L887 LOUGH, N. W. Towards a better democracy

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TOWARDS A BETTER DEMOCRACY

A defence of entrenched provisions in the Electoral Act 1993

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Contents

A. *Introduction*

In 1986 the Royal Commission on the Electoral System published its report, *Towards a Better Democracy*, recommending the adoption of the Mixed Member Proportional system of voting for the House of Representatives. This has been effected with the passing of the Electoral Act 1993. However, the Royal Commission also recommended that the provisions covered by section 189 of the Electoral Act 1956, now section 268 of the Electoral Act 1993, be protected against amendment or repeal other than by the special procedures set down in the Act, and that "[t]he protecting provision should itself be protected in the same way..."[1]

This recommendation has not yet been effected. The reserved provisions of the Electoral Act 1993 cover matters fundamental to our system of Parliamentary democracy, yet constitutional conventions remain the only impediment to their amendment or repeal by an ordinary Parliamentary majority. Ultimately, the people of New Zealand are being asked to trust the present incumbents of the House of Representatives to ensure that our political system will not be altered beyond recognition. It would not be too much to suggest that the people of New Zealand are being asked to repose a great deal of trust in a body which lately has not demonstrated its trustworthiness.

A significant body of public opinion would now accept that certain matters, namely those things essential to the preservation of our political system, be placed beyond the political fracas. Such matters are so important that it should only be possible to alter them with widespread public and political support. Indeed, the protection of our political system from ordinary political manipulation is overdue and, rather than asking why, we should perhaps ask why not.

[1] Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) 292.

PART I
THE VALIDITY OF ENTRENCHMENT

B. *Parliamentary Sovereignty*

It is a well-established doctrine of constitutional law that Parliament is sovereign. The classic expression of this jurisprudential concept may be found in Dicey's *An Introduction to the Study of the Law of the Constitution*:[2]

> The principle of Parliamentary Sovereignty means neither more nor less that this, namely, that Parliament thus defined [*ie. Queen, Lords and Commons*] has, under the English constitution, the right to make or unmake any law whatsoever; and, further, that 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 fullest measure of Parliamentary Sovereignty was to be found in the Parliament at Westminster. Of this body, the courts stated: [3]

> The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act, Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.

Under this traditional interpretation, neither substantive nor procedural restrictions on the legislative power of Parliament could be of any effect. Namely, "... a sovereign Parliament cannot limit its sovereignty."[4]

C. *Effect of section 268*

Section 268 of the Electoral Act 1993 reserves certain provisions from alteration other than by a special majority or a referendum. Yet the protection afforded by

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[2] A V Dicey *An Introduction to the Study of the Law of the Constitution* (MacMillan & Co. Ltd., London, 1960) 40.
[3] *Ellen Street Estates* v *Minister of Health* [1934] 1 KB 590, 597.
[4] *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR 1, A.6: para 7.9.

section 268 is illusory. The ordinary machinery of Parliament may be used to avoid its restrictions.

The problem arises as section 268 is not itself protected against amendment or repeal in the ordinary manner. Parliament could remove section 268 by a simple majority, and the so-called 'reserved' provisions could then amended or repealed in the same manner.

That section 268 may be sufficient to preclude an implied repeal of the sections covered is the most one could argue. However, even this may be going too far. When the original Act was passed Parliament did not entrench section 189 of the 1956 Act because it was felt this was legally impossible. Parliament could only hope to achieve a political or moral constraint on amendment.

P A Joseph argues that section 189 (now section 268) has conventional force.[5] The question of amending section 189 by a simple majority arose with the proposed 'Shirtcliffe Amendment' to the Electoral Reform Bill.[6] Commentators argued that it would be "constitutionally improper" to amend section 189 other than by the set procedures.[7] The propriety of amending section 189 by a simple majority was avoided when the proposal was abandoned. Whatever the constitutionality of amending section 189 by a simple majority, section 189 provides no legal protection to its amendment:[8]

> [A] Government exploiting the single entrenchment under the Electoral Act must accept full political responsibility, as the price of it amending an entrenched section. The sanction would be political accountability.... The discipline of pragmatic politics imposes sufficient self-regulation, whatever further argument may be made for a constitutional convention.

There are only two possible interpretations that can be placed on section 268. Either it is legally ineffective *ab initio* and places no restraint whatsoever on Parliamentary Sovereignty. This approach would conform with the traditional

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[5] P A Joseph "Constitutional Entrenchment and MMP" (1994) *New Zealand Universities Law Review* 67, 78.

[6] The 'Shirtcliffe Amendment,' advocated by the Campaign for Better Government spokesperson Peter Shirtcliffe in 1993, would have required an absolute majority of registered electors in favour of the MMP proposal, not simply a majority of votes cast.

[7] G Palmer "Democratic baseline must stay" *The Dominion*, Wellington, New Zealand, 4 August 1993, 8.

[8] Above n 5, 80.

view of Parliamentary Sovereignty as expressed in *Ellen Street Estates*.[9] Therefore, implied repeal by a later Act of any of the matters covered by section 268 would be effective:[10]

> Section 189 was singly entrenched. It lacked the protection of its own procedures and could have been altered by ordinary Act of Parliament....
>
> If section 189 was susceptible to ordinary legislation, then its amendment would seem possible even by implication under the doctrine of implied repeal. What can be done expressly can be done by implication. This doctrine applies notwithstanding the importance of constitutional amendment.

The alternative is that section 268 is effective in so far as it precludes an implied repeal and requires Parliament to either conform to the protecting provisions or engage in a two-step legislative process.

If the second interpretation is advocated, then it is submitted that this constitutes a genuine restriction of the traditional doctrine of parliamentary sovereignty. If one advocates this position, there is no logical reason for arguing that provisions cannot be genuinely entrenched. In supporting section 268, one has already conceded that Parliamentary Sovereignty *may* be limited. Whether a provision is singly or doubly entrenched is merely a matter of degree.

D. *Developments in New Zealand*

1. *Sunset on the Empire*

As the full plenitude of parliamentary powers was to be found at Westminster, it was by this standard that the powers of other legislatures, including New Zealand's, were to be measured. This does not mean that the powers of the New Zealand Parliament necessarily derive from Westminster; New Zealand possesses a fully sovereign and independent legislature. By 1947, with the Statute of Westminster Adoption Act, and certainly by 1973 with the New Zealand Constitution Amendment Act 1973, the New Zealand Parliament claimed to possess full powers, equal in extent to those enjoyed by the Parliament at

[9] Above n 3.
[10] Above n 5, 73.

