

“A Constitution for Aotearoa in the context of Parliamentary Sovereignty”

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Table of Contents

<i>Abstract</i>	3
<i>Word length</i>	3
<i>Subject and Topics</i>	3
<i>I Introduction</i>	4
<i>II Parliamentary Sovereignty in New Zealand</i>	6
<i>A What is Parliamentary Sovereignty?</i>	6
<i>B Parliamentary Sovereignty in New Zealand</i>	9
<i>C Limits of the doctrine of Parliamentary Sovereignty</i>	10
1 <i>Parliamentary Sovereignty and the Rule of Law</i>	10
2 <i>Parliamentary Sovereignty and Human Rights / Bill of Rights Act 1990</i>	13
3 <i>Parliamentary Sovereignty and the Power of the Courts</i>	14
4 <i>Extra-legal limitations</i>	17
5 <i>Conclusion</i>	19
<i>III Constituent Power</i>	20
<i>A. The difference between the material and formal constitution</i>	20
<i>B. What is constituent power?</i>	21
<i>C. Application of the concept in New Zealand</i>	23
1 <i>Parliament</i>	24
2 <i>Referendum</i>	26
3 <i>Why not a Constituent Assembly?</i>	28
4 <i>Parliament and Referendum</i>	29
5 <i>Māori representation</i>	32
<i>IV Does Parliament have the legal power to bind its successors?</i>	34
<i>A. Form and manner</i>	39
<i>B. Constituent power vs. constituted legislature</i>	43
<i>C. Application to the adoption of Art 116</i>	47
<i>V Is the amendment rule art 116 sufficiently secured against amendment?</i>	49
<i>A. Unwritten entrenchment</i>	51
<i>B. Article 116 itself as part of the amendment procedure</i>	53
<i>C. Double entrenchment / Permanent entrenchment</i>	53
<i>D. Conclusion</i>	56
<i>VI Conclusion</i>	57
 <i>Bibliography</i>	

Abstract

This dissertation argues that human rights and constitutional amendment provisions should be entrenched eternally in the course of adopting a formal constitution in New Zealand. This would prevent abuses of powers within state institutions and provide sufficient protection to basic human rights. The constituent power, which consists of parliament and the electorate, can bind the ordinary parliament through the entrenchment of certain provisions in a formal constitution. The doctrine of parliamentary sovereignty would not be breached if this doctrine is understood to only apply to parliament when acting as an ordinary legislature.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 34080 words.

Subject and Topics

Parliamentary Sovereignty – Constituent Power – Constitution-Making – Constitutional Amendment – Entrenchment – Eternity Clauses

I Introduction

Being from Germany, I see a great importance in a fixed and clearly written constitution, which cannot easily be altered by the ordinary legislature. As history has shown, the instability of a constitution can lead to governments abusing power, and in the worst-case scenario, to the abolishment of democracy itself and the establishment of a dictatorship in which the people of a country have not any say. As a result of that kind of experience, the constitution of Germany, adopted after the Second World War, grants basic human rights to the people and establishes a structure of government that would make it nearly impossible for any constituted power (be it the legislative, the executive, or the judiciary) to legally take away those rights.

I find it surprising that New Zealand does not have a single entrenched constitutional document. Even the legal status of the main constitutional documents often remain unclear and disputed.¹ In my opinion, constitutional rules should be legally binding and entrenched by the constituent power. To give these basic rules their constitutional importance, they must gain a legal status above ordinary law and be secured against amendment at least to a certain extent. There has been a recent development in New Zealand with respect to these issues: the proposal of a written constitution by Geoffrey Palmer and Andrew Butler. My dissertation will analyse that constitution and its amendment rule (article 116), in the context of the doctrine of parliamentary sovereignty. I want to examine whether such an amendment rule can legally bind future legislative majorities, that is to say, whether it can prevent changes such as the abolishment of democracy and human rights.

The dissertation will start with an analysis of the doctrine of parliamentary sovereignty in New Zealand, a far-reaching doctrine that has been challenged in recent years. The reader will be provided with a short overview of the origins of the doctrine and its content and meaning for a democratic society. An overview of the current debate in New Zealand about the limits to parliamentary sovereignty will also be provided, which will be essential for the further analysis of the proposed constitution. Chapter 2 will consider the nature of the constituted and constituent powers of the Parliament of New Zealand. Both are important with regards to the legitimacy of the law being made, but have different functions. The constituent power sets out the basic constitutional rules, whereas the constituted powers are the powers that derive from the constitution (however the constitution exists, written or unwritten), such as those that enable the legislature to make law.²

The structure of the dissertation will lead to the main question discussed in Chapter 4, whether certain provisions, especially those of the proposed constitution by Palmer and Butler could be eternally entrenched, so that no institution could amend them. The constitution proposed by Palmer and Butler is being discussed amongst New Zealand's legal experts. It might become the foundation for a written single constitutional document in New Zealand, if it is ever adopted. In that case, the "strength" of that constitution, to a great extent, lays within the correct entrenchment of the amendment rule. I will use that draft constitution as a sort of case study throughout which the main question of the dissertation will be examined. I will identify problems and offer solutions about the entrenchment of an amendment rule, with specific regards to Palmer and Butler's proposal. My aim is to contribute to the current constitutional debate in New Zealand.

¹ Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders" (2006) 17 PLR 133 at 133.

² Joel Colón-Ríos "Rousseau, Theorist of Constituent Power" (2016) 36 Oxford Journal of Legal Studies 885, at 885 and 886.

Chapter 4 will consist of an analysis of specific aspects of the proposed constitution, particularly the process that would lead to its adoption. The analysis aims to uncover whether the method suggested by Palmer and Butler to entrench constitutional rules can effectively bind future parliaments and therefore stand above ordinary law. Building on to the analysis in Chapter 2, Chapter 4 will argue that the NZ parliament has the power to bind its successors. However, in order to adopt a written constitution and to eternally entrench certain provisions, an additional referendum by the electors would be needed. Richard Albert has argued that amendment rules are most often not effectively entrenched and can themselves easily be altered.³ As a result, the amendment power is able to circumvent the amendment procedure by simply abolishing the amendment rule itself. Chapter 5 discusses whether and how the amendment rule of the proposed constitution is itself entrenched against alteration. This amendment rule will be critically reviewed with regards to its “strength”, and I will argue that the rule itself is not satisfactorily protected against ordinary amendment.

The research will be conducted by a critical analysis of the literature on parliamentary sovereignty, constituent power and constitutional amendment rules. The analysis of the amendment rule of Palmer and Butler’s proposed constitution will be done in light of that literature. For the purposes of this dissertation, I will consider the nature and scope of the proposed amendment rule from a legal and theoretical perspective. As with any rule, there may be political and cultural issues that affect the way in which the amendment power would in fact be exercised. An examination of those political and cultural factors is outside of the scope of the dissertation.⁴

³ Richard Albert “Amending constitutional amendment rules” (2015) 13 ICON 655, at 659.

⁴ Tom Ginsburg and James Melton “Does the constitutional amendment rule matter at all?: Amendment cultures and the challenges of measuring amendment difficulty” [2015] 13 ICON 686, at 699.

II Parliamentary Sovereignty in New Zealand

The doctrine of parliamentary sovereignty and its limits have been extensively discussed in common law literature. Different approaches have been taken. Dicey, for example, sees only factual limits on parliament.⁵ Goldsworthy, on the other hand, considers whether this doctrine is still valid in lieu of modern constitutional culture, and comes to the conclusion that it still is.⁶ Philip Joseph takes a different position by assuming that parliament can limit itself through the entrenchment of legislative procedures.⁷

A What is Parliamentary Sovereignty?

The doctrine of parliamentary sovereignty is one of the oldest and most significant doctrines of the English constitutional tradition.⁸ It is one of “the dominant characteristics of our political institutions”.⁹ Despite the great amount of research that has been done about it, it is until today unclear what it entails and what its limits are. There are even different interpretations of the concept of “sovereignty”. Albert Dicey, one of the forethinkers of the doctrine, was concerned with the interpretation of “[parliamentary] sovereignty” from a legal point of view, where parliamentary sovereignty means the supreme legal authority.¹⁰ The political view¹¹ on the other hand, which is often difficult to distinguish from the legal view, assumes that lawful power and authority should conform with moral standards, which are constituted by ‘higher’ or ‘natural law’.¹² It is more a concept of political authority within a social order, than a description of the institution that has the ultimate power to make law. Part of the political view, advocates of which for example are Thomas Hobbes and Jean-Jacques Rousseau, is the idea of a social contract in which the people surrender their authority to the state.¹³

As the legal view focuses on the constitutional aspect of sovereignty¹⁴, this paper will only assess parliamentary sovereignty in its legal sense. The concept of parliamentary sovereignty dates as far back as the 17th and 18th century. To be able to examine the origins of the doctrine of parliamentary sovereignty as it exists today in New Zealand, a brief look at its development in England will help. New Zealand is a Commonwealth country, whose constitutional history originates in the United Kingdom. New Zealand was constitutionally dependent on the United Kingdom from 1840 to 1947, although there is no consensus about the exact date of independence¹⁵. Though New Zealand’s path to constitutional

⁵ Albert V Dicey *The Law of the Constitution* (1st ed, Oxford University Press, New York, 2013) vol 1 at 41 & 44-49.

⁶ Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” [2005] 3 NZJPIL 7.

⁷ Philip A Joseph *Constitutional Law and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 577.

⁸ Christina E Parau “Core Principles of the Traditional British Constitutions” Department of Politics and International Relations University Oxford
<https://www.politics.ox.ac.uk/materials/Core_Principles_of_the_British_Constitutions.pdf>.

⁹ Dicey, above n 5 at 27.

¹⁰ Hilaire Barnett *Constitutional and Administrative Law* (6th ed, Routledge-Cavendish, New York, 2006) at 151.

¹¹ Barnett, above n 10 at 151.

¹² Barnett, above n 10 at 151.

¹³ See for a more detailed discussion: Barnett, above n 10 at 151-153.

¹⁴ Barnett, above n 10 at 151.

¹⁵ “New Zealand Sovereignty: 1857, 1907, 1947, or 1987?” New Zealand Parliament
<<https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP07041/new-zealand-sovereignty-1857-1907-1947-or-1987>>.

independence started with England passing the New Zealand Constitution Act (UK) 1852¹⁶, it did not achieve full independence until the passing by the New Zealand parliament of the Statute of Westminster Adoption Act 1947.¹⁷ Thus, the political doctrines and constitutional conceptions of New Zealand, apart from more recent independent specifications, also originate in the United Kingdom. Albert Dicey can therefore also be seen as the intellectual father of the doctrine of “parliamentary sovereignty” in New Zealand, as will further be analysed below.

The doctrine of “parliamentary sovereignty” in the United Kingdom is not written down in a statute.¹⁸ The doctrine has been upheld and recognised as law by the courts.¹⁹ Some argue that the doctrine of parliamentary sovereignty is the prerogative of the courts and that it may one day be set aside by courts.²⁰ There have on the other hand been assumptions in the opposite direction.²¹ The recognition of the doctrine of “parliamentary sovereignty” rose at about the time that the prerogative powers of the Crown were being reduced.²² Jeffrey Goldsworthy maintains that the principle of “parliamentary sovereignty” existed long before the 18th century.²³

In England, the parliament consisted and consists of the King/Queen, the House of Lords and the House of Commons.²⁴ The New Zealand parliament, according to the Constitution Act 1986,²⁵ consists of the House of Representatives and the Sovereign and was, therefore, different from the parliament that Dicey envisaged.²⁶ Nonetheless, his ideas are still largely relevant to the New Zealand Parliament, as will be examined below.

According to Dicey, the sovereignty of parliament entails neither more nor less than the power “to make or unmake any law whatever” and, most significantly, that no one is recognised as having the right to overrule parliament made law.²⁷ Law in that sense was to entail everything that might be enforced by the Courts.²⁸ In his examination of the unlimited power of parliament, Dicey relied on William Blackstone’s “Commentaries on the Laws of England”²⁹, in which it is said that the unlimited power of parliament derives from the power of the King, which was also unlimited.³⁰ In this sense, parliament was the King’s successor. Unlimited power simply means there is nothing parliament cannot make a law.³¹ This was

¹⁶ John Wilson “New Zealand Sovereignty: 1857, 1907, 1947, or 1987?” 60 *Political Science* 41 at 43; New Zealand Constitution Act 1852 (UK).

¹⁷ Geoffrey Palmer and Matthew Palmer *Bridled Power - New Zealand’s Constitution and Government* (4th ed, Oxford University Press, 2004) at 6; Anthony H Angelo *Constitutional Law in New Zealand* (2nd ed, Kluwer Law International, The Netherlands, 2015) at 17.

¹⁸ Barnett, above n 10 at 162.

¹⁹ Barnett, above n 10 at 162.

²⁰ Barnett, above n 10 at 163; See also: HWR Wade “The Basis of Legal Sovereignty” [1955] 2 *Cambridge LJ* 172 at 189, “it lies in the keeping of the courts”.

²¹ John Austin *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (Weidenfeld and Nicolson, London, 1954) at 31, assessing that even though the courts recognize rules as being the law, its legal force still derives from the authority delegated by the sovereign power; first published version.

²² Barnett, above n 10 at 163.

²³ See: Jeffrey Goldsworthy *The Sovereignty of Parliament, History and Philosophy* (Oxford University Press, New York, 2001).

²⁴ Dicey, above n 5 at 27.

²⁵ Constitution Act 1986.

²⁶ Palmer and Palmer, above n 17 at 8.

²⁷ Dicey, above n 5 at 23.

²⁸ Dicey, above n 5 at 23.

²⁹ Dicey, above n 5 at 28; William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1965–1969).

³⁰ Dicey, above n 5 at 28, quoting Blackstones *Commentaries*.

³¹ Barnett, above n 10 at 164.

said to have been demonstrated by the adoption of the Septennial Act,³² in which parliament was able to extend its own term from three years to seven years, using its “unprecedented”³³ legal power.³⁴ It was also originally believed, by Dicey, that parliament had retrospective powers as well as extra-territorial powers, extending the scope of legislation even further.³⁵ Parliament’s ability to make smoking in Paris illegal, or to make a man, in law, a woman, were given as examples of parliament’s unlimited legislative power.³⁶ Of course, such examples can only indicate what might legally be possible, without any regard for actual practicability.³⁷

Dicey further identifies as a main feature of sovereignty the absence of competing legislative powers, thus enabling no power other than parliament itself to overrule law or to make law by any other means.³⁸ Not even the single houses – House of Lords or House of Commons, could pass resolutions that became “law”,³⁹ as decided in *Stockdale v Hansard*.⁴⁰ Dicey also challenged the assumption that the vote of the electors could constitute some form of law, or become a sort of legal authority. This is seen by Dicey as being a statement without meaning, as no Court would find an Act of parliament illegal on the grounds that it was not approved of by the electors.⁴¹ Lastly, while acknowledging the courts’ authority to create law, Dicey observed that they are not able to overrule parliamentary law by their own power, while law created by judges can be changed through parliamentary legislation.⁴²

The sovereignty of parliament has been upheld in English courts by various decisions, although historically, some judges appear to have qualified it.⁴³ During the 17th century, some judges seemed to assume that a court could review parliamentary law in terms of reason and equity⁴⁴, as in *Dr Bonham’s Case*⁴⁵ and *Day v Savage*⁴⁶. One can find judgments putting forward similar views from the 17th century to the late 19th century.⁴⁷ *Dr Bonham’s Case*, for example, was remarkable in regards of suggesting that a court could declare certain Acts of parliament void. However, there are split opinions about the remarks made by Sir Edward Coke in that judgement. Some argue that Coke decided that courts had the power to declare statutes invalid should they not be compatible with some form of higher law. Others argued that he only expressed the view that courts were to interpret statutes in a way consistent with higher law and nothing more.⁴⁸

The *Lee v Bude and Torrington Junction Railway Co*⁴⁹ case brought more clarity, as the courts seemed to reject any previous assumptions or interpretations about the alleged right

³² Septennial Act 1716, (UK) 1 Geo 1 St 2 c 38.

³³ Dicey, above n 5 at 31.

³⁴ Barnett, above n 10 at 165.

³⁵ Barnett, above n 10 at 165.

³⁶ Said by Sir Ivor Jennings (1959).

³⁷ Barnett, above n 10 at 166.

³⁸ Dicey, above n 5 at 33.

³⁹ Dicey, above n 5 at 35.

⁴⁰ *Stockdale v Hansard* [1839] 9 Ad&El 1.

⁴¹ Dicey, above n 5 at 37.

⁴² Dicey, above n 5 at 37.

⁴³ Joseph, above n 7 at 519.

⁴⁴ Joseph, above n 7 at 519.

⁴⁵ *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 107; 77 ER 638 (CP).

⁴⁶ *Day v Savage* (1994) 213 Ga App 792; 446 SE 2d 220.

⁴⁷ See: Joseph, above n 7 at 519f; as an example of even present relevance of the case, see: SE Thorne “Dr Bonham’s Case” (1938) 54 LQR 543, which explains, that in US constitutional law, the view of a power of the courts to disallow statutes when in conflict with constitutional law is largely based on Coke’s views in *Dr Bonham’s Case*.

⁴⁸ Ian Williams “Dr Bonham’s Case and ‘Void’ Statutes” (2006) 27 JLH 111 at 111.

⁴⁹ *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576.

of the courts to overrule Acts of parliament in cases concerning inconsistencies between different laws. Willis J stated that it is up to parliament and not in the power of the courts to act on any necessary corrections of the law by repeal or amendment, but that even the inaction of parliament does not empower the courts to take on this role, or set aside a particular law As long as the improperly obtained law exists, the courts are bound by it.⁵⁰ Dicey, described those judgments not recognising the full sovereignty of parliament, as “obsolete”.⁵¹ According to Dicey, morality does not create any legal basis to allow the courts not to apply an act of parliament.⁵²

B Parliamentary Sovereignty in New Zealand

The principle established by Dicey was explicitly acknowledged by the Supreme Court of New Zealand in *Fitzgerald v Muldoon*.⁵³ For the doctrine of parliamentary sovereignty to have a similar level of value in New Zealand as in the United Kingdom, notwithstanding its significance in New Zealand’s constitutional lineage, it must be proven that, in New Zealand too, there is no higher law making authority than parliament. Of course, the NZ parliament was not always considered a completely supreme institution, due to its extraterritorial limitations and its subsidiarity to the law of England.⁵⁴

Through the extension in 1947 of the Statute of Westminster 1931 (UK)⁵⁵ to New Zealand, any limitations on New Zealand “passing legislation repugnant to English law” were abolished.⁵⁶ By the adoption of the Constitution Act 1986, Westminster’s ability to legislate for New Zealand was fully abolished.⁵⁷ Parliament cannot be directly bound by international treaties, as it first must itself pass legislation for treaties to be legally binding in New Zealand and enforceable in the courts.⁵⁸

The non-existence of a law superior to parliamentary statutes was recently recognised within New Zealand Courts in *Kereopa v Te Roroa Whatu Ora Custodian Ltd*⁵⁹ by the adoption of the *Cheney v Conn* principle which holds that a “statute [...] cannot be unlawful, because [it is] itself law”⁶⁰. The New Zealand Constitution Act of 1986 put into statute form what first had to be acknowledged by the judges: that New Zealand was committed to the principle of parliamentary sovereignty.⁶¹ This statement was reaffirmed in 2003, in the Act⁶² that established the Supreme Court of New Zealand in terms of “New Zealand’s continuing commitment to the rule of law and the sovereignty of parliament”.⁶³ The NZ Parliament is presently not subject to any higher law making authority. The principle of parliamentary sovereignty originating in the United Kingdom, has been established in New Zealand and fully realised.

⁵⁰ Joseph, above n 7 at 520, *Lee v Bude and Torrington Junction Railway Co* above.

⁵¹ Dicey, above n 5 at 38 at fn 31.

⁵² Dicey, above n 5 at 38.

⁵³ *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

⁵⁴ Peter C Oliver *The Constitution of Independence* (Oxford University Press, New York, 2005) at 186.

⁵⁵ Statute of Westminster 1931 (UK) 22& 23 Geo V, c 4.

⁵⁶ Joseph, above n 7 at 534.

⁵⁷ Joseph, above n 7 at 534.

⁵⁸ Joseph, above n 7 at 534, see for example: *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

⁵⁹ *Kereopa v Te Roroa Whatu Ora Custodian Ltd*. [2013] NZCA 327, [2013] NZAR 1029 at [21].

⁶⁰ *Cheney v Conn* [1968] 1 All ER 779.

⁶¹ New Zealand Law Society “Constitutional principles in legislation” (07 May 2015)

<<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-864/constitutional-principles-in-legislation>>.

⁶² Supreme Court Act 2003.

⁶³ New Zealand Law Society above n 61 <<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-864/constitutional-principles-in-legislation>>.

