

PARLIAMENTARY SUPREMACY AND CONSTITUTIONAL ENTRENCHMENT: A JURISPRUDENTIAL APPROACH

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I INTRODUCTION

The General Assembly of New Zealand has owed its existence and its legislative and constituent powers to the United Kingdom Crown in Parliament. Under section 53 of the New Zealand Constitution Act 1852 (UK)¹ ("the Constitution Act") the General Assembly of Governor, Legislative Council and House of Representatives was empowered "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 parent legislature gave the General Assembly limited power to amend the Constitution Act by the New Zealand Constitution (Amendment) Act 1857.² Section 3 of the Colonial Laws Validity Act 1863³ clarified the repugnancy limitation in section 53 of the Constitution Act so that mere repugnancy to English common law would not invalidate the Acts of the General Assembly. The celebrated section 5 of the former Act, on the other hand, probably did not enlarge the powers of constitutional amendment (as it did with other colonies)⁴ which, for 90 years, were those granted by the 1857 Act. Then in 1947 New Zealand tardily took its double step to constitutional autonomy and, it may be, autochthony: the Statute of Westminster 1931⁵ was adopted⁶; and (since by virtue of section 8 of the Statute no increase in the power of constitutional amendment would result from that adoption) the United Kingdom Parliament at the request of the General Assembly passed the New Zealand Constitution (Amendment) Act 1947⁷ ("the 1947 (Amendment) Act"). Section 1 of that Act provided:

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provisions of the New Zealand Constitution Act 1852; and the New Zealand Constitution (Amendment) Act 1857 is hereby repealed.

Thus, it would appear, the General Assembly came to have unlimited power, both legislative and constituent. By section 2 of the Statute of Westminster

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15 and 16 Vict, c 72.

20 and 21 Vict, c 53.

28 and 29 Vict, c 63.

See Aikman in *New Zealand: The Development of its Laws and Constitution* (2nd ed Robson 1967) 56-57 and Northey "The New Zealand Constitution" in *The A G Davis Essays in Law* (1965 ed Northey) 149 at 152-156.

22 Geo V, c 4.

By the Statute of Westminster Adoption Act 1947 (NZ).

11 and 12 Geo VI, c 4. As to autochthony, see *infra* n 10.

the General Assembly's legislative power was freed from the repugnancy limitation; and supposed extra territorial limitations were removed by section 3. If there was doubt whether section 2(2) allowed the General Assembly to legislate repugnantly to the Statute itself,⁸ or if the equivocal terms of section 4⁹ left it theoretically possible that the United Kingdom Parliament might re-assert jurisdiction over the one-time colony, the plenary constituent power set forth in the 1947 (Amendment) Act presumably enabled the Parliament in Wellington to sever all remaining links with its parent at Westminster.¹⁰ No such severance has been expressly made; and the latter Parliament for its part has never formally renounced its residual jurisdiction over New Zealand. At the least it may still legislate for this country if requested to do so under section 4 of the Statute; indeed in literal terms of that section it is not the reality of that request but its declared expression in a United Kingdom Act which would extend that Act to New Zealand. Of course unassailable convention, or even perhaps section 4 on its proper interpretation in New Zealand law, requires this request and consent to be actual.¹¹ And, beyond doubt, convention also requires that the Queen in Council will not exercise her remaining statutory powers to make subordinate legislation for New Zealand without actual request.¹²

It is ironic that New Zealand, for long far less nationalist in outlook than the other principal beneficiaries of the Statute of Westminster, could have attained constitutional independence more simply than any of them apart from South Africa. But in New Zealand's case the slowness in political self-assertion, which lingered until the nineteen forties, was matched by reluctance to make any clear cut constitutional severance from the mother

8 See Wheare, *Constitutional Structure of the Commonwealth* (1960) 33.

9 "No Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

10 For the (manner and form type) view that the Statute of Westminster, together with the 1947 (Amendment) Act, conferred on New Zealand an independence that cannot legally be withdrawn, cf eg *Ibrabekbe v R* [1964] AC 900 at 924, and *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 722. On this view, the New Zealand Constitution became autochthonous ("home grown") within Marshall's classification (*Constitutional Theory* (1971) 57-64) but not that of Wheare (supra n 8, ch 4).

The older (Diceyan) view that such legislation could legally, however inconceivably in practice, be repealed by the United Kingdom Parliament, is expressed in Lord Sankey's famous dictum in *British Coal Corporation v R* [1935] AC 500 at 520. See also infra pp 607, 629 and 631 (n 62).

11 See *Manuel v Attorney-General* [1983] 1 Ch 77 (CA), where it was held that English law requires only the declared expression of request and consent. The court acknowledged that courts of a dominion might accept the argument that, in view of the third paragraph of the preamble to the Statute, actual request and consent is necessary before a law made by the United Kingdom Parliament extends to the dominion as part of its law: *ibid* at 100.

12 There was no doubt an actual request for the making of the New Zealand (Appeals to the Privy Council) (Amendment) Order 1972 (SI 1972 1994) by the Queen on the advice of her Privy Council, under the Judicial Committee Act 1844. See discussion by Brookfield (1974) 6 NZULR 82 and Brookfield (1975) 6 NZULR 408. For similar remaining powers of the Crown under United Kingdom statutes, see the (now anomalous) s 71 of the Constitution Act and ss 12 and 31 of the Fugitive Offenders Act 1881 (and see the Fugitive Offenders Amendment Act 1976 (NZ) and discussion by Brookfield [1976] NZLJ at 460-461).

country. The reluctance still lingers, though the reasons for it have substantially changed. No longer sentiment and yearning for the old days of imperial unity but lack of interest probably accounts for the piecemeal constitutional moves marking this country's slow progress to its final formal independence. Indeed it is likely that for many actively involved in New Zealand government and politics all necessary moves have been made. Why bother to do more when, after all, the New Zealand General Assembly has the fullest legislative powers?

So the country's remaining constitutional links with the United Kingdom are, at least if one excepts the continuing appellate jurisdiction of the Privy Council, not of much popular concern. Such other concern as there is directed precisely to the plenary powers of a unicameral legislature where generally by a simple majority vote any measure of the government of the day may be carried. In law, only section 189 of the Electoral Act 1956, within its much disputed but undoubtedly limited effect and compass, and the formal necessity for the royal assent to legislation, can impede the carrying out of even the most draconian policies of a government commanding a simple majority in the House of Representatives.¹³ That in an extreme case a bold Governor-General will refuse assent (or dismiss his Ministers) in exercise of his reserve powers remains some safeguard. But the uncertainty of that and the absence, since 1950, of a second chamber as even a nominal check on the elected House ensures that calls for a protected Bill of Rights or (more radically) for a substantially written constitution are likely to grow rather than lessen in volume. So the constitutionalist's concern today is with the means of making any such changes legally effective in the face of still strongly held Diceyan views, rather than in the residual constitutional links with the United Kingdom.

Yet these things are connected. For not only the nature of the Parliament at Wellington but that of its parent at Westminster and of the measures by which the parent has empowered the child should be understood before one considers the problems of single and double entrenchment inevitably involved in discussions of structurally protected constitutional rights and procedures.

The main question then to which this essay offers possible answers concerns the structure of the New Zealand Constitution. Can the General Assembly, in the exercise of its constituent powers, change the structure of government so as to protect constitutional legislation from repeal by the normal, simple majority-vote procedures?

K J Scott has written that:¹⁴

As New Zealand has no 'Constitution' adopted and amendable only by special procedures, there is no special constituent (that is, Constitution-making and Constitution-amending) power as distinct from legislative power. Constituent purposes are among the purposes for which legislative power can be exercised.

But that is to over-simplify. Plenary constituent power (in the sense used by Scott) was conferred on the General Assembly by the 1947 (Amend-

¹³ The orthodox view. For some recent contrary dicta, see *infra* p 631, n 62.

¹⁴ *The New Zealand Constitution* (1962) 17.

ment) Act. It is necessarily exercised in respect of the legislative powers already granted and hence, even though (subject to section 189 of the Electoral Act 1956 to be discussed in detail below) it is not exercisable by special procedures, there is a sense in which the power is separate. We may see this in one uncontroversial but important exercise of constituent power by the General Assembly, in the enactment of the New Zealand Constitution Amendment Act 1973. Apart from repealing certain obsolete provisions, this Act (by section 2) performed the notable feat of (a) repealing the then existing section 53 of the principal Act under which the General Assembly had enjoyed general power to legislate for the peace, order, and good government of New Zealand and (b) substituting a new section 53, of which subsection (1) provided —

The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand . . . and laws having effect outside New Zealand.

There was of course no possibility that the old section 53 had authorised its own repeal and substitution. The New Zealand Constitution (Amendment) Act 1857 prevented that. Clearly the plenary constituent power conferred in 1947 was employed to clarify and, it may be, to amplify, the General Assembly's own legislative power.¹⁵

The constituent power conferred in 1947 had also been effectively employed in the enactment of the Legislative Council Abolition Act 1950, which, in amending the formerly reserved¹⁶ section 32 of the Constitution Act, altered the composition of the General Assembly itself. It will be argued that one may go further and conclude that the same power was employed equally effectively in the enactment of section 189 of the Electoral Act 1956: to alter further the rules of law-making so that certain reserved provisions in that Act, providing respectively for triennial parliaments, and for voting rights and other related matters, may not be amended or repealed without a 75 percent majority of the House of Representatives or approved by simple majority of a referendum of electors.

With all deference to A V Dicey and H W R Wade and their New Zealand followers, such a conclusion would of course point the way to constitutional reforms that could legally and effectively give greater protection to the reserved provisions of the Electoral Act or, more ambitiously, to a Bill of Rights or a full written constitution.

15 Doubts about the scope of the former s 53 had been created by the judgment of Moll J in *R v Fineberg* [1968] NZLR 119.

16 By the New Zealand Constitution (Amendment) Act 1857, s 2, until repeal of the latter enactment by the 1947 (Amendment) Act.