Westminster. The Constitution Act 1986 simply stated that "[t]he Parliament of New Zealand continues to have full power to make laws."[11] At this time, it was felt that New Zealand possessed a fully sovereign legislature, subject to all the strictures of Diceyan perceptions of Parliamentary Sovereignty:[12]

> ... English constitutional theory received into New Zealand holds the New Zealand Parliament to be sovereign. Questions concerning the validity of legislation do not arise - whatever is enacted is law. This places New Zealand alongside the United Kingdom as possessing illimitable and perpetual powers of law-making.

To say that the powers of the New Zealand Parliament are to be measured against those of Westminster does not imply any sort of floating scale; merely that parliamentary sovereignty is a jurisprudential model developed within the Westminster system. Under this model, the powers of the Westminster Parliament represent the apogee of parliamentary power. A fully sovereign Parliament, as is the New Zealand Parliament, possesses powers equal in extent to those of Westminster. It would be absurd to suggest that the New Zealand Parliament, under this Diceyan model of parliamentary sovereignty, enjoys powers greater the institution which the model itself defines as having the fullest plenitude of power, that is, the Westminster Parliament.

The importance of this assertion is that if the powers of the institution which the model defines as possessing the fullest extent of parliamentary sovereignty undergo a change, then the understanding of parliamentary sovereignty under the model must itself be reconsidered. If the definitive model (ie. Westminster) is able to place restrictions on its law-making powers, then one must accept that the model itself admits of such restrictions.

Since the United Kingdom joined the European Community in 1972, the understanding of the sovereignty of the Parliament at Westminster has undergone considerable change. It is now accepted that the provisions of the

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[11] Constitution Act 1986, s 17(1)

[12] P A Joseph & G R Walker "A Theory of Constitutional Change" (1987) 7 *Oxford Journal of Legal Studies* 155, 156.

European Communities Act 1972 do impose an effective procedural restriction on the powers of its successor Parliaments.[13]

This shift in the Westminster paradigm must impact on New Zealand understandings of parliamentary sovereignty.[14] As the definitive institution of parliamentary powers, it is not now possible to suggest that valid procedural restrictions may not be placed on the law-making powers of the New Zealand Parliament when they may be validly placed on those of Westminster. It remains to be decided how such restrictions may be validly achieved, but one must admit their possibility.

This new understanding of parliamentary sovereignty does not entail a loss of parliamentary power. For the European Communities Act 1972 to be effective, it is necessary to admit that powers to entrench exist in the United Kingdom constitution, and have always done so. So too in New Zealand. By stating that procedural entrenchment is valid, we are not asserting any novel power. It is a power that was always implicit in the parliamentary sovereignty model.

2. *The Sovereignty discourse*

The tenor of recent legal scholarship indicates an acceptance of restrictions on Parliamentary sovereignty.

P A Joseph and G R Walker advance a theory of a retreat from parliamentary sovereignty, resulting largely from concerns with actions of the Muldoon government.[15] This retreat manifests itself in the utterances of varied members of the political and legal establishment, most notably in the *dicta* of Sir Robin Cooke.[16] Even if one rejects the argument that the power to impose restrictions on the law-making powers Parliament is not inherent in the constitution, Joseph

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[13] See para E below.

[14] See B V Harris "Parliamentary Sovereignty and Interim Injunctions: *Factortame* and New Zealand" (1992) 15 *New Zealand Universitites Law Review* 55. Harris notes that the House of Lords has implicitly accepted that the law-making powers of Parliament are not immutable. He suggests that Factortame will enable an international agreement incorporated into domestic law to be capable of overriding future conflicting statutes (p 63). Such a rule could become cruicially important to New Zealand should CER develop into a supra-national legal system.

[15] Above n 12.

[16] See para D(3).

and Walker provide support for a more dynamic reading of our constitution, a constitution which possesses the ability to adapt itself to the changing tides of public will. The New Zealand constitution is moving from a 'continuing' to a 'self-embracing' theory of Parliamentary sovereignty.[17] The scope and speed of these changes are not to be found in legal discourse but "must draw upon wider phenomena than judicial convention or definitive jurisprudential argument."[18]

Similarly J B Elkind argues that entrenchment, although possible, would "involve a massive shift of responsibility between the legislature and the judiciary."[19] Ultimately, whether New Zealand opts for entrenchment, and whether the courts will enforce entrenching provisions is a political, not a legal, decision:[20]

> It is political truth that, in the New Zealand system, judges regard themselves as bound to interpret and apply Acts of Parliament. It is political truth that New Zealand judges and constitutional lawyers have traditionally adhered to a strict Diceyan approach to Parliamentary Sovereignty.... In the end, when we discard theological speculation, theoretical dispute and semantic confusion, the question whether legislation can be effectively entrenched comes down to "what will the judges do?" or "what can they be induced to do?"

Elkind does not believe any of the Commonwealth cases may be used to support a theory of self-embracing sovereignty in an uncontrolled constitution, but avoids this legal problem by postulating a political solution. A shift in New Zealand's constitutional paradigm to permit entrenchment is possible, but only through a clear political movement: "It will be revolution in which the reluctant judicial vanguard will be mustered only by a faltering trumpet."[21]

B V Harris looks to Westminster to support the validity of entrenchment. In 1984, he argued that the powers of the New Zealand Parliament could be fettered neither in substance nor in form.[22] However, he regards these powers as too wide in a unicameral system, and suggests the adoption of a written constitution.

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[17] Above n 12, 169.
[18] Above n 12, 171.
[19] J B Elkind "A New Look at Entrenchment" (1987) 50 *Modern Law Review* 158, 174.
[20] Above n 19, 175.
[21] Above n 19, 175.
[22] B V Harris "The Law-making Powers of the New Zealand General Assembly: time to think about change" (1984) 5 *Otago Law Review* 565.

The first method he advanced, enactment by the Westminster Parliament, is no longer possible after 1986. The other two methods employed the device of a new legislature, acting under a new constitution. Such a document would gain legitimacy by its approval in a nationwide referendum.[23] Harris therefore shares with Cooke P a perception that were Parliament's powers to be limited, the limits would need to enjoy widespread public support.

While it was felt in 1955 that double entrenchment would be ineffective,[24] few such fears were present in 1993. The Justice Department submission on the Bill recommended that section 268 not be doubly entrenched because it was considered unnecessary. That Parliament would have the power to entrench the provisions if it so chose was not an issue.[25]

The most recent New Zealand legal scholarship on this point supports the validity of restrictions on Parliament's law-making powers, at least in so far as they amount only to procedural restrictions:[26]

> The rules which define Parliament on the one hand, and its powers on the other, are distinct. Parliament may, by legislation, validly reconstitute itself or reformulate its legislative procedures, but it cannot alter the rules affecting area of power. Statutes for the former purposes bind Parliament, those for imposing legislative vacuums do not.

