

# REVISITING THE “MANNER AND FORM” THEORY OF PARLIAMENTARY SOVEREIGNTY<sup>†</sup>

HAN-RU ZHOU<sup>\*</sup>

## I. Introduction

Perhaps the most long-standing debate concerning English Parliamentary sovereignty is whether Parliament’s legislative authority can be subject to certain formal or procedural requirements that must be fulfilled before a purported statute concerned by such requirements can be recognized as a statute or be enforceable, namely “manner and form” conditions. The term “manner and form” can be traced back to s. 5 of the Colonial Laws Validity Act 1865, which states that the laws passed by colonial legislatures must abide by “such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.” Over the last century, the notion of manner and form conditions attracted increasing attention in England as well as in many parts of the British Commonwealth, probably reaching a high point in the wake of Sir William Wade’s seminal 1955 article defending the “traditional view” of Parliamentary sovereignty.<sup>1</sup> After a prolonged debate which failed to resolve the issue, the legal community eventually began to lose interest in it. In 2000, one author even suggested that the debate had become “dated”.<sup>2</sup> However, a series of legislative and judicial developments, notably *Jackson*<sup>3</sup> and, more recently, the enactment of the European Union Act 2011, have sparked renewed interest over the place of manner and form conditions in English law.

This article makes the argument that English Parliamentary sovereignty is reconcilable with the manner and form theory. It begins with a brief overview of the traditional view followed by an explanation of the manner and form theory. Having set out these two competing views of Parliamentary sovereignty, I proceed to develop my argument along three propositions. First, from a comparative perspective, the logical implications of the “Commonwealth cases” are that manner and form conditions would bind a legislative body which possesses the same characteristics as the English Parliament. Thus, these cases should be considered as persuasive. Second, in *Jackson*, the majority of the Law Lords explicitly or implicitly accepted the manner and form theory. And third, the attitudes of that other key constitutional actor, namely Parliament, and of “senior officials” of the legislative branch suggest that the legislative branch would accept the manner and form theory.

## II. The Traditional View: Parliament’s Absolute Supremacy

Since the position defended in this article conflicts with the traditional view of Parliamentary sovereignty, I outline at the outset the gist of this latter view along with what are considered its main authorities. Any modern discussion of Parliamentary sovereignty inevitably returns

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<sup>\*</sup> Assistant Professor of Public Law, Faculty of Law, University of Montreal. With thanks to Nicholas Bamforth and Shantona Chaudhury for their comments on earlier drafts; and to Lina Fadlalla for her research assistance. This research was supported by the Social Sciences and Humanities Research Council of Canada and the Boulton Fund of the McGill University Faculty of Law.

<sup>1</sup> See H.W.R. Wade, “The Basis of Legal Sovereignty” [1955] C.L.J. 172.

<sup>2</sup> C. Harlow, “Export, Import. The Ebb and Flow of English Public Law” [2000] P.L. 240, 246-47.

<sup>3</sup> *R. (Jackson) v AG* [2005] UKHL 56; [2006] 1 A.C. 262 HL.

to Dicey's classic exposition of the principle.<sup>4</sup> Dicey referred to Parliamentary sovereignty as a legal fact which he fitted into a two-pronged statement: that Parliament has the right to make or unmake any law whatever, including fundamental and so-called constitutional laws; and that, under the English constitution, no person or body, including the courts, could override or set aside an Act of Parliament. Dicey's conception of Parliamentary sovereignty also had limits, but they were strictly moral and political, thus legally unenforceable. Although Dicey never discussed his views vis-à-vis the manner and form theory as it only became influential after his death, his conception of Parliamentary sovereignty has been interpreted as making manner and form conditions legally unenforceable.<sup>5</sup>

Dicey's view of Parliamentary sovereignty was revisited some years later by Sir William Wade. Like Dicey, Wade subscribed to the notion that Parliament can enact any law and "that no Act of [Parliament] could be invalid in the eyes of the courts".<sup>6</sup> In retracing the source and nature of this rule of judicial obedience to statutes, Wade qualified it as the ultimate political fact or ultimate legal principle upon which the whole system of legislation hangs and for which no purely legal explanation can be given. It is beyond the reach of Parliament and, consequently, Parliament cannot alter or abolish it. For Wade, the ultimate legal principle, which he later equated with H.L.A. Hart's rule of recognition,<sup>7</sup> lies in the keeping of the courts: it is always for the courts, in the last resort, to say what a valid Act of Parliament is. Wade did conceive that the ultimate legal principle could be altered. However, if that occurred, a legal revolution would then have taken place.<sup>8</sup>

According to Wade, three precedents from the 1930s support the traditional view. The first two cases<sup>9</sup> dealt with a purported conflict between a 1919 Act (which provided that any Act inconsistent with it "shall cease to have or shall not have effect") and a later inconsistent statute. In both cases, the courts held the later statute to have impliedly repealed the relevant provision of the 1919 Act to the extent of the inconsistency. Dismissing the appellants' argument in *Ellen Street Estates*, Maugham L.J. (Talbot J. agreeing) stated that:

"The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal."<sup>10</sup>

In the third case, Viscount Sankey L.C., for the Judicial Committee of the Privy Council, expressed the view that s. 4 of the Statute of Westminster 1931, which required the Imperial

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<sup>4</sup> A.V. Dicey and E.C.S. Wade, *Introduction to the Study of the Law of the Constitution*, 10th edn (London: Macmillan, 1959), Ch.1.

<sup>5</sup> See J.D. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: CUP, 2010), pp.181-82; M. Gordon and M. Dougan, "The United Kingdom's European Union Act 2011: 'Who Won the Bloody War Anyway?'" (2012) 37 E.L.Rev. 3, 23; P. Mirfield, "Can the House of Lords Lawfully Be Abolished?" (1979) 95 L.Q.R. 36, 45; P.C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: OUP, 2005), pp.92-95; E.C.S. Wade, "Introduction" in A.V. Dicey and E.C.S. Wade (eds), *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959), pp.xlii-xliii; Wade, "The Basis of Legal Sovereignty", fn.1, *passim* 174, 184, 190; R. Weill, "Centennial to the Parliament Act 1911: The Manner and Form Fallacy" [2012] P.L. 105, 107, 111.

<sup>6</sup> Wade, "The Basis of Legal Sovereignty", fn.1, 174.

<sup>7</sup> H.W.R. Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 L.Q.R. 568, 574.

<sup>8</sup> Wade, "The Basis of Legal Sovereignty", fn.1, 190-92.

<sup>9</sup> *Vauxhall Estates, Ltd v Liverpool Corp* [1932] 1 K.B. 733 KB; *Ellen Street Estates, Ltd v Minister of Health* [1934] 1 K.B. 590 CA.

<sup>10</sup> *Ellen Street Estates*, fn.9, 597.

Parliament to declare in any Act extending to a Dominion that that Dominion requested the enactment and consented to it, could not legally bind Parliament:

“It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities.”<sup>11</sup>

These cases featured (failed) attempts by the claimants/appellants to interpret an Act of Parliament as legally binding on a later Act of Parliament. By suggesting that Parliament could disregard its own law when enacting new laws, the above precedents, in particular Maugham L.J.’s judgment, seem to support the traditional view, rejecting at the same time the manner and form theory.

### III. The Nature and Extent of the Manner and Form Theory

Before discussing further the validity of the manner and form theory, I set out what I believe its two principal characteristics are. First, the manner and form theory requires Parliament to follow a set of formal rules before an Act can be passed. Second, that theory is ultimately defined through the distinction between the formal conditions for legislation to be passed and the substance of that legislation. My later argument in this article that Parliament and the judiciary seem to have accepted the manner and form theory can be appreciated only if one first adopts a version of that theory which can be reconciled with the Commonwealth cases, *Jackson* and the relevant legislation.

It is submitted that the basis of the manner and form theory is the difference between the notions of sovereignty and Parliamentary sovereignty. A true sovereign has supreme absolute power as he may, in any manner whatsoever, do any thing on one day and decide to undo that thing the next day. Contrary to that true sovereign, it is insufficient for Parliament to simply form a will in order for it to become law. Before its will is articulated, Parliament must first be properly constituted and then it must express its will in the proper manner and form. This “first principle of the Constitution of England”<sup>12</sup> stretches back centuries. In *Pilkington’s Case*,<sup>13</sup> the Court of King’s Bench held that a document entered on the Parliamentary Roll was not an Act of Parliament because the Commons passed the bill with a reference to the year 1450 whereas the version of the bill passed by the Lords referred to 1451. Similarly, in *The Prince’s Case*,<sup>14</sup> the Court of King’s Bench opined that a document could not be recognized as an Act of Parliament despite having been entered on the Parliamentary Roll if it was passed by only one House of Parliament and received the Royal Assent. The principle was confirmed again in *Stockdale* where Lord Denman C.J. reiterated that:

“[T]he House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control.”<sup>15</sup>

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<sup>11</sup> *British Coal Corp v The King* [1935] A.C. 500 PC, 520.

<sup>12</sup> *Stockdale v Hansard* (1839) 9 A.&E. 1, 112 E.R. 1112, 1155 (Lord Denman C.J.).

<sup>13</sup> *Pilkington’s Case* (1455) Y.B. Pas. 33 Hen VI, fo. 17, cited in *R. v Countess of Arundel* [1792] Eng.R. 2555, (1792) Hob. 109, 80 E.R. 258.

<sup>14</sup> *The Prince’s Case* [1572] Eng.R. 450, (1572-1616) 8 Co. Rep. 13b, 77 E.R. 497.

<sup>15</sup> *Stockdale v Hansard*, fn.12, 1154-55.

Thus, it is only when the formal rules for passing statutes are complied with that the properly expressed will of Parliament becomes law. Moreover, as a matter of logic, Parliament's unlimited legislative power would also extend to the power to make rules changing its existing lawmaking process as much as it wants. And if Parliament can use the existing lawmaking process to enact new rules pertaining to its lawmaking process, then it must also be able to use these newly enacted rules should it wish to re-modify them. Once the new statutory rules are properly enacted, they will be binding on Parliament in the same way that the old rules were binding on Parliament until Parliament properly changes the rules.

