DOES CONTENT COUNT? CONSTITUTIONALITY AND ENFORCEABILITY OF ENTRENCHMENT PROVISIONS IN AOTEAROA NEW ZEALAND

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Recent commentary on the enforceability of entrenchment has signalled a marked shift from Diceyan orthodoxy. This emergent view suggests that Parliament is legally obliged to comply with enhanced procedural requirements, despite their ostensible contravention of parliamentary sovereignty. The precariousness of this understanding was highlighted by the Green Party's proposal in November 2022 to entrench an anti-privatisation provision in the Water Services Entities Bill at a 60 per cent threshold. The provision was passed under urgency and, following critical backlash, swiftly repealed. This article argues that two constitutional conventions have developed in the wake of this commotion. These conventions require that entrenchment clauses uphold democratic fundamentals and set a threshold of a parliamentary supermajority of 75 per cent. Further, this article contends that the enforceability of entrenchment provisions is predicated on their content: they must uphold the functioning of representative democracy. This is due to a change in the rule of recognition driven by more nuanced understandings of parliamentary sovereignty and its place in the constitution.

I INTRODUCTION

Is Parliament able to bind itself or its future incarnations? A traditional account of the doctrine of parliamentary sovereignty disavows such an ability.[1] The orthodoxy declares that Parliament's powers

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1 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters New Zealand, Wellington, 2021) at 585.

are legally illimitable, and therefore, it continually possesses the same absolute powers.[2] Over time, more nuanced understandings of parliamentary sovereignty have evolved, hypothesising that Parliament may be able to bind itself in a procedural, if not a substantive, sense.[3]

This evolution is reflected in the shifting perceptions of New Zealand's sole entrenchment provision: s 189 of the Electoral Act 1956, re-enacted in s 268 of the Electoral Act 1993.[4] Those responsible for the enactment of s 189 viewed it as having moral and political force only.[5] Approximately 60 years later, the Solicitor-General expressly conceded that a failure to comply with s 268 would invalidate legislation otherwise passed in compliance with Parliament's ordinary processes.[6] Although the Supreme Court refused to make a final decision on the matter, it indicated that the "pendulum has swung in favour of enforceability".[7]

Notwithstanding this tentative conclusion, the legal status of entrenchment remains unclear. This was highlighted in late 2022 by an amendment to the Water Services Entities Bill, adopted by supplementary order paper, under urgency, entrenching provisions securing water services against privatisation.[8] The legislation was part of the Government's Three Waters reforms, a matter of public policy.[9] Following critical backlash, the amendment was swiftly reversed.[10] In the wake of these events, several questions arise regarding entrenchment in New Zealand. First, what constitutional conventions exist relating to entrenchment? Secondly, is entrenchment legally enforceable?

In answering these questions, I will argue that the Three Waters entrenchment proposal crystallised two inter-reliant constitutional conventions: that entrenchment ought to be reserved for matters of fundamental democratic importance; and that the threshold for a parliamentary majority set by an entrenching provision must be 75 per cent.

Further, I will show that the debate surrounding the accepted content of entrenchment provisions illuminated an argument backing their selective enforceability. I propose that entrenchment clauses are only enforceable if their effect is to uphold democracy. This conclusion acknowledges the

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2 At 585.

3 At 623.

4 Elizabeth McLeay *In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy* (Victoria University Press, Wellington, 2018) at 189.

5 At 188.

6 *Ngaronoa v Attorney-General* Transcript SC 102/2017, 26 March 2018 at 55.

7 *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289 at [70].

8 Supplementary Order Paper 2022 (285) Water Services Entities Bill 2022 (136-2).

9 See Jacinda Ardern and Nanaia Mahuta "Major investment in safe drinking water" (press release, 8 July 2020).

10 (6 December 2022) 765 NZPD 14343 (Water Services Entities Bill – In Committee).

complementary roles of the courts and Parliament to, respectively, enforce and create the law, and the democratic substructure authenticating both bodies.

II WHAT IS ENTRENCHMENT?

At its broadest, entrenchment denotes any rule which makes a law more difficult to alter.[11] In its legal sense, entrenchment refers to the passing of a rule by a legislature with the purpose of binding itself or its future incarnations.[12] This is distinct from political entrenchment, or the understanding by convention that a rule should not be altered.[13] Legal entrenchment can bring about political entrenchment,[14] and vice versa. In this article, "entrenchment" denotes strict legal entrenchment.[15]

Entrenchment provisions can be classified according to the device used in the rule of change.[16] First, entrenchment of form comprises requirements to use particular words for amendment or repeal. This includes limitations on implied repeal,[17] including requirements for express language such as that in s 2 of the Canadian Bill of Rights 1960 requiring noncomplying legislation to state that it is enacted "notwithstanding the Canadian Bill of Rights".[18] Secondly, some entrenching rules necessitate that a legislature spend extra time deliberating about a provision's amendment or repeal.[19] Thirdly, entrenchment provisions can demand that a rule is passed by an expanded voting unit.[20] Expansion is either internal, for instance, the requirement for a supermajority or for the support of certain groups within the voting body; or external, such as requiring a referendum or incorporating other assemblies.[21] Entrenchment provisions can be "doubly" or "singly" entrenched, depending on whether they are themselves subject to enhanced procedural requirements.[22] New Zealand's sole entrenchment provision, s 268 of the Electoral Act 1993, exemplifies the third type of entrenchment described above. It is singly entrenched.

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11 NW Barber "Why entrench?" (2016) 14 ICON 325 at 327.

12 Eric Posner and Adrian Vermeule "Legislative Entrenchment: A Reappraisal" (2002) 111 Yale LJ 1665 at 1667.

13 Barber, above n 11, at 328.

14 At 328.

15 Joseph, above n 1, at 23.

16 Barber, above n 11, at 326.

17 At 330.

18 At 331.

19 At 331.

20 At 332.

21 At 332.

22 Joseph, above n 1, at 23.

III HISTORY OF ENTRENCHMENT IN NEW ZEALAND

A New Zealand's Reserved Provisions

To date, only six provisions are entrenched in New Zealand.[23] These reserved provisions, first enacted in the Electoral Act 1956,[24] all relate to the functioning of representative democracy. They concern the term of Parliament; the formation of the Representation Commission; the drawing-up of electoral districts; the voting age; and the method of voting.[25] Section 268(2) of the Electoral Act 1993 provides that a 75 per cent majority vote in the House of Representatives, or a majority of the valid votes cast in a national referendum, is required to amend or repeal the reserved provisions.

The passing of the Electoral Act 1956 was a momentous occasion in New Zealand's constitutional history.[26] The Bill was intended to consolidate and clarify electoral law, but during its formation its scope expanded to embrace concerns regarding fairness of voting and the ramifications of the abolition of the Legislative Council in 1950.[27] Section 189, s 268's predecessor, was introduced in the final stages of select committee consideration and the Bill was passed under urgency.[28] The Act, which was passed unanimously,[29] represented a "pursuit of compromise and consensus".[30] The sanctity with which the reserved provisions are regarded is reflected in their re-enactment in essentially the same terms in s 268 of the 1993 Act, which converted New Zealand's representation system from first past the post (FPP) to mixed member proportional (MMP).[31]

B Changing Perspectives on Single Entrenchment

As noted earlier, New Zealand's reserved provisions are singly entrenched. Despite parliamentarians' views at the time that entrenchment was not legally effective, single entrenchment was utilised to avoid the prospect of a court adjudicating on the matter if a future Parliament decided to overturn the entrenching provision without the requisite majority.[32]

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23 At 23.

24 At 24.

25 Electoral Act 1993, s 268(1).

26 McLeay, above n 4, at 13.

27 At 98.

28 At 114–115.

29 (26 October 1956) 310 NZPD 2902.