Joseph also argues that precedent for the validity of procedural restrictions can be found in the Electoral Acts. Section 189 of the Electoral Act 1956 became accepted by the political and legal fraternity as binding. Although not legally binding, there would be now be no impediment to making it so.[27]

3. *Sir Robin Cooke and fundamental rights*

Between 1979 and 1984, Sir Robin Cooke, the current President of the Court of Appeal, uttered a series of *dicta* which John Caldwell termed "amongst the most

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[23] Above n 22, 600.
[24] Above n 4.
[25] Department of Justice *Electoral Reform Bill: Report of the Department of Justice* (1993) J/11, p 80.
[26] P A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co. Ltd, Sydney, 1993) 460. See also G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 38.
[27] Above n 5, 81.

breath-taking *dicta* ever propounded by a New Zealand Judge."[28] Sir Robin speculated that there may be Common Law rights beyond the power of Parliament. Two later cases raise the issue that limits to Parliamentary sovereignty may be found in the Treaty of Waitangi.[29]

In a legal system traditionally holding to Diceyan doctrines of Parliamentary sovereignty, such suggestions are somewhat novel. However, their impact should not be exaggerated. The comments in the cases are merely *dicta*. With the exception of torture,[30] Cooke's comments have merely expressed doubts as to Parliament's power. And, he has not repeated the comments since 1984.

However, the *dicta* are significant in that they are indicative of growing reservations to accept notions of unfettered parliamentary power.[31] They indicate that our highest indigenous court may recognise limitations on Parliament's powers, be they found in the Common Law or in the provisions of a statute. This acceptance of restricted Parliamentary sovereignty is rooted in a climate of constitutional development:[32]

> Constitutional meaning does not derive from any single utterance from within the interpretive community; rather it derives from the consensus and uniformity of statements emerging from this community. We have recorded statements made by two senior judges, New Zealand's first Ombudsman, a former legal academic (now Minister of Justice), an editorial writer, a former Member of Parliament, and a cross-section of the legal profession. Numerous similar statements appear in legal periodicals and the popular media. Coupled with Cooke J's judicial *dicta*, these expressions form part of a constellation of statements on the New Zealand constitution indicating prescriptive constitutional change.

E. *Developments at Westminster*

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[28] J L Caldwell "Judicial Sovereignty - a new view" [1984] *New Zealand Law Journal* 357. The cases in which these *dicta* are contained are: *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394, 398; *Fraser* v *State Services Commission* [1984] 1 NZLR 116, 121; *New Zealand Drivers Association* v *New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Brader* v *Ministry of Transport* [1981] 1 NZLR 73, 78; *L* v *M* [1979] 2 NZLR 519, 527.

[29] *Te Runanga O Wharekauri re Kohu Incorporated* v *Attorney-General & ors* Unreported, 3 November 1993, Court of Appeal, CA 297/92; *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641.

[30] *Taylor* v *New Zealand Poultry Board*, above n 28.

[31] Above n 12, 167.

[32] Above n 12, 166-167.

1. *European Community Litigation*

The validity of procedural restrictions on the law-making powers of the parliament at Westminster is now a *fait accompli*. The restrictions imposed by the European Communities Act 1972 have been given effect by the British courts.

It is now accepted that the restrictive provisions of the European Communities Act 1972 are effective with respect to subsequent legislation. Indeed, assertions of the supremacy of European Community law in the United Kingdom hardly cause comment. Much has been written in the UK and elsewhere on the *Factortame* Case,[33] but the recent decision of the House of Lords in the *Equal Opportunities Commission* Case goes even further.

In *Equal Opportunities Commission* v *Secretary of State for Employment*,[34] the House of Lords issued a declaration that certain provisions of the Employment Protection (Consolidation) Act 1978 (UK) were inconsistent with article 119 of the EEC Treaty. To some extent, whether a United Kingdom court will set aside an Act of Parliament remains an open question, as a declaration was sufficient on the facts. After *Factortame*, the primacy of European Community law raised no dissent among the Law Lords: "The EOC is concerned simply to obtain a ruling which reflects the primacy of Community law enshrined in section 2 of the 1972 Act...."[35] Their Lordships accepted that European Community law would invalidate inconsistent national law in so far as it applied to nationals of member states.[36]

Arguably the *Equal Opportunities Commission* case goes further than *Factortame*. *Factortame* related to the availability of Common Law relief under conditions of inconsistency with European Community law. The House of Lords held that national law concerning available relief must give way to Community law. However, it is another matter to say that an inconsistent Act of Parliament must give way to Community law.

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[33] *Factortame Ltd. & ors* v *Secretary of State for Transport (No 2)* [1991] 2 All ER 70 (HL).
[34] [1994] 1 All ER 910; [1994] 2 WLR 409; [1994] IRLR 176.
[35] Above n 34, 920.
[36] Above n 34, 920.

Remarkable as the decision in *Equal Opportunities Commission* is, it is equally notable for the equanimity with which the statements were made. That the House of Lords may state that inconsistent statutes must give way to Community law while hardly raising a murmur in doing so, indicates how much perceptions of sovereignty have changed.

2. *The retreat from Sovereignty*

English legal scholarship today is also aware of the transformation effected by the European Communities Act 1972. The topic attracts articles such as "The Undeniable Supremacy of European Community law" in which Emma Chown 'reconfirms a few home truths.'[37]

Even a jurist of the continuing school of Parliamentary sovereignty, H W R Wade admits out of necessity, but, one senses, with some regret, that the United Kingdom's sovereignty has been circumscribed by membership of the European Community, and that the lesson of the litigation is that "international law, in the shape of treaty obligations may help to overthrow the dogmas of constitutional law, and ... the courts may discard fundamental doctrine without appearing to notice."[38]

Elizabeth McCaffrey however, continues to maintain that the European Communities Act 1972 may be regarded simply as a rule of construction, and not as a limit on Parliamentary sovereignty.[39] Ms McCaffrey overcomes the obvious difficulties in such an approach by asserting that the United Kingdom courts will "construe statutes intended to fulfil the UK's Treaty obligations in a flexible way, so as to give effect to Parliament's intention, even if this means going contrary to the apparent meaning of the statute."[40]

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[37] E Chown "The Undeniable Supremacy of European Community Law" (1993) *New Law Journal* 377.
[38] H W R Wade "What has happened to the Sovereignty of Parliament?" (1991) 107 *Law Quarterly Review* 1, 4.
[39] E McCaffrey "Parliamentary Sovereignty and the Primacy of European Law: A Matter of Construction?" (1991) 42 *Northern Ireland Legal Quarterly* 109.
[40] Above n 39, 119.

