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**PARLIAMENTARY SOVEREIGNTY:
JUST A SMOKE SCREEN ?**

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ABSTRACT INTRODUCTION

This paper focuses on the doctrine of parliamentary sovereignty.

Three branches of government: executive, legislature and judiciary.¹

First, a short overview of the doctrine's principles will be given. Secondly, the doctrine will be analysed from a theoretical and historical point of view, and some features of the constitutions of New Zealand, the United Kingdom and Germany will be examined, which raise doubts about the application of the doctrine.

I will draw the conclusion that the doctrine of parliamentary sovereignty is paradoxical and illogical, historically doubtful and due to the possibility of different definitions useless and therefore an obstacle to a substantial discussion about today's constitution.

over acts of the legislature and have the power to invalidate primary legislation on the grounds that it violates, either procedurally or

substantively. Therefore, I will suggest that the concept of popular sovereignty should substitute for the doctrine of parliamentary sovereignty.

power to engage in pre-emptive constitutional review, even though there is no such power once the relevant legislation has actually been enacted – that concept is used in France. In the

and New Zealand, courts are not allowed to strike down or challenge Parliament's legislation according to the doctrine of parliamentary

any. The text of this paper (excluding contents page, footnotes, bibliography) comprises approximately 13,477 words.

Framed in another way, under this doctrine Parliament, being the theoretical guarantor of democracy, can override the core elements of the constitution, and fundamental human rights. Such a prospect might seem alarming.²

One response is purely pragmatic: these things will never occur. But this is a political rather than a legal safeguard.³ Nor can one be confident that the

¹ Philip Joseph "The Legal Theory and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 104.

² Paul Craig "Constitutionalism, Legislation and Review" in Robert Howse (ed) *Constitutional Politics – A History of the Next Two Years* (Oxford University Press, Oxford, 1999) 67.

³ E.W. Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 *YJFWR* 5, 15.

⁴ Thomas, *ibid.* 15.

I INTRODUCTION

The ideal of limited government postulates a separation of the three branches of government: executive, legislature and judiciary.¹

Although most states subscribe to the separation of powers, there are differences in the relationship between the different branches, especially in the relationship between the legislature and the judiciary.

Any legal and political system has to make choices as to the nature of the constraints, which are imposed on the majority as expressed through the legislature.² A classic legal form is for the courts to have some power of constitutional review over acts of the legislature and have the power to invalidate primary legislation on the grounds that it violates, either procedurally or substantively, principles contained in a written constitution or Bill of Rights – this concept is used in Germany. A court may have the power to engage in pre-enactment constitutional review, even though there is no such power once the relevant legislation has actually been enacted – that concept is used in France. In the United Kingdom and New Zealand, courts are not allowed to strike down or challenge Parliament's legislation according to the doctrine of parliamentary sovereignty.

Framed in another way, under this doctrine Parliament, being the theoretical emanation of democracy, can override the core elements of the constitution, and fundamental human rights. Such a prospect might seem alarming.³

One response is purely pragmatic: these things will never occur. But this is a political rather than a legal safeguard.⁴ Nor can one be confident that the

¹ Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168.

² Paul Craig "Constitutionalism, Regulation and Review" in Robert Hazell (ed) *Constitutional Futures – A History of the Next Ten Years* (Oxford University Press, Oxford, 1999) 67.

³ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 15.

⁴ Thomas, above, 15.

improbable will never occur.⁵ The lessons Germany's history should be taken into account, where the seemingly unthinkable occurred. In all, one cannot be wholly confident that today's improbability may not be tomorrow's crisis.⁶

Thus, the question whether the judiciary must acknowledge Parliament's sovereign legislative power without qualification, has been raised ever since the Glorious Revolution of 1688. A great number of judges have positively affirmed the doctrine of parliamentary supremacy. On the other hand, many academics,⁷ and an increasing number of Judges writing extra-judicially⁸, have concluded that Parliament's power is less than omnipotent and that, in extreme circumstances, the validity of legislation can be reviewed by the courts.

Some think that this debate should be left unresolved:⁹

An answer should be deferred until such time as the courts are in fact confronted with legislation which raises a fundamental constitutional issue and places in jeopardy the basis of representative government, the rule of law, or the fundamental rights and freedoms which are embedded in these democratic ideals. Much will necessarily depend on the circumstances at that time. Until then, the answer need not be known; it can, as it were, be left up in the constitutional air.

On the other hand, Professor Jaffe stated, in my view more convincingly, that "a judiciary which too much reminds itself that its power is limited by the dogmas of Parliamentary omni-competence, Parliamentary supremacy and Parliamentary responsibility may lose the will to exercise" this "great historic function"¹⁰.

⁵ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 15.

⁶ Thomas, above, 16.

⁷ For example: Philip Allott "The Courts and Parliament: Who Whom?" [1979] CLJ 79, 116; T R S Allan "The Limits of Parliamentary Sovereignty" [1985] PL 614.

⁸ Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164; Rt Hon Lord Woolf of Barnes "Droit Public – English Style" [1995] PL 57, 69; Hon Sir John Laws "Law and Democracy" [1995] PL 72, 92; Sir Stephen Sedley "Human Rights: A Twenty-First Century Agenda" [1995] PL 386; T R S Allan "Parliamentary Sovereignty: Law, Politics, and Revolution" [1997] 113 LQR 443, 449.

⁹ Thomas, above, 7.

¹⁰ Louis L Jaffe *English and American Judges as Lawmakers* (Clarendon Press, Oxford, 1969) 19.

Although having the opposite opinion, E W Thomas delivers the reason:¹¹

It is all too easy for judges who are faced with a "hard" case for which there is no direct rule or precedence to attribute the responsibility for the harshness of the outcome to Parliament; rational legal analysis is abandoned in favour of leaving the problem to the legislature; the injustice which results, or the fact that the law fails to meet the current needs and reasonable expectations of the community, can be blamed on that institution; this reasoning process may occur even where there is little or no prospect that Parliament will legislate to remedy the problem.

Therefore, this paper focuses on the doctrine of parliamentary sovereignty. The doctrine will be outlined in part II and analysed in part III regarding theory (part III A), history (part III B) and its contemporary applications in New Zealand, the United Kingdom and Germany (part III C). Then, it will be assessed in part IV, before the alternative concept of popular sovereignty will be introduced in part V.

¹¹ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 31.

II WHAT IS PARLIAMENTARY SOVEREIGNTY ?

Some deem the doctrine of parliamentary sovereignty a bulwark of the constitution, for others it is an obstacle regarding desirable reforms of the constitution.¹² But what exactly is the doctrine of Parliamentary sovereignty ?

Albert Venn Dicey described the doctrine in the following way:¹³

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament ... [defined as The Queen in Parliament] has, under the English constitution, the right to make or unmake any law whatever; 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.

Others describe parliamentary sovereignty as the unequalled, and indisputable law-making power,¹⁴ or as the absolute powers of law-making.¹⁵

The doctrine can best be illustrated by the following important and correlated principles: no higher law-making power, Parliamentary legislature cannot be challenged, Parliament cannot bind its successors and implied repeal.

The principle that Parliament is the highest law-making body is comprised of two meanings. First, Parliament may pass any law. For example, if the United Kingdom Parliament enacted that smoking in the streets of Paris is an offence, then it is an offence – naturally, it is an offence by English law and not by French law, and therefore it would be regarded as an offence only by those who paid attention to English law.¹⁶ It means secondly, that acts of Parliament override all other law,

¹² A W Bradley "The Sovereignty of Parliament – in Perpetuity ?" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (3ed, Clarendon Press, Oxford, 1994) 79.

¹³ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 71.

¹⁴ Morag McDowell and Duncan Webb *The New Zealand Legal System* (2ed, Butterworths, Wellington, 1998) 123.

¹⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 441.

¹⁶ Ivor Jennings *The Law and the Constitution* (5ed, University of London Press, 1959) 172.

including common law, judicial precedents, and other judge-made law. It prevails over prerogative instruments issued under the Crown's power, as well as, over delegated legislation passed by subordinate bodies upon whom a law-making power is granted, and international law, which does not become binding unless incorporated in the domestic law.¹⁷

The principle, that Parliamentary legislature cannot be challenged, means that the judiciary cannot overturn Parliament's legislation, provided it follows manner and form as prescribed by statute.¹⁸ Lord Morris summarised the reasons:¹⁹

It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the statute book at all.

Furthermore, it was reasoned in *Cheney v Conn*, that "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known in the country."²⁰

Another principle of the doctrine is that Parliament cannot bind its successor, as the next Parliament enjoys the same law-making power. Or expressed conversely, every Parliament is not bound by its predecessor and can repeal every former act.

¹⁷ Morag McDowell and Duncan Webb *The New Zealand Legal System* (2ed, Butterworths, Wellington 1998) 124.

¹⁸ Keith Jackson "Parliament" in Raymond Miller (ed) *New Zealand - Government and Politics* (University Press, Oxford, 2001) 76, 77.

¹⁹ *Pickin v British Railway Board* [1974] AC 765, 789 Lord Morris.

²⁰ *Cheney v Conn* [1968] 1 All ER 779, 782.

III If there are two conflicting statutes, the principle of implied repeal guarantees that the latest expression of Parliament's will prevails: *lex posterior derogat priori* or *leges posteriores priores contrarias abrogant*. Where possible, the courts try to reconcile the differences in the two acts, for example by confining each to its individual sphere of operation; however, where this is not possible, the later legislation is favoured.²¹

1. Paradox

Either Parliament is all-powerful or it is not. Full power includes the power to destroy or limit its own power. But if Parliament limits its power, it is no longer all-powerful. In short, the paradox is that Parliament is all-powerful, yet powerless to limit its powers.²²

The principle of implied repeal could be taken as an example for the paradox. If Parliament is all-powerful, it could exclude implied or even express repeal of an act. On the other hand, Parliament cannot exclude repeal for two reasons: first, because of the principle that Parliament cannot bind its successors,²³ and secondly due to the principle of implied repeal.

Dicey thought the paradox was verbal only and therefore resolved that "limited sovereignty . . . is a contradiction in terms."²⁴ He continued:²⁵

[E]very attempt to tie the hands of [a sovereign legislature] breaks down, on the logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which, if valid, would make it cease to be absolute.

²¹ Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (2nd, Brookers, Wellington 2001) 488.

²² *Chengut v. Russell James Limited v. Liverpool Corporation* [1971] 1 KB 728; *Alan Jones v. Eastern Chiropractic Union of Australia* [1994] 1 KB 584 (CA).

²³ *The Study of the Law of the Commonwealth* (1968) 102 (repealed).

²⁴ Morag McDowell and Duncan Webb *The New Zealand Legal System* (2ed, Butterworths, Wellington 1998) 126.

III ANALYSIS

A Theoretical Approach

The doctrine of parliamentary sovereignty raises some logical questions.

1 Paradox

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²² Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 480.

²³ Compare: *Vauxhall Estates Limited v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Limited v Minister of Health* [1934] 1 KB 590 (CA).

²⁴ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 61.

²⁵ Dicey, above, 61.

But this is paradoxical and circular: Absolute power cannot be restricted because then the power would not be absolute.²⁶

Even Neo-Diceyans dismiss the paradox as verbal only. O Hood Phillips quoted Blackstone, who explained that:²⁷

Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent Parliament.

Accordingly, he argues that Parliament is not disabled from enacting unchangeable legislation, only that a later Parliament, being of equal and absolute authority, would not be bound. But this is contradictory as well: "unchangeable legislation" cannot describe a statute that a subsequent Parliament is free to change.

Therefore, the question remains why Parliament is powerless to fetter its freedom.²⁸ Dicey asserted that "The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment."²⁹ But Parliament need not remain sovereign.

The concept of parliamentary sovereignty is, therefore, founded on paradox and circular reasoning.³⁰

²⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 480.

²⁷ William Blackstone *Commentaries on the Laws of England, Volume 1* (15ed, Cadell & Butterworth, London, 1809) 90; O Hood Phillips and Paul Jackson *O Hood Phillips' Constitutional and Administrative Law* (7ed, Sweet & Maxwell, London, 1987) 61.

²⁸ Joseph, above, 481.

²⁹ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 68.

³⁰ Compare: Joseph, above, 480.

2 Unchangeable legislation

If there is unchangeable legislation, this would mean that the principle that Parliament cannot bind its successors is wrong.

(a) Independence

Britain's post-war independence legislation relinquished all Westminster law-making power over its former dependent territories, as it has been the practice for post-1960 independence legislation to provide that no future United Kingdom statute "shall extend or be deemed to extend to" the independent country as part of its law.³¹

Legislation that reasserted plenary powers over its former territories may have the force of law in the United Kingdom, but it would be of no effect in the former territories that won independence,³² except on request of the former territory.

