National Library of New Zealand
Cataloguing-in-Publication data

Palmer, Geoffrey, 1942-
New Zealand's constitution in crisis : reforming our political system / Geoffrey Palmer. Dunedin, N.Z. : McIndoe, 1992.
1 v.
ISBN 0-86868-147-4
1. New Zealand--Politics and government. 2. New Zealand. Parliament. 3. New Zealand--Constitutional law. I. Title.
320.993

ISBN 0 86868 147 4

First published and printed 1992 by John McIndoe Limited, 51 Crawford Street, Dunedin, New Zealand

Contents

Preface

The day I resigned as Prime Minister of New Zealand the University of Otago asked me to go and teach there. While not in a position to do so full time I delivered a series of lectures to the law students at Otago in 1991 on my experiences with the New Zealand constitution. This book has its genesis in those lectures. Providentially, the same week as the University of Otago's generous offer there came an invitation from the South Island publishers John McIndoe to write a book for them. I accepted that suggestion too and this is the second book I have done for them.

There is a pleasing symbiosis in the fact that Otago was the venue for the lectures and the domicile of the publishers. My thanks to both the University and the publishers.

My thanks are also due to a number of people who helped me with the project. My colleague Mai Chen, Senior Lecturer in Law at the Victoria University of Wellington with whom I share responsibilities for teaching public law, helped me decide what in the practical life of a minister is of interest to students and scholars of public law. She also read the entire manuscript and provided many helpful comments and suggestions. So did my valued ministerial colleague and friend the Hon David Caygill, my former legal adviser Ellen France and Sir Kenneth Keith President of the Law Commission. To them all I owe a special debt of gratitude, but they are not to be considered as agreeing with the contents. My son Matthew Palmer, a graduate student at the Yale Law School offered very helpful insights and he will be a co-author of the next edition of *Unbridled Power*. Others commented on parts of the manuscript, and made suggestions which were helpful: Richard Boast, Dr Les Cleveland, Tim Dare, Alex Frame, and Tony Shaw and Dr Raj Vasil. Others also provided help, but they are in places where they should not be named.

Carol Spencer, my Secretary reformatted my erratic discs and made the manuscript look much better than I ever could have. The Vice Chancellor at Victoria University, Professor Les Holborow came to my rescue with a research grant for which I was most grateful and Jonathan Kaye LLM helped me as a research assistant.

Finally a word of appreciation to my wife Margaret, who had legitimate expectations that her days of having holidays and family life disrupted by public life were at an end only to find that writing has the same effect.

Queen's Birthday 1992

Victoria University of Wellington

To Owen Woodhouse

1
The Nature of the Crisis

> It must be remembered that there is nothing more difficult to plan, more doubtful to success, nor more dangerous to manage than creation of a new system. For the initiator has the enmity of all who would profit by the preservation of the old institutions and merely lukewarm defenders in those who would gain by new ones.
>
> Niccolo Machiavelli, *The Prince*

I INTRODUCTION

The central feature of the New Zealand system of government is a concentration of power in the central government.[1] The distribution of power within that government has resulted in effective power being located in the executive arm - cabinet and the public service. The New Zealand system has been described as being an "executive paradise".[2] The predominance of the executive when combined with the way in which Parliament, political parties, pressure groups, the media and the public interact in the debating and making of policy decisions, has produced a low level of public confidence in the system. The performance of the system, and the public attitude to it, means the constitution is in crisis.

New Zealand has inherited most of its constitutional structures from the United Kingdom. We have made a number of innovations to these arrangements over time, but we have not altered the basic structure. The constitutional lifeline to the United Kingdom is now frayed and worn.[3] The British are part of the European Community - their legal and constitutional structures are increasingly irrelevant to our own. New Zealand is on its own now. As the British impact on our constitution and law wanes other influences grow to take its place.

Some of the biggest influences on our law are the international obligations New Zealand enters into and which must be given effect to in our domestic law by passing into legislation.[4] A great deal of what is legislated

---

1 Legislative changes in recent years have altered the level of concentration in such areas as health, education, local government and state-owned enterprises so that the tendency is not as pronounced as it was in earlier years.

2 L Zines *Constitutional Change in the Commonweath* (Cambridge University Press, Cambridge, 1991) 47.

3 Reform of the system in the United Kingdom is a live issue: R Brazier *Constitutional Reform - Reshaping the British Political System* (Clarendon Press, Oxford, 1991). While reading this book I felt that while some of the British problems are similar to New Zealand's, many are different.

4 Legislation Advisory Committee, *Legislative Change - Guidelines on Process and Content* (Re-

now is not within the purview of the New Zealand government to determine in practical terms. We are part of an international community which is increasingly interdependent. The law enacted by the New Zealand Parliament to prevent the emission of substances which deplete the ozone layer was the result of complex international negotiations in which New Zealand played its part but which it did not control.[5] Scores of our laws flow from this sort of international obligation. The tendency can only grow.

Where New Zealand has introduced constitutional innovations some of them, such as the institution of caucus, have reduced the role of Parliament. The result is a system which does not work well, which is why the New Zealand constitution is in crisis. There are not enough principles, not enough rules and not enough restraints on executive government. Beneath the surface appearance of adherence to the old forms of government lies serious degradation. In many ways we are clinging to a facade, assuming we are principled and democratic when we are neither.

Members of the public do not understand New Zealand's constitutional arrangements, generally speaking. There is a crying need for good courses in civics at school. But the general public is directly affected by the performance of the system. They ascribe the result to politics. Voter cynicism has reached serious proportions in New Zealand. The National Government's approval ratings in February 1992 reached the lowest levels since public opinion polling began in New Zealand.[6] The previous Labour Government was massively unpopular before it went out of office in 1990. A public opinion poll in mid-1992 found that eighty-one per cent of New Zealanders believed there was corruption in New Zealand politics. Even more believed that donations to political parties should be declared publicly.[7] Such levels of cynicism and mistrust of governments are dangerous for the future of our democracy. But in truth there is more wrong than can be cured by political change. Many of the problems are constitutional.

The purpose of this book is to explain how the New Zealand system of government really works, and in particular to diagnose what has caused the ills which afflict New Zealand's constitution. It puts forward solutions for the cure of the problems. Many of those solutions revolve around the referenda in 1992 on proportional representation, although it is in no way restricted to that opportunity for change. But the referenda are important. Such opportunities for constitutional liberation do not come often and they should be seized.

---

vised Edition, December 1991) Appendix D. Closer Economic Relations with Australia will have a great impact as time goes by. Our constitutional arrangements themselves are not immune from international influences, for example the reports of the United Nations on New Zealand's performance under the International Covenant on Civil and Political Rights.

5 Ozone Layer Protection Act 1990.

6 Heylen Research Centre, Heylen Poll, 2 February 1992. The approval of the overall performance of the National Government in that poll, was 11 per cent, the level of disapproval 80 per cent. The approval ratings were just about the same one year earlier: Heylen Poll, 23 February 1991, (on file Victoria University of Wellington).

7 *National Business Review*, 19 June 1992, 1.

One theme running through this book is the tension between an efficient decision-making process and democratic control of that process. Both are important. The changes recommended here do not go so far as to sacrifice efficient government in order to achieve a democratic constitution. What they do is to change the balance. The executive does need to have the ability to conduct the business of government. It does not need unlimited powers to do so, and it will perform rather better if it has to attend to important principles which are not within its exclusive power.

The nature of the crisis is that our constitution does not contain sufficient checks and balances against the power of executive government. Too much power resides in the executive government and there are insufficient safeguards against its abuse. It is a theory I first developed in my book *Unbridled Power?* which was first published just before I was elected to Parliament.[8] Much of my parliamentary career was spent trying to increase the number of checks and balances, and they were increased significantly. But the changes were not sufficient to change the balance of the entire system, however individually useful the changes were. Driving the machine gives the driver an intimate knowledge of how the machine works and what it is capable of in determined hands. As a result I have now reached the conclusion that more radical steps are called for than were advocated in that book, which in its second edition turned more into a text about New Zealand government than the source of an agenda for reform.[9] The third edition in 1993 will be in the nature of a text book, not a book which presents a case as this one is.

A lot of this book depends upon my personal experience as a Member of Parliament and as a minister. No doubt it is risky to base policy positions on such a base, but it is even more risky to design constitutional structures without having had any firsthand experience in their operation. Whatever reception my views receive, I hope people now understand that having retired from politics I do not have an axe to grind. For the situation we are in I blame neither my former political opponents nor my friends. It is a book written in sorrow, although with the conviction that things can change.

II WHAT IS A CONSTITUTION?

In constitutional terms New Zealand is different from most other countries. We do not have a constitution in the way that Australia, Canada and the United States do. We used to pride ourselves on our unique lack of structure and principle. Now it is more of an embarassment. We need to ask ourselves why our constitutional provisions are so fragmentary and whether that is a good thing.

The New Zealand constitution "establishes the major institutions of government, states their principal powers, and regulates the exercise of those

8 *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979).

9 *Unbridled Power - An Interpretation of New Zealand's Constitution and Government* (2ed, Oxford University Press, Auckland, 1987).

powers in a broad way".[10] A constitution is the way anything is constituted or made up. In the context of this book it is "[t]he system or body of fundamental principles according to which a nation, or state, or body politic is constituted and governed".[11] We are talking here of the structures of the state. Those structures have a big impact on how the policy of New Zealand is fashioned, decided and implemented. Policy outcomes affect everyone.

The constitution creates the basic institution through which government is carried out in New Zealand. The New Zealand constitution cannot be seen, touched, heard or smelt. It is an idea, a conception or series of conceptions found in the law. The constitution consists of a set of restraints and processes both formal and informal which have evolved over time in New Zealand. There never was a particular point in time when the New Zealand constitution was created. Countries like the United States and Australia are different in this respect. Their constitutions were consciously and carefully created at a point in history.[12] When a constitution is created in that fashion its nature and content are vigorously thought about and debated. It is a process which has never occurred in New Zealand. Our arrangements have evolved with no attention to overall structure and the ideas on which it is based.

The arrangements New Zealand has are flexible, often subtle, frequently intricate and sometimes not easily discovered. The rules evolve, often quite freely. Custom determines many things in this area. Political interaction and policy decisions take place within the rules of the constitution:[13]

> Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change. That institutions affect the performance of economies is hardly controversial.

How we structure the institutions of government in New Zealand will have great impact on the decisions government makes and how citizens

---

10 Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Secretary to Cabinet *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) 1.

11 *The Shorter Oxford English Dictionary* (3ed, Clarendon Press, Oxford, 1959) 378.

12 Article VII of the United States Constitution provides: "The ratification of the convention of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same". The Constitution was drawn up and adopted on 17 September 1787 and the ninth State ratified in June 1788, but not until April 1789 was George Washington inaugurated as the first President. *The Constitution of the United States of America - Analysis and Interpretation* (United States Government Printing Office, Washington, 1964) Historical Note, 31. For Australia, see the Commonwealth of Australia Constitution Act 1900 (UK) which came into effect 1 January 1901.

13 D C North *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990) 3.

interact with government. The shape of the electoral system is just one example. The structures will contribute to whether New Zealand is a successful country or not. They will influence how our economy performs.

The purpose of the constitution should be to establish clearly and certainly the rules about government in New Zealand. The rules in New Zealand are not as well established as they are in other countries, although the structures are simple. Our constitution looks primitive and underdeveloped. As our society has become more complex, our constitution remains of a type which evolved for a relatively simple and unsophisticated largely rural society. New Zealand is no longer like that.

Clearly any civilized society needs a government. The task of the constitution is to define:

(a) how the government institutions should be structured;
(b) the powers of the government and the limits on those powers;
(c) how the institutions should relate to each other and to the public.

There are some things which institutions of government must provide for society to function effectively:

(a) law; who makes it and by what process;
(b) means of settling disputes;
(c) provision of core government services;
(d) taxation to pay for government;
(e) conduct of foreign relations, and
(f) defence.

There is room for infinite debate on a myriad of other things which government could do, but there is a minimum which cannot be reduced for the existence of effective civil government.

It is important not to overstate the importance of the constitution and the institutions it erects. They are not everything. The people who work the system, their values and beliefs matter a lot. So do those of the public. Many of the restraints in our system of government are built into the New Zealand culture. But the institutions shape the way the people with different beliefs will interact in making decisions and lay down the processes which must be followed in making decisions. The burden of this book is that informal restraints are not sufficient in New Zealand, we need to develop a more elaborate constitutional framework.

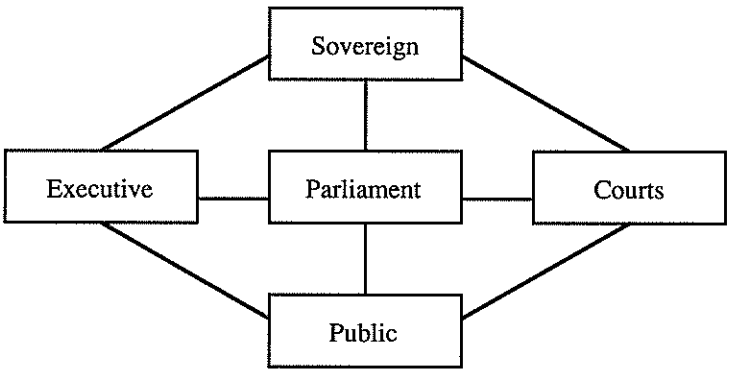
III THE DISTRIBUTION OF POWER IN NEW ZEALAND

The prime source of the New Zealand constitution is the Constitution Act 1986, but the constitution is found not only in acts of Parliament in New Zealand but also in other legal documents, court decisions, and customary practices which are called constitutional conventions. New Zealand is a constitutional monarchy because the Queen of New Zealand is sovereign and head of state. There is a New Zealand Parliament to which members are elected and from which members of the executive, known as ministers,

are drawn; so our system is both parliamentary and democratic. Our constitution reflects now the Treaty of Waitangi as a founding document of New Zealand.

How the New Zealand constitution works and how the constituent elements of it relate to each other is not capable of clear authoritative exposition. It is surprising there is such ambiguity and vagueness about the main framework of public power in New Zealand. However, Diagram 1 below shows the orthodox understanding of the component parts of the New Zealand constitutional system and their inter-relationship. The structure we have makes Parliament central. Democratic control over the system is ensured by elections to Parliament. The executive is accountable to Parliament and needs the confidence of Parliament. The courts interpret legislation passed by Parliament in relation to specific cases. These things are done in the name of the sovereign as a constitutional monarch.

Diagram 1 : Components of the New Zealand Constitutional System



The public relate to Parliament, primarily although not exclusively, through the electoral system. The public also appear at Parliamentary select committee hearings and can listen to the proceedings of Parliament by broadcast, or make representations to MPs about grievances. The public relate to the executive by coming into contact with government departments, which make decisions concerning them and provide services they need; they also absorb announcements of government policy. The public have a direct relationship with the executive in the sense that public opinion is a significant factor taken into account in decisions reached by the executive branch of government.

The public also relate to the courts, which are the agency of government principally responsible for the rule of law, by going to the courts when they

are involved in a dispute or learning about judicial decisions through the media. The courts relate to Parliament by interpreting the legislation passed there in particular cases which come before them, and they relate to the executive by judging the validity of decisions made by the executive by the standards of modern administrative law.[14] Parliament is connected with the executive directly because the principal members of the executive must be drawn from its ranks. Ministers must be drawn from the party which has a majority support in Parliament and that is determined by elections, which give the public control over which party shall form the government.

The sovereign relates to the public by being a symbol of unity and nationhood. The judges are the Queen's judges and the sovereign is the fountainhead of justice; the Queen in Parliament is an integral part of the Parliament in legal terms. The ministers are the Queen's ministers. Government is carried out in the name of the Queen but in practice the Queen and her New Zealand representative play little substantive part in the decision-making of government. Some of the executive's powers, such as the royal prerogative, are powers which come from the monarch. The monarchy itself, however, is not one of the problems of the New Zealand constitution. While there may be a strong republican sentiment in Australia, that does not appear to be the case in New Zealand. So I do not propose to discuss the monarchy further in this book.

The prime problem of the New Zealand constitution is the relationship between the Parliament, the courts and the public. In Diagram 1 formal power lies with the monarch and with Parliament. Real power is with the executive. The relative absence of restraint on that power is at the heart of New Zealand's constitutional discontents. The lack of separation between Parliament and the executive is a marked feature of the New Zealand system. There is little distinction - the executive can always get its way with Parliament. Parliament is not a sufficient check and balance on the proposals of the executive because of institutions and organisations which are not in the diagram. Four are significant - caucus, political parties, pressure groups and the media.

Between the executive and Parliament lies caucus - the weekly meeting of government MPs who give the government its majority in Parliament and who have their say over government proposals before they reach the Parliament. Caucus provides a guarantee to the government that it can secure a majority for its measures in Parliament. All significant matters are cleared in caucus in advance. The cabinet ministers can and do dominate caucus which meets in secret and does not function as an instrument of accountability.

Caucus is partly a result of political parties which have grown up in the twentieth century to capture political power through democratic elections. Parties have a parliamentary component and a component outside Parlia-

14 See G D S Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1992) and H W R Wade *Administrative Law* (6ed, Clarendon Press, Oxford, 1988).

ment. The relationship between the two wings is not only full of tension but significant in determining policy outcomes and election promises. Political parties provide a link between the public, Parliament and the government. Their competition is what gives the public a choice in deciding who will form the government. Parties have become part of our constitutional problem.

Pressure groups play an important role in the institution of government. They make policy proposals of their own and oppose other proposals. They can make representations to all or any of the executive, caucus, opposition, parliamentary select committees and political parties. They are a source of information, publicity, and criticism. They bring issues to public attention. In some areas they play a most important role in the development of policy. I found, for example, as Minister for the Environment, that the environment organisations were most effective pressure groups and often had information and data not available within the government machine.[15] In a democratic society it is imperative such groups be able to organise and represent their point of view. They do act as a restraint on the behaviour of the system. But they are so many with such diverse points of view that they are not a consistent or effective form of restraint.

The media are a significant factor in the relationship between the component parts of the government because it is through the media the public learns of executive proposals and decisions, parliamentary activity, caucus behaviour, pressure group views and policy debate generally. The channels of communication should be accurate, sufficiently detailed to communicate the necessary intelligence for a democratic society, and deep enough to promote public debate at a sufficiently high level to ensure that public debate influences policy outcomes. There is grave doubt these functions are being performed adequately.

For these reasons Diagram 1 does not embrace the reality of how the New Zealand constitution works. To try and express that reality we need a further diagram.

Diagram 2 is not as simple as Diagram 1. It looks like a contrivance built by Heath-Robinson. Any attempt to depict how the New Zealand constitution really operates will never be entirely accurate. The New Zealand constitution has developed structures and organisations which have an important impact on the functioning of the system but which are not regarded as formal parts of our constitution. They all need to be looked at as a whole if we are to fashion a satisfactory series of relationships between them. One element of the crisis in the New Zealand constitution is that the relationships are not as clear as they might be. Partly that is because the constitution proceeds on the basis of Diagram 1 in theory, when in practice its workings more closely resemble Diagram 2.[16]

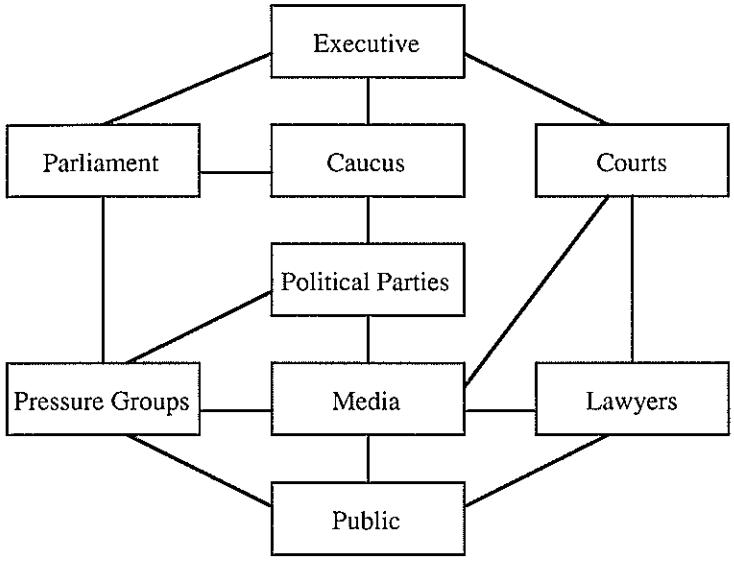
---

15 See G Palmer *Environmental Politics - A Greenprint for New Zealand* (John McIndoe, Dunedin, 1990).

16 Obviously such diagrams involve much simplification of reality. In particular the nature of the interactions between the various elements in Diagram 2 cannot be properly expressed diagrammatically.

Further complexities arise as each part of this system relates to all the others in important ways which are sometimes direct and sometimes subtle. Change one element in one area and there will be consequences in another. The organism has to be understood as a whole, each part related to every other. It cannot be understood by examining only one component, the constitution is a seamless web. The whole framework has to be seen in perspective. It must be judged as a whole.

Diagram 2 : The Reality of the Constitutional System



IV DEGRADATION OF THE SYSTEM

The behaviour of the system as it has evolved is now showing serious signs of decay. The modern theory of the New Zealand constitution is that the public elects a party to be the government, the cabinet governs in accordance with the party programme announced at the election, it holds itself accountable to the public at large rather than to Parliament which it dominates. This doctrine holds that by these means the voting public puts severe limits on freedom of action by government. Modern political theory in New Zealand used to hold this to be the principal restraint on government power. Furthermore, it was this element which made the system democratic and the government accountable to the people.[17] The doctrine was designed to explain the passing of parliamentary democracy, the rise of modern

17 R G Mulgan "Review Article: Palmer, Parliament and the Constitution" 32 *Political Science* 171, 173 (1980). L Cleveland *The Politics of Utopia* (Methuen, Wellington, 1979) 10-11, 19-21.

political parties and the increasing domination of the executive. New Zealand, it was argued, wanted strong government with clear parliamentary majorities to act decisively in response to public demands.

In 1962 Professor K J Scott described the conventions of the New Zealand constitution in the following way when discussing the question of legislation and public opinion:[18]

> Save in emergency, legislative powers should be used only in accordance with the government party's election platform. As each party has a broad platform, this allows a good deal of latitude. The principle on which the limitation rests is that the New Zealand system of government is in one of its aspects a system of representative government in the sense that the electors choose not only between rival candidates but also between rival sets of policies. The positive side is that the government party should honour its pledges (either that certain legislation will be passed or that certain legislation will not be passed).

The inappropriate nature of the above statement, when matched against the performance of both recent Labour and National governments, indicates that the modern theory is in a state of collapse. It can hardly be argued that Scott's formulation is the constitutional convention in 1992. Significant decisions by both Labour and National Governments have been in breach of Manifesto commitments. In the 1987 election campaign Labour pledged as follows: "Labour is opposed to privatising efficient state enterprises. It sees public investment in commercial enterprises as appropriate, but retains the right to quit investments which long achieve the state's economic and social objectives". With more particularity in relation to New Zealand Post, Postbank and Telecom it said: "The three corporations will remain in public ownership with public accountability." Subsequently both Telecom and Postbank were sold to private enterprise - a clear breach of the election commitment.

The National party came to power in 1990 with the following commitments: "National will increase the age of entitlement for National superannuation from 60 to 65. The increase will occur over a 20 year period with annual increases of three months. National will reinstate National superannuation as a universal taxpayer funded pension payable to all eligible citizens without regard to income".[19] National promised the tax surcharge imposed on the payment by Labour would be removed and promised the increase in qualifying age would be phased in over 20 years. These things were not done. Instead more savage measures were implemented. National also stated "We are not going to cut one cent from the Health Budget" and "The primary funding of our public hospitals will continue to be through Area Health Boards made up of freely elected and appointed members.

18 K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) 51.

19 National Party Manifesto 1990.

National set up Area Health Boards and we will retain and support them".[20] In the 1991 Budget the government sacked all members of the Boards and took decisions to abolish them. The Health vote was reduced by $100 million in the Budget. There are a number of other examples, but these are sufficient to make the point that there is a serious problem with the way in which the system is working.

The foremost analyst of the changing electoral mandate is Professor Richard Mulgan who has observed that party manifesto and election policy is the "lynchpin of democratic government".[21] His analysis was done before the National Party was elected to office and he concludes that if governments feel free to make and break election promises whenever they see fit, such a change "would quickly corrode the values of public life and increase cynicism about governments and politicians".[22] The polling data indicate this has now happened and it is one reason our constitution is in crisis. We have got rid of the old rules and do not have new ones in their place. The behaviour Mulgan has observed is only a symptom of a more widespread imbalance in the constitutional system.

By the use of the expression "New Zealand's constitution in crisis" it is not intended to suggest there is an emergency. That is not the nature of the crisis. We have, according to the thesis advanced here, a constitution in crisis, not a constitutional crisis. The two are quite different. There is no immediate obstacle to government being conducted in New Zealand in 1992 - Parliament is meeting, the courts are open, ministers are making decisions. Indeed New Zealand has been singularly free of constitutional crises for more than 150 years. There were the beginnings of one in 1984, which is dealt with in greater detail in Chapter 3, when the exchange markets were closed after the general election and the defeated Prime Minister refused to devalue in circumstances where it seemed a new government could not immediately be sworn in.

It is not some sudden convulsion with which I am concerned here. A constitution in crisis is quite different from a constitutional crisis. By the expression a constitution in crisis I mean that the rules under which government is conducted are defective. They are preventing public decisions being made in a way which engender public confidence and support. This is not a situation which has developed overnight, it has been developing for years. It stems from the lop-sided nature of our constitutional arrangements. It is possible under New Zealand constitution as it now operates to make massive changes rapidly with inadequate public consultation and with little if any notice of the changes. The public is bewildered by the depth and speed of change and much of it does not seem to improve things. A fault of the New Zealand's constitutional arrangements is that it is possible to change

20 Above n19.

21 R Mulgan "The Changing Electoral Mandate" in M Holland and J Boston (ed) *The Fourth Labour Government - Politics and Policy in New Zealand* (Oxford University Press, Auckland, 1990) 11, 13.

22 Above n21.

political parties and the increasing domination of the executive. New Zealand, it was argued, wanted strong government with clear parliamentary majorities to act decisively in response to public demands.

In 1962 Professor K J Scott described the conventions of the New Zealand constitution in the following way when discussing the question of legislation and public opinion:[18]

> Save in emergency, legislative powers should be used only in accordance with the government party's election platform. As each party has a broad platform, this allows a good deal of latitude. The principle on which the limitation rests is that the New Zealand system of government is in one of its aspects a system of representative government in the sense that the electors choose not only between rival candidates but also between rival sets of policies. The positive side is that the government party should honour its pledges (either that certain legislation will be passed or that certain legislation will not be passed).

The inappropriate nature of the above statement, when matched against the performance of both recent Labour and National governments, indicates that the modern theory is in a state of collapse. It can hardly be argued that Scott's formulation is the constitutional convention in 1992. Significant decisions by both Labour and National Governments have been in breach of Manifesto commitments. In the 1987 election campaign Labour pledged as follows: "Labour is opposed to privatising efficient state enterprises. It sees public investment in commercial enterprises as appropriate, but retains the right to quit investments which long achieve the state's economic and social objectives". With more particularity in relation to New Zealand Post, Postbank and Telecom it said: "The three corporations will remain in public ownership with public accountability." Subsequently both Telecom and Postbank were sold to private enterprise - a clear breach of the election commitment.

The National party came to power in 1990 with the following commitments: "National will increase the age of entitlement for National superannuation from 60 to 65. The increase will occur over a 20 year period with annual increases of three months. National will reinstate National superannuation as a universal taxpayer funded pension payable to all eligible citizens without regard to income".[19] National promised the tax surcharge imposed on the payment by Labour would be removed and promised the increase in qualifying age would be phased in over 20 years. These things were not done. Instead more savage measures were implemented. National also stated "We are not going to cut one cent from the Health Budget" and "The primary funding of our public hospitals will continue to be through Area Health Boards made up of freely elected and appointed members.

18 K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) 51.

19 National Party Manifesto 1990.

National set up Area Health Boards and we will retain and support them".[20] In the 1991 Budget the government sacked all members of the Boards and took decisions to abolish them. The Health vote was reduced by $100 million in the Budget. There are a number of other examples, but these are sufficient to make the point that there is a serious problem with the way in which the system is working.

The foremost analyst of the changing electoral mandate is Professor Richard Mulgan who has observed that party manifesto and election policy is the "lynchpin of democratic government".[21] His analysis was done before the National Party was elected to office and he concludes that if governments feel free to make and break election promises whenever they see fit, such a change "would quickly corrode the values of public life and increase cynicism about governments and politicians".[22] The polling data indicate this has now happened and it is one reason our constitution is in crisis. We have got rid of the old rules and do not have new ones in their place. The behaviour Mulgan has observed is only a symptom of a more widespread imbalance in the constitutional system.

By the use of the expression "New Zealand's constitution in crisis" it is not intended to suggest there is an emergency. That is not the nature of the crisis. We have, according to the thesis advanced here, a constitution in crisis, not a constitutional crisis. The two are quite different. There is no immediate obstacle to government being conducted in New Zealand in 1992 - Parliament is meeting, the courts are open, ministers are making decisions. Indeed New Zealand has been singularly free of constitutional crises for more than 150 years. There were the beginnings of one in 1984, which is dealt with in greater detail in Chapter 3, when the exchange markets were closed after the general election and the defeated Prime Minister refused to devalue in circumstances where it seemed a new government could not immediately be sworn in.

It is not some sudden convulsion with which I am concerned here. A constitution in crisis is quite different from a constitutional crisis. By the expression a constitution in crisis I mean that the rules under which government is conducted are defective. They are preventing public decisions being made in a way which engender public confidence and support. This is not a situation which has developed overnight, it has been developing for years. It stems from the lop-sided nature of our constitutional arrangements. It is possible under New Zealand constitution as it now operates to make massive changes rapidly with inadequate public consultation and with little if any notice of the changes. The public is bewildered by the depth and speed of change and much of it does not seem to improve things. A fault of the New Zealand's constitutional arrangements is that it is possible to change

20 Above n19.

21 R Mulgan "The Changing Electoral Mandate" in M Holland and J Boston (ed) *The Fourth Labour Government - Politics and Policy in New Zealand* (Oxford University Press, Auckland, 1990) 11, 13.

22 Above n21.

too much too quickly with too little public input. Rules which permit this to occur need to be changed. The system needs to be slowed down; the whole system in New Zealand has a bad case of the "speed wobbles".

The statement above needs to be qualified. In some areas where there is no political agreement within the executive, or different views on policy details, change may be slow.[23] Making change is not easy because agreement has to be secured and on some issues it may not be. The point is, however, that political agreement within the executive is not always a sufficient check. The need to carry public opinion in support of government measures is much more difficult when a large amount of major reform is being undertaken. But what is decisive is political opinion within the cabinet and to a lesser extent the governing party. This opinion may not coincide with opinion in the community at large. Where the political constraints are not sufficient and there are few constitutional restraints the system becomes unbalanced.

In New Zealand there is a lack of balance between the three components of the system - the executive, Parliament and the courts. The situation now is one of overwhelming executive power. New Zealand prides itself on being a democracy, but the system of government is such that the claim is somewhat hollow. It is true we have elections - but what do they really determine? Indirectly they determine the identity of the party which will supply decision-makers, but not much more. The crisis of the New Zealand constitution lies in the maldistribution of power between its component parts.

There is an irony here. A number of changes to the New Zealand system over the past forty years have given more power to Parliament and to the courts than formerly existed. Some of those changes are outlined later in this chapter and they have been changes in the right direction. But they have not been sufficient to shift the balance away from the overwhelming nature of New Zealand executive power. New Zealand was a simpler society in 1950 and simple constitutional arrangements could work then. The need to face up to change, especially in the economic area, coupled with the diverse range of opinion which now exists in New Zealand, has put the system under strain and it cannot cope. A system which gave adequate levels of satisfaction when there was widespread agreement about the responsibilities of government and the capacity existed to deliver the desired outcomes, is no longer appropriate. The new wine will not pour into the old constitutional bottles. In a sense the changes made to the system of government outlined in this book have not been sufficient to catch up to the new reality facing decision-makers. The challenge is to fashion a new balance between the three components of the system, the executive, Parliament and the courts.

Part of the problem lies in the fact that New Zealand's constitutional arrangements have always been too undefined. The Constitution Act 1986

23 The best current example is the slow progress made in recent years on reform of the Companies Act because of policy disagreements between government advisers and ministers.

does not establish in law all the important features of our system of government, although it is a great deal better than what went before. Much of the constitution is not law, and the conventions can change as has been illustrated. Yet frequently there is no formal constitutional decision to change the practice, it just evolves. In New Zealand the constitution is too flexible and evolves too easily.

The flexibility has some advantages. If New Zealand is compared to Australia we find that Australia has a detailed written constitution, the content of which was settled in 1900 and which in many respects has not adapted easily to changed conditions. Furthermore, it is very difficult to amend. It is not suggested here that New Zealand should get itself into such a situation - in any case federalism on the Australian model is simply unnecessary to a country the size of New Zealand.

It is important to note that policy choice is influenced greatly by the process through which the decision must flow. How the policy-making process is structured can have a great deal to do with the policy outcomes which are delivered. I was often thought by my colleagues in political life to have an obsession with process - with the way of going about making decisions. And that was because I profoundly believed that an orderly, properly-structured process produced better decisions. So it is with our constitution. New Zealand has a constitution with a structure so rudimentary that it lacks the components to ensure balance. It is, however, capable of some achievements in requiring adherence to proper process. One of the most important constitutional cases decided in New Zealand was a decision in which it was held by the Chief Justice that the Prime Minister (Sir Robert Muldoon) was not able to change the law by prime ministerial press statement. A press statement he made declaring at an end a scheme established under legislation passed by Parliament, when Parliament had not repealed it, was held to be contrary to the Bill of Rights 1688, an important English constitutional document which is in force in New Zealand.[24]

The process by which public policy decisions are decided in New Zealand is broadly known as democratic politics. It is the constitution which frames the parameters within which those politics are conducted. The manner in which political conflict is structured and channelled also greatly affects outcomes. We do have wide-ranging democratic debate in New Zealand, but the method by which the rules of the constitution structure that debate to ensure that debate concentrates on the politics of issues, instead of the range of choices available and the competing merits of each.

What has developed in New Zealand is something of a disjunction between the policy-making process and the political process. The decision-makers are a select few politicians who decide things, not on the basis of what the political process of representative democracy tells them, but on the basis of what some varieties of economic or policy theory tell them. There should be greater integration between the policy development process and the democratic political process. The ideas in the theories have to

24 *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615.

be debated in the political marketplace before policies based on them are implemented. That has not been happening sufficiently and it has contributed to a loss of public confidence in the system.

Rather a number of the reforms have been implemented by stealth or ambush because their sponsors thought that the only way of having them accepted. I have taken part in a good deal of policy development of this character: the State Sector Act 1988 is the example which most clearly comes to mind. But my own preferred reform style of reform is best summed up by the elaborate consultative processes over a period of years which led to the Resource Management Act 1991. I do not believe the radical nature of that reform was diminished, or the chances of its acceptance reduced, by going through a thorough consultative process. Rather, the quality of it was enhanced by having the practicality tested. Despite that example, for the last few years there has been developing a dissonance between the expression of will, translated through the political process, and the policies implemented. The disjunction has produced dysfunction. There is widespread mistrust of the system.

My fear is, to borrow an idiom from the old west, we are in danger of shooting the piano player, when she is only doing her best. Politicians must operate within the constraints of the system in which they find themselves. In New Zealand that is not a good system. Politicians in New Zealand now are perilously close to levels of credibility which will cause the system to decay and collapse. The politicians need to be rehabilitated and public faith in the system of government restored by restructuring the constitution.

New Zealanders have never really thought of themselves as being able to change or adopt a constitution for themselves. The vague and flexible character of our present system make this inevitable to some extent. New Zealanders tend to think of issues in terms of politics, not in terms of a constitutional approach. There is rather too much politics and not enough constitutional structure or process. There is a real need to re-consider New Zealand's constitution in its fundamentals. People tend to be disillusioned with the politics and politicians, but they never seem to connect unhappiness in outcomes with the nature of the system itself. It is time to start making the connection.

V PROPOSALS FOR CHANGE

A central concern of the chapters which follow is the relationship between the three great branches of our government - the executive, Parliament and the courts. The proposals advanced amount to an ambitious restructuring of the responsibilities of these component parts of our system of government. A reallocation of powers and functions is proposed in some important respects. But it does not end there.

The traditional concerns of the constitution have been restricted to the branches of the government itself. Yet the functioning of the system is greatly influenced by organisations outside the government as has already been argued. Political parties are private organisations, not subject to public

scrutiny or control. But the constitutions of political parties themselves have a great deal to do with how the system of government behaves. Thus, a constitutional analysis must be applied to political parties to see how they fit into the constitutional arrangements.

Similarly, the media, which convey to the public the only information the mass of the people receive on the performance of the component parts of the constitutional system, influence the behaviour of the system. The media decide what the public will learn about what is happening. The media must be looked at from a constitutional angle, and when they are there is room for considerable disquiet.

There have been big changes to the New Zealand constitution in the last fifteen years. They include:

- The development of the Waitangi Tribunal including the provisions to look at Maori grievances back to 1840;
- The passage of the Official Information Act 1982 and later application of those principles local government;
- Extensive reform of parliamentary procedures in 1985 including establishment of a comprehensive select committee system and Parliamentary Service Commission;
- The enactment of the Constitution Act 1986;
- The setting up of the Law Commission and the establishment of the Legislation Advisory Committee;
- The enactment of the New Zealand Bill of Rights Act 1990;
- The reform of local government and the establishment of regional government;
- The repeal of a number of statutes which allowed broad power to make regulations on important problems without the explicit agreement of Parliament - the Economic Stabilisation Act 1948, the Public Safety Conservation Act 1932 and the National Development Act 1979;
- The establishment of the Regulations Review Committee in Parliament and the passage of the Regulations (Disallowance) Act 1989;
- The slimming down of the public service by the State-owned Enterprises Act 1986 and changed basis for operation of the public service in the State Sector Act 1988 and Public Finance Act 1989.

Not all of these developments or improvements to them can be dealt with in this book. The reforms to local government were vital and as a method of re-distributing power from central government offer possibilities which have yet to be fully developed, but no attention is devoted to these intriguing prospects here. Similarly, the changed nature of the public service is a most important subject, but one touched on in these pages only tangentially. The way in which interaction of the public service with ministers has developed, and the changes in the public service culture, has had a profound effect on the manner in which government functions and one which deserves close attention. I have views on the changes and they are not the same as those which have been expressed in the breathless flood of instant

analysis which the Fourth Labour Government attracted.[25]

To sum up: this book is a critique of the existing distribution of powers in the New Zealand constitution. It makes proposals for change and presents arguments in support. Each chapter deals with a different topic and each is designed to be self-contained, but inevitably there is much inter-relationship between them. The chapters began life as lectures and retain something of the informality of such presentations. I have set out to write a book people will read, at the same time basing the material in the literature to a degree, but not to the extent that the argument becomes tortuous or the references oppressive. This is not a work of reference. It is a book to read.

A number of detailed measures are put forward in the chapters which follow to address the situation which has developed. They are briefly summarised here but the argument for them is complex and is developed later, not in this introductory chapter.

Public Law

There is a conceptual problem in deciding what is embraced by the institutions and processes of public law in New Zealand. Many new institutions and remedies have been made available to people who are aggrieved by the actions of the state and its officials in recent years, yet some of these are little known and not much used. The legal profession has a key role to play in holding public institutions and decision-makers accountable to the standards the law lays down. There are, however, serious gaps and weaknesses in the approach which lawyers bring to the task which mean that people do not get a fair go when often they could. Outcomes can be produced for people if lawyers apply analysis and argument to institutions and decision-makers which they have not traditionally addressed. Many of the new constitutional safeguards can be accessed much more easily and less expensively than court remedies.

Constitutional Laws

Two significant constitutional statutes have been enacted in recent years - the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990. These statutes have changed our system of government in important ways, and they have added to the protections against abuse of power. Despite these changes there is an absolutist tinge to the New Zealand system of government which is based on the notion of giving total power to government. That problem needs to be approached by limiting the power of government and dividing it up among a number of institutions.

Neither the Constitution Act nor the New Zealand Bill of Rights Act is entrenched. They are ordinary statutes enacted by the New Zealand Parliament in the ordinary way and they can as easily be undone. The Constitution Act should be revised to contain more of the basic rules of our consti-

25 See J Boston, J Martin, J Pallot and P Walsh (eds) *Reshaping the State: New Zealand's Bureaucratic Revolution* (Oxford University Press, Auckland, 1991).

tution and the Bill of Rights Act should be added to it. They should then be entrenched so the new Act becomes New Zealand's basic constitutional document - The New Zealand Constitution. It should be not capable of being altered except by a referendum of electors or a 75 per cent majority in Parliament. Such a constitution would give the courts power to declare unconstitutional government actions or legislation contrary to it.

Maori Constitutional Developments

The power of the Waitangi Tribunal to examine grievances back to 1840, and the recognition by the courts and Parliament of the Treaty of Waitangi, has produced a Maori constitutional revolution in New Zealand. But the situation is untidy. The rights recognised and offered in the Treaty of Waitangi should be included in a New Zealand constitution, which should be insulated against alteration by a simple majority in Parliament. Other changes relating to Maori should be made. The Maori seats should be abolished and the system of parliamentary representation recommended by the 1986 Royal Commission adopted. Every effort should be made to make the Ministry of Maori Development a strong and effective department of government.

Reform of Parliament

There has been much parliamentary reform since 1985 and not all of it has reached its full state of effectiveness yet. The most important changes were to erect a new and comprehensive system of select committees with power to examine legislation, policy, expenditure and administration. These select committees are potentially powerful instruments by which to hold the executive government to account. But they have not been as effective as they might have been because so much of Parliament is taken up with party political contest that there are few incentives for MPs to engage in the constitutional functions of scrutiny of legislation, policy and expenditure. Ways have to be found to reduce the amount of political grandstanding and increase the amount of work devoted to constitutional accountability.

If members of cabinet were prohibited on attaining cabinet office from voting in the Parliament it would assist greatly in ensuring the Parliament did its work properly.

A rule should be adopted that bills must spend three months before Parliament unless there is an emergency to which the Speaker certifies or they involve immediate tax changes.

The number of Members of Parliament needs to be increased to 120 if Parliament is to be effective.

A statutory system of disclosure of MP's pecuniary interests should be implemented.

Changes to the Standing Orders of Parliament can help improve the functioning of Parliament, but in essence the problem is not the rules but the habit of regarding Parliament as a place for continuous electioneering.

The Speaker should be chosen on a free vote of Parliament for a fixed

term and thereafter resign his or her seat, and become MP for a notional seat of Parliament Hill. This would enhance the independence of the chair.

The entire Budget process including the parliamentary handling of the Budget and associated legislation needs to be reconsidered.

Political Parties

Political parties occupy an important role in the operation of the New Zealand constitution and their significance needs to be recognised by the enactment of rules regulating their conduct. The recommendations of the 1986 Royal Commission should be followed and an Electoral Commission given power to make decisions relating to the registration of political parties and approve their rules. Political parties should be required to disclose substantial donations received and their source. The allocation of free broadcasting time should also be done by the Commission. State funding for political parties should be introduced.

Party control in the Parliament should be reduced by changing the whipping system of voting and using it only for measures of vital significance to the government. This reform is an essential step of changing the way the New Zealand Parliament behaves. The manner in which party policy is framed and included in Manifestos at election time has produced a dislocation in political parties between what their policy is, and what they do, in government. That situation has produced dislocation in the political system as well, destroying its credibility and public confidence in it. Thus, there exists a constitutional problem.

The adoption of an electoral system based on proportional representation will assist in repairing the dislocation which has developed.

Cabinet and the Prime Minister

There are problems with the office of Prime Minister in New Zealand - there needs to be some clear definition and understanding of what the Prime Minister is supposed to do. At the moment there are far too many functions in the office. The Prime Minister is nominally in charge of everything and practically the range of control is much more limited. The office should be restructured to make the Prime Minister the chief executive officer of government and change the relationship of cabinet to Parliament.

The introduction of mixed member proportional representation as recommended by the Royal Commission provides a good opportunity to restructure cabinet. On appointment to cabinet people should cease to be Members of Parliament and have no vote there. Cabinet members should be able to answer questions in the Parliament, be required to appear before select committees and have speaking rights in the chamber. They would be free from constituency work which is both demanding and time-consuming. Ministers would better be able to concentrate upon their most important functions. The change would also make it more difficult for ministers to dominate Parliament.

Electoral Reform

New Zealand's system of parliamentary elections is fundamentally unfair. Parliamentary seats are not awarded in proportion to the support a party secures at the election. It also means that important political voices are not heard in the Parliament. The remedy is to implement the recommendations of the Royal Commission on the electoral system for a mixed member proportional system of parliamentary representation. This change would function as a fundamental parliamentary reform as well since it would change the behaviour of Parliament and make it more independent from the executive. New Zealanders should take advantage of the referendum in September 1992 to vote for this change.

The Media

The media play an important role in the political process. So vital is this role that it is of constitutional significance. The deficiencies in the performance of the media add to our constitutional difficulties. It is hard to run a democracy properly when people have a distorted and inaccurate impression of what is actually happening. Journalists need to return to the basics of their craft and separate news from comment. There is also need for greater accuracy in media reporting. The parliamentary press gallery has no clear focus or mission. There needs to be a fundamental re-think by newspaper proprietors about what their responsibilities are in the area of political journalism. They need to employ better-qualified journalists and pay them more. Public radio with a strong news and current affairs component needs to be preserved. An educational television channel without advertisements would be a useful development in improving the level of civic culture. Government should have a pro-active policy to make information more readily available.

2
The New Public Law

I INTRODUCTION

This chapter is a set of reflections on experience based around the way the New Zealand constitution works. Lawyers play an important role in the working of the constitution and our system of government. Yet the intellectual focus lawyers in New Zealand bring to public law is flawed. A different approach would serve their clients better and improve the way our system of government works. In a sense the legal profession is part of the problem. They are not alone in this: a later chapter argues that journalists have constitutional duties they are not discharging properly.

In his delightful little book, *Aspects of the Novel*, E M Forster describes the importance of the angle of narration.[1] The point of view from which the story is told has a great deal to do with the impact of the story itself. So I should say at the outset something of my own angle of narration. My approach to legal education and to the law is distinctly American. Before I went into politics my legal education in the United States, and my experience as a law professor there, made a profound impact on my way of thinking about the law, more than my New Zealand legal education or teaching experience here. Now that I have retired from politics, for one semester each year I teach law at an American University, the University of Iowa.

The legal academy occupies a different position in the United States from that which it occupies in New Zealand. When I was first a Law Professor in the United States I was somewhat shocked to find that the senior law professors at the university where I was teaching were paid a good deal more than the judges of the Supreme Court of the State. The same is true today. I thought then it reflected something rather unfortunate about the American system of values, that they did not value judges in the way we do. I have come to believe now that it reflects something interesting about the nature of the American legal culture. The law professors are not mere commentators on the judges' decisions - rather it tends to be more the other way around. The legal academy in New Zealand, I think, has not yet got to that point. The law enterprise in New Zealand universities needs to develop a more ambitious approach, more interdisciplinary, more expansive and more policy oriented. That is the first angle of my narration.

The second comes from spending nearly twelve years in public life, as a Member of Parliament, and as a party leader. This led to the fortunate

1 E M Forster *Aspects of the Novel* (Arnold, London, 1958) 75.

experience of occupying a number of offices of constitutional significance, including Attorney-General, Minister of Justice, Leader of the House, Deputy Prime Minister and Prime Minister. I was involved in making a great deal of public law as well as operating the system. This point of view is that of the participant observer. Not many people who analyse public law have had such experiences, and it certainly alters your thinking. You see the game from the other side of the fence to judges and lawyers. And when you are playing it from the politicians' side it does not even seem to be the same game. Let me give just one example.

I found teaching modern administrative law cases within a year of being the Prime Minister an unsettling experience. There is a yawning chasm between the way ministers look at decisions and the way courts look at them. The biggest problem teaching that material was to convey some understanding of the matrix in which administrative decisions are made, something which is difficult for students who have never worked in a bureaucracy. I am not sure that many of the judges know a great deal about administrative reality either, and I do not make that remark solely on the basis of experience as Minister of Justice. To me, modern administrative law looks like the dance of the seven veils, the judges rehearsing all the alluring things they can do to the executive branch of government but seldom actually doing it.[2] For this elegant dance they ask not for the head of John the Baptist, but something rather more important - for the recognition of the legitimacy of their power. So far they appear to have achieved implicit acceptance of an expanded judicial power, although, like many modern fashions, revisionism may yet set in.

II PERSPECTIVE ON THE LITERATURE

My own perspective on public law may not be unique, but it certainly is unusual. I wrote about, and taught, constitutional law before entering Parliament. This is the third angle of narration - the academic lawyer. As a law professor I had one approach - that I never went into any scholarly field without developing a desire to reform it. I had a lot of fun with the law of torts in that respect. The introduction of accident compensation was something with which I was involved. It was a great adventure getting rid of a big part of the law of torts and providing better help for injured people than the common law could provide.[3] For me law reform is what academic law is about. I always thought that Karl Marx had it exactly right when he said: "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it".[4] And I am fortunate because I have had the opportunity to do that in a lot of different areas. The first edition of

2 O Wilde "Salome" in *Plays* (Penguin Books, Harmondsworth, 1954) 319. See also *Oxford Annotated Bible* Matthew Ch 14 verses 1-12. (Revised Standard Version, 1962).

3 G Palmer *Compensation for Incapacity - A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979).

4 K Marx *Theses on Feuerbach, Marx-Engels, Selected Works Vol II* (Foreign Language Publishing House, Moscow, 1958) 405.

2
The New Public Law

I INTRODUCTION

This chapter is a set of reflections on experience based around the way the New Zealand constitution works. Lawyers play an important role in the working of the constitution and our system of government. Yet the intellectual focus lawyers in New Zealand bring to public law is flawed. A different approach would serve their clients better and improve the way our system of government works. In a sense the legal profession is part of the problem. They are not alone in this: a later chapter argues that journalists have constitutional duties they are not discharging properly.

In his delightful little book, *Aspects of the Novel*, E M Forster describes the importance of the angle of narration.[1] The point of view from which the story is told has a great deal to do with the impact of the story itself. So I should say at the outset something of my own angle of narration. My approach to legal education and to the law is distinctly American. Before I went into politics my legal education in the United States, and my experience as a law professor there, made a profound impact on my way of thinking about the law, more than my New Zealand legal education or teaching experience here. Now that I have retired from politics, for one semester each year I teach law at an American University, the University of Iowa.

The legal academy occupies a different position in the United States from that which it occupies in New Zealand. When I was first a Law Professor in the United States I was somewhat shocked to find that the senior law professors at the university where I was teaching were paid a good deal more than the judges of the Supreme Court of the State. The same is true today. I thought then it reflected something rather unfortunate about the American system of values, that they did not value judges in the way we do. I have come to believe now that it reflects something interesting about the nature of the American legal culture. The law professors are not mere commentators on the judges' decisions - rather it tends to be more the other way around. The legal academy in New Zealand, I think, has not yet got to that point. The law enterprise in New Zealand universities needs to develop a more ambitious approach, more interdisciplinary, more expansive and more policy oriented. That is the first angle of my narration.

The second comes from spending nearly twelve years in public life, as a Member of Parliament, and as a party leader. This led to the fortunate

1 E M Forster *Aspects of the Novel* (Arnold, London, 1958) 75.

experience of occupying a number of offices of constitutional significance, including Attorney-General, Minister of Justice, Leader of the House, Deputy Prime Minister and Prime Minister. I was involved in making a great deal of public law as well as operating the system. This point of view is that of the participant observer. Not many people who analyse public law have had such experiences, and it certainly alters your thinking. You see the game from the other side of the fence to judges and lawyers. And when you are playing it from the politicians' side it does not even seem to be the same game. Let me give just one example.

I found teaching modern administrative law cases within a year of being the Prime Minister an unsettling experience. There is a yawning chasm between the way ministers look at decisions and the way courts look at them. The biggest problem teaching that material was to convey some understanding of the matrix in which administrative decisions are made, something which is difficult for students who have never worked in a bureaucracy. I am not sure that many of the judges know a great deal about administrative reality either, and I do not make that remark solely on the basis of experience as Minister of Justice. To me, modern administrative law looks like the dance of the seven veils, the judges rehearsing all the alluring things they can do to the executive branch of government but seldom actually doing it.[2] For this elegant dance they ask not for the head of John the Baptist, but something rather more important - for the recognition of the legitimacy of their power. So far they appear to have achieved implicit acceptance of an expanded judicial power, although, like many modern fashions, revisionism may yet set in.

II PERSPECTIVE ON THE LITERATURE

My own perspective on public law may not be unique, but it certainly is unusual. I wrote about, and taught, constitutional law before entering Parliament. This is the third angle of narration - the academic lawyer. As a law professor I had one approach - that I never went into any scholarly field without developing a desire to reform it. I had a lot of fun with the law of torts in that respect. The introduction of accident compensation was something with which I was involved. It was a great adventure getting rid of a big part of the law of torts and providing better help for injured people than the common law could provide.[3] For me law reform is what academic law is about. I always thought that Karl Marx had it exactly right when he said: "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it".[4] And I am fortunate because I have had the opportunity to do that in a lot of different areas. The first edition of

2 O Wilde "Salome" in *Plays* (Penguin Books, Harmondsworth, 1954) 319. See also *Oxford Annotated Bible* Matthew Ch 14 verses 1-12. (Revised Standard Version, 1962).

3 G Palmer *Compensation for Incapacity - A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979).

4 K Marx *Theses on Feuerbach, Marx-Engels, Selected Works Vol II* (Foreign Language Publishing House, Moscow, 1958) 405.

Unbridled Power set out an agenda for reform. It was written for that purpose.[5] The second edition in 1987 was a progress report on the implementation of the agenda, with some further developments based on experience. Those parts of the reform agenda in *Unbridled Power* which have not yet become part of the law of the land, such as proportional representation, may yet be achieved.

Public law is rather different now compared with its state in 1984 when I assumed some responsibility for it. But of one fact I remain convinced - changing the world, even a country as small and simple as New Zealand, turns out to be a great deal more difficult than those who have not tried it imagine. My ideas for constitutional reform in New Zealand have had to be tested in the crucible of political conflict and practical politics. Consequently there is a reform angle of narration here as well.

To that I would add a final point; that those outsiders who try and make sense of what goes on inside, whether they be journalists or scholars, get a great deal of it wrong. Of course, truth is so often a question of impression and judgment. As a former academic turned political practitioner, often I used to find the attempts which were made by those outside to analyse what happened inside unreal. One of the most graphic examples I have come across is Jane Kelsey's attempt to analyse the Labour government's policy on the Treaty of Waitangi by reference to documents obtained under the Official Information Act.[6] The documents do not tell all the story even if they are analysed with detachment. Even people less committed to a point of view than Jane Kelsey, frequently are not able to capture the essence of what went on, or why it went on.

There has been a good deal of writing in New Zealand on public law and on politics, more writing than is often realised. There are a number of books that have come out in recent years. There has been Professor Keith Jackson's book *The Dilemma of Parliament*,[7] the University of Otago's Professor Antony Wood has published a book called *Governing New Zealand*,[8] Stephen Levine has edited a book called *Politics in New Zealand*,[9] Hyam Gold has edited a book called *New Zealand Politics in Perspective*,[10] and there is Les Cleveland's book *The Politics of Utopia*.[11] None of those books is by a lawyer although lawyers contributed to two of them - all of those books, however, are relevant to students of public law.

One of the few conceptual works in this area is Professor Richard

5 G Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979). *Unbridled Power. An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Auckland, 1987) is the second edition. There is a subtle but deliberate difference between the two editions. The second omitted the question mark.

6 J Kelsey *A Question of Honour - Labour and the Treaty* (Allen & Unwin, Wellington, 1990).

7 K Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987).

8 G A Wood *Governing New Zealand* (Longman Paul Ltd, Auckland, 1988).

9 S Levine (ed) *Politics in New Zealand - A Reader* (Allen & Unwin, Sydney, 1978).

10 H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul, Auckland, 1992).

11 L Cleveland *The Politics of Utopia* (Methuen Publications, Wellington, 1979).

Mulgan's work *Democracy and Power in New Zealand: a Study of New Zealand Politics.*[12] I do not agree with a lot of what Mulgan has to say, but I do believe his to be the most important of the recent works because it develops a theory. You can agree or disagree with his theory, but at least he provides an intellectual model. Description and analysis have not clarified much about New Zealand's system of government. We do not have a coherent public philosophy in New Zealand neither do we have a developed civic culture. The public do not understand, nor do they like, the existing system of government.

One of the older books that is available and often read by lawyers is Professor Kenneth Scott's work *The New Zealand Constitution.*[13] I was a student of Scott's and I hold his memory in particularly high regard, but I cannot help thinking that he was better on greek philosophy than he was on the New Zealand constitution. Although he was teaching in the Political Science Department at Victoria University when he wrote the book, it exhibits the fault that lawyers so often have - a concentration on the formal which obscures the reality. I was recently asked to write a foreword for J B Ringer's bibliographic work called *An Introduction to New Zealand Government.*[14] I realised when reading the manuscript just how much writing there is by people giving many different perspectives on the New Zealand constitution.

There is a great deal of writing in the law reviews by lawyers and some special issues devoted to public law, but not many books. Professor Michael Taggart edited a series of essays on administrative law which are interesting[15] and Dr Graham Taylor has recently published a text on judicial review.[16] Dr Paul McHugh has produced a book on the Treaty of Waitangi.[17] Three academic lawyers have joined forces to produce a text on official information,[18] and we are promised a text on New Zealand constitutional law.[19] The New Zealand public lawyers, however, despite the excellence of individual contributions, have not produced much material which makes sense of the entire enterprise.

In all the writing from both the stables of political science and law, there is little consensus. There is an emerging incoherence in the political process which is beginning to bring us to a new era of public law in New Zealand.

---

12 R Mulgan *Democracy and Power in New Zealand* (2ed, Oxford University Press, Auckland, 1989).

13 K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962). Perhaps the book which best gets to grips with realities of the modern New Zealand administrative system is J Roberts *Politicians Public Servants and Public Enterprise* (Victoria University Press, Wellington, 1987).

14 J B Ringer *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991).

15 M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986).

16 G D S Taylor *Judicial Review - A New Zealand Perspective* (Butterworths, Wellington, 1991).

17 P McHugh *The Maori Magna Carta - New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

18 I Eagles, M Taggart and G Liddell *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992).

19 P T Rishworth, W C Hodge and A Ladley *Public Law* (Butterworths, Wellington, 1992, forthcoming).

Public law in New Zealand could easily become infected with post-modernism.[20] By this I mean that nothing makes any sense, there is little meaning in anything, everything depends on your point of view; it is all a question of interpretation, and the interpretation is subjective rather than objective. When you come down to it, the post-modernists say, theory and analysis do not explain anything anyway. It is not a view with which I am in any sympathy; I do believe there is a need for strong public institutions based on clear and ascertainable principles, but I also recognise that the structure of New Zealand's constitutional arrangements is conducive to a drift towards constitutional deconstructionism.

The primary actors in our constitutional system are known as politicians. They are held in low esteem. The fact is partly the result of their own activities but more I think from the nature of the system in which they are obliged to operate. It is compounded by the low level of New Zealand civic culture; it must be said, that even people as well educated as second year law students often seem to be ignorant of how we are governed. They do not have any precise knowledge of what Parliament does, how caucus works, the legislative process or what the essential features of the New Zealand constitution are. Indeed, I have long thought that a solid course in High School Civics could do a great deal to improve the understanding of the New Zealand government and to empower New Zealand citizens to take some meaningful part in a process which is, after all, conducted on their behalf.

III THE INFLUENCE OF DICEY

Part of the problem, however, is with the lawyers themselves and with legal conceptions of what public law is. It is in a sense a jurisprudential problem. So, what is "public law"? In the traditional understanding it is about the distribution and exercise of power in the state, or public power. Public law in contemporary New Zealand parlance is both constitutional law and administrative law. Administrative law is supposed to be a child of constitutional law, but such has been its expansionary tendencies, that it tends to dwarf its parent.

There have always been serious problems with the substance and teaching of public law in New Zealand. Those problems I think stem, largely at least, from the arid tradition inherited from the United Kingdom. They come particularly from the dead hand of analytical positivism and its agent in constitutional law, Professor Albert Venn Dicey, and it is upon Dicey that I wish to launch a fully frontal attack now! If you look at Dicey's book, *An Introduction to the Study of the Law of the Constitution,* you find him beginning to discuss what constitutional law is. He examines the distinction between constitutional law and constitutional conventions and he says:[21]

20 J F Lyotard *The Post-Modern Condition: A Report on Knowledge* (Manchester University Press, Manchester, 1984).

21 A V Dicey *Introduction to the Study of the Law of the Constitution* (10ed, Macmillan, London, 1959) 30. The first edition appeared in 1885.

> With conventions or understandings he has no direct concern [he being the constitutional lawyer, a position for which women need not apply, apparently]. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail today differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced against the dicta and practice of Beaconsfield and Gladstone. The subject, however, is not one of law but of politics. And it need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is so only in so far as he may be called upon to show what is the connection, (if any there be), between the conventions of the constitution and the law of the constitution.

As if that were not enough, Dicey goes on to say:[22]

> The duty, in short, of an English professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.

If that is the only task of the law professor and the constitutional lawyer, it is a bad line of work to be in. Dicey and his disciples are all concerned to draw the boundaries between law and politics. Law should be neutral, it should be based on a coherent set of fundamental principles. The idea that such immutable principles exist in public law has always seemed to me to be false. The view is based on a set of distinctions which do not hold up. Law is a political instrument, using the word "political" in its broadest sense.

I was introduced to Dicey myself just after completing a Bachelor of Arts in political science. Dicey produced in me a state of intellectual revulsion and he still does. What is worse, he is fundamentally wrong. Too many lawyers and legal scholars of public law have been under his spell for too long. Dicey was dull, I always thought Bagehot was better. Bagehot was the writer who outlined the nature of cabinet government in the nineteenth century in a way which was very enlightening and still is.[23] While the

22 Above n21, 31

23 W Bagehot *The English Constitution* (Fontana, London, 1963). It was first published in 1867. This

strictures of Dicey have lessened in New Zealand since I was a student, one can see in the fabric of public law in New Zealand, particularly constitutional law, a number of features which tend to deaden the subject and which remove it from practical reality in the eyes of students.