With respect, Ms McCaffrey's approach strains the limits of statutory interpretation. It would surely be more honest, and therefore facilitative of justice, were the courts to admit the primacy of European Community law.

The majority of writers are willing to admit the primacy of European Community law, and that notions of sovereignty are fluid and, essentially political.[41] However, both the writers and the courts admit that the European Communities Act 1972 imposes merely a procedural restriction on Parliament's law-making powers. Were Parliament to pass an Act which explicitly stated that it intends to violate or repudiate a rule of European Community law, the courts would enforce such a provision. However, the passage of such an Act would amount to no less than a unilateral repudiation of Britain's membership of the European Community.[42]

F. *Procedural preconditions for entrenchment*

As no-one in New Zealand has yet attempted to genuinely entrench any statutory provision, the procedural preconditions for validly doing so, if any, are unclear. However, the President of the Court of Appeal has suggested that any entrenched provisions must enjoy 'practical sanctity' for the Courts to uphold them:[43]

> That is why proponents of a Bill of Rights talk of a referendum or a fully representative constitutional conference; or a travelling select committee of the House of Representatives; or a virtually unanimous vote of the House.
>
> The truth is that, in the end, whether guaranteed rights are really fundamental - able to be overridden only by a special parliamentary majority or a referendum - does not depend on legal logic. It depends on a value judgment by the courts, based of their view of the will of the people.

The President's remarks fail to outline any precise criteria, but indicate that any successful attempt at entrenchment must enjoy widespread support. However, it would be in the interests of certainty for Parliament, if it is to venture down the

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[41] See for example, T R S Allan "The Limits of Parliamentary Sovereignty" (1985) *Public Law* 614.
[42] M Akehurst "Parliamentary Sovereignty and the Supremacy of Community Law" (1989) 60 *British Yearbook of International Law* 351
[43] Sir Robin Cooke "Practicalities of a Bill of Rights" F S Dethbridge Memorial Address to the Maritime Law Association of Australia and New Zealand (1984) 112 *Council Brief* 4; see also *A Bill of Rights for New Zealand,: A White Paper* (1985) AJHR 1, A.6: para 7.18.

path of entrenchment, to have a more certain indication of what steps it must follow to ensure a successful entrenchment.

The essential objection to Parliamentary sovereignty has always been that one sovereign Parliament purports to bind another, equally sovereign, Parliament. It is axiomatic to democracy that each generation enjoys full powers over its own existence. However, if one admits that it is possible for one Parliament to procedurally fetter its successors, an Act of Parliament could not be challenged as undemocratic if it requires no higher standard of successor Parliament than that by which it was itself enacted.

Lest this last statement create more uncertainty than it resolved, I will attempt to put this concept into plain English. Despite my support for the validity of entrenchment, I agree that there is something intuitively wrong in one generation forcing another to jump through legislative hoops which they didn't have to jump through themselves. However, my objections are removed if the Parliament imposing the procedural restrictions did so as if the restrictions applied to them also. For instance, the democratic objection to entrenchment would be removed if a provision requiring a 75% majority of the House of Representatives or a majority of votes in a nationwide referendum to be amended or repealed was itself enacted with the support of either a 75% majority of the House of Representatives or a majority of votes in a nationwide referendum.

If Parliament adopts the approach of passing entrenching legislation with the same level of support as is necessary to amend or repeal it, there appears little reason to doubt that such legislation would enjoy 'practical sanctity' and would be upheld by the courts.

This approach has been endorsed by the Royal Commission on the Electoral System:[44]

> We add, *if it is necessary to do so*, that we would see the central provisions in question as being adopted by the House only in the special way provided, that is

[44] Above n 1, 292.

with the agreement of the major parties represented there or by referendum. [Italics mine.]

PART II
THE DESIRABILITY OF ENTRENCHMENT

G. *Fundamental Nature of Reserved Provisions*

Of the reserved provisions, the Report of the Justice Department on the Electoral Reform Bill stated:[45]

> We have mixed feelings about the entrenching provisions of the Electoral Act. They were devised as a safeguard (by an agreed constitutional understanding) to prevent abuses of power (such as gerrymandering) by Governments elected under first past the post. These provisions have operated in practice to prevent abuses by the Government of the day. On the other hand, the existence of entrenchment provisions can pose a large obstacle to legitimate demands for constitutional change....
>
> On balance, we would conclude that under MMP entrenching provisions will probably be of less significance in preventing gerrymandering and we do not accordingly perceive any compelling justification for double entrenchment in the present exercise.

With respect, one could argue that the reserved provisions, such as the term of Parliament, have a wider scope than merely to prevent gerrymandering. The Royal Commission on the Electoral System stated that "[t]he argument for enhanced protection being required by law is that these matters are the most important of those in the electoral system and that they should be given the greatest protection on the face of the statute."[46]

The provisions reserved under section 268 of the Electoral Act 1993 are among the most important guarantees of our political system. Section 268 protects the term of Parliament; the membership of the Representation Commission, which is

[45] Above n 25, 79-80.
[46] Above n 1, 291.

responsible for drawing up electoral boundaries; the allowance for the adjustment of the quota for electoral districts; the definitions of persons eligible to vote; and the method of electing Members of Parliament.

All of these provisions are fundamental to the preservation of our system of parliamentary democracy. Control over the matters covered by section 268 could enable a government of the day to manipulate the electorates to suit its own political needs, or restrict the franchise. A government of the day could extend the term of Parliament to ensure its own survival. It is often said that at the very least, the people of New Zealand get to decide who will govern them for the next three years. With control over the matters covered section 268, even this final instrument of the people's will would be lost.

It is unacceptable to place such matters before the ordinary legislative procedure of Parliament. The powers protected by section 268 must be exercised impartially in the best interests of all New Zealanders and in the interests of our democratic system. The fundamental nature of the reserved provisions is such that they should be amended only when it is absolutely clear that such changes are desired by a majority of electors or by the concurrence of a preponderance of the Members of Parliament. The endorsement of a political platform at a general election cannot indicate support for a particular issue:[47]

> [T]he electorate's role cannot, in the usual case, be focused on a particular issue. A general election is a blunt instrument. It cannot give judgement on particular issues.