In earlier time it was suggested that provisions conferring legislative independence could be revoked by Parliament,³³ but the reality is that the conferment of independence is an irreversible process, as "freedom once conferred cannot be revoked"³⁴.

But even if the independence was revoked, Parliament restricts the geographical area of effective legislation and therefore binds future Parliaments.³⁵

³¹ John Eekelaar "The Death of Parliamentary Sovereignty – A Comment" (1997) 113 LQR 185, 186.

³² Compare: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 482.

³³ *British Coal Corporation v R* [1935] AC 500, 520.

³⁴ *Ibralebbe v R* [1964] AC 900; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 481.

³⁵ A W Bradley "The Sovereignty of Parliament – in Perpetuity ?" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (3ed, Clarendon Press, Oxford, 1994) 79, 88.

(b) Composition of the Parliament

Parliament may also bind its successors by altering the rules for the composition of the Parliament. For example in 1832, when United Kingdom Parliament reformed the House of Commons to secure more democratic representation, succeeding Parliaments were bound by that legislation inasmuch as the only lawful House of Commons was one elected in accordance with the 1832 Act.³⁶ The composition of the Parliament could again be changed by an act, but this would have no effect on the Parliament that passed this act.

(c) Assessment

Contrary to the legal doctrine, some legislation is irreversible and unchangeable.³⁷ Therefore, the principle that Parliament cannot bind its successors is at least an “over-simplification”³⁸, or, in my opinion, in this generality wrong.

3 Assessment

As proven above, the doctrine of parliamentary sovereignty is a paradox and founded on circular reasoning. Furthermore, the principle of the doctrine that Parliament cannot bind its successor is not correct. Therefore, the question is what of the doctrine remains ?

The principle that Parliament is the highest law-making power is the definition of the modern democratic Parliament – with or without the application of the doctrine. The term Parliament is defined in dictionaries as “the highest legislature”³⁹ or “the highest law-making authority in a country”⁴⁰. Whether Parliament can make any law it desires, depends on the existence of supreme law. If

³⁶ E C S Wade and A W Bradley *Constitutional and Administrative Law* (11ed, Longman, London and New York, 1993) 78.

³⁷ Compare: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 481.

³⁸ E C S Wade and A W Bradley *Constitutional and Administrative Law* (11ed, Longman, London and New York, 1993) 77.

³⁹ Della Thompson (ed) *The Concise Oxford Dictionary* (9ed, Clarendon Press, Oxford, 1995).

⁴⁰ Diana Treffry and Sheila Ferguson (eds) *Collins Paperback English Dictionary* (4ed, HarperCollins, Glasgow, 2001).

there is supreme law, Parliament can make all law within its competence, that means all law which does not contravene the supreme law. If there is no supreme law, Parliament's competence is insofar not limited. But that is pure logic and not surprising.

The principle that Parliament's legislation must not be challenged, remains logically untouched and is a possible consequence of the separation of the three branches of government.

On the one hand, there is legislation which is unchangeable – thus, the principle that Parliament cannot bind its successors is wrong. On the other hand, all other legislation is changeable by the Parliament's successor. But again, that is logical and not spectacular.

The principle of implied repeal is the consequence of the principle that Parliament cannot bind its successors and the principle that Parliament is the highest law-making body. If Parliament wishes to change an act of Parliament, it can do so in express words. If Parliament does not use express words, it is for the courts to interpret Parliament's intention.

Therefore in my opinion, after having eliminated the illogical elements of the doctrine, the remaining elements of the doctrine's principles are based on the common definition of the term Parliament and the constitutional decisions whether there is supreme law and whether courts have the power to strike down legislation which is inconsistent with this supreme law.

⁴⁴ K. F. V. Houston *Essays in Constitutional Law* (Clarendon Press, Oxford, 1964) 1; Paul Mitchell "Sovereignty this Century – Must and the Common Law Constitution" (2002) 31 *Vanderbilt Law Review* 187, 192.

⁴⁵ See William Blackstone *Commentaries on the Laws of England – Volume 1* (1765, London, 1783; reprinted, Oxford Publishing, New York, London, 1978) 160.

⁴⁶ Blackstone, above, 161.

⁴⁷ Blackstone, above, 81.

⁴⁸ Albert Venn Dicey *Lectures on the Study of the Law of the Constitution* (1901, 1885; reprinted, Macmillan & Co., London, 1969) 71.

⁴⁹ *Law Journals: The Law and the Constitution* (Clarendon Press, Oxford, 1978) 319.

B Historical Approach

1 The origin

Thomas Hobbes of Magdalen Hall explained to a country weary of civil wars that its sole hope of salvation lay in complete submission to Leviathan, described as absolute, indivisible, unaccountable and unlimited.⁴¹

Having read Locke and Hobbes, this tale was taken up by Blackstone, who asserted "What the parliament doth, no power on earth can undo".⁴² But he reprobated those who talked about "the omnipotence of Parliament" for using "a figure rather too bold"⁴³ and expressed his doubts:⁴⁴

Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.

Albert Venn Dicey developed Blackstone's two assertions by stating that Parliament has "the right to make or unmake any law whatever"⁴⁵, and that no person or body has the power to set its acts aside.

But neither Blackstone nor Dicey could produce authority to their statements. Dicey declared that the doctrine of Parliamentary sovereignty was the law, and considered any doubts "obsolete", with the result that Dicey's views became "orthodox".⁴⁶

⁴¹ R F V Heuston *Essays in Constitutional Law* (2ed, Stevens & Sons, London, 1964) 1; Paul McHugh "Sovereignty this Century – Maori and the Common Law Constitution" (2000) 31 VUWLR 187, 192.

⁴² Sir William Blackstone *Commentaries on the Laws of England - Volume 1* (9ed, London, 1783; reprinted: Garland Publishing, New York, London, 1978) 161.

⁴³ Blackstone, above, 161.

⁴⁴ Blackstone, above, 91.

⁴⁵ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 71.

⁴⁶ Ivor Jennings *The Law and the Constitution* (5ed, University of London Press, 1959) 319.

Other Oxford men who subscribed to the doctrine were Sir William Anson, James Bryce, Sir Thomas Erskine Holland and William Geldart.⁴⁷

Some writers suggest that Lord Coke stated the doctrine of parliamentary sovereignty, but this assertion goes back to a wrong interpretation of Dicey's quotation of Blackstone, who quoted Coke.⁴⁸

2 *Judges in the last centuries*

English judges did not always uncritically subscribe to the doctrine of parliamentary sovereignty, especially not to the principle that Parliament's legislation must not be challenged.

In *Dr Bonham's* celebrated case in 1610, Coke CJ declared:⁴⁹

[I]t appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

Although a cautious approach should be taken in determining what exactly Coke CJ meant by this passage,⁵⁰ one view of this statement is that it asserts the supremacy of fundamental law over statute law; the other view is that the statement is merely a statement about statutory interpretation.

However, Coke's successor, Sir Henry Hobart CJ, affirmed Cook's decision in 1614 and held that "even an Act of Parliament, made against natural equity, as to make a man a judge in his own case, is void in itself"⁵¹.

⁴⁷ R F V Heuston *Essays in Constitutional Law* (2ed, Stevens & Sons, London, 1964) 3 – 5.

⁴⁸ Ivor Jennings *The Law and the Constitution* (5ed, University of London Press, 1959) 318.

⁴⁹ *Bonham's Case* [1610] 8 Co Rep 107a, 118a; 77 ER 638, 652.

⁵⁰ Philip Allott "The Courts and Parliament: Who Whom?" [1979] CLJ 79, 83.

⁵¹ *Day v Savage* [1615] Hobart 85, 97; 80 ER 235; *Lord Sheffield v Ratcliffe* [1615] Hobart 334; 80 ER 475.

This view was supported by Vaughan CJ in 1674,⁵² and endorsed by Holt CJ who thought in 1701:⁵³

What may Lord Coke says in *Dr Bonham's Case* in his 8 Co is far from any extravagancy, for it is a very reasonable and true saying that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament.

Cook's doctrine was acted upon as late as 1795.⁵⁴ Echoes of the doctrine sounded even in 1861,⁵⁵ but thereafter it fell into abeyance.⁵⁶

It must be acknowledged that these dicta have been overwhelmed by the weight of subsequent judicial practise and repeated authority disavowing anything other than a subservient role for the judiciary.⁵⁷

Nevertheless, for example Willes J proclaimed in his much-quoted refutation of Coke's dictum in 1871 that Coke's doctrine stands as a warning rather than an authority to be followed.⁵⁸ But E W Thomas concluded that even the expression of a judicial warning would seem to presuppose that the capacity to act in defiance of Parliament has not been forever foreclosed.⁵⁹ In my opinion, this is convincing - otherwise it would be a somewhat empty warning.

⁵² *Thomas v Sorrell* [1674] Vaughan 330; 124 ER 1098.

⁵³ *City of London v Wood* [1701] 12 Mod 669, 687; 88 ER 1592, 1602.

⁵⁴ *R v Inhabitants of the County of Cumberland* [1795] 6 TR 194; 101 ER 507.

⁵⁵ *Green v Mortimer* [1861] 3 LT 642.

⁵⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 463.

⁵⁷ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 18.

⁵⁸ *Lee v Bude & Torrington Railway Co* [1871] LR 6 CP 576, 582, Willes J.

⁵⁹ Thomas, above, 18.

3 Scholars in the last centuries

As mentioned above, William Blackstone agonised over the idea of an omnipotent power and thought that the phrase “the omnipotence of Parliament ... a figure rather too bold”.⁶⁰

Albert Venn Dicey was much less self-doubting as his sole reference to *Bonham's Case* was a dismissive footnote declaring it “obsolete”.⁶¹ Dicey entertained no exception to Parliament's absolute powers of legislation.⁶²

Diceyan positivism left little place for critical thinking about the law-making process, although it was occasionally questioned what happened to “thousand years of talk about ‘fundamental law’ by kings, judges, political men and commentators”.⁶³

4 New Zealand

The adoption of the Statute of Westminster 1931 (UK), removed any limitation on New Zealand to pass legislation that was repugnant to English law, and in 1947 Parliament acquired full power to alter its constituent statute, the New Zealand Constitution Act 1852 (UK).

It was, however, not before 1973, that the New Zealand Constitution Amendment Act 1973 removed a perceived extraterritorial limitation in Parliament's powers.⁶⁴ In *R v Fineberg*,⁶⁵ Moller J held that this limitation arose from the legislative power to pass laws for the “peace, order and good government of New Zealand” according to section 53 of the New Zealand Constitution Act 1852

⁶⁰ Sir William Blackstone *Commentaries on the Laws of England - Volume 1* (9ed, London, 1783; reprinted: Garland Publishing, New York, London, 1978) 161.

⁶¹ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 61.

⁶² Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 463.

⁶³ Philip Allott “The Courts and Parliament: Who Whom ?” [1979] CLJ 79, 114.

⁶⁴ Joseph, above, 476 and 489.

⁶⁵ *R v Fineberg* [1968] NZLR 119.

(UK). The 1973 amendment Act superimposed the legislative power to pass laws also having effect outside New Zealand.⁶⁶

5 Assessment

R F V Heuston drew the conclusion that the doctrine was established “more by a series of obiter dicta by eminent persons, whether sitting on the Bench or in the professorial study, than by any clear judicial decision of binding authority”⁶⁷.

Sir Ivor Jennings thought the doctrine was the work of text-book writers flirting with political philosophy, none of whom could produce authority for their statement.⁶⁸

1 New Zealand

Similarly, Philip Allott suggests that the idea of the sovereignty of Parliament is the product of three things: first, an inadequate view of what has been achieved by the British constitution before 1600, secondly a distorted view of the outcome of the constitutional struggle of the seventeenth century in the Revolution of 1688 / 1689 and thirdly, a distorting intrusion into British constitutional theory of a particular tradition of general political thought, namely sovereignty theory.⁶⁹

In my opinion, the main explanation for the existence of the doctrine of parliamentary sovereignty is that Dicey's Introduction to the Study of the Law of the Constitution was a well-written, basic book of the English constitutional law.⁷⁰ Dicey's just boldly asserted that parliamentary sovereignty was the law without devoting so much as a line to demonstrate that this was so - the oracle spoke, and came to be accepted.⁷¹

⁶⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 476.

⁶⁷ R F V Heuston *Essays in Constitutional Law* (2ed, Stevens, London, 1964) 1.

⁶⁸ Ivor Jennings *The Law and the Constitution* (5ed, University of London Press, 1959) 320, 328.

⁶⁹ Philip Allott “The Courts and Parliament: Who Whom ?” [1979] CLJ 79, 102.

