

THE DISINTEGRATION OF CONSTITUTIONAL CONVENTIONS

*Rt Hon Sir Geoffrey Palmer KC**

This article is a lightly edited version of a paper prepared for the Supreme and Federal Courts Judges' Conference: "The ties that bind us", in Christchurch, New Zealand, on 22 January 2023. The article begins with a discussion of the constitutional similarities and differences in the constitutional arrangements in New Zealand and the Commonwealth of Australia. While the constitutions are different, many of the democratic values are similar, with both countries having a responsible government through a Cabinet that is established by constitutional convention, not enacted law. The unprecedented censure motion carried on the former Australian Prime Minister in the House of Representatives on 30 November 2022 was based on breaches of convention concerning allocation of ministerial portfolios. There is a discussion of the role of constitutional conventions and the literature relating to them, as all Westminster style democracies have conventions. Whether constitutional conventions are central to the challenges facing democracy is another question. It is doubtful in the case of New Zealand that is the case. Thus, the discussion turns to an analysis of some of the challenges to democracy that are present in the contemporary situation around the world that can lead to rot and decay in democracies.

I INTRODUCTION

This article is structured in three parts. It was prepared in advance of the Supreme and Federal Courts Judges' Conference: "The ties that bind us", in Christchurch, New Zealand, on 22 January 2023, and discusses no events later than 1 September 2022, except in a few instances.

* Distinguished Fellow, Faculty of Law and New Zealand Centre for Public Law, Te Herenga Waka—Victoria University of Wellington. The article deals with developments up to 1 September 2022, except in a few instances. It relies in part on earlier work by the author: Geoffrey Palmer "Rethinking Public Law in a Time of Democratic Decline" (2021) 52 VUWLR 413; Geoffrey Palmer "Reflections upon the Drift Away from Democracy in the United States" (2022) 53 VUWLR 407; and Geoffrey Palmer and Gwen Palmer Steeds *Democracy in Aotearoa New Zealand: A Survival Guide* (Te Herenga Waka University Press, Wellington, 2022).

Part I attempts to locate a place to begin the debate. It attempts to analyse the similarities and differences between New Zealand and Australia. The constitutional differences are profound and the political cultures distinct from one another, but a commitment to democratic values is shared.

Part II outlines the nature of constitutional conventions and some developments that New Zealand has experienced. All Westminster systems have conventions. However, their application is somewhat uncertain and unpredictable. This makes for some areas of uncomfortable vagueness for New Zealand in important issues covered by convention. New Zealand does not have a codified constitution and there is no higher law. No second legislative chamber exists and there are not many checks and balances. Nevertheless, the conclusion reached is that constitutional conventions, at least in New Zealand, are not presently a cause of political disintegration. The Australian side of the issue is largely left to Professor Cheryl Saunders. There are, however, two Australian issues discussed: the dismissal of the Hon Gough Whitlam by the Governor-General in 1975, and the August 2022 developments concerning the "secret" portfolios allocated by the Prime Minister to himself in the Morrison Government.

Part III outlines the perils for democracy resulting from a number of political developments, both nationally and internationally, that have weakened the prospects for democracy. This is the most extensive part of the article. It needs to be appreciated that democracy is a protean concept with many different variants on offer, some more democratic than others. Australia and New Zealand are both at risk from the developments that could produce rot and decay of democratic values and institutions. Part III examines seven perils that could challenge democratic values and institutions:

- (1) the decline of democracy worldwide;
- (2) international tensions, conflict, and breakdown of the rules-based system;
- (3) Trump methods: law, polarisation, and misinformation;
- (4) the United Kingdom: Brexit and disruption;
- (5) the COVID-19 pandemic: loss of social cohesion and economic loss;
- (6) the digital revolution, misinformation, big data, and social media; and
- (7) political parties and transparency.

II PART I: FINDING A PLACE TO BEGIN

Australia and New Zealand share a colonial heritage from the British Empire.

Both nations have indigenous peoples whose lives were disrupted and permanently affected by the imperial project run under the authority of the Parliament at Westminster.

Both have become independent nations, sharing the Westminster traditions of elected parliaments, cabinet governments, the rule of law and adherence to democratic principles as they are now understood, as part of that shared tradition.

That tradition has been nourished by the Anzac spirit forged in times of war.

These days we are bound together by a set of arrangements, known as the Australia–New Zealand Closer Economic Relations Trade Agreement, that amounts to one of the closest, broadest, seamless, and mutually compatible free trade systems that exists anywhere in the world.¹ And it is mercifully free of the political superstructure and bureaucracy that exists in the European Union.

The Trade Agreement includes Trade in Services and Investment Protocols. It is backed by the Trans-Tasman Mutual Recognition Arrangement that allows for anyone who is registered to practice an occupation in one country to practice that occupation in the other country. Freedom of movement allows people to work and visit the other country with little restriction. These connections mean we have much in common. Further, mutual defence arrangements between Australia and New Zealand are long-standing; New Zealand lies in the eastern approaches to Australia. We also share a common commitment to a rules-based international order and many of the same diplomatic objectives.

We both progressed from colonies to British dominions and assumed that the British system would be best without much effort to consider what different features may be required for local conditions and to serve the interests of indigenous people.²

Yet we are also different from one another. Indeed, at this point in history we have distinctive and rather different political cultures. This is most obvious in the fundamental fact that Australia is set up as a federation and New Zealand as a unitary state with a unicameral legislature and powerful executive. Federalism is not congenial to New Zealanders, and it is doubtful that it will ever be part of New Zealand's search for its national identity.³

In no respect are Australia and New Zealand more different than in our respective constitutional arrangements. The Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict c 12 provides a federal system with what many would argue are restricted powers provided to the Commonwealth, compared with those in the United States of America.

New Zealand once had a system of provincial government that attempted to combine the advantages of federalism with a unitary system. It was a type of coordinate powers system in which the provinces could legislate, with 13 exceptions. They were, however, subject to the supremacy of the General Assembly, which comprised the elected House of Representatives and the Legislative Council, an appointed upper house. The Rt Hon Sir George Grey, who had been Governor of South Australia, became Governor of New Zealand twice and later Premier of New Zealand. He was a New

1 Geoffrey Palmer "International Trade Blocs — New Zealand and Australia: Beyond CER" (1990) 1 PLR 223; and Australia–New Zealand Closer Economic Relations Trade Agreement 1329 UNTS 175 (28 March 1983).

2 Colin Howard *The Constitution, Power and Politics* (Fontana/Collins, Sydney, 1980) at 46.

3 Keith Sinclair *A Destiny Apart: New Zealand's Search for National Identity* (Allen & Unwin, Wellington, 1986).

Zealand delegate to the 1891 National Australasian Convention at Sydney and advocated the old New Zealand provincial arrangements as a model for the planned federation.⁴

New Zealand's arrangements were conferred by the New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72. But once responsible government was conceded by Westminster, beginning in 1857, things developed quickly. New Zealand abolished the provinces in 1876 and abolished the Legislative Council in 1950 and never replaced it.⁵ The main constitutional statute now is the Constitution Act 1986, which sets out a formal legal structure and contains vital legal and democratic requirements. It establishes important elements of the key institutions, including the Sovereign and Governor-General, the executive, ministers, the legislature, and the judiciary. Yet a great deal is left to other legislation, customary practices, and constitutional conventions. The New Zealand Bill of Rights Act 1990 (NZBORA) was added in 1990 and forms part of the constitutional architecture gradually increasing in importance.⁶

One salient point emerges from this constitutional description: it is much easier to change the New Zealand constitution than that of the Commonwealth of Australia. It can be done by ordinary legislation as there is no higher law, although key provisions of the Electoral Act 1993 have been protected from change by a simple majority since 1956.⁷

The Australian arrangements may be harder to amend than the American ones, and those are seriously difficult to change. The Australian experience shows the difficulty of satisfying the referendum requirements under s 128 of the Commonwealth of Australia Constitution Act. There

4 J Rutherford *Sir George Grey KCB, 1812–1898: A Study in Colonial Government* (Cassell, London, 1961) at 642–647. See also *Official Report of the National Australasian Convention Debates: Sydney, 2 March to 9 April, 1891* (Government Printer, Sydney, 1891). This report shows the clash of views between Sir George Grey and the Hon Sir Henry Parkes, a delegate from New South Wales. The latter wanted a strong central government on Canadian lines and Sir George Grey would grant only limited authority to the Commonwealth. Indeed, Sir George Grey did not favour joining the federation. The covering clauses to the Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict c 12 still mention New Zealand within the definition of "The States" in s 6. The prospect of New Zealand ever applying to join the Commonwealth of Australia seems unlikely and remote. The trade arrangements and other factors now mean that New Zealand has many of the advantages of being a state of the Commonwealth, but few of the restrictions.

