'wither away' seems more powerful than ever. I think that these distinctions are of considerable importance, for there are many regimes in the world today that are described as 'Fascist' by Left Wing ideologies and shortsighted Liberals. I refer to such regimes as those in Brazil, South Africa, Chile since the overthrow of Allende and Greece during the late sixties and early seventies[36]. These regimes may be justly criticised for their repression and their lack of democracy. However, the fact that they embody constitutional freedoms and limitations in their mode of operation means that they are generally more open to developing into Constitutional Democracies than a Totalitarian democracy will ever be. In other words, the word 'democracy' should not be the touchstone. The central question is that of the way in

which the Constitution places limits upon the extent of and distribution between powers in the life of the State.

In a Totalitarian style of politics the constitution functions in such a way as to sanction the totalitarian vision of life that has gained control of the swollen State that rules the people[37]. In what I have called a Democratic style of politics the constitution functions in such a way as to prevent the swollen State and its established ideology from gaining power.

The relation of these matters to party politics couldn't be more fundamental. James Burnham, writing soon after the conclusion of World War II, said that *a distinguishing and all-important development of this era has been the rise of the totalitarian political movements, of the essentially similar though variously named Nazi, Fascist and Communist varieties. Nowhere is the political illiteracy of Americans more fully and disastrously shown than in their lack of understanding* {27} *of these totalitarian movements. Many of our political leaders believe that the totalitarian parties, though somewhat strange and 'foreign' are fundamentally similar to our own Democratic and Republican parties... These totalitarian movements, with their steel discipline, their monolithic structure, their cement of terror, their rigid and total ideology, their pervasion of every aspect of the lives of their members, are of a species totally different from what we are accustomed to think of as 'political parties'*[38]

Political parties within Western democracies have been characterised by working within the framework of a State constitution that transcends and limits what they can do once elected to positions of power. Political parties with Totalitarian intent may use such Constitutions to gain power. However, once in power they seek to extend that power in a way that denies the Constitution, supplanting it with one that enshrines their own ideology. Thus Hitler wrote that *'The constitution gives us the ground on which to wage our battle, but not its aim.Of course, when we possess all constitutional rights we shall then mould the State into that form which we consider to be the right one'*[39].

For these reasons, I would say that the central political issue of our times is a constitutional one, having to do with the relationship of the Constitutional intent of a political party in relation to the constitution of the State. In a recent book written with specific reference to Great Britain[40], Robert Moss has carefully examined the way in which a number of Constitutional Democracies (he calls them Liberal Democracies) have collapsed under Totalitarian pressure. These include Fascist Italy and Nazi Germany before the Second World War, Czechoslovakia immediately after it and Chile in the 1970's. He also gives a careful study of the way in which Portugal was able to resist such a threat and progress from an Authoritarian to a Democratic situation. The basic issue is simply that Totalitarian political parties seek to use the democratic constitutional process as an initial means of gaining a measure of power. Once securing this foothold by legitimate means they seek to subvert the constitution in an effort to gain total control. In the course of the struggle that ensues - the resistance from the 'counter-revolutionares' - three outcomes are possible: a victory for the Revolution (Germany, Italy, Czechoslovakia) in which case a Totalitarian situation results; a victory for the 'counter-revolutionaries' which may either be in the form of an Authoritarian situation (Chile) or a Constitutional Democracy (Portugal). The lesson is that the Constitutional Democracy can only be maintained with vigilance and that even good constitutional safeguards are no guarantee of its protection. {28}

Chapter 3

'SLEEPING DOGS' and 'BROKEN OCTOBER'

In the last few years two novels have been written by New Zealand authors which place the real life struggles associated with the issues raised in the previous chapter well and truly upon New Zealand soil. I refer to 'Smith's Dream' by C.K. Stead[41], and 'Broken October: New Zealand 1985' by C. Harrison[42]. The former was made into a film entitled 'Sleeping Dogs' that received its first showing during 1977. Although the two novels both take their starting points from an economic crisis, the former is set within a situation in which authoritarian control is already in evidence, whilst the latter actually traces the possible course of a breakdown, during which New Zealand is transformed to the point of coming under authoritarian military rule. The factors contributing to this course of events - an economic crisis, American business interest, student protest, trade union militancy, a Maori uprising, strength and weakness within the government leadership, fundamental weaknesses in constitutional safeguards - all have a basis within the factual situation of New Zealand life. The author draws all these elements together in a way that may well be fictional and exaggerated, but is yet clearly anchored in the factual situation. As such I would suggest that it clearly exposes weaknesses within the fabric of New Zealand social and political life. The taking of emergency powers, the use of Police and Army force, Trade Union militancy, Maori discontent, suppression of civil liberties, imprisonment without trial, are all features of New Zealand's history that most would sooner pretend didn't exist, and, significantly for the thesis of the present essay, New Zealand has a constitutional arrangement that is both exceedingly weak and also little understood or appreciated by the majority of its citizens.

Recent governments may recognise certain dangerous features in this situation, but are generally loathe to recognise its full impact - for the simple reason that for them to admit basic weaknesses in constitutional safeguards could too easily be interpreted as admissions of failure on their part. However, I would claim that whilst these governments cannot be exempt from blame, the principle issues go beyond party politics or at least should do. With these features in mind, I would suggest that the aforementioned novels reveal inherent weaknesses in the New Zealand constitutional arrangement that, within the context of a crisis situation of even modest proportions, could result in major breakdowns as much by accident as by design. Hence, rather than dismissing these novels as 'mere fiction', I would suggest that the more appropriate response would be to engage in a careful analysis of the New Zealand situation in a way that took account of its history, its present trends and its constitutional weaknesses. Such a task is a big one and the intent of the present chapter is simply to open up some of the main lines along which such an enquiry might proceed. To this end I shall bear in mind both the theory of Constitutional Democracy developed in the previous chapter and the background of similar problems in other countries. {29}

THE COMMUNIST THREAT

There are two reasons why I think that it is important to begin with an analysis of the activities of 'the Left'. The first is that it is the avowed intent of the Far Left: to overthrow Constitutional Democracy in their effort to establish a Socialism involving State ownership and control of the means of production. The second is that New Zealand has long been a country in which 'the fear of communism' has been able to breed an explanation for protest, discontent and strike action[43]. During the long period of the Emergency Regulations occasioned by the 1951 Waterfront Strike, for example, this fear was probably the main reason why public opinion was so much against the Watersider Worker's Union without ever having heard their side of the case[44]. It should be remembered that a climate in which the finding of scapegoats to divert attention from the need to give straight answers to deep grievances breeds another kind of constitutional breakdown. For these and other reasons it is of some importance to understand the tactics of the various dissident groups against the general background of communist takeover in order to be able to assess such threats within

New Zealand.

There are two classical formulations in respect to the way a revolutionary, group has sought to seize political power by insurrection. The first has been by means of a direct attempt to provoke a crisis situation by committing some violent or near-violent action that is designed to 'bring society to its knees'. The second has been by means of indirect attempts to support the oppressed and to explain their grievances in the terms of an irreconcilable class struggle, thereby giving leadership and support to the process of social and economic progress. The former was championed by the Anarchists and Populists, and has received increasing attention during recent years, partly as a result of the activities of the New Left and partly as a result of the activities of such groups as the Baader-Meinhopf and the Red Brigade, with their hijackings, kidnappings and urban guerrilla warfare. The latter, indirect approach, was the one favoured by Marx and Lenin. However, the important distinction between these two approaches is apt to blur during what is deemed to be a 'period of revolutionary overthrow', a feature which, together with that of the role of the party, has placed Lenin at the beginning of the growing trend toward the opportunistic guerilla activity now evident in many parts of the world[45]. In this connection. there is a further point of some significance to be borne in mind. I refer to the difference between industrial and political militancy. To suspect militant industrial action as necessarily having political, let alone communist objectives, is quite false. Indeed the Anarcho-Syndicalist tradition of militancy was initially quite scornful of all attempts on the part of workers to improve their lot by political means. They advocated industrial action for industrial ends. Then again, a communist standpoint with regard to militant industrial action would not be one that would advocate industrial action for political ends. It rather seeks to support legitimate industrial grievances in a way that could have political implications of the social conditions are right. {30}

As I have already indicated in the previous chapter, there is a third method by which a revolutionary group may seek to gain political power. I refer to that involving a legitimate use of the democratic process that was rather difficult to envisage by Marx and Lenin, despite the fact that the former believed that it was possible for socialism, as he understood it, to develop by means of the democratic process, in those few countries that were endowed with good constitutional institutions in his time - Britain, Holland and the United States. The big questions that were left unanswered by Marx were those relating to the political future of such institutions once socialism had shown some initial development, and the response to this question has ever since been a long-standing debate between Communists and Social Democrats. The major issue is constitutional, with the former taking the view that constitutional democratic institutions are convenient, but are of little consequence in securing the greater goal of socialism, whilst the latter have generally sought to protect these institutions, along with a non-State mode of ownership and a free Trade Union movement as a matter of principle. In the attempts to subvert and misuse constitutional democratic institutions in this way, however, there is little or no difference between Communists, Fascists or Nazis. The examples of Germany, Italy, Czechoslovakia, Portugal and Chile already referred to in the previous chapter are very similar in this respect, involving the unconstitutional use of power by groups or individuals possessing power within what is basically a constitutional democratic arrangement.

Today there are a number of countries whose politics fall within the general orbit of Constitutional Democracy, but yet have a Communist presence of some strength working within the framework of their institutions. I refer, for example, to the Communist parties and associated Trade Unions (Trade Union life functions according to a pluralism of principled standpoints in both countries) operating in France and Italy, and to the increasingly strong Communist component within the Labour Party of Great Britain, greatly strengthened by its

ties with a Trade Union Congress that is even more under the influence of a Communist leadership. It is important to consider the potential threat to Constitutional Democracy posed by this presence, a matter which I shall do briefly by way of a review of the course of events in Chile. This is especially significant in view of the way in which the outcome in this country tends to lend support to those whose sympathies lie left of centre.

In this connection, an initial comparison with Portugal is instructive: in 1970 Portugal was in an Authoritarian situation and since that time has moved toward a Constitutional Democracy of a predominantly Social Democratic variety. Chile, at the time that Allende assumed power in 1970, was already a State of this general character. Three years later it came under the Authoritarian terror of General Pinochet. The account of this happening generally accepted in circles left of centre has been summarised as follows:

> *Allende was a democratic chief of state, brought to power by popular suffrage; who respected the Chilean Constitution but who from the start ran into opposition from the Right, the any and American interests. From abroad, the big American corporations he had. nationalised, aided by the CIA, instigated the social and economic difficulties that propelled Chile into inflation, want and chaos. At home, Fascist elements in the army and the congress, far less representative of the people's true aspirations than the elected president, used these artificially provoked troubles as a pretext to drown in blood a leftist experiment that they had never accepted, and to abolish democracy'.*[46] {31}

However, if these events are examined more carefully it is apparent that this assessment is quite false. First, Allende did not come to power on a tide of popular opinion. He gained just over a third of the popular vote in a three-way presidential contest, a situation that gave the constitutional final choice of president to Congress, which, as the legislative power, had the opportunity to choose between the. two leading candidates. Despite the fact that Congress, as a body, was far from being predominantly supportive of Allende's party, it choseAllende for president, and, moreover, largely through the Christian Democratic centre, gave a majority support to Allende, during the early period of his office. Secondly, the crumbling of the Chilean economy was as much due to internal mismanagement and the rigid following of a nationalization programme as to the actions of powers hostile to Allende[47]. Finally, and in many ways most significantly, far from abiding by Chile's democratic constitution, Allende flouted it at many points. However, the latter was not of a Parliamentary variety with the result that the Legislature had no power to oust the Executive. However, in the legal proceedings taken out against Allende, the Supreme Court found Allende guilty of enumerable charges of violating the Constitution, a feature which has been described as follows:

> *'In the Spring of 1973, Allende was accused of the same violations of his country's institutions that Nixon was to be charged with a year later. But Nixon was forced to resign though he had been re-elected two years earlier with a large majority while Allende continued to govern in defiance of the legislative and judicial powers*[48].

In this situation there are strong grounds for concluding that Allende should have stepped down from office, and his failure to do so can only be construed as a further violation. of the Constitution. In this situation it became increasingly apparent to the forces who were opposed to Allende that he and his. supporters were intent upon nothing less than a total seizure of power and that the only means of removing him from office was by force. Thus, with the Constitution already in tatters, two powerful opposing forces were determined to gain a power that was well-nigh total. The collapse of Constitutional Democracy was almost

inevitable, whichever side gained this power. To portray Allende as one concerned to uphold the Constitution is a major error in under-standing the course of events that led to the establishment of Pinochet's regime. In a struggle between Totalitarian and Authoritarian forces, it is invariably liberty and justice that suffer. For this Allende shares the guilt with Pinochet.

The events in Chile have important implications for those European countries that have a significant Communist presence within the working of their institutions, and it is not surprising that this theme has been the major one in several books dealing with European politics in the late 1970's. Notable in this respect has been the contribution from two authors of Social Democratic persuasion. Jean-Francois Revel in 'The Totalitarian Temptation'[49], has written on the theme with specific reference to France and Italy, whilst the former British Labour M.P. Woodrow Wyatt, in 'What's Left of the Labour Party'[50], has dealt with it in reference to Great Britain. Both authors are very critical of the continued attempts of Social Democrats in cooperating with and in failing to criticise Communists. Within the French context, Revel refers to the continued efforts of the Socialist Party in forming an alliance with the Communist Party, whilst in Britain Wyatt claims that it has been dangerous for Democracy to vote Labour since 1970. The reason is that the power {32} of the far Left in the Labour Party has grown to such an extent that, if the present programme of the Party were to be carried through, it would make Britain look increasingly like an Eastern European State. His book attempts to trace the way in which this situation has come about since the Second World War, citing the death of Hugh Gaitskell and his replacement by Harold Wilson as a major turning point. The latter's ambivalence, together with the Communist leadership in key Trade Unions, and the block-voting of the latter at Labour Party Conferences, has led to the present situation.

In Britain, especially, the threat to Constitutional Democracy from the forces of the Far Left is, of course, to be compared with the increasing influence of the National Front and its ugly Para-Military Face. The latter, should it continue to gain public support, would constitute an even greater threat. However, within the foreseeable future, it is obvious that because of their relationship to the Labour Party and to the Trade Union Movement, the forces of the Far Left are in a far stronger position to exercise political power in a way that threatens the principles of Constitutional Democracy, a feature which is emphasised by a number of British commentators on the subject[51].