I can sometimes see that glazed look in the eyes of students at Victoria. The subject does not seem to be like contracts, for example, which seems to students to be real. Perhaps the law of contract has rules, perhaps you can find out what they are and apply them. By comparison public law seems smoky and misty; not capable of being understood and therefore not of great importance, especially if you want to get a high paying job in some big commercial firm. Such a view is fundamentally mistaken. Public law is the mainspring from which all the other law flows. Public law sets out the ground rules on which the whole of the society and the whole of the legal system works. Public law is, from a practical point of view, extremely important. Public law is about the legislative process. Public law involves international obligations which play an increasingly important part in shaping our domestic legislation. An important practical point which has been lost sight of, because of this preoccupation with Dicey, is the practical possibility of the lawyer in downtown Oamaru actually advising people on the basis of public law and making some difference.

My contention is that no one can be an adequate public lawyer without understanding not only the laws of the constitution, but also the practice of it, how it works. If one restricts oneself to the rules recognised by courts, one will understand very little about how we are governed, or how public power in New Zealand is distributed. From the lawyer's point of view, there is a further deficiency in the traditional approach - it yields little about how to produce outcomes for clients. If New Zealand public lawyers borrow the approach of the American realists they may at least be able to locate themselves at the ground upon which the match will be played.

The most appropriate insight is Karl Llewellyn's:[24]

> This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.* (Italics in original).

That aphorism has equal application to our constitutional framework and what goes on within it. What MPs, ministers and civil servants do about disputes and policy issues is to my mind public law itself. It seemed to me as a politician that most of the legal profession did not deal in, or have any developed capacity for dealing in, disputes or issues where MPs, ministers

---

edition contains a splendid introduction by R H Crossman, whose practical political experience adds insight to his analysis.

24 K Llewellyn *The Bramble Bush* (Oceana, New York, 1951) 12.

and civil servants had decision-making capacity or the ability to influence outcomes.

In making this point, I do not mean to be understood as denigrating the doctrines of judicial review which are part of modern administrative law, notwithstanding some of the waspish remarks made earlier. I was a law student when the foundation case in modern administrative law *Ridge* v *Baldwin* was decided.[25] The edifice which has been erected by the judges since then is an important and enduring (I hope) contribution to our constitutional framework, because it is a much needed check against the executive. But it is court-oriented jurisprudence. The remedies are expensive. The outcomes remain uncertain and exceedingly difficult to predict whatever claims are made on the need for simplicity.[26] Furthermore, there are many outcomes administrative law cannot reach which can be reached by other legal techniques. Cheap and quick results are usually preferable to more expensive ones which are long and drawn out. Prevention of the dispute arising in the first place is in normal circumstances the most prized goal for any legal adviser and client.

The truth is that public law in New Zealand has to deal with the sprawling mass of reality about how public decisions are made here. Who makes those decisions? What rules do they have to follow in making them? How can those decision-makers be influenced in the content of those decisions? At its broadest, public law in New Zealand is about policy outcomes. The subject needs a new angle of approach - one which is relevant to the law practitioner in the real world.[27]

It is important not to confuse the place where the argument is made with the way in which it is made. The approach being developed here proceeds on the basis that lawyers are expert at clear, logical thinking. That they can analyse and dissect propositions, and develop policy schemes based on carefully defined principles. The traditional intellectual techniques of the law have a significant contribution to make to policy development, both in terms of rigour and in terms of practicality. The world we have now is one of almost limitlessly contestable policy advice. Lawyers need to understand the unique contributions they can make to this field.

My own favourite invention for translating the foregoing insight into reality in New Zealand was the Law Commission.[28] The manner in which the Commission works, by publishing discussion papers and then present-

25 [1964] AC 40. See K J Keith "*Ridge* v *Baldwin* - Twenty Years On" (1983) 13 VUWLR 239.

26 Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s*, above n15, 1.

27 Judges sometimes complain about failure in broad thinking by New Zealand lawyers: see Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 50:

> And unfortunately in my view many counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on.

28 Law Commission Act 1985.

ing final reports with draft bills attached, produces carefully thought out policy with ample public participation. The high standard of the Commission's performance in a relatively short time has moved the legal profession some distance in the direction I believe it should travel.

The exercise of public power frequently impacts on the welfare of citizens directly. Decisions by ministers, civil servants, the content of Acts of Parliament, the content of regulations, and decisions made by local government all have a great effect on individuals. The question posed for public law is what can lawyers do about it? Well, they can learn where representations should be made to influence the decisions. Advocacy is not restricted to the courts. Taking cases to court is one of the least effective ways of influencing decisions and one of the most expensive. To ask for court decisions about public law is like closing the stable door after the horse has bolted.

The effective lawyer wants to influence the decision for the client at the beginning, not overturn it at the end. I suspect that many students at the end of their public law courses think that the Court of Appeal of New Zealand is the place to take clients and as often as possible. A prudent lawyer with a client whose activities may be adversely affected by government has many more avenues available. Some of them have opened up only recently. Knowing where to apply those arguments and how to apply them in the most effective fashion is what public law should be about.

Traditional New Zealand constitutional law is strangely silent on a number of key subjects where policy decisions are really made and where power truly resides. Cabinet is a good example. This institution is largely ignored. Public law also says little about political parties, yet who can deny their fundamental importance in the distribution of power in this community? It is also silent on the subject of caucus, and it has not much to say about the electoral process; on questions of administration and decision-making it is not strong, unless one restricts oneself to judicial review. The media are of vital importance in a modern democracy but do not come within public law's ambit as traditionally understood.

IV THE NEW FOCUS

The new focus for lawyers and public law should be on policy outcomes.[29] It comprises the making of carefully crafted arguments which can alter policies while they are in the gestation period, adding to the effectiveness of parliamentary scrutiny of those policies, altering the application of the policies to specific cases within the executive branch of government, providing input to the legislative process to increase the quality of legislation and ensuring client's interests are fully taken into account within the process. Further, my experience suggests there are some existing areas of public law which lawyers have tended to neglect in representing clients.

29 This view is hardly new, see H Lasswell and M McDougal "Legal Education and Public Policy: Professional Training in the Public Interest" (1963) 52 Yale L J 203. The authors made the following statement at 208-209:

Some may object to such an ambitious sweep for public law as the one I am advocating. It is not, however, a case of whether lawyers are Pericles or the plumber.[30] They must be both. There are many needs for lawyer-like plumbing in constructing even the most holistic Periclean schemes.

While categories can give an artificial sense of order, the situation in which the opportunities occur can be categorised. The categories are:

1 Defining issues for policy attention prior to decisions by government.
2 Bringing argument to bear on policies and decisions of executive government before they are adopted or made.
3 Assisting in the process of parliamentary scrutiny of executive action and utilising parliamentary remedies for clients. (This has particular application to the legislative process, but is not restricted to that.)
4 Ensuring existing features of public law are not neglected in advising clients.

I have constructed a number of questions within these categories, based on my experience in politics, against which lawyers can test their range of public law vision. My suspicion is that many lawyers would not be able to honestly answer in the affirmative, although New Zealand realist lawyers should be able to answer "Yes" to all of these questions.

1 Defining issues for policy attention prior to decisions by Government.

Do lawyers know how to go about getting a policy plank adopted in a political party manifesto? Do they have available the constitutions of the political parties?

Do lawyers know how to use the media to the advantage of a client?

How much attention do lawyers pay to the work of the Law Commission and the effect of its proposals on clients?

What analytical attention do lawyers give to pressure group activity and its impact on their clients' affairs ?

2 Bringing argument to bear on policies and decisions of executive government before they are adopted or made.

Are lawyers familiar with the contents of the cabinet manual and do they use it?

It should need no emphasis that the lawyer is today, even when not himself a maker of policy, the one indispensable adviser of every responsible policy-maker of our society - whether we speak of the head of a government department or agency, of the executive of a corporate or labour union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot *legally* do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy.

(In fairness to Dicey about whom I remarked earlier, it should be noted these two authors are equally sexist. Women could not practise law in England when Dicey wrote and there were not many women lawyers about in 1943 in the United States).

30 W Twining 'Pericles and the Plumber' (1967) 83 LQR 396.

Do lawyers know enough about the Budget process to effectively represent a client who has good reason to suspect that his or her business may be adversely affected by a Budget decision about to be made?

Are lawyers familiar with the structure and membership of cabinet committees?

Do they know about caucus committees and how to make representations to them?

Do law offices have copies of the manuals of government departments with which the lawyers deal?

How often do lawyers write to ministers of the Crown and when they do, are their representations effective?

Do lawyers know how to appeal over the head of a minister to the Prime Minister?

Do lawyers study carefully the bureaucracy with which they deal? Do they know the department's management structure and the statute law which governs the department's activities?

3 Assisting in the process of parliamentary scrutiny of executive action and utilising parliamentary remedies for clients.

Do lawyers know how to secure the help of MPs for their clients? Do they visit the MP in his or her electorate clinic on behalf of clients?

Do lawyers know how to get a Parliamentary question asked on matters which relate to a client's affairs?

Do private practitioners know how to promote local and private bills to be passed by Parliament?

Are practitioners familiar with the legislative process - do they study bills as introduced on behalf of their clients?

Do lawyers know how to make representations on the content of bills at select committees and equally important, how to be effective?

Are practitioners familiar with the new structure of parliamentary select committees, their powers, jurisdiction and capacity to conduct inquiries?

Do all law offices have an up to date copy of the standing orders of Parliament and speakers' rulings?

Do lawyers know enough about the privilege jurisdiction of Parliament to be able to represent a client in front of the Privileges committee? Do they know how to do the research?

Do practitioners complain on behalf of clients to the Ombudsmen in respect of unfair and wrong behaviour by central and local government?

Do lawyers know what an inquiry by the Auditor-General could achieve for their clients?

Are lawyers familiar with the new parliamentary remedies against delegated legislation, in particular the Regulations Review committee and the provisions of the Regulations (Disallowance) Act 1989?

4 Ensuring that existing features of public law are not neglected in advising clients.

Do lawyers make much use of the Official Information Act 1982 to assist their clients?

Do all law offices have a copy of the Directory of Official Information, which must be published every two years, and which contains summaries of all the information held by government agencies?

Do practitioners use the Local Government Official Information and Meetings Act 1987 on behalf of their clients in dispute with local government? Do they know about section 19 which provides a key to the information held?

Do they know how to use the open meetings provision of this legislation?

Do lawyers understand the full implications of the New Zealand Bill of Rights Act 1990 and take it into account when they give advice?

Are lawyers familiar with the content of the Constitution Act 1986?

Are New Zealand lawyers able to find their way around the Australian Constitution Act and the United States Constitution?

How much command do lawyers have of the new Treaty of Waitangi jurisprudence? Do they really understand Maori aspirations and concerns?

I feel I should outline the thinking behind some of the questions. In a sense the entire book is about these issues, so not all the meaning can be revealed in a single chapter. But I hope to give the flavour of the approach being advocated. Much could be written about the legal utility of all the subjects raised and creative ways in which lawyers can use them. The purpose of a public law course in the universities is to teach people who are going to be lawyers how government works. Of all the things that can happen to clients, government can cause them more trouble than any other entity. And the range of remedies available against government is greater than against any other opponent. The most potent of those remedies will not be found in courts, important as the courts are.

A graphic example of what I am talking about is to be found in the area of delegated legislation. There is a massive amount of delegated legislation, which is passed by cabinet, sent to the Governor-General in council and signed into law at a rate which often reaches double figures each week. Regulations are the law of the land, but they are made by the executive branch of government, often in the interests of the executive branch of government, under power delegated by Parliament, in Acts of Parliament.

The way in which subordinate legislation is now subject to both judicial and parliamentary control provides an arresting example of how the modern constitution works. The doctrine of *ultra vires* has long provided a mechanism for judicial review of regulations in New Zealand, but striking down a regulation in court is not easy, because the tests are tight and parliamentary counsel are not in the habit of drafting regulations outside the power of the enabling statute.[31] They are required to certify to cabinet that a draft regulation is within power. Sometimes the certificate is qualified and cabinet is nervous about regulations which come before it in that category.

Consider, however, the parliamentary protections available these days

31 A leading New Zealand case is *Reade* v *Smith* [1959] NZLR 996.

against abuse of the power to make regulations. The select committee called the Regulations Review committee has powers of the widest character. It is chaired by a member of the opposition, a convention which has been established by Labour and followed by National governments. Making complaints to the committee is simple. It is by letter to the chair. The complaint must be placed before the committee at its next meeting and the person or organisation aggrieved must be given the opportunity to address the committee. There is a right to do all of this unless the committee decides by unanimous resolution to proceed no further. This provision in standing order 390 means that the capacity to pervert the process for reasons of political expediency is reduced.

All regulations, whenever they were made, stand referred to the committee. Standing order 389 provides grounds upon which the regulation can be brought to the special attention of the House and they are much broader than those available in ul*tra vires* cases before the courts. The grounds are that the regulation:

- is not in accordance with the general objects and intentions of the statute under which it is made;
- trespasses unduly on personal rights and liberties;
- appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- excludes the jurisdiction of the courts without explicit authorisation in the enabling statute;
- contains matter more appropriate for parliamentary enactment;
- is retrospective where this is not expressly authorised by the empowering statute;
- was not made in compliance with particular notice and consultation procedures prescribed by statute;
- for any other reason concerning its form or purport, it calls for elucidation.

These grounds are potent. Reports have been made under these statutory orders of great help to aggrieved people. But there is more: The Regulations (Disallowance) Act 1989 provides that the House of Representatives may by resolution disallow any regulations or provisions of regulations. Furthermore, there is provision for automatic disallowance of a regulation if a motion put forward by a member of the Regulations Review committee is not disposed of within 21 sitting days. While this procedure has yet to be used, it provides heavy artillery in the hands of the Regulations Review committee. And the experience of the Regulations Review committee itself in the last few years provides ample evidence that other effective remedies are available.

Consider the case of Mr Edward who owned and operated a chemist shop in Rotorua. It is a story about the imposition of the policy that the user

should pay for the cost of government services and the silly effects application of the policy can have in individual cases, if it is not applied with discernment. Mr Edward obtained a second-hand weighing machine for approximately $500 from the United Kingdom.[32] He installed it outside his shop for public use. The machine had a British certification as an approved weighing instrument. It was rather a sophisticated machine which provided a computer printout. Mr Edward was advised by the Labour Department that he was required to apply for New Zealand certification of the machine and that this would cost him $2,000, a charge made under the Weights and Measures Regulations 1987. Mr Edward went to his MP, who complained to the Regulations Review committee. The committee's inquiry was extensive and its report trenchant.

The committee found it "astonishing" that the machine would have to undergo such expensive accuracy tests. It found that the regulation unduly trespassed on personal rights and liberties, and made the rights of persons dependent upon administrative decisions which are not subject to review on their merits. It recommended that such weighing machines should either be excluded from the regulations or that certificates of accuracy issued by other countries belonging to the International Organisation of Legal Metrology should be recognized.[33] The regulations were changed to recognise such certificates and everyone lived happily ever afterwards.[34] Note, that this result was secured under the standing orders - the Regulations (Disallowance) Act 1989 was not involved here. What surprises me is how little known these new protective provisions are among the legal profession and how the opportunities now available are little used.

Parliamentary select committees generally are a forum in which people can influence the outcome of legislation. It is exceedingly rare for a bill to come out of a select committee without alteration, and the amendments are a result of submissions and second thoughts of officials and ministers. It is always easier, of course, to influence legislation before it is introduced. But that requires some knowledge of what is proposed. Good contacts with government departments, plus the Official Information Act can provide the necessary information.

Where there is some really difficult technical legislative problem, contact could be made with the Legislation Advisory committee, which is appointed by the Minister of Justice.[35] This body, consisting of judges, the

---

32 Regulations Review Committee *Report on the Inquiry into Fees Charged under the Weights and Measures Regulation 1987*, (1987-90) AJHR Vol XVIII I.16, 9.

33 Above n32, 12.

34 Weights and Measures Regulations 1987, Amendment No 1, SR 1987/123.

35 For an explanation of the Committee's origins see G Palmer "The New Zealand Legislative Machine" (1987) 17 VUWLR 285, 291. The Terms of Reference of the Committee are as follows:

(a) to scrutinise and make submissions to the appropriate body or person upon aspects of bills introduced into Parliament affecting public law of raising public law issues;

(b) to report to the Minister of Justice or the Legislation Committee of Cabinet on the foregoing aspects of legislative proposals which the Minister or that committee refers to it;

President of the Law Commission, representatives from the Department of Justice and the Crown Law Office, private practitioners, and Chief Parliamentary Counsel, is chaired by Dr Mervyn Probine. It acts as a watchdog on the quality of legislation and public law generally. When the committee does not succeed within the executive branch of government, although it often does, it may make submissions to the select committees. The Legislation Advisory committee improves the quality of legislation, but it is almost unknown.

Select committees play a vital role in the New Zealand Parliament in scrutinising and correcting proposed legislation, but their powers are extensive in other areas as well. Every issue dealt with by every department is now capable of being inquired into by the relevant select committee. Select committees can examine policy, they can look at expenditure, they can hold hearings on virtually anything they like.[36] The powers they have make them important places for people and organisations who think they have not been given a fair shake. Some of them have ancient and technical jurisdiction, what Sir Edward Coke called the *lex et consuetudo parliamenti* (the law and custom of Parliament), which is a very complex field involving much ancient learning.[37]

Representing someone who is hauled in front of the Privileges committee of Parliament is a most challenging assignment. The privileges of Parliament are extensive.[38] I once remember sitting with Sir Robert Muldoon on a Privileges committee hearing. He was dealing with a journalist, a species of person of whom he was not particularly fond. He suggested at one point that we should put the journalist in the parliamentary dungeon and feed him on Bellamy's pies. This frightened the journalist somewhat, which was its intended effect. Although it did not happen, it could have. The New Zealand Parliament has power to imprison for breach of privilege, although probably not the power to fine, despite the fact it has done so. Some members of the legal profession who become involved in privilege are most uncertain in their approach in my experience.

Appearance at parliamentary select committees by lawyers tends to be rather ineffective - it is their own fault. There are disconcerting features from the lawyer's point of view. Sometimes MPs read newspapers or sign

---

(c) to advise the Minister of Justice on such topics and matters in the field of public law as the Minister from time to time refers to it;

(d) to monitor the content of new legislation specifically from an "Official Information" standpoint.

This last reference was added when the Information Authority went out of existence, Official Information Act 1982, s41(2). See also K J Keith "The New Zealand Legislation Advisory Committee: Choreographer or Critic" (1990) 1 Public L Rev 290.

36 *Standing Orders of the House of Representatives 1986* brought into force 1 August 1985. Anyone wanting to know anything about Parliament should consult, D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985).

37 C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21ed, Butterworths, London, 1989).

38 Legislature Act 1908, s242.

their correspondence and show signs of impatience at long-winded pedantic presentations. But lawyers tend to address parliamentary select committees as if they are some species of court. They are not and that is not the way to proceed. Knowing how to get your message across in a fairly compelling, brief, and graphic way is one of the elements of advocacy at parliamentary select committees. There is a lot of work available for lawyers who know what they are doing representing people and organisations at parliamentary select committees.

It is not only at select committees of Parliament where there is scope for legal talent and help to be had for clients. Lawyers tend to ignore what MPs can do for their clients. How many lawyers go to see MPs in their clinics which are held weekly? Often that can be the cheapest, and most effective way of dealing with their client's difficulty. Not many lawyers think of it, in my experience. Quite often representations by MPs in the right quarter can be effective. How many lawyers in private practice know how to get a parliamentary question asked if a government agency or minister has plans which affect the vital interests of the lawyer's client? Again, not very many, in my experience. Yet the parliamentary question can secure commitments which can be of vital importance to clients later.

How many of the standing orders of Parliament are known to public lawyers? Norman Kirk used to tell new MPs in Parliament to learn a standing order a day. There are 413 of them so they take some time to master. The standing orders of Parliament are extensive, but important. Practitioners ought to have a set in their law offices for a number of practical reasons. First of all, if you want to promote a local bill because you are the solicitor for a local Council, the standing orders tell you how to do it. The number of lawyers in New Zealand who have not read the standing orders when they promote local bills is notorious around Parliament. What they mainly do is to write to the Parliamentary Counsel Office, or the Clerk of the House, and ask how to promote a local bill. They ought to know. Some people need to have the law changed by private Act of Parliament. Several private Acts go through the New Zealand Parliament most years and private Acts follow a different procedure. Promoting private Acts of Parliament can be of vital importance to a client and there needs to be knowledge about how to do it.

One of the most useful weapons for any client who is pitted against government is information. The Official Information Act 1982 should be of great advantage to the legal profession; they should study it. It is studied in some detail in the corridors of power in Wellington, but it is studied from a somewhat different point of view. It is studied as to how it can be avoided or evaded. Much effort was put in at the beginning to ensure public servants were familar with the Act and had procedures for dealing with requests. There is a great deal of unpopularity about the Official Information Act in the eyes of decision-makers, because many of them do not like to share information. The Official Information Act is based on the theory that information is power, and in a democracy it ought to be shared. While the Act has changed the culture profoundly it is much less closely observed than it ought to be.

The Official Information Act is particularly unpopular with ministers and ministerial staff. I found it necessary when in government to fend off several efforts to put in harsh charging regimes for requests for information, something which would do much at the practical level to eviscerate the purposes of the legislation. My prediction is that ministers will try to limit the Act if they can. State-owned enterprises tend to be paranoid about it. They did not want to be subject to it when they were established, but I insisted and put a procedure in the legislation for a select committee to review the matter: it reported that they should remain subject to the Act.[39]

When making big policy decisions which may be unpopular, it is better to choose the best time to announce them rather than having someone else half announcing them as a result of information they have obtained under the Official Information Act. The Official Information Act is, however, important to the lawyer in private practice. If someone in government (whether it be an agency, department or a minister) proposes to do something which is adverse to a client's interests, the first thing to do is find out what the facts are. And the best chance of finding out what the facts are is to secure information under the Official Information Act. These principles apply to local government as well. Securing information about what local governments want to do is of vital importance to lawyers in the most humble practices. Yet I do not believe that the cheap and quite quick techniques now available have been used as much as they could have been for professional purposes by lawyers.

Then there are the Ombudsmen. How many lawyers actually send complaints on behalf of their client to the Ombudsmen? In the Ombudsmen's ordinary administrative jurisdiction, an authoritative source told me that something less than 10 per cent of the complaints come from the legal profession. The Ombudsmen, in fact, are effective, and cheap in dealing with wrongs, and at setting wrongs to right. Their "Compendia of Casenotes" make interesting reading.[40]

This brings me to the question of ministers. Lawyers tend to think cabinet does not exist, because Dicey told them it was not part of the law of the constitution. But anyone who wants to understand the distribution of power in New Zealand must study cabinet. Cabinet is where it all happens, and if you have a client who has a real problem and the cabinet is going to decide the policy in relation to that problem, you had better know how to reach the ministers. Of course there are some in Wellington who make livings as lobbyists by knowing who the private secretaries are and knowing how to get entrée; I am not talking about that. I am talking about making timely,

---

39 *Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee On the Review of the Ombudsmen Act 1975 amd the Official Information Act 1982 on the Operation of State Enterprises* (1990) AJHR I.22A para5.

40 See the *Ninth Compendium of Case Notes of the Ombudsmen* (Office of the Ombudsmen, Wellington, July 1989); *Eighth Compendium of Case Notes of the Ombudsmen* (Office of the Ombudsmen, Wellington, October 1987) and the *Seventh Compendium of Case Notes of the Ombudsmen* (Office of the Ombudsmen, Wellington, April 1986).

principled, rigorous representations on behalf of a client about how government policy or agency action may affect that client's affairs. That can be done, it is perfectly proper, but it is not often done. When it is done, in my experience, it tends to be done ineptly because the legal profession simply does not understand how government works.

Consider departments. It is necessary to know something about the structure of the executive branch of government and the departments of state. Some of them, too many of them, have statutes which govern their procedures.[41] Those statutes ought to be studied; but what is more important is that lawyers and students of public law ought to know how advice is tendered to government. Often it will be that the best approach is not to the minister but the public servant. If it is a technical matter, do not worry the minister with it, take it to the person in the department who is most concerned with those technical matters and get it settled at that level. Rather, the present approach too often seems to be to fire a letter off into the bureaucracy and just hope something will happen. You often need a direct representation. You need to know who the decision-makers in the government department are. You need to understand the manner in which advice is tendered by the public service. You need to know in whom the discretions reside. You need to study the manuals of the public service department (available under the Official Information Act), to find out how far down the delegations go.

There are some potent protections for your client's interest in public law institutions which hardly ever come to the knowledge of the legal profession. Take the question of pressure groups. Sometimes pressure groups are very well organised; in the environmental area that is particularly true. The environmental pressure groups have a lot of information.[42] That may be information of value to your client. How many planning lawyers seeking a consent have gone to see the environmental pressure groups to find out their attitude to a particular matter before taking a step so they can advise their client? So often, money, effort and time spent in planning a strategy at the beginning will avoid lengthy legal proceedings later. With matters touching Maori issues, that is also true.

The Controller and Auditor-General is another person whose jurisdiction the public lawyer should be familiar with.[43] The Auditor-General is the watchdog of public expenditure. The Auditor-General has very substantial powers and can cause all sorts of trouble with a good investigation; if your client has got some complaint about government expenditure, then it may be better to go to the Auditor-General than to write to the minister. The public lawyer properly equipped with knowledge can light fires in so many different areas at once that favourable outcomes may quickly result for clients.

---

41 Legislation Advisory Committee, Report No 4 *Departmental Statutes* (Department of Justice, Wellington, 1989).

42 G Palmer *Environmental Politics - A Greenprint for New Zealand* (John McIndoe, Dunedin, 1990).

43 Public Finance Act 1977, ss14-36.

Probably the final place of repose for the public lawyer who has failed everywhere else, is to have some knowledge of how the political parties run; how they make policies; to whom you go to in order to get planks adopted; how to ensure that your client's point of view is not going ignored in the formulation of policy. If a policy comes out of the political party it tends to be harder for the bureaucracy to knock over later.

The point is perhaps self-evident in some respects, but at law school, and in subsequent professional courses, a great amount of time is spent teaching subjects like office and court room practice, civil procedure, and evidence; indeed most substantive courses are concerned with predicting what courts will do. Surely, it is always better to avoid an adverse decision for a client being made in the first place; to ensure that the policy is developed at the beginning in a manner which is most favourable to the client's interest.

I have said a good deal about what public law is about, but let me now say a little about what it is not about, or at least not much. Take the subject of parliamentary sovereignty, a topic which hogs the time of law students and fascinates legal academics. It fascinates no one else. I wish we could stop being preoccupied with it and concentrate on something more useful and real. I can say that after nearly twelve years in the New Zealand Parliament, I never heard that subject of parliamentary sovereignty discussed seriously at all by MPs there, even in the great debate on whether New Zealand should have an entrenched Bill of Rights. The issue was not whether we could, but whether we should. Parliamentary sovereignty is studied by law students to the point of distraction. Then, there is the scope of the royal prerogative. I have spent a lot of time with the Queen, but never have we discussed the Royal prerogative. It does not come tripping off your tongue at every cabinet meeting. It is not very often that a minister becomes involved with it - the prerogative is not one of the central ideas of the modern democratic state although knowledge of it can be vital in certain classes of case. Then there are the conventions of the constitution. Law students look at them and try to figure out what they are. But inquiries into whether some practice has ripened into a convention, or whether it has not, are hardly as profitable as a real knowledge of the components of the system and how they fit together.

V THE INTERNATIONAL PERSPECTIVE

My experience in Parliament and in government tells me that lawyers are on the whole not knowledgeable or effective in using the avenues available to them. We have a simple, but at the same time, subtle and complex system of government. It is not merely in respect of New Zealand that our conception of public law fails. It fails also if that conception is restricted to New Zealand. No one can sensibly advise business in New Zealand today without understanding Closer Economic Relations with Australia.[44] Indeed,

44 G Palmer "International Trade Blocs - New Zealand and Australia Beyond CER" (1990) 1 Public L Rev 223.

I suggest that the Australian Constitution Act 1900 is something that public law students and law practitioners in New Zealand should be familiar with; they need to understand it because the distribution of power in the Australian Commonwealth is something with which New Zealand business has to deal on a daily basis. You have to know whose rules govern, which requires a knowledge of the powers of the states and the powers of the Commonwealth. It can involve some recondite learning, such as the difference between section 109 of the Constitution Act (dealing with manufactured inconsistency) and section 51 which gives the power to the Commonwealth government to legislate on certain matters. The residual powers remain with the states. It is to be remembered, too, that free trade in services, including legal services, across the Tasman is not far away.

I well remember when I was asked to go to Australia to advise the Australian government on accident compensation. A New Zealand judge, Sir Owen Woodhouse, was the Chairman of the Inquiry. We had considerable difficulties with the Australian Constitution Act, which is strange to New Zealand eyes. The Australian Constitution Act is niggardly in its grants of power to the Commonwealth government; we wanted to set up an accident compensation system rather similar to the one in New Zealand. We wanted to take away the right to sue at common law in Australia, and that was a matter of state power, not of federal power. We had to find some federal power somewhere. So we employed some of the best silks in Australia, and we had them all up to Sydney to our Inquiry and we paid them a great deal of money to find out what the Australian Constitution Act meant. They were not asked to provide written opinions but to come and advise orally. The Australian Constitution Act was the subject of an amendment called the Chifley Amendment 1946, which gave the Australian government power to pay sickness benefits. They already had the power to pay invalid pensions and the 1946 amendment gave them the power to pay sickness benefits.

The question that we asked an eminent Victorian counsel, who later became a judge in the High Court of Australia, was whether the Australian government could pay people who were injured by accident, sickness benefits or invalids pensions. If such payments were valid then the Australian government could occupy the field and legislate the common law away. The eminent Victorian counsel got out his dictionary and looked up the words "sick" and "sickness". He went through a dictionary definition of those words and then pronounced that he did not think that accident victims were sick. "They're not sick", he said. Sir Owen Woodhouse echoed his "Not sick" with a tone of such injured incredulity it remains with me still. It taught me exactly how lawyer-like you have to be, when you are dealing with the Australian Constitution Act. Close attention to the meaning of words can be everything, even in the highest matters of policy.

We no longer live on a set of islands which are intellectually remote, if indeed they ever were. The practice of law is increasingly internationalised; it is global. New Zealand lawyers have to understand the international trends. It is not just Australia. The international connection in public law

looms much larger than that. Developments in Europe have big implications for New Zealand exporters. New Zealand's relations with the nations of the South West Pacific are historically and constitutionally important. Their constitutions should be known to New Zealand public lawyers.

The International Covenant on Civil and Political Rights which has been ratified[45] by New Zealand has also an Optional Protocol which the Labour government ratified. This issue sleeps now, but it will awaken. The Optional Protocol allows New Zealanders to make complaints to the Human Rights committee of the United Nations. New Zealand lawyers apparently have not yet discovered it. I have not heard of a lot of advice being given about it. It is a fresh opportunity and one which may have some significant contribution to make on Maori issues.

There is also a strong case for saying that public law in New Zealand should deal with the United States Constitution. This is not for the same reason as we need to understand the Australian Constitution although some of those reasons do apply. Let me give you an example - Brierleys is a big New Zealand company. Brierleys has substantial interests in the United States. The executives and legal advisers of Brierleys in Wellington have to deal on a daily basis with American federalism, with American corporation law, with American tax law and with the power of the American courts. United States constitutional law is probably the most advanced of any of the Western countries and the most sophisticated with dealing with problems of pluralism and discrimination.[46] That is why any educated lawyer should have a basic familiarity with it.

Public law is not immune from globalisation. It is necessary only to look at the so called "long arm statutes" which have been passed by the United States Congress on matters like anti-trust, which purport to extend to New Zealand. Sometimes the New Zealand government passes legislation to block the application of those laws here.[47] We cannot restrict ourselves anymore to the content of the law in New Zealand because that is not the way that law practice is evolving. Indeed, much of our domestic legislation has its origins in international obligations which New Zealand has undertaken. The Legislation Advisory Committee in 1992 listed more than 185 New Zealand statutes which appeared to be affected in some way by treaty obligations.[48] That figure amounted to about a quarter of the all the acts of Parliament New Zealand has which indicates how heavily the international component trenches upon our domestic law. That tendency can only increase in the years ahead.

The purpose of public law - both constitutional and administrative law -

---

45 International Covenant on Civil and Political Rights 999 UNTS 171. Entered into force for New Zealand 28 March 1979. First Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 302. Entered into force for New Zealand 26 August 1989.

46 G Palmer "Another Way of Skinning the Rabbit" (1991) 48 Washington and Lee L Rev 447.

47 Evidence Amendment Act (No 2) 1980. See also 432 NZPD 1834 (1980).

48 Legislation Advisory Committee, Report No 6 *Legislative Change - Guidelines on Process and Content* (revised edition, Wellington, December 1991) Appendix E.

is the same as any other branch of the law. It is to solve people's problems. It is to reduce disputes, it is to ensure that things work. Approached in that way, it does not seem to be some arcane branch of metaphysics or something too vague to be discerned. In fact, it turns out to be one of the most practical and down-to-earth of subjects.

The three legs of the great tripod on which New Zealand public law rests — the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 and the Treaty of Waitangi have not been touched upon in this chapter. It was better to start at the sharp end in order to convince those who believe that constitutional reform is a theoretical topic devoid of practical significance. To those important subjects the next two chapters turn.

3
Constitutional Laws

I THE UNFORTUNATE INFLUENCE OF THOMAS HOBBES

This chapter deals with two statutes which form foundations of the New Zealand constitution - the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990. The history of these two recent pieces of legislation is quite different, but together they form two legs of the tripod on which rests the New Zealand constitution. The third leg is the Treaty of Waitangi which is the subject of the next chapter.

Before discussing these two statutes which form part of the positive law of New Zealand, I want to conduct a short discussion concerning the political philosophy of the father of positive law, Thomas Hobbes. Hobbes is perhaps the foremost political philosopher which the English have produced. Writing at the time of the English civil war his work *Leviathan* had a profound effect upon English minds for generations and especially upon English lawyers.[1] Leviathan, it will be remembered, was the name of the sea monster to be found in the book of *Job* in the Bible.

Hobbes' discussion of sovereignty was so rigorous and powerful that philosophers who followed him owed him a great deal. Jeremy Bentham picked up the notion of sovereignty and transmitted it to John Austin.[2] Hobbes began the development of the modern views of sovereignty. He was also the foremost political philosopher whose work most justifies centralised authority in a form characteristic of modern states. In this regard the United Kingdom stands supreme. For Hobbes the sovereign power is indivisible.[3] He thought someone had the last decision. Whoever had it and can enforce it has sovereign power. Among the essential powers were the right to make laws, the right of adjudication, the right to make war and produce peace, the right to appoint office holders, to reward and punish, to confer titles and dignities on people, and to decide the opinions to be communicated to the multitudes. These were the marks of sovereign power. The sovereign ruled. Those ruled were subjects of the sovereign. In civil society people gave up their rights to act for themselves to the sovereign. The sovereign of Hobbes is indeed a mighty monster.

The political philosophy of Hobbes was not congenial to limited government. He devoted some energy to denying the possibility of mixed govern-

---

1 T Hobbes *Leviathan; or, The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil* (Basil Blackwell, Oxford, 1957).

2 G H Sabine *A History of Political Theory* (3ed, George Harrop and Co, London, 1951) 388 and H L A Hart, *Essays on Bentham* (Clarendon Press, Oxford, 1982) 220-242.

3 *Leviathan*, above n1, 213.

ment.[4] He was an enemy of divisions of power. His philosophy was authoritarian and harsh.[5]

> For what is it to divide the power of a commonwealth, but to dissolve it; for powers divided mutually destroy each other.

Hobbes' sovereign knew few limits. The powers could not be separated. This work was published in 1651 and the enduring nature of its message is with us still. English common lawyers are not greatly given to philosophical expositions. But John Austin, relying heavily on Hobbes' work and upon Bentham, produced in the 19th century the foundation works of the analytical school of jurisprudence. The ideas he developed were carried into constitutional law by Professor A V Dicey at Oxford. Dicey took the idea of sovereignty developed by Hobbes, Bentham and Austin and located it in Parliament. The doctrine of the sovereignty of Parliament in its high Victorian form is almost entirely the work of Dicey, the first edition of whose book appeared in 1885.[6] Dicey recognised that political sovereignty was with the electors, while legal or legislative sovereignty was with Parliament. The effect of this analysis was to take the monster created by Hobbes and give it legitimacy by investing it with a democratic element. The effect of these developments was to attach an altogether exaggerated importance to sovereignty. The New Zealand legal system seems to be lit by its afterglow still.

The philosophy of Hobbes is absolutist. For him there appeared to be no choice between absolute power and anarchy. Either there was a sovereign who was all powerful or there was no society at all. All the necessary powers of government reside in the sovereign. The power to make law, the power to administer justice, the power to use force, these were the sovereign powers. The thinking of Hobbes influenced English political thought for centuries; it still does. The work of the nineteenth century English lawyers translated Hobbes' political philosophy into operational constitutional theory.

New Zealanders are particular inheritors of the Hobbesian tradition. We have had a strong and undivided state. No federalism here, after Vogel abolished the provinces in 1876. There is an absolutist tinge to our government which Hobbes would well recognise. We do not divide up the powers, we concentrate them. For a very long time New Zealanders have believed that giving further power to the state was the most effective way of preserving peoples' welfare and advancing it. The doctrine of sovereignty resonates through New Zealand history since the Treaty of Waitangi and its sway has been increased by advocates of Maori rights asserting sovereignty for Maori.[7]

---

4 *Leviathan*, above n1, 216.

5 *Leviathan*, above n1, 213.

6 A V Dicey *Introduction to the Study of the Law of the Constitution* (10ed, McMillan, London, 1959).

7 A Sharp *Justice and the Maori - Maori Claims in New Zealand Political Argument in the 1980s*

It is time to break the New Zealand Hobbesian tradition and its models of absolutist government.[8] It is notions of limited government which will provide better institutions and more acceptable democratic behaviour. It is the task of the New Zealand constitution to define the organs and institutions which will exercise power and to distribute up the power among them. There is a necessary connection, however, between political philosophy and constitution making. The constitution will exhibit the way in which it is thought power should be given to the state. Constitutional law is about power, who has it, how they get it and what they can use it for. If limits are to be placed on the powers of government, it is in the basic constitutional instruments that those limits must be found. In New Zealand the limits are few indeed. Hobbes' sovereign is alive and well and living in Wellington.

II THE CONSTITUTION ACT 1986

In 1852 the Imperial Parliament at Westminster thoughtfully conferred on New Zealand a constitutional structure of an elaborate and extensive sort. The New Zealand Constitution Act 1852 contained eighty-two sections. It was "[a]n Act to grant a Representative Constitution to the Colony of New Zealand". The Act was much amended over the years, as New Zealand progressed from self-government to Dominion status and gradually acquired the status of a complete nation. It was a long journey. The purpose of this chapter is not to provide a lecture in constitutional history.

The 1852 Act bears no resemblance to the modern structure of New Zealand government. It provided for a General Assembly. This consisted of a House of Representatives elected for a period of 5 years, an upper house of legislative counsellors nominated by the Crown but holding office for life, and the Governor. The right to vote was conferred on men who owned land or leased it. There was no secret ballot. As well as the General Assembly there were provincial legislatures in six provinces, later ten.[9]

Section 53 provided that the General Assembly was competent "to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England ...". There were special provisions to protect the military forces of the United Kingdom and some provisions of the 1852 Act were preserved from alteration by the New Zealand General Assembly, in particular the election of members of the House of Representatives, and the qualifications of the electors and members.

Section 56 provided that the Governor might assent to, or refuse assent to any bills or might reserve them "for the signification of Her Majesty's pleasure thereon". There was also power in the Crown under section 58 of

(Oxford University Press, Auckland, 1990) 252-253.

8 There is a renewal of interest in Hobbes; see D Gauthier *Morals By Agreement* (Clarendon Press, Oxford, 1986); G Oddie and R Perrett *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992).

9 J Hight and H D Bamford *The Constitutional History and Law of New Zealand* (Whitcombe & Tombs, Christchurch, 1914).

the Act to disallow any act within two years of receipt of the same. The Crown's right of pre-emption over native lands was reserved. The constitutional history of New Zealand from 1852 until 1986 was a whittling away of the 1852 Act until all that was left at the end were twelve provisions where there had once been eighty-two. These provisions gave no clue as to the structure of government in New Zealand or how power was exercised. The old Constitution Act was a relic. It was the source of legislative authority but said little about the limits on power.

Curiously enough the United Kingdom Parliament could still make law for New Zealand by request and consent of the New Zealand Parliament until the Constitution Act 1986 came into force.[10] Much attention focussed on the Statute of Westminster 1931 and the full independence it gave to the British Dominions. It followed several Imperial Conferences where these issues had been discussed. The New Zealanders wanted nothing of it. The Statute of Westminster Adoption Act was not passed by the New Zealand Parliament until 1947. It is a stunning indication of New Zealand's feeling about a world to which we have now said farewell. The sun has set on the British Empire, sometimes it seems to this country's regret. Reluctance to take power when it is offered is not often met within constitutional history.

It is doubtful whether the strange relic, the New Zealand Constitution Act 1852, would have quickly changed had it not been for the constitutional crisis in 1984 precipitated by the behaviour of Sir Robert Muldoon, the Prime Minister whose government was defeated in the general election of that year. There was a certain irony here. Muldoon's administration during a period of nearly nine years provided a good political market for constitutional reform and the need to promote open government. It is entirely fitting, therefore, that his conduct promoted a basic New Zealand constitutional reform.

In a sense Muldoon was a Hobbesian. He demonstrated to New Zealanders just what could be done with unlimited amounts of concentrated power. The New Zealand economy was regulated heavily by regulations made under the Economic Stabilisation Act 1948. Indeed there can have been few, if any, economies outside Eastern Europe which were more heavily regulated.

During the election of 1984 it became evident that there was pressure on the New Zealand dollar. The government had been propping up the currency for some months and spending much tax-payers' money doing it. The Treasury and the Reserve Bank thought that the currency needed to be devalued. There had been some comment about devaluation in the election campaign. When the National Party lost the election the Reserve Bank found it necessary to suspend all dealings on the foreign exchange market on the Monday following the election. It was by then clear that the National government had been defeated. It also appeared that under New Zealand law a new government could not be sworn in immediately.

10 See the Statute of Westminster Adoption Act 1947.

In some countries a new government could have been sworn in immediately. In Britain, for example, they could have changed the government on the Sunday after a Saturday election. Something in the nature of a constitutional crisis arose in New Zealand because Sir Robert Muldoon did not believe that the currency should be devalued. He resisted doing so. He would not accept the advice of officials that it should happen. He was still the Prime Minister and Minister of Finance. As a matter of law his signature and affirmative advice was necessary before devaluation could occur.

The apparent defect in New Zealand law was that no member of parliament could be sworn in as a minister until the electoral returns were in, and that would not happen for a week or so after election night. The situation exposed major uncertainties in New Zealand's constitutional law. It was obvious that clear practical rules to enable a swift transfer of power were needed. The immediate crisis receded, since Sir Robert Muldoon in the end was prepared to implement the required measures on the advice of the incoming government.

The crisis was resolved because the Deputy Prime Minister of the day, The Hon Jim McLay, was bold enough to invent a new constitutional convention which had not existed in New Zealand before, but for which there was some overseas support, particularly in Australia. The effect of the convention was that the outgoing government would take no policy initiatives and that it would act on the views of the incoming government. Thus a 20 per cent devaluation of the currency occurred. The incoming government proffered its views; Muldoon acted on them. These events demonstrated clearly that provisions in the Civil List Act, which apparently made it impossible to swear in a new government quickly, had to be changed.

As the Deputy Prime Minister, Minister of Justice and Attorney-General in the new government, the superintendence of making the changes fell to me. It was a wonderful opportunity and it was exploited for all that it was worth. I secured cabinet agreement to the setting up of an expert committee of officials to examine the issue about the transfer of power and to make recommendations on how to rectify the situation. The terms of reference of the committee dealt not only with the transfer of power, but also undertook a general review of New Zealand's constitutional provisions with the object of putting the most important of them in one enactment. That was the genesis of the Constitution Act 1986. The officials produced two reports.[11] The question of transfer of power was solved rather easily by allowing people who had been candidates in the election to be sworn in as ministers even though they had not been formally returned as members at the time.

Section 6(2)(a) of the Constitution Act 1986 makes an exception to the general rule that ministers of the Crown must be members of Parliament:

> A person who is not a member of Parliament may be appointed and may hold office as a member of the

11 Department of Justice *Constitutional Reform - Reports of an Officials' Committee* (Government Printer, Wellington, 1986).

> Executive Council or as a Minister of the Crown if that person was a candidate for election at the general election of members of the House of Representatives held immediately preceding that person's appointment as a member of the Executive Council or as a Minister of the Crown but shall vacate office at the expiration of the period of 40 days beginning with the date of the appointment unless, within that period, that person becomes a member of Parliament.

The provision enacted is not the same as that recommended by officials. The officials recommended that any person could become a minister upon condition that the person becomes a Member of Parliament within three months. Cabinet felt that insufficiently recognised the principles of responsible government. Three months without a parliamentary connection was too long, cabinet thought.

The group of officials were mostly from areas of government under my direct control; they came from the Justice Department, and included the Clerk of the House, the Chief Parliamentary Counsel, the Crown Law Office and the Department of Internal Affairs. Professor K J Keith, from Victoria University, an eminent constitutional lawyer, was the only person from outside government on the group.

I told the officials it was a grand opportunity to produce a new Constitution Act. It ought not to be a controversial one. Broad agreement was needed, but it should clean up for once and for all the untidy nature of New Zealand's basic constitutional law. There should be a document which set out for the first time the framework of New Zealand's system of government in a way that was intelligible and principled. It was firmly in my mind that students and others who may need to consult it could learn something by looking at the Constitution Act.

The remnants of the 1852 Constitution Act had in my experience caused much confusion in student minds without giving them any idea about how power was really exercised. It was an entrancing prospect from an educational point of view, as well as from a legal and political point of view, to have a brand new document. So well did the officials do their job that when the bill was introduced to Parliament and sent to a select committee only eight submissions were received. (In retrospect I do not think any of my parliamentary colleagues or the public cared at all about this Act, but for me it was a great excitement.)

Notwithstanding the fact that the Constitution Act was passed without fanfare, it is the most important constitutional law we have. It is the closest New Zealand has yet got to a written constitution; yet it is rather fragmentary. Much of the detail which matters is to be found elsewhere. The Act gives few indications as to how the institutions with which it deals actually work. There is a much important constitutional material not contained in it.

The essence of the Constitution Act can be stated simply. It constitutes and sets out the main powers of:

In some countries a new government could have been sworn in immediately. In Britain, for example, they could have changed the government on the Sunday after a Saturday election. Something in the nature of a constitutional crisis arose in New Zealand because Sir Robert Muldoon did not believe that the currency should be devalued. He resisted doing so. He would not accept the advice of officials that it should happen. He was still the Prime Minister and Minister of Finance. As a matter of law his signature and affirmative advice was necessary before devaluation could occur.

The apparent defect in New Zealand law was that no member of parliament could be sworn in as a minister until the electoral returns were in, and that would not happen for a week or so after election night. The situation exposed major uncertainties in New Zealand's constitutional law. It was obvious that clear practical rules to enable a swift transfer of power were needed. The immediate crisis receded, since Sir Robert Muldoon in the end was prepared to implement the required measures on the advice of the incoming government.

The crisis was resolved because the Deputy Prime Minister of the day, The Hon Jim McLay, was bold enough to invent a new constitutional convention which had not existed in New Zealand before, but for which there was some overseas support, particularly in Australia. The effect of the convention was that the outgoing government would take no policy initiatives and that it would act on the views of the incoming government. Thus a 20 per cent devaluation of the currency occurred. The incoming government proffered its views; Muldoon acted on them. These events demonstrated clearly that provisions in the Civil List Act, which apparently made it impossible to swear in a new government quickly, had to be changed.

As the Deputy Prime Minister, Minister of Justice and Attorney-General in the new government, the superintendence of making the changes fell to me. It was a wonderful opportunity and it was exploited for all that it was worth. I secured cabinet agreement to the setting up of an expert committee of officials to examine the issue about the transfer of power and to make recommendations on how to rectify the situation. The terms of reference of the committee dealt not only with the transfer of power, but also undertook a general review of New Zealand's constitutional provisions with the object of putting the most important of them in one enactment. That was the genesis of the Constitution Act 1986. The officials produced two reports.[11] The question of transfer of power was solved rather easily by allowing people who had been candidates in the election to be sworn in as ministers even though they had not been formally returned as members at the time.

Section 6(2)(a) of the Constitution Act 1986 makes an exception to the general rule that ministers of the Crown must be members of Parliament:

> A person who is not a member of Parliament may be appointed and may hold office as a member of the

11 Department of Justice *Constitutional Reform - Reports of an Officials' Committee* (Government Printer, Wellington, 1986).

> Executive Council or as a Minister of the Crown if that person was a candidate for election at the general election of members of the House of Representatives held immediately preceding that person's appointment as a member of the Executive Council or as a Minister of the Crown but shall vacate office at the expiration of the period of 40 days beginning with the date of the appointment unless, within that period, that person becomes a member of Parliament.

The provision enacted is not the same as that recommended by officials. The officials recommended that any person could become a minister upon condition that the person becomes a Member of Parliament within three months. Cabinet felt that insufficiently recognised the principles of responsible government. Three months without a parliamentary connection was too long, cabinet thought.

The group of officials were mostly from areas of government under my direct control; they came from the Justice Department, and included the Clerk of the House, the Chief Parliamentary Counsel, the Crown Law Office and the Department of Internal Affairs. Professor K J Keith, from Victoria University, an eminent constitutional lawyer, was the only person from outside government on the group.

I told the officials it was a grand opportunity to produce a new Constitution Act. It ought not to be a controversial one. Broad agreement was needed, but it should clean up for once and for all the untidy nature of New Zealand's basic constitutional law. There should be a document which set out for the first time the framework of New Zealand's system of government in a way that was intelligible and principled. It was firmly in my mind that students and others who may need to consult it could learn something by looking at the Constitution Act.

The remnants of the 1852 Constitution Act had in my experience caused much confusion in student minds without giving them any idea about how power was really exercised. It was an entrancing prospect from an educational point of view, as well as from a legal and political point of view, to have a brand new document. So well did the officials do their job that when the bill was introduced to Parliament and sent to a select committee only eight submissions were received. (In retrospect I do not think any of my parliamentary colleagues or the public cared at all about this Act, but for me it was a great excitement.)

Notwithstanding the fact that the Constitution Act was passed without fanfare, it is the most important constitutional law we have. It is the closest New Zealand has yet got to a written constitution; yet it is rather fragmentary. Much of the detail which matters is to be found elsewhere. The Act gives few indications as to how the institutions with which it deals actually work. There is a much important constitutional material not contained in it.

The essence of the Constitution Act can be stated simply. It constitutes and sets out the main powers of:

- The Sovereign
- The Executive
- The Legislature
- The Judiciary

Politics were deliberately kept out of this exercise. If basic constitutional legislation becomes the subject of party political dispute it is difficult to make progress. The bill was enacted with little controversy. Some controversy did, however, arise in Parliament and later about the royal assent. Section 56 of the New Zealand Constitution Act 1852, to which reference has already been made, provided for bills passed by the New Zealand General Assembly to receive the royal assent through the Governor. Unless the Governor signed, the bill did not become law. The Governor-General could, according to his discretion, assent or refuse assent to a bill. That was a necessary check and balance in a colonial legislature of the sort New Zealand was to become when the 1852 Act was passed. But for a nation in charge of its own affairs with a democratically elected government it was quite inappropriate. The wording of the provisions gave people the wrong idea. Section 56 of the New Zealand Constitution Act provided as follows at the time it was repealed:

> **56. Governor may assent to, refuse to assent to, or reserve or amend Bills**— Whenever any Bill which has been passed by the said [House of Representatives] shall be presented for Her Majesty's assent to the Governor, he shall declare according to his discretion, but subject nevertheless to the provisions contained in this Act ... that he assents to such Bill in Her Majesty's name, or that he refuses his assent to such Bill ...:
> Provided always, that it shall and may be lawful for the Governor, before declaring his pleasure in regard to any Bill so presented to him, to make such amendments in such Bill as he thinks needful or expedient, and by message to return such Bill with such amendments to [the House of Representatives] ...; and the consideration of such amendments by the said [House] ... shall take place in such convenient manner as shall in and by the rules and orders aforesaid be in that behalf provided.

Anyone reading that would tend to think the Governor in New Zealand was a potent force in determining the fate of bills passed by the Parliament. Yet well before 1987, when this provision went out of existence, such had long since ceased to be the case. By a constitutional convention of long standing the power was one that was exercised by the Governor-General on advice; the advice of responsible ministers. Since 1 January 1987 it is still part of the constitutional law of New Zealand that unless a bill passed by parliament is assented to by the Governor-General it is not the law. The 1986 Act provides in section 16: "A Bill proposed by the House of Repre-

sentatives shall become law when the sovereign or the Governor-General assents to it and signs it in token of such assent". But if that power were exercised by the Governor-General without advice there would be a first-rate constitutional crisis.

There was some debate during the passage of the bill[12] and later, as the result of agitation from some right wing fundamentalist Christians, to the effect that the constitutional framework of New Zealand was being drastically altered by the new provision surrounding the royal assent. The new language does not emphasise the Governor-General's power or the personal discretion to the same extent as the old language did.[13] There is no personal discretion which resides in the Governor-General to refuse to sign legislation if she does not like it. Longstanding constitutional convention dictates that in assenting to legislation the Governor-General must rely on the advice of responsible ministers. Even in the event of a crisis in which the Governor-General's reserve powers may be called on it is not clear these extend to not signing legislation which she is advised to sign. The objection rested on a total misunderstanding of the nature of constitutional conventions in the New Zealand Constitution.

Still there are occasions when people have made representations to the Governor-General that the Governor-General ought not to sign some piece of legislation or other that they do not like. Maori people have made such representations, for example. But the Governor-General does not have that power and it is time people understood the point. If it were otherwise there could hardly be said to be democratic control over the content of legislation.

The question of royal assent aside, nothing controversial has emerged from the Constitution Act. It should be noted, however, that the Act is not entrenched, although the provision defining the three year term of Parliament is insulated against alteration by a simple majority in Parliament. The Act is an ordinary act of Parliament. It is not superior law. The Act can be amended or repealed by a simple majority of parliament without any special procedures being followed. It could be repealed by Parliament in one sitting, acting under urgency. Such are the slender threads by which our liberties hang in New Zealand.

New Zealand is unusual in this respect. The constitutions of many nations cannot be altered by ordinary legislation. Something more is required, either a special majority or a referendum of electors or some special indication that the alteration to the constitution enjoys what has been called by the President of the New Zealand Court of Appeal, the Rt Hon Sir Robin Cooke, "practical sanctity".[14]

---

12 476 NZPD 5854, 5857 (3 December 1986).

13 F M Brookfield "The Governor-General and the Constitution" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul Ltd, Auckland, 1992) 77 at 80 admits "[i]t is commonly said that there is no reserve power for the Governor-General, against ministerial advice, to refuse to assent to bills passed by the House of Representatives". But he does argue that there are circumstances in which there is a reserve power to refuse assent. I doubt it.

14 Rt Hon Sir Robin Cooke "Bill of Rights: Safeguard Against Unbridled Power" 1984 Detheridge

It occurred to me during the preparation of the Bill that it might be worthwhile entrenching the 1986 Constitution Act. First there was widespread measure of agreement about it, so we could have got a unanimous vote in Parliament, I thought. The Officials committee report referred to the question of entrenchment without expressing a firm view on it, except as to the term of Parliament, a matter already then entrenched. But in the end I did not pursue the idea. I thought it might complicate the argument which was then developing about a Bill of Rights for New Zealand. I was not sure whether the National Party then believed that Parliament had the power to bind itself into the future.[15] There is much abstruse academic legal argument about the proposition of entrenchment which I will not bore readers with. So it was that the Constitution Act was enacted as an ordinary statute and that is the way it remains.

The Constitution Act preserves the essence of Westminster government. A person can hold office as a Minister of the Crown only if that person has been elected as a Member of Parliament. That basic point provides the linch pin of power in our political system. It binds the executive branch of government to the legislative branch of government. It tends to fuse them together and provide the government with potent and undivided power. That is a situation which I argue in another chapter should be changed.

A final word about what is not in the Constitution Act. There are no guarantees in the New Zealand Constitution Act about fundamental rights or liberties. It is clear that there must be general elections; there must be a Parliament. The independence of the judiciary is protected. There are institutions capable of promoting political accountability set up in the Constitution Act. But there are no navigation lights about what government can and cannot do. All the Act says is that "[t]he Parliament of New Zealand continues to have full power to make laws."[16] There are no formal limitations on the laws it can make.

The apparently unlimited nature of the power causes a problem. Laws of the most repressive and unjust character can be passed by the Parliament. There is no limit on the capacity of Parliament to pass such laws. It can do anything. The only checks are political. Peoples' faith in political checks seem to me in recent years to have dropped rapidly. The example usually used by constitutional lawyers is one from the 19th century - that the Parliament could pass a law requiring all blue-eyed babies to be murdered. It has not done so. It would be wrong to do so. But in theory it can do so. Later in this chapter a number of examples are given of laws passed by the New Zealand Parliament which ought not to have been passed.

Memorial Address (1984) 112 Council Brief 4, 4.

15 K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) 10 says "[t]he theory of the National Party is that double entrenchment is not legally effective: Parliament can on a future occasion enact a valid statute by the ordinary legislative process overriding the entrenching provision".

16 Constitution Act 1986, s15(1).

III THE BILL OF RIGHTS DEBATE

Should there be formal restraints on the power of government? It is a notion which I have spent 25 years thinking about. I first wrote about it in 1968.[17] Over that period my views changed in a fundamental fashion. My experience as a high ranking minister in a government has changed them again. There is an uncomfortable degree of truth in Lord Acton's dictum "[p]ower tends to corrupt and absolute power corrupts absolutely ...". To prevent that it is necessary to place limits on the power of government.

Clear principles should be defined and adhered to. We ought not to be ruled by expedient judgments in every case, made in the heat of the moment. There are some principles which should bind all governments all the time. They are not easy to identify, but the experience of the last 300 years or so in western countries have defined pretty well what they are. The difficulty with New Zealand's present system is that small erosions in rights as a result of some plausible argument at the time often reduce liberty. The situation in New Zealand today is similar to the situation described by Hobbes. Legislation results from the exercise of the will of the sovereign. The sovereign must be obeyed.

The point was well made in the government's White Paper on the Bill of Rights for New Zealand in 1985:[18]

> The power of the government, alone and through Parliament, without the restraint or even the delay which would come from a second chamber, is enormous. In some senses it can be compared with the power, claimed as well as actual, of the Stuart Kings before the revolution of the seventeenth century. The basic difference between then and now is of course the electorate. But the electorate's role cannot, in the usual case, be focussed on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues.

The White Paper went on to point out how our present system of government can ride roughshod over minority interests and that discrimination and oppression can easily result from majority views on such matters. The idea that New Zealand should have a Bill of Rights limiting the power of government and guaranteeing the protection of fundamental values and freedoms was set out in Labour's 1984 Election Manifesto.[19] It was a policy which had been well advertised, even if it was not well understood. The journey between that announcement and the enactment of the New Zealand Bill of Rights Act 1990 was a long and tortuous one.

My essay entitled "A Bill of Rights for New Zealand?" which appeared

17 G Palmer "A Bill of Rights for New Zealand?" in K J Keith (ed) *Essays on Human Rights* (Sweet and Maxwell, Wellington, 1968) 106.

18 *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR Vol I A.6, 27.

19 "Open Government Policy 1984" set out in G Palmer *Unbridled Power* (2ed, Oxford University Press, Auckland, 1987) 281, 282.

in 1968 came from a public lecture given not long after returning from the United States, where I had been a post graduate law student. The lecture suggested that an entrenched Bill of Rights in New Zealand would be a dangerous idea. I argued that it would catapult judges into a political situation: it would allow them to declare unconstitutional Acts of Parliament. I said that to transform our courts into political institutions by empowering them to overrule Parliament or government action involved substantial risk. There was within the idea of judicial review of a constitutional document anti-majoritarian elements. The judges would be a bevy of platonic guardians elected by no-one and accountable only to themselves. New Zealand society was largely homogeneous, or so it seemed to me in 1968. Government's main function was to establish the conditions of economic prosperity for all; our political culture did not generate much conflict and therefore civil liberties were not in jeopardy in New Zealand. The introduction of an entrenched Bill of Rights would be contrary to the pragmatist traditions of our politics. In our small and sensitive political system it was not clear there was any need for it.

Over the years my views on this changed. They were changed first by spending a lot more time in the United States as a law professor, and studying longer the American Bill of Rights and the courts' interpretations of it. The second factor was my realisation that New Zealand was increasingly a more pluralistic society. There are more minorities and they are more vocal. The Maori population had significant problems flowing from pronounced inequality. It was plain to me that there was majoritarian discrimination against minorities in New Zealand. Increasing immigration from non-traditional sources added to the diversity of the New Zealand population. As recently as 1986 36 per cent of the migrants to New Zealand came from the United Kingdom; by 1990 that figure had dropped to 16 per cent. By way of contrast Hong Kong, Taiwan and Malaysia have become important sources of migrants to New Zealand.[20] By 1990 New Zealand could be regarded as a heterogeneous country. There was a certain cultural homogeneity about the New Zealand of my youth which is quite absent now. Maori and Pacific Islanders together comprise about 17 per cent of the population and their relative deprivation compared to the rest of the population is statistically palpable. It seems to me now that protecting the interests of "discrete and insular minorities" is difficult and the more democratic the society the more difficult it is to achieve.[21] The fabric of society requires that their special interest be protected and even from a legislature exhibiting the prejudice of a majority.

The argument for a Bill of Rights was put forward before the 1984 election campaign in a series of speeches. It must be said there was no great enthusiasm for it by Labour MPs then or later. But there was a political

20 New Zealand Working Party on Immigration *Report of the Working Party on Immigration* (Wellington, March 1991) 5.

21 The phrase first appeared in the celebrated footnote 4 penned by Chief Justice Stone in *United States* v *Carolene Products Co* 304 US 144 (1938).

market for it. There was a distinct feeling that the Muldoon government had been high-handed and repressive from a constitutional point of view. The aftermath of the Springbok tour had produced in the New Zealand middle class a distinct feeling of unease about the powers of executive government and the purposes for which they could be exercised.