5 Abolition of Provinces Act 1875; and Legislative Council Abolition Act 1950.

6 Geoffrey Palmer "A chink in the armour of parliamentary sovereignty" [2022] NZLJ 181.

7 Electoral Act 1956, s 189; and Electoral Act 1993, s 268. These protected provisions include the three-year term of Parliament, the Representation Commission that prevents political gerrymandering, the definition of "adult" insofar as that definition prescribes 18 years as the minimum voting age, the method of voting by secret ballot, and the process for dividing New Zealand into electoral districts, including the definition of "General electoral population" for this purpose. It requires a 75 per cent majority in the House of Representatives or a simple majority of voters at a referendum to change the protected provisions. They have always been followed. For the history, see Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018).

have been 44 proposals for change put to the voters and only eight have succeeded, leading Professor Geoffrey Sawer to describe Australia as a "frozen continent".⁸ There are many features of Australia's constitutional law that owe debts to the United States model.⁹ The Constitution of the United States has been amended on 27 occasions. It is easier to get things done in a unitary system of government. That may be an advantage in times of stress, emergency, and uncertainty. The variety of COVID-19 measures adopted around the world were a challenge for federal systems.

Let me conclude this introduction with a personal view. Working in Australia as the Principal Assistant to the Woodhouse Inquiry during the Whitlam Government, and later as an adviser to the department in charge of the legislation, I found the Australian constitutional law exceedingly challenging for a project whose main aim was to replace the common law action for personal injury.¹⁰ I found myself in complete sympathy with Whitlam's constitutional views, particularly his 1957 Chifley Memorial lecture, when he observed "[t]he way of the reformer is hard in Australia".¹¹ That was, it seems to me, an understatement.

My experience in Australia taught me many lessons. With its Constitution, I developed a kind of morbid fascination. It persuaded me to offer a course in Australian constitutional law to New Zealand law students for several years after I retired from politics. The students found it mystifying. I recall one vivid comment on the course evaluations: "Why do the Australians bother?", a reference to both s 92 and *Commonwealth of Australia v State of Tasmania (The Tasmanian Dam Case)*.¹² On the other hand, they liked the 1992 decisions of the High Court of Australia on representative government, drawing implied guarantees of freedom of communication in political and public affairs.¹³

I was working in Canberra on the day in 1975 that Prime Minister Whitlam was dismissed by the Governor-General, the Rt Hon Sir John Kerr PC. It was in my view a highly dubious decision. Professor Jenny Hocking's important book has thrown new light upon it and what an unfortunate story

8 Geoffrey Sawer *Australian Federalism in the Courts* (Melbourne University Press, Carlton (Vic), 1967) at 208. See also George Williams, Sean Brennan and Andrew Lynch *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (6th ed, Federation Press, Sydney, 2014) at ch 30. Given the nature of the topic under discussion, I can find little treatment of the role of constitutional conventions in the book or its index.

9 William G Buss "Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*" (2009) 33 MULR 718.

10 Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979) at 278–289.

11 EG Whitlam *On Australia's Constitution* (Widescope, Camberwell (Vic), 1977) at 194.

12 *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 [*The Tasmanian Dam Case*].

13 See James Stellios *Zines's The High Court and the Constitution* (6th ed, The Federation Press, Annandale (NSW), 2015) at 552–558.

it is.¹⁴ Constitutional scholars have worried about the powers of the Governor-General to make decisions in a situation of crisis or emergency that have great political consequences: the so-called reserve powers. Essentially, the decision to dismiss Whitlam was taken because the Senate had not yet passed the budget, although it also had not yet refused to do so. The decision was extremely controversial. Widespread expressions of outrage occurred in many quarters and later led to Sir John Kerr resigning his office. Professor Hocking had also written a two-volume biography of Whitlam, after years of research in the National Archives of Australia. She brought a legal case to require the public release by the Archives of the correspondence between Sir John Kerr and Buckingham Palace concerning the dismissal. In May 2020, up to 212 letters relating to the issue were released on the order of the High Court of Australia, despite resistance from the Australian Government and the Palace.¹⁵ Much of the correspondence was between Sir John Kerr and Sir Martin Charteris, the Queen's Private Secretary.

The letters revealed that Sir John Kerr made his decisions alone over a long period of time and kept his views to himself, not sharing them with the Prime Minister. However, Sir John Kerr did have extensive contact with the Palace in London and with the Leader of the Opposition, the Rt Hon Malcolm Fraser, who became the caretaker Prime Minister following the dismissal, and the elected Prime Minister after the general election. It appears the Governor-General did not follow legal advice to let politics take its course. Such an event has never occurred in New Zealand. Such events had previously occurred in Australia at the state level, as discussed in *The King and his Dominion Governors*, a 1936 book by the Rt Hon Dr Herbert Evatt PC,¹⁶ which is still read by constitutional lawyers and has been republished. The 1932 dismissal of the Hon Jack Lang, the New South Wales Premier, made it a relevant issue: the Premier had been dismissed despite retaining the confidence of the state's lower house.

III PART II: CONSTITUTIONAL CONVENTIONS

We are asked to examine the disintegration of constitutional conventions in Australia and New Zealand. They certainly exist and they are important. All constitutions have conventions, but some more than others. The Australian-born Sir Kenneth Wheare, who became a professor of government and public administration at the University of Oxford, provides the best definition: "By 'convention' is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working

14 Jenny Hocking *The Palace Letters: The Queen, the governor-general, and the plot to dismiss Gough Whitlam* (Scribe, Brunswick (Vic), 2020).

15 *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, (2020) 271 CLR 1.

16 Herbert Vere Evatt *The King and his Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Oxford University Press, London, 1936).

of the Constitution.¹⁷ Conventions are not made by the legislative or judicial processes, so they are not like legal rules. They can, however, sometimes come within the purview of the courts, although not routinely.¹⁸

The literature on constitutional conventions is mainly British. I have always thought that the British political scientist Geoffrey Marshall wrote the best book on conventions.¹⁹ It was he who characterised the convention on ministerial responsibility as "like most British conventions, somewhat vague and slipperyresembling (to borrow a phrase) the procreation of eels".²⁰ Professor AV Dicey began the modern literature with his 1885 treatise *Lectures Introductory to the Study of the Law of the Constitution*.²¹ Sir Ivor Jennings pointed out that conventions make the constitution work, clothing "the dry bones of the law".²² In more recent times, there have been important discussions from Professor Vernon Bogdanor, whose writings explain that the evolutionary nature of the British constitution makes it peculiar and able to be described only based on experience. It depends not on normative principles but political vicissitudes.²³ Professor David Feldman's 2013 essay is an enlightened examination of the present situation in the United Kingdom, although not up to date:²⁴ this was before the unprincipled decisions that breached convention and that resulted in the two *Miller* cases.²⁵ And what about the convention that ministers must resign if they deliberately lie to the House of Commons? Feldman's analysis clarifies the importance of tradition in the relationships among the institutions of the state. Vagueness of conventions can lead to argument and disagreement. This calls for principled engagement that may not always be forthcoming. Feldman concludes that while there is "clear conceptual water between legal and non-legal constitutional norms ... there is no clear water

17 KC Wheare *Modern Constitutions* (2nd ed, Oxford University Press, London, 1966) at 122. I recall, as a political science student, studying his book KC Wheare *Government by Committee: an Essay on the British Constitution* (Clarendon Press, Oxford, 1955), which has many useful and practical things to say about the processes of collective decision-making.

18 See for example *Re Resolution to Amend the Constitution* [1981] 1 SCR 753; and *Attorney-General v Jonathan Cape Ltd* [1976] QB 752 (QB).

19 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984).

20 At 54.

21 AV Dicey *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1885).

22 Ivor Jennings *The Law and the Constitution* (University of London Press, London, 1938) at 81.

23 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 13–21.

24 David Feldman "Constitutional Conventions" in Matt Qvortrup (ed) *The British Constitution, Continuity and Change: A Festschrift for Vernon Bogdanor* (Hart Publishing, Oxford, 2013) 93.

25 *Regina (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; and *Regina (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

between different kinds of non-legal, constitutional norms, and there is no point in trying to separate them systematically".²⁶

In New Zealand, the *Cabinet Manual 2017* is regarded as something approaching holy writ as to how cabinet government works here. It goes to some pains to spell out several of the key conventions.²⁷ The work done by convention in New Zealand is of basic importance: cabinet government is a convention; Cabinet does not owe its existence to statute. The same is true as to the role of the political party caucus—that strange Antipodean invention that Australia shares with New Zealand. One cannot understand how the New Zealand government works without understanding the conventions, yet they are not legally enforceable. That the Monarch must act on the advice of his Majesty's responsible ministers is another critical convention, preserving the democratic character of the system. The caretaker convention is set out in the *Cabinet Manual*, as is the relationship of the Prime Minister to Cabinet. The conventions on ministerial responsibility, both collective and individual, are dealt with in the *Cabinet Manual*. But predicting what will happen on a particular set of facts can be hazardous.