One potential caveat to the above logical underpinnings of the manner and form theory is Parliamentary privileges, which have been interpreted to prevent the courts from inquiring into Parliamentary procedure and would therefore constitute an obstacle to the acceptance of the manner and form theory.<sup>16</sup> In support of this position is a series of cases involving railway companies.<sup>17</sup> However, it is submitted that the two propositions which emerge from this case law are: (i) that failure by a House of Parliament to comply with one of its Standing Orders is not a ground for challenging the validity of an Act, and (ii) that an Act of Parliament is valid despite having been obtained by fraudulent representations made to Parliament. None of the cases was actually concerned with the validity of a purported manner and form condition. Even if Parliamentary privileges could shield legislative procedures from judicial inquiry, it would not necessarily negate the judicial enforcement of all manner and form conditions. In *Ranasinghe*, Lord Pearce, for the Judicial Committee of the Privy Council, wrote that:

“The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act. But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making. In *Edinburgh Railway Co.*, however, Lord Campbell said: ‘All that a court of justice can do is to look to the Parliamentary roll.’ There seems no reason to doubt that in early times, if such a point could have arisen as arises in the present case, the court would have taken the sensible step of inspecting the original.”<sup>18</sup>

For our purposes, the real debate is not whether *some* manner and form conditions may not be judicially enforceable because they conflict with Parliamentary privileges, but whether manner and form conditions are legally binding at all under English law.

Constitutional scholars have attempted to explain manner and form conditions mainly through the notion of (procedural) entrenchment and the distinction between form and substance. It is submitted that, while the notion of entrenchment is useful in analysing the manner and form theory, the key for reconciling that theory with English Parliamentary

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<sup>16</sup> See N. Bamforth, “Parliamentary Sovereignty and the Human Rights Act 1998” [1998] P.L. 572, 579-82; O.H. Phillips, P. Jackson and P. Leopold, *O. Hood Phillips & Jackson Constitutional and Administrative Law*, 8th edn (London: Sweet & Maxwell, 2001), pp.74-75.

<sup>17</sup> See *Edinburgh Railway Co v Wauchope* [1842] Eng.R. 402, (1842) 8 Cl. & Fin. 710, 8 E.R. 279; *Lee v The Bude and Torrington Junction Railway Cy* (1870-71) L.R. 6, C.P. 576; *British Railways Board v Pickin* [1974] A.C. 765 HL.

<sup>18</sup> *Bribery Commissioner v Ranasinghe* [1965] A.C. 172 PC, 195.

sovereignty resides in the form/substance distinction.<sup>19</sup> It is crucial at this stage to properly define the manner and form theory because a legislative rule will or will not be characterized as a manner and form condition depending on whether one relies on the notion of entrenchment or the form/substance distinction. Therefore, I first explain how I believe they fit into the manner and form theory.

Entrenchment is a mechanism intended to enhance the level of protection of a particular statute from amendment or repeal. Common examples are requiring the enactment of a law to be subject to a two-thirds majority of the Members of Parliament or to a referendum. Manner and form conditions can also be as diverse as the requirement of a joint sitting of both Houses of Parliament in order to pass a particular statute<sup>20</sup> or a condition that any statute, to be validly enacted, be passed in both English and French.<sup>21</sup> These examples suggest that, while the notion of entrenchment is useful in analysing many manner and form conditions, the latter are not solely about entrenchment. To find their real essence, one should return to the authors who first expounded the notion of manner and form conditions. R.F.V. Heuston summarized their operation by reference to the form/substance distinction: courts had jurisdiction to question the validity of an alleged Act of Parliament on form but not on substance.<sup>22</sup> Geoffrey Marshall also recognized that “the distinction between procedural and substantive limitations... has been at the centre of all recent discussion of the doctrine of legislative sovereignty.”<sup>23</sup> Therefore, the essence of manner and form conditions is found in the distinction between a formal (or procedural) requirement and a substantive requirement. To enact a valid law, Parliament must follow the relevant procedure in force at that time. However, the sovereign Parliament remains theoretically unrestrained from adopting any new procedural rules it can think of. A procedural rule need not necessarily be an entrenching manner and form requirement; all that Parliament cannot effectively enact is a rule that affects its substantive lawmaking powers. In this sense, the form/substance distinction

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<sup>19</sup> Another distinction found in the literature is that between composition and procedure. A rule governing the composition of Parliament would concern its three constituent parts (the Queen, the Lords and the Commons), whereas a rule governing the procedure would refer to the requirements that distinguish an Act of Parliament from any other document: R.F.V. Heuston, *Essays in Constitutional Law*, 2nd edn (London: Stevens, 1964), pp.7-9. The composition/procedure distinction was probably intended to be purely descriptive since “courts have jurisdiction to question the validity of an alleged Act of Parliament on [either] ground.” (Heuston, pp.6-7) Also, composition and procedure are often used interchangeably. For instance, a requirement that a proposed Act of Parliament must be approved in a referendum could be conceived either as a redefinition of Parliament by including the electorate as an additional component of Parliament or as an additional procedure for Parliament to comply with before its bill becomes an Act of Parliament (see S.A. de Smith and R. Brazier, *Constitutional and Administrative Law*, 8th edn (London: Penguin, 1998), p.96; J. Goldworthy, “Trethowan’s Case” in G. Winterton (ed) *State Constitutional Landmarks* (Annandale, NSW: Federation Press, 2006), p.98 at pp.112-15; D.L. Keir, D.J. Bentley and F.H. Lawson, *Cases in Constitutional Law*, 6th edn (Oxford: OUP, 1979), p.8; G. Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined” (1976) 92 L.Q.R. 591, 607). In *A-G for New South Wales v Trethowan* [1932] A.C. 526 PC, 540, the Judicial Committee stated that “the words ‘manner and form’ [in s. 5 of the Colonial Laws Validity Act 1865] are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty’s assent.” Absent any reason to distinguish them, they should simply be considered as manner and form conditions.

<sup>20</sup> See *Harris v Minister of the Interior* [1952] S.A. 428 AD; H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: OUP, 1994), p.150; G. Marshall, *Constitutional Theory* (Oxford: OUP, 1971), p.42.

<sup>21</sup> See *Re Manitoba Language Rights* [1985] 1 S.C.R. 721, 744, 746-47; *R v Mercure* [1988] 1 S.C.R. 234, 276-81.

<sup>22</sup> Heuston, fn.19, pp.6-7.

<sup>23</sup> Marshall, fn.20, p.57.

reconciles manner and form conditions with Parliament's (substantive) legislative sovereignty.<sup>24</sup>

Having set out my understanding of the manner and form theory, I can now examine the case law in order to determine whether the courts have accepted the theory.

#### IV. Commonwealth Cases

In this part, I suggest that, from a comparative perspective, the Commonwealth cases<sup>25</sup> dealing with the manner and form theory are persuasive authority on the basis of their theoretical (and legal) relevance to English law. In the literature, the relevance of the Commonwealth cases has been challenged on the ground that the powers of the Commonwealth legislatures were subject to an overriding constitutional instrument or to Imperial Parliamentary authority (or to both). I will defend the relevance of the Commonwealth cases, first, by establishing the relevant similarities between the common law-based systems in these Commonwealth countries and the English legal system and, second, by using the two main conceptual distinctions resorted to by the Commonwealth courts to decide the validity of manner and form conditions. These distinctions are between controlled and uncontrolled constitutions, and between sovereign and non-sovereign legislatures.

##### (a) The Relevance of the Commonwealth Cases in English Law

The general growth of comparative law can be observed from its wide and increasing use in the case law and literature of many countries, including England. For instance, in *Derbyshire*, the House of Lords cited several American and Commonwealth cases in support of its proposition that the right for a governmental authority to sue for libel is contrary to public interest and freedom of speech.<sup>26</sup> In *Kingston*, the House of Lords inquired into how Scottish, Canadian and American criminal cases and materials dealt with the scope of a particular defence "in the absence of guidance from English authorities".<sup>27</sup> As Lord Goff observed (extrajudicially), "[c]omparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow."<sup>28</sup>

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<sup>24</sup> Some authors have criticized the blurry distinction between form and substance. However, W. Friedmann suggests that one way of distinguishing between formal and substantive conditions would be through the use of a "pith and substance" test initially devised by the Judicial Committee in deciding Canadian cases based on the constitutional division of legislative powers between the federal Parliament and the provincial legislatures (see W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 A.L.J. 103). The pith and substance test involves the task of identifying what the dominant or most important characteristic of an impugned statute is, in order to determine whether the legislature has the constitutional authority to pass that statute. Accordingly, the courts will consider the real purpose of the statute, its legal effects and how it actually operates. Applying the test to manner and form conditions, the courts would examine whether the legal or practical effect of a given legislative condition prevents Parliament from subsequently enacting laws on a particular subject matter; if it does, that condition will be invalid or set aside.

<sup>25</sup> These cases discussed in this article are *Trethowan*, fn.19, *Harris*, fn.20, and *Ranasinghe*, fn.18.

<sup>26</sup> *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534 HL, 547-50.

<sup>27</sup> *R. v Kingston* [1995] 2 A.C. 355 HL, 370-75.

<sup>28</sup> Lord Goff, "The Future of the Common Law" (1997) 46 I.C.L.Q. 745, 748.

Some commentators have even suggested that the term “comparative law” would not apply when examining the laws of different common law countries.<sup>29</sup> Underlying this view may be the idea that the basic tenets (and sometimes the content) of the common law would transcend the different jurisdictions and presuppose one unique correct answer in common law matters.<sup>30</sup> To borrow a well-known formula, the common law would apply across national borders by authority of reason as much as by reason of authority.<sup>31</sup> Such a unity in the common law could further help explain the high degree of persuasiveness of precedents from other common law-based systems.<sup>32</sup>

The weight of comparative (case) law has frequently been discussed by reference the notion of persuasive authority. According to Christopher McCrudden, persuasive authority exists when

“other [national or foreign] material is regarded as relevant to the decision which has to be made by the judge, but is not binding on the judge under the hierarchical rules of the national system determining authoritative sources.”<sup>33</sup>

For J.W. Harris, “[c]ommon law decisions are rightly considered potential persuasive authority for any common law court in any part of the world faced with the same issue.”<sup>34</sup> William Lederman is substantially of the same view:

“[B]etween separate systems of courts in different Common Law jurisdictions, all precedents are at the persuasive level, and may suffer rather critical appraisal before acceptance across jurisdictional boundaries”.<sup>35</sup>

However, one should not take for granted that rules or institutions are always transplantable. As Sir Otto Kahn-Freund warns, “[a]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection.”<sup>36</sup> Similarly, Mark Tushnet seems to express a widely held view in the US when he argues that:

“[C]onstitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and... we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.”<sup>37</sup>

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<sup>29</sup> See for instance J.M. Smits, “Comparative Law and Its Influence on National Legal Systems” in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006), p.513 at p.522; G. Winterton, “Comparative Law Teaching” (1975) 23 *Am.J.Comp.L.* 69, 71-72.

