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# Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values

## Abstract

The issue of whether a legislative body in a democratic society can bind itself on matters relating to the procedures by which the legislation is to be enacted, amended or repealed has, to this point, tended to dissolve into the question of which of two contending formulations of the doctrine of parliamentary sovereignty one prefers, Dicey's traditional formulation or the "new view" by Jennings and others. The author argues that, regardless of how one formulates it, the doctrine of parliamentary sovereignty provides an unsound basis upon which to resolve this issue, and that an alternative basis is therefore needed. That alternative basis, he contends, flows from the recognition that the courts are the ultimate arbiters of what the law is in a given society, and that, in this context, the power to determine what the law is carries with it the power to determine to a significant degree how it is that the society will govern itself. For this reason, the courts must ensure that in making such determinations, they take their guidance from, and give expression to, the values of the legal and political culture of that society. These values will include, but will not be limited to, the values reflected in the doctrine of parliamentary sovereignty.

## Keywords

Legislative bodies; Judicial power; Canada

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# RETHINKING MANNER AND FORM: FROM PARLIAMENTARY SOVEREIGNTY TO CONSTITUTIONAL VALUES<sup>o</sup>

BY R. ELLIOT<sup>\*</sup>

The issue of whether a legislative body in a democratic society can bind itself on matters relating to the procedures by which the legislation is to be enacted, amended or repealed has, to this point, tended to dissolve into the question of which of two contending formulations of the doctrine of parliamentary sovereignty one prefers, Dicey's traditional formulation or the "new view" by Jennings and others. The author argues that, regardless of how one formulates it, the doctrine of parliamentary sovereignty provides an unsound basis upon which to resolve this issue, and that an alternative basis is therefore needed. That alternative basis, he contends, flows from the recognition that the courts are the ultimate arbiters of what the law is in a given society, and that, in this context, the power to determine what the law is carries with it the power to determine to a significant degree how it is that the society will govern itself. For this reason, the courts must ensure that in making such determinations, they take their guidance from, and give expression to, the values of the legal and political culture of that society. These values will include, but will not be limited to, the values reflected in the doctrine of parliamentary sovereignty.

[I]f Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation, it may bind itself hard and fast by legislation; if Parliament so binds itself by legislation there are things it cannot do by legislation; and if there are such things Parliament is not sovereign.

– Professor Hamish Gray

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## I. INTRODUCTION

For a number of years, I set as one of the problems for my first year legal writing students in Constitutional Law a question about the effectiveness of what courts and constitutional scholars have come to call self-imposed manner and form requirements.<sup>1</sup> The scenario that the students were asked to consider involved a provincial legislature purporting to enact a section 33 legislative override<sup>2</sup> by simple majority vote in the face of a statute enacted by a previous legislature stipulating (a) that in order for a valid override to be enacted a full three-quarters of the MLA's voting had to support it, and (b) that no amendments could be made to the statute unless they were approved by the same three-quarters majority.<sup>3</sup> The issue for the students was whether or not the section 33 override would be held to be valid by the courts. Would the courts hold that the manner and form requirement enacted by the previous legislature was binding on all future legislatures (unless and until repealed or altered in the manner stipulated), such that failure to observe it would render the override invalid? Or would they

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<sup>1</sup> The term "manner and form requirement" appears to have its origins in section 5 of the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 65, [hereinafter *Colonial Laws Validity Act*] which authorized colonial legislatures to amend their constitutions but *inter alia* stipulated that such amendments had to be made "in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council or colonial law for the time being in force in the said colony" (emphasis added). The effect of section 5 was to condition the validity of such amendments on the observance by the colonial legislature of requirements relating to both the manner (or procedure) by which and the form in which such amendments were to be made, provided those requirements were embodied in one of the four kinds of legal instruments listed (see, in this regard, *A.G. N.S.W. v. Trethowan*, [1932] A.C. 526 [hereinafter *Trethowan*]). The addition of the modifier "self-imposed" is designed to make it clear that the manner and form requirements with which this paper is concerned are not those set forth in an entrenched constitution but those that a legislative body seeks to impose on itself by way of ordinary legislation.

<sup>2</sup> This is a reference to section 33 of the *Canadian Charter of Rights and Freedoms*. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*]. Section 33 authorizes the Parliament of Canada and the provincial legislatures to immunize their legislation from challenge on the basis of a number of the provisions in the *Charter* for a period of five years at a time.

<sup>3</sup> The reason for adding this second check was to "entrench" the first. Without the second clause the first could be repealed by simple majority vote of the legislature, leaving the legislature free to enact its override by simple majority vote.

hold that that requirement could be ignored, leaving the future legislatures free to enact overrides in the same way they enact other legislation, by simple majority vote?

The legal materials — cases and academic commentary — to which the students were expected to have recourse were provided. This was not, in other words, a research exercise. The cases to which they were directed were *R. v. Irwin*,<sup>4</sup> *A.G. N.S.W. v. Trethowan*,<sup>5</sup> *Bribery Commissioner v. Ranasinghe*,<sup>6</sup> *Reference Re Agricultural Products Marketing Act*,<sup>7</sup> *Manuel v. A.G.*,<sup>8</sup> *Reference Re Manitoba Language Rights*<sup>9</sup> (added to the list in 1986) and *R. v. Mercure*<sup>10</sup> (added in 1988). They were also encouraged to look at the discussions of parliamentary sovereignty in Professor Heuston's collection of *Essays in Constitutional Law*<sup>11</sup> and Professor Hogg's textbook *Constitutional Law of Canada*.<sup>12</sup>

The conclusion reached by the overwhelming majority of students on the basis of these authorities was that our courts would invalidate the override. The manner and form requirement imposed by the earlier legislature would be found to be binding on all future legislatures that wished to enact an override clause, they said, unless

<sup>4</sup> [1926] Ex C.R. 127 [hereinafter *Irwin*]. This case is discussed below in the text accompanying notes 44 and 45.

<sup>5</sup> *Supra*, note 1. This case is discussed *infra* in the text accompanying note 23 and in note 23 itself.

<sup>6</sup> [1965] A.C. 172 [hereinafter *Ranasinghe*]. This case is discussed below in the text accompanying note 43.

<sup>7</sup> [1978] 2 S.C.R. 1198 [hereinafter *Agricultural Products Reference*]. This case is discussed *infra* in the text accompanying note 45 and in note 45 itself.

<sup>8</sup> (1982), [1983] Ch. 77 (C.A.) [hereinafter *Manuel*]. This case is discussed *infra* in the text accompanying notes 17-20 and in notes 19 and 20.

<sup>9</sup> [1985] 1 S.C.R. 721 [hereinafter *Language Rights Reference*]. This case is discussed *infra* in note 46.

<sup>10</sup> [1988] 1 S.C.R. 234 [hereinafter *Mercure*]. This case is discussed below in the text accompanying notes 13, 46 and 74.

<sup>11</sup> R.F.V. Heuston, *Essays in Constitutional Law*, 2d ed. (London: Stevens & Sons, 1964) c. 1. Professor Heuston's views are discussed below in the text accompanying notes 25-29.

<sup>12</sup> P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) c. 12. Professor Hogg's views are discussed below in the text accompanying notes 31-45.

and until that requirement were repealed or altered in accordance with the special procedures prescribed for the repeal or amendment of the statute in which it was imposed. Because that requirement had not been met in this instance, and because no attempt had been made to repeal or alter it in accordance with the prescribed procedures, the override clause, they asserted, could not be said to have been validly enacted. Most of the students who reached this conclusion placed great emphasis on the decisions in *Trethowan*, *Ranasinghe* and, more recently, the *Language Rights Reference* and *Mercure*. The views of Professor Heuston and Professor Hogg also received a good deal of play.

I suspect that most Canadian lawyers would reach the same conclusion as these students. On balance, the authorities *do* seem to support the view that, while attempts by a legislative body to bind its successors on matters of substantive policy will not be effective, a manner and form requirement enacted by a legislative body will be binding on its successors. This is particularly true of the Heuston and Hogg texts. It is also true of the recent decision of the Supreme Court of Canada in *Mercure*, in which the failure of the Saskatchewan legislature to respect the obligation imposed by section 110 of the *North-West Territories Act*<sup>13</sup> to print legislation in both English and French was held to render such legislation invalid. Unlike section 23 of the *Manitoba Act, 1870*, which imposes a similar obligation on the Manitoba legislature but which is part of the Constitution of Canada and hence subject to special amending rules, section 110 amounted — as the Court recognized — to ordinary legislation. Hence it was subject to repeal or amendment by the Saskatchewan legislature acting on its own in the ordinary way (for example, by simple majority vote) provided, of course, that the repealing or amending legislation was enacted in both languages.