⁷⁰ A W B Simpson “The Common Law and Legal Theory” in A W B Simpson (ed) *Oxford Essays in Jurisprudence (second series)* (Clarendon Press, Oxford, 1973) 77.

⁷¹ Simpson, above, 77.

It therefore can be said that the origin of the doctrine is at least doubtful. Nevertheless, a constitution is not static – it develops with the history of the country and its people.⁷²

C *Contemporary Approach In Different Countries*

In the following, some features of the constitutions of New Zealand and the United Kingdom, the motherland of the doctrine of parliamentary sovereignty, will be examined and compared with the German constitution, where the doctrine is unknown.

1 *New Zealand*

Parliament's legislative sovereignty has been described as the ultimate principle of New Zealand's constitution.⁷³ Therefore, New Zealand Parliament's power are deemed absolute and illimitable.⁷⁴

There are, however, some issues which raise doubts about this view.

(a) Fundamental common law rights

Similar to Murphy J's concept of "fundamental implied rights" in Australia,⁷⁵ Lord Cooke of Thorndon⁷⁶ questioned whether Parliament had the power to override fundamental common law rights. These attempts at reviving the *Bonham* doctrine present a direct attack on the doctrine of parliamentary sovereignty.

⁷² Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in B D Gray and R B McClintock (eds) *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995) 206, 223.

⁷³ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 14.

⁷⁴ Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 174.

⁷⁵ Murphy J pioneered Australia's implied rights jurisprudence during his term as Judge of the High Court of Australia (1975 – 1986). In a series of cases, he sought to infer from the structure and context of the Constitution a bill of rights.

⁷⁶ Former Cooke J and Hon Sir Robin Cooke.

In 1979, Lord Cooke of Thorndon stated:⁷⁷

It would be a strong and strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the courts are barred. There is even room for doubt whether Parliament could constitutionally do so.

Eighteen months later, he reasoned that:⁷⁸

It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function. It is not to be supposed that by the [Economic Stabilisation Act 1948] the New Zealand Parliament meant to abandon the entire field of the economy to the Executive.

In 1982, two colleagues joined Lord Cooke of Thorndon in noting:⁷⁹

Indeed we have reservations as to the extent to which in New Zealand even an act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.

The following year, Lord Cooke of Thorndon states that “it is arguable whether some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.”⁸⁰

Many lawyers were reluctant to accept these warnings but no attempt at “reading down” the dicta could obscure the author’s purpose following *Taylor v NZ Poultry Board*⁸¹ in 1984. Before *Taylor*, the dicta were cautiously expressed as “reservations”, or through such terminologies as “it is arguable” and “there is even

⁷⁷ *L v M* [1979] 2 NZLR 519, 527 (CA) Cooke J.

⁷⁸ *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA) Cooke J.

⁷⁹ *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA) Cooke, McMullin and Ongley JJ.

⁸⁰ *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (CA) Cooke J.

⁸¹ *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 (CA).

room for doubt". *Taylor's* case, however, removed any ambiguity, as Lord Cooke stated:⁸²

I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

Lord Cooke of Thorndon's dicta have not caused the constitutional ructions that some commentators feared, as until today no court has invalidated or disapplied a statute for encroaching on common law rights in express words.⁸³

Writing extra-judicially in 1988, Lord Cooke of Thorndon stated that the modern common law was "built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts"⁸⁴. He added:⁸⁵

I am suggesting that if a change, by legislation or otherwise, were seen to undermine either of them to a significant extent, it would be the responsibility of the Judges to say so and, if their judgements to that effect were disregarded, to resign or to acknowledge frankly that they are prepared to depart from their judicial oath and to serve a state not entitled to be called a free democracy.

Suppose that an act of the legislature purported to strip Jewish people of their citizenship and their property, or to disfranchise women, or without qualification to require the Courts to receive in evidence any statement appearing to be a confession of crime, whether or not obtained by force or any other form of compulsion.⁸⁶

⁸² *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398 (CA) Cooke J.

⁸³ Compare: *Cooper v Attorney-General* [1996] 3 NZLR 480; *Re Shaw* [1997] 3 NZLR 611; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA); *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

⁸⁴ Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164.

⁸⁵ Cooke, above, 164.

⁸⁶ Cooke, above, 164.

It is easy to say that the hypothetical examples are so unlikely that one need not bother about the problem - that may be so. On the other hand, one has to admit that the concept of a free democracy must carry with it some limitations on legislative power, however generous.⁸⁷

Furthermore, the imagined Act which overrides fundamental rights is not totally unrealistic in New Zealand, as there used to be an Economic Stabilisation Act 1948 which inter alia empowered the Governor-General in Council to make such regulations as appeared to him necessary or expedient for promoting the economic stability of New Zealand. Various regulations made under that power survived challenge, although not always unanimously.⁸⁸

The common law rights specifically referred to by Lord Cooke of Thorndon were the right of Courts to conclusively determine whether actions in the Courts are barred (*L v M*⁸⁹), the right of access of citizens to the Courts for the determination of their rights (*New Zealand Drivers' Association v New Zealand Road Carriers*⁹⁰), the right of an office-holder to natural justice (*Fraser v State Service Commission*⁹¹) and the right to be free from literal compulsion by torture (*Taylor v New Zealand Poultry Board*⁹²).

In *R (Daly) v Secretary of State for the Home Department*, Lord Cooke of Thorndon added other fundamental rights:⁹³

The truth is, I think, that some rights are inherent and fundamental to democratic civilised society; conventions, constitutions, bills of rights and the like respond by recognising rather than creating them. ... It is enough to take the three identified by Lord Bingham: in his words, access to courts; access to legal advice; and the right to

⁸⁷ Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164.

⁸⁸ For example: *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374.

⁸⁹ *L v M* [1979] 2 NZLR 519, 527 (CA) Cooke J.

⁹⁰ *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA) Cooke J.

⁹¹ *Fraser v State Service Commission* [1984] 1 NZLR 116, 121 (CA) Cooke J.

⁹² *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) Cooke J.

⁹³ *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, 1636 (HL) Lord Cooke.

communicate confidentially with a legal adviser under the seal of legal professional privilege; as he says authoritatively from the woolsack, such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment; the point that I am emphasising is that the common law goes so deep.

(b) Interpretation

In *TV 3 Network Ltd v Eveready New Zealand Ltd*,⁹⁴ the Court of Appeal was required to ascertain whether it had power to grant a mandatory injunction ordering corrective advertising in malicious defamation proceedings. Although this power has never been recognised, the Court concluded that it did have such power, to be exercised in appropriate circumstances. The interesting point is, that this decision was reached notwithstanding the fact that in the new Defamation Act 1992, which did not apply to these proceedings because the action arose prior to the legislation being in force, the power to order correction was reduced from a mandatory order, to a recommendatory order only.⁹⁵ Therefore, the decision of the Court of Appeal illustrates arguably a type of judicial law-making that is inconsistent with parliamentary will.

In *Simpson v Attorney-General [Baigent's Case]*,⁹⁶ following the Privy Council's decision *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*,⁹⁷ a majority of the New Zealand Court of Appeal held that a breach of the Bill of Rights Act 1990 gives rise to a new civil cause action in public law which lies directly against the Crown and may, at the Court's discretion, attract a remedy in the form of an award of monetary compensation, despite the remedies provision having been specifically removed from the Bill. This decision was heavily criticised as the history, legal form and overall structure of the Bill of Rights Act 1990 demonstrate beyond doubt that Parliament did not intend the Bill to form part of an

⁹⁴ *TV 3 New Zealand Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435.

⁹⁵ Compare: Morag McDowell and Duncan Webb *The New Zealand Legal System* (2ed, Butterworths, Wellington 1998) 124.

⁹⁶ *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.

⁹⁷ *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 485.

over-arching constitution and, in particular, did not intend to confer power on the courts to create a new regime of public civil liability untouched by existing statutory immunities.⁹⁸

Another recent example is *R v Pora*⁹⁹. A seven member bench was unanimous in allowing Pora's appeal against a 13-year minimum non-parole period imposed under the purportedly retrospective arm of the so-called "home invasion" legislation; all members held that the legislation was not retrospective beyond 1 September 1993, when the power to impose minimum non-parole periods were first conferred.¹⁰⁰ The Bench split, however, three to three - with the abstention of the President - on whether the legislation had any retrospective effect at all. The issue was whether the purportedly retrospective provision, section 2 (4) of the Criminal Justice Amendment Act (No 2) 1999, prevailed over the anti-retrospective protection in section 4 (2) of the Criminal Justice Act 1985. The Chief Justice Tipping and Thomas JJ held that, to the extent of an inconsistency, section 4 (2) of the Criminal Justice Act 1985 prevailed over section 2 (4) of the Criminal Justice Amendment Act (No 2) 1999, Gault, Keith and McGrath JJ held the opposite. Elias CJ suggested Parliament simply did not understand what it was doing when it passed section 2 (4) of the Criminal Justice Amendment Act (No 2) 1999 - it was implausible to believe Parliament would knowingly act in breach of the Bill of Rights Act 1990 and its international obligations. In her view, this did not erode parliamentary sovereignty because the enactment of section 2 (4) of the Criminal Justice Amendment Act (No 2) 1999 by Parliament was not a clear expression of intention to derogate from section 4 (2) of the Criminal Justice Act 1985. Thomas J's same result was mandated by a rights-centred approach to interpretation, which in his opinion the court in the modern era should choose to adopt. He contends that such an interpretative model does not challenge Parliament's supremacy, rather, "it provides a barrier against inadvertent legislation which would have the effect of abridging human rights". Whether or not this decision is incompatible with the

⁹⁸ Compare: J A Smillie "'Fundamental' Rights, Parliamentary Supremacy and the New Zealand Court of Appeal" (1995) 111 LQR 209, 213; James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 394.

⁹⁹ *R v Pora* [2001] 2 NZLR 37.

¹⁰⁰ Daniel Kalderimis "R v Pora" (2001) NZLJ 369.

doctrine of parliamentary sovereignty, mainly because of not applying the principle of implied repeal, is in dispute.¹⁰¹

(c) Privy Council

In *Buxoo v Rex*¹⁰², the Privy Council dismissed an appeal from Mauritius on traditional principles for the tendering of advice in criminal appeals. Such appeals may be presented only with special leave granted by Her Majesty on the advice of the Privy Council¹⁰³, which will be given only in exceptional cases of serious miscarriage of justice.¹⁰⁴ However, a Mauritius statute had made Privy Council appeals in criminal cases “as of right”. The Privy Council avoided these words by holding that the Mauritius Parliament had not intended to dictate to their Lordships the principles governing the disposal of appeals. But had the statute purported to do so, “a serious question would have arisen as to whether the Board were bound to give effect to the enactment, in so far as it purported to bring about a departure from the traditional principles”¹⁰⁵. Lord Keith of Kinkel further said:¹⁰⁶

[T]he Board would not easily be persuaded that their function of tendering advice to Her Majesty was capable of being fettered by the legislature of any of the countries where the jurisdiction of Her Majesty in Council is accepted.

Although the issue in *Buxoo* arose under Mauritius law, Privy Council decisions involving general principles of law are binding in all jurisdictions retaining the appeal.¹⁰⁷ The decision therefore suggests that New Zealand lacks plenary powers when it legislates for its judicial system.¹⁰⁸

¹⁰¹ On one hand: Anita Killeen, Richard Ekins and John Ip “Undermining the Grundnorm?” (2001) NZLJ 299 - 308; on the other hand: Daniel Kalderimis “R v Pora” (2001) NZLJ 369 - 371.

¹⁰² *Buxoo v R* [1988] 1 WLR 820 (PC).

¹⁰³ *Oteri v R* [1976] 1 WLR 1272 (PC); *Holder v R* [1980] AC 115 (PC).

¹⁰⁴ *Ex parte Macrea* [1893] AC 346 (PC).

¹⁰⁵ *Buxoo v Rex*, above, 823 Lord Keith.

¹⁰⁶ *Buxoo v Rex*, above, 823 Lord Keith.

¹⁰⁷ *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 (PC).

¹⁰⁸ Compare: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 487.

(d) Entrenched legislation in section 268 of the Electoral Act 1993

Any law in New Zealand may be altered by the simple majority of Parliament, except certain reserved provisions under section 268 of the Electoral Act 1993 which are entrenched. Section 268 of the Electoral Act 1993 entrenches section 17, which provides that a general election must be held at least every three years, by a majority of votes at a poll of electors or a 75 % majority vote of all the members of the House of Representatives in order to amend or repeal the section. This special amending procedure extends also to five other provisions under of the Electoral Act 1993 relating to the Representation Commission, section 28, the division of New Zealand into electoral districts after each census, section 35, the adjustment of the quota, section 36, and the minimum voting age of 18 years, section 74.