<sup>30</sup> See H.P. Glenn, *On Common Laws* (Oxford: OUP, 2005), p.69; J. Harris, “The Privy Council and the Common Law” (1990) 106 *L.Q.R.* 574, 581; J.N. Matson, “The Common Law Abroad: English and Indigenous Laws in the British Commonwealth” (1993) 42 *I.C.L.Q.* 753, 755.

<sup>31</sup> Glenn, fn.30, p.68; Smits, “Comparative Law and Its Influence on National Legal Systems”, fn.29, at p.527.

<sup>32</sup> Harris “The Privy Council and the Common Law”, fn.30, 583, 599; Matson, “The Common Law Abroad: English and Indigenous Laws in the British Commonwealth”, fn.30, 757-58; Smits, “Comparative Law and Its Influence on National Legal Systems”, fn.29, at p.534; Winterton, “Comparative Law Teaching”, fn.29, 73-74.

<sup>33</sup> C. McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20 *O.J.L.S.* 499, 502-03.

<sup>34</sup> Harris, “The Privy Council and the Common Law”, fn.30, 599.

<sup>35</sup> W.R. Lederman, “The Common Law System in Canada” in E. McWhinney (ed) *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (London: Stevens & sons, 1959), p.34 at p.37.

<sup>36</sup> O. Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37 *M.L.R.* 1, 27.

<sup>37</sup> M. Tushnet, “Some Reflections on Method in Comparative Constitutional Law” in S. Chaudhry (ed) *The Migration of Constitutional Ideas* (Cambridge: CUP, 2006), p.76.

For Tushnet, the use of comparative law must be sensitive to the different contexts of each nation.

In the context of the present inquiry, the use of the Commonwealth cases is justified by the sufficient similarity between the basic constitutional structures of the legal systems in which the cases arose and the English constitution. Sir Ivor Jennings has written that all of the independent Commonwealth countries:

“shared the general principles of English constitutional law, modified to meet local conditions and their former dependent status by Act of Parliament or Orders in Council. Their modern constitutions have therefore been founded upon those principles. [T]hey have without exception adopted or adapted the British system of government.”<sup>38</sup>

His comment seems to be confirmed when we look at the constitutional systems under which the Commonwealth cases were decided. With regard to Australia,

“each of [the six state] governments has a Constitution closely similar to that of Great Britain: a Parliament with legal supremacy over the rest of the system; a Cabinet of Ministers, controlling the executive government, chosen from members of Parliament belonging to the majority party or coalition; an independent judiciary; instruments of local government deriving their authority from the Parliament.”<sup>39</sup>

Speaking of the Sri Lanka constitution, the Judicial Committee of the Privy Council referred to a similar set of British governmental structures and institutions before adding that:

“Thus the Constitution is explicitly designed to secure the subordination of the Executive to the Legislature through their common meeting ground in the procedures of Parliament and, although there are many variations in matters of detail, its general conceptions are seen at once to be those of a parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom.”<sup>40</sup>

The same institutions and structures were introduced in South Africa.<sup>41</sup> The similarity with English law was also reflected in the content of these domestic constitutional laws. Jennings has even stated that, “from a constitutional point of view[,] the ‘common law’ of the colony is English law.”<sup>42</sup> Given this close connection between the constitutions of the Commonwealth legal systems, it became a frequent practice among Commonwealth (including English) judges, lawyers and commentators to refer to other foreign Commonwealth constitutional authorities. These reasons justify that we consider the Commonwealth cases in the analysis of the manner and form theory in English law.

## (b) Examining the Commonwealth Cases

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<sup>38</sup> I. Jennings, *Constitutional Laws of the Commonwealth* (Oxford: OUP, 1957), p.43.

<sup>39</sup> G. Sawyer, “Constitutional Law” in G.W. Paton (ed) *The Commonwealth of Australia: The Development of Its Laws and Constitution* (London: Stevens, 1952), p.38.

<sup>40</sup> *A-G of Ceylon v de Livera* [1962] A.C. 103 PC, 118.

<sup>41</sup> See S. Woolman and J. Swanepoel, “Constitutional History” in S. Woolman, T. Roux and M. Bishop (eds), *Constitutional Law of South Africa*, 2nd edn (Kenwyn: Juta & Co, 2008), Vol.1, pp.2-10.

<sup>42</sup> Jennings, fn.38, p.45.



The issue of the validity of manner and form conditions has appeared several times in the Commonwealth case law. Indeed, many of the colonial and the new Dominion Constitutions contained a provision requiring that certain laws could only be enacted by following a special procedure. Typically, in these cases, the validity of an Act of the legislature was challenged in court because the legislature had attempted to pass it in the ordinary manner in contravention of the special enacting procedure provided in the Constitution. When the courts noted that that legislature had failed to comply with the conditions set out in the Constitution, they either invalidated the improperly passed Act or declined to enforce it.

Commentators have questioned the persuasiveness of these precedents in England on the basis that, in all of them, the manner and form requirement was imposed by a higher form of law that defined or restricted the powers of the local legislature.<sup>43</sup> In *Trethowan*, the New South Wales (“NSW”) Legislature was considered a subordinate legislature as it was subject to the Colonial Laws Validity Act 1865. In *Harris* and *Ranasinghe*, the South African and Ceylonese Parliaments were sovereign by the time the relevant cases were decided,<sup>44</sup> but they remained subject to a constituent instrument which provided the manner and form requirements. Discussions of the relevance of the Commonwealth cases in the English context have thus generally revolved around whether a constitution is “controlled” or “uncontrolled” and whether the legislature is sovereign or non-sovereign. Using these two distinctions, most commentators considered the Commonwealth cases irrelevant on the ground that the Commonwealth constitutions at issue were controlled or non-sovereign whereas the English constitution was uncontrolled and sovereign. Even some of the commentators favourable to the manner and form theory conceded that the Commonwealth cases could not authoritatively settle the question, preferring instead to discuss the desired analogy with English Parliamentary sovereignty.<sup>45</sup>

However, it is submitted that, when the reasoning from the Commonwealth cases is considered altogether and the characteristics of those Commonwealth constitutions are compared with the characteristics of the English constitution, no logical reasons prevents manner and form conditions from being applicable in the English context. This argument first requires that I explain the distinctions between a controlled and an uncontrolled constitution and between a sovereign and a non-sovereign legislature. Each of the objections to the relevance of the (reasoning of the) Commonwealth cases will then be examined under this framework. The fact that constitutions from many (if not all) common law-based systems can fit under such a framework should be a further indication of the usefulness of the present comparative analysis.

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<sup>43</sup> See for instance R. Ekins, “Acts of Parliament and the Parliament Acts” (2007) 123 L.Q.R. 91, 101; Wade, “Introduction”, fn.5, pp.lxxiii-lxxiv.

<sup>44</sup> On South Africa, see art. 2 of the Status of Union Act 1934 of South Africa; *Ndlwana v Hofmeyr, N.O.* [1937] S.A. 229 AD, 236-38; C. Forsyth, “The Definition of Parliament after Jackson: Can the Life of Parliament Be Extended under the Parliament Acts 1911 and 1949?” (2011) 9 ICON 132, 141; *Hansard* HC vol 259 col 1210 (November 20, 1931); I. Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959), p.165; Keir, Bentley and Lawson, fn.19, p.9. On Ceylon, see the Sri Lanka Independence Act 1947; *Ranasinghe*, fn.18, 197-200; *Ibralebbe v The Queen* [1964] A.C. 900 PC, 919, 922, 924; *Liyanage v The Queen* [1967] 1 A.C. 259 PC, 285-86; J.D.B. Mitchell, “Sovereignty of Parliament - Yet Again” (1963) 79 L.Q.R. 196, 211.

<sup>45</sup> See Jennings, *The Law and the Constitution*, fn.44, p.156; Marshall, fn.20, pp.56-57; Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined”, fn.19, 606.

In *McCawley*, Lord Birkenhead, for the Judicial Committee, explained that a constitution was uncontrolled if it could be freely altered without any restrictions; by contrast, a controlled constitution would contain “obstacles of varying difficulty” to overcome before alterations could be validly effected.<sup>46</sup> He added:

“Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth.”<sup>47</sup>

For Lord Birkenhead, whether a constitution is deemed controlled or uncontrolled is independent of the question whether it has been created pursuant to an “originating document”. Rather, the real criterion is whether the constitution has been entrenched (“obstacles of varying difficulty”). Turning to the Queensland constitution, Lord Birkenhead found that the Imperial Parliament never intended to “shackle or control” the powers of the Queensland Legislature; it is “the master of its own household”.<sup>48</sup> However, the Judicial Committee was fully aware that the Queensland Legislature was not absolutely free from “shackles” if it wanted to alter its constitution. From the outset, it was subject to the restrictions stated in the 1865 Act. Moreover, Queensland’s Constitution Act 1867 contained a requirement of an enhanced majority vote for any amendment to the “constitution of the Legislative Council”. Despite these limitations, Lord Birkenhead concluded that the Queensland constitution was uncontrolled.

At least two interrelated but different meanings have come to be attributed to the notion of a sovereign legislature (in a common law-based system). On the one hand, a legislature would be sovereign when its powers are unconstrained by a superior lawmaking authority<sup>49</sup>; the English Parliament is the most obvious example. On the other hand, a legislature has also been considered to possess the “plenitude of sovereign legislative power” whenever it has been given power to make laws for the “peace, order and good government” including the power to alter the Constitution.<sup>50</sup> Indeed, a sovereign legislature need not have absolute legal powers: in *Ranasinghe*, Lord Pearce stated that the powers could “be confined to certain subjects or within certain reservations”.<sup>51</sup> Incidentally, the Ceylonese Constitution prohibited the Ceylonese Parliament from passing legislation related to religious and racial matters, and provided for a requirement for an enhanced majority vote of the House of Representatives to alter any other part of the Constitution. Despite these limitations, Lord Pearce still qualified the Ceylonese Parliament as a sovereign legislature.<sup>52</sup>

The two meanings of what constitutes a sovereign legislature may not be perfectly reconcilable. If a legislature is sovereign in the first sense, it will normally be sovereign in the second sense. However, the converse is not true, as is shown in *McCawley* and in *Trethowan*. The legislatures in these cases were empowered to make laws for the peace, order and good

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<sup>46</sup> *McCawley v The King* [1920] A.C. 691 PC, 703-07.

<sup>47</sup> *Ibid*, 704.

<sup>48</sup> *Ibid*, 705-14.

<sup>49</sup> See J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: CUP, 2007), p.109; Wade, “Introduction”, fn.5, pp.lxxi-lxxiv; Wade, “The Basis of Legal Sovereignty”, fn.1, 182.

<sup>50</sup> *Ibralebbe*, fn.44, 923; *Ranasinghe*, fn.18, 196-97; *Cobb & Co Ltd v Kropp* [1967] 1 A.C. 141 PC, 154; Marshall, fn.20, p.56; Heuston, fn.19, pp.25-26.