II THE WIDER CONTEXT: RIVAL THEORIES

In such matters constitutional theorists divide in general between the Diceyan (including the neo-Diceyan¹⁷) and the manner and form¹⁸ groups. The first are those who, following and in some respects going beyond Dicey, maintain that the Parliament of the United Kingdom cannot bind itself as to the content or form of its future legislation, cannot (according to some) legally abdicate its power or legally alter its own composition. That is to say, Parliament's own supremacy denies it effective constituent power in respect of itself. On this view, in the extreme form held by for example H W R Wade¹⁹, the legislation conferring independence on territories formerly under British rule has been only legal window-dressing concealing a revolution, a change in the facts of paramount power and of constitutional life.

In theory, legislation such as the Indian Independence Act 1947, the Zimbabwe Act 1979 and the Canada Act 1982 are all (on this view) repealable in English law.²⁰ And Parliament's apparent attempt to reconstitute itself by the Parliament Act 1911 amounts merely to the creation of the Lords and Commons as a subordinate legislature with powers exercisable in terms of that Act.²¹

17 The term "Diceyan" will be used to include neo-Diceyan. For Dicey's own views, see *Law of the Constitution* (10th ed, E C S Wade 1959) 64-70 and see *infra* p 624.

The conflict with the manner and form school, implicit (by anticipation) in Dicey, is brought out by writers such as H W R Wade and O Hood Phillips. See Wade "The Basis of Legal Sovereignty" [1955] CLJ 172 (cited as "Sovereignty") and *Constitutional Fundamentals* (1980) (cited as *Fundamentals*), ch 3; and Hood Phillips, *Constitutional and Administrative Law* (6th ed 1978) (cited as *Constitutional Law*), ch 4, *Reform of the Constitution* (1970) 151-156 and "Self-Limitation by the United Kingdom Parliament" (1975) 2 Hastings Const L Qurly 443.

For a New Zealand Diceyan view, see Scott, *supra* n 14 at 6 *et seq* and in (1954) 6 Political Science 29 at 33 *et seq*; and the *Reports of the Constitutional Reform Committee* 1952 4 App JHR 1-18 (where the views are predominantly Diceyan).

8 See eg Latham "The Law and the Commonwealth" in Hancock *Survey of British Commonwealth Affairs 1918-36*, vol i, 510. (Latham's essay was published separately in 1949); Jennings, *The Law and the Constitution* (5th ed 1959) 151 *et seq*; Gray, "The Sovereignty of Parliament Today" (1953) 10 U Toronto LJ 54 and in (1964) 27 MLR 705; Heuston, *Essays in Constitutional Law* (2nd ed 1964), ch 1; Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) chs 2-4 and *Constitutional Theory* (1971), ch 3; de Smith, *Constitutional and Administrative Law* (4th ed 1981) 82 *et seq*; Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 591. Those writing specifically in the New Zealand constitutional context include Aikman, *supra* n 4 at 66-69; Robertson "The Reserved Provisions of the Electoral Act" (1965-68) 1 Otago LR 222 and Northey, *supra* n 4 at 164 *et seq* (who however remained uncommitted: *ibid* at 165).

9 He has rejected the view of Dicey (*supra* n 17 at 68-69) that Parliament, though unable to bind future Parliaments, could divest itself of sovereignty: Wade, "Sovereignty", *supra* n 17 at 196.

10 Cf *supra* n 10.

Hood Phillips, *Constitutional Law*, *supra* n 17 at 89; Zellick "Is the Parliament Act [1949] Ultra Vires?" (1969) 119 NLJ 716; Wade *supra* n 17, "Sovereignty" at 194, *Fundamentals* at 27-28.

Though one proponent of this view, O Hood Phillips,²² allows that Parliament "could" abolish the House of Lords and even the Monarchy,²³ on this reasoning such an abolition would be effective only because *in fact* the institution purportedly abolished goes out of existence;²⁴ and that, to put the matter in H L A Hart's terms,²⁵ courts and officials come to accept that the ultimate rule of recognition has changed from "Whatever the Queen in Parliament enacts is law" to "Whatever the Queen in Commons" — or "Whatever the Commons" — "enacts is law". The courts and officials may be more likely to accept the change because it has purportedly been made legally; but whether they do so or not is on Hart's view a matter of fact. They are not obliged *in law* to accept the purported change.²⁶

Hart's concept of the ultimate rule of recognition may usefully explain generally the views of the Diceyan group of theorists under consideration. His explanation of the ultimate rule of recognition in the English legal system is useful to the same end:²⁷

[T]he presently accepted rule is one of continuing sovereignty, so that Parliament cannot protect its statutes from repeal.

This he contrasts with the principle of "self-embracing" sovereignty, that Parliament has the power to limit irrevocably the legislative competence of its successors.²⁸

It would seem that the sovereignty of the United Kingdom Parliament must be self-embracing to the extent of permitting it to abdicate its power territorially, unless one is satisfied with Wade's explanation of the process by which independence is conferred as technically revolutionary.²⁹ If indeed it is self-embracing in this respect, why logically should it not be "self-embracing" in others and permit Parliament to do all things which the Diceyans deny it the legal power to do, even binding itself as to the substance of future legislation?

The manner and form school in fact do not generally go so far. Their doctrine has been correctly described by a recent proponent as one of "substantively 'continuing' and procedurally 'self-embracing' supremacy".³⁰ Parliament cannot bind itself as to the content of future legislation but it can legally re-constitute itself (as under the Parliament Acts 1911 and 1949, or by abolishing the House of Lords). It could by altering rules of law-making impose special manner and form requirements (say the attaining of a three-quarters or two-thirds majority in the House of Commons to protect special legislation such as a Bill of Rights from repeal or amendment under the normal legislative processes.

22 *Constitutional Law*, supra n 17 at 56.

23 Also Dicey's view, at least as to the latter: supra n 17 at 88.

24 See further infra p 619.

25 *The Concept of Law* (1961), ch 6.

26 The matter is somewhat complicated by Hart's insistence on the validity of self-referring laws. See infra p 625.

27 Supra n 25 at 146.

28 Ibid at 145-146.

29 See Wade, "Sovereignty", supra n 17 at 191-192.

30 See Winterton, supra n 18 at 604 et seq.

The manner and form school would, with Dicey himself but as against Wade, accept that Parliament can legally abolish itself or abdicate. For probably most of that school independence legislation is legally effective to do what it purports to do. It is not window-dressing for a technical revolution.

III LEGAL NATURE OF THE UNITED KINGDOM PARLIAMENT

I do not wish to rehearse exhaustively the controversies thus outlined. My special concern is rather with the differences between the Diceyans and the manner and form school about the constitution of the Queen in Parliament. Do rules of law require the Lords and Commons to deliberate separately and decide matters by simple majority vote? If so, and if those rules are not complied with in respect of any particular Bill, it would seem that the royal assent if given cannot make it an Act of Parliament. So R T E Latham:³¹

Where the purported sovereign is anyone but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.

And he added that “[t]hus, the King, Lords, and Commons meeting in a single joint assembly, and voting by majority, or even unanimously, could not enact a statute”.³² Similarly Centlivres CJ in *Harris v Minister of the Interior*,³³ rejecting the view that a sovereign parliament, composed of its constituent elements, can adopt any procedure it thinks fit, commented:³⁴

It would indeed be surprising if a Government which is in a minority in the House of Commons could, by advising the Sovereign to convene a joint sitting of the House of Lords and the House of Commons, swamp the majority in the Commons by the votes of the Lords.

Once the constitutional practices³⁵ referred to by Latham and indirectly by Centlivres CJ are thus identified as legally binding constituent rules,

¹ Supra n 18 at 523.

² Idem, footnote.

³ 1952 (2) SA (AD) 428.

⁴ Ibid at 470.

⁵ No full discussion is attempted here. For the development of the separate Houses, see eg Richardson and Sayles, *The English Parliament in the Middle Ages* (1981), Sayles, *The King's Parliament of England* (1975) and Powell and Wallis, *The House of Lords in the Middle Ages* (1968). The summoning of the Commons was invariable from 1327 onwards (Sayles and Richardson, op cit xxvi at 44-45 and Sayles, op cit at 107); the practice of their functioning separately from the Lords became established by 1340 (Powell and Wallis, op cit 328-329) and by the end of the century had come to seem “fundamental and of remote antiquity” (Sayles, op cit at 107).

For the simple majority rule in the Commons established in the course of medieval parliamentary development and apparently beyond doubt by the end of the 15th century, see Littleton J's mention of it in (1476) YB 15 Edw IV Mich pl 2, quoted by Chrimes, *English Constitutional Ideas in the Fifteenth Century* (1936) 137; Thomas Smith, *De Republica Anglorum* (1583, ed Alston 1906) 56; *Parliament in Elizabethan England*; John Hooker's *Order and Usage* (ed Snow 1977) 169 and (as to the Speaker's casting vote) 170. For the rule in the Lords', see Smith, op cit at 56 and (on “perhaps the first recorded instance” in 1532) Powell and Wallis, op cit at 568. Generally see Chrimes, op cit at 133-137.

it becomes relatively easy (apart from a logical objection dealt with below)³⁶ to accept the manner and form school's contention that Parliament may change those very rules "because its power to change the law includes the power to change the law affecting itself".³⁷

If on the other hand the common law constitution of the Queen in Parliament is such that an Act is an expression of the royal will, to which the assent of Lords and Commons is necessary but is actually given according to practices that have not the status of rules of law, then the *legal* element in the definition of the Sovereign is very much less than that indicated by Latham, Jennings, Gray and others. The law knows the Monarch and her successive Parliaments, which are, in Pollard's words, "emanation[s] from the Crown";³⁸ and the Courts obey Acts as expressions of her will in Parliament, authenticated by appearance on the Parliamentary Roll or its modern equivalent in the official vellum copies signed by the Clerk of the Parliaments. But there are no legally binding rules or procedures for the making of those Acts, or at least no rules of which the courts can take cognisance.