Australian events in August 2022 involving "secret" portfolios raise important issues about conventions. It was revealed former Prime Minister, the Hon Scott Morrison MP, secretly took on the portfolios of health, finance, treasury, home affairs and resources. The secret allocations began in March 2020 and developed further up until the general election in May 2022. The allocations were never publicly announced. It was not even revealed to some of the relevant ministers that they were now sharing responsibility. Part of this was induced by the COVID-19 pandemic, but not all of it. It was unprecedented. And the justification for the actions when they were defended by Morrison were thin. This does appear to be a breach of the convention of ministerial responsibility. It damages transparency. Calls for Morrison to resign as a Member of Parliament (MP) were resisted.²⁸ Two comments from me: what occurred makes the convention of ministerial responsibility unworkable, because it is not clear who is making the decisions or who should defend them. The lines of accountability are warped. Second, it would not happen in New Zealand. The Cabinet Office here runs a tight ship. It maintains online an official list of Ministers and the portfolio warrants they hold

26 Feldman, above n 24, at 119.

27 For more detail on the New Zealand Cabinet, see Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution" (2006) 4 NZJPIIL 1.

28 Josh Butler "Defiant Morrison resists pressure to resign as governor general says he thought powers would be made public" *The Guardian* (online ed, London, 17 August 2022); and Kate Ainsworth "Revelations of secret portfolios held by Scott Morrison have dominated headlines this week. What happened, when and who knew about it?" (17 August 2022) ABC News <www.abc.net.au>.

from the Governor-General. When there are changes or reshuffles, the list is updated and published.²⁹ And all appointments to warranted portfolios are published in the *New Zealand Gazette*.³⁰

In Australia, the Solicitor-General, Stephen Donaghue KC, provided a legal opinion on 22 August 2022 that was made publicly available. It contains an extensive analysis and concludes that the appointments made were lawful. They were made by the Governor-General on the advice of the Prime Minister. There was no legal requirement for notification of an appointment. There was, however, a breach of the conventions and practices that form an essential part of the system of responsible government.³¹

That is because it is impossible for Parliament and the public to hold Ministers accountable for the proper administration of particular departments if the identity of the Ministers who have been appointed to administer those departments is not publicised.

The opinion also contains an analysis of many possible solutions to the problem. The Prime Minister, the Hon Anthony Albanese MP, in a press conference on 23 August 2022, announced two steps to be taken.³² First, the Cabinet had determined there was a need for a further inquiry into the events and the details of that would be announced later. It would not be a political inquiry, but an inquiry conducted by an eminent person with a legal background (later confirmed to be former Justice of the High Court of Australia, the Hon Virginia Bell). Second, the Prime Minister had directed the Department of Prime Minister and Cabinet to work with the Official Secretary to the Governor-General to adopt a practice of publishing in the *Commonwealth of Australia Gazette* future appointments to administer departments. Following receipt of the Bell Report, the House of Representatives on 30 November 2022 passed a motion of censure on Scott Morrison, by 86 votes to 50, for the breaches of constitutional convention relating to unannounced allocation of portfolios to himself when he was Prime Minister.

29 Department of Prime Minister and Cabinet "Ministerial list" (14 June 2022) <www.dPMC.govt.nz>. The list always contains the date it was made. At the time of writing, it was last updated in June 2022. It should be noted that s 7 of the Constitution Act 1986 allows any minister to exercise any function, duty or power conferred on a minister to be exercised by another minister. This provision is often used when a minister goes overseas or is otherwise not available.

30 See for example "Appointment of Ministers" (15 June 2022) *New Zealand Gazette* No 2022-vr2372.

31 Stephen Donaghue *In the Matter of the Validity of the Appointment of Mr Morrison to Administer the Department of Industry, Science, Energy and Resources: Opinion* (Department of the Prime Minister and Cabinet, SG No 12 of 2022, 23 August 2022) at [8].

32 See Anthony Albanese, Prime Minister of Australia "Scott Morrison's secret ministerial appointments; Torres Strait Islander communities; Voice to Parliament; John Farnham's battle with cancer" (press conference, Parliament House, Canberra, 23 August 2022). A transcript for this press conference is available at Anthony Albanese "Transcript: 23 Aug 2022, Prime Minister: Scott Morrison's secret ministerial appointments; Torres Strait Islander communities; Voice to Parliament; John Farnham's battle with cancer" (23 August 2022) Prime Minister of Australia <www.pm.gov.au>.

In my experience, too few lawyers have sufficient grasp of how the conventions work, how they change and why they are followed. Lawyers tend to follow Dicey's dictum that "[w]ith conventions or understandings" the constitutional lawyer "has no direct concern".³³ This approach is hazardous for lawyers advising in the real world. The law is not enough. The first rule of politics is to learn how to count. Strategies for change must encounter the need to secure the numbers. It is also helpful to understand political theory and political practice. Political scientists tend to be more interested in conventions than lawyers and better at analysing them.³⁴

Teaching conventions to students in public law is a demanding task; they are too "smoky" for them. Strangely, in my political life I hardly heard conventions discussed, even when a minister. In New Zealand, Justice Matthew Palmer and Associate Professor Dean Knight provide a useful constitutional sketch of the key relationships encapsulated by convention and reinforced by legislation.³⁵ They are:

- representative democracy;
- legislative supremacy;
- the Sovereign's obligation to act on ministerial advice;
- collective Cabinet responsibility;
- individual ministerial responsibility;
- public service neutrality and loyalty; and
- rule of law and judicial independence.

The most interesting recent issue concerning a convention arose in New Zealand after the 1984 election. It involved the caretaker convention. The difficulty had all the ingredients of a constitutional crisis, until it was defused by the adoption of a new convention from Australia, previously unknown here. The results on election night in 1984 made it clear that the Third National Government had been defeated by the Labour opposition, but the final official results were some days away under the rules allowing for special votes. New Zealand was then in the throes of a financial crisis. The Reserve Bank had suspended all foreign exchange dealings to stop the flow of money out of the country. Officials had briefed the outgoing government that an immediate response by way of a devaluation was

33 AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 30. Upon the doctrine of parliamentary sovereignty that has strong adherents in Australia, see Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999). To be fair to Dicey, in other passages Dicey said constitutional law includes all rules which directly or indirectly affect the distribution of power.

34 A good example of this literature is Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015).

35 Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 5–9. See also material on Cabinet and its environs at 77–100.

required. Yet the Rt Hon Sir Robert Muldoon PC, the outgoing National Prime Minister as well as the Minister of Finance, at first refused to act. Later he said on television that he would not devalue as long as he held the finance portfolio. In response to the reporter's suggestion that there was little sense in not letting the government-elect make the decision, Sir Robert Muldoon said that he hoped to give the incoming Prime Minister some instruction in the realities of government over the next day or two.

Sir Robert Muldoon saw himself as still in charge. Legally he was still both Prime Minister and Minister of Finance and would remain so until the Governor-General accepted his resignation or dismissed him. Over the next 10 days, the Muldoon Government was the lawful government. Its actions were considered to be limited by certain constitutional conventions. The most important of these is that the outgoing government must not undertake any action that will embarrass the incoming government. That rule was generally understood. The question was whether constitutional convention required the outgoing government to act on the direction of the incoming government on a major policy issue. The situation was resolved three days after the election when Sir Robert Muldoon wrote to the Prime Minister-elect saying he would act on the decisions of the incoming government in relation to the currency crisis.

Critical to resolving the crisis at the time was a press statement by the Attorney-General and Deputy Prime Minister, the Hon Jim McLay MP, in which he formulated the conventions to which outgoing governments were subject. He put the essentials like this:³⁶

1. that it [the outgoing government] will undertake no new policy initiatives.
2. that it will act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that cannot be delayed until the new government formally takes office, even if the outgoing government disagrees with the course of action proposed.

As stated in my memoir:³⁷

McLay creatively conjured up a new constitutional convention that had not existed in New Zealand before, but for which there was some overseas support, particularly in Australia. He simply announced it. The convention was to the effect that the outgoing government would take no new policy initiatives. Further, "it will act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that it cannot be delayed until the new government formally takes office, even if the outgoing government disagrees with the course of action proposed". By these means McLay convinced

36 JK McLay "Attorney-General's Press Statement" (press release, 17 July 1984). See also *Constitutional Reform: Reports of an Officials Committee* (Department of Justice, February 1986) at 12. Sir Jim McLay has written a fascinating article on the political background to how the decisions were eventually made by National Party ministers: see Jim McLay "1984 and All That: Opening Address to the EmpowerNZ Workshop" (2012) 10 NZJPIIL 267.

37 Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 602–603.

his colleagues to accept the advice of the incoming government and the currency was devalued by 20 per cent. It was a brilliant move because it circumvented a clear defect in New Zealand's constitutional law brought to light by the situation that had arisen. I had become most concerned at the shape of these developments and requested from Professor Ken Keith a legal opinion as to whether, if things became critical, the Governor-General could dismiss Muldoon and then appoint new ministers.

The answer was yes. The legal root of these events was resolved permanently by the Constitution Act 1986 clarifying who could be ministers and when government could change. It is now known that the Hon Sir David Beattie, the Governor-General at the time, was prepared to dismiss Sir Robert Muldoon if he did not acquiesce in the devaluation. Sir Jim McLay acted with courage in accordance with principle, but incurred the enmity of Sir Robert Muldoon. As Minister of Justice, after the new government was sworn in, I set up a group of officials to make recommendations on the issue and later extended it—the technique that produced the Constitution Act.