Section 268 is singly and not doubly entrenched. From a legal point of view, this means that the entrenching provision itself could be amended or repealed by an ordinary Act of Parliament.¹⁰⁹ Nevertheless, even single entrenchment can rise to the political fact that the entrenching provision can only be amended by a special majority. Or in Lord Cooke of Thorndon's words, to amend or repeal an entrenching provision by an ordinary act of Parliament is "theoretically doubtful and practically unthinkable".¹¹⁰

Regarding the doctrine of parliamentary sovereignty, it is questionable whether Parliament can successfully bind a succeeding Parliament by the "manner and form" of legislation, particularly by this special procedures of law-making.

Earlier constitutional theorists rejected entrenchment or at least double entrenchment, which means that the entrenching section itself is entrenched and protected from ordinary repeal, as an attempt to bind a later Parliament.¹¹¹ This view is derived from Dicey who stated:¹¹²

¹⁰⁹ Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 169.

¹¹⁰ Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371, 372.

¹¹¹ Compare: Joseph, above, 174.

¹¹² Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 88.

There is no law which Parliament cannot change, or (to put the same things somewhat different), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.

This Diceyan view was rejected in the cases *Attorney-General v Trethowan*¹¹³, *Harris v Dönges*¹¹⁴ and *Bribery Commissioner v Ranasinghe*¹¹⁵.

Although commentators have sought to argue that these decisions depended upon special constitutional circumstances and do not establish a general rule, the decisions have worked to weaken Dicey's proposition that a hallmark of sovereign Parliament is that it can repeal all statutes with a simple majority.¹¹⁶

Later theorists, sometimes referred to as the "manner and form school", reinterpreted the doctrine to a "new view" and drew the distinction between the powers of Parliament, and the procedures of law-making that it adopt. While Parliament cannot create legislative vacuums concerning the substance of legislation, which means that Parliament cannot enact unchangeable legislation, it can redefine itself through the procedures of legislation it adopts for ad hoc purposes.¹¹⁷

In my opinion, at least from a purist point of view, it is doubtful whether any entrenchment is compatible with the doctrine's principle that parliament cannot bind its successor. At least regarding the procedure, Parliament is bound by its predecessors. Furthermore, if the requirements of the procedure is high enough, this threshold can bind the next Parliament, de facto even substantially.

¹¹³ *Attorney-General of New South Wales v Trethowan* [1932] AC 526 (PC).

¹¹⁴ *Harris v Dönges* [1952] 1 TLR 1245, 1259.

¹¹⁵ *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197.

¹¹⁶ Daniel Kalderimis "R v Pora" (2001) NZLJ 369, 370.

¹¹⁷ Compare: Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 174.

(e) New Zealand Bill of Rights Act 1990

In 1985, the Labour Government released a 'White Paper' that proposed a superior bill of rights, but the Parliamentary Select Committee that heard public submissions around the country recommended in 1988 that it not proceed for lack of public support. The Committee recommended that a bill of rights be enacted as ordinary statute, which means, not as supreme law and hence not capable of rendering other parliamentary laws invalid. In August 1990, the New Zealand Bill of Rights Act 1990 was duly enacted.

However, today's New Zealand Bill of Rights Act 1990 is an ordinary statute, and not entrenched law. This means that sufficiently clear legislation passed by ordinary acts of Parliament and possibly very speedily in the absence of a second House can override the Bill of Rights.¹¹⁸ Therefore the Act is regarded internationally as one of the weakest affirmations on human rights.¹¹⁹

The assessment of the Bill of Rights differs. Some consider the New Zealand Bill of Rights Act 1990 as an ideal precedent for a Bill of Rights since it is in accord with the democratic and parliamentary traditions and the doctrine of parliamentary sovereignty.¹²⁰ Others ask: "If one genuinely believes in the abiding value of the rights and freedoms proclaimed, as distinct from paying lip service to them, how can one consistently reject their entrenchment?"¹²¹

Furthermore, New Zealand is already, ethically if not strictly legally, in breach of its international obligations. The Human Rights Committee of the United Nations, composed of jurists of the highest standing, released the following damning statement on the Bill of Rights Act:¹²²

The Committee regrets that the provisions of the
Covenant have not been fully incorporated into domestic

¹¹⁸ Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371, 373.

¹¹⁹ Lord Cooke, above, 373.

¹²⁰ Rt Hon Lord Woolf of Barnes "Droit Public – English Style" [1995] PL 57, 70.

¹²¹ Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 159.

¹²² Concluding Observations of the Human Rights Committee: New Zealand (3 October 1995) CCPR / C / 79 / Add 47, 176.

law and given overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires state parties to take such legislative or other measures which may be necessary to give effect to the rights recognised in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights and that it does not repeal earlier inconsistent legislation and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.

Furthermore, the Bill of Rights Act 1990 is one of the weakest pieces of legislation. In order to get it passed through the legislature, the original version was watered down by the inclusion of section 4 so that the Bill of Rights Act 1990 loses to all other conflicting statutes. The courts are instructed that even prior enactments are not to be held to be impliedly repealed or revoked, or in any way invalid, ineffective or inapplicable by reason of inconsistency with the Bill of Rights Act.¹²³ Therefore, the principle of implied repeal does not apply to this Act.

Nevertheless, section 4 restrains Parliament in two ways. Through recognition by Parliament of the legal values that underpin the rights and freedoms affirmed, and through the Attorney-General's reporting function under section 7 of the Bill of Rights Act. In submitting legislative proposals to Cabinet, Ministers must state whether their proposal complies with the Bill of Rights and give reasons if the proposal does not comply.¹²⁴ The Attorney-General must report to the House any bill that, in his or her opinion cannot reasonably be reconciled with the rights or freedoms affirmed. This prospect of an adverse report operates as a practical disincentive to infringing legislation.¹²⁵

¹²³ James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 394.

¹²⁴ Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) 5.36.

¹²⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 506.

While the Bill of Rights Act 1990 was certainly not designed to have this effect and nothing was said about it at the time of its enactment, section 5 can be read so as to authorise a New Zealand court to state whether a statute is inconsistent, because it violates a right to an unreasonable degree, even though section 4 requires that the court must nonetheless apply the inconsistent provision. This happened for the first time in the judgment of Thomas J in *Quilter v Attorney-General*¹²⁶ without fanfare. In *Moonen v Film and Literature Board of Review*¹²⁷, the Court of Appeal, however, expressly affirmed its entitlement to make these declarations, although adding a qualifying phrase that suggested they would not always do so.¹²⁸ This shows that there is a tendency by the judiciary that this Act takes on a certain higher, quasi-constitutional status even without explicit, single entrenchment provisions.¹²⁹ Furthermore, the prospects of such a declaration will practically restrain Parliament's power.

(f) Treaty of Waitangi

The Treaty of Waitangi is upheld as the 'founding document' of New Zealand's constitution.¹³⁰ It is deemed by Lord Cooke of Thorndon "a fundamental charter", "part of the essence of the national life" and "simply the most important document in New Zealand",¹³¹ and is in Lord Woolf's view "of the greatest constitutional importance to New Zealand"¹³². Nevertheless, the exact legal standing of the Treaty is in dispute.

The orthodox view is that native tribes lacked international legal personality and therefore cannot enter into international relations. The *Wi Parata* doctrine concluded that the Treaty was incapable of ceding rights of sovereignty as the Maori lacked international legal personality. Prendergast CJ held that, so far as the

¹²⁶ *Quilter v Attorney-General* [1998] 1 NZLR 523.

¹²⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

¹²⁸ Compare: Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 407.

¹²⁹ James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 394.

¹³⁰ Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 170.

¹³¹ Compare: Joseph, above, 170.

¹³² *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) Lord Woolf.

Treaty purported to cede rights of sovereignty, it was a “simple nullity” and has no legal standing for enforcement in the courts other than through incorporation by Parliament for ad hoc legislative purposes.¹³³

Other lawyers have argued that it was post-1840 doctrinal developments that denied the Treaty its status in international law, and the decisive time for an assessment was the time of the conclusion of the treaty.¹³⁴ Therefore, the Treaty is not a “nullity” and can be enforced in the courts.

Whether or not enforceable in law, the Treaty was elevated in the social compact and repatriated within the legal order. The incorporation of the principles of the Treaty under recent statutes has liberated the jurisprudence from the deadweight of the *Wi Parata* doctrine.¹³⁵ Under Parliament’s legislation, the courts have imputed to the Treaty the principle of partnership, fiduciary-like duties and obligations of utmost good faith, and the concept of the honour of the Crown.¹³⁶

Thus, the Treaty of Waitangi imposes extra-legal standards for legislation for two reasons. When a Minister submits a bill to Cabinet’s Legislation Committee for approval, the covering submission must indicate whether the bill complies with the principles of the Treaty and must provide reasons if the bill does not so comply.¹³⁷ For publicity reasons no Minister tends to introduce a Bill not complying with the principles of the Treaty. Furthermore, the courts will not lightly ascribe to Parliament an intention to permit conduct that is inconsistent with Treaty principles.¹³⁸ They therefore interpret an act of Parliament in a way consistent with the principles of the Treaty.

¹³³ *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur (NS) SV 72, 78.

¹³⁴ Compare: Philip Joseph “The Legal History and Framework of the Constitution” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 177.

¹³⁵ Joseph, above, 170.

¹³⁶ Paul McHugh “Sovereignty this Century – Maori and the Common Law Constitution” (2000) 31 VUWLR 187, 190.

¹³⁷ Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) 5.35.

¹³⁸ *NZ Maori Council v A-G* [1987] 1 NZLR 641, 655 (CA).

As sovereignty of Parliament is seen as “absolute, territorial, indivisible and unlimitable”¹³⁹, the concept of parliamentary sovereignty is increasingly seen as an inappropriate basis by which to secure for Maori the rights guaranteed to them under the Treaty and to order the relationship of the two peoples of New Zealand.¹⁴⁰

A right to special status does not strike an immediate accord with the notion of majoritarian rule underlying the precept of parliamentary legislative supremacy.¹⁴¹ Elias observes therefore that it is time to recognise that the notion of arbitrary parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand constitution.¹⁴² Her conclusion is that the Treaty of Waitangi is part of New Zealand law and it is the duty of the courts to protect the principles which are fundamental to the legal order.¹⁴³

Demands for Maori sovereignty, or separate Maori parliaments, are cases in point. The question was also implicit in a comment on the Tainui agreement by the then President of the Court of Appeal, Lord Cooke of Thorndon, in October 1989 that “in the end, no doubt, only the courts can finally rule on whether or not a solution accords with the Treaty principles”¹⁴⁴.

The actual discussion about the status of the Treaty cannot be resolved here. Only the future will show how the Treaty will be interpreted. But even if the Treaty is deemed a “nullity”, it at least imposes self-restraint on the legislation and is a rule for the courts how to interpret the Treaty. Therefore, the Treaty of Waitangi is at least a practical limit on the doctrine’s omnipotence of Parliament.

¹³⁹ Paul McHugh “Sovereignty this Century – Maori and the Common Law Constitution” [2000] 31 VUWLR 187, 194.

¹⁴⁰ E W Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 10.

¹⁴¹ Sian Elias “The Treaty of Waitangi and the Separation of Powers in New Zealand” in B D Gray and R B McClintock (eds) *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995) 206.

¹⁴² Elias, above, 224.

¹⁴³ Elias, above, 230.

¹⁴⁴ Keith Jackson “Parliament” in Raymond Miller (ed) *New Zealand – Government and Politics* (University Press, Oxford, 2001) 76, 78.

(g) International Law

International treaties and conventions do not have legal standing and are not enforceable in the courts, unless Parliament introduces legislation to adopt them into municipal law.¹⁴⁵ Parliament may legislate notwithstanding the comity of nations,¹⁴⁶ and binding international agreements.¹⁴⁷ No international convention, treaty or rule of public international law may defeat the clear meaning of a statute.¹⁴⁸

Nevertheless, international treaty obligations and principles of customary international law impose extra-legal restraints: In its 1997 Report, *The Treaty Making Process*, the Law Commission pointed out that “[t]he idea of a national Parliament with full power to make whatever law it likes without any constraint from outside, was never an accurate one” as about a quarter of the public Acts which make up the New Zealand statute book give effect to international obligations.¹⁴⁹

Furthermore, it is a Cabinet requirement that Ministers proposing legislation must vet their proposals for compliance with international law,¹⁵⁰ and the courts apply a presumption of interpretation that Parliament does not intend to legislate in breach of international law or specific treaty obligations.¹⁵¹ If a statute may reasonably bear more than one meaning, a court will prefer the meaning that is compatible with international law.¹⁵²

In my opinion, international law, therefore, restrains Parliament’s legislation.

