

# THE LAW-MAKING POWERS OF THE NEW ZEALAND GENERAL ASSEMBLY: TIME TO THINK ABOUT CHANGE

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## INTRODUCTION

The recently elected Labour Government is committed to the policy of introducing an entrenched Bill of Rights in New Zealand. One object of the proposed Bill of Rights will be the restraint of the law-making powers of the General Assembly.<sup>1</sup> The law-making supremacy of the General Assembly is the dominant feature of the structure and functioning of the present New Zealand constitution.<sup>2</sup> The Bill of Rights proposal therefore invites a critical examination of the development and nature of the current law-making powers of the New Zealand legislature.

## I THE HISTORY OF THE ACQUISITION OF PLENARY LAW-MAKING POWERS

### *The establishment of a representative legislature*

The United Kingdom conclusively acquired sovereignty over New Zealand about 1840.<sup>3</sup> Representative government was introduced to New Zealand in 1852 when the United Kingdom Parliament passed the New Zealand Constitution Act<sup>4</sup> which created the General Assembly<sup>5</sup> with limited law-making powers.<sup>6</sup> The General Assembly consisted of the Governor, an elected House of Representatives, and an appointed Legislative Council.<sup>7</sup>

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The House of Representatives together with the Governor-General constitutes the General Assembly: see s 32 of the New Zealand Constitution Act 1852. The General Assembly should be contrasted with "Parliament" which is defined in s 4 of the Acts Interpretation Act 1924 as "the House of Representatives of New Zealand in Parliament assembled". The House of Representatives is constituted by s 11 of the Electoral Act 1956.

The concept of parliamentary *supremacy* has traditionally been referred to as parliamentary *sovereignty*. Parliamentary supremacy is used in this paper because it describes more accurately the legislative powers of the New Zealand General Assembly. The word "sovereignty" suggests an unlimited law-making power when, as this paper will reveal, the legislative powers of the General Assembly are in practice limited by different factors. See Jennings, *The Law and the Constitution* (5th ed 1959) 147-148.

See generally Aikman and Robson, "Introduction" in *New Zealand: The Development of its Laws and Constitution* (2nd ed 1967, ed by Robson) 2-5; McKean, "The Treaty of Waitangi Revisited" in *W P Morrell: A Tribute* (1973 ed, Wood and O'Connor) 237-249. 15 and 16 Vict, c 72.

Section 32.

Section 53.

Section 32. The Legislative Council was abolished in 1950: see s 2 of the Legislative Council Abolition Act 1950.

Section 53 delegated to the New Zealand legislature the power "to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England . . . ."

The words "peace, order, and good government of New Zealand" impose a substantive restriction upon the General Assembly which allegedly extended to prohibiting, *inter alia*, legislation of extraterritorial effect. However, it would appear that this restriction on extraterritorial legislation may not have been as strict as was originally thought.<sup>9</sup>

The prohibition on legislation repugnant to the law of England ensured that the local legislature would remain subservient to that at Westminster. The meaning of the words "law of England" was clarified by the enactment of the Colonial Laws Validity Act 1865.<sup>10</sup> Sections 2 and 3 of this statute specified that colonial laws would be void only if they were repugnant to United Kingdom statutes extending to the colony, or order or regulations made under those statutes.

Thus the New Zealand Constitution Act 1852, since it was an imperial statute obviously extending to New Zealand, could not be amended by the General Assembly. However, the United Kingdom Parliament gave the General Assembly express powers to amend a large part of the 1852 Act when it enacted the New Zealand Constitution (Amendment) Act 1857.<sup>11</sup> The 1857 Act authorised local amendment or repeal of the whole act except for 21 of the more important sections. Power to amend all the sections of the act was not conferred until the United Kingdom Parliament passed the New Zealand Constitution (Amendment) Act 1947.<sup>12</sup> Section 53 was one of those sections which could only be amended or repealed by the United Kingdom Parliament until the enactment of the New Zealand Constitution (Amendment) Act 1947.

## 2 *The Statute of Westminster 1931*

The imperial Parliament enacted the Statute of Westminster 1931<sup>13</sup> to give the dominions greater legislative autonomy. This statute purported to allow local legislation to be valid even though it may have been repugnant to the law of England<sup>14</sup> and even though it may have been of extraterritorial operation.<sup>15</sup> The Statute of Westminster also provided that the United Kingdom Parliament only retained the right to legislate for a dominion if it declared that it did so at the request and with the consent of the dominion.<sup>16</sup>

The Statute of Westminster 1931 specifically allowed New Zealand to delay in adopting the sections broadening the legislative competence of

8 See eg *R v Lander* [1919] NZLR 305.

9 See *R v Fineberg* [1968] NZLR 119 at 122-123 per Moller J.

10 28 and 29 Vict, c 63.

11 20 and 21 Vict, c 53.

12 11 Geo VI, c 4.

13 22 and 23 Geo V, c 4.

14 Section 2.

15 Section 3.

16 Section 4. The New Zealand General Assembly specified that it alone could request a consent to legislation pursuant to s 4: see s 3(1) of the Statute of Westminster Adopted Act 1947. See also *Manuel v Attorney-General* [1983] 1 Ch 77 at 106-107 per Slade

the dominion legislature.<sup>17</sup> This New Zealand did until 1947 when it passed the Statute of Westminster Adoption Act 1947. The latter statute, by adopting sections 2 to 6 of the Statute of Westminster 1931, incorporated the intended legislative authority into New Zealand law. However, the wording of section 53 of the New Zealand Constitution Act 1852 was left unchanged.

### *The New Zealand Constitution (Amendment) Act 1947*

Section 8 of the Statute of Westminster 1931 provided an important qualification to the purported broadening of local law-making powers. It specified that the New Zealand Constitution Act 1852 was only to be altered or repealed in accordance with the law as it existed before the commencement of the 1931 Act. This meant that adoption of the Statute of Westminster 1931 still left the New Zealand General Assembly without the power to amend or repeal the remaining entrenched sections of the 1852 Act. However, the United Kingdom Parliament obliged by passing the New Zealand Constitution (Amendment) Act 1947<sup>18</sup> to provide such power. The General Assembly had requested and consented to this imperial enactment extending to New Zealand in keeping with section 4 of the Statute of Westminster 1931.<sup>19</sup>

### *The post-1947 law-making competence of the General Assembly*

Section 53 of the New Zealand Constitution Act 1852 was not expressly amended by either the adoption of the Statute of Westminster 1931 or the enactment of the New Zealand Constitution (Amendment) Act 1947. However, the restriction on legislation repugnant to that of England, and any implied restriction on extraterritorial legislation that may have existed were impliedly overridden when the Statute of Westminster 1931 was adopted. Even with these substantive limitations removed, section 53 continued to specify that legislation should be for “*the peace, order, and good government of New Zealand*”.

The Supreme Court pronounced upon the significance of this requirement in *R v Fineberg*<sup>20</sup> in 1967. In this case it was argued that section 8 of the Crimes Act 1961 was outside the law-making competence of the General Assembly. Moller J interpreted the post-1947 section 53 as allowing legislation of extraterritorial effect so long as such legislation “comes within the general scope” of, and at least in “some aspects and relations” bears upon, the peace, order, and good government of New Zealand.<sup>21</sup> The court found that section 8 of the Crimes Act 1961 satisfied these substantive requirements and was therefore valid.

In the course of his judgment Moller J stated clearly that New Zealand legislation could be challenged as being ultra vires those requirements of section 53 which remained unrepealed.<sup>22</sup> His Honour did not accept that

Section 10.

<sup>17</sup> 1 Geo VI, c 4.

<sup>18</sup> The New Zealand Constitution Amendment (Request and Consent) Act 1947.

<sup>19</sup> [1968] NZLR 119.

<sup>20</sup> Ibid at 125. With respect to the meaning of the words “peace, order, and good government” see Roberts-Wray, *Commonwealth and Colonial Law* (1966) 369-370.

<sup>21</sup> Ibid at 122.

<sup>22</sup> Ibid at 122.

the law-making powers of the General Assembly were as broad as those in the United Kingdom.<sup>23</sup> Moller J did accept, however, that the General Assembly was empowered by section 1 of the New Zealand Constitution (Amendment) Act 1947 to amend or repeal section 53, but that it had not expressly done so at the time of the decision.<sup>24</sup>

The approach taken by Moller J requires analysis. His Honour held because of the wording of section 53, that the law-making powers of the General Assembly were subject to a substantive restriction which could render purported legislation *ultra vires*. However, it was accepted that this substantive restriction could be removed by the General Assembly under the authority of section 1 of the New Zealand Constitution (Amendment) Act 1947. It would appear from these two holdings that Moller J did not consider the argument that a post-1947 statute which a court construed as not being for "the peace, order, and good government of New Zealand" could impliedly repeal any substantive restriction which section 53 continued to impose.<sup>25</sup> This is the argument that section 8 of the Crimes Act 1961, if it had not been capable of being construed as satisfying the requirements of section 53, may have prevailed and impliedly repealed the requirements of section 53 with which it was inconsistent.

The courts are reluctant to accept that a later statute has impliedly repealed an earlier statute; however, where it is not possible to construe the two statutes as capable of existing side by side, the court is obliged to acknowledge the implied repeal.<sup>26</sup> It has been held that it is proper to assume that the legislature intended the earlier requirements to be repealed even though this has not been expressly stated in the later statute.<sup>27</sup>

If the court had expressly considered the argument based on the doctrine of implied repeal and rejected it, the court would have been recognising the Westminster Parliament as having imposed a procedural restriction upon the New Zealand General Assembly when it enacted section 1 of the New Zealand Constitution (Amendment) Act 1947. The procedural restriction would have been the requirement that the General Assembly could use only *express* words to amend the provisions of the New Zealand Constitution Act 1852 which had prior to 1947 been reserved for amendment or repeal only by the United Kingdom Parliament.

The United Kingdom Parliament enacted section 1 of the New Zealand Constitution (Amendment) Act 1947, at the request of the New Zealand General Assembly,<sup>28</sup> in order to dispense with the need for some section

23 *Idem*.

24 *Idem*.

25 See *R v Fineberg (No 2)* [1968] NZLR 443 at 449 per Turner J. See also Bridge, "The Legislative Competence of the New Zealand Parliament" [1969] Pub L 112 at 120-121 and Northey, "The New Zealand Constitution" in *The A G Davis Essays in Law* (1965, Northey) 160-161.

26 See *Kutner v Phillips* (1891) 2 QB 267 at 271-272 per A L Smith J; *O'Meara v Westfield Freezing Company Ltd* [1947] NZLR 253 at 268 per O'Leary CJ; at 273-278 per Finlay J. See generally *Maxwell on the Interpretation of Statutes* (12th ed by Langan) 191. See also *Craies on Statute Law* (7th ed by Edgar) 366ff; Burrows, "Inconsistent Statutes" (1973) 3 Otago LR 601 at 607-615.

27 See *McCawley v R* [1920] AC 691 at 709 per Lord Birkenhead LC.

28 The New Zealand Constitution Amendment (Request and Consent) Act 1947.

of the New Zealand Constitution Act 1852 still to be amended at Westminster. However, there is no doubt that the Parliament at Westminster had the power to dispense with one form of entrenchment and impose another form upon the New Zealand General Assembly. The authority flowed from the fact that the United Kingdom Parliament had constituted the General Assembly and remained in the process of conferring law-making powers upon it.

The central question to which the analysis appears to lead is one of statutory interpretation. Does section 1 of the 1947 amendment impose the suggested procedural restriction upon the New Zealand General Assembly? The section provides:

It shall be lawful for the Parliament of New Zealand by any Act or Acts of that Parliament to alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act 1852; . . . .

It is submitted that a court would be stretching any judicial discretion inherent in the statutory interpretation process if it were to construe such a broadly worked authorisation as requiring the alteration, suspension, or repeal to be only by way of *express* wording. One would have expected the United Kingdom Parliament to have employed a more clear wording if it intended to displace the doctrine of implied repeal and to impose such a procedural restriction upon the General Assembly.