THE NEW ZEALAND SITUATION

In the light of the above analysis of the ways and means of Communist activity, I shall try to give some assessment of this threat within the New Zealand context. For Communists or revolutionary socialists to be able to use the democratic process. as a means of gaining a footage of political power, it is necessary that they have some organized means of gaining that political power. In this respect, a comparison of New Zealand with France and Great Britain is very instructive. The numerical strength of organized political parties with a revolutionary socialist objective in New Zealand is exceedingly small compared with France or Italy. As such they have little or no prospect of securing any Parliamentary representation in the foreseeable future, and even if they were to achieve such representation, it would be most unlikely that it would have any effect. There are also some very important organizational and ideological differences from the situation that pertains in Great Britain. There are two main reasons for the recent developments of the Left wing influence in the Labour Party in Great Britain, both of which are absent in New Zealand. The first is that both the Labour Party and the Trade Union Congress continue to have 'the socialist ownership of the means of production' as written objectives of their Constitution. The second is the continuing close organizational link between the T.U.C. and the Labour Party, by means of

which, strong Communist leadership within the T.U.C. is able to exercise block-voting rights in the formation of Labour Party policy. These two features enable a, strong and able grouping of Left-wingers to use constitutional means of furthering their objectives in a way that is contrary to the wishes of the majority of Labour party members and supporters.

As the New Zealand Labour Party sought to broaden its electoral appeal, it has gradually retreated from its original objective of 'securing a socialist ownership of the means of production'. By 1933 the Party's manifesto made virtually no mention of any socialist objective, and, finally in 1951, the Labour Party Conference decided to formally abandon this objective. Since 1974 the party's objective has been largely to 'promote and protect the freedom and welfare of the people and to educate the public in the principles of democratic socialism, and economic and social co-operation'. Moreover, {33} the FOL's replacement of its socialist objective actually preceded the Labour Party's by two years, with subsequent efforts at its reinstatement being clearly rebutted[52].

Moreover, unlike their British counterparts, New Zealand Trade Unions do not 'sponsor' Labour Party election candidates. There has also been a steady change in the relationship between the Labour Party and the FOL, one that makes it much more difficult for the one to directly influence the policy of the other. In this respect the differing personalities and standpoints within the FOL and the Labour Party during the '51 Waterfront Strike have undoubtedly contributed a great deal to the growth of this gap between 'the two wings of the Labour movement'[53]. A corollary to these features has been the growth, within the Labour Party, of a predominantly pragmatic variant of Social Democracy that scarcely uses the words 'capitalism' or 'socialism', and which leads one author to comment that 'though the possibility of its ultimate rebirth can not be excluded, working-class politics in New Zealand, at least as represented by the Labour Party, has simply expired'[54]. Thus the trend in New Zealand has been exactly the reverse of that which has occurred in Great Britain, and I am forced to the conclusion that New Zealand has little or no immediate threat of a 'Communist takeover' through an abuse of the electoral process. For this to occur, there would either have to be a considerable growth in support for the political parties committed to revolutionary socialism or a change in the constitutional objectives of the Labour Party that would permit Left-wingers to press their viewpoint.

What are the possibilities of a Bolshevist-style takeover via a General Strike? The Trade Union movement in New Zealand, as in almost every other country enjoying a measure of civil liberty, has been caught up in the problems of industrial conflict. Although this is to a degree due to the problem of union 'militancy' it should be remembered that there are a large number of factors involved in such conflict, many of which are initiated by parties other than the Trade Unions[55]. Moreover, it would be quite erroneous to trace 'militant' tactics to a 'communist plot' that had a concerted attempt to take over political power in Bolshevist style. Rather it finds its roots in a greatly watered down Anarcho-Syndicalist strand of Trade Union activisim. This was the stand, for example, of the early 'Red' Federation of Labour before and during the First World War. Significantly, their tactics were designed toachieve the industrial ends of better working conditions and higher wages by means of industrial industrial action, taking the view that all political action for these ends was 'spineless and ineffective'. Although, since the 1913 Waterfront Strike, New Zealand Unions have rarely adopted such an anti-political stance, it is nevertheless the case that much of the militancy has remained in this vein, with varying attempts on the part of the Government and of the F.O.L. to handle it. The attitude of the militants has generally been one of a disbelief in the compulsory conciliation and arbitration machinery set up by the I.C. and A. Act of 1895 as an effective means of raising their standards of pay and working conditions, desiring in its stead a means of direct bargaining together with the use of the strike weapon. As H. Roth has pointed out in

his study of Trade Unions in New Zealand, the leaders of the '51 Waterfront Strike were more indebted to the tradition of anarcho-syndicalism than to any desire to support a communist takeover[56]. {34}

Moreover, the fact that a number of people involved in that strike have since risen to prominence in other unions, is significant for the style and intent of the militancy that has developed in more recent years. The genuine Communist element in Trade Union life in New Zealand has always been and, despite the influence of a number of very able members of the Socialist Unity Party in Trade Union leadership, remains, small. More importantly, it should be remembered that the genuine political influence sought by Communists through industrial action is not achieved by inciting such action for immediate political purposes. Rather, it is achieved by getting in behind and supporting existing grievances in a way that seeks to expose their social and economic causes, thereby seeking to gain the political support of the workers. In this respect the growing militancy in New Zealand, both within trade unions and elsewhere, is not part of a deliberate communist 'plot'. It marks a certain mode of response to an economic and social situation in which the tactics of 'direct action' have proved 'more effective' in getting what is desired. As such one may lament the selfish sectional interest and lawlessness that such attitudes involve. However, to account for them by Communist infiltration is merely trying to find a scapegoat. In such a situation, the threat of Communism is not the cause of the militancy, but rather in how Communists use it to extend these influences, if not their power. However, in the context of the complexities of historical crisis, it is invariably the case that people look to organizational assistance to meet their problems. As such the swollen hammerhead of the State is just as important a contender to facilitate constitutional breakdown as any activities by the revolutionary Left.

My conclusion, therefore, is that whilst New Zealand has a far from insignificant Communist presence, it is one that has yet to build a significant industrial or political footing to enable it to control the course of events in any significant way. Their present mode of operation is therefore by and large confined to an activity of getting in behind existing grievances in Labour relations, economic hardship, racial injustice and the like, seeking to expose the underlying class-conflict that produces the problems and offering Socialist solutions to them. In this respect New Zealand has three small Communist parties - the pro-Russian 'Socialist Unity Party', the Maoist 'Communist Party' and the Trotskyist 'Socialist Action League'. The S.U.P. has a number of active Trade Union leaders, whilst the C.P. confines its trade union activities to the rank and file. The Maoists and the Troskyites are both active on University Campuses. The latter are especially active in supporting the struggles for Maori Land, and for Maori Nationalism. Although the support for these groups may be slowly growing, it would be a mistake to suppose that the growth of militancy in New Zealand was caused by their activities. Communists are not anarchists - at least not until they can see some real prospect of revolutionary overthrow. Until that situation develops, their tactics are designed to show up the inadequacies of 'the more respectable parties', thereby seeking to gain support for an idealistic Socialist solution once the 'capitalist system' has been overthrown.

However, the Communist threat has another side to it. I refer to attempts by political leaders to explain away criticism, dissidence and grievances by minority groups as due to communist agitation. The approach to the Bastion Point protest and evacuation on the part of the National Government during May and June 1978 was typical in this respect. The allegations made to the effect that because Communists were present and supportive of these grievances they were therefore responsible for initiating them are merely adding fuel {35} to the fire. They do this in two ways. First by encouraging an already credulous populous to believe that New Zealand is subject to an extensive Communist threat, thus laying the basis for public support should the Government need to claim Emergency Powers. Second by further

alienating those who have had their pleas for a just settlement to their grievances rebuffed and rejected with the banter of a tiled Scare'. Attacking Communists for getting behind such issues, or attacking others because they associate with Communists in their sympathetic support for such issues simply attempts to shift the attention away from the issues to the stance of the personalities. To those with a real sense of injustice, the consequent failure to actually address the points of grievance simply acts as a confirmation that the more 'respectable' parties are not interested in their grievances, and that the real problem is therefore 'the system', which needs to be over-thrown. As a result they are the more likely to lend their support to the Communist parties.

Thus, although the threat from Communism in New Zealand should not be dismissed, it should be recognised as a threat that arises as much from what others think they do as to what they in fact do. As such it is but a contributing factor to a wider problem.

WEAKNESSES IN THE NEW ZEALAND CONSTITUTIONAL SITUATION

To appreciate something of this wider problem, we need to examine the de facto character of the New Zealand constitutional situation with some care. This I shall try to do with reference to the theory of Constitutional Democracy that I began to develop in Chapter Two. There I argued that a Constitutional Democracy was characterised by four main features:

i) a limited as opposed to a totalitarian State
ii) a pluralist as opposed to an established life-principle directing the life of the nation.
iii) a democratic as opposed to an authoritarian mode of appointment and exercise of office.
iv) a divided as opposed to a concentrated sovereignty in the exercise of power by the State.

Of these (i) and (ii) are centrally related to the way in which the State relates to non-political spheres of life - labour, business, arts, church, family, marriage, education etc. - whilst (iii) and (iv) are centrally related to the way in which a State is organized so as to maintain its continuity of power over a given area. The State should exercise this power in a way that establishes and maintains justice and liberty within the social fabric, but the precise way in which a State will seek to achieve this will vary greatly according to political philosophy and to specific conditions. Generally speaking, however, Liberal Democrats, Social Democrats and Christian Democrats all subscribe to some variant of these principles, principles which, by and large, are rejected by Communists, Fascists and Anarchists. With regard to the important question of the legal protection of a constitutional state of affairs of this general character, I would suggest that in respect to (i) and (ii) it is the task of a Dill of Rights (or what I prefer to call a Charter of Liberties and Obligations) to set out the kinds of liberties and obligations that a State will endeavour to maintain for its citizens. {36}

In respect to (iii) and (iv) it is the task of constitutional law together with institutional checks and balances to protect the form of the State from abuse from both within and without.

With all this in mind, I shall examine the weaknesses of the New Zealand Constitutional situation under three headings: Limits and Alternatives, covering the issues of the limitation of State power and Pluralism of Life principle; Democracy and Sovereignty, covering the issues of democratic appointment and the exercise of State power; Safeguards, covering the issues of the legal and institutional protection of the Constitution.

(i) Limits and Alternatives

Whilst there are many ways in which the limits of State power and of pluralism are the domain of party politics, there are some fundamental matters of justice and liberty that should enjoy some measure of protection from the executive and legislative programmes of political parties. In this connection, New Zealand, unlike some other countries, has no Bill of Rights or Charter of Liberties and Obligations having the legal power to call into question legislation or executive programmes. On the other hand, New Zealand is the heir of an English tradition in which the coronation of the monarch has been connected with the ratification of fundamental liberties in return for an allegiance to the crown, a tradition which, when abused by King John, led to a formalisation of such liberties and obligations in the extended documents known as Magna Carta. In addition, New Zealand is the heir of the Treaty of Waitangi, a document usually understood as providing the basis for the obligations, land rights, and general liberties of its Maori community in relation, to the Crown.

To illustrate the present day significance of this heritage in a way that does not venture into abstractions, I shall briefly comment upon three major areas of State involvement in New Zealand life - Maori identity and Maori land; economic life in general and Trade Unions in particular; and education. In each of these areas the questions of the limits of State power and of pluralist as opposed to an established Life-principle has been and continues to be contentious and problematic in ways that deeply affect the fundamental issues of justice and liberty for all citizens. Bastion Point, Maori Land, dissident and alienated Maori youth, and the whole range of problems associated with Maori identity are all issues that have deep roots that go back to Waitangi, to the quest for identity in the King movement, to the meaning of the sovereignty of British rule, to the Maori land wars and the Land Confiscation Acts.

The issues of Trade Union militancy and of Government attempts to control it by legislation, even at the expense of breaking up an existing organization, have deep roots in New Zealand history, going back to the Maritime Strike of 1890, the I.C. and A. Act of 1895, and the Waterfront Strikes of 1913 and 1951.

The State Education system that has been developed in New Zealand since 1877, has grown under the organic principle of 'free, secular and compulsory'. Initially this was to provide a system of education that would supplement but not supplant the teaching of the home and the church. In this way it would provide an education of basic skills that were common to all sections of the community in a way that did not give richer people any advantage. To this end the secular clause was designed to keep 'contentious and divisive' issues out of the school curriculum. Schools that did not fall within the orbit of the State system were given very little by way of State assistance. {37}

However, in recent years those schools which have sought to provide alternatives to the State Education system have been having great financial problems. In addition it has become evident that there has been a great decline in the basic education for living being provided by the home and church for a great majority of New Zealand children. The State has responded to these problems with the Private Schools Integration Act of 1975 and has published the 'Johnson Report'[57], which advocates meeting the latter problem by introducing programmes for teaching, 'values', 'human development' and 'non-sectarian spirituality'[58]. Although these moves may seem small steps in an evolutionary process, when compared with the situation in which the 1877 Act was first drawn up, their present implementation involves a significant change in policy - one that has the danger of entrenching the overall control of education within the orbit of the State in such a way as to establish a certain Life-principle, thereby making it extremely difficult for any group of people to develop education along lines which are in conflict with this principle.

Each of these areas of New Zealand life raises fundamental questions as to the limits of the power of the State and of pluralism of Life-principle. As the situation stands, there would appear to be little opportunity for Maoris to live out their cultural identity in a way that was not a mere addendum to the dominant Anglo-Saxon culture, for workers 'to establish and join organizations of their own choosing'[59] , or for parents to choose an education of a distinctive character that they wish for their children[60]. Moreover, given the preoccupation of the Government with the management of the economy, it is unlikely to take much initiative in changing the well-worn paths in these areas. However, the issues they raise are of fundamental significance for the future of Constitutional Democracy in New Zealand. Indeed, in this respect it is somewhat ironic that the nationalization of industry and farming has never really been an issue in New Zealand. It is ironic because this cardinal feature of 'socialism' would seem to be the only area of New Zealand life in which the State does not hold the great predominance of power. {38}

(ii) Democracy and Sovereignty

It is well known that New Zealand was one of the first countries in the world to develop a universal suffrage, and thereby qualify for one of the important features of being called a 'modern democracy'[61]. However, as I have already pointed out in the previous chapter, there is much more to the maintenance of Constitutional Democracy than the opportunity to exercise a free vote every three years; indeed, this particular feature is quite consistent with some forms of Totalitarian Democracy. Having tried to point out some of the ways in which the ideal of Constitutional Democracy is endangered in respect to the limitation of State power, and of pluralism of Life-principle, I shall now attempt to examine some of the ways in which this ideal is threatened in respect to the mode of appointment and the centralization of sovereignty. In the main I shall be content to review the points already made in Chapter One on this matter.