The latest expression of the Sovereign's will so authenticated must then prevail over any prior expression to the extent of inconsistency between the two, whether the inconsistency lies in substance or in the manner of law-making. If this understanding of the history of the English Constitution is accepted, the theory of continuing sovereignty, both in the substance and form of legislation, is undoubtedly correct of the United Kingdom Parliament. The establishment of a Bill of Rights or a fully written constitution, protected by effective conditions of law-making, could then only be effected by a revolutionary shift of judicial obedience to a new grundnorm or rule of recognition.³⁹

This view, for which Wade in particular continues vigorously to contend,⁴⁰ has much to support it. There is indeed authority against the Court going behind the Parliamentary Roll or its modern equivalent in the Queen's Printer's official vellum prints. If the will of the Monarch and the supporting advice and assent of the Lords and Commons are so recorded the rules to enable an Act to be identified as such are satisfied;⁴¹ and court will not, it is then argued, inquire into any of the legislative practices and procedures which lie behind the record. The argument is supported by wide interpretation of the words of Lord Campbell in *Edinburgh and Dalkeith Railway v Wauchope*:⁴²

36 See *infra* pp 624-627.

37 Jennings, *supra* n 18 at 153.

38 Pollard, *The Evolution of Parliament* (1926) 262.

39 For some of the now extensive literature on the jurisprudential nature of revolution (and some differing views), see Honoré "Reflections on Revolutions" (1967) 2 *Ir Jur* (NS) 26; Brookfield "The Courts, Kelsen, and the Rhodesian Revolution" (1969) 19 *Univ Tor* 326; Harris "When and Why Does the Grundnorm Change?" [1971] *CLJ* 103; Eekela "Principles of Revolutionary Legality" in *Oxford Essays in Jurisprudence* (2nd series 1971 ed Simpson) 22; Finniss "Revolutions and Continuity of Law" in the same work, 44; Gu "Revolution and the Position of the Judiciary" [1980] *PL* 168.

40 See *Fundamentals*, *supra* n 17 at 24 et seq.

41 Hood Phillips, *Constitutional Law*, *supra* n 17 at 81-82.

42 (1842) 8 *Cl* and *F* 710 at 725; 8 *ER* 279 at 285.

All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

Consistently with this, Hood Phillips, commenting on the dictum of Centlivres CJ quoted above, writes:⁴³

But Centives CJ took as his example a particular case which would be constitutionally objectionable. It may be replied, conversely, that it would be absurd for a court to deny validity to an Act passed unanimously by both Houses sitting together. There seems to be no strictly legal objection to the Lords and Commons debating and voting in a joint sitting. The matter seems now to be one of the Commons' privileges and of constitutional convention. If it is one of the Lords' privileges also, both Houses would have to agree before a joint sitting could be held. It is submitted that the courts would not wish to involve themselves in these procedural matters.

But a different understanding of English and British constitutional history is possible, from that of Hood Phillips. For one thing, the respective Acts of Union of the Parliaments of England and of Scotland may be understood as constituent Acts which set up a new supreme legislature, the Parliament of Great Britain, whose constituted successor the Parliament of the United Kingdom remains subject to the limitations in the Treaty of Union protecting the Scottish legal system and the Scottish Church.⁴⁴ If this is correct and the modern Crown in Parliament is thus a *legally* constituted body, it is difficult to understand the practices by which it makes laws as otherwise than embodying at least some rules of law, as distinct from constitutional conventions or from mere privileges (of either House)⁴⁵ which may presumably be waived.

Secondly, even if one takes the view that at least in English constitutional law (as distinct from Scots) the correct interpretation of the successive Unions of the Parliaments is that, in 1707 and 1800 respectively, the Scottish and Irish Parliaments were absorbed into the Parliament of England, it is a strange understanding of history which does not see as law-creating at least the customs by which the Lords and Commons came to deliberate separately and each House to determine matters by simple majority vote.⁴⁶ If these are matters of law (as the manner and form school could contend), the rule of recognition if more fully stated must include them:⁴⁷

Whatever the Queen enacts, with the separate assents by simple majority of the respective Houses of Lords and Commons, is law.

Constitutional Law, supra n 17 at 82-83.

MacCormick "Does the United Kingdom have a Constitution?" (1978) 29 Northern Ireland Leg Qrly 1.

See Hood Phillips, quoted supra, text at n 43.

See supra n 35.

That is, as among the complex criteria contained in the rule of recognition. See MacCormick, *H L A Hart* (1981) 110.

This is not of course to suggest that the Courts may inquire into the observance of procedural rules dependent merely on resolution of the House, such as alleged non-compliance with standing orders, or otherwise into what are merely its intra-mural deliberations.⁴⁸ It is rather to assert that those procedures of Parliament which are admittedly at its mercy do not include legal conditions of law-making. The latter, being constituent, must be complied with if purported legislation is to be valid. The privileges of Parliament cannot exclude inquiry by the Courts. "Proceedings in Parliament" which, under section 9 of the Bill of Rights 1689, are not to be impeached or questioned outside it, do not include "matters of substance that go to the root of legislation".⁴⁹

The force of this argument depends in part on limiting Lord Campbell's words in *Edinburgh and Dalkeith Railway v Wauchope*⁵⁰ to the merely procedural.⁵¹ But it derives strong support from common sense and from the basic and long standing nature of the parliamentary practices it holds to be rules of law; and some from the manner and form decisions given (in respect of legislatures constituted by the United Kingdom Parliament) in *Harris v Minister of the Interior*⁵² and *Bribery Commissioner v Ranasinghe*.⁵³

One may also urge for it early authority that indicates the composition of the estates in Parliament to be a matter of law. Henry VIII's judges advised him in 1521 that the ecclesiastical estate was not a separate component of Parliament, the Lords Spiritual deriving their seats from their baronies and constituting one body with the Lords Temporal.⁵⁴ The Annates Act 1532⁵⁵ and the Elizabethan Act of Supremacy 1559⁵⁶ were passed by a majority in the House of Lords but (so it appears) with all or the majority of the Bishops voting against.⁵⁷ F W Maitland remarks of the 1559 occasion that at the time "our rule, that the bishops may all be in the minority and the Act never the worse, was certainly in the making, but I doubt it was already past discussion". He concludes (by way of a "humble guess") that "an impartial court (had impartiality been possible) would have decided in favour of our modern doctrine of two estates in one House".⁵⁸

Maitland saw the matter as one of constitutional law, and as a justiciable issue upon which the validity of purported legislation would depend. In that surely he was right.

48 *Edinburgh & Dalkeith Railway v Wauchope*, supra n 42; *Cormack v Cope* (1974) 13 CLR 432.

49 Beinart "Parliament and the Courts" (1954) Butterworths South African L Rev 134 at 14. Supra n 42.

50 See Heuston, supra n 18 at 21.

51 Supra n 33.

53 [1965] AC 172. Even if the scope of privilege were taken to be so wide as indeed to occlude a court's inquiry into compliance with conditions of law-making, appropriate reform could remove the protection. See infra p 633-634.

54 Keilwey 184b, 72 ER 361. And see Powell and Wallis, supra n 35 at 554.

55 23 Hen VIII, c 20.

56 1 Eliz I, c 1.

57 For the passing of the Annates Act, see Powell and Wallis, supra n 35 at 568. For the Act of Supremacy, see Maitland, *Collected Papers* (1911 ed Fisher), vol iii, 1.

58 Ibid at 126, 128.

But if the Constitution of the United Kingdom Parliament is (quite apart from the effect of the Treaty and Acts of Union) so far a matter of law, then, contrary to the general Diceyan view, the United Kingdom Parliament is *bound* by common law (customary) constituent rules and conditions of law-making. There appears no reason to suppose that these rules and conditions are beyond the powers of the modern Parliament to change legally and effectively. That should be so whether the change is in respect of Parliament's composition or manner and form; or effects the abandonment of authority over a hitherto subject territory; or (though the matter is beyond the scope of this essay) self-subjection to another system of law such as that of the European Community.⁵⁹

IV LEGAL NATURE OF THE GENERAL ASSEMBLY

For the purposes of this essay however it is unnecessary to make a definite choice between the Diceyans and the manner and form school so far as their controversy concerns the British Constitution (though it is clear what my choice would be). Wade's statement that "sovereignty is a political fact for which no purely legal authority can be constituted"⁶⁰ may, for all its intended generality, be true of the United Kingdom Parliament for historical reasons;⁶¹ but not true of Commonwealth legislatures created by purported devolution of authority from Westminster, whose supremacy may indeed have a legal rather than a political basis,⁶² and where Wade's doctrine of independence attained by technical revolution is so at variance with the general understanding of reasonable people as to be suspect. To be more specific, Hood Phillips⁶³ may be right, as against Centlivres CJ⁶⁴ and R v E Latham,⁶⁵ in suggesting that the separation of Lords and Commons and simple majority voting in each House are purely matters of parliamentary privilege or of constitutional convention. But that could not describe accurately the legal position in the other legislatures just referred to (nor indeed does Hood Phillips suggest that it does). Those are or were all legally constituted by the United Kingdom Parliament⁶⁶ and bound by conditions of law-making expressly or impliedly included in their respective constitutions. In two notable cases, *Harris's case*⁶⁷ and *Bribery Commissioner v Ranasinghe*,⁶⁸ the courts have held that in law those rules and conditions remain binding, despite the sovereignty of the legislature, until validly amended in accordance with the appropriate rule for amendment. As was said by the Privy Council in the latter case:⁶⁹

⁵⁹ See now *McCarthy's Ltd v Smith* [1979] 3 All ER 325; [1981] QB 180.

⁶⁰ "Sovereignty," supra n 17 at 196. Approved by Lord Denning MR in *Blackburn v A-G* [1971] 2 All ER 1380 at 1383.

Dicey, supra n 17 at 69-70. See the discussion by MacCormick, supra n 44 at 8-9.

Cf Keir and Lawson, *Cases in Constitutional Law* (4th ed 1954) 8, (6th ed 1979) 9; Northey, supra n 4 at 166-167.

Quoted supra, text at n 43.

Supra nn 33 and 34, and text.

Supra nn 31 and 32, and text.

Some of course have since independence been succeeded by legislatures established by clearly revolutionary breaks with the old constitutional order.

Supra n 33.

Supra n 53.

Ibid at 198.

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.

And again:⁷⁰

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

Diceyans may perhaps correctly conclude that the support given to the manner and form school by the decisions in *Harris* and *Bribery Commissioner* does not help the case for the legal validity of self-imposed limitations on a sovereign legislature; and that those decisions establish only that a sovereign legislature is bound by the rules of law-making initially imposed in its constitution.⁷¹ If, however, as I think, the whole Diceyan doctrine of continuing sovereignty (substantive and procedural) depends on a particular understanding of constitutional history relevant (if correct) to the United Kingdom Parliament alone, we may find the constitution of the New Zealand General Assembly to be as properly explained by manner and form theories as were the South African and Ceylon legislatures. (That will be the more certain of course if the Diceyan understanding is wrong even for the United Kingdom.)