On becoming Minister of Justice, I set up a group of officials to work intensively on the production of a high quality white paper, presenting a draft Bill of Rights and the arguments for it. The team which did this work was one extraordinary high quality. It was headed by Mr B J Cameron the Deputy Secretary of Justice, a civil servant in the area of legal reform who had no peer. Professor K J Keith from Victoria University was also involved in it along with Mrs Janice Lowe, Geoffrey Lawn and Mrs Ellen France from the Department of Justice and D A R Williams QC. Professor Peter Hogg, an eminent Canadian constitutional lawyer with a New Zealand background also contributed to it. I set out the core of the argument in favour of the Bill of Rights in the foreword to the 1985 White Paper:[22]

> A Bill of Rights for New Zealand is based on the idea that New Zealand's system of government is in need of improvement. We have no second House of Parliament. And we have a small parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multi-cultural society. The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform. In that sense a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards.

The Bill of Rights had two features which attracted particular opposition. The first was that it was to be entrenched. To alter it would have required the support of 75 per cent of Members of Parliament or a majority at a referendum of electors. This limited the sovereignty of the New Zealand Parliament. Parliament could no longer declare that all blue eyed babies should be murdered. To do so would be contrary to the Bill of Rights Act

22 *White Paper*, above n18, 5.

and the statute doing it would be held unconstitutional. Thus Parliament could no longer assume all of its decisions were beyond question in the courts. Many people felt that elected representatives were more sensitive to the democratic will and more accountable than judiciary. Judges should not be entrusted with powers of this character.

The second feature of the Bill of Rights of particular significance was its incorporation of the Treaty of Waitangi. It entrenched the Treaty as part of the fundamental law of New Zealand. That caused a lot of difficulty, not least among segments of the Maori community themselves. Foolishly some Maori opposed that step, with implications which are analysed in the next chapter of this book. It should be remembered, however, this was before Maori won a famous victory in the Court of Appeal in the State-Owned Enterprises case.[23] This case gave real weight and substance to the principles of the Treaty of Waitangi. Had the timing been different Maori attitudes to giving the Court power may have been different.

When the White Paper was published it was referred to the Justice and Law Reform select committee of Parliament, which began extensive hearings which took two years. Four hundred and thirty one submissions were received and the committee published an interim report of 246 pages. The Report analysed what the submissions said and the policy arguments made in front of the committee. It was clear from that report that the central idea that there would be judicial review of Acts of Parliament, and that courts could declare unconstitutional enactments of Parliament which did not comply with the provisions of the Bill of Rights Act, was unacceptable to many. Extensive submissions from fundamentalist Christian groups did not help. There were 25 submissions which said that the Bill should acknowledge God because God is the source of rights and New Zealand is a Christian Country. The sentiment expressed commonly was summed up in the submissions of Matthew J Jenkinson: "[t]he government needs to realise that there is a higher authority than its own, and that civil law should be an extension of that law revealed in the Holy Scriptures".[24] So much for freedom of religion! The Right to Lifers were also out in force with a large number of the submissions concentrating on whether the right to life in Article 14 should extend to the foetus.

No doubt the Bill of Rights debate stimulated interest in the way New Zealand is governed, but it also exposed lamentable ignorance in how that process is carried out under existing arrangements. In a thoughtful submission to the select committee the National Council of Women observed what they had found in dealing with their branches:[25]

> A small but not insubstantial number of replies were of doubtful value because of evident ignorance of how the New Zealand system of government works

23 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

24 Submission of Matthew Jenkinson p16 (1985).

25 Justice and Law Reform Committee *Interim Report on the Inquiry into the White Paper - A Bill of Rights for New Zealand (1986)* (1986-1987) AJHR Vol X I.8A, 22.

> beyond the legislature. This was particularly, but not exclusively, in relationship to the proposed function of the courts; many seem unaware of the whole field of administrative law. We consider that before effective consent can be given to the Bill of Rights, steps must be taken to educate the electorate on the processes of government.

That need remains and ignorance is a significant obstacle to constitutional reform in New Zealand.

The arguments for and against an entrenched Bill of Rights for New Zealand emerged in front of the select committee in a comprehensive fashion, despite the attraction of special and vested interests determined to argue the merits of their single issue campaigns in this context. Opponents of the measure advanced these arguments:

(a) The measure gave power to the judiciary, who were not elected, not accountable and unrepresentative of the community;
(b) The bill required to be enforced through the judicial process to which people did not have equal access, especially the poorest people;
(c) Because some Acts of Parliament could be repugnant of the Bill of Rights and it was not readily predictable which laws these would be considerable uncertainty about what the law is would be created;
(d) There would be increased litigation as a result of the Bill;
(e) If more checks and balances were needed better ones were available, 39 submissions thought an Upper House would be better;
(f) It would be premature to adopt a Bill of Rights, more time was needed to study the implications and it was not necessary as there were no threats to human rights in New Zealand;
(g) That a Bill of Rights would freeze New Zealand's constitutional development and not allow for social change in the future;
(h) That the Bill emphasised individual rights and not collective rights.

There were a number of somewhat grotesque arguments put forward against the Bill of Rights - that it did not guarantee New Zealand's sovereignty, or protect the flag, that it linked New Zealand with the United Nations, that it was communist inspired, and that it would take rights away. Unfortunately, extremely eccentric people seem to gravitate to constitutional issues and lavish their attention upon them.

Support for a bill was argued for in the submissions on what were basically constitutional grounds:

(a) That New Zealand lacked constitutional safeguards and a Bill of Rights would be a check on the executive;

(b) That the Bill of Rights would protect the interests of minorities and disadvantaged groups, which democratic elections do not and cannot protect;
(c) That the Bill of Rights would educate and raise the level of awareness amongst New Zealanders about human rights;
(d) That the Bill of Rights would be a necessary safeguard against the erosion of fundamental rights;
(e) That the Bill of Rights advances New Zealand's compliance with its international obligations to respect human rights, especially the International Covenant on Civil and Political Rights.

Although I did not sit on the select committee (having engineered a parliamentary reform to keep ministers off them) I followed its progress carefully and had regular meetings with the Justice Caucus committee. I found the proceedings profoundly depressing. It was clear New Zealanders knew little about how government worked and the ordinary New Zealander did not seem to care much. Vested interests and many with strange off-beat views paraded in front of the select committee. In a very real sense it was a debate beyond the capacity of New Zealanders to conduct at that stage. They simply had not thought about the issues before, had no background against which to consider them and felt confused. New Zealanders must be amongst the most constitutionally underdeveloped people in the developed world.

In one of the most supreme ironies imaginable, the New Zealand Law Society opposed the Bill of Rights. "The Society has formed the clear view that the proposals in the white paper should not proceed. The white paper could, in fact, be said to be a one-sided and tendentious document."[26] The formal submission was supported by flamboyant rhetoric at the select committee hearings. The submissions exhibited little faith in the judges and suggested they were narrow and made more narrow by their professional training. It has never been clear to me how the New Zealand Law Society, which is supposed to promote the idea of the rule of law, got themselves in a position where they had to advocate unvarnished Hobbesian ideas. The Society preferred to leave the situation as it was, with the limits of power "in a constant state of flux". It was perhaps even more remarkable when it is considered that the Society conducted a poll of its own members and only 6 per cent considered they had comprehensive knowledge of the Bill. Such wonders will have to await the attention of legal historians. The Law Society did not have a monopoly on lack of vision, the New Zealand Council for Civil Liberties opposed the bill in a submission full of fatuities about both the New Zealand system of government and civil liberties themselves. The main argument was the failure to include social, economic and cultural rights. The Council preferred political action as a way of protecting civil liberties. I never paid my subscription to that body again.

26 New Zealand Law Society Submissions on the White Paper - A Bill of Rights for New Zealand, p1 (1985).

As a result of these debates the National Party decided that it was opposed to an entrenched Bill of Rights. That opposition in itself made the conduct of the enterprise much more difficult. Basic constitutional change really does need widespread political support if it is to succeed. Constitutional change is different from other reform. It cannot be rammed through on the basis of the preferences of one group. The constitutional rules bind everyone. They are the rules of game. It is different in kind from economic policy, just to name one example.

The Chairman of the select committee which heard the submissions, Mr Bill Dillon the MP for Hamilton East, a lawyer in private life, became an enthusiastic advocate of the proposals. The chair of the Caucus Justice committee, Richard Northey, was meticulous in working through the arguments. I spent many hours with the Caucus committee hammering out a means by which we could proceed, rather than have the entire enterprise scuttled. We came up with a Bill of Rights Act similar to the one put in the White Paper, but which would be enacted as an ordinary Act of Parliament.[27] The Treaty of Waitangi provisions would be removed, a step I deeply regretted but to leave them in would have consigned the measure to oblivion.

There was a spirited debate in the Caucus committee as to whether economic and social rights should be included such as appeared in some of the international instruments, notably the Universal Declaration on Human Rights. Such rights would include such matters:

- The right to work and an adequate standard of living
- The right to housing
- The right to education
- The right to adequate health care

I successfully opposed such matters being included in the legislation because it would suggest such matters may be capable of judicial resolution. To broaden a Bill of Rights so that it encompassed such broad policy questions would have made it unmanageable in my view and opened it up to ridicule. It also seemed to me that to state as fundamental rights matters which it was not within the power of the government to deliver would cause expectations to rise, only to be dashed. I do not doubt it should be the aim of the political system to deliver such things as far as practicable. I cannot see that in such areas of policy quasi-legal guarantees help in the delivery.

The principle of Parliament's supremacy to make the law was presumed in the select committee's final report. Parliament would have the final say under the revised approach. Parliament could disobey the Bill of Rights if it chose to, but it would have to do so conscious of the knowledge that to do so was a breach of fundamental principle. The mechanism chosen was to require the Attorney-General to certify when Bills were introduced into

27 Justice and Law Reform Committee *Final Report on A White Paper: A Bill of Rights for New Zealand (1988)* (1987-1990) AJHR Vol XVII I.8C.

Parliament containing provisions contrary to the Bill of Rights, so that the select committee considering the bill and the public would know that was the case. There was not a great deal of enthusiasm for all of this in the government. So when I became the Prime Minister I retained responsibility for this legislation to ensure that it was passed. That was duly done.

IV THE PRACTICAL EFFECTS OF THE BILL OF RIGHTS ACT

The New Zealand Bill of Rights Act 1990 is a great deal more important than the legal profession and political commentators have understood. It is a very important addition to our constitutional laws. The manner in which the courts have gone about interpreting it indicates that it will be very important in future.

But it will not only be important in the courts. One of the most fundamental of its effects is upon the government itself. People outside government misunderstand how necessary it is to have certain obstacles in place in order to prevent enthusiastic but misguided people doing things which should not be done. I spelt out this message in the introduction to the White Paper:[28]

> In practical terms the Bill of Rights is a most important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in by Government. In that way a Bill of Rights provides a set of navigation lights for the whole process of Government to observe. And in the end I believe that will be the greatest contribution a Bill of Rights will make to improving our system of Government.

The New Zealand Bill of Rights which has been enacted provides that protection now. Earnest and careful analysis has to be carried out in government before legislation is introduced to ensure that it does not breach any of the principles enacted in the Bill of Rights Act.

Experience within government convinced me that more hurdles needed to be put in front of those within government who wished to promote legislation. Too often bills come to the Cabinet Legislation committee which contain provisions hidden away in them of an objectionable kind. If the government system were obliged to look at these properly they would be less likely to be included. The New Zealand Bill of Rights Act 1990 accomplishes this goal to a degree not accomplished before. The Attorney-General is obliged by section 7 to "bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights". This provision erects a road block in the way of promoting provisions contrary

28 *White Paper* above n18, 6.

to the Bill of Rights Act. Ministers have to have the matter drawn to their attention by officials. Such provisions cannot be hidden away. The Attorney-General's power to certify is a potent weapon. It must be done on proper professional legal advice. It is not a matter of political judgment, but of law. There will be considerable hesitation to bring in measures to the Parliament which require a certificate.

A system has been set in place to discharge this function. The Department of Justice vets all bills for compliance with the Bill of Rights except those promoted by the Minister of Justice which are vetted by the Crown Law Office. By April 1 1992 there had been three occasions when certificates had been made by the Attorney-General. The Kumeu District Agricultural and Horticultural Society Bill attracted such a report,[29] with the result that the select committee deleted the provisions involved. The Napier City Council (Control of Skateboards) Empowering Bill attracted a certificate and did not proceed.[30] The Transport Safety Bill provision about random breath testing drew a certificate and while at the time of writing its fate is unknown, the fact of the certificate has certainly focussed the public debate.[31] The time may come in the New Zealand Parliament when a specialist select committee is required to report separately to the House about provisions which infringe, in much the same way as the Regulations Review committee does. It is already clear, however, that the requirement to test legislative proposals against a clear set of principles has a beneficial effect on both the legislation and in protecting the values embodied in the Bill of Rights Act. Already it has stopped one proposal from being introduced - the first version of the National government's Bail bill.

Public opinion is usually in support of the basic principles stated in the Bill of Rights Act. The fact that a proposed measure is contrary to one of the principles is likely to cause opposition to it for that reason alone. Governments will not want to be seen abridging peoples' rights. They will be loath to introduce legislation doing so without good reason and substantial public backing. Thus there is a distinct political value in the provision requiring the Attorney-General's certificate. It sounds a warning bell.

The device of using a certificate of the Attorney-General based on rigorous professional legal advice came to me as a result of what I had seen in Canada which I had visited as Minister of Justice in 1986. The Canadian government was most helpful. I had lengthy discussions with their minister, judges and officials. I found that the Department of Justice in Ottawa had a team of lawyers who were devoted full time to the task of vetting legislation to ensure that it complied with the Canadian Charter. When it became clear that an entrenched Bill of Rights was not going to be possible in New

29 Report on the Kumeu District Agricultural and Horticultural Society Bill, tabled in Parliament by the Attorney-General, 23 July 1991, NZPD 3053 (No 21).

30 Report on the Napier City Council (Control of Skateboards) Empowering Bill, tabled in Parliament by the Attorney-General, 15 August 1991, NZPD 4095 (No 24).

31 Report on the Transport Safety Bill, tabled in Parliament by the Attorney-General, 17 December 1991, NZPD 6367-6368 (No 36).

Zealand I thought the certificate procedure would have two functions. First, to ensure that the internal mechanisms of government addressed the issues seriously and with full legal analysis and, second, that the political consequences of breaching the standards were brought to the fore.

It is important to realise at this juncture that New Zealand's international obligations, solemnly undertaken, require it to observe in its domestic law certain fundamental guarantees and protections. These are set out in the International Covenant on Civil and Political rights, which was ratified by the National government as long ago as 1978. International scrutiny as to whether New Zealand is actually providing those protections is possible through the Human Rights committee of the United Nations. This is because New Zealand has ratified the optional protocol to the covenant.

Even with its relatively humble status as an ordinary act of the New Zealand Parliament, the New Zealand Bill of Rights Act 1990 constitutes a fundamental element of our constitutional system. It would be a great mistake to think, as many New Zealand lawyers did after superficial consideration, that because the Bill of Rights Act preserves parliamentary sovereignty, that it lacks impact. It is both a legal and logical fallacy to jump to the conclusion that because the Bill of Rights Act does not empower courts to strike down statutes, it is therefore devoid of practical effect and does not change anything. It changes a great deal. The full flowering of the Bill of Rights plant will take a long time in the New Zealand legal garden. But it will be no worse for that. Already there has been a substantial amount of writing[32] about it and more than 90 cases have referred to the Act or used it in some way by mid 1992.[33]

The potential effect of the New Zealand Bill of Rights Act is very wide indeed. It is much wider than the legal profession appear to have realised at first instance, although the New Zealand Court of Appeal has not misjudged its significance in the appropriate appeals when they reached that court. The Bill of Rights Act has the effect of an ordinary statute and contains many broad general principles with a wide range of applications. Already a number of cases have come before the courts which illustrate the importance that the measure has.

---

32 See, A S Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261; J B Elkind "Interpreting the Bill of Rights" [1991] NZLJ 15; P Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990" (LLB(Hons) Research Paper, Victoria University of Wellington, 1991); W K Hastings "The New Zealand Bill of Rights and Censorship" [1990] NZLJ 384; J C Hay "Section 27 of the New Zealand Bill of Rights Act 1990 The Right to Justice: Something Old, Something New" (LLM Research Paper, Victoria University of Wellington, 1991); D M Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent L Rev 351; D M Paciocco and P T Rishworth *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992); P T Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in a Breath and Blood Alcohol Cases" [1991] NZ Recent L Rev 337; P T Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68; B Robertson "Confessions and the Bill of Rights" [1991] NZLJ 398; A Shaw and A S Butler "The New Zealand Bill of Rights Comes Alive (I)" [1991] NZLJ 400.

33 I am indebted to my colleague Tony Shaw for this list of cases which is too lengthy for citation here. Only about thirty of the cases on Mr Shaw's list so far appear in the law reports.

In 1990 Robert Lee Flickinger appeared before the Auckland District Court when the government of Hong Kong sought his extradition for offences of commercial fraud allegedly committed there. The Court allowed the application under the Fugitive Offenders Act 1881, a United Kingdom statute in force in New Zealand. The hearing took 8 weeks. The High Court turned down an application for a writ of habeas corpus. The matter went to the Court of Appeal. Section 66 of the Judicature Act 1908, it had been held in a previous case, did not confer a right of appeal in a criminal matter, and this was a criminal matter. The Court said that this could not continue to be the legal position because of section 6 of the New Zealand Bill of Rights Act 1990 which provides:

> Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights that meaning shall be preferred to any other meaning.

So the Court said if section 66 of the Judicature Act could be given a meaning consistent with the rights and freedoms contained in the Bill of Rights Act - that meaning must be preferred. Furthermore, section 23(1)(c) of the Bill of Rights Act provided that everyone who is arrested has the right to have the validity of the arrest determined without delay by way of habeas corpus.[34]

Thus, the Court of Appeal said the Judicature Act should now receive a wider interpretation than previously. The judges assumed this to be the case, without deciding it. They went on to find nothing had occurred in the proceedings contrary to the Bill of Rights Act and Flickinger had to go back to Hong Kong to face trial. The case is a good illustration of how the New Zealand Bill of Rights Act will influence the courts in interpreting the language of Acts of Parliament. Interpretation of statutes is a vital function in the protection of liberty. It is a practical daily task in the courts. The Bill of Rights Act will be a big new influence in application of the law by the courts.

Important as statutory interpretation is the application of the Bill of Rights Act substantively is likely to be even more striking. Consider the case of an Auckland man detained by the Police at 12.20 a.m. one night and not formally arrested or charged until 3.38 a.m. He had been chased by a constable, handcuffed to a fence and then put in a police car and taken to three police stations without being told of his right to consult a lawyer until almost the end of an interview in which he made damaging admissions. The Court of Appeal ruled the confession he made in those circumstances could not be used against him because the Police had breached the right in section 23 of the Bill of Rights Act .[35] That section provides:

> **23. Rights of persons arrested or detained**—(1) Everyone who is arrested or who is detained under any

34 *Flickinger* v *Crown Colony of Hong Kong* [1991] 1 NZLR 439.

35 *R* v *Kirifi* (1991) 7 CRNZ 427, 431.

> enactment— ...
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; ...

A rule similar to the one above has been accepted in New Zealand for many years and found in administrative practises and instructions to law enforcement authorities. But when elevated to a plain statement of principle of general application and put in the law it can have important consequences, as a 1992 decision of the New Zealand Court of Appeal demonstrated. In the most important decision yet decided under the Bill of Rights Act the Court held by a majority of 4 to 1 that the provision quoted above required the law enforcement authorities to inform two people of their right to consult a lawyer before they were required to go to a testing station for an evidential breath test or blood test because they were suspected of driving with a level of alcohol in their blood over the limit allowed by the law. (It is important to appreciate that this is not a decision which holds people have the right to a lawyer before undergoing roadside breath testing.) The Transport Act which created the offence was silent on the question whether a person required to undergo a test should be told of the right to consult and instruct a lawyer. The court held that the Bill of Rights Act required people to be told of their right to a lawyer.

Sir Ivor Richardson put it this way in his judgment:[36]

> The right to consult a lawyer is part of our basic constitutional inheritance. Not surprisingly it is also a central feature of contemporary international statements of human rights. The right is pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. It recognises the reality that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State. Access to counsel is a means of reducing that imbalance and of ensuring that anyone arrested or detained is treated fairly in the criminal process. In that regard the right to a lawyer facilitates access to knowledge and also allows for representation by an independent intermediary.

In practical terms there must now be reasonable opportunity for telephone consultation with a lawyer before taking the test. It was clear from the evidence in the case that allowing time for the consultation would not prejudice the test given the level of alcohol in the human body.

At the time of writing the judgment is the most important delivered on the Bill of Rights Act because the judges went to great trouble to establish the principles which would be applied to interpreting its provisions. It is clear the judges regarded the Act as one having a special character. There are indications that since the rights in the Act are rights which New Zealand

36 *Ministry of Transport* v *Noort* Not yet reported, Court of Appeal, CA369/91, 30 April 1992 pp9-10.

is obliged by its international obligations to uphold they will be scrupulously protected by the courts.

The decision affirms a basic right in a civilised society. It is the application of such standards which advance the humane use of power and not arbitrary power. The state must set a high standard and follow it. Abuse of power is easy if the full might and resources of the state are available to those who transgress. As Sir Owen Woodhouse has observed:[37]

> The mere presence of constitutional safeguards to which ordinary people could appeal at any future time of crisis would act in times that were normal as a sensible brake upon the Executive and encourage revival of the true functions of Parliament.

Some New Zealand lawyers seem to have been seduced into thinking that because the Bill of Rights Act is not entrenched, its broad principles and standards should not be given effect to. That view is a congenial one for New Zealand lawyers to arrive at. New Zealand lawyers and law students are fond of a "black letter" approach to law. This could be described as slot-machine justice in which answers are produced automatically, when the facts are fed into the machine. The law does not, cannot, and never has operated in such a way. Such an approach avoids the need to think. It avoids the need to make policy arguments. But a "black letter" approach is simply not going to work with the Bill of Rights Act. Tabulated legalism, as it has sometimes been called, is out. The Bill of Rights Act requires the balancing of some fairly broad policy judgments. It may well turn out that the rights that we thought we enjoyed in New Zealand are not so self-evident when it comes to the detail of New Zealand statutes and New Zealand government action.

The Bill of Rights Act applies to:[38]

- acts done by the legislative branch of government
- acts done by the executive branch of government
- acts done by the judicial branch of government
- acts done by bodies which perform public functions.

So the range of state action opened up to judicial review by this Act is wide, although it is not unlimited. It is not restricted to the obvious cases of police powers where many of the cases have arisen so far. It could include a wide range of conduct by state agencies and officials towards even commercial enterprises. Indeed, it could include any citizen with whom agents

---

37 Rt Hon Sir Owen Woodhouse *Government Under the Law* (Price Milburn for the New Zealand Council of Civil Liberties, Wellington, 1979).

38 Section 3 of the New Zealand Bill of Rights Act 1990 reads:

> **3. Application**— This Bill of Rights applies only to acts done—
>
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

of the state come into contact. Acts and omissions will be covered. The exercise of statutory discretions may well have to meet the standards of the Bill of Rights Act. Common law rules will have to meet those standards, at least in some circumstances.

Furthermore the range of broad civil and political rights protected is considerable and includes:[39]

- right not to be deprived of life
- right not to be subjected to torture or cruel treatment
- right not be subjected to medical or scientific experimentation
- right to refuse to undergo medical treatment
- electoral rights including the right to vote
- freedom of thought conscience and religion
- freedom of expression
- freedom of peaceful assembly
- freedom of association
- freedom of movement
- freedom from discrimination
- rights of minorities
- protection against unreasonable search and seizure
- right not to be arbitrarily arrested or detained
- a definition of the rights of persons who are arrested or detained
- rights of persons charged with an offence
- defined minimum standards of criminal procedure
- protection against retroactive penalties and double jeopardy
- right to justice in respect to the procedures of public authorities

It is not always easy to judge when the language of the Act may apply, but it certainly provides a flexible and creative means of protecting the rights of New Zealanders. It does that by holding the state to certain fundamental standards defined by the law. That was the original intention of the legislation and it has been efficiently translated into action. There are now a set of rules which are binding on the government. The question about the New Zealand Bill of Rights Act is not whether it is a beneficial constitutional reform, it clearly is. The question is whether it goes far enough. My answer to that is that it clearly does not. The standards it defines should be put beyond alteration by a simple majority in Parliament.

V THE FUTURE?

In 1960 the Canadians enacted a Bill of Rights similar to our own. In 1982 they replaced it with the Charter of Rights, a full-blown constitutional document limiting the sovereignty of Parliament and providing limits on the power of government in Canada at both federal and provincial levels. When settling for a reduced version of the Bill of Rights concept of New Zealand I had the Canadian experience very much in mind. It is quite

39 New Zealand Bill of Rights Act 1990, ss 8-27.

conceivable that we will evolve to the same pattern as the Canadians, but I hope more quickly.

There is a need for New Zealand to develop greater constitutional maturity. The idea that total power should reside with the executive government of New Zealand because it has total wisdom in all circumstances is not just naive, it is fundamentally wrong. If New Zealanders have not realised that by now it is time they did. The Court of Appeal has damaged their interests far less than the executive government of New Zealand. The arguments against a full-blown Bill of Rights simply do not stack up.

New Zealand society tends to be complacent about its record in protecting fundamental human rights and there are often public expressions of New Zealand superiority compared with other countries. The record by international standards is a solid one but it is by no means without blemish. There are a number of examples of New Zealand legislation which would not have survived judicial scrutiny against the standards of an entrenched Bill of Rights. Not all of them are well known so an excursion through some of them may help to convince people why New Zealand should take the next step and entrench the New Zealand Bill of Rights Act.

In the late nineteenth century some completely unacceptable legislation was passed to deal with Maori disturbances on the west coast of the North Island. The Maori Prisoners Act 1880 was "[a]n Act to provide for the Further Detention, for a Limited Time, of certain Natives now in custody in Her Majesty's Gaols." Land had been confiscated. Maori said promises had been made about it and they had not been fulfilled. A Commission was set up to look into the grievances. A number of Maori were arrested and committed for trial. They were sent to gaols in Dunedin and Hokitika. But the government did not want to try them because, as the parliamentary debate on the bill makes clear, it appeared they would not be convicted or if they were convicted they would not be imprisoned.[40] Since the Maori campaign led by Te Whiti was one of passive resistance, it was hard to argue that an emergency situation justified the actions taken by the government. The Maori were to be kept in goal by statute. Their trials were postponed. *Habeas corpus* was taken away from them by statute. The lawfulness of their detention could not be tested. Some of the Maori goaled were not charged with any offences. They had simply refused to enter into sureties to keep the peace.

The sorry episodes on the west coast of the North Island culminated in the storming of the village of Te Whiti at Parihaka. The Riot Act was read to a passive and orderly crowd, wholesale arrests were made, villagers evicted, houses and crops destroyed. Then Parliament passed the Indemnity Act 1882 which gave retrospective protection to all those who had committed these acts against any legal proceedings both civil and criminal. Maori could not recover for the damage incurred by the actions nor could prosecutions be launched. The Maori were not armed. The events were a disgrace,

40 36 NZPD 282-288 (1880).

but they were supported by public opinion at the time. Much of the legislation passed during this period could not have survived a Bill of Rights for a moment.[41]

New Zealand immigration legislation over the years has had some ugly racist elements which would have run foul of an entrenched Bill of Rights. But discrimination on the ground of race was not restricted to immigration. In 1881 the New Zealand Parliament passed the Chinese Immigrants Act which exacted a poll tax of 10 pounds on every Chinese and imposed tonnage quotas on ships for each Chinese person brought to New Zealand.[42] The poll tax was increased in 1896 tenfold. It was not abolished until 1934. The tonnage requirement survived until 1944. When the Old Age Pension Act 1898 was passed Chinese and other Asians were excluded from its provisions even if they were New Zealand citizens.[43] In 1899 the Immigration Restriction Act imposed an education test on potential immigrants not of British or Irish parentage.[44] Reading tests were imposed on Chinese immigrants in 1907 - there were only about 2,500 Chinese people in New Zealand at this time.

The Tohunga Suppression Act 1907 had as its purpose the suppress an aspect of Maori culture.[45]

> Whereas designing persons, commonly known as tohungas, practise on the superstition and credulity of Maori people by pretending to possess supernatural

41 The Maori Prisoners Trials Act 1879, The Confiscated Lands Inquiry and Maori Prisoners Trials Act 1879, The Maori Prisoners Detention Act 1880 and the West Coast Peace Preservation Act 1882.

42 Section 5 of the Chinese Immigrants Act 1881 stated:

> **5.** Before making any entry at the Customs, and before any Chinese shall be permitted to land, the master shall pay to such Collector or other principal officer ten pounds for every such Chinese; and no entry shall be deemed to have been legally made, or to have any legal effect, until such payment shall have been made.

Section 3 stated:

> **3.** If any vessel shall arrive in any port in New Zealand, having on board a greater number of Chinese passengers than in the proportion of one to every ten tons of the tonnage of such vessel, according to the registry thereof if British, and if not, then according to the measurement prescribed by any Act for the time being in force regulating the measurement of British ships, the owner, Charterer, or master of such vessel shall be liable, on conviction, to a penalty not exceeding ten pounds for each Chinese passenger so carried in excess.

43 Old Age Pension Act 1898, s64 stated: "This Act, in so far as it provides for the grant of pensions, shall not apply to- ... (4) Chinese or other Asiatics, whether naturalised or not."

44 Section 3 provided:

> **3.** Except in so far as is otherwise provided in the subsequent sections of this Act, it shall not be lawful for any person of any of the following classes (hereinafter called "prohibited immigrant") to land in New Zealand, that is to say:—
>
> (1.) Any person other than of British (including Irish) birth and parentage who, when asked to do so by an officer appointed under this Act by the Governor, fails to himself write out and sign, in the prescence of such officer, in any European language, an application in the form numbered two in the Schedule hereto, or in such other form as the Colonial Secretary from time to time directs: ... .

45 Tohunga Supression Act 1907, preamble.

> powers in the treatment and cure of disease, the foretelling of future events, and otherwise, and thereby induce the Maoris to neglect their proper occupations and gather into meetings where their substance is consumed and their minds unsettled, to the injury of themselves and to the evil example of the Maori people generally.

Such a measure would clearly be contrary to the freedom of religion provisions of a Bill of Rights. The odd thing about such cultural chauvinism and paternalism is that it is easier to see with hindsight than at the time.

In times of war extraordinary powers are taken by governments and some are undoubtedly necessary. Some are not. In 1941 a person was convicted and sentenced to 3 months imprisonment for distributing a pamphlet. The Jehovah's Witnesses had been declared a subversive organisation.[46] It would not be a fair criticism of the New Zealand record on these questions to dwell too much on wartime legislation of a repressive and objectionable nature. But there has been a lot of it.[47] In relation to emergency legislation generally, the New Zealand record is not a good one. One scholar who has surveyed it concludes the legislation was "astonishingly wide in terms of the lengths to which it went in sacrificing individual liberties to the exigencies of the moment. ... The New Zealand Parliament has not shown itself to be a particularly effective agency in monitoring emergency bills and providing for adequate safeguards."[48] This is a sobering conclusion.

There is, however, one measure passed by the New Zealand Parliament which was related to a war but which is absolutely objectionable. The Expeditionary Forces Amendment Bill 1918 abolished conscription after the First World War and granted a bonus to soldiers. People classed as military defaulters were dealt with severely under the legislation. Military defaulters were, under the Act, people on a list prepared by the Minister of Defence who had since the beginning of the War:

(a) been convicted by a court martial of any offence of "such a nature as to indicate, in the opinion of the Minister, an intent to permanently evade or refuse to fulfil their obligations of military service:" or
(b) having been called up, deserted; or
(c) having been members of the reserves, illegally evaded enrolment in circumstances "in the opinion of the Minister" which show an intent to evade service permanently.

There was provision for people with a bona fide religious objection to war to be left off the list. There was appeal to a magistrate on the ground that a name had been included in error. The effects of being on the list were

46 *Herbert* v *Allsopp* [1941] NZLR 370.

47 R Boast "Emergency Powers in New Zealand Legal History" (Unpublished Paper written for the Law Commission, on file Victoria University of Wellington, March 1989).

48 Boast, above n47, 43.

serious. Every one on the list was deprived of civil rights for ten years. They could not vote, they could not be employed by the government, they could not stand for Parliament or local government.[49] To breach or attempt to breach the requirements of the deprivation was an offence punishable by twelve months imprisonment. The list had 2,600 names on it. Many of them would already have been punished under the law for the same actions which led them to be placed on the list.

Closer to our own times there are such blots on New Zealand's record as the Waterfront Strike Emergency Regulations which prohibited freedom of speech in respect to the strike.[50] The Regulations were made under the Public Safety Conservation Act 1932, a draconian piece of legislation which gave great powers to government in an emergency and made the judgment as to whether to invoke the act a subjective one.[51] Happily the Act is now repealed. It provided an unfettered power to govern New Zealand by regulation for limited periods. Had a Bill of Rights been in force in New Zealand such a sweeping measure may never had been enacted in the first place, but in any event its use could have been challenged in the courts.

---

49 Expeditionary Forces Amendment Act 1918, s13:

> **13.** (1) All military defaulters are hereby deprived of civil rights for a period of ten years from the passing of this Act.
>
> (2) Every man so deprived of civil rights shall be incapable—
>
> (a) Of being appointed or of continuing to hold any office or employment in the service of the Crown or of any local or other public authority:
>
> (b) Of being elected or appointed or of continuing to hold office as a member of either House of Parliament or as a member of any local or other public authority:
>
> (c) Of being enrolled as an elector or voting at any election of a member or members of either House of Parliament or of a member or members of any local or other public authority.

50 Waterfront Strike Emergency Regulations SR1951/24, regulation 4 provided:

> **4.** Every person commits an offence against these regulations who—
>
> (a) Is a party to a declared strike; or
>
> (b) Encourages or procures a declared strike or the continuance of a declared strike; or
>
> (c) Incites any person or class of persons or persons in general to be or to continue to be a party or parties to a declared strike; or
>
> (d) Prints or publishes any statement, advertisement, or other matter that constitutes an offence against these regulations, or that is intended or likely to encourage, procure, incite, aid, or abet a declared strike or the continuance of a declared strike, or that is a report of any such statement made by any other person.

51 Section 2 provided the grounds for proclaming a state of emergency:

> **2. Issue of Proclamations of Emergency**—(1) If at any time it appears to the Governor-General that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light or with the means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life, or if at any time it appears to the Governor-General that any circumstances exist, or are likely to come into existence, whereby the public safety or public order is or is likely to be imperilled, the Governor-General may, by proclamation approved in Executive Council (hereinafter referred to as a Proclamation of Emergency), declare that a state of emergency exists throughout New Zealand or, according to the tenor of the Proclamation, throughout any area or areas that may be specified of defined in the proclamation in that behalf.

The Clutha Development Empowering Act 1982 was legislation which permitted the building of the high dam at Clyde. The Crown had applied for a water right but as a result of a case in the High Court had lost.[52] Much of the work had already been done. But objectors to the dam won in the courts. They were orchardists who would lose their orchards if the dam was built. Fruits of their victory in the courts were denied them by passage of the legislation. Such an action would have been contrary to the Bill of Rights Act 1990 and could not have prevailed had that Act been in force at the time and entrenched from repeal by a simple majority in Parliament. It provides that people have the right to bring civil proceedings against the Crown and have those proceedings dealt with according to law "in the same way as civil proceedings between individuals."[53] Individuals cannot pass acts of Parliament if they are beaten in the courts.

The Whangarei Refinery Expansion Project Disputes Act 1984 is perhaps the most recent example of an enactment which would fall foul of an entrenched Bill of Rights. It was legislation passed after the Standing Orders of Parliament had been suspended. It was passed to deal with a particular industrial dispute. It gave power to the police which cannot be reconciled with guarantees of freedom of expression. The Act made it an offence punishable by imprisonment to fail to comply with a police direction. So even if the police direction was unreasonable it had to be complied with.

The guarantees in a Bill of Rights are not absolute. The proposed entrenched Bill of Rights for New Zealand contained, as does the New Zealand Bill of Rights Act 1990, a provision which says "[t]he rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[54] It is a question of balancing the interests on both sides. In the nature of things not many statutes would be held unconstitutional by a court - but it is a protection which should be available in a democracy like New Zealand. The experience in Canada has been that the interpretation function of the provisions is more important than the capacity to strike down statutes.

The resistance to checks and balances via judges is based on out-dated Hobbesian ideas about the virtues of concentrations of power. The nineteenth century saw English constitutional lawyers develop the idea in doctrines about the sovereignty of Parliament. These ideas have not translated well into our environment. In particular they did not travel to the antipodes with some of the institutions of restraint with which the notion was accompanied in the place of its birth. In the New Zealand context the argument is that it is both safe and appropriate to give the courts in New Zealand power

52 *Gilmore* v *National Water and Soil Conservation Authority* (1981-82) 8 NZTPA 298.

53 Section 27(3) (right to justice) provides: "(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

54 Section 5, New Zealand Bill of Rights Act 1990.

to measure law, of the type discussed in the examples above, against the standards of an entrenched Bill of Rights. To do so is not empowering the judges to legislate. It is asking them to apply the law. It is so similar to what they do now in applying legislation that it amounts only to a moderate increase in judicial power. They will not be asked to work in new and unfamiliar areas. Most of the standards in the Bill of Rights are familiar to them from the common law and New Zealand's international obligations.

Power in New Zealand needs to be broken up and redistributed. A Bill of Rights which abridges parliamentary sovereignty to the extent of the standards in an entrenched Bill of Rights would be a highly desirable step. Of all the constitutional changes advocated in this book, this is the least radical and the least controversial. We are halfway there already and perhaps further, depending on how the Court of Appeal finally interprets the New Zealand Bill of Rights Act 1990.

If New Zealanders used to think they could hold governments to certain clear standards and policies via the existing parliamentary system and general elections every three years, they are now probably changing their minds. Those who worry about giving judges too much power do not understand the nature of the judicial power in our system of government. Neither do they focus on the fact that the imbalance in our system is that the executive has too much power and Parliament too little. True, we do not want to turn judges into legislators, but they are the best suited to keeping up the standards. All branches of government should be bound by the same standards, a set of values which go to the core of our civilization. How can New Zealanders any longer pretend they are different from other people? That government here can be trusted when it cannot elsewhere? That governments will not invade people's liberties and no safeguards against governments are needed? No-one in the developed world believes that, not even the British now that they have gone into Europe. Neither should we. It goes against the grain. Certainly our constitutional arrangements are unique - but neither uniquely virtuous nor realistic. It is time to exorcise the ghost of Thomas Hobbes.

4
A Maori Constitutional Revolution

I WHERE IT ALL STARTED

Of all the subjects in this book the present one is the most difficult to write about, particularly in a confined space. There are a number of reasons. First, of all the political issues that came my way Maori issues were the most difficult. The fearsome complexity of Maori politics themselves, coupled with the fraught relationship they have to pakeha politics, makes accurate analysis and correct characterisation hazardous undertakings. There were times when I thought that there were nothing but Maori issues on my ministerial plate - they grew and multiplied in an astounding way. Second, of all the changes made by the Fourth Labour Government none has brought forth such a stream of scholarship, such a torrent of writing, such an avalanche of analysis as the Maori issues. Important as this literature is I cannot in this chapter stay in touch with it.[1] Here more than elsewhere in the book I tell of my own experiences handling Maori issues - what it all means I cannot be sure. I only know what I did and why. Third, the revival of Maori culture in Aotearoa has been coupled with an astonishing development in Maori jurisprudence of great richness and complexity. When I left the Victoria University of Wellington Faculty of Law to go into politics in 1979 there was hardly any teaching of legal issues pertaining to matters Maori. When I returned in 1991 Maori issues occupied important parts of the curriculum.

The central feature of these developments has been the Treaty of Waitangi. Its place in New Zealand history has fluctuated in the 152 years since it was

1 See further: P Cleave *The Sovereignty Game: Power, Knowledge and Reading the Treaty* (Victoria University Press, Wellington, 1989); I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989); J A Kelsey *Question of Honour?: Labour and the Treaty, 1984-1989* (Allen & Unwin, Wellington, 1990); P G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991); R Mulgan *Maori, Pakeha and Democracy* (Oxford University Press, Auckland, 1989); C Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987); W Renwick *The Treaty Now* (GP Books, Wellington, 1990); A Sharp *Justice and the Maori* (Oxford University Press, Auckland, 1990); P Spoonley *Racism and Ethnicity* (Oxford University Press, Auckland, 1988); H Tauroa, *Healing the Breach - One Maori's Perspective on the Treaty of Waitangi* (Auckland, Collins, 1989); P Temm *The Waitangi Tribunal* (Random Century, Auckland, 1990); R Vasil *Biculturalism - Reconciling Aotearoa with New Zealand* (Victoria University Press, Wellington, 1988); R Walker *Ka Whawhai Tonu Matou - Struggle Without End* (Penguin, Auckland, 1990); R Walker *Nga Tau Tohetohe* (Penguin, Auckland 1987).

signed and it has always been a document surrounded by controversy. The Treaty of Waitangi marked the beginning of constitutional government in New Zealand.[2] It was the starting place. Sir Robin Cooke, the President of the Court of Appeal has described the Treaty as "simply the most important document in New Zealand's history."[3] The legitimacy of conducting the sort of government we conduct on these islands flows from the Treaty. Undertakings were given to Maori by the Crown in the Treaty when the Crown assumed authority over New Zealand. Whether those undertakings have been honoured has been a burning issue ever since.[4] The truthful answer is that expressed by the Queen in her speech at the Waitangi commemorations of 1990, the obligations have been "imperfectly observed."[5] There is a significant proportion of New Zealand opinion which does not think the undertakings should be honoured.[6] The matter is further complicated by the fact that it is difficult to be sure what the undertakings mean, especially in a contemporary context more than 150 years after the document was signed. The Treaty has not changed. But the conditions in which it is to be applied are different.

The primary reason why the Treaty took a long time to flower as a constitutional and legal instrument was that a long line of judicial decisions said it was not part of the law of New Zealand. Chief Justice Prendergast, in an 1877 case brought by a Maori tribe to void a Crown grant of land, declared the Treaty to be:[7]

> [A] simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.

This view is now recognised to be based on a wrong approach to international law and British colonial practice, but it was an approach which persisted for a long time.[8] There are still lawyers in New Zealand who

---

2 Report of the Royal Commission on the Electoral System *Towards A Better Democracy* (Government Printer, Wellington, 1986) 81. The point is contested by N A Foden *New Zealand Legal History* (Sweet & Maxwell, Wellington, 1965) 94.

3 R B Cooke "Introduction - Special Waitangi Edition" (1990) 14 NZULR 1.

4 See, C Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987).

5 One of the most unmanageable tasks of government was to arrange each year to have adequate consultations and arrive at a format each February as to how the Treaty was to be commemorated. I could write a whole article on those problems.

6 > It [the Treaty] is not, and never will be, a Bill of Rights or a constitutional document of any kind. Its modesty, its purpose, and its non-legal character, together preclude this. Nor can such a document ever grow into such a thing, or be prodded, or conjured, into becoming such. ... to seek to 'politicise' the Treaty, and give it present day political currency as an agenda-setting instrument for advancing particular claims or purposes for a particular section of society, as was certainly attempting to be done during the 1984-90 period, ... is mischievous.
>
> G Chapman "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 228, 235-236.

7 *Wi Parata* v *The Bishop of Wellington* (1877) 3 NZ Jur (OS) 72, 78.

8 P G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) 178. See also A Frame "A State Servant Looks at the Treaty"

support that view of it.

There was a further legal difficulty. Under our system of government it is for the executive branch of government to make treaties. Treaties are an instrument of foreign policy. Those treaties do not alter the law of the land, however, unless they are incorporated into municipal law by being passed through Parliament. The Treaty of Waitangi received scant legislative recognition until quite recently. The only part of the Treaty which was quickly translated into statute law was the Crown's right of pre-emption in Article II of the Treaty, which was adopted in substantially similar terms in the Land Claims Ordinance 1841, and later in the Constitution Act 1852. Thus the Crown secured what was its essential means of controlling colonisation through a monopoly on the purchase of land from Maori, but the positive protections for Maori in the Treaty remained unlegislated.

In a case which went to the Privy Council in 1941, 101 years after the Treaty was signed, where the paramount chief of Ngati Tuwharetoa challenged a statutory charge over ancestral tribal land as contrary to the Treaty, the Maori claim failed.[9] This was because the Treaty had not been made part of the statute law of New Zealand. Viscount Simon L C said:[10]

> So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him.

These and other cases effectively blocked Maori from using the ordinary courts to seek redress of grievances under the Treaty.[11] On this latter point the legal view has not changed. The Court of Appeal has reaffirmed it in 1992 in the Maori broadcasting assets case.[12] There, in the leading judgment for the majority, McKay J cited the 1941 case as laying down again the well settled principle that the treaty could not be enforced except so far as it had been incorporated into municipal law. He then said:[13]

> In the present context, because the statute refers to the principles of the Treaty, these principles have to

---

[1990] 14 NZULR 82, 83 footnote 2.

9 *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* [1941] AC 308.

10 Above n9, 325.

11 *In re the Bed of the Wanganui River* [1962] NZLR 600; *In re the Ninety Mile Beach* [1963] NZLR 461. It should be observed that the Treaty was often cited in decisions of what is now the Maori Land Court first established in 1865 but the issue was what it meant, there were not interpretations on such things as the meaning of rangatiratanga or kawanatanga.

12 *New Zealand Maori Council* v *Attorney-General*, Not yet reported, Court of Appeal, CA206/91, 30 April 1992.

13 Judgment of McKay J above n12, 7. It is significant that in this case Cooke P dissented. I read the decision, with a differently constituted court from that of the 1987 Maori Council case as a retreat from the outer limits of Treaty jurisprudence which had developed in the 1987 case and its progeny. It is certainly contrary to the trend that had been developing in the judgments of Cooke P that parliamentary soveignty was a doctrine which had its limits and the Treaty may be one of those issues which was beyond them.

be identified in order to determine whether or not the actions proposed by the Crown are inconsistent with them.

The net effect of the state of the law as it had developed in New Zealand was that, apart from the specialised jurisdiction of the Maori Land Court, Maori had nowhere to go for the redress of grievances except by making political and parliamentary arguments. They petitioned the Queen repeatedly but to no avail. The legal system effectively gave the executive a monopoly in deciding if and when to honour the Treaty. It is not surprising that the executive found it expedient not to take the Treaty too seriously. Wide-ranging legal changes were required if the situation was to be altered in favour of Maori and the Treaty.

The politics of the situation has for many years favoured the traditional legal approach. It is unpopular to try and redress the grievances of Maori. It is the familiar problem isolated by John Stuart Mill, the problem of the tyranny of the majority.[14] In a democracy how can the rights of minorities be protected when the majority does not want to protect those rights and does not even recognise they exist. In New Zealand the argument is most frequently put on the basis that all New Zealanders have equal rights - Maori have those rights - they should be treated no differently in any respect from pakeha. The Treaty is history. From it nothing should spring now, the argument runs. There is a substantial political market for the argument, particularly if Maori politicians make it. Disguised prejudice is never far from the surface in New Zealand, whenever there is debate on Maori matters. There is a dark and unpleasant underside to the New Zealand psyche when questions of race are confronted. These things I learned only by exposure to the issues at the sharp end. For much of the time the truth is disguised under the egalitarian exterior of New Zealanders.

Notwithstanding the problems, there is also much which is admirable in New Zealand's race relations. We have been more successful than many other societies, there is a fair measure of tolerance here. Furthermore, our history has been one of constant interaction, intermarriage and mutual respect. The attractive features of Polynesian culture have undoubtedly had a lot to do with this. New Zealand Maori have fared better with their dominant culture than have the Australian aborigines, to take one example close to home. Maori are numerous - about half a million New Zealanders have some Maori ancestry. This single fact gives political weight to Maori claims - Maori are a big cultural minority. Indeed, some statistical projections suggest that by 2025 a majority of New Zealanders will have some Maori blood. The proud history of Maori gives them a dignity often denied indigenous peoples. The British army had 18,000 people under arms in New Zealand during the New Zealand wars of the nineteenth century, yet complete subjugation of Maori was never achieved.

---

14 J S Mill *Utilitarianism, Liberty and Representative Government* (Dent & Sons, London, 1964) 249-250.

One of the biggest problems in New Zealand has been complacency about race relations. I grew up in the South Island, in the liberal town of Nelson. There were only three or four Maori families I knew of. It never occurred to me that they were in any way different. I am not sure that it did to them either, in the Nelson of the nineteen-fifties. I was taught quite deliberately and firmly that New Zealand was different from other countries. We did not discriminate against people on racial grounds. Maori were in every respect as good as pakeha. There were no racial problems in New Zealand, in this we were different from the United States, South Africa, and even Australia. It was some years before it occurred to me to question this liberal orthodoxy. The New Zealand history I studied did not tell me anything of the history of oppression which had characterised much Maori experience in the nineteenth century. When I first went to university in the North Island and came into contact with students from the East Coast of the North Island, I began to realise that there was much I did not know. Later experience in the United States forced me to probe further into the issue of New Zealand's race relations to try and sort myth from reality. In many ways what fuelled my determination in the area of Maori policy was my realisation that the facts were not as I had been brought up to believe them to be. New Zealand was not handling this issue well. The myths were preventing us from confronting the realities.

The factor that shaped my intellectual approach to Maori issues in New Zealand was my experience in the United States. As a student at the University of Chicago I lived in a ghetto, part of it euphemistically known as a rapidly changing neighbourhood. On one side of the street only whites lived, on the other side only blacks lived. Relations between the two groups were strained. This was at the height of the American civil rights movement. Marches in the south were taking place in order to force racial equality. At the University of Chicago Law School I was studying United States constitutional law. This was the instrument by which the civil rights revolution in the United States was being implemented. Legislatures in the South would not act. The politics of elected politicians allowing integration in the south were entirely adverse. It was the Supreme Court of the United States interpreting the Bill of Rights in the United States Constitution which caused the change. The great case of *Brown* v *Board of Education* in 1954 , which held that public schools could not be segregated along racial lines, started it all.[15] By the time I was in Law School in the United States there was a mass of case law on civil rights, of which I had to study. The United States Congress had started to pass the civil rights legislation in the mid-sixties and I studied that as well.

A number of features become clear studying this rich tapestry at a time when it was fresh and the issues were live. Courts, and the methods of the law, were more reliable in providing racial minorities with true equality than legislatures were. Legislatures responded to political stimuli not to

15 *Brown* v *Board of Education* (1954) 347 U S 483.

principle. Legislatures reflected the views of the dominant group, not that of the minority. That being the case legislatures themselves could be active participants in denying the minority their equal rights, rights in the United States which are constitutionally guaranteed.[16] The Supreme Court of the United States began examining and subjecting to strict scrutiny legislation from majoritarian legislatures which exhibited "prejudice against discrete and insular minorities."[17]

The tension between the courts, the legislature and the executive government in the United States was something I was not familiar with in New Zealand. It seemed alien and strange at first. Surely the Government could be trusted to do the right thing? Such would have been the instinctive approach for people of my generation and background in New Zealand. The American experience convinced me that it is wise to be suspicious. In New Zealand, with the supremacy of Parliament and Cabinet and no constitutional guarantees of any description, the civil rights revolution of the American type would have been impossible. I could see that clearly enough. I contented myself in those days with the view that such things were not necessary in New Zealand anyway.

It was on this background that I drew, and with adaptations used, as the basis for legislation to advance the interests of the Maori minority in New Zealand.The logic of the approach was as follows. Since New Zealand lacked a constitutional framework with guaranteed rights the American approach *simpliciter* would not work. Some parliamentary action by way of legislation was needed to make a base. But if that legislation itself redressed the grievances it would run into the problem that the majority of the community would oppose it. If, on the other hand, legislation was used to set up processes, and procedures and the principles on which decisions should be based were stated, it may be possible to get even a majoritarian legislature to act. The initial commitment required was to a process. No tangible outcome was provided by the legislation itself. What should be done was to be decided only after judicial or quasi-judicial processes had assessed individual cases. First it was necessary to give the courts something to interpret. Such was the nature of the approach I brought to both statutory incorporation of the Treaty in statutes, and extension of the Waitangi Tribunal to examine grievances back to 1840.

Obviously in the New Zealand constitutional context it is not possible to divorce entirely the issues from the Parliament and the government, but it is wise to remove as much of the substance from politicians as possible. If this is not done the questions will not be addressed, the grievances will smoulder and could ultimately develop into burning resentment. Democracy hangs by a slender thread in an open society. It is always possible that widespread disorder and chaos can emerge. If a significant minority defined by race develop grievances which remain ignored it is a potent brew for disorder. If that group, as is the case with New Zealand Maori, have by

16 L H Tribe *American Constitutional Law* (2ed, Foundation Press, New York, 1988).

17 *United States* v *Carolene Products Co* (1938) 304 US 144, fn 4, 152-153.

every objective social indicator available a clear position of relative deprivation, it will increase the likelihood of violence.

For many years, it seemed to me, official policy in New Zealand had been against the grain of Maori culture. The structures of traditional Maori society - the whanau, hapu and iwi were strong. It was very much a collective culture and derived strength from that feature. After the Second World War the culture began to weaken as Maori migrated to the cities in search of employment. Official policy encouraged assimilation. It encouraged the weakening of the tribal bonds. It did not encourage a sense of distinctiveness or pride in being Maori.[18] The language started to die, young Maori growing up in cities did not know their Maori cultural heritage. They were too often adrift and alienated. Criminal offending among Maori grew rapidly. Something close to 50 per cent of the inmates of New Zealand's prisons are Maori.[19] Maori are disproportionately represented among the unemployed. Their life expectancy is significantly lower than pakeha. Maori educational qualifications and incomes are lower than pakeha. Their health is worse. Their rates of mental illness higher.

This seemed to me like a recipe for such a serious social situation in the future that it needed to be addressed. The development of a permanent underclass defined by race is an ugly situation for any society. It is particularly poignant when the dominant culture gave undertakings to the minority which legitimised the majority's presence in New Zealand, only to ignore them later when they clearly were established as the majority. The social problem stemming from the situation was unique. Social deprivation which threatened the fabric of the New Zealand community was caused, at least in part, by serious injustice which the Crown resolutely refused to address. Measures were required to address both the social deprivation and the injustice - to deal with one and not the other would not be enough. It is not merely a problem about the distribution of resources, there is a spiritual side to it as well.

There is another more optimistic strand in Maori constitutional issues. Too much of our constitutional law and practice is derivative. We have not developed our own distinct constitutional approach. We have clung for too long to a British tradition that proved to be increasingly arid and not capable of sustaining the various aspirations exhibited by the many different sorts of people who live here. The Maori dimension to our constitution has forced us to strike out on our own and to devise our own home-grown solutions to the problems. Just as the presence of Maori in New Zealand gives a unique flavour to our culture and country, so does the Maori dimension in our constitution help to make our constitution our own.

Such was the cast of mind I brought to Maori policy in the Labour Government. Unpopular as many of the measures were, and they were unpopular within the government itself, they will endure I believe. In the

18 J K Hunn *Report on Department of Maori Affairs* (Government Printer, Wellington, 1961).

19 Ministerial Committee of Inquiry into the Prisons System *Prison Review Te Ara Hou: The New Way* (Government Printer, Wellington, 1989) para11.12.

final analysis a country cannot ignore its own history and cast it aside. It must confront the issues and come to terms with them. We have the means to do that now. Those means have become part of the texture of our constitution.

II THE TREATY AND THE TRIBUNAL

While I do not want to turn this chapter into a personal reminiscence, my views on this question will not be capable of being understood unless the manner in which my involvement with the issues developed is understood. When I became Deputy Leader of the Parliamentary Labour Party in 1983, part of the arrangement I reached with David Lange was that I would chair the party's Policy council which contained representatives from the caucus and those elected by conference. Making the policy is vital to a party in opposition and being a party of change Labour had many activists keen on many different aspects of policy. Chairing the Policy council was an exacting and time-consuming job. I had been its secretary in the period from 1979 to 1981 and so was well versed with its workings. Maori policy occupied a special place in the hearts and minds of Labour Party members because the Maori MPs had all been Labour for many years, and because the Maori community always voted overwhelmingly for the Labour Party.

There was within the Labour Party organisation a Maori Policy council as well, although historically this had difficulties in reaching conclusions and producing coherent policy. I took an interest in the development of Maori policy and saw ways in which I could frame the party's 'Open Government' policy to accommodate Maori aspirations. The commitment to introduce a Bill of Rights for New Zealand included a promise to incorporate within it the Treaty of Waitangi. The commitment was later honoured in the White Paper on the Bill of Rights, although the Treaty provisions had to be dropped from the measure which was finally passed.[20] It was an opportunity lost due in part to the reluctance of Maori to support the measure. In September 1984 an important hui at Turangawaewae projected a mood of scepticism towards an entrenched Bill of Rights containing the Treaty. The attitude was "suspicious, uneasy, doubtful or undecided."[21] The attitude carried through into the submissions and effectively sank the possibility of including the Treaty. It was an accident of timing to some extent. Maori attitudes would have been very different had the debate been held after the decision of the Court of Appeal in the 1987 Maori Council case.

Another important feature of the policy was a commitment to extend the jurisdiction of the Waitangi Tribunal back to 1840. The third Labour Government had passed a measure setting up the Waitangi Tribunal and giving it power to make recommendations about grievances resulting from breaches of the Treaty.[22] This was the bridgehead upon which progress could be

20 Department of Justice *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985) and New Zealand Bill of Rights Act 1990.

21 W Renwick *The Treaty Now* (GP Publications,Wellington, 1990) 95.

22 Treaty of Waitangi Act 1975.

built. The statute included the Treaty - it did not make the Treaty part of New Zealand law for all purposes, its ambit was restricted to the particular purposes of the legislation. The tribunal was to examine current policies and practices against the principles of the Treaty and make recommendations about them to government. The tribunal was no hive of activity in its early years, indeed it did virtually nothing, but it came to dramatic public attention over the claim Te Atiawa brought to the tribunal in 1981 against one of the "Think Big" projects.

Maori claimed that untreated sewage and industrial waste from the Synfuels plant discharged through the Motunui outfall would pollute traditional fishing reefs. The tribunal ruled clearly in 1983 in favour of Maori claims, the government proposed to ignore the finding but was forced to retreat after heavy publicity. The outfall was abandoned. The findings of the tribunal were quite moderate but the reasons were conspicuous for the weight they put on the Treaty:[23]

> The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. It made us one country, but acknowledged that we were two people. ... The Treaty represents the gift [by the Maori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interests of the indigenous inhabitants. ... That then was the exchange of gifts the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority.

This looked promising material for constitutional development to me. I had been a law student with the tribunal chairman Judge E T Durie. Reading this finding encouraged me to be bold with the Labour Party election policy on the Treaty and the tribunal. There were two striking features of the Motunui report. The first was the rediscovery, in effect, of the Maori language version of the Treaty, especially the words taonga, kawanatanga and rangatiratanga from which has flowed a new political vocabulary. The second was procedural — hearings could be held on marae, a development which produced a total change in procedure and more important an increase in the tribunal's mana in Maori eyes.

The Motunui decision was followed by others, the Kaituna River decision, the Manukau Harbour case and Te Reo Maori, dealing with the Maori language. The tribunal was building a new jurisprudence. Indeed the contribution of the tribunal to the Maori constitutional revolution is of prime importance. The development of principles of the Treaty, applied in a contemporary context, provided an intellectual and legal framework which could be relied upon with confidence and adopted by the courts. And the

23 *Report of the Waitangi Tribunal on the Motunui - Waitara Claim* (Wai-6, Government Print, Wellington, 1983) 52, 55, 52.

courts, unlike the tribunal, have the power of decision not just of recommendation.

The 1975 legislation was prospective only.[24] There was no power to look at problems which had arisen before 1975 and the most serious breaches of the Treaty had arisen before then, most of them in the nineteenth century and involving land. I did some research on the outstanding grievances and it did not appear to me that looking into them would open the can of worms which many feared. I took the view that the claims may take a decade to deal with, that it would cause some anguish but it would be worth it in the end. Subsequent events have not caused me to alter any of those judgments. Indigenous peoples' rights were advancing in many countries, including the United States and Canada. Why not give a body equipped with powerful research tools power and powers of inquiry to look into the old grievances and allow the body to recommend what should be done. It would be for the government of the day to decide what to do about the recommendations. A body which looked at the evidence fully and fairly, sifted through the history and measured it against the Treaty would give Maori an outlet for their grievances. There would be no further need for direct action. Indeed, one touchstone for judging the success of the policy is to ask whether there has been any major political disturbance based on the Treaty since the policy was implemented. I think there has been none.

So the policy was developed, although not without some difficulties among the Maori MPs. Some of my most enduring memories of dealing with Maori issues are how difficult it is to get the Maori MPs to agree on any Maori policy. The person whose instinct, acumen and judgment I came

---

24 Section 6(1) Treaty of Waitangi Act 1975. Despite this provision the Waitangi Tribunal managed to consider matters before 1975 in the Manukau claim, see Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai-8, Government Print, Wellington, 1985) 70-73. The new jurisdictional provision as inserted by the Treaty of Waitangi Amendment Act 1985 is as follows:

> **3. Jurisdiction of Tribunal to consider claims** - (1) Section 6 of the principal Act is hereby amended by repealing subsection (1), and substituting the following subsection:
> "(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected -
> "(a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
> "(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or
> "(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
> "(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, -
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section."

to trust most was Koro Wetere who became Minister of Maori Affairs in the Fourth Labour Government. We were able to accomplish a lot together in this area and he is a person for whom I have an abiding respect. From him I learnt what it was to be Maori in Aotearoa. He is a fluent Maori speaker and I was able to get some understanding from Koro of the values which drive Maori culture, and I found many of them to be attractive values.

I announced the Maori policy as Acting Leader when David Lange was away in Europe, on 2 February 1984. The policy attracted some raised eyebrows at the time, that we would propose something as radical and bold as giving the Waitangi Tribunal power to examine claims back to 1840. The commitment was made in clear and specific terms. It was not the sort of policy which could be shied away from or watered down. It was implemented.

I recall when we set about implementing the policy that it became evident how defective the Department of Maori Affairs was at generating policy papers for cabinet and preparing instructions for legislation. Koro and I arranged to have my officials from the Justice Department assist his officials to get the job done. From that early experience we developed a method of operating in government which became routine. Koro had a big programme to implement. His officials were not experienced in major legislation or large reform policy development. But we had to develop policy. So Koro and I would work as a team and I would procure skilled officials necessary to do the job from various parts of the government. Being Deputy Prime Minister and Minister of Justice was most helpful in this respect. The Deputy Prime Minister is the Government's fix-it person and Maori matters certainly took a lot of fixing. The Justice Department was one agency within Government whose mission statement embraced the sort of constitutional exercise we were engaged on, and they had some knowledgeable and dedicated officials. Working on the Treaty of Waitangi Amendment set a pattern that we repeated many times. The Treaty of Waitangi Amendment Act was passed in 1985.