30 McLeay, above n 4, at 189–190.

31 See Electoral Act 1993, s 2.

32 McLeay, above n 4, at 133.

Notwithstanding this, contemporary opinion suggests that – setting aside the question of whether entrenchment is enforceable at all – single entrenchment is as effectual as double entrenchment.[33] The remarks of several members of the House of Lords in *R (Jackson) v Attorney-General* relating to the Parliament Act 1911 (UK) provide a good example.[34] The Parliament Act established a procedure whereby in certain circumstances a Bill that had been passed in the House of Commons could be lawfully enacted without receiving the House of Lords' consent.[35] Section 2(1) prohibited using the procedure to amend the term of Parliament. In querying whether the House of Commons could circumvent this requirement by using the procedure to amend s 2(1) and subsequently to alter the term of Parliament, Lords Nicholls, Hope and Carswell all concluded that this indirect course would not be available.[36] Lord Nicholls explained that the express exclusion carried, by necessity, an ancillary implied restriction upon "achieving the same result by two steps rather than one".[37]

While the provision in *Jackson* provided for an alternative procedure, rather than making legislating more difficult,[38] s 268 arguably carries an analogous implied bar against its own repeal or amendment by a majority less than 75 per cent.

C The Place of s 268 in New Zealand's Constitution

New Zealand's constitution is unwritten.[39] Section 268 is merely one provision in an assortment of laws and conventions regarded as constitutional that govern law-making and may affect the enforceability of entrenchment.

First, s 16 of the Constitution Act 1986 provides that a Bill becomes law when it receives Royal assent. Secondly, the processes followed by the House when legislating are established by its Standing Orders, which are rules adopted by the House regulating its procedures and the exercise of its powers.[40] Importantly, Standing Order 270(3) requires any proposal for entrenchment to be carried in the House by a majority of the same percentage that it stipulates is required for the amendment or repeal of the provision to be entrenched. Thirdly, the House is bound by statute law like any person.[41]

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33 Joseph, above n 1, at 24.

34 *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262.

35 At [6].

36 At [59] per Lord Nicholls; at [122] per Lord Hope; and at [175] per Lord Carswell.

37 At [59].

38 The distinction between alternative and restrictive procedures is further discussed below in Part VI.

39 Joseph, above n 1, at 1.

40 Standing Orders of the House of Representatives 2023. See David Wilson (ed) *Parliamentary Practice in New Zealand* (Clerk of the House of Representatives, Wellington, 2023) at 163.

41 Joseph, above n 1, at 512.

However, the judiciary has affirmed its right to exclusive cognisance, an aspect of parliamentary privilege.[42] This prevents the courts from scrutinising the House's internal proceedings.[43] Enforcing and reviewing internal parliamentary proceedings is the responsibility of the House itself.[44] For instance, the courts will not declare an enactment invalid by reason of Parliament's non-compliance with Standing Orders during its passing.[45]

D Developing Views of the Legality of s 268

At the time of its enactment, s 189 of the Electoral Act 1956 was perceived as having only moral and political, not legal, force.[46] This perspective accords with the orthodox conception of parliamentary sovereignty.[47] The orthodoxy, propounded by Dicey, stipulates that Parliament has the power to make or unmake any law it wishes.[48] This articulation is "continuing", meaning that any given Parliament cannot bind itself or its successors.[49] Entrenchment is merely a suggestion as to the preferred way to amend or repeal a provision.[50]

Historically, the "moral sanction" imposed by s 268 has been effective.[51] Successive Parliaments have adhered to its procedural requirements.[52] This reflects Parliament's commitment to democracy and respect for s 268. It also means that few legal challenges have been brought against enactments allegedly passed in contravention of s 268.[53] Accordingly, opinions on the enforceability of entrenchment provisions have been speculative, and primarily driven by academics, extrajudicial writings and obiter dicta from New Zealand courts and overseas jurisdictions.

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42 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684, as cited in Wilson, above n 40, at 681; and Joseph, above n 1, at 510.

43 Joseph, above n 1, at 511; and Wilson, above n 40, at 681.

44 Wilson, above n 40, at 681.

45 At 743.

46 McLeay, above n 4, at 120–121.

47 At 121.

48 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Liberty Fund, London, 1915) at 3–4.

49 HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 149; and Timothy Shiels and Andrew Geddis "Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand" (2020) 41 Stat LR 207 at 211.

50 Shiels and Geddis, above n 49, at 212.

51 (26 October 1956) 310 NZPD 2839 (Hon Jack Marshall, Attorney-General).

52 Shiels and Geddis, above n 49, at 211.

53 See for example *Ngaronoa v Attorney-General*, above n 7.

While the House has always regarded itself as morally obliged to abide by s 268, this matured into a belief that it was legally bound to do so.[54] However, it considered that parliamentary privilege meant the courts could not enforce its constraints.[55] Professor Jeffrey Goldsworthy similarly articulates that there is a difference between legal validity and legal enforceability.[56] A law is valid if it was enacted by a legislature with the authority to do so and it does not violate any superior law.[57] The question of justiciability arises only if a law is valid.[58] Bindingness is a spectrum, from judicial enforceability to mere political obligations, such as the House's belief it was legally obliged to comply with s 268.[59]

Rulings made by several Speakers indicate the House's adoption of the view that entrenchment is, albeit modestly, legally binding. In 1975, the Speaker stated that although the entrenching provision impinged upon the House's procedures, it would be "strictly applied".[60] Subsequently, an amendment to the Electoral Act 1956 allowing the Representation Commission to adjust the quotas of General electorates that passed by a simple majority was ruled by the Speaker to have failed due to not reaching the requisite majority.[61] Further, in 1980, the Speaker clarified the effect of entrenchment on the House's procedures.[62] The 75 per cent vote was required at the Committee of the Whole House stage and was deemed to be unanimous if carried on the voices.[63] Professor Brookfield argued that these rulings revealed the House's acceptance that it was legally bound to comply with s 189, although the courts would not enforce the rule, describing this protection as "very modest but nevertheless real".[64]

Recently, perspectives have shifted to consider compliance with entrenchment as a precondition for valid law-making.[65] For example, a "self-embracing" view of parliamentary sovereignty has emerged, maintaining that Parliament may reconstitute itself for a specific purpose, hence varying the

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54 Shiels and Geddis, above n 49, at 216.

55 At 216.

56 Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) at 187.

57 At 187.

58 At 187.

59 At 187.

60 (15 July 1975) 399 NZPD 3055.

61 (15 July 1975) 399 NZPD 3057; and Electoral Amendment Bill 1975 (33-1), cl 7.

62 (18 September 1980) 4333 NZPD 3513.

63 (18 September 1980) 4333 NZPD 3513.

64 FM Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 Otago L Rev 603 at 620.

65 Shiels and Geddis, above n 49, at 218.

conditions for judicial recognition of law.[66] Proponents explain that the question to be asked is not whether Parliament can bind itself, as under the orthodox conception, but rather: what *is* Parliament?[67] The rules defining Parliament are distinct from, and logically prior to, its absolute powers once established.[68] This understanding would empower courts to declare legislation passed in contravention of entrenchment clauses invalid without infringing upon the sovereignty of Parliament in its reconstituted form.

In New Zealand, the most influential agent of the changing attitude regarding enforcement has arguably been the judiciary. In *Shaw v Commissioner for Inland Revenue*, for example, the Court of Appeal said that the courts have the power to decide whether legislation was properly enacted and therefore valid.[69] This was extended in *Westco Lagan Ltd v Attorney-General*, where McGechan J maintained in obiter that he had "no doubt" that the courts have the "jurisdiction to determine whether there has been compliance with any mandatory 'manner and form' requirements".[70] In *Taylor v Attorney-General*, Elias CJ approved of McGechan J's avowal that entrenchment was enforceable,[71] further doubting that entrenched provisions are only protected from direct, rather than implied, amendment or repeal.[72] Moreover, writing in an extrajudicial capacity, Sir Robin Cooke detailed that there are "fundamental" substantive limits to Parliament's law-making powers, furthering the argument that the courts can hold Parliament to certain standards.[73] Arguably, these standards could include entrenchment clauses.