¹⁴⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 476.

¹⁴⁶ *Theophile v Solicitor-General* [1950] AC 186, 195 (HL) Lord Porter.

¹⁴⁷ *Salomon v Commissioners of Customs and Exercise* [1967] 2 QB 116, 143 (CA) Diplock LJ.

¹⁴⁸ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 504.

¹⁴⁹ Bill Mansfield “The Constraints of Treaties and International Law” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 105, 106.

¹⁵⁰ Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) 5.35.

¹⁵¹ For example: *Cooke v The Charles A Vogeler Company* [1901] AC 103, 107 (HL) Lord Halsbury; *Theophile v Solicitor-General* [1950] AC 186, 195 (HL) Lord Porter; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 (CA); *Police v Hicks* [1974] 1 NZLR 763, 766 (SC); *Van Gorkom v Attorney-Genera* [1977] 1 NZLR 535, 543 (SC); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

¹⁵² Compare: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 505.

(h) Referenda

Parliamentary sovereignty is also called into question in the distinction between binding and non-binding referenda. Both have been used in New Zealand and are examples of direct, as opposed to representative, democracy.

According to the terms of the Citizens' Initiated Referenda Act 1993, a person or group who wants to trigger a vote on any issue must first submit a proposed question to the clerk of the House of Representatives. The clerk then advertises this question and calls for submissions on how the wording should be changed. Three months after the original submission the clerk must have determined the final wording of the referendum question. The purpose of this process is to produce a question that is simple to understand and allows for only a "yes" or "no" answer. The proposer then has twelve months to collect the signatures of ten per cent of enrolled electors. When the petition is delivered to Parliament, the clerk's office checks a random sample of pages to assess the validity of the signatures. Once the signatures have been checked and found to be in compliance, the Speaker presents the petition to Parliament. The governor-general then sets a date for the referendum to be held, which must be within a year of the date of presentation, unless three-quarters of MPs vote to defer it for a further year.¹⁵³

Technically, binding and non-binding referenda have to be implemented by Parliament. This raises the question as to whether, theoretically, Parliament could refuse to implement a binding referendum if it so chose.¹⁵⁴ But even not-binding referenda bind Parliament at least in practise.

¹⁵³ Compare: Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand – Government and Politics* (University Press, Oxford, 2001) 386, 387.

¹⁵⁴ Keith Jackson "Parliament" in Raymond Miller (ed) *New Zealand – Government and Politics* (University Press, Oxford, 2001) 76, 78.

(i) Other extra-legal limitation

Even Dicey acknowledged extra-legal constraints on parliamentary power. He believed wholly unacceptable legislation would be legally valid but politically impossible. He quoted Stephen's "blue-eyed baby" hypothesis:¹⁵⁵

If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.

The sanction for breach is adverse government publicity, thereby exemplifying a broader constraint. Governments usually show little concern for public opinion during their first years in office, using these as "working" terms for implementing policies, but they show concern during election year.¹⁵⁶

A further extra-legal restraint is pragmatism. Parliament will not legislate for impractical causes, it will not legislate knowing that its statutes will be unenforceable.¹⁵⁷

(j) Assessment

Most of the above mentioned aspects which raise doubts about the application of the doctrine in New Zealand are in dispute. But even if one subscribes to a doctrine of parliamentary sovereignty that is defined in a way that allows New Zealand's constitution to fit in, it has to be acknowledged that there are at least a lot of practical and extra-legal limits of the sovereignty of New Zealand's Parliament.

¹⁵⁵ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959) 81.

¹⁵⁶ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) 496.

¹⁵⁷ Joseph, above, 506.

2 United Kingdom

According to the traditional view, the doctrine of parliamentary sovereignty applies in the United Kingdom. As Lord Reid stated in *Madzimbamuto v Lardner-Burke*:¹⁵⁸

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

(a) European Union

In the United Kingdom, the courts have had to cope with the inroad into the doctrine of parliamentary sovereignty brought about by the country's entry into the European Community.¹⁵⁹

The United Kingdom generally has a dualist approach to international law, including the law of the European Community. This means that international obligations will become binding internally when incorporated or transformed into domestic law by an act of Parliament.¹⁶⁰

However, a number of Articles of the European Union Treaty have been held to have direct effect in each member state. According to Article 189 of the European Union Treaty, regulations are always directly effective, directives may be in special circumstances.

Furthermore, the European Court of Justice has repeatedly held that Community law must take precedence in the event of a clash with national law.

¹⁵⁸ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723.

¹⁵⁹ Sir H William R Wade "Sovereignty – Revolution or Evolution?" (1996) 112 LQR 568.

¹⁶⁰ Paul Denham *Law – a modern introduction* (4ed, Hutter & Stoughton, 1999) 89.

Where two English statutes conflict, the purely domestic approach is that the latest expression of Parliament's prevails.

It was therefore not surprising that Community law would prevail over pre-1972 legislation and that the courts were bound to interpret domestic legislation in accordance with Community law where possible.

The United Kingdom courts have consistently attempted to prevent a conflict between United Kingdom law and Community law by reading the United Kingdom law to be compatible with Community law requirements.¹⁶¹ As the *Factortame* cases demonstrate, this is not always possible.¹⁶²

Lord Bridge of Harwich stated in the *Factortame (No 2)* case:¹⁶³

If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the European Economic Community Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 it was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.

Some argued that this decision was a blow to the doctrine of parliamentary sovereignty. It represents an exception to the rule that Parliament cannot bind its successors, as the Parliament of 1972 has bound its successors.¹⁶⁴

¹⁶¹ Paul Craig "Constitutionalism, Regulation and Review" in Robert Hazell (ed) *Constitutional Futures – A History of the next ten years* (Oxford University Press, Oxford, 1999) 69.

¹⁶² *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85; *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

¹⁶³ *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, 658.

¹⁶⁴ Sir H William R Wade "Sovereignty – Revolution or Evolution" (1996) 112 LQR 568; Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371, 374.

Others argued that, derived from section 2 (4) of the European Communities Act 1972, all this decision did was to implement a rule of construction. The United Kingdom Parliament is presumed not to intend statutes to override Community law.¹⁶⁵ The Hon Sir John Laws described the decision as providing that:¹⁶⁶

the rule of construction implanted by section 2 (4) cannot be abrogated by an implied repeal. Express words would be required. That, however, is hardly revolutionary: there are numbers of areas where a particular statutory construction is only likely to be accepted by the courts if it is vouchsafed by express provision.

Nevertheless, the *Factortame* cases are the clearest indication that the European Union membership is no longer compatible with Dicey's classical doctrine of Parliamentary sovereignty.¹⁶⁷

The recent case of *Thoburn v Sunderland City Council & Ors*¹⁶⁸ revisited the issue of parliamentary sovereignty in the context of the European Communities Act 1972. Four retailers were prosecuted for trading in imperial weights after it became unlawful to use imperial measures under secondary legislation enacted to ensure the United Kingdom's compliance with European Community directives. The Divisional Court set out that Community law could not be entrenched in English law because Parliament could not bind its successors against repeal of the European Communities Act 1972. However, the court held that the European Communities Act was a constitutional statute and could not be impliedly repealed. This was the first open recognition of the constitutional status of the European Community Act 1972.

Although most writers agree that Parliamentary sovereignty has been compromised by the United Kingdom's membership of the European Community, it is generally accepted that this limitation is reversible through withdrawal from the

¹⁶⁵ P Craig "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 YBEL 221.

¹⁶⁶ Hon Sir John Laws "Law and Democracy" [1995] PL 72, 89.

¹⁶⁷ John F McEldowney *Public Law* (Sweet & Maxwell, London, 1998) 34.

¹⁶⁸ *Thoburn v Sunderland City Council & Ors* [2002] LTL 18/02/2002.

European Community.¹⁶⁹ This may be the case, but today's constitutional fact is that there is a hierarchy in the law of the United Kingdom - European Community law prevails over United Kingdom law. In my opinion, it is probable that this hierarchy will be maintained and even strengthened, as it is unlikely that the United Kingdom withdraw from the European Union.

(b) Human Rights Act 1998

The United Kingdom incorporated the European Convention on Human Rights into United Kingdom law through the Human Rights Act 1998.¹⁷⁰

The Human Rights Act 1998 neither entrenches European Convention rights, allowing them to take priority as a matter of law over later legislation, nor grants complete political freedom to Parliament to undermine them by later statutory amendment. Instead, ministers stressed during the relevant parliamentary proceedings that the Act is designed to be compatible with parliamentary sovereignty, while also giving effective protection to Convention rights.¹⁷¹

The balance between Convention rights and Parliamentary sovereignty is effected via sections 3, 4 and 10 of the Act. Section 3 requires courts to construe legislation "so far as it is possible to do so" in conformity with Convention rights. Where this proves impossible, the courts issue a declaration of incompatibility under section 4. Such a declaration will not, however, affect the validity, continuing operation or enforcement of the offending legislation. Section 10 makes provision for such legislation to be amended by ministerial order to remedy the incompatibility, but does not lay down a requirement that this must be done.¹⁷² The expectation is that a judicial declaration of incompatibility will render it difficult for Parliament to resist modification of the offending provisions.¹⁷³

¹⁶⁹ Mark Elliott "The Demise of Parliamentary Sovereignty ? The Implications for Justifying Judicial Review" (1999) 115 LQR 119, 128.

¹⁷⁰ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 403.

¹⁷¹ Nicholas Bamforth "Parliamentary sovereignty and the Human Rights Act 1998" PL 572.

¹⁷² Nicholas Bamforth "Parliamentary sovereignty and the Human Rights Act 1998" PL 573.

¹⁷³ Paul Craig "Constitutionalism, Regulation and Review" in Robert Hazell (ed) *Constitutional Futures - A History of The Next Ten Years* (Oxford University Press, Oxford, 1999) 67, 70.

The dual prospects of judicial declarations of incompatibility and administrative amendments to parliamentary enactments will lead the legislature to exercise self-regulation in order to ensure that, save in exceptional circumstances, legislation is consistent with the rights protected by the Convention. In this sense, the Human Rights Act will fetter Parliament's legislative freedom.¹⁷⁴

Furthermore, section 19 of the Act requires the minister in charge of a Bill in either House to make a statement in writing, before the Bill's second reading, that in the minister's opinion the provisions of the Bill are compatible with Convention rights, or that the government wishes to proceed with the Bill even though such a statement cannot be made.

Therefore, in my opinion, regarding the Human Rights Act, Parliament's legislative freedom is limited in practise by the two other branches of government, the executive and the judiciary.

(c) Interpretation

In *Anisminic v Foreign Compensation Commission*¹⁷⁵, section 4 (4) of the Foreign Compensation Act 1950, which provided that decisions of the Foreign Compensation Commission "shall not be called into question in any court of law", was interpreted in a way that judicial review was possible. One view is that the judiciary asserted, or at least came close to asserting, that the courts would not enforce a statutory provision which effectively required them to surrender their capacity to review the decisions of an all-powerful executive.¹⁷⁶ Since that case, Parliament has not again mounted such a challenge to the reviewing power of the High Court.¹⁷⁷ Others explain the decision as the result of a rule of construction, whereby clauses excluding the courts' jurisdiction should be narrowly interpreted.¹⁷⁸

¹⁷⁴ Mark Elliott "The Demise of Parliamentary Sovereignty ? The Implications for Justifying Judicial Review" (1999) 115 LQR 119, 127.

¹⁷⁵ *Anisminic Ltd v Foreign Compensation Commission* [1962] 2 AC 147.

¹⁷⁶ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 27.

¹⁷⁷ Rt Hon Lord Woolf of Barnes "Droit Public – English Style" [1995] PL 57, 69.

¹⁷⁸ T R S Allan "Parliamentary Sovereignty: Law, Politics, and Revolution" [1997] 113 LQR 447.

More recently, in *R v Secretary of State for the Home Department, ex parte Simms*¹⁷⁹, Lord Hoffmann stated:¹⁸⁰

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

Therefore, the interpretation of statutes by the courts is, even if the doctrine is upheld, a practical limitation of Parliament's omnipotence.

(d) Other extra-legal limitation

Fundamental common law rights, entrenched legislation, international law and the public limit the sovereignty of the United Kingdom Parliament as they limit New Zealand's parliamentary sovereignty.

¹⁷⁹ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 – 146 (HL).

¹⁸⁰ *R v Secretary of State for the Home Department, ex parte Simms*, above, 131 Lord Hoffmann.

(e) Assessment

Similar to the assessment in New Zealand, the application of the doctrine in the United Kingdom depends on the definition of parliamentary sovereignty. Even if one is of the opinion that the membership of the United Kingdom in the European Union is not the end of the doctrine, one must at least acknowledge that the sovereignty of the Parliament is fettered by this membership, the interpretation of acts by the courts and some extra-legal limitations.