It is unfortunate that in the *Fineberg* case Moller J did not consider specifically some of the issues raised in the above analysis.<sup>29</sup> In holding that legislation enacted by the General Assembly could be found in 1967 to be ultra vires the remaining requirements of section 53 his Honour was inadvertently holding that the doctrine of implied repeal had been displaced by the wording of section 1 of the 1947 amendment. In the light of the discussion above, it is difficult to understand how his Honour could have come to this conclusion if he had expressly construed the words of the section in order to ascertain whether the doctrine had been displaced.

It is submitted that section 1 of the 1947 amendment should be construed as authorising the General Assembly to amend, either expressly or by implication, all the sections of the New Zealand Constitution Act 1852. It is further submitted that if this construction is combined with the law-making powers conferred by section 53, and the extension of those powers sought about by the adoption of the Statute of Westminster 1931, the New Zealand General Assembly gained a law-making competence in 1947 similar in breadth to that possessed by the United Kingdom Parliament. This submission is, of course, directly contrary to the conclusion reached by Moller J.<sup>30</sup>

Unfortunately when the *Fineberg* case came before the Court of Appeal it was not required to pronounce upon the issues of legislative competence discussed by Moller J: *R v Fineberg (No 2)* [1968] NZLR 443.  
[1968] NZLR 119 at 122.

### 5 *The New Zealand Constitution Amendment Act 1973*

The *Fineberg* decision left an air of uncertainty surrounding the legislative competence of the New Zealand General Assembly. When the Special Law Reform Committee on Admiralty Jurisdiction prepared a draft admiralty bill in 1972 it was concerned that the proposed provisions might have come into conflict with any limitations which section 53 of the New Zealand Constitution Act 1852 continued to impose. The Committee therefore proposed that a specific provision should be included in the Admiralty Act expressly declaring that its provisions should prevail over any remaining limitations expressed or implied in section 53. However, the members of the Statutes Revision Committee when, during the enactment process, they were called upon to review the proposal, thought "that the power of Parliament should be clarified and its full competence put beyond doubt and second, that this should be done on a general basis and not by piecemeal amendments".<sup>31</sup> Thus the Statutes Revision Committee thought that the clause in the Admiralty Bill should be dispensed with and that more general legislation clarifying the law-making competence of the General Assembly should be introduced since there were other statutes which would give rise to similar doubts.

Section 2 of the New Zealand Constitution Amendment Act 1973 was the legislation which followed from the recommendation. The General Assembly enacted the section with the object of resolving the uncertainty surrounding its own law-making competence. Section 2 repealed the original section 53 and inserted a new section 53 in its place. The new section 53 provides:

- (1) The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.
- (2) Without limiting the validity of any Act of the General Assembly passed before the 25th day of November 1947 (being the date of the passing of the Statute of Westminster Adoption Act 1947), every Act of the General Assembly duly passed on or after that date, and every provision of every such Act, are hereby declared to have, and always to have been valid and within the powers of the General Assembly.

It is interesting to note the incidental way by which the New Zealand General Assembly came to enact section 2 of the 1973 amendment. There was no widespread call for a clarification of the legislature's law-making powers; just a possible obstacle in the path of a particular piece of proposed every-day legislation which prompted the Statutes Revision Committee into thinking that it was time something was done to clarify the law-making powers of the General Assembly.<sup>32</sup> The nature of this constitutional development is typical of the whole evolution of the New Zealand constitution. The evolution has been largely unsystematic and unplanned change being brought about as a practical response to the revelation of needs.

Section 53 of the New Zealand Constitution Act 1852 needed to be

31 See the explanatory note accompanying the New Zealand Constitution Amendment Act 1973.

32 See the low-key and relatively insignificant parliamentary debate which accompanied the enactment of the amendment: 1973 NZ Parliamentary Debates 2232-2234, 5235-5236.

written in order to express more accurately the law-making powers of the General Assembly as they had existed since 1947. However, there is doubt as to whether, in addition to clarifying the law-making powers of the General Assembly, amendment was required in order to extend those powers. This doubt flows from the arguments which surround the *Fineberg* case. If one subscribes to the argument that after the enactment of the New Zealand Constitution (Amendment) Act 1947 the General Assembly remained subject to the substantive restriction that legislation had to be for "the peace, order, and good government of New Zealand", and that this substantive restriction could only be removed by the General Assembly if the procedural requirement of expressly worded amendment or repeal were satisfied, then an enactment in the nature of section 2 of the New Zealand Constitution Amendment Act 1973 was necessary in order for the General Assembly to achieve plenary law-making powers. This analysis is consistent with that advanced by Moller J in the *Fineberg* case.<sup>33</sup>

On the other hand, if one subscribes to the view that the General Assembly has had supreme law-making powers, restricted neither substantively nor procedurally, since the enactment of the 1947 amendment, the 1973 amendment must be seen only as a clarification rather than an extension of the law-making powers. Once again the key question to be answered in order to decide between the competing arguments is whether section 1 of the 1947 amendment imposed a procedural restriction upon the General Assembly requiring express amendment or repeal of the provisions of the 1852 act, the repeal or amendment of which had prior to 1947 been reserved for the United Kingdom Parliament. Moller J inadvertently recognised section 1 as imposing such a procedural restriction which displaced the doctrine of implied repeal. The writer, however, as has already been stated, believes that the section is not capable of this construction, and that the General Assembly has had supreme and unrestricted law-making powers since 1947.<sup>34</sup> Thus the suggestion is that the 1973 amendment should be seen as an aid to clarity of understanding, but not as an extension of the law-making powers of the New Zealand General Assembly.

Did the New Zealand Constitution Amendment Act 1973 have to satisfy the original section 53 requirement that laws be for "the peace, order, and good government of New Zealand"? It is submitted that the 1973 amendment could not have been successfully challenged as being ultra vires the original section 53 law-making authorisation. The General Assembly gained the authority to enact the new section 53 not from the original section 53, but from section 1 of the New Zealand Constitution (Amendment) Act 1947. The latter law-making power was an express delegation by the United Kingdom Parliament of authority to amend or repeal section 53 or any of the other remaining sections of the New Zealand Constitution Act 1852. The additional law-making power conferred in 1947 was not subject to the substantive fetters which may have limited the original section 53 authorisation.

See also *Re Ashman and Best* unreported, Supreme Court, Auckland, 13 April 1976, M389/76 and M390/76 (Wilson J).

Cf Jennings, *Constitutional Laws of the Commonwealth* volume I (1957) 337.

### III THE NATURE OF THE CURRENT LAW-MAKING POWERS

#### 1 *Source of law-making powers is statute rather than common law*

If the above analysis is accepted as correct, it is the United Kingdom Parliament which, through a series of statutes, has created the New Zealand General Assembly and delegated to it plenary law-making powers. The law-making power of the General Assembly thus finds its immediate legal source in statute, more particularly United Kingdom statute.

As stated earlier, the United Kingdom gained the right to legislate with respect to New Zealand from the acquisition of sovereignty about 1840.<sup>35</sup> In tracing the authority back one step further, the interesting question has to be asked, what is the legal basis of the law-making powers of the Parliament at Westminster?

It is a logical impossibility for the Westminster Parliament to have created itself as a supreme law-making body so some explanation has to be found for that Parliament's constitution and authority. The supreme law-making powers of the United Kingdom Parliament are argued to have an historic common law basis.<sup>36</sup> The expression "common law" is used because the rules of parliamentary supremacy have been promulgated and recognised by the courts. The courts have a law-making capacity; however such law making powers are normally regarded as being subservient to those of Parliament. This raises the difficult question of how the law-making supremacy of the Westminster Parliament can be explained as a common law concept when it does not have the characteristics of a common law rule, namely, the capacity to be changed by Parliament acting by a majority of one. It could be argued that the "common law", to which parliamentary supremacy is alleged to belong, is something different from that traditionally thought to be the common law. Rather, it is a body of "higher law" which cannot be altered by statute.

If the supremacy of the Westminster Parliament is explained as a common law rule, the next question must be what gives the common law its authority? The process of finding legal sources could go on ad infinitum.<sup>37</sup> In all legal systems a point has to be reached where a rule accepted as an operative legal rule even though its authority cannot be explained in traditional legal analysis. Kelsen called such a rule "grundnorm".<sup>38</sup> Hart wrote in terms of the "ultimate rule of recognition". Such rules are justified historically rather than legally.<sup>40</sup> As explained by Sir John Salmond:<sup>41</sup>

35 *Supra* n 3.

36 See eg Dixon, "The common law as an ultimate constitutional foundation" (1957) 31 *ALJ* 240 at 242.

37 *Idem.* See also *Salmond on Jurisprudence* (12th ed 1966 ed by Fitzgerald) 111.

38 See Lloyd, *The Idea of Law* (1964) 195ff.

39 Hart, *The Concept of Law* (1961) 145ff.

40 See Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1982) 92 *LQR* 591 at 593-596 for a short historical perspective on Westminster parliamentary supremacy.

41 Salmond, *Jurisprudence* (7th ed 1924) 169-170. See also *Salmond on Jurisprudence* (12th ed 1966 by Fitzgerald) 111.



[T]here must be found in every legal system certain ultimate principles, from which all others are derived, but which are themselves self-existent . . . . But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal . . . . It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.

Attempts have been made to explain Westminster parliamentary supremacy as a constitutional convention.<sup>42</sup> Such an explanation gives the concept an even lesser status than the common law, as conventions are not justiciable and may be altered by mere change of habit. The traditional understanding of the omnipotent and unalterable nature of parliamentary supremacy cannot be accommodated easily in an explanation in terms of constitutional convention.

Even though incapable of being convincingly justified in terms of legal origins, the rules of parliamentary supremacy, in varying forms, have been accepted by United Kingdom commentators and courts. Commentators are deliberately mentioned first because the theory has been largely developed and written about in extra-judicial settings, there being relatively few judicial decisions on parliamentary supremacy and thus little scope for the courts to give substance to the doctrine. Bacon,<sup>43</sup> Coke,<sup>44</sup> and Blackstone<sup>45</sup> may be cited as authorities for the traditional doctrine of continuing<sup>46</sup> supremacy. Dicey<sup>47</sup> and more recently Wade<sup>48</sup> have furthered the momentum of this thinking.

## 2 *The assumption that the New Zealand General Assembly enjoys a law-making supremacy similar in nature to that enjoyed by the United Kingdom Parliament*

The law-making supremacy of the United Kingdom Parliament is a common law doctrine whereas the law-making powers of the New Zealand General Assembly are provided by statute. It is often assumed that the United Kingdom Parliament has conferred upon the General Assembly supreme law-making powers identical in extent and nature to its own.<sup>49</sup> However, there is no reason why the courts should be obliged to adopt this assumption. They are free to construe section 53 of the New Zealand Constitution Act 1852, the Statute of Westminster 1931, and section 1 of the New Zealand Constitution (Amendment) Act 1947, as conferring a self-

42 See eg Wilson, *Cases and Materials on Constitutional and Administrative Law* (2nd ed 1976) 226.

43 See Dicey, *The Law of the Constitution* (10th ed 1959) 64 n 2 where passages are quoted from *The Works of Francis Bacon* (1858, ed by Spedding, Ellis and Heath) volume vi 159-160.

44 4 Co Inst 36.

45 1 Bl Comm, 160-162.

46 The word "continuing" is used as opposed to the word "self-embracing". The former expression means that one parliament cannot impose effective restrictions upon future parliaments, whereas the latter means that it can. See Hart, *The Concept of Law* (1961) 146.

47 Dicey, *The Law of the Constitution* (10th ed 1959) 39-85.

48 Wade, "The Basis of Legal Sovereignty" [1955] CLJ 172. Cf Wade, *Constitutional Fundamentals* (1980) 24-40.

49 See eg Scott, *The New Zealand Constitution* (1962) 10ff, 39-40.

embracing<sup>50</sup> supremacy as different from the continuing<sup>51</sup> supremacy which is argued to exist in the United Kingdom.<sup>52</sup> The statutes conferring the law-making powers have left the New Zealand courts with scope for determining the detailed nature of the law-making authority.