New Zealand inherits a constitutional settlement from Britain which has had as its organic principle 'the sovereignty of Parliament in its legislative function'. This principle developed in the eighteenth century in a situation in which the unity of the British nation was powerfully identified in the institutions of the Monarch, the Church, the Lords and the Commons. Although political factions may have existed, they were definitely subordinated to the unity of the nation as maintained by the aforementioned institutions. However, there have been great changes both in New Zealand and in Great Britain since the early 1850's, when the former was granted a measure of self-government. The 'Christian' establishment maintained by the Anglican Church in England (and others elsewhere) has been replaced by a 'Liberal' establishment that is maintained 'by a State-School system; the growth in the democratisation of power has been accompanied by a slow but steady change in the nature of 'the Queen's Sovereignty'. Although the monarch may continue to have a formal power that adds a sense of pageantry and dignity to the life of the nation, it now has very little to do with the actual exercise of political power. Moreover, in this connection the exercise of the latter through the effective division of sovereignty that once existed in the institutions of Parliament, Cabinet and Courts has since been threatened in a way that amounts to a major departure from the de jure constitutional principle that has guided the British version of Parliamentary democracy since the late eighteenth century. Whilst this is a problem that is general to all modern forms of Westminster Parliamentary democracy, the centralization of Government, the two-party system, and the single chamber legislature existing in New Zealand expose it more clearly than else-where. I have already tried to indicate the way in which this state of affairs is now operative in New Zealand in the first chapter of the present essay. There I argued that de facto sovereignty exists within the complex of Party-Caucus-Cabinet-Prime Minister-Administrative Bureaucracy, with Parliament playing a secondary, though still important role.

However, the major role that Parliament plays is significant. That role is one that can best be described as offering the opportunity for the legislative and executive programmes of the ruling party to be opened to opposition and public scrutiny. Whilst this is a very important function, it cannot disguise the fact that the bulk of the activity of Parliament is quite predictable. All the Government sponsored Bills are passed whilst the vast majority of private members Bills are defeated. Regardless of their implications, all actions of Cabinet can count upon a majority support of the party Caucus to withstand any no-confidence vote by the opposition. But perhaps the most important point to be made is that the all-or-nothing 'prize' given to the {39} 'winning party' upon the outcome of a three-yearly election is one that brings the supposed Constitutional Democratic form of Government within the orbit of the Totalitarian type - one or other political party has complete control of both Cabinet and Parliament, and the State as a whole has a monopoly of power over national life.

It may well be true that neither New Zealand major political party has the attainment of absolute power as a part of its constitution, and that the maintenance of popular elections has a constitutional legal sanction, requiring 75% majority for its amendment. Nonetheless, the electorate is always confronted with a lock, stock and barrel situation, the 'winning' of which is interpreted by the party as implying a mandate for the whole of its manifesto, and the resulting control of both executive and legislative power by the ruling party in this way has a great deal to do with the failure to develop a consensus politics, tending rather to favour extremes on both sides[62]. I'm not suggesting that either of New Zealand's major political parties have a totalitarian intent; I'm simply drawing attention to the de-facto constitutional state of affairs. Indeed, I would claim that each major party has, in its own way, acknowledged this state of affairs and sought to use it in a way to gain votes - by implying that the other party has totalitarian intent. Thus, the National Party, during its 1975 Election Campaign, had a T.V. sequence that saw New Zealand gobbled up by the Stateunder the Labour Party, ending up with Cossacks dancing across the patch of red in South Pacific. It used the same innuendo in its 1977 publicity brochure entitled, 'The Only Choice', stating that because the National Party put the emphasis upon the individual, whereas Labour put it upon the State, there was only one choice - namely National. On the other side, Mr. J. Knox, of F.O.L. addressed the 1978 Labour Party Conference accusing the 1975-78 National Government of taking the first steps in the development of any Fascist State in its efforts to smash the free Trade Union Movement, claiming that the Government's penal legislation had the single objective of taking away the rights of the Trade Union movement by State Interference[63] Thus both sides recognise the potential power granted to the other by virtue of the present de-facto state of affairs, and seek to offset it by advising people to vote for them as the means of maintaining their liberty. One of the ways in which such a situation could degenerate into Government by sectional interest for sectional interest, sanctioned by the support of the majority, was hinted at in certain remarks by the leader of the National Party in his keynote address to the Party Conference on 30th July, 1978. It was significant that the key-note of his remarks were not addressed to principles of individual liberty, or to the virtues of capitalistic industry. They were addressed to the National party as that grouping of people who as a general spectrum of true New Zealanders, were differentiated from trendy intellectuals, Trade Unionists and other dissidents. A growth of an emphasis of this kind of nationalism in conjunction with the weaknesses observed in the SIS by Sir Guy Powles[64], could all too easily develop into a situation in which opposition was silenced in ways that were antithetic to the principles of Constitutional Democracy. Indeed it is ironic that whilst the main spokesmen enunciating these principles in Great Britain today are from the Conservative Party, that, with some significant back-bench exceptions, the leadership of its apparent ally in New Zealand, the National Party, would seem to have less insight into these {40} principles than the Labour Party, the party, which in Great Britain is the most culpable

in bringing the existing constitution into disrepute[65].

iii) Safeguards

Chile, Germany, and Czechoslovakia all had legal and institutional safeguards that were designed to prevent democratic breakdown. Many have argued from the inability of these safeguards to prevent the breakdowns that have occurred in these countries to the conclusion that such safeguards are ineffective and are therefore unnecessary. While I believe that this argument has an important point, I consider the conclusion to be false. If I were making the claim that good constitutional safeguards were always a guarantee against the breakdown of Constitutional Democracy, then the cited exceptions would be sufficient to refute my claim. However, the infallibility of constitutional safeguards is not what is at stake. Indeed I would argue that if there is a very powerful political grouping that is dedicated to achieving totalitarian control, then no constitutional safeguards can prevent the breakdown. If the grouping already possesses the political and military power, then all resistance to their ends is readily suppressed. If the grouping does not actually possess the political power but commands considerable military strength then they may seek to use a combination of constitutional and unconstitutional means to increase their power, finally coming to the point of a showdown in their quest for control. The resulting conflict usually sees a totalitarian or authoritarian situation develop, and the cited example are illustrations of the way such power conflicts have contributed to the life of the twentieth century.

The situation in which constitutional safeguards are important is not so much that in which there are powerful groupings with definite totalitarian intent, but rather that in which individuals and minority groupings can suffer injustice and loss of liberty because of the way in which those who hold power seek to retain it by resorting to fair means or foul. In this sense a good constitutional arrangement is one that has the effect of being able to root out attempts at the elicit use of power; a bad constitutional arrangement allows the unjust use of power to be covered up, placing individual or party self-interest above integrity, justice and liberty. Thus, although the Watergate scandal in the United States in 1973-74 may have brought out a lot of dirty washing and thereby placed America in international disrepute, it was precisely because of a good constitutional arrangement that allegations were able to be investigated and published in a way that those in power were unable to suppress. By the maintenance of a divided sovereignty in an open and democratic mode of government all attempts at the misuse of power may be checked and the break-down of Constitutional Democracy minimized, if not infallibly prevented.

With this view of constitutional safeguards in mind, I would like to argue that New Zealand should be considered the weakest and therefore in many ways the most vulnerable of all the 'Western democracies' at this point. {41}

I say this for the following four reasons:

a) Due to its demographic and geographic size, New Zealand has no State Federal division in its politics, as is the case, for example, with Australia, Canada and the United States. In this respect, even Great Britain and the smaller European countries have strengths which New Zealand does not share, with the various national groupings in Great Britain, for example, continuing to exercise a strong force that has this de facto effect. Overall demographic size, in this respect, cannot be used as the sole argument in this matter, for when New Zealand was first granted a measure of self-government, considerable power was given to the provincial governments. The present situation is one in which any mode of regional government is having difficulty

in maintaining its viability.

b) New Zealand has, since 1950, had no division with its houses of Parliament. This stands in contrast to all the other examples of the Western democratic experiment, and even if the Upper Houses in Australia and Great Britain are coming under criticism from many quarters[66], there is at the same time a recognition that its complete abolition could have the effect of establishing an 'elective dictatorship'[67].

c) New Zealand has no written constitution or Bill of Rights. The only other Western country sharing this distinction is Great Britain, in whose footsteps New Zealand has faithfully trodden. With regard to the comparison of New Zealand with Great Britain in this respect there are three points to be made. The first is that Great Britain has other constitutional safeguards that are not shared by New Zealand. In addition to those just mentioned there is the fact that although the British House of Commons may be tailor made for a two-party system, there are nonetheless a number of minor parties, especially the Liberal Party, whose representation, as illustrated during 1977-78, can command a significant balance of power that curtails some of the more extreme features of the Government of one particular party. The second is the fact that Britain has a considerably longer experience of constitutional settlements than New Zealand, a feature which is of some importance when a constitution is heavily dependent upon conventions whose roots lie deeply in tradition. The monarchy is a good case to illustrate the point here. In Britain the constitutional task of oversight and the symbolic maintenance of national unity falling to the monarch, continue to be effectively removed from the control of the Executive, Administrative, Legislative and Judicial branches of State in a way that is not the case with a Governor-General. This is so because the monarchy continues to enjoy a surprising measure of public affection and support. Finally, there are an increasing number of voices in Britain itself speaking out about the weaknesses of the {42} present British Constitutional settlement[68].

d) Finally, there is a basic legal weakness in much of the Constitutional Law that New Zealand does have. I refer, in particular, to the Electoral Act of 1956. This Act is the only one ever passed by the New Zealand Parliament in which amendment by the ordinary legislative process is prohibited. Its revision requires seventy-five percent Parliamentary support or a majority decision in a national referendum. However, as many lawyers have pointed out, this entrenchment is not a 'double entrenchment'. As a consequence, a bare Parliamentary majority that wanted to amend or repeal any of the entrenched provisions could give itself the power to do so simply by repealing the relevant section from the Act[69].

OBJECTIONS and COUNTER-OBJECTIONS

It is usually argued, of course, that all these weaknesses are offset by the power of political pressure groups, by the power of the various statutory bodies, by internal discipline within political parties, and by the electorate exercising its democratic right every three years. However, whilst there is an undoubted validity to these claims, I have three objections to them.

a) In the first place, such solutions to the maintenance of constitutional justice and liberty amount to little more than placing the whole question of constitutional legality into the arena of power politics in a way that presumes an effective rule of law. For this reason I would suggest that constitutional law is most important in situations in which the rule of law is threatened by the actions of power groups. In extreme cases such as those of Germany in the 1930's, Czechoslovakia in the late 1940's and in Chile in the 1970's Constitutional Law is unable to prevent the fundamental breakdown of the Constitutional settlement. There are many situations in which the

threat to the rule of law is not of the extreme kind just cited. I refer especially to situations in which the executive, administrative, or legislative branch of State sides against a minority grouping in such a way as to violate their sense of fundamental justice and liberty. As a result of their treatment at the hands of the State, and having no means of constitutional legal redress, such groups are nowadays, quite unashamed to flout the law in general, and thus promote a situation in which the conflict between law and order and repression by the State is exacerbated. This sort of thing only needs to occur on a moderately large scale before a *de-facto* Authoritarian situation results. {43}

b) In the second place, by depending upon political pressure as a means of maintaining constitutional justice and liberty, the State is all too easily able to opt out of its responsibility of declaring and protecting the obligations and liberties of minority groups. The reverse side of the situation of extremely powerful political groupings concerned to subvert the State into its Totalitarian mould is that of the minority grouping wishing to claim its integrity against external pressure. Such groups usually have very little political power, and are therefore very vulnerable. One of the few ways in which they may be protected from the combined power of opposing groups acting together with the executive, administrative or legislative branch of State is by means of a Bill of Rights (or Charter of Liberties and Obligations) that has a legally entrenched or elevated status able to be brought to bear against the actions of these branches of State.

c) Thirdly, the possibility of the redress of a constitutional abnormality once it has taken place is an important matter that needs to be considered, again with special reference to minority groupings. The question of constitutional redress is very much one of restoring a basis of unity to the life of a nation. Once this unity has been fractured in a fundamental way, then political pressure may be brought to bear in a way that effectively destroys much of the constitutional liberty of one or other minority grouping favouring the more powerful ones. In the absence of any effective legal constitutional means of maintaining their justice and liberty, such groups can all too readily find their integrity threatened by the power of the State acting with the consent of the majority.

A BRIEF LOOK AT HISTORY

One does not have to look far to find ways in which these problems have already contributed to New Zealand's history. In Education, for example, the guiding principle of 'free, secular and compulsory' has functioned in such a way as to have made it very difficult for minority groups to promote a form of education that does not receive the label as narrow, 'sectarian' or upper class as opposed to the 'neutral and unbiased' variety provided by the State. Whilst this problem has had historical links with genuine religious bigotry between different Christian denominations[70] the issue has been mistakenly identified with the occurrence or nonoccurrence of such strife. The issue that I wish to draw attention to is simply the liberty (or the lack of it) for minority groupings to be able to provide a public education of quality that can contribute to the national life from a principled standpoint in an unbigoted manner. In this respect, little notice seems to have been taken of the way in which organizations like NZEI and PPTA have excluded teachers from 'Private Schools' from membership, and have at the same time vigorously campaigned for a mode of integration of the latter into the State-system upon a basis that would make it extremely difficult for the 'special character' to have an all-pervasive influence upon the life and curriculum of the school. Moreover, the actions of the State in conjunction with such bodies make it extremely difficult for new developments in 'alternative schools' seeking to be founded on a minority {44} principled standpoint to gain the assistance they deserve[71].

Since 1895, the Trade Union life of New Zealand has been dominated by the legal framework set by the I.C. and A. Act[72] legislation that was initially designed both to promote and support Unionism and also to prevent strikes. As a consequence, until the conclusion of 'the honeymoon' period of this Act with the Blackball Mine Workers Strike in 1908, New Zealand was hailed as 'a country without strikes' and, as such, the object of study by many notable figures within the International Labour Movement. However, during 1912 and 1913, it became abundantly clear that the legislation of the I.C. and A. Act could be used very effectively by a Government that was basically unsympathetic to Trade Unionism. The provisions of the Act did not make it compulsory for a Trade Union to register under the Act, and the rise of the 'Red reds' after 1908 saw an increasing preference on the part of the 'more militant' unions to pursue their activities by means of 'direct bargaining' and 'strike action' as preferable methods for securing better wages and working conditions over those of compulsory conciliation and arbitration. Under the I.C. and A. Act, however, any group of 15 workers can form a union, apply to the Arbitration Court for an award, with such an award extending to all workers in the industry in the district or, if the Court decides, to the whole country. Thus if the members of a union were to withdraw their registration from the Arbitration Court with the view to getting better working conditions by direct bargaining, 15 could register with the Court and accept conditions that would automatically be binding upon hundreds or thousands of workers. Similar consequences could follow if the Government were to de-register a Union under the terms of the same Act.