Additionally, several overseas decisions support the efficacy of entrenchment. In *Attorney-General for New South Wales v Trethowan*, the Privy Council enforced a "manner and form" provision requiring that Bills abolishing both the Legislative Council and the entrenchment provision itself be approved in a national referendum before being presented for Royal assent.[74] Similarly, in *Harris v Minister of the Interior*, the Supreme Court of South Africa enforced an entrenchment provision in the South Africa Act 1909 (UK).[75] Likewise, in *Bribery Commissioner v Rangasinghe* the Privy

66 Hart, above n 49, at 149; Shiels and Geddis, above n 49, at 212; Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [7.12]; and Joseph, above n 1, at 623.

67 Joseph, above n 1, at 625.

68 At 624–625.

69 *Shaw v Commissioner for Inland Revenue* [1999] 3 NZLR 154 (CA) at [13].

70 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].

71 *Taylor v Attorney-General* [2014] NZHC 2225, [2015] NZAR 705 at [68].

72 At [70].

73 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164.

74 *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC) at 541.

75 *Harris v Minister of the Interior* [1952] 2 SA 428, 1 TLR 1245 (SCSA).

Council observed that limitations imposed by entrenchment clauses on "some lesser majority of members does not limit the sovereign powers of Parliament itself".[76] More recently, in *R (Jackson) v Attorney-General*, several members of the House of Lords made statements supporting entrenchment's enforceability.[77]

In 2018, in *Ngaronoa v Attorney-General*, the Solicitor-General expressly conceded an Act passed in contravention of s 268 would have no effect, explaining that our constitutional framework had undergone a "maturation".[78] The Supreme Court opted not to resolve whether entrenchment was enforceable.[79] However, it posited that the "pendulum" had swung in favour of enforceability.[80] Then again, all judicial statements in New Zealand endorsing the enforceability of entrenchment have been obiter. Moreover, *Trethowan*, *Harris* and *Rangasinghe* all involved subordinate legislatures deriving their powers from a "higher law constitutional document".[81] And *Jackson*, as noted earlier, involved an alternative, rather than a restrictive procedure, which, unlike s 268, does not restrict Parliament's legislative power because it leaves the ordinary process intact.[82]

Overall, while it is widely understood that s 268 is legally valid, there is a difference between legal validity and enforceability. A definitive answer on the question of enforceability will not be reached until a case requiring "argument on the point" arises.[83] That answer, in turn, must address the issue of whether holding that entrenchment is legally enforceable would impinge upon the House's right to exclusive cognisance.[84]

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76 *Bribery Commissioner v Rangasinghe* [1965] AC 172 (PC) at 200.

77 *R (Jackson)*, above n 34, at [27] per Lord Bingham, at [51] per Lord Nicholls, at [81]–[85] per Lord Steyn, at [162]–[163] per Baroness Hale and at [174] per Lord Carswell.

78 *Ngaronoa v Attorney-General* Transcript, above n 6, at 55.

79 *Ngaronoa v Attorney-General*, above n 7, at [70].

80 At [70].

81 Shiels and Geddis, above n 49, at 212.

82 Goldsworthy, above n 56, at 177.

83 *Ngaronoa v Attorney-General*, above n 7, at [70].

84 Shiels and Geddis, above n 49, at 225.

IV THE THREE WATERS DEBACLE: A PROPOSAL TO ENTRENCH A MATTER OF PARTISAN POLICY AT A 60 PER CENT THRESHOLD

In the six decades since the Electoral Act 1956 was passed, an understanding has developed: entrenchment likely is judicially enforceable.[85] However, as I argue in Part V, by convention, it is reserved for matters of fundamental democratic importance.

This tenuous balance was disrupted in November 2022 by the Green Party's proposal to entrench an anti-privatisation provision in the Water Services Entities Bill.[86] The proposal was anomalous for two reasons: it concerned a matter of partisan policy;[87] and it sought to establish entrenchment at a 60 per cent threshold.[88]

In July 2020, the Labour Government announced its "Three Waters" reforms, a $761 million package to restructure New Zealand's water infrastructure.[89] In October 2021, the Government publicised its intention to introduce legislation creating four Water Services Entities,[90] which engendered public concern regarding security against privatisation.[91] Nanaia Mahuta, Minister of Local Government, announced the establishment of the Working Group on Representation, Governance and Accountability of New Water Services Entities (the Working Group) to examine these concerns.[92] The idea of entrenchment originated with the Working Group.[93] It recommended entrenching provisions protecting Water Services Entities from privatisation at a 75 per cent threshold.[94]

On 19 April 2022, noting the Working Group's recommendation, Cabinet agreed to entrench the anti-privatisation provisions in the Water Services Entities Bill "in a similar form to section 268 of

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85 *Ngaronoa v Attorney-General*, above n 7, at [70].

86 Supplementary Order Paper 2022 (285), above n 8.

87 See cl 206AA(1).

88 At cl 206AA(2)(a).

89 Ardern and Mahuta, above n 9.

90 Department of Internal Affairs *Recommendations from the Working Group on Representation, Governance and Accountability of New Water Services Entities* (7 March 2022) at 3.

91 At 3.

92 Nanaia Mahuta "Working group to ensure local voice in Three Waters reform" (press release, 10 November 2021).

93 Department of Internal Affairs, above n 90, at 27.

94 At 27.

the Electoral Act 1993".[95] As cross-party support was necessary to obtain the 75 per cent majority required by Standing Order 270 to pass the entrenchment proposal, the Minister of Local Government wrote to all political parties requesting their support.[96] Cross-party support was not obtained.[97] In May 2022, Cabinet decided not to pursue entrenchment.[98] The Water Services Entities Bill 2022 (the Bill) was introduced to the House without an entrenchment clause on 2 June 2022.[99]

On 11 November 2022, the Finance and Expenditure Committee released its Select Committee report on the Bill.[100] The Report detailed a differing view held by the Green Party.[101] The Green Party again raised the topic of entrenchment, disagreeing with the Department of Internal Affairs that entrenchment should be reserved for constitutional matters, suggesting entrenchment of the anti-privatisation provisions at a 60 per cent threshold, sufficiently low that, with Labour's support, the National Party's votes were not needed to pass it.[102]

The Bill reached Committee stage on 22 November 2022, under urgency.[103] Green MP Eugenie Sage submitted Supplementary Order Paper 285, proposing entrenchment of cl 116 and sch 4, the anti-privatisation provisions, by a 60 per cent majority or a majority vote in a national referendum.[104] A 60 per cent majority was required for the amendment to pass.[105] It passed via a party vote, with 74 affirmative votes (a majority of 62 per cent), comprising the Labour and Green parties, and 43 no votes, from National and ACT.[106]

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95 Minute of Decision "Strengthening Representation, Governance and Accountability of the New Water Services Entities" (19 April 2022) CAB-22-MIN-0144 at [18].

96 At [19]–[20].

97 Minute of Decision "Water Services Entities Bill: Approval for Introduction" (2 June 2022) CAB-22-MIN-0195 at [10].

98 At [11].

99 Water Services Entities Bill (136-1).

100 Water Services Entities Bill (136-2) (select committee report).

101 At 28–32.

102 At 29. See also *Water Services Entities Bill: Departmental Report* (Department of Internal Affairs, 23 September 2022) at 333.

103 (22 November 2022) 764 NZPD 13860.

104 (22 November 2022) 764 NZPD 13948 (Water Services Entities Bill – In Committee, Eugenie Sage).

105 (22 November 2022) 764 NZPD 13949 (Water Services Entities Bill – In Committee, Eugenie Sage); and Standing Orders of the House of Representatives 2020, SO 270(1).

106 (22 November 2022) 764 NZPD 13991. Te Pāti Māori did not vote on the amendment itself but joined the Labour and Green parties in voting to agree to pass Part 6 of the Bill as amended.