The New Zealand Court of Appeal, led by Mr Justice Cooke, has quietly offered a reminder in a series of recent cases that, ultimately, the nature of the supremacy of the New Zealand General Assembly may be determined only by the courts. Cooke J has suggested as obiter dictum that "[s]ome common law rights presumably lie so deep that even Parliament could not override them".<sup>53</sup> It has been suggested in the different Court of Appeal decisions: that the General Assembly may not be able to confer upon a body other than the courts the right to determine conclusively whether actions in the courts are barred;<sup>54</sup> that the General Assembly may not be recognised as capable of abdication of its own function;<sup>55</sup> that the General Assembly may not be able to take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights;<sup>56</sup> that the General Assembly may not be able to take away the right of the holder of an office in the civil service to be told what is alleged against him, and heard in his defence or explanation, before he is dismissed;<sup>57</sup> that the General Assembly may not be capable of making a person compellable to answer questions from an official by literal compulsion, such as, for example, torture.<sup>58</sup>

If the courts were to apply this suggested approach and not recognise the General Assembly's enactments as effective to achieve their stated purposes in some circumstances, the courts would not only be effecting judicial review of the parliamentary law-making process, but the courts themselves would be the authors of the substantive rules against which the validity of legislation would be determined. Even though the suggested substantive rules appear to be commendable, should the courts, which are appointed by the executive and which are not responsible to the electorate, exercise this ultimate rule-making authority in our allegedly democratic system of government? The approach suggested by the Court of Appeal should be viewed with caution. The Court of Appeal's stance does, however, serve to illustrate the reality that it is the court which will ultimately decide the nature of parliamentary supremacy.

It is likely, however, that the courts will construe the authorisation from the United Kingdom statutes as giving the New Zealand General Assembly

50 See *supra* n 46.

51 *Idem*.

52 See *eg supra* n 49.

53 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 per Cooke J. For a similar statement see *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 per Cooke J.

54 *L v M* [1979] 2 NZLR 519 at 527 per Cooke J.

55 *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 78 per Cooke J.

56 *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 37 at 390 per Cooke, McMullin, and Ongley JJ. Compare with the judicial attitude to privatisation or ouster clauses in United Kingdom and New Zealand legislation: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *O'Reilly v Mackman* [1982] 3 All ER 1124; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129.

57 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA).

58 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394.

supreme law-making powers similar in nature and extent to those possessed by the United Kingdom Parliament. It is therefore necessary to consider the approach which has been taken in the United Kingdom and other jurisdictions to the nature of so-called "supreme" law-making powers.

To say that a parliament is supreme, or can enact any legislation whatsoever, does not provide answers to some of the practical questions which may be raised about legislative competence. For example, do such law-making powers allow one parliament to impose substantive or procedural restrictions upon future parliaments? To hold that one parliament cannot impose such restrictions would detract from the fullness of the current parliament's law-making powers. However, if restrictions can be imposed on future parliaments this will detract from the fullness of the law-making powers of future parliaments.

Notwithstanding the recent obiter dicta of Cooke J, the traditional understanding is that all other law-making bodies within the structure of government, such as the executive and the courts, perform their law-making functions subject to the will of Parliament as expressed through statutes. For example, if a court-developed common law rule and a statute conflict, the statute prevails.<sup>59</sup> Similarly, if an executive-made statutory regulation and a statute conflict the statute prevails, unless that statute and the statute which authorised the regulation can be construed as intending that the regulation should prevail in those circumstances.<sup>60</sup> There is doubt, however, as to whether future parliaments can be obliged to perform their law-making functions in accordance with the will of the existing Parliament. In other words there are doubts as to whether one parliament may impose substantive and procedural restrictions upon future parliaments.

### 3 *The General Assembly's lack of power to control the substance of future legislation*

#### (a) The attitude of the courts

It is commonly believed that it is impossible for the present United Kingdom Parliament to ensure that its legislation will not be altered by future parliaments.<sup>61</sup> Parliamentary supremacy is accepted as preventing one parliament from imposing effective substantive restrictions on future parliaments. The rationale for this approach is easy to understand. The idea of one parliament establishing the law in a particular area of human activity as unchangeable for all time would not be tolerated by succeeding generations. Further, human society is in constant flux and few areas of human activity could be adequately served by immutable laws.

The English courts have made their attitude clear in two cases: *Vauxhall Estates Ltd v Liverpool Corporation*<sup>62</sup> and *Ellen Street Estates Ltd v Minister of Health*.<sup>63</sup> Both cases involved section 7(1) of the Acquisition

<sup>59</sup> See for example the court's attitude to conflict between the prerogative and statute: *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

<sup>60</sup> See eg *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742.

<sup>61</sup> See eg *Manuel v Attorney-General* [1983] 1 Ch 77 at 89 per Sir Robert Megarry V.C.

<sup>62</sup> [1932] 1 KB 733.

<sup>63</sup> [1934] 1 KB 590.

of Land (Assessment of Compensation) Act 1919 which provided:

The provision of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect.

Both courts held that notwithstanding the wording of section 7(1) of the 1919 Act, section 46 of the Housing Act 1925 repealed by implication the provisions of the 1919 Act so far as they were inconsistent. The Court of Appeal did not accept that one parliament could prevent a future parliament repealing either expressly, or by clear implication, that which the earlier parliament had enacted, although none of the judges involved offered any detailed reasoning for the rule other than to say to hold otherwise would be "absolutely contrary to the constitutional position that Parliament can alter an Act previously passed . . .".<sup>64</sup> The principle was assumed to be so well established that it did not require to be justified by detailed authority.<sup>65</sup>

#### (b) Abdication of legislative authority

The purported abdication of legislative authority by parliaments raises questions about the nature of parliamentary supremacy.<sup>66</sup> The United Kingdom Parliament has recently purported to deny itself the ability to make laws which will be in force in Canada. Section 2 of the Canada Act 1982<sup>67</sup> provides that "no Act of the Parliament of the United Kingdom passed after the Constitution Act 1982 comes into force shall extend to Canada as part of its law". In 1961 the New Zealand General Assembly similarly purported to deny itself the ability to make laws which will be in force in Western Samoa. Section 4 of the Western Samoa Act 1961 provides: "No Act of the Parliament of New Zealand passed on or after Independence Day . . . shall be in force in Western Samoa." Such moves are, from a practical political point of view, inevitable. However, would the courts recognise the legislation as effective in preventing future parliaments from enacting laws which would have the force of law in the former territories?

64 *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 at 595 per Scrutton LJ

65 Coke (4 Co Inst 43) and Blackstone (1 Bl Comm 90-91) both accepted the principle. The Union with Scotland Act 1706 provided that some of its provisions "shall remain and continue unalterable" (Article XXV 2). A Scottish court once suggested, as obiter dictum that the courts, if they were to have jurisdiction, may be obliged to act to preserve these provisions from alteration. See *MacCormick v Lord Advocate* 1953 SC 396 at 411-41 per Lord Cooper. The approach taken by Lord Cooper has not received support. See e.g. Heuston, *Essays in Constitutional Law* (2nd ed 1964) 9. At least two statutes have been passed which were arguably in contravention of the "unalterable" restriction: The Church Patronage (Scotland) Act 1711 (10 Anne, c 21) and the Universities (Scotland) Act 185 (16 and 17 Vict, c 89).

66 See generally Marshall, "What is Parliament? The Changing Concept of Parliamentary Sovereignty" (1954) 2 Political Studies 193 at 199ff.

67 1982 c 11. There are many other examples of statutes granting independence to former colonies where the United Kingdom Parliament has purported to divest itself of legislative authority: see e.g. section 1(2) of the Nigeria Independence Act 1960 (8 and 9 El 2, c 55).

If the courts were to adhere to the principle that one parliament cannot impose substantive restrictions on future parliaments, such purported closing-off of areas of potential legislation must be held to be legally ineffective. Thus, if the New Zealand courts were confronted with a statute enacted by the General Assembly after independence was granted to Western Samoa, which purported to create law intended to be in force in Western Samoa, it is likely that the courts would find the statute to be valid notwithstanding section 4 of the Western Samoa Act 1961.<sup>68</sup> To hold otherwise would be to recognise that one parliament could restrict the substantive areas in which future parliaments may legislate.

This understanding of the theoretical position has to be tempered by an appreciation of two important practical factors.<sup>69</sup> First, it is highly unlikely that either the United Kingdom or New Zealand Parliaments would, after the granting of independence, enact legislation which was intended to be in force in the former territories. Secondly, even if the respective Parliaments did enact such legislation it is unlikely that it would be enforced in the former territories by either the local courts or the local executive.<sup>70</sup>

The enforcement problem is clearly illustrated if one contemplates the likely response to the United Kingdom attempting to repeal expressly section 2 of the Canada Act 1982, or the New Zealand General Assembly attempting to repeal expressly section 4 of the Western Samoa Act 1961. The local constitutions have gained a momentum which would render reassertion of the parent country's law-making dominance impossible. The likely difficulties with enforcement do not restrict Parliament's ability to make the laws, but rather limit the effectiveness of those laws when made.<sup>71</sup>

When weaning some formerly dependent territories, the United Kingdom and New Zealand Parliaments have reserved the power to make laws intended to have force in those territories if certain procedures are complied with. For example, section 4 of the Statute of Westminster 1931 authorises the United Kingdom Parliament to make laws for New Zealand if "it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof". The English Court of Appeal recently held that the legislation need only contain the express declaration in the form required by section 4 and that no further evidence will be required of the consent and request of the dominion.<sup>72</sup>

New Zealand has reserved the power to legislate with respect to the Cook Islands<sup>73</sup> and Niue.<sup>74</sup> It is interesting to contrast the wording of section 4 of the Statute of Westminster 1931 with the wording of the reserved law-

<sup>68</sup> See *Manuel v Attorney-General* [1983] 1 Ch 77 at 87-88 per Sir Robert Megarry V-C. See also *Brader v Ministry of Transport* [1981] 1 NZLR 73 at 78 per Cooke J.

<sup>69</sup> See *British Coal Corporation v The King* [1935] AC 500 at 520 per Viscount Sankey LC; *Ibralebbe v The Queen* [1964] 1 All ER 251 at 257 per Viscount Radcliffe; *Blackburn v Attorney-General* [1971] 1 WLR 1037 at 1040 per Lord Denning MR.

<sup>70</sup> See *Manuel v Attorney-General* [1983] 1 Ch 77 at 87-88 per Sir Robert Megarry V-C. *Idem*.

<sup>71</sup> *Ibid* at 106 per Slade LJ.

<sup>72</sup> Article 46 of the Constitution of the Cook Islands (contained in the second schedule to the Cook Islands Constitution Amendment Act 1965).

<sup>73</sup> Article 36 of the Constitution of Niue, the English version of which is contained in the second schedule to the Niue Constitution Act 1974.

making powers with respect to the Cook Islands and Niue. The latter not only require that the consent and request of the local legislature be declared, but specifically require the consent and request to have been given.

The broader point with respect to section 4 of the Statute of Westminster 1931, and the equivalent New Zealand provisions with respect to the Cook Islands and Niue, is that the parent legislatures have not purported to prevent themselves from making laws intended to have force in their former territories, but rather have prescribed procedures which have to be followed before the legislation will be regarded as valid. In terms of the theory of parliamentary supremacy one could argue that it is not a substantive restriction which is being imposed upon the future parliament, but rather a procedural restriction.<sup>75</sup> Whether one parliament can impose an effective procedural restriction upon a future parliament is discussed later in this paper.

Another aspect of the question of abdication of legislative authority is raised by the entry of the United Kingdom into the European Economic Community. After entering into the Treaty of Rome, the United Kingdom enacted the European Communities Act 1972<sup>76</sup> to incorporate provisions of the Treaty into municipal law and to allow the United Kingdom to comply with the obligations of E.E.C. membership. The combination of sections 2(1) and 2(4) of the 1972 Act requires the courts to construe United Kingdom legislation subject to what is provided by E.E.C. regulations. The courts are obliged to construe in this way not only statutes in existence at the time the 1972 Act was enacted, but also statutes enacted after 1972. Since the relevant sections of the act are expressed in terms of construction, it has been suggested that the obligation imposed upon the courts is only one of interpretation.<sup>77</sup> However, where does interpretation end and the imposition of a substantive restriction begin? If the courts were to uphold E.E.C. regulations when their conflict with post-1972 legislation could only be overcome by artificial interpretation of the statute, they would, in reality, be recognising the 1972 United Kingdom Parliament as being capable of imposing effective substantive restrictions upon future Parliaments. This would be a departure from the theory of the continuing substantive supremacy of Parliament.