For these and other reasons the I.C. and A. Act has always had an in-built bias against pluralism of principled organization within Trade Union life in New Zealand, a feature which has been very significant in all the subsequent major conflicts between Trade Unions and the Government. In the 1951 Waterfront Strike, for example, the issue of the freedom for different principled stances toward Trade Union activity was one that divided the 'more militant' Trade Union Congress (T.U.C.) from the 'more moderate' F.O.L. The former drew upon the syndicalist heritage of 'the Red Feds' in seeking to by-pass the provisions of the I.C. and A. Act in favour of 'direct bargaining', whilst the latter {45} favoured working within the provisions of the Act. This, coupled with the desire of the leading figures within the F.O.L. to dominate and control the national Trade Union scene, led to the interesting situation in which the National Government, under the leadership of Holland and Sullivan was able to use the provisions of the I.C. and A. Act to break-up the powerful Watersider's Union, and foster the growth of sympathetic and smaller Port Unions in a way that virtually commanded the blessing of the F.O.L.[73]

The interesting thing is that the I.C. and A. Act has done very little to prevent strikes or to provide the encouragement to Trade Union activity that was the intent of its authors - Pember Reeves and Ballance. The addition of the compulsory clause by the Labour Government in 1936 may have made unions numerically larger. However, in combination with the clauses of the original Act and a history characterised by a lack of recognition being given to a pluralism of Trade Union principles, it has laid the Trade Union Movement open to the kind of abuses that have given some grounds for the overtures taken by the 1975-78 National Government in conducting ballots on Compulsory Unionism. I would suggest that the way through to a solution to these problems that would be fair by all parties would be for a ratification of the I.L.O. conventions. One of the consequences of such a move would be to open up the possibility of free organization in a way that allowed for a pluralism of principles, but did not involve the threat of interference by the State in the internal affairs of Trade Union activity.

New Zealand has frequently basked in the claim that its relations between Maoris and Pakehas could be taken as an example for race-relations throughout the world. Whilst there

have been and continue to he many excellent features of New Zealand life in this regard, there are many things that are apt to be forgotten in this sensitive matter. It is of some significance, for example, that during the last two decades historical scholarship of the Maori Wars in New Zealand has invariably concluded that it was the Europeans rather than the Maoris who were the aggressors[74]. There is, however, less agreement as to the motives for the aggression of the Europeans, with land acquisition, high-minded and bloody-minded European cultural superiority all figuring prominently. Significantly, the discussion of the causes of these wars and their relation to their legal justification in the eyes of both Colonial and Imperial Governments has drawn little comment from historians.

In the way that it has set out fundamental conditions for the relationships between Maoris. to the State governing New Zealand, the Treaty of Waitangi has often been compared with the Magna Carta. As signed in 1840, this Treaty has three main clauses: the first conceding sovereignty over New Zealand to the British Crown; the second providing for land rights to the Maoris, both individually and corporately, and for rights of land purchase to the British Crown; and the third for equal rights of British citizenship to Maori and Pakeha. Short of suggesting that the actions of Governors Browne and Grey were taken with an outright disregard for this agreement, the attitude of {46} the Colonial and Imperial Governments to the problems of the 1860's can only be construed in the terms of judging the Maoris of the Waikato to have failed to have abided by the terms of 'British Sovereignty' set in its first article. That these were the grounds upon which the initiative was taken is quite plain from Governor Grey's 'Declaration by the Governor to the Natives assembled at Nguaruawahia'[75], a summary of which is well expressed in the following words:

> *'By that treaty (of Waitangi) the Queen's name has become a protecting shade for the Maori's land, and will remain such, so long as the Maoris yield allegiance to Her Majesty, and live under Her Sovereignty; but no longer. Whenever the Maoris forfeit this protection, by setting aside the authority of the Queen and the law, the land will remain theirs so long only as they are strong enough to keep it: - might and not right, will become their sole title to possession'*[76].

It would appear that 'sovereignty' came to be understood by the Colonial and Imperial Governments as the acceptance by the Maoris of British law and of British institutions in a way that would give little right to cultural independence and self-determination to the Maori people over their land. However it is quite plain that this was not the understanding of 'British sovereignty' on the part of the Maoris and significantly, not that which can be legitimately drawn from the Maori of the Treaty of Waitangi[77]. However, whilst the Maoris of the King Movement were united in their opposition to this threat, there were two different strands to it: the one, symbolised by Wiremu Tamehana, focusing upon the positive concern for Maori identity in a way that would incorporate good features of European civilization, and seeking to work with and remain under the Queen's sovereignty as he understood it; the other, symbolised by Rewi Maniapoto, focusing upon an armed opposition to the Pakeha in a more traditional attempt to prove his 'mana' over his land. Nevertheless, as the situation developed between 1860 and 1885, it can be fairly said that the colonists came to view any and every attempt to resist Europeanization by Maoris as a threat to British sovereignty, and thereby to provide legitimate grounds for land annexation. Thus, in the absence of any legal power to protect the liberty of association of Maoris on their own lands for the purposes of developing their distinctive cultural identity, State power, with majority support was able, with the use of such Acts as the Land Confiscation Act of 1863 and the Individualization of Land Ownership Act of 1873 to ease the acquisition of land. The abuse of State power in this respect reached its height in the early 1880's, with reference to the attempt under Te Whiti and Tohu to maintain Maori land and cultural identity at Parihaka in Taranaki. Special Acts of Parliament

were passed to sanction the holding of several hundred Maoris prisoner without trial[78].

Such events may have had the backing of the majority and may have had the legal sanction of Parliament. They nevertheless constituted violations of the {47} freedom of association, freedom of assembly, freedom of movement and other civil liberties that should have been accorded to all British subjects. The bitterness caused by the injustice of this and other incidents, such as that associated with Rua in the Ureweras in 1914, has tended to be glossed over by a later period of good relationships between Maori and Pakeha, a period in which some of the injustices were redressed and in which the dominant leadership amongst Maoris was not one of emphasising a distinctive Maori identity. However, in more recent years there has been a renewed quest for Maori identity on the part of a significant minority of young Maori people in a way that many pakehas find threatening. Indeed in many ways the major significance of Bastion Point is its relationship to the history of the quest for Maori cultural identity and land rights in the face of attempts by the dominant culture to force them to conform. For this modern quest, as much as for the old, there is an important question as to the direction that it could take - that of Tamehana or of Maniapoto. If that of the latter is to be avoided, then suffice to say that perhaps greater attention should be given to assisting rather than opposing the genuine development of a Maori cultural identity upon land that can truly be called their own.

From these examples taken from Education, Trade Union Life and Maori land and culture, I would suggest that the fabric of New Zealand life has known the consequences of the lack of constitutional safeguards in ways that have continuing significance for the grievances that such denials of justice and liberty pass on to those affected. As such they continue to be a part of the present in a way that forms part of the threat to Constitutional Democracy in New Zealand.

THE THREAT TO CONSTITUTIONAL DEMOCRACY IN NEW ZEALAND

My conclusion from the above analysis is one that would suggest that whilst 'Broken October' and 'Sleeping Dogs' may be exaggerated, they do indeed point to genuine danger points within the de-facto state of affairs of New Zealand's constitutional setup. For this reason the tendencies which seek to dismiss such contributions as irrelevant or unpatriotic must be judged as an ostrich contribution to the problem[79], the major features of which I shall attempt to summarise by way of conclusion to the present chapter.

1. New Zealand has a highly centralized form of State that is deeply extended into the direct and indirect control of the affairs of the nation.
2. New Zealand has a form of sovereignty within the State that has a de jure justification founded upon a formal unlimited power conferred on Parliament acting in its legislative function and, largely as the result of the development of the Welfare State, and of the way political parties are now organized, a de facto situation in which the exercise of that power has become located within the complex of Political Party -Prime Minister-Cabinet-Caucus-Administrative Bureaucracy.
3. New Zealand has a cultural heritage that is very conformist, one that is apt to confuse pluralism with sectarianism, and thus all too ready to condemn those who do things differently from the majority. This feature, in conjunction with the previous two provides a climate in which the State, acting on the side of the majority, can all too easily do injustice to non-established minority groupings. {48}
4. New Zealand has the weakest Constitutional safeguards in the Western world.
5. New Zealand has both a worsening economic and a worsening social situation. The latter is characterised by such features as the decline of such values as the respect for persons and respect for the law.

The consequence of this state of affairs is, I believe, one that makes the dividing line between the constitutional form of democracy and the totalitarian or authoritarian variety extremely thin. Whilst tradition may place New Zealand well upon the side of the former, there is a steady but sure drift taking it toward the latter. It is in this respect that I would like to offer some further criticism of the view that would see 'communism as the major threat to our way of life'. The issue, I suggest, is not in the first instance one of communism; it is between a constitutional form of democracy and a totalitarian democracy or an elective authoritarianism. The constitutional settlement that New Zealand has inherited from Great Britain is one that has proved to have an Achilles heel, and may be exploited by political parties of any colour. In Britain, where the political forces of the Far Left are well organized in a way that enables them to exploit the de jure constitutional principle of the unlimited sovereignty of Parliament to their advantage, communism is indeed a very real threat to Constitutional Democracy. By contrast, the forces of the Far Left in New Zealand have, at the time of writing, very little political power to exploit the constitutional weaknesses in their favour. However, this does not stop the SIS and certain ranks within the National Party from viewing questions of security first and foremost as preventing the spread of communism. Without the steadfast adherence to the principles of Constitutional Democracy, anti-communism can become as dangerous to justice and liberty as its arch-enemy. It is for these reasons that the more likely form of constitutional breakdown in New Zealand within the foreseeable future, would result from the exercise of State-power under an anti-Communist Government having little insight into the principles of Constitutional Democracy against organized resistance by militant Maoris and militant Trade Unions. For such a threat to come from the direct exercise of political power from the Left, there would need to be both a considerable growth in the power of the Far Left within the Trade Union movement and an attempt on the part of the Labour Party to try and absorb it or cooperate with it in the interests of maintaining their political strength, the course which has, by and large, been followed in Great Britain. Irrespective of whether such developments transpire, however, the present drift is likely to continue unless the present constitutional arrangement is checked. {49}

Chapter 4

TOWARD A NEW CONSTITUTIONAL SETTLEMENT

Within the previous chapter I have sought to analyse the weaknesses of the New Zealand constitutional arrangement set against the background of the theory of Constitutional Democracy developed in Chapter 2 in a way that sets the symptoms reviewed in Chapter 1 in perspective. I have also sought to draw attention to the broader social and economic problems that could, together with these weaknesses, precipitate a breakdown in Constitutional Democracy as much by accident as by design. My purpose within the present chapter is first to deepen the analysis of the basic constitutional problem already alluded to in earlier chapters and subsequently to offer some suggestions as to how this might be dealt with in a new constitutional settlement designed to uphold the principles of Constitutional Democracy.

Usually in connection with a rider that would seek to expose the threat of those who apparently show some disrespect for its rule, politicians and lawyers are sometimes reported as referring to 'our way of life' being 'founded upon the rule of law', If such comments are meant to refer to the basic pillar of the British Constitution, then they are at best a half-truth. For, as Lord Hailsham has written in this connection *'of the two pillars of our constitution, the rule of law and the sovereignty of Parliament, it is the sovereignty of Parliament which is paramount in every case'*[80]. Similar reasons render it quite insufficient to point to the rule of

law as providing the pillar of New Zealand political life without pointing to the nature and extent of the way in which the law comes into force, and how it is viewed and treated by the Executive arm of State. In this matter there are two interrelated features involved. The first is that of the lack of any legal check upon the legislative power of Parliament; the second the way in which political parties are able to exploit the principle of the legislative sovereignty of Parliament to secure the control of the Executive and Legislature in a manner that can be broken only by 'the electorate exercising its democratic right every three years'. These two features are related because they refer to two different sides of the present doctrine that surrounds 'the Legislative Sovereignty of Parliament'. The lack of any legal check upon the legislative power of Parliament relates directly to the question of the law and its administration by the Judiciary whilst the power of political parties within and without Parliament relates directly to the relationship of Parliament to the power of the Executive and Administrative branches of State.

Whilst it is apparent that these problems go right to the heart of the organic principle of the British Constitution as New Zealand inherits it from the constitutional struggles of Seventeenth Century England, the last ten years have seen some significant changes of attitude on these matters, by some important voices both in New Zealand and in Great Britain. In 1968, as part of the Victoria University of Wellington series of lectures to celebrate the twentieth anniversary of the adoption of the Universal Declaration of Human Rights, Geoffrey Palmer gave a paper entitled 'A Bill of Rights for New Zealand?'. In it he wrote that *'the suggestion that New Zealand should have a Bill of Rights has been received with almost universal expressions of horror, especially in academic circles*[81], and proceeded to review the {50} main arguments that have been adduced against the adoption of such a feature into New Zealand political and legal life. These may be briefly summarised as follows:

i) A Bill of Rights with real teeth would have to be enforced through the Courts, thereby involving a fundamental redistribution of political power in New Zealand, features which the Courts in the author's judgment, are not likely to be able to easily or capably fulfill.
ii) Judicial review of this type is a characteristically American contribution to the science of government, significantly different from the British system that has nurtured New Zealand political life. In this respect it should be borne in mind that the American system has its own sec of problems.
iii) A Bill of Rights together with judicial review is moreover contrary to the New Zealand pragmatic way of doing things, and, in any case, need not provide an infallible protection for a society against overwhelming forces likely to restrict liberty.

However, in 1978, almost ten years later, the former Ombudsman, Sir Guy Fowles has written that *'the only basis for national unity, whether political or social, is the Rule of Law, and that this in turn depends upon the maintenance of human rights among us all. Our first concern should therefore be for the human rights of our own citizens. Over a long term, deep study should be given, publicly, to the ways in which we could create a new constitutional settlement. It has been established legal doctrine for years that we cannot have a constitution because we could always alter it too easily. That doctrine needs re-examining. This new settlement should make use of judicial power to keep within constitutional limits the legislative sovereignty of Parliament. It should use the Rule of Law to resolve the conflicts that arise between citizens and the State in the newly developing fields of administrative - legal activity, because it is in those fields that our quality of life in the late 20th century is emerging.*

Parliament, as the key institution of our democracy (which we call a parliamentary

democracy), is under great strain and appears incapable of reforming itself. There is now a need for action, before it is too late."[82].

Over this same period this view has also been receiving increasing attention in Great Britain, Thus, in 1969 Quitin Hogg is reported as having said that 'although he had for a very long time considered that written safeguards in a constitution were not really worth the paper they were written on' he had since changed his mind. Among the reasons for this he cited the need for constitutional provisions regionalized government and protection from parliamentary encroachment upon individual liberties, with many parliaments, in his opinion, not being able 'to recognise an important human right when they see one'[83]. As Lord Hailsham, he has reported similar comments in 1970[84], and has criticised the present British Constitutional arrangement as 'an elective dictatorship' in the Richard Dimbleby Lecture of 1976[85]. More recently he has published a book setting out the diagnosis and cure for the present problems of British Democracy[86]. {51}

The other major protagonist for these views within Great Britain over the last decade has been Lord Justice Scarman. In 1974 he was quoted as saying *'it is Parliament's sovereign power, more often than not exercised at the will of an executive sustained by an impregnable majority, that has brought about the modern imbalance in the legal system. The Common Law is no longer the strong, independent ally, but the servant of Parliament. A new Supreme Court which could be developed from the existing judicial Committee of the House of Lords and the Privy Council, would have power to invalidate legislation that was unconstitutional and restrain anyone, citizen, Government, even Parliament itself from acting unconstitutionally"*[87].