Constitutional provisions of this importance should not be subject to the ordinary parliamentary process.

H. *Duration of Convention under MMP*

All amendments of the provisions reserved by section 189 of the Electoral Act 1956 have in fact been passed in accordance with the terms of section 189. In real terms, this means that amendments have been passed with the support of the

[47] Above n 4, para 4.7.

Opposition, ie. unanimously. However, although one could assert that a convention presently exists that section 189 (or section 268 in the 1993 Act) will be observed,[48] there is no reason to assume that such a consensus will continue under MMP.

It is likely that MMP will produce a more politically diverse Parliament than exists at present. There are already four parties represented in the present parliament, and based on present support, the shares held by the minor parties will increase and that of the major parties decrease. In all likelihood, a single party will be unable to command a majority of seats and coalition governments will be necessary.

If (constituency) MPs become more accountable to the electorate, there may be a tendency for party discipline and the whips system to decline as MPs become more mindful of the opinions of their constituency than the approval of the party machine. Such a development may make the achievement of the broad consensus needed to satisfy the strictures of section 268 more difficult than at present. This may result in a situation where legitimate demands for constitutional change remain unheeded or governments unable to secure the necessary majority may be tempted to ignore the convention and legislate in an ordinary manner. Indeed, the Justice Department commented in 1993 with reference to the Electoral Reform Bill that "[o]ne of the major difficulties in implementing the present reform process has arisen from the need to develop proposals which comply with the letter and spirit of section 189 of the Electoral Act."[49]

However, even if it will become more difficult to achieve the necessary majority under MMP, the reserved provisions should still be protected if they are matters deserving of protection. One should not forgo safeguards on the integrity of our constitution solely by reason of legislative inconvenience. Indeed, one might suggest, based on the legislative history of electoral law, that legitimate demands for constitutional change which enjoy widespread public support will receive the

[48] Above n 5, 78.
[49] Above n 25, 80.

necessary parliamentary endorsement. Bearing in mind the fundamental nature of the provisions, if a particular proposal cannot muster the support necessary to comply with section 268, then one may legitimately suggest that it should not be passed at all.

I. *Loss of Parliament's power by entrenching section 268.*

Since the passing of the Electoral Act 1956, any changes which have been made to the reserved provisions, have in fact been made in compliance with section 189. This is the position even though there was no legal requirement on Parliament to comply with them. For forty years, Parliament has demonstrated that despite these restrictions, it has nevertheless been possible to muster the requisite majority to pass legislation complying with the provisions of section 189.

One could argue that this demonstrates that the political sanctions hoped for in 1955 now exist and do in fact function efficaciously. It is now politically unacceptable for any of the matters reserved by section 189 to be amended other than in conformity with that provision. As the political sanctions achieve the desired result, there is no need to engage in novel constitutional developments to achieve a result which is already available within the present constitutional system. So many of our constitutional safeguards already rest solely upon constitutional conventions. It is not necessary to genuinely entrench the provisions to safeguard the matters covered.

However, this complacency, and indeed the convention itself, may not survive in a more diverse Parliament likely to result under MMP. In any respect, that Parliament has been able to comply with section 189 may be used to argue that it should be genuinely entrenched. Political convention now dictates that the matters reserved by section 268 only be amended in compliance with section 268. There will therefore be no real loss of power to Parliament were the provisions to be given effect. Doubly entrenching section 268 will merely affirm the *status quo*. In addition, it will remove the matters in section 268 from the danger of being

amended by the ordinary procedure to suit the whims of a transitory parliamentary majority.

The substance of this argument is that genuinely entrenching section 268 will involve no *real* loss of power to parliament. Given this, and given that entrenchment would preserve the fundamental elements of our political system from amendment or repeal by a transient parliamentary majority, there seems no reason why we should not entrench section 268.

J. *Other provisions deserving the protection of section 268.*

1. Provisions in the Electoral Act 1993

(a) Electoral Commission

Part I of the Electoral Act 1993 establishes and regulates the Electoral Commission. The Electoral Commission is charged with three functions. Firstly, to register political parties; secondly, to promote public awareness of the electoral system, an awareness which is at present woefully inadequate; and thirdly to consider electoral matters referred by the Minister or the House of Representatives.

Although all these functions are important, the registration of political parties is crucial to the effective functioning of MMP. Half the seats are allocated to party lists, and only registered political parties will be eligible for those seats. It is essential that the Electoral Commission retain this function, and the requisite powers and resources to carry it out without political interference.

Sections 5-8 and 10-11, at least, should be accorded the protection of section 268 to preserve the Commission's ability to carry out its functions impartially.

(b) Political Parties

Part IV of the Act relates to the registration of political parties, a function carried out by the Electoral Commission. However, it is desirable that the conditions governing the registration of parties, and the conditions under which the

Commission can decline to register a political party be protected from political manipulation.

Sections 63 and 66 should therefore be covered by section 268.

(c) Maori electors

It is with some surprise that it is noted that although section 268 protects non-Maori electors and the division of electoral districts, no such protection is accorded to the Maori roll.

The Royal Commission of the Electoral System recommended that the Maori option be abolished if MMP were adopted, as they felt that MMP would provide "optimal conditions for the effective representation of Maori interests."[50] The original proposal in the Electoral Reform Bill was for the abolition of the four Maori seats, but for the waiver of the 5% threshold for Maori parties. However, the Electoral Act 1993 provides for a variable number of Maori seats and retains the 5% threshold.[51]

In a political system which professes the importance of protecting minority interests, by such devices as the Bill of Rights Act 1990, and which recognises the special position enjoyed by Maori under the Treaty of Waitangi, the importance of the Maori seats cannot be denied:[52]

> The existence of the seats guarantees there will be members of Parliament who directly represent the interests of Maori people in a national forum where their voices can be heard on matters of particular importance to those they represent. They are directly elected by those people, and are accountable to them. While the seats may have been established for reasons of expediency, they have nevertheless been of value in ensuring that the political interests of the Maori people were kept before Parliament, especially during the periods when Maori numbers were too small or non-Maori attitudes too unsympathetic for Maori to have been elected from within the general electoral system.

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[50] Above n 1, 113.
[51] The main objections to the original proposal were ensuring a continued Maori representation in Parliament and the difficulty, and indeed the propriety, of the the Chief Electoral Officer determining what is or is not a political party "primarily representing Maori interests."
[52] Above n 1, 89.

