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7

Requirements as to procedure or form for legislating

I Introduction

One of the most important questions not settled by the doctrine of parliamentary sovereignty is whether, and how, Parliament can make the legal validity of future legislation depend on compliance with statutory requirements as to procedure or form.[1] A requirement as to procedure is a requirement that Parliament follow a particular procedure in order to enact legislation of a certain kind. A requirement as to form is a requirement that such legislation take or include some particular form (for example, a particular form of words). Such requirements might be designed to protect important legislation from inadvertent or ill-considered amendment or repeal, by prompting more careful or extensive deliberation within Parliament than is required to enact ordinary legislation. They might also serve other purposes, such as: (a) to ensure that a bill likely to be controversial is brought to public attention; (b) in the case of requirements as to form, to ensure that Parliament expresses its intentions with unmistakable clarity in order to avoid subsequent misunderstandings; or (c) to differentiate between the respective functions of the two Houses in a bicameral system.

In this chapter I will argue that legally binding and judicially enforceable requirements as to procedure or form are consistent with parliamentary sovereignty, provided that they do not control or restrict the substantive content of legislation, or make it so difficult for Parliament to legislate that its power to do so is diminished. The second qualification, admittedly, gives rise to questions of degree. But provided that these qualifications are satisfied, such requirements are consistent with Parliament retaining full, continuing power to change the substance of the law however and whenever it sees fit.

[1] In this chapter the word 'Parliament' will be used to refer not only to the United Kingdom Parliament, but to any Parliament with respect to which the questions under discussion might arise.

My argument will differ in several respects from those put by proponents of the so-called 'new view' of parliamentary sovereignty, such as W. Ivor Jennings, Richard Latham and R.F.V. Heuston. First, I will not rely on Jennings' idea that (a) the common law is the source of Parliament's legislative authority and of the existing 'manner and form' requirements that govern its exercise; and (b) Parliament can change the common law, including these requirements.[2] Secondly, I will not rely on Latham's idea that the ultimate *grundnorm* of the British constitution is 'simply the sum of those principles which command the ultimate allegiance of the courts'.[3] Thirdly, I will not rely on Commonwealth cases such as *Trethowan* v. *Attorney-General (NSW),*[4] which Jennings, Latham and Heuston pressed into service as authorities for Parliament having power to change 'manner and form' requirements.[5] They paid insufficient attention to the need to ensure that changes to such requirements do not diminish Parliament's continuing sovereign power.

To avoid confusion, I will try to avoid the term 'manner and form' except in a specific context. That term, which appears in s. 5 of the Colonial Laws Validity Act 1865 (Imp) and s. 6 of the Australia Acts 1986 (UK and Cth), has become widely used since the decision in *Trethowan*.[6] There, the High Court of Australia gave the term such a broad interpretation that it was held to include a referendum requirement. A requirement that legislation can be passed only with the assent of a body outside Parliament, whether it is a private body or the electorate as a whole, cannot be regarded as merely a requirement as to the procedure by which Parliament must exercise *its* power to change the law. This is because such a requirement takes power away from Parliament, rather than merely specifying the way in which it must exercise its power. It subjects Parliament's power to the veto of an external body.[7] In this chapter, the term 'procedure or form' rather than 'manner and form' will be used, to emphasise that we are concerned with requirements that govern the method by which Parliament must exercise

[2] W.I. Jennings, *The Law and the Constitution* (5th edn) (London: University of London Press, 1959), pp. 151–63. For further discussion, see Chapter 5, Section III, Part B(2), above.

[3] R.T.E. Latham, *The Law and the Commonwealth* (Oxford: Oxford University Press, 1949), p. 525.

[4] (1931) 44 CLR 97.

[5] Jennings, *The Law and the Constitution,* pp. 153–4, Latham, *The Law and the Commonwealth,* pp. 525–34, R.F.V. Heuston, *Essays in Constitutional Law* (London: Stevens & Sons, 1961), pp. 9–16.

[6] (1931) 44 CLR 97.

[7] See the discussion in Chapter 6, Section IV, Part B, above.

its full, continuing power to enact legislation without diminishing that power.

II Alternative and restrictive requirements: *Jackson's* case

It is important to draw a distinction between three different kinds of legislative procedures. Procedures of the first kind might be called 'ordinary' or 'standard' procedures: these are the procedures routinely used to enact ordinary legislation. Those of the second kind have been called, in Australia, 'alternative' procedures: they establish an alternative procedure for enacting legislation, either in general or of a special kind, which Parliament is permitted but is not obligated to use. Alternative procedures are usually established to deal with deadlocks between the two Houses of a bicameral Parliament, enabling the assent of the Upper House to be dispensed with if certain conditions are satisfied. Procedures of the third kind have been called 'restrictive' procedures: they establish a special procedure for enacting legislation of a particular kind that is more onerous – more 'restrictive' – than the ordinary procedure, and they purport to be mandatory, in that such legislation cannot validly be enacted by the ordinary procedure.[8]

The Parliament Acts 1911 and 1949 (UK) establish an alternative procedure. It is not mandatory: Parliament may still enact any legislation by its ordinary procedure. But if that proves too difficult to use, due to a deadlock between the two Houses, Parliament has provided that it may also act through the alternative procedure.

The difference between alternative and restrictive procedures is important. The famous Commonwealth 'manner and form' cases – such as *Trethowan's* case,[9] *Harris* v. *Minister of the Interior*[10] and *Bribery Commissioner* v. *Ranasinghe*[11] – all concerned restrictive procedures. These are problematic because, by requiring legislation to be enacted by a more onerous procedure, they make it more difficult (and might make it almost impossible) for Parliament to legislate. To that extent, Parliament's substantive power to change the law – and therefore its legislative sovereignty – is diminished or even destroyed. For example, requiring certain laws to be approved in a referendum makes it impossible for Parliament by itself to enact those laws: its power to do so is subordinated to the veto of an external body.

[8] For this terminology, see P. Hanks, *Constitutional Law in Australia* (2nd edn) (Sydney: Butterworths, 1996), p. 92.

[9] (1931) 44 CLR 97. [10] [1952] (2) SA 428. [11] [1965] AC 172.

Alternative procedures do not raise the same problem. They cannot plausibly be argued to restrict Parliament's substantive power to legislate, because they leave the ordinary legislative procedure intact and always available.[12] No matter how difficult an alternative procedure may be to use – how narrow its ambit or how onerous its preconditions – it does not restrict Parliament's legislative power overall. To the contrary, it could be said to expand Parliament's practical ability to legislate, by providing an alternative procedure that might prove successful when the ordinary procedure has failed. The right way to think about how Parliament is 'limited' by such a procedure is this: the procedure does not limit Parliament's law-making powers or its practical ability to exercise them; instead, it expands that ability, but only to a limited extent.[13]

Consider the difference this makes to questions such as whether or not Parliament can be 'bound' by any requirements that form part of special legislative procedures. If they are restrictive procedures, then Parliament is obligated to follow them, which may have very significant consequences for its sovereign power to legislate. But if they are merely alternative procedures, Parliament can only be 'bound' by their requirements if it chooses to take advantage of them. Parliament might be bound to use restrictive procedures to exercise its law-making power, but is never bound by alternative procedures to do so.