Extensive work on the nature of a caretaker government was undertaken by officials and agreed to by ministers before subsequent elections. It applies after a general election, while a new government is being formed, and when a government has clearly lost the confidence of the House and while a new government is being formed or an election is being held. The key thing is that while a new government is being formed, the previous government is still formally in office, with the same legal powers as it has before, but, by convention, acts only as a "caretaker". The *Cabinet Manual* makes it plain in detail what the caretaker convention is now considered to be.³⁸

The New Zealand mixed-member proportional representation electoral system (MMP), borrowed from Germany by a New Zealand Royal Commission and adopted here by referendum against the wishes of the two principal political parties, gives each voter two votes: one for an electorate MP; and one for a political party. It is the party vote that determines the number of seats in the House each political party secures. Under MMP, the question of what a caretaker government can and cannot do, and should and should not do, is even more important. In the first MMP election in 1996, a caretaker government had to function while New Zealand First negotiated for eight weeks to get the best deal from both National and Labour.

MMP necessitated a loosening of the convention of collective Cabinet responsibility. Since coalitions and confidence and supply agreements were necessary, a less binding practice to allow the smaller parties sufficient political oxygen to survive was required. Ministers outside Cabinet from parties supporting the government may be bound by collective responsibility only in relation to their particular portfolios. The *Cabinet Manual* was amended, and few problems have resulted from the changes. Paragraph 5.6 provides for an "Agree to disagree" process to be used in relation to differing party positions on particular issues. There is an incentive for parties to form a government after an election. Section 19 of the Constitution Act requires that Parliament must be called together not later

38 Cabinet Office *Cabinet Manual 2017* at [6.21]–[6.40].

than six weeks after the return of the writs. If a government has been formed by then, this requirement is likely to test its support. If a government has not been formed, it will put pressure to resolve negotiations through parliamentary votes. This happened in 1996.³⁹ Parliament had to be called no later than Friday, 13 December. It was not until Tuesday, 10 December that the Rt Hon Winston Peters PC announced his coalition agreement with the National Party. Parliament's formal opening was held on Thursday, 12 December and the new government was sworn in on Monday, 16 December. By majority vote the government adjourned Parliament until February 1997.

The most recent political kerfuffle in New Zealand concerning conventions occurred in December 2022 when the Government supported a Supplementary Order Paper containing an amendment, moved by the Green Party when the House was under urgency. The purpose was to entrench a provision in a controversial Bill regulating water so that public water assets could not be nationalised unless the Bill was supported by a majority of 60 per cent. After vigorous public criticism, especially from the constitutional law community in academia, the Government announced it would remove the measure inserted by the Committee of the Whole. This was a victory for convention.

The conclusion reached concerning constitutional conventions in New Zealand is that they are important yet in some respects uncertain. These facts have contributed to my view that the Constitution Act could have some additional features.⁴⁰ But there are other constitutional issues, such as Parliament's response to declarations of inconsistency by the superior courts in respect of legislation that may breach the guarantees in NZBORA.⁴¹ However, the operation of constitutional conventions in New Zealand has not been unsatisfactory and they have not broken down or disintegrated. They are somewhat vague and uncertain, but they cannot be counted as a prime risk to constitutional propriety as matters stand. On the overall position in Australia, I venture no opinion.

39 Jonathan Boston and Elizabeth McLeay "Forming the First MMP Government: Theory, Practice and Prospects" in Jonathan Boston and others (eds) *From Campaign to Coalition: New Zealand's First General Election Under Proportional Representation* (Dunmore Press, Palmerston North, 1997) 207 at 209.

40 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016); and Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018). Working on these books and conducting meetings all round New Zealand convinced me New Zealanders had little understanding of how their government works. Given the dangers to democracy around the world, I concluded that a book about civics was essential. I wrote one with my 21-year-old granddaughter: see Geoffrey Palmer and Gwen Palmer Steeds *Democracy in Aotearoa New Zealand: A Survival Guide* (Te Herenga Waka University Press, Wellington, 2022).

41 Palmer, above n 6.

IV PART III: PERILS FOR DEMOCRACY

The text for this part of the article comes from the late Professor Robert Quentin-Baxter, with whom I was privileged, along with the Rt Hon Sir Kenneth Keith PC, to teach constitutional law at Victoria University of Wellington in the mid-1970s. He said in 1980:⁴²

A constitution is a human habitation. Like a city, it may preserve its life and its beauty through centuries of change. It may, on the other hand, become either a glorious ruin from which life has departed, or a dilapidated slum that no longer knows the great traditions of its builders.

We move now to a consideration of the wider political, constitutional and practical issues that are impeding the advance of democracy. These developments pose challenges to democracy and could produce rot and decay in institutions and democratic values.

New Zealand learned of some of these dangers during the terrorist attack by a lone gunman in Christchurch on 15 March 2019. The attack killed 51 Muslim people worshipping in mosques in Christchurch and injured many more. This led to the Christchurch Call in which the Prime Minister, the Rt Hon Jacinda Ardern MP, combined with other foreign leaders to encourage the social media platforms to remove the images uploaded to Facebook and other platforms by the terrorist depicting the carnage he had wrought. The tragedy has been carefully analysed by a Royal Commission chaired by the Hon Sir William Young and a topic at this conference. The report was released on 8 December 2020.⁴³ Terrorism is an obvious and difficult issue for liberal democracies based on openness.

A Decline of Democracy

Democracy itself, despite its protean quality, is under challenge in various part of the world and has been for some years. Rot and decay can set in. It has done so in several countries. Even in democratic countries to which New Zealand has looked traditionally, namely the United Kingdom and the United States, things are less than satisfactory.

Ample literature charts the crisis in which contemporary democracies now find themselves.⁴⁴ And seldom have they faced such existential challenges, encompassing climate change, the COVID-19 pandemic, and an unstable global situation. The assumption that democracy is inevitable needs to be revisited. Professor Ian Shapiro, a political theorist, wrote in 2003 in relation to democracy, that its

42 RQ Quentin-Baxter "The Governor-General's constitutional discretions: an essay toward a redefinition" (1980) 10 VUWLR 289 at 290.

43 William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020).

44 Mark A Graber, Sanford Levinson and Mark Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press, New York, 2018); Jack M Balkin "Constitutional Crisis and Constitutional Rot" (2017) 77 Md L Rev 147; Steven Levitsky and Daniel Ziblatt *How Democracies Die: What History Reveals about Our Future* (Viking, London, 2018); and AC Grayling *Democracy and its Crisis* (Oneworld, London, 2017).

"political legitimacy is seldom seriously challenged in the contemporary world".⁴⁵ It is challenged now. A tendency toward authoritarianism is clearly discernible. The number of democracies has declined; democracy is seen to be in retreat. A recent and rigorous 2020 report produced by the Centre for the Future of Democracy at the University of Cambridge concluded: "We find that dissatisfaction with democracy has risen over time, and is reaching an all-time global high, in particular in developed democracies."⁴⁶ Across the globe democracy is in a state of malaise. Dissatisfaction has risen sharply since 2005. The gains made by the liberal democratic state are now endangered.

B International Tensions, Conflict, Breakdown of Rules-based System

The unprovoked invasion of Ukraine by Russia threatens the international order and stability. A rules-based international system is the best security protection for small and remote states. As a founding member of the United Nations, New Zealand, along with Australia, has always strongly supported the need for robust international law. Larger nations sometimes not so much. At international law, all states, big and small, enjoy sovereign equality.⁴⁷ Might is not right. The rules-based system shows signs of serious decay. There is a danger that the United Nations could go the same way as the League of Nations.

A cornerstone principle of the Charter of the United Nations is art 2(4), which provides in elegant and plain language:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

45 Ian Shapiro *The State of Democratic Theory* (Princeton University Press, Princeton, 2003) at 146.

46 RS Foa and others *The Global Satisfaction with Democracy Report 2020* (Centre for the Future of Democracy, January 2020) at 1. The report states there has been an especially acute crisis of democratic faith in the Anglo-Saxon democracies (at 18). Dissatisfaction has doubled. New Zealand, however, has avoided the "trajectory of soaring public discontent": this may be because it is the only country in the group to have adopted a proportional representation electoral system (at 19). See also Freedom House *Nations in Transit 2020: Dropping the Democratic Facade* (2020). This study found that 2018 was the 13th successive year of deteriorating freedoms around the globe. The decline of democracy was alarming with more countries moving toward authoritarian rule. Populist forces were pushing against long held democratic principles. Freedom House's latest annual report published in 2021 stated it was the 15th year in a row that it had reported that democracy was going backwards. Three quarters of people live in countries where freedom is declining: Sarah Repucci and Amy Slipowitz "Freedom in the World 2021: Democracy Under Siege" (February 2021) Freedom House <www.freedomhouse.org>. New Zealand scored 99 out of 100. Sweden, Finland and Norway scored 100. An important recent book is Francis Fukuyama *Liberalism and its Discontents* (Profile Books, London, 2022).