<sup>51</sup> *Ranasinghe*, fn.18, 196-97.

<sup>52</sup> *Ibid*, 197.

government even though they were both directly subject to the authority of the Imperial Parliament.

With this understanding of the notions of controlled/uncontrolled constitutions and sovereign/non-sovereign legislatures, I can now return to the Commonwealth cases and assess how these distinctions help render the overall reasoning in these cases persuasive in the English context.

*Trethowan* has generally been held irrelevant in English law because the NSW Legislature was non-sovereign. However, since the Constitution Statute 1855 empowered the NSW Legislature “to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever”<sup>53</sup> even though it remained under the authority of the 1865 Act, the NSW Legislature should be considered as sovereign in the second sense. Consequently, *Trethowan* cannot be distinguished on the ground that the NSW Legislature was non-sovereign in the second sense but only in the first sense, that is, as a subordinate legislature subject to Imperial legislation. However, this latter ground would not have been sustained in *Harris* and *Ranasinghe* where the legislatures had ceased being subject to Imperial legislation by the time the relevant cases came to the courts. The courts held in these cases that the legislatures still remained bound by manner and form requirements, namely a joint sitting of both Houses of Parliament and an enhanced majority vote of the Members of Parliament (or of the House of Representatives for Ceylon). Therefore, it is incorrect to claim that the Commonwealth cases are irrelevant in the English context because the English Parliament is sovereign and the legislatures at issue in these cases were not. On the contrary, these legislatures were sovereign and the courts held that these sovereign legislatures were legally bound by manner and form conditions.

Also, claims by the opponents of the manner and form theory that, contrary to the English constitution, South Africa and Ceylon were governed by a controlled constitution, do not settle the matter. Indeed, in *Ranasinghe*, Lord Pearce stated quite clearly that such considerations were irrelevant to the discussion of the effectiveness of manner and form conditions:

“A legislature has no power to ignore the conditions of lawmaking that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon[, or whether the Constitution is ‘uncontrolled,’ as the Board held the Constitution of Queensland to be]. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions.”<sup>54</sup>

Here, in a last theoretical challenge to the relevance of the Commonwealth cases, one could point to the Judicial Committee’s reference to the “regulating instrument” in order to restrict the scope of its statement. The argument would be that, if the distinction between controlled and uncontrolled constitutions was irrelevant to the analysis of the validity of manner and form conditions, it would only be so in respect of uncontrolled constitutions governed by a “regulating instrument”. Uncontrolled constitutions “constituted by historic development”

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<sup>53</sup> *Trethowan*, fn.19, 534-35.

<sup>54</sup> *Ranasinghe*, fn.18, 197-99.

like the English constitution would still not be captured by the Judicial Committee's reasoning in the Commonwealth cases. However, returning to *McCawley*, the focus of Lord Birkenhead's distinction between controlled and uncontrolled constitutions was not revolving around the existence of an originating document but was rather based on the notion of entrenchment. Making at this point the distinction between an uncontrolled constitution governed by a regulating instrument and an uncontrolled constitution constituted by historic development runs counter to the Judicial Committee's analysis.

Moreover, take two legal systems both governed by completely uncontrolled constitutions, the only difference being that one legal system has a constitution governed by a regulating instrument while the other legal system's constitution has been constituted by historic development. What is the basis upon which we can justify why the legislative body under the "codified" constitution would be able to enact legally effective manner and form conditions while its counterpart under a "historic" constitution would not? In reality, the difference between a codified uncontrolled constitution and a historic uncontrolled constitution is more a matter of degree than a clear-cut distinction. Every constitution probably finds its origins partly in historical development and partly in formal instruments. At which exact point one must trace the line and decide that beyond it manner and form conditions shall or shall not be legally effective ends up being a rather arbitrary task.

Ultimately a legislature under a historic uncontrolled constitution is not prevented from codifying any part of its constitution. Similarly, a legislature under a codified uncontrolled constitution can abolish or alter any part of its constitution. Lawmakers in both constitutional systems would have virtually the same altering powers over their respective constitutions, thus rendering meaningless a distinction between those two constitutions based on whether they are governed by a regulating instrument or constituted by historic development. This even holds true if we take entrenched Constitutions into consideration, since they may perfectly be "dis-entrenched" by having their entrenching provisions legislatively removed (under the proper legislative procedure). Of course, none of these constitutional alterations would be permanently binding as the lawmakers could always decide to return to the *ex ante* status by resurrecting the previous version of their constitution.

Together the Commonwealth cases stand for the proposition that a manner and form condition legally binds a sovereign or non-sovereign legislature under a controlled or uncontrolled constitution. Therefore, a sovereign legislature under an uncontrolled constitution would also have to comply with manner and form conditions. As this latter type of constitution corresponds to the English constitution, my comparative analysis of the Commonwealth cases suggests that they constitute persuasive authority for the proposition that the manner and form theory would be part of English law. However, one may still raise the point that these cases failed to prove actual acceptance of such a theory in England. The reality is that, since the early cases cited in support of the traditional view (and, perhaps, *Pickin*), virtually no judicial discussion occurred until *Jackson*, to which I now turn in order to determine the Law Lords' views vis-à-vis the validity of manner and form conditions in English law.

#### V. R. (*Jackson*) v A-G

In this part, I will argue that the Law Lords' reasoning in *Jackson* and their recognition of the legal effectiveness of the Parliament Acts 1911-1949 imply that a majority of the Law Lords accepted (at least part of) the manner and form theory. I will begin by outlining the

judgments which are relevant to the manner and form theory. These judgments will serve as the basis of my examination of three possible interpretations of that case: first, that *Jackson* is inconclusive on the validity of the manner and form theory in English law; second, that a majority of the Law Lords accepted the specific manner and form condition created by the 1911-1949 Acts; third, that their acceptance of this manner and form condition entailed an implied general acceptance of the manner and form theory in English law.

At issue in *Jackson* was the validity of the Hunting Act 2004 which was adopted pursuant to the Parliament Act 1911 as amended by the Parliament Act 1949. Section 2(1) of the 1911 Act provided that, after a delay period, a public bill (except a money bill, which is subject to a slightly different rule set out in s. 1 for its adoption without the Lords' consent, or a bill extending the duration of Parliament beyond five years) would become an Act of Parliament notwithstanding its rejection by the Lords. The 1949 Act – the purpose of which was to reduce the delay period – was subsequently adopted using the procedure set out in the 1911 Act. In *Jackson*, the claimants' position was that the 2004 Act was invalid since the 1949 Act could not have relied on the procedure of the 1911 Act to amend the 1911 Act itself.

Before examining the House of Lords judgments, it is worth mentioning the Court of Appeal's view on the manner and form theory as it carried some appreciable weight on their Lordships' discussion. At Court of Appeal level, the claimants unsuccessfully argued that the Queen in the House of Commons formed a subordinate legislature barred from amending the conditions granting it its powers in the absence of express authorisation. Lord Woolf C.J. (Lord Phillips M.R. and May L.J. concurring) held that:

“A sovereign legislature, uncontrolled by antecedent written constitutional instrument, may alter its own legislative powers and procedures by legislation duly enacted in accordance with its embedded procedures. ... Thereafter, further constitutional alterations may be validly enacted under and by means of the altered powers and procedures. Such alterations may include alterations to the powers and procedures prescribed by the first legislation. This is, however, all subject to the proviso that the making of these subsequent alterations is within the power afforded by the first legislation properly understood, and provided that they are duly enacted in accordance with its procedures.”<sup>55</sup>

This statement makes the Court of Appeal judgment the first time that an English appellate court has recognized the validity of the manner and form theory in English law.

One interpretation of the House of Lords judgments is that *Jackson* is not an authority for the acceptance of manner and form conditions in English law. According to this view, the judges' opinions on the issue were purely *obiter*, and there was no explicit consensus among them (some even suggested that Lord Bingham, Lord Carswell and Lord Brown were unreceptive to the manner and form theory).<sup>56</sup> Unfortunately, the commentators supporting this view provided few explanations for their position, as their analysis was limited to a brief statement of their understanding of the judges' discussion in connection with the manner and form theory.

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<sup>55</sup> *R. (Jackson) v AG* [2005] EWCA Civ 126; [2005] Q.B. 579 CA, [67] (*Jackson (CA)*).

<sup>56</sup> See for instance Allison, fn.49, p.109; T. Mullen, “Reflections on *Jackson v Attorney General*: Questioning Sovereignty” (2007) 27 L.S. 1, 11.

Only Lord Steyn and Baroness Hale directly expressed an opinion in favour of the manner and form theory in English law. For Lord Steyn, Parliament could “functionally redistribute legislative power in different ways”, for instance by requiring a two-thirds majority in both Houses for specific matters.<sup>57</sup> Citing with approval the Commonwealth cases, he held that the 1911 Act authoritatively restated the manner and form in which certain laws could be made.<sup>58</sup> Baroness Hale also relied on the Commonwealth cases to opine that:

“[I]f Parliament is required to pass legislation on particular matters in a particular way, then Parliament is not permitted to ignore those requirements when passing legislation on those matters”.<sup>59</sup>

One can challenge the first interpretation of *Jackson* on the ground that a close reading of the Law Lords’ judgments considered to be unreceptive to the manner and form theory may not necessarily support such an interpretation; on the contrary, the necessary implications of the House of Lords’ conclusion with respect to the 1911-1949 Acts suggest a different interpretation.

In examining the House of Lords judgments, one certainly senses the tension between the traditional view of Parliamentary sovereignty and the application of the 1911-1949 Acts. Some of the Law Lords – in particular Lord Bingham, Lord Hope and Lord Carswell – appeared to adhere to the traditional view and thus implicitly reject the manner and form theory. For these Law Lords, Parliamentary supremacy remained a pillar or the bedrock of the British Constitution, legally unconstrained by any attempt to entrench or codify the constitution; any Parliament could make or repeal any law it wished as its statutes enjoyed the highest legal authority.<sup>60</sup> As Baroness Hale and Lord Carswell underlined, this authority obviously included that of enacting even fundamental constitutional changes and interferences with fundamental rights.<sup>61</sup> To a lesser extent, even Lord Steyn mentioned that the supremacy of Parliament remained the general principle of the UK constitution.<sup>62</sup> However, these statements conveyed only a partial account of the judges’ reasoning concerning Parliamentary sovereignty.

