A LETTER FROM

Archbishop Ferguson (circa 1985)

Lord Hewart, former Lord Chief Justice of England, in his celebrated book, *"The New Despotism"* (1929), stated: "Writers on the Constitution have for a long time taught that its two leading features are the Sovereignty of Parliament and the Rule of Law. To temper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employee the one to defeat the other, and to "establish a despotism on the ruins of both".

He went on to say that: "It is manifestly easy to point a superficial contrast between what was done or attempted in the days of our least wise kings, and what is being done or attempted today. In these days the method is to cajole, to coerce, and to use Parliament - and it is strangely successful. The old despotism, which is not yet defeated, gives parliament an anaesthetic. The strategy is different but the goal is the same. It is to subordinate Parliament, to evade the Courts and to render the will, or caprice of the Executive unfettered and supreme".

It would appear that in Britain particularly the two great obstacles to the idea that the only people fit to govern were the experts or permanent officials, or in today's parlance "the bureaucrats", were "The Sovereignty of Parliament" and "The Rule of Law". Now what is meant by "The Rule of Law" is the supremacy of the predominance of law as distinguished from any other method, which is not law, of disposing of the rights of individuals.

Prof A.V. Dicey, the eminent British Constitutional lawyer, in his classical work on *"The Law of the Constitution"* enumerates three distinct conceptions involved in the statement that the English Constitution is characterised by the supremacy, or, the Rule of Law.

1. That in England no man can be punished, or can lawfully be made to suffer either in his body all his goods, except for a distinct breach of law established in the ordinary legal manner before the ordinary courts.
2. That in England not only is no man above the law, but every man, whatever his rank or condition may be, is subject to the ordinary law of the land and the jurisdiction of the ordinary courts.
3. That the general principles of the Constitution are mainly

the results of judicial decisions determining the rights of private persons brought before the Courts.

But even Dicey regarded the sphere of the Rule of Law as having been diminished by the tendency of legislation to confirm judicial powers upon officials, the growing power of the Trade Unions and increasing resistance by the people protesting against different forms of legislation and what he regarded as lawlessness in the mis-development of party government - "The rule of party cannot be permanently identified with the authority of the nation or with the dictates of patriotism".

The Law, however, afforded three remedies by which the right of personal liberty might be vindicated (1) by the writ of Habeas Corpus (2) by an action for damages for false imprisonment and (3) by a prosecution of the person imposing the illegal restraint, that is, a prosecution for assault.

The Writ of Habeas Corpus was a very ancient common-law writ, directed to any person detaining another, commanding him to produce the body of the person detained before the court, showing the day and cause of his detention, to be dealt with as the law requires. The writ enabling the person unlawfully detained to be brought before the Court and have the cause of his detention enquired into. If no legal justification is shown he must be released.

Other well known examples of common law rights are "The right of freedom of speech", which again, is the right which everyone has, to say, write or publish what he pleases so long as he does not commit a breach of the law. If he publishes anything construed as defamatory by word of mouth or in any publication, he may be sued by the person defined in an action for slander or libel. The liberty of the press is merely an application of the principle that one is liable to be punished or condemned in damages except for a breach of the law.

Also, in the British Constitution, there is not any definite right of public meeting. The right is the result of the individual common law rights of personal liberty and freedom of speech. The right of people to assemble together in a lawful manner for public discussion or other lawful purposes so long as they do not break the law, as for example, by causing obstruction to traffic or

trespassing or committing similar unlawful acts.

Apart from the rights and responsibilities provided under the Common Law there exist in Britain and in Australia many Statutes which confer upon certain officials such as a minister of the Crown or Head of a Department the power of deciding questions of a judicial nature and commonly providing that the decision of such official is final. Frequently such decisions are delegated to some minor departmental official. In the words of Lord Hewart, to employ the words administrative "law" or administrative "justice" to such a system is really "grotesque".