The unprecedented use of entrenchment provoked critical reactions. The National Party and ACT Party described it as "skulduggery",[107] and "grossly irresponsible",[108] respectively. Eight constitutional law experts penned an open letter to the Government, imploring reassessment of the provision.[109] They objected to the manner of its introduction and the lack of thorough debate about its effects. They counselled that the provision expanded the use of entrenchment from "a very limited range of matters fundamental to our constitutional system to a matter of … social policy". The provision risked "undermining the seriousness with which entrenchment is taken". Further, the New Zealand Law Society President wrote to the Minister of Local Government with "serious concerns" regarding the "unconstitutional" provision.[110]

Following this backlash, the Labour Party swiftly shifted its stance. Numerous ministers described the provision as "a mistake",[111] not because the Government was no longer committed to public ownership of water assets, but because it was an improper use of entrenchment.[112] The Bill was recommitted on 6 December exclusively to reconsider the entrenchment clause.[113] The consequent party vote removed it by a majority of 104 to 10, with only the Green Party voting against its deletion.[114] At the same time, the Government referred the wider matter of entrenchment to the Standing Orders Committee,[115] which invited public submissions on Standing Order 270. Parliament subsequently adopted the Committee's recommendations that for an entrenchment proposal to be considered in the Committee of the Whole House, a select committee must have first received

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107 Paul Goldsmith "Labour must reverse Three Waters skulduggery" (press release, 26 November 2022).

108 Simon Court "Three Waters entrenchment on dangerous constitutional ground" (press release, 27 November 2022).

109 Open letter from Janet McLean, Paul Rishworth, Andrew Geddis, Dean Knight, John Ip, Eddie Clark, Edward Willis and Jane Norton regarding the entrenchment provisions in the Water Services Entities Bill 2022 (28 November 2022).

110 Letter from Frazer Barton (President of the New Zealand Law Society) to Nanaia Mahuta (Minister of Local Government) regarding the entrenchment provisions in the Water Services Entities Bill 2022 (1 December 2022) at [1.4].

111 Chris Hipkins "Government to remove entrenchment from Three Waters legislation" (press release, 4 December 2022); (6 December 2022) 765 NZPD 14337 (Water Services Entities Bill – In Committee, Nanaia Mahuta); and (6 December 2022) 765 NZPD 14295 (Oral Questions, Jacinda Ardern).

112 Chris Hipkins, above n 111; and (6 December 2022) 765 NZPD 14300 (Oral Questions, Jacinda Ardern).

113 (6 December 2022) 765 NZPD 14327 (Water Services Entities Bill – Recommittal).

114 (6 December 2022) 765 NZPD 14343, above n 10. Te Pāti Māori did not vote on the removal of the clause.

115 Chris Hipkins, above n 111.

submissions and reported on the proposal, and that the proposal cannot be considered under urgency.[116]

Whilst denunciation of the provision was widespread, and the Government rapidly rescinded it, ambiguity lingers. Two questions stand out. First, what constitutional conventions exist relating to entrenchment? Second, is entrenchment legally enforceable regardless of the content of the entrenched provision? In particular, if entrenchment of partisan policy is unconstitutional, does this jeopardise the legal status of the reserved provisions in the Electoral Act?

V CONSTITUTIONAL ANALYSIS

Critics denounced the entrenchment of the anti-privatisation provision in the Water Services Entities Bill for two reasons: it was unrelated to democracy; and it set a threshold of 60 per cent, considerably lower than the accepted 75 per cent. This article argues that constitutional conventions have developed which demand that entrenchment proposals conform to those norms.

A Constitutional Conventions

Constitutional conventions are rules serving a necessary constitutional purpose that political actors perceive as obligatory.[117] The courts will not directly enforce conventions.[118] Conventions evolve and dissolve, meaning contrary opinions can be held regarding their existence. The classical test for identifying conventions was coined by Sir Ivor Jennings.[119] It has three requirements: there must be precedents; the relevant actors must have believed they were bound by a rule; and there must be a reason for the rule referable to the needs of constitutional government.[120]

When s 189 was enacted, parliamentarians did not contemplate it as being capable of establishing a constitutional convention mandating that its procedures are observed.[121] However, this convention subsequently emerged.[122] In McLeay's words, "to comply with [s 268] is to act constitutionally".[123]

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116 Now reflected in the 2023 Standing Orders, above n 40, SO 270(2) and (4). See (31 August 2023) 771 NZPD 19690–19695; and Review of Standing Orders 2023 (select committee report) at 77–78.

117 Joseph, above n 1, at 42–43.

118 At 280. For recent analyses of the enforceability of constitutional conventions, see Farrah Ahmed, Richard Albert and Adam Perry "Judging constitutional conventions" (2019) 17 ICON 787 and Farrah Ahmed, Richard Albert and Adam Perry "Enforcing constitutional conventions" (2019) 17 ICON 1146.

119 Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, 1959) at ch 3.

120 Jennings, above n 119, at ch 3.

121 McLeay, above n 4, at 187.

122 At 187.

123 At 193.

Parliament's unyielding observance of this convention, and its disinclination to entrench other matters, has produced the two abovementioned conventions regarding entrenchment clauses.

B The First Convention: That Entrenchment Provisions Must Uphold the Functioning of Representative Democracy

A constitutional convention has evolved necessitating that entrenched provisions uphold representative democracy.[124] The Electoral Act's reserved provisions have a clear purpose: safeguarding the fundamental tenets of democracy. Discussing the Bill, Leader of the Opposition Walter Nash explained that the "objective on both sides was the same".[125] The intention across the House was "to ensure that democratic principles should prevail".[126] It can be argued that no convention relating to the (democratic) substance of entrenched provisions exists. It simply transpires that New Zealand's only entrenched provisions are constitutional in nature. However, the treatment of entrenchment by parliamentarians and scholars since the passing of the Electoral Act 1956 suggests otherwise.

First, despite the shift in attitude about the legal status of entrenchment, novel entrenchment proposals have been scarce. A Bill protecting Kiwibank against privatisation was rejected in 2016.[127] A primary reason for this refusal was that entrenchment is reserved for the protection of key electoral processes.[128] Furthermore, in 2001, the MMP Review Committee deliberated entrenching the Māori seats.[129] As is discussed further below, the Committee was advised that this would be inappropriate, because the seats' very existence was "a subject of intense political debate" and was not considered integral to MMP elections.[130] These examples provide the required precedents for the Jennings test.[131]

Practically, there must be significant agreement on an entrenchment proposal for it to be passed in compliance with Standing Order 270. Perceptions on what qualifies for entrenchment, and thus attracts significant agreement, change over time.[132] For instance, the authority to draw up the Māori

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124 Arguably, entrenchment may also be appropriate when it upholds direct democracy. However, this is beyond the scope of this article. In this article, "democracy" denotes "representative democracy".

125 (26 October 1956) 310 NZPD 2843.

126 (26 October 1956) 310 NZPD 2843.

127 Keep Kiwibank Bill 2016 (57-1); and (29 June 2016) 715 NZPD 12337 (Keep Kiwibank Bill – Second Reading).

128 Joseph, above n 1, at 644.

129 At 644.

130 At 644.

131 See Jennings, above n 119, at ch 3.

132 BV Harris "How Can Entrenchment and Democracy be Reconciled in the New Zealand Constitution?" [2023] 1 NZ L Rev 1 at 7.

electoral boundaries initially resided with the Governor-General,[133] whereas the drawing up of general electorates by the independent Representation Commission was entrenched.[134] The Labour Party transferred the power to draw the boundaries of the Māori electorates to the Representation Commission in 1975.[135] The incoming National Government summarily reversed this.[136] Finally, in 1981, the Representation Commission took over the drawing of boundaries.[137] While this issue once divided political parties, views have stabilised, illustrated by the Independent Electoral Review recommending entrenchment of the Representation Commission's role in drawing up the boundaries of Māori electorates.[138] This demonstrates that perceptions on what is democratic, and hence the proper scope of entrenchment, adapt.

