It can be forecast, though, with very little danger, that s 12, as it reads now, will give rise to problems and proceedings in practice. This will be the case because of the many loopholes (rendering the protection of the credit receiver less effective), on the one hand, and the unnecessary long periods prescribed in ss 11 and 12, on the other hand, which will force credit grantors to take steps to safeguard their own interests.

J M Otto*

THE PERFECT PRESENT

'There are no bad judges; there have been bad judges and there will be bad judges, but there are no bad judges': an anonymous English barrister, quoted in E S Turner *May it Please Your Lordship* (1971) 10.

CATCH-22: HENRY VII'S TIME (1509–47)

'For my part, I find myself unable to follow counsel for the tenant through the gap which he thus seeks to make between the prongs of Morton's fork': per Oliver LJ in *Cam Gears Ltd* v *Cunningham* [1981] 2 All ER 580 (CA) at 563. ('Morton's Fork. Archbishop Morton's plan for increasing the royal revenues, in the time of Henry VII, so arranged that nobody should escape. Those who were rich were forced to contribute on the ground that they could well afford it, those who lived without display on the ground that their economies must mean that they were saving money': *Brewer's Dictionary of Phrase and Fable.*)

---

* BA LLB LLD (Pret), Professor of Mercantile Law in the Rand Afrikaans University.

THE FOUNDATION OF VEREIGNTY—PARLIAMENT AS A LAW-MAKING BODY

is article I examine whether Parliament is doing its job as the s sovereign. Is it benevolent or dictatorial? Dare we look at sh in terms of its original intentions, or is it Leviathan d, unchecked?

ll look at two approaches in evaluating parliamentary sov- y: the first, with reference to Parliament's openly professed otence, the second with reference to its proper value as ruler.

The thesis is an appeal to a return to basics in constitutional values and a call for very much less of the self-immolating indulgence of an omnipotent Parliament.

Introduction

The Constitutions of some countries claim authority by virtue of being prior in time and thus superior. 'It is often prior in time to the legislature, but even if it is not, it is logically prior.'[1] The words *fundamental*, *paramount* and *superior* are all freely used to describe the nature of the Constitution. The archetypal example ~~of this type~~ is the American Constitution. A federation of states was born of a delegates' convention, coupled with judicial overseeing of the Constitution.

The second type of authority claimed originates as a 'product of a body which has power to make supreme law'.[2] Examples of countries that claim authority on this basis are Britain and the members of the Commonwealth. Though the case of Britain can readily be understood, it is more difficult at first blush to credit the erstwhile dominions with Constitutions based on this type of authority. The unique similarity between these countries is that each obtained its Constitution as a British Act of Parliament. Legal supremacy was gradually transferred to the Parliaments of the dominions via forms such as the Statute of Westminster.

[1] K C Wheare *Modern Constitutions* 1 ed (1951) 81, 2 ed (1966) 56.
[2] Op cit 1 ed 82–3, 2 ed 57.

CONCLUSION

In conclusion it can be said that s 12 of the Credit Agreements Act provides the debtor in need with a strong remedy. Clever (but completely lawful) dealing by a bank or individual trader can, however, limit the operation of the section. One never knows—this may well have been the intention of the legislature!

One last remark: A serious problem with almost all rights and benefits bestowed upon consumers is their ignorance regarding the very protection created for them. This is not the place or time to embark on a full discussion of this difficult and multisided topic. Suffice it to say that ignorance is a most acute and serious problem when the right of redemption is at stake. Most ordinary citizens will probably have some idea of protection in the field of warranties or the like, but very few will even think of a second opportunity being in existence after the seller etc has already sent a thirty-day notice, *and* has cancelled the contract, *and* has repossessed the goods. It would seem that the solution lies along the lines chosen by Australian law discussed above, namely, that the credit grantor is obliged to send a notice to the credit receiver whereby he is informed that he has a right of redemption, and the date before which it should take place and the amount to be paid.

It can be forecast, though, with very little danger, that s 12, as it reads now, will give rise to problems and proceedings in practice. This will be the case because of the many loopholes (rendering the protection of the credit receiver less effective), on the one hand, and the unnecessary long periods prescribed in ss 11 and 12, on the other hand, which will force credit grantors to take steps to safeguard their own interests.

J M OTTO*

THE PERFECT PRESENT

'There are no bad judges; there have been bad judges and there will be bad judges, but there are no bad judges': an anonymous English barrister, quoted in E S Turner *May it Please Your Lordship* (1971) 10.