C *Limits of the doctrine of Parliamentary Sovereignty*

Besides parliament not being subject to a higher law making authority, there has been constant criticism of the idea that the NZ parliament is *sovereign*, because it was and is assumed by some that its powers are not unlimited or absolute. This has led some authors to conclude that the principle of parliamentary sovereignty might be outdated.⁶⁴ The greatest focus of criticism has been in terms of (1) a contradiction between parliamentary sovereignty and the rule of law, (2) the authority of the courts to declare acts of parliament invalid in certain cases and (3) the power of the parliament to bind itself through constitutional means.

1 *Parliamentary Sovereignty and the Rule of Law*

Besides the doctrine of parliamentary sovereignty, the rule of law is one of the fundamental principles of common law constitutions.⁶⁵ There is a lack of consensus as to what the rule of law consists of. The different views can be summarized under two categories:

- (1) Legal positivists generally find the rule of law to consist in the basic procedural concept that requires the government to obey basic formal rules, but not more than that.⁶⁶ Positivists reject the notion that the rule of law could be more specifically defined than the “law of rules”.⁶⁷
- (2) The natural law view understands the rule of law as protecting basic values of the law, implying more than government according to law.⁶⁸ It assumes that law and morality are intertwined and that this relationship is expressed through the rule of law. Thus, the rule of law forbids anything that “enables an oppressive regime to attain its aims by the use of law”.⁶⁹

There will possibly never be an agreement on what the rule of law is.⁷⁰ But it is not commonly in dispute that the rule of law exists, and regulates governments, making their decisions subject to some sort of legal standard, be it only formal procedures or some form of morality. Notwithstanding how far the rule of law stretches, it contains at least a minimal number of obligations which have to be obeyed by state authorities including the government. Under both views, however, the coexistence of the rule of law and parliamentary sovereignty could potentially lead to problems in deciding whether a particular rule should prevail over another.

This is especially true for the rule of law as it is seen by the vast majority as not only obliging the people to comply with the law, but also obliging the government (including parliament) to comply with the rule of law (the making of clear law, duly made and publicly promulgated and, according to the naturalist view, even respecting human rights).⁷¹ On the one hand, if the rule of law subsists, then parliamentary sovereignty cannot properly be considered unlimited.⁷² If, for instance, parliament is prevented by the rule of law from creating

⁶⁴ As for example assumed by Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

⁶⁵ Joseph, above n 7 at 153.

⁶⁶ Joseph, above n 7 at 156.

⁶⁷ Joseph, above n 7 at 158.

⁶⁸ Joseph, above n 7 at 156.

⁶⁹ Joseph, above n 7 at 157, citing former Law Lord Johann Steyn.

⁷⁰ Joseph, above n 7 at 158.

⁷¹ Lord Bingham of Cornhill “The Rule of Law and the Sovereignty of Parliament” [2008] 19 KLJ 223 at 255.

⁷² Lord Bingham of Cornhill, above n 71 at 224.

oppressive and unclear law to govern the people of the country, one would find it difficult to argue that this would not be a limitation to the right to make any kind of law parliament wants to make. On the other hand, if parliament has the ability to change laws as and when it likes, then the rule of law does not really govern politics.⁷³ For example, if one would allow parliament to make oppressive law, then this would be an acceptance of a breach of the rule of law in its most common perception. The conflict between the rule of law and parliamentary sovereignty is even clearer in light of the naturalist view of the rule of law. If the rule of law describes that parliament needs to respect basic human rights, then parliament cannot adopt a law that discriminates between citizens, and is therefore effectively limited in its law-making-power. Trevor Allan and Sir John Laws, for example, have criticized parliamentary sovereignty because it would allow parliament to be noncompliant with the more “fundamental” principle of the rule of law, arguing that the idea that there are higher principles that take priority over parliamentary sovereignty is not revolutionary.⁷⁴

When Dicey wrote about parliamentary sovereignty, he was aware of the concept of the rule of law⁷⁵. Dicey though, found both principles to be of value without interfering with each other. He even argued that the rule of law favoured parliamentary sovereignty and also the other way around.⁷⁶ However, Dicey seems to have understood the rule of law as mainly controlling the executive: it forces the executive to obey parliament made law.⁷⁷ Furthermore, in Dicey's view, the rule of law not only recognizes that institutions have to obey the law but that the law maker is the supreme authority.⁷⁸ In this way, Dicey managed not having to decide to what extent parliament would have to obey the law.

Even Joseph Raz, an advocate of the legal positivist view accepts that, according to the rule of law, legislation must be prospective, adequately publicised, clear and relatively stable,⁷⁹ and recognises that this enables some sort of judicial control over parliament, even if only to a “very limited” extent.⁸⁰ That would without doubt create some form of legal limitation of parliamentary sovereignty. Goldsworthy, on the other hand, finds that parliament already follows the rule of law, though rather for political reasons, despite the absence of a mechanism for judicial review of legislation. If judicial review of acts of parliament according to the rule of law were to take place, it would be incompatible with the (current) parliamentary system and the notion of parliamentary sovereignty. For Goldsworthy, it would be hard to draw the line where one principle protected by the rule of law conflicts with another.⁸¹ He maintains that there are “powerful reasons”⁸², for example that the rule of law is too vague or defeasible, against the idea that the principles protected by the rule of law enable (or should enable) judicial review or enforcement.⁸³ A lack of enforcement or judicial review, however, makes the rule of law redundant.

⁷³ Jeffrey Goldsworthy *Parliamentary Sovereignty - Contemporary Debates* (Cambridge University Press, New York, 2010) at 57.

⁷⁴ See: Goldsworthy, above n 73 at 58; referencing to: TRS Allan *Law, Liberty, and Justice - The Legal Foundations of British Constitutionalism* (Oxford University Press, New York, 1995) at 16; John Laws “Law and Democracy” [1995] *Publ L* 72 at 85.

⁷⁵ Dicey, above n 5 at 95.

⁷⁶ Dicey, above n 5 at 182 to 184.

⁷⁷ Dicey, above n 5 at 183.

⁷⁸ Dicey, above n 5 at 95.

⁷⁹ Goldsworthy, above n 73 at 63.

⁸⁰ Joseph Raz “The Rule of Law and its Virtue” in *The authority of law: Essays on law and morality* (2nd ed, Oxford University Press, New York, 2009) at 217.

⁸¹ Goldsworthy, above n 73 at 64.

⁸² For example, that the rule of law is too vague and defeasible.

⁸³ Goldsworthy, above n 73 at 66.

Goldsworthy also defends this position against the “thick”⁸⁴ conception of the rule of law⁸⁵ (that is to say, the naturalist view, connecting law to requirements of morality⁸⁶). He notes that even advocates of the thick approach do not consider that the rule of law necessarily requires judicial review, or subjecting parliament to any judicially enforceable framework⁸⁷. Moreover, according to Goldsworthy’s view, limiting parliamentary sovereignty by virtue of pre-existing laws that cannot be altered or amended by parliament would not enhance the rule of law.⁸⁸ Firstly, accepting these limitations would only shift unlimited powers to a different level.⁸⁹ Secondly, there are no rules that should be considered indefeasible (including human rights) by the legislative process.⁹⁰ Goldsworthy also criticises the idea that parliament can be limited by constitutional conventions as these are not legally binding.⁹¹ He refers to F.A. Hayek, who maintains that the rule of law could only be properly safeguarded if it limits parliament’s legislative power through a binding constitution. The rule of law, if not constitutionally entrenched, could therefore not be more than an aspirational ideal.⁹² Constitutional entrenchment, however, is not required by the rule of law.⁹³ Although Goldsworthy argues against having any form of higher law that could restrict parliament, he does not maintain that this would be theoretically impossible from a legal perspective.

Cambridge Law Professor T R S Allan offers an important contribution to the discussion about parliamentary sovereignty and the rule of law, and that differs in important ways from Goldsworthy’s.⁹⁴ Allan does not oppose the concept of parliamentary sovereignty in itself, but he thinks that the rule of law is the absolute and superior principle against which the former has to be adjusted.⁹⁵ Allan argues that the rule of law is not only of value because the legislature chooses to obey it, rather, because it constitutes the legal order and does not allow law to be inconsistent with the integrity of the legal order.⁹⁶ The rule of law should, according to Allan, also be enforced by the courts.⁹⁷ Allan refers to Chief Justice Coke, in *Dr Bonham’s Case*⁹⁸, recognising parliamentary law making as being subject to judicial interpretation of common law and reason, though, as said above, for some authors it is unclear to what extent this interpretation is correct.⁹⁹

Allan argues that parliamentary sovereignty is incorrectly understood if allowed to contradict the rule of law, pointing the discussion away from the question of what principles prevails over the others, and leading to a deeper assessment of the content of parliamentary sovereignty. According to him, parliamentary sovereignty must be understood in a way that

⁸⁴ Goldsworthy, above n 73 at 61.

⁸⁵ Joseph, above n 7 at 156; Goldsworthy, above n 73 at 67.

⁸⁶ Joseph, above n 7 at 156.

⁸⁷ Goldsworthy, above n 73 at 67 referring to the 1959 International Congress of Jurists in New Dehli.

⁸⁸ Goldsworthy, above n 73 at 68.

⁸⁹ Goldsworthy, above n 73 at 68, this argument will be dealt with in chapter II, where I will argue that the 'constituent power' is the higher unlimited authority and can therefore create limitations on parliament.

⁹⁰ Goldsworthy, above n 73 at 71. I will argue in chapter 5 that there is a need for an entrenchment of certain human rights and constitutional provisions.

⁹¹ Goldsworthy, above n 73 at 69 and 70.

⁹² Friedrich A Hayek *The Constitution of Liberty* (Chicago University Press, Chicago, 1978) at 206; Goldsworthy, above n 73 at 70.

⁹³ Goldsworthy, above n 73 at 70-78.

⁹⁴ TRS Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, New York, 2003).

⁹⁵ Allan, above n 94 at 201.

⁹⁶ Allan, above n 94 at 202.

⁹⁷ Allan, above n 94 at 202.

⁹⁸ See above page 9.

⁹⁹ Allan, above n 94 at 203.

allows the courts to observe the rule of law as a common law principle.¹⁰⁰ Allan's arguments are supported by Lord Hope, who questions the validity of Dicey's suggestion that no person or body has the right to set aside or override the legislation of parliament.¹⁰¹ With respect to this discussion around the rule of law and parliamentary sovereignty, only a few cases in the United Kingdom actually dealt with matters where parliamentary sovereignty and the rule of law appeared to be in conflict with each other, and therefore a clear judicial view of what principle prevails over the other is missing.¹⁰²

As noted earlier, in 2003, with the passing of the Supreme Court Act, the NZ legislature officially expressed its continuing commitment to the rule of law and the doctrine of a sovereign parliament. As both principles are named in that statute without further specifics, it does not contribute to resolve the abovementioned conflict. Therefore, the status of the rule of law in New Zealand is still unclear, but it can be seen from the different views on the relationship between the rule of law and parliamentary sovereignty that not all scholars see a clear superiority of the sovereignty doctrine over the rule of law.

2 Parliamentary Sovereignty and Human Rights / Bill of Rights Act 1990

Not too long ago, the question of whether the judicial power had taken an activist position¹⁰³ in New Zealand law making became a topic of discussion. In an article titled "Human Rights and parliamentary sovereignty in New Zealand", Petra Butler questions, with reference to statements by Lord Cooke, whether the New Zealand Court of Appeal has in its decisions challenged the law-making power of parliament. The analysis is based on the New Zealand Bill of Rights Act 1990¹⁰⁴ or human rights law in general and whether the reviewed decisions bear an assumption that the court had the power to judicially review legislation with respect to these statutes. A similar development was also lead in the UK, after for example in *R v Secretary of State for the Home Department, ex parte Simms*¹⁰⁵ it was observed by Lord Hoffmann, that the British parliament may still legislate however it likes, but must face an assessment of its doing so in respect to human rights law before the Courts.¹⁰⁶

In *Moonen v Film and Literature Board of Review (Moonen)*,¹⁰⁷ the NZ Court of Appeals stated that it had the power to declare a statutory law incompatible with the rights guaranteed in the Bill of Rights. The Bill of Rights Act 1990, in Section 6 obligates the courts to give an enactment of the legislature, when possible, a meaning that is consistent with the rights and freedoms contained in the bill. But it does not explicitly establish the power of the courts to declare the incompatibility of a statute with the Bill of Rights. For that reason, the decision of the court in *Moonen* has been criticised for assuming a much greater judicial power in applying the Bill of Rights than what was originally intended by parliament.¹⁰⁸

¹⁰⁰ Allan, above n 94 at 206.

¹⁰¹ Hope "Is the Rule of Law now the Sovereign Principle?" in *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press, New York, 2013).

¹⁰² CJS Knight "The rule of law, parliamentary sovereignty and the ministerial veto" [2015] 131 LQR 547 at 547.

¹⁰³ Petra Butler "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 at 344.

¹⁰⁴ New Zealand Bill of Rights Act 1990.

¹⁰⁵ *Regina v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 22; [1999] 3 All ER 400.

¹⁰⁶ Joseph, above n 7 at 793.

¹⁰⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZRL 9.

¹⁰⁸ James Allan "Moonen and McSense" [2002] 4 NZLJ 142 at 142, the role of the courts will be further discussed in part 3 of this chapter.

In a later decision, *R v Poumako*,¹⁰⁹ one of the dissenting judges, Thomas J, agreed with the view that the court could declare a parliamentary statute incompatible with the Bill of Rights, arguing that the Bill of Rights Act itself enabled the courts to do so, and even required them to give priority to human rights wherever possible. According to Thomas J, without being able to at least declare incompatibility, the courts could not fulfil that obligation. He also maintained that because of the commitment to human rights made by parliament, the courts would be serving the former's interests by ruling on the compatibility of laws. According to Thomas J, this would not infringe the doctrine of parliamentary sovereignty. This development in which NZ courts would declare formal declarations of inconsistency has most recently been reassured with the decision in *Taylor v Attorney General*¹¹⁰. The NZ High Court issued a formal declaration that a provision denying prison inmates the right to vote was inconsistent with Section 12(a) of the Bill of Rights Act 1990. Having examined the (pre-*Taylor*) developments with respect to the relationship between human rights and parliamentary sovereignty, Butler concluded that the doctrine of parliamentary sovereignty "still stands in New Zealand", but observed a growing role for the courts in respect to human rights protection.¹¹¹

Interestingly, in the White Paper on the Bill of Rights for New Zealand, it was doubted that the courts would uphold its content against acts of parliament¹¹² due to the fact that the act was not entrenched. The Bill of Rights Act is an ordinary law and it can, therefore, be set aside itself through the ordinary law-making process. These doubts as to whether its content could be upheld against parliament were therefore less based on a general doubt that parliament could be made subject to human rights. Whether such rules, limiting the scope of parliamentary sovereignty could exist, was therefore not subject of the question of whether parliament would be bound by the bill of rights. Namely, the absence of provisions in the Bill of Rights with a superior constitutional status above ordinary law, was considered to be the reason for parliament not being bound by the Bill of Rights. Even though breaches of the Bill of Rights Act has, up until today, only led the courts to declare the incompatibility of statutory law with the former, therefore not invalidating legislation¹¹³, the importance of the Bill of Rights, even for parliamentary sovereignty, is by now established. Declaring incompatibility does impose political limits on parliament, at least to the extent that it articulates an authoritative critique that should be taken into account. By not declaring statutes invalid, only incompatible, the courts have not used the Bill of Rights to legally limit parliament's law making power. Whether the ability to overrule legislation may actually exist, will be discussed in the next section.

3 Parliamentary Sovereignty and the Power of the Courts

Apart from the growing importance of human rights, the question as to whether courts should be able to declare the invalidity of certain statutes or should only have the power to declare their incompatibility with human rights, is a matter that is best examined separately. There could be a legitimate justification for the judicial power to overrule parliament made law, to control its power to pass legislation for oppressive causes.¹¹⁴ Therefore, there is the possibility that courts could end their "loyalty" towards the legislature by declaring legislation to be invalid.¹¹⁵

¹⁰⁹ *R v Poumako* [2000] 2 NZLR 695, Thomas J.

¹¹⁰ *Taylor v Attorney General* [2015] NZHC 1706.

¹¹¹ Butler, above n 103.

¹¹² Butler, above n 103 at 345.

¹¹³ Olga Ostrovsky "Declarations of inconsistency under the New Zealand Bill of Rights Act" [2015] NZLJ 283 at 286.

¹¹⁴ Joseph, above n 7 at 564.

¹¹⁵ Joseph, above n 7 at 565.

In *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*, Robertson J stated that it was “clear and unambiguous [that] parliament is supreme and the function of the Courts is to interpret the law as laid down by parliament. The Courts do not have a power to consider the validity of properly enacted laws.”¹¹⁶ Parliament’s enactments would therefore be the ultimate source of law – not the courts, as it was reaffirmed by the Court of Appeal in *Shaw v CIR*¹¹⁷. Courts in New Zealand, however, have also questioned parliamentary sovereignty in terms of immunity against judicial review. According to the authors of “Undermining the Grundnorm?”¹¹⁸ the cases *Taylor v New Zealand Poultry Board*¹¹⁹ and *R v Pora*¹²⁰ show a development of judges advocating towards courts negating the intention of parliament in order to prevent “fundamental principles” from being breached.¹²¹ This was argued in *R v Pora* in the context of basic human right principles. The case regarded the sentencing of Pora for a crime for which the law that imposed that sentence was enacted after the crime was committed. It was questioned whether this law could have retrospective effects. In that decision, at the High Court level, Williams J found that he had an obligation to follow the clear intention of parliament. Later, at the Court of Appeal, three of six judges decided that statutes do not have retrospective effect, since retrospective effects were found to be forbidden by the rule of law, contrary to the precise wording of that piece of legislation.

That decision, being a split decision, indicated the confusion surrounding the scope of statutory interpretation. It was argued that the purpose of the legislation could be realised through appropriate interpretation, without overruling the intentions of parliament. That way, courts would be able to correct statutes when parliament “misfires and does not appreciate the significance of its legislation”.¹²² The authors of “Undermining the Grundnorm” have strongly criticised that approach, as being inconsistent with the principle parliamentary sovereignty, as it circumvents or sets aside parliament’s clear intention as set out in the wording of the statute, by way of interpretation –being effectively a way of invalidating law.¹²³

Daniel Kalderimis, on the other hand, has defended the decision against that criticism, arguing that the methodology of interpretation does not neglect the notion of a supreme parliament as the principle should be understood.¹²⁴ He points out that the original Diceyan view of parliamentary supremacy is today not embraced by most judges and academics in its most strict sense.¹²⁵ Parliament is still supreme, but does find itself obligated to leave the court no room for interpretation if its legislation would negatively affect human rights.

Beyond these criticisms, the approach taken by the court in *R v Pora* was eventually less of an affront against parliamentary sovereignty, as the court only interpreted a parliamentary statute beyond the scope of its wording, and did not expressly decide against the will of parliament.¹²⁶ This was also recognized by Andrew Butler although he disagrees with the fact that the court’s power of judicial review of legislation should have a limited scope.¹²⁷

¹¹⁶ *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323.

¹¹⁷ *Shaw v Commissioner of Inland Revenue* [1991] 3 NZLR 154.

¹¹⁸ Anita Killeen, Richard Ekins and John Ip “Undermining the Grundnorm?” [2001] 7 NZLJ 299.

¹¹⁹ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394.

¹²⁰ *R v Pora* [2001] 2 NZLR 37.

¹²¹ Killeen, Ekins and Ip, above n 118 at 299 [1].

¹²² Joseph, above n 7 at 568.

¹²³ Killeen, Ekins and Ip, above n 118 at [5 and 6].

¹²⁴ Daniel Kalderimis “R v Pora” [2001] 9 NZLJ 369 at 371.

¹²⁵ Kalderimis, above n 124 at 370.

¹²⁶ Killeen, Ekins and Ip, above n 118 at 302.

¹²⁷ Andrew Butler “Implied repeal, parliamentary sovereignty and human rights in New Zealand” [2001] Publ L 586 at 594, see also at 594 fn 29.

Without potentially distorting the meaning of parliamentary statutes by way of interpretation, Thomas argued earlier, in *R v Poumako*,¹²⁸ that the role of the judiciary to balance the power of the legislature was already satisfied when the courts identified inconsistencies between acts of parliament and constitutional rules, without embarking on dubious interpretation exercises.¹²⁹ The court's role was that of a supervisory institution. By issuing a declaration of incompatibility, the courts fulfilled the task of enabling parliament to make a judgment as to whether it wants to uphold its legislation despite its inconsistency with previous legislation.¹³⁰

Interesting are also the statements by Lord Reed in *AXA General Insurance Ltd, Petitioners*.¹³¹ Even though the main issue of the case was related to the powers of the Scottish Parliament as a subordinate legislature to the United Kingdom Parliament, Lord Reed assessed from a more general perspective to what extent parliamentary legislation was subject to review by the courts.¹³² According to Reed, the courts have the power to intervene in exceptional circumstances, for example when legislation breached fundamental rights or the rule of law. It is unclear what "intervene" was supposed to entail, but Lord Reed saw parliament limited to the extent that it "could not override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so."¹³³ Though it is more likely that the court would try to resolve a conflict between statutes that are ambiguous and unclear and seem to be inconsistent with fundamental common law principles by way of interpreting them in a way consistent with those principles, the statement that courts would "intervene" under certain circumstances might indicate a power to overrule parliament made law.