Although perceptions of democracy change, the conventional understanding that entrenchment must relate to democracy has not. This is evident from the parliamentary debate surrounding the recommission of the Water Services Entities Bill. National MP Simon Watts claimed that it is "utterly inappropriate to attempt to entrench a particular policy outcome regardless of the support that it enjoys at a particular time".[139] Nicola Willis, Deputy Leader of the Opposition, accused the Government of "thumb[ing] their noses at basic principles of our democracy".[140] Attorney-General David Parker stated that it is "important to guard [the] boundary [of entrenchment] around constitutional matters".[141] The close relationship between democracy and entrenchment identified by politicians illustrates both the perception that the convention is binding and the constitutional reasoning underlying it.[142]

In its 2023 Interim Report, the Independent Electoral Review expressed approval of the currently reserved provisions..[143] Each provision upholds the principles of entrenchment established by the

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133 By proclamation (that is, on the advice of the Minister): Electoral Act 1956, s 23(2).

134 Electoral Act 1956, s 189(1)(b).

135 McLeay, above n 4, at 167.

136 At 167.

137 At 169. See Electoral Amendment Act 1981.

138 Independent Electoral Review *Interim Report: Our draft recommendations for a fairer, clearer, and more accessible electoral system* (June 2023) at 23.

139 (6 December 2022) 765 NZPD 14329 (Water Services Entities Bill – In Committee, Simon Watts).

140 (6 December 2022) 765 NZPD 14330 (Water Services Entities Bill – In Committee, Nicola Willis).

141 (6 December 2022) 765 NZPD 14334 (Water Services Entities Bill – In Committee, David Parker).

142 See Jennings, above n 119, at ch 3.

143 Independent Electoral Review, above n 138, at [2.41]. This view was maintained in the final report: Independent Electoral Review *Final Report: Our recommendations for a fairer, clearer, and more accessible electoral system* (November 2023) at [2.63].

Royal Commission on the Electoral System.[144] These conditions are that the matter is "constitutional in nature"; does not "reduce the rights of the electorate"; and does not "grant powers to parliamentarians that could be misused".[145] The Interim Report recommended the entrenchment of additional democratic matters: the Māori electorates; the allocation of seats in Parliament and the party vote threshold; the right to vote and to stand as a candidate; the tenure of the Electoral Commission; and the provisions relating to the Representation Commission.[146] The principles espoused regarding the proper scope of entrenchment, and the nature of the suggested additions to the reserved provisions, highlight that democracy is central to entrenchment.

Academics have made similar pronouncements. Professor Philip Joseph stated that "constitutional process[es]" may legitimately be entrenched but "substantive policy" may not.[147] The "constitutional rationale" of entrenchment is to protect "the integrity of representative democracy".[148] Comparable opinions emerged from the critique of the Three Waters entrenchment clause. The open letter from legal scholars designated the departure from the accepted scope of entrenchment – "a very limited range of matters fundamental to our constitutional system" – a "dangerous precedent".[149]

Numerous submissions to the Standing Orders Committee on entrenchment agreed. The Ministry of Justice explained that "entrenchment should be used sparingly", to protect laws that relate to Parliament's legitimacy, protect the democratic system and have broad political consensus.[150] Dr Dean Knight admonished the use of entrenchment "as an instrument of partisan politics for policy objectives", warning the Government against "upset[ting] important precedents suggesting entrenchment should be reserved for matters 'above politics'".[151] Significantly, the Standing Orders Select Committee explained that its recommended amendments to Standing Order 270, which Parliament subsequently adopted,[152] would ensure the House turns its mind to the appropriateness of proposals for entrenchment, which should be restricted to "matters of constitutional importance".[153]

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144 At [2.39].

145 At [2.39].

146 At [2.42].

147 Joseph, above n 1, at 644.

148 At 644.

149 McLean and others, above n 109.

150 Rajesh Chhana, Deputy Secretary, Policy "Submission to the Standing Orders Committee on the Review of Standing Orders 2023 – Proposals for Entrenchment" at 1 and 3.

151 Dean Knight "Submission to the Standing Orders Committee on the Review of Standing Orders 2023 – Proposals for Entrenchment" at 2.

152 (31 August 2023) 771 NZPD 19690–19695.

153 Review of Standing Orders 2023, above n 116, at 33.

Overall, New Zealand's reserved provisions uphold representative democracy. Parliament's respect for these provisions, several failed entrenchment proposals and academic thinking have highlighted an emergent convention limiting the scope of entrenchment to matters of fundamental democratic significance.

C The Second Convention: That Entrenchment of a Parliamentary Supermajority Must Set a 75 per cent Threshold

A second constitutional convention has arisen requiring entrenchment clauses to stipulate a parliamentary supermajority of 75 per cent. The proposals for the entrenchment of a Bill of Rights;[154] the Māori seats;[155] and New Zealand's flag, name and national anthem[156] all suggested the same threshold as s 268: a 75 per cent supermajority in the House, or a majority in a national referendum. Likewise, the first pitch for entrenchment of the anti-privatisation clause in the Water Services Entities Bill proposed a 75 per cent threshold.[157] These precedents support the existence of a convention.[158]

There is no evidence as to why 75 per cent was initially chosen.[159] During the debate on the Electoral Act 1956, Jack Marshall, Minister of Justice, described the entrenchment clause as "representing the unanimous view of Parliament".[160] Parliament viewed a two-thirds majority requirement as an insignificant protection, given the absence of an upper legislative chamber.[161] This constitutional reasoning supports a conventional 75 per cent threshold.[162]

This is salient in the modernised MMP system, within which minority or coalition governments are the norm.[163] Under the previous FPP system, minor parties held few or no seats, despite having a greater share of the votes.[164] Under MMP, it is more likely that multiple parties can form a majority above 50 per cent plus one, but lower than 75 per cent. For instance, Labour and the Greens' 62.5 per

154 Palmer, above n 66, at 16.

155 Electoral (Entrenchment of Māori Seats) Amendment Bill 2018 (56-1).

156 Flags, Anthems, Emblems, and Names Protection Amendment Bill 1990 (00-1), cl 3.

157 CAB-22-MIN-0144, above n 95, at 3.

158 See Jennings, above n 119, at ch 3.

159 McLeay, above n 4, at 137.

160 At 119.

161 At 138. See also South Africa Act 1909 (UK), s 152.

162 See Jennings, above n 119, at ch 3.

163 Joseph, above n 1, at 367.

164 At 414.

cent majority was used to pass the Three Waters' 60 per cent entrenchment clause without the support of National and ACT.[165]

While the fixing of a conventional percentage for entrenchment is inevitably somewhat arbitrary, it is essential that a percentage is established, to prevent future governments from entrenching provisions at whatever majority they can muster. The 75 per cent threshold is sufficiently high to "normally involve some sort of agreement between the major political parties" and hence prevent this type of political manipulation.[166]

McLeay explains that the "often-neglected convention that there is a legitimate parliamentary opposition" is "integral" to parliamentary sovereignty.[167] This convention developed in the context of ordinary law, where the majority is 50 per cent plus one. However, the opposition's key functions of opposing or agreeing with the government can be translated into the context of entrenchment, where the legitimate opposition is only 25 per cent, due to the constitutional significance of entrenchment demanding greater support for entrenchment provisions. Entrenching at a level lower than 75 per cent hampers the opposition's ability to effectively oppose entrenchment. Likewise, if a 75 per cent majority of Parliament passed a law which could only be amended or repealed by a majority greater than 60 per cent, a future opposition's ability to protect that provision from amendment or repeal would be compromised.

The Three Waters entrenchment proposal was set at 60 per cent because that was the majority the Green Party could rally to pass the amendment in compliance with Standing Order 270. Dr Knight describes this clause as restrictive.[168] It does not empower entrenchment at a threshold lower than 75 per cent.