The decision to extend the jurisdiction of the tribunal back to 1840 was the key decision made on Maori matters by the Fourth Labour Government. At the same time the size of the tribunal was increased from three to seven members.[25] From the decision to go back to 1840, all other developments flow. The constitutional block-busting Maori Council case concerning transfer of assets to state-owned enterprises could never have happened without it. The fishing saga would have developed quite differently because there the courts relied on the work of the tribunal in the Muriwhenua claim, which in turn required power to go back to 1840. This was the decision which opened the whole field up to a different approach from the traditional one. It could not have worked unless the tribunal had created a new legal approach to the Treaty by removing the shackles of past precedent.

25 Later it became necessary to extend it to 16, such was the weight of the work. See s2 Treaty of Waitangi Amendment Act 1988 which substituted s4(2) Treaty of Waitangi Act 1975.

The government's policy caused a political maelstrom, but it was one driven by a fundamental principle of justice.

III TURNING THE GOVERNMENT MACHINE AROUND

It soon became evident that there was no adequate source of advice available within the executive government on Treaty of Waitangi issues. The issues are intellectually demanding and appeared to be ignored for the most part throughout the bureaucracy. This came to my notice in a most arresting way quite early in the time of our stewardship. Jane Kelsey, a law academic at the University of Auckland, sent me a letter she had been given prepared by the Ministry of Agriculture and Fisheries. It answered an inquiry about the Treaty of Waitangi and fisheries and questioned whether exports of kina were contrary to the Treaty.[26] The letter said that the Treaty was not part of New Zealand law, and until there was an indication of its status MAF could not take unilateral action to give effect to the Treaty's provision for Maori fishing rights. This was a surprising policy line for a Department which administered a subject as sensitive as fisheries and, furthermore, appeared to be contrary to the Department's own legislation. There had been a provision in the fisheries legislation more or less continuously since 1877 which required the recognition of traditional Maori fishing rights.[27] MAF actually told the Waitangi Tribunal that it had not implemented the legislation because it would fall foul of the Race Relations Act! This sort of behaviour called for stern ministerial direction but it was far from the last occasion upon which the Government suffered from the indifferent advice it received from that quarter.[28]

The government had the Treaty as a centrepiece of its Maori policy. It could not tolerate a bureaucracy with a policy of the sort disclosed by the letter. I discussed the matter with Koro and we got together a cabinet paper which required Departments to take Treaty considerations into account, to become familiar with them and handle them properly. Treaty considerations should not be ignored in department administrative processes as the letter clearly indicated they were being. After substantial consideration of a paper put forward in March, in June 1986 cabinet:

(i) agreed that all future legislation referred to cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

---

26 J Kelsey *A Question of Honour? Labour and the Treaty* above n1, 108.

27 Section 88(2) of the Fisheries Act 1983 provides "Nothing in this Act shall affect any Maori fishing rights."

28 I use the term indifferent rather than a stronger term because the New Zealand Supreme Court had held in 1914 in *Waipapakura v Hempton* (1914) 33 NZLR 1065 that Maori had no rights to fish beyond those of the public in general and that there would need to be some further legislative provison made for that right to exist. But for MAF to rely on such old authority was dangerous as the decision of Williamson J in *Te Weehi v Ministry of Agriculture* [1986] NZLR 682 demonstrated. This case made the doctrine of aboriginal title a potent force in New Zealand law again, after many years of slumber.

(ii) agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary, and

(iii) noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed whereever possible in future reports.

This directive did not produce a quick change in attitudes - it was a big learning curve for the bureaucracy to go through and further educational efforts were necessary to secure a permanent alteration of approach. But one of the important by-products of the policy was the inclusion in various statutes of references to the Treaty of Waitangi. Once these references began to appear it gave the courts the ability to give them some meaning. Thus the Treaty began to be sprinkled around the statute book using various formulations depending on the subject matter. The Law Commission Act 1985 had required the Commission to:

> [T]ake into account te ao Maori (the Maori dimension) and shall also give consideration to the multicultural character of New Zealand society.

While this formulation does not have an explicit reference to the Treaty it leads in practice to the same conclusion. The long title to the Environment Act 1986 said, among other things it was:

> An Act to—...
>
> (c) Ensure that, in the management of natural and physical resources, full and balanced account is taken of—
>
> (iii) The principles of the Treaty of Waitangi.

The Conservation Act 1987 provided in section 4:

> This Act shall be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

This process of statutory incorporation of the Treaty principles, along with extending the Waitangi tribunual's power to look back to 1840, expanded and deepened the application of the Treaty and gave it some real practical bite. The process of statutory incorporation was designed not to give Maori enforceable Treaty rights as such, but to require decision-makers exercising powers under various pieces of legislation to give the Treaty proper consideration. They could not ignore it.

In the Government's earliest days I found Treasury provided the best advice on the Treaty. Treasury had one official, the late Graham Martin, whose knowledge of the issues was first-rate. And later when the Maori fisheries negotiations got under way I found Irene Taylor a superb person with deep knowledge and sensitivity to the issues. Treasury is often criticised within government and outside, but it does have some of the most able officers available anywhere and they are not afraid to think. When Hekia Parata arrived in the Prime Minister's Department, from the Ministry

of External Relations and Trade, she rapidly became a key adviser of great ability.

One of the tasks of the government on Treaty issues and Maori issues generally was to change the whole public service culture and make it sensitive to Maori and Treaty issues. It took a lot of effort and there were a number of false starts. But there was a growing commitment throughout the public service to becoming familiar with the issues.

The problem had been that the Department of Maori Affairs was regarded within government as the Department which dealt with Maori issues - no other department needed to worry, was the attitude. The Department of Maori Affairs spent much of its time and energy administering financial assistance programmes of various types. It was not wonderfully competent. As Winston Peters was to demonstrate in what became known as the Maori Loans scandal, the Department was capable of behaving in quite bizarre fashion. There the Secretary of Maori Affairs attempted to negotiate a loan for $600 million from an Hawaiian source, it seems for the purpose of establishing a Maori Bank. The negotiation of such loans requires Treasury and cabinet approval under the law and there was neither. Permission had not been sought. And the Minister knew nothing about it. It was stopped before anything happened but there was massive publicity. The media went on a real binge of self-righteous Maori bashing. It made for a torrid time in government.

Koro Wetere came under great pressure and we came close to deciding he should resign his seat and stand again - he was sure to be re-elected - to clear the air. It was Richard Prebble who counselled the cabinet against this course and he was absolutely right. Koro stood his ground, but the running of the Department became even more difficult after this episode. We tried all sorts of things to shore it up. Jim Callahan, recently retired as Secretary for Justice, was brought in as an acting Assistant Secretary to try to bring some order to the place. But there was no doubt the Department of Maori Affairs was not capable of producing hard-edged policy advice.

The Department did have a Treaty unit which was supposed to furnish policy advice on the Treaty. I was never able to see how a Department whose main mission was to assist Maori could proffer objective advice to the Crown on Treaty issues. There were two sides to the Treaty: The Crown and Maori. If it was the mission of the Department to look after Maori interests, it could hardly advise the Crown on its Treaty stance.

When it became clear that Treaty claims involved some tough issues I sought and obtained cabinet authority to set up, within the Department of Justice, a unit to deal with the Crown response to Treaty negotiations and claims. It was headed by a former academic colleague of mine Alex Frame, who had a good grasp of the legal issues involved in Treaty jurisprudence.[29] The unit was designed for several purposes: to act as the centre within Government for the Crown's policy on Treaty matters, to generate that

29 For an account of some of his work in this capacity see A Frame "A State Servant Looks at the Treaty" (1990) 14 NZULR 82.

policy, co-ordinate the activities of other departments in respect to the Treaty, and negotiate directly with Maori on claims. It was plain that direct negotiation was going to be required. I had done enough of it myself to realise how difficult and time-consuming it was, there needed to be official back-up.

In March 1989 I put forward a cabinet paper seeking permission for a group of officials to prepare a paper setting out the principles upon which the government proposed to act on Treaty issues. It was to be balanced ensuring that the Crown's rights and obligations were both stated. The Treaty unit and Alex Frame were the main authors of the report later adopted by cabinet and published on 4 July as "Principles for Crown Action on the Treaty of Waitangi."[30] This document was the subject of some misunderstandings by people interested in Treaty issues, some of them wilfully misrepresented it. They were suspicious of the statement of principles, as they thought it was a self-serving declaration designed to allow the Crown to avoid obligations it should have undertaken.

There was no intention on my part or the Government's to rewrite the Treaty. And the document did not do this. There did need to be some specificity about what we were doing and what we were not doing. Where did the Crown stand? The Treaty is not a self-executing document. It does not render up plain meaning to current issues in the way that statutes sometimes do. It is vague, and uncertain. When you are running a government it is not enough to tell the officials to follow the Treaty. They need more clarity than that, especially where valuable economic assets are being negotiated. I wanted a clear set of principles which would be applied by the whole government system. I also wanted a statement that could be given to the public which set out in plain terms the principles on which the government was acting. I wanted the principles on which we were acting rigorously thought through and stated. That was achieved and the statement was used later as the base for the decisions we took. It was found, for example, that some of the things which had been said by the Court of Appeal about the concept of partnership were not easily expressed as a principle for officials, so in the statement this was reformulated as the principle of co-operation. The work that went into the principles was based on a scholarly analysis of all the material available on the Treaty, including the findings of the Waitangi Tribunal and the judicial decisions up to that time. The principles were:[31]

1 *The Kawanatanga Principle — The Principle of Government*

The first Article of the Treaty gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process. This sovereignty is qualified by the promise to

30 Department of Justice *Principles for Crown Action on the Treaty of Waitangi* (1989). See further, G Palmer "The Treaty of Waitangi - Principles for Crown Action" (1989) 19 VUWLR 355.

31 Above n30.

accord the Maori interest specified in the second Article an appropriate priority.

2 *The Rangatiratanga Principle — The Principle of Self Management*

The second Article of the Treaty guarantees to iwi Maori the control and enjoyment of those resources and toanga which it is their wish to retain. The preservation of a resource base, restoration of iwi self management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga.

3 *The Principle of Equality*

The third Article of the Treaty constitutes a guarantee of legal equality between between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.

The third Article also has an important social significance in the implicit assurance that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

4 *The Principle of Co-operation*

The Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development and unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of co-operation which is an obligation placed on both parties to the Treaty.

Reasonable co-operation can only take place if there is consultation on major issues of common concern and if good faith, balance, and commonsense are shown on all sides. The outcome of reasonable co-operation will be partnership.

5 *The Principle of Redress*

The Crown accepts a responsibility to provide a process for the resolution of grievance arising from the Treaty. This process may involve courts, the Waitangi Tribunal, or direct negotiation. The provision of redress, where entitlement is established, must take account of its practical impact and of the need to avoid the creation of fresh injustice. If the Crown demonstrates commitment to this process of redress then it will expect reconciliation to result.

There needed to be a statement which set out for the Crown - in more precise terms than those in the Treaty itself - what the purposes of government Treaty policy were. It was the view of the Crown expressed in the principles. They were not intended as objective statements. They were designed to guide the actions of one Treaty partner, the Crown, in its dealing in good faith with the Maori partner. I was satisfied that we achieved this with the statement of principles. Looking at it with the advantage of hindsight it still seems to me sound.

IV SECTION 9 OF THE STATE-OWNED ENTERPRISES ACT 1986

The State-Owned Enterprises Act 1986 produced the most dramatic case on Maori issues ever decided by a New Zealand Court. It proved to be a stern test of the Government's resolve to stick to the principles it had adopted. The government decided to change most of its trading departments into corporations run on commercial principles for profit. Their entire culture was to be changed. They were not to be run as departments of state under the principles of ministerial responsibility. Their employees were not to be state servants. Many of these trading organisations within government were hopelessly confused as to what their objectives were and how those objectives were to be attained. For example, the Forest Service was supposed to make money from commercial forestry but it was also supposed to be conserving native forests - an obvious conflict of interests. The State Coal Mines, on the other hand, were supposed to make money, although they had made losses for almost all of the preceding twenty years. Government accounting meant they had no balance sheet and could not tell which mines were profitable and which not. Because these trading departments were subject to government policy they were often used to soak up unskilled labour which would otherwise be unemployed. The massive policy shift of the state-owned enterprises legislation was designed to ensure the organisations had clear objectives, clear lines of financial accountability, and incentives to be efficient in a commercial environment.

The economic implications of these changes were far-reaching and it was economic policy which was driving the change, but it involved big legal changes as well. The powers, legal personality and accountability structures of the new enterprises raised challenging legal and constitutional issues in their own right. I was in effect the first Minister of State-Owned Enterprises, being in charge of the design and passage of the legislation. Much property of the Crown had to be transferred to these trading organisations. Large tracts of Crown land and state forest were included.

Maori became concerned that this big re-organisation would have the effect of denying to them their rights under the Treaty. They had only recently been given the ability to go to the tribunal with claims back to 1840. If, for example, Crown land passed out of the hands of the Crown to a state-owned enterprise, it could not be given back under the Treaty to Maori claimants. Some Maori came to see me about it and some saw David

Lange. Their concerns were genuine even though they had not arisen until quite a late stage in the progress of the legislation. The Waitangi Tribunal issued an interim report drawing the attention of the government to the consequences of the legislation on claims and raising the question whether the bill was contrary to the Treaty.[32] I felt we had to act. It seemed to me quite reasonable that the State-Owned Enterprises Act ought not to have the effect of frustrating Maori claims, claims which the government had so recently implemented legislation to allow to be heard.

When the legislation was in the Committee of the Whole I had two amendments drafted in the following terms. One was the following:

> **9. Treaty of Waitangi—** Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

My intention was for this to announce that the government did not by passage of the State-Owned Enterprises Act 1986 seek to frustrate or jeopardise Maori rights. I did not envisage, however, that the provision would have an effect as dramatic as the one it did have in a case before the Court of Appeal. The other amendment, section 27, gave explicit protection to claims filed before the Act received the royal assent and gave recognition of any of the tribunal recommendations after that date.[33] My view was that in respect to fresh claims which had not then been formulated or lodged, the Crown would still have to face up to them and make amends if the Waitangi Tribunal so recommended, whether the land had been transferred to a state-owned enterprise or not. But that did not necessarily mean giving back the land.

Following the passage of the Act, but before the land and other assets were transferred to the SOEs, the New Zealand Maori Council brought

---

32 *Interim Report to Minister of Maori Affairs on State-Owned Enterprises Bill, 8 December 1986* reproduced in *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai-22) 289.

33 **27. Maori land claims**—(1) Where land is transferred to a State enterprise pursuant to this Act and, before the day on which this Act receives the Governor-General's assent, a claim has been submitted in respect of that land under section 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:

(a) The land shall continue to be subject to that claim:

(b) Subject to subsection 2 of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown:

(c) Subject to subsection (2) of this section, no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title in respect of the land.

(2) Where findings have been made pursuant to section 6 of the Treaty of Waitangi Act 1975 in respect of land which is held by a State enterprise pursuant to a transfer made under this Act (whether or not subsection (1) of this section applies to the land), the Governor-General may, by Order in Council,—

(a) Declare that all or any part of the land shall be resumed by the Crown on a date specified in the Order in Council; or

(b) In the case of land to which subsection (1) of this section applies, waive the application of paragraphs (b) and (c) of that section to all or any part of the land.

proceedings for a declaration to stop the transfer until arrangements were made to deal with Maori claims in respect of those assets. The Crown's legal advice was that section 9 of the State-owned Enterprises Act could not be read in the way contended by Maori. As Attorney-General I had to attend closely to this litigation. It seemed to me that for the Maori Council to win the courts would have to read down the very specific provisions in section 27 in order to make section 9 controlling. Conventional statutory interpretation would dictate victory for the Crown, I thought. I was wrong and so was the Solicitor-General. The Court of Appeal held that the principles of the Treaty of Waitangi overrode everything else in the Act.

The Court of Appeal President Sir Robin Cooke began his judgment with the words:[34]

> This case is perhaps as important for the future of our country as any that has come before a New Zealand Court.

That statement was no exaggeration - massive resources were at stake. This was the stuff of which leading cases are made. The five judges who heard the case were all in agreement and they all gave separate reasons, which are a rich source of learning on the subject.

This is not the place to summarise the points established by the judgments, but a number of important matters were established. The courts would give very heavy weight to the findings of the Waitangi Tribunal which were "of great value."[35] Textual differences between the Maori and English versions ought not to matter much because "[w]hat matters is the spirit [of the Treaty]"[36] and the interpretation of section 9 to mean a partnership.[37] The judgments contained broad declarations of principle of a type never before made by a New Zealand Court. This was constitutional litigation of a novel and exciting nature.

The case established Treaty of Waitangi jurisprudence so firmly and dramatically in the courts of New Zealand that they can now play something of the role of American courts, and that will assist in the protection of the minority to secure to them things which the legislature would not award them directly. The Court of Appeal ruled that section 9 meant that the Crown was obliged to establish a system so it could consider, in relation to particular assets or particular categories of assets, whether such transfer would be inconsistent with the principles of the Treaty of Waitangi and would be unlawful. The Crown had to find a way to safeguard lands and waters in such a way as to avoid prejudice to Maori claims.

This judgment was a great set-back to the government's policy and there was loose talk among some cabinet members that we should legislate it away. I was totally opposed to that, it would have been violently unconsti-

34 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 651.
35 Above n34, 662.
36 Above n34, 663.
37 Above n34, 664.

tutional and redolent of the Muldoon administration's legislation to give themselves a water right to build the high dam at Clyde when they had been conspicuously denied that right in the courts. I was equally opposed to appealing the decision to the Privy Council in London. This was because I was trying to do away with appeals to the Privy Council, which I believe to be inconsistent with New Zealand's position as an independent nation, and increasingly anomalous at this time in our history. I was utterly opposed to the Privy Council having anything to say at all about what the Treaty of Waitangi meant in New Zealand.[38] By way of strange irony it was fear of Maori litigation, and the Court of Appeal's approach to it, which slowed down efforts to abolish appeals to the Privy Council after I had left the Justice portfolio.

Following the Court of Appeal's decision, it fell to me to find a way of satisfying both the Court of Appeal and the government's state-owned enterprises policy. I had occasion to think ruefully that the hard work had been left to the executive branch of government after the ringing declarations of principle from the courts. In effect what the court said was the Crown had to come up with a scheme and there was not much guidance in the judgments about what its elements should be. Hammering out those details was one of the most challenging tasks I ever faced as a minister.

After much heavy negotiation and a lot of detailed legal work the Treaty of Waitangi (State Enterprises) Act 1988 was passed. This allowed the transfers to be made to the state-owned enterprises but subject to claims before the tribunal. The transfers would be noted that they were subject to resumption by the Crown so that third parties taking title would know what they were getting. Further, in this category of claim the decisions of the Waitangi Tribunal would not merely be advisory they would be legally binding. I thought this a rather elegant legal solution myself and it was endorsed by the Court of Appeal. But I quail still when I think of the amount of work it involved.

That method of handling the problem turned out to be satisfactory to everyone. It caused a great fuss and the red-necks had a field day on the issue, but in the end the principles of the Treaty were upheld and the state-owned enterprises policy was fully implemented. It was just as well the issue was dealt with the way it was, since the policy of corporatisation turned into a policy of privatisation after the 1987 elections (for which purpose I had not designed the Act), and without the new 1988 Act Maori may well have lost something of value. They did not stand to lose much while the Crown retained ownership of the businesses.

The *Maori Council* case was not the last of the big constitutional cases about the Treaty in the Courts. Tainui brought a claim before the tribunal

38 It was an appeal on a Maori question to the Privy Council in *Wallis* v *Solicitor-General* (1902) [1840-1932] NZPCC 23 which led to the unprecedented action of a special sitting of the Supreme Court in Wellington to criticise the board's advice. It is far from clear, however, that the Privy Council was in error on the basic point. The transcript of these extraordinary proceedings is recorded in [1840-1932] NZPCC 730.

concerning confiscated lands.[39] Tainui thought they may be entitled to the coal under the land and the mining rights were with the new SOE, Coal Corporation of New Zealand. The 1988 Act provided that where any land or interest in land had been transferred to a state enterprise, but the Waitangi Tribunal recommended its return to Maori ownership, the Crown was obliged to resume it under the Public Works Act 1981 using the powers of compulsory acquisition and pay compensation. People buying such land had notice it was subject to this possibility. The Crown argued that mining rights were not caught by the 1988 Act, because they were not an interest in land. The Crown was wanting to sell Coal Corporation. The Court of Appeal held that the mining rights were an interest in land. It was 1989 by the time this decision came down.

By this time there had developed a climate of political hostility to Maori issues. The Government secured a reputation of doing things for Maori, but not for anyone else. Incessant activity on many fronts of Maori policy were worrying the country and disturbing the government. It was necessary to provide some reassurance. I was Prime Minister by this time and seen by my colleagues as having visited upon them a political problem of some large dimensions. The Under-Secretary for Agriculture and Fisheries, Ralph Maxwell had publicly called in January 1988 for the the "Treaty to be scrapped" and another agreement substituted for it.[40] There were other much more senior members of the Government who had grave reservations about the Treaty policy, which they voiced in Cabinet but not elsewhere. Equally there were strong supporters of the initiatives, Russell Marshall was the most consistent of these.

As the Waitangi Tribunal began coming down with recommendations favourable to Maori — the negotiations over Maori fisheries continued in a blaze of publicity, the Maori won a string of cases in the courts against the Crown, the Maori Language Commission was established and Maori made an official language — a white backlash of strong proportions set in. It was fanned by the opposition Maori MP Winston Peters who said some very strong things about the Treaty, in particular while in opposition, which he showed no sign of carrying out when he was Minister of Maori Affairs.

In the Tainui case the President of the Court of Appeal made some observations which appeared to suggest that the courts may have the final power on ruling on solutions to Maori grievance questions:[41]

> [T]he Treaty partners should work out their own agreement. The principles of the Treaty require that they make a genuine effort to do so. For this case that

39 *Tainui Trust Board* v *Attorney-General* [1989] 2 NZLR 513. For the other major cases on the Government's corporatisation programme see: *MRR Love* v *Attorney-General* (Unreported, High Court, Wellington, 17 March 1988, Ellis J, CP135/88); *New Zealand Maori Council* v *Attorney-General* [1989] 2 NZLR 142; *Attorney-General* v *New Zealand Maori Council* [1991] 2 NZLR 147.

40 *New Zealand Herald* 25 January 1988, p8.

41 *Tainui Trust Board* v *Attorney-General* [1989] 2 NZLR 513, 529.

> means Tainui and the Crown. In the end no doubt only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles.

This was too much for the cabinet. We had lost important cases and it seemed to the ministers they were being told they were about to lose the ability to govern on these issues. By that the cabinet ministers meant they should make the final decisions not the courts. They saw it as more than the court deciding what section 9 of the State-owned Enterprises Act meant. I was not worried at the approach of the court but the attitude of cabinet did reflect a strongly held view as to the political consequences of the developments on the public. The Crown Law Office and the Solicitor-General were concerned at the trend in the Court of Appeal decisions.

We needed to take the initiative. A cabinet paper was prepared under my supervision setting up a Crown Task Force on Waitangi issues to develop the Crown's position on Waitangi Tribunal hearings, direct Treaty negotiations and court proceedings. We needed some order and oversight in the process. Too many departments were involved and they were not getting anywhere. The government did not appear to be decisive or in control. We needed a new structure to streamline and improve the government's handling of Treaty issues throughout government. Cabinet agreed to set up the Crown Task Force, chaired by the new Minister of Justice, Hon W P Jeffries and serviced by an officials committee - extra staff were to be procured. A negotiation register was established so that claims could be prioritised and handled in an orderly sequence. One of our problems was that these issues arose in different departments which reported to different ministers, and there was no easy way of ascertaining what was happening across the whole government. The group was to be in charge of developing a "clear and consistent policy and legislative framework in respect of Maori interests in natural resources."[42] The job was to develop the Crown's position in respect of Waitangi Tribunal hearings, negotiated settlements and court cases.

In the speech announcing these decisions I tried to make it clear that the government was in charge, that we had everything under control and that we were proceeding in an orderly manner. But I went further, disagreeing with the personal observations of the President of the Court of Appeal as to where final responsibility rested in the Tainui case. The cabinet wanted a strong statement to be made and I made it. I fear it offended the President of the Court of Appeal who is undoubtedly one of the greatest lawyers New Zealand has ever produced. But I had to speak. As I pointed out in the speech "we have come a long way in a short time. That has caused some anxiety to many New Zealanders who have found much of the process bewildering and disturbing."[43] I wanted to make it clear that the Government claimed for itself the right to make the final decisions on Treaty

42 Rt Hon G Palmer, Prime Minister "Speech notes for address to Wellington District Law Society, 14 December 1989".

43 Above n42, 4.

policy. In the New Zealand situation of parliamentary supremacy that is hardly a surprising position for a Government to take. Governments are interested in the preservation of their own power and do not willingly give it up. They have to be forced to do so.

But in truth the courts have done the nation great service on Maori issues. It is entirely appropriate that they should since for most of New Zealand's history the courts refused to recognise the Treaty as having any legal force. I think we had devised a unique New Zealand framework in which the Waitangi Tribunal, the courts, the executive and the Parliament all played an important role in fleshing out the nature of Treaty obligations. I still think that. But do not underestimate how elected politicians will respond to public opinion which is perceived to have electoral consequences.

What all this activity will achieve in the end it is too early to say. My hope is that Maori who have been wrongly treated in the past, will see those wrongs righted and will have, as a result, a fairer share of the resources to assist them to have a better life. Once wrongs are done it is difficult to set them to rights later. The aim here was to produce some restoration and some healing. It is quite simple to say, it is hard to do. Justice is like that.

V THE MAORI FISHING ISSUE

The Maori fisheries issue was difficult and time-consuming and it was the one which had most to do with exciting public opinion about the government's Treaty policy. This was rather unfair since in legal terms the dispute centred on a provision which had been in the law for many years. The problem arose from the failure of Ministry of Agriculture and Fisheries officials to advise the government, that the new quota management system of fisheries regulation raised questions about Maori fishing rights. The Fisheries Act 1983, and earlier statutes going back to 1877 had similar provisions, provided that "[n]othing in this Act shall affect any Maori fishing rights." That statutory provision seemed to be related to the Treaty.[44] MAF seemed to think it was restricted to recreational fishing. The policy re-organisation of fishing quotas replacing a licensing system was going to have a serious and adverse effect on small-time Maori fishers and meant that their interests had not been adequately taken into account.

The root problem was failure to conserve fishing stocks. There was serious overfishing of some species and the means of regulation was quite inadequate. A new quota management system was devised for certain species of fish. A total allowable catch for that species in the area would be set by the Minister of Fisheries. The catch would be divided into individual

44 This was not held to be the case in *Waipapakura v Hempton* (1914) 33 NZLR 1065, but the 1983 provision was altered in a subtle but important respect by deleting the proposed protection of Maori fishing rights as being confined to those "in any enactment." Alex Frame made a submission to the Select Committee on the behalf of the Maori Law Students at Victoria University to this effect and it appears to have been taken by the select committee. Considering that the words were removed an argument can be made that Treaty rights were in contemplation by the legislature and perhaps fishing rights under the doctrine of aboriginal title.

transferable quotas. The fishing industry and the government were keen to have a new system of tradeable quotas which created a property right in perpetuity. It was an ingenious concept and attracted much overseas attention, but it was not sufficiently worked through in the course of its formation. I was worried about aspects of the legislative drafting and intervened as Attorney-General to try and get the legislation dealt with on a better basis. I got some changes but the pressure was on to get it through and primary production people in the caucus wanted no delay.

Maori fishers went to court and obtained an interim injunction ordering the Crown not to grant any further fishing quotas until it had dealt fully and fairly with the requirements of the legislation pertaining to Maori fishing rights. These rights had been the subject of considerable attention before the Waitangi Tribunal, because the Muriwhenua runanga (under the leadership of Matiu Rata) had brought a claim for fishing rights under the Treaty, arguing Maori were entitled to 100 per cent of fishing rights in their northern tribal waters. The tribunal sent an interim finding to the Minister of Fisheries on 30 September 1987 which in effect said that if fishing quotas for commercial purposes were issued, the Crown would be in breach of its Treaty obligations since the Treaty guaranteed to the tribes "full exclusive and undisturbed possession of their...Fisheries...". The next day Maori went to court asking for an interim injunction since the new quotas were to be issued that day. The application before Mr Justice Greig was successful.[45]

Inevitably it fell to me to sort this out, primarily with the help of the Minister of Fisheries Colin Moyle and the Minister of Maori Affairs Koro Wetere. I certainly gained the view that it could have been prevented with adequate attention to the Maori issues at the outset. On Maori issues extensive consultation early is most important. Many Maori fishers had been hurt by the introduction of the new system. We negotiated the continuation of the fishing management system on a temporary basis and paid Maori $1.5 million as contribution towards their costs in developing their interests in fishing. We then agreed to set up a Working Group consisting of four representatives of the Crown and four from Maori interests, to report by the end of June 1988.

Mr Justice Wallace, then chair of the Human Rights Commission, assumed the chair of the Working Group and I was most grateful for his patient and painstaking co-operation in negotiating with Maori on the issue. The Crown side included people expert in business, expert in the nature of fisheries issues and legislation as well as in law. The groups sat for many months and in the end were not able to reach agreement. It was difficult in the abstract to tell what Maori fishing rights were. Maori wanted 50 per

45 *NZMC & Runanga O Muriwhenua* v *AG & Minister of Fisheries* Unreported, High Court, Wellington, 30 September 1987, Grieg J, CP553/87, for other fishing cases, see: *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 682; *Ministry of Agriculture and Fisheries* v *Love* [1988] DCR 370; *Te Runanga O Muriwhenua Inc* v *Attorney-General* [1990] 2 NZLR 641; *Ministry of Agriculture and Fisheries* v *George Campbell & Ors* [1989] DCR 254; *Ministry of Agriculture and Fisheries* v *Hakaria and Scott* [1989] DCR 289; *Te Runanga O Muriwhenua Inc* v *Attorney-General* Unreported, Court of Appeal, 28 June 1990, CA110/90.

cent of all the fish. They said they were entitled to them all but as gesture of goodwill to their Treaty partner they would take 50 per cent. This claim aroused the fishing industry members, some of whom became very vocal.

When the Working Party could not reach agreement I had to take over the negotiations. Crown negotiators had been prepared in effect to give Maori 29 per cent of the fishing resource.[46] The cabinet was not prepared to go that far. The negotiations were long and difficult, but free from acrimony. In the end I hammered out the basis of what I thought would run in legislative form, but David Lange became ill and I had to do his job so I handed over the running of the issue to Richard Prebble. While I was representing New Zealand at the South Pacific Forum meeting in Tonga, Colin Moyle introduced the government's bill. It outraged me as much as it did Maori. A number of provisions had been included in it of a completely unconstitutional character. It appeared to me that MAF thought they could legislate their problems away and had taken advantage of my absence to try to do so. The bill purported to repeal section 88(2) of the Fisheries Act, amend the Treaty of Waitangi Act to prevent Maori taking claims to the tribunal for twenty years, and prevent the hearing of any claims already before the tribunal.There were attempts to oust the jurisdiction of the courts. These clauses were correctly described by David Lange as the Idi Amin clauses. The bill did give substantial quota to Maori over a period of 20 years, as much as 50 per cent, but this upset the fishing industry. The bill caused an uproar and put resolution of the issue back months.[47]

To retrieve the situation I had to resume the negotiations with Maori representatives myself. I took the view that the thing to do was to get Maori fishing. I wanted to base the approach on the Principles of the Treaty outlined earlier. We were never going to agree on the allocation of the property right, I told Maori. Let us all go to court to get a ruling on the legal issues. In the meantime give Maori 10 per cent of the fisheries quota over four years and a $10 million grant to establish Maori fisheries. It was an unusual way to handle the issue, especially given the nature of the bill in the House, but I took absolutely no responsibility for the bill which had been introduced and all the Maori negotiators knew it and they trusted me. We also had discussions with representatives of the fishing industry who were by this stage, under legal advice, becoming much more reasonable than they had been.

The amendments which were made to the bill at the select committee were in fact as a result of the negotiations Ministers were having with Maori. In the end we were able to put together a legislative solution of an

46 *Reports of the Joint Working Group on Maori Fisheries* (Government Printer, Wellington, 1988) 3.

47 There is an extensive account of these developments in J Kelsey *A Question of Honour?: Labour and the Treaty* above n1, 107. I find it misleading. The notion that one can read documents obtained under the Official Information Act 1982 and understand the dynamics of the development of government policy is flawed. It is flawed for a basic reason—that the discussions over the policy are not in the documents. The ministers decide the policy but they hardly ever write the documents. Frame's discussion in "A State Servant looks at the Treaty" 14 NZULR 82, 92 has the great advantage of being written by someone closely involved in the development of the policy.

interim nature to the fishing issue which was sound in principle and in practice. It was far from easy, and late in the select committee stage it was necessary for me to intervene again and ensure the thing did not run off the rails. There were so many interests in there pitching for their point of view. But Ken Shirley, the MP for Tasman, chaired the committee admirably, and coming from one of the biggest fishing areas in New Zealand he was fully conversant with the technicalities of the issues and the industry point of view. The legislation set up the Maori Fisheries Commission to administer the resource, and set up the staged granting of quota to Maori.[48] There is also provision for the approval and management of taiapure where local Maori can apply for areas to be set aside for the use of local communities with the approval of the Minister of Fisheries - there is a public objection procedure and a management committee is appointed if one is declared.

In the end, however, legislation concerning Maori fisheries gave Maori interests a substantial interest in fishing quota. It was not as much as they wanted. But all the quota they are entitled to would make the asset worth, I was advised at the time, equivalent in value to the 26th biggest company of any sort in New Zealand. It cost the public purse more than $100 million. It was a substantial economic asset for Maori which can go on producing income and jobs virtually for ever. And it was only an interim solution. Maori were free go back to court to secure a judgment on the extent of their rights. In the event they decided against doing so, at the time and so informed me. Immersing myself in all these fishing issues made me curious about fishing. When I retired from politics I became a keen saltwater recreational fisher.

No doubt these issues will need further attention in the years ahead, fishing is becoming of larger economic significance every year.

VI DEVOLUTION

A Maori policy initiative in which I was deeply involved was the policy known as "devolution" and contained in *Te Urupare Rangapu: Partnership Response*, a paper the Minister of Maori Affairs Koro Wetere published towards the end of 1988. It was designed to give Maori some control at the local level of their own destiny. It would have given iwi a say in how government agencies delivered services to their people, indeed Maori organisations may have become agents of the state for the purpose of delivering some of the services. Its signal contribution was to give iwi legal personality. It was a complete reversal of previous policy in the area and truly innovative.

The process of designing the policy was tortuous, not just because of pakeha resistance but also because of division among the Maori MPs about what the real principles of the reform were. The way I saw the policy was that it was a reversal of the direction of New Zealand government policy to Maori since the Second World War. It was designed to build up the authority

48 Fisheries Amendment Act 1989.

of the traditional Maori structures at the local level by giving them highly practical and important tasks to perform. It would, I thought and still think, have given the tribes real functions and an identifiable legal personality. The structures created by the Runanga Iwi Act, had they survived the change of government, would have given Maori iwi an infusion of life and substance which would have revitalised Maoridom. In my view the long-term results of this would have been to help arrest the relative deprivation which afflicts Maori in New Zealand.

There were substantial practical problems with the policy and at times I despaired that it would ever make it through the policy process. But Koro Wetere, the Minister, was very persistent. One of the biggest problems was the fact that in the large cities the iwi structures had broken down to a large extent. There were many Maori living there whose iwi was located in a place far distant. The challenge was to devise a structure that had integrity in Maori terms by recognising the tangata whenua, but which catered for the many Maori in a city area who may come from many different iwi.

Then there was the problem of control of money. Maori projects had a habit of causing embarrassment to central government due to lax financial administration, by pakeha standards. Somehow the New Zealand Government has never been able to run things in a way which is both sensitive to Maori cultural needs, and satisfactory from the point of view of pakeha financial practices. Sir Apirana Ngata had to resign in 1934 because of this, and little has changed since his day in that respect. We had all had sufficient political heat visited upon us over the Maori loan scandal that we did not want trouble of that sort. Furthermore, some of the Maori Trust Boards had been engaged in irregular financial administration and it had been necessary to take steps under the Maori Affairs Act to have inquiries into one or two of them. Koro and I had worked hard behind the scenes to avoid such things breaking out as fully-fledged scandals in their own right. There were heavy practical constraints on the degree to which complete devolution could be contemplated.

There was a good deal of division of opinion within Maoridom about the proposed approach. There was objection that legislation promoted by the Crown should in any way seek to legally define, and perhaps constrain, iwi. That would be against the Treaty itself, some argued. I met a large delegation in May 1990 and from that meeting the view seemed to be that there should be legislation for the incorporation of iwi. The select committee looking at the bill, published an interim report and called for submissions on it - that seemed to quiet much of the opposition in Maoridom. The Iwi Transition Agency was set up to help with systems of management and training to develop the skills preparatory to handing over functions to iwi. This whole effort was designed to take the concept of rangatiratanga in the Treaty seriously. I regret it has been destroyed by the National Government.

We do learn from experience. Consultation can solve many problems when it comes to dealing with Maori issues. Extensive consultation at the beginning of the process of selling the Crown forest assets yielded up a

smoother process than was encountered in other areas.[49] When it came to devising the policy for the Resource Management Act we went through a systematic process of consulting Maori about the policy in all stages of its development and building their concerns into the processes of the Act. The result was quite a comprehensive and sensitive method of addressing Maori issues in the resource management process, but not so that it is obtrusive or impractical. The provision making reference to the Treaty itself is quite weak ("have regard to"), but that is not of great moment given all the other procedures and specific references to protect Maori interests which are built into the Resource Management Act 1991.

I have always thought that in New Zealand, the lion can be made to lie down with the lamb. On Maori issues in New Zealand that has to be the case.

VII THE CONSTITUTIONAL POSITION OF MAORI

After a great deal of activity in the area of the Treaty rights where do Maori now stand in New Zealand's constitutional arrangements? The work of Parliament, the courts and the Waitangi Tribunal have all combined to enhance the status of the Treaty to the extent that it now can be regarded as part of the fabric of our constitution. It is not easy to be dogmatic about what this means. But in broad terms what has happened has increased the share of responsibility for Treaty decisions of the courts and the Waitangi Tribunal. It can even be said that the effects of parliamentary sovereignty have been blunted in relation to the Treaty, although this is a controversial statement and not supported by the most recent decision of the New Zealand Court of Appeal.[50]

From a practical point of view the Treaty cannot now be removed from New Zealand law. The politics of attempting to pare the Treaty back would be highly divisive and not worth embarking on for this reason alone. The courts have been edging towards a view that the Treaty may be a fundamental component of New Zealand law which sets the parameters within which other questions must be judged. They have not reached that point yet but they could. Common law decision-making has produced changes as significant in the past. It is true that the Treaty of Waitangi Act 1975 and all the other statutes which give explicit recognition to the Treaty are not entrenched. They can be swept away by a simple majority in Parliament. No special procedures have to be followed. But it would be difficult now for New Zealand to revert to the position common for so many years, that the Treaty had not been brought into municipal law by legislation, and it was not part of the law of New Zealand and had no legal force or effect. That particular genie cannot be put back in the bottle. Dr Paul McHugh entitled his recent book on the Treaty *The Maori Magna Carta*.[51] He was

49 *New Zealand Maori Council* v *Attorney-General* [1989] 2 NZLR 142.

50 *New Zealand Maori Council v Attorney-General* Not yet reported, Court of Appeal, CA206/92, 30 April 1992.

51 P G McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford

not the first to use that characterisation of it, but it is more accurate now than it used to be.

New Zealand is now in the position where substantial grievances of the Maori minority have a good chance of being handled in a principled way which reduces the opportunity of a legislature, and government dominated by majoritarian sentiment, preventing settlements being reached. We have not achieved in New Zealand, and probably cannot under our current constitutional arrangements, total insulation against majority opinion. But the balance of power has tilted against the government of the day towards the courts and the tribunal. It has been a big change and one full of political heat and passion on several sides.

I attempted to entrench the Treaty of Waitangi as part of New Zealand's supreme law in an entrenched Bill of Rights. Had that occurred there could have been no retreat. Despite the failure to pass an entrenched Bill of Rights we have gone nearly as far in the same direction using other means. The results have been quite similar. Much of the credit for this belongs to the courts, particularly the Court of Appeal which has been bold and resolute on these questions.[52] The work of the Waitangi Tribunal has been vital in framing the issues, doing the research, assessing the strength of the claims and writing its reports. The tribunal has developed the reasoning and approaches which have been taken up by the courts. No-one can read a document like the Orakei report and fail to be moved at the sheer injustice inflicted on Maori by pakeha over a period of many years, and the quiet dignity with which Maori continually reasserted their grievance.[53] It is possible, now we have found the machinery, to put such matters to rest.

The sum effect of the developments has been to give Maori a different relationship to the centres of power in New Zealand. It has enhanced their ability to protect their position and secure principled attention to wrongs done. Furthermore, the new jurisprudence offers a framework which can shape developments in the future. Maori issues were moved into the mainstream of court business, where they had never been before. Maori procured results which had been lacking for most of New Zealand's history, simply because the arguments were moved away from the majoritarian legislature where the four Maori MPs could never expect to win an argument that mattered. And history shows they hardly ever did.

University Press, Auckland, 1991).

52 The high water mark of the new Maori jurisprudence in the courts may have been reached. It is possible to read *New Zealand Maori Council v Attorney-General* Not yet reported, Court of Appeal, CA206/91, 30 April 1992 as a retreat. It would have been quite within the framework of the principles the courts have erected to grant relief in that case to Maori. It was denied. The case contains expressions of judicial restraint not evident in the earlier cases. For example, McKay J in the main majority judgment said at p20:

> The Court, however, does not have the power or the responsibility to review the restructuring legislation, nor to direct the Crown on matters of policy. Its power is limited to restraining any exercise by the Crown of its powers under the State-Owned Enterprises Act in a manner inconsistent with the principles of the Treaty.

53 Waitangi Tribunal (Wai-9) *Report of the Waitangi Tribunal on The Orakei Claim* (Government Print, Wellington, 1987).

There are significant economic issues bound up in the constitutional issues discussed in this chapter. The sheer fiscal weight of settlements is a factor any government must take very seriously indeed. The shadow of Maori claims over particular industries can sometimes discourage investment in those areas.The complexity of the issues requires much time and effort from many in government at every level. But none of this has persuaded me that the effort should not be made. It can all be accommodated over time - after all it took more than 150 years to reach the stage we have with the Treaty. Remedies do not have to be provided immediately.

In many ways the changing position of Maori in the New Zealand constitution has been the most significant constitutional change in recent times. It is a bit muddled, uncertain in parts but it seems to work. And it was New Zealand solutions providing a home-grown constitutional innovation. It is not too much to say it has been something of a revolution; certainly in legal terms it has been. But is it enough? There will be testing times ahead when it comes to decide how to rectify the injustices found by the tribunal in some of the big cases such as the Ngai Tahu claim.[54] I still believe the rights in the Treaty of Waitangi should be entrenched as part of a New Zealand Bill of Rights.

As this book went to press there were indications that there may be a retreat underway from some of the advances which have been made. Reference has already been made to the decision of the Court of Appeal in the broadcasting assets case. In May 1992 the Waitangi Tribunal recommended the return of private land to Maori tribes in the Te Roroa claim; parts of ten privately-owned farms were involved. The Tribunal had never before made such a recommendation and the response of the government was to announce it would not follow the recommendation and planned to legislate to deprive the Tribunal of power to make such recommendations.[55] Since such recommendations do not have to be followed there is no legal reason for such legislation, only the political purpose of providing reassurance to the public that their land is not subject to Maori claims. The political pressures for such reassurance are overwhelming in my experience. The legislation will open up a number of issues for re-examination. Where revisionism will end, should it set in seriously, is hard to predict, but we are unlikely to retreat far.

There are other Maori issues which require attention. One of the most intractable is Maori land law which is now in a state which requires sorting out properly. Far from costing resources this is an area where reform would produce economic advantages in the form of better use of the land.

The future of the four Maori seats in Parliament is another issue which must be addressed. The seats exist for historical reasons and the justification for retaining them is thin. If the electoral system is changed as recommended by the 1986 Royal Commission they would be abolished. The mixed member proportional (MMP) system as recommended would, how-

54 Waitangi Tribunal (Wai-27) *The Ngai Tahu Report 1991* (Brooker & Friend, Wellington, 1991).
55 *New Zealand Herald*, 26 May 1992, p 3.

ever, offer a special situation for Maori political parties. They would not have to secure the threshold of 4 per cent which other political parties would have to reach to gain representation in Parliament. Certainly the diverse voices of Maoridom have not been heard in the New Zealand Parliament under the first-past-the-post system.

Maori appearing before the Royal Commission revealed widespread opposition to the abolition of the seats. But the Royal Commission made a good point when it said:[56]

> All MPs ought to be accountable in some degree to Maori electors. Support of the majority for Maori interests is more likely to be forthcoming if all Maori electors have an effective vote - one which carries some weight in the election of political parties to Government, and hence one for which parties will need to compete. An effective Maori vote would have an important bearing upon the ways in which Maori concerns are regarded both by the individual representatives and by the political parties.

The system proposed by the Royal Commission would give the majority the political incentive to take Maori issues seriously. It would enhance Maori voting strength. In my view it is plainly in the interests of Maori to support the MMP system recommended by the Royal Commission in the 1992 referendum on the voting system.

There are substantial unfairnesses in the existing system of Maori seats. They are impossible geographically. Southern Maori stretches from Stewart Island to Hawkes Bay. No MP can cover a territory like that effectively. Furthermore, the number of total population represented by the Maori MPs is greater than it should be: on the basis of parity with the general population there should be between five and seven Maori seats, not four. (The precise number depends upon how Maori who opt to remain on the general roll are treated and how Maori children are apportioned.) The number of Maori seats is not entrenched so they could be increased or reduced by a simple majority. But in reality the only way to deal with the Maori seats is not by themselves, but in the context of a total reconstruction of the method of parliamentary representation along the lines of that proposed by the Royal Commission and discussed in Chapter 8.

The need to develop an effective department of state dealing with Maori policy is also a priority. The bureaucracy in New Zealand has not served Maori well. The Labour government reconstructed the bureaucracy by abolishing the old Department of Maori Affairs and putting in a Ministry of Maori Policy and the Iwi Transition Authority which was to have a limited life of five years. The National government on its election abolished both those agencies and created a Ministry of Maori Development which is still in its formative stages at the time of writing. It is vital to have a high

56 Report of the Royal Commission on the Electoral System *Towards A Better Democracy* (Government Print, Wellington, 1986) 88.

powered group of officials of the highest intellectual calibre. Since there is no such tradition within the New Zealand government in dealing with Maori issues it will be a challenging task to create it.

In conclusion let me say that progress has been made. There is machinery available for the redress of grievances. Procedures are now established within government to weigh Maori concerns and not to ignore them as was so often the case in the past. Some significant resources have been made available to Maori. It would be good to tidy up the constitutional position further by giving unambiguous constitutional status to the principles of the Treaty of Waitangi. International obligations towards indigenous peoples require New Zealand to be active in protecting Maori interests. We cannot go back.

5
Reform of Parliament

I INTRODUCTION

While the institution of Parliament in England is venerable, with a tradition stretching back something like eight hundred years, it has changed so much in the course of its existence that it is nothing like it was when it began. How could it be? Like all human institutions it has evolved, mutated and been transformed over time from within and without. From its ancient origins and traditions we take pride, and Parliament has been the centre of many glorious exploits and not a few inglorious ones. There is something atavistic about Parliament and its traditions; it reminds us of our ancestors and their struggles; it conjures up visions of liberty and even in later centuries, the notion of representative democracy. In one central respect Parliament has not changed - it began as a talking shop and a talking shop it remains.[1]

This is not the place to rehearse the constitutional history of the English Parliament, although that history is part of New Zealand's constitutional history and through it we are the inheritors of a rich tradition which contains many strands. It is the tradition which is the single biggest influence on the way we are governed and there is a great deal to be thankful for in it. On the whole it has been a benign and liberal influence on our affairs. What we often forget about Parliaments, both the one at Westminster and our own, is that their behaviour has changed a great deal this century. It is these changes which are the cause of our current discontents with Parliament because they have caused a constitutional imbalance to develop.

For much of the early part of its history Parliament was concerned about the distribution of power between its three parts, the Lords, the Commons and the sovereign. It took centuries of stern struggle to establish the supremacy of the Commons, and to put to rest notions of government based on the divine right of kings. Taming the crown was the issue almost until the nineteenth century. But the essential fundamentals were established

---

1 The name 'Parliamentum' was first applied in the reign of Henry III (1216-1272), it was Carlyle who translated it as 'talking shop': G M Trevelyan *History of England* (Longman Green and Co, London, 1952) 176. Something of the flavour of Parliament in its early days can be gained from Trevelyan's description: "England's characteristic institution, Parliament, was not devised on the sudden to perpetuate a revolution in which one power rose and another fell. It grew up gradually as a convenient means of smoothing out differences and adjusting common action between powers who respected one another—King, Church, Barons, and certain classes of the common people such as burgesses and knights. No one respected the villeins and they had no part in Parliament". Above 192.

much earlier. The end of the Stuart Kings and the so-called bloodless revolution of 1688 settled some important questions - the King and his ministers were subject to the law passed by Parliament and could not suspend it or have power to dispense with the laws or their execution.[2] A number of other important constitutional principles were settled at that time and set out in the Bill of Rights 1689, such as free elections of MPs, freedom of speech and debate in Parliament and the fact that a standing army could not be kept in time of peace, except with the consent of Parliament.

Slow to change, and when they did, almost always in an evolutionary manner, the British began to evolve in the eighteenth century a style of political management which depended upon a small group of members of Parliament convincing other members of Parliament that their policies should be supported. These were the ministers who were appointed by the Crown but whose continued existence in office depended upon keeping the confidence of Parliament. Sir Robert Walpole was the first great manager of this type. And from this time onwards more and more of the focus shifted from the House of Lords to the House of Commons.

In time the group of office holders who managed the system became known as cabinet. Cabinet evolved from the Privy Council when the habit developed of a committee of the King's most trusted advisers, rather than the full council, meeting to take decisions. It met in the King's "cabinet" although in time the King stopped attending. Gradually the authority of the cabinet came to replace the authority of the monarch. As this evolved so were pressures to extend the franchise developing - to allow more people to vote for parliamentary representatives. The first reform bill in Britain to extend the franchise was passed in 1832 and there were further extensions later in the nineteenth century and into the twentieth century.

In 1867, the year of the second great reform bill widening the proportion of the population who could vote in parliamentary elections, Walter Bagehot, editor of *The Economist*, wrote an influential book called the *The English Constitution*. He outlined the theory that the genius of the English constitution was cabinet. The language Bagehot used has been influential down to our own day in shaping our conceptions of the Westminster form of government:[3]

> The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. ... A Cabinet is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other. ... In England a strong Cabinet can obtain

2 Elementary principles which have been applied in two recent New Zealand cases: *Fitzgerald* v *Muldoon* [1976] 1 NZLR 615 and *Profession Promotion and Services Ltd* v *Attorney-General* [1990] 1 NZLR 501.

3 W Bagehot *The English Constitution* (Fontana, London, 1963) 65, 68, 75.

> the concurrence of the legislature in all acts which facilitate its administration; it is itself, so to say, the legislature.

In this theory the function of Parliament, particularly the House of Commons was to make and unmake governments, although as Bagehot points out the House of Commons created cabinet and in effect cabinet has the capacity to destroy its creator by creating a dissolution if it does not get its own way. The government had to have the confidence of the House and they were responsible to it. Parliament was no push-over. The crown had effectively lost the ability to choose the ministers as it had earlier lost the ability to control the policies. The Commons was made up of robust people who thought for themselves. They were not subject to party control to anything like the extent they are now.

What Bagehot articulated became the classical theory of the relationship between cabinet and Parliament. It probably was true for some period in the nineteenth century. There were echoes of it in New Zealand with the 'continuous ministry', which was made and unmade by the House of Representatives to some extent.[4] Two forces were at work even at the time Bagehot wrote which would in time undermine his model. The first was the franchise itself. Bagehot did not altogether trust the people - democracy was a dangerous thing and in some respects government was a contrivance to keep the masses happy without taking their opinions too seriously. With the entire population voting, it would be those opinions which determine the views of the House of Commons. The capacity to make and unmake government would pass in real terms, although not in theory, from the House of Commons to the electorate at large.

In order to manage the phenomenon of the mass vote, new techniques were needed and they could not be located in Parliament. Political parties developed in order to mobilise and organise. Parties stood candidates at elections, they announced programmes of policy and they sought a majority of members in Parliament. Parties did not want MPs to act as they wished in Parliament. They sought to control them. MPs who did not toe the party line in Parliament were not selected as candidates in elections.[5]

There was another development, the modern public service. It recruited people of great ability who worked in departments headed by ministers and under the principles of ministerial responsibility. They were obliged to carry out the minister's policies, but they were also in a position to proffer advice on what policies should be adopted. The expansion of the public service gave to cabinet great power. In New Zealand was added the institution of caucus. Each week MPs of the governing party met in caucus and in secret settled their policy. Once adopted, all members were obliged to vote

4 In 1881 the Continuous Ministry won a majority of seats in the general election and after two changes in leadership found itself without a majority in 1884 owing to the defection of backbenchers.

5 Above n3, the introduction to the 1963 Fontana edition of Bagehot contains a brilliant and incisive analysis by R H Crossman which is drawn on here.

for it in Parliament. Parliament became a rubber stamp - it determined nothing. It was just a talking shop. The positions were pre-determined elsewhere and the control just about total. Cabinet in a small Parliament like New Zealand's came to dominate the caucus and therefore the Parliament to an extent still not possible in the United Kingdom.

What we have now is what Lord Hailsham called in the United Kingdom "an elective dictatorship". Speaking of the powers of government in the United Kingdom he said:[6]

> Its powers are restrained only by the consciences of its members, the checks and balances of its different parts and the need, recognized in practice if capable in theory of being deferred, for periodical elections. In our lifetime the use of its powers has continuously increased, and the checks and balances have been rendered increasingly ineffective by the concentration of their effective operation more and more in the House of Commons, in the government side of the House of Commons, in the Cabinet within the government side, and to some extent in the Prime Minister within the Cabinet.

The power of the crown which it took so long for Parliament to tame has now been transferred to cabinet, the members of which are in no real sense accountable to Parliament in the way they were in Bagehot's day. This is the background against which parliamentary reform must be considered. In the modern political context what should parliament do and what is it realistic to expect it to do? Much of what goes on in the modern New Zealand Parliament is adversarial party political contest and pays scant regard to the important constitutional functions with which Parliament has been entrusted. The effective dictator in New Zealand is cabinet.

What Bagehot overlooked, and what the modern understanding of the English constitution tends to neglect as well, is an older tradition in English constitutional thinking derived from the theory of separation of powers. It is an idea with a long pedigree in western political thought and had made its mark on English legal thought. Sir William Blackstone, who wrote the first real textbook on English law in 1765, was an exponent of it. He articulated it this way:[7]

> Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the

6 Lord Hailsham *The Dilemma of Democracy* (Collins, London, 1978) 126.

7 W Blackstone *Commentaries on the Laws of England* Bk I ch ii s2, 155 adapted to the present state of the law by R M Kerr *Commentaries on the Laws of England: In Four Books* (3ed, John Murray, London, 1862) 136.

> whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate.

The thinker who most popularised the theory of separation of powers was a Frenchman, Montesquieu who developed the theory on the basis of a supposed analysis of the English Constitution made in his book the *Spirit of the Laws* published in 1768. He thought of Government in England as exhibiting a separation between the legislative, executive and judicial powers and the balancing of these powers against one another. He turned it into a sort of system of checks and balances. There is grave doubt that England ever exhibited the characteristics Montesquieu held out for it, but his model had considerable weight with the political thinkers who designed the United States Constitution.

The pure model of separation of powers may not be practical, yet as a model it is undoubtedly analytically powerful. It is particularly potent when applied to New Zealand, because New Zealand has too little by way of separation of powers and checks and balances. While we ought not to adopt the pure theory we need to travel further than we have in the direction of separation. The pure theory has been simply stated by M J C Vile:[8]

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.

The separation of powers model in its pure form has not been converted into practice in any system of government, but the idea has been influential nonetheless in influencing the shape of many governments. Several more moderate versions of the theory have been developed - the theory of mixed government and a later one - the theory of checks and balances. Both use the notion of a set of checks on the exercise of power resulting from the division of functions between the branches of government. The result was a partial separation of functions which helped to bring about the feeling that

8 M J C Vile *Constitutionalism and the Separation of Powers* (Oxford University Press, Oxford, 1967) 13.

the exercise of power in government is subject to some control. All these theories have in common the principle that government must be limited. Limited government is what we do not have in New Zealand. Obviously government changes over time, the needs and aspirations of the society change. New Zealand needs now a new approach to the problems of modern constitutional government based on a sensible approach to limited government.

Application of the separation of powers model to the New Zealand Parliament, even in a much weaker version than the pure model, would produce a very different institution than the one we have now. We have the 'elective dictatorship' model in an even more extreme version than the British. In order to deal with that problem it may be necessary to remove the ministers from Parliament altogether, as is argued in another chapter of this book. Such a step would change in a fundamental fashion how our system of government works. It is a change which will be greatly resisted and will probably not come about quickly.

It is beyond doubt, however, that the New Zealand Parliament needs considerable reform if it is to occupy a position of power and influence in the New Zealand system of government. Since it has already been extensively reformed in recent years without those changes materially improving its performance it can fairly be concluded that the problem is structural. The aim of the reforms should be to give some power to Parliament. The purpose of that is to redress the imbalance which has developed in our constitutional arrangements which are too friendly by far to executive power. Some development in the way of real checks and balances is what is called for in the New Zealand situation. This rather lengthy historical and philosophical introduction has been a necessary preface to what is essentially a set of practical recommendations as to what now should be done in the New Zealand Parliament to make it work better.

II WHAT IS THE PURPOSE AND FUNCTION OF PARLIAMENT?

In order to make an institution work better it is necessary to decide what the purpose of the institution is. Unfortunately concerning this fundamental question there is a lack of clarity in New Zealand about what Parliament is for. Partly that is because the functions of Parliament have changed over time, although our expectations are still cluttered with some of its older functions because of our communal memories. The most authoritative guide to Parliament's mission statement is the Constitution Act 1986. What the Constitution Act provides New Zealand with is a legislature. A legislature is a place which makes. The Act constitutes the House of Representatives and the Parliament.

Parliament, the Constitution Act tells us in section 14, consists of "the Sovereign in right of New Zealand and the House of Representatives". The Sovereign, or the Governor-General on her behalf, opens the Parliament and reads a speech written by the government for the occasion outlining the

way it sees things and the legislative programme; she must also sign bills and send messages authorising appropriations. On very rare occasions it may be necessary for the reserve powers to be exercised, but that has not happened in New Zealand in modern times, and it is devoutly to be wished that it never does.[9] In substantive terms the work of Parliament is carried out by the House of Representatives.

In terms of the Constitution Act the House of Representatives is made up of Members of Parliament who must be elected in accordance with the provisions of the Electoral Act 1956. They cannot sit or vote until they have taken the Oath of Allegiance. The Act says that at its first meeting after a general election the House must "choose one of its members as its Speaker". The first meeting must take place "not later than 6 weeks after the day fixed for the return of writs" after a general election. The Act also provides that the term of Parliament shall be three years, unless it is earlier dissolved. And this provision is entrenched, that is to say it cannot be changed unless the change is agreed to by 75 of the MPs present and voting, or carried by a majority in a referendum of electors. It is the only provision in the Constitution Act protected in this way. Everything else can be changed by a simple majority.

Obviously the Constitution Act contemplates that the Parliament is an important place since there is considerable elaboration about how it is to be constituted. In terms of functions given it by the Act there are two: laws and money. The New Zealand Parliament has "full power to make laws". No limits on this power are to be found in the statute and few exist in practice. The other classical parliamentary function is to be found in section 22:

> It shall not be lawful for the Crown, except by or under an Act of Parliament,—
> (a) To levy a tax; or
> (b) To raise a loan or to receive any money as a loan from any person; or
> (c) To spend any public money.

The power to make laws and the power of the purse are considerable powers, but they do not make Parliament the government. The executive government of New Zealand are the ministers and the public servants. They initiate the policies, they drive the machine. Parliament has it within its power to stop them, but for the most part it does no such thing these days.

By custom Parliament carries out a range of other functions not mentioned in the Constitution Act, but important nonetheless. Anyone is entitled to petition Parliament for a redress of grievances. This right is very ancient indeed and began with Magna Carta. Questions to Ministers in Parliament hold them to account in a public forum for their stewardship and

9 See R Q Quentin-Baxter "The Governor-General's Constitutional Discretions: An Essay Towards A Re-Definition" (1980) 10 VUWLR 289.

they are an important potential check on government. There are other ways in which Parliament acts as check on the actions of governments. Situations which arise can be debated quickly and the government put on the spot. All government policies can be debated in an environment where it is safe to make the most ill-based claims free from the chance of legal action.

MPs carry out important functions in making representations to government on behalf of their constituents. This work is very important and is now assisted by the provision of electorate secretaries paid for by Parliament. This was an important constitutional reform and gave constituents a much better service than they had previously had. This can be a particularly valuable tool against high-handed treatment or excessive bureaucratic enthusiasm. MPs become local community leaders in their electorates and must attend a wide range of social functions and community gatherings.

But despite what the law says about the functions of Parliament perhaps the activity to which Parliament devotes the most time and energy is party political contest. Parliament is a forum for party political contest. Virtually every activity in Parliament can be turned into this whether it be debating the enactment of laws, or scrutinising expenditure proposals. Much of the debate is vapid nonsense, but MPs incentive structures are geared towards the political, not to producing good legislation or looking deeply and carefully at the finances of the country. Political debate is too superficial for that and the next election is never far away.

Politics swallows up the rest of what goes on in the House of Representatives. Securing party political advantage is the not the same thing as listening carefully to submissions about a bill or probing a policy proposal rigorously. Anyone who wants to reform Parliament has to contend with one fact above all others. The New Zealand House of Representatives is a bearpit of ill-mannered and vituperative political debate to the exclusion of nearly everything else. At least that is so in the chamber, where the outcomes have been determined in the secrecy of the party caucuses.