Regardless of the constitutional arguments for the preservation of the Maori option, while it exists there is little reason not to afford the Maori option the protection afforded to the general option. For instance, as the number of Maori electorates now varies according to the number of persons on the Maori roll, governments may be tempted to redefine either the electoral districts or the requirements for registration on the Maori roll, in order to manipulate the composition of Parliament. Even more seriously, there is no impediment to a government which resolves to abolish the Maori option entirely. These dangers are not present for the general option, and it is time this anomaly was removed.

Both the integrity and the existence of the system should be protected. Section 268 should therefore be extended to cover sections 45 and 76-78.

2. *Bill of Rights Act 1990*

When a Bill of Rights was originally proposed in 1985, it was to have been doubly entrenched. Largely due to the spectre of unelected judges overruling Acts of an elected Parliament, when the Bill became law in 1990, it did so as a piece of ordinary legislation. Indeed, section 4 of the Bill of Rights Act states that other enactments passed before or after the Bill of Rights Act will not be affected by this Act. Noting that even implied repeal of earlier legislation is precluded, the intended limited effect of the Bill of Rights Act is apparent.

However, sections 5 and 6 of the Bill of Rights Act provide avenues which have been used by the courts to interpret other enactments to give the fullest effect possible to the rights contained in the Bill of Rights Act.[53] Considerable effect has therefore been given to the Bill of Rights Act despite the constraints of section 4; largely due to the fact that it implements international standards of human rights. Indeed, some may suggest that the practical impact of the Bill of Rights Act is virtually as if it were doubly entrenched.

However, the Bill of Rights Act remains vulnerable. Given that the missive in section 4 has had little effect in restraining the courts from giving effect to the

[53] See for instance *Police* v *O'Connor* [1992] 1 NZLR 87; *R.* V *Butcher and Burgess* [1991] 2 NZLR 257 (CA); *Noort* v *Ministry of Transport*, *Curran* v *Police* [1990-1992] 1 NZBORR 97; *R.* V *Goodwin* Unreported, Court of Appeal, CA 460/91, 25 November 1992.

rights contained in the Bill of Rights Act, the obvious avenue open to a government is to amend the provisions of the Act itself. An ordinary parliamentary majority unwilling to trust the effect of section 4 could amend the substance of the rights contained in the Act to avoid an undesirable judicial result.

One must question the ability of political sanctions to prevent the amendment of the Bill of Rights Act in such a manner. Governments over the last ten years have demonstrated a willingness to do politically unpopular things. The effect of MMP remains to be seen. Although the lack of a secure majority in the Government caucus may increase Ministerial accountability to Parliament, one may argue whether the likelihood of coalition governments under MMP will blur the lines of accountability *viz à viz* the electorate and thus allow politicians to avoid accepting culpability for actions.

Protecting the Bill of Rights Act against amendment or repeal other than by the means prescribed in section 268 of Electoral Act 1993 will not enable judges to set aside Acts of Parliament solely by reason of their inconsistency with the Bill of Rights Act, but would prevent a parliamentary majority amending the Bill of Rights Act to reduce the scope of the rights contained therein. This would avoid the spectre of unrestrained judicial activism, but would protect the substance of the rights against political encroachment.

Enabling the Bill of Rights Act to override other Acts of Parliament is not *necessary*, as the courts have demonstrated an ability to apply the Bill of Rights Act in spite of the absence of an overriding power. It is more important to ensure that the scope of the rights contained in the Act cannot be altered other than with broad public consent.

3. *Constitution Act 1986*

Similar arguments could be made for the entrenchment of the Constitution Act 1986. Presently only section 17(1), setting the maximum term of Parliament, is protected by section 268 of the Electoral Act 1993. The other provisions of the Act are subject to the ordinary parliamentary process. The Act was not

entrenched in 1986 owing to residual doubts among some parliamentarians on the validity of entrenchment, and a desire not to frustrate the enactment of a Bill of Rights.[54]

The Constitution Act 1986 brings together "the principal pieces of statutory constitutional law applicable to New Zealand as a fairly coherent whole containing much of what a 'written' constitution would provide."[55] Given that procedural entrenchment is now recognised as valid, the fundamental elements of our constitution should be removed from the political arena. Entrenching the Constitution Act 1986 would protect the basic features of responsible government, Parliamentary democracy and judicial independence. Even in 1986, it would have been possible to get unanimous agreement for the Act;[56] protection should therefore be afforded to the Act to preclude its amendment or repeal other than by similar support.

However, entrenching the Constitution Act 1986 at this time would open a perhaps unhelpful constitutional debate at a time when we are already undergoing a significant constitutional realignment. For instance, entrenching the Act would inevitably bring the republican debate to the fore, as the from of Head of State is specified in section 2 of the Act. For the moment, it is perhaps better to devote our attention to implementing the new electoral system.

K. *Res Publica*

The more diverse Parliaments likely to result under MMP may involve some shift of power to the Governor-General. Although the essential constitutional conventions of responsible government are unlikely to be displaced, their operation may become uncertain. For instance, while Ministers must still be able to command the support of a majority in Parliament, "the Governor-General may be left in some doubt as to who is [sic] his or her responsible advisers and may have to exercise reserve powers, powers which have not been exercised in

[54] G Pamler *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992), 50.
[55] Department of Justice *Reports of an Officials Committee on Constitutional Reform: Second Report* (1986), para 1.7.
[56] Above n 54, 50.

New Zealand in modern times."[57] The adoption of MMP may occasion more frequent exercises of the reserve powers.

One could validly question whether it is still acceptable for the British monarch, who happens also to be New Zealand's monarch, to, on occasion, exercise real political power in New Zealand today. The same question could be raised about her appointed representative. This may lead one to suggest replacing the monarchy with an elected Head of State.

However, the Republican debate is a considerable one, and one which is beyond the scope of this paper. Although I do not want to enter this debate, a brief comment is necessary given that this paper advocates entrenching the fundamental elements of our political system.

Concerns about the Queen's direct influence on our political system can be largely dispensed with. When reserve powers have been exercised in the Commonwealth, the powers have been exercised by the Sovereign's representative, and not by the Sovereign herself. It is therefore extremely unlikely that if the exercise of reserve powers was necessary, this would be done by the Queen. The reserve powers would be exercised by the Governor-General.

However, one may object to the unelected nature of the vice-regal office. If the Head of State is to enjoy real political power, then the position should be an elected one, with the holder accountable to the people of New Zealand for his/her actions. *Ad captandum vulgus* arguments for Republicanism based solely on maturing as a nation and discarding colonial shackles fail to appreciate the fact that much power in this country resides in unelected officers:[58]

> [S]uch rules [*on the exercise of reserve powers*] stem from a purely representative view of the constitution, in which the Governor-General should not have discretion because she has no democratic credentials. But our constitution is not a purely representative one. We do not elect police chiefs, judges, or dog-catchers.