Taking the contributions and comments from such quarters in conjunction with the problems already exposed in this essay, it would seem to me quite irresponsible not to take a long hard look at the British system of Parliamentary democracy, especially as it presently functions in New Zealand and Great Britain. I shall attempt to do this within the present chapter, taking the opportunity to examine the issues with particular reference to an historical overview of what might be called Anglo-Saxon constitutional history, bearing in mind the principles of Constitutional Democracy outlined in Chapter Two. Finally, it is against the background of this analysis that I shall attempt to look at some of the options that are open for constitutional reform in New Zealand.

COMMON LAW, STATUTE LAW AND FUNDAMENTAL LAW

Within the British tradition, Law is generally considered to have two primary sources, Common Law and Statute Law. Of these the former has had the longer history, antedating Parliament and the legislative process. Moreover, as to its origins, it is impossible to point to any body of learned men sitting down for the express purpose of designing the common law system. It is law that has been founded upon custom, and has since been developed, codified, modified and, in more modern times, fundamentally redirected by the decisions of judges and by the legal profession generally, working through the medium of the courts. As such it is sometimes now referred to as 'judge-made' law, resulting from the long line of precedents set by the history of judges' decisions on the various cases that have been brought before the courts. Statute Law, on the other hand, whilst possibly gaining its first significance simply by virtue of the fact of its being written down in a formal manner, and in this way to be enacted upon within the framework of the King's Courts, is now by and large identified with the Acts that have been sanctioned by a Parliamentary majority and not subsequently amended or repealed by Parliament.

In modern times within the more especially English legal and political tradition of which

New Zealand is part, little mention is made of fundamental law. Moreover, the term 'fundamental law' has a precise meaning within certain traditions of political and legal theory. It is applied to some framework of government, such as the Constitution of the United States, or more broadly to provisions of an 'entrenched' sort. In this sense law is deemed to be 'fundamental' when it cannot be amended or repealed by the ordinary legislative procedures. As such it is generally associated with the principle of 'judicial review', a procedure by which a supreme court, or constitutional court, is empowered to have the last word in cases where the validity of a legislative programme is challenged as being contrary to fundamental law. Although this {52} procedure is characteristic of the United States of America, with other nations following their lead, it has no place within the more especially English tradition that characterises Great Britain and New Zealand today. Within this tradition Parliament is a sovereign legislative, with the courts of common law having no power to challenge its enactments. Thus, whilst a judge continues to see Statute Law an exception to or a graft upon, the tradition of common law that goes back over centuries, he also pays unswerving loyalty to the enacted law of Parliament in a way that allows him no .latitude if such law should come into sharp conflict with the Common Law tradition. In this sense the constitutional principle of 'the sovereignty of Parliament' implies that Statute Law always has the power to override Common Law. In this respect, the abilities of the Common Law to be able to protect liberties and rights of individual and non-State organizations have been well expressed by Sir Leslie Scarman in discussing the challenge of the movement for human rights to the present functioning of English law. He writes:

> 'There are many who believe that the response of the common law to pressure for the incorporation of a declaration of human rights into English law should be, quite simply, that it is unnecessary. The point is a fair one and deserves to be taken seriously. When times are normal and fear is not stalking the Land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament.... It is the helplessness of the law in face of the legislative sovereignty of Parliament which makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights'[88].

With particular reference to the British context, Scarman goes on to discuss a number of other ways in which the present constitutional principles are inadequate to meet the pressing contemporary problems - problems posed by membership of the Common Market, problems taken from family life and social security, problems from the responsible use of the natural environment, problems from industry, and finally problems relating to the pressure for greater power to be given to regional government. Most of these matters have a bearing upon the New Zealand situation precisely because of the similarity in the general constitutional situation pervading the two countries.

How is it that the great tradition of English legal and political life that was once able to be such a pioneer in the protection of liberty against the encroachment of arbitrary State power is now in such a weak position? Is it correct to view the idea of 'fundamental law with judicial review' as something alien to the tradition of English law, being a 'characteristically American contribution to the science of government'? These are complex and difficult questions to answer definitively in an essay of the present type. However, in spite of the difficulties involved in detail, it would seem to me that their main lines may be sketched with a fair degree of accuracy for the present purposes. {53}

FUNDAMENTAL LAW IN ENGLISH HISTORY

In an historical study of some significance, J.W. Gough has sought to examine the significance of the extensive use of the term 'fundamental law' within the context of English history during the seventeenth and early eighteenth centuries[89]. In this he is careful to point out that not only was the understanding of fundamental law in seventeenth century England very diverse, it was also very different from the ideas that are now associated with it - those that date from the Constitution of the United States of America, receiving their formulation in the late eighteenth century. Indeed, it was precisely because the term 'fundamental law' was associated with such a diverse and contradictory range of ideas by the warring factions in the seventeenth century, that people like Halifax were so sceptical of the value of discussing the basic issues at stake in these terms at all[90]. For these and other reasons, it subsequently became the practice both of English historiography and of English constitutional theory to view the issues in the terms of a 'struggle for sovereignty' rather than one of 'an adherence to a fundamental law'. Thus, the field of historiography was won over by 'the Whig interpretation' and constitutional theory was won over by a view of 'the sovereignty of Parliament' that, in the hands of people like Blackstone, Bentham and Austin, rendered the Courts well-nigh the complete and obedient servant of Parliament. However, whilst the fallacies involved with the former have been increasingly appreciated, those involved with the latter would seem to be slower in gaining the critical scrutiny they deserve[91].

In this connection too, J.G.A. Pocock has also pointed out[92], that although much has been written about fundamental law in the light of the contrary theories of judicial review and parliamentary sovereignty, it has generally been left unclear as to how a seventeenth century Englishman would have answered the question 'What is it that makes the fundamental law fundamental?'. According to Pocock *'he might indeed have been embarrassed for an answer, but would probably in the end have replied: "Its antiquity, its character as the immemorial custom of England." The adjective 'ancient' was used little less often than 'fundamental'; was frequently coupled with it and (it may be suggested) could in the majority of cases have been substituted for it without serious loss of meaning'*. In other words 'fundamental law' in the seventeenth century was a term used to refer to the basis of the constitutional relationships between the various parties and institutions that were presumed to have existed from time immemorial. Whilst all the conflicting parties of the seventeenth century may have appealed to 'fundamental law' in this sense, the sharp differences arose because of the differing perceptions of 'what the time immemorial relationships' had been. The fact that the Glorious Revolution of 1688 involved a victory for the sovereignty of Parliament in the modern sense is partly a consequence of this struggle and partly a con-sequence of the late eighteenth and nineteenth century constitutional and political theorists - Blackstone, Bentham and Austin. To quote Pocock again: {54}

> *'One of the underlying themes in the history of seventeenth century political thought is the trend from the claim that there is fundamental law, with parliament as its guardian, to the claim that parliament is sovereign. Books are still being written in the attempt to decide how far this transition was carried and at what times; but it seems to be fairly well agreed that it was both incomplete and largely unrealized. Parliament claimed its increasing powers in virtue of the fundamental law; when in 1642 its claims reached such a height as to become a claim to arbitrary sovereignty, it still alleged that these were substantiated by fundamental law. The lower house's claim to be sole sovereign often took the form of a claim that it was immemorial and therefore subject to no checks. The attempt at single-chamber despotism failed, and both the Restoration and the Revolution of 1688 could be represented as efforts to restore the fundamental law, rather than to establish the sovereignty of king in parliament. The concept of fundamental law therefore did much both to cloak and to delay the transition to a full assertion of parliamentary sovereignty'*[93].

Thus, whilst 'fundamental law' began as the more crucial idea in the English tradition, it was an idea that was bound to a view of a differentiation in the powers of the King, Parliament and the Courts that was rooted in an ancient tradition. This tradition, though appealed to by all parties was interpreted by them in very different ways, thereby setting the background for conflict. The victory of Parliament over the King was seen initially as implying the responsibility for protecting 'the fundamental' rights of Englishmen over against the misuse of the King's prerogative. Moreover, insofar as Statute law was concerned, the influence of the view of Parliament as a High Court continued to have a strong influence upon the understanding of Parliament's legislative function. It was construed more in the terms of 'declaring what the law is' - in the sense of formalizing existing custom or declaring general guidelines along which the existing Common Law should be channeled, than in those of drafting entirely new legislation. Thus, although the term 'fundamental law' subsequently lost its constitutional significance in favour of the principle of 'the sovereignty of Parliament', there yet remained an important background of tradition that effectively charged Parliament with the responsibility of protecting the fundamental rights and liberties of the citizens (which to a large extent, of course, meant property-owners.). Nevertheless, although the significance of Statute law may have changed considerably since the late seventeenth century, it continues to have the power to be able to override Common law, by virtue of the constitutional principle of 'the sovereignty of Parliament'. This feature, coupled with the unprecedented growth of Executive power together with the way that power is able to be enacted by Legislative means, has produced a basic imbalance in the British Constitutional tradition that was once so sturdy in its ability to be able to protect the citizenry from the over-zealous exercise of Government power. This is well summarised by Sir Leslie Scarman in the following terms:

> *'The common law system is in retreat: it is being remaindered to corners of the house which are unvisited by most members of society. The basis of the system is not only being challenged: it is being abandoned. Yet the rule of law must be preserved if we are to have a just society. The problem, I have sought to argue, is not technical but fundamental. The common law is part of our constitution: a new settlement is needed, which will retain its strengths, while eradicating its features of weakness and obsolescence. In times past the strength of the common law was its* {55} *universality together with its origin in a customary law which owed nothing to the legislative activity of Parliament, indeed it preceded it. This strength, when ranged alongside the power of Parliament, gave it victory over the King in the seventeenth century and led to the constitutional settlement of 1688-1689. But the true victor in that settlement was Parliament, whose sovereignty then began. Today, however, it is Parliament's sovereign power, more often than not exercised at the will of an executive sustained by an impregnable majority, that has brought about the modern imbalance in the legal system. The common law is no longer the strong, independent ally, but the servant of Parliament... I suggest that the less internal control Parliament is prepared to accept the greater the need for a constitutional settlement protecting entrenched provisions in the field of fundamental human rights, and the universality of the rule of law... We can no longer rely on distributive justice, concepts of property and individually owned rights, judge-made law, the adversary system, and a legal profession historically educated, if the rule of one law -- the great blessing of the common law-is to be retained.... We must seek a new constitutional settlement that makes use of judicial power to keep within constitutional limits the legislative sovereignty of Parliament, and to use the rule of law in resolving the conflicts that will arise between the citizen and the state in the newly developed fields of administrative-legal activity upon which the quality of life in the society of the*

twentieth century already depends[94].

THE EXECUTIVE IN PARLIAMENT: FROM MONARCH TO PARTIES, WHIPS AND CAUCUSSES

Although it is usually appreciated that the English Parliament is an institution that has served as a model for many modern political developments all over the world, and that, in this respect it is an institution dating back some 700 years, the political and constitutional significance of many of the changes that have taken place during that time are not always appreciated. Having its origins largely in a feudal assembly of the King together with his tenants-in-chief, the English Parliament incorporated several unique features quite early on in its history. There was, for example, the way in which Parliament acted as a High Court, a feature that has embued it with important judicial functions, more especially associated with the House of Lords. In this respect A.F. Pollard has written that 'the fundamental difference between the English and other parliaments lies in the fact that it combines a system of popular representation with a high court, of justice. Unlike all other courts of justice, it is representative, and, unlike all representative assemblies; it is a court of justice'[95]. Again, the Commons assumed a significant place in the governing of the realm at an early date because of the way in which knights and burgesses found themselves in it together. As Professor Plucknett has written in this connection: 'Without the knights of the shire the burgesses would have been mere deputies to consent to taxation and advise on matters of trade; united with them on equal terms, they were enabled at once to claim a voice in the government of the nation, and to defend the liberties of the people against both King and nobles'[96]. {56}

In spite of, or perhaps more accurately, because of, such developments, the early history of Parliament - by which I mean the period prior to the settlement of 1688-1689 - can be characterised by its varying relation to the Monarch, this relation being the delicate one between Kingly prerogative and ruling according to law and Parliamentary consent. After the steady rise of both the significance of Parliament and the power of the Monarch under the Tudors in the sixteenth century, the seventeenth century was torn asunder by this problem. However, throughout the period in question it was generally understood that the Monarch, together with the council of his chief ministers exercised executive power in the realm, whilst Parliament, as the 'great council', gained its significance from the way that reviewed the activities of the King, raised taxes, passed legislation, acted as a High Court, and generally maintained a supervision of the Realm. In this connection its power was not unrelated to the way in which it 'represented the whole realm'. Although the mode of this representation was not one that would fit the canons of modern democratic franchise, it is significant that it embodied both geographical and non-geographical features. The Lords - consisting of representatives from 'the Lords temporal' and 'the Lords spiritual' forming one house, and constituent representatives of Knights and burgesses forming the second house - the Commons.

The constitutional settlement of 1688-1689, insofar as it settled the age-old problem of the relationship of the King's prerogative to the power of Parliament, made the former subservient to the latter in the following sense: the Monarch was able to exercise executive power in the Realm provided that this was in conformity with the law, and provided that the ministers aiding the exercise of this power enjoyed a majority support in Parliament. Although political parties began to assume a significance from about this time, they were but loose groupings that found their meaning in relation to certain general principles and in relation to the matter of those who supported and those who opposed the ministry of the day. This particular arrangement had the great virtue of having a unity and continuity provided by limited monarchy, together with an executive ministry that required Parliamentary support for

its continuing viability. Three major changes to this state of affairs have come about since the settlement of 1688-1689. The first is the increase in the franchise which, coupled with the loss of the power of the House of Lords in favour of the House of Commons, supposedly warrants the modern Parliament being described as 'democratically elected'. The second is the effective loss of the exercise of executive power on the part of the Monarch, with this power residing almost exclusively with Cabinet. The third, and most significant for the present purposes, is the rise in the significance of political parties. The latter - together with all the machinery associated with them: party conferences, branches, remits, rallies, campaigns, caucuses, whips - are, in many ways, the major political realities of our time. Within the situation in which the life of Parliament and Cabinet is very much one between two such major contestants vying for power, effective and stable government is viewed by both contestants in the terms of being able to exercise what amounts to and an almost exclusive control over both the executive and legislative functions of State.

However, the end result of these changes is, I suggest, in many ways to reverse the intent of the principle upon which it was founded. The principle of 'the legislative sovereignty of Parliament' was intended as a means of making the executive prerogative of the Monarch accountable to Parliament, as representing all estates of the Realm. In the way that {57} modern political parties are organized in respect to this principle, however, it has the effect of one or other of such political parties having the privilege of having well-nigh exclusive control over both the executive and legislative functions of government. They are able to do this by virtue of holding a majority of the seats in Parliament, whether or not their possession. corresponds to a majority public support. Not only this, the 'winning' of an election is interpreted by the 'victorious' party as an endorsement by the people of its election manifesto in all respects.