In *Jackson* v. *Attorney-General*,[14] some of the judges considered whether Parliament could use the alternative procedure provided by the Parliament Acts to bypass the limitation in s. 2(1) of the Parliament Act 1911 (UK), which in authorising 'any Public Bill' to be passed by that procedure, expressly excludes bills to extend the maximum duration of Parliament beyond five years. Until the 1911 Act is amended in that respect, 'duration bills' can only be passed by the ordinary legislative procedure with the assent of the House of Lords. But there are no express words that also prevent a public bill to remove that limitation from being passed by the alternative procedure: to use the terminology developed in 'manner and form' cases, the exclusion of duration bills is not 'self-entrenched'. Could the alternative procedure be used to repeal the exclusion, without the assent of the Lords, and then be used to pass a duration bill? A majority of the judges – in my view correctly – said that it could

[12] C. Munro, *Studies in Constitutional Law* (2nd edn) (London: Butterworths, 1999), p. 164.

[13] See J. Allan, 'The Paradox of Sovereignty: Jackson and the Hunt for a New Rule of Recognition?' *King's Law Journal* 18 (2007) 1 at 12–14.

[14] [2005] UKHL 56.

not, on the ground that this would be contrary to a clear implication of the express words of s. 2(1).[15]

It has been argued, to the contrary, that in this respect Parliament cannot bind itself, and therefore 'it is unclear how the 1911 Act could have any greater status than subsequent amending statutes'.[16] Alison Young suggests that, if the majority in *Jackson* are correct, s. 2(1) of the 1911 Act is 'entrenched' in that it binds future Parliaments.[17] If Parliament must use its ordinary legislative procedure to remove the exclusion from s. 2(1), it is 'bound' to comply with 'a specific manner and form'.[18]

But this is surely misconceived. Parliament is free to amend or repeal s. 2(1) at any time, either expressly or by implication. That it must use its ordinary legislative procedure to do so does not mean that it has succeeded in 'binding itself' to use a 'specific manner and form'. Parliament has not imposed its ordinary legislative procedure upon itself; the requirement that all three elements of Parliament must approve legislation is a product of custom that has existed since medieval times. What Parliament has done is to enact a less onerous alternative to the ordinary procedure, while leaving the ordinary procedure unaffected. Young's argument amounts to saying that Parliament cannot establish an alternative procedure that is easier to use than the ordinary one for some legislation only: it can only establish such a procedure for all legislation, because otherwise it would be 'binding itself' to use the ordinary procedure to pass any legislation excluded from the alternative one. Indeed, it amounts to saying that if Parliament does establish an alternative legislative procedure that bypasses the House of Lords, but attempts to exclude some kinds of legislation from its scope, the attempted exclusion can be ignored (and expressly or impliedly repealed) by the House of Commons and Her Majesty in the same way that Parliament itself can ignore (and impliedly repeal) any attempt to limit its powers merely by enacting legislation inconsistent with the limitation.

When the argument is taken this far, its flaws become obvious. There is no similarity at all between Parliament attempting to restrict its substantive law-making powers by requiring itself to use a legislative procedure

[15] *Ibid*., paras. 59, 79, 118, 122, 164 and 175.

[16] M. Plaxton, 'The Concept of Legislation: *Jackson* v. *Her Majesty's Attorney General*' *Modern Law Review* 69 (2006) 249 at 257. See also Young, *Parliamentary Sovereignty*, pp. 193–4.

[17] Young, *Parliamentary Sovereignty*, p. 194.

[18] *Ibid*. See also the illuminating discussion in R. Ekins, 'Acts of Parliament and the Parliament Acts' *Law Quarterly Review* 123 (2007) 91 at 109–10.

that is more onerous than its ordinary procedure, and Parliament partially expanding its practical ability to exercise its powers by permitting itself to use an alternative procedure that is less onerous than its ordinary one, for some but not all legislation. In the former case, the attempt to restrict its substantive powers can subsequently be ignored by Parliament; in the latter case, Parliament's decision to expand its powers only to a partial extent cannot be subsequently ignored by the House of Commons and Her Majesty. A bill not assented to by the House of Lords cannot become an Act of Parliament unless it is passed in accordance with the Parliament Acts. Thus, if the House of Commons and Her Majesty, without the assent of the Lords, were to attempt to pass an Act outside the requirements of those Acts, it would not be an Act of Parliament. This would not be an instance of Parliament itself attempting to, and being prevented from, enacting law.[19]

It seems to have been accepted by all parties and judges involved in *Jackson's* case that the alternative procedure provided by the Parliament Act 1911 (UK) was valid. But Parliament's ability to enact an alternative procedure does not entail that it can enact restrictive procedures. This is because by definition the former cannot, but the latter might, diminish its sovereign power to legislate. Partly for this reason, everything said in *Jackson's* case in relation to the possibility of the British Parliament enacting binding restrictive procedures must be classified as *obiter dicta*.[20] The question of whether Parliament can enact mandatory requirements as to procedure or form remains open.

III Policy considerations

To see why it may sometimes be desirable for a Parliament to use requirements as to procedure or form to regulate its legislative activity, it may be useful to start with an analogy.

Before going to the Antarctic for twelve months I tell a friend, who will be sending me packages of food, that I do not want any chocolate because it is bad for my health, and I ask her never to send me any food that contains chocolate because if it is accessible I cannot resist it. Seven months later I write to her from the Antarctic and ask her to send me several packets of a particular brand of biscuits. She knows that they contain

[19] Ekins, 'Acts of Parliament', 109.

[20] See T. Mullen, 'Reflections on *Jackson* v. *Attorney General*: questioning sovereignty' *Legal Studies* 1 at 11.

chocolate, but does not know whether I know it. She therefore does not know whether I have changed my mind and intend to override my earlier request, or whether I acted in ignorance of the biscuits' chocolate content, in which case I myself, if fully informed, would want her to refuse my request. Let us assume that although she receives messages from me, she cannot send any to me, and therefore cannot seek clarification of my current state of mind. She wishes to act as my 'faithful agent', and fully accepts my 'supremacy' in the matter.[21] But whether or not she should send the biscuits to me is still an open question.

In deciding what to do, she should weigh up the consequences. If my initial request was based on medical advice that I have a life threatening allergy to chocolate, she will know that I am very unlikely to have changed my mind, and will conclude that I have requested the biscuits in ignorance. Alternatively, if that request was based merely on a desire to lose some weight, she may think it possible that after seven months in the Antarctic I have exceeded that goal, and now want to end my diet. However, she may also reasonably think that if I had changed my mind about eating chocolate, I would have expressly said so, to avoid confusing her. My failure to expressly override the initial request may itself be treated as evidence that the later request was a mistake due to ignorance.

I could have prevented this uncertainty from arising by initially directing her not to send me anything that includes chocolate unless, in the future, I expressly override that directive. If the potential consequences of a mistake are extremely serious, I might want to eliminate any possibility of mistakes by insisting that she not send me chocolate unless I use a very specific form of words that establishes beyond doubt that I have changed my mind. This would be similar to a mandatory requirement as to the form of legislation, which requires that a certain form of words must be used as a pre-requisite for a statutory provision, deemed by a court to be contrary to some earlier provision, to be valid and efficacious.[22] In less serious cases, I might not want my future requests to be frustrated by technicalities: I might prefer my initial directive to be able to be overridden by any unequivocal indication of my intention to do so, regardless of the particular form of words I use. In other words, I risk making mistakes whatever I do. I might prefer my friend to act on the

[21] Terms used in the American literature on statutory interpretation: see Chapter 9, Section I'.