The Standing Order was created following a recommendation made by the Standing Orders Committee in 1995 that an entrenchment clause must be passed by at least the same majority as the provision would require, using a 65 percent majority as an example.[169] Perhaps the Committee did not consider the possibility of entrenchment at varying thresholds being weaponised as a political tool. Notwithstanding the Committee's comment, Dr Knight's view is superior, as it respects the convention that there is a legitimate opposition. The political upset following the Three Waters entrenchment proposal supports this argument, also showing that political actors perceive themselves as bound to

165 (22 November 2022) 764 NZPD 13991.

166 Palmer, above n 66, at [7.21]; and Mark Steel, Chair, Legislation Design and Advisory Committee "Submission to the Standing Orders Committee on the Review of Standing Orders 2023 – Proposals for Entrenchment" at [25].

167 McLeay, above n 4, at 191.

168 Knight, above n 151, at 6.

169 McLeay, above n 4, at 188–189.

only propose 75 per cent as an entrenchment threshold.[170] During the Bill's recommittal, Simon Watts described the use of a 60 per cent majority as "inappropriate – indeed, … cynical".[171]

This raises the question whether a proposal for entrenchment at a percentage higher than 75 per cent would be constitutional. I argue that it would not. As well as its ability to "obstruct the parliamentary majority",[172] a further function of a legitimate opposition is its ability to agree with the government. Setting a higher threshold than 75 per cent compromises this ability. For instance, a threshold of 99 per cent would consign all power to oppose an entrenchment proposal in one MP, requiring the support of both major political parties and all smaller parties. This would therefore impinge on the opposition's ability to agree with the government, further undermining democracy, which requires that all rules are open to change.

How about a 76 or 80 per cent threshold? The issue described above is less likely to occur the smaller the entrenched supermajority is. However, constitutional conventions can develop from seemingly arbitrary norms where their purpose is to restrain the exercise of public power.[173] A 75 per cent threshold will likely always need the support of both major political parties.[174] If, in the future, New Zealand's political arrangements change so that this threshold is no longer suitable, the convention might adapt. Still, currently, 75 per cent is a sensible threshold.

D Lack of Mutual Exclusivity

It could be argued that the content of the entrenched provision is not important and that the convention only requires resounding agreement. However, the two conventions are not mutually exclusive. The historical treatment of entrenchment indicates that both conventions work synergistically to constrain the scope of entrenchment. The response of the House and constitutional experts to the Three Waters proposal further embedded these norms.

At the margins, whether a given provision is constitutionally significant can be uncertain. Significant agreement on a matter can help to determine this. For example, while entrenchment of the Māori seats in Parliament could be seen to be an essential democratic matter, a 1993 select committee review maintained that it was not, as party views diverged on it.[175] In contrast, the party list system would qualify as something that can be entrenched, as it is central to MMP democracy, and there is

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170 Jennings, above n 119, at ch 3.

171 (6 December 2022) 765 NZPD 14329 (Water Services Entities Bill – In Committee, Simon Watts).

172 McLeay, above n 4, at 191.

173 Joseph, above n 1, at 279.

174 Steel, above n 166, at [25].

175 Joseph, above n 1, at 644.

major agreement on it.[176] This shows that the content of a provision, and the extent of agreement on it, both impact its suitability for entrenchment.

VI ARE ENTRENCHMENT PROVISIONS ENFORCEABLE?

Although, as a matter of constitutional convention, entrenchment should be limited to matters of fundamental democratic importance, the legal validity of entrenchment provisions is its own quandary, which will not be explored in this article. Instead, I question whether entrenchment provisions are enforceable.

There are two circumstances in which a court might declare a Bill or an Act adopted in violation of an entrenchment provision invalid. The first is by intervening between the third reading and Royal assent, as the High Court suggested in obiter in *Westco Lagan v Attorney-General*.[177] The second is in proceedings brought claiming an enactment is invalid due to failure to comply with an entrenchment provision, as seen in *Ngaronoa v Attorney-General*, or challenging the validity of an Act amending or repealing an entrenchment provision.[178] This second circumstance is more likely to occur. Joseph explains that the courts will not rule on the validity of legislation before the House out of respect for the principle of judicial non-interference in the legislative process.[179] The Court of Appeal has espoused the same view.[180]

Nevertheless, neither circumstance is likely to arise. The House's strict compliance with s 268 and Standing Order 270 leaves little opportunity for a case to be brought where a court is in a clear position to decide whether to enforce s 268. Moreover, the Supreme Court has refused to rule on this matter until the question is directly in point.[181]

Even in a case where the question of enforceability of entrenchment directly arises, courts are likely to act with caution. This is because such a decision will involve an examination of the scope of parliamentary privilege.[182] Parliament's privileges originate from the common law and have subsequently been codified in the Parliamentary Privilege Act 2014.[183] A key privilege is Parliament's right to exclusive cognisance, which is protected by the principle of judicial non-interference with

176 At 644.

177 *Westco Lagan Ltd v Attorney-General*, above n 70, at [93].

178 *Ngaronoa v Attorney-General*, above n 7.

179 Joseph, above n 1, at 577.

180 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 307–308.

181 *Ngaronoa v Attorney-General*, above n 7, at [70].

182 Shiels and Geddis, above n 49, at 222.

183 Joseph, above n 1, at 520.

parliamentary proceedings.[184] Subpart 2 of the Parliamentary Privilege Act clarifies the function of art 9 of the Bill of Rights 1688. Article 9 encompasses Parliament's right to exclusive cognisance, providing that proceedings in Parliament must not be impeached or questioned in court.[185] Ostensibly, this precludes courts from adjudicating whether an entrenchment procedure was followed because this would involve the questioning or impeaching of Parliament's proceedings.

It can be argued that s 15 of the Parliamentary Privilege Act, allowing evidence from parliamentary proceedings to be used in court to establish a relevant historical event or fact without questioning or impeaching those proceedings, applies. Assessing compliance with entrenchment simply establishes a historical fact and the validity of the resulting statute is a separate query.[186] This justification is unsatisfactory. While the use of Hansard to establish noncompliance with entrenchment provisions would constitute the use of evidence to establish a historical event, deciding that the resulting legislation is invalid would entail the questioning or impeaching of parliamentary proceedings.

Nevertheless, parliamentary privilege should not bar the courts' jurisdiction to rule on the enforceability of entrenchment. The Court of Appeal has emphasised that under s 3 of the Declaratory Judgments Act 1908, the High Court has the jurisdiction to grant a declaration about the "construction or validity of any statute".[187] This power is limited to ensuring that legislation was properly enacted.[188] Courts cannot "consider the validity of properly enacted laws".[189] The High Court has stated that parliamentary privilege does not disqualify the courts from adjudicating on compliance with entrenchment provisions because "'manner and form' goes to legal requirements as to process" but "not … to content".[190] For instance, it is significant that the Speaker of the House made no application to intervene in *Ngaronoa v Attorney-General*.[191]

Furthermore, parliamentary privilege "is liable to be abrogated in whole or in part by legislation".[192] Such abrogation must be clear and unambiguous.[193] The purpose of entrenchment is

184 Shiels and Geddis, above n 49, at 216.

185 Bill of Rights 1688, art 9.

186 Shiels and Geddis, above n 49, at 223.

187 *Shaw v Commissioner for Inland Revenue*, above n 69, at [13].

188 At [13]

189 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330.

190 *Westco Lagan Ltd v Attorney-General*, above n 70, at 62.