On one level, defined by the authorities, the answer that the majority of the students have given to the problem cannot be said to have been surprising. But on another level, it was surprising. When I gave the students the problem, I admonished them not to assume that the solution lay within the four corners of the authorities. I urged them to think critically about those authorities

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<sup>13</sup> R.S.C. 1886, c. 50 as am. R.S.C. 1985, c. N-27.

and their relevance to the specific problem that they had been assigned. In particular, I asked them to view the problem as raising a question about the values upon which our constitution is based and to attempt to isolate, and discuss the relative importance of, the values that this particular problem called into play. In spite of these urgings, very few of the students did look behind or beyond the authorities and those that did tended to focus on the fact that the purpose of this manner and form requirement was to promote the values embodied in the rights and freedoms expressed in the *Charter*. This, they contended, would be certain to enure to the benefit of that requirement in the competition between it and the override clause. Almost totally ignored — and herein lay the surprise — is the fact that the manner and form requirement posed a very real and serious threat to one of the cardinal principles of democratic self-government — majority rule. The one or two students every year who did recognize this dimension of the problem acknowledged that it would operate against the requirement. They were usually amongst the small group of students that concluded that the override clause would be upheld as valid.

Why is it that so few students incorporated a discussion of the challenge to democratic self-government posed by this manner and form requirement into their analysis? I suspect that, in the case of some students, the failure to do so flowed from an impoverished understanding of democracy: they simply did not see the difficulty. But I also suspect that, in the case of a good many of the students, the failure to do so was attributable less to them and their lack of understanding of democracy than to the way in which the question of the effectiveness of self-imposed manner and form requirements has traditionally been approached, particularly by constitutional scholars. This traditional approach conceives of the question in terms of the doctrine of parliamentary sovereignty and attempts to resolve it through a highly formalistic and abstracted process of definition; it makes it exceedingly difficult to incorporate into one's legal analysis concerns about democracy and other important constitutional values that a particular manner and form requirement might engage. To ensure that such concerns would find easy and full expression, a new approach would have to be constructed and most first year students are, it seems clear, reluctant to embark on such a task, even in the face of encouragement from their professor.

It is not my intention here to write the opinion memorandum that I would have liked my students to have written. Nor do I propose to provide a blueprint for the way in which I would resolve this particular manner and form problem were I a judge. My objective is simply to make the case for rethinking the way we approach the question of the effectiveness of self-imposed manner and form requirements. In attempting to make that case, I will, from time to time, make reference to this particular problem. But I will also refer to other hypotheticals where I think it will be helpful to do so. My primary interest is with the way in which we approach this question in Canada. However, the alternative to the traditional approach that I suggest we adopt is one that would have application in any country that has a democratic and reasonably stable political system.

## II. THE TRADITIONAL APPROACH DESCRIBED

The effectiveness of self-imposed manner and form requirements has been the subject of debate amongst constitutional scholars for some time.<sup>14</sup> I do not propose to review that debate in any detail, but it is necessary, if I am going to be able to critique what I have termed the traditional approach in this area, that I review it at least in terms of its broad outlines. Reflecting the fact that the debate has focused on the ability of the Parliament of the United Kingdom to impose binding manner and form requirements on itself, I will frequently refer to that institution in this review.

The starting point of any such review is Professor Dicey's formulation of the doctrine of parliamentary sovereignty. Having defined Parliament as the Queen, the House of Lords and the

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<sup>14</sup> A number of the scholars who have written in this area are mentioned in the text that follows. Others not mentioned include H.W.R. Wade, "The Basis of Legal Sovereignty," [1955] Cambridge L.J. 172; G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957) *passim*; S.A. de Smith, *Constitutional and Administrative Law*, 4th ed. (Harmondsworth: Penguin, 1981) c. 4; W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: Carswell, 1975) c. 3; W.E. Conklin, "Pickin and its Applicability to Canada" (1975) 25 U.T.L.J. 193; and K. Swinton, "Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege" (1976) 14 Osgoode Hall L.J. 345.



House of Commons "acting together," he said that "Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever, and further, no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."<sup>15</sup> According to Dicey, the only limits on the power of the British Parliament to legislate were extra-legal: the "internal" limits that flowed from the fact that elected representatives were likely to be imbued with, and hence constrained by, the moral and political values of the majority of the electorate and the "external" limits imposed by the knowledge that the electorate would be unlikely to obey legislation that was wholly at odds with those values. Although it seems clear that Dicey was primarily concerned with the absence of any judicially enforceable *substantive* limitations on the power of the British Parliament, rather than the absence of any judicially enforceable *procedural* limitations on its power, this formulation of the doctrine has generally been taken to cover both. Hence, if it is accepted, attempts by one Parliament to bind future Parliaments as to the procedures by which, or the manner and form in which, future legislation is to be enacted are considered to be no more effective legally than attempts to bind future Parliaments on matters of substance or policy.

Dicey's formulation of the doctrine has come under challenge from a number of constitutional scholars, particularly in the latter half of this century. But it has to this day always been the preferred formulation of the courts in the United Kingdom.<sup>16</sup> Although challenges to the validity of legislation enacted by the Parliament of the United Kingdom have been few and far between, the courts there have consistently rejected those that have been brought. A good example is the decision in *Manuel*, which arose out of the patriation of Canada's constitution in the early 1980s. The challenge in that case was to the validity of the *Canada Act*

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<sup>15</sup> A.V. Dicey, *The Law of the Constitution*, 10th ed. (London: MacMillan, 1965) at 39-40.

<sup>16</sup> See, for example, *Vauxhall Estates Ltd v. Liverpool Corporation*, [1932] 1 K.B. 733; *Ellen Street Estates Ltd v. Minister of Health*, [1934] 1 K.B. 590; *British Coal Corporation v. R.*, [1935] A.C. 500; and *British Railways Board v. Pickin*, [1974] 2 W.L.R. 208 (H.L.).

1982<sup>17</sup> and was based on the contention that section 4 of the *Statute of Westminster*<sup>18</sup> imposed on the Parliament of the United Kingdom a binding requirement that, before it enacted legislation intended to apply in Canada, it had to have the consent of the aboriginal peoples of Canada, whose consent in this instance, of course, had been lacking.<sup>19</sup> That contention was summarily rejected by Megarry, V.C., who said that

the duty of the court is to obey and apply every Act of Parliament, and ... the court cannot hold any such Act to be *ultra vires*. ... [I]t is a fundamental of the English constitution that Parliament is supreme. As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its own omnipotence.<sup>20</sup>

One of the first constitutional scholars to challenge Dicey's formulation of the doctrine of parliamentary sovereignty was Sir Ivor Jennings.<sup>21</sup> At the heart of his critique was the contention that Dicey's formulation left unanswered the question of what constituted a valid expression of the will of Parliament. Not only was that a question that had to be answered if one was going to construct a comprehensive doctrine, he argued, but it was clear to him that,

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<sup>17</sup> (U.K.), 1982, c. 11.

<sup>18</sup> (U.K.), 22 Geo. 5, c. 4. Section 4 provides 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.

<sup>19</sup> By its terms, section 4 imposes a *form* requirement on the Parliament of the United Kingdom. The plaintiffs argued that section 4 should also be read as imposing a *manner* requirement to the effect that no law made by the Parliament of the United Kingdom could have effect in a Dominion unless that Dominion had *in fact* requested and consented to its enactment. They also argued that at least insofar as Canada was concerned, "Dominion" should be read to include *inter alia* the Indian nations of Canada.

<sup>20</sup> *Manuel, supra*, note 8 at 89. It should be noted that an appeal from the decision of Megarry V.C. to the Court of Appeal, *ibid.* at 99, was dismissed on the ground that, even if section 4 could be said to impose a binding *form* requirement (refusing to accept that it imposed a binding *manner* requirement as well), that requirement had been satisfied in the enactment of the *Canada Act 1982*. Leave to appeal to the House of Lords was denied, *ibid.* at 110.

<sup>21</sup> W.I. Jennings, *The Law and The Constitution*, 4th ed. (London: University of London Press, 1952) c. 4.

when one did answer it, one was driven to conclude that the doctrine as Dicey had formulated it was unacceptable. The reason that was so was that, for Jennings, that question was a question of law and, as such, was one over which Parliament itself had control. He expressed the revised doctrine of parliamentary sovereignty to which this reasoning led him in the following terms:

"Legal sovereignty" is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, "with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same", will be recognised by the courts, including a rule which alters this law itself. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself ... The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911. But Parliament may, if it pleases, provide another manner and form. Suppose, for instance, that the present Parliament enacted that the House of Lords should not be abolished except after a majority of electors had expressly agreed to it, and that no Act repealing that Act should be passed except after a similar referendum. There is no law to appeal to except that Act. The Act provides a new manner and form which must be followed unless it can be said that at the time of its passing that Act was void or of no effect.<sup>22</sup>

In support of this alternative formulation of the doctrine of parliamentary supremacy, Jennings relied on the decision of the Privy Council in *Trethowan*, in which the legislature of New South Wales was held to be bound by a self-imposed manner and form requirement.<sup>23</sup> The fact that that decision appeared to have been based on a provision of the *Colonial Laws Validity Act, 1865*,<sup>24</sup> a statute to which the Parliament of the United Kingdom was not subject, was, in his view, of no moment. But it is clear from Jennings's discussion of this issue that his preference for this revised formulation of the doctrine lay not in the fact that there was a

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<sup>22</sup> *Ibid.* at 147-49.