47 Charter of the United Nations, art 2(1).

The military actions of Russia are plainly illegal. The only real defence against the powerful principle above depends upon whether a state can rely on art 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Such a defence does not appear to be available to Russia on the facts, despite the fake news allegations that have been advanced. Further, the Charter provides in art 2(3):

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The effects of oil, energy demand and climate change on democratic politics and the world economy are analysed in a recent book by Helen Thompson, a Professor of Political Economy at the University of Cambridge. She concludes that "there is considerable potential for geopolitics to continue to fuel democratic disruption".⁴⁸ Fierce distributional conflicts can be anticipated.

C Trump, Law, Polarisation and Misinformation

The behaviour of Donald Trump during his presidency of the United States and since has attracted an enormous volume of literature.⁴⁹ His methods may have diminished the power and prestige of the United States in the eyes of many. The absence of leadership on such critical issues as COVID-19 was breathtaking. A flurry of books has been published on American extremism.⁵⁰

48 Helen Thompson *Disorder: Hard Times in the 21st Century* (Oxford University Press, Oxford, 2022) at 277.

49 Bob Woodward *Fear: Trump in the White House* (Simon & Schuster, New York, 2018); Bob Woodward *Rage* (Simon & Schuster, New York, 2020); and Michael Wolff *Fire and Fury: Inside the Trump White House* (Henry Holt, New York, 2018). The tendencies that found their expression in the Trump administration have been building in the United States for some years: see Thomas Frank *What's the Matter with America? — The Resistible Rise of the American Right* (Secker & Warburg, London, 2004); and Ezra Klein *Why We're Polarized* (Profile Books, London, 2020). Earlier developments are also clear from Volume 1 of former President Obama's recent memoir: Barack Obama *A Promised Land* (Viking, London, 2020) at 403–407. See also Jill Lepore *These Truths: A History of the United States* (WW Norton, New York, 2018) at ch 16. This chapter, entitled "America Disrupted", gives a chilling account of the forces that culminated in the election and presidency of Donald Trump. See also Timothy Snyder *On Tyranny: Twenty Lessons from the Twentieth Century* (Bodley Head, London, 2017).

50 "Fear and loathing: Several new books assess the spread and peril of far-right ideas in America" *The Economist* (London, 12 December 2020) at 75; and Francis Fukuyama "Liberalism and its Discontents: The Challenges from the Left and the Right" (5 October 2020) *American Purpose* <www.americanpurpose.com>. Much of what is said in this segment comes from the author's reading of *The New York Times* and *The Washington Post*. Correspondence with law professors in the United States has also been very helpful. To provide a citation for every point seems unnecessary since most of the points can be derived from the Internet.

1 Law

The erosion of the rule of law and the politicisation of the judiciary have been of concern, and that tendency has been going on for some years.⁵¹ The Senate, under the leadership of Republican Senator Mitch McConnell, achieved confirmation by the Senate of numerous conservative appointments to the federal judiciary during the Trump administration. Three new Supreme Court justices ascended the bench. The conservative majority on the Supreme Court voted to overturn the long-standing 1973 abortion law precedent of *Roe v Wade* in *Dobbs v Jackson Women's Health Organization*.⁵² They held the Constitution does not confer a right to abortion. This set off a political furore the results of which remain uncertain. Polling shows that a majority of Americans favoured a more liberal abortion law than permitted by the Supreme Court. Considerable uncertainty, confusion and argument within the various states will result. Professor Laurence Tribe of Harvard University, long a leading United States constitutional scholar, has warned that "the [C]ourt is at a point that is far more dangerous and damaging to the country than at another point, probably, since *Dred Scott*".⁵³

On the long drawn out and persistent campaign that the election was stolen from Trump, there was a clear response from the courts in vindication of the rule of law. More than 60 lawsuits were dismissed in a variety of state and federal courts. The Supreme Court of the United States refused to intervene in cases involving the critical issue to Trump: the lack of restrictions on voting by mail.⁵⁴ The suspicion was that he set out in advance of the election to consciously discredit the electoral process, especially voting by mail brought on by COVID-19, in the hope he could challenge the results later and remain in power. Trump's Attorney General took an extremely generous and unduly wide view that almost everything the President did was constitutional.⁵⁵

51 Steven M Teles *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, Princeton, 2008). Despite the politicisation of judicial appointments, it is encouraging to note that this did not result in the numerous Republican-appointed judges who considered Trump's challenges to the 2020 election results misapplying the electoral law.

52 *Dobbs v Jackson Women's Health Organization* 142 S Ct 2228 (2022), overruling *Roe v Wade* 410 US 113 (1973).

53 KK Ottesen "Current Supreme Court is damaging to the country, law scholar warns" *The Washington Post Magazine* (online ed, Washington DC, 16 August 2022) (emphasis added). "*Dred Scott*" refers to the 1857 decision of the Supreme Court that did much to bring on the civil war: *Dred Scott v Sandford* 60 US 393 (1857).

54 ABA Standing Committee on Election Law "Current Litigation" (30 April 2021) American Bar Association <www.americanbar.org>. This is the most helpful source of the disposition of the cases that reached the Supreme Court. No attempt will be made to cite the many decisions of other state and federal courts.

55 Tom Hamburger "How William Barr, now serving as a powerful ally for Trump, has championed presidential powers" *The Washington Post* (online ed, Washington DC, 16 May 2019).

2 *Storming the Capitol*

Having failed in the courts to overturn the election result, other efforts occurred to organise a rally at the Capitol supported by the President on 6 January 2021. He urged his supporters to march upon the Capitol Building, where the Senate and the House were then considering the certification of the election results from the Electoral College.⁵⁶

The mob stormed the Capitol and broke in. Proceedings were suspended. People died. And order was not restored for several hours. When business resumed, the results were certified and Vice President Mike Pence, who was presiding in the Senate, refused to heed requests from President Trump to overturn the declared results. These actions led to the impeachment of Trump for the second time. He was again acquitted. The President was widely accused of promoting a riot and insurrection. His behaviour and actions remain under criminal investigation by the Department of Justice.

Impeachment was not the end of investigations into the events of 6 January 2021. (Remember the President escaped conviction after a trial in the Senate on two articles of impeachment for abuse of power and obstruction of Congress in 2019.) After the results of the 2020 election had been certified, the House of Representatives set up an investigation which is ongoing at the time of writing. The hearings have been dramatic in casting light on what happened and the role Trump played at the time. The activities of groups like the Proud Boys and QAnon, an organisation that promotes conspiracy theories, were investigated. Charges against 800 individuals had been filed in the courts by August 2022 and this will continue for a long period. Steve Bannon defied a subpoena from the Committee and was convicted on July 22 of two counts of contempt of Congress. The Committee is sharing with the Department of Justice the evidence it has accumulated to help with criminal prosecutions.

Trump aides gave evidence to the Committee of a type highly damaging to Trump and suggested that he had encouraged the riot. Trump failed for a long period to call his supporters off. He resisted efforts by his staff to get him to act in that regard.⁵⁷ What consequences the hearings will have and what legal steps will emerge is unknown at the time of writing.⁵⁸ It seems clear that efforts to cover up the conduct and move on have failed.

56 Philip Rucker and Carol D Leonnig "I Alone Can Fix It' book excerpt: The inside story of Trump's defiance and inaction on Jan 6" *The Washington Post* (online ed, Washington DC, 15 July 2021). See also Luke Mogelson "The Storm: In the weeks before the assault on the Capitol, the President and his supporters kept stoking paranoia and rage" *The New Yorker* (New York, 25 January 2021) at 33.

57 Maggie Haberman "Sarah Matthews witnessed efforts by Trump aides to get him to act on Jan 6" *The New York Times* (online ed, New York, 21 July 2022). See also Annie Karni and Maggie Haberman "In Jan 6 Hearings, Gender Divide Has Been Strong Undercurrent" *The New York Times* (online ed, New York, 23 July 2022), which describes the strong efforts by Republican Congresswoman Liz Cheney to dig down into the details.

58 Charles M Blow "We Can't Afford Not to Prosecute Trump" *The New York Times* (online ed, New York, 24 July 2022).

3 *Disinformation*

Disinformation or fake news has been a feature of the political activities of Donald Trump. Developments within social media and other media loomed large in the Trump presidency and his methods of political communication. Fact-checking for false statements has produced a legion of examples.⁵⁹ Trump made Twitter a prime instrument of government communication: a strange and somewhat dangerous development. Many of the social media platforms banned him from access after his actions on 6 January, including Facebook, Twitter, YouTube and a number of other digital platforms.⁶⁰ But for most of his presidency, Trump used social media to attack people, to provide false information and encourage conspiracy theories. The existence of these digital platforms and their effects upon democratic politics is an issue that appears to require regulatory attention.

One serious consequence of the Trump presidency from the point of view of a democratic future lies in his use of rhetoric to inflame a mob by repeating lies over and over again. Since he occupied the highest office in the land, many people believed him. The effort to undermine democracy by storming the Capitol has caused many to turn upon Trump. While there has been an atmosphere of authoritarianism from the beginning of the Trump Administration, it developed into a serious attempt to change the result of the election and conduct—something in the nature of a coup d'État based on conspiracy theories.