The nub of Lord Bingham’s reasoning lay in his distinction between the principle stated in *Pickin* that courts “have no power to declare enacted law to be invalid” and the question (within the courts’ jurisdiction) whether the impugned Act was actually “enacted law”.<sup>63</sup> This question is also the object of the inquiry pursued by the proponents of the manner and form theory who seek to define how we identify an Act of Parliament, which implies an answer to the preliminary question of how we define the composition of Parliament. Lord Bingham conceived that the answer to his question could not always be dictated by the traditional view, as he stated that the 1911 Act created a new way of enacting primary legislation.<sup>64</sup> He then opined that the Court of Appeal distilled from the Commonwealth cases the correct principle applicable in English law, namely that whether a legislature is empowered to enact alterations to the rules governing its lawmaking powers is a question of statutory interpretation.<sup>65</sup>

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<sup>57</sup> *Jackson*, fn.3, [81].

<sup>58</sup> *Ibid*, [75], [94].

<sup>59</sup> *Ibid*, [163].

<sup>60</sup> *Ibid*, [9], [113], [168], [177].

<sup>61</sup> *Ibid*, [159], [176].

<sup>62</sup> *Ibid*, [102].

<sup>63</sup> *Ibid*, [27].

<sup>64</sup> *Ibid*, [24], [64].

<sup>65</sup> *Ibid*, [35], [36]; also [51] (Lord Nicholls), [110] (Lord Hope), [169] (Lord Carswell).

Lord Carswell's general comments on Parliamentary sovereignty were consistent with the traditional view, which appears to be further supported by his acceptance of Lord Reid's statement in *Madzimbamuto* that courts cannot hold any Act of Parliament invalid.<sup>66</sup> However, this reference must be read in the context of Lord Carswell's discussion of the Court of Appeal's distinction between changes of a fundamental nature and changes of a less fundamental nature for the purpose of determining which laws could be passed following the procedure set out in the 1911-1949 Acts. Thus, he relied on *Madzimbamuto* specifically in the context of his discussion about this specific distinction,<sup>67</sup> not as a disapproval of the manner and form theory. Indeed a few paragraphs earlier, Lord Carswell, like Lord Bingham, approved the Court of Appeal's interpretation of the Commonwealth cases and its comment cited above.<sup>68</sup>

Perhaps the only differing opinion came from Lord Hope, who did not adopt the other Law Lords' characterisation of Parliament having redefined itself or its lawmaking process. Instead, he returned to the traditional formula that Parliament cannot bind its successors and then added that there were "no means whereby [Parliament] can entrench an Act of Parliament" even though he admitted that, in reality, the 1911 Act might have just done that in the sense that the effect of the 1911 Act was that Parliament "enact[ed] something which a subsequent statute dealing with the same subject matter cannot repeal."<sup>69</sup>

With *Jackson*, the courts were given the opportunity to pronounce on the legal effectiveness of the procedure introduced by the 1911 Act. As a result, a majority of Law Lords expressly referred to the 1911 Act either as Parliament having successfully "reconstituted", "redefined" or "redesigned" itself for the particular purpose of enacting a money bill or a public bill,<sup>70</sup> or as a new method of passing legislation.<sup>71</sup> Four Law Lords and the Court of Appeal expressly considered the Commonwealth cases as persuasive.<sup>72</sup> In the end, of the 14 judges from the High Court up to the House of Lords who heard the case, all of them accepted that, because of the 1911-1949 Acts, laws must now be passed in the ordinary manner or by following the 1911-1949 Acts in order to be recognized as such. Failure by Parliament to do so would entail the court's refusal to recognize the defective document to be an Act of Parliament.

In light of my analysis of the manner and form theory, it is submitted that the necessary implications of the House of Lords' ruling in *Jackson* can be encapsulated in the following propositions: 1) Parliament may enact a legislative rule requiring a formal condition to be met before an Act of Parliament can be passed, namely a manner and form condition; 2) The 1911-1949 Acts provided a new method for passing legislation, namely the approval from a majority of MPs along with Royal Assent; 3) the method set out in the 1911-1949 Acts is a new manner and form condition; 4) in *Jackson*, the House of Lords recognized the validity of the 1949 Act which was enacted pursuant to the method set out in the 1911 Act; 5) therefore,

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<sup>66</sup> See *ibid*, [177] citing *Madzimbamuto v Lardner-Burke* [1969] 1 A.C. 645 PC, 723.

<sup>67</sup> See *ibid*, [176]-[178]. See also my explanation at fn.110, that *Madzimbamuto* is not concerned with the issue of manner and form conditions.

<sup>68</sup> *Ibid*, [174].

<sup>69</sup> *Ibid*, [113].

<sup>70</sup> *Ibid*, [81]-[86] (Lord Steyn), [160]-[163] (Baroness Hale).

<sup>71</sup> *Ibid*, [24], [35]-[36] (Lord Bingham), [64] (Lord Nicholls), [75], [94] (Lord Steyn), [174] (Lord Carswell), [187] (Lord Brown).

<sup>72</sup> *Ibid*, [35]-[36] (Lord Bingham), [81]-[85] (Lord Steyn), [162]-[164] (Baroness Hale), [174] (Lord Carswell); *Jackson (CA)*, fn.55, [67]-[69].

the House of Lords implicitly accepted Parliament's powers to enact such a manner and form condition. If these propositions are correct, then the House of Lords implicitly accepted the manner and form theory in English law, the extent of which will be examined under the second and third interpretations of *Jackson*.

Under a second interpretation of *Jackson*, only “downwards” manner and form conditions can bind Parliament. A manner and form condition would be downwards when the process of passing laws has been made easier to accomplish whereas an “upwards” manner and form condition would be synonymous with entrenchment. This second interpretation, supported by some commentators,<sup>73</sup> would be inferred from the House of Lords' recognition of the 1949 Act as an Act of Parliament, thus confirming the legal effectiveness of the procedure set out in the 1911 Act: if the 1911 Act could be interpreted as removing the need to obtain the Lords' consent for passing legislation, then this new legislative process would be considered as a “downwards” manner and form condition since it would be easier to comply with. Finally, one could adopt a third interpretation of *Jackson*, which is that it has implicitly recognized the general authority of the manner and form theory in English law. Under this interpretation, the House of Lords' recognition of the 1911-1949 Acts as a legally effective method to enact legislation would presuppose its general acceptance of the manner and form theory. The House of Lords provided little guidance as to whether they would have favoured the second or third proposed interpretation, but the latter may be preferred for the following reasons.

Attempts at making multiple distinctions between various manner and form conditions generally tend to cloud the essence of the manner and form theory rather than contribute to a clearer understanding of it. The uncertainties resulting from the distinction between composition and procedure<sup>74</sup> is an illustration of this potential confusion. Likewise, the upwards/downwards distinction may serve as a helpful device to better understand the practical operation of various types of manner and form conditions but invoking them to justify a differential legal treatment becomes an arbitrary task which also seems to run against logic: if Parliament could only redefine itself or its lawmaking process downwards like it did in the 1911-1949 Acts, then no future Parliament could ever repeal these Acts since doing so would make the lawmaking process more difficult.<sup>75</sup> Returning to the original expositions of the manner and form theory, its nature and effectiveness were governed not by such a classificatory scheme but rather through the unique chief distinction between form and substance.<sup>76</sup> If *Jackson* interpreted the 1911-1949 Acts as a downwards manner and form condition, then logically upwards manner and form conditions should have been accepted as well.

So far only the case law has been considered. One may ask whether case law alone provides a complete understanding of Parliamentary sovereignty. After all, the manner and form theory is about the legal effectiveness of a technique that a *legislature* may use to render its statutes less vulnerable to future alteration. Intuitively, one would think that Parliament

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<sup>73</sup> See for instance A. Chander, “Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights” (1991) 101 Yale L.J. 457, 466-67; Mullen, “Reflections on *Jackson v Attorney General*: Questioning Sovereignty”, fn.56, 11.

<sup>74</sup> See fn.19, above.

<sup>75</sup> See *Jackson*, fn.3, [163] (Baroness Hale); E.M. Barendt, *An Introduction to Constitutional Law* (Oxford: OUP, 1998), p.92; de Smith and Brazier, fn.19, p.96; M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart, 2001), p.231; Mitchell, “Sovereignty of Parliament - Yet Again”, fn.44, 212.

<sup>76</sup> See III. The Nature and Extent of the Manner and Form Theory, above.



would also have some influence in the determination of the extent of its own legislative powers. I now turn to examine that influence.

## VI. Parliament's Position

This part examines the views or attitudes of Parliament and senior officials of the legislative branch vis-à-vis the manner and form theory. At the outset, I will explain the relevance of inquiring about Parliament's views or attitudes by referring to the Hartian rule of recognition. It follows that a change in the content of Parliamentary sovereignty occurs when the relevant senior officials in the legal system, mainly from the judiciary *and Parliament*, accept such a change.<sup>77</sup> If it can be determined that Parliament has accepted the manner and form theory and if that acceptance coincides with the judicial position (as inferred from *Jackson* and, to a lesser extent, from the Commonwealth cases decided by the Judicial Committee of the Privy Council), then it would follow that the manner and form theory would be part of the rule of recognition in England.

### (a) The Relevance of Parliament's Position

When examining the characteristics of the rule of recognition, it seems that the traditional view may not be as solidly anchored in English law as Sir William Wade has suggested. Indeed, H.L.A. Hart does acknowledge that the traditional view is only one among other theoretically conceivable conceptions of Parliamentary sovereignty under English law: "no necessity of logic, still less of nature," dictates that Parliament is sovereign in the sense established by the traditional view.<sup>78</sup> Under the formula that Parliament cannot bind its successors, Hart observes that the rule of recognition can in theory be consistent with the acceptance of manner and form conditions.<sup>79</sup> Even Wade concedes that the manner and form theory could be "a perfectly possible state of affairs" (although he quickly dismisses it since it would amount to a revolution).<sup>80</sup> How the manner and form theory would become part of English law can be explained through the notion of the rule of recognition, which also helps reveal the role of Parliament (and of the legal officials of the legislative branch) in the determination of the content of Parliamentary sovereignty.

In *The Concept of Law*, Hart repeatedly emphasizes that the rule of recognition depends upon common acceptance by the legal officials.<sup>81</sup> In a later essay, he stated that the existence of the rule of recognition:

"is manifested in the acknowledgement and use of the same set of criteria of legal validity by the law-making, law-applying, and law-enforcing officials and in the general conformity to law so identified."<sup>82</sup>

From Hart's works, Goldsworthy developed a theory of Parliamentary sovereignty pursuant to which a necessary condition for the existence of Parliament's authority "is a consensus

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<sup>77</sup> J.D. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: OUP, 1999), Ch.10; A.L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009), Chs 1 and 3. See also Hart, fn.20, pp.115-16.

<sup>78</sup> Hart, fn.20, p.149.