III RECENT EFFORTS AT REFORM

A great deal of parliamentary reform was carried out by the Fourth Labour Government although it does not appear to have made a deep impression on the public or improved their opinion of Parliament. But it is necessary now to examine what has been done in order to assess what further needs to be done. In 1985 the Standing Orders committee recommended far-reaching changes to the procedure and structures of the House of Representatives, probably the biggest single set of changes made at one time this century to the procedures of the House. The changes were accepted by the House and implemented.

The changes were based to a large extent on the Labour Government's announced policy of parliamentary reform contained in the "Open Government" segment of its 1984 election manifesto. The promises were both extensive and specific. Almost all of them were carried out. The few not implemented were rejected because they would have held up the business

of government more than the government itself was prepared to tolerate. And this is one of the deepest restraints on parliamentary reform. In order to accomplish parliamentary reform it is necessary to convince the government, which has the most to lose, that the reform has to be carried out.

There were a number of strands to the reform programme. The most radical called for a total reconstruction from first principles of the system of select committees in the New Zealand Parliament. The second strand called for important changes to standing orders "to ensure that a determined Executive cannot dominate Parliament".[10] There had been a habit of having Parliament meet only about half the year, something convenient to an executive wanting to avoid parliamentary scrutiny. When it did meet, legislation by exhaustion was quite common. Urgency would be taken and the House sit through the night, sometimes continuously for several days at a time, until the government's list of legislation for which urgency had been taken was passed. MPs would go without sleep, or sleep in the House. In such circumstances serious efforts to scrutinise the legislation were doomed to failure. Parliament failed too often as a result, in one of its primary functions.

There was a further commitment in the policy to abolish the Legislative Department. This was an instrument of the executive government and the Prime Minister was the minister in charge of it. It meant the minister could effectively decide what the resources devoted to Parliament would be and what they would be spent on. It was an instrument by which the executive was able to starve Parliament of resources and reduce its effectiveness through ministerial control. (I was the last minister in charge of it and abolished it. The Department was replaced by the Parliamentary Service Commission established under the Parliamentary Service Act 1985.) There were also proposed a number of specialised changes which enhance the position of Parliament, such as a commitment to provide parliamentary machinery to control the use of delegated legislation and regulations by the executive. It took quite some years to implement this programme of reform and not all of it was done by changing the standing orders of Parliament. But changes to the standing orders were important.

Of the changes made by standing orders the most important were those to the select committees. Select committees in New Zealand had gradually since the 1960s developed a capacity to scrutinise government legislation, conduct public hearings on bills and recommend changes as a result. To begin with, this was confined to major pieces of legislation but gradually it was realised that all legislation could benefit from such examination. In 1979 changes were made to the standing orders requiring all bills except money bills to be referred to a select committee after introduction.

Apart from legislative scrutiny and some reports by the Public Expenditure committee, parliamentary committees in New Zealand were not active. They could do only what Parliament asked them to do. For many years that

10 G Palmer *Unbridled Power* (2ed, Oxford University Press, Auckland, 1987) 281, Appendix I.

was not much. It had appeared to me when I wrote *Unbridled Power* in 1979 that select committees were the most promising route by which to revitalise Parliament. In 1983 the United Kingdom government gave me an official visit to England for several weeks and allowed me to study there topics which interested me. I spent much time researching the working of the Parliament at Westminster and in particular the changes they had then recently made to select committees. I was able to interview MPs and officials in the Clerks office and get much valuable background. Michael Ryle, the Clerk of Committees in the House of Commons, was particularly helpful and I was able to interview British experts such as Professor J A G Griffith. I used this information to fill out the detail of the Labour Party's Manifesto commitments on constitutional reform and in particular the reform of Parliament segment.

When the changes were made by the Labour government in 1985, for the first time every aspect of government policy, administration and finances came within the jurisdiction of a select committee of Parliament. A complete new structure of select committees was

established in order to accomplish this, each with defined jurisdiction. The committees as they now exist are:

- Commerce and Marketing
- Communications and Road Safety
- Education and Science
- Finance and Expenditure
- Foreign Affairs and Defence
- Government Administration
- Internal Affairs and Local Government
- Justice and Law Reform
- Labour
- Maori Affairs
- Planning and Development
- Primary Production
- Social Services

Each of those select committees has power to consider bills referred by the House and petitions as well as any other matter specifically referred to it. The novelty comes from the feature that each committee is empowered by the standing orders themselves, not requiring specific authorisation of the House, to "examine the policy, administration and expenditure of departments and associated non-departmental government bodies"[11] within the committee's ambit of authority. It is hard to exaggerate how potent such powers could be holding government to account, checking excesses, seeing that money is properly spent and looking at policy defects. There are three other Committees with specialised functions: the Regulations Review Committee, the Privileges Committee and at the time of writing a Standing Orders Committee.

11 *Standing Orders of the House of Representatives* (Government Printer, Wellington, 1986) SO 322.

I said at the time it would take ten years for Members of Parliament to learn to use these new powers and as a prediction it was not wrong. The powers are there. They can be used. But so far they have not had the results I intended for them. That is not say there has been no improvement. There has been much. MPs have useful avenues to do real work of substantive kind through the select committees. Many of the committees have been very active. Some valuable reports have been produced. But there seem to me a number of reasons that have combined to produce a situation where the changes have not been as dramatic as the authors intended or the public expected.

The first problem is that MPs do not see political rewards in select committee work. Those with marginal seats resent the time spent in Wellington at hearings when they feel they could be more profitably employed going around their own electorates. Under the new arrangements select committees have been sitting much longer than formerly was the case - the committees now meet regularly most of the year. Indeed, what has occurred is that much of the extra work that has occurred in Parliament as a result of massive reform programmes pursued by governments of both political persuasions has been taken up by the select committees.

For MPs to devote time to select committees and work hard there must be incentives for them. There do not appear to be political incentives at present. The media do not pay much attention to select committees. Thus, much of the work will not be recognised. And the people back home will not get to hear of it. Thus, opening the annual school gala will seem more important to an MP; at least at that he or she will have some chance of talking to the people on whose opinion future political prospects rest. Wrestling with intricate policy issues, masses of paper, advice and complexity is not something the average MP is used to. Usually they are better at people skills.

The legislative load of Parliament is so big that legislative scrutiny tends to dominate the work of the select committees. About two-thirds of their time is devoted to legislation.[12] When the need to examine petitions and approve the estimates for the departments within the committee's jurisdiction are added, there is simply not enough time to devote to other tasks. There is not enough time to examine policy, administration and expenditure. Yet in many respects such inquiries would be more congenial to MPs than legislative scrutiny.

I had one colleague who promised on the hustings to read all the bills which were introduced to Parliament. The general public were probably surprised that such a promise should be made, assuming that lawmakers would read all proposed laws. But they do not and I doubt that my colleague kept his promise since there is so much to read. Reading a bill and understanding it either takes legal training or high levels of ability. The bills are drafted by lawyers and are intricate highly complex documents.

12 W Iles "New Zealand Experience of Parliamentary Scrutiny of Legislation" 12 Stat L R 165, 168 (1991).

Some MPs are interested in legislation, but many are not. They are interested in the policy and principles of the bill, but much of the work of legislative scrutiny is devoted to the task of seeing if the policy is translated into the bill faithfully and what anomalies may be created. It is demanding, technical, lawyer-like work. It is more concerned with the nuts and bolts than matters of high policy. For the discerning MP there is a route to high policy through mastering the technical arts of legislative scrutiny. But not a lot see that as a means of political advancement and it is political advancement which drives MPs - their political lives may be short. They want to achieve something.

I came to Parliament as a law professor, vitally interested in constitutional law and legislative process. I took my select committee responsibilities very seriously. In opposition I persuaded the government to change its legislation on many occasions - select committees have the advantage of being non-partisan for the most part. After I had engaged in that sort of activity for a couple of years my opposition colleagues began to object in the caucus. They said I was fixing up government legislation. It would be far better, they said, if it was enacted in an unworkable fashion. That would be politically disadvantageous for the government, which was the best result for the opposition. It is a very sensible political argument. If the government makes a mess of something, they will be blamed. Why rescue them from their own folly? In fact, it was argued on the occasion to which I refer that we should do our best to make the government's legislation worse, since they will still get the blame. The argument was seriously made in caucus, although happily it did not prevail. Nevertheless, it illustrates what perverse incentives are at work in the parliamentary process.

The hard truth is that MPs can do something to improve the quality control of our legislation but theirs is probably not the most important contribution. Bills are drafted by professional parliamentary counsel to ensure quality; expert government officials and bodies such as the Legislation Advisory committee can contribute more than MPs. But it is important for MPs, as elected representatives, to take an interest in legislation and worry it in the manner that a dog worries a bone. The trouble in the Parliament at present is that the weight of legislative work is so heavy that not enough of the other functions select committees are empowered to perform get done.

Much of the work of Parliament is taken up with political party conflict. To some extent legislative and policy scrutiny can be grist to that mill, but not as much as inflammatory press statements, posturing on television and engaging in other sensational and newsworthy behaviour. Much of the business of government is technical and intellectually rigorous. A prime requirement of politics is theatre - select committee proceedings do not on the whole make good theatre.

But the requirements of politics impinge on the work of select committees in a more fundamental way. It is the custom in the New Zealand Parliament for select committee chairpersons (all the committees except one are chaired by a government member) to take advice from the government caucus before reporting a set of recommendations back to the House.

This means that the findings of the select committee are not necessarily the work of the select committee. Frequently, they are the work of the government caucus - the caucus has not heard the submissions, the caucus is primarily motivated by the political health of the government. Members do not like political embarrassments. This means that reports which contain political bombshells, bad news or adversity of some kind for the governing party tend not to be made by the select committees. The whole thing is prearranged behind closed doors in a fashion the public would find shocking if they knew about it.

It is true that caucus listens carefully to the chairs of select committees when they report to it. A skilful presentation can cause permission to be granted to report in a particular way. Often the members of the select committee on the government side and the caucus committee have met before the main caucus meeting and worked out an agreed strategy which they put to the caucus. The procedure is based on the theory that since the government is made up of one party, all members of the parliamentary party should have a say when recommendations of select committees may affect the political health of the party. Such formal levels of control are only possible in a small Parliament and would be unheard of at Westminster. There caucus does not exist.

It would be far better if select committees in New Zealand reported the way their members saw fit. Trying to manage it all in the interests of presenting a unified front is becoming increasingly futile. If the government does not like what the select committee comes up with let them vote it down on the floor of the House, if they can find the numbers to do it. Let the committees of Parliament function free from the domination of the party caucuses and the opportunities offered by the new standing orders to put new life into the New Zealand Parliament may be achieved. Members of Parliament will not thereby lose their party loyalty and or set out on missions to destroy the government or even undermine it. But the accountability function of Parliament in respect to the executive requires something more than suppression of carefully reasoned arguments by use of caucus standover tactics.

In reality what has happened in recent years is that MPs seek leave to be absent so much from their select committee work that the whips have great difficulties in mustering the numbers. Many MPs are asked, at short notice, to turn up to select committee hearings when they are not members of the committee, they are not interested in what is going on and have not read the relevant papers which are being discussed. The amount of substitution of members in the select committees has reached farcical proportions and causes great concern to people whose business regularly takes them in front of such committees. One of the problems is that there are not enough MPs in the New Zealand Parliament, when ministers and office holders are taken out, to run a comprehensive select committee system. It can be said that the practice of wholesale substitution enables more members to taste the work of the committee and form a view of it. Up to a point substituting an experienced MP onto a committee for a particular issue can be beneficial.

But the truth is that some of the select committees have such a lack of continuity in their membership that their work becomes something of a shambles. In 1989 the Business Committee of the House looked at the figures which disclosed that in the months of January to May 1989 there were 254 select committee meetings and 303 substitute members appointed for those meetings, making a substitution rate of 1.2 members per meeting. The committee observed "[t]he Business Committee considers that this constantly changing membership acts against building up a tradition of investigatory work reviewing government activity. If select committees are able to develop a reputation for independent thorough investigation, they need to develop a constant membership with a bipartisan orientation."[13] On my own observations since I think the position has become worse and in the case of some committees threatens their credibility. Competent professional people who appear before the committees are not impressed when some members do not appear to have any knowledge or continuing interest in what the committee is doing. Neither are they impressed when the MPs who do have an interest are incompetent and out of their depth.

It is the people involved, the MPs, who are the crucial variable in successful parliamentary reform. The behaviour of MPs is the biggest single factor involved in reforming Parliament. The MPs must have rewards and incentives available if they are to alter their behaviour. If Parliament is a place for the continuous election campaign and egregious political grandstanding then MPs have made it that because they have found rewards in doing so. If select committee work matters in the interest of good government and the constitution, then MPs should be encouraged to devote their time and activity to it. But there is little reason for them to do so as things stand. One way of altering the incentive structures may be to provide a financial allowance to the chairs of select committees, which is done in Victoria, Queensland, South Australia and Tasmania, and perhaps a meeting attendance fee to members. The Higher Salaries Commission has jurisdiction to address these matters. Ministers are paid more because they work harder, so are whips, The Speaker and the Chairman of Committees. Application of this principle to ordinary Members of Parliament could cause them to concentrate their efforts on their most worthwhile activity and to advance in it.

Despite the analysis above, the reform of the select committee system has been worthwhile. The committees have staff available, and the staff are not employed by the executive branch of government. They are employed by the Parliamentary Service Commission. But the staff are largely secretarial and the committees do not have available to them and under their control the professional expertise which they need. As the Hon David Caygill put it recently "...committee staff lack specialist expertise in the policy areas of the committee. The experience they gain frequently allows them draw useful insights. But they are not a significant source of expertise on

13 *Report of the Business Committee on the Committee's Review of the Inquiry Function of the Subject Select Committees 1989* (1987-1990) AJHR Vol XVII I.14B para6.2.

the various departments' policies and administration."[14]

The government must respond, under Standing Orders within 90 days of receiving a select committee report to say what action it proposes to take concerning the report.[15] This obligation is limited in a number of ways. It does not apply to reports on legislation but only to reports on a departmental inquiry. More significantly, the government's responses are frequently brief and derisory. For example, the 1992 response to the select committee inquiry into electricity pricing was a one and a half page dismissal and there is no provision to debate the response in the House.

The select committee proceedings are automatically open to the new media. But unfortunately they are seldom reported and certainly not systematically.

One important element of the reform, and one not achieved without a struggle from ministers, was to ensure the ministers do not sit on committees. It was not so much that ministers agreed to step back from hands-on control of select committees, rather it was that ministers saw an opportunity to cut back on their killing work-load. The change does mean less ability for the executive to dominate proceedings and get its way without the contrary arguments being adequately examined.

The other reforms which were undertaken have been beneficial as well. Having Parliament meet regularly throughout the year ensures that the main issues of the day can be debated in the central democratic institution. All-night sittings are a thing of the past except for the occasional Budget bill which must change taxes immediately, the sort of matter which the Standing Orders refer to as "extraordinary urgency".[16] It is not often required. Some of the more absurd opportunities for political games were removed - the reading of notices of motion was abolished. Measures were taken to ensure that Parliament is broadcast all the time it is sitting. The executive branch's control over Parliament was brought to an end with the abolition of the Legislative Department and the creation of the Parliamentary Service Commission. A comprehensive set of parliamentary procedures was erected to guard against government by regulation - and the Regulations (Disallowance) Act 1989 was passed.

The law relating to parliamentary privilege is long overdue for reform. The topic has been on the agenda of the Privileges Committee for years and little progress is evident. Real safeguards need to be put in place to reduce the capacity for abuse which exists. Parliament can imprison. It ought not to be able to. A statute should be passed defining the protection needed and making trial of offences the task of the ordinary courts.

One of the most important changes was the provision of electorate secretaries to each MP in his or her electorate. This assisted the MP with

14 Hon David Caygill MP "Functions and Powers of Parliamentary Committees:A New Zealand Perspective" (Paper delivered to a Conference in Brisbane, May 1992, on file Victoria University of Wellington.)

15 *Standing Orders of the House of Representatives* (Government Printer, Wellington, 1986) SO 352.

16 *Standing Orders of the House of Representatives* (Government Printer, Wellington, 1986) SO 50.

constituency work of which there is a considerable bulk. It helps the MPs schedule their time in the electorate, make appointments, research local issues and generally be much more effective. It also takes some of the strain off their families, and that strain is considerable. Public life is much more burdensome for families than can be understood by people who have not experienced it. Of all the constitutional reforms I engaged in, this was the most popular with my parliamentary colleagues on both sides of the House.

There are a number of further changes to parliamentary procedure which would be beneficial. But none of them will alter the fundamental character of the institution. It is a talking shop where there can be full ventilation on any issue of public concern. Parliament is not and never has been the government. Cabinet is the engine of government, not Parliament. In New Zealand in theory the cabinet is accountable to Parliament but in practice dominates it. Parliament is a place for continual party political conflict. There can be no doubt that this fact weakens the Parliament as a lawmaker, as a scrutineer of finance, policy and administration. Remove the cabinet from Parliament and a great deal will change. Short of that step being taken the best hope lies in the select committees. The power of select committees lies in their ability to receive submissions, get authoritative information, consider it and report to the House on what should be done. It does not mean the government will always listen, but the committees are in a strategic position to be listened to. They can function as agents of information and criticism of policy, legislation, administration and expenditure. Nowhere else is that constitutional power located. Government by party weakens select committees somewhat as instruments of accountability but it does not destroy them.

IV LEGISLATION

One policy commitment in Labour's Open Government Manifesto the Fourth Labour Government would not wear at all. The policy stated:[17]

> The Standing Orders of the House of Representatives will be changed to allow three months to pass between the introduction and final passage of any Bill—except a money Bill, or Bill necessitated by an emergency, or with the agreement of Parliament.

The party had agreed to that in opposition, but in government to the cabinet it all looked different. The flexibility of being able to do things quickly was appealing. To incorporate such a measure in standing orders, it was said, may cause a situation where the government may have to suspend standing orders (something the previous government had done prior to the 1984 election to pass a bill dealing with the industrial situation at Marsden Point[18]). Change should be made. The public complaint about rushed

17 G Palmer *Unbridled Power* (2ed, Oxford University Press, Auckland, 1987) 282, Appendix I.

18 See the Whangarei Refinery Expansion Project Disputes Act 1984. For the times when standing

legislation has been constant in the last fifteen years.

For reasons which are not entirely rational, governments are always impatient to have their legislation passed as soon as possible. It is not a phenomenon restricted to New Zealand. It is magnified in New Zealand because we have three year parliamentary terms. In countries like the United Kingdom and Canada with five year terms the government can wait a little longer. There is a real and ever present feeling in New Zealand that unless the legislation is passed quickly and starts to work before an election, the electors will think the government has not achieved what it said it would. The three year term acts as a super-charger on the speed of legislation. It seems to be in the nature of things that when a government has devoted time and effort to making a policy it wants to see the policy in operation as soon as possible, but many new policies require changes in the law and the need to procure legislation can become a source of delay in implementing the policy.

There is always pressure on the government's legislative programme. Each year Ministers are asked to put in their requests for legislation and the Cabinet Legislation committee examines the bids and puts them in priority.[19] Much of the legislation which is asked for will never get drafted let alone introduced, so there is a considerable debate within government as to what the legislation priorities will be. Even when they have been set they change quickly, due to new developments, emergencies which arise or simply changing political priorities. There are considerable delays in the Parliamentary Counsel office in drafting bills after instructions are received, since the drafting is done in accordance with the priorities set by the Cabinet Legislation committee.

There is always a temptation to get the legislation through as quickly as possible. There are many reasons for this. Often ministers have given public commitments to a timetable which they then find suffers slippage. It takes them longer to get the bill ready for the House than they think it will. But they will lose face if the timetable is not adhered to, so they abridge the time it spends in front of the house. Often there are administrative reasons why a bill must be passed, so that mechanisms can be put in place to run a new programme. Having only one house makes it easier to get measures through Parliament quickly and adds to the temptation to do it.

The legislative procedures we have are quite elaborate. Bills must be sent for scrutiny to select committees, unless they are introduced under urgency. They must go through three readings in Parliament as well. There are really six legislative stages in New Zealand. Much of the time available for debate is usually not used, the opposition oppose outright with every weapon available only a few bills each session. When that happens every stage is debated down to the closure: which means that speakers are put up until the

orders were suspended see: 456 NZPD 89, 120-122, 175, 273 (6, 7, 8 and 12 June 1984 respectively).

19 For a detailed description of the machinery, see G Palmer "The New Zealand Legislative Machine" 17 VUWLR 285 (1987).

Speaker rules that the debate is so tedious and repetitious that the question should be put. A big hard-fought bill can take four or five days in the chamber itself. The Committee of the Whole, where the details of the bills are examined on a clause by clause basis, can take a very long time. Since on most such occasions the resistance is political, and is using the procedures to hold the bill up rather than examine its detailed provisions in any bona fide way, the custom has grown up of moving a motion that the bills should be considered part by part in the Committee of the Whole. It is much quicker than considering the bill clause by clause. My successor as Leader of the House the Rt Hon Jonathan Hunt became so proficient at this, he became known in some quarters as "Part by Part" Hunt. In truth there is ample time for proper legislative scrutiny for most measures in the New Zealand Parliament. There is no guillotine motion possible in New Zealand as exists in most other Parliaments. I recall when advising the Australian government, sitting in the adviser's box in the Australian Parliament when the Leader of the House, Fred Daly, moved that the committee stage and third reading of the bill I was advising on, take 65 minutes.[20] It did and most of the time was spent debating not the substance, but what a parliamentary travesty it was to treat Parliament in this way. The rights of the minority cannot be restricted in such a way in New Zealand.

Despite what has been said there is undoubted abuse in the New Zealand Parliament about the speed and circumstances of legislation. The 1991 Budget was perhaps the worst example ever - where many pieces of legislation, many of them not connected with the budget at all were passed under urgency in the days following the Budget. There was not a substantive case for treating most of the legislation urgently, it was simply convenient to the government to get it out of the way.[21]

The most recent criticism of the legislative process in New Zealand comes from an article in the *New Zealand Law Journal* by Professor John Burrows and P A Joseph of the University of Canterbury.[22] They make a number of points:

1 *Excessive and unnecessary use of the urgency provisions in Standing Orders.* The point is valid. Governments too often set deadlines for themselves which they cannot meet. When policy commitments have been made, that changes will come into effect on a particular date, rushed legislation is often the result. The House sits for many hours under urgency, more than it used to, partly because the debates must stop at midnight and do not resume until 9 a.m. which means legislation by exhaustion is no longer possible. Now that all-night sittings are banned, the real effect of urgency is to change the agenda of Parliament. It determines what will be debated - it ensures business is

20 G Palmer *Compensation for Incapacity-A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979) 149.

21 See the adjournment debate in NZPD 3635-3660 (30 July 1991).

22 J F Burrows and P A Joseph "Parliamentary Law Making" [1990] NZLJ 306.

dealt with in a certain order and the sitting continues until it is dealt with. It is undoubtedly coercive but not as bad as it once was.

2 *Speed is achieved by taking bills part by part.* This is true but overlooks the point above, that there are these days effectively six stages of the legislative process, not three.

3 *The habit of introducing omnibus bills, such as the Law Reform (Miscellaneous Provisions) Bill which contains many separate law changes and will be divided up into separate bills before being passed.* The criticism of this method of legislating is misplaced. Such bills get proper Select Committee examination. There is scope for abuse by putting too much in and material which is not strictly of a law reform character. Some ministers regard such bills as a convenient train going by, to which they will hitch a carriage or two. Despite this, the lack of parliamentary time will mean many useful and often uncontroversial reforms will not be made if such omnibus bills cannot be used.

4 *Sometimes measures are plucked out of omnibus bills and put through ahead of the rest of the provisions. Tacking on new policy measures by Supplementary Order Paper at the Committee of the Whole stage is wrong.* The authors see these practices as an admission that debate in the House has lost much of its force, a point which is undoubtedly true. They go on to make a number of points about the need for consultation and object particularly to amendments by supplementary order paper in the Committee of the Whole. Whole new policies can be tacked on to bills this way and there is undoubted scope for this type of abuse. It has been done. The standing orders should be changed to prohibit it. A carefully-drafted standing order could further prevent the introduction of major new policy outside the scope of the original bill by way of supplementary order paper and leave the judgment to be made by the Clerk of the House. But SOPs themselves are essential to correct points of detail which come up late in the legislative process and will render the new law defective if not corrected before enactment.

5 *More time should be allowed for Select Committee submissions.* Usually three weeks is allowed - it would be desirable to allow more. Four weeks should be the standard period allowed for preparation of submissions but it is unrealistic to go further given the time it takes to get legislation through. What has been forgotten with the parliamentary reforms which have already taken place is it takes much longer now to pass legislation than it did in the days before bills did not go to the select committees. It is also possible to abridge select committee scrutiny by sending bills to a committee for examination only and not to take submissions. This has been done on

two occasions in 1992.[23] The standing orders should be amended to make it more difficult.

I said in the first edition of *Unbridled Power* that "New Zealand passes too many laws and it passes them too quickly".[24] It is still true, although not accurate as when it was first written in 1979. Legislation takes longer these days as a result of changes to parliamentary procedures. In my view, coloured by three years as Leader of the House and five years as chairman of the Cabinet Legislation committee, I would say that the time in the Chamber has to be cut down. There is a limited time debate of two hours for the introduction - the debate on the report back from select committee has been restricted to one hour since 1985. So normally each bill goes through the following procedure:

1 First reading debate - 2 hours.
2 Select committee consideration - public submissions called for and heard. Bill amended as a result.
3 Debate on the report back of the select committee - 1 hour.
4 Second reading debate. Unlimited. (Suggested limit 5 hours.)
5 Consideration by the House in Committee of the Whole. Unlimited. (Suggested limit 4 hours.)
6 Third reading. Unlimited. (Suggested limit 1 hour.)

I think maximum time limits could be prescribed for all stages of legislation as indicated above. It is done now for two of the stages. The quality of legislation will not suffer from such a change. Some gradation may have to be considered depending on the size and importance of the bill. Limited time debates on bills can occur now by agreement between the whips and sometimes do. But it does not occur frequently as it alters the nature of the debate. Where there is a time limit the debate is shared between the two sides. An open-ended debate subject to the possibility of a closure motion provides the government with an incentive to drop its speakers giving the opposition more time.

The real scrutiny is done in the select committees not in the chamber. What happens now is that time made available for the purpose of legislative scrutiny is actually used for the purpose of political attack. It is relatively simple to improve legislative scrutiny if that is regarded as a priority. The problem with the New Zealand Parliament is that politics is a higher priority with members and in any event MPs are not particularly adept at legislative scrutiny. Despite this the New Zealand Parliament probably has a better system of legislative scrutiny than most other Parliaments because of the select committee system. The select committees make an open and public contribution to legislation. They work hard at the task, sitting long hours listening to submissions. For example, the Resource Management

23 Government Superannuation Fund Amendment Bill (No 3) 1992; Social Security Amendment Bill (No 6) 1992.

24 G Palmer *Unbridled Power?* (Oxford University Press, Wellington, 1979) 77.

Bill in 1989 attracted 1,325 submissions, the most ever received for any bill. More and more select committees feel free to make substantial changes to bills in light of the submissions and the detailed consideration the bill is subjected to in the committee.

The conclusion on Parliament and legislation is that the development of legislative scrutiny through select committees has had a beneficial effect on the quality of legislation and the public's capacity to express views on it. Sometimes the submissions bring forward information not known to those who framed the bill. But the new approach must not be taken as an invitation to the government to introduce bills which have not been properly considered, and which may have been drafted under such time constraints that they are in a "rough state".[25] It has happened. Generally however, the changes have been in the right direction and should be reinforced.

V A SECOND CHAMBER?

New Zealand had a second house of Parliament up until 1951. It was called in New Zealand the Legislative Council. It was appointed, not elected. Until 1891 the members were appointed for life, then the term was for seven years, with the chance of reappointment. The Legislative Council did not do very much and when it was abolished the event occasioned little public attention. It was abolished by the National Party government, a somewhat unusual measure for a conservative administration. In their election manifesto they promised to "examine the possible alternatives to provide for some form of safeguard against hasty, unwise or ill-considered legislation."[26] Nothing emerged however, and the situation remains as it was in 1951 - New Zealand is unicameral.

The point of having a second chamber is usually said to be for the purpose of further scrutiny of legislation. Second chambers fit somewhat uneasily into any system. Either they have the power to frustrate the duly elected government, as is often the situation in Australia, in which case they are a nuisance. Or they do very little indeed - the Canadian Senate is such an example - in which case they seem to be unnecessary. Federal systems do seem to require a second house of Parliament, as some sort of guarantor of the federal compact. Thus in Australia, each state has the same number of representatives in the Senate regardless of population. But in a country like New Zealand, it is far from clear what purpose a second chamber would serve.

The present Prime Minister The Rt Hon J B Bolger has said repeatedly that he favours a second chamber and the National Party promises to have a referendum on the question in conjunction with the 1993 election. But no analysis is available of the nature of the proposal. And it is deep and difficult water in which to sail. Since the subject is on the agenda, however,

25 W Iles "New Zealand Experience of Parliamentary Scrutiny of Legislation" 12 Stat L R 165, 178 (1991).

26 289 NZPD 538 (1950).

some consideration needs to be given to it. What can fairly be claimed for a second chamber? The answer is that it all depends on what its powers are, how it is constituted and how it behaves. Since no element of this is known at the time of writing it is difficult to be dogmatic. In many ways the real issue is what would a second chamber do? That question needs to be answered before it can be decided whether the existence of one would be constitutionally beneficial.

But a number of general features could fairly expect to be achieved by a second House. The first would be delay. Since all legislation and supply measures would have to be passed through it, law could not be made as quickly as it can now. It is also possible better scrutiny of the legislation may occur, because the atmosphere in upper houses tends to be less politically charged than in the House of Representatives, the composition of which determines who is the government. Whether the scrutiny would be as good as the select committees of the House of Representatives now provide, is less easy to answer. It would depend what sort of resources were devoted to the task.

It is also likely that more in-depth examination of policy, finance and administration would be possible. These parliamentary functions are not being performed well at present because the select committees in the House of Representatives concentrate on legislation. Looking at what the House of Lords does in the United Kingdom it is also possible that more reflective, in-depth debating on important subjects could occur. But it should be remembered that the composition of the House of Lords is the result of a series of historical developments not capable of being replicated in New Zealand. The second chamber in New Zealand would have to be elected and it would be the subject of party political capture. It seems unlikely New Zealanders now would accept the legitimacy of an appointed upper house. Thus, it is not easy to assess how far a second chamber could function differently from the House of Representatives we already have. Since most people do not think that functions well they may be reluctant to add another which may behave similarly. If one house does not work properly why add a second? Its existence will not improve the behaviour of the first, in fact it may make it worse.

It seems clear that in New Zealand we would not want a second chamber that could bring the government down, as occurred in Australia in 1975, by failing to pass the budget. Probably only limited power to delay money bills would be tolerable in a New Zealand upper house. There is some prospect, however, that a second chamber could put the brakes on executive power and the domination of cabinet to some extent. There would be more people to convince. The party caucuses would be bigger and less manageable. This may particularly be the case if the second chamber were elected by proportional representation since it would have greater legitimacy. There would be a wider diversity of view, one from the whole community, not merely the two main political parties. At the level of general principle is is hard to resist the conclusion that a second chamber would be an additional check

and a balance in the New Zealand system of government. If it were given sufficient powers it could be quite a potent check.

The real issue is whether a second house is the best sort of additional check to have. It is a parliamentary institution, a new one. It will behave like a parliamentary institution. Other checks reside in quite different measures. An entrenched Bill of Rights involves the judiciary in checking functions. Judges use a different set of intellectual and institutional techniques from a parliamentary institution which functions in a political way. It is hard to compare the two, but that comparison is necessary. Having both would seem to be a bit much.

The other significant proposal I advance in this book is to remove the cabinet from Parliament altogether. That is a drastic step, much more drastic than re-instituting a second chamber. It would result in quite a different political system than the one we have now. A second chamber may alter the behaviour of our existing system to some extent, but would not change it fundamentally. Further, proportional representation in the House of Representatives would be a preferable step compared to an upper house. Proportional representation I see as the ultimate reform of Parliament policy.

I have never favoured a second chamber for New Zealand but I have been obliged to re-examine my attitude in light of the promised referendum on the subject. I prefer proportional representation in the House of Representatives to a second chamber; I prefer taking cabinet out of Parliament to a second chamber. But consistent with my general views on the need to limit the power of governments, if proportional representation is defeated in September 1992 I would vote for a second chamber as a second best. That is more likely to be carried out than the drastic step I propose of removing the cabinet from Parliament.

VI PROCEDURE AND OTHER CHANGES

Parliamentary procedure is a fascinating but arcane field. Quite a number of detailed improvements could be made to the way Parliament works by changing the rules. Some of that is occurring. The Standing Orders committee is sitting at the time of writing. The way in which the House handles financial expenditure of government has never been satisfactory. In substantive terms there has been little or no scrutiny of government finance and spending. Appropriation Bills have to be passed by Parliament and considerable time is devoted to the Budget cycle, and up to about 50 hours are spent on the estimates of expenditure in the House each year after the estimates have been examined by select committees. But the procedure has not been satisfactory.

This is now changing. In 1991 a new method of handling the estimates of expenditure was agreed upon and it is possible it will be effective in actually focussing on the subject, instead of getting lost in a diatribe of five minute political speeches as happened under the old estimates procedures.[27]

27 *Report of the Standing Orders Committee on a New Financial Procedure for the House of Representatives* (1991) AJHR I.18A.

The new procedure is in three segments:

- a debate on the expenditure proposed in the budget for the forthcoming year;
- a later debate on the financial performance of departments over the previous financial year, and
- a debate on the financial performance of SOEs and Crown agencies.

The new procedure is already demonstrating some of the weaknesses of the old one. MPs find it difficult to focus on the distinction between future expenditure and past performance. Most MPs still want to talk about topical political issues on every available occasion.

The new Public Finance Act 1989 requires a different indication of the government accounts to be given to Parliament than used to be the case. Assets of the government are now being included in the accounts. This should enable people to get a real picture of what is going on. For example, when the accounts in this format were tabled for the first time it was clear that the government's liabilities exceeded its assets, a matter which should cause advocates of high government expenditure or low taxes to pause.

The time has come, too, to re-examine the whole way in which the budget works in New Zealand. It is far too secretive and the reason is political convenience not constitutional propriety. There is no reason why the Government's expenditure proposals cannot be tabled in the House at any time. There is no need to make some great avalanche of announcements on budget night, many of which get lost in the rush. It certainly has the political convenience of burying unpopular proposals, but it does nothing else of value. The entire budget processes should be revised. It should be more open.

The last word on the possibilities of changing the rules in order to improve Parliament should belong to a recent student of the subject Geoff Skene:[28]

> Continuous electioneering is largely to blame for what are said to be some of Parliament's worst features—the interjections and abuse, lack-lustre debating, and excessive politicking. Endless repetition and name-calling is practised by politicians on all sides and levels of the House, apparently in the belief that it will give them the upper hand in the duel. Each party has one or two parliamentary pugilists who tend to lead these confrontations, their purpose being to batter the opposing side into a state of punch-drunk confusion. Regrettably, however, it is sensational debate of this kind that gets the best coverage from the press gallery; the parties and the gallery combining to reinforce the public's negative stereotypes of Parliament.

28 G Skene "Parliament: Reassessing its Role" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul Ltd, Auckland, 1992) 257.

In the end Parliamentary reform depends on convincing MPs to have a different view of what they ought to be doing. There are, however, a number of other measures which could be introduced to change the way in Parliament works. The key responsibility for controlling the proceedings in the House is The Speaker. In New Zealand The Speaker is invariably the nominee of the party in government, a fact which erodes his or her independence. Now that The Speaker's office and role have been enhanced by the Parliamentary Service Act 1985. The Speaker should be given more independence. The Speaker should be chosen on a free vote and one chosen should resign his or her seat and become the MP for a notional seat - called Parliament Hill. Probably the appointment should be for a fixed number of years by statute.

A further improvement would be to provide by statute a register of MP's pecuniary interests. Under reforms I introduced when I was Prime Minister, and adopted and added to by the National government, ministers are now required to lodge with the Registrar of Ministers' Interests:[29]

(a) remunerated directorships or other employment
(b) ownership interests in a business enterprise or professional practice
(c) ownership of company shares or beneficial interest in a trust
(d) ownership of all real property
(e) holding of mortgage or debt instruments
(f) overseas visits from public funds
(g) gifts received as a minister where the estimated value exceeds $500 (such gifts must be relinquished on giving up ministerial office unless the express permission of the Prime Minister is obtained to retain them).
(h) payments received from outside activities.

The register is tabled in the House every year by the Prime Minister. The same rules should be applied to all Members of Parliament. The avoidance of conflict of interest and the maintenance of public probity requires it.

The electoral law and its reform are dealt with in a later chapter, but there is much interest in the United States in limiting the time which people can retain elective office. The President of the United States, under the United States Constitution can serve only two terms. There are moves to apply restrictions to members of the House and Senate. There is merit in such restrictions. Public life changes one's outlook and sometimes all politicians seem to have more in common with each other than they do with the public they represent. Turning politics into a career does not enhance the performance of the system— it makes survival the only imperative. There are arguments against such a change. Experience helps people to avoid mistakes. It provides institutional memory on such matters of parliamentary procedures, something lacking in the present Parliament which has so many new members. Some MPs do find it difficult to find a job after a parliamen-

29 Secretary to Cabinet *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) 2/11.

tary career. A limitation on terms for MPs may need to be considered for New Zealand.

There are strong arguments for increasing the number of members of Parliament despite the fact it is unpopular with the public. For Parliament to do its job, and to ensure that select committees work effectively (since no ministers can sit on them), more MPs are required. The recommendation of the 1986 Royal Commission that there be 120 would be the appropriate level. In 1989 the Final Report of the House Business committee pointed out:[30]

> Of the 97 members of the House of Representatives, there are 41 Opposition members and 56 Government members. Since 1985, the convention has been that the Speaker and Ministers will not usually be appointed to select committees other than Standing Orders, Privileges and Officers of Parliament. This creates a situation where in effect only 31 government members are available for most of the select committees and some members must be appointed to more than one committee, something the Standing Orders Committee in 1985 did not envisage happening.

In the Parliament elected in 1990 the opposition had a total of 29 members. These facts are conclusive evidence that a proper system of select committees needs more MPs.

VII CONCLUSION

Parliament, or strictly speaking the House of Representatives, is an important place, despite its imperfections. It is our central democratic institution. It is the well-spring of our system of government. But Parliament does not govern. It is not the government. It responds to the initiatives of the executive branch of government. Its main problem in the contemporary setting is that it is too compliant. It does not rigorously hold to account the executive government and look sufficiently closely at what it is doing. The members of cabinet, who are part of Parliament, dominate it. The influence of Parliament ought to increase. That is my point. Things are out of balance. An effective Parliament would reduce the need for other changes.

30 *Report of the Business Committee on the Committee's Review of the Inquiry Function of the Subject Select Committees 1989* (1987-1990) AJHR Vol XVII I.14B para.6.2.

6
The Constitution and Political Parties

I INTRODUCTION

There is no subject upon which constitutional lawyers and political scientists diverge more than on the subject of political parties. Traditional constitutional law tends to ignore parties and some aspects of it proceed on the pretence that they do not exist. Much of the law and custom of Parliament takes the same approach. Parties of course are not unique in this respect. Cabinet being the creature of constitutional convention, is largely ignored by traditional constitutional law as well. The unrealism of this needs to be banished. Constitutional lawyers need to broaden their horizons and deal with reality. Those institutions which profoundly influence the patterns of public decision-making must all be within the ambit of constitutional law. Mass political parties are the most important constitutional development during the past century. They have transformed Parliament and elections.

Political scientists on the other hand, tend to think that parties are the only things that matter. They also believe that many of the things that occupy the minds of constitutional lawyers are irrelevant. Indeed, some of the political scientists are quite strong in their condemnation of the constitutional approach. This what Professor Richard Mulgan has to say:[1]

> [T]he relative blindness of laws and formal rituals to the fact that the major function of an MP is to be part of a party team is dangerous. It helps to perpetuate the misapprehension that there is something constitutionally disreputable or undemocratic about political parties. As we shall see, the truth is quite otherwise. Political Parties and the competition between them are an aid, not a hindrance, to democracy;... .

What has happened gradually in the twentieth century in New Zealand is that electoral politics have replaced parliamentary politics. Up until 1890 in New Zealand, individuals were elected to Parliament and once there they formed groupings from which ministries came, but it was all done within Parliament.

Parliament made and unmade governments in New Zealand in the nine-

1 R Mulgan *Democracy and Power in New Zealand* (2ed, Oxford University Press, Auckland, 1989) 58.

teenth century in a way which cannot happen now.[2] It was parliamentary politics of the type about which Bagehot wrote his classical account of cabinet government in Britain.[3] Cabinet inherited the powers of the crown, cabinet depended upon the confidence of Parliament for its continued existence and when those constitutional facts emerged, new institutions developed. They were the political parties based in the population outside Parliament. The political party did not centre around Parliament. Disciplined party organisation developed more fully as the franchise was extended.

So the constitutionalists surely have a point. In constitutional terms the main function of a political party is to capture and control the behaviour of the Parliament. In that sense a political party is certainly subversive of the institution of Parliament. The creation of one institution was for the purpose of capturing another. The aim of a political party is to dominate the policy outcomes of the Parliament and ensure that its programme is implemented. Certainly it is a recognition of the central importance of Parliament, and it must be acknowledged that political parties in modern New Zealand have been entirely successful in controlling Parliament. Due to a plurality voting system they enjoy an effective two party duopoly which the parties have been careful to nourish.

For more than 50 years there have been two parties which have formed governments in New Zealand. So political oscillations do not take place over a broad band at least so far as the names in the competing brands are concerned. What goes on inside the parties is another matter. Professor Robert Chapman wrote in 1989:[4]

> Writing at the end of the 1980s, one is struck instead by the confusion of party political beliefs and traditions; by public uncertainty about the role of government; and by the rising level of dislocation, conflict and, again, confusion in New Zealand society.

These tendencies have increased not decreased since then and political parties, or at least the two main ones, are receiving a lot of the blame. While that feeling is fair to some extent there are respects in which it is not. The whole system is not healthy and the way in which parties interact in the system is part of the problem. Chapman makes the very good point that the gift of party to governments was stability of support by MPs. "Party's gift to the electorate was meaningful choice between alternative governments whose proposals were known."[5] Professor G A Wood makes a similar point when he says "[p]olitical parties are part of the chain that binds government

2 W H Oliver *The Story of New Zealand* (Faber and Faber, London, 1960) 129 describes the politics of the 1880s in this way: "A two party system did not exist. In its place a congeries of factions congealed into alliances and dissolved into individuals."

3 W Bagehot *The English Constitution* (Fontana, London, 1963).

4 R Chapman "Political Culture: the Purpose of Party and the Current Challenge" in H Gold (ed) *New Zealand Politics in Perspective* (2ed, Longman Paul, Auckland, 1989) 14.

5 Above n4, 21.

to its electorate."[6] We have Chapman's first ingredient now, but the second is in the process of disintegration. The second feature has broken down in ways which are an important source of present political discontent in New Zealand.

The reasons for these developments are in my view structural and we will not reclaim the old order and symmetry. It has gone and will not come back. If permanently incapacitated political institutions are to be avoided, reform is essential. Such is the modest message of this chapter.

II WHAT PARTIES DO

The most important functions that political parties perform in our system of government are:

- to provide the machinery of political organisation
- to raise money, and to spend it on election campaigns
- to select candidates for parliamentary elections
- to decide party policy and promote it
- provide a means for people to participate in the political process

The rules governing political parties in New Zealand are almost entirely within the power and competence of the political parties themselves. They determine the rules. So long as they meet the requirements of the Electoral Act, they are free to behave as they please. The Royal Commission on the electoral system observed that political parties were largely ignored by the law. Let me quote their report:[7]

> It proceeds on the basis that candidates will be nominated as individuals, that they will campaign as individuals and, on that basis, they will or will not be elected.

The fact that the central elements of the political process as set out in the Electoral Act make no reference to political parties, surely should be regarded as somewhat remarkable given their pivotal role in that very system.

Some activities of political parties may be reviewed by the courts under modern administrative law and it has happened.[8] But it is fair to say that

---

6 G A Wood *Governing New Zealand* (Longman Paul, Auckland, 1988) 71.

7 Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) 265.

8 Writs were filed over a dispute in the Labour Party in the electorate of Auckland Central in 1989. The dispute turned on conflicting interpretations of the constitution of the New Zealand Labour Party and the then constitution was drafted in a way that was bound to produce dispute. But there were underlying personality and political conflicts which also fuelled the row. After tortuous negotiations with lawyers present a settlement was achieved. See also the unsuccessful proceedings by the Social Credit party against a former member: *O'Brien* v *New Zealand Social Credit Political League Inc* [1984] 1 NZLR 63; *O'Brien* v *New Zealand Social Credit Political League Inc (No 2)* [1984] 1 NZLR 68; *New Zealand Social Credit Political League Inc* v *O'Brien* [1984] 1 NZLR 84. There have been several disputes within the British political parties that have ended in court: *John* v *Rees* [1970] Ch 345; *Lewis* v *Heffer* [1978] 1 WLR 1061; *Conservative and Unionist Central Office* v *Burrell* [1982] 1 WLR 522.

political parties are amongst the least regulated of all the institutions in our society. They are much less regulated, for example, than public companies. Indeed the form of legal personality of political parties has kept it as primitive as possible, deliberately. The two major parties at least have no corporate personality. They are not even incorporated societies.

There are a number of reasons for the pattern. Suing them is much more difficult given their current form of legal organisation. Executing a judgment against them is virtually impossible; but preserving financial secrecy is clearly the most important reason for their existing form of legal organisation. The parties do not want to disclose anything about their finances to anybody. The irony in all this of course, is, that many organisations of much less constitutional significance are in fact subject to the Official Information Act, but not political parties. Yet, political parties are not the private organisations that their legal structures would suggest, they are in fact important public bodies invested with considerable power and authority to affect the lives of citizens. It would be a salutary and simple step to make them subject to the Official Information Act. It is perhaps not widely known that the Official Information Act does not have any application to Parliament, caucus and the Parliamentary Service Commission. I tried to change that. My colleagues would not have it.

The conduct of political parties, both in their organisations generally and in their arrangements in caucus, are subject to very little law indeed and hardly any constitutional conventions either. These are the institutions which deal with political competition in the community, but they are subject to almost no safeguards or restraints. To underline the point consider what the parties and caucus have the ability to do:

- choose the Prime Minister and Deputy Minister
- in the case of Labour, choose the Cabinet
- choose the Leader of the Opposition

People of course in New Zealand are free to join political parties. Most choose not to do so. I am confident that the total membership - individual membership that is of all the political parties in New Zealand at the time of writing in 1992 is less than 10 per cent of the population. Of those people who are members of political parties, many of them are not people who could be categorised as political activists; in other words they may pay a membership or subscription, but they do not go to meetings. They do not participate in policy-making, they do not participate in candidate selection, and they do not participate in a lot of other things that political parties do.

Indeed, of those people who do participate in party activity, quite a lot of them do so for reasons that really are not strictly political. There is one interpretation of political parties in New Zealand called the "Tea and Scones" or a social interpretation of politics; there is a branch meeting, someone does the catering, they make the tea, they make the scones, there is a little talk, there is a raffle, everyone comes for a pleasant social occasion devoid of much political content. People come with friends. They might like to

meet the local MP. These people have some sort of minor celebrity status and meeting them is thought to be entertaining. I do not mean to disparage the social function the political parties perform. It is important and beneficial. I have seen it provide interest and a locus of social contact for people who greatly needed it. For some, political activity is therapy. Often people who engage in party activities really do not have many strongly developed political views or agendas, and their interest in political issues themselves is not intense; more often they feel a general attitude of support towards the party. They feel loyalty to the party whose meetings they attend, but it is not a central feature of their lives.

The political parties do, however, attract *homo politicus* who is the person passionately interested in politics, with strong policy views and prepared to work hard at organisation, an important but thankless task. In my experience something like ten per cent of the signed up members of the party in my electorate were active participants in the meetings, the policy discussions and in doing the real political work. These are the activists. Perhaps it is different in marginal seats, but not much. New Zealand's political life depends on the active efforts of remarkably few people. They select themselves and MPs are glad to have them, although I have known some who keep the membership down deliberately so they do not have difficulties in their electorates with selection and policy arguments.

The activists are vital to the success of the political party on the ground at election time. They get the voters out. They are the ones who spend a great deal of their leisure time on politics, which means going to numerous and endless meetings at which many of the same people appear. The activists dominate the proceedings at electorate level, regional conferences and New Zealand conferences. They are often people of high principle and high motivation who want to make their country a better place. But they are not particularly representative of moderate opinion in the community at large. They have political commitment, which is absent in most of the population. They have strong and often radical policy beliefs which are often not shared by ordinary people. But these are the people who control the destiny of the party.

Effective control of the political parties is in the hands of a few people, and these few are not greatly accountable to the membership of the party at large, let alone the general public.The membership could be in control if it exerted itself and came to meetings.Votes are taken on everything at every level. But many prefer to judge matters from afar and simply not renew their membership if they do not like what is going on. This insight is not particularly new. Michels saw political parties as dominated by the "iron law of oligarchy" as long ago as 1915.[9] The prospect of ordinary people making a great impact on the programme of the party was very early found to be exaggerated. Parties have always been the subject of great hopes and enormous cynicism.[10] The facts suggest two possibilities in New Zealand.

9 R Michels *Political Parties* (Free Press, Illinois, 1958).

10 J Blondel *Political Parties: A Genuine Case for Discontent?* (Wildwood House, London, 1978) 11.

Perhaps the political parties do represent well the views of the community at large despite the fact that few belong. Or perhaps they are good enough politically to know they must temper the opinions of their most active members in order to have electoral appeal.

In New Zealand now we are in a period of disillusionment with parties, but that seems to have caused the development of new parties rather than the decline of the institution altogether. It is true that political parties have conferences and that they have regional conferences, but there is not a great deal that goes on at those meetings which acts as an effective control or check on the party hierarchy or MPs. Conferences do debate and they do pass remits on policy matters and I will say more about policy later. Parties do not really represent the real views of the population as a whole. That does not mean to say that they do not represent real views - they do. But they do not represent as much as they purport to represent, or even as they appear to represent. There is a great deal of public dissembling which goes on about party membership numbers, but even when there are many members most of them are in effect sleeping.

In the reality of the political process, the parties are everything and the candidates who do not belong to political parties have no chance of success. That statement could be amended by saying unless a candidate is a member of one of two main political parties there is hardly any chance of success. That has been true for fifty years in New Zealand although it may be in the course of changing. The parties do not have large memberships in terms of the total population. The views of their activists are not the views of the electorate at large. Yet the electorate at large votes for candidates put forward by political parties and never independents. The received wisdom in New Zealand political life is that the quality of the candidate may make a difference of 800 votes one way or the other, but not more. The one thing the party system does ensure is that the electorate can change the government at three-yearly intervals if they are unhappy. That ability would be greatly reduced if there were no party system.

In the four elections I was a candidate for the electorate of Christchurch Central I had a quite large number of opponents - sometimes 7 or 8. Some of them were members of some strange little organisation or other often invented for idiosyncratic reasons. There was a party interested in promoting eugenics. Someone connected with the Wizard once ran. A disc jockey once ran for fun. But it was of supreme irrelevance. The seat was one of the safest in the country. No vote there could ever change the government. Not that people without ability are necessarily selected by parties for safe seats. The Labour Party in Christchurch Central has always taken very seriously its responsibility to select a good MP because it is a fortress seat. Because it is safe there are plenty to choose from - there were eighteen who sought the nomination I was lucky enough to win in 1979. Furthermore, the electorate always sends most of its money to help the campaign in marginal seats.

The political truth is that voters do feel loyalty to a political party and vote for it consistently, at least in safe seats. And the safe seats do have

some uses. MPs can pay attention to what is happening in Parliament instead of perpetually nursing their electorate. I well remember as a relatively new MP, being able to have unlimited debating time given me in the House on the evils of the 1981 Springbok tour, because more senior members were in marginal seats where it was not prudent to give voice to such sentiments.

It is a great comfort for an MP to have a safe seat because it involves virtually no campaigning at all. In two elections after 1983, when I was elected the Deputy Leader of the Labour Party, I never spent more than 3 days campaigning in my own seat. I was always campaigning on behalf of the Party in other seats - marginal seats. That is the reality of party politics in New Zealand today, that it has to do with marginal seats; not safe seats. And it has to do with party, not individual candidates. There are not as many safe seats as there used to be, but there still are a number on both sides of the house and marginal seat organisation and campaigning determines who is the Government.

There are some exceptions to the principle that only individual candidates are recognised by our electoral law. The law does say that election officials are not to hold any post in a political party.[11] The law does recognise that unofficial members of the Representation Commission do represent political parties[12] and party designations are now on the ballet paper.[13] It is, however, apparent in our system of government, that electoral competition is the single most important control on the exercise of power in the government of New Zealand. The only threat to single party domination is the existence of one opposition party capable of making a credible bid for the treasury benches.

Indeed, the whole thing can be likened to a franchise. The powers of the government in New Zealand are powers in the nature of a natural monopoly.[14] The franchise for exercising this monopoly is limited as to time. At the expiration of the time there is a further bidding process, and the bidding processes are called elections. So the predominant feature of our system is competition between the political parties. It is hard to see what merit there is in the traditional fact that there are only two principal parties engaged in the competition. It can convincingly be argued that in an increasingly pluralistic and heterogeneous society, public choice cannot be confined to two views of complicated policy issues.

The fact that there are only two major political parties which can be regarded as realistic competitors for holding the monopoly franchise, adds to the fact that each party is, in reality, a complex coalition of interests which often sit uneasily together. Ideology, which is often discussed in

11 Electoral Act 1956, s9(3).

12 Electoral Act 1956, s15(1)(e)

13 Electoral Act 1956, s87(3)(d)(i)-(iii) and Form 8, First Schedule.

14 M Palmer "A Reinterpretation of Ministerial Responsibility" (Unpublished paper, Yale University, 1991, on file Victoria University of Wellington). This lengthy paper develops a new interpretation of ministerial responsibility based on public choice theory.

popular political debate, is frequently irrelevant in the operation of the main political parties, except perhaps in the sense of trying to maintain some sort of primitive tribal loyalty devoid of much intellectual or policy content. We are coming to the end of ideology in New Zealand politics. The new right has not provided much that is enduring. Ideology was never much of a main spring in political action in New Zealand anyway; pragmatism was always much more powerful.

III SUGGESTIONS FOR REFORM

While the decisions of political parties are critical in determining who is elected to Parliament, they are not as critical in determining which policies a government will follow, or at least not on every issue and not as much as their members would wish. The nature of the two-party system of Government in New Zealand is greatly influenced by the electoral system itself. The first-past-the-post or plurality system will provide a two-party system of government in almost all circumstances. This is one of the few clearly established propositions in political science.[15]

I do not want to rehearse in any detail here the case in favour of proportional representation in the electoral system, but it does seem that the duopoly, or perhaps more accurately, two-party monopoly of the New Zealand political party system itself constitutes a strong argument for adopting the recommendations of the Royal Commission which would have introduced an MMP system of representation. Electoral reform I have favoured since I wrote the first edition of *Unbridled Power* in 1979. Proportional representation will limit the freedom of action of the two main political parties when in office, and it will restrict their opportunities to gain and hold political office. Proportional representation may be a good thing for the public, but it is most certainly unlikely to be perceived as a good thing for the two main political parties themselves. It will reduce their power, control, and influence.

Quite apart from proportional representation, there is a very strong case for following the recommendations of the Royal Commission on reforming the law relating to political parties. Those recommendations were not adopted in the most recent changes to the Electoral Act, but in my judgment there is a great deal of merit in them. The recommendation was that political parties, given their prominence in the electoral system, should be registered, and that registration would be open to any party that had 200 members; registration would lapse unless the party fielded 3 candidates in the general election.[16] An independent body called the Electoral Commission was recommended also by the Royal Commission.[17] It was the body to make decisions relating to the registration of political parties, subject to an appeal to the High Court. In order to get registration, political parties would have to

15 W H Riker "The Two-Party System and Duverger's Law: An Essay on the History of Political Science" 76 *Political Science* 753, 761 (1982).

16 *Report of the Royal Commission* above n7, 265-268.

17 *Report of the Royal Commission* above n7, 271-275.

meet certain requirements which were to be laid down in the law. Obviously, with MMP, the rules of the party dealing with the selection of candidates takes on a heightened importance, but even without it those rules are of great importance in the conduct of our democracy.

I can say from personal experience that the rules of the New Zealand Labour Party, as they were actually practised in the run-up to the selection of the Labour candidate in the seat for Te Atatu for the 1990 election, were quite unacceptable by any democratic standard. The rules themselves invited abuse and abuse was certainly forthcoming. Given the fact that the rules are often written by party conferences which are dominated by people who see themselves, or their friends, as potential political candidates, it is quite understandable how these things take place. Political activists have all sorts of means of rigging nomination meetings - it is almost an art form. To have the rules of the political party selection process subject to outside scrutiny and review, would be a salutary and important democratic check.

One of the central difficulties of the Labour Party's constitution in New Zealand is to accommodate the participation of trade unions within the party. It has been a source of difficulty all the time I have been involved with the party and it is not capable of being resolved in a satisfactory way. The Labour Party consists of ordinary branch members and affiliated members - that is members of affiliated trade unions. Unions vote in accordance with their own rules about whether to affiliate. Some unions carry the vote by a certain percentage and they only affiliate that percentage of their members. They must pay a levy to the party based on the number affiliated. In return the unions receive multiple votes at regional and annual conferences. They can also send delegates to the Labour Electorate Committee, the major decision-making committee in each electorate.[18]

In fact the power of the trade unions in the Labour Party is exercised by the trade union officials with little effective control from the rank and file of the trade unions. When it comes to using members of trade unions to vote for the floor vote, or select delegates for the panel at selection meetings, real problems arise. How does the electorate know who are the affiliated members of the trade union in the electorate, when there is no list of names and addresses made available by the trade union? The constitution of the party does allow the general secretary of the party to look at lists of names and addresses in the union records, but no-one else. How do the branch members feel when they have done all the work over the years only to find that, when a decision of real importance comes up, their views are swamped by trade unionists acting under instruction, often unionists whom the branch members have never seen before? Various efforts have been made to clean up the procedures over the years but none is free from difficulty. The truth is that it would be more democratic if there were no affiliated members. But then the trade unions would effectively lose much of their power in the Labour Party. And for better or for worse it is a party

18 *New Zealand Labour Party Constitution and Rules* (New Zealand Labour Party, Wellington, September 1991) rules 5, 9, 44, 165, 172, 232, 239, 243.

which has in many ways been defined by the trade unions. At least if there were independent scrutiny of the rules of the constitution it would be a protection against undemocratic provisions.

That other great function of political parties, that of raising money, is similarly capable of abuse. I agree with the Royal Commission's recommendations that there should be no restrictions on the size or source of donations to political parties, and I agree with the recommendation that parties should be required to disclose the funds they have received and the names and addresses of the individual donors who have given money.[19] The recommended threshold for disclosure was $250 at electorate level or $2,500 at regional national level, but the chances of those recommendations being accepted by the main political parties are zero. There would also be a lot of resistance in the business community to such a disclosure rule.

Political parties are kept viable by donations from the business community. Financial donations from rank and file members are quite inadequate for the day-to-day running of a modern political party let alone for financing election campaigns. The 1987 and 1990 election campaigns of the Labour Party were financed by extensive donations from the business community. The Labour Party campaign received at least $3 million in 1987. Donations tend to dry up if business does not like the policies that are being pursued. One can argue of course that this financial 'muscle' gives the business community in New Zealand more power over the direction of government policy than it should have, but the influence is much less direct and much more muted than the conspiracy theorists would like to portray.

The whole question of state assistance to political parties is unpopular with the public, which is why any state assistance tends to be covert rather than overt. Parliamentary mailing privileges are a good example; an enormous amount of mail goes out from the Prime Minister's office, from the Leader of the Opposition's office and from MP's offices at public expense. Much of it is propaganda designed to help in elections. All the political research overseas shows that direct mail is highly effective when carefully targeted, and sophisticated computer programmes applied to the electoral rolls make this simple. Vast amounts of propaganda mail have been sent out from the New Zealand Parliament in recent years. MPs have the right to send mail free. This privilege gives an advantage to incumbent MPs at election time compared with their opponents.

There have been a series of reports and inquiries into the ever- increasing levels of expenditure spent by MPs on postage, printing and travel. The Auditor-General has taken a close interest in the subject after receiving complaints from the public.[20] The Expenditure Select Committee reported on it in December 1991.[21] An outside review was conducted and reported at

19 *Report of the Royal Commission* above n7, 185-190.

20 *Report of the Controller and Auditor-General on the Parliamentary Postal Privilege* (1990).

21 Finance and Expenditure Committee *Report on the Inquiry into the Expenditure of the Parliamentary Service* (1991) AJHR Presented to the House 3 December 1991.

the beginning of 1991.[22] The message was the same in all of these investigations. The system was under no effective control as to the amount of expenditure. The report done by a Treasury Official and two former MPs, one from each side of the House, recommended in February 1991 "that a full study be undertaken as soon as possible of the feasibility costs and benefits of setting an annual budget for each Ministerial and Member's cost centres so that any decision to set such budgets is made in time for the 1992/93 financial year." While that report met with little approval the Expenditure committee did recommend in December 1991 "[t]hat a system of global budgets for each political party be introduced for the items of expenditure: postage, printing and photocopying."[23] The committee went on to recommend that all costs associated with MPs' offices including postage, printing, travel, photocopying, telecommunications and taxis should be identified on an individual member basis and provided to whips as well as the members. The Leader of the Opposition should be treated as a minister and not be subject to the system of global budgets. This report was in response to a blow-out in costs, particularly in printing and photocopying.

The amounts of money in 1990-91 were as follows:

Photocopying and Printing in Parliament	$1,461,000
Postage	$1,374,000
Outside Printing	$1,025,719

An MP could spend any amount at any time on these services. Whether the new system will be effective is not known at the time of writing. There are other items of uncontrolled expenditure as well - all MPs and their spouses can travel by air within New Zealand whenever they wish. They also have free telephones and toll calls.

There is tension from two sources in bringing these items under effective budget control. If the expenditure is fixed by the executive then the independence of Parliament is eroded and MPs are rightly jealous of their ability to preserve parliamentary control. The second difficulty flows from a distinction which is often impossible to make. The rules on printing and postage are supposed to allow for material which relates to parliamentary business and not party political material. Since most of what goes on in Parliament is party political contest the distinction is unreal. Towards election time an enormous flow of material streams from Parliament into the electorates, material which is designed to persuade voters, however it is dressed up.