The idea was that the government of the United States lacked legitimacy. This tendency could lead to something approaching fascism if it prevails. An American historian has written: "Post truth is pre-fascism, and Trump has been our post-truth president."⁶¹ Without agreement about basic facts, citizens cannot form a civil society or maintain vital institutions. The development also illustrates how over time an atmosphere can be created that will allow democratic practices and procedures to be discredited and fade away.

4 *Outlook*

The mid-term elections for the House of Representatives, the Senate and a variety of state offices were conducted on 8 November 2022. Due to the close results in some states, because of state law requirements, there will be run-off elections in some instances. The overall result was too close to call the morning after the election, so the precise composition of the Senate and the House was not known for a considerable period after the election. Some general observations can be made.

59 Glenn Kessler "Trump made 30,573 false or misleading claims as president. Nearly half came in his final year" *The Washington Post* (online ed, Washington DC, 23 January 2021).

60 Davey Alba, Ella Koeze and Jacob Silver "What Happened when Trump was Banned on Social Media" *The New York Times* (online ed, New York, 7 June 2021).

61 Timothy Snyder "The American Abyss: A historian of fascism and political atrocity on Trump, the mob and what comes next" *The New York Times Magazine* (online ed, New York, 9 January 2021).

The levels of support for both Republicans and Democrats fluctuated over the months prior to election. In the period immediately before polling, many polls suggested there would be a red wave of Republican Party support, and that the Democratic Party would be seriously depleted, losing control of both houses of Congress. In the event, no red wave eventuated and the Democratic Party was highly competitive and did better than has been the case for many administrations in mid-term elections. The polling was misleading, not for the first time in recent years.

One factor assisting the Democrats was the issue of abortion rights for women, resulting from the recent decision of the Supreme Court that reversed a long-established precedent. The base of the Democratic Party turned out to vote, even defeating the Republicans in the Senate election in the swing state of Pennsylvania. The Democrats retained control of the Senate and the Republicans secured a small majority in the House of Representatives.

Another encouraging feature was the turnout of voters, which was much higher than usual for mid-term elections. Participation must be a positive trend in the health of any democratic system. Trump's domination of the Republican Party resulted in many weaker candidates and significant numbers of them were defeated. Despite inflation that worried voters, Trump may not now be secure in seeking the Republican nomination for President if he decides to run, since superior choices may be available, particularly Ron DeSantis, who swept into the governorship in Florida. The mid-term elections have damaged the prospects of Trump again securing the presidency of the United States. Nevertheless, Trump announced his intention to run for the presidency in 2024 on 16 November 2022. His rambling speech contained the falsehoods that have become his political stock-in-trade. Some commentators suggest the magic is gone and Trump will face a struggle to secure his party's nomination.⁶² The conclusion is that the future of American democracy is not immediately imperiled, and the trend to authoritarianism has not yet embedded itself. But how the future of American democracy will develop cannot be predicted.

It may be argued that Trump is barred from holding the office again, as in 2021 he engaged in an insurrection against the Constitution after swearing to uphold it.⁶³ The degree of polarisation and the inability to compromise do not bode well. The level of support secured by Trump remains a brake on a return to orthodoxy and will test the methods by which government is conducted in the United States. It is sad that democracy has become a partisan issue—it is as if the country has split into two camps that believe different versions of reality. However, the United States has endured democratic breakdowns before and has overcome them. It can do so again.

62 Glenn Kessler "New Trump campaign, same old falsehoods" *The Washington Post* (online ed, Washington DC, 16 November 2022); and Dana Milbank "At Trump's angry announcement, the magic is gone" *The Washington Post* (online ed, Washington DC, 15 November 2022).

63 Bruce Ackerman and Gerard Magliocca "Biden vs Trump: The Makings of a Shattering Constitutional Crisis" *Politico Magazine* (online ed, Washington DC, 1 February 2022). See United States Constitution, amend XIV, § 3.

White supremacy was encouraged again in America, notably with the "Unite the Right" rally in Charlottesville, Virginia in 2017, 152 years after the end of the civil war that stopped slavery, and long after the Civil Rights Act of 1964 and the Voting Rights Act of 1965—great reformist pieces of legislation—were enacted by Congress. It looked as though efforts may be made to return to the discrimination reimposed in the South after reconstruction.⁶⁴

A tendency to persuade his supporters to believe in conspiracy theories may turn out to be one of Trump's most enduring legacies. Trump persisted in asserting, contrary to all the evidence, that he won the 2020 election and deliberately stirred up his political base to support these unverified assertions. Whatever happens, his political shadow will not easily disappear.

By the end of August 2022, Trump's ascendancy of the Republican Party was increasing just as his legal difficulties increased as well. The defeat of Liz Cheney in the Republican primary for Wyoming's House seat produced defiance from her and a determination to fight on. President Joe Biden's staff was preparing for an important speech on 1 September indicating he was prepared to take on a battle for the nation's soul, to save American democracy. FBI agents executed a search warrant on Trump's Mar-a-Lago club and home in Florida and took away cartons of classified secret documents, in an investigation by the Department of Justice from which prosecutions could emanate.⁶⁵ Three recent books on Trump and his presidency have appeared and repay close study.⁶⁶

D The United Kingdom, Brexit and Disruption

In the other main English-speaking democracy, the United Kingdom, things are also rather serious in terms of democratic standards. Managing the crisis brought about by COVID-19 and completing the steps to leave the European Union have been disruptive and damaging to the economy and the morale of the people. The United Kingdom has, since the carrying out of the Brexit referendum, been in a long-drawn-out crisis of governance. The use of big data by Cambridge Analytica in the Brexit referendum showed how new methods of using collected data could influence voting behaviour. Brexit has involved three general elections, four Prime Ministers who have come and gone, two

64 It is as if the doctrine of concurrent majorities of John C Calhoun, the redoubtable supporter of slavery, has a new lease of life: see Richard Hofstadter *The American Political Tradition and the Men who Made It* (Vintage Books, New York, 1989) at 89.

65 "That hideous strength: After the mid-term elections this November, the Republican Party will be Trumpier than ever" *The Economist* (London, 20 August 2022) at 17; and "Joe Biden to deliver prime-time speech on the 'battle for the soul of the nation'" *The Telegraph* (online ed, London, 30 August 2022).

66 Maggie Haberman *Confidence Man: The Making of Donald Trump and the Breaking of America* (Mudlark, London, 2022); Peter Baker and Susan Glasser *The Divider: Trump in the White House, 2017-2021* (Doubleday, New York, 2022); and Jedediah Purdy *Two Cheers for Politics: Why Democracy is Flawed, Frightening — And Our Best Hope* (Basic Books, New York, 2022).

defeats in the Supreme Court of the United Kingdom, and two defeats in Parliament for the government.⁶⁷

In the run-up to Brexit and since, the United Kingdom has experienced a turbulent political and constitutional period. The courts have had to deal with difficult decisions in the *Miller* series of cases. All that be accomplished here is to note the issues in summary form. The best source for these is *Monitor*: a newsletter published online periodically by the Constitutional Unit at University College London and edited by Professor Robert Hazell. What follows is drawn to a large extent from *Monitor* 81 (July 2022).

Points to reflect upon are:

- the nature of the referendum and its aftermath;
- the use of algorithms and big data to influence the result in scandalous circumstances that led to the demise of Cambridge Analytica;
- misconduct of the former Prime Minister, the Rt Hon Boris Johnson MP, in making misleading statements on several subjects, including the "Partygate" scandal with a report by Sue Grey into those events and other matters that led to his resignation, resulting in a lengthy hiatus before a new Prime Minister was appointed;
- at the time of writing, an ongoing investigation into the issue by the Privileges Committee was continuing into allegations of misleading the House of Commons by Prime Minister Johnson that may have consequences for his continuing as an MP;
- rule of law issues with the Brexit arrangements for Northern Ireland;
- setting up a scheme to send to Rwanda refugees trying to get to the United Kingdom;
- the removal of the requirement for parliamentary approval if the Prime Minister decides upon an early election;
- Fixed-term Parliaments Act 2011 (UK) repealed;
- possible Brexit freedoms Bill;
- limits placed on the independence of the Electoral Commission;
- the future of the Union with continued pressure for independence for Scotland;

⁶⁷ In the first *Miller* case, *Regina (Miller) v Secretary of State for Exiting the European Union*, above n 25, the Court held by a majority that an invocation of art 50 of the Treaty on European Union 1757 UNTS 3 (signed 7 February 1992, entered into force 1 November 1993) would remove rights enacted through primary legislation, and, therefore, may not be done by royal prerogative without enabling primary legislation. In the second *Miller* case, *Regina (Miller) v Prime Minister*, above n 25, 11 judges unanimously held the use of the prerogative power of prorogation to be justiciable. The Prime Minister's advice to the Queen to prorogue Parliament, and the resulting Order in Council, were unlawful because they had "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive" (at [50]). The order was void, and Parliament was not legally prorogued. These developments revive thoughts of what Lord Hailsham called in the 1980s "elective dictatorship". See Lord Hailsham *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, London, 1978) at 9–11.