<sup>79</sup> *Ibid*, p.150.

<sup>80</sup> Wade, "The Basis of Legal Sovereignty", fn.1, 185, 190. See also J.W. Salmond, *Jurisprudence*, 7th edn (London: Sweet & Maxwell, 1924), p.530.

<sup>81</sup> See Hart, fn.20, pp.110, 115-16.

<sup>82</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: OUP, 1983), p.359.

among the most senior officials of the legal system, in all three branches of government.”<sup>83</sup> Goldsworthy’s idea of consensus has been relatively popular in the literature.<sup>84</sup> For Goldsworthy, the consensus requirement follows from the proper identification of the source of Parliamentary sovereignty. That source could not be statute because Parliament could not have conferred sovereign power on itself:

“Any Parliament that enacted a statute purporting to confer sovereign power on itself would be begging the question, since the validity of that statute would depend on the very power it purported to confer.”<sup>85</sup>

Correspondingly, the source cannot be the common law for a similar reason: judges cannot have conferred power on themselves unless one believes that the source of the judges’ powers is the judges themselves. The conundrum is resolved if Parliamentary sovereignty is grounded “in a kind of law that was not made either by Parliament or by the judges.”<sup>86</sup> On the basis of his extensive examination of the historical development of Parliamentary sovereignty, Goldsworthy suggests that it can be better described as *sui generis* common law, that is, not in the sense of judge-made law but of customary law gradually discovered by judges. Consequently, because neither judges nor Parliament alone created Parliamentary sovereignty, neither of them may unilaterally change it. Any branch of the government including the judiciary may attempt to initiate a change to the official consensus, but that change will be successful only if a new official consensus is reached.

Alison Young observes that, on an alternative interpretation of Hart’s account of the relationship between the rule of recognition and the manner and form theory, the latter could simply be an uncertainty lying at the periphery of the rule of recognition, which could be authoritatively settled by the courts alone.<sup>87</sup> However, on the role of the legislative branch, Young appears to agree with Goldsworthy when she writes that:

“A change in the rule of recognition requires acceptance by officials representing different types of officials within the system—ie the legislature, the judiciary and those that police or administer the law. Although courts are in the position to make an authoritative legal declaration as to the content of the rule of recognition, the legal decision only succeeds in changing the rule of recognition if it is accepted.”<sup>88</sup>

Similarly, Peter Oliver opines that:

“[T]he law regarding Parliamentary sovereignty is worked out between Parliament itself and the courts. [W]hatever officials or academics might say, the issue of Parliament’s self-embracing powers remained open until Parliament enacted

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<sup>83</sup> Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, fn.77, p.5-6, 236, 240, 245-46; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, fn.5, Pts 2.III and 5.III.

<sup>84</sup> See for instance J. Allan, “The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?” (2007) 18 K.C.L.J. 1, 18; T.H. Bingham, *The Rule of Law* (London: Allen Lane, 2010), pp.162-67; C.R. Munro, *Studies in Constitutional Law*, 2nd edn (Oxford: OUP, 2005), p.171; P.C. Oliver, “Abdicating and Limiting Parliament’s Sovereignty—Reply to Goldsworthy” (2006) 17 K.C.L.J. 281, 282-84.

<sup>85</sup> Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, fn.77, p.238.

<sup>86</sup> Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, fn.5, p.51. Also Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, fn.77, p.243.

<sup>87</sup> Young, fn.77, pp.87-88 citing Hart, *The Concept of Law*, fn.20, pp.146-48.

<sup>88</sup> See Young, fn.77, p.90.

independence legislation, and until courts... were called upon to judge its legal effectiveness.”<sup>89</sup>

At times, Goldsworthy has also suggested that a new agreement between Parliament and the courts was sufficient to operate a change in the rule of recognition.<sup>90</sup> In the end, official consensus seems to be a somewhat flexible requirement which focuses mainly on Parliament and the courts. Thus, it follows from these authors’ discussion of the rule of recognition that a more complete understanding of the content of Parliamentary sovereignty requires inquiring about Parliament’s position as such an inquiry will help determine whether the manner and form theory is part of the rule of recognition. My argument concerning the relevance of Parliament’s position (or views or attitudes) adopts this Hartian analysis.

Thus, in the next stage of my analysis, I will examine Parliament’s views or attitudes vis-à-vis the manner and form theory. Since Parliament’s principal means of action is through legislation, the search for potential manner and form legislation will be directed to the statute books and to subsequent Parliamentary attitudes under such legislation. It is submitted that the best potential manner and form condition is the rule first set out in s. 4 of the Statute of Westminster 1931. I will examine the meaning of s. 4 and subsequent Parliamentary attitudes in connection with this provision in order to assess whether Parliament has eventually considered it to be a manner and form condition. After having established Parliament’s position, we can then determine whether there can be a common acceptance along with the judiciary of manner and form conditions.

#### (b) Searching for Manner and Form Conditions in the Statute Books

At the outset, one struggles with the difficulty of finding manner and form conditions in the UK statute books. However, there are still a few legislative examples where Parliament appears to subject the enactment of its legislation to special conditions.

Following my discussion of *Jackson*, one example would be the 1911-1949 Acts. Evidently, its characterisation as a manner and form condition has been challenged and my previous discussion was intended to answer that challenge from both theoretical and legal perspectives. Opponents of the manner and form theory could again raise the point (which I have considered to be theoretically unsound and legally irrelevant) that, if the 1911-1949 Acts are to be considered as manner and form legislation, they have still imposed a downwards manner and form condition, and one would have trouble finding in the statute books any attempt by Parliament to entrench its legislation against its own amending powers.<sup>91</sup> Nevertheless, there is one statute which stands out for the clarity of its language in

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<sup>89</sup> Oliver, “Abdicating and Limiting Parliament’s Sovereignty-Reply to Goldsworthy”, fn.84, 288-89.

<sup>90</sup> See for instance Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, fn.77, pp.244-45.

<sup>91</sup> Some statutes could be interpreted as containing an *implied* manner and form condition. For instance, it has been suggested that s. 2 of the European Communities Act 1972 would operate to give precedence to Community law through a mechanism akin to a manner and form condition. Thus, if Parliament wanted to override the 1972 Act, it would have to enact a law expressly stating its intention to contravene Community law (see *Macarthy Ltd v Smith* [1979] 3 All E.R. 325 CA, 329 (Lord Denning, diss.); *Thoburn v Sunderland CC* [2002] EWHC 195; [2002] 23 Q.B. 151 QB, 185-87; Allison, fn.49, pp.107-10; P. Craig, “Sovereignty of the United Kingdom Parliament after *Factortame*” (1991) 11 Y.E.L. 221, 252-53; C. Forsyth and M. Elliott, “The Legitimacy of Judicial Review” [2003] P.L. 286, 297; Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, fn.77, pp.244-45; Wade, “Sovereignty – Revolution or Evolution?”, fn.7, 570-71; Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined”, fn.19, 607, 614-15; Young, fn.77, pp.88-90. In *Thoburn*, Laws L.J. (Crane J. agreeing) extended such a view to all “constitutional statutes”, citing as

attempting to restrict Parliament's legislative powers and the large number of opinions expressed by legal officials and constitutional scholars. In the remaining part of this article, I will argue that the rule expressed in s. 4 of the Statute is best interpreted as a manner and form condition and that Parliament's subsequent behaviour has been in accordance with this interpretation.

Section 4 states as follows:

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

This section has been described as the most complex issue related to legal self-limitation.<sup>92</sup> It is the most complex in large part because its simple and clear language offers a very serious legislative challenge to the traditional view. Section 4 of the Statute essentially embodies a constitutional convention already expressed in the preamble to the Statute.<sup>93</sup> This provision has been subject to two competing interpretations. A number of commentators have favoured an interpretation faithful to the traditional view: since Parliament is incapable of subjecting its lawmaking powers to any conditions whatsoever – including with respect to the Dominions, the only way to read s. 4 was as a rule of statutory construction.<sup>94</sup> Thus, Parliament could always pass an Act extending to a Dominion provided its intention was sufficiently clear. Section 4 could also be interpreted as a manner and form condition: an Act of Parliament shall not extend to a Dominion unless it contains the specified declaration required by s. 4.<sup>95</sup> Which of these two competing interpretations best fits the meaning of s. 4 is the focus of the next section.

### (c) The Meaning of Section 4 of the Statute of Westminster 1931

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examples the Magna Carta, the Bill of Rights 1689 and the Human Rights Act 1998. More recently, Parliament passed the European Union Act 2011, a legislative scheme regulating the UK ratification of EU treaty provisions or transfers of powers from the UK to the EU. Under this scheme, such a ratification or transfer of powers must be approved by a national referendum. Most early opinions regarding this referendum condition tend to consider it as a purported manner and form condition (see N. Bamforth, “Current Issues in United Kingdom Constitutionalism: An Introduction” (2011) 9 *ICON* 79, 85; European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, HC Paper No.633-II (Session 2010-11) Ev 19-20 (P. Craig), Ev 26 (T.R.S. Allan), 69-70 (A. Bradley); Gordon and Dougan, “The United Kingdom’s European Union Act 2011”, fn.5; *Hansard* HL vol 736 cols 672, 697, 711-12, 720 (March 22, 2011). But see European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, HC Paper No.633-I (Session 2010-11) [90]).

<sup>92</sup> See H.V. Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (London: OUP, 1936), p.273; J.D.B. Mitchell, *Constitutional Law*, 2nd edn (Edinburgh: W. Green & Son Ltd, 1968), p.78.

<sup>93</sup> The third paragraph of the preamble states as follows: “And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion”.

<sup>94</sup> See for instance F.A.R. Bennion, “Copyright and the Statute of Westminster” (1961) 24 *M.L.R.* 355; A.B. Keith, *The Dominions as Sovereign States: Their Constitutions and Governments* (London: Macmillan, 1938), pp.87-89, 167-68; K.C. Wheare, *The Statute of Westminster and Dominion Status*, 5th edn (London: OUP, 1953), pp.148, 151-54, 192; Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined”, fn.19, 603.

<sup>95</sup> See for instance O. Dixon, “The Law and the Constitution” (1935) 51 *L.Q.R.* 590, 611; Evatt, fn.92, Ch.XXIX; *Hansard* HC vol 259 col 1216 (November 20, 1931); Jennings, *The Law and the Constitution*, fn.44, p.163; Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined”, fn.19, 603.

In seeking the best interpretation of s. 4 of the Statute, the principles of statutory construction provide several valuable aides. In this respect, I will proceed to further explore the meaning of s. 4 based on its legislative history, its language, its internal coherence with the rest of the Statute as well as its external coherence with other Imperial laws.