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[57] M Chen "Remedying New Zealand's Constitution in Crisis: Is MMP part of the answer?" (1993) *New Zealand Law Journal* 22, 32.
[58] B Robertson "MMP threatens Governor-General's powers" The Dominion, Wellington, New Zealand, 3 August 1994, 6.

> To one who believes in responsible government there is nothing incongruous in the monarch or her representative having the power to appoint the Prime Minister. As a trustworthy person above the political fray she is ideally suited to the task.

This statement also highlights the need that the reserve powers be exercised in an impartial way, and not subject to political bias. An elected Head of State would inevitably become politicised:[59]

> [A] new set of rules would have to be devised to decide who would be Head of State. At this point in our history the office would almost certainly be an elective one. And there would be a real danger that the office would be the subject of political contest between the parties.

Appointments to the office of Governor-General, made on the advice of the New Zealand Government, have not been overtly political, and incumbents have maintained a strict impartiality. When a genuine discretion is attached to the office, it is essential that the reserve powers be exercised in such a way as to give effect to the democratic will of the people. These powers should not be used to manipulate or subvert the will of the people expressed in a general election. Although by no means perfect, the continuation of the present system is less likely to result in the politicisation of the office that an elective office.

It may nevertheless be objected that appointing the Governor-General on the advice of the Government of the day allows this Government to recommend a person designed to secure its future political fortunes. While the history of the office does not substantiate such fears, one could adopt a practice of appointing the Governor-General on the advice of the House of Representatives, as are the Auditor and Comptroller-General and the Ombudsmen.

L. *Conclusion*

At the last resort, our entire political system is currently at the whim of an ordinary parliamentary majority. It is desirable that those matters most fundamental to our system of government be protected so as to ensure that change occurs only with widespread public support.

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[59] G Palmer *Unbridled Power* (2 ed, Oxford University Press, Auckland 1987), 26.

The validity of entrenchment is today beyond question. The European Community litigation in the United Kingdom marks the victory of the self-embracing school of parliamentary sovereignty and the acceptance of procedural restrictions on parliament's law-making powers. As the sovereignty of our parliament is measured against that of Westminster, it would be absurd to suggest that procedural restrictions are not possible in New Zealand.

However, although procedural restrictions may be shown to be valid, one must still demonstrate their necessity in a particular instance. I would submit that the imperative in this instance can be found in the lack of adequate safeguards presently existing for the fundamental elements of our constitutional system. Although these elements have never enjoyed protection, the adoption of MMP provides an opportune time to protect these essential matters. We are already undergoing major constitutional change and creating a truly New Zealand political system. Echoing P A Joseph, one can only argue that as we redefine our constitution, it is time to protect the essential elements of our democracy:[60]

> One ponders why Parliament did not squarely seize the opportunity for double entrenchment under the new Act – for entrenchment of section 268 itself and protecting it from simple repeal. Single entrenchment under section 189 was an awkward compromise for accommodating Diceyan orthodoxy, but that compromise expended its purpose as soon as Governments and lawyers accepted that section 189 was binding. The MMP referendum also held out hope of popular support for double entrenchment. Popular endorsement might have vouchsafed the entrenchment and given the Courts confidence in a crisis, that they might stand resolute against a hostile Government. Without double entrenchment, MMP must rely, like its predecessor (FPP), on ordinary political disincentives against tampering with the electoral system.

[60] Above n 5, 81.

Bibliography

TEXTS & ARTICLES

- *Halsbury's Laws of England* (4 ed, Butterworths, London, 1980) vol 8: Constitutional Law, para 811, p 531.
- M Akehurst "Parliamentary Sovereignty and the Supremacy of Community Law" (1989) 60 *British Yearbook of International Law* 351.
- T R S Allan "The Limits of Parliamentary Sovereignty" (1985) *Public Law* 614.
- P Allott "Parliamentary Sovereignty - from Austin to Hart" (1990) 49 *Cambridge Law Journal* 377.
- G Anav "Parliamentary Sovereignty: An Anachronism?" (1989) 27 *Columbia Journal of Transnational Law* 631.
- J Aragonés "*Regina* v *Secretary of State for Transport, ex parte Factortame Ltd.*: The Limits of Parliamentary Sovereignty and the Rule of Community Law" (1990/91) 14 *Fordham International Law Journal* 778.
- W Bagehot *The English Constitution* (Garland Publishers, New York, 1978).
- S Bailey "Referendum is a Foreign Word" (1988) 138 *New Law Journal* 181.
- S Belgrave & A Kilpatrick "Much Ado About Maastricht" (1993) 90 *Law Society's Guardian Gazette* 2.
- C J Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Procedure and Usage of Parliament* (21 ed, Butterworths, London, 1989).
- A W Bradley "The Sovereignty of Parliament - in Perpetuity?" in J Jowell & D Oliver (eds) *The Changing Constitution* (Clarendon Press, Oxford, 1985) p 23.
- F M Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 *Otago Law Review* 603.
- G Brysland "Legal Fundalmentalism and *Mabo*" (1993) 18 *Alternative Law Journal* 212.
- C L Caldwell "Judicial Sovereignty - A new view" (1984) *New Zealand Law Journal* 357.
- A Chander "Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights" (1991) 101 *Yale Law Journal* 457.
- G Chapman "Change requires a majority" *The Dominion*, Wellington, New Zealand, 3 August 1994, 6
- M Chen "Remedying New Zealand's Constitution in Crisis: Is MMP part of the answer?" (1993) *New Zealand Law Journal* 22.