The system of Parliamentary democracy as it functions within New Zealand in particular is one which has many features of a Presidential system, but is without its advantages. The executive is not independent of the legislature or adequately accountable to it. One or other of the major political parties is able to control both. Moreover for a political party to interpret an election 'victory' as a wholesale endorsement of its manifesto by the majority of citizens is quite fallacious. In the first place, even though a given political party may gain a large parliamentary majority, it is very often supported by less than half the overall population. In the second place, overall support for a party is not synonymous with a wholesale endorsement of every feature of its programme. In these and in many other ways the present system carries with it many injustices. Principally, however, it gives far too much power to the political party 'winning' elections. Insofar as the exercise of Executive and Legislative power is concerned it is a winner-take-all situation that has degenerated to an 'elective dictatorship'. As such it is the functioning of modern political parties within the framework of a constitutional arrangement that presumes constituency issues to predominate over party issues, and presumes Parliamentary and Cabinet procedures to have a non-partisan character provided by the over-arching exercise of power by the Monarch that constitutes the second major anomaly in the operation of the principle of 'the legislative sovereignty of Parliament'. The facts are that Parliamentary sovereignty gives little or no effective check upon the exercise of Executive power, and that party issues rather than constituency issues predominate in the exercise of Executive and Legislative power.

CONSTITUTIONAL DEMOCRACY REVISITED

In Chapter Two of the present essay I sought to set forward a theory of Constitutional Democracy and in its light to analyse the major political issue of our times. This I suggested was the contrast between a Totalitarian and a Constitutional State, whether or not either were characterised by democratic as opposed to authoritarian modes of appointment. Moreover, I

contended that the dividing line between them was characterised by the relationship of the constitution of a political party to the constitution of the State. In a Constitutional State, a political party is prevented from exercising a monopoly of power that would seek to bring the State in total conformity with its ideology; in a Totalitarian State the ideological viewpoint of an established political party is sanctioned in the way that it exercises political and legal power. In this distinction I do not necessarily mean by the word 'constitution' a formal statement of aims and objects. I mean the latter only insofar as it is an accurate statement of the de facto operations, institutions, offices and procedures that together give an organization its integrity. {58}

In this light I would suggest that the constitutional dilemma for British Parliamentary Democracy goes right to the heart of its organic principle. The nature of the sovereignty attributed to Parliament now implies

i) that Parliamentary Statute can always overrule the common law.
ii) that one or other political party has simultaneous control over both legislative and executive programmes of the State.

From this, a simple deduction makes plain that a political party having a majority in Parliament has a sovereignty that, in the formal sense, at least, is well-nigh absolute. For the curing of the possible full exploitation of that power, the citizenry at large is dependent upon the good will and moral fibre of the parties in power, the large number of State agencies that 'have no political bias one way or the other', the need for the Government to account for itself once every three years, and the continuity of the British legal and political tradition which has given to us our liberty and our institutions. All these things notwithstanding, it cannot be denied that the constitutional state of affairs that I have sought to lay bear is one that makes the distinct-ion between a Totalitarian and Constitutional State in the context of British Parliamentary Democracy extremely thin: one which can be easily exploited by political parties and as a consequence, given the nature of the times in which we live, can make the preservation of Constitutional Democracy extremely vulnerable in a situation of crisis.

The answer to this problem, I suggest, is simply to seek ways of restoring the strengths of Constitutional Democracy in ways that seek to restructure and redefine some of the fundamental offices, institutions and procedures of the State in a way that is in accordance with the good things of the British tradition, and yet are moulded in a way that is relevant to the development of the principles of Constitutional Democracy in the concrete, modern setting that New Zealand knows itself to be today.

In my attempt to do this, I will give attention to two main features of Constitutional law that I sought to distinguish in Chapter Two: a Charter of Liberties and Obligations, enabling the limitation of the power of the State and the pluralism of Life principle to have a formal status within the legal framework of the country; and a constitutional arrangement that, together with legal safeguards, sets out the extent and nature of the powers assumed by the institutions, offices and procedures of the various arms of State in a way that is democratic as opposed to authoritarian, embodying checks and balances in the exercise of such power in a divided sovereignty. I will argue that the idea of a Charter of Liberties and Obligations is something that belongs intrinsically to the British constitutional tradition, and I will offer some suggestions as to ways in which constitutional reforms might be developed in tune with the aforementioned principles.

A CHARTER OF LIBERTIES AND OBLIGATIONS

By a Charter of Liberties and Obligations, I mean an agreement between a State and its citizenry that sets out both the liberties of the citizenry and the encumbent obligations that are correlative for the enjoyment of these liberties. Such liberties may, as in the case of a Bill of

Rights, be founded upon attempts to set out the unimpeded rights that all individual human beings should enjoy by virtue of 'nature's decree'. However, I would {59} argue that whilst such a declaration may indeed serve as this kind of Charter, it is generally both lacking in the recognition that liberties always go hand in hand with responsibilities and obligations, and is also formulated in terms which are too individualistic. There are, for example, other ways in which liberties and obligations of this sort have been set forth. In this respect, the best historical example is, of course, the Magna Carta granted by King John in 1215 at Runnymede[97]. This is not a statement of the abstract rights of the individual, but a statement of specific liberties, rights and obligations applying to citizens within the context of their various callings as understood and appreciated by the feudal setting in which it was issued. As such the Charter was founded in specific customs that were couched within the general idea of mutual obligation or fealty. Indeed its historic significance derives largely from the fact that it embodied both traditional and innovative features that relate both to the more immediate situation which occasioned the document and also to inadequacies in the realization of feudal custom that had been produced by the changing conditions of a century or more[98].

Despite the historiographical problems that have surrounded the precise way in which it has exercised its historical influence[99], Magna Carta has generally been recognised to have played a significant role in the development of the English Constitution, especially with respect to those issues that have surrounded the liberty of the subject[100]. It is for this reason that the precise circumstances in which it was drawn up need not concern us here[101]. Of greater significance is the fact that Magna Carta, amended as deemed appropriate for the times, was re-issued by Parliament as Statute Law on as many as forty-four subsequent occasions, sometimes with a corollary to the effect that all statute provisions not in accord with it may be ignored, in the sense of having the force of law[102]. In spite of this acknowledged significance, much has been made of the point that Magna Carta does not qualify for the description 'fundamental law'[103]. If the point of departure for a Charter of Liberties and Obligations is taken from the modern idea of 'fundamental law with judicial review' then this judgment is undoubtedly valid. However, I would suggest that not only does this approach tend to lose sight of the fundamental point at issue, it also tends to read the past in the light of the present rather than seeing the past give rise to the present. Magna Carta clearly embodied liberties and obligations for the citizenry (the privileged of them at any rate) that had statutory recognition. The matter of judicial review in this matter is essentially connected with the growth of the modern State in the sense of the universal rule of law and the means of providing a legal means of redress in the event of the Legislative or Executive activities of the State failing to comply with the provisions of such a Charter. In feudal times, when the Great Charter was first drawn up, the State in the modern sense did not exist. The King was bound by bonds of fealty to his tenants-in-chief, the barons, in a way that implied that allegiance to him was no longer obligatory should the oath of the King be broken. {60}

Should action be taken against the King on these grounds it was not tantamount to rebellion in the modern sense. The barons did not usually seek to overthrow the King, but simply to settle their disputes in a way that would bring the King back to the terms of his oath of fealty. I would suggest that much of the significance of the growth of Parliament and of its continuing re-issues of Magna Carta is to be found by viewing it against this feudal background and that it is of considerable significance for under-standing the battles between King and Parliament that were fought in the seventeenth century. If social developments had made many of these legal and constitutional ideas anachronistic by that time, then I would suggest that it is because the rise of the modern State has made it imperative to seek other ways for seeking lawful redress for the failure of Governments to honour the liberties they supposedly grant their citizenry. With the 1688-1689 settlement, England thought she had

such a means in the institution of Parliament. I have already argued that the constitutional changes that have taken place since that time have now rendered that solution highly suspect. The alternative is for the State to grant a Charter of Liberties and Obligations in a way that gives the citizenry opportunity of redress by means of judicial power - either through a Supreme Court or through a specially appointed Constitutional Court - with powers to call into question actions taken by Executive, Legislative, or Administrative institutions, when these are contrary to the Charter. It would suggest that in many ways this procedure would be a more definitive expression of the English tradition of a Charter of Liberties and Obligations than that which presently exists in Great Britain and in New Zealand.

Insofar as New Zealand is concerned, I would suggest that the problem surrounding the legal status of the Treaty of Waitangi provides another good example to illustrate the idea of a Charter of Liberties and Obligations. I am well aware that the current legal and political orthodoxy does not see fit to acknowledge the Treaty as having a great deal of legal significance. However, the fact that those imbued with this orthodoxy have seen fit to set up such bodies as the Waitangi Tribunal to hear claims related to the terms of the Treaty is perhaps an indication that there may be some reservations in official circles over these views. Moreover, many events in New Zealand history would seem inexplicable apart from according some juridical if not legal status to the Treaty: the immediate causes of the Wars in Taranaki in 1860 were centrally related to the terms of the Treaty, and were seen to be so by such figures as the former Chief Justice, Sir William Martin[104]. Governor Grey's decision to invade the Waikato in 1863 was justified in his own eyes by the view that the King Movement constituted a violation of the first article of the Treaty of Waitangi, concerning the recognition of the Queen's sovereignty over New Zealand[105]. The actions of the New Zealand Government and the Pakeha population in the decades immediately after the wars of the 1860's were seen by later generations of both Government and people to constitute contraventions of the terms of the Treaty, with consequent attempts being made to secure forms of redress to the Maori people, many of which have continued to prove unsatisfactory. {61}

It may well be that the present New Zealand legal system has great difficulty in finding a place for the Treaty of Waitangi. However, it cannot be concluded from that that the Treaty can be accorded no legal status. The other alternative would be to admit that the Treaty is indeed a Charter of Liberties and Obligations but that it has never been accorded a means of legal redress. Indeed the futility of seeking to work within the framework of such a Charter given the rise and power of the modern State is well illustrated by the difficulties that New Zealand has experienced in her attempts to honour the terms of this Treaty. However, to be able to accord the Treaty of Waitangi some status in this regard, would have many difficulties. The first and most fundamental would involve admitting a new dimension to the New Zealand legal system - embodying basic liberties and rights within entrenched provisions. The second would be simply that of discovering the meaning of the original Maori treaty in a way that was applicable to the contemporary situation[106]. However, I would suggest that if these difficulties were to be overcome, then the way would be made clear to make both a great deal more legal sense of New Zealand's own history, and, perhaps more importantly, a better legal basis to tackle ethnic relations in the future.

To conclude this section I would suggest that the granting of a Charter of Liberties and Obligations embodying particular reference to basic freedoms, together with an acknowledgment of an appropriate status to such historic documents as Magna Carta, Habeas Corpus, the Treaty of Waitangi, the Universal Declaration of Human Rights and the ILO Conventions would be the first important step to be taken in the development of a new constitutional settlement in New Zealand[107].

TOWARDS A NEW CONSTITUTIONAL SETTLEMENT

The adoption of a Charter of Liberties and Obligations would do a great deal to settle the present imbalance between Statute Law and Common Law. However, as I have already argued, the latter is only one of the sources of the anomaly in the present functioning of the doctrine of the 'legislative sovereignty of Parliament'. Moreover, even if such a measure were adopted, machinery would have to be developed in order to carry it through, and this in itself would demand some basic changes in New Zealand's legal and political institutions. Within the present section I shall try to examine ways in which the institution of Parliament itself could be modified so as to fit into a framework that was better able to dispense justice and liberty to all parties and individuals within the life of the nation. These are: Proportional Representation, Regional Government, a Constitutional Court, Parliamentary Reform and a Written Constitution.

PROPORTIONAL REPRESENTATION

If its mode of election is compared with the central character of its activities, then it is extremely questionable whether the political system of which the New Zealand Parliament is a part, is worthy of the description 'representative democracy'. The present constituency mode of election is one that has a long history, one which antedates the development of political parties in the modern sense, by several hundred years. Nevertheless when {62} it comes to the realities of the life of Parliament, few would doubt that its principle feature is bound up with the number of seats that are held by the respective political parties. Moreover, the simple two-party system to which New Zealand has by and large become conditioned, dates back to the situation in which Executive power was still largely within the prerogative of the Monarch, who exercised it with the assistance of ministers drawn from Parliament. For ministers to be able to hold such office, it was necessary that the Prime Minister enjoy a majority support of Parliament. Rather than viewing the two parties in any modern sense, therefore, it would be better to see them as resulting from those in general support of the policies of the Prime Minister and those in general opposition to them. Because allegiances were able to shift quite readily, the support of Parliament for any executive programme was never a foregone conclusion as it is now.

I would suggest that the mode of representation in an institution such as Parliament should be related to all the relevant diversity of issues and viewpoints with which that institution is concerned. In this respect, despite its many bad features, it would seem that party politics is a factor of political life that is likely to remain for some time. This being the case, I would suggest that it would take a lot of the heat and the petty bickering out of the contemporary situation if all parties were to respect as a principle of justice a mode of representation in Parliament whereby actual party support was paralleled by representation within the decision-making body itself. I am not suggesting that the good features of accountability to a constituency be jettisoned. However, especially in a country with a small number of Parliamentary seats, I am claiming that unless due weight is given to overall party support in its representation to Parliament, then that country, in spite of having once 'led the world' in universal suffrage, cannot be said to espouse the principle of representative democracy. I am well aware of the major arguments that have been adduced against the concept of 'proportional representation'[108]. Generally, however, these arguments are characterized by one of two features. Either they have all been given before - in opposition to 'the potential irresponsible use of the vote on the part of those who haven't sufficient maturity to know what they are doing' that arose in opposition to the proposals for universal suffrage. Or else they are pragmatic contrivances to further party interest. As a result they generally tend to bypass the central issue at stake: if the central reality of the life of a modern Parliament

results from an organization of political parties, then is it not a simple matter of justice that the principal seat of political power in a nation give due weight to all political parties in a manner that takes account of the deficiencies in a constituency mode of election of a first-past-the-post type? To withdraw from this central issue, I would suggest, is but another symptom of the central disease of modern political life: its placing of party interest above the principles of justice and liberty that all should be striving to serve.

There are a whole host of ways in which the principle of proportional representation can operate. My point here is not to debate the virtues of one or other of them. It is first of all to point out the justice of the procedure. A consequence, I would suggest, would be the way in which Parliament would be able to function more effectively as a body charged with the responsibility of keeping a daily check upon the activities of the Executive and Administrative branches of State, for the simple reason that the Executive may not be able to count as readily upon party solidarity in defending its programmes. {63}

REGIONAL GOVERNMENT

In its early history New Zealand had strong provincial parliaments. However they were abolished early in the country's history, in favour of one central body. Although New Zealand has certainly nothing like the pressure for national autonomy that is currently being expressed in Great Britain, there has been something of a groundswell in a movement toward more regional government in recent years. In 1960, for example, the Local Bills Committee of Parliament under the chairmanship of Henry May recommended that most of the existing ad-hoc authorities (such as hospital boards, harbour boards, catchment boards, regional planning authorities, drainage boards, electric power boards) could be abolished and that their functions, in most cases, could be taken over by existing territorial local governments, already possessed of the statutory power to pass by-laws. Under this general scheme it was envisaged that New Zealand would end up with a system of local government that carried a wide range of powers that could legitimately be considered to be more appropriately carried out at the regional level. Mr. May attempted to initiate this programme when he was Minister of Local Government in the 1972-75 Labour Government.