The General Assembly has to be understood as a legally constituted body, in origin an example of a standard type of colonial legislature that the Crown in Parliament created in its developing overseas territories. The rules constituting and empowering the General Assembly are logically prior to and binding on it; unless some technical revolution in the passing of paramount power or force from Westminster to Wellington in patriating the constitution has somehow freed it from those rules so that it exists, legally unconstituted in the sense that the Crown in the United Kingdom Parliament (if the objections already made are put aside)⁷² is said to do. But though this shifting of paramount power might have had the revolutionary effect of patriating the Constitution, there is (as will be shown) no reason to suppose that any such liberation of the General Assembly from its constituent rules has taken place. On the contrary, it is suggested that they remain as part of the rule of recognition in New Zealand.⁷³

⁷⁰ Ibid at 200.

⁷¹ See to this effect Hood Phillips, *Constitutional Law* supra n 17 at 61-62, 88. He appears to accept both decisions as correct in law. For Wade both are necessarily "political" decisions. See infra n 97 and text.

⁷² See supra pp 609-613.

⁷³ See infra pp 616 et seq.

Enough has been said to show it an error to over-emphasise the similarities between the British and the New Zealand Constitutions. The United Kingdom Parliament is “an emanation from the Crown”,⁷⁴ in origin and in theory still the Monarch’s High Court of Parliament, formed by custom and (to some) of uncertain constitution in that (as we have seen) the *legal* element in its composition is in dispute. No such uncertainty surrounds the General Assembly, created and empowered by the Constitution Act.

That Act as originally passed shows in detail the statutory nature of the two bodies which, with the Governor, under section 32 were to constitute the General Assembly. Sections 33 to 39 provided the detailed constitution of the Legislative Council, section 39 being especially important:⁷⁵

The presence of at least five members of the said Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers; and all questions which shall arise in the said Legislative Council shall be decided by a majority of votes of the members present other than the Speaker, and when the votes shall be equal the Speaker shall have the casting vote.

In providing for the House of Representatives, the Act was silent about the quorum of the House, about the majority required to decide questions before the House and about the Speaker’s casting vote. Doubtless however the simple majority rule applied from the outset, as an instance of the general common law rule governing bodies charged with decision in matters of public concern.⁷⁶ It is thus unnecessary to see the majority rule governing the House of Representatives as an importation from the *lex et consuetudo parliamenti*; and in any case one may be wrong to do so since the General Assembly was not created as a reproduction of the High Court of Parliament.⁷⁷ On the other hand the voting rights of the Speaker of the House of Representatives must be such an importation, impliedly effected by section 48 which, in obliging the House to proceed (subject to confirmation by the Governor) “to the choice of one of their members as their Speaker”, clearly created an office after the model of that of the speaker of the House of Commons.⁷⁸ The quorum of the House of Representatives must originally have been a common law quorum of half the membership of 40⁷⁹ but became 15 under the first Standing Orders of 9 June 1854,⁸⁰ made under section 52 of the Constitution Act.

Pollard’s words, already quoted; supra n 38.

The specific provisions as to quorum, simple majority vote and the Speaker’s casting vote, were probably thought necessary because the Council (like other colonial upper houses), though corresponding in some measure to the House of Lords, was not modelled on it. See Todd, *Parliamentary Government in the British Colonies* (1894) 704-705. The Council thus needed its own rules.

Hand “The Development of the Common Law Principle of Majority Rule . . .” (1969) 4 *Ir Jur* (NS) 74.

See *Kielley v Carson* (1842) 4 *Moo PC* 63; 13 *ER* 225. As to the simple majority rule in the House of Commons, see supra n 35.

See *Hooker’s Order and Usage*, supra n 35 at 170 as to the casting vote.

Staple of England (Mayor etc of) v Bank of England (1887) 21 *QBD* 160 at 165 per Wills J. This is to assume that the same rule as that for corporations applies.

Adopted (with vice-regal approval) on 9 June 1854. See *Votes and Proceedings of the House of Representatives Session I 1854* part 9.

So, in regard not only to the Legislative Council where the Constitution Act itself made detailed provision but to the House of Representatives also the rules described above were legal rules, conditions of law-making. Together with them of course one must group the provisions of the Constitution Act which specifically limited the General Assembly's powers to make law.⁸¹ That body was provided for by the Constitution Act, subject to the limitations there imposed; and where that Act was silent (as in regard to the House of Representatives) common law rules must have applied for the ascertainment of its will.

It is scarcely possible to disagree about this, for the General Assembly was created a subordinate legislature, legally explicable to a latter-day Diceyan without recourse to any argument that sovereignty is merely a matter of political fact. While the facts of paramount power or force — of political fact — might be the sole and correct explanation of the power of the Crown in Parliament in New Zealand, that was not so of the General Assembly, created and empowered by enactments of the Crown in Parliament and regulated by rules of law.

Suppose that in the colonial days, which in law lasted until 1947, a Government brazenly obtained the royal assent to a bill which had not received a majority of votes in the Legislative Council (as required by section 6 of the Legislature Act 1908)⁸² or in the House of Representatives (as required by the applicable common law rule). Is it not clear that, without the (legally necessary) majority in each or either House, the rules of law-making would not have been complied with?

Post 1947: A legally constituted supreme legislature

If the answer suggested is to be any different since the adoption of the Statute of Westminster on 25 November 1947 and the passing of the New Zealand Constitution (Amendment) Act 1947 (UK) on 10 December of that year, this must be because the legal result of that legislation was automatically to free the New Zealand General Assembly from the remaining conditions of law-making which bound it. First, it is clear that there was no such liberation from certain practically obsolete provisions of the Constitution Act relating to the Governor-General's power to reserve bills for the Monarch's assent,⁸³ and the Monarch's power of disallowance of bills assented to by the Governor-General.⁸⁴ Either of those powers could have been legally exercised between 1947 and its abolition by the New

81 Apart from the limitations in s 53 itself, see ss 54, 61, 75, 77 and 78 (of which only 54 remains in force).

82 Replacing Legislative Council Act 1891, s 6; which had replaced s 39 of the Constitution Act as amended.

83 Sections 56 and 59.

84 Section 58.

Zealand Constitution Amendment Act 1973 (NZ),⁸⁵ and, at the request of New Zealand ministers, even with constitutional propriety.⁸⁶

One would also conclude that other conditions of law-making, whether statutory (as to the separate functioning of the two Houses and the simple majority rule in the Legislative Council) or common law (as to the simple majority rule in the House of Representatives) would remain in force also, unless and until amended under the 1947 (Amendment) Act. The binding authority of the Privy Council in *Bribery Commissioner v Ranasinghe*⁸⁷ and the high persuasive authority of the South African Supreme Court in *Harris v Minister of the Interior*⁸⁸ support that conclusion.

It seems then that after the constitutional legislation of 1947 the New Zealand General Assembly, however similar in many respects to the United Kingdom Parliament in the practical flexibility of its Constitution, continued (1) to have a governing instrument which prescribed its law-making powers and (2) to be subject to rules of law-making expressed or (by common law) implied in the instrument. One can only avoid this conclusion if (putting aside the revolutionary "political fact" view)⁸⁹ one supposes that somehow, despite the matters just considered, the constituent legislation of 1947 turned the General Assembly into (in relevant respects) a version of the United Kingdom Parliament as understood by the Diceyans. Is that supposition — so much part of the received wisdom of Diceyan-trained New Zealand lawyers — correct? Or did the Parliament at Westminster, whatever the nature of its own supremacy, create in Wellington a legislature of procedurally self-embracing supremacy, still subject to existing rules of law-making but having now the power to change any of those rules?

That the answer to the latter question is an affirmative and the Diceyan supposition wrong appears from section 1 of the 1947 (Amendment) Act, here conveniently repeated in part:

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

This must be read primarily with section 53 of the Constitution Act which, as it had stood in 1947, empowered the General Assembly to make laws for the "peace, order, and good government of New Zealand" subject to the repugnancy proviso.

Section 53 conferred the general legislative power of the Assembly. We may base on it, on section 1 of the 1947 (Amendment) Act and on the

Section 3. For the proposition that the shift in fact of paramount force or power does not of itself annul or render inoperative any part of the constitutional structure, see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 and *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246. Cf (i) the discussion of *Re Ashman and Best* (1976 unreported) in [1976] NZLJ 458 (Brookfield) and (ii) [1982] NZLJ 173 (Brookfield).

The hypothetical circumstances, if highly unlikely, are not inconceivable.

Supra n 53.

Supra n 33.

See infra pp 629-630.

Statute of Westminster, and other statute and common law applicable, the following proposition as the then ultimate rule of recognition for the New Zealand legal system:

The General Assembly of New Zealand (comprising the Governor-General, and the Legislative Council and the House of Representatives (each of those bodies deciding by simple majority vote)), may make any laws whatever for the peace, order, and good government of New Zealand, *including any law which alters this law.*

The emphasised words do of course accord with the theory of procedurally self-embracing sovereignty favoured in general by the manner and form school. But a firm basis for them is afforded by an obvious and convenient construction of section 1 itself of the 1947 (Amendment) Act. There is nothing in the section to suggest that the plenary constituent power thereby conferred cannot be used to impose *effective* manner and form restrictions should the General Assembly determine so to use it. On the contrary, one must assume that the power conferred *was* intended to be in no way less fully effective than that which, as conferred or recognised by section 5 of the Colonial Laws Act 1865, enabled colonial legislatures to bind themselves as to manner and form.⁹⁰ In short, there is good reason to accept the suggestion of Geoffrey Marshall:⁹¹

If . . . the New Zealand Parliament which at present operates in a similar way to the United Kingdom Parliament is seen as having attained authority to remould its own constitution, it is not obvious that it might not use that authority to provide a different manner and form of legislation for particular purposes.

It is then reasonable to conclude that the United Kingdom Parliament having unquestionably power to impose limitations upon the General Assembly, conferred that power upon the General Assembly itself by the 1947 (Amendment) Act.

This interpretation of the constitutional amending power conferred in 1947, which would permit the valid and legally effective entrenchment of a Bill of Rights, convincingly explains two of the most significant uses of which the General Assembly has made of that power since 1947.