The relationship between United Kingdom domestic law and E.E.C. regulations has come before the English courts on several occasions. However, the courts have not had to decide whether an E.E.C. regulation prevails over an irreconcilable post-1972 enactment of the Parliament at Westminster. The courts have on several occasions commented on the pre-

75 It has been argued that s 4 of the Statute of Westminster 1931 provides only a rule of construction. In other words United Kingdom statutes will not be construed as applicable in the dominions unless they are declared to be enacted at the request of and with the consent of the dominion legislature. See eg *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597. The rule was a constitutional convention prior to the enactment of the Statute of Westminster 1931.

76 1972 c 68.

77 See Allan, "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution" (1983) Oxford Journal of Legal Studies 22.

dominance of E.E.C. regulations,<sup>78</sup> but it remains to be seen whether the courts will allow E.E.C. regulations to override, on the authority of the 1972 Parliament, later enactments of Parliament with which they are inconsistent.<sup>79</sup>

An analogous situation has arisen in New Zealand with respect to the executive's regulation-making powers under section 11 of the Economic Stabilisation Act 1948. When there is an irreconcilable conflict between regulations made under section 11 and a post-1948 statute, should the parent authorisation, that is the Economic Stabilisation Act 1948, or the later statute which is allegedly affected, be the ultimate determinant of whether the regulations or the statute should prevail? The New Zealand courts appear to see section 11 as the ultimate determinant which could be argued to be a denial of the doctrine of the continuing substantive supremacy of parliament.<sup>80</sup> The 1948 General Assembly is seen as having the potential to restrict the effective laws which can be made by a later General Assembly. It is submitted that the courts have not deliberately departed from the doctrine of the continuing substantive supremacy of parliament, but rather have not appreciated the implications with respect to the doctrine when placing so much importance on the construction of the parent authorisation at the expense of the will of the General Assembly as expressed at a later time. To be consistent with the doctrine, the courts should look to the General Assembly's intention as expressed in the later statute as the ultimate determinant in deciding whether the regulation or the statute should prevail.

#### 4 *The General Assembly's power or lack of power to impose procedural restrictions upon future General Assemblies*

##### a) Self-imposed procedural entrenchment

Doubts also surround the very important question of whether one parliament can impose effective procedural restrictions upon future parliaments. The answer to this question is important because it determines whether

<sup>78</sup> See eg *Bulmer Ltd v Bollinger* [1974] Ch 401 at 418-419 per Lord Denning MR; *Application Des Gas v Falsk Veritas Ltd* [1974] Ch 381 at 393 per Lord Denning MR; *Eso Petroleum Co Ltd v Kingswood Motors Ltd* [1974] QB 142 at 151 per Bridge J; *McCarthy's Ltd v Smith* [1981] 1 QB 180 at 200 per Lord Denning MR.

<sup>79</sup> The European Court of Justice has made it clear that in its opinion the member states have limited their sovereignty by joining the EEC: see eg *Costa v ENEL* [1964] CMLR 425; *Re Export Tax on Art Treasures (No 2)* [1972] CMLR 699. Academic opinion is divided as to whether EEC regulations or a post-1972 United Kingdom statute would prevail in circumstances of conflict: see Wilson, *Cases and Materials on Constitutional and Administrative Law* (2nd ed 1976) 228; Hood Phillips and Jackson, *Constitutional and Administrative Law* (6th ed 1978) 74ff. See contra Mitchell "The Sovereignty of Parliament and Community Law: The Stumbling Block That Isn't There" (1979) 55 *International Affairs* 33; Jaconelli, "Constitutional Review and Section 2(4) of the European Communities Act 1972" (1979) 28 *ICLQ* 65.

<sup>80</sup> See *NZ Shop Employees' Industrial Association of Workers v Attorney-General* [1976] 2 NZLR 521; *Auckland City Corporation v Taylor* [1977] 2 NZLR 413; *NZ Drivers' Association v NZ Road Carriers* [1982] 1 NZLR 374; *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742. See generally Harris, *Executive law-making under the Economic Stabilisation Act 1948* (1984) (Legal Research Foundation Inc) 17-27.

or not the New Zealand General Assembly can effectively entrench its own legislation. Entrenchment is any mechanism which requires legislation to be supported formally in the process of enactment by some body or bodies other than parliament acting by a majority of one. The entrenchment may require, for example, a majority in the General Assembly of more than one, or the approval of the majority of electors in a national referendum.<sup>81</sup> Entrenchment is used in most jurisdictions to ensure careful consideration of a proposed constitutional change and a wide base of support for that change. Provisions in written constitutions are often entrenched because of the importance of such legislation to the functioning of a country's government and legal system. Ideally, constitutional changes should be as widely supported as possible, and at least beyond the governing party. A country's organisation and stability will be threatened if the constitution, as the law behind the law, is not accepted as an almost unchangeable frame of reference which is beyond the selfish manipulation of the incumbent government.

The predominant approach amongst English commentators is not only that the supremacy of Parliament is continuing with respect to substance, but that it is also continuing with respect to procedure.<sup>82</sup> Arguably there is an obiter dictum which supports this view in the judgment of Maugham LJ in the *Ellen Street Estates* case where he said, "The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation . . .".<sup>83</sup> The imposition of procedural restrictions on a future parliament is argued to be a detraction from the supremacy of that future parliament. The law in a particular area cannot be amended or repealed by the ordinary legislative process which may restrict the actions of future governments and parliaments, who will not be able to achieve legislative change without enlisting the support of those persons or bodies required to satisfy the procedural restrictions.<sup>84</sup>

The issue is largely one of definition. Can the parliament or the law making body be redefined for different purposes? If we accept that such redefinition is not possible, then is parliament assumed to be defined for all time as a law-making body legislating by a majority of one? How does one reconcile this approach with the change in the composition of the New Zealand General Assembly when the Legislative Council was abolished,<sup>85</sup> and the change in the potential functioning of the United Kingdom Parliament when the Parliament Acts of 1911<sup>86</sup> and 1949<sup>87</sup> were passed? A struggle

81 See article 41 of the Constitution of the Cook Islands (second schedule to the Cook Islands Constitution Amendment Act 1965) for an example of entrenchment in the nature of legislative majority greater than one.

82 See eg Dicey, *The Law of the Constitution* (10th ed 1959) 68 n 1; Wade, "The Basis of Legal Sovereignty" [1955] CLJ 172 at 184; Hood Phillips and Jackson, *Constitution and Administrative Law* (6th ed 1978) 84. Cf Jennings, *The Law and the Constitution* (5th ed 1959) 151-163; Gray, "The Sovereignty of Parliament Today" (1953) 10 U Toron LJ 54 at 61ff.

83 [1934] 1 KB 590 at 597.

84 One could argue that if one parliament cannot impose procedural restrictions upon a future parliament then that is a substantive limitation upon the supremacy of the existing parliament as it is one matter with respect to which it cannot validly legislate.

85 Legislative Council Abolition Act 1950.

86 1 and 2 Geo V, c 13.

87 12, 13 and 14 Geo VI, c 103.



exists between a pure theory of parliamentary supremacy and the political reality of the inevitable pressure to change from time to time the composition and mode of functioning of a legislative body.

Neither the New Zealand nor the United Kingdom courts have been directly required to pronounce upon the validity of purported procedural restrictions on future parliaments. This is because such procedural restrictions are uncommon in the legislation of both countries. The one example in New Zealand, section 189 of the Electoral Act 1956, has never given rise to litigation.<sup>88</sup> However, the section has been the subject of some guarded judicial comment.

In *Re Hunua Election Petition*<sup>89</sup> the Full Court of the Supreme Court was concerned with comparing the relative importance of two apparently competing sections of the Electoral Act 1956. The court thought it relevant that one of the sections, section 106, was subject to section 189:<sup>90</sup>

It is said that s106 must now be regarded as entrenched by reason of the fact that by s189 it is accorded special significance. In the absence of a constitution it is difficult to appreciate that s106 is entrenched within the true meaning of that term but suffice it to say that this Court must take notice of the fact that the legislature has indicated that the section is of special significance . . . .

If one assumes that by "constitution" the court meant "written constitution", the passage quoted is suggesting that effective procedural entrenchment is not possible under the New Zealand system of parliamentary supremacy, where "higher law" in the form of a written constitution does not exist. The attempt to entrench in section 189 did, however, reveal to the court for the purposes of interpretation, the relative importance which the General Assembly intended to be attached to section 106.

One should be careful not to attribute too much importance to this comment of the court with respect to entrenchment in New Zealand. It is merely an incidental comment, which is arguably ambiguous. Furthermore, the court has used words which convey its reluctance to make a conclusive pronouncement upon this important aspect of New Zealand constitutional law.<sup>91</sup>

In its present form section 189 is not likely to give rise to litigation. The reason for this is that, although the section purports to impose procedural restrictions on the amendment of other sections,<sup>92</sup> it is not itself entrenched

<sup>88</sup> Section 189(2) provides:

"No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal —

(a) Is passed by a majority of 75 percent of all the members of the House of Representatives; or

(b) Has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts . . . ."

[1979] 1 NZLR 251.

Ibid at 298.

See Joseph, "The Apparent Futility of Constitutional Entrenchment in New Zealand" (1982) 10 NZULR 27.

The sections cover such matters as, for example, the duration of the House of Representatives (s 12), the Representation Commission (s 15), and the method of voting (s 106).

and can be amended by a majority of one. Should the General Assembly wish to avoid the procedural restriction it could simply repeal section 189.<sup>93</sup>

Because of the absence of local litigation it is necessary to look to cases decided in other jurisdictions. The crucial question is: will a New Zealand court uphold purported legislation, enacted by the ordinary legislative process, which does not comply with procedural restrictions enacted by a previous New Zealand General Assembly?

(b) Attorney-General for New South Wales v Trethowan

The first authority traditionally considered in this context is *Attorney-General for New South Wales v Trethowan*.<sup>94</sup> In 1929 the legislature of New South Wales amended the Constitution Act 1902 by inserting a new section 7A.<sup>95</sup> The new section specified the only procedure by which the Legislative Council's constitution, powers, or procedure could be altered.<sup>96</sup> A bill attempting to achieve any of these objectives was not to be presented to the Governor for the royal assent until it had been approved by the majority of those voting in a referendum of electors.<sup>97</sup> Section 7A also provided that the section itself could only be repealed or amended by a similar procedure.<sup>98</sup> The section was a clear example of what is called "double" entrenchment: the section which did the entrenching was itself entrenched.

In 1930 the incumbent government passed two bills: one an attempt to repeal this legislation and the other an attempt to abolish the Legislative Council of New South Wales. The bills passed both houses of the legislature. The Supreme Court of New South Wales granted an injunction to prevent the bills from being presented to the Governor for the royal assent until they had been supported by the majority of those voting in a referendum of electors.<sup>99</sup> The decision was upheld by the High Court of Australia<sup>1</sup> and the Judicial Committee of the Privy Council.<sup>2</sup>

In the Privy Council the advice to His Majesty was based on the operation of section 5 of the Colonial Laws Validity Act 1865. There was no doubt that, in order to enact valid constitutional legislation, the legislature of New South Wales had to act within the confines of the 1865 imperial

93 When introducing s 189 into the House of Representatives the Attorney-General (Mr. R Marshall) acknowledged that the entrenchment would not be legally effective, but he did say that a government would be compelled by extra-judicial pressures to comply with the procedural requirements. Mr Marshall made a very clear statement with respect to his own understanding of the supremacy of the New Zealand General Assembly: "Under our constitution Parliament cannot bind successive Parliaments, and each successive Parliament may amend any law passed by a previous Parliament." See 1956 NZ Parliamentary Debates 2839.

94 (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; [1932] AC 526.

95 Section 2 of the Constitution (Legislative Council) Amendment Act 1929 (New South Wales).

96 Section 7A(1).

97 Section 7A(2), (3), (4) and (5).

98 Section 7A(6).

99 (1930) 31 SR (NSW) 183.