The case law in New Zealand shows that courts might not always reject the notion of invalidating parliamentary legislation on the basis of incompatibility with rights. Until most recently, there was simply no need to rely on such rather drastic measures, because courts were mostly able to resolve conflicts between acts of parliament with other statutes of constitutional character through interpretation (*Pora*-method).

In 1988, Lord Cooke also maintained that the task of the courts, even in lieu of parliamentary sovereignty, could go beyond the mere interpretation of statutes.¹³⁴ He declared that the ultimate question of the power of the courts to overrule legislation has not been answered because the courts have never needed to make such a decision.¹³⁵ It is therefore not unthinkable that courts would find in favour of this power, particularly in light of the path that the judiciary has taken throughout the years. That would ultimately limit parliament's ultimate power to pass legislation. Cooke found this kind of limitation necessary.¹³⁶ More strongly, it lead him to assume that there is no parliamentary sovereignty.

This discussion has not ended. Up until now, the courts will only declare parliamentary statutes as being in breach of constitutional values or the Bill of Rights Act, and the *Pora*-method is the strongest mechanism by which statutory law will be interpreted beyond its

¹²⁸ *R v Poumako* Above n 109.

¹²⁹ Killeen, Ekins and Ip, above n 118 at 300.

¹³⁰ See: *R v Poumako* above n 109, opinion of Thomas, p 95-97.

¹³¹ *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46; [2012] 1 AC 868 (SC).

¹³² A development of the courts towards stronger review is also analysed by Chris Himsworth "The Supreme Court reviews the Review of Acts of the Scottish Parliament" (2012) April Publ L 205.

¹³³ Reed in *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46; [2012] 1 AC 868 (SC above n 131 at 152.

¹³⁴ Robin Cooke "Fundamentals" [1988] NZLJ 158.

¹³⁵ Cooke, above n 134 at 160.

¹³⁶ Cooke, above n 134 at 164.

wording, rather than declared void or invalid.¹³⁷ It is likely, as articulated by Geoffrey Palmer and Matthew Palmer, that “New Zealanders [will get] more used to, and accepting of, the notion that a court should be able to ‘strike down’ legislation as they can regulations or administrative decisions.”¹³⁸

4 *Extra-legal limitations*

Beyond the abovementioned restrictions and limitations to parliamentary sovereignty there are clear ‘extra-legal’ limitations on its law making power, commonly referred to as constitutional conventions. . These are defined by Dicey as “[...] conventions, understandings, habits or practices which, though they may regulate the [...] conduct of the several members of the sovereign power [...] are not in reality laws at all, since they are not enforced by the courts”.¹³⁹ The existence of such conventions restricting parliament’s power is mostly undisputed.¹⁴⁰ An example is the Westminster convention according to which parliament is not to legislate for tyrannical or oppressive purposes.¹⁴¹ The existence of conventions is frequently disputed. Geoffrey Marshall for example, has explained that there is no consensus as to whether the Westminster convention in fact exists.¹⁴² The courts, however, have already recognized the principle that forbids the creation of retrospective offences or penalties as one of common law’s fundamental principles.¹⁴³

Even though these conventions are seen to be limiting parliament’s freedom of action through its observance by the members of the parliament, the conventions are not enforceable as “law” in the courts, though they factually bind parliament through political pressure.¹⁴⁴ They therefore do not impose restrictions that lessen or threaten the legal sovereignty of parliament.

Public opinion can also regulate the actions of parliament. In fact, this is seen as one of the more critical checks of parliamentary sovereignty. Public political pressure can be exercised formally through the Official Information Act 1982,¹⁴⁵ which enables individuals to get access to Government information and documents, and the Citizens Initiated Referenda Act 1993,¹⁴⁶ which enables citizens to express their opinion through a referendum, though such referenda would be only indicative, not legally binding, according to art 3 of the act. The citizens initiated referenda are therefore of little impact.¹⁴⁷ By gathering and exposing governmental information through the media, parliament can be held accountable to the public. This does not, however, entail any legal accountability.¹⁴⁸ There are similar extra-legal restrictions like “pressure groups”, “consultation” processes and the “doctrine of the mandate”.¹⁴⁹ The existence of these restrictions will not be discussed in great detail as they have only speculative political impact and do not contribute to the legal question central to this dissertation.

¹³⁷ Joseph, above n 7 at 570.

¹³⁸ Palmer and Palmer, above n 17 at 289.

¹³⁹ Carl Schmitt *Constitutional Theory* (Duke University Press, Durham and London, 2008) at 20.

¹⁴⁰ See for example United Kingdom Barnett, above n 10 at 25; for New Zealand Joseph, above n 7.

¹⁴¹ Geoffrey Marshall *Constitutional Conventions* (Clarendon Press, Oxford, 1984) at 9.

¹⁴² Joseph, above n 7 at 156.

¹⁴³ See *R v Pora* [2001] 2 NZLR 37 at 47.

¹⁴⁴ Palmer and Palmer, above n 17 at 4 and 5.

¹⁴⁵ Official Information Act 1982.

¹⁴⁶ The Citizens Initiated Referenda Act 1993.

¹⁴⁷ See also Joseph, above n 7 at 556.

¹⁴⁸ Joseph, above n 7 at 556 and 557.

¹⁴⁹ See Joseph, above n 7 at 557 to 559.

There are two limitations, which Joseph describes as “extra-legal” limitations, that do have an impact on the NZ parliament arguably greater than that of political culture. These are the Treaty of Waitangi and international law. The Treaty of Waitangi is an integral part of New Zealand’s constitution. It is not merely ordinary law.¹⁵⁰ Whenever a Bill is introduced to the Cabinet’s Legislation Committee, compliance with the Treaty of Waitangi must be indicated.¹⁵¹ The Treaty is not only of constitutional character, but it is deeply rooted in New Zealand’s governmental and judicial system. After a volatile judicial history, it has been recognised by the courts.¹⁵² The Conservation Act 1987,¹⁵³ the State-Owned Enterprises Act 1986,¹⁵⁴ and the Environment Act 1986,¹⁵⁵ have all given effect to the principles of the Treaty.¹⁵⁶ Notwithstanding its fundamental importance and constitutional character, however, the Treaty is not protected from abolishment through ordinary legislative repeal by parliament.¹⁵⁷ Of course, parliament would have a difficult time defending such a decision. The Treaty acts as a stronger limit on parliament than the abovementioned extra-legal limitations.

Moreover, New Zealand has made itself subject to various international obligations. Ultimately, none of these obligations prevail over existing domestic law.¹⁵⁸ Nonetheless, obligations established by international treaties have a greater impact than political restraints. The Cabinet, when introducing law, also has to review its compliance with international treaties, and more significantly, the courts interpret parliamentary legislation in a way that assumes parliament would not legislate in breach of international law.¹⁵⁹ This practice has similarities with statutory interpretation in light of human rights, especially the Bill of Rights Act. Further, even though international law cannot directly prevail over domestic law, parliament is obligated to follow and implement its international law obligations through ordinary legislation.¹⁶⁰ Negative obligations (for the state to refrain from doing something) are not enforceable, only positive obligations (for the state to do something).¹⁶¹

Significantly, the United Kingdom, from which New Zealand’s parliamentary system originated, has bound itself through international law to the European Union, by joining the then European Community in 1973. The Court of Justice of the (then) European Community established the superior rank of the regional law of the former, over the internal law of state parties.¹⁶² The United Kingdom 1972 European Communities Act¹⁶³ made community law effective in United Kingdom.¹⁶⁴ The superiority of Community / Union law has raised discussions and concern in regards to parliamentary sovereignty in the United Kingdom.¹⁶⁵ In a 1981 case, *Macarthy v Smith*¹⁶⁶, Lord Denning made the remarkable statement, that

¹⁵⁰ Palmer and Palmer, above n 17 at 346.

¹⁵¹ Joseph, above n 7 at 561.

¹⁵² See for example *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

¹⁵³ Conservation Act 1987.

¹⁵⁴ State-Owned Enterprises Act 1986.

¹⁵⁵ Environment Act 1986.

¹⁵⁶ Joseph, above n 7 at 561.

¹⁵⁷ Palmer and Palmer, above n 17 at 346 to 348; Joseph, above n 7 at 562.

¹⁵⁸ Joseph, above n 7 at 562.

¹⁵⁹ Joseph, above n 7 at 563.

¹⁶⁰ Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at 4 to 7.

¹⁶¹ Joseph, above n 7 at 563.

¹⁶² See early cases *Costa v ENEL* (1964); *Van Gen den Loos* (1963); *Simmenthal* (1977); *Internationale Handelsgesellschaft* (1972).

¹⁶³ European Communities Act 1972 (UK).

¹⁶⁴ Barnett, above n 10 at 184.

¹⁶⁵ John Alder *constitutional law and administrative law* (6th ed, Palgrave Macmillan, Hampshire, UK, 2007) at 211.

¹⁶⁶ *Macarthys Ltd v Smith* [1981] QB 180; [1981] All ER 111.

If on close investigation it should appear that our legislation is deficient – or is inconsistent with Community law – by some oversight of our draftsmen – then it is our [the courts] bounden duty to give priority to Community law.

Denning did not go as far as to define the duty of the courts in terms of following European Community law against the will of parliament.¹⁶⁷ The House of Lords, in *Litster v Forth Dry Dock Ltd*,¹⁶⁸ interpreted domestic law contra to its clear verbal meaning. The court nevertheless argued that it was interpreting domestic law according to parliament's intention.¹⁶⁹ Later, in 1995, the House of Lords found domestic law to be incompatible with European Union law, without ruling on the validity of that domestic law.¹⁷⁰ The courts in the United Kingdom have therefore made domestic law subject to judicial review in terms of compatibility with European Union law. Similar to judicial review within the Bill of Rights framework, this interpretative approach appears to make ordinary domestic law subject to higher law, thereby putting the traditional doctrine of parliamentary sovereignty under pressure. This is not negated by the fact that the courts purport to be undertaking this role in accordance with parliament's assumed intention.

Even though New Zealand is not bound by European Community law like the United Kingdom, it is always possible that it takes a similar step, if such a regional framework evolves. Of course, New Zealand's geographic situation is different to that of the United Kingdom within Europe. However, it is a fact that in the country of the origins of parliamentary sovereignty, this doctrine has been limited through parliament incorporating European Law into the British legal system.¹⁷¹

5 Conclusion

Parliament in New Zealand is still sovereign, even if one would say that not anymore in the traditional Diceyan sense. There have been further suggestions that parliament can limit *itself*. The question as to whether this power practically exists, and if so to what extent, will be examined in Chapter V. The arguments that have been made with regard to the legal (and extra-legal) limitations of parliamentary power to enact any kind and form of law can, as will be argued in the next Chapter, can also be made to argue that the constituent power can create a constitution without breaching parliamentary sovereignty. In neither case the existence of parliamentary sovereignty is negated.

¹⁶⁷ Barnett, above n 10 at 520.

¹⁶⁸ *Litster and Others v Forth Dry Dock and Engineering Co Ltd* [1989] UKHL 10; [1989] 1 All ER 1134.

¹⁶⁹ Barnett, above n 10 at 520.

¹⁷⁰ *R v Secretary of State for Employment ex parte Equal Opportunities Commission* (1995).

¹⁷¹ NW Barber "The Afterlife of Parliamentary Sovereignty" (2011) 9 IJCL 144 at 149.

III *Constituent Power*

The concept of constituent power is not unknown to the common-law world. Constituent power is the power to create a constitution. This chapter will argue that in New Zealand, the exercise of constituent power requires not only an act of the people through a referendum, but a process that also involves a decision by parliament.

New Zealand does not have a single written constitutional document. Furthermore, it is unclear how the country was originally constituted, besides the contentious foundation laid by the Treaty of Waitangi. As New Zealand's constitution is defined through various statutes, court decisions and conventions, there is no single foundational document.¹⁷² Attempts have been made to introduce a written constitution in New Zealand. Entertaining that idea begs the question as to who, if this did happen, would have the legitimate authority to create it, and how the process would look. For a constitution to be valid and accepted politically and within society, and for it to have authentic legal status, its adoption by a recognised constituent authority is of great importance. In New Zealand, the concept of a "constituent power" that may exist outside ordinary parliament is still very uncommon. The power to create a new constitution (i.e. the constituent power) is most often seen as being part of the sovereign power of the New Zealand parliament. However, in this chapter I will argue that there is a difference between parliament's legal authority to create ordinary law, and its authority to entrench a constitution which stands above ordinary law.

A. The difference between the material and formal constitution

To better analyse the relationship between the principle of parliamentary sovereignty and the concept of constituent power, one must understand the distinction between a formal and a material constitution. A constitution in the material sense describes the "norms that govern fundamental aspects of a political system".¹⁷³ It may entail the combination of written and unwritten rules of constitutional character, as well as traditions, interpretations, court decisions, or practices of the constituted organs of government.¹⁷⁴ Such material constitutional norms include, for example, the rule that U.S. Courts have a final say over the validity of legislation under the constitution. That rule creates fundamental constitutional law, without being written in a constitutional document.¹⁷⁵

Most countries nowadays also have a formal constitution.¹⁷⁶ A constitution in the formal sense refers to a positive law that can only be altered according to procedures which contain requirements more difficult to meet than those that apply to ordinary laws.¹⁷⁷ The formal constitution may entrench norms that are not constitutional in the material sense.¹⁷⁸ To be able to define whether a formal constitution exists, the following three criteria can be used¹⁷⁹:

¹⁷² "Our constitution" New Zealand Now <<https://www.newzealandnow.govt.nz/living-in-nz/history-government/our-constitution>>.

¹⁷³ Joel Colon Rios "What is a Constitutional Transition" [2017] NJCL 43 at 45.

¹⁷⁴ Julian Arato "Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations" (2012) 10 IJCL 627 at 636.

¹⁷⁵ Arato, above n 174 at 637.

¹⁷⁶ Colon Rios, above n 173 at 53.

¹⁷⁷ Colon Rios, above n 173 at 45.

¹⁷⁸ Hans Kelsen *General Theory of Law and State* (2nd ed, Harvard University Press, Cambridge, 1946) at 125.

¹⁷⁹ Niels Petersen "Europäische Verfassung und Legitimität" (2004) 64 ZaöRV 429, 446 to 449, translation by author of this dissertation.

- (1) The constitution must be superior to all other law. This superiority is given if all execution of power by the institutions of the state have to be in compliance with the constitution.
- (2) There must be a heightened threshold to make changes on the constitution, which can be expressed through a requirement of achieving specific qualified majorities before an amendment can be adopted.
- (3) The existence of a single constitutional document.

The difference between the formal and the material constitution can be better understood by looking at some aspects of Hans Kelsen's work. Kelsen describes the formal constitution as a purely formal document. The purpose of the prescribed procedures to make changes on that solemn document is to make them more difficult.¹⁸⁰ The material constitution on the other hand is the set of the -written or unwritten- rules that, because of their subject matter, are at the highest level of the legal system. These rules govern how law is to be created, interpreted and applied.

Whereas the material constitution, in modern law, is an "essential element" of every legal order, which includes the norms governing the organs and procedures of legislation, as Kelsen put it, a formal constitution only exists when there is a written constitution containing an amendment procedure.¹⁸¹ What will later become of importance is that as long as a state is only governed by a material constitution, there will be no formal difference between ordinary and constitutional laws.¹⁸² This is the case of New Zealand, where the doctrine of parliamentary sovereignty exists without the legal burden of higher or constitutional laws, as such laws have not been created. That does not mean that a formal constitution cannot be adopted and that the difference between ordinary law and constitutional law could not then emerge. However, in the absence of that distinction, the concept of 'constituent power' is of less importance. Such a concept only comes into play when a formal constitution is going to be adopted or altered. If the proposed constitution by Palmer and Butler is adopted, the difference between the formal and the material constitution, and furthermore the concept of the 'constituent power', are likely to play a far greater role in New Zealand.

B. What is constituent power?

Just as Dicey is one of the founding fathers of the doctrine of parliamentary sovereignty, Carl Schmitt is such a figure with respect of the concept of constituent power.¹⁸³ Schmitt is an author of great controversy, which is related to his Nazi-government friendly publications which (justified) its dictatorship in Germany from 1933 to 1945.¹⁸⁴ His pre-1933 writings are nevertheless considered, even by liberal and progressive constitutional theorists, as essential for understanding the theory of constituent power. Schmitt describes the constituent power as being "the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence".¹⁸⁵ The need to identify the constituent power, even the existence of a constituent

¹⁸⁰ Kelsen, above n 178 at 124.

¹⁸¹ Kelsen, above n 178 at 124 to 126.

¹⁸² Kelsen, above n 178 at 125.

¹⁸³ Joel Colon Rios "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform" (2010) 48 Osgoode Hall L J 199.

¹⁸⁴ Bill Scheuermann "Review: Carl Schmitt and the Nazis" [1991] 23 German Politics & Society 71.

¹⁸⁵ Schmitt, above n 139 at 125.

power in the first place, is directly connected to Schmitt's idea that a constitution can have validity if a legitimate "political will" was the one to establish it.¹⁸⁶

The constituent power essentially makes the constitution, and is also involved in every constitutional conflict.¹⁸⁷ It is different from other powers like those of the legislature, executive and judicial branches (i.e. the constituted powers), and should not be seen as a state organ. It is rather a power that stands and exists besides all constituted authorities. The constituted powers can only exist according to the rules established in the constitution.¹⁸⁸ Schmitt maintained that constituent power always refers to a superior authority, which is not necessarily the same in each constituted state. There can be, for example, a constituent power that has been understood as coming from God, or the "people" may be seen as the constituent subject.¹⁸⁹ Schmitt points out that constituent power has also been seen as coming from a king, by virtue of what he calls the "monarchical principle".¹⁹⁰ As further examples, Schmitt explains that even "minorities" can be constitution-making powers, as in an aristocracy, where certain families or groups are the constituent power,¹⁹¹ or in an oligarchy.

According to Schmitt, what matters is not the particular identity of the constituent power, but that this constituent power is acknowledged as such. If it is so acknowledged, then its constitution-making acts are legitimate.¹⁹² In the case of legitimate **democratic** constitution-making,¹⁹³ there are further requirements. In a modern and liberal democracy, the constituent power has to lead back to the people, rather than to a king, emperor or pope.¹⁹⁴ Our modern democracies are defined through the idea that the collective people have the freedom and autonomy to decide how they will be governed by creating a number of institutions.¹⁹⁵ This idea developed as part of the historic transfer of sovereign powers from the king to the people, or from the "One to the Many".¹⁹⁶ This handing down of power from the king to the collective is also part of the development of democracy as a movement contrary to the sovereignty of the king.¹⁹⁷ As Kalyvas puts it, popular sovereignty or the power of the people, is not only the transfer of the power of command from one set of hands to others, but discloses a different idea of sovereignty, which is the "power of the people to constitute".¹⁹⁸

In *The Paradox of Constitutionalism*,¹⁹⁹ the editors try to give a general perspective on the concept of constituent power and its historic development, paying special attention to the common law tradition. According to Loughlin, the concept of constituent power was first articulated by English political actors, although it has by now become absorbed into the doctrine of parliamentary sovereignty.²⁰⁰ Loughlin examines the development of the idea

¹⁸⁶ Schmitt, above n 139 at 76.

¹⁸⁷ Schmitt, above n 139 at 125 and 126.

¹⁸⁸ Schmitt, above n 139 at 126.

¹⁸⁹ Schmitt, above n 139 at 126.

¹⁹⁰ Schmitt, above n 139 at 129.

¹⁹¹ Schmitt, above n 139 at 130.

¹⁹² Schmitt, above n 139 at 136.

¹⁹³ Aspect of "democratic" introduced for example by Schmitt, above n 139 at 138; also recognized for example by Joel Colon Rios in "New Zealand's Constitutional Crisis" [2011] 24 NZULR 448 at 1.

¹⁹⁴ Andreas Kalyvas "Constituent Power" Political Concepts

<<https://www.politicalconcepts.org/constituentpower/>>. at 1.

¹⁹⁵ See further referencing in Andreas Kalyvas above n 194, at n 2.

¹⁹⁶ Hannah Arendt *On Revolution* (Penguin Books, New York, 2006) at 154 to 158.

¹⁹⁷ <<https://www.politicalconcepts.org/constituentpower/2/>>. above n 195 at 2.