- M Chen & G Palmer (eds) *Public Law in New Zealand* (Oxford University Press, Auckland, 1993).
- E Chown "The Undeniable Supremacy of EC Law" (1993) *New Law Journal* 377.
- L Collins *European Community Law in the United Kingdom* (3 ed, Butterworths, London, 1984).
- Sir Robin Cooke "Fundamentals" [1988] *New Zealand Law Journal* 158.
- G Craven "The Kirmani Case - Could the Commonwealth Parliament amend the Constitution without a Referendum?" (1986) 11 *Sydney Law Review* 64.
- P Cumper "A path to a Bill of Rights" (1991) 141 *New Law Journal* 100.
- S A de Smith & R Brazier *Constitutional and Administrative Law* (Penguin, Harmonsworth, 1989).
- A V Dicey *An Introduction to the Study of the Law of the Constitution* (MacMillan & Co. Ltd., London, 1960).
- N Dickens "Incompatibility of UK and EEC Law" (1988) 85 *Law Society Gazette* 33.
- J B Elkind "A New Look at Entrenchment" (1987) 50 *Modern Law Review* 158.
- R Elliot "Rethinking Manner and Form: from Parliamentary Sovereignty to Constitutional Values" (1991) 29 *Osgoode Hall Law Journal* 215.
- M P Furmston, R Kerridge & B E Surfirm (eds) *The Effect on English Domestic Law of Membership of the European Community* (Martinus Nijhoff Publishers, The Hague, 1983).
- J Goldsworthy "Manner and Form in the Australian States" (1987) 16 *Melbourne University Law Review* 403.
- J Goldsworthy "The 'Principle in Ranasinghe': A Reply to H P Lee" (1992) 15 *University of New South Wales Law Journal* 540.
- N Gravells "Disapplying an Act of Parliament pending a preliminary ruling from the European Court of Justice" (1989) *Public Law* 568
- B V Harris "A Changing Perception of the Law-making powers of Parliament" [1988] *New Zealand Law Journal* 394.
- B V Harris "Parliamentary Sovereignty and Interim Injunctions: Factortame and New Zealand" (1992) 15 New Zealand Universities Law Review 55.
- B V Harris "The Law-making Powers of the New Zealand General Assembly: time to think about change" (1984) 5 *Otago Law Review* 565.
- Sir Ivor Jennings *The Law and the Constitution* (University of London Press, London, 1959).
- P A Joseph "Beyond Parliamentary Sovereignty" (1989) 18 *Anglo-American Law Review* 91.

- P A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co. Ltd., Sydney, 1993).
- P A Joseph "Constitutional Entrenchment and the MMP Referendum" (1994) 16 *New Zealand Universities Law Review* 67.
- P A Joseph "The Apparent Futility of Constitutional Entrenchment in New Zealand" (1982) 10 *New Zealand Universities Law Review* 27.
- P A Joseph & G R Walker "A Theory of Constitutional Change" (1987) 7 *Oxford Journal of Legal Studies* 155.
- Sir Kenneth Keith *The Law and the Constitution in 1989* (Butterworths, Wellington, 1989).
- H P Lee "'Manner and Form': An Imbroglio in Victoria" (1992) 15 *University of New South Wales Law Journal* 516.
- A Majid "Did the *Factortame* Ruling cut United Kingdom Sovereignty Further?" (1992) 18 *Commonwealth Law Bulletin* 746.
- G Marshall *Parliamentary Sovereignty and the Commonwealth* (Clarendon Press, Oxford, 1957).
- E McCaffrey "Parliamentary Sovereignty and the Primacy of European Law: A Matter of Construction?" (1991) 42 *Northern Ireland Legal Quarterly* 109.
- H McCullough "Parliamentary Supremacy and a constitutional grid: the Canadian Charter of Rights" (1992) 41 *The International and Comparative Law Quarterly* 751.
- G Palmer "Democratic baseline must stay" *The Dominion*, Wellington, New Zealand, 4 August 1993, 8
- G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992).
- M Principe "The New Zealand Bill of Rights: A Step Towards the Canadian and American Examples of a Continuation of Parliamentary Supremacy?" (1990) 6 *Florida Journal of International Law* 135.
- Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986).
- B Robertson "MMP threatens Governor-General's powers" *The Dominion*, Wellington, New Zealand, 3 August 1993, 6
- W Sadurski "Last Among Equals: Minorities and Australian Judge-made Law" (1989) 63 *Australian Law Journal* 474.
- K J Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962).
- F A Trindade "Parliamentary Sovereignty and the Primacy of European Community Law" (1972) 35 *Modern Law Review* 375.

H W R Wade "The Basis of Legal Sovereignty" (1955) 14 *Cambridge Law Journal* 177.

H W R Wade "What has happened to the Sovereignty of Parliament?" (1991) 107 *Law Quarterly Review* 1.

G Winterton "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *Law Quarterly Review* 591.

CASES

Ali v *The Queen* [1992] 2 WLR 357.

Attorney-General for New South Wales v *Trethowan* (1931) 44 CLR 394.

Attorney-General for New South Wales v *Trethowan* [1932] AC 526 (Privy Council).

Brader v *Ministry of Transport* [1981] 1 NZLR 73.

Bribery Commissioner v *Ranasinghe* [1965] AC 172.

Builders' Labourers Federation v *Minister of Industrial Relations* (1986) 7 NSWLR 372.

Clayton v *Heffron* [1960] 105 CLR 214.

Ellen Street Estates Ltd. v *Minister of Health* [1934] 1 KB 590.

Equal Opportunities Commission v *Secretary of State for Employment* [1994] 1 All ER 910; [1994] 2 WLR 409; [1994] IRLR 176.

Factortame Ltd. & ors v *Secretary of State for Transport (No 2)* [1991] 2 All ER 70 (HL).

Factortame Ltd. v *Secretary of State for Transport* [1989] 2 All ER 692; [1990] 2 AC 85.

Fraser v *State Services Commission* [1984] 1 NZLR 116.

Harris v *Donges* [1952] 1 TLR 1245.

Harris v *Minister of the Interior* [1952] 2 SALR 428.

Hinds v *The Queen* [1977] AC 195.

L v *M* [1979] 2 NZLR 519.

Liyanage v *The Queen* [1967] AC 259.

Madzimbamuto v *Lardner-Burke* [1969] 1 AC 645.

McKechnie v *UBM Building Supplies (Southern) Ltd.* [1991] 2 CMLR 668.

Mitchell v *Director of Public Prosecutions* [1986] LRC(Const) 35.

New Zealand Drivers Association v *New Zealand Road Carriers* [1982] 1 NZLR 374.

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

R v *HM Treasury, ex parte Smedley* [1985] QB 657; [1985] 1 All ER 589; [1985] 2 WLR 576; [1985] 1 CMLR 665.

- *R* v *Secretary of State for Foreign & Commonwealth Affairs, ex parte Rees*-Mogg [1994] 1 All ER 457; [1994] 2 WLR 115.
- *Re Hunua Election Petition* [1979] 1 NZLR 251.
- *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394.
- *Te Runanga O Wharekauri re Kohu Incorporated* v *Attorney-General & ors* Unreported, 3 November 1992, Court of Appeal CA 297/92.
- *Vauxhall Estates Ltd.* v *Liverpool Corporation* [1932] 1 KB 733.