1 (1931) 44 CLR 394.

2 [1932] AC 526.

statute. The legislature of New South Wales had only such legislative powers as were delegated to it by the United Kingdom Parliament.<sup>3</sup>

Section 5 of the Colonial Laws Validity Act 1865 ensured that constitutional continuity was maintained by the colonial legislatures. The relevant part of the section provided that:

every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law, for the time being in force in the said colony.

Section 7A had been validly enacted because section 5 of the Colonial Laws Validity Act 1865 specifically empowered colonial legislatures to modify their own “constitution, powers and procedure”, and when section 7A was enacted such legislation did not have to meet any special entrenchment requirements, but merely had to achieve simple majorities in both houses.

Similarly in 1930 the legislature had the potential to alter the legislation with respect to its “constitution, powers and procedure”, but it was obliged to satisfy the proviso to section 5 and pass the laws “in such manner and form” as was required by existing law. The “manner and form” stipulated by section 7A was the existing law and required the proposed legislation to be supported by a majority of those voting in a referendum. This requirement had not been satisfied. The Privy Council therefore held that to present the bills to the Governor for His Majesty’s assent would be unlawful, and that such unlawful action was correctly restrained by the injunction which had issued from the Supreme Court of New South Wales.

The decision of the Judicial Committee is of limited assistance in answering the question whether the current New Zealand General Assembly could effectively impose a procedural limitation upon a future General Assembly. In the *Trethowan* case the first impression is that the Judicial Committee recognised that one legislature could, by the ordinary legislative process, impose an effective procedural limitation upon itself in the future. However, the imposition of the procedural restriction was only effective because of the obligation which the United Kingdom Parliament had imposed, by section 5 of the Colonial Laws Validity Act 1865, on subsequent New South Wales legislatures. The effectiveness of the procedural restriction flowed from the “higher” authority of the United Kingdom Parliament in relation to New South Wales, where the local legislature had freedom to legislate only within the confines specified by the United Kingdom Parliament. Section 5 was one limit imposed by the United Kingdom Parliament upon the law-making capacity of the New South Wales legislature.

By a process of abstraction it could be argued that *Trethowan’s* case supports the idea that, if a pre-existing procedure exists for the enactment of specific types of legislation, the courts will insist that the procedure is complied with before the new legislation is recognised as valid. However,

See (1931) 44 CLR 394 at 425-426 per Dixon J.

it is doubtful whether such abstraction can be justified in view of the limited law-making competence of the legislature of New South Wales and the effective operation of section 5 of the Colonial Laws Validity Act 1865. It would appear that effective procedural limitations may be imposed only by some form of "higher law" such as the imperial legislation which applied to the circumstances of the legislature of New South Wales in 1930. When a legislature has unlimited law-making powers there can be no such "higher law" as it is the supreme law-making body within the territorial area.

When the *Trethowan* case was before the High Court of Australia, Dixon J commented on the effectiveness of the United Kingdom Parliament attempting to impose procedural restrictions upon itself with respect to future legislation. His Honour suggested that:<sup>4</sup>

An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so.

Dixon J went on to acknowledge that should the Bill have received the royal assent the courts would then have to decide whether or not the later purported enactment was the action of the legislative body with which the law-making supremacy resided at that time.

It can be argued that Dixon J's obiter dictum supports the view that, at least in some circumstances, self-imposed procedural restrictions will be upheld by the courts. However, there are arguments against judicial intervention before the royal assent is given to proposed legislation. The first is the courts' reluctance to review any aspect of the parliamentary law making process. The second argument is that it would be inconsistent for a court to intervene to prevent a bill passed by the normal parliamentary process from being presented for the royal assent and yet possibly to uphold such a bill as an act should it receive the royal assent before the court had the opportunity to intervene. Surely it is unlikely that a court committed to the concept of continuing parliamentary supremacy would consider intervening prior to the giving of the royal assent to prevent, in effect Parliament from exercising its supreme law-making powers. A third argument is that Dixon J erred in stating that the procedural restriction would have the force of law until a bill for their repeal received the royal assent. The argument would be that a parliament enjoying continuing supremacy cannot enact valid laws which purport to impose procedural restrictions upon future parliaments. The prohibition on the valid enactment of laws which impose procedural or substantive restrictions upon future parliaments is the one limitation on the law-making powers of parliament which enjoys continuing supremacy.

4 Ibid at 426.

(c) *Harris v Dönges*

The second major authority is *Harris v Dönges*,<sup>5</sup> a decision of the Appellate Division of the Supreme Court of South Africa. Again a court recognised that the manner and form of enactment could be determined by pre-existing legislation.

Section 35(1) of the South Africa Act 1909<sup>6</sup> required that certain legislation concerning voting rights “be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses”. This section was preserved from amendment through the ordinary legislative process by the double entrenching effect of section 152, the entrenchment being in the same terms as that in section 35.

The Separate Representation of Voters Act 1951, which provided for the separate representation of European and non-European voters in the Province of the Cape of Good Hope, was passed by the House of Assembly and the Senate sitting separately and assented to by the Governor-General. Thus section 35 was not complied with and there could not be implied repeal of section 35 because of the operation of section 152. The question of which should prevail thus arose for determination by the court; the entrenched provisions of the South Africa Act 1909, or the later Separate Representation of Voters Act 1951 enacted by the ordinary legislative process?

Had this question arisen before the enactment of the Statute of Westminster 1931 there is no doubt that the court would have been obliged to uphold the entrenching requirements.<sup>7</sup> The South Africa Act 1909 was an imperial statute which conferred the law-making power, and therefore limited and determined the way by which the Union Parliament legislated. As Centlivres CJ said:<sup>8</sup>

The Court in declaring that such a statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by statute; its duty is simply to declare and apply the law, and it would be inaccurate to say that the Court in discharging that duty is controlling the Legislature.

Since the case arose after the enactment of the Statute of Westminster 1931 the court had to determine what effect, if any, this statute had on the effectiveness of the entrenching provisions of the South Africa Act 1909. Section 2(2) of the Statute of Westminster 1931 allowed the dominion parliaments to enact legislation repugnant to that of the United Kingdom. It was argued that the Union Parliament could therefore enact legislation repugnant to the South Africa Act 1909, which was a United Kingdom statute, by “any procedure it might choose to adopt”.<sup>9</sup> The submission was

[1952] 1 TLR 1245.

<sup>9</sup> *Edw VII*, c 9.

See *R v Ndobe* 1930 AD 484.

[1952] 1 TLR 1245 at 1252. Centlivres CJ delivered the only full judgment in the case. The other four judges concurred without adding any further reasoning.

*Ibid* at 1257 per Centlivres CJ.

that the Parliament could act either bicamerally or unicamerally "no matter what the subject matter of the legislation might be".<sup>10</sup>

Centlivres CJ did not accept this argument.<sup>11</sup> His Honour approached the submission by considering whether the Statute of Westminster 1931 had repealed or amended the legislative procedure of the Union Parliament set out in the South Africa Act 1909. There was definitely no direct repeal or amendment and the question was whether there was any implied alteration to the 1909 statute. The answer to this question was an exercise in statutory interpretation. The court employed the rule in *Heydon's case*<sup>12</sup> and asked what "mischief" the Statute of Westminster 1931 was designed to overcome. One "mischief" was the supremacy of the United Kingdom Parliament. If section 2 of the Statute of Westminster 1931 were to have repealed impliedly sections 35 and 152 this would not have furthered the removal of the United Kingdom Parliament's supremacy. The Union Parliament already had power prior to the enactment of the Statute of Westminster 1931 to amend the South Africa Act 1909, providing the procedure specified in sections 35, 63 and 152 were complied with.<sup>13</sup>

Further, Centlivres CJ found that there was no evidence that the United Kingdom in enacting the Statute of Westminster 1931 intended to modify the entrenched provisions of the 1909 Act. Amendment was seen as unlikely in circumstances where there had been no request for change from the Union Parliament.<sup>14</sup> In fact the Union Parliament had passed resolutions to the effect that it did not want change.<sup>15</sup>

Centlivres CJ reasoned that in referring to "the Parliament of Dominion" the Statute of Westminster meant, in relation to South Africa the Parliament as defined by the South Africa Act 1909.<sup>16</sup> His Honour held that the Union Parliament could be defined differently for different purposes:<sup>17</sup>

In my opinion one is doing no violence to language when one regards the word 'Parliament' as meaning the Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act.

He went on to say that:<sup>18</sup>

A State can be unquestionably sovereign although it has no legislature which is completely sovereign . . . . In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted un-

<sup>10</sup> Ibid at 1259 per Centlivres CJ.

<sup>11</sup> Ibid at 1257.

<sup>12</sup> (1584) 3 Co Rep 7a, 7b.

<sup>13</sup> [1952] 1 TLR 1245 at 1257.

<sup>14</sup> Ibid at 1258.

<sup>15</sup> Ibid at 1253 and 1258. The 1929 Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation drafted a bill which subsequently became the Statute of Westminster 1931. Paragraph 67 of the report of the Conference suggests that it was understood that the provisions of the South Africa Act 1909 would continue to regulate legislative procedure in South Africa. See [1952] 1 TLR 1245 at 1253.

<sup>16</sup> Ibid at 1257.

<sup>17</sup> Ibid at 1258.

<sup>18</sup> Ibid at 1259.

section 63 and the proviso to section 152. Such a division of legislative powers is no derogation from the sovereignty of the Union, and the mere fact that that division was enacted in a British statute (viz., the South Africa Act) which is still in force in the Union cannot affect the question in issue . . . .

The South Africa Act, the terms and conditions of which were, as its preamble shows, agreed to by the respective Parliaments of the four original Colonies, created the Parliament of the Union. It is that Act and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers.

Parliament had to be functioning as required by the 1909 Act for the particular substantive purpose of the legislation before the purported legislation would be regarded as valid. Centlivres CJ saw entrenchment as the redefining of Parliament for different purposes. Parliament is the collective name given to the different composite bodies which may enact legislation for different substantive purposes. Parliament in its collective sense is supreme, rather than one particular body acting by one particular procedure being supreme.

The obligatory nature of the entrenchment may be justified by the argument that for a parliament to be supreme the courts must be able to identify that parliament and its enactments. How would the court recognise valid legislation by the "proper" legislature if the particular body was not authoritatively defined for recognition purposes? In other words, an indispensable prerequisite to the recognisable existence of a legislature is the definition of what constitutes that body for particular purposes.

Is such an approach a detraction from the traditional concept of parliamentary supremacy? It could be argued that no legislative power is taken away from a parliament. Rather, the approach facilitates the effective operation of the traditional doctrine by preserving the proper parliament from being confused with other bodies which may purport to enact legislation.

The broad principle of the logical priority of a definition of a legislative body, and the idea of parliament being defined differently for different purposes, could be considered relevant to an understanding of the nature of the law-making supremacy of the New Zealand legislature. However, the transplantation of these principles from the South African decision is complicated by the peculiar legal circumstances in which that case arose: the fact that the entrenching provisions were contained in an imperial statute and that the decision in effect held that the "higher" status of the entrenching statute survived the enactment of the Statute of Westminster 1931. The United Kingdom Parliament, in delegating the extended law-making powers to the South African Parliament through the Statute of Westminster 1931, did so subject to the condition that Parliament would continue to be defined as provided in the South Africa Act 1909. The Union Parliament had the law-making authority to free itself from the law-making procedures imposed by the parent United Kingdom Parliament, but only if those procedures were complied with when the new law-making procedures were being enacted. A New Zealand court considering the validity of self-imposed entrenchment could, if it so desired, distinguish the *Harris* decision on the

ground that the law-making power in that case was conferred by a "higher" law-making authority, namely the United Kingdom Parliament, to be exercised only in accordance with specified procedures. The New Zealand court could not point to such "higher" law-making authority to support the effectiveness of self-imposed entrenchment.