While there was a marked division in local government circles, about this programme, it is of some importance to note that, in principle, it did not challenge the basic tenet of parliamentary sovereignty, insofar as its fundamental relationship of local to central government was concerned. As such it involved no proposals for constitutional revision; just administrative changes designed to rationalize and integrate the existing machinery.

I would like to suggest that one of the important ways in which the current directive of centralist control may be opened up would be by means of investigating the possibility of the development of a regional government that had constitutional power to act independently of the central Parliament, built perhaps, upon the original idea of provincial parliaments with limited but definitive powers. Whilst there might well be many good objections to this kind of development - particularly in respect of its financing, given that it would probably involve another tax system - it would nevertheless provide another way in which New Zealand politics could take another lease of life, through the active participation of people in their regional affairs in a more direct and responsible manner.

A CONSTITUTIONAL COURT AND PARLIAMENTARY REFORM

New Zealand's former Upper House - the Legislative Chamber - was abolished by the National Government in 1951. Since that date there have been periodic attempts by various

individuals and groups to reinstate it in one form or another[109]. The usual arguments that have been given for re-introducing the Upper House have usually been a combination of the need to maintain a check upon the hasty legislative activity of the single chamber together with the need to maintain some oversight over the activities of Cabinet, Parliament and the Administrative Bureaucracy. Whilst I am in entire agreement with the need for these functions to be fulfilled, I am not at all sure that the reintroduction of the Upper House concept is the best way of achieving them. It is worth bearing in mind, for example, that this concept is coming under considerable criticism in many of the countries (such as Australia and Great Britain) in which such a House continues to be part of the constitutional process. There are many possibilities for the existing single {64} chamber to make reforms that would go a long way toward tightening up many of the bad features of the present legislative process. The 1978 proposals by the Labour Party, for example, have much to commend them in this regard, and if proportional representation were adopted as a means of increasing the membership of the single chamber, then this would have consequences that would generally force more principled and relevant discussion on many issues that have come to be sorted out in caucus meetings. However, having said this, I would also point out that there are a number of advantages in a two - chamber Parliament. The first and most obvious is that it would provide a good means whereby legislation would always receive the necessary scrutiny, thereby obviating the present practice of rushing legislation through at the Government's request. The second is that it would provide a treatment of the legislation under a different mode of leadership. A third reason would be that, presuming a different mode of appointment, it could obviate some of the features of 'elective dictatorship' that I have already mentioned. On these grounds, for example, I would suggest that a good case can be made for a Parliament consisting of two houses - one a House of Constituent Representatives, elected much along the present lines and the other a House of National Representatives, appointed at a different time to the former, and upon the basis of proportional representation.

All this notwithstanding, however, I believe that in the light of the issues that I have been seeking to analyse in the present essay, that something more is needed. I say this for three basic reasons. The first relates to the need for a new constitutional settlement that tries to cure the fundamental anomaly that has arisen with regard to the doctrine of the unlimited sovereignty of Parliament. The second relates to the fact that the Upper House concept embodied many important judicial functions that are no longer readily fulfilled within a modern Parliament, whether of a single or of a double chamber[110]. Finally, in the light of all that I have sought to analyse with regard to the threats to Constitutional Democracy in the present essay, it would seem to me that the most important functions of oversight within a modern State are those of a constitutional nature: seeking to protect the citizenry from the totalitarian extension of State power; providing for the liberty of minority groups to live according to their principles; seeking to protect the integrity of the State from the abuse both of those who exercise power and those who have aspirations toward it. Because of the predominance both of party interest and of the issues of an Executive and Administrative character now confronting Parliament, I believe that it is questionable whether it is an institution still fitted for all of these tasks. Accordingly, I would suggest that a new institution to fulfill these functions - a Constitutional Court - needs to be investigated. Moreover, if a Charter of Liberties and Obligations were to be adopted, then it would need some such machinery to make it work.

Many good reasons have been given against the desirability of using the existing court machinery for the purposes of protecting a Bill of Rights through a process of judicial review[111]. Principally, it would involve Judges entering {65} into a task involving political responsibilities which they are neither used to or necessarily capable of fulfilling well. However, without necessarily casting aside the possibility of employing the courts in this

way, it would seem that a preferable procedure would be for the separate appointment of a Constitutional Court that had a blend of legal, political and administrative skills that could well incorporate the office of the Ombudsman into its brief. It could be appointed partly by the High Court Judges, partly by Parliament and partly by any regional Parliamentary bodies that develop. As such it would have power to act solely upon the whole range of constitutional matters that surround public life, and, as such would incorporate the needed . institutional means of off-setting the present unlimited sovereignty of Parliament.

A WRITTEN CONSTITUTION

One of the major weaknesses of the present constitutional state of affairs that exists in New Zealand, is to be found in the fact that very few citizens have much of an insight into the history and constitutional character of the various offices of State that constitutes its political system. The result is that, in general, the public has little ability to be able to exercise its supposed role in 'the check upon the abuse of State power'. This feature would constitute my first argument in favour of a written Constitution. The second is in relation to the whole matter of Security. I would like to suggest that Security is only definable' in constitutional terms. A threat to security usually involves breaking the law, but not all law-breaking involves a threat to security. Threats to security usually involve an opposition to the Government of the day, or to a system of enacted legislation. However, at least within what I have termed a Constitutional Democracy, not all such opposition constitutes a threat to security. Finally, a threat to security is sometimes associated with the divulging of confidential or secret information. Again, however, not all breaches of this kind can be said, to be a threat to security, as is evident in the attempt to embezzle funds. It would seem to me, whether it concerns the breaking of the law, the opposition to the government or the divulging of information, that security is threatened when there is a deliberate attempt to subvert the integrity of the State in a way that, if carried through, would result in a basic change in the character or mode of operation of one or more of its institutions, by unlawful means. However, I would suggest that 'the integrity of an institution of State' is precisely what is involved with 'its constitutional character' whether or not it is written down, or part of an article of law. It is for this reason that I would claim that security is only well-defined in relation to a constitution. I do not imply that all breaches of the constitution are to be construed as a threat to security. For the latter to apply, there must be a deliberate attempt to act in a way that would have the effect of changing its de facto character by unlawful means.

In modern times the problems surrounding security are amongst the most difficult that a Constitutional Democracy has to deal. There are many without power who would seek to use its freedom as a means of subversion. There are also those who possess power in a way that would seek to use such threats as a cloak for entrenching their own hold upon that power. I would suggest that solutions to the tricky problems promoted by this situation are best handled within a framework that clearly spells out the nature of the liberties and obligations involved in a Constitutional Democracy by means of a written constitution that has the legal power both to reprimand those who possess power but misuse it, and to prosecute those who attempt to change it by unlawful means. {66}

As an example of the way in which such a document might contribute to this, I would suggest that a strong case can be made for a constitutional requirement making the ministers of Police and of the Security Intelligence Service directly responsible to and appointed by Parliament as a whole, rather than by way of the Prime Minister. I say this because these departments are especially concerned with the matter of the integrity of the State as a whole, and, as such, even greater care should be taken in seeking to place their actions above the suspicion of party politics - than is the case with other departments. A similar case could also be made out

for the office of the Attorney General. In the case of such an eventuality, the Ministers would, of course, be able to sit on the Cabinet, at the Prime Minister's request. However, their prime responsibility would be to Parliament, rather than to Cabinet.

My final argument for a Written Constitution has to do with the way in which proposed amendments would be able to proceed with a minimum of ambiguity, and with the most effective and just way in which an institution like a Constitutional Court would be able to conduct the matters placed before it. I cannot see such a body being able to fulfill its function in a way that would be open to the general public unless the main points of the Constitution that it adjudicated were summarised in a form that everyone could read.

CONCLUSION

I believe that any realistic assessment to the threats to Constitutional Democracy in New Zealand must give attention to the weaknesses involved with the fundamental principle of its present constitution. These I have sought to expose and to suggest lines for reform. It is not appropriate for me to go on and try to settle the many detailed proposals for a new settlement along the lines that I have herein sketched out. Such a plan would need to take account of skills that I do not possess. Moreover, if these ideas are to be taken up seriously they would require a number of years of trial and debate involving Parliament, public and the legal profession. Despite the difficulties that would be involved in charting such a course, I would suggest that any other course would be merely tinkering with the symptoms rather than with the disease. Because of the ties of New Zealand with Great Britain, and because of the obvious debt that I owe him, I would like to conclude with some words from Lord Hailsham's BBC lecture on a similar theme:

'A nation cannot survive by controversy alone; it needs cement, and that cement can, in the long run, only be afforded by tradition. And tradition needs symbols, and our symbol is the Crown, guarding and forming part of our sovereign body, by which we have been ruled so gloriously and for so long. I would myself have wished to continue along these traditional lines unaltered. I would not have made these suggestions if, at the end of a long life, I had not seen unmistakable marks of disruption and dissolution. My object is continuity and evolution, not change for its own sake. But my conviction remains that the best way of achieving continuity is by a thorough reconstruction of the fabric of our historic mansion. It is no longer wind- or weather-proof. Nor are its foundations still secure'[12]. {67}

APPENDIX

Although I have resisted the temptation of trying to spell out any details of a new constitutional settlement, I felt that some tentative statement as to the kind of Bill of Rights or Charter of Liberties and Obligations that could be considered would be of value, especially in view of the fact that I have consistently referred to this in the terms of the latter rather than the former terminology.

CHARTER OF LIBERTIES AND OBLIGATIONS

In acknowledgment of the responsibility of the State before God and all peoples to exercise its mandate of securing and maintaining justice, equity and liberty for all citizens of whatever creed, colour, cultural tradition or political persuasion, citizenship shall entail the responsibility to keep the law of the State and to abide by its constitutional provisions. In return the State shall be obliged to make every endeavour to maintain the following rights and liberties for, all those under its jurisdiction:

1. The Freedom of movement within and without the country.
2. The Freedom to worship according to conviction.
3. The Freedom of speech and publication in the pursuit of truth and the public good
4. The Freedom of assembly for peaceful purposes.
5. The Freedom to associate in accordance with principles that are compatible the Charter of Liberties and Obligations and the Constitution, and the freedom to so organize within the framework of the law.
6. The Right of Individuals and of Organized groupings to the responsible stewardship of property and to the legal protection of the same.
7. The Right of Privacy.
8. The Right of State Protection to Individuals and Organizations abiding by the Law and the Constitution.
9. The Right of State protection from the coercion of and organizational monopoly of power on the grounds of principled conviction.
10. The Right to a fair trial in accordance with the Law, and to legal representation whenever the circumstances, by the nature of their outcome, may be deemed to have the nature of a trial.

The interpretation and administration of this Charter shall have particular regard for the tradition and the provisions made within Magna Carta, Habeas Corpus, The Treaty of Waitangi, the I.L.O. conventions, and the Universal Declaration of Human Rights.

[1] ed. by Robert S. Gold, Dell Publishing Co. N.Y. (1970), p. 218
[2] Mason Drukman, NZ 'Listener' July 1, 1978, p. 42.
[3] Refer, for example to correspondence between G.A. Jones and B. Brill, M.P. for Kapiti, in Kaipiti 'Observer', September 18 and 25, 1978.
[4] This point was emphasised in 'The Holyoake Appointment', The Public Issues Committee of the Auckland District Law Society (1977).
[5] For a discussion of the constitutional consequences of this decision refer to 'The Constitutional crisis of 1975' by Colin Howard in The Australian Quarterly March 1976 Vol. 48, No.1 pp. 5 26; and to 'Change the Rules: Toward a Democratic Constitution' Ed. by S. Encel, D. Horne and E. Thompson, Penguin (1977).
[6] Refer to the article 'The Fastest Law-Makers in the West' by G. Palmer. N.Z. 'Listener', May 28, 1977, together with its subsequent discussion.
[7] 'A Bill of Rights', Tony Reid, N.Z. 'Listener' editorial Nov. 5, 1977. p. 10.
[8] Refer, for example, to the article 'The Case for Proportional Representation' by B. Beatham in 'Politics in New Zealand ' ed. S. Levine George Allen and Unwin (1978), p.284. The polarising effect of the two party system and a solely constitutional mode of representation is the main subject of the article entitled 'The Road to Electoral Reform' in 'The Economist' May 31, 1975.
[9] NZ 'Listener' May 27, 1978.
[10] 'The Moyle Affair: Another Perspective' by B. Brill, N.Z. 'Listener' July 2 1978; 'Justice is the Issue' by P. Trickett. N.Z. 'Listener' July 29,1978.
[11] The Auckland District Law Society public issues committee have made some important investigations into these and into other matters related to the whole incident.
[12] 'The British Constitution' George Allen and Unwin (1938) pp.108-109
[13] Indiana University Press (1966).
[14] a feature which is touched upon at length in 'The Technological Society' by J. Ellul, Jonathan Cape (1965), and 'The Society of the Future' by H. van Riessen, Pres. and Ref. Publ. Co. (1953).
[15] Refer, for example, to the 'Evening Post', 18th October, 1977.
[16] 'The Dominion' October 31, 1977, in a lead article entitled. 'Liberalism Poses Danger to Society, Police Chief Claims'.
[17] NZ 'Manufacturer' Dec. 1977/Jan. 1978.
[18] 'Information and Power: Parliamentary Reform and the right to know' NZ Politics ed. S. Levine (1978).
[19] NZ 'Listener' 25 Feb. 1978.
[20] For a discussion of the contribution of Christian Democracy to the political and social situation on the European continent, refer to 'Christian Democracy in Western Europe: 1820-1953' by M. Fogarty. Routledge and Kegan Paul (1957). For a discussion of the important distinction between Communism and Social Democracy, refer, for example, to 'A Short History of Socialism' by G. Lichtheim. Fontana (1975) esp. pp. 225-307).
[21] Xenophon 'Memorabilia' quoted in M.I. Finley 'Democracy Ancient and Modern' Chatto and Windus (1973), p.91
[22] Refer 'Christian Democracy in Western Europe: 1820-1953' Chapters III & IV
[23] 'The Constitution of Liberty' Routledge and Kegan Paul (1960) p.103
[24] J.L. Talmon, 'The Origins of Totalitarian Democracy' Sphere Books (1970) p.1
[25] J.L. Talmon, 'The Origins of Totalitarian Democracy' Sphere Books (1970) p.1-2
[26] Refer for example 'The Rebel' A. Camus, Penguin (1952); 'Unbelief and Revolution' VII, IX and XI. G. van Prinsterer, Amsterdam translated by H. van Dyke (1973, 1975).
[27] Talmon op. cit. p.12
[28] Penguin (1962)
[29] Refer, for example, to Carl J. Friedrich 'Limited Government' Prentice Hall (1974), p.120.
[30] Article 28 'The Constitution of the People's Republic of China'. Foreign Languages Press, Peking (1975), pp. 38-39.
[31] 'The Spirit of Laws' Book XI
[32] For a lucid historical discussion of this matter, refer to 'The Political Theory of Possessive Individualism' by C.B. MacPherson, O.U.P. (1964).