¹⁹⁸ <<https://www.politicalconcepts.org/constituentpower/2/>>. above n 195 at 2.

¹⁹⁹ Martin Loughlin and Neil Walker *The Paradox of Constitutionalism - Constituent Power and Constitutional Form* (Oxford University Press, New York, 2007).

²⁰⁰ Loughlin and Walker, above n 199 at 27.

that reject the notion of sovereignty coming from above, but rather that sovereignty is situated within the people. He explains how the idea of constituent power developed in the English world with reference to the constitutional conflict where the power of parliament as the people challenged the ultimate authority of the king.²⁰¹ According to his studies, the concept became more important in 1642, in the midst of a constitutional crisis. During that crisis, the view of authority changed, and parliament as the representative of the people's will became a more apparent and respected authority.²⁰² Later on, around 1660, it was considered that constituent power was different from the ordinary powers of government. According to George Lawson, there was a necessity to “distinguish between ordinary law and constitutional law”, to identify the ‘real’ sovereignty, the constituent power, which is the power to constitute and abolish forms of government.²⁰³

Loughlin observes that the constitutional debate in England emphasised the establishment of parliamentary sovereignty, neglecting the idea that there exists a separate constituent power.²⁰⁴ Of course, as Loughlin articulates, this does not mean that constituent power has lost its value, but that it has not been properly recognised. The concept of constituent power is not one unfamiliar to English constitutional law, but one that has yet to be properly respected and realised. When determining who is the constituent power of a country, the acceptance and recognition of the public is a major factor. Indeed, only if the constituent subject is generally accepted by the public, a newly created constitution is likely to be respected and long lasting.²⁰⁵

As it will become important when establishing the legal limits of parliament's power in the context of a constitution-making process, there are two types of “law” making exercises. The first is constitutional law making, in which the constituent power acts. The second is ordinary law making, which occurs within the limits of the constitution and is created by the constitutionally empowered authority. This distinction, I will argue below, explains why the doctrine of parliamentary sovereignty is not undermined if an entity other than parliament is required to participate in the creation of a new constitution.

C. Application of the concept in New Zealand

The concept of constituent power is strongly tied to a written and entrenched constitution.²⁰⁶ This is because the concept was developed in greater depth during the French and American revolutions, which lead to written constitutions.²⁰⁷ Even though literature on this matter has long been rare in the English context, the concept is not completely foreign to it but, as noted earlier, it has been pushed aside by the emphasis on the doctrine of parliamentary sovereignty.²⁰⁸ As Joel Colón Ríos puts it, the acknowledgment of parliament's power to reject constitutional law by a simple parliamentary majority seems to reject the idea of an existing constituent power.²⁰⁹ This is because the principle of parliamentary sovereignty involves a parliament with the authority to make and control all forms of positive law, including constitutional law.²¹⁰

²⁰¹ Loughlin and Walker, above n 199 at 28.

²⁰² Loughlin and Walker, above n 199 at 32 and 33.

²⁰³ G Lawson *Politica Sacra et Civilis* (Cambridge University Press, Cambridge, 1992) at 47.

²⁰⁴ Loughlin and Walker, above n 199 at 48.

²⁰⁵ See: Richard S Kay “Constituent Authority” [2011] 59 AJCL 715 at 720 and 721; Schmitt, above n 139 at 136; See also: Andrew Arato *Post Sovereign Constitution Making* (Oxford University Press, New York, 2016) at 22 about the idea that there is always a form of authority in relation to constitutionalism.

²⁰⁶ Colon Rios, above n 193 at 4.

²⁰⁷ Colon Rios, above n 193 at 4.

²⁰⁸ Loughlin and Walker, above n 199 at 27; Colon Rios, above n 193 at 5.

²⁰⁹ Colon Rios, above n 193 at 5.

²¹⁰ Dicey, above n 5 at 51.

Indeed, if the doctrine of parliamentary sovereignty is understood as including the idea that parliament is the exclusive law-making institution, it seems that there is no reason for further review of the concept of a constituent power.²¹¹ The fact that there is a difference between entrenching a constitution and making ordinary law does not necessarily mean that parliament cannot be part of both processes.

Dicey's work, which advocates for one of the strongest interpretations of the doctrine of parliamentary sovereignty, already contains hints of the idea of a constituent power.²¹² Even though this idea has not been adopted in the United Kingdom, Colón-Ríos suggests that New Zealand's constitutional thinking might be more open to it.²¹³ He points to the work of John Salmond, in which it is argued that any constitution must have an extra-legal origin.²¹⁴ The notion of an extra-legal power, which operates apart from the constituted institutions, can easily be understood as a constituent power.²¹⁵ Colón-Ríos also notes that in New Zealand, the Electoral Act 1993 contains a formal distinction between ordinary legislation and constitutional legislation. In that Act, a requirement that certain changes would need a qualified majority vote in parliament or of the majority vote in a referendum, was codified.²¹⁶

Plans to draw up a written constitutional document, like that proposed by Geoffrey Palmer and Andrew Butler, imply the existence of and need for a superior authority. New Zealand might take a step further towards the basic idea of a constitution being the written and entrenched foundation of the legal order, which would expose the need to identify the constituent power. So far, the concept of a constituent power has not yet been articulated in New Zealand because the stage of adopting a formal constitution simply has not been reached. What has to be examined is how this constituent power would be best expressed, recognising New Zealand's exceptional characteristics in terms of its constitutional history, where parliament has played such a major role.

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1 Parliament

As argued above, in English law, the concept of a constituent power has been lost in the development of the doctrine of parliamentary sovereignty and is therefore not particularly prevalent in the literature.²¹⁸ Because of this doctrine, by which parliament has full and complete authority over the law, parliament is seen to also have the power of making constitutional law. Dicey did not distinguish between parliament's authority to make ordinary law and its authority to make constitutional law, and indeed held that it had the

²¹¹ Colón Ríos, above n 193 at 5.

²¹² In Dicey, above n 5 at 52, Dicey acknowledges that there could be a distinction between constitutional law and non-constitutional law, also at 66 where Dicey compares analyses the constituent / sovereign powers of other countries.

²¹³ Colón Ríos, above n 193 at 5.

²¹⁴ John W Salmond *Jurisprudence: or the Theory of Law* (Stevens and Haynes, London, 1910) at 108; referred to by Colón Ríos, above n 193.

²¹⁵ Colón Ríos, above n 193 at 5.

²¹⁶ Colón Ríos, above n 193 at 5 and 6.

²¹⁷ Colón Ríos, above n 150 at 5.

²¹⁸ Joel Colón Ríos "Five conceptions of constituent power" [2014] 130 LQR 306 at 208 and 309.

authority to do both.²¹⁹ He assumed that the absence of a distinction of ordinary law making and the making of a constitution would not prohibit parliament from adopting a written constitution.²²⁰ However, even in such cases the constitution would be subject to parliament's will. Evidently, Dicey identified the superior constituent authority with parliament.²²¹

The reason why many see parliament as having the right to create constitutional law comes from the idea that parliament exercises power on behalf of the people, a power that was earlier seen as coming from the King (whose power came not from the people, but from God, as some assumed)²²². Parliament is under this view seen as acting on behalf of the original constituent authority. Constitutional politics are significantly different from ordinary politics.²²³ In the process of creating constitutional law through the adoption of a formal constitution, parliament would be acting as a constituent assembly, whereas when creating ordinary law, parliament acts as the constituted authority.²²⁴ In this sense, seeing parliament as having constituent authority and as the superior law making authority does not negate the concept of constituent power. Moreover, as Pavlos Eleftheriadis points out in "Parliamentary Sovereignty and the Constitution", the idea that there is no superior law that constituted the parliament as the ordinary legislature, is incompatible with modern and developed democracies.²²⁵

In New Zealand, there seems to be broad acceptance amongst the people of parliament's power to create materially constitutional laws. Even though these statutes themselves are not any more enforceable than any other ordinary law, they become respected as primary sources of the constitution – seen as of being of more importance than ordinary law.²²⁶ For these reasons, there are legitimate grounds on which to find parliament to be a constituent power in New Zealand. The idea of parliament having the power to act alone as a constituent power, however, raises concerns and a potential conflict of interests. If this were the case, the people who would be making ordinary law in a legislative capacity, would also be establishing their right to do so in a constituent capacity. Further, parliamentary constitution-making does not involve public participation which, as will be argued below, could be easily achieved through a referendum.

Under the view that will be presented in this section, the doctrine of parliamentary sovereignty would be understood as only applying to ordinary law making, which the adoption of a formal constitution is not part of. Parliament's sovereign law-making authority, when acting as a constituted power, is hereby not harmed. At the same time, constituent power also resides with the people, and they retain this power even after the establishment of a constitution.²²⁷ Parliament should not be the only institution having constituent authority, because otherwise it would be able to adopt any constitution without being subject to any control or direction by the people.²²⁸ This problem can be avoided if

²¹⁹ Dicey, above n 5 at 52.

²²⁰ Dicey, above n 5 at 53.

²²¹ Dicey, above n 5 at 52 and 53: [...] traits of Parliament sovereignty as it exists in England: [...] alter any law, fundamental or otherwise..

²²² See: Glenn Burgess "The Divine Right of Kings Reconsidered" (1992) 107 *Engl Hist Rev* 837.

²²³ Tom Ginsburg, Zachary Elkins and Justin Blount "Does the Process of Constitution-Making Matter?" (2009) 5:1 *Annu Rev Law Soc Sci* 51 at 5.10.

²²⁴ See for the discussion: Pavlos Eleftheriadis "Parliamentary Sovereignty and the Constitution" [2009] 22 *CJLJ* 267 at 279; Dicey, above n 5 at 52.

²²⁵ Eleftheriadis, above n 224 at 278.

²²⁶ Palmer and Palmer, above n 17 at 6 to 7; Joseph, above n 7 at 28.

²²⁷ For example modern view of the Levellers Loughlin and Walker, above n 199 at 36.

²²⁸ See for example: Miguel Vatter "Political ontology, constituent power, and representation" (2015) 18 *CRISPP* 679.

the formal constitution is adopted both by parliament and the people (acting through a referendum), working together as one constituent authority.

I acknowledge that a constitution-making process that partly takes place in parliament (as opposed as to in a separate Constituent Assembly) might involve the risk that the process, if it is more time consuming than expected, coincides with a general election. Although this could be complicated from the perspective of party politics, if the process was spread over more than one election period and the goal is still accomplished, the constitution would show the view of the parliament / people, even across different political parties and moments in time.

2 Referendum

In modern democracies, it is usually said, the constituent power ultimately lies with the will of the people. A referendum would come closest to the expression of that political. As Colón-Ríos points out, to be robust and reliable, the process of constitution-making must fulfil the principles of democratic legitimacy, which involve democratic openness and popular participation.²²⁹

The need for the participation of the people in a democratic constitution-making process was even identified by Schmitt who suggested that it could be achieved through different forms of public participation, like a referendum or a constitution-making assembly.²³⁰ As parliament could already be acting as constitution-making assembly (further explained below), more direct participation would be achieved through popular vote. According to Colón-Ríos, the principles of democratic legitimacy must be satisfied through a mechanism of popular participation – other than parliament – that allows citizens to “freely deliberate on the proposed constitutional change”²³¹. Because referenda could be seen as satisfying this principle, it could be concluded, that the constituent power of New Zealand might, in addition to a constituent assembly, also require a referendum to satisfy the need for popular participation.

For some, the idea of a constitution established through referendum, rather than by elected representatives, represents the very ideal model of democracy. A referendum “[I]n a way captures neatly both the people’s collective, popular sovereignty, and the political equality of all citizens”.²³² The popular vote in a referendum is also the most accessible and direct form of citizen participation and an effective way of maximising engagement by the people, potentially resulting in a high standard of democratic legitimacy.²³³ It has been argued that direct participation is essential to really express the will of the people.²³⁴

Another advantage of referenda is their simplicity. As referenda usually require a ‘Yes’ or ‘No’ answer, a great part of the complexity of decision-making is taken away.²³⁵ The adoption of a constitution, of course, is a complex matter. But a complete and well pursued preparation for the referendum, including informing the public, and the development of a draft that has previously been discussed amongst the public, enables a simplified question

²²⁹ Colón Ríos, above n 193 at 6.

²³⁰ Schmitt, above n 139 at 138.

²³¹ Colón Ríos, above n 193 at 7.

²³² Stephen Tierney *Constitutional Referendums - The Theory and Practice of Republican Deliberation* (Oxford University Press, New York, 2012) at 19.

²³³ Tierney, above n 232 at 261.

²³⁴ David Miller *Citizenship and National Identity* (Polity Press, Cambridge, 2000) at 27.

²³⁵ Tierney, above n 232 at 261.

to be answered by the people: “Should the draft constitution ‘x’, become the constitution of New Zealand?”.

Even though a referendum would most directly express the will of the people and would therefore give explicit recognition to fundamental democratic principles, referenda have some weaknesses. These weaknesses, which have also been pointed to by Tierney, can cause decision-making to be democratically flawed and cause referendums to have a negative association in modern political and constitutional theory.²³⁶ One of these weaknesses is that a referendum involves decision making by an entity that has no defined competencies or expertise, as opposed to a constitutional assembly or expert body.²³⁷ In a representative institution, decision-making might be more rational, because it takes place within a professional institution with politically experienced representatives.²³⁸

It has recently been observed that the exercise of political power by the public has fallen victim to manipulation, both internal and external.²³⁹ This might lead to the view that referenda can be controlled by the elites. Manipulation can take place through how the questions are worded, and the timing with which they are released and advertised.²⁴⁰ It has further been suggested that a representative institution, in contrast, would be less susceptible to manipulation, in light of its structured institutional mechanisms.²⁴¹

If the fundamental law was created by a referendum, this decision making process would be limited to a single vote in a single situation. Indeed, with a referendum, the formal decision-making starts and ends with the casting of a vote. This process has, in some cases, led to authoritarian rather than democratic governments. This is illustrated in an article by William Partlett.²⁴² One of his examples is Russia, where the transferring of the constitution-making power from parliament to a referendum was used by Boris Yeltsin as a method to secure his authoritarian power.²⁴³

A further criticism of referenda is that by a simple “Yes” or “No” vote, individuals can express pre-judged positions that lead to fundamental decisions without the need to compromise, whereas compromise would most likely have to happen in a representative institution.²⁴⁴ This could ultimately marginalise the interests and views of minorities.²⁴⁵ The participation of the public is thus very limited, and does not necessarily extend to discussion of different drafts or different constitutional possibilities.²⁴⁶

Referenda are already used in the New Zealand political decision making context. The first national referendum was held in 1967.²⁴⁷ There are two common types of referenda in New Zealand, the Government Initiated Referendum and the Citizens Initiated Referendum. Even though such referenda cannot overrule parliamentary legislation, they can impact on the

²³⁶ Tierney, above n 232 at 1.

²³⁷ Schmitt, above n 139 at 131; Tierney, above n 232 at 30.

²³⁸ Tierney, above n 232 at 24.

²³⁹ John S Dryzek and Patrick Dunleavy *Theories of the Democratic State* (Palgrave Macmillan, 2009) at 207 to 209, see also *Brexit-decision made in Referendum*.

²⁴⁰ Tierney, above n 232 at 20.

²⁴¹ Tierney, above n 232 at 19.

²⁴² William Partlett “The Dangers of Popular Constitution-Making” (2011) 38:1 *Brook J Int’l L* 193 at 209.

²⁴³ David Landau “The Importance of Constitution-Making” [2012] 89 *DULR* 611 at 629.

²⁴⁴ Tierney, above n 232 at 29.

²⁴⁵ Tierney, above n 232 at 39.

²⁴⁶ Andrew Arato “Conventions, Constituent Assemblies, and Round Tables: Models, principles and elements of democratic constitution-making” (2012) 1 *Global Constitutionalism* 173 at 184.

²⁴⁷ Mary Harris and David Wilson *Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Wellington, 2017) at 662.

constitutional process, and particularly government initiated referenda are of significant constitutional character. Citizens initiated referenda have yet had little impact in New Zealand, as only a very low number of submitted questions have being voted on. According to Caroline Morris, that might be only due to the unfavourable structure of the current referenda processes.²⁴⁸ Furthermore it has also been argued that because the Citizens Initiated Referendum is not legally binding for the government, it has failed its purpose of more direct participation of the people in the making of decisions, as this form of non-binding participation has yet not made government to act accordingly to referenda results.²⁴⁹

There is a lot to be said for a referendum as the expression of the will of the people, but there are also a number of risks that accompany this mechanism. In New Zealand, if a referendum was seen as the sole mechanism for the exercise of constituent power, the importance of the New Zealand Parliament would be ignored. However, parliament not only has had an historic role in constitution-making and there is no intention to create a constitution as a result of a revolutionary act, by which parliament would cease to exist. This reflects the need for parliamentary participation in the process.

3 *Why not a Constituent Assembly?*

Some have suggested that a constituent assembly, instead of parliament, should be the entity called to exercise constituent power, for the following reasons.

It has been argued that a constituent assembly with unrestricted constitution-making power would facilitate a form of popular participation superior to and unrestrained by the constituted organs of the government.²⁵⁰ As Schmitt has put it, a constituent assembly could be a valid form of expressing the ‘will of the people’ and therefore of fulfilling the democratic requirement of popular participation.²⁵¹ Colón-Ríos has also suggested a constituent assembly as one of the available options for constitution-making in New Zealand. He finds that this mechanism would bear greater democratic legitimacy than parliamentary constitution-making, since people might want to alter the power and structure of parliament, which might be less likely to happen if the people affected by such a decision are the ones required to make it.²⁵² Specialized constituent assemblies are believed to reduce the role of narrowly-conceived interests in the process, as opposed to a constituted legislature acting as a constituent power, as the former are less likely to base their decision on “aggrandising” their own institutional power.²⁵³

Despite these arguments, a constituent assembly is, after all, nothing more than an elected body, in which representatives have a particular competence or interest in constitutional change. This is not that different from a parliament. Like a constituent assembly, parliament is made up of representatives, elected by the people, often with some form of political or legal experience. An extra representative institution therefore seems not to be necessary, at least not in New Zealand, where an elected and representative body already exists. Other receivable advantages of having the constitution created by a constituent assembly rather than by parliament, for example, that the constituent assembly is a body specifically created for constitution-making, cannot easily be ignored. Those advantages mostly have the effect

²⁴⁸ Caroline Morris “Citizens’ Referenda: time to review?” [2002] 2 NZLJ 44 at 46.

²⁴⁹ Ben Goschik “You’re the Voice - Try and Understand It: Some Practical Problems of the Citizens Initiated Referenda Act” [2003] 34 VUWLR 695 at 719.

²⁵⁰ Andreas Kalyvas “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12 Constellations 223 at 226.

²⁵¹ Schmitt, above n 139 at 138.

²⁵² Colón Ríos, above n 193 at 456.

²⁵³ David Landau “Constitution-Making Gone Wrong” [2013] 64 ALR 923 at 930.

of minimizing the threat of decisions that only serve particular interests with a negative effect for the country. However, such threats can be avoided by the addition of a popular referendum. A constituent assembly is preferred by many commentators, in light of the fears of parliamentary self-aggrandisement, but the inclusion of a referendum as an independent “approval-mechanism” mitigates any such risk. Just as a constituent assembly would most likely consist of a board with a majority of constitutional or political experts, so too parliament would be obliged to engage and consult such experts.

The idea of parliament acting as a constituent assembly has, for example, been seen in the Czech Republic, where the constitution of 1993 was enacted through parliament, as well as in France (though changing its name before doing so).²⁵⁴ Such examples provide evidence of the acceptance in other jurisdictions of the legislature acting as a constituent assembly.²⁵⁵

4 *Parliament and Referendum*

Analysing the literature pertaining to constitution-making processes, and the proper powers to create a constitution, and applying it to the specific New Zealand situation, it becomes apparent that deciding who should act as a constituent power is not a self-evident black-and-white decision. All arguments, including those in favour of parliament as the proper constituent power, those in favour of a referendum as the most direct expression of the will of the people, and those in favour of a constituent assembly as the only institution able to represent the relevant groups as well as the relevant experts, offer reasons to assume that any or all of these institutions can bear constituent authority.

However, New Zealand is special in terms of constitution-making, because its constitution is formed by ordinary laws, court decisions and conventions, whereas many other countries established written constitutions fairly early. One could ignore this reality and propose that a written constitution is created through a revolutionary act. This is not intended to be the case in none of the existing proposals for the adoption of a written constitution. Instead, it is expected that a new constitution will settle the rules by which the country should be governed without breaking the chain of legal continuity. A “new” and written constitution does not require a revolution.²⁵⁶

It could even be argued that to leave parliament out of the process would be unconstitutional, considering that the current constitutional framework of New Zealand relies on the constitutional legislation passed by parliament. The recognition and acceptance of the authority of the acting institutions is of imminent importance for constitutional stability. But the principles of democratic constitution-making would not be met if parliament were to adopt a constitution by itself. Such a process would lack the direct participation of the people. A manifestation of the ‘will’ of the people, as discussed above, is essential for a democratic constitution-making progress.