<sup>23</sup> The requirement in that case stipulated that no bill to abolish the upper house of the state legislature could be presented for Royal Assent without first being approved in a public referendum. To protect that requirement from repeal by simple majority vote, the legislation also stipulated that a bill repealing it had to be approved in a referendum. The case arose when a future legislature purported both to repeal the legislation embodying these requirements and to abolish the upper house without holding referenda.

<sup>24</sup> The provision in question is section 5, referred to *supra*, note 1.

decision of the Privy Council that appeared to support it but in the simple and highly appealing logic upon which it was based. Even if, as many have argued, *Trethowan* does not provide support for Jennings's view of the appropriate way to define parliamentary sovereignty under the Constitution of the United Kingdom, he would have argued for it.

Professor Heuston, writing in the early 1960s, summarized Jennings's "new view" of parliamentary sovereignty, to which he subscribed, in the following terms:

- (1) Sovereignty is a legal concept: the rules which identify the sovereign and prescribe its composition and functions are logically prior to it.
- (2) There is a distinction between rules which govern, on the one hand, (a) the composition, and (b) the procedure and, on the other hand, (c) the areas of power, of a sovereign legislature.
- (3) The courts have jurisdiction to question the validity of an alleged Act of Parliament on grounds 2(a) and 2(b), but not on ground 2(c).
- (4) This jurisdiction is exercisable either before or after the Royal Assent has been signified – in the former case by way of injunction, in the latter by way of declaratory judgment.<sup>25</sup>

Heuston, like Jennings, saw *Trethowan* as providing strong support for the new view. The fact that Sir Owen Dixon, one of the judges of the High Court of Australia who sat on that case, had subsequently written that the decision represented "a modern reconciliation of the supremacy of the law and the supremacy of Parliament,"<sup>26</sup> and clearly saw it as endorsing the new view, was taken to be an important indication that the case should not be viewed as having turned on the fact that New South Wales was governed by the *Colonial Laws Validity Act, 1865*. Heuston also relied on decisions of the Irish Court of Appeal and the Appellate Division of the Supreme Court of South Africa in cases arising under the constitutions of the Irish Free State and South Africa respectively.<sup>27</sup> Both decisions resulted in legislation being declared invalid on the ground that its passage had been achieved otherwise than in accordance with manner and form requirements prescribed

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<sup>25</sup> *Essays in Constitutional Law*, *supra*, note 11 at 6-7.

<sup>26</sup> O. Dixon, "The Law and the Constitution" (1935) 51 L.Q. Rev. 590 at 604.

<sup>27</sup> *R. v. Military Governor, N.D.U. Internment Camp*, [1924] 1 I.R. 32 (C.A.); and *Harris v. Minister of the Interior*, [1952] 2 S.A. 429 (App. Div.).

by the constitution in question. However, as with Jennings, it is clear that it was not these authorities but rather the inherent logical appeal of the new view that impelled Heuston to adopt it in preference to that of Dicey. He saw in the new view the "strict logic and high technique"<sup>28</sup> of the common law so admired by the English lawyer, and said, "The great advantage of the new doctrine is that it enables these tremendous issues to be decided according to the ordinary law in the ordinary courts. By redefining the doctrine of sovereignty from within its own four corners, the common law has shown its instinctive wisdom."<sup>29</sup>

The new view of parliamentary sovereignty has clearly become the preferred view amongst constitutional scholars,<sup>30</sup> and it is this view that Hogg adopts in his text when he comes to deal with the effectiveness of self-imposed manner and form requirements. He draws a sharp distinction between substance and procedure, and acknowledges that "a legislative body is not bound by self-imposed restraints as to the content, substance or policy of its enactments."<sup>31</sup> The rationale for this, he says,

is clear. If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues.<sup>32</sup>

But "it is reasonably clear," he goes on to say, "that a legislative body may be bound by self-imposed procedural (or manner and

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<sup>28</sup> *Essays in Constitutional Law*, *supra*, note 11 at 31.

<sup>29</sup> *Ibid.*

<sup>30</sup> One scholar who refused to join with those who rejected Dicey's formulation in favour of the new view of parliamentary sovereignty is H.W.R. Wade. His preference for Dicey's formulation was based in part on his view of the authorities, but more importantly on the assertion that "the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends" and, as such, cannot be altered by Parliament: "The rule is above and beyond the reach of statute ... because it is itself the source of the authority of statute." *Supra*, note 14 at 187. He characterized the rule as a "political fact," changeable only "by revolution." *Ibid.* at 189.

<sup>31</sup> *Constitutional Law of Canada*, *supra*, note 12 at 262.

<sup>32</sup> *Ibid.*

form) restraints on its enactments."<sup>33</sup> He begins this part of his analysis by asserting that "[t]here is of course no doubt as to the binding character of the rules in the Constitution that define the composition of the legislative bodies and the steps required in the legislative process."<sup>34</sup> He then claims, in accordance with the new view of parliamentary sovereignty, that subject to provisions of the Constitution of Canada, such as those protecting the role of the Crown and the Senate from alteration by ordinary legislation, it is open to Parliament or a provincial legislature to "re-define itself" by changing the nature of the legislative process ... either for all statutes or just for particular statutes."<sup>35</sup> He gives as examples of such redefinitions, Parliament requiring the approval of the electorate in a referendum before the office of the Auditor-General could be abolished, and a provincial legislature barring changes to electoral constituencies unless the changes have the support of two-thirds of the members of the legislative assembly. Legislation enacted in disregard of these manner and form requirements would, he asserts, "be held to be invalid by the courts."<sup>36</sup>

Unlike Jennings and Heuston, who appear to believe that all manner and form requirements must be taken to be binding, Hogg acknowledges that some might, in fact, be attempts to impose limitations on the substance of future legislation, and accepts that it would be appropriate for the courts to treat them as such — that is, to hold that they are not binding on future legislatures.<sup>37</sup> Friedmann appears to have been the first of the new view scholars to recognize that the line between substance and procedure was not a bright one, and that courts that adopted this view would have to

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 262-63.

<sup>36</sup> *Ibid.* at 263.

<sup>37</sup> Hogg also makes exceptions for what he calls purely "directory" procedural requirements (by which he means requirements that are held by the courts not to have legal force, even though they are embodied in legal instruments), rules of interpretation, and purely "internal" rules of parliamentary procedure. *Ibid.* at 264.

come up with some way of distinguishing one from the other.<sup>38</sup> He proposed an extension of the pith and substance test used by Australian (and Canadian) courts in division of powers cases into this area. If, in pith and substance, a manner and form requirement was directed to procedure, it would be held to be binding; if to substance, it would be held not to be binding. Friedmann acknowledged that under such a test, "the borderline would be a matter for judicial discretion in appraisal of a particular situation."<sup>39</sup> He consoled himself with the thought that "[t]hat ... is nothing novel. No conceivable formula could lay down satisfactorily when the exercise of a legislative power becomes an abuse."<sup>40</sup>

Hogg cites no Canadian cases in support of the view that self-imposed manner and form requirements would be held to be binding by Canadian courts.<sup>41</sup> The cases he does cite, which include *Trethowan* and *Ranasinghe*, he acknowledges, do not provide unequivocal support for it: *Trethowan* because "it could be explained as resting on section 5 of the *Colonial Laws Validity Act*"<sup>42</sup> and the others, including *Ranasinghe*, because they "involved restrictions in the constitution [of the country in question] itself, although," he goes on to add, "the constitution was as freely amendable as an ordinary

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<sup>38</sup> W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950-51) 24 *Austl. L.J.* 103 at 105. Friedmann credits McTiernan J., one of the judges who sat alongside Dixon C.J. on the High Court of Australia when that Court decided *Trethowan*, with this insight.

<sup>39</sup> *Ibid.* at 106. For an example of how that discretion might be exercised, see the *obiter dicta* of King C.J. in *West Lakes Ltd v. South Australia* (1980) 25 S.A.S.R. 389 at 396-98.