First, the abolition of the Legislative Council is difficult to explain other than as an exercise of a power of amendment under a self-referring ultimate rule for succession of rules⁹² which only self-embracing sovereign

⁹⁰ See *infra* p 630.

⁹¹ *Parliamentary Sovereignty and the Commonwealth* (1957) 121. Compare the view of the Canadian Bill of Rights as "an implicit amendment to the Canadian constitution" (under which legislation inconsistent with it could be held inoperative): Gold "Equality Before the Law in the Supreme Court of Canada" (1980) 18 Osgoode Hall LJ 336 at 357.

⁹² The ultimate rule of succession of rules is, in accordance with Finnis's analysis, a component of the ultimate rule of recognition: Finnis, *supra* n 39 at 48, 68. It is assumed here that the (pre) 1947 rule of succession of rules was reflexive (that is, that the supremacy of the United Kingdom Parliament over New Zealand was *self-embracing*); or that it was not (that is, if that supremacy was *continuing*) the passing of paramount force from Westminster to Wellington brought a revolutionary end to the United Kingdom supremacy. As shown (*supra* pp 609-613), I prefer the former of those assumptions. For the logical difficulty attaching to self-referring or reflexive constitutional change, see *infra* pp 624-629, and the solution there discussed.

could accommodate. The point can be made from a consideration of the place of the House of Lords in the British rule of recognition, "Whatever the Queen in Parliament enacts is law". P Mirfield,⁹³ following Hart,⁹⁴ concluded that an Act of Parliament purporting to abolish the House of Lords would not change the rule of recognition to "Whatever the Queen in Commons enacts is law"; for the rule of recognition, being established as fact from the obedience of courts and officials (and the present rule being of continuing sovereignty), only the obedience of courts and officials would establish the new rule in which the Queen and Commons constitute the only ultimate law-maker. Now a judge according obedience to the Crown in Commons might purport to "hold" that the House of Lords had been legally abolished by Parliament. But this would be window-dressing. As in Wade's view,⁹⁵ a technical revolution would have occurred to establish the new rule of recognition.

In New Zealand the Diceyan K J Scott similarly explained the abolition of the Legislative Council by Act of the General Assembly passed in 1950:⁹⁶

The reason why the abolition of the Legislative Council was effective was that the Legislative Council ceased to exist and thus could not purport to exercise any powers.

Not entirely happily expressed, this passage nevertheless points clearly enough to a view like those of Wade, Mirfield and others. The Legislative Council was abolished not because as a matter of *law* the General Assembly had to that end exercised authority conferred by the United Kingdom Parliament; but because *in fact* paramount power, having already switched from the United Kingdom Crown in Parliament to a General Assembly of Governor-General, Legislative Council and House of Representatives, had now (in 1950) switched again, to a General Assembly of Governor-General and Elected House alone. The rule of recognition, simply as a matter of fact, had changed again.

Such an explanation is far indeed from the legal and popular understanding of the abolition of the Council. To say much would be to labour the obvious; but was it not *because* section 32, constituting the General Assembly in its three parts, was a reserved section protected by the 1857 (Amendment) Act that the General Assembly was thought powerless to abolish the Council? And if so, was it not *because* the 1947 (Amendment) Act conferred full power to alter any sections of the Constitution Act including section 32) that the Council could legally be abolished? And had any of the Legislative Councillors sought to establish in litigation that, after all, their House had not been legally abolished, would anyone really have thought, as would Wade, that whether the judge decided for or against

‡ "Can the House of Lords Lawfully be Abolished?" (1979) 95 LQR 36. But see Winterton "Is the House of Lords Immortal?" *ibid*, 386.

! See *supra* p 608. But for Hart's view that rules of law can indeed be self-referring (so that the component rule of succession provides for its own supersession), see *infra* p 625. That Parliament cannot legally reconstitute itself. See *supra* n 17, "Sovereignty" at 193-194; *Fundamentals* at 27-29.

Supra n 14 at 16.

them was a political choice, undictated by legal principles, between alternatives "[equally] justifiable in terms of constitutionality"?⁹⁷

If the answers obviously invited by those questions are right, we conclude that by the Legislative Council Abolition Act 1950 the General Assembly changed the rules of law-making by legally reconstituting itself.

But the conclusion leads one to consider a more important and controversial point: when six years later the now unicameral legislature enacted section 189 of the Electoral Act 1956, it again (I suggest) altered the rules of law-making, this time by imposing on itself a single entrenchment to give a very modest but nevertheless real legal protection to the reserved provisions of the Act. These include section 12 securing triennial parliaments, and provisions as to the voting age, the Representation Commission and the method of voting.⁹⁸ Under section 189(2) none of the reserved provisions can be amended or repealed except with a 75 percent majority of all members of the House of Representatives or on a simple majority vote in a referendum of electors.

Section 189(2) not being itself entrenched, a manner and form theorist would have to acknowledge that the single entrenchment could be removed in two steps — (1) by the express repeal (at least pro tanto) of section 189(2) by a simple majority, to clear the way for (2) the repeal or amendment by simple majority of any reserved section. On this view the first step is necessary: the lifetime of Parliament, for example, cannot be extended by a measure which, by-passing section 189, purports to amend section 12 directly. To the manner and form theorist, then, section 189(2) is legally effective to the limited extent that it purports to be.

The Diceyans, scornful of double entrenchment as legally ineffective are the more so of the single entrenchment in section 189(2).⁹⁹ They think that, a fortiori, that too can simply be ignored and the entrenchment impliedly amended and removed pro tanto by any measure passed in a manner contrary to the terms of the subsection. Their point is clear that whereas the Legislative Council having in fact ceased to exist can in fact no longer exercise its powers, the House of Representatives exists in fact and may in fact ignore section 189(2) and by a simple majority pass a bill directly amending a reserved section. On the Governor-General's assent the bill becomes a valid Act because the apparent condition of law-making in section 189(2) has been (so far as necessary in the particular instance) repealed.

97 See Wade, *supra* n 17 *Fundamentals* at 36. (The Councillors' case would of course rest on the proposition that the General Assembly, being now sovereign, had no power to reconstitute itself. Cf Mirfield, *supra* n 93). It is not denied that the whole relationship between the courts and parliament is in a sense "political" (Allan "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution" (1983) 3 Oxford J Legal Stud 2). But this does not mean that, in a case where part of the basis of the constitution is in question, the judge's decision is determined by personal choice of the type suggested by Wade.

98 See ss 2(1), 12, 15, 16, 17, 39, 99 (e) and 106; as affected by s 189.

99 Northey tentatively took up an intermediate position, subjecting single entrenchment to not double to implied repeal: see Northey, *supra* n 4 at 170. But this position is untenable. For the logical difficulties, see Marshall, *Constitutional Theory* (1971) 45.

All would agree that, whatever the legal effect of section 189(2), it has at least become strongly protected by convention. Indeed, so the Diceyan J R Marshall explained when introducing the Electoral Bill in 1956, this was the only kind of protection the reserved provisions could obtain.¹

Except for one possibility however. As Wade has recently suggested, the "facts of constitutional life" may be changing in New Zealand, in accordance with a "moral entrenchment" of section 189(2) that has come to be by convention.² In effect he suggests that the convention may in time pass into law, thus doing what a purported legal self-entrenchment (by an amendment to section 189(2)) could (in his view) not in itself effectively do.

One may be grateful for Wade's suggestion. Notwithstanding recent authority for the proposition that modern constitutional conventions cannot "crystallise" into law,³ changes in the facts of constitutional life may be such that they ultimately become part of the law, whether those changes have taken place with revolutionary abruptness or through the slow evolutionary force of custom.⁴ Such a change may be taking place as suggested in regard to section 189(2). Wade would perhaps agree that the change could even be hurried by an amendment purporting to entrench the subsection,⁵ which (to him) would be legally ineffective in itself but presumably some evidence of change in the constitutional facts.

But the view taken above of the 1947 (Amendment) Act would enable us, without resort to Wade's suggestion, to attribute definite legal effect both to section 189(2) as it stands and to any future amendment that would purport to entrench *it*. In 1956 the General Assembly, under the power of amendment conferred in 1947, impliedly amended the Constitution Act by enacting the single entrenchment contained in section 189(2). The common law simple majority rule applicable to the law-making power in section 53 was modified by the new provisions for a 75 percent majority or approval by referendum for the repeal or amendment of the reserved provisions. It is of course unnecessary that the change should have been expressly made to the Constitution Act itself, because, the New Zealand Constitution being at the time uncontrolled, no special process of constitutional amendment was prescribed.⁶ In other words, section 189(2) of the Electoral Act 1956 legally and effectively made a modest change in the rules of law-making applicable to the General Assembly.

It follows that the more radical change of double entrenchment could

1 1956 NZ Parliamentary Debates 2840.

2 Supra n 17 *Fundamentals* at 30. Cf Joseph "The Apparent Futility of Constitutional Entrenchment in New Zealand" (1982) 10 NZULR 27.

3 *Re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1.

4 See the treatment in this essay of the customs establishing the simple majority rule and separate deliberating of Lords and Commons, supra n 35 and text; and see generally Maher "Custom and Constitutions" (1981) 1 Oxford J Legal Stud 167. "Constitutional usage and practice" was recognised as the basis of the doctrine of the divisible Crown in *R v Secretary of State ex parte Indian Association of Alberta* [1982] 1 QB 892 (CA) by Lord Denning MR at 916-917. Cf May LJ at 929. And see *Manuel v Attorney-General* [1983] 1 Ch 77 at 91-93, per Megarry V-C.

5 Cf Joseph, supra n 2 at 38-39.

6 *McCawley v R* [1920] AC 691.

also be legally and effectively made to secure section 189(2) from repeal by a statute passed by a simple majority vote.

The consequences of this reasoning for the like protection of a Bill of Rights will be obvious.

The above argument has admittedly no support in New Zealand judicial authority. Such authority as there is will have to be disposed of below.⁷ But support can be inferred from what has been done by the General Assembly and within the House of Representatives, in other contexts from those of 1947, 1950 and 1956 discussed above. The support, if not conclusive, is significant as we shall now see.