What might seem revolutionary at first is this idea: to meet the requirements for establishing a written and entrenched constitutional document by constitutional continuity but also by meeting the standards of democratic constitution-making, both means must be used: parliament, as the legislative sovereign and the historic institution responsible for New Zealand’s constitutional rules, and a referendum, directly expressing the will of the people.

²⁵⁴ Kay, above n 205 at 744.

²⁵⁵ See: Jon Elster “Legislatures as Constituent Assemblies” in *The Least Examined Branch* (1st ed, Cambridge University Press, New York, 2006) 181 at 184 and 185 also for a more detailed discussion.

²⁵⁶ See for the different variations of democratic constitution-making: Arato, above n 205 at 108.

Such a process would combine the strengths of parliamentary law making and the direct political participation of the people. As shown above, the idea of parliament creating a constitution alone involves risks, because it would enable an already existing institution to give itself a legal mandate by which to enhance its powers and pursue a self-serving agenda. As Schmitt has observed, parliament is generally an institution created by a constitution, not one that creates a constitution. Though Schmitt did not refer to a situation in which a constitution was to be created for an already existing legal and political framework with the goal of maintaining its already constituted organs, he did acknowledge, that the constituent power can also be identified within such a context.²⁵⁷ The history of an already constituted government structure might have the effect of requiring that some of the government organs, like parliament, participate in constitutional change.

In Chapter 5, it will be argued that the democratic legitimacy of the constitution can be strengthened if it is approved at different stages. From that perspective, it is recommended that the decision of parliament and the referendum are separated in time. This idea has been introduced by Richard Albert, when he referred to the aspect of intertemporality²⁵⁸, making amendment rules subject to special amendment procedures themselves.²⁵⁹

Not including the New Zealand Parliament in the constitution-making process would completely neglect the significant constitutional role that parliament has played in the country and would also preclude constitutional continuity. As such, a constitution established at this stage without the participation of parliament would contradict the historic importance of that institution, politically and legally. By virtue of the intention to preserve constitutional continuity while creating a written constitution, parliament must necessarily be involved in a constitution-making process.

The involvement of parliament will ensure that a politically and legally competent decision can be made, by the institution that has been involved in constitutional development since the beginning. The involvement of parliament alongside a referendum will mitigate any risks in terms of the latter giving force to an uninformed or “false” decision. The participation of parliament in the constitution-making process would also be more likely to ensure that minority interests are respected, as parliamentary consensus most often requires discussion and compromise. A referendum would only enable people to decide over already predetermined questions, having only the option to simply answer with a “Yes” and “No” vote. It is therefore a rather passive decision making process. Parliamentary participation, where parliament would be working like a constituent assembly, would take away the passivity of the decision.

A second decision through referendum, on the other hand, would strengthen the acceptance of the constitution, approved by two different democratically legitimate institutions. The referendum would also ensure the political participation that is required as one of the principles of democratic constitution-making. Of course, this referendum decision would not negate the historical importance of parliament in the constitutional process, as parliament would also be involved.

As discussed above, a constituent assembly could also represent the political will of the people. But sufficient representation of the people by politically experienced representatives can already be found in parliament. However, democracy requires a more direct

²⁵⁷ Schmitt, above n 139 at 130.

²⁵⁸ The concept will be discussed in more detail in chapter 5.

²⁵⁹ Albert, above n 3 at 678.

participation of the wider public, which could only be realised through a referendum and neither by parliament nor a constituent assembly alone.²⁶⁰

The argument could be made that parliament, as representative of the people, already expresses the democratic will. Nonetheless, besides the fact that a referendum will establish greater acceptance than a decision made only by parliament, there are more arguments that support the idea that parliament cannot act on its own when adopting a new constitution. Even in the development of parliament in the English system, Dicey recognised that the people were still able to exercise control over it as they elect the individuals who they wish to be governed by.²⁶¹ But, if parliament were to create the binding and very fundamental rules of the country (a written constitution that might be entrenched such that it could not easily be altered), parliament could not be held accountable through the electoral procedure, because the adoption of a formal constitution cannot be reversed as easily as ordinary law.²⁶² The lack of control over the decision making process of parliament in the context of adopting a constitution should therefore not be resolved by making the adoption of a constitution as a whole subject to a process that could be easily repeated. A decision by parliament in the creation of the constitution should therefore not be able to be easily reversed. In contrast to ordinary law, which can be changed by a simple procedure, the election of a new parliament would not impact any decisions in relation to the initial adoption of the constitution as the adoption of a constitution as a whole is not to be repeated. An approval by a referendum, on the other hand, could ensure the needed control over the adoption process. Even Dicey argued for a limited use of referenda as a form of control over parliament in matters of irreversible constitutional change.²⁶³

It could be argued that if parliament and the electorate have to act together when adopting a formal constitution, it would be unclear what would be the result in case that either of these two parts of the constituent power disapprove of the constitution and the other part finds broad approval. Eventually, in the most optimistic outcome, this would only show that the draft of the constitution does not yet have a form that reflects the views and hopes of the people and still needs further development and changes. In a more pessimistic view, it could lead to a constitutional crisis, because it could cast doubt on the chances of New Zealand to ever adopt a written constitution. Furthermore, this could contradict the purpose of creating a written constitution in the first place, that is, to create clarity and protection for the people and the government.

Various situations seem possible (notwithstanding which institution would make the first decision, as a decision of both institutions would have to be made in any case). (a) The referendum could approve with a *simple majority*, whereas parliament disapproves of the constitution with a *simple majority*. That scenario is rather unlikely, since parliament would probably make the first decision and then pass it on to the electorate. It could still happen that parliament, seeing the pressure within society to make a decision, sets up a referendum process without initially approving of the draft constitution itself. Parliament could for example use this method to reassure itself, that by disapproving of a proposed constitution, it is not acting against the will of the people. In that case, it would be shown that the draft did not create acceptance amongst the people of the country. The constitution should not be adopted until a developed draft is approved. (b) The electorate approves with a clear and *broad majority*, whereas parliament (aa) disapproves by *simple majority* or (bb) disapproves

²⁶⁰ Tierney, above n 232 at 261.

²⁶¹ Dicey, above n 5 at 43.

²⁶² See, the argument of accountability also being made in: Loughlin and Walker, above n 199 at 35.

²⁶³ Albert V Dicey "Ought the referendum to be introduced into England?" [1890] Contemporary Review 57; See also: Mads Qvortrup "AV Dicey: The Referendum as the Peoples's Veto" (1999) 20 History of Political Thought 531.

with a clear and *broad (75 per cent) majority*. In the first situation it seems that overall the people agree and approve of the constitution. Only a very small majority in parliament would be disapproving for reasons that might not justify a complete rejection, as the referendum has clearly shown the will to adopt the proposed draft. In that scenario (though of rather theoretical nature due to parliament being unlikely to propose a constitution it does not approve of itself) if the referendum has shown clear intention to adopt the draft constitution, parliament should be required to disapprove by a qualified majority of 75 per cent in order for it to be rejected. This step would help prevent a constitutional crisis as constitution-making could not be blocked by a small majority in parliament when the overall will of the people is to adopt the constitution. Only in scenario (b) (bb) would the constitution not be approved, and in scenario (b) (aa) the constitution would still be adopted.

The whole scenario could also be seen from the opposite perspective. In scenario (c), parliament could be the one accepting with a small majority and the electorate rejects the proposal by small majority or (d) parliament would approve by a strong majority and the electorate disapproves with (aa) small majority or (bb) great majority (75 per cent). It could be argued that the electorate should prevail over parliament if it disapproves the draft constitution, because the referendum, as the most direct expression of the will of the people, should have more weight than parliament. The same, however, could be said in regards to parliament as it is acting as a constituent assembly and could be seen as the stronger authority, having political and / or constitutional experts in it and being of great historical importance to New Zealand. Both sides of those arguments, however, would contradict the reasons why I previously argued that parliament and a referendum should act in concert, because both have advantages and disadvantages. I would therefore claim, that in scenario (c) and (d) the same method should apply as in scenario (a) and (b). Therefore, if parliament approves of the constitution by broad majority, it would have to take a large majority of the referendum to disapprove it and for the constitution not to be adopted.

With that solution, the electorate and parliament, as equal parts of the constituent power, would be equally respected. If the risk of constitutional crisis is hereby further narrowed down is unclear. A constitutional crisis could for example arise in the case that parliament approved the constitution by supermajority (supermajority = a qualified higher majority) and the electorate, rejecting that constitution by a great majority, does not achieve the same supermajority. In that case, the adoption of the constitution could be seen as being against the will of the people. A scenario, on the other hand, in which parliament and the electorate would have fairly great majorities though making the opposite decision, would only expose greater problems in regards to the relationship of parliament and the electorate. In that case, parliament might anyhow find itself obliged to delay the adoption of the constitution. Still, having the electorate and parliament acting together should support constitutional development, not create unacceptable burdens. Accordingly, in case one of these two constituent powers clearly expresses the will to adopt a constitution by supermajority, the other institution should not be given the power to overrule this clear expression of political will with only a simple majority.

5 *Māori representation*

Although it goes beyond the scope of the dissertation, consideration would also have to be given as to how Māori interests should be respected while discussing a constitution. This consideration is necessary due to the exceptional character of the Treaty of Waitangi, and the significance of Māori culture in New Zealand. The idea of specific considerations of the indigenous perspective in the process of constitutional development has for example been suggested by various essays contained in *Weeping Waters: The Treaty of Waitangi and*

Constitutional Change.²⁶⁴ One should find a forum for including and integrating Māori needs and interests to the greatest extent possible in the process. With parliament and a referendum, there would already be two ‘institutions’ working together, and bringing in a third ‘veto’ right would not only complicate the constitution-making process but would make it almost impossible. Further, the Māori perspective is already present in the referendum and parliament, as Māori are part of the electorate and of the interests represented in parliament. To recognize specific Māori rights and needs, it seems to be sufficient if a special advisory panel on Māori issues would be formed and integrated into the process. This might still not be enough, but it is in any case out of the scope of the dissertation.

I have argued that in New Zealand, both the doctrine of parliamentary sovereignty and the concept of a constituent power exist, without negating each other. The constituent power is the ever-present political authority or political will to set up the fundamental rules of the country. The appropriate constituent authority in the context of New Zealand consists of parliament alongside the people acting through a referendum. This has the advantage of creating a broader acceptance of the constitution, and it ensures that the legislature cannot empower itself without limitation. Including the referendum takes into account the democratic need for direct popular participation in a constitution-making process. On the other hand, the concept as presented does not ignore the fact that parliament in New Zealand is historically important in the making of constitutional law. As parliament also has the political experience and expertise to work through the constitutional drafting process, and might also be more likely to protect minority interests, parliament is naturally and necessarily included in it. That established, I will now provide a short overview of the history of New Zealand’s constitutional development leading to the draft constitution proposed by Palmer and Butler. I will briefly describe its intention and part of its content, after which I will examine whether the constitution as proposed can be legitimately entrenched against the doctrine of parliamentary sovereignty.

²⁶⁴ Malcolm Mulholland and Veronica Tawhai *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (1st ed, Huia, Wellington, 2010).

IV Does Parliament have the legal power to bind its successors?

*Regarding the discussion about the limits to parliamentary sovereignty, a great question posed for the adoption of a formal constitution is whether parliament would have the legal power to bind its successors, as parliamentary sovereignty could be understood as preventing. As argued above²⁶⁵ and indicated by Kalderimis' statement with regards to *R v Pora*²⁶⁶, the principle of parliamentary sovereignty is not undermined by accepting that certain principles of constitutional significance should not be susceptible of being abolished by a simple majority decision of parliament.*

In this Chapter I will examine what led Geoffrey Palmer and Andrew Butler to propose the constitution which is the subject to this dissertation. I will outline the background of the proposed constitution and part of its content. Following that, I will focus on article 116, as this provision is directly connected to the subject of this dissertation, asking whether parliament, by adopting a draft constitution, could legally bind itself and its successors through the entrenchment of certain provisions.

The constitution proposed by Geoffrey Palmer and Andrew Butler is not the first proposal for a written and formal constitution in New Zealand. Nor is the idea of adopting a written constitution particularly new in the context of New Zealand's political and constitutional discussions. To be precise, this is the third substantive proposal for a written constitution; the first one was presented by the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand²⁶⁷, the second by D E Paterson for the New Zealand Section of the International Commission of Jurists.

Some discussion regarding the adoption of a written constitution was generated by the push to make the Treaty of Waitangi superior law.²⁶⁸ In 2011, a constitutional advisory panel was appointed. Part of its job was to research the question as to whether New Zealand needs a written constitution. Here, emphasis was laid on the Treaty of Waitangi.²⁶⁹ This dissertation does not go into the discussion about what should be the constitutional status of the Treaty of Waitangi. That is an important question but is beyond the scope of this project. The importance of the Treaty is, however, another reason for which New Zealand arguably needs a written constitution.

The Treaty of Waitangi is not the only framework guaranteeing specific rights (to its signatories) that is seen to need protection by entrenchment. Provisions for fundamental rights and freedoms, procedures for reorganising the governmental system, and principles concerning the power of the courts to invalidate statutory law are all in need of definition and entrenchment, so as to be protected with clarity and credibility.²⁷⁰

The constitution drafted by the Constitutional Society was introduced to parliament by the National Party. It was dropped in 1960 by the Parliament's Public Petitions Committee, who

²⁶⁵ At page 20.

²⁶⁶ Kalderimis, above n 124.

²⁶⁷ *Suggested Constitution for New Zealand / submitted and recommended by the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand* (Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand, Auckland, 1961).

²⁶⁸ Joseph, above n 7 at 140, referring for example, to the "Building the Constitution" conference held at Parliament in 2000 and Parliaments "constitutional stockage" in 2005, or calls made in a submission to the House of Representatives on the Supreme Court Act 2003; other suggestions made by Moana Jackson and Margaret Mutu, in: HE WHAKAARO HERE WHAKAUMU MŌ AOTEAROA, claiming that the constitution should be developed from the Treaty of Waitangi, should be noted.

²⁶⁹ Joseph, above n 7 at 140.

²⁷⁰ See also: Joseph, above n 7 at 141.

recommended that no action be taken upon the draft.²⁷¹ Then, in 1963, the Society drafted another constitution. This proposal was also rejected by parliament, on the advice of a specifically appointed Constitutional Reform Committee.

The draft constitution presented by Paterson did not introduce major constitutional changes but proposed instead the consolidation of what already existed. His constitution also introduced an amendment rule which made its alteration subject to a 2/3 majority vote of the House of Representatives or to a national referendum.²⁷²

In 2016, Geoffrey Palmer and Andrew Butler presented a third proposal for a written constitution. In their book, *A Constitution for Aotearoa New Zealand*, the authors describe the nature of New Zealand's existing (unwritten) constitution as too flexible. They also describe the constitution as “dangerously incomplete, obscure, [and] fragmentary”²⁷³. Its excessive flexibility causes unpredictable and irregular developments. It also compromises the transparency and accessibility of the constitutional framework of the country, from the perspective of ordinary New Zealanders. According to Palmer and Butler, such flexibility does not fit the requirements of the modern age. Therefore, they have proposed a single constitutional document, which would form New Zealand's first written constitution since the New Zealand Constitution Act 1852²⁷⁴.

As with Paterson's draft, the constitution proposed by Palmer and Butler would not result in too many major changes to the constitutional system. Rather, it would preserve the core branches of government, being the legislature, the executive and the judiciary. It would, however, abolish the monarchy, as well as authorize courts to strike down legislation. Furthermore, it aims to guarantee fundamental civil rights, by entrenching the rights contained in the Bill of Rights Act and Human Rights Act in the written constitution itself, with some minor amendments and additions.²⁷⁵ Moreover, the constitution would protect and promote the rule of law, as well as the rights-based²⁷⁶ relationship established by the Treaty of Waitangi. As one of the bigger changes, Palmer and Butler introduce a 10-yearly review of the constitution, to provide for regular assessment as to whether it needs to be altered, in light of changed values and new or changed collective needs. Most significantly, though, Palmer and Butler have proposed to secure the constitution against amendments by the ordinary law-making procedure.

The authors have criticised the lack of constitutional entrenchment that exposes even the most fundamental laws and principles of the country to arbitrary change and derogation (because of its low amendment threshold). Currently, by a simple majority decision, it is within the power of parliament to abolish any or all provisions of human rights protection. As an example, they draw the reader's attention to 2013, when parliament enacted the New Zealand Public Health and Disability Amendment Act²⁷⁷, in only one sitting day.²⁷⁸ The absence of warning that the bill was going to be introduced, as well as the absence of public

²⁷¹ Sir Geoffrey Palmer “Preparing a written, codified Constitution for New Zealand: Is there a need that can be met?” (19 May 2016) Constitution Aotearoa <<http://constitutionaotearoa.org.nz/wp-content/uploads/2016/05/19-May-2016-speech-Preparing-a-written-constitution.pdf>>.

²⁷² Joseph, above n 7 at 141.

²⁷³ Palmer and Butler, above n 64 at 13.

²⁷⁴ Originally: An Act to Grant a Representative Constitution to the Colony of New Zealand [1852], UK.

²⁷⁵ Palmer and Butler, above n 64 at 7 and 167.

²⁷⁶ Rights-based relationship, because the Treaty of Waitangi is an agreement between the Crown of England and Māori defining their rights and obligations in relationship to each other.

²⁷⁷ New Zealand Public Health and Disability Amendment Act 2013 had the effect, that anyone was prevented from making complaints to the Human Rights Commission. It also retrospectively took away a remedy provision for past discriminations. See: Palmer and Butler, above n 64 at 14.

²⁷⁸ Palmer and Butler, above n 64 at 14.

consultation or consideration of the Select Committee, showed the ease with which major changes can be made. The Act itself had, according to the authors, “ousted” constitutional protections of New Zealanders and removed their rights not to be discriminated in certain cases. Yet, notwithstanding significant public criticism, the Act remains part of New Zealand’s legislation and, according to Palmer and Butler, reflects the fragility of New Zealand’s (unwritten) constitutional arrangement.²⁷⁹

Such procedural and legislative abuses could be easily prevented if the constitution, or at least certain essential provisions, were made subject to an extraordinary amendment procedure. As a major change to the constitutional system of New Zealand, Palmer and Butler therefore propose the an amendment rule (Article 116), that secures the constitution against change by a simple majority in parliament. In New Zealand, a similar measure only appears in Section 268 of the New Zealand Electoral Act, as will be considered in more detail below. Article 116 makes amendments to the draft constitution subject to either a 75 per cent parliamentary majority or a referendum.

“116 Entrenchment and amendment

(1) No article or part of this Constitution may be repealed or amended following the commencement of this Constitution unless the proposal for the repeal or amendment:

- a. is contained in an Act of Parliament that has been passed by a majority of 75 per cent of all members of the House of Representatives: [or]²⁸⁰*
- b. is contained in the Act of Parliament that has been carried by a majority of the valid votes cast at a poll of the electors eligible to vote.*

(2) [...]”

As constitutional entrenchment would not be of great value without the support of judicial review, the entrenchment of the constitution would be supported by a judicial review mechanism. Article 68 (2) (a) gives any court or tribunal of New Zealand the power to trigger a process that could lead to striking down a law to the extent that it is inconsistent with the constitution. Importantly, courts and tribunals do not make the final decision if an Act of Parliament is to be invalidated. In that case, the matter must also be confirmed by the Supreme Court. Parliament would then still have a last say, as according to art 68 (4), it could decide by a 75 per cent majority within one year of the Supreme Court decision, that notwithstanding its inconsistency with the constitution, the Act should continue to have effect. It also remains unclear whether changes made according to Article 116 (1) b, particularly when involving a referendum, could be judicially reviewed as they would also involve an Act of Parliament. Notwithstanding to what extent Palmer and Butler considered judicial review of amendments to the constitution, and even though judicial review is a great part of supporting and strengthening the constitution, this dissertation only aims to examine the legal status created by the proposed constitution, not its enforcement mechanisms.

Whenever a constitution has been proposed for entrenchment in New Zealand, questions about whether parliament would be bound by it have arisen.²⁸¹ The discussion, depending on the matter of how it should have been entrenched, goes hand in hand with the question regarding whether parliament can bind itself and its successors. Article 116, as proposed by Palmer and Butler, attempts to entrench the constitution by making it subject to a qualified majority vote in parliament or a referendum. As I suggested in the precious chapter,

²⁷⁹ Palmer and Butler, above n 64 at 14.

²⁸⁰ The “or” is being added here, because in a later draft, not contained in the book that is here being referred to, Palmer and Butler added the it to make clear that amendments would only need either parliament’s decision or approval in a referendum.