<sup>40</sup> *Ibid.*

<sup>41</sup> He does, however, cite one case, *Gallant v. R.*, [1949] 2 D.L.R. 425 (P.E.I.S.C.), in support of his assertion that manner and form requirements set forth in the Constitution of Canada are binding. The decision in that case was to the effect that it was not open to a provincial lieutenant-governor to give royal assent to a bill from which royal assent had previously been withheld under sections 55 and 56 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [formerly *British North America Act, 1867*]. This case might be said to support Hogg's claim that self-imposed manner and form requirements are also binding, but as I think even he would concede, it does so only in the most limited sense. It simply removes what might otherwise be an obstacle to that claim: if courts were not prepared to enforce manner and form requirements embodied in the Constitution, the "supreme law," *a fortiori* they would not be prepared to enforce self-imposed manner and form requirements.

<sup>42</sup> *Constitutional Law of Canada*, *supra*, note 12 at 263.

statute."<sup>43</sup> His commitment to this view appears to depend largely on the fact that the new view of parliamentary sovereignty has found favour with the great majority of constitutional scholars who have expressed an opinion on the effectiveness of such requirements.

The only Canadian cases decided prior to 1985, when Hogg wrote, that might be said to have been directly relevant to this issue and of which I am aware, suggest that he probably should have been somewhat more tentative in expressing his view than he was. In both of these cases, *Irwin* and *Agricultural Products Reference*, the courts were asked to declare federal legislation unconstitutional on the ground that it was enacted in violation of the procedures for the handling of money bills in sections 53 and 54 of what is now the *Constitution Act, 1867*.<sup>44</sup> In neither case was the court prepared to accept the premise on which the challenge to the legislation was based, which was that the legislation in question was in fact a money bill. But both courts went on to say that, even if they had accepted that premise, the challenge would have failed. In so doing, they adopted, in the first case explicitly and in the second implicitly, Dicey's view of parliamentary sovereignty. In *Irwin*, the judge said, as Megarry V.C. was later to do in *Manuel*, that it was the court's duty to accept as having been validly enacted any and all legislation that appeared to have received the approval of the Governor-General, the Senate and the House of Commons. In the

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<sup>43</sup> *Ibid.* This latter assertion is a bit surprising given the fact that the issue in these cases was precisely whether or not the constitutions were as freely amendable as an ordinary statute – and they were held not to be. In both of these cases (the other being *Harris v. Minister of the Interior*, *supra*, note 27) the court in question refused to recognize as valid legislation that had not been enacted in the manner prescribed by the relevant constitution, thereby entrenching those prescriptions.

<sup>44</sup> *Supra*, note 41. Sections 53 and 54 provide as follows:

53. Bills for appropriating any Part of the Public Revenue or for imposing any Tax or Impost, shall originate in the House of Commons.
54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.



*Agricultural Products Reference*, Pigeon J., speaking for himself and four other members of the Supreme Court of Canada, said that

sections 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by section 91(1). Absent a special requirement such as in section 2 of the *Canadian Bill of Rights*, nothing prevents Parliament from indirectly amending sections 53 and 54 by providing for the levy and appropriation of taxes in such manner as it sees fit, by delegation or otherwise.<sup>45</sup>

It is by no means clear what it was about section 2 of the *Canadian Bill of Rights* that, in Pigeon J.'s mind, served to distinguish it from sections 53 and 54, but there can be no doubt that he did not consider the latter to be binding on the Parliament of Canada. Parliament was free to ignore the procedural requirements they imposed. To the extent that it did so, sections 53 and 54 were to be considered as having been impliedly amended.

When the next edition of Hogg's text is written, he will be able to support his view about the binding nature of self-imposed manner and form requirements by reference to the recent decision of the Supreme Court of Canada in *Mercury*.<sup>46</sup> Reference will probably be made to the fact that, in the course of his reasons for judgment, La Forest J. cited, with apparent approval, the view of both Jennings and Hogg himself on the binding nature of such requirements. Therefore, *Mercury* can, with some justification, be said to reflect a choice on the part of the current Supreme Court of

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<sup>45</sup> *Agricultural Products Reference*, *supra*, note 7 at 1291. Laskin J., who wrote for himself and the three other members of the Court, refused to commit himself on the question of "whether sections 53 and 54 lay down prescriptions which are cognizable in the Courts." *Ibid.* at 1229. His only comment on this aspect of the case was that the fact that British courts did not consider it appropriate to review legislation for conformity to procedural requirements should not be viewed as decisive when Canadian courts came to consider the question of whether or not it was appropriate for them to enforce procedural requirements embodied in the *Constitution Act, 1867*.

<sup>46</sup> Hogg will also no doubt cite the decision in *Language Rights Reference*, *supra*, note 9, in support of his preliminary and, at least for him, non-controversial assertion that manner and form requirements imposed by the Constitution of Canada are binding. In that case the Supreme Court of Canada, relying in part on the decision in *Ranasinghe*, held that legislation not enacted by the Manitoba Legislature in both French and English in accordance with section 23 of the *Manitoba Act, 1870* was invalid. The relevance of such a holding to Hogg's claim about the effectiveness of self-imposed manner and form requirements is discussed *supra* in note 41.

Canada to prefer the new view of parliamentary sovereignty to that of Dicey.

### III. THE TRADITIONAL APPROACH CRITIQUED

To this point, then, the debate about the effectiveness of self-imposed manner and form requirements has tended to dissolve into a question of to which of two opposing views of parliamentary sovereignty one subscribes. If one subscribes to Dicey's view, one is bound to conclude that such requirements are *not* binding. If one subscribes to the new view championed by Jennings, Heuston, Hogg and others, one is bound to conclude that, subject to specific and express limitations prescribed by the provisions of an entrenched constitutional document, and (possibly) to the power of the courts to control abuse, they *are* binding.

If this were the only basis upon which the debate had to be resolved, I would be hard pressed to choose between the two views of parliamentary sovereignty that it has generated. That would be true even if I were concerned only with countries without an entrenched constitution; countries in which, in other words, it is meaningful to describe the doctrine of parliamentary sovereignty as a, if not the, governing principle of the constitution. The major problem with Dicey's formulation of the doctrine of parliamentary sovereignty is that it introduces a significant element of inflexibility into the constitutions of such countries.<sup>47</sup> For example, it precludes the possibility of the Parliament of the United Kingdom enacting a Bill of Rights that would prevail over inconsistent legislation enacted by future Parliaments, even if every MP and every member of the electorate supported the enactment of such a bill. It also precludes the possibility of entrenching new procedures for the enactment of particular kinds of legislation to ensure that the interests of particular minority groups find adequate expression in the legislative

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<sup>47</sup> There is something of an irony in this given the fact that, in Dicey's view, one of the major attributes of the British constitution was its flexibility: "Every part of it," he said, "can be expanded, curtailed, amended, or abolished, with equal ease." *The Law of the Constitution*, *supra*, note 15 at 91. At least in the one respect noted here, he was clearly wrong in asserting this.

process, again even if these new procedures had the unanimous support of all MPs and the electorate. In short, it assumes that leaving it up to a simple majority of the members of the House of Commons and the House of Lords to decide what is right for the people of the United Kingdom will always be the preferred way of deciding that question.<sup>48</sup> In a very real sense, in other words, it takes out of the hands of those people and their elected representatives the power to determine the most important question of all – how it is that they wish to govern themselves.

Dicey's formulation is also vulnerable to criticism on the ground that it creates the impression that the courts are merely passive actors in the process of determining what the law is. They simply accept as the law whatever the Parliament of the day says it is. But this impression of passivity is a false one. Ultimate responsibility for determining what the law is rests with the courts, and it is no less an active choice on their part to accept whatever the Parliament of the day acting in traditional fashion says it is than it is to hold the Parliament of the day bound by manner and form requirements imposed by the Parliaments of yester-year. It is a choice of one view of how the United Kingdom should be governed

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<sup>48</sup> Dicey himself had no difficulty with the idea that the Parliament of the United Kingdom might see fit at some point to abolish the House of Lords; he said that the enactment of legislation to that end was no less within Parliament's competence than the enactment of legislation "to give London a municipality" (*Ibid.* at 88). H.W.R. Wade, a supporter of Dicey, had no difficulty accepting the validity of the *Parliament Act* of 1911 and 1949 which cut back on the power of the House of Lords (Wade, *supra*, note 14 at 193). *Parliament Act, 1911* (U.K.), 1 & 2 Geo. 5, c. 13; *Parliament Act, 1949* (U.K.), 12, 13 & 14 Geo. 6, c. 103. It would appear, therefore, that at least in the minds of those who subscribe to it, Dicey's formulation allows for flexibility in the law-making process to the extent that that process is made more easy; only attempts to make the process more difficult are ruled out. If they are correct in this, then alongside the problem of inflexibility that I have identified, one has to add the problem of lack of consistency. What possible justification is there for giving effect to legislation that "redefines" Parliament in such a way as to *facilitate* the enactment of legislation while denying effect to legislation that "redefines" it in such a way as to *hamper* the enactment of legislation? H.W.R. Wade appears to recognize this problem when he comments on the significance of the *Parliament Acts* of 1911 and 1949: he characterizes them as "creating yet a further species of delegated legislation." Of the *Act* of 1911 he says, "the threefold sovereign has delegated its power, subject to restrictions, to a new and non-sovereign body made up of two of its parts only" (Wade, *supra*, note 14 at 193-94). But such a characterization of these Acts seems hardly plausible. (See, in this regard, the comments of Professor Marshall in *Parliamentary Sovereignty and the Commonwealth*, *supra*, note 14 at 43-46).

over another. And it is a choice, as we have just seen, with potentially profound consequences.