The absence of rules on travel came to attention during the Tamaki by-election in 1992 when many MPs were campaigning there. They appeared to be using the parliamentary travel privilege for party political purposes. I remember being told by one of the whips when I was elected an MP that I could, if I wished, join the Invercargill Public Library and travel there as

22 Office of the Clerk and Ministerial Services Branch of the Department of Internal Affairs *Review of the Parliamentary Service* (T M Berthold, I McLean and S J Rodger, February 1991).

23 Finance and Expenditure Committee, above n21.

often as I liked to change my books. But, of course, I never did. MPs have to fly so often that they avoid it as much as possible. I once had to travel to Wellington from Christchurch twice in one day to help a constituent. Limiting MP's travel would be silly. Travelling around New Zealand is essential to the job and it is no use the Auditor-General or anyone else complaining about it. Travel is a necessity for MPs; it is no pleasure.

Obviously some of the money spent on the items discussed above is used as a hidden state subsidy to the political parties. But it is unrealistic to expect it to stop because MPs would not be able to carry out their jobs as required by the present system. The only effective way to deal with the problem of expenditure by MPs is to give each member a total budget. But even this is not a simple step. Wellington MPs would not have the same travel expenses as the MP for Invercargill. A formula could be devised. This would encourage thrift and accountability. It would also be a salutary step to make the Parliamentary Service Commission subject to the Official Information Act so the facts can be found out. Sunlight is a good disinfectant.

The Royal Commission's recommendations about state funding for political parties were rather modest, but even those modest recommendations have not been accepted. If they were, it would tend to lessen the dependence of the political parties on the business community, which would be a very good thing. Money is a constant source of anxiety to political parties; they never have enough to run their organisations properly. It may surprise New Zealanders to know that in 1991 Greenpeace employed more people in New Zealand than any of the political parties. When it comes to paying for campaigns large sums are needed. The amount of money which can be spent on modern election campaigns is staggering and no one really knows how much difference it makes. It is spent on advertising, pamphlets, filming television commercials, public opinion polling on a daily basis during the campaign, telephone canvassing and door-to-door canvassing.

The allocation of broadcasting time prior to elections is another source of hidden state funding for political parties. If the parties had to purchase television time they would need a great deal more money. Efforts have been made to minimise the share of small parties' broadcasting time and in some cases squeeze them out altogether. Decisions on allocation should be removed from broadcasting or government and made by the independent Commission recommended by the Royal Commission on the Electoral system to supervise the activities of political parties. Allocation decisions ought not to be made by passing a law through Parliament close to election time, or by political parties negotiating with the Broadcasting authorities. Such decisions ought to be made by an independent body.

The case for registration and regulation of political parties in the interests of the wider democratic health of the country, is to my mind overwhelming. It will be resisted, however, by the small group of people in New Zealand who actually run the main political parties. They do not want to be accountable and some of what they do could not easily stand public scrutiny.

The fourth major function of political parties which I outlined earlier, is

the making of policy. It is in this connection that the interaction of the parliamentary representatives with the rank and file members of the party outside parliament becomes a critical consideration. It is also in this respect that the institution of caucus must be discussed. Caucus can be regarded as the instrument by which the political party controls the Parliament. But this assumes that the aims and outlook of the Parliamentary party are the same as the leadership and membership of the party outside Parliament. Frequently this is not the case. The factors which have caused such developments are intricate but it is not some temporary phase. The complexity, the difficulty, of the multi-faceted nature of the decisions which have to be taken by any New Zealand government in contemporary conditions are the primary reason.

IV THE PARTY IN PARLIAMENT

The world that we have lost in political terms was a very simple world. Simple political institutions which over-simplified reality were adequate. Now such political institutions are quite inadequate and their inadequacy is becoming increasingly obvious. Caucus is at the heart of all of this. Caucus is an antipodean contribution to Westminster-style government - it exists in its most rampant form, only in Australia and New Zealand. Caucus is private, Parliament is public. Of course it would not do for members of the same party to argue with others in Parliament, the public would think there was a lack of unity. (There is always a lack of unity, but it would be bad if the public thought so.) Caucus is the instrument by which unity is achieved in private by majority vote. All are bound by the outcome. In the days before the rise of electoral politics and in the heyday of parliamentary politics, that actually happened in the Parliament itself. The effect of caucus has been to short-circuit that process. Now the caucus structure in New Zealand produces the most rigorous party control of any Parliament, anywhere. It is unnecessarily brutal and inflexible.

In British terms on government bills in New Zealand, we have a three-line whip on almost every vote. A 'three-line whip' is a term which I should explain - it comes from the activities of the whips at Westminster who put up notices for MPs on a notice board. These notices have lines showing expected divisions. A one-line whip has one line under it and so on. A one-line whip is not a very serious vote, it does not really matter how the MP votes. The party two-line whip is a stronger one, but not of critical proportions; not voting for the government will be forgiven if there is a good reason. A three-line whip might be a confidence vote, in which government MPs better vote for the government, or look out! We do not have these distinctions between votes in the New Zealand Parliament. In New Zealand a vote is either whipped or it is not. The vast majority are. In effect, every vote in the New Zealand Parliament (except a conscience vote) is a three-line whip. It is just a custom, and the custom could easily be changed. It would be a good thing if it was changed, more flexibility would

only be a recognition of reality.[24]

But looked at from the point of view of the executive, the New Zealand system has a substantial set of advantages over a looser system. Things are predictable. The Government knows in advance the fate of its legislative and budgetary measures. It knows that legislation will preserve coherence because it will not get out of control on the floor of the house. MPs will not be able to jump up and move amendments that might carry, putting big holes in the policy of a bill. That happens in many democratic legislatures. It is hard to manage.

For the executive branch of Government, therefore, caucus is a sure way to control outcomes in the Parliament, and it is the prime instrument in producing what Lord Hailsham calls an elective dictatorship, a form of Government more evident in New Zealand than in the United Kingdom for which country the term was coined.[25] But do not think that caucus is only advantageous to the executive. It is also of great solace and importance to back-bench MPs. For an MP in a marginal seat there are certain advantages in being able to hide behind a caucus decision. The caucus decision is a bit like the featureless generality of a jury's verdict. Everyone can hide behind it. For example, an MP who wants to conduct a crusade against frigate purchase can make statements against and speak against frigates, vote against them in caucus, lose and then go out and deplore the decision. The MP can present herself as a hero if there is a strong peace organisation in her electorate. Some think unpopular decisions are in fact much easier to defend in the electorate if the MP can say she was not in favour of them. That has begun recently to lead to a new development in New Zealand politics which looks now to be popular, but which will prove in the end, I think, to be mistaken. It is the increasing tendency by back-bench MPs to campaign against the government, even if they are members of the government party. They think it will bring them popularity, but I suggest it will convince the electorate that if they as government MPs do not think it worthwhile to support the government, neither should the electorate.

Without caucus, MPs would be bereft. They would be like lost ducks in a thunderstorm. The truth is that if individual members of parliament in New Zealand had to consider how to vote on each issue as it came up in Parliament, they would be unable to function. They are unused to behaving in that way. The system does not allow it. Yet in many overseas legislatures that is precisely what happens. In American legislatures, party affiliation as an influence in voting behaviour has been lessening markedly, and does not control or predict a legislature's vote the way it does in New Zealand. I have often heard it said in the United States that Americans do not really have political parties as in New Zealand. They prefer democracy, but it is a democracy subject to a rigorous separation of powers amounting to a form of limited government quite unknown to us.

---

24 Such a change requires an alteration to the Labour Party constitution. All candidates are pledged under rule 227 to vote in Parliament in accordance with decisions of the caucus.

25 Lord Hailsham *The Dilemma of Democracy* (Collins, London, 1978) 125.

In axiomatic terms, the New Zealand system of government works like this:

1 Political parties select and offer candidates at general elections for Parliamentary seats.
2 Political parties announce policy intentions, prior to elections concerning what they will do if the party secures enough seats in Parliament to become government.
3 Party candidates who are elected to Parliament, elect the Leader, the Deputy Leader of the party and, in the case of the Labour Party, those members also elect the cabinet.
4 In government, all major policy decisions, appointments and legislation are agreed to by the caucus before being introduced into the House, or announced. It should be noted, and it is important to note, that all those decisions are actually made in cabinet. Cabinet votes as a block in caucus and can always effectively control the caucus. (This latter proposition may be open to doubt given the size of the present National Party caucus.)
5 By these means, the government is assured of a majority in Parliament for its measures. It is exceedingly rare in New Zealand for Members of Parliament to vote against the decisions of their party of caucus.
6 The accurate inference from all these foregoing propositions is that cabinet can do anything.

This system as it is practised in New Zealand has a debilitating effect on the Parliament. Professor Keith Jackson puts it this way, "while undoubtedly having a number of theoretical and practical advantages, its overall effect on the parliamentary system in New Zealand has been adverse."[26] The reason is, that caucus has reduced Parliament to a rubber stamp, it has sucked the vitality from it. It is important mostly as a political contesting place with the next elections in mind. All important issues are pre-cooked, in caucus. And by offering an opportunity, (which tends to be more illusory than real), to ordinary MPs to have some influence over government decisions, government MPs are thereby stopped from disputing the validity of those decisions later, and they must vote accordingly.

V POLICY: THE STRUGGLE FOR CONTROL

A trend is developing in New Zealand politics. There is an increasing divergence between the agreed policy of the political parties at election time and their performance in office. Some of the more blatant examples were discussed in Chapter 1. Both main political parties have set out in their constitutions the procedures to make party policy. In the National Party according to its constitution, the functions of the policy co-ordinating

26 K Jackson "Caucus: The Anti-Parliament System?" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul, Auckland, 1992) 233, 244. See also A Mitchell *Government by Party* (Whitcombe and Tombs Ltd, Christchurch, 1966).

committee are to co-ordinate, encourage, stimulate and supervise various policy activities of party members, and to facilitate the flow of material to divisional policy committees, electorate policy committees and to the policy committee of the party itself.[27] The National Party's constitution says the policy committee consists of the Leader, the President, two persons elected by the national executive, who cannot be MPs, and two persons appointed by the Leader from the caucus, who are MPs.[28] That is the group which drafts and finalises the policy of the party, and there is in that a balance between representatives of the party from outside the Parliament and the MPs.

With the Labour Party this, as with so much else, is much more complicated. The policy used to be made by the annual conference; that proved to be rather impracticable. It tended to produce a whole range of policy commitments which could not possibly be implemented and would have caused embarrassment if the party had actually won an election based on them. I remember once at a Labour Party conference, $500 million was spent on the social welfare remits in 10 minutes. Such warm-hearted feelings are to be applauded but the economic unreality of it had to be contained somehow. In the mid-seventies, a group of activists campaigned to change the party constitution and to set up a policy council.

Yet one of the motivating forces when the policy council was established was mistrust of the parliamentary wing which was prone to ignore the wishes of the conference when it seemed politically expedient. That tension between the two wings took different forms over the years, but it was a constant feature of the Labour Party in the years I was active in it. The original policy council, which had 15 members (five were elected by conference, five by the caucus plus five special sector representatives) functioned quite well for a number of years. Such institutions are much easier to run when the party is in opposition than when it is in government because there is less tension. When the party was in government, and the policy council met, there was always debate about government actions with which members disagreed.

There were, when the Labour party got into government, increasing difficulties forming policy. Who made it? The government or the party? There was, at the 1988 conference, a crisis about policy and particularly the government tendency not to implement agreed policy, or to do the opposite. The Labour Party conference agreed on special procedures for reconciliation when the government felt obliged to depart from the details of the election manifesto. Part of that accord established ten policy committees to deal with policies contradictory to the Manifesto or not contained in it. Operationally these committees became a mire of confusion, doubt and resentment.

It is noteworthy that the Manifesto for the 1987 election had not been

27 *Constitution and Rules of the New Zealand National Party*, Issued by the authority of P B Leay, Secretary General (8ed, 1986) especially Rule 43.

28 Above n27.

published until after the elections were over. The party's constitution requires that both the party's governing council and the caucus agree to the Manifesto. Trying to get both bodies to agree is one of the more challenging undertakings I have been involved in. The caucus wanted short statements of principle which did not spell things out in a way which could mean future embarrassment when commitments were not followed. The Party wanted to tie the MPs with detail because they were nervous that what conference had voted on, and what the policy council had framed, would be abandoned by the government in office. There was an underlying strategic concern in the campaign that the totality of the policy would create an impression which was misleading. So Margaret Wilson, the President, and I devised a scheme for giving out policy statements which were authoritative, but not published together in a Manifesto until after the election. It was a successful strategy for the 1987 campaign but the underlying tension and problems remained as an irritant.

In the new constitution of the Labour Party adopted after the 1990 election, the policy council consists of 6 members, three elected by the New Zealand Council, 3 from caucus.[29] The primary function of the new council is to prepare policies for the Manifesto. To do this, a complicated set of policy committees are established to provide reports which are discussed and debated at annual conference, and which are submitted to the policy council. There are ten policy committees and each of them has 6 members, three appointed by the New Zealand Council and three by the caucus. It is also possible for matters to be inserted directly into the Manifesto by the annual conference under a procedure called a manifesto card vote.[30] These procedures are exceedingly complicated and there is little chance, in my judgment, that they will work well. Their main purpose is to prevent members of the caucus, the MPs from controlling the party's policy. But as the public's elected representatives they will continue to want to do this. Both MPs and the New Zealand Council are required to approve the Manifesto. MPs are exposed to the arguments, they have access to information that rank and file members of the party do not have. They debate these things constantly; on select committees they are exposed to a lot of highly educational material and other advice available to government. MP's views develop in the context of their service to the whole community. Often, those views are not shared by the rank and file of the party. Furthermore MP's views are tempered by the fact that if the policies are unpopular or impractical they may lose their seats.

The method of making policy in political parties is haphazard and impractical. It is expecting a great deal to think that broad-based organisations, with members who give their time voluntarily, will be able to behave professionally and knowledgeably in the making of policy. The parties are often captured by people who are occupationally active in a particular area.

29 *New Zealand Labour Party Constitution and Rules* above n18, rule 148 as adopted by the Annual Conference 1990. The rest of the policy-making machinery is contained in rules 149-151.

30 *New Zealand Labour Party Constitution and Rules* above n18, rule 149(r).

Sometimes they represent a pressure group point of view within the party; often they are there to ensure that the party adopts a particular policy about which they feel passionately. On the other hand, MPs are particularly motivated by one aim - to be elected to office. They do, after some experience, understand the constraints of public opinion and, in particular, the constraints of the economy on policy development.

What can happen is that the parliamentary leadership and the leadership of the party outside, develop a tense relationship, may even work in opposition to each other. It is hardly surprising, therefore, that a credibility gap for political parties has been developing in our political system. The grass roots of the political party comprising several hundred political activists, and the party leadership outside the Parliament, will state their aims and aspirations forcefully. These will be the passionate opinions of the political activists who work for the party, raise the money, knock on doors and do all the other things that armies of volunteers must do for political parties to succeed. But these opinions may be unrepresentative of the whole community. There is a further problem; sometimes commitments made by the processes I have described and put in party policy *cannot* be implemented - frequently because there is not enough money. Sometimes, if elected to office, the parliamentary wing may have to reject commitments made with the best of intentions, while conscious that it will have an adverse effect on the party's future prospects.

Professor Richard Mulgan has analysed in trenchant terms the essence of the traditional party policy obligation in New Zealand.[31]

> To break a commitment is to break faith with those voters who chose to vote for the party for that reason. Moreover, the breach of an electoral commitment will make the government appear generally untrustworthy and will jeopardize its support, even from those who did not know or care about the particular policy in question. Hence the very strong obligation on the party to enact all its election policy regardless of how many voters may or may not have been aware of each item in it. The strength of this obligation, together with the convention that requires parties to present the electorate with very detailed election policies, means that New Zealand governments are considerably constrained and limited in certain areas of public policy.

Despite events of the last few years, it remains true that many of a party's policy commitments are translated into government policy. It is true, though, that in recent years some highly conspicuous undertakings have been ignored by the government, or the opposite has been done.

One obvious recent example illustrates the point that political parties cause some of the problems. It has long been clear that New Zealand could not afford the national superannuation scheme implemented by the National

31 *Democracy and Power in New Zealand* above n1, 68.

government in 1976. It was too generous, took too large a proportion of our tax dollars, and as the proportion of the population which was qualified to receive the benefit increased, it was clear the scheme could not be sustained economically. This was obvious to any policy analyst before the 1990 election and must have been obvious to a number of MPs in the National Party. But the party promised to retain the scheme and even to abolish the tax surcharge put on it by the Labour government. Why did they do this? It seems in retrospect to have been such a silly promise.

I have no inside information but I suspect they did it because of the democratic and political operations of the National Party itself. Many of the active members of the National Party were superannuitants. They had a passionate interest in this policy and the iniquity they perceived of Labour's surcharge. They contributed money to the party; they worked for it, they delivered the leaflets, they got out the vote. No doubt most National Party branches, and the conference, had passed resolutions on this policy which would have been one of the key items of interest of the party activists. These views would have been well represented in the policy formation process when it came to drawing up the manifesto. For the National Party leadership to have faced down the policy and refused to run with it would have created a major crisis in the party in an election year. I doubt that Mr Bolger could have accomplished such a task. So he could not avoid the promise and he could not deliver on it either. That is the curious logic of the political party system we have in New Zealand. It will happen repeatedly unless the system is changed.

It is possible to use the policy-generating procedures of political parties for political reasons of narrow sectoral advantage. Various groups with careful and pre-determined plans of action are able to secure commitments to certain causes which turn out to be impracticable, or impossible, or both. But under the democratic procedures used to make policy, there is little that can be done about it.

The labyrinthine difficulties involved in managing a political party in power have been well documented in a book by Margaret Wilson.[32] Her conclusion deserves to be restated:[33]

> The relationship between the party and government, however,was not only about specific policy issues. It was also about the way in which decisions were made by the government and the party. The Labour Party has emphasised the importance of accountability through a system of representative democratic decision making. This style of decision making is not always well suited to a government that feels compelled, through circumstances, to implement a programme of radical reform as quickly as possible.

Margaret Wilson's book is a study in how to reconcile divergent demands.

32 M Wilson *Labour in Government 1984-1987* (Allen and Unwin, Wellington, 1989).

33 Above n32, 1-2.

But as she concludes, the irreconcilable cannot be reconciled. Both main political parties in New Zealand are now in that situation and the only way out is to turn the spotlight on the parties themselves and reform them. It is truly a labour of the proportion of those performed by Hercules.

It is all a question of balance. MPs may well develop conservative tendencies and not want to change things. They need the idealism and vision of the party activists to ginger them up. New Zealand's nuclear free policy would never have come to pass but for the determination of the Labour Party conference. But maintaining the integrity of the internal policy-making procedures in a political party, and at the same time producing a policy which can be implemented in New Zealand's current economic circumstances has been virtually impossible.

These policy aspirations, especially those of the political activists, outstrip the capacity of the country to sustain them. New Zealand has always been a country with utopian tendencies. The parties must promise. The political imperative of announcing policy is what motivates the active portion of the membership. If the parties do not promise they will die. They must stand for something. That something must be exciting and saleable in the political marketplace. If they only promise what they can do they will also die. It will not be attractive. They will not win the policy auction at election time.The politics of austerity has had a fair run and there are not many votes in it.

VI CONCLUSIONS

In part, the solution to the policy problem lies in proportional representation. If there are several political parties with several policy points of view, a process of negotiation will often have to take place for secure policies to be implemented. No doubt this is complicated. It happens now in many other successful countries, but in this unsuccessful country we are used to something much simpler. We should relate our political discontents to the processes by which the decisions are arrived at.

In the final analysis, a government has to govern in the interests of the whole of New Zealand and two big political parties do not represent the interests of all New Zealanders, either in their membership or in the way they are presently constituted or run. Reforming their structures and the law relating to their structures is an enormous undertaking, but it is certainly an undertaking which ought to be carried out. Our constitution and our political science tells us little about how political parties are supposed to function. When one reads political scientists' views about how the parties function, one is struck by the fact that so often they have clearly been written by people who have never actually been there and done that. The way in which political parties are supposed to function in theory is quite different, in my experience, from the way they function in practice.

So we end this chapter at the very point we began. The constitutional lawyer needs to take more notice of the operation, structure and law relating to political parties and the need for democratic checks and balances

over their behaviour. The political scientist needs to pay some attention to the place of political parties in our constitutional arrangements and look at how they actually function. The ordinary member of the public can hope only that the system will be changed, quickly. The implementation of all the changes for political parties recommended by the Royal Commission on the electoral system is the place to start.

7
The Prime Minister, Cabinet and the Constitution

I INTRODUCTION

The first question which faces any analyst of Prime Ministerial power in New Zealand is to determine the nature and functions of the office. Those functions are not defined anywhere, they tend to be both flexible and excessively broad.[1] The most humble clerk in the New Zealand public service will have a list of defined duties. None exists for the most powerful post in the land. The *Cabinet Office Manual* offers this insight:[2]

> As the parliamentary leader of the party with the support of the House, the Prime Minister by convention is the head of the government. There is no statutory provision which establishes the office of Prime Minister, or which generally defines its role.

For New Zealand there needs to be some clear definition and understanding of what the Prime Minister is supposed to do. There needs to be a debate about the scope of the office. We tend to accept some impressionistic understanding of what Prime Ministers are supposed to do elsewhere, without stopping to see if such descriptions fit our own constitutional needs.

The observations on the office offered here are gained from two primary sources: being Prime Minister for 13 months, Deputy Prime Minister for 5 years, and often acting Prime Minister during that time. As Prime Minister I claim one distinction: I was the only New Zealand Prime Minister in modern times who neither won nor lost a general election.

I should observe that being the Deputy Prime Minister can be in many respects a more difficult job than that of Prime Minister, if it is done properly. It is a much less publicly visible job, but it can be extraordinarily demanding, being in my conception of it a trouble-shooting, crisis management and co-ordinating job. Co-ordination is most difficult to achieve at the interface between ministers and public servants since many of the operational and other issues deal with questions of emphasis, interpretation and detail. Providing effective ways of sorting out such things quickly and in a

---

1 The literature on the office in New Zealand is not extensive. The two most useful sources I have found to be K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) 94-136 and R Alley "The Powers of the Prime Minister" in H Gold (ed) *New Zealand Politics in Perspective* (3ed, Longman Paul, Auckland, 1992) 174.

2 Secretary of the Cabinet *Cabinet Office Manual* (Cabinet Office, Wellington, 1991) 2/1 A.

manner which preserves harmony involves endless hours of work. The Prime Minister does not often get involved in such a "hands on" role.

The observation of Rodney Brazier in a recent article in the *Modern Law Review* applies to both jobs in New Zealand: "[t]he office of Prime Minister amounts to what each individual is able and willing to make of it."[3] There does need to be clear agreement and understanding, however, between the Prime Minister and the Deputy as to the respective roles of each. No two administrations ever work the same way due to differences in temperament, aptitudes and interests. Personal style of working has a big impact on cabinet government and there are many different styles.

A prime requirement of the Deputy's job is loyalty to the Prime Minister. The Deputy Prime Minister is in a position to undermine the Prime Minister more effectively than anyone else in the caucus. The only way to handle this in my experience is to be totally supportive at all times, even when counselling privately different behaviour. It does require, however, full and frank statements from time to time. David Lange's book shows that he resented very much my advice to him that he had lost the confidence of the cabinet over his Yale speech on New Zealand's nuclear policy.[4] But it was my duty to tell him the truth. He never did appreciate what a shattering effect that speech had on his colleagues - they regarded it as a breach of the principles of collective responsibility. But I never in my entire tenure as Deputy Prime Minister was disloyal to the Prime Minister, and I endured much criticism on account of it from those who felt the government may have fared better if he had gone earlier. My own view was that the unity of the government had been shattered by the public disagreement between the Prime Minister and his Minister of Finance. My view was, and is, that if the Deputy wishes to oppose the Prime Minister then that person should first resign from cabinet.

What is so difficult to communicate about the office of Prime Minister is the flavour of it, the demands of it, because they look quite different from the outside, than they do from the inside. The Prime Minister is the Queen's first Minister. Some of the older writers used to talk about the Prime Minister being *Primus Inter Pares* or first among equals. While that view has some constitutional attraction, it overlooks the development of the office in the mass media age. In the minds of the public the Prime Minister is much more than a first among equals. The public sees the Prime Minister as being in charge of the government, and regards him or her as the boss. While that political reality resonates through the system, it does not undo the undoubted nature of the collective responsibility of cabinet and the collective nature of cabinet decision-making. A focus of public attention in the media is often the story that the Prime Minister's view on an issue has not prevailed or has been defeated. Such reporting in recent years has changed the perception from the outside, but it has not changed the reality of cabinet government on the inside.

3 R Brazier "The Downfall of Margaret Thatcher" (1991) 54 MLR 471, 487.

4 D Lange *Nuclear Free: The New Zealand Way* (Penguin Books, Auckland, 1990) 206-207.

II CABINET AND COLLECTIVE RESPONSIBILITY

The method of making government decisions through cabinet is not well understood by the public. This is partly because there is a contradiction in the appearance and reality of Prime Ministerial power. To the public the Prime Minister appears to be in charge, appears to be the person making decisions and is the person that the public looks for to take final responsibility. But decisions in the New Zealand cabinet system are actually made by cabinet acting collectively. Again, the essence of the doctrine appears in the *Cabinet Office Manual*:[5]

> Decisions at Cabinet and Cabinet Committee meetings are usually reached by consensus. Votes are rarely taken. Once a decision has been made, however, it is to be supported collectively by all Ministers, regardless of their personal views and whether or not they were at the meeting concerned. The convention of collective responsibility is an essential underpinning of the system of Cabinet government, whereby Ministers are required to advise the Sovereign (in practice, the Governor-General) on matters of public importance. Ministers whose opposition to a Cabinet decision is such that they wish to publicly disassociate themselves from it must first resign from the Cabinet.

The first observation to make about that passage is that in my experience votes are almost never taken in cabinet. It is possible to ask each member in turn for a view, although that is not often done. It is common, however, for three or four ministers to to express doubts about all or some of the policies in a cabinet paper, but it will go through nonetheless. Where there is extensive disagreement the matter is sent to a cabinet committee or smaller group of ministers to work out another line. Deferral of an item, or modification, is much more common than outright rejection.

In New Zealand cabinet decisions are consensus decisions. Massive policy changes can go though on the nod if no voice is raised against them. Long speeches are not encouraged in cabinet, the agenda is too big. The purpose of the meetings is to make decisions. Sometimes long debates on contentious matters will occur, but the essence of cabinet is that it is a committee making decisions. But it is a committee sitting in secret, unlike a city council, for example, so there is no need for grandstanding. Skill at committee work is of great advantage to ministers. Their work as Members of Parliament gives them plenty of experience in it. Cabinet is simply the apex of an elaborate committee system which collectively is called government.[6]

Indeed, in many respects in New Zealand, we do have a system of government by committee: cabinet and its committees, caucus and its committees, the party organisation and its committees, the select committees of

5 *Cabinet Office Manual* above n2, 3/2 A4-5.

6 See generally, K C Wheare *Government by Committee* (Clarendon Press, Oxford, 1955).

Parliament itself, the policy committees of the various parties, the electoral committees of the MPs in their home electorates. In fact an MP's life in politics is one long committee meeting discussing almost the same issues at every committee, it is simply that the membership changes. The task of the political leadership is to try and ensure that each committee produces a result which is in harmony with the output of all the others, a hopeless expectation. In politics one learns a great deal about how to collapse committees which are causing problems, by-passing them or rendering their work redundant. Nonetheless, perhaps the most defining characteristic of our type of democracy is its committee character - most decisions are made by committees. In order to have their ideas prevail people have to convince others of their worth. That is true of cabinet. What is also true of cabinet, but not other committees, is the elaborate fiction that all are agreed on one policy when frequently they are not. Unanimity is the first principle of the doctrine of collective responsibility. It promotes the idea of unity within the cabinet and the government. It seems to reinforce a strong electorate preference for a unified government.

There needs to be strong justification for a such a fiction which prevents the public learning the truth. The doctrine of collective responsibility is one of the key elements of cabinet government and it has important consequences for the way the system works. The first consequence of the doctrine is that every government looks more unified than it is. This has a number of advantages. First, it avoids confusion as to what the government's policy is. Second, it enables the people to know who are responsible and to hold them accountable. Every minister must be prepared to defend every government policy - that advances the value of cohesion and purposefulness. Over time the doctrine assists cabinet to continue to act together in the knowledge that the public do not know what their past differences have been. The idea is well summed up in the expression of Benjamin Franklin at the Declaration of Independence on 4 July 1776; "[w]e must indeed all hang together, or, most assuredly, we shall all hang separately."[7] The doctrine of collective responsibility is the quintessential ingredient of the adversary approach to politics generated by the Westminster system. There can only be one view in the government itself and all the members of cabinet must defend it. The principle goes further. Those who hold office as ministers or under-secretaries outside cabinet are also bound by the doctrine, despite the fact that they have no voice in making the cabinet decision.

The doctrine has further important consequences. It is a definite ingredient of prime ministerial power. When the Prime Minister says after cabinet discussions what the government's policy is, no minister will contest it and none can say they disagree. It is a useful management tool in keeping in line ministers who disagree with the policy. It means there is a solid block in caucus in favour of the cabinet policy. Cabinet goes to caucus with one

7 Remark to John Hancock, at the Signing of the Declaration of Independence, 4 July 1776 in *The Oxford Dictionary of Quotations* (3ed, Oxford University Press, Oxford, 1979) 218.

view and one voice. Collective responsibility is one of the factors in producing strong executive control over Parliament.

When I worked for the Whitlam administration in Australia in the period 1973-75, I saw first hand a tendency in the Australian Labour government for cabinet decisions to be overturned by the caucus, sometimes at the behest of ministers who had lost in cabinet.[8] It was a most destructive tendency in terms of promoting a coherent policy on a continuing basis. When a minister in New Zealand I was instrumental in ensuring a system of management which did not permit cabinet ministers to speak against cabinet decisions in caucus or vote against them. Such a rule may seem arrogant and undemocratic, but it is a natural result of the principle of collective responsibility. So long as the system existed it was my duty, in the positions I held, to run it as efficiently as possible.

The radical reform programme of the Fourth Labour Government was the subject of contention in New Zealand, but whatever view is taken of it there can be little argument that it was implemented decisively and for the most part efficiently. The manner in which we operated the principle of collectively responsibility was the key to it. It may have looked like a steam-roller, but steam-rollers have their uses. The trouble in New Zealand is that it is rather too easy to start the steam-roller and use it before there is a clear idea of what to do with it.

The impression created by the previous paragraph has to be tempered by some reference to that little thing which all practising politicians know to be critical - timing. Cabinet can only act when the issue reaches it. By the time the issue reaches it, in effect, the decision may have been taken. The issues have been thrashed out by civil servants in committees, or between ministers in informal discussions, or in caucus committees and there may have been extensive public debate. So by the time the matter gets to cabinet in a formal submission it may be clear what the decision should be, even though had that policy come to cabinet at the beginning it would have been rejected.

Subtle operators know how to play bureaucratic, media and pressure group games which will produce the desired outcomes. Ministers can do it too. If you are the Minister of X you may meet with the influential people interested in outcomes in that portfolio area. Find out what they want. Pack it up in a speech floating a policy saying "As Minister of X I think we should do Y". The media ask the interested groups to comment, who say we want Y to be done. The paper goes to cabinet saying the pressure groups demand Y. There are variants on this theme - you can cut out the middle part by simply securing people outside to demand what you as minister want to do and then do it. More than a little of the economic policy in recent years was managed in ways similar to the above. Cabinet still makes the decision, but shaping the context in which the issue came to cabinet turns out to be the vital ingredient in the decision.

---

8 Some of the details are described in G Palmer *Compensation for Incapacity - A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Auckland, 1979) 131-196.

Frequently collective responsibility in cabinet may produce decisions with which the Prime Minister does not personally agree. The Prime Minister has available a number of levers to ensure that cabinet sees an issue in the same way as the Prime Minister. But the cabinet may not see it that way, and such is frequently the case in my experience. Most members of the public would assume the opposite.

One example from my own experience illustrates the point. I have always been a strong supporter of proportional representation as an important reform in the electoral system. While I was Prime Minister, and indeed while I was Deputy Prime Minister, the majority of my cabinet colleagues did not support that view. It was extremely hard to make any progress on the policy without creating total disunity and disruption within the government. There were numerous such examples during my period in cabinet, often concerning fundamental aspects of policy direction. Maori issues are a case in point: prominent members of the government were totally opposed to some of the initiatives Koro Wetere, the Minister of Maori Affairs, and I took on the Treaty of Waitangi and other aspects of Maori policy, but because of timing and the courts we were able to preserve that policy, although we had to trim it a little.[9]

Obviously there are instances in which collective responsibility is not followed in New Zealand. It is possible to document many. Some the economic statements made by David Lange and Roger Douglas before Mr Douglas left the cabinet is one notable example.[10] The manner in which Winston Peters made statements as a cabinet minister distancing himself from the National government's economic policy is another. But in both cases collective responsibility had its revenge in the end - Douglas went and Peters was removed from cabinet.[11] Perhaps the most drastic application of the doctrine in recent years was when Sir Robert Muldoon insisted on Mr D F Quigley's resignation for a speech which could have been construed as critical of the government's 'Think Big' development policies. Whether that speech was in breach of the doctrine is in fact highly dubious.[12]

Since collective responsibility suggests a unanimity which does not exist and everyone knows it, leaks and unattributed comments can destroy it in substance if not in form. That happens. In New Zealand members of the parliamentary press gallery get to know which ministers are on which sides of particular issues and report the fact. The operation of the Official Information Act in recent years has lifted the veil of secrecy on cabinet. It is possible to secure cabinet submissions and reports soon after decisions are taken which reveal the depth of disagreement which may exist between ministers.

9 See Chapter 4.

10 J Boston "The Cabinet and Policy Making Under the Fourth Labour Government" in M Holland and J Boston (ed) *The Fourth Labour Government: Politics and Policy in New Zealand* (2ed, Oxford University Press, Auckland, 1990) 62, 74-76.

11 See respectively *The Dominion* 15 December 1988 pp1-2 and *The Dominion* 3 October 1991 p1.

12 P A Joseph "The Honourable D F Quigley's Resignation Strictly Political - Not Constitutional" 1 Canterbury L Rev 428 (1982).

The doctrine of collective responsibility assists in control of the government party in Parliament and the Parliament itself. Indeed in the New Zealand context collective responsibility is the primary mechanism by which the strong incentives for party unity are preserved and enforced by the governing party. It is a constitutional convention, it is not law. It is a flexible and evolving convenience. If it is inconvenient it can be done away with. So long as unity is a prime requirement of the New Zealand system collective responsibility will be preserved.[13]

In New Zealand collective responsibility is a vital component of executive power; while it adds to the appearance of prime ministerial power, substantively the doctrine restricts it. There is a difference between appearance and reality. The Prime Minister depends to a large extent on the cabinet. This is particularly true on matters of policy direction. The dynamics of every major policy decision are different but it ought not be assumed that the Prime Minister is comfortable with every government decision.

In the New Zealand context the Prime Minister is not like a President and while it is an office of great power and authority, it is not the office itself which is the threat. The threat is cabinet. Certainly if one person is both the Prime Minister and the Minister of Finance the concentration of power is unacceptable, and the checks and balances of the cabinet system are effectively short-circuited. But it is unlikely that Sir Robert Muldoon's decision to hold both portfolios will ever be attempted again. The results were just too disastrous.

The irony of the present position is that the Prime Minister tends to be held accountable for everything but is not effectively in control of everything. It is obviously not practicable to put one person in control of everything, nor would it be desirable if it were possible. It may be better to fine down the functions somewhat and make some structural changes which enable them to be actually carried out.

III THE PRIME MINISTER IN CABINET

Apart from chairing cabinet, the Prime Minister is also responsible for running it. He, or she, has authority in relation to the agenda, and the week-to-week running of cabinet itself. This is an important Prime Ministerial function. As the *Cabinet Office Manual* observes "[c]abinet is the central decision-making body of Executive Government."[14] But the nature of this power should not be exaggerated. In New Zealand ministers and only ministers "may make or authorise submissions to Cabinet or Cabinet Committees."[15] The guidance about what should go to cabinet and what not is delightfully vague but quite realistic. The *Manual* offers this gem: "[a]s a

13 What is said here is indebted to an unpublished paper 'A Reinterpretation of Ministerial Responsibility' written by my son M S R Palmer at Yale University. (Unpublished paper, on file Victoria University of Wellington, 1991).

14 *Cabinet Office Manual* above n2, 3/1 A1.

15 *Cabinet Office Manual* above n2, 4/1 A2.

general rule, Ministers should put before their colleagues the sort of issues on which they themselves would wish to be consulted."[16] It is hard to see how a more precise test would be possible. While it is possible to have items deferred, or for the Prime Minister to persuade people not to put them forward, in reality in New Zealand, ministers do have complete access to cabinet for it to register its views of their proposals.

The New Zealand Cabinet Office is a remarkably efficient organisation. Each week cabinet papers are circulated to Ministers on Fridays; these will sometimes be numerous, as many as 30 or 40 items and with the reports of cabinet committees it can come to much higher than that. They will often be accompanied by Treasury reports and other reports containing departmental views. The Cabinet Manual says submissions must be presented at least two working days before the meeting at which they will be considered. This is a good rule and is really a minimum. It is surprising how powerful are the pressures to abbreviate it. I noticed an improvement in 1992, that the National government has decided to enforce the two day rule - I wish them luck.

There is one technique which is greatly disliked and actively discouraged by Cabinet Office, that of tabling late papers at the cabinet meeting itself, papers which ministers have neither seen nor read prior to the meeting. This tactic is particularly favoured by some ministers, and is known as "an end run", in which case it is possible to put through a proposal that ministers have not had the chance to consider properly, and which has not been through a cabinet committee. I have known of some very large policy changes decided by this technique. Some elements of the Labour government's restructuring dealing with the environment were dealt with in this way, notably the creation of the Forestry Corporation. Where a Department disagrees with a cabinet paper that it has been shown, a paper to the Department's Minister with alternative recommendations can be used in this way.

Usually most of the proposals have been looked at carefully, or at least there has been an opportunity to look at them carefully, which is not quite the same thing. A cabinet comprising ministers who have a sense of confidence and a unified sense of purpose can decide big and controversial policy issues with ease. Where there is division and an atmosphere of political adversity it is hard to decide any big policy. Meetings start at 10.30 a.m. on a Monday, break for lunch about 1.p.m., resume at 2.15 p.m. and can continue until 5 p.m. On a big agenda, however, cabinet cannot have detailed discussion on every issue. Frequently cabinet discussions of particular items are very short, nonetheless cabinet meetings often last all day, partly because of the length of the agenda, but also because political developments are often discussed in some detail. There are no papers about them. But on a contentious and difficult matter, lengthy debate is sometimes held in cabinet. But normally such debates tend to be held in the cabinet committees.

16 *Cabinet Office Manual* above n2, 3/2 B1.

The New Zealand cabinet committee system is extensive and systematic. There are currently twelve committees and one sub-committee.[17] While each of the main political parties in office tends to run a different structure of cabinet committees, the structure is announced, it's publicly available, and so are the memberships. This information is rightly prized by people who want to influence the outcome of government decisions. But it is also somewhat misleading. Certain topics tend to be "run" by certain ministers whose views will be decisive. The committee minutes and the cabinet papers simply cannot capture the dynamic of the cabinet decision-making process, the essence of which is an interchange between ministers.

At cabinet committees, officials can be called in and questioned by ministers, usually a helpful interchange takes place to clarify the nature of proposals. Sometimes such interchanges illustrate the weaknesses in the proposals not evident from the papers themselves. There have been suggestions that with the Fourth Labour Government the value of the cabinet committees was reduced because fewer officials attended and sometimes they were not called into the room to give their views.[18] What this overlooks is that officials are only useful to ministers when ministers are in doubt or confused. Cabinet committees' most important function is for ministers to have discussions among themselves - the views of officials are an aid to this, not a substitute for it.

Because the cabinet committee system is extensive, good policy co-ordination is essential, otherwise various elements of the government can start to work against each other in a way which is counterproductive. A wide range of policy proposals and a large number of papers are considered each week. Overall goals must be kept in mind; they are easily lost sight of when there is wide-ranging policy action on many fronts. The Prime Minister, the Deputy Prime Minister, and in a different way the Minister of Finance, are the only ministers in cabinet formally charged with the responsibility to look at the overall shape of the government's programme. (It is possible that other ministers can assume responsibility for co-ordination as the Hon W F Birch, Minister of State Services appears to have done in the current National government.) On the financial and economic consequences of proposals there is a well established system for receiving Treasury advice, which is seen by the whole cabinet. But in other respects there is something of a gap.

In the nature of things the best evaluations of weaknesses in proposals do not come from the department which has put up the proposal. Such evaluations need to be independent of departments putting forward the proposals

17 *Cabinet Office Manual* above n2, 3/Appendix 2.

18 Over time it became clear that officials were being invited in for fewer and fewer items. The number of departmental heads attending steadily declined as it involved spending an hour or two in the waiting room on the off chance that they would be called in. After a while it became the practice for departments to send less senior officials who were associated with the actual preparation of a paper.

B Galvin *Policy Co-Ordination, Public Sector and Government* (Institute of Policy Studies, Victoria University Press, 1991) 17.

and indeed independent of the ministers in charge of those departments. Provision of such advice is the prime function of the new Department of Prime Minister and Cabinet about which I will have more to say later in this chapter. It is, however, in the provision of this type of advice that the New Zealand government has been weak in the time I was a minister. The nature of cabinet government in New Zealand appears to be more systematic and rigorous than it is in the United Kingdom. The case against Mrs Thatcher's Prime Ministership in the United Kingdom could not be made in New Zealand, even I think under the Prime Ministership of Sir Robert Muldoon who was reputed to have dictatorial characteristics. Here is Rodney Brazier's account of cabinet reforms which might be undertaken in Britain now that Mrs Thatcher is gone:[19]

> The Cabinet might insist that important decisions, if not actually debated in the Cabinet, must always be decided in the formal Cabinet system, thus avoiding the rigging of decisions which disfigured parts of Mrs Thatcher's premiership. Decisions on the timing of dissolutions, and on the economic strategy - including the details of each budget - might also be restored to full Cabinet responsibility, rather that being respectively for the Prime Minister alone, or the Prime Minister and the Chancellor of the Exchequer. Such ideas may be dismissed as absurd because no Prime Minister would ever concede them.

That passage is interesting because in my experience none of those items mentioned has ever been dealt with other than by a full cabinet in New Zealand, although Sir Robert Muldoon's decision to advise the Governor-General on a dissolution of Parliament in 1984 may not have been after cabinet discussion. The date of the 1990 election was carefully discussed in cabinet, and all features of every budget which the Labour government brought down between 1984 and 1990 were put in front of the full cabinet.

It does seem that because of the formal nature of the cabinet system in New Zealand, that the features which can occur from time to time in the United Kingdom, do not exist here. The late Richard Crossman wrote of the United Kingdom in 1963 that "[t]he post-war epoch has seen the final transformation of Cabinet Government into Prime Ministerial Government."[20] That may well not have been an accurate characterisation of the position in Britain, but it does not describe the reality of cabinet government in New Zealand.

None of this to say there is no inner cabinet; often there is, and particularly in the Labour government from 1984 to 1987 there were 5 senior ministers who tended to decide on a course of action and persuade their colleagues in the cabinet of its wisdom. But they had to go to cabinet and

19 Brazier, above n3, 491.

20 R H S Crossman, Introduction to W Bagehot *The English Constitution* (Fontana, London, 1963) 51.

persuade them. This is not to say that ministers cannot influence cabinet decisions by the sort of atmosphere they create by their media pronouncements. It is not to say, either, that the Prime Minister cannot act outside cabinet, and sometimes produce great changes.

The cabinet decisions in the Labour government for the economic package of December 1987 were made by cabinet. Certainly they were made hurriedly, certainly there were details which were not sufficiently subject to advice from the bureaucracy, but they were decisions of cabinet. The Prime Minister's decision to undermine the cabinet decisions was a decision he made personally, and carried out in January of 1988 without any cabinet authority, at a time of the year when cabinet did not meet for several weeks. This unilateral breach of the principles of collective responsibility certainly contributed to the political disintegration of the Fourth Labour Government. It damaged the image of unity which seems so valued in the New Zealand political culture.

So while the Prime Minister is formally responsible for the management of the cabinet system and its outcomes, the amount of time required to master all the details of the cabinet papers and the treatment of those papers by various cabinet committees, requires quite superhuman abilities. There's so much to read, so many complex issues to master, things which commentators frequently fail to understand. The shortage of ministerial time is what gives ministerial advisers their greatest ability to control policy outcomes. The proposition is true at every ministerial level. To a large extent the Prime Minister has to rely on advice to point out the warnings and consequences of certain proposals. The fact is that the office has so many other pressing duties that the Prime Minister will not want to get involved in any but the most contentious and difficult of those issues. To a very large extent in New Zealand, individual ministers are left in charge of their own ministerial bailiwicks. Only a small proportion of activities in portfolios cause trouble or political embarrassment requiring Prime Ministerial or Deputy Prime Ministerial intervention.

IV THE PRIME MINISTER IN CAUCUS

While the most important functions of the Prime Minister revolve around cabinet, his or her authority comes from caucus. Caucus decides who the Prime Minister is. The Leader and the Deputy Leader of both main political parties in New Zealand are elected by the party's parliamentary members. There are a number of points that need to be made about this. In some countries the parliamentary leader of the party is actually elected, or there may be some input at least to the election from the party organisation outside Parliament. In Canada the leaders of both main political parties are elected by the party conference, not by the caucus. And indeed in the United Kingdom in the case of the Labour Party, the party outside the house has a significant role to play in the election of the leader.

The traditional defence of the New Zealand situation is that members of caucus know best, who among their colleagues is best suited to lead them,

and basically their judgments revolve around the likelihood of winning and losing elections. Few other considerations enter their minds. MPs are consumed with two things, the need to retain their seats and the advantages of becoming the government. The judgments they make about their leaders are based on how they see these people advancing the party's prospects in an election.

The requirements needed to win elections are not the qualities best suited to administering the government when in office. In some respects the requirements are quite different. The ability to project a favourable image to the media, and explain policies, is quite different from the ability to develop those policies, pilot them through the decision-making process, and make them coherent, effective and workable in practice.

At present there appears to be no great wish to change the place where party leaders are selected. I would not be surprised, however, to see party pressures develop for the rank and file to be given greater say. They have no say at the moment. The tendency for both main New Zealand political parties not to pursue the policies promoted by the party outside the Parliament has produced a move for greater accountability of the parliamentary leadership to the party at large. This could be most easily accomplished by the party conference electing both the leader and the deputy.

The move may strike some constitutional problems. What if the parliamentary caucus decided on a different leader from party conference? Clearly under our present constitutional arrangements, the person who could command a majority in the House of Representatives would be the one for whom the Governor-General would have to send, in order to form a government. But such a prospect may be unlikely, and can perhaps be dismissed as it has not arisen in Canada where the party conference selects the leader. Given the characteristics of political parties in New Zealand discussed in the previous chapter, if there is to be a change in the method of electing the Prime Minister and the Deputy, it should be to direct election by the public of New Zealand.

In New Zealand both the leader and deputy leader of the parliamentary party play an important role in party affairs outside the Parliament. They attend all important party meetings, they are involved in policy formation, they take a conspicuous role at annual conferences. Indeed the burdens which fall on the leader and the deputy leader in this respect are quite distinct from those which fall on the other members of the parliamentary party. The time commitment and the complexity of the issues are substantial. Inherently the problems are hard to manage because the leadership lacks formal authority over the leadership of the non-Parliamentary party. It is necessary to rely on forceful argument and prestige rather than any formal authority. The increasing tension between MPs and the party outside Parliament, which has been a feature of recent New Zealand political history on both sides of the political fence, is likely, I think, to lead to new developments.

The Prime Minister is the leader of the political party in Parliament

which has a majority. That fact is the defining characteristic of the office. It means that the Prime Minister is very much a party political figure. In a sense the Prime Minister is seen by the public as the manager of the entire political party not withstanding that the formal authority of that task is not vested in him or her by the constitution of the party.

Management of outcomes in the political party processes outside Parliament are unpredictable, time-consuming, difficult, frustrating, and frequently ineffective. The role of the Prime Minister as manager of the government is less problematic. Here the Prime Minister has authority and has available instruments of control. The Prime Minister chairs the cabinet. The Prime Minister is responsible for the allocation of portfolios in cabinet. That task is invariably done in close consultation with the Deputy Leader who is elected by the caucus.

In the case of the National Party it is important to remember that the cabinet is not elected, but selected by the leader, whereas the Labour Party conducts an exhaustive secret ballot in caucus. The task of cabinet-making is a tense one which often leaves bruised egos and unhappy aspirants. It is impossible to satisfy every aspirant when allocating portfolios. When the decisions are being made the political situation within caucus tends to be particularly unstable. In the Labour Party, either the leader or the deputy leader, or both, interview the people who have been elected to cabinet. Preferences and options are discussed. Quite frequently in this process, people are seen at their worst, over ambitious, grasping, and full of threats. The Labour Party selection process is bruising, especially to those who think caucus should elect them to cabinet, only to find that their colleagues have a different opinion of them. The disruption that some people can cause in that situation ought not to be underestimated, and this explains why so many people are appointed to office outside cabinet. Many commentators have explained this recent phenomenon as due to the need to have a controlling number of votes in caucus. But this analysis overlooks the need to provide balm to wounded political egos.

The Prime Minister is the chair of caucus, which also has a committee system. A lot of effort goes into the composition and construction of the caucus system, in order to provide back-bench Members of Parliament with the means to make a contribution to policy development. Back-bench MPs do not like to be regarded as lobby fodder, and they like to think they have some influence on government policy.

Caucus committees can make a useful contribution if the Minister in charge of the area is prepared to let them. But ministerial practice varies a good deal. Some ministers are autocratic, others want to co-operate with their caucus committees. Caucus committees can have access to officials advising the minister, when the minister consents to such access, and consent is frequently given. Over the detail of legislation, particularly that applying to legislation rather than other policies, the input can be valuable.

Caucus's main function at its weekly meeting is to act as something of a sounding board. Questions are asked of ministers about difficult issues which may have emerged, bills are approved for introduction, other policies

are approved and caucus discussions are often consumed with immediate political issues and tactics in Parliament. It is not a suitable body for long-term strategic considerations or sophisticated policy development either. It is simply too big. It is conducted in secret which is just as well, since the standard of debate and general conduct is frequently appalling. One of the difficulties that the Prime Minister and the Deputy Prime Minister have in relation to caucus management is to ensure that the whips give ministers adequate notice of impending difficult issues. The last thing the leadership wants in a caucus is ambush on an issue. Every eventuality must be prepared for. Quite often the numbers must be mustered and effort put into the task of convincing caucus that the government's strategy is correct. A lot of time and energy has to go into managing the caucus in order to secure desirable outcomes. Listening to the members can also provide a helpful perspective on the effects of government policy in the electorates, insights which are not available in cabinet papers.

V OTHER PRIME MINISTERIAL FUNCTIONS

The Prime Minister is expected to perform an impossibly wide range of functions. The number of committee meetings and other meetings that the Prime Minister and the Deputy must attend is also a great strain on their time, their physical vitality, their ability to carry out other duties. There are a number of ways of coping with this. One is simply not to attend, but there are big risks in that. One of the central difficulties of high office is to decide where the priority lies in the use of time. It seems to be a more difficult problem in New Zealand than in bigger countries. Here everyone expects to have attendance from, and access to, people at the top.

The Prime Minister and the Deputy must function as leaders of the government and Parliament itself. It means taking part in all the big debates. They will be the lead speakers for the government and their contributions need to be incisive and hard-hitting. They need time to prepare their speeches, and they need to have some ability at public speaking. Indeed they are usually among the best speakers in Parliament, and they have been elected to their positions partly because of that. Furthermore, the leadership is going to be the target for heavy questions from their political opponents in Parliament. They will have to impress in Parliament in order to convince the back-bench members that the government's performing well there.

The development of those parliamentary skills takes time; it is a difficult forum to speak in. The level of interruption is high. These skills are usually developed in opposition where there is plenty of opportunity to speak in Parliament, and no opportunity to decide anything. One of the features of a Westminster Parliament which is not found in other systems, is that MPs have the ability to make good extemporary speeches. Emergency debates can take place frequently on subjects upon which there has been little warning. An MP must be able to stand up and speak fluently and convincingly without notice or notes.

The next function of the Prime Minister is to be the chief publicist for the

government. The Prime Minister makes all the major announcements. The Prime Minister holds a weekly post-cabinet press conference in which he submits himself to journalists for questioning and makes a number of announcements. Frequently press conferences are also held after caucus. Numerous press statements are made every week. Many interviews are given to all branches of the media - the Prime Minister can command the attention of the media on virtually everything that he or she says. Frequently work that is done by other ministers is incorporated in Prime Ministerial announcements. That is done to boost the Prime Minister in the eyes of the electorate, because the Prime Minister is seen as the person whose impact best helps the re-election chances of the government. That form of promotion has increased in recent years due to the Prime Minister's need to appear constantly on the electronic media. Government might be better, and the public's understanding of it would not be reduced, if such promotional activity were sharply cut back.

The polls measure exposure, as much as anything else, and public presentation and communication is a vital part of modern government. It has to be planned for through detailed briefings. I often thought I had spent more time dealing with the media than devising the policies. The media in New Zealand require continuous feeding, instantaneous comment and government pronouncements on virtually everything. Since the government's public standing depends so much on what the media say about it Prime Ministers must pay close attention to what they say to the media.

The Prime Minister has an important foreign affairs function. New ambassadors are received by, and hold discussion with, the Prime Minister; there are important international conferences to attend; in fact the Prime Minister is New Zealand's primary representative in foreign relations. And therefore the Prime Minister has to keep in touch with representatives of foreign governments and read the cabled messages from New Zealand embassies around the world every morning, which takes time. Much of that task has to be carried out in private through the diplomatic machinery, but it is a critical Prime Ministerial function. It requires close and continuous contact with the Minister for External Relations and Trade.

The Prime Minister also has extensive ceremonial duties, is expected to attend Anzac Day and Waitangi Day ceremonies, attend the Queen on royal visits, and and so on. Such functions are very time-consuming. They enable the Prime Minister to meet a wide variety of people all over New Zealand, but again they put great demands on time and energy. Bagehot's classical treatise on cabinet government made a distinction between the dignified parts of the constitution and the working parts. It sometimes seemed to me at the beginning of 1990 that the office of Prime Minister was increasingly becoming one of the dignified parts of the constitution and not one of the working parts. In January and February 1990 my wife and I attended 34 public functions in various parts of New Zealand. Admittedly it was New Zealand's 150th commemoration but nonetheless such engagements are draining and distracting.

Over the years more and more ceremonial work seems to have been attached to the office. Hundreds of invitations flow in constantly to make speeches, to open things and attend functions. No doubt protocol demands it to some extent, but it's a frightful distraction from a role which already has far too many demands. I well remember once spending a very uncomfortable half hour in the rain and wind at Wellington Airport, waiting for the Governor-General of Fiji. He was to receive a 21-gun salute when he arrived in an aeroplane which was late. The entire cabinet turned out for the ceremony. It was relatively early in our term of office and we had a long discussion after getting wet and cold out there; we could not believe that it was necessary to have 20 Ministers lining up on the tarmac, and the range of cabinet attendance at such ceremonies was cut down after that.

Another Prime Ministerial task is maintaining contact with the Governor-General. The Governor-General is involved in much of the formal day-to-day business of government. Sometimes matters arise which require the attention of the Palace in London and the conduit for those is the Governor-General. The Prime Minister is the main link between the cabinet and the sovereign. The Secretary of the Cabinet is also Clerk of the Executive Council, over which the Governor-General presides. Sometimes a Council needs to be held urgently or the Governor-General's signature is urgently required. Occasionally complex logistical arrangements have to be made to get the documents to the Governor-General. I remember on one such occasion the Governor-General was walking the Routeburn track. The Secretary of Cabinet is in constant contact with Government House. These relationships and contacts involve the proper constitutional functioning of the government. The Governor-General is sometimes consulted on matters of substance - I remember having lengthy discussions with Sir David Beattie about the form of the Waitangi commemoration. Sir Paul Reeves took an active interest in developments relating to Maori matters.

There are important resource questions relating to the running of Government House, and the servicing of the Governor-General in accordance with standards appropriate to the dignity of the office. The Governor-General has an Official Secretary, as well as a Support Services manager and Comptroller of the Household. There are two residences to maintain, briefings and speech notes to be provided.[21] The arranging of the Governor-General's itinerary and functions she hosts is an arduous and challenging assignment. The servicing of Government House used to be the responsibility of the Department of Internal Affairs. I felt strongly that the constitutional function of relating to the Governor-General was with the Prime Minister, and the administrative responsibility should be with the Department of Prime Minister and Cabinet. This change was stoutly resisted by the Department of Internal Affairs but it came about, and I am convinced it is a much tidier arrangement.

Another Prime Ministerial function relates to honours. Honours are con-

21 *Report of the Department of Prime Minister and Cabinet for the Year Ended 30 June 1991* (1991) AJHR G.48, 12.

ferred on the recommendation of the Prime Minister, but the advice travels to Government House and thence to the Palace. There are quotas for various awards and sometimes delicate questions arise in respect to the lists which require some discussions. The honours were actually settled in the Fourth Labour Government by the Honours and Appointments committee of cabinet. There is a great deal of work in sifting through the hundreds of nominations which come in from the public and from MPs. Servicing this function requires high quality work from the department. One interesting feature of the conferring of honours which is different from any other government decision, is that the lists do not go to the full cabinet. They are never approved there, and that is different from the work of any other cabinet committee. In theory the Prime Minister could probably make the recommendations himself, except that he would never have the time and needs the committee to do all the sifting and considering. Recommendations for membership of Her Majesty's Privy Council are, however, made by the Prime Minister acting alone. These are the only recommendations made by a New Zealand government which still go to the Queen through the Prime Minister of the United Kingdom.

In New Zealand the Prime Minister is also in charge of the Intelligence Services whose role is important, and much more extensive than the public of New Zealand understands. Supervision of the services is much more time-consuming than I ever expected before I took over responsibility for them. There is not much than can be said about them in public, but I can say that the amount of time and effort that intelligence took from me, vastly exceeded the time that I had available, and caused me a great deal of anguish and concern in the resolution of the problems that they brought to me. They are not trifling matters but issues of great moment. Perhaps intelligence matters could be entrusted to another minister, legislation does not appear to require the minister to be the Prime Minister, although there is a strong constitutional convention that it should be.

The New Zealand Parliament has short terms by international standards, the term cannot exceed 3 years. While the public may not recognize it, political campaigning is now virtually continuous in New Zealand. The Prime Minister is the chief person to conduct election campaigns for the government. The function has been well described by Professor Richard Mulgan who said the Prime Minister is "the manager of the party's electoral prospects."[22] The time and energy which must be devoted to this is high. Political visits and political campaigning take great energy, and while it is continuing the work of running the government tends to be neglected.

The development of an electoral strategy is devised by a Strategy committee which looks at polling information, and at various techniques for speeches and appearances by key figures all over the country. The committee will have on it senior parliamentary members, the President of the Party, the general secretary, and other key personnel from the party organisation.

---

22 R Mulgan *Democracy and Power in New Zealand* (Oxford University Press, Auckland, 1984) 61.

In addition to all those important functions the Prime Minister and the Deputy between them have to carry out vital political fire-fighting duties. In the course of any government unexpected emergencies arise, crises develop, Ministers get into difficulties from which they must be rescued; political embarrassments break out that have to be quelled. The time devoted to political fire-fighting is great, and the amount of advice available to help with it is very small. It is a function which cannot be neglected, indeed when I was Deputy Prime Minister I devoted at least half my time to it, despite having heavy legal portfolio responsibilities.

In order to sort out frequent conflicts between ministers, or between ministers and their departments which can sometimes be quite serious, or between ministers and the political party, authority is required and only the leader and the deputy leader - both elected by the caucus - have the requisite authority. But added to the political fire-fighting function is a function that might be called policy fire-fighting. Developments in the economy, or overseas, may demand an urgent response from the government. Events such as the Gulf War, for instance, require a speedy response. Sometimes it is necessary to by-pass cabinet in order to get the job done in time. Cabinet approval is required, but often special steps have to be taken to get ministers and officials together from a number of areas to co-ordinate a policy response. Floods and other emergencies were a classical example of this until a set of routine procedures was developed for dealing with floods.

VI THE PROVISION OF ADVICE AND CO-ORDINATION

In a sense fire-fighting is a subset of the wider responsibilities that the Prime Minister and the Deputy have for overall co-ordination of the government's policy. This overall co-ordination of the government's policy programme development, and its implementation, is at the heart of the Prime Minister's responsibilities. This requires harmonious relations between ministers who must work together. Often personality clashes do not make it easy. Then there are departments with different responsibilities and their responsibilities frequently have to be orchestrated.

The Prime Minister has to keep in touch with the thinking of key elements in the community: the manufacturing industry, the agricultural industry, the finance sectors. Government policy is critical to those sectors. The Prime Minister needs continuous feedback on what they think of what is happening, and what adjustments they think should be made. It is necessary to have somebody, or a number of people, to act as the ears and eyes of the Prime Minister reporting on what key people think in vital sectors of the economy. Time needs to be put aside regularly for briefing on these issues by advisers. It is necessary to meet frequently with important decision-makers. While they know what they do not like, they tend to have only shadowy and self-serving ideas about what should be done.

There was no separate Prime Minister's Department within the New Zealand government until after the 1975 election, and when it was formed it was small and remained small. I concluded before I became Prime Minister

that there were some great weaknesses in the organisation of the advice system and servicing. Indeed some important people with detailed knowledge of the Wellington bureaucracy, suggested to me when I was Deputy Prime Minister, that changes were needed because co-ordination of the advice systems was breaking down. This was due in part to reforms made by the State Sector Act and the Public Finance Act which had dislocated the machinery for co-ordination within the public service. There was also the view that there had been a blurring between the political and the bureaucratic advice that was being prepared. The Prime Minister's Office, I was told, was seen by the public service as overly political and was not therefore trusted with co-ordination.