3 Germany

In Germany the doctrine of parliamentary sovereignty is unknown. But this does not necessarily mean that the principles of the doctrine would not apply.

(a) Hierarchy of law

As Germany is a federal state and part of the European Union, there is a hierarchy of the different sources of the law.

The law of the European Community prevails over the German law, even over the "supreme" constitutional law.¹⁸¹

According to Article 31 of the "Grundgesetz" (Basic Law), the federal law prevails over the law of the "Länder". But this Article is logically not applicable, as the "Grundgesetz" contains competence provisions, distributing every issue either to the federal Parliament or to the parliaments of the "Länder". If there is a clash of provisions, one provision must logically be void as it contravenes the competence provisions and therefore the "Grundgesetz".¹⁸²

¹⁸¹ Compare: *Solange I - Beschluss (Until I - decision)* [1974] 37 BVerfGE 271, 277 (Bundesverfassungsgericht (Federal Constitutional Court)); *Solange II - Beschluss (Until II - decision)* [1986] 73 BVerfGE 339, 387 (Bundesverfassungsgericht (Federal Constitutional Court)).

¹⁸² Jörn Ipsen *Staatsrecht I - Staatsorganisationsrecht* (12ed, Luchterland, Neuwied and Kriftel, 2000) 625.

(d) Within the federal law and the law of each “Land”, there is also a hierarchy of the law. The top of the hierarchy is created by the constitutions, which include human rights. The second ranked ordinary statutes made by the Parliament are superior to delegated legislation.

If there is a contradiction between higher ranked law and lower ranked law the latter is void: *lex superior derogat legi inferiori*.

(b) Entrenched constitution

According to Article 79 (2) of the “Grundgesetz”, all provisions of the “Grundgesetz” can only be changed by an act of Parliament adopted with a two-thirds majority. According to Article 79 (3) of the “Grundgesetz”, the protection of human dignity, Article 1, and the basic principles of democracy, federalism and social state, Article 20, are legally unalterable.¹⁸³ However, Article 79 (3) of the “Grundgesetz” itself is not among the unalterable provisions. It is in dispute, if Article 79 (3) can be repealed itself.¹⁸⁴ In my opinion, Article 79 (3) and therefore the whole “Grundgesetz” can be repealed theoretically. In practise, it is unthinkable that the German federal Parliament would desire to change this provision – and if it did, it would be a revolution.

(c) Human Rights

Article 1 (3) of the “Grundgesetz” provides that all three branches of government are bound to the constitution. This includes, that acts of Parliament will be declared void by, and only by, the “Bundesverfassungsgericht” (Federal Constitutional Court), if they contravene the “Grundgesetz” and, particularly, its human rights.

¹⁸³ Bruno Schmidt-Bleibtreu and Franz Klein *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (6th ed, Neuwied, 1983) Art 79, 10; Jörn Ipsen *Staatsrecht I – Staatsorganisationsrecht* (12ed, Luchterland, Neuwied and Kriftel, 2000) 889.

¹⁸⁴ Ipsen, above, 256.

(d) Assessment of implied repeal also applies in Germany. Regarding law of the same level of the hierarchy, there is the rule of interpretation that later statutes prevail. All features of the German constitution can be interpreted in a way compatible with the doctrine of parliamentary sovereignty.

The classic doctrine of parliamentary sovereignty does not apply in Germany. As the legislation of the German Parliament prevails over all other national legislations, the German Parliament is the supreme law-making body. Regarding the membership of Germany in the European Union, there is no difference to the membership of the United Kingdom – both states are theoretically able to withdraw from the Union.

Furthermore, it can be said that the German Parliament can legislate on every topic it desires. Although there are issues which are distributed to the Parliaments of the “Länder”, the federal Parliament can legislate on these issues as it has the power to change the provisions containing these distributions. The requirement of a two-thirds majority for changing the German constitution can be interpreted as a rule of construction, as the entrenchment of provisions is interpreted in this way. The only limit, imposed by the arguably changeable Article 79 (3) of the “Grundgesetz” is the federalism, so that there always must remain some competence for the Parliaments of the “Länder”.

But if a re-defined term of parliamentary sovereignty is used, the doctrine of parliamentary sovereignty can be interpreted as a rule of construction. The power of the “Bundesverfassungsgericht” to strike down legislation which is inconsistent with the “Grundgesetz” can also be interpreted as a rule of construction, as the federal Parliament has the theoretical power to change the jurisdiction of the “Bundesverfassungsgericht”.

The principle that Parliament cannot bind its successors applies in Germany as well. For example, the announced attempt of the government, consisting of the Social Democrat Party and the Greens, to unchangeably withdraw from nuclear power plants in the next years, cannot be legally successful, as the next Parliament can change any piece of legislation, if it wishes to do so.

The principle of implied repeal also applies in Germany. Regarding law of the same level of the hierarchy, there is the rule of interpretation that later statutes prevail over former statutes.

The classic doctrine of parliamentary sovereignty does not apply in Germany. With the help of the rule of construction, however, the doctrine can be defined in a way that the doctrine applies. Furthermore, if Germany had a history of parliamentary sovereignty, in my opinion, today's scholars would argue if the doctrine still applies in Germany, or not, and to which extent – in the same way as the discussion takes place in New Zealand and the United Kingdom.

4 *Comparison*

In my opinion, the question whether parliamentary sovereignty exists in New Zealand and the United Kingdom or even Germany is a question of the definition of the term parliamentary sovereignty.

If the pure definition of Dicey is used, neither New Zealand, England nor Germany apply the concept of parliamentary sovereignty.

But if a re-defined term of parliamentary sovereignty is used, the doctrine of parliamentary sovereignty applies in New Zealand, the United Kingdom and, in my opinion, even in Germany. The legally entrenched and especially the few arguably unchangeable provisions in the German "Grundgesetz" are the same provisions which are – with the exception of federalism - arguably the limits of the common law, or at least the limits created by the pressure of the public: human rights and basic democratic principles. Therefore, from a practical point of view, the limits or restraints of an all-powerful Parliament are the same. Thus, in this regard there is no substantial difference between the United Kingdom and New Zealand on one hand and Germany on the other.

5 *Assessment*

The definition of a term only makes sense, if it is so clear and precise that the term can be distinguished from other terms - otherwise the definition is useless. If a term cannot be defined in that way, the term itself is useless.

If one is of the view that the doctrine of parliamentary sovereignty still applies in New Zealand and in the United Kingdom, one has to admit that the doctrine must be re-defined in order to maintain the doctrine as a description of the constitutional reality. If the doctrine is re-defined in such a way, even the constitution of Germany is compatible with this doctrine.

Traditionally the characteristics of not having a written constitution, not having a Supreme Court and not having a superior Bill of Rights are attributed to the doctrine of parliamentary sovereignty. These attributes, however, are the key factors which distinguish the constitutions of New Zealand and the United Kingdom on the one hand and the German constitution on the other.

Thus, the classical definition of the doctrine does not describe today's constitutional reality; the modified definition makes the doctrine undistinguishable. The doctrine of parliamentary sovereignty is therefore useless.

⁴⁵ E C S Wade and A W Bradley *Constitutional and Administrative Law* (11th, Longman, London and New York, 1975) 61.

⁴⁶ Lord Cooke of Thorndon, 'The Role of the Judge' in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 1994) 71.

⁴⁷ Paul Rishworth 'The Right to Know: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights?' in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 207, 208.

IV ASSESSMENT OF THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

Debates are often confusing due to the wide variety of meanings attributable to the doctrine of parliamentary sovereignty.¹⁸⁵ In the following, the doctrine will be defined as the status quo of New Zealand, particularly not having a written constitution, not having a superior Bill of Rights and not having a Supreme Court, which can strike down acts of Parliament.

Whereas the introduction of binding referenda, entrenched electoral law, or membership in a supernational organizations such as the European Union, might be seen as a question of taste, "the entrenchment of human rights is required as a badge of civilisation"¹⁸⁶.

Two questions should not be confused: The question if New Zealand can, and the question if New Zealand should introduce a supreme Bill of Rights.

A *Can a Superior Bill of Rights Be Introduced ?*

The question is raised whether it is possible to impose constitutional limits, such as a superior Bill of Rights would involve, upon New Zealand's Parliament with its traditional doctrine of parliamentary sovereignty. Or more abstract: Can a body with unlimited powers use that power to impose limits upon itself for the future ?

Some authors are of the view that this is possible.¹⁸⁷ The general proposition is that New Zealanders should have the kind of constitution that a majority of New Zealanders want, and if that means that constitutional limits are to be imposed, then

¹⁸⁵ E C S Wade and A W Bradley *Constitutional and Administrative Law* (11ed, Longman, London and New York, 1993) 69.

¹⁸⁶ Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371.

¹⁸⁷ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 399.

so be it.¹⁸⁸ A successful adoption of a supreme Bill of Rights depends ultimately on the judiciary accepting that this Bill of Rights is supreme – that turns on the measure being demonstrated to have widespread public support.¹⁸⁹ Majority approval by the electorate in a referendum would signify such support, as perhaps would a near unanimous vote in the Parliament.

In my opinion, the question itself should not be asked for two reasons.

First, parliamentary sovereignty cannot be used as a slogan, as if its meaning were self-evident.¹⁹⁰ This is – as shown above – not the case. Therefore the question of definition is prior to this question. The point is that what is meant by the phrase parliamentary sovereignty has changed over time, and, especially today, depends somewhat on the speaker.¹⁹¹

Acknowledging that, it is suggested that the true debate about parliamentary sovereignty should be about the proper conception of the doctrine in contemporary New Zealand.¹⁹² But this is, secondly, one step too short and the question is converse. In my opinion, the doctrine of parliamentary sovereignty is only a vague description of the constitution, but not the constitutional law itself. If the constitution is changed, then – depending on the definition of the doctrine – the doctrine applies, or does not apply. The doctrine itself, however, should not be seen as an obstacle for changing the constitution.

Therefore, in my opinion, the only question in this regard should be: Should New Zealand have a superior Bill of Rights ?

¹⁸⁸ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 400.

¹⁸⁹ Rishworth, above, 400.

¹⁹⁰ Daniel Kalderimis "R v Pora" (2001) NZLJ 369.

¹⁹¹ Kalderimis, above, 370.

¹⁹² Kalderimis, above, 369.

B *Should a Superior Bill of Rights Be Introduced ?*

It is argued that a governmental system including the doctrine of parliamentary sovereignty and without a superior Bill of Rights tends to be more flexible and informal.¹⁹³ But the "limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold ... are limits of the most modest dimensions which I believe any democrat would accept"¹⁹⁴. Furthermore, provided that Parliament does not legislate contrary to the Bill of Rights, the position regarding statute law is precisely the same as it is under the orthodox doctrine of sovereignty: No court is permitted to contravene the will of Parliament.¹⁹⁵

Some argue that key social policy decisions are made in a much more democratic fashion without a Supreme Court, as political choices and social policy-making decisions get transmogrified into legal issues,¹⁹⁶ and in a democracy the only law-makers should be elected ones; Judges should make law only in the "interstices", the small gaps left by legislation.¹⁹⁷ This view neglects that the judges of a Supreme Court do not make law, they are just able to strike down a statute or more likely only some provisions of it which actually contravene the Human Rights, so that Parliament can repeal or amend the legislation. Insofar, the declaration of incompatibility according to the Human Rights Act 1998 in the United Kingdom and the *Moonen* decision in New Zealand has the same effect. The only difference is that the pressure to pass new law, which does not infringe the Bill of Rights, is legal and not only practical. The German "Bundesverfassungsgericht" has made law only if the situation without any provisions would be worse and only until Parliament has passed new legislation. Furthermore, a Supreme Court does not

¹⁹³ Compare: Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168, 169.

¹⁹⁴ Rt Hon Lord Woolf of Barnes "Droit Public: English Style" [1995] PL 57, 69.

¹⁹⁵ Mark Elliott "The Demise of Parliamentary Sovereignty ? The Implications for Justifying Judicial Review" (1999) 115 LQR 119, 131.

¹⁹⁶ James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 392.

¹⁹⁷ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 411.

mean that there is judiciary supremacy, as it is the constitution of the people which is supreme and not the Court.¹⁹⁸

It is stated that many proponents of a written constitution simply believe that unelected judges are more to be trusted than elected politicians, but some see no persuasive evidence for this essentially undemocratic belief.¹⁹⁹ On the other hand, despite being criticised for some judgments, which is in my view unavoidable for a institution in such as high position, the "Bundesverfassungsgericht" is probably the most popular institution in Germany.