But it is clear that the new view of parliamentary sovereignty poses serious problems as well. The greatest weakness in this approach is the threat to democratic values that it embodies. In the hands of Jennings and Heuston, this new view of parliamentary sovereignty would require the courts to enforce a self-imposed requirement that no future Parliament could amend or repeal any existing legislation unless, for example, the amending or repealing legislation received the unanimous support of the members of both the House of Commons and the House of Lords. The "strict logic" of the new view would necessitate characterizing such a requirement as a "redefinition" of Parliament and of the way in which the will of Parliament is to be expressed. Any approach to questions about the effectiveness of self-imposed manner and form requirements that would permit such a result is clearly badly flawed. Moreover, with all due respect to those who subscribe to the new view, it is surely naive to think that the courts would think otherwise. No court in a society with a strong democratic tradition is going to turn a blind eye to the profound implications for democratic self-government of a manner and form requirement of such a character.

This weakness in the new view can, I think, be attributed to the fact that those who devised it forgot the reason why it is generally thought to be wrong to allow one Parliament to bind future Parliaments on matters of substance or policy. That reason, which is explicitly acknowledged by Hogg, is that it would be anti-democratic to permit the representatives of previous electorates to determine the policies upon which the representatives of today's electorate must govern.<sup>49</sup> The electorate of today is clearly not able to exercise the right of self-government it would otherwise have if its hands have been tied in terms of the policies it can pursue by legislation attributable to previous electorates. But if that is the case, then why should we not be concerned about manner and form requirements that make the passage of certain kinds of legislation more difficult? The inroads on the right of self-government made by such requirements may not always be as significant as the inroads

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<sup>49</sup> See text accompanying note 32, *supra*.

that would be made if self-imposed constraints on substantive policy were held to be binding, but they are nevertheless real. And it is therefore wrong to ignore them when the focus shifts from the one to the other.

Like the approach generated by Dicey's formulation of parliamentary sovereignty, though perhaps to a lesser extent, the approach generated by the new view is vulnerable to the criticism that it portrays the courts as playing an essentially passive role. All that the courts are required to do is categorize an attempt to bind future Parliaments as either substantive or procedural — a categorization that in the Jennings-Heuston version of the new view turns simply on the form of the legislation in which the attempt is made — and the result follows as a matter of course. Again, however, the impression of passivity is a false one. By adopting such an approach, the courts would be making a choice about the way in which the United Kingdom should be governed, a choice that gives considerable power to the Parliaments of yester-year to define the kind of society that the people of today can create for themselves.

With the addition to the new view of the pith and substance test proposed by Friedmann and apparently endorsed by Hogg, these criticisms would lose some of their sting. But the addition of that test would not eliminate these problems with the new view. The fact that the courts would be free under this approach to enforce some self-imposed manner and form requirements but not others means that the illusion of passivity created by the use of a hard and fast rule would be difficult to maintain. However, as anyone who is familiar with the application of the pith and substance test in division of powers cases in Canada well knows, that test provides ample opportunity for obfuscation and manipulation on the part of judges. There is no guarantee, in other words, that judges applying this test will provide anything approaching full and honest explanations for the choices they make, or even acknowledge that they are making choices. The test might also provide a mechanism for protecting democratic values from assault. But again, there is no guarantee that concern about such values would figure in the application of the test, and even if it did, that these values would receive adequate protection. It is important to remember that Hogg appears to have no difficulty whatsoever accepting that a require-

ment of a two-thirds majority to alter the boundaries of provincial electoral districts would be held to be binding.

Moreover, the pith and substance test introduces two new problems into the equation. The distinction between substance and procedure is relatively easy to make in purely formal terms in this context, that is, in terms simply of the form of the legislation that attempts to bind future Parliaments. But that distinction becomes very difficult to make in pith and substance terms. Is it not the case that any attempt to make legislation more difficult to enact has a significant substantive element to it? The more onerous procedural requirements are simply the means used to achieve the end of substantive control. Substance and procedure merge and become, in effect, one and the same. The use of the pith and substance test in this context seems, in short, misguided.

On top of that, it is difficult to see how, if the simple logic of the new view is accepted, as it is by both Friedmann and Hogg, the addition of an evaluative test like the pith and substance test can be justified. The new view is based on the assumption that Parliament is supreme with respect to the law relating to itself. But, if Parliament is supreme in that sense, it necessarily follows that no court has the power to ignore or otherwise refuse to abide by such law relating to itself as Parliament chooses to enact. And yet it is precisely that power that the pith and substance test gives to the courts. How can one graft onto the new view a limitation that challenges the very assumption upon which it is based? From a conceptual standpoint, that would seem to be impossible.

The simple fact is that the doctrine of parliamentary sovereignty is ill-equipped to deal with questions about the effectiveness of self-imposed manner and form requirements. That doctrine evolved out of the victory of Parliament over the monarchy in the competition between the two for control over what we would now call the legislative branch of government in the United Kingdom. As a legal doctrine, it is capable of resolving questions that flow from any current manifestations of that same competition that might arise. It is also capable of resolving questions about the relationship between the courts and the Parliament of the day: when these two institutions are in conflict about what the law in a particular area should be, it is Parliament's view that must ultimately prevail. But the doctrine is not capable of resolving — or at least

resolving adequately — questions that flow from the competition that from time to time arises between two different Parliaments, or, if you prefer, between the Parliaments of two different eras. To resolve such questions adequately, one needs a basis upon which to choose between the two Parliaments. A doctrine that asserts simply that Parliament is supreme over other institutions of government such as the Crown and the courts clearly does not provide such a basis. That basis has to be found elsewhere.

To this point, my critique of Dicey's and the new view formulations of the doctrine of parliamentary sovereignty has been directed to their use in countries *without* entrenched constitutions. It is apparent, however, that the problems with these two opposing views of parliamentary sovereignty are no less serious when one shifts one's attention to countries *with* entrenched constitutions. Insofar as Dicey's view is concerned, the problem of inflexibility may not be quite as significant because, if changes in the way the country in question is governed are thought to be necessary, these changes can presumably be introduced through a constitutional amendment. How easily such changes can be introduced will depend on how demanding the rules are for amending the constitution; the more demanding they are the more significant the problem of inflexibility will be. But the other problems with these two views remain every bit as real under an entrenched constitution. Moreover, there is the additional, and in my view, fundamental problem that, regardless of whose definition one uses, *the doctrine of parliamentary sovereignty simply does not apply in countries with entrenched constitutions.*

Dicey himself recognized that there is a world of difference between the constitutions of countries like the United Kingdom, which are not entrenched, and those of countries like the United States, which are. In fact, he devoted an entire chapter of his textbook to the nature and significance of the differences between the constitutions of these two countries.<sup>50</sup> And the critical difference was that the doctrine of parliamentary sovereignty was not a feature of the American constitution. In the course of that chapter, in a passage that has too often been ignored by Canadian courts, Dicey made it clear that, in spite of its preamble, Canada's

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<sup>50</sup> *Supra*, note 15, c. 3.

constitution was "in its essential features modelled on that of the [United States],"<sup>51</sup> by which he meant that it was equally incorrect to speak of the doctrine of parliamentary sovereignty as a governing principle of Canada's constitution. It is the entrenched constitution that is supreme in such countries, not the legislative branch of government, and it is to the entrenched constitution that one should be turning for answers to questions about the effectiveness (if not the validity) of self-imposed manner and form requirements, not the doctrine of parliamentary sovereignty.

To say that the doctrine of parliamentary sovereignty has no application in countries with entrenched constitutions is not, I hasten to add, to say that the values embodied in that doctrine are irrelevant to the resolution of constitutional questions in such countries. On the contrary, it is clear that many of those values — the accountability of the government to the electorate, majority rule, formal equality, free elections and others — are not only relevant to, but of critical importance in, the resolution of such questions. But that is because these values are reflected in the constitutions of these countries. And, as such, when these values do come into play, they do so alongside and in competition with other values that are reflected in these constitutions.