[22] A 'notwithstanding clause', such as that set out in s. 33 of the Canadian Charter of Rights and Responsibilities, is a kind of 'form' requirement: see Chapter 8.

basis of a strong presumption that I have not changed my intentions, but remain open to any unequivocal evidence that I have, rather than to adopt a more rigid and possibly obstructive approach by insisting that I use a particular form of words, which I might later forget to use. I might want my friend to act on the basis of 'necessary implication' as well as explicit words. Mandatory requirements as to procedure or form, and interpretive presumptions, can serve the same purpose, but in different ways. The differences will be discussed in the next section.

The point is that I may have a *standing commitment* that I want to protect from my own ignorance or negligence in these ways. I do not want to abdicate my ability to change my commitments, or to decide for myself what they entail. But I do want to protect myself from the consequences of certain kinds of mistakes, by authorising my agents to ignore my future instructions or requests unless they have sufficient evidence to conclude that I have not made such a mistake. My ability rationally to control my own destiny may be enhanced if I can effectively do this. If I cannot, my long-term objectives may be defeated by inadvertence or accident.

A Parliament, too, can have standing commitments, and it can be plausibly argued that an ability to protect those commitments by empowering courts to correct certain kinds of mistakes is not only consistent with, but can enhance, its sovereignty. As I have argued previously, a legislature is sovereign provided that its law-making authority is not limited in any substantive respect, even if it is bound to exercise its authority according to requirements of a purely procedural or formal kind. Indeed, a legislature is more rather than less sovereign if it has the ability to subject itself to such requirements, which enhances rather than detracts from its ability to control its deliberative and decision-making processes. If the courts were prepared to enforce these requirements, by invalidating any statute enacted contrary to them, Parliament might no longer be fully sovereign in Dicey's sense. But it would still be fully sovereign in the more important sense of being free to change the substance of the law however and whenever it should choose.[23] I therefore argued that Dicey's definition of parliamentary sovereignty should be revised as follows:

> [A] legislature has sovereign law-making power if its power to change the law is not limited by any norms, concerning the substance of legislation, that are either judicially enforceable, or written, relatively clear, and set out in a formally enacted legal instrument, even if it is governed

[23] J. Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Oxford: Clarendon Press, 1999), p. 15.

> by judicially enforceable norms that determine its composition, and the procedure and form by which it must legislate. Furthermore, its sovereign power is a continuing one even if it includes power to change the norms that govern its own composition, procedure, and form of legislation, provided that it cannot use that power to unduly impair its ability to change the substance of the law however and whenever it chooses.[24]

This superior definition is inconsistent with the doctrine of implied repeal. That doctrine is often thought to be essential to the doctrine of parliamentary sovereignty,[25] but no good reason for this view is apparent. It is essential to Parliament's sovereignty that it is able to amend or repeal its own earlier statutes however and whenever it chooses. But why must it be able to do so by implication, as opposed to being required in some cases to do so by using express words? A Parliament that is able to impose such a requirement on itself is empowered to protect itself from its own inadvertence. Perhaps the worry is that, if a Parliament were permitted to bind itself in this modest way, there would be no logical reason to forbid it from binding itself as to matters of substance. But there is a logical reason: the need to preserve its substantive power to change the law whenever and however it wants. A requirement as to form that it must do so expressly does not limit that substantive power.[26] Nor do very mild procedural requirements.

IV Distinguishing requirements as to procedure or form from interpretive presumptions

Interpretive presumptions are presumptions that legislation was not intended by Parliament to have some particular consequence, and should therefore be interpreted – if possible – as not having it unless the presumption is rebutted by evidence of sufficient strength that Parliament did intend that consequence. These presumptions were, until recently, ostensibly concerned to ensure that before the courts interpret legislation as impinging on important principles or rights, they are quite sure that Parliament intended it to do so. It is not sufficient that Parliament probably intended it: reasonable doubts about its intention should be resolved

[24] *Ibid*., p. 16.

[25] See A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), pp. 297 and 315.

[26] On this point I am in agreement with Sir John Laws in 'Constitutional Statutes' *Statute Law Review* 29 (2008) 1 and 8. But, I disagree with his view that only the common law can subject Parliament to an express repeal requirement.

against impingement. The strength of such presumptions can vary, but they are usually said to require that the requisite intention either be spelt out in express words or be 'necessarily implied'. The relevance of clear extra-textual evidence of such an intention does not seem to have been settled.[27]

A requirement as to procedure or form is: (a) prescribed by a constitution or by legislation; (b) usually formulated with some specificity; and (c) usually interpreted as mandatory, in the sense that legislation passed in violation of it is invalid *ab initio*.[28] Interpretive presumptions, on the other hand are: (a) created by the courts as well as by ordinary legislation; (b) rarely as specific as requirements as to procedure or form;[29] and (c) not mandatory, in that the consequence of a failure to satisfy them is not invalidity, but an interpretation of the legislation as not having the consequence in question.

There is another important difference between requirements as to procedure or form, and interpretive presumptions. The former but not the latter are enforced regardless of Parliament's intentions in enacting the later law. Assume, for example, the existence of a mandatory requirement as to procedure or form that is designed to protect some important principle from inadvertent amendment or repeal. The requirement then takes on a life of its own, in the sense that legislation purporting to amend or repeal that principle, but passed contrary to the requirement, will be invalid even if it is quite clear that the amendment or repeal was not inadvertent. With interpretive presumptions, on the other hand, legislative intention is crucial, at least according to their orthodox rationale. Interpretive presumptions are not supposed to be used to defeat Parliament's intention, provided that intention has been made quite clear. Therefore, if relevant

[27] To ensure that Parliament's intention to interfere with certain rights is known with sufficient certainty, it may be reasonable to adopt a rule that requires express words or necessary implication. But like other rules, this one might be over-inclusive, if Parliament's intentions can sometimes be clearly established by means other than express words or necessary implication, such as statements made in parliamentary debates. The risks of error might be grounds for excluding such evidence where protected rights are at stake, even if it might sometimes be persuasive in such cases and is generally admitted in other cases. For a possible example, see *Re Bolton, ex parte Beane* (1987) 162 CLR 514, discussed in J. Doyle and B. Wells 'How Far Can the Common Law Go Towards Protecting Human Rights?' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999), pp. 57–8.

[28] But some procedures have been held to be 'directory': see *Clayton* v. *Heffron* (1960) 105 CLR 214.

[29] See the discussion in Hon J.J. Spigelman, 'Principle of Legality and the Clear Statement Principle' *Australian Law Journal* 79 (2005) 769, esp. at 779.

evidence of Parliament's intention, including legislative history, clearly shows that it did intend to impinge on some important principle, that should be enough to overcome a presumption to the contrary, even if the intention is neither spelt out by express words nor necessarily implied by them. Otherwise, it would have to be conceded that the presumption has some other rationale, and is really, in effect, a mandatory requirement as to form.

Requirements as to procedure or form may in this respect go further than necessary: they will successfully prevent inadvertent amendments and repeals, but may sometimes frustrate advertent ones. Interpretive presumptions, on the other hand, may not always go as far as necessary: they may not prevent some inadvertent amendments or repeals, if Parliament has inadvertently used words that cannot be interpreted in any other way.