[33] This doctrine received its classic formulation in 'Commentaries on the Laws of England' by W. Blackstone in 1765.
[34] 'The New Zealand Constitution' by K.J. Scott. Oxford University Press (1962). p.1
[35] These are distinctions which I owe mainly to Robert Moss in his 'The Collapse of Democracy' ABACUS (1977) pp. 220-234
[36] For the Chilean situation, refer to 'Chile's Marxist Experiment' David and Charles, Newton Abbot (1973), and 'Chile's Coup and After' in Encounter, March 1974, by Robert Moss, and 'The Totalitarian Temptation' by Jean-Francois Revel, Seeker and Warburg (1977) pp.225-235.
[37] Article 2 of the Constitution of the People's Republic of China, for example reads : *'The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China. Marxism-Leninism - Mao Tsetung Thought is the theoretical basis guiding the thinking of our nation'.*
[38] J. Burnham `The Struggle for The World' Jonathan Cape (1947) pp.19-20
[39] Konrad Heiden 'A History of National Socialism' New York (1935)p.
[40] 'The Collapse of Democracy' ABACUS (1977)
[41] Longman; Paul (1973)
[42] A.H. and A.W. Reed (1976)
[43] In this connection, the action of 'The Save New Zealand Campaign' in collecting 51,607 signatures calling for a public enquiry into communist activities in the Trade Union movement, and submitted to Parliament on the 1st August, 1978 for this purpose, it is not unusual.
[44] Refer, for example, to 'Confrontation '51' by M. Bassett A.H. and A.W. Reed (1972). pp.26-27, 37-45, 61, 81-82, 86-92, 200-206.
[45] The article 'Unreason and Revolution' by R. Lowenthal in 'Encounter' November, 1969, develops this thesis in detail.
[46] 'The Totalitarian Temptation' by T.F. Revel. Seeker and Warburg (1977) pp. 225-226.
[47] For a more detailed analysis of these claims, refer to 'Chile' Marxist Experiment' by Robert Moss, op. cit. pp.52-97.
[48] Revel, op. cit. pp.231-232.
[49] Seeker and Warburg (1977).
[50] Sidgwick and Jackson (1977).
[51] Robert Moss in 'The Collapse of Democracy' op. cit. Woodrow Wyatt in 'What's Left of the Labour Party' op. cit and Ian Gilmour in 'Inside Right; a Study of Conservatism' Hutchinson (1977).
[52] 'Trade Unions and the Labour Party 'D.C.Webber in 'Politics in New Zealand' ed. by S. Levine op. cit. p.186-7.
[53] Refer to 'Confrontation '51' by M. Bassett. A.H. & A.W. Reed (1971) pp. 23-33, 176-179, 211-212
[54] D.C. Webber,op.cit.p.192.
[55] Refer to the paper 'The Forms of Industrial Conflict' by Don Turkington, Occasional Papers in Industrial Relations No.18,1976. Industrial Relations Centre VUW, for a valuable introductory discussion of these matters.
[56] 'Trade Unions in New Zealand' by H. Roth. A.H. & A.W. Reed (1973) p.65.
[57] 'Growing, Sharing, Learning - the report of the committee on health and social education Department of Education (1977).
[58] Ibid. pp. 32-42.
[59] New Zealand law gives great powers to the Government in their dealings with Union life, but is very restrictive in the kinds of ways in which Trade Union Life can be organized. As such it contravenes ILO Convention No. 87. Refer to 'Trade Unions in New Zealand' by H. Roth, op. cit. pp. 93-111. In this connection it is significant that the F.O.L. has finally sought to ask the Government to ratify the I.L.O. conventions as part of its plan to 'fight back' against what it sees as an attempt to weaken the power of the Trade Union movement by the efforts of 1975-78 National Government to make Union membership voluntary. Hitherto it has shown little or no interest in this ratification.
[60] In this connection the rights of parents as set down in the Universal Declaration of Human Rights, Article 25 (3) is worthy of attention.
[61] Refer for example, to 'A History of New Zealand' by K. Sinclair, Penguin 1969 edition.

[62] These tendencies are even more exaggerated in Britain, but are due, nonetheless, to the same symptoms. The article 'The Road to Electoral Reform' appearing in 'The Economist' May 31, 1975, gives a valuable analysis of these tendencies as due fundamentally to a two-party system operating solely upon a constituency mode of election.
[63] 'Evening Post' 11th May, 1978.
[64] I refer to the difficulty of the SIS being able to distinguish between subversion and dissent, or between attacks on the Government and attacks on the State, mentioned by Sir Guy in his public report on the SIS.
[65] The most outspoken advocate for these principles in Great Britain today would probably be Lord Hailsham, and, in a recent visit to Australia, he is reported as saying, in the Sir Robert Menzies Inaugural oration at Sydney University in May, 1978, that 'We of the centre Right in all nations of the world are, I believe, the true guardians of human freedom... It is important to remember that in Western countries, including Britain, there have been signs recently of a revived authoritarianism of the Right. None of these phenomena can be lightly disregarded by Conservatives in Britain or their counterparts in Europe or Australia'. Reported in the 'Evening Post' 13th May, 1978. Moreover, other Conservatives, such as Ian Gilmour, in 'Inside Right' op. cit., have also been campaigning along similar lines.
[66] For example — 'Upper Houses: Do they belong in Democracies?' by Lex Watson in 'Change the Rules' edited by S. Eucel, D. Horne and E. Thompson. Penguin (1977), pp. 101-118 in respect to the Australian example.
[67] Refer, for example, to the Home Report in Great Britain, with its recommendation that the hereditary principle of the Lords be abolished in favour of a chamber chosen by the Crown on the advice of the Prime Minister.
[68] Refer, for example, to 'A New Bill of Rights' by Quintin Hogg, 'The Listener'(BBC) 24 April, 1969; 'Lord Justice Scarman calls for. Supreme Court Watchdog on Parliament', Daily Telegraph, Dec. 13, 1974; 'English Law-The New Dimension' by Sir Leslie Scarman, Hamlyn Lectures, Stevens, London (1974); 'The Road to Electoral Reform', an article in 'The Economist', May 31, 1975; 'The Need for a Bill of Rights', an interview with Lord Hailsham, 'The Sunday Times', 19 July, 1976; 'Elective Dictatorship' by Lord Hailsham, 'Listener (BBC), 21 October, 1976; 'What's Left of the Labour Party?' by Woodrow Wyatt, Sidgwick and Jackson (1977); 'The Collapse of Democracy' by Robert Moss, ABACUS (1977); 'Inside Right: A Study of Conservatism' by Ian Gilmour, Hutchison (1977); 'Dilemma of Democracy: Diagnosis and Prescription' by Lord Hailsham, Collins (1978). In addition there has been the growth of the 'National Association for Freedom', an organization set up under the chairmanship of Lord De L'Isle, to co-ordinate the activities of various groups devoted to the defence of individual and economic freedom and the reform of the British Constitution.
[69] Refer, for example, to 'The New Zealand Constitution' by K.J. Scott, op. cit. pp.6-9.
[70] Refer especially to the Catholic-Protestant wrangle over 'the Bible in Schools Movement' between 1910 and 1930, to which the prominent figures-Joseph Ward and William Massey- contributed. The former was a Catholic and the latter a former Orangeman.
[71] for example, the alternatives being fostered by such groups as The Association for the promotion of Christian Schools, P.O. Box 5160, Dunedin, albeit in a tentative, non-professional and exploratory manner, are based upon a fundamental break with the secularistic principle of the humanistic self-assertion of man measure of all things in favour of one that recognises man as God's image bearer, and, as such a creature called to an obedient and responsible care for and opening-up of the world as God's creation. Such an alternative can scarcely be called sectarian in the old sense of that term. It may be Christian as opposed to Secular Humanist, but there are grounds to believe that the 1877 Act was not affirming the universal adoption of Secular Humanism as the Life-Principle for all subjects, but rather affirming a broad Christian-Liberal Life-Principle that sought to avoid sectarian in the sense of denominational bias.
Moreover, such curricula as have been developed by allied groups in other countries, especially by the Curriculum Development Centre, Toronto, in the concrete form of 'Joy in Learning' Wedge (1974) and 'Shaping School Curriculum' Signal (1977), although of high educational quality, would have a great difficulty in meeting the general approval of the PPTA and NZEI in the implementation

of the 1975 Integration Act.
[72] This Act, with its amendments is now termed the Industrial Relations Act.
[73] A valuable analysis of these and other aspects of this whole incident is given in 'Confrontation '51' by M. Bassett. A.H. and A.W. Reed (1971).
[74] Refer for example, to 'The Origins of the Maori Wars' by K. Sinclair, NZ University Press (1957); 'Race Conflict in New Zealand 1814-65' by H. Miller, Blackwood and Janet Paul, Auckland (1966); 'War and Politics in New Zealand 1855-1870' by B.J. Dalton, Sydney University Press (1967); 'The Origins of the Anglo-Maori Wars: A Reconsideration' by A.D. Ward. NZ Journal of History Vol.1 (1967).
[75] Discussed in `Maori King' by John Gorst, McMillan (1864) pp.168-172.
[76] Ibid pp. 170-171
[77] That the 'sovereignty' over the land surrendered to the British Crown was one limited by the needs to govern the country and lack any transference of 'mana' was recognized by Sir William Martin in his 'The Taranaki Question', Auckland (1860) pp.9-10. These and other features of the Maori draft of the Treaty have more recently been emphasized by R.M. Ross in 'Te Tiriti o Waitangi'. NZ Journal of History Vol.6 (1972) pp. 127-157.
[78] Although not free from polemic 'The Parihaka Story' by Dick Scott, Southern Cross Books (1954), gives a detailed account of these and other events associated with Parihaka history based upon well-authenticated documentation.
[79] In this regard, for example, it is of some significance that 'Broken October' has encountered a certain degree of resistance because of the nature of its content. Refer to 'Author alleges banning', an article appearing in the Waikato Times on 30th March, 1978.
[80] 'Elective Dictatorship' Lord Hailsham BBC Listener 21 October, 1976 p.496.
[81] 'Essays on Human Rights', a series of lectures delivered at Victoria University, Wellington, ed. by K.J. Keith.
[82] NZ 'Listener', Editorial 25th Feb. 1978.
[83] 'Listener' (BBC) April 24, 1969 p.550
[84] 'The Need for a Bill of Rights'. Interview with Lord Hailsham, The Sunday Times, 19th July, 1970, p.6
[85] 'Listener' (BBC) 21 October 1976, pp.476-500.
[86] 'Dilemma of Democracy: Diagnosis and Prescription'. London, Collins (1978).
[87] 'Scarman calls for Supreme Court Watchdog on Parliament'. Daily Telegraph Dec. 13th, 1974. His views in this connection have been set out at greater length in the 1974 Hamlyn Lectures under the general title 'English Law - the New Dimension'. London, Stevens (1974).
[88] 'English Law - The New Dimension' op. cit. p.15.
[89] 'Fundamental Law in English History' Oxford (1955).
[90] 'Fundamental Law in English History' op. cit. pp. 168-171.
[91] In this connection, as Sir Leslie Scarman has pointed out, the work of Professor Lauterpacht is significant for the way he has drawn attention to features in the development of the common law which the nineteenth century theorists mentioned above chose to disregard. Refer especially to Chapter 8 of 'International Law and Human Rights' by Lauterpacht, London (1950),
[92] 'The Ancient Constitution and the Feudal Law' Cambridge University Press (1957), pp. 48-49.
[93] Ibid pp. 49-50.
[94] 'English Law - The New Dimension' pp. 74-75.
[95] 'The Evolution of Parliament' Longmans, London (1926). p.149.
[96] quoted in 'A Short History of Parliament' by Faith Thompson. University of Minnesota (1953). pp. 38-39.
[97] For a good assessment of the significance of Magna Carta within its own context, refer to 'Magna Carta' by J. C. Holt. Cambridge Un. Press (1965).
[98] Holt. op. cit. pp.43-104
[99] Refer, for example to 'The Englishman and His History' by H. Butterfield. Cambridge Un. Press (1944) Part I.
[100] Refer, for example, to 'Magna Carta: its Role in the Making of the English Constitution 1300-1629' by Faith Thompson. Un. of Minnesota (19148) 'Magna Carta: Text and Commentary' by A.E.

Dick Howard, Magna Carta Commission, Un. of Virginia (19614); 'Magna Carta and its Influence in the World Today' by Sir Ivor Jennings, London (1965); 'Magna Carta and the Idea of Liberty' ed. by J.C. Holt, Wiley and Sons (1972).

[101] They are extensively dealt with in 'Magna Carta' by J.C. Holt op. cit. for example.

[102] 'Magna Carta: its Role in the Making of the English Constitution 1300-1629' by Faith Thompson, Un. of Minnesota (19148) p.10.

[103] Refer, for example, to Gough 'Fundamental Law in English History', op. cit. p.10-

[104] Refer to 'The Taranaki Question' by Sir W. Martin, Auckland (1860) Published by Hocken Library, University of Otago, NZ (1967).

[105] 'Maori King' by John Gorst McMillan (1864) pp.168-172.

[106] There are, I believe, good reasons for suggesting that the meaning of the Treaty of Waitangi is extremely confusing from many angles. Refer, for example to 'Te Tiriti o Waitangi' by R.M. Ross. NZ Journal of History Vol. 6 (1972).

[107] I have taken the trouble of setting down a sample of the kind of document that I have in mind. Refer to the Appendix p. 56

[108] For example, even Lord Hailsham has spoken out against this principle on the grounds that 'it encourages extremist elements into Parliament'. 'Elective Dictatorship' op. cit. p. 498.

[109] For a recent example, refer to that by the Christchurch Trade Union official, Mr. G.G. Walker, published in the 'Christchurch Press', 15 Sept, 1978, followed up by a somewhat sceptical editorial in the same paper on the 18th September, 1978.

[110] For the significance of Parliament, and more especially the House of Lords, as a High Court, refer, for example, to 'The High Court of Parliament and its Supremacy' by C.H. McIlwain, Yale University Press (1910) and 'The Evolution of Parliament' by A.F. Pollard, London (1926).

[111] Refer for example, to the article entitled 'A Bill of Rights for New Zealand?' by Geoffrey Palmer in 'Essays on Human Rights', a series of lectures delivered at V.U.W. ed. by K.J. Keith, in 1968.

[112] 'Elective Dictatorship' op. cit. p.500