191 Shiels and Geddis, above n 49, at 224.

192 Wilson, above n 40, at 713.

193 At 713.

to impose enhanced procedural requirements on Parliament. Enforcing an entrenchment provision requires evidence of parliamentary proceedings to be brought before a court. Therefore, entrenchment provisions must, by "necessary implication", comprise a waiver of the privilege, otherwise "the statutory purpose is thereby stultified".[194]

A Enforceability of Entrenchment Only if it Upholds Democracy

The Three Waters entrenchment fiasco illuminated a discrepancy in the emerging view that entrenchment is legally effective. If entrenchment is judicially enforceable, there is an ever-present risk that it will be weaponised to entrench partisan policy, degrading the principles of parliamentary sovereignty and democracy. Conversely, if entrenchment is judicially unenforceable, the entrenched provisions of the Electoral Act lose their reserved status, and democracy and parliamentary sovereignty are similarly impaired.

It is arguable that democracy would not be weakened by a ruling that s 268 is not judicially enforceable because that was, until recently, believed to be the case, but by convention s 268 was followed regardless. Nevertheless, the convention that s 268 must be followed would be degraded by a finding that it is not judicially enforceable because it would become clear to all parliamentarians that they are only politically bound by it.[195] Although there is a difference between legal validity and enforceability, a court ruling that entrenchment is unenforceable would nevertheless impart a message about its strength.

Furthermore, a finding that entrenchment is unenforceable would impair democracy because claimants would have no recourse for erosion of their key electoral rights. For instance, had the majority agreed with Elias CJ's minority view in *Ngaronoa v Attorney-General* that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was invalidly passed, the Court would not have had jurisdiction to grant relief.[196]

In summary, a finding that entrenchment is judicially unenforceable would weaken the convention that s 268 must be followed and mean that claimants would have no remedy for the erosion of their democratic rights. However, if entrenchment is universally enforceable, it could be weaponised to entrench partisan policy. Under either conclusion, both democracy and parliamentary sovereignty are eroded. To avoid this circularity of argument, I contend that the emerging view of entrenchment does not support its universal enforceability. Rather, entrenchment should be considered judicially enforceable only when its effect is to uphold the sanctity of representative democracy. This approach would empower courts to declare the entrenchment of matters of partisan policy to be judicially unenforceable, without compromising their power to enforce s 268. Its theoretical basis is that New

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194 *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [59].

195 See Joseph, above n 1, at 285.

196 *Ngaronoa v Attorney-General*, above n 7.

Zealand's rule of recognition has developed to permit the encroachment into parliamentary sovereignty demanded by entrenchment provisions only for the purpose of safeguarding democracy.

The idea of the "rule of recognition", developed by HLA Hart, refers to the fundamental norms of a legal system determining what counts as law.[197] The rule of recognition arises from the consensual understanding of officials in all three branches of government.[198] Some authors argue that the judiciary is best placed to determine this consensus.[199]

As is explained in Part III of this article, when the Electoral Act 1956 was passed, legal officials perceived s 189 as having moral force only.[200] The consensus was that any Bill passed by the House, even in a manner that did not conform with enhanced procedural requirements, and given the Royal assent, was law. This perspective aligned with orthodox parliamentary sovereignty.

In contrast, Goldsworthy maintains that procedural requirements may enhance parliamentary sovereignty, provided that such requirements do not diminish Parliament's plenary power.[201] Goldsworthy contrasts restrictive procedures, which limit Parliament's absolute power, and alternative procedures, which provide a limited expansion of law-making power, and are hence enforceable.[202] He reasons that referendum and supermajority requirements are restrictive procedures because they fetter Parliament's power to legislate and thus cannot be enforced.[203]

Goldsworthy's view is misaligned with recent thinking that, notwithstanding parliamentary sovereignty, s 268 is likely enforceable.[204] Recently, more nuanced conceptions of parliamentary sovereignty have developed.[205] New Zealand's rule of recognition has evolved accordingly.[206] The

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197 Goldsworthy, above n 56, at 110.

198 At 110–111.

199 Harris, above n 132, at 24.

200 (26 October 1956) 310 NZPD 2839 (Hon Jack Marshall, Attorney-General).

201 Goldsworthy, above n 56, at 191–192.

202 At 176–177.

203 At 198.

204 See for example *Ngaronoa v Attorney-General*, above n 7, at [70].

205 McLeay, above n 4, at 190.

206 Some scholars describe the change in the rule of recognition as involving acceptance of the "self-embracing" view of parliamentary sovereignty, which is described in Part III of this article: see for example Harris, above n 132. However, this view does not need to be accepted to conclude that entrenchment provisions are enforceable in New Zealand if they uphold democracy. In any event, it does not seem that government officials actually consider Parliament as capable of being constituted in numerous ways.

consensus now seems to accept the notion that to be "law", a Bill must have been adopted in compliance with entrenchment provisions, provided that those provisions seek to uphold democracy.

There is no one authoritative conception of parliamentary sovereignty. Joseph highlights that the doctrine is "almost entirely the work of Oxford men … none of whom could produce authority for their statements".[207] Dame Sian Elias surmises that the emphasis on sovereignty has "inhibited the development in New Zealand of more flexible systems of political organisation".[208]

McLeay describes parliamentary sovereignty as a "convention".[209] However, the courts' willingness to enforce parliamentary sovereignty indicates that it is more than a convention.[210] Adopting Dicey's distinction between written and unwritten constitutional laws,[211] parliamentary sovereignty is an unwritten law underlying the constitution. Hart similarly stated that parliamentary sovereignty is a rule of change.[212]

These descriptions of parliamentary sovereignty suggest that the doctrine must serve a necessary constitutional purpose: upholding representative democracy. Parliament is a democratic body. It derives its legitimacy from the populace's votes. Accordingly, due to Parliament's democratic foundation, adherence to the principle of democracy precedes and overrides parliamentary sovereignty.

Harris similarly proposes that parliamentary sovereignty is predicated upon both democracy and a facilitation of equality between generations.[213] He argues that entrenchment is only justified when its democratic worth outweighs the intergenerational inequity caused by restraining future Parliaments' powers.[214]

Likewise, in *Ngaronoa v Attorney-General*, the Court of Appeal described the reserved provisions in the Electoral Act as involving "aspects of the electoral system" which are "of such fundamental

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207 Joseph, above n 1, at 562.

208 Sian Elias, Chief Justice of New Zealand "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148 at 156.

209 McLeay, above n 4, at 191.

210 See for example *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

211 Dicey, above n 48, at 23.

212 Hart, above n 49, at 144–148.

213 Harris, above n 132, at 6–7.

214 At 7.

importance that they should not be subject to political whim or partisan attitudes".[215] This language links the democratic significance of these provisions with their reserved status.

The rule of recognition can be presently understood as accepting limitations on parliamentary sovereignty. This legitimises the enforcement of only those entrenchment provisions that uphold democracy. An analogy can be drawn with how courts in the United States, Canada and Australia will strike down legislation overstepping the federal division of powers[216] because the division of powers supersedes the authority of federal governments to legislate. Likewise, New Zealand's Parliament's democratic foundation takes precedence over its legislative supremacy.

Parliamentary sovereignty is misaligned with the practical realities of governance. Joseph explains that government is a "collaborative enterprise".[217] He notes Lord Cooke of Thorndon's observation that the supremacy of either Parliament or the judiciary "has no place".[218] The political-judicial relationship is one of "comity, interdependence and reciprocity", according to which parliamentarians and judges exercise specific functions.[219] Similarly, a Full Court of the Court of Appeal has described the "co-dependent" functions of Parliament and the courts,[220] according to which the courts can declare void any legislation that exceeds "the limits of [Parliament's] power".[221]

Likewise, Professor Murray Hunt explains that the "conceptual neatness" of parliamentary sovereignty is misaligned with "the way in which public power is now dispersed and shared between … constitutional actors, all of which profess an identical commitment to … democratic constitutionalism".[222] This accords with the proposition of Sir Robin Cooke that Parliament's power is limited by certain "fundamentals", including the operation of a democratic legislature.[223]

Dame Sian Elias likewise states: "An untrammelled freedom of Parliament does not exist".[224] She proposes "a more modest principle of *legislative primacy*", whereby Acts of Parliament prevail

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215 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [12].