As we have seen, interpretive presumptions, and requirements as to form, such as that express words or even a particular verbal formula must be used to amend or repeal legislation, can serve similar purposes.[30] Indeed, it is sometimes unclear whether a statutory directive is intended to operate as a mandatory requirement as to form, which is a precondition to the validity of subsequent legislation, or as a mere interpretive presumption.

For example, in the *South Eastern Drainage Board* case,[31] a provision that appeared to impose a mandatory requirement as to form was construed as merely directing the interpretation of future legislation. Section 6 of the Real Property Act 1886 (SA) provided that 'no law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply notwithstanding the provisions of the Real Property Act 1886'. The High Court of Australia interpreted this section as directing the interpretation of future legislation, rather than as imposing a 'manner and form' requirement for validity. Dixon J. said that s. 6 'is a declaration as to what meaning and operation are to be given to future enactments, not a definition or restriction of the power of the legislature'. It followed that, even if the 'notwithstanding' formula were not used, if a later enactment contained clear language that was impossible to reconcile with the earlier Act, that language had to be put into effect. 'For

[30] For example, T.R.S. Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' *Cambridge Law Journal* 44 (1985) 111.

[31] *South Eastern Drainage Board* v. *Savings Bank of South Australia* (1939) 62 CLR 603.

the later enactment of the legislature must be given effect at the expense of the earlier.'[32] Given the wording of the provision in question, this seems a dubious interpretation; it was influenced by Dixon J.'s opinion that the alternative interpretation would have given rise to constitutional objections that could not have been intended.[33]

It is also possible for what purport to be interpretive presumptions to be treated as, in effect, mandatory requirements as to form. Recently, the orthodox rationale of interpretive presumptions has been questioned, and other rationales suggested. In *R* v. *Secretary of State for Home Department; Ex parte Simms*, Lord Hoffman justified the presumptions partly on the orthodox ground that legislators may have adopted general or ambiguous words without noticing, and therefore without intending, the full consequences of their literal meaning. But he also said that 'Parliament must squarely confront what it is doing and accept the political costs.'[34] Lord Bingham observed extra-judicially that the presumptions are important because:

> if … the executive as the proponent of legislation wants to introduce a provision that would strike ordinary people as unfair or disproportionate or immoral, the need to spell out that intention explicitly on the face of the bill must operate as a discouragement, not last because of the increased risk of media criticism and parliamentary and popular resistance.[35]

This rationale has little to do with legislative intention: it would be more appropriate as a reason for imposing a mandatory requirement as to form. If the 'presumptions' are treated as requiring express words, even when Parliament's intentions are clear – given either necessary implication or legislative history – then they will amount to requirements as to form.

There is no doubt that interpretive presumptions can either be recognised by the courts or created by Parliament. Parliament has done so, for example, by enacting the Human Rights Act 1998 (UK). The difficult question is whether Parliament can go further and subject itself to mandatory requirements as to procedure or form. If the courts themselves now treat interpretive presumptions as, in effect, requiring express words before they will accept that a statute overrides 'fundamental' common law rights, or 'constitutional' statutes, they are hardly well placed to deny that Parliament can subject itself to a similar requirement.[36]

[32] *Ibid*., 625. [33] See n. 61 below. [34] [2002] 2 AC 115 at 131.

[35] Lord Bingham of Cornhill, 'Dicey Revisited' *Public Law* 39 (2002), 48.

[36] In *Thoburn's* case, Laws L.J. spoke of interpretive presumptions as if they were requirements as to form, but Alison Young has argued that he is best understood as treating

V Beyond the stereotypes: the variety of requirements as to procedure or form

When we think about provisions governing the 'manner and form' of legislation, we habitually contemplate a few stereotypes: provisions requiring a referendum, a special majority in Parliament, or express amendment and repeal. These are all restrictive procedures, as distinct from ordinary and alternative procedures (as previously defined).[37] But constitutions can include other provisions that purport to regulate the passage of legislation, which rarely attract attention in this context.[38] It might illuminate the issues if we take these into account, and ask whether they are or could be legally binding, and if so why. Our penchant for stereotypes may have led us to overlook some important considerations.

In Australian state constitutions, these other provisions include standard quorum requirements for the transaction of business in each House, standard voting rules that determine whether presiding officers have a deliberative or merely a casting vote, and special rules concerning the initiation and passage of finance (appropriation and taxation) bills. The latter typically provide that such bills must originate in the Lower House, after being recommended to it by the Governor; that they may be rejected but not altered by the Upper House, although it may request that the Lower House make certain kinds of amendments; that annual Appropriation Bills deal only with appropriation (a requirement as to form), and so on.[39]

Are provisions such as these, dealing with matters such as quorums, the voting rights of presiding officers, and the manner in which finance bills must be initiated, formulated and amended, legally binding? Are they, or could they be made, judicially enforceable? Could the United Kingdom Parliament enact legally binding procedures along similar lines? If the answer to all these questions is 'yes', could these parliaments go further, and enact other mandatory requirements as to procedure or form?

them as interpretive: see A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009), pp. 40–5. Sir John's recent article 'Constitutional Guarantees' *Statute Law Review* 29 (2009) 1 suggests that she is wrong. Indeed, he acknowledges that the adoption of his view would involve a change in the rule of recognition of statutes as valid laws: *ibid*., 9.

[37] See Section II, above.

[38] An exception is Hanks, *Constitutional Law in Australia*, p. 100, text to n. 44.

[39] See, e.g., Constitution Act 1975 (Vic), ss. 62–65.

VI Validity, enforceability and bindingness

To answer the first question – whether these provisions are legally binding – we need to ask what 'legally binding' means. There is a difference between legal validity and judicial enforceability.

For example, some of the provisions regarding finance bills in Australian constitutions expressly provide that they are, and others have been held to be, non-justiciable.[40] But they are nevertheless legally valid: the parliaments that enacted them had legal power to do so, and they do not violate any higher or superior law. Indeed, if a provision were not legally valid, it would be pointless to ask whether it is justiciable: the question of justiciability can arise only if the provision is legally valid.

But are these provisions legally 'binding' as well as valid? The answer depends on what is meant by 'binding'. In the most obvious sense of the term, which connotes judicial enforceability, they are not. But in another, weaker sense of the term, they are. They impose legal obligations that are clearly intended to govern the conduct of the two Houses of Parliament. Indeed, one of the justifications for regarding them as non-justiciable is that they can be 'enforced' by the Houses themselves, their members and presiding officers.[41] If, for example, the Upper House initiated a finance bill, the Lower House would be entitled to refuse to consider it on the ground that it violated a legal – indeed, a constitutional – requirement. The Lower House would be asserting that the Upper House is bound by that requirement, despite the fact that it is non-justiciable.

The 'remedies' or 'sanctions' available to the Lower House would be 'political' rather than judicial. The House would refuse to act on a bill passed by the Upper House contrary to constitutional requirements. In that respect, non-justiciable provisions are like constitutional conventions. But they are unlike constitutional conventions in that they have been validly enacted in statutory form. Moreover, expectations and demands that they be complied with are based partly on their status as valid laws, and not just on their merits as politically desirable practices or

[40] Section 46(9) of the Constitution Acts Amendment Act 1899 (WA) provides that 'Any failure to observe any provision of this section shall not be taken to affect the validity of any Act …' See also s. 64, of the Constitution Act 1934 (SA). As to s. 54 of the Commonwealth Constitution, see *Northern Suburbs General Cemetery Reserve Trust* v. *Commonwealth* (1993) 176 CLR 555 at 578 per Mason C.J., Deane, Toohey and Gaudron J.J., and 585 per Brennan J.