In sum, then, for the reasons I have given, I am of the view that neither in countries with entrenched constitutions nor in countries without does it make sense to approach questions about the effectiveness of self-imposed manner and form requirements on the basis of the doctrine of parliamentary sovereignty, in either of its forms. An alternative approach is required.

#### IV. AN ALTERNATIVE APPROACH

The fact is, of course, that one is not obliged to accept that the debate about the effectiveness of self-imposed manner and form requirements has to be resolved on the basis of which of two different views of parliamentary sovereignty one subscribes to. There is another way to think about the question, one that not only

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<sup>51</sup> *Ibid.* at 166.



avoids the necessity of choosing between two different views of parliamentary sovereignty, but that avoids the necessity of explicitly engaging that principle altogether. And, at least as a way of thinking about the question, if not necessarily in the manner in which it plays itself out, it is an approach that can be used in countries without, as well as in countries with, entrenched constitutions.

I begin this alternative approach with what I take to be a statement of the obvious, that, to borrow from Marshall C.J. in *Marbury v. Madison*, it is "the province and the duty of the [courts] to say what the law is."<sup>52</sup> In the great majority of cases, the determination of what the law is involves nothing more than the interpretation of legislation or, in common law jurisdictions, the articulation of a common law rule.<sup>53</sup> But it is clear that, in some cases, it involves a good deal more. In countries with entrenched constitutions, that determination will sometimes call for the measuring of legislation against the requirements of the constitution to see if the legislation is valid. And both in countries with and without such constitutions, that determination will on occasion require the courts to choose between two apparently contradictory legislative enactments. What the law is in such cases will depend on which of the two enactments the courts prefer. This is no less true of cases in which the contradiction arises out of the failure of one legislature to satisfy a manner and form requirement imposed by one of its predecessors than it is of cases in which the same legislative body has created two primary rules which contradict each other.<sup>54</sup>

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<sup>52</sup> (1803) 1 Cranch 137 at 177 (U.S.S.C.).

<sup>53</sup> In saying "nothing more than," I do not mean to suggest that these tasks are simple ones or that they do not allow for a great deal of judicial creativity. My comment is directed to the kind of tasks the courts are called upon to perform, not the difficulty of their performance.

<sup>54</sup> That this is true in cases involving contradictory primary rules (by which I mean here all rules that do not fit the description of a self-imposed manner and form requirement) seems clear enough. The reason it is also true in cases involving a failure to satisfy a manner and form requirement is that the primary rules will be different if the manner and form requirement is held to be binding than they would be if it is held not to be. Consider the problem that I set my students. If the manner and form requirement there were held to be binding, the attempted override would be held to be invalid and the main body of the legislation would be vulnerable to challenge on the basis of the *Charter*. If it were not held

The reason for starting this alternative approach with this statement of the obvious is that, unlike the approaches that have been generated by the debate to this point, it focuses attention on the right institution — the courts. If cases involving the effectiveness of self-imposed manner and form requirements can be characterized as clearly as they can be, as falling within "the province and the duty of the [courts] to say what the law is," then we place the courts in the centre of the controversy rather than on the periphery. The question becomes, not whether one Parliament can bind another, but how the courts should address cases in which they are confronted with legislation that has not been enacted in accordance with manner and form requirements set forth in an earlier enactment of that same legislative body. The change is, of course, largely symbolic. But it is none the less important, because it provides a different starting point for the inquiry and makes it easier to break out of the arid conceptualism that has dominated the debate to this point.

How should courts address such cases? My answer to that question is a function of the way in which I conceive of constitutional issues generally and of questions about the effectiveness of self-imposed manner and form requirements in particular. All constitutional issues — even those that can be said to be governed by rules embodied in an entrenched constitution or the common law of the constitution — are ultimately about values. Our proclivity for looking to rules to find solutions to constitutional issues has tended to blind us to this, because rules are seldom formulated in terms of values. Take, for example, the rules generated by Dicey's and the new view formulations of the doctrine of parliamentary sovereignty. Neither of those rules is expressed in terms of values. Yet no one can doubt that the constitutional issue that these rules are designed to resolve engages a broad range of values — the accountability of the government to the electorate, majority rule, formal equality, and the right of self-government at a minimum.

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to be binding, the override would be valid and the legislation would be immune from challenge.

If constitutional issues are ultimately about values, it makes sense to resolve them, not only with that in mind, but with careful attention being paid to what values are engaged by a particular issue, why those values are important and, if they come into conflict as they almost always do, why one set should win out over another. Courts may not always be free to act in this way because they are often constrained by existing rules. For example, courts in a country with an entrenched constitutional provision stipulating that no self-imposed manner and form requirements were to be given effect would have little, if any, occasion to approach questions about the effectiveness of self-imposed manner and form requirements from an explicitly value-oriented perspective. But most such rules, whether they be found in the text of an entrenched constitution or in the common law of the constitution, leave ample scope for such a perspective because of the generality and vagueness of the language in which they are formulated.<sup>55</sup>

For the purposes of this part of the paper, I am, of course, assuming that the courts in the countries with which we are concerned are not governed by existing rules about the effectiveness of self-imposed manner and form requirements. For them, the question is an open one. How are they to approach it? They should do so in a manner that best ensures that the values of the legal and political culture of the society in question are respected and enhanced. Directing the courts to resolve questions about the effectiveness of self-imposed manner and form requirements on the basis of their best assessment of the underlying values of the legal and political culture is conceded to be a rather vague form of direction. But it is necessary, I think, to be somewhat vague at this stage. What I am proposing is not a rule that is designed — as the rules generated by the opposing formulations of the doctrine of parliamentary sovereignty are designed — to provide a more or less ready answer to such questions, but a way of conceiving or thinking about such questions. And it is a way of conceiving or thinking about such questions that permits one to resolve them on the basis of an analysis of what is truly at stake.

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<sup>55</sup> Values, or more particularly those values the courts consider it appropriate to promote, come into play in the act of interpreting and applying the rules.

Moreover, when this approach came to be applied, much of the vagueness would quickly evaporate. There is obviously a common thread running through manner and form requirements from the perspective of the values they engage — all of them in one form or another engage values associated with democratic self-government. They may engage other values as well — for example, linguistic duality, as in *Mercurie* — but they will at least engage these. This means that the analysis in each case will proceed along very similar lines, with many of the same values being identified and discussed and many of the decisions turning on the same kinds of choices. It is also the case that the courts will be using very similar sources to assist them in the making of these choices. The primary source, and this will be true in countries without an entrenched Constitution as well as in countries with an entrenched Constitution, will be the Constitution itself. For it is there that one is presumably most likely to find the values underlying the legal and political culture of the country expressed.<sup>56</sup>

It goes without saying that if this approach were to be taken, it would be open to courts to conclude that some self-imposed manner and form requirements were binding while others were not. In spite of the common thread running through them, not all manner and form requirements engage the same values. And manner and form requirements that do engage the same values may do so in different ways or to a different extent. For example, the manner and form requirements at issue in both *Manuel* and the problem I set my students engage values associated with democratic self-government. But they engage them in very different ways. The requirement said to have been imposed in *Manuel* would have promoted such values because it would have enhanced the scope of public participation in the process by which the *Canada Act 1982* came to be enacted.<sup>57</sup> The requirement hypothesized for the purpose of the problem, by contrast, would have threatened such

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<sup>56</sup> I am using the term "constitution" here in its broadest sense as including not only the text of the relevant constitutional documents, but also the doctrine engrafted onto that text by the courts, constitutional conventions, constitutional traditions, and the organizing principles of the constitution generally.

<sup>57</sup> This assumes a conception of democracy that goes beyond the elitist "government by representatives" conception that predominates in most of the Western world.

values because it would have made it very difficult, if not impossible, for future generations to exercise a critically important aspect of self-government.<sup>58</sup>

The fact that this approach is flexible in the sense that it permits the courts to take note of, and give expression in their analysis to, the differences between one manner and form requirement and another, does not, of course, preclude the possibility of creating categories of manner and form requirements that are governed by a general rule. In fact, given the way in which the courts tend to function, it is not only possible but likely that this would happen. For example, there is every reason to believe that the courts of the countries with which we are primarily concerned — Canada, the United Kingdom, New Zealand and others that have adopted the British parliamentary system — would hold that, in all but the most unusual circumstances, self-imposed manner and form requirements that call for an increased majority vote of a legislative body to alter or repeal legislation enacted by that same body were not binding. That case would be grounded in the proposition that such requirements offend one of the basic tenets of the form of democratic government found in such countries — majority rule. If effect is given to a requirement that a provincial legislature legislate only when, say, three-quarters of its members support the legislation, it will clearly be the minority within that province, not the majority, that governs. If twenty-five percent plus one of the members oppose the enactment of that legislation, the legislation will not be enacted; it will be their wishes, and not the wishes of the majority, that prevail.<sup>59</sup> Manner and form requirements that call for the holding of public referenda would also likely be governed by a general rule, although that rule might well vary from country to country. The critical determinant would likely be the extent to which public referenda and other forms of direct democracy are used to determine the direction of public policy in each country.