- a Bill introduced to replace the Human Rights Act 1998 that has received widespread criticism;
- publication in April 2018 into the findings of a citizens' assembly concerned about the honesty and integrity of elected representation and distrust of ministers;
- decline in scrutiny of Parliament due to refusals by ministers to cooperate, delays and intentionally attempting to escape the protections of international law and compliance with it;
- proposed changes to the Code of Conduct for MPs;
- 56 investigations into sexual misconduct by MPs;
- controversy about the political appointment of peers;
- resignation of a second ethics adviser;
- photographic evidence now required to vote; and
- record numbers of defeats in the House of Lords.

Such a record supports an interpretation of a decline in democratic principle and a lowering of standards of political behaviour. It is different from the forces at work in the United States, but in both countries one can discern a trend to populism and a refusal to follow well established democratic norms. Anger seems to be a developing political technique used to secure change. How the new Conservative Party government that emerged in October 2022, after 45 days in office for the administration headed by the Rt Hon Liz Truss MP, will perform cannot be predicted. A confusing set of ministerial musical chairs resulted from three different Prime Ministers from the Conservative Party within a short period.

E The Covid Pandemic

The government response to the COVID-19 pandemic in New Zealand demonstrates the great power of the state to limit people's liberties in order to protect the health and welfare of the wider public. Few experiences can tell us more about the methods, capacity and competence of our system of government than how it responds to exceptional events.⁶⁸

The COVID-19 pandemic brought unprecedented challenges to the entire system of government in New Zealand. These challenges sprang up on multiple fronts and placed great strain on the machinery of government to adjust to so many issues so quickly and for so long. Challenges included:

- medical and scientific issues concerning the nature of the virus, diagnostic issues concerning its detection, the changing research on the means of combatting and treating it, and dealing with the levels of uncertainty and the risks present;
- medical treatment delivery issues and how hospitals and the public health system can be organised to keep the death rate low;

68 For further discussion, see Palmer and Palmer Steeds, above n 40, at ch 12.

- border control issues as to how to prevent the spread of the disease from people returning to New Zealand from overseas, involving immigration issues, enhanced border controls involving the Customs Service, the Police, and the development of government quarantine facilities for new arrivals where the Defence Force took an important role;
- how to deal fairly with the numbers of New Zealanders returning to the country when the spaces available for quarantine could not accommodate them all in a timely fashion and adjusting the system over time;
- the development of policy and law to adjust for changes in the virus, and the passing of many statutes and secondary legislation containing large quantities of technical detail, and the development of a new framework at speed following the impossibility of stamping out the Delta variant;
- measures to ensure compliance with the detailed rules that restricted liberties and the role of the Police and development of methods encouraging compliance without being too heavy-handed, including regarding illegal demonstrations in breach of the new measures;
- a communication strategy so the government could communicate its messages to the public on a continuing basis in a rapidly developing situation to influence their behaviour and tell them how to best protect themselves. This involved a massive multi-media advertising programme, leaflets, telephone helplines and detailed information on the COVID-19 government website to get accurate information out and to combat the false information on social media. There were numerous media conferences led by the Prime Minister and responsible ministers with officials;
- further challenges included the development of detailed policies for segments of the economy, such as retail, hospitality, and public events, including funerals, to prevent the spread of the disease, which required a great deal of consultation with affected groups;
- the development of a vaccination strategy once vaccines were available, choosing the most appropriate ones, procuring them, taking steps to ensure they were available all over New Zealand and that people were vaccinated in a timely fashion;
- developing and delivering policies for the protection of people in schools and tertiary education facilities, including universities and their halls of residence;
- adjusting the practices in justice facilities, including prisons, and changes to the operation of the courts, led by the Chief Justice, to protect people there, which caused big disruptions in the working of the courts;
- much financial and Treasury advice was required to ensure measures were taken to prevent the economy from collapsing due to COVID-19. Colossal sums of public money were handed out to assist and subsidise employers and the self-employed with taxpayers' money and this required increased government borrowing;
- final challenges included adjustments that had to be made to the system of social welfare benefits to cushion people against poverty due to COVID-19; and
- planning steps to reopen New Zealand when safe to do so.

Complex legal drafting had to be carried out by the Parliamentary Counsel Office and many Orders in Council were made. The Governor-General needed to sign many of the documents produced. Cabinet government is a flexible system, but for the pandemic it had to be adjusted to be more agile, due to the emergency character of the public health decisions that had to be made. The ordinary Cabinet processes were too ponderous for the demands of the situation.

A rapid but considered decision-making system was developed. An ad hoc Cabinet Committee was superseded by a group of eight ministers, headed by the Prime Minister and Deputy Prime Minister. The Secretary of Cabinet, Michael Webster, wrote that a "battle rhythm" for meetings emerged. He described the process:⁶⁹

Ministers were, at incredibly short notice, regularly provided with information, analysis and advice and, in a collective setting, after robust discussion in a virtual environment, made decisions that were accurately and clearly recorded, and quickly promulgated. The longstanding principles of best practice decision making, as set out in the *Cabinet Manual*, were effectively combined with modern technology, the adaptation of systems and processes, and a dash of Kiwi pragmatism, to deliver a decision-making approach that supported Ministers to respond to one of the most significant crises New Zealand has ever faced.

Serious issues developed about the plight of New Zealanders overseas not being able to return because of the limited numbers of spaces in managed isolation facilities. Many were unhappy they could not return at the time they wished. A lottery system was introduced, which many disliked. The Ombudsman received more than 200 complaints. A legal challenge was filed in the High Court and determined in 2022. Two declarations were issued by the High Court. The first declaration was to the effect that in the period between 1 September 2021 and 17 December 2021, the fact that the system for emergency allocation did not make allowance for New Zealanders facing unreasonable delays to be considered and prioritised where necessary, amounted to an unjustified limit on the right of citizens to return to their own country, which "inevitably meant that in some instances that right could be breached".⁷⁰

Since the COVID-19 pandemic arrived in New Zealand, 22 separate Acts of Parliament bearing on COVID-19 were passed between 15 May 2020 and 21 December 2021.⁷¹ More than 220 pieces of secondary legislation containing orders and regulations on many matters of detail affecting many businesses, occupations, and activities have been made. The volume of law was enormous; it was

69 Michael Webster "Government decision making during a crisis: the New Zealand experience during the Covid-19 pandemic" (2021) 17 Policy Quarterly 11 at 14.

70 *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 1407 at [8]. For the substantive judgment resulting in the declaration described above, see *Grounded Kiwis Group Inc v Minister of Health* [2022] NZHC 832, [2022] 3 NZLR 19.

71 Parliamentary Counsel Office "COVID-19 legislation" <www.pco.govt.nz>.

complex and much of it technical. Finding out what you had to do became difficult because of the changing circumstances, especially after the arrival of the Delta variant of the virus.

Making policy and law in a rapidly developing situation posed grave problems. What should the policy be in a situation where the science may be unknown? How should the policy be adopted and what legal changes must be made? How can the public be informed about what is going on and the actions they need to take?

The constitutional protections were at work. It is an intricate story of the interaction between Cabinet, the public, the House of Representatives, the Regulations Review Committee, NZBORA and the courts. Challenges were taken to the courts, but not many succeeded. None of the challenges succeeded in overturning the fundamental elements of the policies adopted or upset the overall strategy adopted. It is a story of how the New Zealand constitution works when under extreme pressure.

Cabinet made decisions and was advised by a wide range of officials and experts from both inside and outside the government system. The decisions were communicated to the public through widespread methods and there was plenty of public debate on the measures.

The quantity of COVID-19 law is vast and altered often. The methods of scrutiny of the legislation were on occasions truncated, due to the need for speed and because of changes concerning the virus and its spread. The legislation that imposed the greatest restrictions required renewal by parliamentary vote on a regular basis to avoid its automatic expiry. Parliamentary debates were held on measures. The legislation passed was not general legislation giving the government wide powers, but it was restricted to the COVID-19 situation. Ministerial accountability was enhanced because orders made by the Minister for COVID-19 Response were made subject to parliamentary debate and disallowance.

No steps were taken to abridge the right of people to test the legality of the measures taken and their consistency with NZBORA. All COVID-19 legislation must be made, like other legislation, considering NZBORA and the courts must also strive to give an interpretation that is consistent with NZBORA. The key COVID-19 statute in 2020 made protection of NZBORA explicit and the law said that restrictions on civil liberties should be undertaken only to the extent required.⁷²

The resistance to the vaccine mandates and the lockdowns produced a range of conspiracy theories on social media. Demonstrations were held in many places. Dissent from a vocal minority weakened the authority of government and damaged the community's sense of social cohesion that had been generated at the beginning of the pandemic. Sizable numbers of people were restricted if they did not take vaccinations against COVID-19. There have been big public demonstrations against the use of masks and lockdowns. In New Zealand, thousands of people illegally occupied Parliament grounds

72 See for example COVID-19 Public Health Response Act 2020, ss 9(1)(ba), 10(c), 11AA(a) and 13(2).

for weeks and had to be forcibly removed by the Police. Many of them are being charged with offences.