[41] Richard Ekins has pointed out in correspondence that the Houses, and their members and officers, also enforce non-justiciable laws of contempt of Parliament and parliamentary privilege.

customs. If someone asked why the Lower House should not add extraneous provisions to appropriation bills, or why the Upper House should not initiate or amend such bills, it could forcefully be said in reply that this would violate not only long-standing practices and sound political principles, but the written constitution itself.

According to A.V. Dicey's definition of 'law' as 'any rule which will be enforced by the courts', these provisions are not laws.[42] But as I have argued at length elsewhere, there are good reasons to reject that definition:

> [A]s we conceive of law, what distinguishes legal norms from purely customary or moral norms is that the former belong to a system of norms that is administered by governmental institutions … Some legal systems include constitutional rules that are 'non-justiciable' – not enforceable by their courts – but are nevertheless generally regarded by legal officials as laws binding other institutions of government … Non-justiciable rules should be regarded as laws only if, other than not being judicially enforceable, they are indistinguishable in form and function from other rules that are unquestionably laws. That condition is satisfied if they are expressed in written, canonical form, in formally enacted legal instruments, such as constitutions; are expected to be obeyed by legal institutions other than courts; are in fact generally obeyed by those institutions; and, despite borderline problems of vagueness and ambiguity, are sufficiently clear that some possible actions of those institutions would plainly be inconsistent with them. Provided that the rules satisfy these criteria, there is no good reason to refuse to call them laws. They belong to the system of norms that is administered by legal institutions as a whole.[43]

Standard quorum requirements would no doubt also be held to be non-justiciable, on the ground that a judicial enquiry into voting within a House could not have been intended because it would violate parliamentary privilege. In the United States, quorum requirements have been held to be, in effect, non-justiciable, because the 'enrolled bill' rule has been applied.[44] In Australia, no quorum requirement has, to my knowledge, been the subject of litigation. Indeed, it is apparently common practice for quorum requirements to be ignored when legislation before a House is routine and uncontroversial. Such requirements become significant only if a member present sees fit to draw the presiding officer's attention to 'the state of the House'.[45] This suggests that parliamentarians regard such

[42] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn) (London: Macmillan, 1959), p. 40.

[43] J. Goldsworthy, *The Sovereignty of Parliament*, pp. 11–12.

[44] *Marshall Field & Co* v. *Clark* (1892) 143 US 649.

[45] Conversation with Mr Ken Coghill, former Speaker of the Victorian Legislative Assembly.

requirements as directory rather than mandatory, at least in the sense that 'substantial' rather than strict literal compliance is acceptable. On the other hand, presumably they would not claim that such requirements are in no sense legally binding. As valid statutory provisions, they can only be amended by statute, whereas if they were not legally binding, each House would be legally entitled to ignore them, and adopt Standing Orders inconsistent with them. In other words, the Houses would be in the same position as the Houses in Westminster, where quorums are governed not by statutory provisions, but by Standing Orders under the control of each House itself. It seems, then, that even though standard quorum requirements are regarded as directory and/or non-justiciable, they are legally binding in a weaker sense of the term.

The point is that requirements as to procedure or form can be legally valid, and legally binding in a weak but meaningful sense of the term, even if they do not impose judicially enforceable preconditions for the validity of legislation. This applies also to requirements enacted by the Westminster Parliament. Consider Richard Ekins' powerful argument that the requirements of the Parliament Acts 1911 and 1949 (UK) are non-justiciable, partly because s. 3 of the 1911 Act ousts the jurisdiction of the court, by providing that a certificate of the Speaker under the Act is conclusive and may not be questioned in any court.[46] Even if Ekins is right, it does not follow that the requirements of the Parliament Acts are not legally valid and binding.

VII Sources and limits of the validity and enforceability of requirements as to procedure and form

Although provisions in Australian constitutions dealing with finance bills are usually regarded as directory and/or non-justiciable, this is a matter of statutory interpretation. It should therefore be possible for them to be made mandatory and justiciable by the use of explicit statutory wording. Indeed, some state constitutions provide that any provision in an Appropriation Act dealing with any matter other than appropriation 'shall be of no effect'.[47] It also seems possible for a standard quorum requirement to be made justiciable: an express provision to that effect would surely overcome the usual objection that a judicial enquiry into voting within a House would violate parliamentary privilege. A parliament can choose to relinquish any of its privileges.

[46] Ekins, 'Acts of Parliament', 113.

[47] Constitution Act 1902 (NSW), s. 5A(3); Constitution Act 1934 (Tas), s. 40.

There are *obiter dicta* in *Attorney-General (WA)* v. *Marquet*[48] that imply the opposite: that Australian requirements as to procedure or form can be judicially enforceable only if they fall within the scope of s. 6 of the Australia Act (UK and Cth) ('AA'), which applies only to the passage of legislation respecting the constitution, powers or procedure of the parliament. Since finance bills do not relate to these subject-matters, it would follow that the usual requirements governing the introduction, form and amendment of such bills cannot be made judicially enforceable; an express provision deeming them to be mandatory preconditions for the legal validity of financial legislation would be ineffectual. For the same reason, quorum requirements could only be made judicially enforceable in the case of bills dealing with the parliament's own constitution, powers and procedure, and not other bills.[49] And the same would be true of other rules of procedure, such as those governing voting by presiding officers.

These conclusions are implausible, for reasons that may also apply to the powers of the Westminster Parliament. To see why, it is useful to start with quorum requirements. There is no good reason to think that standard requirements, of the very undemanding kind that are typical of Australian state constitutions, cannot under current constitutional arrangements be made judicially enforceable across the board. This is because there is no good reason to doubt that they are legally valid, even if they are not currently judicially enforceable. And if they are valid, what reason could there possibly be to deny that a state Parliament has authority to require its courts to enforce them?

These requirements are legally valid, and can therefore be made legally enforceable, because: first, state parliaments have a plenary legislative power that surely includes power to prescribe procedures for their own decision-making; and secondly, that power is not subject to any legal restriction that would invalidate standard quorum requirements. Precisely the same reasons apply to the Westminster Parliament.

Starting with legislative power, AA, s. 2(2) provides that state parliaments have power to make laws for the peace, order and good government of their states. This is a plenary power, which AA, s. 6 plainly assumes includes power to make laws respecting their own procedures

[48] (2003) 202 ALR 233, at 251 per Gleeson C.J., Gummow, Hayne and Heydon J.J., and 279 per Kirby J.

[49] Section 6 of the AA states that 'a law … made by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force of effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament'.