216 Joseph, above n 1, at 577.

217 At 834.

218 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 at 278.

219 Joseph, above n 1, at 834.

220 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [51].

221 At [54].

222 Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oregon, 2003) 337 at 339.

223 Cooke, above n 73, at 164.

224 Elias, above n 208, at 163.

"unless contrary to the constitutional rules upon which law-making validity depends".[225] However, Elias cautions that in exercising the judicial role of articulating the law, "great deference is due to Parliament as the primary institution through which democratic government is delivered".[226] This illustrates the discrete functions of Parliament to legislate, and the judiciary to adjudicate, according to the law as set down by Parliament. Parliament alone has the power to legislate. Yet, Elias explains that "restrictions to protect the essential democratic process are now widely accepted as constitutional limits on parliamentary competence".[227]

Finally, and notably, Elias' notional answer to the question of whether Parliament can bind itself aligns with the idea that New Zealand's rule of recognition now supports the enforceability of entrenchment only if it upholds fundamental democratic rights:[228]

> Parliament is not limited by earlier legislation. But it is bound by the constitution which may partly be expressed in earlier legislation. The constitution evolves. Saying what it is in a case where the content of the constitution directly arises is ultimately for the courts. That is because the conditions of valid law-making are law.

In conclusion, a modernised conception of Parliament's role eschews the unconditional language of "sovereignty". New Zealand's rule of recognition incorporates an understanding of the distinct but complementary roles of the legislature and the judiciary to, respectively, create law and adjudicate on it. Consequently, entrenchment is legally enforceable only if its purpose is to uphold fundamental democratic principles underpinning the "collaborative enterprise" of government.[229]

Arguably, this reasoning supports the enforceability of the entrenchment of other fundamental rules deemed to be "content of the constitution".[230] This could include basic human rights, te Tiriti o Waitangi or values upholding the rule of law.[231] However, in this article I have explained that by convention the legitimate scope of entrenchment is limited to the mechanisms by which democracy operates. Although, legally, entrenchment of other constitutional fundamentals is arguably possible, presently it is not advisable or necessary. Maintaining distinct conventions as to the proper use of entrenchment avoids constitutional uncertainty and the possibility of courts adjudicating on whether a given matter is constitutionally significant.

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225 At 152 (emphasis added).

226 At 162.

227 At 162.

228 At 162.

229 Joseph, above n 1, at 834.

230 Elias, above n 208, at 162.

231 Harris, above n 132, at 8–9.

B Interpretative Approach

Courts are likely to be especially prudent when interpreting entrenched provisions. Unless an entrenchment provision undoubtedly upholds democracy, courts likely will not declare it to be binding. This applies not only to possible future provisions, but also to determining the extent of the reserved provisions in s 268. This caution was evident in *Ngaronoa v Attorney-General*.[232] The majority of the Supreme Court found that s 268(1)(e) of the Electoral Act 1993 should be interpreted narrowly, as entrenching only the minimum age to vote, and not all qualifying criteria in s 74.[233]

Nevertheless, a "rights-consistent" approach to interpretation, congruous with the constitutional purpose of entrenchment, and the courts' duty under s 6 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), should be adopted. In her dissent in *Ngaronoa v Attorney-General*, Elias CJ considered that s 6 (requiring a rights-consistent meaning where such meaning can be given) applies when interpreting an entrenchment provision.[234] This is compelling. It is implicit in the former Chief Justice's reasoning that democracy underpins all rights in the Bill of Rights Act. This is evidenced by the electoral rights in s 12, as well as s 5, which provides that limitations on other rights are only acceptable if justifiable in a "free and democratic society".[235] Still, circumspection is important: "Judges must recognise that they are 'not appointed to set the world to rights'".[236]

For example, were Parliament to enact legislation lowering the voting age below 18, without complying with s 268, and that legislation was subsequently challenged, a rights-consistent interpretation of s 268 would consider that it only entrenches the minimum voting age against increase. In *Ngaronoa v Attorney-General*, the majority noted that:[237]

> … s 268 gives procedural protection. It does not distinguish between lowering or raising the minimum age to vote, for example, even though one would infringe on the right to vote and the other broaden that right.

Elias CJ concurred.[238]

From a rights perspective, an Act lowering the voting age passed without compliance with s 268 would be valid because it expands the right underlying the reserved provision. This is consistent with the proposition that entrenchment is only judicially enforceable if it protects fundamental democratic

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232 *Ngaronoa v Attorney-General*, above n 7.

233 At [70].

234 At [103].

235 At [105].

236 Elias, above n 208, at 158, citing Lord Hoffmann "Separation of Powers" [2002] JR 137 at 144.

237 *Ngaronoa v Attorney-General*, above n 7, at [69].

238 At [131].

principles. Lowering the voting age does not impinge upon any elector's right to vote, but instead bestows that right upon more people.[239] Therefore s 268 is not engaged at all. Although expanding the right in the entrenchment provision without following s 268 would comprise a breach of Standing Order 270, courts cannot declare legislation invalid for this reason.[240]

C The Appropriate Form of Relief

Despite concluding that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was invalidly passed, Elias CJ did not consider what type of relief would be available.[241] Wilson states that judicial scrutiny of compliance with entrenchment provisions is only appropriate after the Bill in question has received Royal assent.[242] The Court of Appeal has expressed the same opinion.[243] Therefore ruling the Bill invalid is the most appropriate form of relief.[244]

Joseph states that an injunction between the third reading and Royal assent may be available in extreme circumstances.[245] When such circumstances might arise is uncertain. Joseph posits that an injunction may be appropriate if the pending legislation "threatens irreparable harm" or if declining an injunction would "defeat private rights of a substantial nature".[246] Likewise, the Court in *Westco Lagan v Attorney-General* held that an injunction may be an appropriate remedy if the public interest supported early intervention.[247]

Overall, the issuing of an injunction is unlikely, as in most cases a ruling following Royal assent would achieve the same result.[248] The availability of the alternative remedy of a ruling of invalidity

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239 Some may argue that lowering the voting age dilutes the voting rights of existing electors by diminishing the power of their votes. That argument fails to recognise that the right to vote is concerned with a person's ability to vote being equal with others', as opposed to maintaining its percentage value at any given time. If the voting age were lowered, the new electors' votes would be worth the same as existing electors', meaning existing voting rights would not be affected.

240 Wilson, above n 40, at 743.

241 *Ngaronoa v Attorney-General*, above n 7, at [159].

242 Wilson, above n 40, at 9.

243 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*, above n 180, at 308.

244 Joseph, above n 1, at 649.

245 At 649.

246 At 651.

247 *Westco Lagan Ltd v Attorney-General*, above n 70, at [93].

248 Joseph, above n 1, at 651.

following Royal assent militates against the issuing of an injunction,[249] especially as doing so would threaten to breach the principle of comity amongst governmental branches.

VII CONCLUSION

New Zealand is unlikely to see increased use of entrenchment. Much of our constitution is upheld by convention. Parliament likely will learn from the events surrounding the Three Waters entrenchment debacle, employing circumspection before making similar proposals in the future. The commotion following the proposal reflects the House's respect for the constitutional conventions that entrenchment provisions must relate to matters of fundamental democracy and should stipulate a supermajority requirement of 75 per cent.

In the unlikely event that the courts adjudicate on whether entrenchment is judicially enforceable, they are likely to distinguish between entrenchment provisions protecting matters of democratic significance, and those protecting matters of partisan policy, the latter not being judicially enforceable. This is due to a change in the rule of recognition driven by a consensual understanding between officials of all branches of government of the distinct roles of Parliament and the judiciary, each of which are validated by, and motivated to safeguard, representative democracy.

249 *Rediffusion (Hong Kong) Pty Ltd v Attorney-General (Hong Kong)* [1970] AC 1136 (PC) at 1156–1157.