Legislature Amendment Act 1977

By this Act the General Assembly has abrogated the rule⁸ that parliamentary business is discontinued by the prorogation or dissolution of Parliament and must be renewed at the next session if it is to be pursued further. The abrogated rule is described by Erskine May as a "constitutional law" and that authority refers to proposals in the United Kingdom to amend the rule "either by statute or by standing orders".⁹ The choice of statute as the proper means of effecting the change in New Zealand is significant: in a legislature constituted by law the rule in question was likely to be a rule of law-making which required to be abrogated by statute and not by a change in standing orders. Providing for the future carrying over of business from one session to the next,¹⁰ the Act also validated all Acts resulting from carried over Bills, whenever purportedly enacted.¹¹ One can not infer too much from the validating provision which was perhaps included out of caution. However, the provision makes sense to a manne and form lawyer but none at all to a Diceyan. For if, whatever the practices followed in the legislative process, legislation is accorded validity by enactment, there was simply no need to validate the Acts resulting from carried over Bills.

Electoral Act: Parliamentary practice in amending reserved sections

Equally interesting and significant is the changing understanding of section 189(2) of the Electoral Act 1956 shown by the legislators in the House of Representatives. D B Collins' researches demonstrated that it was at least uncertain whether the Electoral Amendments Acts of 1969 and 1974, respectively lowering the voting age to 20 and 18 and therefore amending certain reserved provisions, were passed with the 75 percent majority required by section 189(2).¹² In fact, the bills had the support of the Opposition and section 189(2) *could* have been complied with. But the apparent lack of concern to see that it was shows a Diceyan scepticism

7 *Infra* pp 630-632.

8 Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* (20th ed 1983) 27.

9 *Idem* (footnote 8).

10 Section 2.

11 Section 3.

12 Collins "A Constitutional Conundrum" [1975] NZLJ 195.

about the legal effectiveness of single entrenchment. On the other hand, it was treated as legally effective in the somewhat different circumstances of 1975 when a proposal for the amendment of another reserved provision, in section 2(1), did not obtain the requisite majority in Committee and was declared lost. Mr Speaker Whitehead, after quoting the simple majority rule recognised in Standing Order 118, remarked that¹³

Accordingly, as far as the Standing Orders are concerned, the motion was decided in the affirmative. But *it was agreed* that section 189 of the Act should be strictly applied to those proposals in the Bill which affect the reserved provisions.

The words I have emphasised are a little puzzling. They are scarcely apt for acknowledging that the House of Representatives is bound by statute. Further, it was the amendment by section 189 of a rule of law logically prior to the Standing Orders which was in question. Those comments aside, section 189(2) was applied as a rule of law-making to strike down a proposal which, had the simple majority rule applied, would have been carried and passed into law by the ordinary legislative process.

In his ruling on section 189(2) in relation to the Electoral Amendment Bill in 1980, Mr Speaker Harrison rightly or wrongly confirmed that it is proper to apply the 75 percent majority rule at the Committee stage only.¹⁴ But for our purpose the significant part of his ruling is his understanding of the context in which he made it:¹⁵

I could quibble my way round the words of the statute, but the words have a clear meaning to me. After all, they were written here, by common men using common sense, and common sense is still the foundation of the common law.

Here (rhetoric aside) he acknowledges impliedly but clearly the *legal* effect of section 189: the section has where it applies changed the simple majority rule of the common law. This ruling, if not the earlier, shows the matter seen as one of law to be strictly complied with; and not merely of convention where it might (as was apparently thought in the 1969 and 1974 instances) be enough that the proposal was known to have the general support of the House, without any need for a formal 75 percent majority at any stage.

We may conclude that, if parliamentary practice shows no clearly formulated understanding of the constitutional nature of the General Assembly, at least the dominant tendency has been consistent with the manner and form view already argued in this essay. There *are* precise rules of law-making to be complied with.

But there are possible objections, one of a general and theoretical nature and others more specifically practical, which have to be answered.

¹³ 1975 NZ Parliamentary Debates 3056.

¹⁴ 1980 NZ Parliamentary Debates 3512-3513. See Joseph, *supra* n 2 at 38.

¹⁵ *Supra* n 14 at 3513.

V OBJECTIONS AND ANSWERS

1 *The problem of self-referring laws*

In contending that Parliament could not fetter itself and therefore, in effect, for its continuing rather than self-embracing sovereignty, Dicey relied in part on the logic of sovereignty: "a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment".¹⁶

The objection leads to the wider problem of self-referring laws. It has been argued that the part of the rule of recognition which provides for constitutional amendment — the rule of succession of rules — cannot provide for its own supersession or amendment.

Alf Ross argued this as a corollary to a general principle that a proposition cannot logically refer to itself.¹⁷ We may relate Ross's arguments to the constitutional changes discussed in this essay as follows, taking in succession three successive statements of the ultimate rule of succession of rules in the New Zealand Constitution:

- (a) *The 1947 rule:* The New Zealand Constitution may be amended by and only by an Act of the United Kingdom Parliament.¹⁸

The New Zealand Constitution (Amendment) Act 1947, conferring the same exclusive power of amendment on the New Zealand General Assembly, was passed in accordance with the 1947 rule (i.e. is an Act of the United Kingdom Parliament).¹⁹

Therefore the New Zealand Constitution may be amended by and only by an Act of the General Assembly.

- (b) *The 1950 rule:* The New Zealand Constitution may be amended by and only by an Act of the General Assembly consisting of the Governor-General, Legislative Council and the House of Representatives.

The Legislative Council Abolition Act 1950 was passed in accordance with the 1950 rule (i.e. is an Act of the General Assembly so constituted).

Therefore the New Zealand Constitution may be amended by and only by the General Assembly consisting of the Governor-General and the House of Representatives.

- (c) *The 1956 rule:* Any part of the New Zealand Constitution may be amended by and only by the General Assembly, consisting of (1) the Governor-General and (2) the House of Representatives voting by a simple majority vote.

The Electoral Act 1956, providing by section 189 that section 12 and other reserved sections may be amended only with a 75 percent majority of the House of Representatives (or with approval of a referendum), was passed in accordance with the 1956 rule.

Therefore there is a part of the New Zealand Constitution which may not be amended in accordance with the 1956 rule and may only be amended in accordance with a new special rule.

16 Dicey, *Law of the Constitution* (10th ed 1959) 68. Dicey relied also on his understanding of the *history* of the Constitution: *ibid* at 68-70. See MacCormick, *supra* n 44 at 6 et seq.

17 *On Law and Justice* (1958) ("*On Law*") 80 et seq; "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 *Mind* 1.

18 The 1857 (Amendment) Act being such an Act, amendments made by the General Assembly under the limited power conferred by that Act are included in the premise.

19 The form of the premise assumes that the constituent powers conferred by the 1947 (Amendment) Act were not only plenary but *exclusive* also, except in so far as further amendment might be made by the United Kingdom Parliament on a New Zealand request under the Statute of Westminster, s 4.

The three arguments have been set out in essentials only. Each has been modelled on Ross's example of a self-amendment of article 88 of the Danish Constitution.²⁰ As in that example, the first premise states (as the ultimate rule of succession of rules or basic norm) *the only way* in which the Constitution may be amended. The inference which follows is (according to Ross's argument) logically absurd in that it contradicts that first premise. Ross regarded this reasoning as "sufficient proof of the impossibility of amending a basic norm in accordance with" itself.²¹

Ross's arguments were not accepted by H L A Hart and others, Hart in particular contending that, because the original rule and the amended rule relate to different periods of time, there was no contradiction between them and the former simply ceased to be valid law when superseded by the latter.²² Ross replied that this was to confound legal with logical contradiction; that of course the later law supersedes the earlier; but that it does so because it is logically incompatible with the earlier law.²³ In turn Joseph Raz stated what appears to be a similar defence of self-referring laws to Hart's²⁴ and, more recently, Laurence Goldstein has argued that Ross's reasoning is based on "a mistaken view about the relation between a constitution and its rules".²⁵

It is beyond the scope of this essay (and the competence of its writer) to pronounce further on this controversy. A judge, if it has ever to be argued before one, is not likely to feel confident in solving it by preferring one side or the other. Instead the judge may well be attracted by Ross's change of mind on the ultimate merits, and his new found legal solution to the constitutional puzzle he had himself created by his own logical objections. Originally Ross had thought that the type of constitutional change in question, being (on his view) impossible to explain logically in terms of the previous law, was "an extra systematic phenomenon, a factual social-psychological change in the dominant political ideology".²⁶ The purported amendment of the basic norm (or rule of succession of rules) in accordance with itself was then done as a kind of "magical act"²⁷ which signified the factual change in the dominant ideology. The notion of "magical acts" aside, Ross's position was of course not in substance very different from that of Wade: the latter too (in effect) denied that power can legally devolve under a self-referring rule of succession of rules.²⁸ Or, again in Ross's words, "from a norm of competence, no norm contrary to it can be derived".²⁹

"On Self-Reference . . .", supra n 17 at 5. For the purpose of the argument the 1947 (Amendment) Act is, like Article 88, an ultimate rule of succession of rules or basic norm (in Ross's equivalent term).

"On Self-Reference . . .", supra n 17 at 5.

"Self-Referring Laws" in *Festskrift till ägnad Karl Olivecrona* (1964) 307 at 314.

"On Self-Reference . . .", supra n 17 at 20-21.

"Professor A Ross and Some Legal Puzzles" (1972) 81 *Mind* 415 at 420. See also Hoerster, *ibid* 422.

"Four Alleged Paradoxes in Legal Reasoning" [1979] *CLJ* 373 at 376.

On Law, supra n 17 at 83.

Idem.

The comparison is made by Finnis in *Oxford Essays in Jurisprudence* (2nd series 1973 ed Simpson) 44, 53-54. As to Hood Phillips' similar view, see *infra* at p 629.

"On Self-Reference . . .", supra n 17 at 21.

Hence on this view each of the New Zealand constitutional changes in 1947, 1950 and 1956 was an attempt to create a new basic norm or rule of succession of rules by derivation from but in contradiction to its immediate predecessor.

Ross's significant change of mind was this. Though maintaining still his logical objections to self-referring laws, he abandoned as unsatisfactory the view of basic constitutional change as extra-legal and accomplished by "magical acts". He was driven to this because he recognised that:³⁰

[P]eople (in Denmark, as elsewhere) think and act as if the basic norm (art 88) may be amended in accordance with its own rules.

He continued:³¹

If people do in fact act on a certain understanding of the meaning of art 88, this understanding *must* be expressible in rational terms.