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<sup>58</sup> This assumes a conception of democracy that does not include the necessity of having constitutionally entrenched and judicially enforceable rights and freedoms.

<sup>59</sup> This is true, of course, only in the negative sense of being able to prevent changes. There would be no complete transfer of power to the minority, only a granting of the power to preserve the *status quo*.

Courts in those countries that have an established tradition of direct democracy are obviously going to be far less concerned about giving effect to requirements that call for public referenda than courts in countries that do not.<sup>60</sup> Such requirements would be seen as promoting the values of democratic self-government as they have evolved in the former, but challenging those same values as they have evolved in the latter.

The likelihood is, of course, that few self-imposed manner and form requirements would be held to be binding if this approach were to be adopted. Most judges, simply by virtue of who they are and the role they see themselves playing, are going to be reluctant to see the traditional way of doing things within the legislative branch of government come under attack, and will be wary of claims that effect should be given to requirements that call for change, particularly significant change.<sup>61</sup> The fact that the approach calls for judges to reach their decisions on the basis of the values underlying the society in which they live is likely to reinforce this tendency to conservatism. There will, however, be some judges who will be sympathetic to at least some innovations in the process by which we determine the content of our law, particularly those that would have the effect of diffusing the overwhelming power now exercised by the executive branch of government and/or opening up that process to a greater degree of participation by groups within society that have traditionally lacked access to the levers of political power.<sup>62</sup> Unlike Dicey's approach, this alternative approach at least makes it possible for these judges to permit such reforms to take hold. A constitution gives expression to an extremely broad range of often conflicting values and, in the hands of creative and determined judges, can usually be invoked in support of conceptions of democracy different

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<sup>60</sup> Hence, courts in Australia are likely to look more favourably on referendum requirements than courts in Canada. For a description of the extent to which direct democracy schemes have taken hold in Australia, see G. de Q. Walker, *Initiative and Referendum: The People's Law* (Sydney: Centre for Independent Studies, 1987).

<sup>61</sup> J.A.G. Griffith, *The Politics of the Judiciary*, 2d ed. (London: Fontana, 1981).

<sup>62</sup> A good example of a requirement that fits the latter description would be one stipulating that legislation dealing with abortion had to be approved by a majority of the women MPs or MLAs.

than the one that appears to be dominant at a particular moment in time. The range of available alternatives may vary a bit from country to country, and some conceptions may be easier to find in some constitutions than in others, but there will always be room for some flexibility.

Even if courts that saw fit to employ this approach were generally inclined to be conservative in applying it, the fact that it empowers judges to make important and, in many cases, no doubt, contestable choices about the way in which a society is to be governed, leaves it open to the criticism that it gives judges too much power.<sup>63</sup> That this approach gives judges a great deal of power cannot be denied. But it must be remembered that the power to choose the particular conception of democracy by which a society is to be governed will reside with the courts regardless of which approach they take to the question of the effectiveness of self-imposed manner and form requirements: that power inheres in the duty of the courts to determine what the law is. If there is a distinction between this approach and the approaches generated by Dicey's and the new view formulations of the doctrine of parliamentary sovereignty, it lies in the manner in which the power is exercised. Dicey's formulation requires that that power always be exercised in favour of the *status quo* — that is, in favour of the society being governed by simple majority vote of Parliament. The

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<sup>63</sup> There is a large and rapidly expanding body of literature on the problems of judicial review in the constitutional sphere. For a sampling of this literature, both American and Canadian, see A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986); J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982); M.J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982); R.M. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985); M.V. Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988); A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct L. Rev. 473; P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) Osgoode Hall L.J. 485; J. Bakan, "Constitutional Interpretation — Social Change: You Can't Always Get What You Want (Nor What You Need)" [forthcoming, (1991) 70:2 Can. Bar Rev.].

new view formulation, in the hands of Jennings and Heuston requires that the power always be exercised in the same way also, except that it operates in favour of change — that is, in favour of the society being governed by whatever set of procedural rules Parliament has chosen to impose on itself. In the hands of Friedmann and Hogg, the new view formulation does not require that the power always be exercised in the same way — the courts can exercise it in favour of either the *status quo* or change depending on the pith and substance of the particular manner and form requirement in question.

Because courts are always required to exercise the power in the same way under both Dicey's formulation and the new view formulation as it is applied by Jennings and Heuston, it can be said with some justification that there is less scope for judges to impose their own views of how society can best be governed if one of them is adopted than if the approach that I am suggesting were adopted. But that is to say nothing more, in this one respect, than that these other approaches may have an advantage over the one that I am proposing. It is not to say that, on that account, either of these approaches is to be preferred. To reach that further conclusion, one would have to be of the view that it is worth living with the problems associated with one of these approaches in order to avoid the problem of giving judges a somewhat freer hand in deciding how a society is to govern itself. That is not a view to which I would subscribe.

I say this primarily because I consider the problems associated with each of these approaches to be particularly grave ones.<sup>64</sup> But I say it also because there are grounds for not attaching too much weight to the problem of giving judges a somewhat freer hand in this area. For one thing, there is no reason to believe that the courts would be called upon to rule on the effectiveness of self-imposed manner and form requirements with any great frequency. Even if legislators knew that some such requirements might be held to be effective — which they would do if the courts explicitly adopted my approach — it is hardly to be expected that we would see a lot of them enacted. Respect for principles like

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<sup>64</sup> These problems are discussed above in text accompanying and following notes 47-49.



majority rule will, I think it is fair to say, always run deep amongst legislators, not always or necessarily because of their intrinsic merit, but because of the dictates of self-interest. Every member of a governing party contemplating the enactment of a manner and form requirement that is designed to make it more difficult for future legislatures to enact certain kinds of legislation knows that sooner or later he or she – or at least his or her party – will be in opposition, at which time, as they say, the shoe will be on the other foot. In short, unlike judicial review under the Charter, which occurs with great frequency, there is good reason to believe that judicial review in this area will likely be a very infrequent occurrence. Moreover, the consequence of holding as invalid legislation that has not been enacted in accordance with self-imposed manner and form requirements is not that the legislation cannot be enacted at all; it is simply that the legislation cannot be enacted unless and until the manner and form requirement in question has either been satisfied or repealed. It is true that some manner and form requirements might be very difficult to satisfy or to repeal, but I think it highly unlikely that the courts would hold these requirements to be effective. The point here is that this is not an area in which the courts would have the final say. Ultimate power would continue to reside with the electorate and its representatives.

Any advantage that the approaches flowing from the Dicey, Jennings, and Heuston's conceptions of parliamentary sovereignty might be able to claim over my approach, insofar as limiting judicial choice is concerned, is clearly lost when one turns to the Friedmann-Hogg approach. Judges would have every bit as much freedom of choice under that approach as they would under mine. Moreover, there is good reason to believe that the choices would be driven by many of the same considerations under the two approaches. The only difference between the two is that my approach encourages judges to be open and candid about those considerations while the other does not. If openness and candidness on the part of judges are thought to be important, and I believe they are, the approach that I am proposing is clearly to be preferred. That is true even without taking into account the other

problems associated with the Friedmann-Hogg approach discussed above.<sup>65</sup>

Convincing the courts in Canada to adopt this alternative approach would not, I confess, be an easy task. The traditional way of thinking about the effectiveness of self-imposed manner and form requirements appears to be very firmly entrenched in both the academic commentary and the jurisprudence in this area. More importantly, what I consider to be the advantages of the alternative approach — that is, its flexibility, the fact that it obliges courts to acknowledge that they are not passive actors but the makers of important and contestable choices, and the fact that it encourages them to make those choices openly and on the basis of their assessment of how the underlying values of our legal and political culture can best be served — would likely be seen as disadvantages by at least some judges. But the cause is by no means a hopeless one. The fact that we in Canada have an entrenched Constitution which has primacy over all other law clearly provides a powerful incentive not to turn to the doctrine of parliamentary sovereignty for answers to questions about the effectiveness of self-imposed manner and form requirements. It is to the provisions of the Constitution of Canada that we should be turning for answers to such questions, in particular to those provisions that define and delimit the legislative authority of Parliament and the provincial legislatures. My own view is that attempts by the Parliament of Canada or a provincial legislature to alter the process by which legislation is to be enacted would, if they were to be valid and hence effective, presumably have to be characterized as exercises of the powers granted to the Parliament of Canada and the provincial legislatures by sections 44 and 45, respectively, of the *Constitution Act, 1982*.<sup>66</sup> Whether or not a particular attempt is effective is going to depend

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<sup>65</sup> These problems are discussed above in text following note 49.