The reports of the Imperial Conferences 1926-1930 provide a useful portrait of the political situation at the time, which can help us better understand the purpose of the Statute and of s. 4 in particular. Indeed, the Conferences' special relationship with the Statute is evidenced by its long title ("An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930") and its preamble stating that:

"[I]t is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the [Imperial Conferences 1926-1930] that a law be made and enacted in due form by authority of the Parliament of the United Kingdom".

Moreover, s. 4 of the Statute reproduces *verbatim* one of the recommendations of the Report of the Conferences.<sup>96</sup>

At these Conferences, the parties recognized that the evolution of the British Dominions had reached a stage whereby they could no longer be considered as being subordinate to Great Britain. Across the Commonwealth, the traditional view had become inadequate to represent the reality of the relationship between Great Britain and the Dominions.<sup>97</sup> One pervasive theme was the need to formally recognize the principle of equality in status between Great Britain and the Dominions.<sup>98</sup> It was considered that the best method of giving effect to this recognition was for the Imperial Parliament to pass a law which would reconcile the political position of inter-imperial equality with the legal theory of Parliamentary sovereignty.<sup>99</sup> In doing so, it was acknowledged that the principle of the legislative supremacy of the Imperial Parliament over the Dominions was "no longer constitutionally appropriate".<sup>100</sup>

Moving on to the language of s. 4, its plain meaning seems to be that no Act of the Imperial Parliament can effectively apply to a Dominion if the Imperial legislators omit to insert in the Act a declaration that the Dominion has requested and consented to that Act ("*No Act of Parliament... shall extend... to a Dominion*"). On its face, the wording does not exactly indicate a legislative intention to create a rule of statutory construction. Even Sir William Wade concedes that s. 4 "is an attempt to control the form of later legislation – to

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<sup>96</sup> See Secretary of State for Dominion Affairs, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929* (The Stationery Office, 1929), Cm.3479, [55].

<sup>97</sup> See *Blackburn v AG* [1971] 1 W.L.R. 1037 CA; *Ndlwana*, fn.44, 237; Hart, *The Concept of Law*, fn.20, p.152; Jennings, *The Law and the Constitution*, fn.44, p.167.

<sup>98</sup> *Imperial Conference, 1926. Summary of Proceedings* (The Stationery Office, 1926), Cm.2768. See also O. Dixon, "The Statute of Westminster 1931" (1936) 10 A.L.J. 96 (suppl) 98; *Hansard HC* vol 259 col 1173 (November 20, 1931).

<sup>99</sup> See Secretary of State for Dominion Affairs, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929*, fn.96, [7], [49], [56]. See also *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 831-32, 835; Mitchell, *Constitutional Law*, fn.92, p.79; Wheare, fn.94, pp.142, 147.

<sup>100</sup> Secretary of State for Dominion Affairs, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929*, fn.96, [49]; *Hansard HC* vol 259 col 1199 (November 20, 1931).

limit its legal effect unless it contains a certain form of words”<sup>101</sup> although he opines that such an attempt was legally ineffective given the traditional view. If we were strictly concerned with the terms of s. 4, they suggest that s. 4 would operate as a formal control upon Parliament’s lawmaking powers by requiring the specified declaration of request and consent.

Looking at other provisions of the Statute and evaluating their coherence with the competing interpretations of s. 4 can further help determine the meaning of s. 4. Section 2(2) of the Statute states as follows:

“No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom... and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.”

This rule empowers the Parliament of a Dominion to enact legislation contrary to Imperial law. When considered in conjunction with s. 4, the view that s. 4 is a rule of statutory construction would imply that, in enacting the Statute, the Imperial Parliament would have established a legislative scheme which could theoretically allow perpetual cycles of conflicts where the Imperial Parliament would remain free to legislate in contravention of s. 4 but the Dominion Parliament could immediately repeal that Imperial Act. While in reality such a conflict would have been unlikely to materialize, nonetheless, one could have reasonably thought that the Imperial legislators would not have allowed a situation where two legislative bodies would have the exact same legislative power on the exact same subject matter. By contrast, if s. 4 is interpreted as a manner and form condition, then it includes a mechanism preventing such a conflict as every eventual Imperial Act intended to extend to a Dominion would have necessarily obtained beforehand that Dominion’s consent.

Any interpretation of s. 4 should also be considered with other Imperial legislation in order to further assess its coherence. Prior to 1931, the operation of Imperial legislation in the Dominions was governed by the Colonial Laws Validity Act 1865. Section 1(5) of the 1865 Act is a rule of statutory construction pursuant to which:

“an Act of Parliament shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament”.

With s. 2(1) of the Statute having repealed the 1865 Act with respect to the relevant Dominions,<sup>102</sup> s. 4 of the Statute became the new provision governing the operation of Imperial legislation in the Dominions. If s. 4 is merely a rule of statutory construction, then it would not have accomplished much more than what s. 1(5) of the 1865 Act had already accomplished under the colonial regime.<sup>103</sup> In other words, a later Imperial Act which did not recite the s. 4 declaration would nevertheless be made applicable to a Dominion if the Act expressly stated that it shall apply to that Dominion or such intention was implied by

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<sup>101</sup> Wade, “The Basis of Legal Sovereignty”, fn.1, 177.

<sup>102</sup> Section 2(1) of the Statute states as follows: “The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.”

<sup>103</sup> W.N. Harrison, “The Statute of Westminster and Dominion Sovereignty. Part II” (1944) 17 A.L.J. 314, 315.

necessary intendment; in such a case, the later Imperial Act would amount to an implied repeal *pro tanto* of s. 4.

Consideration should also be given to subsequent self-government and independence Acts enacted by the Imperial Parliament following the Second World War, which some of them consisted in the reproduction of the Statute of Westminster. In particular, s. 4 was integrally reproduced in the Sri Lanka Independence Act 1947, the Ghana Independence Act 1957 and the West Indies Act 1967. The purpose of the 1947 Act was examined in *Ibralebbe* where the Judicial Committee held that the Act's main purpose was to ensure that the new Ceylonese Parliament "was not to be in any sense a subordinate legislature. It was to have the full legislative powers of a sovereign independent state."<sup>104</sup> Section 4 was part of the legal scheme devised to achieve this purpose and to grant independence to these new nations. If s. 4 is a rule of statutory construction, then its corresponding provision in the self-government and independence Acts which reproduced s. 4 almost *verbatim* should logically be interpreted as a rule of statutory construction, but that interpretation would maintain the Imperial Parliament's legislative supremacy to a degree contrary to the nature and purpose of these Acts.

The foregoing analysis of the rule expressed in s. 4 of the Statute suggests that it is better interpreted as a manner and form condition rather than as a rule of statutory construction. However, Parliament's intent or one's interpretation of the meaning of a legislative provision provides only a partial picture of Parliament's views or attitudes. The other part can be found by examining whether Parliament's subsequent behaviour under s. 4 is compatible with its interpretation as a manner and form condition.<sup>105</sup>

#### (d) Imperial Parliamentary Attitudes to Section 4 of the Statute

Before examining Parliamentary attitudes to s. 4 of the Statute, it is necessary to address two preliminary issues aimed at clarifying the ambit of the inquiry to be undertaken. First, one must distinguish the rule expressed in s. 4 from the corresponding convention embodied in that provision. Otherwise, it could be argued that, whenever the request and consent recital is contained in an Imperial statute, the Imperial Parliament was just following the convention rather than complying with a legal obligation. Second, I will examine how the existence of Parliamentary attitudes in accord with the interpretation of s. 4 as a manner and form condition may be established.

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<sup>104</sup> *Ibralebbe*, fn.44, 922.

<sup>105</sup> This examination is akin to the Court of Appeal's and the House of Lords' analyses in *Jackson* of subsequent Parliamentary behaviour in order to further support their interpretation of the 1911-1949 Acts. The Court of Appeal identified three statutes in addition to the Hunting Act 2004 where the procedure of the 1911-1949 Acts was used. From the amendments to two of those statutes in the ordinary manner and the successful prosecutions brought under the third statute, the Court inferred a general recognition by "[both Houses of] Parliament, the Queen, the courts and the populace" that the 1949 Act and the legislation enacted pursuant to it are Acts of Parliament (*Jackson (CA)*, fn.55, [93]-[97]). At House of Lords level, a plurality of judges similarly considered that Parliament's behaviour since 1949, including its enactment of the three statutes identified by the Court of Appeal along with the 2004 Act, was evidence that the 1911-1949 Acts validly provided for a new way to enact primary legislation (*Jackson*, fn.3, [36] (Lord Bingham), [67]-[69] (Lord Nicholls), [124], [128] (Lord Hope), [171] (Lord Carswell)). Only Lord Steyn did not regard post-1911 legal developments as evidencing the recognition mentioned by the Court of Appeal and endorsed by a plurality of Law Lords. However, he still accepted the proposition that political events could lead to the creation of a new *grundnorm* (*ibid*, [99]).

Strictly speaking, the rule enacted by s. 4 has a “textual” component, the specified request and consent declaration, and another component implied from that declaration, which is the actual receipt by the Imperial Parliament of the Dominion’s request and consent. Although closely interrelated, these two components are distinct, which allows us to identify when Parliament is complying with s. 4 rather than just following the convention. This interpretation of s. 4 has been clearly endorsed by the Court of Appeal in *Manuel*:

“Section 4 itself does *not* provide that no Act of the United Kingdom Parliament shall extend to a Dominion as part of the law of that Dominion unless the Dominion has *in fact* requested and consented to the enactment thereof. The condition that must be satisfied is a quite different one, namely, that it must be ‘expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.’ Though Mr Macdonald, as we have said, submitted that section 4 requires not only a declaration but a true declaration of a real request and consent, we are unable to read the section in that way. There is no ambiguity in the relevant words... If an Act of Parliament contains an express declaration in the precise form required by section 4, such declaration is in our opinion conclusive so far as section 4 is concerned.”<sup>106</sup>

Thus, the request and/or consent by a foreign body<sup>107</sup> and the requirement of an express declaration<sup>108</sup> are different manner and form conditions. Strictly speaking, complying with s. 4 does not necessarily require complying with the convention but only requires an express legislative declaration that that convention has been complied with.

Having identified the exact object of my inquiry of Parliamentary attitudes, one must then determine whether subsequent Parliamentary attitudes suggest that Parliament viewed s. 4 as a manner and form condition or as a rule of statutory construction. Since Parliament expresses its will through legislation, the best evidence should be found in the statute books. Two types of evidence can support the claim that Parliament would have regarded s. 4 as a manner and form condition: evidence that it has consistently complied with that provision and evidence that Parliament believed that an Act failing to comply with it would not be extended to a Dominion.