(since it refers to the enactment of a law 'respecting the … procedure of the Parliament'). This was clearer still under the previous regime of the Colonial Laws Validity Act 1865 (Imp) ('CLVA'), which the Australia Acts repealed in relation to Australia. Section 5 of the CLVA expressly conferred power on each colonial legislature 'to make laws respecting the … procedure of such legislature'. In *Trethowan's* case, Dixon J. said that this 'power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct'.[50] This seems undeniable, for what would be the point of conferring power on a legislature to make laws respecting its own procedure, if those laws could not be given the full force of law: that is, if they could not be made judicially enforceable? That is why the requirements of alternative legislative procedures have been enforced by Australian courts independently of the 'manner and form' proviso in s. 5 of the CLVA.[51]

The Westminster Parliament, also, surely possesses the ability to enact procedures for its own decision-making as part of its sovereign legislative power. As Richard Ekins has pointed out, no legal requirements – statutory or common law – currently govern its ordinary legislative procedures: each House determines its own internal procedures through its Standing Orders.[52] But it is hard to find good reasons to deny that Parliament as a whole has the power to replace Standing Orders with legislative requirements. As Ekins has argued, Parliament's power to determine the decision-making procedures by which it is to be taken to have acted is the reason why the Parliament Acts 1911 and 1949 (UK) are legally valid and effective.[53] It does not, of course, logically follow that Parliament could also impose requirements on the internal proceedings of each House. But to deny that it could, it would be necessary to argue that Parliament's sovereign power is limited by immutable fundamental custom, which not only prevents Parliament from limiting its sovereign power to legislate, but also prevents it from controlling the internal decision-making procedures that govern its exercise of that power. In other words, it would be necessary to argue that immutable fundamental custom dictates that the two Houses must always have unfettered discretion to regulate their own internal procedures. That would surely be a surprising restriction on Parliament's sovereign power to legislate, since it could not be justified by the overriding need to preserve of that power.

[50] *A.G. for NSW* v. *Trethowan* (1931) 44 CLR 394 at 429–30.
[51] E.g., *Clayton* v. *Heffron* (1960) 105 CLR 214.
[52] Ekins, 'Acts of Parliament', 103. [53] *Ibid*.

All these Parliaments should therefore be regarded as having power to enact procedural requirements. But it does not follow that this power is unlimited: that any and every procedure they might choose to enact would be legally valid, and could be made judicially enforceable. The power is subject to one legal restriction: neither the Westminster Parliament, nor an Australian state parliament, can destroy or diminish its continuing plenary power. In the case of the Westminster Parliament, this is the continuing sovereign power that it possesses according to the customary rule of recognition that underpins the constitution as a whole. In the case of Australian state parliaments, it is the power conferred on them formerly by s. 5 of the CLVA, and today by AA, s. 2(2). This is also a 'continuing' power: because AA, s. 15 denies that state parliaments can amend or repeal the AA, their power under s. 2(2) necessarily survives any attempt on their part to destroy or diminish it.[54]

It follows that the validity of a restrictive procedure might be successfully challenged on the ground that, in substance, it violates this limit to the power used to enact it. It has frequently been recognised that a procedural requirement could be so difficult – perhaps even impossible – to comply with, that in substance it would amount to a fetter on parliament's power to legislate.[55] Imagine, for example, a requirement that certain legislation can only be enacted if passed on two occasions, separated by an election, by a 100 per cent majority of all members of both Houses. Such a requirement would make it virtually impossible for the Parliament to legislate. If a state Parliament purported to impose such a requirement on the enactment of future legislation, it would be rendered invalid due to inconsistency with s. 2 of the AA, the source of the parliament's continuing plenary power. If the Westminster Parliament purported to do so, it could be impliedly repealed – and therefore ignored – by a subsequent Parliament. Arguably, this entails that such a requirement would also be invalid in Britain, because it would not bind the only body it purported to bind.

Standard quorum requirements do not make it difficult to pass legislation. Indeed, they are designed to make the passage of legislation easy, by requiring as few as one quarter or one third of the members of a House to be present. Since they do not infringe this, or any other restriction on a parliament's power to prescribe its own procedures, there is no good

[54] J. Goldsworthy, 'Manner and Form in the Australian States' *University of Melbourne Law Review* 16 (1987) 403 at 411.

[55] *Ibid*., 409–10, 417–25 and 420, n. 79.

reason to deny that they are legally valid and could be made legally enforceable. The same goes for requirements concerning voting by presiding officers. These requirements are examples of what, in earlier work, I have called 'pure procedures or forms': requirements as to the procedure or form of legislation that do not in any way diminish Parliament's substantive power.[56]

It might be objected that, when the judges in *Marquet's* case suggested that s. 6 of the AA provides the only foundation for the enforcement of 'manner and form' requirements in Australia, they did not have in mind standard requirements, such as quorum rules, that apply to legislation in general. They were thinking, instead, of restrictive procedures that apply only to particular, narrow categories of legislation.

That might indeed be what they had in mind. We do tend to distinguish between procedural requirements that are routine and easy to comply with, and those that are unusual and more demanding. And we tend to assume that the former are legally unproblematic, whereas the latter need the support of some special rule or principle, such as the provision in AA, s. 6 that makes some 'manner and form' requirements enforceable. But is there any good reason to draw such a distinction? The continuing plenary or sovereign power of a Parliament is not limited to the enactment of requirements as to procedure or form that apply to legislation in general. There is no good reason to think that the power does not extend to the enactment of special requirements that apply only to particular categories of legislation. Nor is there any good reason to think that the relevant limit to that power – which invalidates any requirement that in substance diminishes or destroys the Parliament's continuing plenary power – tracks the distinction between general and special requirements. The issue is whether a requirement diminishes or destroys the parliament's continuing plenary power, not whether it is a general or special requirement. A general requirement that violates that limit should be held invalid, and a special requirement that does not violate it should be held valid.

To see this, imagine that a special quorum requirement of an absolute majority of members of one or both Houses of an Australian state Parliament were required for a specific category of legislation regarded as particularly important. There is surely no good reason to assume that this special requirement could be made judicially enforceable only if AA, s. 6 applied, but that if it were made the standard quorum requirement,

[56] *Ibid*., 408–9.

applicable to all legislation, it could be made judicially enforceable regardless of s. 6. It makes no sense to think that whether or not AA, s. 6 is needed to make such a requirement judicially enforceable, depends on whether or not the requirement is the standard, as opposed to a special, requirement for legislating.

The tendency to assume that standard requirements are legally unproblematic – legally valid and at least potentially judicially enforceable – is a consequence of our habit of thinking about 'manner and form' in terms of a few stereotypes. Once we free ourselves of that habit, we can see that if standard requirements are legally unproblematic, it is because they do not diminish Parliament's continuing substantive power to legislate. And we can then see that special requirements might be legally unproblematic for precisely the same reason. Consider, once again, the special requirements that govern finance bills. They clearly have no detrimental effect on Parliament's substantive power to enact such bills. They merely differentiate between the functions of the two Houses. There is no good reason to deny either that they are legally valid, or that they could be made judicially enforceable.