It is argued that opting for a superior Bill of Rights within a written constitution involves a fair degree of paternalism, not to say arrogance, as written constitutions are, by their nature, hard to amend and the whole point of a written constitution, therefore, is to lock in particular provisions and to make changes very difficult.²⁰⁰ This was justifiable only if those doing the locking-in know what is best for later generations.²⁰¹ In my opinion, guaranteeing fundamental human rights, is unlikely to become out-of-date. But, even if the case occurred, there would still be the possibility of a legitimate revolution.

If there is a Supreme Court, which could strike down acts of Parliament, the composition of this court would be a matter of considerable importance. It is argued that the executive would therefore attempt to ensure that judges are appointed who are likely to give decisions, which are in line with the executive's thinking. Although it is a fact, that most judges of the "Bundesverfassungsgericht" are members of political parties, there is no complaint about the impartiality of its judges, as the election of the judges of the "Bundesverfassungsgericht" requires a two-thirds majority by both Houses of Parliament according to Article 94 (1) ((2)) of the "Grundgesetz". The figure of the so-called guardians of the minority's rights requires that the minority has to participate in its guardians' elections.²⁰²

¹⁹⁸ Klaus Schlaich *Das Bundesverfassungsgericht* (4ed, C H Beck, München, 1997) 26.

¹⁹⁹ James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 392.

²⁰⁰ Allen, above, 392.

²⁰¹ Allen, above, 392.

²⁰² Schlaich, above, 33.

Furthermore, until today no decision was split according to the membership of the judges to the political parties.

It is also argued, that there is no basis for supposing that judges, trained in law, are better equipped to decide human rights issues than legislators, as they bring to some extent their subjective judgement to the issue.²⁰³ Although it has to be admitted that human rights law is difficult law and many decisions in courts around the world are close and very few are unanimous, it must be acknowledged that the policy issues inherent in rights questions are generally made the subject of much better argument in constitutional litigation than they are in politics, for often there will have been several years for a constitutional case to develop through the lower courts, by which time the issues will be thoroughly researched and refined by the protagonists, and courts can take as long as they like to decide.²⁰⁴ On the other hand, good decisions may be fast decisions. It can be observed in Germany that it sometimes takes years until a final decision is made.

In my opinion, the decisive argument in favour of a superior Bill of Rights protected by judges of a Supreme Court is, that the courts are better protectors of minorities, as the minority needs protection and not the majority that is represented in Parliament. The tyranny of the majority was even recognised by Tocqueville and Bacon:²⁰⁵

If force prevail above lawful regiment, how easy it will be to procure an act of Parliament to pass according to the humour and bent of the State, to sweep away all these perpetuities which are already slandered and discredited.

There are certain basic rights which should not be capable of being easily overridden by a majority, as minority rights should not depend on the pleasure of

²⁰³ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 410; James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391, 392.

²⁰⁴ Rishworth, above, 411.

²⁰⁵ Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in B D Gray and R B McClintock (eds) *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995) 206, 227.

the majority.²⁰⁶ A Parliament that respects the rights of the minorities is the ideal, but only non-elected judges are an essential insurance against the dictation of the majority.²⁰⁷

The mere power of the courts to make a declaration of incompatibility, does not help the individual that suffers from the infringement of the Bill of Rights either directly by the legislation, or indirectly by an act of the executive based on the legislation. It is unlikely that a Parliament that is aware of the infringement changes its legislation due to such a declaration. Some writers consider it as an acceptable result, if the Parliament states "Well, that is the Court's view, but ours is different".²⁰⁸ Although the electorate can decide whether it still wished those parliamentarians to retain office, the right of the individual who suffered from the legislation is still infringed and perhaps the infringement is tolerated or even approved by the majority. Furthermore, even if Parliament changed its legislation, it would be too late for the individual.

²⁰⁶ Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371, 375; compare: Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 159.

²⁰⁷ Lord Cooke of Thorndon, above, 375.

²⁰⁸ Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397, 407.

V THE BETTER CONCEPT: THE SOVEREIGNTY OF THE PEOPLE

A *Is Another Concept Possible ?*

Dicey's doctrine of parliamentary sovereignty is a coherent theory of a constitutional system. It is, however, only a theory and it is, thus, possible to take another view of the constitutional system.²⁰⁹ In the words of Lord Cooke of Thorndon:²¹⁰

Before any serious discussion of the subject it is necessary to get Dicey out of the way. Of immense historical weight, a weight still continuing among those who prefer not to be troubled by much thinking about the subject, his hypnotically persuasive pronouncements do not condescend to deal with obvious difficulties. At any rate those usually quoted do not.

As the doctrine of parliamentary sovereignty is, in my opinion, paradoxical, historically doubtful and useless, a better concept is not only possible, but also required.

B *The Concept of Popular Sovereignty*

Parliament's power to legislate cannot confer this power on itself. Thus, Parliament, as the executive and the judiciary, must look to the people for the source of its power.²¹¹

In a full and free democracy, sovereignty rests with the people.²¹² Therefore, the fundamental plank of today's constitution is the sovereignty of the people, and neither the sovereignty of Parliament nor the supremacy of the courts.²¹³

²⁰⁹ Philip Allott "The Courts and Parliament: Who Whom ?" [1979] CLJ 79, 80.

²¹⁰ Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 160.

²¹¹ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 21.

Unable to undertake the machinery of government, the people have delegated that task together with such powers as are necessary to carry it out to the three branches of government: legislative, executive and judiciary. Parliament's legislative supremacy would continue to be the rule, with Parliament enacting laws and the courts interpreting those laws. Tension would only arise, should the commitment of one or the other suffer an unconstitutional lapse.²¹⁴

The power to infringe fundamental human rights is not conferred to the government, as such power is not necessary to undertake the machinery of government. Which human rights are part of these fundamental rights depends on the perception of the consensus of the people as to what is or is not tolerable.²¹⁵

Furthermore, nothing in this concept suggests that the people have delegated to government the power to destroy this machinery.²¹⁶ Parliament's legislative supremacy as well as the court's and the executive's power is limited by its essential constitutional function. If Parliament should cease to be a representative assembly in any plausible sense, or if it proceeded to enact legislation undermining the democratic basis on which it exercises the sovereign power of the people, there is nothing which would preclude judicial resistance rather than obedience.²¹⁷

On the other hand, the exercise of the power to strike down parliamentary legislation, when it is not strictly necessary to preserve the basis of representative government or the fundamental human rights, is a usurpation of power which is as unconstitutional as would be Parliament's attempt to destroy democracy or override those rights by legislation.²¹⁸

²¹² Compare: Philip Allott "The Courts and Parliament: Who Whom?" [1979] CLJ 79, 80.

²¹³ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 21 and 36.

²¹⁴ Thomas, above, 30.

²¹⁵ Thomas, above, 25.

²¹⁶ Thomas, above, 22.

²¹⁷ T R S Allan "The Limits of Parliamentary Sovereignty" [1985] PL 621 according to E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) VUWLR 22.

²¹⁸ Thomas, above, 29.

Even Lord Cooke of Thorndon's concept of fundamental common law rights fits into this concept, as the courts can intervene if an act of Parliament breaches the delegated power.

Rt Hon Lord Woolf of Barnes takes a similar approach. He bases the parliamentary democracy on the rule of law, which consists of the supremacy of Parliament in its legislative capacity and the courts as final arbiters as to the interpretation and application of the law.²¹⁹

Similarly, in Hon Sir John Laws view, the ultimate sovereignty rests not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, he states, not the Parliament, is in this sense sovereign.²²⁰ He asserts that:²²¹

It is a condition of democracy's preservation that the power of a democratically elected government – or Parliament – be not absolute. The institution of free and regular elections, like fundamental individual rights, has to be vindicated by a higher-order law: very obviously, no government, therefore, must be allowed to do so.

Even Dicey, notwithstanding his insistence on parliamentary sovereignty, provides support for this view, as he states that “the essence of representative government is that the legislature should represent or give effect to the will of the political sovereign, ie of the electoral body, or the nation”.²²²

The German constitution is based on this concept, as well, as it states in Article 20 (2) ((1)) of the “Grundgesetz” that all state authority emanates from the people, and Article 1 (3) provides that the basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

²¹⁹ Rt Hon Lord Woolf of Barnes “Droit Public – English Style” [1995] PL 57, 68.

²²⁰ Hon Sir John Laws “Law and Democracy” [1995] PL 72, 92.

²²¹ Hon Sir John Laws, above, 85.

²²² E W Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) VUWLR 21.

VI The application of this concept renders the doctrine of parliamentary sovereignty unnecessary, as it is the people who are sovereign.²²³

Although it has to be acknowledged that this concept of popular sovereignty cannot be proven better or worse than any other concept, it is a model that mirrors the reality of today's constitution and enables an open-ended discussion about constitutional issues.

Historically, the doctrine is a concept that reflects the struggle between the Crown and the Parliament. The reason for its recognition as law of the United Kingdom and New Zealand, however, is the mere assertion in a law book that the doctrine was law.

Some features and developments in the constitutions of New Zealand and the United Kingdom require the doctrine to be re-defined in order to be applicable. Due to United Kingdom's membership in the European Union, the Treaty of Waitangi in New Zealand, some developments in the interpretation of statutes by the courts and extra-legal, practical restraints, it is at least doubtful whether such a re-definition is possible. Even if such a re-definition of the doctrine was possible, the doctrine would be without meaning as it could be applied even in Germany with its entrenched written constitution, its supreme human rights and its "Bundesverfassungsgericht" that can strike down Parliament's legislation. The term parliamentary sovereignty is therefore useless.

In short, the doctrine of parliamentary sovereignty is paradoxical, not correct, historically doubtful and useless.

As debates are often confused because of the wide variety of meanings attributable to the sovereignty of Parliament, everything and the opposite can be explained. The doctrine, therefore, has the function of a smoke-screen.

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²²³ E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) VUWLR 21.

VI CONCLUSION

The doctrine of parliamentary sovereignty is paradoxically, as Parliament is all-powerful, yet powerless to limit its powers. Furthermore, contrary to its principles, some legislation is irreversible and the doctrine therefore not correct. The remaining elements of the doctrine are based on the common definition of the term Parliament and the constitutional decision, whether there is supreme law and whether courts have the power to strike down legislation which is inconsistent with this supreme law.

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VI The usual structure of contemporary public law books is to describe the doctrine of parliamentary sovereignty in the first place and to explain in the next chapters where and why the doctrine does not apply. But instead of upholding a dubious doctrine, it is time to throw the term parliamentary sovereignty on the "historical rubbish heap", stick to the constitutional facts and discuss the advantages and disadvantages of today's constitutional issues on the fundament of a better concept, the concept of the sovereignty of the people: A superior Bill of Rights for New Zealand ? A written constitution that incorporates the Treaty of Waitangi ? Transformation into a republic ? Abolition of the Privy Council as New Zealand's highest court ? Introduction of binding referenda ?

Economic Stabilisation Act 1948

Criminal Justice Act 1963

Constitution Act 1986

Merchant Shipping Act 1968

Bill of Rights Act 1990

Defamation Act 1992

Electoral Act 1993

Citizens' Initiated Referenda Act 1993

Human Rights Act 1993

Criminal Justice Amendment Act (No 2) 1999

B Cases

Antonic Limited v Budget Compensation Commission [1969] 2 Appeal Cases (AC) 147-256

Ashby v Minister of Immigration [1981] 1 New Zealand Law Reports (NZLR) 222-234 (Court of Appeal, CA)

Attorney-General of New South Wales v Tomlinson [1932] Appeal Cases (AC) 526-542 (Judicial Committee of the Privy Council, PC)

VI BIBLIOGRAPHY

A Legislation

Treaty of Waitangi 1840

New Zealand Constitution Act 1852

Statute of Westminster 1931

“Grundgesetz” (Basic Law) 1949

European Communities Act 1972

New Zealand Constitution Amendment Act 1973

Economic Stabilisation Act 1948

Criminal Justice Act 1985

Constitution Act 1986

Merchant Shipping Act 1988

Bill of Rights Act 1990

Defamation Act 1992

Electoral Act 1993

Citizens' Initiated Referenda Act 1993

Human Rights Act 1998

Criminal Justice Amendment Act (No 2) 1999

B Cases

Anisminic Limited v Foreign Compensation Commission [1969] 2 Appeal Cases (AC) 147–256.

Ashby v Minister of Immigration [1981] 1 New Zealand Law Reports (NZLR) 222–234 (Court of Appeal (CA)).

Attorney-General of New South Wales v Trethowan [1932] Appeal Cases (AC) 526–542 (Judicial Committee of the Privy Council (PC)).

Blackburn v Attorney-General [1971] 2 All England Law Reports (All ER) 1380 – 1383.