Where the Imperial Parliament did legislate for the Dominions covered by the Statute, the relevant Acts recited the s. 4 declaration. These examples include the abdication of King Edward VIII (His Majesty’s Declaration of Abdication Act 1936), the conferral to a Dominion of full powers to amend its Constitution (New Zealand Constitution (Amendment) Act 1947), the transfer of sovereignty over a colony to a Dominion (Cocos Islands Act 1955, Christmas Island Act 1958), and the termination of Imperial legislative authority over a former Dominion (Australia Act 1986). One can also find instances where the s. 4 declaration was not legally required but the Imperial Parliament still recited it or an equivalent formula (see the Constitution Acts 1940-1982 of Canada). In 1959, Sir Ivor Jennings stated that s. 4 has been “strictly followed” in all the “[Imperial] Acts applying to the Dominions as have been enacted since 1931”.<sup>109</sup> Since then, no reported instances of an Imperial Act extending to, or enforced against, a Dominion without the s. 4 recital has been found.

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<sup>106</sup> *Manuel v A-G* [1983] Ch. 77 CA, 106.

<sup>107</sup> See Goldsworthy, “Trethowan’s Case”, fn.19, pp.115-21; Hart, *The Concept of Law*, fn.20, p.151; Winterton, “The British Grundnorm: Parliamentary Supremacy Re-Examined”, fn.19, 614-15.

<sup>108</sup> See Elliott, fn.75, p.52; Young, fn.77, p.33.

<sup>109</sup> Jennings, *The Law and the Constitution*, fn.44, p.163.



Evidence that Parliament believed that s. 4 would bar the application of an Act of Parliament against a Dominion where that Act did not recite the s. 4 declaration is more difficult to find. Perhaps because the request and consent convention was so widely accepted throughout the Commonwealth, its transition from a convention to a statutory rule did not entail real changes in constitutional practice. As a result, there may be only indirect legislative evidence suggesting that Parliament believed that s. 4 was a manner and form condition and not a rule of statutory construction.

Where the request and consent principle remained no more than a convention, the Imperial Parliament has sometimes ignored it. Indeed, in the turmoil surrounding Southern Rhodesia's struggle for independence, the Imperial Parliament responded to the Southern Rhodesian government's unilateral Declaration of Independence with the Southern Rhodesia Act 1965 which reasserted Her Majesty's authority over Southern Rhodesia and allowed Her Majesty to pass an Order in Council voiding the actions taken by the Southern Rhodesian government. Delivering the majority judgment of the Judicial Committee, Lord Reid acknowledged the existence of the request and consent convention but still upheld the 1965 Act.<sup>110</sup>

Moreover, there were no statements in the Parliamentary debates on bills containing a s. 4 request and consent requirement which could suggest that this requirement would be a rule of statutory construction. On the contrary, there are statements suggesting that an Imperial Act which does not contain the s. 4 recital could not extend to a Dominion. For instance, AG Sir Donald Somervell (later a Law Lord) seemed inclined to consider s. 4 as a manner and form condition. Speaking about His Majesty's Declaration of Abdication Bill, he said that:

“Canada, which is one of the Dominions to which Section 4 applies and which has not modified the law as it appears in the Statute, appears here as ‘requesting and consenting’ because those are the words which under Section 4 of the Statute of Westminster had to be expressly declared if our Act is to extend to that Dominion. Australia and New Zealand have not adopted the Statute of Westminster, and therefore, as a matter of strict law—I am not now speaking of the constitutional usage and conventions referred to in the Preamble of the Statute of Westminster—the Act of this Parliament amending the Act of Settlement would apply to Australia and New Zealand.”<sup>111</sup>

In a debate on the War in the South-West Pacific, Viscount Bennett made the following comment on s. 4 of the Statute:

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<sup>110</sup> *Madzimbamuto*, fn.66. Lord Reid's judgment has been cited as authority for the traditional view and thus for the implied rejection of an interpretation of s. 4 of the Statute as a manner and form condition. Such a proposition is arguable. At the outset, Lord Reid's statement – that courts cannot hold any Act of Parliament invalid – should be considered in its proper context, which was a reply to the Southern Rhodesian government invoking a constitutional convention. Moreover, s. 4 of the Statute did not extend to Southern Rhodesia. Lord Reid actually invoked s. 4 of the Statute to dismiss the argument that any limited grant of self-government had diminished the sovereignty of the Imperial Parliament over the colony. He then added, immediately before citing s. 4, that “[i]t was necessary to pass the Statute of Westminster, 1931, in order to confer independence and Sovereignty on the six Dominions therein mentioned, but Southern Rhodesia was not included” (*Madzimbamuto*, 722), which suggests that the outcome of the case could have been different if s. 4 had applied to Southern Rhodesia, otherwise the Judicial Committee could have simply dismissed the claim that Southern Rhodesia had acquired a measure of sovereignty without having to invoke the Statute. In the end, as there was no manner and form condition involved in this case, the better (and safer) interpretation is that *Madzimbamuto* confirms that an Act of Parliament may validly ignore a convention.

<sup>111</sup> *Hansard* HC vol 318 col 2228-29 (December 11, 1936).

“What this great Parliament did was to renounce completely its legislative control over the whole of these vast Dominions unless the Dominions not only consented but requested that it should exercise such power. The effect of that seems to me to be so clear that one quite understands what has been happening in Australia. Australia is not represented in the War Cabinet in this country. There is no Imperial War Cabinet. We cannot legislate for Australia. We have divested ourselves of the power to legislate for any of the Dominions in the life-and-death struggle which is being carried on. That is the position.”<sup>112</sup>

Another example of a statement consistent with the manner and form theory was made during the debates on the Overseas Resources Development Bill. Solicitor-General Sir Frank Soskice responded to a proposed amendment in the following terms:

“The objection, however, to making the Amendment which they propose is that it would not be operative in view of Section 4 of the Statute of Westminster. If the Amendment were made, if, in other words, our Imperial Act purported to transfer rights conferred upon the Corporation under the Queensland Act, it would be purporting to amend Queensland legislation. ... *The effect of Section 4 would be that any attempt by the Imperial Legislature to alter the legislation of the Queensland Parliament would be ineffective.* It is for that reason that we did not incorporate in our draft the words which by this Amendment it is proposed to insert.”<sup>113</sup>

Thus, Parliament has consistently complied with s. 4 and legislators believed that they had to comply with s. 4. Of the two possible interpretations of s. 4, the overall evidence suggests that Parliamentary attitudes are better reconcilable with an interpretation of s. 4 as a manner and form condition.

To summarize my third argument supporting the manner and form theory in English law, it is submitted that the interpretation of s. 4 as a manner and form condition better suits the language chosen by Parliament. It accords with Parliament’s intention and is coherent with the rest of the Statute and other relevant Imperial legislation. The manner and form interpretation of these statutes is also consistent with Parliamentary attitudes.<sup>114</sup> If my analysis of the case law and of Parliament’s views or attitudes is sound, then, from the

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<sup>112</sup> *Hansard* HL vol 121 col 505 (January 28, 1942). See also *Hansard* HL vol 133 col 718-19 (October 26, 1944).

<sup>113</sup> *Hansard* HC vol 485 col 579 (March 7, 1951) [emphasis added].

<sup>114</sup> One cannot exclude the possibility that, for other subjects, a comprehensive search in government papers, Parliamentary reports or the Hansard might unveil opinions against the manner and form theory. In the preparation of this article, my research in these materials has revealed only one such instance: see *Report of the Select Committee on a Bill of Rights*, HL (Session 1977-78) 176. The Report, adopted on a split vote, stated that its position against the manner and form theory was based on a memorandum of one of the Committee advisors. However, in this memorandum, the analysis of the manner and form theory rests partly on a misreading of the Judicial Committee’s judgment in *Ranasinghe*, fn.18, and on the wrong prediction “that if a UK court were faced with an irreconcilable conflict between an Act of Parliament and an earlier provision of directly applicable Community law the court would apply the ordinary principle of Parliamentary supremacy and give effect to the Act of Parliament, notwithstanding section 2(4)” of the European Communities Act 1972 (D. Rippengal, “Memorandum on the Question of Entrenchment” in *Minutes of Evidence Taken Before the Select Committee on a Bill of Rights*, HL (Session 1977-78) 81, 9). Indeed, in *R. v Transport Secretary, ex p Factortame Ltd (No 2)* [1991] A.C. 603 HL, the House of Lords gave precedence to Community law as internalized into English law by virtue of the 1972 Act, over a later statute, the Merchant Shipping Act 1988.

perspective of the rule of recognition, it suggests that the manner and form theory is reconcilable with Parliamentary sovereignty under English law.

## VII. Conclusion

In this article, I examined the validity of manner and form conditions in English law, which I suggested are best defined using the form/substance distinction. I presented three separate arguments supporting the proposition that the manner and form theory is reconcilable with English Parliamentary sovereignty. First, under a comparative analysis of the Commonwealth cases, I suggested that their reasoning entails that a legislature possessing the same characteristics as the English Parliament and governed by a constitution similar in principle to that of England would be bound by manner and form conditions. I then sought to argue that the majority of the Law Lords in *Jackson* expressly or implicitly accepted the manner and form theory. Such an acceptance would derive from their holding that, following the enactment of the Parliament Act 1911, Parliament has successfully redefined itself or created a new method of enacting legislation. Finally, using the Hartian notion of the rule of recognition, I turned my attention to Parliament and suggested that, mainly through the rule enacted in s. 4 of the Statute of Westminster 1931, Parliament has enacted manner and form conditions and has since abided by them, thus suggesting that it has accepted their validity.

Over the years, constitutional jurists from England but also from many parts of the Commonwealth have developed a variety of theories addressing issues of Parliamentary sovereignty, some of which have been influenced by the experiences of different common law-based systems. To be sure, the debate concerning the manner and form theory of Parliamentary sovereignty is complex and fraught with persisting questions over its nature, content and scope. This article focussed on whether the manner and form theory can be considered to be part of English law. Inevitably, it cannot satisfactorily deal with all the issues regarding this theory. For instance, a more normative question is whether one legislature ought to be able to procedurally bind future legislatures. One argument is that its purpose is to ensure that some statutes “which were regarded as important safeguards by... minority and majority alike... should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws.”<sup>115</sup> Conversely, one could also question on which basis the will of one distant past generation of legislators should bind the actions of today’s legislature. These more normative considerations would and should also factor in to any opinion or decision concerning the validity of manner and form conditions. However, such considerations must fit with a sound interpretation of the relevant legislative and judicial developments which have taken place since A.V. Dicey first expounded his conception of Parliamentary sovereignty.

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<sup>115</sup> *Hinds v The Queen* [1977] A.C. 195 PC, 214.