If that is so, then arguably an absolute majority requirement could also be valid and judicially enforceable independently of AA, s. 6. It is somewhat more demanding than the standard requirement of a bare majority, provided that a quorum is present. But the crucial question is whether it infringes the relevant limit to Parliament's power to enact procedural requirements, which invalidates requirements that destroy or diminish Parliament's continuing plenary power. Surely an absolute majority requirement does not infringe that limit. The purpose of the standard quorum requirement is not to make it possible for legislation to be passed that is supported only by a minority of members in a House. It assumes that, when political parties are properly managed by their whips, a quorum of members summoned to vote will be sufficiently representative of the membership as a whole that a majority of those present will accurately reflect the views of an absolute majority. The purpose is to avoid the inconvenience of that absolute majority having to attend. The practical difference is merely attendance, not the extent of overall support for the legislation in question. But in relation to proposed legislation of sufficient importance, there is no good reason of principle why, if an absolute majority supports the legislation, it should not be required to attend and be counted, to dispel any possible doubt that it exists. The passage of legislation is, after all, the principal business for which members are elected. Party discipline is sufficiently strong that this is not an onerous

exercise: any member whose absence from the House results in a failure to secure an absolute majority is subject to severe criticism from his party leaders and colleagues. The better view is that such a requirement does not diminish Parliament's substantive power to pass the legislation in question.[57]

The same reasoning applies to requirements as to form, that require express words or even a particular verbal formula in order to amend or repeal an earlier law. It is essential to a parliament's plenary power that it be able to amend or repeal its own earlier statutes. But why must it be able to do so by implication, as opposed to being required in some cases to do so by using express words? As previously argued, if a Parliament can require that an important statute be changed only by express words, or even a specific 'literary form', rather than by mere implication, it can prevent itself from changing that statute accidentally, by enacting a less important statute that its members do not realise is inconsistent with the more important one. Parliament can ensure that future legislators must be given clear notice of any proposal to change the statute, without restricting their ability to change it.[58]

It was noted earlier that in the *South-Eastern Drainage Board* case, the Australian High Court interpreted s. 6 of the Real Property Act 1886 (SA) as governing the interpretation of future legislation, rather than as imposing a 'manner and form' requirement as a precondition of validity.[59] The Court was strongly influenced by a supposed constitutional principle, stated by Evatt J., that 'the legislature of South Australia has plenary power to couch its enactments in such literary form as it may choose. It cannot be effectively commanded by a prior legislature to express its intention in a particular way.'[60] Evatt J. was guided by the earlier statement of Maugham L.J. in *Ellen Street Estates* v. *Minister of Health*, namely: 'The legislature cannot, according to our Constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal.'[61]

[57] For an argument to the contrary, see G. Taylor, *The Constitution of Victoria* (Sydney: Federation Press, 2006), pp. 483–4.

[58] See Section III, above.

[59] *South Eastern Drainage Board* v. *Savings Bank of South Australia* (1939) 62 CLR 603 at 625.

[60] *Ibid*., 633. Alternatively, Dixon J. may have thought that on any other view, s. 6 would not have any effect because the subject-matter of the later law did not concern the 'constitution, powers or procedure of the legislature', as required by s. 5 of the Colonial Laws Validity Act 1865 (UK) (and today, s. 6 of the Australia Act 1986 (Cth) (UK)).

[61] *Ellen Street Estates Ltd* v. *Minister of Health* [1934] 1 KB 590 at 597.

Evatt J. was certainly wrong about Australian state legislatures, which were, and still are, explicitly authorised to subject themselves to requirements as to the 'manner and form' by which future legislation must be enacted.[62] And what is a requirement that a particular verbal formula must be used in legislation, if it is not a requirement as to the 'form' of the legislation?[63] But even in the case of the Westminster Parliament, which is not expressly authorised by a higher law to enact requirements as to 'manner and form', it is – as I have suggested – difficult to find any good reason why it should not have the power to require that special legislation be amended or repealed only by express words. The oft-quoted judicial statements to the contrary, in *Ellen Street Estates*[64] and *Vauxhall Estates* v. *Liverpool Corporation*,[65] are merely *obiter dicta*, because in the relevant statute Parliament had not purported to control the making of future legislation.[66]

The preceding reasoning therefore applies equally to the Westminster Parliament. Its sovereign power should be regarded as including power to regulate by statute its own internal decision-making procedures, subject only to the overriding requirement that its continuing sovereign power to legislate may not be destroyed or diminished. If it has the power to give legislative force to its ordinary law-making procedures, including its ordinary quorum requirements, and to make them judicially enforceable – and surely it does – then it has the power to 'bind' itself at least to that extent. The crucial question, then, is not whether Parliament can 'bind' itself, but whether it can do so in a way that destroys or diminishes its continuing sovereign power to legislate. Only requirements as to procedure or form that would have that consequence should be regarded as beyond its power to prescribe.

[62] Originally by s. 5 of the Colonial Laws Validity Act 1865 (UK); today by s. 6 of the Australia Act 1986 (Cth) (UK).

[63] However, manner and form requirements can only govern the future enactment of laws 'respecting the constitution, powers, or procedure' of the state parliament in question, and so in *South-East Drainage Board*, Dixon and Evatt J.J. were still right to deny that the requirement in the Real Property Act 1886 (SA) was a binding manner and form requirement within the scope of s. 5 of the CLVA.

[64] [1934] 1 KB 590 (CA).

[65] [1932] 1 KB 733 (Div Ct).

[66] P. Oliver, *The Constitution of Independence, The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), pp. 9, 70–1, 98 and 306–7.

VIII Is the 'manner and form' provision in s. 6 of the Australia Act redundant?

In the case of Australian state parliaments, it might be objected that, if procedural requirements can be valid and judicially enforceable independently of AA, s. 6, that section is redundant. Various responses are possible. The most obvious is that express provision was made for 'manner and form' requirements in AA, s. 6, and previously in s. 5 of the CLVA, to enable the judicial enforcement of some requirements that to some extent *do* diminish a state parliament's continuing power to legislate. The requirement of a referendum is the most obvious example. Logically, such a requirement diminishes the substantive power of a Parliament to legislate, because it is unable to enact specified legislation without the assent of an outside body (the electorate). In effect, this outside body is given a power to veto such legislation. It would be impossible to justify a referendum requirement along the lines set out in the previous section: it is not a requirement as to 'procedure or form' that has no impact on parliament's substantive power. Indeed, as shown in Chapter 6, Dixon J.'s reasoning in *Trethowan's* case was for this reason unpersuasive.[67] Gavan Duffy and McTiernan J.J., in dissent, argued more convincingly that the referendum requirement effectively shackled parliament's power to enact of its own motion the legislation in question.[68] Nevertheless, Dixon J.'s view prevailed, and *Trethowan's* case today stands as an unquestioned authority on the point. Section 6 of the AA was undoubtedly enacted partly to ensure that pre-existing manner and form requirements would continue to be legally binding, notwithstanding the declaration in s. 2(2) of the AA that every state Parliament has plenary legislative power with respect to its state. By re-enacting the words of the manner and form proviso in s. 5 of the CLVA, which had been authoritatively interpreted in *Trethowan's* case, s. 6 of the AA must have been intended to preserve intact the authority of that decision, ensuring *inter alia* both that pre-existing referendum requirements remain legally binding, and that new ones can be validly enacted and judicially enforced (although only in relation to laws respecting Parliament's constitution, powers or procedure). It follows that s. 6 of the AA is far from redundant, because a referendum requirement could not plausibly be justified as an example of 'pure procedure or form'.

[67] See Chapter 6, Section IV, Part B, above. [68] *Ibid*.

Standard requirements governing quorums and (generally speaking) the voting rights of presiding officers do not destroy or diminish a parliament's continuing plenary power, and therefore could be made judicially enforceable independently of s. 6 of the AA. The same goes for the special requirements that commonly govern the passage of finance bills. A requirement of an absolute majority should also be valid and enforceable for the same reason. So, too, should requirements that any change to some pre-existing law must be effected by express provision, rather than by implication.[69] These special requirements cannot plausibly be regarded as diminishing Parliament's substantive power to change the law in question.