Ross's solution to the constitutional puzzle was to remove from the ultimate rule of amendment the status of basic norm and postulate instead a "legally unchangeable" basic norm to authorise the successive constitutional changes, which now cease to be complicated by the problem of self-reference. Adapting Ross's new model,³² we may formulate this as the basic norm in New Zealand for the period up until the constitutional legislation of 1947:

Obey the United Kingdom Parliament until it points out a successor; then obey that successor until *it* points out a successor; and so on indefinitely.

The first successor was of course the General Assembly consisting of Governor-General and Upper and Elected Houses; the second was the General Assembly consisting of the Governor-General and the Elected House (voting by simple majority) alone; and the third the same body but with a special majority rule where section 189 of the Electoral Act applies.

This concept of a presupposed basic norm directing obedience to or empowering³³ (i) the United Kingdom Parliament and then (ii), (iii) and (iv) a succession of General Assemblies, is difficult and not clearly better (at least in the sense of more serviceable) than the more straightforward one of a self-embracing supremacy which allows the United Kingdom to abdicate in favour of a General Assembly with plenary powers of self-reform.³⁴ The latter concept is of course generally that at least implicitly

30 Ibid at 6.

31 Ibid at 7.

32 Ibid at 24.

33 The norm may be formulated as a power-conferring law, as well as a duty-imposing law. See Raz, *supra* n 24 at 416-417.

34 For criticisms of Ross's new basic norm, see eg Raz, *ibid* at 416-419; Hoerster, *ibid* 424-426. And of the controversy over the supposed basic rule on which the doctrine precedent is argued to rest: see Evans [1982] CLJ 162, Goldstein [1984] CLJ 88 and Evans (in reply) [1984] CLJ 108.

in the views of the manner and form school and is supported by arguments for the validity of self-referring laws.

Whatever the difficulties, Ross may be found to share with at least some of his critics recognition of a proper need, which a judge might well likewise recognise, to explain basic constitutional change in a way which rationally expresses the popular understanding of it as a matter of law.

Thus J M Finnis, while sceptical of Ross's logical objections to self-referring laws,³⁵ refers to the " 'analytical' explication of 'the ordinary man's point of view' "³⁶ in justifying a general principle of legal continuity; which he puts forward, expressly as a generalisation of Ross's unchangeable basic norm, to provide an adequate "practical and theoretical understanding" of law and legal change.³⁷

Finnis's general principle (1) not only, like Ross's norm, explains as *legally* valid the process by which one rule of succession of rules by (at least apparently) self-referring amendment establishes another to replace it but also (2) goes further in explaining how (overtly) revolutionary change in the rules of competence to make law and of succession of rules leaves the rest of the legal system unaffected.

All this is important (though the latter aspect of the principle is not under consideration here) because it gives effect to the reasonable expectation of ordinary people: the continuity of a given society should generally be reflected in the continuity of its law. To adapt Finnis,³⁸ there is no good reason to disappoint that expectation (as Wade does) by forcedly interpreting orderly and apparently lawful constitutional devolution or development as a series of technical revolutions ungoverned by law. We are free rather to see apparent legal and constitutional continuity as real, rationally supported either by the concept of self-referring laws or by that of Ross's basic norm authorising the successive changes.

Above all there is now a means (or rather there are alternative means) of reconciling the twin principles of the supremacy of law and of Parliament, and of enabling the latter in the exercise of its very supremacy to submit itself, for the better protection of constitutional values, to special rules of law-making.³⁹

That however is to assume a view of the merits which some do not share. We turn now to their objections.

Supra n 28 at 54, 57.

Ibid at 65 (quoting Raz, *Concept of a Legal System* (1970) 200 n 2).

Ibid at 63 (the emphasis is his): "A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*."

Ibid at 65.

See O Dixon's discussion of the wide significance (not limited to the colonial context) of *Attorney-General for New South Wales v Trethowan* ((1931) 44 CLR 394; affirmed [1932] AC 526) in "The Law and the Constitution" in *Jesting Pilate* (1965) 38 at 50. But see infra p 630.

2 *A constitutional straitjacket?*

In a celebrated passage in *McCawley v R*⁴⁰ Lord Birkenhead disavowed for the mother of Parliaments any intention to fetter her colonial offspring in the exercise (within the prescribed limits) of the powers conferred on them:

Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived.

There are serious logical objections to Lord Birkenhead's view as a defence of continuing sovereignty.⁴¹ The argument remains however that it is undesirable to recognise in an uncontrolled constitution a power for the sovereign legislature to impose limits on itself. Such a power is said to be undemocratic⁴² in that it enables a simple majority to entrench its legislation by a manner and form provision, such as a special majority rule, that will make the legislation virtually unrepealable. McTiernan J drew attention to the problem in his dissenting judgment in *Attorney-General for New South Wales v Trethowan*⁴³ and it has perhaps never been satisfactorily solved theoretically.⁴⁴ The distinction between a proper and improper use of manner and form restrictions must depend on constitutional values generally accepted. For example, the protection of voting rights or of the election of triennial parliaments appears a proper matter for protection by double entrenchment; protection of either voluntary or compulsory membership of trade unions (at least in our society) might not. The distinction of course would depend on whether or not there is a strong community consensus to support the entrenchment. There is no mystery or real difficulty here: any change to a measure of (greater) rigidity in a constitution must in fact command support far exceeding that indicated by the minimum legislative vote by simple majority legally necessary to achieve it. If general support is lacking, the government which employs its legislative majority in this way invites either refusal by the courts (which might be prone in the circumstances to remain determinedly Diceyan) to recognise the new constitutional rules or else revolutionary breach of those rules. But in any event, the legal possibility of a constitutional straitjacket is an evil less to be feared than that of perpetual and helpless submission to an omnipotent parliament, unbound and incapable (otherwise than through revolution) of becoming bound by conditions of law-making.

40 [1920] AC 691 at 703.

41 See Finniss "Scepticism, Self-Refutation, and the Good of Truth" in *Law, Morality and Society* (1977 ed Hacker and Raz) 247 at 254-256.

42 O'Brien "The Indivisibility of State Legislative Power" (1981) 7 Monash U L Rev 225-244-245.

43 Supra n 39, 44 CLR at 442-443.

44 The difficulty can be partly met by a test as to the substantial nature of the self-restricted legislation: it must not under the guise of manner and form amount to an attempt to abrogate the law-making power. See Winterton "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 LQR 591 at 605. Cf Lumb, *The Constitutions of the Australian States* (4th ed 1977) 112.

3 A (post?) 1947 revolution?

Hood Phillips has stated thus his logical objection to self-limitation by a legislature:⁴⁵

The problem raised in this chapter is that known to logicians as self-referring or reflexive propositions. The view put forward here is that it is impracticable for a legislature to limit itself as to the laws it shall make or repeal unless it is empowered, expressly or impliedly, so to limit itself by some "higher law", that is, some (logically and historically) prior law *not laid down by itself*.

Hood Phillips cited in support Ross's views on self-referring laws⁴⁶ discussed above. It seems that he accepts Ross's concept of a basic norm empowering constitutional change but only where it is actually shown to exist as an identifiable law at the base of a particular legal system. He does not accept it as a presupposition to account for the ordinary person's understanding of constitutional change.

Let us look at the New Zealand position in the light of the passage quoted. In Hood Phillips' view, there was no logically or historically prior law enabling the United Kingdom to abdicate its supremacy over New Zealand. Hence the 1947 (Amendment) Act can be interpreted only as an empowering of the General Assembly, not as also an abandonment of the legislative supremacy of the United Kingdom Parliament, which remained undiminished in law. Both that Act and the Statute of Westminster remained in theory repealable by the United Kingdom Parliament as in British constitutional law, until the "political fact" of New Zealand independence came to ensure that that body "can no longer alter" the law of New Zealand.⁴⁷ But the movement of paramount power that took place or was made complete when New Zealand independence in fact became established beyond all doubt leaves undisturbed the existing constitutional structure. That is unquestionably shown by the decisions, accepted by Hood Phillips, in *Harris v Minister of Interior*⁴⁸ and *Bribery Commissioner v Ranasinghe*⁴⁹ and (in a slightly different context) by more recent decisions of the High Court of Australia.⁵⁰ The 1947 (Amendment) Act, basic to that structure in New Zealand, remains in force as a logically and historically prior law not laid down by the General Assembly but empowering it to bind and limit itself by making whatever amendments to the Constitution Act it thinks fit. Hood Phillips, citing the New Zealand Constitution Amendment Act 1973, considers that the New Zealand Parliament is not "limited by a higher law".⁵¹ But that is to leave out of account the self-limitative powers which a higher law appears to have conferred.

What if the political facts of New Zealand independence were not substantial enough to be reflected in the law? If that were so, neo-Diceyans

⁴⁵ *Constitutional and Administrative Law* (6th ed 1978) 61 (his emphasis).

⁴⁶ Ross "On Self-Reference . . .", *supra* n 17.

⁴⁷ Hood Phillips, *supra* n 45 at 73. Cf Wade, *Constitutional Fundamentals* (1980) 29-30.

⁴⁸ 1952 (2) SA (AD) 428.

⁴⁹ [1965] AC 172.

⁵⁰ See *supra* p 617, n 85.

⁵¹ *Supra* n 45 at 85.

like Hood Phillips and Wade (believing legal devolution impossible in any event) and any manner and form theorists who might (quite reasonably) hold that there has been no clear and unequivocal abdication by the United Kingdom Parliament of its legislative authority over New Zealand,⁵² would alike agree that the General Assembly remains constitutionally subordinate to and dependent upon that body. It would then follow that the General Assembly's power to reconstitute itself or to bind itself by manner and form legislation rests upon the unchanged rule of recognition in New Zealand that whatever the United Kingdom Parliament enacts is law. The United Kingdom Parliament has empowered it to do so by the 1947 (Amendment) Act; just as, by section 5 of the Colonial Laws Validity Act 1865, it empowered the New South Wales Parliament to impose on itself the manner and form restriction upheld by the Privy Council in *Attorney-General for New South Wales v Trethowan*.⁵³

4 *The New Zealand courts: dicta: attitudes so far*

In his Hamlyn Lectures H W R Wade trenchantly answered his manner and form opponents:⁵⁴

But, in the end, what is the substance of their argument? It is simply their prediction, made with varying degrees of dogmatism, that the judges will, or should, enforce restrictions about manner and form and abandon their clear and settled rule that the traditional manner and form is what counts. But if it is vain for Parliament to command the judges to transfer their allegiance to some new system of legislation if the judges are resolved to remain loyal to the old one, it is still more vain for professor to assert that they should. The judicial loyalty is the foundation of the legal system and, at the same time, a political fact. This is the reality which the "manner and form" school fail to appreciate.