The Office had been reviewed in 1987, but it was not working in a satisfactory way mainly because it lacked resources. It was too small. When I become Prime Minister I immediately instituted a review of it, by the Chairman of the State Services Commission, Don Hunn and Henry Lang, a retired former secretary of the Treasury. They were invited to "[t]o review the structure of the Prime Minister's Office and Cabinet Office with the objectives of improving the co-ordination of the conduct of Government business and improving the quality of the advice available to the Prime Minister and the Government, particularly in the economic and social areas."[23] I settled those terms of reference because I was worried that the predominance of Treasury advice in the New Zealand system had become too overweening and powerful. It was necessary to locate some economic intellectual capacity in the government that would enable the Treasury line to be questioned, probed and overturned if necessary. There was no adequate counter-weight to Treasury and Treasury advice was received on every conceivable subject, not merely financial or expenditure proposals. The report stressed the Prime Minister's role as minister for co-ordination. It found that the existing machinery was inadequate for the carrying out of such a role. The reviewers also said "[t]he opportunity should now be taken to draw a clear line between the political and the bureaucratic elements in the support system for the Prime Minister and Cabinet so that the structure and its operation are transparent: both of these elements are essential to the effectiveness of the system and both must be of the highest quality, but they should, as far as practicable, be kept separate and be seen to be so."[24]

The Review also found that the passing of the State Sector Act and the Public Finance Act had had a substantial effect on the operations of the public service, and that a gap had developed "at the heart of the machinery of government."[25] The co-ordinating functions of Treasury and the State Services Commission had been substantially reduced with the result that cabinet and its committees, while still responsible for co-ordinating the efforts of the government system, had had their ability impaired "by the

23 H Lang and D Hunn *Review of the Prime Minister's Office and Cabinet Office* (Prime Minister's Office, Wellington, 1989) Annex A.

24 Above n23, 4.

25 Above n23, 5.

failure to receive high quality, fully tested and co-ordinated advice on some major policy issues."[26]

The review recommended that a single department should be established which combined the Cabinet Office with the advisory side of the Prime Minister's Office. The purpose of this was to ensure that professional advice and co-ordination of the government machinery would function under a single chief executive. That person was also to have responsibilities for co-ordinating the intelligence function of the Prime Minister. At the same time the reviewers recommended a separate Prime Minister's Office to carry out the political advice function, liaise with political party and administrative and ceremonial functions. They recommended that the advisory and co-ordinating functions in the new department be substantially strengthened with an increase of policy advisory staff from 8 to 20. The purpose of this recommendation was:[27]

> [T]o provide the group with sufficient quality and quantity of staff, first, to assure the Prime Minister that the departments whose duty it is to provide the detailed advice are in fact doing so to the required quality standard; second, to test that advice to ensure it addresses all the appropriate issues and offers viable, sensible solutions; and third, to insist on adequate co-ordination and co-operation in cases where issues cross departmental boundaries (as virtually all the major issues do).

The recommendations for the new structure are set out in the diagram (see page 170). The essence of them was to divide the political function from the policy co-ordination and advice function. The cabinet secretariat was brought into the Department of Prime Minister and Cabinet. So the co-ordination machinery and the advice function was put in one Department. The political function of the Prime Minister would be carried out in the Prime Minister's private office. The principal Private Secretary would be in charge of that office, which would arrange all of the Prime Minister's schedule, appointments and correspondence. A massive amount of correspondence comes into that office, 50,000 letters a year or more; they all have to be answered. (Furthermore, the Prime Minister has to sign all the replies which takes a lot of time, although it is a useful source of information about what issues are concerning people.) A political adviser is certainly necessary these days and such a person is in the Prime Minister's private office. Press and administrative advice, and advice concerning the ceremonial and protocol functions also have to be provided from within the private office.

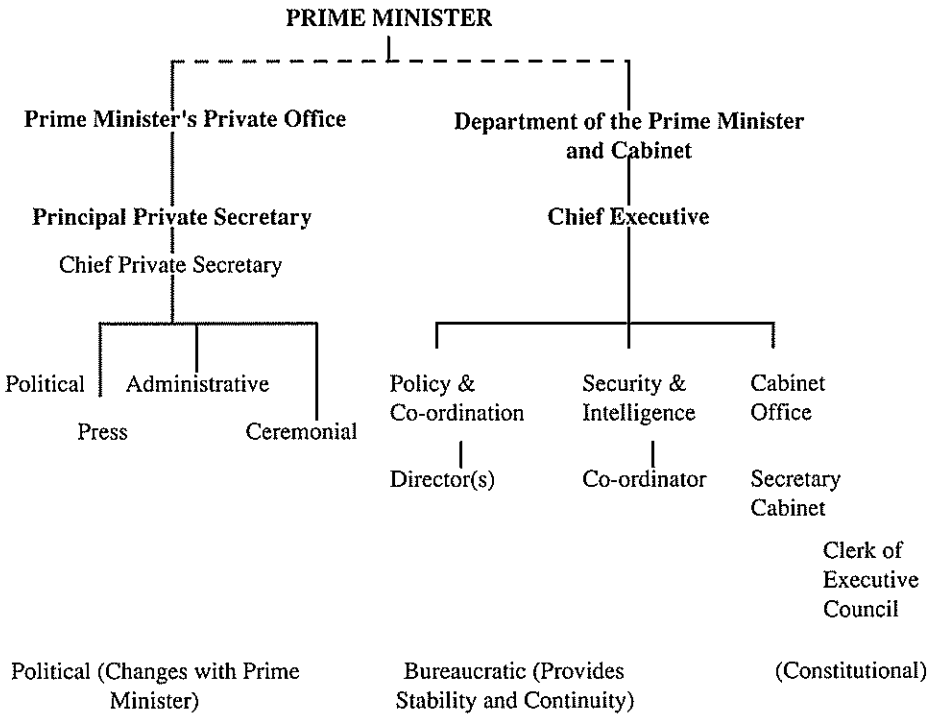
These recommendations were discussed in detail with me in the course of their formulation. I agreed with them completely and they were rapidly implemented by cabinet decision. It took quite a long time, however, to fill

26 Above n23, 5.

27 Above n23, 8-9.

the new positions, get a new chief executive in place, and provide the enhanced advisory services. The leader of the opposition agreed with the changes but asked that a review be done of the services available to him. Don Hunn and Henry Lang also carried out that review. They recommended some increases in staff which the government agreed to, and which I am sure the members of the current opposition are very grateful for.

RECOMMENDED STRUCTURE FOR PRIME MINISTER



The organisation has been preserved by the National Party Prime Minister and in substantially the same shape. The Rt Hon Mr Bolger has added a Communications Co-ordination Unit which is separate from the press office, which remains in the private office. Mr Bolger has merged the advisory group and the analytical group (the distinction between those two groups was one with short-term fire-fighting, the other with long-term policy trends), and added an enterprise development emphasis in order to provide advice on getting rid of obstacles to growth. They preserve, however, the important feature that the bureaucratic advice comes from the public service separate from the political advice in the Prime Minister's private office. It will turn turn out to be a viable and enduring structure, in my judgment.

The political weight needed to achieve policy co-ordination is considerable. When ministers or departments or both are at loggerheads, authority is required to sort that out. The Prime Minister could well devote all his or her time to that and still not achieve it. Yet ministerial time is very scarce; much is done in the Prime Minister's name which the Prime Minister knows little about. The much-needed policy co-ordination function will not be achieved unless other tasks in the office are reduced. It is idle to think it can be achieved by the bureaucracy, the choices are political.

It is perhaps a little early to judge the efficacy of the changes. I am nervous, however, that the policy co-ordination function is not yet being performed adequately. It is more difficult to judge this from the outside, but a number of elements of government policy, retreats from announced policy and conflicting statements, suggest that the system does not always integrate the advice successfully, and provide measures which work efficiently. The 1991 annual report of the Department of Prime Minister and Cabinet said:[28]

> The Department provides advice to the Prime Minister on policy and constitutional issues and provides secretariat support to Cabinet and the Executive Council. The Department also contributes to the effective co-ordination of Government across departmental lines, tests the quality of advice coming from departments and acts as an "honest broker" where there are conflicts over policy advice being offered by different parts of the public sector.

VII CHANGING THE NATURE OF CABINET

Even with the increased support services available to the Prime Minister there are serious problems with the role and function of the office in New Zealand. To a substantial extent these are bound up with the problem of cabinet's relationship to Parliament. A strong case can be made out that no single individual can carry out adequately the range of tasks which attach to the office of Prime Minister of New Zealand. The tasks are simply too many, the time required to carry them out is too great, and the complexity of a lot of the issues requires time and attention which simply cannot be found in the press of other duties.

It is my conclusion that it is impossible for any individual to perform adequately all the duties of Prime Minister in New Zealand. It may be that an individual can appear to be performing the functions adequately, but what I am saying is different. I am saying that no one can perform that range of functions with anything remotely approaching sufficient attention to every element in them. It is mission impossible from the start. That being the case, some more fundamental restructuring of the responsibilities of the office is required. To accomplish that requires cabinet re-organisation since

28 *Report of the Department of Prime Minister and Cabinet for the Year Ended 30 June 1991* (1991) AJHR G.48, 7.

the Prime Minister's main function is to head the cabinet.

If a management consultant experienced in running large commercial organisations were asked to analyse the job of Prime Minister in New Zealand, and make recommendations for improvement, serious consideration would have to be given to either abolishing or heavily restructuring the job. In New Zealand in recent years we have found the state's traditional way of running businesses inefficient. We have removed political decision-making from the state-owned enterprises. We have changed in radical ways the manner in which the public service works. What we have not done is look at the structure of the core government system, especially the cabinet, and see whether it serves our needs. It is a system under severe stress which could perform much better if it were restructured.

All ministers - including the Prime Minister - have to perform the function of a Member of Parliament. It is a substantial burden and ministers do not have time to do the job. Under the Constitution Act 1986 no person can be appointed to ministerial office unless that person is an MP. Subject to some qualifications as to timing the law is that "[a] person may be appointed and may hold office as a member of the Executive Council or as a Minister of the Crown only if that person is a member of Parliament."[29] That is the democratic link and it is rather tenuous. Only elected persons can take the big policy decisions. Yet these are persons who are elected as MPs to represent a particular geographical area. They are not elected as ministers and their electorate has no say and influence over what, if any, office they may hold in government.

The tasks of representing an electorate, functioning as a legislator and doing all the things MPs do, is very different from directing a large organisation and determining its policy. The tasks may well be better performed if they were separated. There would be built in checks and balances. The Parliament would still pass the law and appropriate the money.

What I am suggesting may sound similar to the system of separation of powers in the congressional system of government in the United States, but it is very different and not just because of New Zealand's political culture. Under the arrangements outlined here ministers would have the power to appear in Parliament and answer questions, to give accounts of their stewardship in front of select committees, present budgets, bills and other policy proposals and speak to them.[30] But they would not be able to vote in Parliament. The only major change required would be to remove the requirement that ministers be Members of Parliament. There would not be direct election of the executive officers of the government as occurs in presidential elections in the United States. There would still be only one set of parliamentary elections.

The ministers would appear regularly in Parliament to answer questions.

---

29 Constitution Act 1986, s6(1).

30 A similar proposal was first made for the United Kingdom by Jeremy Bentham, *Plan of Parliamentary Reform in the Form of a Catechism* (R Hunter, London, 1817) 5, 14. "Exclusion of Placemen in general from the right of sitting in the House, in the quality of the Members entitled to vote."

They could be questioned in front of select committees. By carefully designing the Standing Orders it would be possible to ensure ministers would be accountable to Parliament more rigorously than they are now. It is possible to provide means to make executives accountable to Parliament, even if they are not members of it. The present system shelters incompetent ministers. Under this proposal they would have to be personally competent and effective.

It would also mean that the executive would be freer to try to manage in coherent and systematic ways. Most MPs would still have to serve a parliamentary apprenticeship before becoming ministers.

The essence of such an arrangement would be to redefine the accountability relationships. In theory at present ministers and cabinet are accountable to the Parliament. But the reality is that they dominate and control it. Under the suggested arrangements all ministers could be scrutinised and held to account by Parliament, which is what it's empowered to do but does not. As I said to Parliament in my valedictory address, if ministers:[31]

> [A]re a part of this place, assuredly they will dominate it, and they will find means to continue their domination of it.

Ministers are not directly elected under our existing system. They stand for a particular seat. Their responsibilities are nation-wide. The Royal Commission's recommendations discussed in the next chapter provide for the mixed member proportional system of elections. Half the members of Parliament would be elected from party lists. This arrangement helps removing the cabinet ministers from Parliament. If each party placed its most senior MPs on the party lists it would assist what I propose. The cabinet members would be free of territorial constituency work which is both demanding and time-consuming. The effect would be to break down the unity of interest between MPs, even within the same party. Thus, party discipline would be weaker in the Parliament and executive domination more difficult. The increased size of the Parliament to 120 members, as recommended by the Royal Commission, would assist in this aim.

The result of these proposals is that 20 MPs would vacate their seats on appointment to cabinet. Their places would be taken by others of the same party from the party lists in the event that the new cabinet minister had been elected from a party list. For territorial members a by-election would be necessary. For the duration of the Parliament ministers could not vote in Parliament, although they would answer questions, appear in front of select committees and have speaking rights. At the next election cabinet members would again stand for Parliament. The provision of list seats would greatly facilitate that, they would need to retain the confidence of Parliament to continue in office as ministers. I considered going as far as suggesting direct election to cabinet. But that would threaten the coherence of the system and produce something much closer to the American system. I still

31 510 NZPD 4396 (6 September 1990).

want a parliamentary system.

In one sense such a change is the ultimate reform of Parliament policy. It would add to the vitality and power of Parliament. It would breath life into some of the procedures which have become meaningless, symbolic ritual under the yoke of executive domination. It would add cutting edge to the new select committee system. Certainly it may be harder to get policy changes through, but they might be better thought out when they did get through. In the New Zealand context such a change would yield better protection to people than the addition of a second chamber of our Parliament.

The aim is to change the balance of the system by dividing up the power. Our system would be altered fundamentally and the operation of Parliament would be altered by removing the major source of executive domination, namely the members of the executive themselves. It would also add substantially to the system of checks and balances, by ensuring that Parliament would not automatically agree with the executive, and that financial proposals made to it by the executive may not necessarily be accepted.

There are a number of downsides and costs in taking cabinet out of Parliament. It would be more difficult for the government to produce decisions. There would need to be more debate, there would be need to be a lot more persuasion before policies were adopted. But this would be a good thing. It would mean better decisions, more acceptable decisions which are better understood by the public.

Judgments will differ on the desirability of changing the New Zealand model of the Westminster system and reducing its potency. The important thing about the new approaches discussed here is that they would flow from New Zealand's constitutional experience. Executive domination of our political decision-making process has not produced the sort of government that New Zealanders are happy with, or improved decisions. Changing the composition of the executive in relation to Parliament, introducing proportional representation coupled with a new New Zealand constitution, including an entrenched Bill of Rights, would provide a three-pronged reform programme and provide a new constitutional balance.

The message of this chapter is that our political structures are set up in such a way as to encourage them to work badly. It is not necessary to become Prime Minister to discern this, but it certainly helps. The system is sick and it will not get better easily. It will not be cured by new elections bringing more changes of government and hopes that political parties will keep their promises. It will take a new constitutional settlement to do the job. The irony is that New Zealanders are resistant to, and suspicious of, constitutional change. But it will come.

8
Electoral Reform

I INTRODUCTION

Two related features of the 1990 general election stand out. The first is that the swing to the National Party produced a much higher proportion of parliamentary seats than the proportion of votes cast for the National Party. The consequence is that the National Party caucus is so big as to be unmanageable, and the Labour Party caucus is so small it has great difficulty carrying out its constitutional functions as an opposition. It is clear that both the government and the opposition have substantial and continuing difficulties as a result of the distribution of seats and that has had adverse consequences on the political process.[1]

Another point stemming from the 1990 election is that landslides have become a feature of modern political life in New Zealand.[2] We have had at least four in the last seven elections. Landslides have a tendency to produce instability and violent lurches in policy, which are not necessarily in the long-term good of the country. Serious constitutional issues arise from the question of elections and the nature of the electoral system.

The election returns in 1990 show that National secured 47.8 per cent of the vote throughout New Zealand, that was an increase of a little less than 4 per cent on their 1987 percentage. Put another way the National Party's 48 per cent produced 69.1 per cent of the seats in Parliament (whereas Labour got 35.1 per cent of the vote, which was down from 47 per cent in 1987) and the Labour Party's 35 per cent produced only 29.9 per cent of the seats. A lot of people did not vote at all, but the truth is that the government got more seats than its share of the vote would indicate that it deserved, and apart from Sydenham, the minor parties got nothing. The Greens polled 6.8 per cent for no seats at all. New Labour got 5.24 per cent of the vote for one seat. In 1984, the New Zealand Party polled 12.2 per cent of the vote for no seats. Social Credit got two seats, but only 7 per cent of the vote that year. These are clear examples of the anomalies created under a first-past-the-post system. It seriously distorts the party preferences of the voters. Parliamentary seats are not in proportion to the way the votes are cast.

While by-elections are not necessarily an indication of what may occur in a general election, consider the results of the 1992 Tamaki by-election extrapolated to a general election with proportional representation applied

1 I first outlined this view in an article in the *New Zealand Herald* 3 November 1990 and *Star Sunday* 4 November 1990. Subsequent developments have shown my prognosis to be correct.

2 The results of recent elections are analysed in G Palmer *Unbridled Power* (2ed, Oxford University Press, Auckland, 1987) 239.

to it. By proportional representation I mean that the representation of the parties in Parliament should be in proportion to the votes they receive.

TAMAKI BY-ELECTION 1992[3]

	Percentage of Vote	Seats
National	45.5%	46
Alliance	38.3%	39
Labour	12.2%	12
Others	4.0%	—

The point is also illustrated by the recent British General Election, where results under a proportional representation system would be as follows.

UNITED KINGDOM 1992 ELECTION[4]

	Percentage of vote	Actual number of seats	Seats in Proportion to votes
Conservative	43%	336	292
Labour	35%	271	238
Liberal-Democrat	18%	20	121
Others	4%	24	—

A result like the Tamaki by-election is unlikely in the 1993 general election but if it occurred, under proportional representation the National Party would have a choice. It could elect to govern alone, but since it had only a minority of the seats in Parliament, this would be risky, since its measures may be defeated and if proposals like budgets were rejected the government could not continue. It may, therefore, decide to enter a coalition with the Labour Party. There would need to be discussions about how many Labour Party MPs would become ministers and what distinct Labour policies would be implemented. The arrangements reached may be formal or informal but they would permit the running of a stable government. There would be elements of National Party policy which could not be implemented due to Labour sensibilities, and vice versa.

What would be likely in these circumstances is that the Alliance would form the opposition in Parliament. In the next general election the government may decide to contest it as a coalition or as separate parties. Such arrangements provide considerable flexibility, but they also provide stable government. The governments of many European countries are conducted in this fashion with considerable success.

The issue arising from the New Zealand electoral arithmetic is a fundamental one. Is an electoral system which produces parliamentary representation not in proportion to the popular support expressed for parties at the polls, a fair and democratic electoral system? That is the most important issue of all in the debate on electoral reform. In essence the whole argument

3 *New Zealand Herald* 28 February 1992. Both the calculations on this page assume the 4 per cent threshold for party support to secure any parliamentary representation.

4 *The Times* 11 April 1992 1.

is almost as simple as stated, and the answer is obvious. Those who resist it have to defend unfairness and the defence is a conservative one - it is better to leave things as they are. The essential argument is that the existing system provides stability together with ease of decision-making. The second point has been a constant theme in this book: it ought not be so easy to make decisions in government. My contention is that the current electoral system cannot meet any principled test of fairness, and that it ought to be changed.

When I was Minister of Justice, I set up a Royal Commission on the electoral system, chaired by Mr Justice Wallace, which produced proposals for change in the electoral system - sweeping change. The report's principal recommendation was the adoption of a different voting system.[5] The commissioners recommended that the existing first-past-the-post or plurality system be replaced by a mixed member proportional system. The Maori seats were to be abolished. The closest system to that recommended is that of West Germany. The system chosen by the Royal Commission is, I think, likely to have a number of advantages. First, it is fairer to the supporters of significant political parties, because each elector has a vote of equal value. Second, it is likely to provide more effective representation of Maori and other minority interests than the present system. Third, it is likely to provide a more effective Parliament because there would be a wider range of debate and more scrutiny of the executive. The recommended system has advantages in terms of voter participation and even in the legitimacy of the political system itself. It would, I think, certainly better recognise the diverse and pluralist nature of New Zealand society. Smaller parties would be more likely to gain seats.

Under proportional representation, seats in Parliament should be allocated in relation to each Party's share of the popular vote. Obviously, the purpose of parliamentary elections is to decide who should govern. Certainly the election in 1990 produced a clear result in terms of who should rule. In New Zealand it always does. In our system, the results are decisive in elections, but they do not reflect levels of voter support. A two-party system is the inevitable consequence of the plurality voting system.

The existence of a two-party system in New Zealand has determined the nature of our governments for the past 50 years. There are signs that it is beginning to break down, that it may have outlived its usefulness. I hope it happens because the two-party system has exerted a stranglehold on our democracy which does not allow the New Zealand Parliament to reflect the very real diversity of views which exist here. Third parties have a hard time under our first-past-the-post-electoral system. They can get an appreciable number of votes without securing any parliamentary seats.

The greatest disappointment that I had in politics was not being able to get the 1986 Report of the Royal Commission on the Electoral System adopted as policy by the government. There were studies at great length by

5 Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986).

a select committee and by caucus committees. There were numerous inconclusive debates in caucus. David Lange promised a referendum in the 1987 election campaign on the question of proportional representation. He promised that by accident. It was not party policy and he misread his briefing notes before a television interview. I agreed with what he said and, surprised as I was, went on television the next day and backed him up. After that it was difficult for other people to deny the intention, so they had to keep quiet. But the position did not prevail and the Labour caucus refused to honour that part of his commitment. Yet both parties promised a referendum on the issue in their 1990 election manifestos. In September 1992 a referendum on the electoral system will be held.[6]

Our constitution is in a constant state of evolution and change. The perfect constitutional model does not exist, it will never be attained and constitutional reform, more than any other area of reform, requires the reformer to have long-term goals. Change takes many years. This chapter is concerned with the case for electoral reform. But it must be put in the context out of which it arises. Otherwise there is a risk that electoral reform will be thought of as some sort of nostrum to remove all of our present discontents.

II THE CONTEXT FOR ELECTORAL REFORM

The ultimate constitutional question which has to be asked about New Zealand is whether it can continue to exist as an independent nation? The place for small independent nations in our world is far from easy. International commerce is changing radically, trading blocks of the world may well emerge quite soon, especially if the GATT talks fail. Merger with Australia will become a livelier issue as time goes on, unless New Zealand's relative economic decline is halted. Even if we do not merge with Australia, our relationship with that country will become much deeper and complete over time, both economically and politically.

It is possible for New Zealand to continue to exist as an independent nation. I would not expect to see formal merger with Australia in my lifetime, although there will be an inexorable march towards integration at all levels. The issue becomes a political one: should New Zealand continue to exist as an independent nation, or is some other arrangement likely to serve the interests of New Zealanders better? That is a political question, but it contains a heavy overlay of constitutional issues. It must not be forgotten that Australia itself has a load of unresolved constitutional difficulties surrounding the distribution of powers between the Commonwealth and the States. I do not propose to discuss further the Australian option as one means of solving New Zealand's constitutional problems - it may come to pass. But the rest of what is said here proceeds on the basis that New Zealand will continue as an independent nation.

Much of the alienation and the deep political disaffection in New Zealand

6 Electoral Referendum Act 1991.

stems from the failure of the New Zealand economy to produce wealth in the quantities that New Zealanders think they require. Proposals for constitutional change have to confront this basic point. Systems which do not deliver economic improvement will be discredited even if the systems are not responsible for the problem. The most important point advocates of proportional representation have to confront, is the claim that adoption of the system may weaken a government's capacity to make necessary economic reform. There appears to be a body of opinion in the New Zealand financial community of that view. I think the view is mistaken. The capacity to deliver change quickly and decisively in New Zealand is plainly provided by the present arrangements. But those arrangements are so efficient that they do not encourage the policies to be thought through as carefully as they should be. Carefully crafted and properly integrated reforms were often not produced by both governments in the recent New Zealand economic reform programmes. Indeed, Sir Roger Douglas's Mt Pelerin speech deserves to be studied by all economic reformers.[7] Contrary to what Roger says, I believe it is possible to go too fast and that New Zealand has.

There has been much talk about the need to take quality decisions in government in New Zealand in recent years. Often that is code for not consulting about the decision or debating it in advance publicly. It downgrades the role of representative government. In the New Zealand system there is a constant temptation to use cabinet's power, in both caucus and Parliament, to drive policy through, even where the policy is massively unpopular. At least that has been the tendency in recent years. Before that big changes were not attempted because it was thought they would be unpopular and so politically disadvantageous. It was as if we swung suddenly from not making any changes to making too many.

Constitutional discussion often proceeds by comparing the systems in different countries on the basis that it is the constitutional systems alone which make the difference in policy outcomes. Isolating the constitutional variable from other variables in the political and social mix is an impossible task. So we cannot be dogmatic about what constitutional structures cause particular outcomes. Links can be suggested and may in some circumstances be persuasive, but it is treacherous ground upon which to put heavy buildings. Some of the relationships can be isolated by asking some elementary questions:

1 What relationship exists between the constitutional structure of a country and its economic performance?
2 What relationship exists between the constitutional structure of a country and its capacity to deal fairly and effectively with the problems of pluralism and the interests of minorities?
3 Can the forces present in a political culture be channelled in

7 Hon R Douglas "The Politics of Successful Structural Reform" (Paper delivered to the Mt Pelerin Society, 28 November 1989).

constructive ways by constitutional structures, or are those structures merely reflective of the underlying political culture?

4 Where there is political discontent with the performance of a system due to the state of the economy, or the failure to deal with problems of pluralism, can these issues be addressed by constitutional reform?

5 Do constitutional and democratic measures designed to advance pluralism impact on the economic performance of a country?

6 Is it possible to have strong and open democratic government accommodating the needs of pluralism as well as strong economic performance?

These issues are stated at such a high level of generality that it is difficult to give them a focus. Their relationship to New Zealand can, however, be examined by using as examples two different countries, Singapore and Canada.

One of the things to bear in mind in relation to constitutional reform generally, and in politics, is that there are no final answers nor victories. Whether one political and constitutional system is better than another depends on many factors - most of them outside the system. The traditions of the country, the values of its people, the racial mix, the quantity of natural resources, will all play a big part in determining the nature of the constitutional system. It sometimes used to be said that the British peoples had a genius for self-government and sound political institutions. Compared with some other traditions, for example in South America, the point has some power. New Zealand did inherit the British tradition and it was benign. But the particular mix we have arrived at may not be the one which best suits our present circumstances and those of the foreseeable future.

If New Zealand had no unemployment, and a growth rate of 5 per cent per annum in Gross Domestic Product (GDP), there would probably be little discontent with the New Zealand system of government. Whether a different constitutional system would make the economy perform better is highly problematic and subject to argument. The range and depth of constitutional change in New Zealand in recent years has been considerable, yet our economic performance remains poor, and disaffection with the system is growing. Partly the spill-over into constitutional and political discontent stems from the implementation of radical economic policies designed to make the New Zealand economy internationally competitive. It has produced considerable hardship and little growth so far. That is not to say it will not succeed ultimately.

Political discontent and constitutional reform have to be dealt with separately, they are analytically distinct. New Zealanders are no longer convinced that theirs is a successful nation. Their expectations are much larger than the capacity of the system to deliver their wants. However, as constitutional law comprises the ground rules within which the political process operates, the two subjects are linked in a dynamic way. If the political process does not produce a contented or prosperous society, then people will look at changing the ground rules. People will think different basic

rules may produce a better society. Yet there are many elements in the equation, and constitutional structures will not be the most important of them. Nonetheless, appropriate constitutional structures may contribute to better ways of making policy decisions, and reaching decisions with a greater element of public acceptability.

We have in New Zealand a very open and vigorous democratic political system. We have also an economy which which has been in decline, relatively speaking for 20 years at least, despite the adoption of many different economic policies. The reputation of Parliament, politics, and politicians has been steadily declining over the same period.

For the past seven years, massive economic changes have been engaged in, more or less continuously, but because there has been no discernible improvement in peoples' situations, those policies are beginning to be discredited. The question is whether that phase will pass, or whether it is a condition that is more or less permanent. Election promises have been broken by both parties which suggests election campaigns are becoming meaningless rituals. When governments actually take decisions based on the situation New Zealand is in they incur enormous resentment.

One issue facing New Zealand is, can we have a healthy democracy only at the expense of a healthy economy, or can we have a healthy economy only if we reduce the amount of democracy? The argument being that the pressures and demands of open and representative democratic government work against pursuit of economic policies which will lead to growth and economic health. That may seem a strange way of setting up an issue, but it can be seen that way if the experience of other countries is examined. Singapore is a good example.

The example of Singapore is extremely instructive. It is a country to which New Zealand used to give aid. Singapore is now more in a position to give aid to us. It is certainly investing heavily in New Zealand. The Singapore Government has been seen as an autocracy ever since Lee Kuan Yew took over in 1959. Lee Kuan Yew is still a Senior Minister in the Cabinet under Go Chok Tong. Singapore under Lee had one overriding objective - continuing well-being and prosperity of its citizens. It was not too concerned with philospohical issues and was largely guided by pragmatism. Singapore was a rock that a couple of hundred years ago had 150 fisherfolk on it and nothing else. It is the size of Lake Taupo and yet it has been extraordinarily successful in producing economic growth and prosperity.

It is fair to say of Singapore, that absence of full-scale democracy did not in any way hinder the achievement of spectacular economic success. On the contrary, it can be stated that its limited democracy made it much easier for Singapore to achieve that success. Singaporeans have shown greater interest in the economic prosperity of Singapore than in the processes of democratic politics. The continuity of its political management has been remarkable. The political decision-makers have been people with technocratic managerial skills, they were hand-picked for those qualities. Western democratic

norms, institutions and processes are not treated as sacrosanct. The leadership was not interested in such notions as absolute freedom of the press. They wanted a modern, affluent, industrialised society. Economic management came before politics. An open and competitive political system was seen as an obstacle to sound economic management; so was political pluralism. The political lid was kept on Singapore. I am indebted to my colleague, Dr Raj Vasil, Victoria University Department of Politics, a comparative politics specialist who studied Singapore carefully for details of the code on which it was built.[8]

Lee Kuan Yew was aware of the pattern and working of democracy in third world countries, especially India, and formed a certain view of democracy in developing countries. Democracy, instead of being a key instrument of a social and economic revolution, had become a key barrier in its way. Corruption, nepotism and lack of discipline turned many of those democracies into soft societies. People were prone to demand rewards and benefits without having to work for them. Governments had concerned themselves primarily with maintaining their hold on power, through the manipulation of the political institutions and processes. They exploited primordial loyalties, bought mass electorates through promises that could not be fulfilled, and indulged in non-productive distribution of national wealth. Populist non-modernising leaders, who were adept word-spinners but had few problem-solving technocratic managerial skills, had established their ascendency on power. Opposition for the sake of opposition by the political opposition, as well as the mass media, made it extremely difficult for governments to rule and get on with the task of achieving social and economic change and progress. Governments acted as representatives of narrow sectional or ethnic interests rather than those of the nation. Governments fearful of alienating the largely unsophisticated electorate, tended to follow the easy course of action of not taking the hard decisions necessary to institute discipline and commitment to hard work. Trade Unions viewed employers as well as the government as their adversaries rather than as partners in progress. Populist politicians, through excessive and unwarranted interference, caused considerable loss of morale, efficiency and professionalism amongst public servants. Left in the hands of largely competing political parties, political mobilisation and organisation of the masses was achieved mostly on the basis of narrow sectional and ethnic ends, rather than national objectives. So having examined that situation, Lee Kuan Yew said "We will have none of that in Singapore." And what he went for instead was economic transformation and prosperity.

In my view the Singapore model could not be adopted for New Zealand. It is not clear that the performance of the democratic political system can be related to economic performance, although there may be a relationship between them. Singapore has different racial and ethnic characteristics;

8 R Vasil *Governing Singapore* (2ed, Times Books International, 1988) and unpublished research on file, Victoria University of Wellington.

different values and different traditions. It is true, however, that some of that operational code which the Singaporeans set themselves to abolish in the foundation years has been evident in New Zealand for years.

Another reason the Singapore model will not work in New Zealand is that more autocratic models of government will not be acceptable to New Zealanders who have a long political tradition of strong debate, press freedom and changing their government. Such a tradition cannot easily be retreated from. I think the operation of democratic politics in New Zealand has contributed to our economic weakness by encouraging the adoption of policies which would be politically popular in the short-term, but which stacked up economic problems which eventually required measures which were both harsh and unpopular. That fact, however, is not a sufficient reason for abandoning democratic politics. It is an argument for modifying the framework in which they operate.

Another example relevant to New Zealand comes from Canada. That country's recent constitutional experience contains lessons quite different from those of Singapore. The Canadians have a major constitutional crisis regarding the future of Quebec in the Canadian Federation, and that has turned from a constitutional crisis into a crisis of spirit for the Canadian people. A number of initiatives have been taken to solve the crisis. A commission was set up, and a citizen's forum to travel around Canada and find out what the people thought about the Quebec issue. Keith Spicer, who was the Chairman of the Citizen's Forum, wrote in 1991:[9]

> Canadians used to believe, - and many many still hope - that they harbour some special genius for compromise. It's at least as easy to prove that our real knack is in turning opportunities into problems. Seen from abroad, both by foreigners and Canadians, Canada looks like paradise. Long queues of immigrants - seeking freedom, tolerance and prosperity say so. Yet seen from within, Canada looks to Canadians like a pessimist's nightmare of Hell. That's the message we get from almost all our elites - politicians, bureaucrats, media, business and unions, even sometimes our artists. ... Citizens want leaders to listen to their electors, but then to lead them with vision and courage, not to govern by polls or play sterile partisan games; therein lies a contradiction good politicians are paid to resolve. If our leaders show common sense, imagination, generosity and much courage, call a cease-fire in their jurisdictional guerrilla wars and try to build a lasting peace for us before a world horizon, they can translate most Canadians' hopes for a fair and workable future to include us all, whatever the structures are needed.

9 *Ottawa Citizen* 28 June 1991 "Canada's Crisis of Spirit". The Op-Ed Page.

The Canadian crisis has quite different origins from our own. Canadians have a significantly higher standard of living than New Zealanders but this does not bring constitutional contentment. In attempting to find an accommodation between the political needs of Quebec and French-speaking Canadians on the one hand, and the Anglophones on the other, an impasse has been reached. It threatens the future of Canada as a nation. Such imploding forces are not at work in New Zealand; our location gives an identity and distinctiveness which makes a sense of nationhood easier for us than it is for Canadians. Yet we share with the Canadians democratic traditions and the need for a political system that genuinely accommodates the aims and aspirations of diverse racial and ethnic groups. It is in the need to accommodate the facts of pluralism in New Zealand society, and respond to those demands in a sensitive and constructive way, which makes the Canadian approaches so helpful to us.

The demands of pluralism tend to be muted in Singapore, and can therefore be given low priority. But I believe that we share with Canada the need to accommodate pluralism in our constitutional structures. Even if we had greater prosperity, that would probably not be enough in New Zealand. The political culture of New Zealand had too many strands to be contained by the single-minded commitment of the Singapore model. While the pressures of pluralism in New Zealand are not as intense as they have been in Canada in recent years, accommodating those pressures is essential to a successful system of government.

Ours is a stripped version of the Westminster model; some might call it the racing model. It knows fewer of the checks and balances of the pure Westminster form. It has some unique characteristics, particularly the Maori dimension. Discontent with its performance is certainly driving more change. What is needed is a re-balancing which provides a better framework for making economic decisions and a more wholesale commitment to the demands of pluralism. Those should be the twin elements of the new Aotearoa model of government in the 21st century.

It can be argued that our open democracy, our intensely adversarial party politics, have damaged New Zealand's economic prospects. Constitutional change can blunt the worst features of the existing system. It can connect up once more a system which has become outdated and restore coherence and balance. Constitutional change is worth undertaking for that reason alone, but it is not a panacea for all our ills.

Proportional representation needs to be seen in light of the proposals discussed in this section. Proportional representation can accommodate and give better representation to the pluralistic pressures which do not get adequate weighting in our two-party, executive-dominated system. It can also ensure that broader consensus exists in the community, and among its political representatives, before full-scale policy changes are undertaken. This would stabilise economic policy and make it easier to pursue over time.

Proportional representation would be a significant constitutional change. It would help improve the balance in the New Zealand political system.

III THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM

Proportional representation in New Zealand arrived as a serious issue with the Royal Commission on the Electoral System's report entitled *Towards a Better Democracy*.[10] Until then the issue had been hovering around, the subject of desultory consideration by academics and some fringe political groups. But inclusion in the terms of reference of the Royal Commission ensured serious consideration. In all the political twisting and turning which has taken place since then, the powerful analysis of the Royal Commission itself has been neglected. It was a highly qualified Royal Commission; the report is a model. Its arguments for change are compelling. They have never been effectively answered. Many participants in the current debate seem not to have read the report, nor to have understood it. Certainly they do not challenge its arguments.

The existing electoral system in New Zealand is the essence of simplicity. It is the system known as plurality or first-past-the-post. To win a candidate needs more votes than any other candidate - the successful candidate does not need a majority of the votes cast. Frequently in New Zealand elections the votes for losing candidates will exceed the number given to the winner. Furthermore, when all the election results around the country are aggregated, the Royal Commission found that "since 1954 all Governments have been elected with the support of fewer than half the voters."[11] Even in the landslide election of 1990, the National Party did not secure fifty per cent of the valid votes cast. Furthermore, in 1978 and 1981, Labour won more votes across New Zealand than National, but National's were better spread in marginal seats, so National formed the government.

It is not always appreciated how recent the existing system of first-past-the-post voting in single member electorates is. In early English elections for Parliament voting was all done in public, there was no secret ballot. If necessary, heads were counted. Indeed there was little discussion in Britain about the electoral system until the right to vote was extended, which started with the first Reform Act in 1832. At that time, as a recent history of proportional representation in Britain observes, "over five-sixths, of United Kingdom returned two members each. In England proper there were only five single member constituencies."[12] It was only when the system went to predominantly single member constituencies that the problem of "wasted" votes became much debated.[13] There is nothing magical or particularly historic about the existing New Zealand system. Nor is it based on any clear principle, except that it is both simple and crude.

What the New Zealand Royal Commission recommended was a totally new electoral system known as the mixed member proportional system, or

10 Report of the Royal Commission on the Electoral System above n5.

11 Report of the Royal Commission on the Electoral System above n5, 14.

12 J Hart *Proportional Representation - Critics of the British Electoral System 1820-1945* (Clarendon Press, Oxford, 1992) 9-10.

13 Above n12, 17.

MMP for short. While the recommended system is more complicated than the existing system, it is not too hard to understand. There would be 120 members of Parliament. Sixty of these would be elected to territorial electorates as at present, although the electorates would have more people in them because of the contraction in number. The boundaries of these seats would be drawn in the same manner as at present by the independent Representation Commission, and there would be at least fifteen of these seats in the South Island. A further sixty members would be elected by a nation-wide system of party lists. Thus, each voter would have two votes - one for a party list and one for a constituency MP. List members would be elected from ordered party lists nominated by each registered political party prior to election day. The ballot paper would show only each party's name and the first few names on the list. Once the constituency winners were known, the list seats would be allocated by a statistical method so as to achieve overall proportionality. This would work so that a party securing 40 per cent of the vote would secure 40 per cent of the seats in Parliament.

To avoid the proliferation of minor parties a threshold would apply. In order to participate in the allocation of list seats, a party would have to have more than four per cent of all list votes, or have won at least one constituency seat. The Royal Commission also recommended that the existing four Maori seats be abolished, but that the four per cent threshold not apply to parties representing primarily Maori interests.

These recommendations (and many others) were arrived at after the most meticulous examination and analysis. Many different types of electoral system were examined. They were analysed using criteria drawn up by the Royal Commission, and the criteria deserve to be set out in full since they form the basis of the whole edifice on which the recommendations of the Commission stand or fall. There were ten elements in the standard adopted by the Royal Commission, and the Commission stated at the outset that "no voting system can fully meet the ideal standards. The best voting system for any country will be one which provides the most satisfactory overall balance between them, taking account of that country's history and current circumstances".[14] The criteria set out by the Royal Commission were:[15]

a) **Fairness between political parties.** When they vote at elections, voters are primarily choosing between alternative party governments. In the interests of fairness and equality, therefore, the number of seats gained by a political party should be proportional to the number of voters who support that party.

b) **Effective representation of minority and special interest groups.** The voting system should ensure that parties, candidates

14 Report of the Royal Commission on the Electoral System, above n5, 11.

15 Report of the Royal Commission on the Electoral System, above n5, 11.

and MPs are responsive to significant groups and interests. To facilitate this, membership of the House should not only be proportional to the level of party support but should also reflect other significant characteristics of the electorate,such as gender, ethnicity, socio-economic class, locality and age.

c) **Effective Maori representation.** In view of their particular historical, Treaty and socio-economic status, Maori and the Maori point of view should be fairly and effectively represented in Parliament.

d) **Political integration.** While the electoral system should ensure that the opinions of diverse groups and interests are represented it should at the same time encourage all groups to respect other points of view and take into account the good of the community as a whole.

e) **Effective representation of constituents.** An important function of individual MPs is to act on behalf of constituents who need help in their dealing with Government or its agencies. The voting system should therefore encourage close links and accountability between individual MPs and their constituents.

f) **Effective voter participation.** If individual citizens are to play a full and active part in the electoral process, the voting system should provide them with mechanisms and procedures which they can readily understand. At the same time, the power to make and unmake governments should be in the hands of the people at an election and the votes of all electors should be of equal weight in influencing election results.

g) **Effective government.** The electoral system should allow governments in New Zealand to meet their responsibilities. Governments should have the ability to act decisively when that is appropriate and there should be reasonable continuity and stability both within and between Governments.

h) **Effective Parliament.** As well as providing a government, members of the House have a number of other important parliamentary functions. These include providing a forum for the promotion of alternative governments and policies, enacting legislation, authorising the raising of taxes and the expenditure

of public money, scrutinising the actions and policies of the executive, and supplying a focus for individual and group aspirations and grievances. The voting system should provide a House which is capable of exercising these functions as effectively as possible.

i) **Effective parties.** The voting system should recognise and facilitate the essential role political parties play in modern representative democracies in, for example, formulating and articulating policies and providing representatives for the people.

j) **Legitimacy.** Members of the community should be able to endorse the voting system and its procedures as fair and reasonable and accept its decisions, even when they themselves prefer other alternatives.

At this juncture we encounter one of the most distracting issues of electoral reform. The complexity of the choice between competing systems which are available if it is decided to abandon first-past-the-post. What tends to happen is that the details of the various systems, some of which are of mind-boggling complexity, tend to dominate the debate and the main principles behind the need for change are lost sight of. There are a number of systems:

- At-large voting as with City Council elections.
- Single non-transferable vote. This is used in Japan where electors may cast only 1 vote in a constituency with several members.
- The second ballot which ensures the winning candidate gets more than 50 per cent of the vote.
- Preferential voting achieves the same purpose as the second ballot but does it at one election by the placing of orders of preference on the ballot.
- Supplementary member system, where supplementary seats are allocated to parties in proportion to their share of the total vote in the constituencies. The details of how this could work in the New Zealand context were worked through by the Royal Commission.
- The Single Transferable vote. Each elector votes in a multi-member constituency and numbers the candidates in order of preference. This is the system used in Ireland and Tasmania. Its details are complicated. Voting is simple enough, counting more complicated.
- The MMP system, which was the system unanimously recommended for New Zealand by the Royal Commission.

There are others not gone into here, since I am determined this chapter is

not going to become bogged down in minute comparisons between the various systems. The essence of proportionality is simple. The debate needs to concentrate upon that principle. The trouble is that the way the government has formulated the referendum on the voting system for New Zealand, the public is likely to become bemused by these comparisons and forget what the whole issue is about.

Let me conclude this section by repeating again the conclusion of the Royal Commission. It found the existing system seriously deficient. After evaluating the proportional systems it found MMP clearly the best because it promoted fairness between political parties, provides effective representation of Maori and other minority groups, it will provide an effective Parliament and it has advantages in terms of voter participation and legitimacy. In terms of effective government the new system would make coalitions or minority government more likely "though by no means inevitable."[16]

IV THE CHOICES IN THE REFERENDUM

In the 1990 election manifestos, referenda on electoral reform were promised by both Labour and National, but it is important to remember that neither of those main political parties has embraced the introduction of proportional representation as a policy. To say it is policy to have a referendum is one thing, to promote proportional representation is quite another. Neither of the main political parties has endorsed changing the present system and I do not think there is any prospect that either of them will, because it is clear that proportional representation operates against the interests of the major political parties. In New Zealand it is either going to be National or Labour who governs, so why would the beneficiaries of a duopoly of that character voluntarily agree to surrender it? They may be convinced to do so if it can be shown the country will be better off as a result. They will listen to a strong expression of view in the September referendum.

The only thing which will produce change, therefore, is extraordinary pressure from public opinion. It is idealistic to expect that Members of Parliament will vote for the abolition of their own seats. Many of them would have to do that if the Royal Commission's proposals were adopted, and it is unreasonable to expect the major political parties to give up voluntarily a position that they have long enjoyed.

The Parliament in 1991 passed an Act to conduct a referendum on electoral reform in 1992.[17] The referendum on offer is really an offer to the public to play the game of getting proportional representation with the dice loaded against such a system. The first-past-the-post plurality system - the existing system under the government's policy, gets two chances. First, the Electoral Poll Act provides a choice in the 1992 referendum between the present first-past-the-post system, or a vote for change. Every voter gets

16 Report of the Royal Commission on the Electoral System, above n5, 64.

17 Electoral Referendum Act 1991.

two votes: for or against change, then a choice between four types of changed voting system. The choice is between preferential voting, the mixed member proportional system, the supplementary member system or the single transferable vote system.

The voter does not get to vote for change definitively unless there is a majority for change in 1992. If the first-past-the-post system prevails in the 1992 referendum, under the Act there will be no second poll. If it fails, there will be a run-off in conjunction with the 1993 general election. The run-off will be between the first-past-the-post system again, and the favoured reform option from the 1992 referendum. So even if there is a majority in favour of change in 1992, the existing system has another chance to prevail again in 1993. It does not take a great deal of prescience to conclude that the chances of change prevailing twice are not very high in a ballot for a system that neither of the main political parties support.

The Electoral Poll Act does not provide for a fair contest. Nevertheless, it does provide an opportunity which must be taken. Ironically enough, it is only the lash of massive public unpopularity which has forced the government to hold this referendum. The decisions which have been made, and the policy on which the Act is based, all show the marks of division and compromise within the governing party. The Minister of Justice, the Hon Douglas Graham, deserves considerable credit for keeping the idea afloat, and it would be churlish to criticise the Act too profoundly because Parliament has agreed to play with a dice loaded against the public being able to change the system. The opportunity New Zealanders are offered must be seized.

There are, however, a number of features in the Act which need to be pointed out. There is no a legal obligation to hold a second referendum in the event that the first one passes. Such is the stated intention of the Government, and it is even mentioned in the schedule containing the voting paper, but there is no provision in the Act requiring a second poll. Given the rather fraught history of this matter, there should be.

There are some technical aspects in the Act which are a little odd. The voting paper itself is perforated, and after voting, each voter is required to tear it apart and fold each piece separately and put it in the ballot box. This seems likely to cause confusion and administrative difficulty. There seems to be no substantial policy reason for it. I suspect that administrative convenience in counting may be the reason.

Since the first referendum is indicative only, fresh legislation will be needed for the second, so that it can be binding. The second referendum, it will be remembered, is between the existing system and the most preferred of the four options for change in the 1992 referendum, assuming a plurality vote for change. The second piece of legislation is a major legislative challenge because every detail of the new system has to be drafted so that it can go into effect if the final referendum votes for change. So it will be necessary to draft and pass a binding referendum Bill including all the changes required to the Electoral Act, should proportional representation or

one of the other choices be adopted. That is a big undertaking and it would be easy to find reasons not to do it between September 1992 and the November 1993 general election, regardless of what has been said earlier.

What is clear and enacted into law at the time of writing, is the nature of the choice facing the New Zealand voter in the indicative referendum on the electoral system on 19 September 1992. Voters will face two sets of questions on two separate pieces of paper.[18] The first is simple. The voting paper gives the following choice:

I VOTE TO RETAIN THE PRESENT FIRST-PAST-THE-POST SYSTEM

I VOTE FOR A CHANGE TO THE VOTING SYSTEM

The next step is curious. All those who vote, including those who vote against changing the system, are asked to indicate their preference of one among four stated options. In the event that change carries in 1992, the 1993 referendum will offer another choice between first-past-the-post and the reform option that receives the most votes in the 1992 referendum. These are the choices:[19]

I VOTE FOR THE PREFERENTIAL VOTING SYSTEM (PV).

I VOTE FOR THE MIXED MEMBER PROPORTIONAL SYSTEM (MMP)

I VOTE FOR THE SUPPLEMENTARY MEMBER SYSTEM (SM)

I VOTE FOR THE SINGLE TRANSFERABLE VOTE SYSTEM (STV)

The logic of offering four choices is strange. The Royal Commission unanimously favoured one, MMP. Surely the sensible thing to do was to offer that against the existing system. Then it could all have been settled in one referendum. And such a referendum would have been much fairer than the proposal upon which the government is engaged. It would have been a fair contest.

There is a further complication. The electoral changes are going to take place in a constitutional context which is even more elaborate than outlined so far. The Government's constitutional reform policy is complicated, even convoluted. There is substantial opportunity for confusion, both within the separate policies themselves, and in the way the various components interact. The elements of the policy, as outlined here come from manifesto commitments, and from the Minister of Justice's introductory speech on the Electoral Poll Bill.[20]

There are three main elements in the policy. First, the introduction and passage of a Citizens Initiated Referendum Bill. This was promised in 1991 but did not appear until 1992. This is a different sort of referendum compared with the one on the electoral system. The bill provides for non-binding referenda to seek the public's view on appropriate issues. And to cause a referendum to occur, a petition signed by 10 per cent or more of the

18 Electoral Referendum Act 1991, Schedule, Form 1.

19 Above n18.

20 Hon D A M Graham, Introductory speech, Electoral Poll Bill 22 August 1991, NZPD, No 25 4316-4334.

eligible voters would be required and that would have to be presented to Parliament, then a referendum would be held within 12 months.[21] That particular reform was severely criticised by the Royal Commission on electoral law and not recommended. Nevertheless, it is in the National Party's policy. Second, there are the two referenda possible on electoral reform. One, an indicative reform, must be held on 19 September 1992. A second, binding one is promised if change secures a majority at the first. The second referendum will be held in conjunction with the 1993 general election. Third, in the 1993 general election there will be a further referendum, on the creation of a second House of Parliament - a senate. The Minister of Justice said in his introductory speech on the Electoral Poll Bill:[22]

> The voter, when voting on the senate question, will know that the electoral system for the House of Representatives will either be first past the post, which is the status-quo, or the system referred to in the previous question on the ballot paper, which is the most preferred reform option. Therefore, the senate question will be worded in such a way that the person voting can vote for the creation of a senate, which ever system is used, or only if the present first past the post system is retained, or only if the preferred reform option is introduced. Alternatively, the voter can simply vote against the creation of a senate.

I would add, the voter is going to have a headache, and not know much about what to think of constitutional reform after all of that. The cynic might think that such is the conclusion the voter is supposed to reach. The problem is that there are three separate policies, which taken together are bound to create some doubt and confusion. They all interrelate yet they are to be treated separately. High levels of voter confusion are inevitable, indeed they may be welcomed by the government. In order to have a meaningful referendum, therefore, it will be necessary to have a massive educational programme if the exercise is to have any meaning at all.

It is objectionable to have a referendum on a second chamber at the same time as one on changing the voting system. The arguments for a second chamber resemble those for a change in the voting system: that the second chamber will be a fresh check in the system. It would curb executive power and provide for ways of preventing hasty legislation. There are great problems in knowing how to elect a second chamber or how it might operate in New Zealand. There is no evidence the idea has been thought through by its proponents. Yet this idea comes to be determined at the same time as the electoral system. It is a classic recipe for a constitutional botch-up.

Further confusion will result not only from the context in which the electoral reform will be considered, but also from the nature of the options

21 National's Policy on Electoral Reform, Policy No. 26, released 11 September 1990 by Murray McCully Opposition Spokesperson on Electoral reform, 4.

22 Hon D A M Graham, above n20, 4318.

in the electoral reform itself. Election systems are notoriously difficult to understand in detail, except for the existing system, which is the most powerful argument in favour of it - it is simple. The difference between the supplementary member system, the mixed member proportional system and the single transferable vote numb the mind of all except the specialist. The choices are difficult and the Royal Commission's report on those matters is very dense. Why the Australian system of preferential voting was added into an already difficult referendum it is impossible to say. It found no favour with the Royal Commission itself. The single transferable vote option was added by the select committee when the bill went there. Certainly if preferential voting is to be voted on, STV should be, but the logic of voting on a number of choices for change is flawed.

Despite all the obstacles which have been put in the way, the best prospect of electoral reform has to be the widespread and still growing disillusionment with the political process generally. The National Party policy in which the electoral referendum was pledged says that the National Government intends to display integrity: "By implementing the policy commitments it has made, and by consulting with a wide range of New Zealanders along the way."[23] Primary amongst those commitments was a review of standing orders which allow the Government to take urgency and pass legislation in a single sitting, especially after budgets. After that promise the 1991 Budget saw the most massive use of such powers ever made in the New Zealand Parliament.

The 1990 National Party election policy document also promised that the binding referendum on electoral reform would be held prior to the end of 1992 to ensure that any changes to the Electoral Act required by its result could be made before the next general election. But under the Act as passed that is no longer the policy. There can now be no change in the electoral system before the 1996 general election, a major breach of the manifesto commitment. That in itself, I think, indicates a certain degree of apprehension at the consequences that the changes may bring.

There is plenty of room for the proposals for change to falter even if change carries in 1992. It may not carry again, as it must in 1993. If it does it would be a simple thing to apply proportional representation only to a new second chamber and avoid stopping executive control of the House of Representatives. Even if electoral change is voted for and implemented it will determine nothing until 1996, which provides plenty of room for political back-sliding on the question. If a new government is returned in 1993 it may feel able to ignore and repeal whatever commitments the National Government put in place.

So we are looking forward to what one might call a 'plethora of referenda'. In 1992, the public is going to vote on the changed method of voting. In 1993, they are going to vote on the question of a senate. If the policy on indicative referenda is enacted some of these referenda may surface as well.

23 National's Policy on Electoral reform above n21, 6.

To explain all this to the public, and clearly show the merits of the various arguments for the various changes, would challenge the best-funded public relations campaign. It could not be done effectively by television advertisements. For example, in the electoral referendum of 1992, the choices are so many and so intricate that no simple message could be devised. Yet the public get most of their information about political matters from television.

The Minister of Justice promised that the September 1992 indicative referendum will be preceded by a publicity campaign "[t]o explain to voters how each of the alternative reform options operates, and arguments for it against each option."[24] A small impartial committee has been established, chaired by the Chief Ombudsman, to approve or reject the material. That was certainly a prudent step.

I recall when I prepared an information pamphlet for every householder on the report of the Royal Commission, the caucus committee gutted it. Caucus was divided over the merits of the changes recommended by the Commission. And when the pamphlet was sent out, some of my cabinet colleagues objected because it looked as though it might bring proportional representation a bit closer. When I was Minister of Justice, I was advised that it would cost $12 million to conduct a referendum. That is because it is not only necessary to staff the polling booths but also to bring the electoral rolls up-to-date. A meaningful referendum is expensive. It would take at least another $10 million to run a proper education and advertising programme. The Government has made available $2.3 million plus GST for the campaign.[25] This will not be sufficient to produce public understanding.

The case for electoral reform needs to be developed and promoted if it is to have a fair chance of success. For the referenda on the voting system to pass there will have to be a strong upsurge of public opinion. The main political parties will not be promoting it. Indeed prominent members of them are combining to oppose it.

V WHY VOTE FOR CHANGE?

I favour the Royal Commission's recommendation of MMP because I find the Commission's reasoning persuasive. On principle MMP is clearly fairer than our present system. MMP is the best choice in terms of the criteria laid down by the Commission for judging voting systems.

I have some reasons of my own as to why the changes would benefit the New Zealand constitution and body politic. Those reasons depend upon some predictions about the effect the changes may have on the way our system of government now operates. It is not possible to be absolute about how the system would behave were MMP implemented. It is not clear that existing patterns of voting would be maintained. So some speculation is involved in making predictions on how the system will work. But some features are tolerably clear.

---

24 Above n20.

25 *The Capital Letter*, Vol. 15, No. 20 (1992).

There are some substantial arguments in favour of the Royal Commission's recommendations. The quality of the decision-making may very well be improved by such changes. The nature of the political debate would be changed. There would, I think, be more confidence in the system because it would seem to be fairer, it would promote co-operation and moderation, not conspicuous features of our current political system. The alienation of the public from our political system has increased to a dangerous extent.

The adversarial style of politics which characterises the Westminster system in New Zealand would be broken down by proportional representation. The present system is based on political confrontation. It is not based on negotiation or reasonableness. Our system is extraordinarily efficient in destroying the credibility of the political parties, because each political party has a vested interest in destroying the credibility of the other, and, in recent years, added to that has been the additional factor that political parties destroy their own credibility as well. So, there is little faith in the political party system in New Zealand today. In a political system where the winner does not take all, and all the participating parties know it, there is likely to be a more highly developed sense of political restraint.

What proportional representation might encourage is the development of a system of negotiated policy decision-making based on consensus. This would mean deliberate and careful debate about policies before their adoption and the securing of a wide measure of agreement. It is possible, even likely, that proportional representation could produce that sort of political system.

Both main political parties in New Zealand can gain only minority support at election time. Yet under the "winner take all" system one or other of them forms the government, and with a parliamentary majority which may be small they have the total running of the government. All other interests are shut out of it. With a relatively small shift in support at the next election, the other party can form the government and undo previous policies. This leads to government strategies which do not have great credibility with the public, since the public are not sure that those in power will last beyond the next election. Once in power, parties have tended not to think beyond the next election and a series of short-term expedient policies before 1984 was responsible for the need for harsh policies which have produced discontent.

Small shifts of opinion can change the government and the government can change the policies. It is not usual to change all of them but there is quite serious policy discontinuity because of changes of government. Our present system tends to be destructive. Drastic changes in direction do not help anyone. It would be far better if each government built on the work of those who went before, making adjustments and corrections incrementally. That way we could build enduring policies based on real consensus.

The three year term in New Zealand further weakens the system. It is necessary to act quickly to get major changes implemented at all within three years. So often they are not thought through and insufficient consulta-

tion takes place. A consultative style of decision-making can produce enduring change - the Resource Management Act 1991 is an example of such legislation. Systematic consultation over a period of years was no barrier to the production of a radical and comprehensive policy accepted by both main political parties. This pattern should be used more often. In fact it ought to be the general pattern. Proportional representation will encourage a pattern of policy consultation. Political parties will have their policies but they may not be able to implement them without the support and agreement of others.

One of the most common arguments against the change is that it will produce coalition, and government by coalition is unstable. It will only produce coalitions if community electoral opinion is sufficiently divided. If it is so divided democratic principle requires that minority opinion should not prevail over the majority. Where there is division, policy development by discussion, consultation and negotiation is entirely appropriate. Such a style is the antithesis of our present adversarial patterns of decision-making behaviour.

Neither is government by coalition necessarily unstable. The country upon which the Royal Commission's recommendations were based, Germany, has had highly stable coalition government for a long period. Furthermore, the threshold recommended by the Commission will prevent small and extreme groups having a stranglehold over policies in certain situations as has occurred in Israel where there is no such threshold. My view is that the changes would produce a more stable and sustainable political system than the one we have now.

There can be no denying, however, that MMP is likely to produce a "weaker" system of government in that it will be more difficult for the executive to get its way in the Parliament. There will need to be more discussion. The cabinet will not have automatic control of the Parliament as it has now. Strong government in New Zealand has done us a lot of harm. By strong I mean the ability of the executive to get its own way quickly and decisively without debate. It is that feature of the New Zealand system which is most in need of change and proportional representation can provide the brakes Parliament needs.

The New Zealand system has inherited all the power of the crown and effectively placed that power in cabinet. It is not a system where the power flows from participation at the grass roots level, upwards. But in any enduring democracy that is the direction in which power must flow. New Zealanders are naive about the use and abuse of power. They are far too willing to entrust unbridled power to their governments. They would find more contentment with a system which moved away from the "elective dictatorship" model. The Royal Commission's system will blunt the excesses of our present system.

There is a further reason to embrace MMP. The two main parties are now in the position where they do not honour some of the promises they make in their election manifestos. The traditional understanding in New Zealand has been that parties give a solemn undertaking to follow their

manifestos. This undertaking amounted virtually to a constitutional convention; the electors expected governments to follow their party manifestos. In another chapter in this book I have analysed why the dynamic of the main political parties, and government, is now such as to make this unlikely and impossible for some major policies. That used to be the system, but it is disintegrating. It is one thing to elect a government on a minority vote to implement policies which are clear and announced. It is quite another to grant the government a blank cheque. There is no legitimacy for strong executive action on an unannounced programme. Manifestos under proportional representation would in some instances become a starting point for negotiation, not a prescription for action. That is what they should be anyway. The idea that a party can govern in modern conditions on the basis of a manifesto drawn up in the way New Zealand manifestos are drawn up is manifestly absurd. It is even more absurd to anyone who has a close knowledge of how party policy is actually made.

Policy development by negotiation could include the interest groups - business and trade unions, local government and indeed all centres of power in the community. That is not to say that pressure groups should exert veto power, or that policy initiatives have to be tame in order to prevail. It is simply a means of ensuring that there is an equitable accommodation of interests in decision-making.

What is involved here is a shift in the nature of the political culture in New Zealand. The parties' relationships with one another would alter. There will be areas where they agree, probably big areas. But where they do not they will be in competition with one another. But the new system would require levels of co-operation between them not previously seen in New Zealand. The validity of several points of view will readily come to be accepted in the new political culture. The parties will have to co-exist permanently, more than two of them. The idea which underlies the existing system, that politics is war, would have to go. Politics should be about building, not about destruction. The two-party duopoly should be broken.