²⁸¹ Joseph, above n 7 at 142.

parliament would have to participate in the process of constitutional entrenchment, which begs the question as to whether parliament has the legal power not only to make constitutional rules, but also to make them superior to ordinary law, forcing itself and future parliaments to obey them.

At first glance, it seems that if parliament is the supreme power of the land, it should also be able to make self-restricting law. On the other hand, even if parliament can restrict its own law-making power, it seems that successive legislators would have, by virtue of their own supremacy, the power to overrule any such previous legislation. Otherwise, one might infer that parliament does not have a supreme law-making power anymore. But if a successor is able to overrule any law previously made, parliament would be “all-powerful”, and yet “powerless to limit its own powers”.²⁸² This matter raises problems for the question regarding the amendment rule of the proposed constitution. If there is no way for parliament to limit its own power, nor any way to limit parliament’s power to override constitutional rules, Article 116 cannot make the constitution binding on parliament. Even if measures were taken to entrench its provisions, they could still be altered by simple majority.

Dicey assumed that there could not be any limitation to something that is, by definition, of unrestricted might, and unconditional in its application.²⁸³ He also extended this logic to the theory of self-limiting legislation as he assumed that it would effectively bind parliament’s successor and thereby contradict the definition of ‘unlimited power’. Dicey asserted this to be the case because, in his opinion, if parliament could limit its successors’ rights, parliamentary sovereignty would not be a valid principle.²⁸⁴ This view was affirmed by other prominent commentators, including Paul Jackson and Patricia Leopold, who said that if a parliament could bind future parliaments, then it would become superior to its successors. These authors argue that parliament can legislate in a way that affects its successor, but that the successor could just simply change the relevant legislation by virtue of its own supreme legislative power.²⁸⁵

According to Joseph, notwithstanding Diceyan opposition to the notion of parliament limiting its own law-making authority, there is already legislation in the United Kingdom that for practical purposes, cannot be changed.²⁸⁶ For example, independence legislation like the Statute of Westminster 1931 (UK) could be theoretically set aside through parliamentary legislation, but such an action would be without an actual effect.²⁸⁷ This is due to the affected territories having set up their own functioning and independent governments, which cannot be set aside through British ruling. The decision made through the Statute of Westminster is graven in stone and permanently took away some of Britain’s legal influence.²⁸⁸ Joseph also refers to constitutional statutes that might be binding, even on successive parliaments. Chapter 29 of the British Magna Carta²⁸⁹, which prohibits detention other than by law, for example, could be considered as beyond the reach of the legislature, as it was the first document to put the Rule of Law in writing.²⁹⁰ Of similar significance, as above, is the statute by which Britain joined the European Union. These

²⁸² Joseph, above n 7 at 538.

²⁸³ Dicey, above n 5 at 41, “[...] complete both on its positive and negative side [...]”.

²⁸⁴ Dicey, above n 5 at 41.

²⁸⁵ Paul Jackson and Patricia Leopold *O Hood Phillips and Jackson Constitutional and Administrative Law* (8th ed, Sweet & Maxwell, London, 2001) at 54.

²⁸⁶ Joseph, above n 7 at 540.

²⁸⁷ *British Coal Corp v R* [1935] AC 500 (PC) at 520.

²⁸⁸ Joseph, above n 7 at 540.

²⁸⁹ Magna Carta NZ statutes.

²⁹⁰ Joseph, above n 7 at 540, see also judgement in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (DC) [at 1095].

laws effectively constrain parliament's power, both politically and constitutionally.²⁹¹ However, this may change should the United Kingdom eventually leave the European Union. Lord Denning also saw the step of becoming a member of the European Union as irreversible as long as this was not revoked through the designated mechanisms.²⁹² In 2006, the House of Lords accepted that the membership decision was binding on parliament's successors, so that only using the designated European Union mechanisms would reverse the membership decision.²⁹³ However, in New Zealand, there is no such thing as an irrevocable statute, since even the Constitution Act 1986 could be repealed by a simple majority (as well as section 268 of the Electoral Act with a qualified majority vote²⁹⁴, possibly also by a simple majority). The fact that in English constitutional law, under certain circumstances parliament could, for the sake of the practicability of politics,²⁹⁵ be able to bind its successor, shows that the Westminster system accommodates such exceptions. Such exceptions also led Lord Steyn to believe that the modern constitutional order of the United Kingdom does not embody Diceyan parliamentary sovereignty in its pure form.²⁹⁶ There seems to be no reason why that should be any different in New Zealand, although it begs the question as to which statutes or forms of legislation should fall within this exception.

Constitutional entrenchment can theoretically be achieved by laying down certain special procedures that must be followed in order to change the constitution. There could, for example, be a procedure that requires qualified majorities. A constitution can also contain "eternity" clauses which make some constitutional provisions unalterable. The reason for eternity clauses is that certain provisions are seen as the foundation of the constitution, and they are protected from amendment since their alteration would amount to fundamentally replacing the constitution as a whole.²⁹⁷ Such provisions might include, for example, human rights protections and the choice of governing system. There are strong arguments for a complete entrenchment of fundamental rights, freedoms, and organisational rules, so that these cannot be changed even with a qualified majority. Only then, a constitution achieves a superior character and fulfils the democratic need for the protection of the basic structure of the state, as well as the protection of human rights. Furthermore, it would defeat the purpose of establishing a formal constitution to not secure as much as possible the protection of fundamental rights and rules.

A country with existing 'eternity clauses' is Turkey, where certain provisions of its constitution are not amendable. These provisions describe Turkey as a republic, a democracy, and a secular and socialist state governed by the rule of law.²⁹⁸ Another example is Germany, which constitution establishes as 'eternal' the division of the federation into states, the human rights and dignity principles provided for in art 1 of the GG (constitution), as well as the determination that Germany is a federal, democratic and socialist state.²⁹⁹ Such eternal entrenchment in Germany has had practical consequences.³⁰⁰ The United States

²⁹¹ Joseph, above n 7 at 540.

²⁹² *Blackburn v Attorney-General* [1971] 2 All ER 1380, at 1381.

²⁹³ *R (Jackson) v Attorney General (UK)* [2005] UKHL 56.

²⁹⁴ The legal right to make the successor subject to qualified amendment procedures will be discussed in more detail in this Chapter.

²⁹⁵ See: *Blackburn v Attorney-General* [1971] 2 All ER 1380, at 1382.

²⁹⁶ *R (Jackson) v Attorney General (UK)* [2005] UKHL 56

²⁹⁷ See for example article 79 of the German constitution, „Grundgesetz“, that regards certain provisions as being the core principles of the constitution.

²⁹⁸ In 2011, See: Aharon Barak "Unconstitutional Constitutional Amendments" (2011) 44 ILR 321 at 322.

²⁹⁹ Barak, above n 298 at 329.

³⁰⁰ See for example: *Neue Juristische Wochenschrift (NJW)* 1971, 275, where the German Federal Constitutional Court decided, in a case about a proposed constitutional amendment that was intended to limit the right to privacy of correspondence, post and telecommunications (article 10 of the Constitution), that parts of the amendment, due to a breach of article 79 (3) of the constitution and thereby protected provisions, were

is also specifically interesting in regards to its amendment clause, article V, as its amendment procedure is said to make constitutional amendment close to impossible, almost having the effect of an eternity rule.³⁰¹

I will argue below that it is possible for parliament to give itself a set of rules which even its successors must obey. Beyond this, I will argue that parliament can create special majority vote requirements for certain alterations, and that if the constituent power (which parliament is an essential part of, as argued in the previous chapters) is acting, then parliament can even be made subject to rules that cannot be changed. I will argue that the idea that parliamentary sovereignty prevents any kind of eternal entrenchment is not a legal burden but a political myth, and I will explain that it can be overcome if it is understood that the process of constitutional entrenchment is different from ordinary law making.

To examine whether parliament is authorised to bind its successors, it is necessary to distinguish two entrenchment scenarios, the first of which provides for amendment through a 75 per cent majority decision in parliament or a referendum. The second excludes certain provisions from possible amendment through an eternity clause.

A. Form and manner

The first scenario for entrenching qualified majority procedures has been discussed in New Zealand for some time now.³⁰² It has been argued that a sort of “reconstructed” system of the doctrine of parliamentary sovereignty could enable parliament to make rules that describe the requirement of certain amendment procedures.³⁰³

There are two conflicting views in this regard: the continuing and the self-embracing view.³⁰⁴ The former view adheres to the Diceyan notion of parliamentary sovereignty according to which parliament is not able to bind its successors because it is a ‘continuing’ sovereign that cannot get rid of its unlimited law-making power. A simple majority can pass valid laws notwithstanding any attempts by a predecessor to change the law regarding what constitutes legislation.³⁰⁵ The latter view, a more modern approach, maintains that there should be a possibility of prescribing certain procedures that bind parliament and its successors, because it should be part of a sovereign power to be able limit its own freedom.³⁰⁶

Some commentators³⁰⁷ suggest that the latter view is consistent with parliamentary sovereignty, because it doesn’t change the answer to the question of whether parliament can

invalid. The court also assumed that article 79 (3) did not prevent revolutionary change but prevented that the “core” of the constitution could be amended or a totalitarian regime established through the formal amendment procedure; see also: NJW 1991, 1597, also a decision of the Federal Constitutional Court related to a proposed constitutional amendment? about the expropriation of land property, which the court decided to be in breach of article 79 (3).

³⁰¹ See for example: Rosalind Dixon “Updating Constitutional Rules” [2009] Sup Ct Rev 319 at 319; Richard H Fallon Jr “American Constitutionalism, Almost (But Not Quite) Version 20” (2012) 65 MeLRev 77 at 92.

³⁰² Joseph, above n 7 at 606.

³⁰³ Joseph, above n 7 at 575.

³⁰⁴ See for example Joseph, above n 7 at 577 fn 13.

³⁰⁵ Geoffrey Marshall “Legislative Power and Sovereignty” in *Constitutional Theory* (Clarendon Press, 1980) at 45.

³⁰⁶ Marshall, above n 305 at 45.

³⁰⁷ See for example: R Elliot “Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values” (1991) 29 Osgoode Hall L J 215; Andrew Geddis “‘Manner and form’ in the House of Lords” [2005] 11 NZLJ 415; George Winterton “Can the Commonwealth Parliament Enact ‘Manner and Form’ Legislation” (1980) 167 Fed L Rev 202; Han-Ru Zhou “Revisiting the ‘manner and form’ theory of parliamentary sovereignty” (2013) 129 LQR 610.

be limited through previous legislation, but answers instead the question as to how parliament can be required to navigate certain procedures before making certain laws. It does not affect parliament's power to make law, but identifies how such law is to be made, or how sovereign power is to be exercised.³⁰⁸ This description of parliamentary procedures can, for example, be found in the constitutional law Australia.³⁰⁹ The distinction between the rules that describe parliament and the ones that describe its powers reflect the fact that parliament can never change the scope of its legislative power, but is always free to reconstitute itself or formulate its legislative procedures.³¹⁰ I will argue later that the assumption that the scope of legislation cannot be limited becomes problematic when a constitution-maker wants to make certain rules completely unamendable. Notably, the rule that parliament (in its ordinary capacity) cannot limit its own powers is not being challenged by the assumption that parliament, acting as part of the constituent power, could.

An example of efforts to entrench certain rules into New Zealand's constitutional system is the Electoral Act, 1956.³¹¹ This Act defined specific amendment procedures for certain provisions. It raised the required parliamentary majority from its ordinary 50+1 per cent of the House of Representatives to a qualified majority of 75 per cent or a decision by a national referendum.³¹² Until today, the Electoral Act 1993 contains New Zealand's first and only legal entrenchment.³¹³

Though it may seem that parliament is bound by that amendment procedure, Section 268 was not made subject to that procedure itself, and therefore is arguably open to ordinary change. In theory, this enables parliament to derogate the entrenchment provision and then change the protected sections through a simple majority vote – a problem that may also arise in respect of Article 116 of the “Constitution for Aotearoa New Zealand”, which will be further discussed in Chapter 5.

The problems arising from incomplete entrenchment will be discussed later, but it is worth mentioning that Section 268 was not completely entrenched for the reason that this was seen as a clear breach of sovereignty.³¹⁴ As it was said by the Attorney General in one of the parliamentary debates leading to the passing of the Act: “[...] each successive parliament may amend any law passed by a previous parliament”.³¹⁵ The reason why the Electoral Act has not been changed through simple majority is the moral boundary that was put on parliament. According to the traditional understanding of parliamentary sovereignty, parliament could simply ignore Section 268 and still make alterations to any other provision through a simple majority decision. But even in that case, the existence of the qualified majority burden imposes at least a moral threshold.

According to the continuing view of parliamentary sovereignty, parliament is not able to subject itself to manner and form limitations,³¹⁶ which would include the procedures contained in an amendment rule. The option to pass law that is intended to bind the legislature itself is also challenged by the argument that such would be “self-imposing” legislation, and therefore not binding for the institution (parliament) that “imposed” it.³¹⁷ It

³⁰⁸ Joseph, above n 7 at 577.

³⁰⁹ Gerard Carney “An Overview of Manner and Form in Australia” (2012) 5 QUT Law Rev 69.

³¹⁰ Joseph, above n 7 at 577.

³¹¹ Electoral Act 1956

³¹² Electoral Act 1956, Section 268.

³¹³ Joseph, above n 7 at 588.

³¹⁴ Joseph, above n 7 at 588.

³¹⁵ (1956) 310 NZPD 2839.

³¹⁶ Joseph, above n 7 at 603.

³¹⁷ Joseph, above n 7 at 603.

has further been argued, contrary to the self-embracing view (and pertaining to constitutional amendment rules), that a basic constitutional rule cannot contain conditions relating to its own amendment.³¹⁸ Alf Ross, for example, has argued that this is because a proposition cannot refer to itself. In other words, a provision of a legal document cannot make itself subject to any rules it itself describes. Any such self-reference would actually require a form of higher law.³¹⁹ An amendment procedure that pertains to the amendment rule itself as a method to prevent any circumvention of the amendment procedure (though abolishment of the amendment rule), would in that event have to be a form of a law higher than that which it tries to affect. Consequently, if the constitution is already supposed to be the highest law existing law, it would not, by definition, be possible to make the constitution and the amendment procedure therein itself subject to amendment procedures.

This traditional view of parliamentary sovereignty was also partly defended by H W R Wade. Importantly, Wade did not oppose the idea that parliament could make itself (and its successors) subject to formal rules, but he considered that the English courts would be unlikely to accept self-imposed limits and pointed to evidence in the case law that suggests that would not happen. Using South Africa as an example, however, Wade argues that it is the prerogative of countries which have obtained legal independence from England to interpret their own principles and fill in any vacuum that might exist. Even if the courts in commonwealth countries (especially England) are not willing to accept the notion that parliament may bind itself, this does not prevent courts in other common-law countries, independent of Westminster, from taking a different position. As the interpretation of constitutional principles can naturally not only be only of a legal nature, courts have always had to make political decisions.³²⁰ Because he leaves the ultimate decision up to the courts, Wade's analysis might be seen as a transitional view, between the Diceyans 'continuing view', and the alternative 'self-embracing' view.

Sir Ivor Jennings, amongst others, rejected the traditional Diceyan doctrine, arguing that parliament could always reconstitute itself and thereby could prescribe formal rules about how to pass legislation.³²¹ So did Geoffrey Marshall as he presented what he described as the 'new view', being the notion that it is well within the powers of parliament to "reformulate what shall count as legislation for particular purposes",³²² prescribing certain qualified procedures for bills to become valid law. Marshall argues that sovereignty entails an unlimited power 'X', until an authority determines that its power shall be limited, to a refined/qualified power 'Y'. He argues that, logically and legitimately, this limits the sovereign power to that of 'Y'.³²³ He further seems to agree with the notion that power can be limited not only in a legal sense, but also in an ideological and political sense.³²⁴ Following these assumptions, the historical view of the doctrine of parliamentary sovereignty might have, in accordance with the Diceyan view, originally prohibited parliament from restricting the legislative freedom of its successors. But as politics develop, so does the perception of the constitutional principles of a country. As it becomes apparent that there is the need for certain rules to be protected from amendment by simple majority vote, the rule of parliamentary sovereignty seems to have developed in a direction where the self-limiting concept is not only an idea, but a legally and politically permissible principle.

³¹⁸ Marshall, above n 305 at 46.

³¹⁹ Alf Ross *On law and Justice* (Stevens and Sons, London, 1958) at 80 and 81.

³²⁰ Wade, above n 20.

³²¹ Sir Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, London, 1959) at 152 and 153.

³²² Marshall, above n 305 at 43.

³²³ Marshall, above n 305 at 48.

³²⁴ Marshall, above n 305 at 48.

Coming back to the starting point of the self-embracing view, Marshall recognises that parliament, according to the new view, would still have unlimited sovereignty in respect of every sort of policy. The only qualification is that the way certain objects in those policies might be achieved would involve specific formal procedures.³²⁵ If one follows the self-embracing view, it is not a breach of the doctrine of parliamentary sovereignty for parliament to pass legislation that restricts its authority to change certain law, by defining the rules of how those laws are to be passed. These rules could involve, for example, requirements related to qualified majorities or referenda.

Under this approach, parliament could pass the proposed constitution and make its amendment subject to a 75 per cent qualified majority vote. This rule would be legally binding on its successors.

However, such a rule would still lack sufficient strength. As the purpose of modern democratic constitutions should be to strongly protect the **fundamental** rights of its citizens as well as ensuring a basic structure of government that secures a system of checks and balances, making all provisions subject to the same amendment procedure that “only” requires 75 per cent of votes in parliament, does not seem to be enough. Eternal entrenchment, or at least a much higher threshold than a 75 per cent majority vote would change that. Of course, this is problematic in the face of parliamentary sovereignty, because it would be hard to argue that categorically preventing successors from changing certain laws would still be within parliament’s right to ‘define’ the rules on how to pass legislation. The idea would be that parliament, in its ordinary capacity, cannot completely protect certain rules from ordinary amendment. In fact, this result aligns with how the ‘self-embracing’ view has also been defined, namely that:

Parliament cannot place any blanket *prohibition* on its future action but can place procedural restrictions on such action – Parliament may do anything, but the rules which define it may be altered.³²⁶

The difference between tying its successor to certain procedures, and preventing it from legislating on a particular matter, has also been acknowledged by Goldsworthy. He argued for what could be seen as a third position,³²⁷ that the focus should be the procedures of lawmaking, so that parliament could control its “deliberative and decision-making process in a way also enforceable in courts,³²⁸ provided that parliament’s substantive power to legislate is not restricted and that the procedural rules do not pertain to the rules of parliament’s fundamental structure.³²⁹ Goldsworthy, for example, argued that to some extent parliament must be able to prescribe to itself a framework, which cannot be subject to change, that outlines the ‘scope of policy-making’. According to him, allowing parliament to tie itself to certain procedures enhances its sovereignty rather than taking it away, as giving parliament the right to limit itself acknowledges that it initially has a very broad scope of legislation which also includes being able to limit its own successor.³³⁰ This ‘third view’ was adopted by Goldsworthy as a reaction to the uncertainties that would arise, if parliament was allowed to restrict itself through manner and form requirements which

³²⁵ Marshall, above n 305 at 52.

³²⁶ See: Marshall, above n 305 at 52, though the author suggests different interpretations on that view, as for example: “[...] reformulation or redefinition of the procedure for legislating may be regarded as redefining the legislative organs [...]”.

³²⁷ The view has for example been labelled as ‘third view’ by Alison L Young “Parliamentary Sovereignty Re-defined” in *Sovereignty and the Law* (Oxford University Press, New York, 2013) 68 at 69.

³²⁸ Goldsworthy, above n 73 at 181.

³²⁹ Goldsworthy, above n 73 at 181 and 182.

³³⁰ Goldsworthy, above n 73 at 181.

include setting up procedures to change and enact law. What would be the limits of self-restriction? Could parliament simply enact completely arbitrary amendment procedures? For example, could there be a 90 per cent majority requirement for amendments to the constitution? Especially on highly politicised and polarising policies, such majorities would be nearly impossible to achieve. It is in light of these concerns and considerations that Goldsworthy subjects parliament's right to change procedures, or to define the way law should be made, to the qualification that it cannot categorically prevent its successor from making certain changes.³³¹ Indeed, Goldsworthy only accepts very minor procedural rules as well as a requirement that parliament could not set aside legislation through implied repeal³³² but would have to use express words to do so.³³³ Still, the advantage of Goldsworthy's direction of thinking has been identified by Alison L Young, in that it allows parliament to make long-standing commitments, and to clarify which legal provisions cannot be "inadvertently overridden by future legislation" without unjustifiably compromising parliamentary sovereignty.³³⁴

The self-embracing view better reflects the needs and development of modern constitutionalism than the original Diceyan views on parliamentary sovereignty. Thus, the self-embracing view will be followed henceforth in this chapter. In order not to undermine parliamentary sovereignty in the course of ordinary law making, the notion that parliament (as an ordinary legislature) can limit itself through manner and form requirements should not negatively affect parliament's substantive power. Making the amendment of certain legislation subject to a qualified majority vote requirement would therefore only be allowed as long as its successor is not burdened with rules that would make amendments practically impossible. As indicated in the paragraph above, however, Goldsworthy saw these manner and form requirements to be very limited and did not accept amendment procedures that require qualified majorities to be binding on parliament's successor. What still needs to be considered in respect of Article 116 of the proposed constitution is whether parliament could, while acting as part of the constituent power, have a broader scope of authority, enabling it to enact amendment procedures with more than a 75 per cent threshold or even to make certain provisions completely unamendable. This distinction is significant because, as I will argue below, only when parliament is acting together with the electorate, it is possible for ordinary parliament to be made subject to unchangeable law, without breaching parliamentary sovereignty.