The great difference between Wade and his opponents is precisely that they believe the question in debate is one of law while Wade denies this. In the New Zealand context one may more easily meet him on his own ground by showing, as I have tried to show, that there is here (whatever the case in the United Kingdom) no traditional manner and form beyond the power of the General Assembly effectively to reform in law. The case to this effect would perhaps attract judges who, after all, might not take kindly to the argument that questions of the validity of basic constitutional changes have no legally correct answers but are matters of political choice whatever legal window-dressing is employed to conceal this. But, unacceptable as the Wade argument is likely to be in this form, the influence of Dicey is still strong here. One cannot be sure that in the New Zealand courts Diceyan views, with or without the sophisticated developments of Wade, would not prevail against the manner and form views argued in this essay. Further, some obiter judicial opinion indicates that they would prevail. Those indications must be briefly considered before the conclusions of the essay are summarised and the solutions to the whole problem offered.

52 See supra p 604.

53 Supra n 39. This was the narrow ground upon which the Privy Council upheld the High Court of Australia in that case — a ground acceptable of course to both Hood Phillips (supra n 45 at 86) and Wade ([1955] CLJ at 182-183).

54 Supra n 47 at 29.

In *Simpson v Attorney-General*⁵⁵ the Court of Appeal appears to have suggested that sections of the Acts Interpretation Act 1924⁵⁶ and of the Evidence Act 1908⁵⁷ might bar a court from going behind a Government Printer's copy of an Act of Parliament to determine any question of its validity. This view cannot be sustained from a consideration of the sections referred to,⁵⁸ though doubtless it would be possible for Parliament by a curious piece of (possibly self-referring) legislation to give Government Printers' copies the sanctity and conclusiveness of the old English Parliamentary Roll. In the absence of so eccentric a piece of legislation, the rule for Diceyans is likely to remain that the courts cannot go behind a copy of the Act signed by the Governor-General. Even then the Diceyan would allow that the purported enactment would not be valid if a defect appeared on its face.⁵⁹ *Simpson's* case is innocent of discussion on these issues and, apart from indicating Diceyan attitudes on the part of the judges, is of no direct help in a problem requiring the legal nature of the General Assembly and its supremacy to be closely analysed.

Nor do these words from the judgment of the Full Court in *Re Hunua Election Petition*,⁶⁰ on the effect of section 189(2) of the Electoral Act 1956, carry the matter further:⁶¹

In the absence of a constitution it is difficult to appreciate that s 106 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 in that it is provided that it shall not be repealed or amended [otherwise than as laid down in s 189(2)].

No doubt P A Joseph⁶² is correct in his inference that, in the Court's view, "in the absence of a constitution", section 189 had not altered the rules of law-making and that double entrenchment would make no difference.

But it was unnecessary in the particular case for the matter to be closely considered. The dictum does no more than show a judicial readiness to give special weight to a single entrenchment but against an unexamined background of orthodox Diceyan doctrine.

⁵⁵ [1955] NZLR 271 at 284 (per Stanton and Hutchison JJ). Cf McGregor J at 286.

⁵⁶ Sections 10 and 17(b).

⁵⁷ See now ss 28(1) and 29(1).

⁵⁸ For the correct view, that the sections (supra nn 56 and 57) do not have such an effect, see Northey, supra p 603, n 4 at 169, who cites W A Anderson's examination of the matter in his unpublished thesis (unavailable to me; but the point does not admit of any doubt). *The Princes Case* (1606) 8 Co Rep 1a; 77 ER 481.

⁵⁹ [1979] 1 NZLR 251.

⁶⁰ Ibid at 298. Section 106 deals with the method of voting.

⁶¹ 10 NZLR at 29-30. The implicit Diceyanism of the Judges finds some reinforcement in the dicta of Megarry V-C in *Manuel v Attorney-General* [1983] 1 Ch 77 at 89. It may perhaps be countered somewhat in spirit by the unDiceyan revival of common (natural?) law substantive limitations on the supremacy of Parliament, suggested by dicta of Cooke J in such cases as *L v M* [1979] 2 NZLR 519 at 527, *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390 and *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. But any such revival, welcome as it may be, is not directly related to necessary compliance with (procedural) conditions of law-making. (The dicta are discussed by Caldwell [1984] NZLJ 357 and Keith (1985) 14 VUWL Rev 29 at 33-34).

However, to that doctrine there appears to have been no explicit or reasoned commitment by any New Zealand court. The way is therefore open for acceptance of a manner and form view under which the General Assembly, whatever its present constitutional position in relation to the United Kingdom Parliament, is legally able to reconstitute itself or bind itself by manner and form legislation.

VI CONCLUSION: AND A WAY FORWARD

This essay has sought (i) tentatively to show the United Kingdom Parliament as, in accordance with the view of the manner and form school, a creature of law, bound by rules of law-making as to manner and form rules which it may itself (as is suggested) change in the exercise of a procedurally self-embracing supremacy; but also (ii) to establish the same conclusion much more strongly of the New Zealand General Assembly. Whether that body has been freed from dependence on the United Kingdom Parliament by legal devolution of authority or by change in the political facts of paramount power, or whether it remains in law constitutionally dependent, it is a legally constituted legislature to which Diceyan argument of an historically evolved sovereign, in all respects above the law, cannot be applied. Some support for this understanding of the General Assembly was found in the actions of that body and in practices within the House of Representatives itself in its compliance with section 189 of the Electoral Act 1956. The possible force of logical objections to self-referring laws was acknowledged but the solution of the logician himself (Alf Ross) was used to counter their effect. Objections to the merits of self-imposed manner and form restrictions were answered. In the relevant dicta of New Zealand judges nothing but unargued Diceyan assumption was found to prevent a manner and form interpretation of the New Zealand Constitution from acceptance.

Especially the case presented here rests upon a principle of the proper use of law in accomplishing generally desired constitutional change, which in several aspects has been expounded by Owen Dixon and, more recently, Alf Ross and J M Finnis in particular, and by the manner and form school generally.

We may conclude out of all this that the manner and form theories convincingly explain the nature of the New Zealand Constitution and provide an acceptable basis for (i) regarding section 189 of the Electoral Act 1956 as effective in law within the modest limits of a single entrenchment and (ii) much more ambitious schemes for double entrenchment of the reserved provisions in that Act or of a Bill of Rights or written constitution. The following practical suggestions for the constitutional reformer in the present area imply no resiling from that firm conclusion.

These suggestions are offered then to manner and form and Diceyan theorists alike who, agreeing about the need for a firmer constitutional structure, necessarily disagree about the means to attain it:

(1) A modest step forward would be double entrenchment of the reserved provisions of the Electoral Act 1956, section 189(2) being amended to become itself entrenched.

(2) The enactment of a doubly entrenched Bill of Rights or of a written

constitution would obviously be a much more radical reform, requiring a degree of general consensus that has yet to appear.⁶³ But discussion of the merits should not be clouded by any dispute over the legal effectiveness of reform to this end, should the reform be undertaken. Some might suggest that the United Kingdom Parliament be requested, under section 4 of the Statute of Westminster, to pass a New Zealand Act which would both “confer” the Bill of Rights or the new constitution including it and also formally abandon United Kingdom legislative authority over New Zealand. To the neo-Diceyan such a measure, though legally ineffective itself, would be indicative of revolutionary changes in the facts of constitutional life but changes that would remain uncertain in their extent until the establishment of the new constitutional order found acceptance by judges and officials. To the manner and form theorist the changes would be legally effective. But to request such legislation of the United Kingdom Parliament would be anachronistic and unnecessary when for so long — since 1947 — the full power of constitutional amendment, of the nature expounded in this essay, has resided in the General Assembly. Hence no suggestion is made here for the enactment of a New Zealand Act (UK) after the model of the Canada Act 1982 (UK).⁶⁴

(3) For the sake of caution, however, some step is needed to ensure that a doubly entrenched Bill of Rights (or new constitution), enacted by the General Assembly under the 1947 (Amendment) Act, should be protected against Diceyan attack. Here Wade himself, in no way sharing the constitutional passivity and helplessness once somewhat characteristic of Diceyans, has proposed a simple means of obtaining the necessary switch of judicial allegiance:⁶⁵

If we should wish to adopt a new form of constitution . . . all that need be done is to put the judges under oath to enforce it.

One need only add that the legislation providing for the new judicial oath should itself be doubly entrenched against its being amended or repealed by the normal legislative process.

(4) Finally the mysteries of parliamentary privilege should no longer be allowed to obscure the way of reform. Though we have argued that privilege does not bar a court’s inquiry into parliamentary observance of conditions of law-making, the point might remain doubtful to some. Any doubt, however, may readily be removed, for privilege, indeed a concomitant of parliamentary supremacy,⁶⁶ is yet as subject to it as the rules of law-making

Discussion will be influenced by (among other writings) Scarman, *English Law: The New Dimension* (1974) and Woodhouse, *Government Under the Law* (J C Beaglehole Memorial Lecture 1979).

This Act patriated the Canadian Constitution, leaving it doubly entrenched, and also finally terminated the power of the United Kingdom Parliament to legislate for Canada. The Charter of Rights contained in the Constitution is subject to some extent to legislative over-riding.

Supra n 47 at 37-38. Wade is against “contriv[ing] some artificial legal discontinuity” (ibid at 39) — as for example occurred in Eire in 1937 (see Wheare *The Constitutional Structure of the Commonwealth* (1960) 89 et seq).

British Railways Board v Pickin [1974] AC 765 at 798 per Lord Simon of Glaisdale.

themselves. In preference (or in addition) to adopting the device of a Speaker's certificate or a special enacting formula to show at least prima facie compliance with the rules, the General Assembly should, as part of the entrenched reforms, remove any possibility that the courts might be barred from necessary inquiry into the alleged facts of compliance.