"The exercise of arbitrary power is neither law or justice, administrative or at all. The very conception of law is a conception of something involving the application of known rules and principles, and a regular course of procedure for its application.

But how do these inherent rights of the Common Law apply to Australia? Firstly, the States of Australia were established long before the Commonwealth of Australia was constituted in 1900. All the laws and established common law practices automatically became law and established practices in those States which were Colonies of the Crown. Even at that time, these laws were only affected to the degree that the new Australian Constitution gave the Commonwealth specific legislative powers. It must also be remembered the British Constitution is what is known as an Unwritten Constitution as distinct from the written Australian Constitution. Where the British Parliament is recognised as having the right to make or unmake any law whatsoever, and no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament, the Australian Constitution possesses only those powers specifically granted to it in the Constitution. The residue of powers remains with the States, hence the almost feverish desire of every Commonwealth Government to acquire greater power.

Perhaps, at this stage it may be appropriate to set out that the Act of the Imperial Parliament of 9 July 1900 proclaimed in Clause 3 the following :-

> "It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day varying appointed, not being later than one year after

the passing of this Act, the people of New South Wales, Victoria, South Australian, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australian, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth".

Let us now examine the methods by which the Commonwealth Constitution may be amended.

Firstly, there is the accepted method of Referendum as prescribed in Section 128. This section begins with the words "This Constitution shall not be altered except in the following manner:-

"The proposed law for the alteration thereof must be passed by an absolute majority of each House of Parliament, and not less than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members in the House of Representatives".

The next paragraph provides for the position where either House passes the proposed law and the other House rejects it for the resubmission of such proposed amendment despite the continued refusal of the other House to accept it.

If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting approve the proposed law, it shall be presented to the Governor-General for the Queens assent.

It is a well known fact that most Referenda submitted to the people for approval have been rejected and it is not surprising that our Governments have endeavoured to overcome this difficulty. This has been achieved, somewhat rarely, by the Reference Power from the States to the Commonwealth by virtue of Section 51 of the Constitution. This power was used in connection with the Financial Agreements between the States and the Commonwealth which resulted in the setting up of the Loans Council, a matter which has been of considerable regret to some of the States ever since. The other, and perhaps a more sinister method, is by the use of the External Affairs Power of the Constitution. By this

method, the Commonwealth adopts some Charter of the United Nations in legislation of the Commonwealth. If this is challenged by any State, it must of course run the gauntlet of an appeal to the High Court. It is perhaps notable that in both the Koowarta and Franklin Dam cases, the Appeal was decided in favour of the Commonwealth.

Another matter to which some reference should be made in relation to the matter of power politics is the Statute of Westminster. This was an Act of the Imperial Parliament of 1931 which provided that no law thereafter made by the Parliament of the United Kingdom should extend to any of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

I have in my possession a copy of a speech made by an eminent English Constitutional lawyer, Mr J.H. Morgan, K.C., to a Meeting of the Royal Empire Society at the Hotel Victoria, London on 10th of November 1931, presided over by the Right Honourable Viscount Hailsham, the then Secretary of State for War. Referring to the Bill (i.e. The proposed Statute of Westminster) Mr Morgan used these words:

> "It is something of so negative, I will not say so destructive, a character, that a Dominion statesman whose sobriety of judgement no one could question has recently described it as the first step in the dissolution of the Empire. So spake Sir Francis Bell in July last of those recommendations of the Imperial Conference of 1926 and 1930, which, after perching for a view fugitive moments on the tables of six Dominion legislatures, have now come home to roost in the form of an agreed Bill already known as the "Statute of Westminster".

The reader might wonder how all these matters which I have endeavoured to unravel are connected. I believe that they are all part of a web of political and economic intrigue which commenced with the elimination of Great Britain as a world power, the deliberate alienation of the British Dominions from the Mother Country, the formation of the European Common Market and ultimately the setting up of the United Nations designed and eventually to become the International Socialist World Government. — Archbishop Ferguson