B. Constituent power vs. constituted legislature

Ordinary parliament can create ordinary rules and procedures that must also be observed by its successors. However, for constitutional entrenchment, especially in respect of the basic human rights that are set out in the proposed constitution, and the basic constitution-making process itself, parliament should not be viewed in its capacity as ordinary legislature, but instead as part of the constituent power.

Even though Goldsworthy disagrees with such an approach,³³⁵ he finds that there is "no logical reason that prevents constitutions from including provisions that are unalterable",

³³¹ See: Young, above n 327 at 70.

³³² Implied repeal, meaning that whenever an enactment by parliament is inconsistent with a previous enactment, the earlier is abrogated by the later, Rebecca Prebble "Constitutional Statutes and Implied Repeal: The Thorburn Decision and the Consequences for New Zealand" (2005) 36 VUWLR 291 also with a more detailed discussion.

³³³ Goldsworthy, above n 73 at 181 and 182.

³³⁴ Young, above n 327 at 79.

³³⁵ Because, according to Goldsworthy there is nothing that could be thought of as being so important that it should be made absolute, not even human rights.

even by the process of constitutional amendment.³³⁶ The power to make this form of law, which is binding for every governing institution, is described as inherent in either a monarch, a legislature, the people, or a combination of these.³³⁷ This concept clearly describes the idea of the ‘superior’ (constituent) power, apart from the ordinary parliament, having authority to make law that is and has to be respected by all, including by parliament itself.

Goldsworthy has also pointed out, in reference to the Australian constitution, which establishes that parliament has unlimited power only within its defined field of operation, that Australia was able to adopt a written constitution without abandoning the principle of parliamentary sovereignty.³³⁸

Parliament in its ordinary capacity should not have the legal and political authority to entrench a formal constitution. Only the constituent power should be able to adopt and entrench a formal constitution. As argued above, this would require a referendum approval vote as well as approval by parliament. In that case, parliament would not be acting as the ordinary legislature but as a constituent assembly and, therefore, as part of the constituent power. Only the constituent power has the authority to establish a written constitution in New Zealand. If the goal is to make the constitution proposed by Palmer and Butler a fundamental document of the country, a referendum and a decision of parliament acting as a constituent assembly would be necessary.

More specifically: because parliament would not be acting as ordinary legislature but as part of the constituent power there would be no ordinary power limiting itself but instead the constituent power limiting the ordinary power. The constituent power would limit the constituted parliament’s (which is the ordinary power) authority in a process that also organises and empowers the supreme parliamentary institution. The matter at hand is, therefore, not actually a question of self-limitation.

It is also not the case that by making parliament subject to a higher legal standard, the constitution would breach parliamentary sovereignty. For example, in common-law, under the rule of law as well as constitutional conventions or the UK membership to the European Union, there are principles of constitutional character which the legislature is required to obey. Even though they appear to be in conflict with the doctrine of parliamentary sovereignty, the coexistence of these principles has been well established and accepted by now. The very detailed European Union’s legal framework has become accepted by English courts as being binding law at least to the extent that it would require the United Kingdom to leave the European Union in order for its law ceasing to prevail over national law. This is because it does not take away parliament’s right to be the ultimate law making institution, within the scope defined by higher law. Within the national context, parliament is still the highest law-making authority. Entrenching a constitutional system through which the parliament is governed, only defines its jurisdiction, it does not affect its sovereign power to make law within its jurisdiction.

³³⁶ Goldsworthy, above n 73 at 70.

³³⁷ Goldsworthy, above n 73 at 70.

³³⁸ Goldsworthy *The Sovereignty of Parliament: History and Philosophy at 1*, see also: Andrew Blick and Blackburn “Codifying - or not Codifying – The United Kingdom Constitution” UK Parliament <<http://www.parliament.uk/documents/commons-committees/political-and-constitutional-reform/KCLexistingconstitutionMay2012.pdf>>. referring to Goldsworthys statements to support the idea, that parliamentary sovereignty does not necessarily undermine the chance for a written constitution, even when it contains unalterable provisions.

Furthermore, the distinction between parliament acting as an ordinary legislature, and parliament acting in accordance with the public vote as the constituent power, disposes of the ‘self-limiting’ problems arising in respect of the doctrine of parliamentary sovereignty, because the ordinary parliament is not limiting itself. The *political* decision as to whether parliamentary sovereignty precludes parliament from limiting itself does not need to be made when it comes to the transition of New Zealand from a country with only a material constitution to a country with a formal constitution.

Now, it might be argued that the distinction between the ordinary parliament and parliament acting as part of the constituent power is just sophistry, contrived to circumvent parliamentary sovereignty. However, the concept of constituent power is not alien to the common-law world. It just has not been widely discussed, as the United Kingdom, the “homeland” of parliamentary sovereignty, has (like New Zealand) not yet adopted a formal constitution. In the course of a constitution-making process, the New Zealand Parliament would be part of the constituent power. The adoption of the constitution is an essential expression of the democratic will of the people, defining the fundamental framework within which the ordinary parliament can exercise its sovereignty.

Moreover, a fair number of authorities have recognised the difficulties associated with defining what the doctrine of parliamentary sovereignty entails, and the extent to which it applies. As the doctrine is also a constitutional principle, it follows that if the constituent authority makes use of its power to establish the constitutional rules of the state, which include defining parliament’s sovereignty, parliament would still be the superior law-making institution. This is because, once the state has constituted itself, no entity other than parliament has the power to make or amend legitimate laws within this defined constitutional framework. Indeed, parliamentary sovereignty is a constitutional principle and therefore a principle only established by the constitution (regardless of being unwritten). The whole idea of the adoption of a formal constitution being the initial decision that freely defines the jurisdiction of the country’s constitutional organs, would be compromised if the authority to adopt the constitution would already be limited.

In *The Concept of Law*³³⁹, H L A Hart, provides further support for the idea that even the “supreme” legislature can be subject to legal limitations while exercising its legislative powers. He does that by comparing countries with a common law history, where the legislature is already subject to legal limits. These kinds of limits can, for example, be found in the United States and Australia.³⁴⁰ Such limitation could, like in Australia, be established by the enactment of “higher” law, in a process involving the electorate, by which the people confer their trust on representatives to create law within the agreed scope.³⁴¹ Furthermore, the difference between states where the legislature faces legal limitations, and those where it does not, is determined by the extent to which the constituent power³⁴² chooses to empower its representative body.³⁴³

An even more radical position has been taken by Vernon Bogdanor, who wrote that “there is no point in having a constitution unless one is prepared to abandon the principle of the sovereignty of parliament, for a codified [formal] constitution is incompatible with this principle. A constitution would specifically have to “*limit* the sovereignty of parliament.”³⁴⁴

³³⁹ HLA Hart *The concept of law* (2nd ed, Oxford University Press, New York, 1994).

³⁴⁰ Hart, above n 339 at 72.

³⁴¹ Hart, above n 339 at 74.

³⁴² Hart speaks of the sovereign electorate here, but this only seems to be the case, because Hart believes the electorate to be what is being described here as the constituent power.

³⁴³ Hart, above n 339 at 74.

³⁴⁴ Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 14.

Even though this paper does not try to abandon the principle of sovereignty, but define its limited scope of application, Bogdanor emphasises that the doctrine of parliamentary sovereignty cannot prevent the constituent power from adopting a formal constitution.

In terms of the scope of parliamentary sovereignty, Joseph affirms that it is necessary to define what “parliament” in this sense is supposed to entail.³⁴⁵ If parliament is not acting as part of the constituent power or as a constituent assembly, it becomes clear that it can only be sovereign within the established constitutional framework. Hart also mentions that even Austin, another forethinker of parliamentary sovereignty in Diceyan terms, did not consider the legislature as the sovereign of the state / constitution.³⁴⁶ In his remarks in *The Province of Jurisprudence Determined*³⁴⁷ when Austin writes about the validity of positive law and the exercise of power, he maintained that representatives derive their powers from the delegation by the sovereign.³⁴⁸ He identified the electorate, the king and the House of Lords as the sovereign, whereas the electorate who can delegate either whole or nearly the whole power to their representatives, the House of Commons.³⁴⁹ This indicates that he perhaps recognized a higher authority than the legislature.

The arguments made here essentially point to the distinction between the formal and material constitution. As Kelsen has said, as long as there is only a constitution in the material sense, there is no difference between the ordinary and constitutional laws.³⁵⁰ Consequently, in New Zealand, all laws created by parliament are, in terms of constitutional consequence, the same. One might argue whether that is also true for Section 268 of the Electoral Act, but since it is the only provision subject to an amendment procedure that requires a qualified majority, there is still no formal constitution and even Section 268 could be considered to be only ordinary law, because it itself is not included in the number of provisions that require a 75 per cent majority for amendments. The substantive differences relate largely to political implications. Thus, due to the absence of a formal constitution, parliament exists and acts as the ultimate sovereign without limitation. However that would change if a formal constitution, like that proposed by Palmer and Butler, were adopted. In this situation, through an act of the constituent power, parliament would be given a newly defined scope of law making. In this case, the fact that parliamentary sovereignty only applies to the making of ordinary law, would be exposed.

In conclusion, if a written and formal constitution is adopted, it should be established by the constituent power. A set of rules could be passed by the ordinary parliament, introducing a binding amendment requirement of 75 per cent majority of parliament or a majority of the electorate. But the adoption of such rules through parliament, would not give the constitution its fundamental constitutional character. Further, parliament in its ordinary capacity would not be able to make certain provisions unamendable.

As suggested earlier, in a modern democracy the basic structure of government and basic human rights³⁵¹ should be further protected. This does not mean that human rights should be entrenched in a way that would prevent the ordinary parliament or, for that matter, the

³⁴⁵ Joseph, above n 7 at 575.

³⁴⁶ Hart, above n 339 at 73.

³⁴⁷ Austin, above n 21.

³⁴⁸ Austin, above n 21 at 228; see also: Pavlos Eleftheriadis “Austin and the Electors” in *The Legacy of John Austin’s Jurisprudence* (Springer, London, Heidelberg, New York, 2013) at 157.

³⁴⁹ Austin, above n 21 at 228.

³⁵⁰ Kelsen, above n 178 at 125.

³⁵¹ See: Jeffrey Jowell and Dawn Oliver *The Changing Constitution* (6th ed, Oxford University Press, New York, 2007); Geoffrey Palmer “What the New Zealand Bill of Rights Act aimed to do, Why it did not succeed and how it can be repaired” (2016) 14 NZJPIL 169.

constituent power, from introducing additional human rights to the list. Only the human rights catalogue entrenched in the constitution should not be subject to alteration in any way that could weaken its protection or provisions for rights already identified and defined. The aim should always be to broaden the guarantee of human rights and, therefore, the list should only be open to possible additions in the future. Human rights have not been completely developed and defined, as of yet. For example, with the rise of digitalisation or the growth of multinational and powerful companies, there might be a need to entrench certain additional protections against previously unforeseen threats to human rights. Human rights should surely not be entrenched without due consideration. But a qualified entrenchment would be worthwhile, let alone achievable. The law is such that subsequent additions could, in effect, undermine existing protections, and substantive precautionary measures would need to be taken to avoid such unintended adverse consequences. These considerations, however, are beyond the scope of this dissertation. For my purposes it is sufficient to say that human rights justify heightened protection, and that this is theoretically possible.

C. Application to the adoption of Art 116

The results of the above analysis can now be applied to the adoption of Article 116 of the constitution proposed by Palmer and Butler:

In their book, the authors suggest establishing the constitution through a public vote, which will be set up by parliament. It is not explicitly stated that parliament must ‘approve’ the entire constitutional text before submitting it to a referendum. However, it seems unlikely at first thought, that if parliament set up a referendum, it would not approve itself of the content that is being passed on to the electorate. On the other hand, there are historical examples of legislatures and government institutions that have left decisions up to a referendum on which they did not have a clear opinion or in which it was politically convenient to abstain from expressing an official view. That could have just recently been witnessed with the ‘Brexit referendum’ in the United Kingdom. By way of leaving a decision to the electorate, the government institution can avoid having to decide on a highly controversial topic. It is a way to avoid discussion within the institution or to move beyond an impasse. If parliament does not have to explicitly state itself that it approves of the content which is passed on to the electorate, it could decide not to express approval of certain controversial parts of the constitution and leave them for the electorate to decide. If that is the case, parliament would not be acting as part of the constituent power, but performing an administrative function (at least with respect of some provisions).

If parliament acted only as an administrative institution, to process the establishment of the constitution, two things would follow. First, this particular process will produce only ordinary law, like the constitutional documents previously passed, as it would lack the double approval of a referendum and parliament. Second, ‘the constitution’ would not have been adopted by the constituent power of New Zealand.

If the constitution is not entrenched by the constituent power, it would lack a superior character. Because of the nature of a constitution, describing the fundamental rules that protect the citizens of the country and control government institutions, its adoption process must contain the broad acceptance of its status by the people. Furthermore, if the only actual approval decision was to be done by a referendum, it seems odd that a constitution entrenched by that referendum could then be changed (as proposed) by parliament with a 75 per cent majority. The fact that this would require more than a single majority decision does not take away from the fact that the constitution is made subject to alterations by a body other than that in which the constituent power rests. Establishing the constitution

without both, parliament and referendum, would therefore fail to give effect to the true constituent authority and fail to recognise its status.

V Is the amendment rule in Article 116 sufficiently secured against amendment?

*“No part of a constitution is more important than the rules that govern its amendment and its entrenchment against it.”*³⁵²

There is a body of literature on the question of how constitutional entrenchment should be achieved, especially in respect of protecting the amendment procedures themselves against constitutional amendment.³⁵³ Most differences can be found with regards to the way constitutional entrenchment is tried to be achieved, either by a simple act of parliament, through the ordinary legislative process, through a referendum of the people, or by a constituent assembly elected specifically for that purpose. With regards to the method of entrenchment, the results of the research in the previous chapters also apply to the entrenchment of Article 116, the amendment rule of the proposed constitution. The question is whether Article 116, as it is proposed, is entrenched strongly enough itself against amendment. If Article 116 can be altered fairly easily, then a 75 per cent majority in parliament would be able to free itself from the amendment rule through a double amendment procedure: In a first step, parliament could, according to Article 116, do away with Article 116 itself, and lower the threshold for amendments, for example by making amendments only require a 51 per cent majority. In a second step, parliament could then make any future changes to the constitution without the higher threshold of the current Article 116. Since Article 116 makes all amendments subject to a 75 per cent majority or referendum, parliament could also change each constitutional provision in a single legislative act. Gathering a 75 per cent majority on a variety of provisions would possibly appear to be of greater political difficulty than only abolishing Article 116 in one step, and then proceed to make any more amendments through a more easily accomplishable simple-majority decision. Obviously, this defeats the purpose of adopting a formal written constitution in the first place. Indeed, the purpose is to prevent state institutions from acquiring excessive power within government and to prevent abuses of power.

There have been historic examples of political autocracies using the formal political procedures to achieve undemocratic results.³⁵⁴ For these reasons, Frank Michelman suggested that amendment rules might need to be absolutely entrenched, to ensure that every other provision of the constitution is at least relatively entrenched. If amendment provisions are not entrenched strongly enough, the whole constitution may fail.³⁵⁵ Such ‘eternal entrenchment’ has been criticised with regards to theories of popular sovereignty, in terms of intertemporality in popular constitution-making.³⁵⁶ That is to say, even if eternity clauses were established through popular vote - by the constituent power – they could hold future generations accountable to rules that are no longer suitable, as the values of the society can

³⁵² Albert, above n 3; see also: John W Burgess *I Political Science and Comparative Constitutional Law* (1891) vol 1.

³⁵³ When speaking of constitutional amendment, I only refer to those amendments, that continue the constitution and do not lead to breaks or replacements. See further distinction in: Heinz Klug “Constitutional Amendments” (2015) 11 *Annu Rev Law Soc Sci* 95.

³⁵⁴ A recent example being President of Turkey, using formal amendment procedures to strengthen his authoritarian powers, making the democratic state less and less democratic, see: Kareem Shaheen “Erdogan clinches victory in Turkish constitutional referendum” (16 April 2017) *The Guardian* <<https://www.theguardian.com/world/2017/apr/16/erdogan-claims-victory-in-turkish-constitutional-referendum>>.

³⁵⁵ Frank I Michelman “Thirteen easy pieces” (1995) 93 *MLR* 1297 at 1303 and 1304.

³⁵⁶ See for the discussion: Sharon Weintal “The Challenge of Reconciling Constitutional Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory” (2011) 44 *ILR* 449 at 466.

change over time. In this sense, the ‘dead hand’ of a past constituent power would govern the living.³⁵⁷

However, the concept of permanent entrenchment does not negate popular sovereignty. It is the people themselves who, as the constituent power, create the formal constitution. It is in the authority of the people to define the jurisdiction of all constituted powers, the amendment power only being one of them.³⁵⁸ Therefore, it is also within the authority of the constituent power to limit the scope of authority of the amendment power. Furthermore, the constituent power can abolish the whole constitution by the adoption of a new one, as will be explained in more detail below.

According to Richard Albert, amendment rules require careful consideration, as they constrain political actors through the entrenchment of procedures through which constitutional changes can be made. They are more than the rules of the government or the state, but “rules for *changing* the [constitutional] rules”.³⁵⁹ The easier it is to make constitutional changes, the more there appears to be a lack of opportunities for due consideration and consultation of experts and the public, as the burden to make constitutional amendments is easier to overcome.³⁶⁰

Given the significance of amendment rules, one might think that they are given a great deal of consideration when a new constitution is adopted. It is, therefore, rather surprising that a small number of democratic countries have taken specific steps to ensure that amendment rules are themselves protected against amendment.³⁶¹ Examples of such precautions will be given throughout this chapter.

Albert suggests that amendment rules should be entrenched against amendments at least to a greater extent than other constitutional rules.³⁶² He promotes the idea of not making amendment rules completely unamendable, though it is not clear whether with respect to the ordinary institutions or the constituent power.³⁶³ Similarly, Ulrich Preuss argues that amendment rules are essential to a constitution, even more so than bills of rights.³⁶⁴ If they are so essential, the continuing existence of the constitution would only be ensured if the amendment rule is made unamendable. Before examining Article 116 of the proposed constitution, it is necessary to consider the kinds of procedures that could be used to entrench amendment rules so that they fulfil their fundamental purpose of protecting the constitution.

According to Albert, some countries which intended to include permanent entrenchments³⁶⁵ in their constitutions in fact failed to do so, due to how their amendment provisions are

³⁵⁷ Weintal, above n 356 at 446.

³⁵⁸ Schmitt, above n 139 at 150.

³⁵⁹ Albert, above n 3; on the other hand, Ginsburg and Melton, above n 4 have considered, that the amendment rule eventually might not be of great importance at all, as politics and amendment cultures are really the relevant aspects of defining how strongly entrenched constitutions or certain provisions actually are.

³⁶⁰ See for example Matthew Flinders “V8 Constitutional Amendment” in *Democratic Drift: Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press, New York, 2010) 215 at 234, given the example of the United Kingdom, having the same constitutional amendment requirements, New Zealand has (table at 216).

³⁶¹ Albert, above n 3 at 657.

³⁶² Albert, above n 3 at 657.

³⁶³ Albert, above n 3 at 677.

³⁶⁴ Ulrich K Preuss “The Implications of ‘Eternity Clauses’: The German Experience” (2011) 44 ILR 429 at 430.