(d) *The Bribery Commissioner v Ranasinghe*

The third major decision on the effective procedural restriction of future parliaments is *The Bribery Commissioner v Ranasinghe*,<sup>19</sup> a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Ceylon. The Judicial Committee was asked to determine the validity of section 41 of the Bribery Amendment Act 1958 which was in conflict with section 55 of the Ceylon Constitution.<sup>20</sup> The Bribery Amendment Act 1958, in providing for the appointment of members of the panel of the Bribery Tribunal, provided for the appointment of "judicial officers". However, section 55 of the Constitution required such appointments to be made by a different procedure, namely by the Judicial Service Commission, which was independent of the executive. It was argued that the 1958 Act had impliedly amended the Constitution. The Constitution was, however, entrenched in the sense that no bill for the amendment or repeal of its provisions could be presented for the royal assent unless it had endorsed on it a certificate from the Speaker to the effect "that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present)".

This procedural requirement had not been met when the Bribery Amendment Act 1958 was enacted. The question therefore arose whether the entrenchment would be effective to preserve the Constitution from amendment by other than the specified procedure, and thus render the late enactment by the ordinary legislative process invalid. The Judicial Committee of the Privy Council, interestingly a court comprised exclusively of British judges, upheld the procedural restrictions on amendment of the Constitution and held the later enactment to be invalid in so far as it was inconsistent with the Constitution.

In the words of Lord Pearce who delivered the advice of the Board:

[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is 'uncontrolled' . . . . Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

19 [1965] AC 172.

20 Ceylon (Constitution) Orders in Council 1946 and 1947.

21 [1965] AC 172 at 197-198.



His Lordship did not see these principles as detracting from the supremacy of Parliament:<sup>22</sup>

The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whether it chooses, pass the amendment with the requisite majority.

The approach of the Judicial Committee is similar to that of the Appellate Division in the *Harris* case.<sup>23</sup> Parliament is seen as capable of being defined differently for different purposes. The legal authority for the effectiveness of the different definitions is arguably the logical priority which should be given to the rules which constitute and regulate the law-making body. However, notwithstanding the breadth of the principles advanced by Lord Pearce, the decision can be distinguished from the New Zealand and United Kingdom situations in the same way that the *Harris* decision is distinguishable.<sup>24</sup> The United Kingdom delegated a law-making capacity to the Ceylonese Parliament. The law-making power of the Ceylonese Parliament was conferred by a "higher" law-making authority which specified certain manner and form requirements that had to be satisfied before the local law-making power could be recognised as existing.<sup>25</sup>

(e) Conclusions with respect to procedural restrictions

The practical question, so far as the General Assembly of New Zealand is concerned, is whether self-imposed procedural restrictions would be effective. Could the current General Assembly, by the ordinary legislative process, impose effective procedural restrictions upon future General Assemblies? There are no direct precedents with respect to such a situation. As has already been discussed, *Trethowan's* case, *Harris' case* and *Ranasinghe's* case can all be distinguished because of the "higher status" of the law imposing the procedural restrictions. However, the reasoning implicit in the latter two decisions could be argued to support the principle that self-imposed procedural restrictions should be effective in New Zealand.<sup>26</sup> That is the idea that a supreme parliament can be defined differently for different purposes, and that procedural restrictions enacted in accordance with the existing procedure should be complied with, because of the logical priority of those rules constituting and regulating the legislative process.

If one is to support the principle that one parliament should be able to impose procedural restrictions on future parliaments, but not substantive restrictions, a problem arises. How is a line to be drawn between procedural

<sup>22</sup> Ibid at 200.

<sup>23</sup> For a further acceptance of this approach see *Victoria v The Commonwealth of Australia and Connor* (1975) 134 CLR 81 at 162-165 per Gibbs J.

<sup>24</sup> For a judicial discussion of the distinction between the constitutional contexts in *Harris* and *Ranasinghe* and that in the United Kingdom see *Victoria v The Commonwealth of Australia and Connor* (1975) 134 CLR 81 at 162-164 per Gibbs J.

<sup>25</sup> [1965] AC 172 at 199.

<sup>26</sup> See eg Aikman in *New Zealand: The Development of its Laws and Constitution* (2nd ed 1964, ed Robson) 66-69.

restrictions and substantive restrictions?<sup>27</sup> Is the requirement that a parliament only enact legislation in a certain area by a unanimous vote a procedural or a substantive restriction? One could argue that it is only a procedural redefinition of the parliament for that particular purpose because it would still, theoretically, be possible for parliament to enact legislation in that substantive area. The contrary argument is that the practical difficulty of achieving a unanimous vote in a parliament means that legislation in the particular area will seldom, if ever, be changed. It is unlikely that the courts would allow "manner and form" restrictions to achieve indirectly what cannot be done directly. The court would have to decide in each case whether the particular procedural requirement in reality amounted to an unjustified prohibition on any legislative change in a substantive area. Such a decision would inevitably be discretionary. The justification for entrenchment would have to be balanced against the undesirability of substantive restrictions on future parliaments.

Notwithstanding the persuasiveness of the arguments advanced for the validity of self-imposed procedural entrenchment, it is unlikely that the New Zealand courts would uphold such restrictions.<sup>28</sup> The courts are unlikely to be persuaded by the idea that the rules constituting and regulating the legislative process should be complied with because of their logical priority. This is so despite the courts' willingness to recognise the effectiveness of the self-imposed redefinition of the General Assembly when the Legislative Council was abolished in 1950.<sup>29</sup> The courts are likely to insist upon more convincing authority for the overriding effect of the procedural restrictions.<sup>30</sup>

The imposition of the restrictions by a "higher" law-making body may be sufficient authority. However, the courts are unlikely to recognise the present General Assembly as capable of being subject to such a "higher" law-making authority. A law-making body cannot enjoy a supremacy which is continuing with respect to both substance and procedure, and yet at the same time be subject to a "higher" law-making authority. Effective procedural restrictions are not likely to be established in New Zealand until the nature of the legislature is changed so that the General Assembly acting by a majority of one no longer has supreme law-making powers. Such change would inevitably involve the setting up of a legislature subject to a "higher" law, that law imposing the procedural restrictions.

27 See *Attorney-General for the State of New South Wales v Trethowan* (1931) 44 CLR 39 at 442-443 per McTiernan J; Friedmann "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change" (1950) 24 ALJ 103 at 105-106; Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) 141-142.

28 It is interesting to contrast the predictions of two writers as to whether self-imposed procedural restrictions on a future New Zealand General Assembly would be effective. See Turner, "Steering the Ship of State — Functions of Parliament" (1980) 10 VUWLR 2 at 213-214 and Palmer, *Unbridled Power* (1979) 128-129.

29 Legislative Council Abolition Act 1950.

30 See *Re Hunua Election Petition* [1979] 1 NZLR 251 at 298.

## 5 Judicial review of the legislative process

### (a) The attitude of the courts

If one parliament were able to impose effective procedural restrictions upon a future parliament some mechanism would have to exist for pronouncing statutes which did not comply with the specified procedural restrictions to be invalid. The court is the logical existing body in the structure of government to perform this role.

When the law-making powers of the General Assembly were limited substantively by the original authorisation in section 53 of the New Zealand Constitution Act 1852, there was no doubt that the court could declare purported legislation *ultra vires* if it was not within the authorisation.<sup>31</sup> Since there are no longer any substantive restrictions on the legislative competence of the General Assembly such judicial review will not take place.

Now that the General Assembly enjoys a law-making supremacy similar to that possessed by the United Kingdom Parliament, it is highly unlikely that the courts would be willing to review the legislative process at all. The English courts have shown a clear unwillingness to undertake such review.<sup>32</sup> However, most of the decisions where jurisdiction has been declined have arisen in the context of attempted review of the deliberative processes of Parliament.<sup>33</sup> Different reasons have been put forward as explanations for the courts' attitude. It has been explained historically in terms of Parliament's origin as the highest court.<sup>34</sup> All other courts being of inferior jurisdiction were unable to review the exercise of Parliament's jurisdiction. Another explanation put forward is that since Parliament is omnipotent no criteria exist against which legislation may be measured.<sup>35</sup> The subservience of the courts to the supremacy of Parliament is inherent in this idea. Yet a further explanation is the desire, in the interests of maintaining the stability of the constitution, that in all circumstances conflict between the courts and Parliament should be avoided.<sup>36</sup>

The internal workings of the House of Representatives are insulated by the amorphous concept of parliamentary privilege. Basic to parliamentary privilege is the idea that the House itself should regulate and control its

31 See eg *R v Lander* (1919) NZLR 305 and *R v Fineberg* [1968] NZLR 119.

32 See eg *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710 at 725 per Lord Campbell; *Lee v The Bude and Torrington Junction Railway Company* (1871) LR 6 CP 576 at 582 per Willes J; *Labrador Company v The Queen* [1893] AC 104 at 123 per Lord Hennen; *Hoani Te Heuheuk Tukino v Aotea District Maori Land Board* [1941] AC 308 at 322 per Viscount Simon LC; *British Railways Board v Pickin* [1974] AC 765 at 786-787 per Lord Reid; at 790-792 per Lord Morris of Borth-y-Gest; at 792-793 per Lord Wilberforce; at 798-800 per Lord Simon of Glaisdale; at 801 per Lord Cross of Chelsea. See also a recent Scottish decision: *Sillars v Smith* 1982 SLT 539.

33 See eg *British Railways Board v Pickin* (1974) AC 765. In the United Kingdom the Royal Assent Act 1967 (1967 c 23) details the procedure required to signify royal assent. If this procedure were not followed, would the enactment be valid? Would the courts even be willing to look into the question?

34 See eg Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 591 at 595.

35 See eg Mitchell, "The Sovereignty of Parliament and Community Law: The Stumbling Block That Isn't There" (1979) 55 International Affairs 33 at 42.

36 See eg *British Railways Board v Pickin* [1974] AC 765 at 788 per Lord Reid; at 799 per Lord Simon of Glaisdale.

own internal workings.<sup>37</sup> For example, it is for the House to decide how many readings a bill should have before it is sent to the Governor-General for assent. The Bill of Rights 1688<sup>38</sup> purported to maintain this privilege when in article 9, section 1, it provided:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Perhaps this section articulates the real reason for the courts' traditional unwillingness to review the processes of parliament: the desire that the legislative body should enjoy the maximum freedom of deliberation.<sup>39</sup> Members should be able to speak without fear of any consequences other than those political.<sup>40</sup>

It can be argued, however, that procedural review, which is essential if effective entrenchment is to exist within a constitutional system, does not trespass upon the sacred deliberative functions of the legislature. Few would question the principle of maintaining an environment which allows the maximum freedom of debate prior to the making of laws. The court in insisting upon, for example, evidence of certain majorities in Parliament, or the support of a national referendum, cannot be criticised as limiting what is said in debate. On the contrary, the existence and enforcement of such restrictions may enhance the quality of debate because of the greater support, either within or outside Parliament, which will have to be mustered before the proposed legislation is enacted.

The absence of entrenchment in New Zealand and the United Kingdom has meant that the courts have not been called upon to enforce procedural restrictions. Once again it is necessary to look to other jurisdictions for guidance. *The Bribery Commissioner v Ranasinghe*<sup>41</sup> is the case most often

37 Ibid at 790 per Lord Morris of Borth-y-Gest.

38 1 Will and Mar sess 2, c 2.

39 See *Pickin v British Railways Board* [1974] AC 765 at 788-799 per Lord Simon of Glaisdale.

40 Obviously some rules are required to allow effective debate in the House of Representatives. These rules are found in the Standing Orders and non-compliance with them may amount to breach of parliamentary privilege. Such a breach may be punished by the House of Representatives.