F The Digital Revolution, Big Data and Social Media

The consequences for democratic government from what has become known as the disinformation age are profound. The Australian author Ed Coper has written an important book on the subject.⁷³ The demonstration at the New Zealand Parliament mentioned in the previous section provides a graphic demonstration of misinformation at work and is the subject of a close analysis by two investigative journalists.⁷⁴

The digital revolution has had profound effects upon systems of government. And the problems with regulating it in the public interest have not been solved. A discussion of the implications of the digital revolution on politics, political communication and the selection of policies has become essential to understanding how systems of government operate in democracies nowadays. Some of the developments suggest risks of democratic decay and rot. These issues need to be understood by lawyers.

Isolating the strands that have contributed to the crisis in governance and that weigh upon democracies is no easy task. Many of these factors have been considered to be outside the scope of public law and falling within the domain of various social sciences.

Yet these developments have changed the way in which politics is conducted, have changed the nature of political parties, and have changed the methods of political communication. These developments have weakened the traditional media and threatened their business models. On the other hand, it can be seen that the approach of social media systems has been opened up to a wider range of people who have a wider range of views and aims than are reflected in the traditional media. A revolution has been wrought by the digital media. It may not be going too far to suggest that these developments pose more difficult challenges for governments than did the invention of the printing press centuries ago.

At the same time, the development of social media platforms such as Facebook, Twitter, YouTube and Reddit have provided the opportunity for the expression of unmediated opinions with no fact checking. They have also provided the opportunity to express extreme views and conspiracy theories with no accountability for the consequences. The gatekeepers have gone.

73 Ed Coper *Facts and Other Lies: Welcome to the Disinformation Age* (Allen & Unwin, Sydney, 2022).

74 Louisa Cleave and Paula Penfold "Special Investigation: Living on the Edge" *Sunday Star-Times* (Auckland, 14 August 2022) at 1. The investigation also included an online video—"Fire and Fury"—that is compelling viewing: see Stuff Circuit "Fire and Fury: Who's driving a violent, misinformed New Zealand — and why" (14 August 2022) Stuff <www.stuff.co.nz>.

Other features of the digital revolution are illustrated by the saga of Cambridge Analytica—the Facebook data breach and the scandal that ensued with its use in the Brexit referendum in the United Kingdom. The Russian intelligence agencies, through cyber activity, attempted to influence the outcome of the election in the United States in 2016. The development of the internet was thought to have provided new opportunities for connection and engagement with the traditional political processes, enlivening them and promoting a sense of real engagement with politics and decision-makers. Certainly, some of this has taken place. Public authorities engage in their consultations with the public through the internet and social media platforms.

How the digital media will influence politics in the long term cannot yet be fully known. But there can be little doubt that political decision-makers and the institutions of government are profoundly affected by these changes. New means are available for promoting ideological goals. New means are available for influencing political decision-makers.

Truth does not always prevail in these engagements. Now there is a crisis in knowing what information to believe and what to discount. Voters are easily confused and do not know what to believe. Rumours are spread frequently through these platforms with deliberate political purpose. Group attitudes and voting preference can be manipulated by algorithms. Against such developments, the traditional protections provided in New Zealand by the Electoral Act are largely impotent. Bad information can be spread, and people make up their own minds, and the facts tend to be discounted.

The new media increased capacity to promote conspiracy theories through the Internet. Social media became "a breeding ground for fanaticism, authoritarianism, and nihilism".⁷⁵ White supremacy made a resurgence. Twitter became a central means of political communication. Troll factories developed. Political polling became unreliable.

G Political Parties

Political parties play a vital role in the function of any democracy. They provide much of the machinery of political organisation and discussion in the communities, select candidates to run for the party in elections, and decide and promote party policy.

Political parties are neglected by our constitutional law in a similar way to the treatment of Cabinet. Parties profoundly influence public decision-making, yet they are treated to a large extent by the law as private organisations. The two major parties in New Zealand have no corporate personality; they are not even incorporated societies which makes them harder to sue in the courts and to enforce any judgment against them. Parties are only slightly regulated by the need to be registered. There is one provision in the Electoral Act that prevents the worst types of abuse and candidate rigging:

⁷⁵ Lepore, above n 49, at 770.

71 Requirement for registered parties to follow democratic procedures in candidate selection

Every political party that is for the time being registered under this Part shall ensure that provision is made for participation in the selection of candidates representing the party for election as members of Parliament by—

- (a) current financial members of the party who are or would be entitled to vote for those candidates at any election; or
- (b) delegates who have (whether directly or indirectly) in turn been elected or otherwise selected by current financial members of the party; or
- (c) a combination of the persons or classes of persons referred to in paragraphs (a) and (b).

What has happened over time is that MPs now arrive in the House as members of a political party to which they have pledged loyalty, and they will try to carry out its policies that they have been sent there to promote. People are free to join political parties, but many fewer people do than was the case up until the 1960s. Those who do belong nowadays tend to be passionately interested in politics and may wish to become parliamentary candidates. Party members are active in fundraising and canvassing the electorate to see where the support lies and getting the vote out at election time. Party rules are also important in determining who may become leader.

Despite the importance of political parties, membership has declined drastically since the 1950s in New Zealand. Nonetheless, National and Labour remain the two main political parties in terms of voting behaviour in recent elections. But they are largely now both cadre parties rather than political parties with a mass membership base. They are dominated by an elite group of political activists. This has consequences for citizen engagement with the machinery of government and governance. Fewer people have a direct involvement these days with the issues that concern political parties, and many feel less connection with ordinary people.

Next comes the issue of campaign and party financing. Funding for political parties tends now to be sourced from corporations, trade unions and wealthy individuals, rather than from mass party membership, which no longer exists. In such a situation, there are risks that the voices of ordinary people will be drowned out by corporate and business interests. Serious issues also exist about funding that derives from foreign sources. The manner in which the funding of political parties by business has developed in the United States has much to do with the present state of political discontent in that country.

The United States has made a radical change in recent years relating to campaign financing. The 2010 decision of the Supreme Court of the United States, *Citizens United v Federal Election Commission*, is anchored in the idea that freedom of expression must be protected.⁷⁶ It has been interpreted to allow corporations and wealthy individuals to spend unlimited amounts of money on

76 *Citizens United v Federal Election Commission* 558 US 310 (2010).

election campaigns. It has encouraged a most unhealthy relationship between members of Congress and donor corporations. The general perception is that there is a *quid pro quo* arrangement involved. This development results in unrestricted outside spending on political campaigns, by corporations and very rich individuals alike. This is at a time when wealth disparities in the United States are at high levels. The undemocratic character of this development is obvious and is to be avoided.

Following the constitutional conniptions in the United Kingdom from Brexit, Professor AC Grayling argued that:⁷⁷

[t]here should be complete transparency about the funding involved in an election campaign, not just in the period of the campaign itself but in the research and development of all methods used in campaigning; and a cap on it.

New Zealand law regulates political party funding to some extent, attempts to limit the expenditure of money on elections, and purports to require transparency in political donations. There are ways to avoid many of these requirements. But it should be noted that in New Zealand, at least two of the political parties rely on small online donations to a substantial extent.

In New Zealand, there are serious gaps in the law when it comes to regulating political parties, and one expert says this "disclosure regime was so riddled with loopholes as to operate on a virtually voluntary basis; any donor who wished to keep her or his identity secret could do so easily and completely legally".⁷⁸

The rules are easy to evade. Limits on election expenses imposed by the law have defects in them as well. Yet those who decide on the content of the law are MPs who have more direct interest in the issue than in almost every other matter they legislate on.

The law should require political parties to publicly report their membership numbers periodically so that the public can know to what extent they speak for many, and how extensive their support is. It would also be transparent to require parties to report publicly on their finances and these should be available for public inspection. There is a strong case for changing the law so limits are placed on expenditure throughout the electoral cycle.

In many parts of the world political parties are corrupt. Transparency International reports that political parties are the most corrupt institutions internationally, as found by their surveys. Many of them, even in Europe, are widely regarded in this way. It would be prudent in New Zealand to take steps to ensure such charges cannot be made here. Despite the statutory entrenchment of six important provisions of the Electoral Act 1996—the most important of which is the Representation Commission

⁷⁷ Grayling, above n 44, at 187.

⁷⁸ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 156.

that makes gerrymandering the boundaries of electorates for political advantage impossible and protects the secret ballot—there is more work to be done.

New Zealand does not have sufficient regulation and oversight for political parties to ensure they do not develop in this way, particularly when the MMP system confers such a central role to political parties. The degree of regulation is too light and the recommendations of the Royal Commission on the Electoral System in 1986 should be revisited, as they were never implemented. The rules of parties need outside scrutiny.

V CONCLUSION

Democracy faces many challenges. It will take determination and commitment in the long term to preserve it and enhance it.