Holder v R [1980] Appeal Cases (AC) 115 – 124 (Judicial Committee of the Privy Council).
Dr Bonham's Case [1610] 8 Co Rep 107a – 121a; 77 English Reports (ER) 638 – 658.

Evans v R [1964] Appeal Cases (AC) 900.

Brader v Ministry of Transport [1981] 1 New Zealand Law Reports (NZLR) 73 – 85 (Court of Appeal (CA)).

(CA).

Bribery Commissioner v Ranasinghe [1965] Appeal Cases (AC) 172 – 200.

Lee v Gude & Torrington Railway Company [1871] LR 6 CP 576.

British Coal Corporation v R [1935] Appeal Cases (AC) 500.

Lord Sheffield v R [1615] Hobart 74; 80 English Reports (ER) 475.

Buxoo v R [1988] 1 Weekly Law Reports (WLR) 820 – 824 (Judicial Committee of the Privy Council (PC)).

Appeal Cases (AC) 346 – 350 (Judicial Committee of the Privy Council (PC)).

Cheney v Conn [1968] 1 All England Law Reports (All ER) 779.

Mr. Kishanbhai v London & North Western Railway [1969] 1 Appeal Cases (AC) 745 – 763.

City of London v Wood [1701] 12 Mod 669 – 690; 88 English Reports (ER) 1592 – 1603.

Cheney v Conn [1968] 1 All England Law Reports (All ER) 779.

Cooke v Charles A Vogeler Company [1901] Appeal Cases (AC) 102 – 117 (House of Lords (HL)).

Cheney v Conn [1968] 1 All England Law Reports (All ER) 779.

Cooper v Attorney-General [1996] 3 New Zealand Law Reports (NZLR) 480 – 512.

New Zealand Mason Council v Attorney-General [1987] 1 New Zealand Law Reports (NZLR) 116 – 128 (Court of Appeal (CA)).

Day v Savage [1614] Hobart 85; 80 English Reports (ER) 235.

Ellen Street Estates Limited v Minister of Health [1934] 1 King's Bench (KB) 590 – 598 (Court of Appeal (CA)).

(PC).

Fraser v State Services Commission [1984] 1 New Zealand Law Reports (NZLR) 116 – 128 (Court of Appeal (CA)).

Harris v Dönges [1952] 1 Times Law Report (TLR) 1245 – 1266.

Holder v R [1980] Appeal Cases (AC) 115 – 124 (Judicial Committee of the Privy Council (PC)).

Ibralebbe v R [1964] Appeal Cases (AC) 900. *Queen's Bench (QB)* 740 – 762 (Court of Appeal (CA)).

L v M [1979] 2 New Zealand Law Reports (NZLR) 519 – 539 (Court of Appeal (CA)).

Lee v Bude & Torrington Railway Company [1871] LR 6 CP 576.

Lord Sheffield v Ratcliffe [1615] Hobart 334; 80 English Reports (ER) 475. *English Reports (ER)* 507 – 509.

Ex parte Macrea [1893] Appeal Cases (AC) 346 – 350 (Judicial Committee of the Privy Council (PC)).

Madzimbamuto v Lardner-Burke [1969] 1 Appeal Cases (AC) 645 – 745. *Appeal Cases (AC)* 115 – 146 (House of Lords (HL)).

Moonen v Film and Literature Board of Review [2000] 2 New Zealand Law Reports (NZLR) 9 (Court of Appeal (CA)).

New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 New Zealand Law Reports (NZLR) 374 – 396 (Court of Appeal (CA)).

New Zealand Maori Council v Attorney-General [1987] 1 New Zealand Law Reports (NZLR) 641 (Court of Appeal (CA)).

New Zealand Maori Council v Attorney-General [1994] 1 New Zealand Law Reports 513 (Judicial Committee of the Privy Council (PC)).

Oteri v R [1976] 1 Weekly Law Reports (WLR) 1272 – 1278 (Judicial Committee of the Privy Council (PC)).

Pickin v British Railway Board [1974] AC 765.

Police v Hicks [1974] 1 New Zealand Law Reports (NZLR) 763 – 768 (Supreme Court).

Post Office v Estuary Radio Ltd [1968] 2 Queen's Bench (QB) 740 - 762 (Court of Appeal (CA)).

Quilter v Attorney-General [1998] 1 New Zealand Law Reports (NZLR) 523.

R v Fineberg [1968] New Zealand Law Reports (NZLR) 119.

R v Inhabitants of the County of Cumberland [1795] 6 TR 194 - 198; 101 English Reports (ER) 507 – 509.

R v Pora [2001] 2 New Zealand Law Reports (NZLR) 37 (Court of Appeal (CA)).

R v Secretary of State for the Home Department, ex parte Simms [2000] 2 Appeal Cases (AC) 115 - 146 (House of Lords (HL)).

R v Secretary of State for Transport, ex parte Factortame Limited [1990] 2 Appeal Cases (AC) 85.

R v Secretary of State for Transport, ex parte Factortame Limited (No 2) [1991] 1 Appeal Cases (AC) 603; [1991] 1 All England Law Reports (All ER) 70.

R (Daly) v Secretary of State for the Home Department [2001] 2 Weekly Law Reports (WLR) 1622 – 1637 (House of Lords (HL)).

Salomon v Commissioners of Customs and Exercise [1967] 2 Queen's Bench (QB) 116 – 152 (Court of Appeal (CA)).

Re Shaw [1997] 3 New Zealand Law Reports (NZLR) 611 – 616.

Shaw v Commissioner of Inland Revenue [1999] 3 New Zealand Law Reports (NZLR) 154 – 158 (Court of Appeal (CA)).

Simpson v Attorney-General [Baigent's Case] [1994] 3 New Zealand Law Reports (NZLR) 667 (Court of Appeal (CA)).

C Secondary Materials

Solange I - Beschluss (Until I - decision) [1974] 37 BVerfGE 271 (Bundesverfassungsgericht (Federal Constitutional Court))

Solange II - Beschluss (Until II - decision) [1986] 73 BVerfGE 339 (Bundesverfassungsgericht (Federal Constitutional Court)).

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] Appeal Cases (AC) 80 – 112 (Judicial Committee of the Privy Council (PC)).

Taylor v New Zealand Poultry Board [1984] 1 New Zealand Law Reports (NZLR) 394 – 411 (Court of Appeal (CA)).

Theophile v Solicitor-General [1950] Appeal Cases (AC) 186 – 203 (House of Lords (HL)).

Thoburn v Sunderland City Council [2002] LTL 18/02/2002.

Thomas v Sorrell [1674] Vaughan 330 - 359; 124 English Reports (ER) 1098 – 1113.

TV 3 New Zealand Limited v Eveready New Zealand Limited [1993] 3 New Zealand Law Reports (NZLR) 435.

Van Gorkom v Attorney-General [1977] 1 New Zealand Law Reports (NZLR) 535 – 544.

Vauxhall Estates Limited v Liverpool Corporation [1932] 1 King's Bench (KB) 733 – 747.

Westco Lagan Limited v Attorney-General [2001] 1 New Zealand Law Reports (NZLR) 40.

C Secondary Materials

James Allen "No to a Written Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 391 – 395.

T R S Allan "The Limits of Parliamentary Sovereignty" (1985) *Public Law* (PL) 614.

T R S Allan "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 *Law Quarterly Review* (LQR) 443 - 452.

Philip Allott "The Courts and Parliament: Who Whom ?" (1979) *Cambridge Law Journal* (CLJ) 79 – 117.

Nicholas Bamforth "Parliamentary Sovereignty and the Human Rights Act 1998" *Public Law* (PL) 572 – 582.

William Blackstone *Commentaries on the Laws of England, Volume 1* (16ed, Cadell & Butterworth, London, 1826).

A W Bradley "The Sovereignty of Parliament – in Perpetuity ?" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (3ed, Clarendon Press, Oxford, 1994) 79 – 107.

Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001).

Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand – Government and Politics* (University Press, Oxford, 2001) 386 – 395.

Rt Hon Sir Robin Cooke "Fundamentals" (1988) *New Zealand Law Journal* (NZLJ) 158 – 165.

Lord Cooke of Thorndon "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 371 – 381.

P Craig "Sovereignty of the United Kingdom Parliament after Factortame" (1991) 11 *YBEL* 221.

Paul Craig "Constitutionalism, Regulation and Review" in Robert Hazell (ed) *Constitutional Futures – A History of the Next Ten Years* (Oxford University Press, Oxford, 1999) 67 – 85.

Paul Denham *Law – A modern Introduction* (4ed, Hutter & Stoughton, 1999).

Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10ed, 1885; reprinted: Macmillan & Co, London, 1959).

John Eekelaar "The Death of Parliamentary Sovereignty – A Comment" (1997) 113 *Law Quarterly Review* (LQR) 185 - 187.

Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in B D Gray and R B McClintock (eds) *Courts Policy: Checking the Balance* (Brookers, Wellington, 1995) 206.

Mark Elliott "The Demise of Parliamentary Sovereignty ? The Implications for Justifying Judicial Review" (1999) 115 *Law Quarterly Review* (LQR) 119 – 137.

B D Gray and R B McClintock *Courts and Policy* (Brookers, Wellington, 1995).

R F V Heuston *Essays in Constitutional Law* (2ed, Stevens, London, 1964).

Jörn Ipsen *Staatsrecht I – Staatsorganisationsrecht* (12ed, Luchterhand, Neuwied and Kriftel, 2000).

Keith Jackson "2.4 Parliament" in Raymond Miller (ed) *New Zealand – Government and Politics* (University Press, Oxford, 2001) 76 – 78.

Louis L Jaffe *English and American Judges as Lawmakers* (Clarendon Press, Oxford, 1969).

Ivor Jennings *The Law and the Constitution* (5ed, University of London Press, 1959).

Philip Joseph "Literal Compulsion and Fundamental Rights" (1987) *New Zealand Law Journal* (NZLJ) 102 – 104.

Philip Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 168 – 178.

Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001).

Daniel Kalderimis "R v Pora" (2001) *New Zealand Law Journal* (NZLJ) 369 – 371.

Anita Killeen, Richard Ekins and John Ip "Undermining the Grundnorm ?" (2001) *New Zealand Law Journal* (NZLJ) 299 – 308.

Hon Sir John Laws "Law and Democracy" (1995) *Public Law* (PL) 72 – 93.

Bill Mansfield "The Constraints of Treaties and International Law" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 105 – 111.

Morag McDowell and Duncan Webb *The New Zealand Legal System* (2ed, Butterworths, Wellington 1998).

John F McEldowney *Public Law* (Sweet & Maxwell, London, 1998).

Paul McHugh "Sovereignty this Century – Maori and the Common Law Constitution" (2000) 31 Victoria University of Wellington Law Review (VUWLR) 187 – 214.

O Hood Phillips and Paul Jackson *O Hood Phillips' Constitutional and Administrative Law* (7ed, Sweet & Maxwell, London, 1987).

Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights ?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 397 – 413.

Klaus Schlaich *Das Bundesverfassungsgericht* (4ed, C H Beck, München, 1997).

Bruno Schmidt-Bleibtreu and Franz Klein *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (6ed, Neuwied, 1983).

L Stephen *Science of Ethics* (Smith, London, 1883).

Sir Stephen Sedley "Human Rights: A Twenty-First Century Agenda" (1995) Public Law (PL) 386.

A W B Simpson "The Common Law and Legal Theory" in A W B Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford, 1973).

J A Smillie "'Fundamental' Rights, Parliamentary Supremacy and the New Zealand Court of Appeal" (1995) 111 Law Quarterly Review (LQR) 209 – 217.

E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 Victoria University of Wellington Law Review (VUWLR) 5 – 36.

Della Thompson (ed) *The Concise Oxford Dictionary* (9ed, Clarendon Press, Oxford, 1995).

Diana Treffry and Sheila Ferguson (eds) *Collins Paperback English Dictionary* (4ed, HarperCollins, Glasgow, 2001).

E C S Wade and A W Bradley *Constitutional and Administrative Law* (11ed, Longman, London and New York, 1993).

H W R Wade "Sovereignty – Revolution or Evolution ?" (1996) 112 *Law Quarterly Review* (LQR) 568 – 575.

Rt Hon Lord Woolf of Barnes "Droit Public – English Style" (1995) *Public Law* (PL) 57 – 71.

Della Thompson (ed) The Concise Oxford Dictionary (9th Edition) Oxford, 1993

Diana Trilling and Sheila Trilling (eds) Collier's Concise Oxford Dictionary (4th Edition) Harper, 1961

Law (1) (ed)

Quarterly

Public Law

E C S Webb

Longman, 1961

H.W.R. Wade

Review (1961)

Rt Hon Lord

(PL) 57-58

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