41 [1965] AC 172. *Attorney-General for New South Wales v Trethowan* [1932] AC 526 can also be argued to support the idea of judicial review of legislation with respect to maintaining procedural requirements. The Judicial Committee did not expressly discuss the issue but rather assumed that the court could determine whether the procedural requirements had been satisfied. However, the issue was discussed in the High Court of Australia: see (1931) 44 CLR 394 at 425-426 per Dixon J. Further, *Harris v Dönges* [1952] 1 TLR 1245 at 1252 and at 1262-1263 per Centlivres CJ supports judicial review of legislation with respect to maintaining procedural requirements. The High Court of Australia has recently affirmed that the court may review whether the procedural requirements imposed by the Australian Constitution on law-making have been satisfied. See *Cormack v Cope* (1974) 3 ALR 419 at 427 per Barwick CJ; *Victoria v The Commonwealth of Australia and Connor* (1975) 134 CLR 81 at 117-119 per Barwick CJ; at 162-165 per Gibbs J. *Ranasinghe, Trethowan, Harris, Cormack* and the *Victoria* case can all be distinguished from the New Zealand and United Kingdom contexts because the courts, in being willing to uphold the procedural restrictions, are arguably upholding the "higher law" rather than upholding self-imposed procedural restrictions.

ited as an example of a court's willingness to review the processes of a parliament to see whether pre-ordained procedural requirements have been complied with. Lord Pearce said in delivering the advice of their Lordships:<sup>42</sup>

[I]t has been argued that the court, when faced with an official copy of an Act of Parliament, cannot inquire into any procedural matters and cannot now properly consider whether a certificate was endorsed on the Bill. That argument seems to their Lordships unsubstantial, and it was rightly rejected by the Supreme Court. Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process.

The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth. Their Lordships were informed by counsel that there were two duplicate original Bills and that after the Royal Assent was added one original was filed in the Registry where it was available to the court. It was therefore easy for the court, without seeking to invade the mysteries of parliamentary practice, to ascertain that the Bill was not endorsed with the Speaker's certificate.

The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act. But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making.

The justification for the court's intervention in the *Ranasinghe* case could be argued to be necessity. In other words, since a "higher law" was recognised to exist, some mechanism *had* to be available to enforce it.<sup>43</sup> As has been discussed above, the situation in *Ranasinghe's* case can easily be distinguished from that prevailing in New Zealand and the United Kingdom.

#### b) Sections 28(1) and 29(1) of the Evidence Act 1908

Even if the New Zealand courts were willing to review the law-making process in order to ensure compliance with procedural restrictions certain further obstacles may have to be overcome. Section 28(1) of the Evidence Act 1908 provides: "Every Act shall, unless it is expressly declared to be a private Act, be deemed to be a public Act, and judicial notice shall be taken thereof by all Courts and persons acting judicially." Section 29(1) of the same act further provides: "Every copy of any public Act printed under the authority of the Government by the Government Printer shall be evidence of such Act and of its contents; and every copy of any such Act purporting to be printed as aforesaid shall be deemed to be so printed unless the contrary be proved."<sup>44</sup> It is submitted that the two subsections are stating:

that judicial notice shall be taken of every public act by the courts;

[1965] AC 172 at 194-195.

See also *Attorney-General for the State of New South Wales v Threlkeld* (1931) 44 CLR 394 at 425-426 per Dixon J. Similar reasoning compelled judicial review of legislation to be accepted by Marshall CJ in the famous United States authority: *Marbury v Madison* 1 Cranch 137; 2 L Ed 60 (1803).

See also s 17 of the Acts Interpretation Act 1924.

2. that government printer copies of public acts shall be deemed to be evidence of such acts;
3. that if a copy of an act purports to be a government printer copy it will be deemed to be so unless the contrary is proved.

It could be argued that these statutory provisions would prevent the New Zealand courts from reviewing the General Assembly's law-making process.<sup>45</sup> Whether the sections will have this effect will turn on the courts' interpretation of the obligations imposed by the words "judicial notice shall be taken thereof" in section 28(1). The courts may hold that the particular wording indicates that the General Assembly has imposed a mandatory requirement that judicial notice must be taken and that therefore it is not open to a party to introduce argument or evidence which denies that of which judicial notice is obliged to be taken. The use of the word "shall", rather than "will" or "may", arguably indicates that the General Assembly did not intend the courts to have a discretion as to whether judicial notice should be taken of acts of Parliament. Further, there is strong support for the view that the taking of judicial notice at common law does not merely create a rebuttable presumption, or establish *prima facie* evidence, but rather is conclusive in establishing for the court's purposes the fact or law of which judicial notice is taken.<sup>46</sup>

Several arguments can, however, be advanced to support the idea that sections 28(1) and 29(1) of the Evidence Act 1908 will not operate to prevent judicial review of the law-making process. The object of the taking of judicial notice is to expedite litigation; to remove the need to prove formally that which is beyond dispute or that which can be easily ascertained from accurate sources.<sup>47</sup> If judicial notice were to operate so as to prevent the courts from reviewing irregularities in the parliamentary law-making process it would arguably be causing consequences beyond its intended purpose.

With this reasoning as a foundation it could be more specifically argued that notwithstanding the statutory wording, and the authorities suggesting that judicial notice is conclusive, sections 28(1) and 29(1) merely create a rebuttable presumption. In other words it is not necessary for the parties to litigation to introduce evidence to prove acts of Parliament; however the court's right to take judicial notice does not prevent a party from introducing evidence and argument to prove that what is alleged to be an act of Parliament is in reality not one because the prerequisite procedure for enactment has not been observed.

The argument could be advanced that a purported statute which has not been enacted in accordance with the procedure specified for its enactment is not an "act" and that therefore sections 28 and 29 do not apply. This argument may be supported by drawing an analogy with statutory regulations. Sections 28(2) and 29(2) provide for judicial notice to be taken of statutory regulations in a similar way to that provided for statutes, yet

45 See *Simpson v Attorney-General* [1955] NZLR 271 at 284 per Hutchison J; at 286 per McGregor J.

46 See *Auckland City Council v Hapimana* [1976] 1 NZLR 731 at 732-734 per Somers.

47 Ibid at 732 per Somers J.

these sections have not discouraged the courts from reviewing regulations in order to ascertain whether or not they are ultra vires.<sup>48</sup>

A less conceptual and more pragmatic approach would be to argue that when confronted with the conflict between the need for judicial review, in order that the system of entrenchment may be effective, and the wording of section 28(1) of the Evidence Act 1908, the courts should construe section 28(1) as having been impliedly modified to the extent that it is in conflict with the intention of the General Assembly as expressed in the later legislation imposing the entrenchment. The suggestion is, that if the New Zealand courts were otherwise willing to review the parliamentary law-making process to ensure compliance with procedural requirements, sections 28 and 29 of the Evidence Act 1908 would not prove an insurmountable obstacle to such review. If the General Assembly were to attempt to impose effective procedural entrenchment upon future General Assemblies it is, however, highly likely that sections 28 and 29 of the Evidence Act 1908 would be expressly amended so as to remove any obstacle to judicial review of the law-making procedures which the sections may currently impose.

*Existing practical limitations upon the  
supremacy of the General Assembly*

So far in this paper the view has been propounded that the New Zealand General Assembly is a law-making body capable of doing almost<sup>49</sup> anything by a majority of one. In theory this may be so; however, there are numerous practical factors which restrict what the theoretically supreme legislature may do in reality.

First, the efficacy of any legislation is dependent upon voluntary compliance by the bulk of the population. The inevitable limitations, economic and otherwise, upon the mechanisms which the government has available to enforce laws mean that laws may be successfully enforced if it is only a minority of the population who do not voluntarily comply. A prerequisite of voluntary compliance is acceptance and a law will only be accepted if those whose activities are regulated by the law support its existence. Thus the General Assembly is restricted to enacting legislation which the government is capable of enforcing. One could accurately say that political as distinct from legal sovereignty lies with the people.<sup>50</sup>

Related to the important factor of acceptance is the influence of public opinion on legislation. Governments are sensitive to public opinion, especially when the term of Parliament is only three years.

Another class of legislation which will be ineffective is that which purports to achieve what is physically impossible. The General Assembly could effectively legislate that the only land available for residential purposes in New Zealand should be that area of land currently known as "Eden

<sup>48</sup> See eg *NZ Drivers' Association of Workers v NZ Road Carriers' Industrial Union of Employers* [1982] 1 NZLR 374.

<sup>49</sup> See *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 per Cooke J.

<sup>50</sup> See Dicey, *The Law of the Constitution* (10th ed 1959) 73.

Park". To accommodate from a residential point of view the whole population of New Zealand in that one park would be a physical impossibility.

A related practical limitation on law-making is the requirement that the law has to be capable of being adequately expressed in words. If the wording is vague and the courts are unable to give it an explicit meaning, the purported law will not be enforced.<sup>51</sup>

International law and contractual obligations may from a practical point of view circumscribe the legislative scope of the General Assembly. There is no doubt that such obligations could be overridden by the General Assembly; however, the political consequences, domestic and international, would make such a course of action unlikely.<sup>52</sup>

The election itself may constrain the legislative programme of the newly elected government in the sense that that government will be morally, although not legally, obliged to carry out the legislative promises contained in its election manifesto. The election of the government may be construed as a compelling expression of electoral support for the proposed new laws.

#### IV THE NEED FOR REFORM

A number of conclusions about the nature of the law-making powers of the New Zealand General Assembly may be advanced as a result of the above discussion. First, the United Kingdom Parliament has conferred the law-making powers through a series of statutes. Secondly, the powers conferred are likely to be construed by the courts as being similar in nature to those possessed by the United Kingdom Parliament. That is, one Parliament may not restrict a future Parliament, either substantively or procedurally. Further, the courts have demonstrated a clear disinclination to review the legislative process. Finally, although the law-making powers of the General Assembly may, in theory, be unlimited, a miscellaneous collection of practical factors exists to restrict the legislators. Most of these practical factors are influential, rather than obligatory, in nature and therefore they do not detract from the principle that the General Assembly has the potential to enact or amend any law whatsoever by a majority of one.

Modern party politics has put an important qualification upon Parliament acting by a majority of one. Party discipline is particularly effective in the relatively small New Zealand House of Representatives, crossing the floor of the House to vote against one's own party being a rare occurrence. The combination of party discipline and the General Assembly's ability to legislate by a majority of one means that the governing party may be reasonably confident of turning its policies on any matter into legislation irrespective of the thinking of any opposition. Those members of Parliament who do not belong to the governing party may criticise and attempt to excite a public reaction against the proposed legislation. However, the reality is that supreme law-making power resides with the government.

51 See Turner, "Steering the Ship of State — Functions of Parliament" (1979) 10 VUW 209 at 215-217.

52 See *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1.



the day rather than with the full elected House of Representatives acting together with the Governor-General.

The General Assembly acting by a majority of one has too much power. Some purposes for which it is necessary to make laws are so important to society that laws with respect to these purposes should only be made, or changed, after careful deliberation, and support has been ascertained to exist well beyond the governing party. This principle has already been acknowledged by the New Zealand General Assembly when it enacted section 189 of the Electoral Act 1956, although as discussed above, the entrenchment is unlikely to be effective. The electoral process is an obvious substantive area where the laws setting up the system should only be made by a legislative process which requires the proposed law to be supported by a sizeable proportion of society. Other substantive areas of law concerned with the structure and functioning of government deserve a similar legislative process. For example, the laws establishing and regulating the law-making process itself, the court system, and the Governor-General, would fall into this category.

It can be argued that proposed laws which threaten specified basic human freedoms should only be enacted through a legislative process which demands evidence of broad support from society. This is the idea currently being advanced by the Labour Government that New Zealand should follow the recent example of Canada<sup>53</sup> and adopt an entrenched Bill of Rights against which legislative action and executive action may be measured by the courts. The Canadian Charter of Rights and Freedoms "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".<sup>54</sup> Subject to this qualification the Charter guarantees: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.<sup>55</sup> Subject to the same qualification the Charter purports to guarantee a variety of: democratic rights,<sup>56</sup> mobility rights,<sup>57</sup> legal rights,<sup>58</sup> equality rights,<sup>59</sup> and language rights.<sup>60</sup>

The need for a law-making process which requires evidence of a broader base of support for some proposed laws is well illustrated by recent fluctuations in areas of New Zealand electoral law which are outside the range of sections to which section 189 of the Electoral Act 1956 applies. The fluctuations have resulted from a difference in policy between the 1972-1975 Labour Government and the succeeding National Government. The first example concerns the right of prisoners to vote in general elections.

See the Canada Act 1982 (1982 c 11).

Section 1 of the Canadian Charter of Rights and Freedoms. The Canadian Charter of Rights and Freedoms is part I of the Constitution Act 1982. The Constitution Act 1982 is set out in schedule B to the Canada Act 1982 (1982 c 11).