What is said against such a change? The first point to note is that almost all of it is said by practising politicians from the two main political parties. They do have a vested interest in perpetuating the present oligarchical system and what they say should be discounted for that reason. They avoid answering the careful reasoning advanced by the Royal Commission for the good reason that they cannot. The Minister of Health, the Hon Simon Upton makes the argument that it is "highly questionable whether electoral reform will in any way advance this country's fragile prospects."[26] He explains present discontents by the fact that both main political parties when in government have been forced to implement unpopular policies. Then he tries to deflect the argument onto the need for parliamentary reform, a chorus echoed by the deputy leader of the opposition the Rt Hon Helen Clark.[27] Upton asserts that electoral reform has nothing to do with

26 *The Press* 9 January 1992.

27 *The Press* 4 January 1992.

the operation of Parliament. Nothing could be more wrong. In fact proportional representation is the ultimate reform of parliamentary policy as I have argued in Chapter 5. Proportional representation is the ultimate reform of Parliament programme because it will force Parliament to change its behaviour.

Helen Clark's arguments against change first ask the question "[w]ould a change to the electoral system, and specifically to a more proportional system, result in either less public cynicism about the political system and/or in parties which remained true to their word."[28] She doubts that would be the result. There is no doubt people are cynical about political parties and they have reason to be. Political parties in New Zealand have failed in recent years partly because there are only two realistic competitors for power under the present electoral system. As I have argued elsewhere in this book the party structure produces policy demands which cannot be met by the government. The two parties make promises they cannot keep because they cannot avoid doing it in the context in which they find themselves within the existing system.

Helen Clark goes on to complain that change may produce coalitions echoing Disraeli's 1852 quip "England does not love coalitions". She says the result will be even less respect of party manifestos than there is now. That is so because there will be bargaining about what the policy lines should be in the government, since more than one party may be represented in it. Her point overlooks the fact that proportional representation may produce policy that is more in line with the views of the population as a whole. The problem with her analysis is that it is an implicit defence of the "elective dictatorship" theory of New Zealand government. She goes on to offer some palliatives against executive power.

In truth the sickness of the New Zealand system is more than the fact that two governments broke some of their manifesto commitments. It is in the nature of the parties themselves, the structure of government in New Zealand, and the way in which executive power is exercised. An electoral system which ensures that significant points of view go unrepresented in the Parliament is bound to produce unacceptable outcomes and cynicism from the population.

It is plain that both main parties have developed something which now resembles a bi-partisan policy on proportional representation. They are against it. There are some senior MPs on both sides of the House in favour of proportional representation, but they are in a minority. So both parties promote mild measures of parliamentary reform in order to give the impression this will curb executive power. But underneath the main parties want to preserve the essence of the existing system. That is where their self-interest lies. It gives the two main parties an advantage over the smaller parties. It is not characteristic of New Zealand politicians to give up power or the prospect of power. It is to be hoped the public is not duped by this uncharacteristic consensus which is developing for the wrong reasons. The

28 Above n26.

New Zealand public have an interest in having a better democracy, even if it involves sacrificing the interests of the current crop of politicians.

There is a more respectable argument, however. This argument admits the existing electoral system is unfair. But, it postulates, there is a price to be paid for removing the unfairness. The price is a loss in stability in government, and a prospect that governments may be deterred from taking hard decisions because they will be unpopular, and that unpopularity will be more politically potent in a proportional representation system. In other words, it is an argument about the virtues of elective dictatorship and the danger of too much democracy. In particular, advocates of recent wide-ranging economic reform take pride in what New Zealand did, and do not want to see removed the opportunity to do such things fast. There is something in the argument, but not enough to make it decisive. It also needs to be balanced against the social costs of changing things fast.

It would be an extraordinary and unprecedented step for a basic constitutional reform to be adopted without the support of the two main political parties in New Zealand. But it ought to be done. A political system which does not produce a close relationship between voting preferences and seats in Parliament has little claim to be regarded as legitimate.

9
The Media and Politics

I INTRODUCTION

It is a dangerous enterprise for politicians, perhaps even retired ones, to offer to the public their opinions on the news media. Politicians' opinions concerning the performance of the media are seldom charitable and the media tends to discount them or attack them, and it is the media which has the last word. The media and politicians are bound together by a powerful bond of mutual need. Politicians provide news for the media. The media provides exposure for politicians to the public. The journalists carry the messages and fashion the images. It will always be a tense relationship, lacking in mutual trust.

My experience in politics has altered my attitude to the media. In Parliament ministers and leaders are served by superb clipping and media monitoring services. The service provides ministers with an unusually broad overview of media behaviour and approach. Half a dozen years of looking at this material gives a realistic understanding of the strengths and weaknesses of the New Zealand media. Reflecting on the experience has lead me to the conclusion that the media is part of New Zealand's constitutional problem. When I was in a position to know what was actually going on, it too often seemed to me that the media was an "ever-bubbling spring of endless lies",[1] misrepresentations and distortions. They were not usually lies in the sense of deliberate falsehoods, but falsehoods nonetheless. My journey to this sombre conclusion has been tinged with sadness and regret. My father was a journalist; my sister was a journalist; my daughter is a journalist. I almost became a journalist myself; I worked as a journalist in the university vacations and edited a student newspaper. As a lawyer I have long taken a professional interest in media law and have written about it.[2] So heedless of cries that the critic has an axe to grind, I want to try to diagnose what is wrong and suggest how it can be set right.

II THE CONSTITUTIONAL FUNCTION OF THE MEDIA

In days gone by people were divided into estates for the purposes of politics and government. The main distinction in England was between the House of Lords and the House of Commons; the lords spiritual were the first

---

1 W Cowper "The Progress of Error" quoted in *The Oxford Dictionary of Quotations* (3ed, Oxford University Press, Oxford, 1979) 166.

2 Palmer "Defamation and Privacy Down Under" 64 Iowa L Rev 1209 (1979); "Politics and Defamation - A Case of Kiwi Humbug?" [1972] NZLJ 265.

estate, the lords temporal or peers the second estate. Both sat in the House of Lords. The commoners comprised the third estate; they sat in the House which still bears their name. The conception of estates was feudal and religious in origin; it does not sit easily with modern democratic ideas of political communities. How it was ever possible to think in terms of estates is effectively beyond modern understanding.

Even before the extension of the franchise, the relationship of Parliament to the community outside became a vital ingredient of political life. In 1828 Lord Macaulay observed "[t]he gallery in which the reporters sit has become a fourth estate of the realm".[3] Indeed, the idea that free expression and freedom of the press is an important feature of political freedom goes back at least as far as John Milton. It is certainly reflected in the writings of Junius and found its way into the United States Constitution as a preferred freedom embodied in the First Amendment.

No educated person can deny the relationship between political liberty and freedom of expression articulated in Chapter 2 of John Stuart Mill's *Essay on Liberty*. It is the foundation principle of liberal democracy. He begins by remarking that the time had gone when any defence of the liberty of the press was required. We can, of course, take that as a given in New Zealand. The evil of attempting to suppress views has never been put better than Mill put it:[4]

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

I do not want anything said here to be construed as bringing that principle into question. I am a firm and committed believer in freedom of expression. There is, however, at least in my experience, a vast gulf between the classical ideals of liberal democracy and the practical performance of the media in the New Zealand political system. Yet it is by the principle of Mill the media must be judged. Of course, Mill's theory is based on the assumption that people are rational, that they can intelligently calculate their own interests and are capable of self-government. The assumption is not free from doubt.

The performance of democratic systems of government fall short of the ideal of liberal democratic theory. In fact the entire political process can be

---

3 Lord Macaulay *Historical Essays Contributed to the 'Edinburgh Review'* in *The Oxford Dictionary of Quotations* (3ed, Oxford University Press, Oxford, 1979) 323.

4 J S Mill *Utilitarianism, Liberty and Representative Government* (J M Dent & Sons, London, 1964) 79.

regarded, under some theories, as a struggle by factions for power and the advantages of office. The real question, therefore, is whether governments and political parties are truly interested in the will of the people, or whether they are engaged in managing the symbols of democracy as a mask to advance factional interest. If these theories are true, then the notion that a sensible and informed public will allow democratic government to reflect the will of the people is doomed.

Under Mill's theory the media would have some responsibility to convey useful information to informed citizens who want to have a say in their government. The media could not be regarded as a purely market-driven business supplying entertainment for the most part. It is not clear what conception the New Zealand media have of their responsibilities, or whether they recognise any.

If it is not the media's responsibility to provide the material to keep the public well informed about their government, then it must be the responsibility of the government itself. That immediately raises a conflict of interest for the government. In a competitive political system the prospects for propaganda are not to be encouraged. We may well have departed from Mill's nineteenth century notion of representative government. Power is not located in Parliament, as this book has been at pains to point out. It is in the hands of the executive. But even in this modified system of representative democracy freedom of expression is essential. Despite the fact that the mass of people are not interested in the political process, or informed about it, the media do perform the function of keeping the politicians on their toes. The media are an important linkage in the political system and therefore of constitutional significance.[5]

The classical question is, do the media provide the information and the range of opinion which allow the free market in ideas to flourish? Or in terms of modern political theory, do they provide adequate linkages in the political system? The conclusion I have reached is that serious criticisms can be made of the New Zealand media's treatment of government and politics. One of the problems with the constitutional and political system is the performance of the media. If the media were of a better standard the political system would function better. In the world of media excellence "analysis and intelligence are valued above all else".[6] Such is the case elsewhere, but not in New Zealand.

I do not assert that the media have been responsible for any constitutional or political crises, although political journalists are certainly participants in some of those. The media are a centre of power in the political system.[7] The nature of that power, the manner of its exercise, and the accountability for it, are all issues with a constitutional dimension. In some respects the media hold political decision-makers in society to account, but

5 I am indebted to some useful exchanges with Dr Les Cleveland for some of the points made in this section.

6 D Halberstam *The Powers That Be* (Chatto & Windus, London, 1979) 132.

7 The word "media" is the plural of "medium".

who guards the guardians? The media are subject to the market and subject to the law. Both these pose substantial restraints on media activities, but not in a way which aids the performance of the *constitutional* function. In important ways it is the professional standards of the journalists themselves which determine media outcomes. Those standards tend to be somewhat vague and elastic.

Since the argument here revolves around the constitutional role of the media, that should be defined. The media have an obligation to provide the public with information about the functioning of the executive government, the decisions it takes, the inputs to those decisions, the public debate surrounding them, and the consequences. The media have a similar function in relation to Parliament - reporting what is done and said in Parliament, the work of its select committees, scrutinising government legislation, policy and expenditure. There is also an obligation to provide the public with information on the activities of political parties, their caucuses, party organisations in policy-making, and the selection of parliamentary candidates.

Not only should information be provided but analysis and comment is necessary too. Why was this policy chosen rather than that one, what were the critical arguments, what was the advice given, where were the points of difference; what was the performance of various ministers; what are the future policy prospects? High quality analysis requires a lot of knowledge, experience and ability. It is altogether different from reporting what happened.

The notion of the media as an instrument of information and instruction is well recognised. It was well articulated by the Report of the Royal Commission on the Press in the United Kingdom which reported in 1949:[8]

> The press may be judged, first, as the chief agency for instructing the public on the main issues of the day. The importance of this function needs no emphasis. The democratic form of society demands of its members an active and intelligent participation in the affairs of their community, whether local or national. It assumes that they are sufficiently well informed about the issues of the day to be able to form the broad judgments required by an election, and to maintain between elections the vigilance necessary in those whose governors are their servants and not their masters. More and more it demands also an alert and informed participation not only in purely political processes but also in the efforts of the community to adjust its social and economic life to increasingly complex circumstances. Democratic society, therefore, needs a clear and truthful account of events, of their

8 *Report of the Royal Commission on the Press 1947-49* at 100 reprinted in B Berelson and M Janowitz (eds) *Reader in Public Opinion and Communication* (2ed, The Free Press, New York, 1966) 535-536, "The Standard by which the Press Should be Judged".

> background and their causes; a forum for discussion and informed criticism; and a means whereby individuals and groups can express a point of view or advocate a cause.

The Royal Commission also discussed the standards set by the media themselves and the standard of the media as an industry - a matter governed not only by economics and the need to sell the product, but also by different judgments as to what constitutes news. The conclusion was that while the media are not purely an agency for the political education of the public, they could not be considered purely as an industry either. They have wider responsibilities. They are invested with a scaled-down set of duties as outlined in the passage quoted. The Royal Commission was concerned with the print media only. The multi-media cacophony in the world has developed since, but the standards should not have changed on that account. However, standards have changed with little public, and not much professional, debate.

It is a well recognised rule in both journalism and the law of defamation that fact and comment must be distinguished. As a famous editor of *The Manchester Guardian* C P Scott said in 1926; "[c]omment is free but facts are sacred."[9] The distinction is not always easy to draw, and the modern "Gonzo" school of journalists does not recognise it at all.[10] Nevertheless, it is a fundamental necessity for a proper functioning democracy. Sufficient accurate information must be imparted to provide the consumer of the media with the essence of what the government's policy is. Journalists are free to say "The Government stinks" if they wish, but that ought to be separate from a factual account of the government's actions. The United Kingdom Royal Commission formulated the relevant standard for this problem. It said "if a newspaper purports to record and discuss public affairs, it should at least record them truthfully. It may express what opinions it pleases ... but opinions should be advocated without suppressing or distorting the relevant facts."[11]

In both television news and political journalism in New Zealand these distinctions are frequently not observed. Fact and comment are jumbled up, the material is highly selected and slanted. Thus the stream of ideas in the political marketplace is polluted at the source.[12] Television is the major influence on the political process. The way in which the distinction

---

9 *Manchester Guardian* 6 May 1926, quoted in *The Oxford Dictionary of Quotations* (3ed, Oxford Unveristy Press, Oxford, 1979) 415.

10 It is not clear that the alleged inventor of this school of journalism recognises its existence, see Dr H S Thompson *Songs of the Doomed* Gonzo Papers Vol 3 (Picador, New York, 1991) in which this is said at 317: "Hunter S Thompson is a humble man who writes books for a living and spends the rest of his time bogged down in strange and crazy wars. He is the author of many violent books and brilliant political essays, which his friends and henchmen in the international media have managed for many years to pass off as "Gonzo Journalism"."

11 *Report of Royal Commission on the Press 1947-49* above n7, 106, and Berelson and Janowitz above n7, 541-542.

12 For examples see section IV of this chapter.

between fact and comment should be applied in television is by no means an easy issue. The amount of hard information imparted by television news in New Zealand is small. The images are selected and edited down so far as to often be distorted and misleading. The public is left not with substance but with image. And so politics is becoming more about images and less about policy.

The implications of increasing television dominance for the political system in New Zealand have not been analysed systematically so far as I know. The question has to be asked whether television is inherently incapable of offering the audience any reliable analysis. There is also a question as to how much depth we can reasonably expect in the news. No-one can manage to publish all the news that is fit to print, although that should be easier in New Zealand than most places given its size and the fact that not a great deal happens here.

These rather austere conclusions should be balanced by some good news. The picture is not one of unremitting gloom. Radio New Zealand does the best news job in New Zealand. There is a lot of news, it is pretty accurate and it distinguishes fact from opinion. No one can take part in political life without listening to "Morning Report" each morning. The virtue of this programme is that the contending arguments are usually heard from the mouths of the contenders so that listeners can make up their own minds. It would be a tragedy if this were lost to us in further restructuring.

Some of the magazines do well - I believe *Metro* and *North and South* have added to the depth of our understanding on a number of issues. Without *The Press* life would be worse. It carries so much news and presents it straight. There are some specialist publications of a very high standard, the *New Zealand Geographic* and *Terra Nova* come to mind. The New Zealand media have bright spots - they are free from government control and reasonably robust. Their constitutional faults, in a symbiotic way, mirror the faults in the functioning of the political system itself. The quality of journalism in New Zealand needs to be improved if we are to improve the quality of government and the public's ability to participate in it. Practical ways of accomplishing this are set out in Part VII.

III THE REVOLUTION

The nature of the media in New Zealand has undergone profound change to its structure in recent years. There has been a revolution in mass communications and information - it is now an industry of an entirely different character than it was in 1960. The New Zealand industry has lacked the resources available to its counterparts. That, along with New Zealand's size, makes it hard to have a media of the sophistication we would like. The market is small - many parts of the media have to try to appeal to everyone.

There was a time when there was extraordinarily vigorous and colourful competition between newspapers in New Zealand, but this era came to an end with the closure of many papers in the 1920s and 1930s. Now newspaper monopolies are common in New Zealand towns. In recent times the

biggest causal factor changing media behaviour has been the introduction of television and the development of intense competition between the different components of the media. The introduction of serious radio news in the 1960s was also important in setting up the conditions for three-way competition in the media.

In my opinion these factors have produced changes in political journalism, a diminution in accuracy and a falling off in standards. At the same time the style of journalism has changed. The change has been induced in part by intense competition between the media for the advertising dollar. It has been brought about also by the nature of the electronic media, particularly television. These pressures have produced a tendency to be interesting and entertaining rather than accurate.

There are still 29 daily newspapers in New Zealand but the current economic climate has been particularly severe for them, especially evening newspapers. The 1991 closures of the *Auckland Star* and *Christchurch Star* were preceded by the closure of the Dunedin *Evening Star* some years ago. In 1991 the *National Business Review* reverted to weekly publication after a period as a daily which included some disastrous and ill-judged journalistic experiments in slanted sloganeering. The papers we do have range in circulation from something like 2,700 for *The Westport News* (even fewer for the *West Coast Times*) to the *New Zealand Herald* with something over 250,000. There are weekly papers as well, most of them looking a bit sick currently along with some dailies, due to lack of advertising and falling sales in hard times. Many papers, like *The Dominion*, have been reducing the number of journalists to cut costs while raising the proportion of advertising to editorial material. The fall off in content has been quite noticeable in the case of the *The Dominion*. In hard times the media can afford less thorough investigation of major issues, resulting in increased superficiality.

A large number of community newspapers exist in New Zealand, with over 100 belonging to their industry association. There are also many magazines, it was estimated there were 400 in 1984 ranging from *The Listener* to the Clifton Hill Residents' Newsletter.[13] Magazine circulation has also proved to be susceptible to changing patterns of taste and economic recession - *The Listener* has had a rough ride in recent years and has markedly declined in both quality and influence. There are numerous other specialist publications which attempt to provide some coverage of political issues.

With the electronic media the scene has been even more unstable than with the print media. Public broadcasting in New Zealand has been restructured every few years - indeed so constant have been the changes that they must have had detrimental effects on the producers and the programmes. I would assert that the quality of political journalism has deteriorated steadily over the last decade in both radio and television. In 1988 the Labour Government decided to permit greater competition in broadcasting markets and restructured the Broadcasting Corporation of New Zealand along

13 B Priestley "Official Information and the News Media" in R J Gregory (ed) *The Official Information Act: A Beginning* (New Zealand Institute of Public Administration, Wellington, 1984) 46, 47.

state-owned enterprise lines.

This was done against a background of profound change in the international broadcasting environment driven by changing technology and changing consumer choice. Video cassettes, broadband cable, satellite broadcasting and low power local television meant that the pressure to change would have been strong even without government impetus. But the government wanted greater competition and that is what now exists. Television and radio were separated into two state-owned enterprises. TV3 started transmission. Sky television arrived. A new regional television station began in Christchurch, and others are planned. New Zealand television became fully competitive for the first time since the arrival of the medium in New Zealand. The competitive environment was also sharpened for radio. Then the radio spectrum was sold off. Public broadcasting objectives were met by the establishment of a Broadcasting Commission to provide publicly funded grants to be bid for competitively by broadcasters. Standards were protected by a statutory framework including the establishment of the Broadcasting Standards Authority.[14]

Change continues. In the future there may be 15 or more television channels in New Zealand - national and regional, and most subscriber-based. There will be new telecommunications products. The markets will become even more fragmented than they are now.[15] Competition will become more vigorous. It will be hard for the traditional television channels to make money. Whatever happens to the industry it is unlikely to be re-regulated. Such is not the international trend. But to cope with all this in a country the size of New Zealand is not as easy as it is in larger countries. The present National Government promises further change.

The result of all these structural changes has had an important effect on how the electronic media behave, particularly television. There is no doubt that the battle for the ratings has produced different news and current affairs to those New Zealand used to have. The ratings wars on radio are also intense, particularly among breakfast shows and talk-back, both of which have a big influence on political attitudes. Because they must compete with the electronic media for the advertising dollar, the print media, especially daily newspapers, have changed their approach too. There has been a decline in the daily print media - we are moving towards final victory for the sound bite and pictures. All this could have far-reaching effects on our representative democracy.

From the industry point of view, news and current affairs are commodities. There is a market for them. The market exists because people want to see or read about them. The more interesting the product the greater the chance of reward. The need to be accurate can be a great dampener on an interesting story. Television has found that scandalous revelations sell; attacking the government sells; creating confrontation sells. Emphasising the negative sells. Entertainment sells. Balance and objectivity, on the other

14 Broadcasting Act 1989.

15 TVNZ Planning Department *New Zealand and the International Television Industry* (1990).

hand, tend to destroy what may otherwise be an interesting story.

News and current affairs in New Zealand are threatening to become "info-tainment" in which the trivial, the colourful and the personal count more than the policy, its consequences and the public interest.[16] To succeed, politicians have to play this game - they become actors rather than decision-makers; poseurs rather than people of substance. Getting on the media is the message in politics. Enormous efforts are devoted to seeking out "photo opportunities" where the politician is depicted in some favourable setting. Politicians get involved in an endless series of pseudo-events,[17] events which would not happen except as instruments for publicity. It ends up being the pursuit of endless trivia and flim-flam. Like anything else media exposure is an art to be studied. Some believe all publicity is good publicity, an adage in which there is more truth than there should be.

Many MPs spend more time courting the media than thinking about the issues. Appearance becomes more important than reality. Some see the road to public prominence in getting media coverage, not in attending select committees and working hard to study issues in depth. A conspiracy in favour of superficiality is shared by politicians and the media in New Zealand - neither thrives on analysis of complex ideas; both prefer slogans and short bites, a theme to which I shall return in Part VI.[18]

IV GETTING THE FACTS STRAIGHT

Accuracy is the most fundamental rule of journalism and it is the one most often and most easily breached. A United States Commission on Freedom of the Press said in 1947 that "[t]he first requirement is that the media should be accurate. They should not lie."[19] Inaccuracy, however, is frequent in New Zealand. Here are just two examples from my personal experience.

When I was Deputy Prime Minister I visited a number of Pacific Island countries in May 1989 to underline the commitment New Zealand has to the Pacific, and to conduct talks on bi-lateral issues with a number of governments. While I was in Vanuatu a New Zealand frigate was in port and I spent some time on board - we had a reception and visited some of the outlying islands. When attending a reception in a hotel in Port Vila, hosted by the Government of Vanuatu, I saw a number of New Zealand naval ratings drinking there. They were in high spirits and sang out to me, but not in a way to which any objection could reasonably be taken. The next day *The Dominion* in Wellington carried a front page story headed:

16 Info-tainment has heavily infected political debate in New Zealand in the "Holmes" television show and the efforts of Mr Bill Ralston on TV 3.

17 D J Boorstin *The Image - A Guide to Pseudo-events in America* (Harper Golophon Books, New York, 1961).

18 As *The Asian Wall Street Journal* 9 January 1992 p 7 col 2 pointed out in an important article: "Journalism that puts too high a priority on entertaining is destined to distort and mislead. Entertainment masquerading as news, meanwhile taints and tarnishes genuine journalism."

19 *Report of the Commission on Freedom of the Press: A Free and Responsible Press* (University of Chicago, 1947) reprinted in *Reader in Public Opinon and Communication* above n7, 530.

"Kiwi Sailors Punished for insult to Palmer". The first three paragraphs were as follows:[20]

> A group of sailors from the frigate HMNZS Wellington have been punished for baring their buttocks at the Deputy Prime Minister Geoffrey Palmer.
> They were on shore leave in Vila and arrived at Vila's biggest hotel on Monday night.
> Mr Palmer was recognised by the group, who dropped their trousers and exposed their buttocks before leaving.

Two reporters had their by-lines on the story, Pauline Swain, who was in Port Vila at the time but not at the scene of the alleged events, and Martyn Gosling who was in Wellington. Neither of them had spoken to me or any of my staff, an elementary step which could have reasonably been expected, and required, by proper standards of journalism. I objected strongly to the story and asked the paper to print a retraction. *The Dominion* did what it so often did in my experience. It attempted to stand by its story. The next day a small piece appeared on page 3 headed "Palmer Disputes Dominion Report."[21] It stated my objection then went on to say that the reporter had sought comment from a naval spokesman who verified the paper's account. The editor put his name to this falsehood.

On probing further I discovered that inquiry had been made of the naval public relations officer in Wellington, who was not in a strong position to know what had happened in Vila, and who denied having confirmed the paper's story in the way the paper alleged. I objected further to the paper. Finally after a lot of pressure the paper climbed down, but with bad grace. The next day a small piece appeared on the front page (with much less prominence than the original story) saying that the paper accepted that no sailors had bared their buttocks to me. It then had the arrogance to say that the paper thought it had obtained confirmation, but now accepted there had been a misunderstanding between the reporter and the naval spokesman. At the end the editor said the paper accepted that the report was incorrect and "regrets any embarrassment caused."[22] Not one word of apology.

Not only had the events not happened, nothing remotely resembling them had happened. The New Zealand journalist who wrote the story had not been present. Apparently a few sailors had got up to some escapades and gone swimming in the hotel pool, but I was not there, nor had I ever been near the place where it happened. It was a disgraceful instance of reporting which was factually wrong and damaging. It was damaging to me and it was damaging to New Zealand's image overseas. Not only that, but it took a lot of effort to get *The Dominion* to retract. The paper did so only after I had objected in the strongest possible terms. In my experience that was typical office practice for *The Dominion*. They always tried to stand by

20 *The Dominion* 11 May 1989 p1 col 4.
21 *The Dominion* 12 May 1989 p3 col 2.
22 *The Dominion* 13 May 1989 p1 col 1.

their stories, however factually inaccurate and would not admit error. Obtaining a correction takes incredible persistence, which is why busy people shrug their shoulders and pass on to other things. It is possible to complain to the Press Council but it takes a long time and the damage is done unless retractions are rapid.

Another example. The night before the 1990 Waitangi Commemorations which the Queen attended, it was reported on television and on radio that when I crossed the Waitangi Bridge in a government car, beer cans had been hurled at me. It did not happen. Nothing like it happened. No reporter had seen it. The report was based on hearsay and the hearsay was wrong. My press secretary was up until the early hours of the morning straightening that one out. The message had been sent overseas, and we fielded calls from as far away as the United Kingdom and the United States about these non-events at New Zealand's 150th commemoration.

These two lapses are the result of the basic rules of journalism being broken. The stories were not checked, or such efforts as were made at verification were manifestly inadequate. In both instances the alleged events involved me, but in neither instance was any effort made to inquire of me or my staff as to what, if anything, had happened. It is my impression that standards of accuracy have been slowly slipping for years, perhaps encouraged by the need to be bright, breezy and interesting.

I wish I could say such incidents are rare, but they are not. When in office, with a close knowledge of what is happening, it is possible to pick up a newspaper and see factual errors in abundance. Often they are matters of little importance and they never get corrected - it takes too much trouble. Most of the media take a highly defensive and aggressive approach to allegations they have made errors. They do not want to admit it.

Inaccuracy runs the gamut from minor and trivial to substantial and serious. Credibility is an important ingredient of good journalism. A reputation for being reliable can be useful in the market. *The Press* in Christchurch, for example, flourishes commercially under a carefully-nurtured image of conservative credibility. *The Press* is much more ready than others to correct errors.

Factual inaccuracy is one thing; slanting and distortion are another. The distortion, selection and slanting which television news can exert over a report is quite remarkable. It comes from the function of journalists as "gatekeepers."[23] The gatekeepers say "Yes" or "No" to the publication of material which comes along the news chain. The decisions of these gatekeepers "are therefore of extreme importance in determining our views of the world."[24] In television in New Zealand a few people have very great control as to what the public learns about government from television news. Small snippets on television are supposed to represent a complex reality.

The power to select can have a big influence in setting the political

23 "The Gatekeeper: A Memorandum" in W Schramm (ed) *Mass Communications* (2ed, University of Illinois Press, Urbana, 1960) 175.

24 Above n23, 177.

agenda. For example, the Justice Department knows and advises its ministers continually on the effect of crime reporting on the public perception of danger from crime. Old people may be afraid to go out of their houses at night for fear of crime, yet statistically they are much more likely to suffer a car accident than become the victim of a crime. Repeated and sensational crime reporting makes law and order a big political issue because it strikes a chord in the public to which the politicians feel they have to respond. The result is to imprison more people for longer, something which does not address the problem. The law and order debate in politics is dominated by media-induced images which obscure the real facts. The police feed these fears of the public through the media in a manner which is self-serving. As Minister of Justice I became familiar with this media manipulation.

Maori issues are almost invariably distorted in the New Zealand mass media, something which has strengthened Maori demands for their own media outlets. Tapping in subtle ways the drum of racial division is guaranteed to stir up interest. The distortion, selection, and angling which television news can exert on a political story is extraordinary. The most common failing is the beat-up. The report will present the story in a way to make it seem much more important and more serious than it is. TVNZ news consistently beat-up the Maori Fishing negotiations of which I was in charge, making resolution more difficult. The issues in these negotiations were complicated - TV made them seem simple. I conducted a series of meetings with Maori negotiators. When these were held TV invariably turned up in my office and would not leave until they were told something. It became such a problem that we often would spend scarce negotiating time discussing what to say to television. What the reporter wanted was confrontation and division. These were the elements highlighted. Television news never attempted to explain the complicated background and the historic injustices Maori had suffered.

Political journalists in New Zealand are not subject to the same disciplines as other journalists in separating fact from opinion. Frequently they editorialise and slant the material in a fashion which would be quite unacceptable with other news. Sports journalists do it too and politics is treated a bit like a sort of sport. Journalists attempt to put their revelations in context, which is frequently wrong or misleading, and present it as fact. The political reporting of the *New Zealand Herald* has developed in this fashion in recent years due, no doubt, to competition. Fact and opinion are mixed in a way which produces significant distortion.

On 28 June 1990 *The Herald* carried a front page story reporting the Leaders' debate on television the night before. John Armstrong was the reporter. There was more opinion than reporting of what was said. It started, "[i]t was as inspiring as a warmed-up sausage roll. And about as tasty." No effort was made to actually report what was said, only to characterise it in snide terms. The readers of New Zealand's largest-selling newspaper were treated to an account of one person's opinion of the debate, not to a

summary of the issues in it, or the substance of the arguments.

Another instance, again by John Armstrong. This time a front page report of the Government's economic package.[25]

> Sudden U-turns on capital gains tax and repaying debt have been accepted by the Government, with a surprise promise to use cash from the Telecom sale to build schools and hospitals.

What is the purpose of this sort of report? Is it to tell the public what the Government decided or to give the reporter's opinion of it, or put it in context, or simply to bash the Government? Failure to separate fact from opinion always leads to distortion and unfortunately in political reporting today, opinion and facts are not differentiated.

These examples have been drawn from my own experience but the practice was not in any way special to my administration. Consider the following story from *The Herald* about a public debate on law and order which took place in January and February 1992.

On January 30, 1992 the front-page headline in the *New Zealand Herald* was "PM Stumbles as Crime Debate rages"[26]. The lead paragraph was as follows:

> The Prime Minister, Mr Bolger - embarrassed by his own contradictory views on the cause of violent crime - tried to talk himself out of the corner.

So wrote Andrew Stone. That may be fine as an editorial comment. It is abysmal as a news story purporting to be a report. The paper is accepting direct responsibility for taking a political stance and making political judgments in its news columns. The people cannot judge for themselves, judgment has become the prerogative of reporters.

None of the reports cited above was labelled "Comment" or "Opinion". They purported to be news reports. My contention is that they were not. They were interpretative. Indeed, they might well be classed as editorialising. Political reporters have become entertainers with their opinions. They have played, thereby, an important role in deconstructing the political system.

This tendency to mix fact and opinion in political journalism has not passed unnoticed among the people who teach journalism. In a recent book, Jim Tucker, Head of the School of Journalism at the Auckland Institute of Technology, noted the tendency for reporters of general election campaigns in the 1980s "to lace their news stories with opinion and a new confusion was unleashed on the reader."[27] I go further and say political journalists do it all the time. Tucker says it is time "for a return to the old-fashioned approach to balance, fairness and accuracy - back to basics."[28] I agree with him.

---

25 *New Zealand Herald* 21 March 1990 p1 col 1.

26 *New Zealand Herald* 30 January 1992, pl col 1.

27 J Tucker *Kiwi Journalist - a Practical Guide to News Journalism* (Longman Paul, Auckland, 1992) 58.

28 Above n27.

The public are bound to be influenced by the way such news is distorted and slanted. The qualifications of the journalists concerned to make those judgments is highly suspect. No doubt they think they are performing a public service by telling the public the real truth. The problem is they are often ill-informed and frequently unduly cynical and negative. This style of reporting, which newspapers have increasingly engaged in, seems to be an effort to ape the impact of television. Its main ingredient is an insidious mixture of fact and opinion. Yet this reporting influences the public's thoughts and opinions about what is going on in the political decision-making process.

Television, however, is even worse. Reporters will interview you for ten minutes or more on film and use a thirty second clip. Indeed in the United States these days television sound bites are down to about 9 seconds. The subject has no influence over what is selected. Neither is there any control over the context in which it is used. These characteristics are common in both news reporting and current affairs programmes - they offer great scope for taking things out of context, for selecting unfavourable images and for distortion generally.

The media may deal with a trivial or unimportant angle of the story. Or they may ignore important issues and report unimportant ones. In many ways, both subtle and unsubtle, the media sets the political agenda. They can make an issue important simply by blowing it up. They can render an important issue unimportant simply by not publicising it.

All news reporting involves oversimplification of reality but television political news in New Zealand involves the most distortion. TV decides what the most important news is, decides how to present it, selects which parts to emphasise. Everyone in New Zealand politics knows the television news is the most important factor in moulding opinion of government policy and politicians. That is the reality of modern representative politics. Journalists are more than gatekeepers. Their activities help to determine what people think. That is why the media has constitutional significance.

The defects are not restricted to reporting of facts. The expression of opinion is also an important media function. There is little capacity for opinion leadership in the New Zealand media through carefully reasoned opinion pieces representing the view of the publication, as is traditionally practised overseas. Editorials have gone into a decline in New Zealand. I found reading all the editorials an enormous disappointment. These used to be taken seriously. Now they seem to be regarded as irrelevant. Little time or trouble seems to be taken in their composition. Their intellectual content has gone down - some of them even seem to be syndicated out of the parliamentary press gallery. Often the facts are wrongly stated. There is little evidence of research and little of intellectual fire-power. There are honourable exceptions - *The Press* takes the writing of editorials seriously, as do some of the smaller papers like the *Nelson Evening Mail* and *Timaru Herald*. But on the whole editorials in the New Zealand press are a wasteland. I used to think the worst were produced by *The Northern Advocate*.

Opinion pieces of more depth, weight and bite are urgently needed.

V THE PARLIAMENTARY PRESS GALLERY

The parliamentary press gallery is the centre of political reporting in New Zealand and has the most important role in carrying out the constitutional function of the media. It is the only segment of the media which devotes its activities entirely to politics and government. Its performance, therefore, is central to the public understanding of policy issues and the political process. Obviously the press gallery does not operate in isolation from the rest of the media. Gallery journalists are much affected by trends in journalism generally and the pressures which drive them. But they also have particular problems of their own due to the way they are organized and the place where they work. Their central difficulty is lack of a coherent conception of what they are supposed to be doing.

The press gallery comes within the purview of the standing orders of Parliament, which provide that any organisation whose representative infringes the standing orders may be excluded from representation in the press gallery. The rules of the parliamentary press gallery are approved by the Speaker and cover such matters as accreditation. Membership is restricted to those whose primary duties are "to cover politics and to report to the public what is happening in Parliament." Full accreditation goes to those who work in the gallery on a full time basis. There are about 50 such reporters. Associate members can be appointed if they can demonstrate a need for frequent access to Parliament. Currently there are about 40 associate members.

The elected executive officers of the press gallery, the chairman, the deputy chairman and the treasurer, are quite busy. They deal with accommodation issues and discuss administrative matters with the parliamentary authorities. Sometimes they are called in to smooth out problems which may have arisen between members of the gallery and ministerial offices or individual MPs. But because of the competitive nature of the journalism in the gallery it is hard to get agreement on many issues of direct media concern.

If, for example, the Prime Minister is late to his press conferences the journalists might all be annoyed and wish to complain. But there will be some whose publications are advantaged by the delay so they will not want to join in the complaint. On other questions, such as getting embargoed copies of government reports before they are released, there may be agreement. I have known occasions when the power of the Speaker to discipline members of the gallery has been invoked, but it was not for misbehaviour of a type unique to journalism. The gallery levies itself $60 a year to pay for administrative expenses and provide hospitality for MPs on both sides of the House, a social aspect which has significance as will emerge later. I have thought about how to categorise the gallery's work. That is hard. The best I can do is to set out my own observations on the gallery's range of reportorial functions.

Range of Gallery Reporting

- reporting Parliament
- reporting Select Committees
- reporting ministerial announcements and press conferences
- reporting on the activities of the Opposition
- reporting statements made by MPs
- trying to find out what went on in Caucus meetings
- preparing reports of official government documents, reviews, commissions, reports and studies
- finding out what is going on in government departments and reporting on it
- reporting on Cabinet to the extent this is possible
- interviewing and profiling ministers and MPs
- preparing background reports on issues, preparing analysis of political issues and prospects
- covering regional and national conferences of political parties
- covering party candidate selections and backgrounding them
- analysing annual reports tabled in Parliament
- preparing summaries of legislation introduced into Parliament
- reporting on the conduct of New Zealand's foreign relations
- providing reports on economic policy and the state of the economy

These functions are impossibly broad, yet specialisation appears to be very limited. Most members of the gallery have to turn their hand to most of the above tasks at some time or other.

The gallery journalists attend press conferences, and concentrate on reporting them, ministerial press statements, and documents released by the government or tabled in the house. They also write weekly round-ups containing their opinions of various issues and the government's performance. They will also spend a lot of time on political stories - splits and divisions, if any can be discerned, in either the opposition or the government. They love personalities more than policies. Leaks and inside information will always get prominent display. Colour pieces are also common - Jane Clifton writes a column in *The Dominion* which is based on about the first hour of Parliament each day it is in session. It is cleverly written, amusing and tells you absolutely nothing substantive about parliamentary proceedings or any policy. It is "Info-tainment". Bill Ralston's material on TV3 is in the same genre, only not as clever. These contributions seem to be based on the theory that politics is theatre, and while some of it is, that is hardly the most significant or important aspect.

It is not very difficult to send up the political system and the people in it. What is hard is to analyse what is really going on. On that point New Zealand political journalism is at its weakest. There is little quality analysis. The people in the gallery lack the intellectual capacity, the experience, the time and the incentives to write it. Their employers do not ask for analysis, I presume because they do not think there is a market for it. When I read

the quality press on political issues in both the United Kingdom and the United States, the contrast is remarkable. They have experienced people analysing the policy options, and what the consequences might be. Some of these journalists are among those countries' most able people. Their work is an astonishing contrast to the undistinguished material ground out by the reporters who inhabit the New Zealand parliamentary press gallery. Nonetheless, many members of our press gallery supplement their income by writing extra material on New Zealand politics for overseas publications, a process known as "ratting".

Because of its range of tasks, it may be better if the gallery acted co-operatively, but the competitive nature of the news industry precludes this to any great extent. The Press Association is the major co-operative news agency in New Zealand. It is owned by newspapers roughly in proportion to their size, but has been less prominent in recent years and has been seriously under-resourced. Big papers prefer to keep their own staff in the gallery but not enough to carry out all the tasks above - the biggest paper *The Herald* has four staff members there; the smaller papers are served by the Press Association or another agency. The Press Association usually has only four people in the gallery. Private radio and Radio New Zealand have their own staff as do the television services.

There are no organised rounds as exist in ordinary journalism. There is no system to it. Deadlines impose tight time restraints and it is a struggle to get material out, let alone do the necessary background reading and research which proper analysis requires. The impossible demands cause some members of the gallery to cut corners, ignore much important material and become lazy.

If there are defects in the performance of the gallery, much of the blame must rest with the media proprietors. They skimp on resources and appear to have no developed theory of what they want from gallery reporters. They also send many to the gallery who are unsuitable, and some who are downright ignorant of the most basic details of how government works. The press gallery seems to be regarded by media owners as a place which produces political news. However, the gallery's basic constitutional function is to report the proceedings of Parliament, and that is probably one of their more minor tasks these days and often hardly done at all.

Another ambiguity haunts the gallery journalists. Gatekeeping is done on the basis of "newsworthiness", a notoriously subjective concept when applied to news generally, and perhaps even more difficult when applied to political news. What is news was perhaps best defined by Evelyn Waugh in *Scoop*, his classic satire on journalism:[29]

> News is what a chap who doesn't care much about anything wants to read. And it's only news until he's read it. After that it's dead.

As a basis for founding a constitutional principle about the media's duty

29 E Waugh *Scoop* (Penguin Books, Harmondsworth, 1987) 66.

to politics that is not a promising start. Topicality and titillation are not useful standards for conveying messages about public policy.

What is it members of the gallery are supposed to be doing? What is their focus, what is their function? Since they cannot do everything, what should they concentrate upon? As in many fields of endeavour the first questions are the most important. I have seen no evidence that they have even been asked by the gallery, let alone answered.

The gallery tends to ignore the constitutional divisions of power. The executive government, parliament, the political parties and the departments of state tend to be lumped together. Reporting or analysis based on the principles of the constitution on which the whole edifice rests is hardly ever seen. Parliament is not the same as the executive government, but in the New Zealand media it often looks as though it is. Most media output is driven by gallery judgments of what the salient political issues are, regardless of the location of the issues in the constitutional system. Sometimes those judgments are highly questionable: issues like ministerial trips overseas or MPs' salaries receive more attention than important legislation or big new economic policies.

One great difference between our own Parliament and that of Westminster is the position of the press gallery. Here the press gallery covers the government as well as the Parliament. At Westminster the gallery covers Parliament. Other journalists cover the executive branch of Whitehall. This eliminates the problem of failing to preserve the distinction between the executive government and the Parliament. This fact, together with the Lobby system at Westminster, ensures that the reporting of politics in the United Kingdom is very different from New Zealand.

Once the journalists in the gallery were the most senior in the profession: all were seasoned and experienced. No more. I went to Parliament in 1979. There are now only three journalists in the parliamentary press gallery who were there when I arrived. The turnover is very high indeed; few have the opportunity to build much by way of experience or expertise.

Gallery journalists used to report what happened in Parliament. That seldoms happens today, despite the fact that the rules governing the Gallery say that is its primary purpose. Let me give one recent example. Within the last two weeks of August 1991 the Standing Orders Committee reported to the House on "A New Financial Procedure for the House of Representatives". It is a report of 16 pages. Estimates under current Standing Orders are debated for 16 days - they take a significant chunk of parliamentary time and they involve the House in one of its most important constitutional functions, detailed scrutiny of the Government's proposals for appropriation. The changes recommended by the Committee are important. They rectify a situation with the estimates debate which has been unsatisfactory for years. The recommended changes were not reported anywhere in the media, as far as I can discover. Who knows why? Did the journalists not notice the report, did they not think it newsworthy? Or could they not understand its significance? Such an omission is indefensible. I could give

other examples. This is simply one of the more recent.

In the Fifties and Sixties newspapers would carry many column inches of what MPs said in Parliament. No longer. Parliament is, of course, broadcast on the radio when it is sitting, but the audience is small most of the time. Whether this has influenced the coverage of Parliament by the rest of the media is hard to say. I tend to think it has not been a major factor. It is remarkable, however, that television has not made greater use of the permission they now have to televise Parliament. The institution of Parliament will become increasingly moribund if it is not shown on the television screens.

These days the media cover Parliament only if it is newsworthy - which in the realm of politics means unusual or sensational. The failure to cover what is actually said in Parliament, as distinct from what is done there, may not be too serious given the fact that much of the debate contains tedious and repetitious material. But parliamentary debate and question time can be important, and often what occurs is of great public interest. Since the debating chamber moved to Bowen Street the situation has become worse. The journalists are a long way from the fifth floor chamber. They do not go to the chamber much anymore.

The Parliament took urgency for more than a week after the Budget in 1991. Many MPs made speeches. You could not find out from the press what was in the bills. There were basic errors in some of the provisions passed. I did not read about it in the news media. Journalists seldom cover in any detail the content of the law Parliament is processing. Yet that ought to be one of the prime functions of Parliamentary reporting.

The law is enacted by Parliament. Its content is important. Bills are a rich source of news but they are neglected. There is considerable public interest in what changes are proposed, what the alternatives are, what weaknesses they have. But the gallery shows little interest in legislation and the legislative process which are central to Parliament's functions.

The gallery journalists have not focussed on the great importance of select committee work - their coverage of them is inadequate. Yet it is in the select committees where legislative detail is decided. A critical review by the standing orders select committee of Parliament in 1985 fired a heavy broadside at the media's reporting of Parliament in general, and at their failure to deal with select committees in particular.[30] There has been no discernible improvement since then, and that is even more serious now than it was in 1985 because the jurisdiction of select committees has been greatly expanded. What the committees do now is even more important than it used to be.

When I held the legal portfolios in government, I found that journalists have a lot of trouble reporting legal topics. They find them technical and complex and have difficulty meeting the standards of precision and accuracy which legal subjects demand. While the issues may be important,

30 *Standing Orders Committee—First Report* (1985) AJHR I.14, 11.

members of the gallery will seldom take the time and trouble to master them and write a competent report. If you are attempting to involve the public in law reform it is very frustrating because you cannot reach them. I found it particularly difficult to interest journalists in the question of a Bill of Rights for New Zealand. It was a difficult subject, but it involved profound constitutional change. Of the writing there was about it, most was superficial, but the tragedy was how little space the media devoted to what was a profound constitutional proposal. I went to the trouble of holding a special media seminar but it did not make much difference.

I have often thought legal training would improve the performance of journalists. Perhaps this is a new job opportunity for lawyers. Developments in the law exert an important influence on society. To report properly on complex new legislation, legal training is essential. And it would be helpful when reporting the important political issue of law and order. But the media owners do not employ legal writers, they do not want to pay adequate remuneration for professionally qualified people.[31]

The criticisms I have made need to take account of the revolution in information which is going on in society. How much should the news media have to carry? Some observers say that it is necessary to develop other means of conveying the information. Dr Les Cleveland and Mr Brian Conroy have written:[32]

> For example, a great deal has been said in recent years about the need for a more extensive presentation of the work of Parliament, but it is unrealistic to expect newspapers and radio and television services as they are at present constituted to cope with this task. The chief deficiencies of their present coverage are the episodic nature of their reportage, its lack of explanatory depth and its superficiality on all but the major topics of current political debate. A great deal of information currently available in departmental reports and other published documents, or located in the deliberations of select committees goes largely unreported. Furthermore, during each session a considerable output of legislation in the form of bills and regulations is available for detailed analysis.

Specialised services have grown up to cater for those who must have the information and some of it is available on computer. I like the suggestion of Cleveland and Conroy that the government itself should do much more to make the information available in printed form. But for the moment my argument rests on the need for the media to provide information sufficient for citizens to take an intelligent role in self-government. For this they they need more than they are getting.

---

31 I notice that the New Zealand Press Association now has a lawyer writing for it.

32 L Cleveland and B Conroy "Government Agencies and the News Media: A Better Working Relationship" (1979) 2, 2 *Public Sector* 10, 12.

The social milieu in which gallery journalists work is a significant factor in determining how they behave. Each caucus entertains the gallery once a year and the gallery reciprocates. These parties are boisterous. Members of the gallery and politicians get to know each other well within the confines of Parliament buildings - they see each other daily, often socially. Journalists have the privileges of being able to eat and drink at Bellamy's and use the parliamentary library. Some do more drinking than reading. There are pluses and minuses about the journalistic aspects of the parliamentary subculture. The bar is a common hideout of journalists - they pick up information there. Some MPs have a rule not to drink in Parliament, or if they do, not with journalists. Other MPs take the opposite approach and deliberately drink with journalists. Certainly the nature of the journalists' work, their close contact with one another and with MPs, tends to promote a pack mentality among them. People who hunt in packs must have a quarry. The quarry are usually ministers.

The journalists, in this atmosphere, seem to be as much affected by the public opinion polls as the politicians. Comment and interpretaton seem to parallel the polls and even to re-inforce them. Once journalists start to be negative it is hard to get them to be positive. This is not the place for an analysis of the consequences of public opinion polls on the political process, but it is profound. Yet these continual measures of public opinion on political issues do not make for better decisions, better government or even more democracy. It is a paradox worthy of exploration.

The way in which the social context of the press gallery influences what journalists write is important. A system of values and attitudes emerges which is both subtle and insidious. An American study[33] of how social control in the newsroom determines what appears in newspapers, showed that norms developed and there was conformity to them. The media people were rewarded, not by the public, but by the opinion of their colleagues and superiors. They redefined their values to the level of the group in which they worked. The hot-house atmosphere of the parliamentary press gallery in New Zealand certainly deserves systematic study from this point of view.

VI POLITICIANS AND THE MEDIA

So far I have concentrated on the deficiencies in what the journalists do. Many of them are not of the journalists' making, but they are deficiencies nonetheless. Now I want to look at the scene from the other side of the fence, since one of the biggest obstacles to the achievement of high standards in political journalism lies in the nature of politics itself and the behaviour of politicians. Politics is war. It is a struggle for power. It is conducted by political parties and politicians in a system which is designed to be adversarial. For this reason political communication is

33 W Breed "Social Control in the News Room" in W Schramm (ed) *Mass Communication* (2ed, University of Illinois Press, Urbana, 1960) 178.

different from other types of communication.

Governments and politicians are not concerned with the ideals of Mill on which my argument rests. They are concerned with the brutal and often unpleasant business of obtaining and holding power. To do this they want to be attractive to the electorate. They want to look good and present themselves in the best possible light. Because it is so important for political success, politicians attempt to manipulate the media. So do governments. They do not lack resources to try to achieve these aims. For example, National's public relations campaign in respect of the 1991 budget was designed to do more than present information - it wanted the policy to be well received by the electorate. Governments crave favourable coverage because it helps them get re-elected. There is an electoral circus every three years and much of the government's effort is involved in continuous political campaigning, something less necessary in political systems with longer Parliamentary terms. People in the media are fully aware of this craving and they do not want to be sucked in by it. Because both sides know what the other wants there is a 'them and us' mentality between the politicians and the press gallery. Journalists are naturally cynical - they tend not to attribute worthy motives to people in public life. Some of them want to hunt ministers down or build up some MPs. They sometimes behave as if they are actors in the system, not detached observers. They regard their function as fulfilled if they can turn up the heat and cause embarrassment. It is not unique to New Zealand.

Consider what P P McGuinness wrote about Prime Minister Hawke's departure from office in Australia:[34]

> He will, of course, also embarrass the press gallery which did so much to bring about the crisis and challenge which finally led to his defeat. Of course the issues were not created by the gallery, nor was it just a matter of an unfounded promotion of his inadequacies. But the taste for drama and the pursuit of activity regardless of purpose, the incessant discussion of politics in preference to policy, has been the besetting sin of the gallery. The status of Keating depends on his own abilities but it has been magnified by his influence over the weaker personalities in the gallery.

One of the effects of television - which has affected all the media - has been to heighten the awareness of personality, and the importance of image, to the detriment of policy analysis. So politicians go to great pains to polish their image and cultivate the art of impression management. This means less emphasis on policy specifics, facts and analysis, and more on generalised impressions and warm fuzzy images. In all this, personality becomes more and more important. And so gradually our political process is turning more into a contest of images and personality and less into one of policy

34 *The Australian* 20 December 1991 p 17 col 5.

and programmes. The artificiality and falseness of it all is a matter for concern. Politics is becoming all about mastering the techniques of persuasive communication and political propaganda.

At election time politicians and parties are marketed like a brand of soap. Governments attempt to do the same with their policies. Journalists try to counteract those tendencies and attempt to break down the images and explain what is really going on. In some senses two wars are being waged - one between the government and opposition and another, different, war between the government and the media. The beneficiary of both wars is supposed to be the public, but that is not the result. Like most wars, they do not benefit anyone and would be better not fought. The public is left confused and uncertain.

Against this background any attempt by politicians to subvert journalists into giving them favourable publicity has to be carefully nurtured if it is to succeed. But there are ways. What politicians have to trade is secrets, the secrets of caucus and cabinet. Politicians can provide reliable information to selected journalists in order to enhance their own standing. These sorts of trades may work for a time but there are dangers in them. Journalists are likely to develop contempt for people who act against the collective ethic, although they will still use the information. The search for the source of leaks around Parliament buildings is constant and unending. Often public servants are blamed. The truth is that it is the MPs themselves who do most of the leaking.

One of the surprising things is that leaks and their reportage do not appear to have been affected much by the enactment of the Official Information Act 1982. Journalists use the Act; but they tend to use it in a half-hearted and desultory way. That is partly because their focus of attention constantly shifts. They do not usually follow a policy development carefully over time. (The gallery has been known, however, to report as leaked, information obtained by MPs under the Official Information Act and distributed around the gallery.)

By and large journalists do not seem interested in analysing past decisions. They want information on decisions about to be taken. What will happen is always bigger news than the background to what has happened. Crystal ball gazing is also easier than hard research. You cannot be wrong at the time you publish. Plenty of people are prepared to discuss speculation. It is easy to write. Gallery behaviour suggests any hint about the future is much more significant than any learning about the decisions of the past. It is a misconception that deprives the public of much important information. MPs who want coverage will issue press statements. They will go around the press gallery and try to interest journalists in reporting the statements. A typical day's press statements from the government and MPs will far exceed the amount of news reported. For MPs it is a contest to get attention. For oppositions media death is an ever present phenomenon - except if there are political ructions. To MPs it seems that they can never get media attention when they have something which they think is impor-

tant for the public to hear; but they can never avoid it when there is something politically damaging. This brings politicians to the view that the media really prefers the negative to the positive. And there is truth in the charge - negative stories sell. The result is to induce unduly pessimistic impressions about policy issues. Disaster is always just around the corner in the world of the media.

The government has resources to influence the media. The government also makes the decisions which make the news. The timing of announcements can have a profound effect on the prominence with which they are reported. Sunday afternoon is always a good time. The journalists are hungry then. Joe Bjelke Peterson's reference to "feeding the chooks" is an apt way of describing how ministers deal with journalists. Timing is an important tool on the government side of the media manipulation contest.

Ministers also have press secretaries sometimes known as executive assistants (media). Press secretaries tend to control journalists' access to their minister. They may often explain the background to a statement to the journalists or provide further information. Press secretaries are essential. So voracious is the media's appetite for making inquiries that it is essential to have staff to deal with it - often many of the inquiries to the minister's office are from outside Parliament buildings. Answering queries is a time-consuming and expensive activity. The minister's office is frequently used as a cheap way of getting information which is easily publicly available elsewhere. I often used to think when I was a minister, that if I spent all my time answering queries from the media and doing interviews, I would never have time to make decisions. The media demands add greatly to the burdens of office.

Press secretaries and their employers will be interested to put a spin on the news being announced by the government. They want not only to provide the facts but also the interpretation. The government will always be interested in co-ordinating its announcements and giving them the appropriate spin. It adds to an impression of purposefulness and coherence. This is a most important message because it is almost never the truth. Government tends to be a chapter of accidents, mess-ups and conflicts much of the time.

Sometimes press secretaries may be competing with the press secretaries of other ministers. If there is a cabinet battle on an issue with different ministers on different sides it can become quite intense. In the early stages the struggle between David Lange and Roger Douglas was very much a battle through proxies, and the proxies were press secretaries interacting with the press gallery. Press secretaries can do a great deal of subtle undermining of ministers by putting carefully placed and unattributable comments round the press gallery. It is one of the blacker political arts and more widely practised than the public realises.

I had one rule which the parliamentary journalists did not appreciate. I hardly ever went off the record, nor did I permit my press staff to do so. There is a convention in the press gallery at Westminster, that a lobby correspondent can report a minister and the government without actually

attributing the statement to the person who said it. The tradition of the Lobby is best described by a top rate journalist who worked in it for many years:[35]

> For close on a century the mysteries of 'Lobby terms', which critics deride as the mumbo-jumbo of a secret society, have prevailed unimpaired and virtually unamended. Lobby terms, the despair of all the Lobby's enemies but now widely adopted as their very own by countless groups of specialist journalists everywhere, enable Lobby men and women to report as their own views and discoveries the opinions and possible policies of Prime Ministers and others confided to them—not at some metaphysical level but physically at meetings in a Commons committee room, never to be acknowledged by the Minister concerned. They know better than anybody they are playing a game of compulsory kite flying by reporting the views of high authorities anonymously and unattributably after communion with the political saints. The Lobby correspondents are the most important and influential corps in the whole of the modern media as a source of important news, political investigation and comment. Their constant challenge is to assert their independence and not to appear the allies and part of the established Executive on whom they depend for their daily sustenance.

This institution and its practices are unknown in New Zealand. I doubt very much that it could be successfully instituted here. Certainly in the United Kingdom it can serve a useful purpose in political discourse. The absence of any such institution in New Zealand makes the business of going off the record hazardous and counter-productive.

My decision not to go off the record or to allow my staff to do so tended to drive the press gallery to distraction. When I became Prime Minister they exerted enormous pressure to try and get better background information into what was happening. But it was a practice I had always followed and I would not change. It may have been one factor which prompted Tom Scott to draw a cartoon of journalists hanging themselves in the press gallery when I became Prime Minister.

VII THE WAY AHEAD

The media are a centre of power in the political system. The power is the power to decide who will communicate what to whom. The judgments and selections journalists make influence both the public and the decision-making process itself. Their task is made difficult by the nature of politics and

35 J Margach *The Anatomy of Power: An Enquiry into the Personality of Leadership* (W H Allen, London, 1979) 125-126.

the efforts of government to manipulate the media. But in the end, to whom are the media accountable? They need to be accountable to more than the ratings and the market. Efforts must be made to improve the information and analysis that is provided to people in our democracy. While I know there is a problem, prescribing the cure is far from easy.

The media have something in common with political parties. Their constitutional role is vital to the functioning of the system. But both the media and political parties are almost entirely free from legal control or accountability in the performance of those important public functions. In both cases it is assumed that the forces of market competition will impel the behaviour which is the optimal for the good functioning of our system of government. In both cases the assumption is open to serious doubt. One of the more delicious ironies is that the poor performance of each is reinforced by the other. But if there are market imperfections in both political party and media markets, the rules for the organisation which governs society (the constitution) should address those imperfections.

The whole burden of the argument presented here, in terms often highly critical of the New Zealand media, is that the media carries out a constitutional function of importance to the health of New Zealand government and democracy. If that thesis is correct, then high standards of journalism will improve the quality of government and the public's ability to participate in it. The argument I make is that we have seen media degradation in recent years and that is having an adverse effect on the political system.

Part of the reason for the degradation is that we have taken deregulation to extremes in both radio and television. After all, the entire market is the size of the city of Sydney. But in New Zealand we have more radio stations, nearly as many TV stations and many more newspapers. The result, exacerbated by the recession, has been competition for the advertising dollar and ratings wars. In such a situation the notions of public service and the constitutional functions of the media do not rank.

News is an expensive commodity and its expense is increasing. Yet news-gathering resources have been trimmed back in recent years. In practical terms this means more superficial coverage, reliance on supplied statements and the inability to research anything in depth. Sources are not checked, rumour is run and those with an axe to grind have their opportunities enhanced.

Much of what is wrong with journalism in New Zealand rests with the proprietors - if the quality is to be upgraded, we must look to the people who control the industry. They should start with the journalists themselves. Few members of the parliamentary press gallery have top class educational qualifications or discriminating intellects. Journalism in New Zealand tends not to attract the best minds. Whether that is because of the working conditions or remuneration or what I am not sure. Not only are New Zealand journalists not the best and the brightest, they tend to be discouraged with their vocation and leave early for public relations or some allied occupation. Such a trend would be a disaster in a profession like law and it has had

a bad effect on journalism. Many journalists have been made redundant in recent years and they have tended to be those with more experience and seniority because they cost more. Those who are left are young, they tend to be inexperienced and inadequately educated for the task. That may not matter if news is regarded as a commodity to be bought in the same manner as a can of beans. But it matters a great deal if the constitutional freight carried by the media is to be delivered to its destination.

There can be no doubt, however, that if we are to do better the journalists will have to be better paid, better educated and better recognised. Furthermore, their services will have to be retained in the industry to which they have been recruited. The current situation is a recipe for mediocrity, inaccuracy and litigation - all of which we have. Journalism needs to be turned into a profession with tough standards of entry and high rewards for those who make it. Once started, the education of journalists should not stop. If improved standards are to be achieved, publishers and editors have a responsibility. These are tasks to which some intellectual bite needs to be brought, not the mindless pursuit of lowest common denominator journalism.

These changes will not be sufficient, however, to meet the constitutional challenge. An appropriate system of public broadcasting is necessary for the health of the political system. The capacity must exist for in-depth analysis on subjects which may be obscure and lack ratings appeal. The gathering of news itself may require encouragement and subsidies, certainly public affairs analysis will.

There is a certain irony in the direction of the observations offered here. I was a senior member of a government which engaged in heavy deregulation of the media and thus increased some of the adverse tendencies noted here. Nothwithstanding this background I remain a believer in public broadcasting. I think one education television channel free of advertisements would be a great advantage. Public radio should be preserved as well. The truth that the tastes of a few should not dictate the media consumed by many, does not mean that every attempt to salvage some public values from the media for the good of society as a whole is doomed. The BBC television news on Sky, and especially its political reporting, is so much better than what is seen on Television New Zealand I want to weep. It is not a question of resources. It is a question of professional news judgment, balance, fair and knowledgeable senior analysts and a serious desire to concentrate on the policy issues.[36]

The government has some responsibilities too. It has an obligation to provide information about its many activities in a systematic, readily accessible form free from political slant. The Official Information Act and the access it provides is not enough. Work, time and money have to go into

36 After writing this I read a new book on news in New Zealand, M Comrie and J McGregor (ed) *Whose News?* (Dunmore Press, Palmerston North, 1992). I was particularly struck by Brian Edwards' contribution "The Cootchie Coo News" analysing One Network News in which he makes serious criticism of Television New Zealand's news.

gathering the information and seeking creative ways of making it available to those who may find it useful. The information policy of government needs to be pro-active, not one that simply lies in wait for users to apply for it. One of the greatest advantages ministers have is the constant flow of reliable information to which they are continually exposed.

No doubt a better media does not guarantee a better political system, but it would surely help. If we in New Zealand believe in the principles of liberal democracy, we ought to do something about implementing them.