³⁶⁵ Permanent entrenchment is here being used meaning the same as eternal entrenchment.

designed.³⁶⁶ The German constitution, for example, laid down a permanent entrenchment for certain provisions. Its Article 79 (German Basic Law³⁶⁷) states that amendments “*affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible*”.³⁶⁸ By adding the phrase “Articles 1 and 20 [or this Article] shall be inadmissible”, according to Albert, the German Constitution would have more clearly secured the amendment rule itself against amendment.³⁶⁹ Similarly, Brazil tried to permanently entrench certain provisions of its Constitution through an eternity clause, but was unsuccessful as it did not ensure special entrenchment of its amendment rule (Article 69 s 4 of the Brazilian Constitution). The entrenchment of the constitution could therefore be reversed through the alteration of the entrenchment rule itself.³⁷⁰ A lack of strong constitutional entrenchment in Hungary has exemplified how it is possible for the amendment power to alter the complete basic structure. The amendment rule of the old Stalinist constitution, namely Article 15 (3), only required a majority of two thirds.³⁷¹ This enabled the legislature in 1989 to replace all major institutions, without having to abolish the old constitution.³⁷² Although this process has been used to abolish the Stalinist structure of government and instead implement a liberal democratic structure that included several human rights, the process shows that significant changes that even touch the core values of the constitution, can be made without a revolution if the constitution only provides weak amendment rules. This might be a welcome possibility in the context of overthrowing a dictatorship-like structure, but not if it would be used to overthrow a structure that already is modern and democratic. This form of negative change has come to effect in the same country just recently, when the Hungarian Fidesz party used the amendment mechanisms to create a less democratic structure of government.³⁷³ In Japan, the constitution has grown to be effectively almost unamendable, and since its initial introduction after the Second World War, constitutional amendments have not taken place, as the amending powers were unable to gather required majorities. But even with this heightened threshold, Japan might now be getting a lot closer to undertake major constitutional changes.³⁷⁴ This shows that even heightened thresholds to constitutional amendments do not prevent the constituted powers from trying to alter the constitution in fundamental ways.

A. Unwritten entrenchment

Within legal theory it has occasionally been assumed that there is an unwritten rule preventing double-amendment³⁷⁵. A factual unwritten unamendability somehow exists, for example, in Germany. As argued above, Article 79 of the German Basic Law does not especially entrench that provision itself. However, scholars generally reject the double-amendment tactic as illegitimate. Because of that, it is usually argued that the German amendment power cannot simply abolish Article 79 and subsequently make changes to the

³⁶⁶ Albert, above n 3 at 661.

³⁶⁷ Which is the constitution.

³⁶⁸ English translation can be found at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0421.

³⁶⁹ Albert, above n 3 at 663.

³⁷⁰ Virgílio Afonso Da Silva “A Fossilised Constitution” (2004) 17 Ratio Juris 454 at 455.

³⁷¹ Andrew Arato “Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?” (2010) 26 SAJHR 19 at 29; Kriszta Kovács and Gábor Tóth “Hungary’s Constitutional Transformation” (2011) 7 ECLR 183 at 184.

³⁷² Arato, above n 371 at 29.

³⁷³ David Landau “Abusive Constitutionalism” [2013] 47 UC Davis Law Review 189 at 209.

³⁷⁴ “JAPAN: Abe’s Constition plans will soon take shape” *Oxford Analytica Daily Brief Service* (Oxford, 14 June 2017) <https://search.proquest.com/docview/1911210050?accountid=14782>.

³⁷⁵ Meaning that in a first step the amendment provision itself would be revised or abolished, followed by the abolishment or revision of the provisions that were originally protected by the amendment rule.

German constitution as it pleases.³⁷⁶ It has for example been suggested that Article 79 itself cannot legally be altered, because that would breach the core values of the constitution, and the system and ideals of the constitution do not allow for that to happen.³⁷⁷ The idea is that the constitution itself, in its structure and ideology, prevents the abolishment of the amendment rule. In Turkey, even in light of the complete absence of an amendment rule before 1971, the Court assumed that the constitution's silence on amendment did not prevent the Court from judicially reviewing the constitutionality of certain amendments,³⁷⁸ reflecting an assumption that amendments would always need to be subject to certain rules or principles that can be judicially reviewed. This shows that in certain cases, courts are willing to read certain principles or rules into a constitution even if not clearly expressed in them, if the character of the constitution provides for such an assumption. Although this is an example of a different phenomenon than here discussed, this sort of development of a court interpreting the character of a constitution and reading certain principles into it, could also happen in regards to the assumption of a nonwritten unamendability rule. It could therefore be said with respect of the proposed Article 116, that the character of the constitution protects it from amendment, thereby effectively protecting the proposed constitution of New Zealand against the double-amendment tactic. This approach, on the other hand, can be criticised for being largely political, rather than legal. Thus, if the political view changed, even the German constitution, which is perceived as being fairly robust, could be abolished through double amendment.³⁷⁹ From this follows that even if courts would assume that the character of the proposed constitution for New Zealand would contain the principle of unamendability of its amendment rule, this view might be reversed by the courts if the political view of its judges changes.

Another form of unwritten unamendability could be constitutional conventions. A development in political and cultural practice, for example, could lead to certain provisions becoming factually unamendable through constitutional convention³⁸⁰.³⁸¹ Constitutional are not legally enforceable, as they are political in nature, yet they can still be a strong defence against ordinary amendment of the amendment rules.³⁸² On the basis of an unwritten unamendability convention, it could be assumed, with respect to Article 116 of the proposed constitution, that it is not amendable by the ordinary legislature, regardless of it being expressly entrenched or not. This unwritten entrenchment could certainly not come from the historic and political development of the constitution itself, as it has not even been adopted yet. However, it could be that in New Zealand a constitutional convention has developed from section 268 of the Electoral Act, which could also apply here. If so, once amendment mechanisms are set in place, parliament would respect those and only make alterations according to those rules, not defeating the purpose of the amendment rule itself by changing it. Section 268 of the Electoral Act, for example, has never been touched, and changes to the entrenched provisions of the Electoral Act have only been made according to the procedure set out in s 268. On the other hand, s 268 is only one entrenchment rule, regarding only one piece of legislation. Even though it has already been argued that there is a conventional force to section 268³⁸³, assuming this by considering only one provision

³⁷⁶ See for further information Da Silva, above n 370 at 458, fn 11.

³⁷⁷ Herdegen Matthias "GG art 79" in *Grundgesetz-Kommentar* (80th ed, C H Beck, 2017) at paragraph 77.

³⁷⁸ Kemal Goetzler *Judicial Review of Constitutional Amendments - A Comparative Study* (Ekin Press, Bursa, 2008) at 23 and 24.

³⁷⁹ Albert, above n 3 at 663, fn 79.

³⁸⁰ 'Constitutional Conventions' being recognized customs, norm, or practices that are generally understood to create obligations on government and worth following, which can be just as important as constitutional 'laws', see: Palmer and Palmer, above n 17 at 4 and 5.

³⁸¹ Albert, above n 3 at 672.

³⁸² Albert, above n 3 at 672.

³⁸³ See for example: *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at 288.

would go too far. In any case, it is obvious that amendment rules must not be susceptible to easy amendment themselves, as this would compromise the constitution's higher status.

Albert has also concluded that the “theory of unwritten unamendability is stronger in theory than reality”.³⁸⁴ Besides needing strong political signs and historic development, which New Zealand ultimately lacks, this theory still fails to bind political actors with absolute credibility. Beyond the difficulties arising from just assuming that certain provisions are unamendable, it is problematic that no explicit provision exists that makes the amendment rule itself unamendable. The absence of explicit implementation could indicate that a legislature did not want that extent of constitutional entrenchment. Both of these aspects show that the assumption of the existence of a rule or principle that has never explicitly been put in writing always creates great difficulties.

B. Article 116 itself as part of the amendment procedure

Article 116 of the proposed constitution states that, “No article or part of this Constitution may be repealed [...]”³⁸⁵. By that formulation two different things could follow. Article 116, as it is written in the same document as the rest of the constitution, is included in the expression “no article [...] of this constitution”. In that case, Article 116 itself would be subject to the procedure described in it. However, it could be argued that Article 116 is itself not part of the constitution that is being referred to, because there is a difference between the provision containing the amendment procedure and all other provisions of the constitution.

It seems more likely that Palmer and Butler intended to include Article 116 in the amendment procedure. Therefore, one can assume that Article 116 cannot be changed by a simple majority in parliament but would require either a 75 per cent parliamentary majority or a popular vote. Of course one never knows how this would be applied in practice, regardless of what the intention was. To prevent ambiguity and uncertainty, as to whether Article 116 is also subject to the amendment procedure that it prescribes, its text should be expressed more clearly. That can be done by, for example, providing that, “No article or part of this constitution, including this article, may be repealed or amended [...]”.

For the reasons mentioned above, I still do not think that this entails strong enough entrenchment. Again, if parliament intended to make significant constitutional changes instead of pursuing them through the amendment procedure for every single change, it could simply abolish Article 116 itself and then make any future changes to the constitution through any more flexible procedure it decides to adopt.

C. Double entrenchment / Permanent entrenchment

Albert sees flaws in using only one method of entrenchment. Entrenchment provisions are either ordinary, special or absolute. Ordinary entrenchment (as in Article 116 as discussed above) seems to be the most common. Ordinary in this context does not refer to the possibility of changing the entrenchment provision by ordinary simple majority decision. It refers to amendment through the same procedure that the provision sets out to change other parts of the constitution.³⁸⁶

³⁸⁴ Albert, above n 3 at 661.

³⁸⁵ Full provision see page 37.

³⁸⁶ Albert, above n 3 at 661.

Albert suggests the creation of amendment rules according to two principles: (1) intertemporality; and (2) relativity. Intertemporality means that after the initial decision of adopting and entrenching the amendment clause is made, the decision will then be repeated after a previously determined time period. Jed Rubenfeld discusses intertemporality in terms of democratically representing the will of the people.³⁸⁷ According to his view, self-governing societies have failed to realise the impact of time on their lives and therefore the “relation of self-government to time”.³⁸⁸ Even though intertemporality is referred to subsequent constitutional amendment, its arguments can also apply to the initial creation of the amendment rule. Democratic self-government would require more than one public vote (and likely also similar methods of constitutional approval). It needs to facilitate a process that makes the public aware of their decisions and commitments in the context of time.³⁸⁹ Democratic “self-government”, according to Rubenfeld, does demand that the commitment to the constitution can be altered whenever a majority sees fit, but only when the majority is willing to make a “significant temporal commitment to [it]”.³⁹⁰ One way this commitment could be shown is by introducing an amendment rule that requires a sequential approval, which means [multiple] votes over multiple years. Having the decision made over multiple years requires at least one initial decision and one confirmatory decision after a set time.³⁹¹ Albert generally suggests an interim period of 5 years, but it could be more or less than this, depending on the specific preferences of the constituent power. However, the timeframe should not be too long or too short.³⁹² A sequential period that is too short defeats the purpose of sequential approval, that is, to introduce the perspective of time and create temporal commitment. A period that is too long on the other hand would show a lack of contemporaneity between proposal and ratification.³⁹³ Some countries have already adopted amendment procedures that include a method of sequential approval, as for example Denmark and Norway.³⁹⁴

The concept of relativity, on the other hand, requires that amendment rules face a higher threshold than the other provisions of the constitution in order to respect the “special importance of amendment rules relative to other constitutional provisions”.³⁹⁵ Creating a higher threshold for the amendment of the amendment rule than that applicable to the other provisions of the constitution, helps prevent double amendment as the amending power would have to gather a greater majority.

With regards to the idea of intertemporality, Albert has a point. The advantages of having a sequential approval that includes a supermajority across a period of time is that it has a greater claim of representativeness than one established only at a point in time. Depending on the time period, the sequential vote could coincide with the elected representatives’ term

³⁸⁷ Jed Rubenfeld *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University, Chelsea, USA, 2001).

³⁸⁸ Rubenfeld, above n 387 at 92.

³⁸⁹ Rubenfeld, above n 387 at 163.

³⁹⁰ Rubenfeld, above n 387 at 175.

³⁹¹ Albert, above n 3 at 680.

³⁹² Albert, above n 3 at 680.

³⁹³ Albert, above n 3 at 680.

³⁹⁴ Denmark’s constitution, Part X [Constitutional Amendments], Section 88 establishes that: “[...]. If the Bill is passed unamended by the Parliament after the election, the Bill shall within six months after its final passing, be submitted to the Electors for approval or rejection by direct voting.”³⁹⁴, English translation: <http://www.parliament.am/library/sahmanadrutyunner/dania.pdf>; Norway’s constitution, tying the amendment process to the General Election period in article 112: “[...] the proposal to this effect shall be submitted to the first, second or third Storting after a new General Election and publicly announced in print. But it shall be left to the first, second or third Storting after the **following** General Election to decide whether or not the proposed amendment shall be adopted.”³⁹⁴, English translation: <https://www.stortinget.no/en/Grunnlovsjubileet/In-English/The-Constitution---Complete-text/>.

³⁹⁵ Albert, above n 3 at 678.

and therefore mean that another constituted organ could confirm any changes made by its predecessor. Thirdly, sequential approval would offer multiple opportunities for public constitutional discussion³⁹⁶.

Especially with regards to Albert's assumption, that supermajorities are not created only by a majority of people but also by their stability over time,³⁹⁷ there are strong arguments for having an initial and timely separated additional approval decision. If intertemporality and the requirement that decisions be made over time are considered significant, then Article 116 is susceptible to criticism. Of course, having an initial and an approval decision is a process that requires multiple decisions.

According to this dissertation, however, the aspect of time is less significant than having an adoption procedure that requires multiple decisions. With respect to Article 116, this dissertation proposes an eternal entrenchment, or at least an amendment procedure that requires "both" parliament and referendum and therefore multiple decisions. Having multiple (at least two) decisions made also seems to be one of the core ideas of Albert's suggestions.

When the constituent power adopts a formal constitution, it defines the constituted authorities, their jurisdiction and its representatives. Through the establishment of an amendment power different from the constituent power, the constituent power has expressed its will not to make constitutional changes itself and it is therefore prevented from doing so. This does not contradict Schmitt's idea about the constitution-making power, as the constituent power does not cease to exist.³⁹⁸ If the constituent power does not establish a procedure for its future exercise, it can only be exercised through a revolution. Schmitt perhaps had this in mind when he distinguished the constitution-making power from the "constitutional power for 'changes' or 'revisions' of constitutional laws"³⁹⁹. This way of passing authority to the amendment power, if it involves the legislature, best acknowledges the doctrine of parliamentary sovereignty as parliament participates in the process of making constitutional changes, but only once the formal constitution has been adopted.

As a minimum concept for constitutional protection, the concept of relativity seems to be more important than intertemporality. Even if not permanently entrenched, the threshold for amending Article 116 should be significantly heightened, and it should at least require a decision that parliament and referendum can only make together, as with the constitution-making power. If Article 116 provided explicitly that a referendum and parliament were both needed to decide whether the amendment rule should be altered, there would be certainty as to the power to amend this provision, without having to rely on the unwritten concept of a constituent power – regardless of whether the constituent power should always bear the authority to make (even minor) constitutional changes.⁴⁰⁰

The idea of emphasising time in the amendment procedure could be rejected in light of two major disadvantages: firstly, a process that is spread over a longer period requires more effort and is essentially more complicated than a twofold decision-making process at a particular point in time. Secondly, the time period between these decisions can lead to constitutional uncertainties, and preparations made in anticipation of constitutional change,

³⁹⁶ Albert, above n 3 at 679 to 681.

³⁹⁷ Albert, above n 3 at 679.

³⁹⁸ Schmitt, above n 139 at 140.

³⁹⁹ Schmitt, above n 139 at 140.

⁴⁰⁰ This has for example been assumed by Sanford Levinson and W St John Garwood in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton, 1995) at 86, as art V of the United States Constitution is seen of making constitutional changes too difficult.

for example, would have to be reversed if those changes are not approved and do not eventuate. Moreover, Rubinfeld's argument for a decision-making processes being spread over a longer time period is based on the assumption that constitutional provisions cannot be entrenched eternally.⁴⁰¹ In light of that assumption, it becomes clear why Rubinfeld attempts to introduce an even more complicated process of constitutional amendment.

As I have argued, however, certain provisions should be eternally entrenched and also could be, because the constituent power is inherently empowered to do so. If the most important provisions are already protected through permanent entrenchment, there is no need to review constitutional amendments after a longer time period in order for them to become effective. As for the amendable provisions, if the people and / or parliament develops the view that changes made to the constitutions are incompatible with the needs and interests of contemporary society, then by observing the prescribed amendment procedure, they could still reverse previous changes or introduce new ones. Therefore, to leave a decision up to a majority at a given time does not privilege that majority, because a majority at another given time could use exactly the same procedure, to express its support or lack thereof, and act accordingly.

What remains, however, is the need for a multiple decision-making approval process. Albert also prefers an amendment procedure that would include multiple decision makers. As I have argued, that would ideally entail parliament alongside a referendum.⁴⁰² Article 116, as formulated, fails to meet this expectation, as it only requires either the qualified majority in parliament **or** a referendum. Therefore, the idea of double approval for amendments to the amendment rule has not been acknowledged, neither with respect to a temporal dimension, nor in terms of having at least an initial and a confirmatory decision.

The greatest emphasis should be put on the concept of relativity. As already mentioned, to effectively protect the constitution, the entrenchment rule would have to be at least more entrenched than the other provisions of the constitution. As analysed above, such strong, and ideally permanent, entrenchment is possible.

D. Conclusion

Considering the methods of entrenchment and applying them to the proposed Article 116, it becomes clear that this provision is insufficiently protected. This chapter has argued that certain rules should, according to the principle of relativity, be entrenched more strongly than other constitutional provisions. An eternal entrenchment of human rights and the fundamental structure of government, if included in Article 116, would become void where the amendment rule itself could be altered. Moreover, as has been pointed out above, the amendment authority (parliament or referendum, according to proposed Article 116), should not be given the power to circumvent the higher thresholds to make amendments to constitutional provisions by simply abolishing or amending Article 116 itself. Entrenching Article 116 of the constitution more permanently does not contradict the concept of parliamentary sovereignty, because sovereignty relies precisely on the constitutional process by which parliament's jurisdiction is defined.

⁴⁰¹ Rubinfeld, above n 387 at 174.

⁴⁰² Albert, above n 3 at 680.

VI Conclusion

Parliamentary sovereignty is still a doctrine of high constitutional significance. It has guided New Zealand throughout history, as parliament has been the essential institution creating constitutional law. Nevertheless, a rising number of principles and constitutional developments are repeatedly challenging the doctrine of parliamentary sovereignty in its traditional understanding. For example, NZ parliament recognizes the rule of law and courts declare inconsistencies of legislation with the Bill of Rights. The United Kingdom, the country in which the doctrine of parliamentary sovereignty originated from, has effectively limited parliament's sovereignty through membership in the European Union. As I have argued, all these developments and limitations have not made the doctrine of parliamentary sovereignty redundant. They have only led to a modernized version of how the doctrine of parliamentary sovereignty should be understood, namely that it only applies within the jurisdiction that is being defined through higher law.

Because all laws that have been passed by NZ parliament are (arguably with the exception of sec 268 of the Electoral Act) only ordinary law, New Zealand still does not have a formal constitution. Since a written constitution has never been adopted, the country has never had to face the task of identifying the constituent power. Only the constituent power can adopt a formal constitution. As I have argued, the constituent power in New Zealand should be understood as involving parliament and the electorate acting together. This would not only recognize the principle of a modern democracy (that the ultimate sovereign power lies within the people), but also that parliament has been and therefore continues to be an important part of constitution-making. The notion of the constituent power having the authority to adopt a written constitution, that even parliament as an ordinary legislature would be bound by, does not breach the doctrine of parliamentary sovereignty. Through the adoption of a formal constitution, the constituent power determines the scope of the doctrine of parliamentary sovereignty.

Palmer and Butler have, on the one hand, recognized in parliament and in a decision by the electorate the authority to adopt their proposed constitution. On the other hand, they do not seem to acknowledge that parliament would have to explicitly approve of every proposed provision. Parliament, as part of the constituent power, should not be able to avoid political controversial decisions by only leaving them to the electorate.

Furthermore, to satisfy the idea of a modern democratic constitution, protecting the basic rights and freedoms of the citizens of the country, and to prevent government institutions from abusing their powers, certain provisions of the proposed constitution should be entrenched eternally or at least more strongly than it has been proposed. Palmer and Butler have restrained from proposing such a strong entrenchment, probably also because of the doctrine of parliamentary sovereignty. But, as I have argued, the doctrine only applies to the ordinary parliament, not to parliament as part of the constituent power. The eternal entrenchment of certain provisions is therefore possible.

As long as at least the amendment provision of the proposed constitution is not sufficiently entrenched itself against amendment, there will always be a risk of the amending powers abolishing that provision and thereby abolishing the higher threshold of Article 116 for amendments to the constitution. If the threshold for amendments to the constitution is lowered, the constitution would be deprived of its superior character. As a minimum, at least Article 116 should therefore be more strongly secured against amendment, ideally by eternally entrenching it.

Looking forward, New Zealand should not be afraid of certain constitutional developments because of the doctrine of parliamentary sovereignty. A proper understanding of the doctrine, requires an ongoing process of development, according to modern democratic values.

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