<sup>66</sup> *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11. Sections 44 & 45 read as follows:

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.
45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

on how the terms used in those provisions — terms like "the constitution of the province" — are interpreted.<sup>67</sup> What I am suggesting is that that interpretation should respect the underlying values of the Constitution as a whole. That can hardly be said to be a radical suggestion.

Moreover, it is not the case that commitment to the traditional approach on the part of those who have employed it has been uniformly wholehearted, nor is it the case that support for the alternative approach that I am proposing cannot be found in some of the commentary and jurisprudence. Both the shortcomings of the traditional approach and the benefits of this alternative approach are clearly reflected in, if not explicitly acknowledged by, the recently published *White Paper* of the Government of New Zealand entitled "A Bill of Rights for New Zealand."<sup>68</sup> In the course of that *White Paper*, the Government, which had expressed an intention to introduce a Bill of Rights very similar in content to the *Canadian Charter of Rights and Freedoms* into the New Zealand Parliament, examined the question of whether or not such a Bill of Rights could be made to prevail over inconsistent future legislation given the fact that New Zealand lacks an entrenched Constitution. Was it possible, in other words, for the Parliament that enacted the Bill of Rights effectively to entrench it?

The *White Paper* answers that question in the affirmative, albeit somewhat equivocally. The solution, it suggests, is to incorporate in the *Bill of Rights* a manner and form requirement to the effect that no provision in it could be "repealed or amended or

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<sup>67</sup> As the *Reference Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 makes clear, it cannot be assumed that the power to amend given by sections 44 and 45 to Parliament and the provincial legislatures, respectively, will be interpreted as generously as the terms used would suggest they should be. In the case of both sections, there is every reason to believe that limitations on the power would be implied from other provisions of the Constitution of Canada, and from our constitutional history and traditions in much the same way that the Supreme Court of Canada, in that reference, found there to be limitations on the power to amend given to Parliament by the old section 91(1) of the *Constitution Act, 1867*. (See also *A.G. Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016.)

<sup>68</sup> (1985) [hereinafter *White Paper*]. The White Paper was presented to the New Zealand House of Representatives by then Minister of Justice (and later Prime Minister) Geoffrey Palmer. It would appear that the Labour Government has since abandoned its plan to enact a Bill of Rights for New Zealand.

in any way affected" by future legislation unless that legislation was approved either by seventy-five percent of the members of the House of Representatives or by a majority of the electorate in a referendum.<sup>69</sup> The courts would be likely, the *White Paper* says, to hold that such a requirement was binding on future Parliaments.<sup>70</sup> Support for that view was said to come from cases like *Trethowan* and *Ranasinghe*, as well as from academic commentary supporting the new view of parliamentary sovereignty.<sup>71</sup>

But the *White Paper* is quick to point out that there is no certainty that the courts would rule this way. It notes that

[i]t is the courts which have the ultimate task of determining what the law is ... While there are strong grounds for believing that the courts would accept entrenchment of something as important as a Bill of Rights, they would probably not accept one which was forced through Parliament by a simple majority ... A statute of this nature is of such major significance that there needs to be a general consensus amongst the public, both that it is needed and on its content. If this consensus exists, it is far more likely that the courts will rule in favour of effective entrenchment of a Bill of Rights.<sup>72</sup>

In form, these observations appear as part of an analysis based on the standard approach to questions about the effectiveness of self-imposed manner and form requirements. They are made, the *White Paper* says, because "the matter is not clear" (by which the authors mean that the standard approach does not provide a clear answer).<sup>73</sup> But I prefer to view them as, if not a rejection of that approach, at least a recognition that it provides an inadequate basis upon which to resolve such questions. The question of whether or not the Bill of Rights could be effectively entrenched is

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<sup>69</sup> Section 28 of the proposed Bill of Rights, *ibid.* at 118.

<sup>70</sup> *Ibid.* at 56.

<sup>71</sup> *Ibid.* at 55-56.

<sup>72</sup> *Ibid.* at 57. In support of this view of the matter, the authors quote a passage from an address delivered by Sir Robin Cooke, a member of the New Zealand Court of Appeal, entitled "Practicalities of a Bill of Rights," reprinted in (1984) 112 Council Brief 4. In that passage he says, "The truth is that, in the end, whether guaranteed rights are really fundamental (able to be overridden only by a special parliamentary majority or a referendum) does not depend on legal logic. It depends on a value judgment by the courts, based on their view of the will of the people."

<sup>73</sup> *Ibid.*

acknowledged to involve more than the characterization of a particular group of words as either a substantive or a procedural limitation on future Parliaments. It involves matters of fundamental constitutional policy that will ultimately be resolved by the courts. And it will be resolved by the courts primarily, or at least partly, on the basis of the extent to which they can be satisfied that the change in policy that such a step would represent has the support of the citizenry; on the basis, in other words, of a sensitivity to the principles of democratic self-government.

A careful reading of the judgment in *Mercure* suggests that it too could be said to lend support to the alternative approach that I am proposing. It is true that La Forest J. invoked both Jennings and Hogg to buttress his conclusion that the requirement that both French and English be used in the enactment of legislation by the Saskatchewan Legislature was binding on that Legislature. But he placed a good deal of emphasis in his analysis both on the fact that the requirement was imposed by what he termed Saskatchewan's "constituent statute"<sup>74</sup> and on the fact that the requirement was "aimed at an accommodation of an historically sensitive matter like the use of the English and French languages in this country."<sup>75</sup> The implication seems to be not only that not every self-imposed manner and form requirement will necessarily be held to be binding, but that the decision as to whether a particular requirement will be held to be binding will be based at least in part on an assessment of how Canada's basic constitutional values — one of which is clearly linguistic duality — can best be served. It is worth noting, in this regard, that in no sense could it be said that the manner and form requirement at issue in *Mercure* represented a threat to democratic values. If anything, that requirement promoted such values because it facilitated participation in the legislative process by French-speaking residents of the province.

Even if one is not prepared to read *Mercure* as explicitly endorsing the approach that I am suggesting, there is good reason to believe that the result in that case is the same as the result that would have been arrived at if my approach had been used. At the

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<sup>74</sup> *Mercure*, *supra*, note 10 at 277 and 279.

<sup>75</sup> *Ibid.* at 277.

very least, therefore, *Mercure* does not constitute a bar to the adoption of that approach at some point in the future.

Finally, it can be said with some justification that the approach that I am proposing is already being applied by the courts when they employ the doctrine of implied repeal in cases in which they are confronted with a conflict between two primary rules.<sup>76</sup> By preferring the later enactment to the earlier, they are protecting the value of democratic self-government. To prefer the earlier to the later would be to permit the policies of the representatives of some previous electorate to prevail over the policies of the representatives of today's electorate, and thereby to inhibit the ability of today's electorate to govern itself. That ability, which is obviously integral to democratic self-government, is preserved intact by the doctrine of implied repeal. If this is the approach the courts take when the conflict is between two primary rules, why should it not be the approach they take when the conflict arises out of a failure to satisfy a self-imposed manner and form requirement?

## V. CONCLUSION

My first year students no longer have to worry about solving the mystery of what to do with self-imposed manner and form requirements in the course of their legal writing program. Changes to our first year curriculum have resulted in Constitutional Law being moved into the upper years and the course I now teach in first year is not one in which it would be appropriate to deal with the issue. Had these changes not occurred, I must confess that I would have been of two minds about whether to continue setting a problem in the area. The problem I used to use remains a good one, but I suspect that the students' judgment when they came to tackle it would be unduly influenced by the fact that their professor had expressed his views on the matter in print.

But the fact that my students are free of the issue does not mean that the rest of us can ignore it. Although not an issue that the courts are frequently called upon to address in any of the

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<sup>76</sup> See, for example, E.A. Dreidger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 174.

countries with which we have been concerned, it is clearly an issue of considerable theoretical importance. Not only does it raise fundamental questions about the way in which a country should be governed (for example, should a country be governed by simple majority vote of the people's representatives, by that in combination with some form of direct democracy involving the electorate, or one or more of a broad range of other options?) but it brings into stark relief the power of the courts to determine what those answers should be.

But there is a practical reason for being concerned about this issue as well. The recent decision of the Supreme Court of Canada in *Mercure* may well, at least in this country, embolden legislative bodies who, for one reason or another, would like to make changes in the way in which legislation within their jurisdiction is to be enacted, through the imposition of manner and form requirements in ordinary legislation. If that were to occur, it would not be long before the courts would be asked to rule on the effectiveness of one of these requirements. At that point, the question of how we should be thinking about such requirements would, I hope, be raised. Are we to continue to think about them in terms of which of two formulations of the doctrine of parliamentary sovereignty we favour? Or are we to break new ground and think about them in terms of the constitutional values they engage? My hope, clearly, is that the courts opt for the latter approach.

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