Super majority requirements, such as a requirement of a two-thirds or three-quarters majority, are more problematic.[70] They should not be regarded as purely procedural, and therefore should not be held binding independently of s. 6 of the AA. In effect, they give a minority of members the power to veto legislation. They do diminish parliament's substantive power, because they make it considerably more difficult for it to legislate. This limit on parliament's power to enact procedures or forms should be strictly construed. Whether or not s. 6 of the AA should be held capable of making super majority requirements binding is another matter. In *Trethowan's* case, the High Court adopted a broad interpretation of the words 'manner and form', extending them well beyond what I have called 'pure procedures and forms'.[71]

IX Reconstitution

Referendum requirements are difficult to reconcile with the continuing plenary or sovereign power of a parliament. The two most common ways of attempting reconciliation are: firstly, to argue that the referendum requirement is merely a 'manner and form' by which laws must be passed, which does not limit parliament's substantive power to pass them; and secondly, to argue that the requirement changes the composition of Parliament by adding to it an additional element – the electorate as a whole – while leaving its powers unaffected.

Objections to the second alternative in the Australian context have been explained in Chapter 6.[72] If the 'reconstitution' argument were made

[69] E.g., s. 85(5) of the Constitution Act 1975 (Vic).

[70] Note that an absolute majority requirement is a special but not a super majority requirement.

[71] See Chapter 6, above.

[72] Chapter 6, Section IV, Part A, above.

in the United Kingdom, it would be even less plausible. There, 'Parliament' is defined by ancient custom as the House of Commons, the House of Lords and the monarch. Parliament thus defined undoubtedly has power to legislate with respect to how each of these three components is constituted. It was settled in the late seventeenth century, for example, that Parliament can control the succession to the throne. Parliament has frequently made legislative changes to the composition and mode of election of the House of Commons. And it is accepted as having a similar power with respect to the House of Lords, which would enable it to change that House into an elected body.

But if Parliament were to subject its power to enact certain kinds of legislation to the veto of the electorate, voting in a referendum, it would in substance severely restrict that portion of its power. Such a radical change would require a change in the fundamental rule of recognition – in the customary consensus among senior legal officials – that underpins the British constitution. The necessity for such a change could not be evaded by formalistic word magic – by labelling the change a 'reconstitution' of Parliament itself, rather than a limitation of its powers. The reality of such a radical change in legal authority cannot be concealed, and debate about its profound philosophical and political implications evaded, by semantic game-playing.

X Conclusion

It is necessary to choose between two theories of the validity and justiciability of statutory requirements as to procedure or form.

According to the first theory, such requirements are only enforceable by virtue of some 'higher' or 'superior' law such as s. 6 of the AA. In the Australian states, this theory would have the unfortunate consequence that a large number of existing and possible future requirements are only justiciable in relation to legislation respecting the constitution, powers or procedure of a state parliament. This consequence affects special requirements, applicable to particular categories of legislation, that are more onerous than the general requirements that govern ordinary legislation. These special requirements include not only the usual suspects, such as referendum and super majority requirements, but also uncontroversial requirements that currently govern the passage of finance bills. Since finance bills do not concern parliament's constitution, powers or procedure, these requirements cannot – according to this theory – be made judicially enforceable. But the crux of my argument is that logically, this unfortunate consequence also affects general requirements that apply to

ordinary legislation. According to this theory, even routine requirements prescribing quorums, and the voting rights of presiding officers, could be made judicially enforceable only in relation to legislation respecting a parliament's constitution, powers or procedure.

In the United Kingdom, the first theory entails that Parliament cannot make any procedural requirements binding, not even the ordinary procedures that are currently set out in Standing Orders. An inability to give legislative force to its own decision-making procedures would be a debilitating incapacity for a supposedly sovereign parliament. This theory is also inconsistent with the assumptions of all parties, and the House of Lords, in the *Jackson* case.

I have argued that the first theory is counter-intuitive, undesirable and groundless, in the sense that there are no good legal or policy reasons for it.

According to the second theory, which I have advanced, statutory requirements of a purely procedural or formal nature, which do not diminish parliament's continuing, substantive power to legislate, do not need the support of a 'higher law' such as AA, s. 6. A parliament's continuing, plenary power surely includes power to make laws respecting its own decision-making procedures and legislative forms, as long as they do not in any way diminish the continuing plenary power itself. No special, independent support, such as that provided by a 'higher law', is needed, because there is no principled objection that it is needed to overcome.

A provision such as AA, s. 6 is only needed to support a requirement, such as a referendum requirement, that does to some extent diminish a parliament's plenary power. Despite the fact that referendum requirements have that effect, one was held to be valid and enforceable in *Trethowan's* case, and by re-enacting the relevant words of s. 5 of the CLVA, s. 6 of the AA must have been intended partly to perpetuate the authority of that decision. It follows that onerous requirements of that kind can only be judicially enforceable (and indeed, legally valid) in relation to the passage of legislation respecting a state parliament's own constitution, powers or procedure. But routine general requirements such as quorum rules, and innocuous special requirements such as those that currently govern finance bills, are valid and can be made judicially enforceable independently of s.6. And if that is true, then other special requirements that do not in any way diminish parliament's substantive power, such as requirements of an absolute majority, or of express rather than implied repeal, are also valid and enforceable independently of s. 6.

These conclusions of the second theory apply equally to the Westminster Parliament. A referendum or other requirement that diminishes Parliament's sovereignty could only be made binding and justiciable if there were a radical change to the customary rule of recognition that underpins Britain's unwritten constitution. But Parliament should be permitted to bind itself to comply with purely procedural or formal requirements, which do not diminish its substantive power to legislate, even if this would also require a (much less radical) change to the rule of recognition.

The conclusion that a requirement of express words, or even of a particular verbal formula, to amend or repeal legislation, is a requirement as to form that could be made binding and justiciable, is very significant. A 'notwithstanding' clause such as the one set out in s. 33 of the Canadian Charter, providing that a statute inconsistent with human rights protected by an earlier law can have a valid operation only if it uses a particular verbal formula that expresses parliament's intention to override those rights, is a requirement as to form. Section 33 is limited in scope, and by no means preserves the law-making powers previously enjoyed by Canadian parliaments.[73] Nevertheless, it provides a model of legislative override that could be expanded in some future attempt to reconcile parliamentary sovereignty with more robust judicial enforcement of constitutional rights. For example, the Human Rights Act 1998 (UK) could be amended to authorise courts to invalidate any legislation inconsistent with the rights it protects, except for legislation expressly declaring Parliament's intention to amend or repeal them, or to override actual or possible judicial interpretations of them. Since judicial review under the Canadian Charter is often classified as 'strong' judicial review, equivalent to review under the United States Constitution, it may seem paradoxical that the inclusion of a 'notwithstanding' clause might be sufficient to make it consistent with parliamentary sovereignty.[74] Questions of judicial review, legislative override and democracy are considered in more depth in the next chapter.

[73] See Chapter 8 for more detailed discussion.

[74] For this classification, see G. Huscroft, 'Constitutionalism From the top Down' and A. Petter, 'Taking Dialogue Theory Much Too Seriously' *Osgoode Hall Law Journal* 45 (2007) 91 and 147 respectively.