Section 2 of the Canadian Charter of Rights and Freedoms.

Ibid, ss 3, 4 and 5.

Ibid, s 6.

Ibid, ss 7, 8, 9, 10, 11, 12, 13 and 14.

Ibid, s 15.

Ibid, ss 16, 17, 18, 19, 20, 21, 22 and 23.

In 1975 the Labour Government enacted legislation to confer this right;<sup>61</sup> however, the right was taken away when the National Government returned to power.<sup>62</sup>

The second example, which is a little more complicated, concerns the Maori electoral districts. Until 1975 the number of Maori electoral districts had been fixed by statute at four, and the Governor-General was given a discretion, which did not have any criteria specified for its exercise, to determine where the boundaries of the districts should be drawn.<sup>63</sup> In 1975 the Labour Government caused the General Assembly to bring the Maori electoral districts under the auspices of the Representation Commission, which was the body charged with the responsibility of determining the number and boundaries of the general electoral districts.<sup>64</sup> The statute provided specific criteria which the Commission had to take into account in determining the number and the boundaries of the Maori electoral districts. The criteria were such that there had to be a population correspondence between Maori and general electoral districts, the calculation of the Maori population being derived from the number of Maoris who had applied to be registered as electors of a Maori electoral district rather than from the actual Maori population. As a result of this last factor it was possible that the number of Maori seats may have varied; possibly decreased from the existing number of four. The variations would have resulted from the movements in both directions between the Maori and general electoral rolls, all Maoris being free to choose to be on one or other roll at any one time. A mass movement of Maoris from the Maori to the general electoral rolls would have led automatically to the reduction, and possibly the disappearance, of the Maori seats.

This major change to the system of Maori representation in the House of Representatives did not last very long. The National Government repealed the innovation and restored the status quo almost immediately upon coming into office and well before the new system could be put into practice.<sup>65</sup>

Thus the pattern with both these examples is for an innovation to have been made by one government, and for that innovation to have been repealed and the status quo restored by the succeeding government. Both the substantive matters effected are important aspects of the electoral process and therefore of the structure and functioning of government. Constitutional provisions regulating who may vote in a parliamentary election and the nature of Maori representation in the House of Representatives should not be altered freely at the whim of the incumbent government. The importance of the provisions transcends individual governments which may be tempted to modify the laws to their own advantage.<sup>66</sup> These are

61 See s 18(2) of the Electoral Amendment Act 1975.

62 See s 5 of the Electoral Amendment Act 1977.

63 See s 23 of the Electoral Act 1956 as it was originally enacted.

64 See s 8 of the Electoral Amendment Act 1975.

65 See s 2 of the Electoral Amendment Act 1976. See now, however, s 8 of the Electoral Amendment Act 1981 which has returned the control of the boundaries of the Maori electoral districts to the Representation Commission.

66 Cf s 3 of the Canadian Charter of Rights and Freedoms (Canada Act 1982 (1982 c 11 schedule B)).

the laws upon which the whole system of government is based. They ensure the maintenance of a fair democratic system in which successive governments have only a limited tenure of office. Each government should perform its role subject to the constitutional system, change of the system requiring support from not only the incumbent government, but also from those who may form future governments. A breadth of support should be required that will ensure that innovation and changes are only made after extensive deliberation.

It is submitted that the present system of government gives the General Assembly, acting by a majority of one, too great a breadth of law-making power. The system has to be changed to ensure that law-making in selected substantive areas is only carried out after extensive deliberation, and evidence of broader support from society than is represented by the House of Representatives acting by a majority of one.

## V SUGGESTED REFORM

If the courts were to recognise the supremacy of the New Zealand General Assembly as being procedurally self-embracing in nature, and if they were willing to review legislation in order to ensure that procedural requirements were satisfied, the effective entrenchment required to ensure broad support for law-making in important substantive areas could be enacted by the General Assembly itself. However, as discussed above, the courts are unlikely to adopt this approach. Therefore a more dramatic reform is called for. The doctrine of parliamentary supremacy, as it is currently understood, should be abolished. The suggestion is that an entrenched written constitution should be established by some mechanism other than enactment by the General Assembly itself.

### *Ways by which New Zealand could establish an entrenched written constitution*

In order to establish an effectively entrenched written constitution in New Zealand the existing General Assembly with its supreme law-making powers would have to be abolished. Further, the new written constitution would have to have the authority of "higher law" and the new legislature created by the constitution would have to exercise its powers subject to the constitution.

At least three possible methods exist whereby a written constitution with the authority of "higher law" could be established in New Zealand. The first method would be for the New Zealand General Assembly to follow the recent example of Canada<sup>67</sup> and request the United Kingdom Parliament, pursuant to section 4 of the Statute of Westminster 1931, to abolish the present General Assembly and enact a written constitution setting up a new legislature which was subject to different procedural requirements for the enactment of legislation in different substantive areas. As part of this legislation the United Kingdom Parliament could specifically provide that no future statutes that it may enact should extend to New Zealand

See the Canada Act 1982 (1982 c 11). See generally Hogg, "Supremacy of the Canadian Charter of Rights and Freedoms" (1983) 61 Can B Rev 69.

as part of New Zealand's law.<sup>68</sup> As discussed earlier in this paper, the doctrine of the continuing substantive supremacy of the United Kingdom Parliament may not allow such a prohibition to be upheld by the United Kingdom courts. However, it is unlikely that the United Kingdom Parliament would wish to override the expressed intention. Secondly, even if such an overriding statute were enacted by the United Kingdom Parliament it is unlikely that it would be regarded as effective by the New Zealand executive or courts once the new self-contained constitution had gained a momentum of its own.<sup>69</sup> This method for setting up a written constitution would be a return to the former system of the imperial Parliament delegating limited law-making powers to the local legislature.

Establishing a written constitution for New Zealand by this method has two main attractions. First, it maintains constitutional continuity. There is no stage in the transformation process which could be argued to be unauthorised by the presently existing legal order. Secondly, the necessity for entrenchment to be imposed by a "higher law" is satisfied. The authority of the "higher law" would be necessary in order to abolish the present New Zealand General Assembly, and to set up an entrenched written constitution constituting the new less-than-supreme legislature. The new legislature would be constituted by the United Kingdom Parliament, and would be obliged to exercise its law-making powers subject to limitations imposed by the United Kingdom Parliament.

A second possible method of establishing a written constitution would be for the New Zealand General Assembly to set up a convention, transfer all its powers to that body, and then abolish itself. The convention could then create a written constitution with a new legislature, the law-making powers of which would be limited by the constitution. The authority of the new written constitution would be enhanced if it were approved by the majority of voters in a national referendum. The latter action would allow the will of the people to be the authority for the "higher status" of the written constitution.<sup>70</sup> In terms of constitutional theory the new constitution would be autochthonous in the sense that it would be "home grown".<sup>71</sup>

The third possible method for adopting a written constitution would similarly be autochthonous. The General Assembly could enact an ordinary statute which provided for both its own abolition and the setting up of the new constitution, the statute only to come into effect once it was approved by the majority of voters in a national referendum. Again it could be argued that such a constitution would derive its authority as "higher law" from the approval of the people.

One question which haunts the second and third avenues for change is whether the New Zealand General Assembly is capable of abolishing itself. It could be argued that the General Assembly in attempting to abolish itse

68 Cf s 2 of the Canada Act 1982 (1982 c 11).

69 See *Manuel v Attorney-General* [1983] 1 Ch 77 at 87-88 per Sir Robert Megarry V-C.

70 As an example of a constitution deriving its authority from a similar source see the Constitution of Ireland of 1937.

71 See Wheare, *The Constitutional Structure of the Commonwealth* (1960) 89. See also Marshall, *Constitutional Theory* (1971) 57-64. The Constitution of the United States is an example of an autochthonous constitution.

would be imposing a substantive restriction upon future General Assemblies which courts wedded to the doctrine of continuing parliamentary supremacy would not uphold. Self-abolition is not consistent with the doctrine of continuing substantive supremacy. However, this query should not rule out the possibility of employing either the second, or third, suggested methods for adopting an entrenched written constitution. It is possible for change to be achieved by means which are not in keeping with the existing constitutional system. Such a change would be a breach of constitutional continuity and technically a revolution. However, after a revolution, if the new legal order is accepted, it quickly gains a legitimacy so far as its participants are concerned.<sup>72</sup>

## 2 *The nature of the law-making powers provided by the new constitution*

The written constitution could set up a compartmentalised law-making structure. A series of different law-making bodies could be constituted, each having a confined substantive area within which it would be free to make laws. For example, the law-making body which had authority to modify the written constitution itself, and the Bill of Rights contained therein, could consist of a two-thirds majority of the elected House of Representatives supported by the majority of voters in a national referendum.

The constitution could confer law-making authority with respect to the electoral process upon a different body, such as the elected House of Representatives acting by a two-thirds majority together with the assent of the Governor-General, without any need for the support of a national referendum. There would no doubt be many other substantive areas for which this legislative body may be appropriate. Those substantive areas not allocated to the elected House of Representatives acting with a two-thirds majority, or with a two-thirds majority together with the support of the majority of votes in a national referendum, could remain the law-making domain of the elected House of Representatives acting by a majority of one together with the assent of the Governor-General. In other words, the residue could be left within the auspices of a law-making body very similar to the present General Assembly. The allocation of substantive areas among the three tiers of the law-making structure would be determined by the degree of consideration and the breadth of support from society which was thought that the making of new laws in the particular substantive areas required.

Some independent body, probably the court, would have to be authorised by the constitution to declare invalid legislation which was outside the law-making authority of the body which purported to make the law. The courts could be able to disallow purported enactments of the legislature as being invalid because the procedure required for enactment in the particular substantive area had not been complied with. The courts would be involved

See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723ff per Lord Reid. The actions of the Convention Parliament in 1689 could be argued to be revolutionary, yet those actions have not undermined the validity of later legislation. See Maitland, *Constitutional History of England* (1955) 283-285; *Hall v Hall* (1944) 88 Sol Jo 383 (County Court).

in both procedural and substantive review of the legislative process. Arguably the courts would have a law-making role themselves in the sense that they would have to give a detailed content to the different substantive areas of law which determined the particular law-making procedure required, and the broadly worded guarantees of any bill of rights which may be introduced. The courts would be much more powerful than they are at present and they would have to have a correspondingly higher status in the eyes of the public. Whether the public would accept the courts performing a more dominant role is difficult to predict. Many people may not support the idea of an appointed court prevailing over the legislature, which is responsible to the electorate. The degree to which the courts will inevitably have to assume an increased law-making role may also not be accepted.

## VI CONCLUSION

Should the courts be called upon to do so, they are likely to decide that the New Zealand General Assembly enjoys a supremacy which is continuing with respect to both substance and procedure. It is submitted that this is too extensive a law-making power for a small, party dominated, single chamber legislature, acting by a majority of one, to possess. The making of laws in some substantive areas requires a depth of consideration, and a breadth of support from society, which the present parliamentary law making process cannot ensure. The process must be changed. There is a need for a reform which is more far-reaching than that which is currently being advanced by the Labour Government. It is time to start thinking not only about an entrenched Bill of Rights, but also about a full entrenched written constitution that allocates the law-making functions which New Zealand society requires amongst a set of differently constituted legislative bodies.

This paper has discussed ways by which the transformation from the present system to the suggested new system could be brought about. Suggestions have been made as to possible sources for the authority of the entrenched written constitution. A possible array of different law making bodies has been put forward. However, many questions remain to be answered. For example, how would the different substantive areas with respect to which laws have to be made, be distributed amongst the different law-making bodies? Who would decide upon this distribution? What procedural restrictions should be imposed upon the different law making bodies? How would the limits on the law-making powers of the different bodies be enforced? Would the courts be suitable bodies to carry out the required enforcement? What can be gleaned from the existing courts' performance of analogous functions? How have the courts fared in other jurisdictions where the powers of law-making bodies are limited by written constitutions? What substantive rights should be included in the Bill of Rights? How should these rights be expressed?

The answering of these questions is beyond the scope of this paper. However, these and related questions are likely to be widely debated in New Zealand during the next decade.