CATCH-22: HENRY VII'S TIME (1509–47)

'For my part, I find myself unable to follow counsel for the tenant through the gap which he thus seeks to make between the prongs of Morton's fork': per Oliver LJ in *Cam Gears Ltd* v *Cunningham* [1981] 2 All ER 580 (CA) at 563. ('Morton's Fork. Archbishop Morton's plan for increasing the royal revenues, in the time of Henry VII, so arranged that nobody should escape. Those who were rich were forced to contribute on the ground that they could well afford it, those who lived without display on the ground that their economies must mean that they were saving money': *Brewer's Dictionary of Phrase and Fable.*)

---

* BA LLB LLD (Pret), Professor of Mercantile Law in the Rand Afrikaans University.

THE FOUNDATION OF SOVEREIGNTY—PARLIAMENT AS A LAW-MAKING BODY

THESIS

In this article I examine whether Parliament is doing its job as the people's sovereign. Is it benevolent or dictatorial? Dare we look at it afresh in terms of its original intentions, or is it Leviathan untamed, unchecked?

I shall look at two approaches in evaluating parliamentary sovereignty: the first, with reference to Parliament's openly professed omnipotence, the second with reference to its proper value as popular ruler.

The thesis is an appeal to a return to basics in constitutional values and a call for very much less of the self-immolating indulgence of an omnipotent Parliament.

INTRODUCTION

The Constitutions of some countries claim authority by virtue of being prior in time and thus superior. 'It is often prior in time to the legislature, but even if it is not, it is logically prior.'[1] The words *fundamental*, *paramount* and *superior* are all freely used to describe the nature of the Constitution. The archetypal example ~~of this type~~ is the American Constitution. A federation of states was born of a delegates' convention, coupled with judicial overseeing of the Constitution.

The second type of authority claimed originates as a 'product of a body which has power to make supreme law'.[2] Examples of countries that claim authority on this basis are Britain and the members of the Commonwealth. Though the case of Britain can readily be understood, it is more difficult at first blush to credit the erstwhile dominions with Constitutions based on this type of authority. The unique similarity between these countries is that each obtained its Constitution as a British Act of Parliament. Legal supremacy was gradually transferred to the Parliaments of the dominions via forms such as the Statute of Westminster.

[1] K C Wheare *Modern Constitutions* 1 ed (1951) 81, 2 ed (1966) 56.
[2] Op cit 1 ed 82–3, 2 ed 57.

In the United States Chief Justice Marshall said in 1803 in *Marbury* v *Madison*:[3]

> 'The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> 'If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.'

The exception (according to some writers) among the dominions in respect of the nature of the authority relied upon was South Africa. Although its Constitution was created by Act of the British Parliament, the entrenched sections were said to have a status superior to that of the rest of the Constitution. The decision in *Harris* v *Minister of the Interior*[4] strengthened this view. 'The judgment . . . asserts the logical priority of a constitution over the institutions which it has created and whose nature and powers it describes and determines.'[5]

The *Harris* case established that Parliament should be read as Parliament sitting bicamerally for its day-to-day business, and unicamerally for those matters covered by the entrenched sections.[6]

Sovereignty includes the conferred power to rule. Legality is the use of those sovereign powers. The legitimacy of legal norms is subject to both constitutive (rule-conferred) and external[7] (for example, political) restraints.

Sovereignty is therefore prior to legality in time only; after that both exist side by side. Therefore, should the meaning of sovereignty change or shift in extent, legality could also be affected (adversely or favourably).

Constitutive restraints are the *sine qua non* of both conferred power (to rule) and legality, since these restraints taint conferred power. But external restraints restrict only legality, since these merely affect the use of conferred powers.

Hence the subject of this article, acquiescence, is both constitutive and external; for it at once explicates conferred powers *and* the use of those powers. Therefore, in its constitutive sense, it is both prior to and co-extensive in time, that is, the Founding Fathers meet, but thereafter also act as legislators or legitimately delegate their conferred powers—an evolutionary process. In its external

[3] 1 Cranch 137 at 177 (1803). [4] 1952 (2) SA 428 (A).

[5] K C Wheare *The Statute of Westminster and Dominion Status* 5 ed (1953) 347.

[6] The court held that the answer to the question 'What is the Union Parliament?' was contained in the South Africa Act itself. The Statute of Westminster was never intended to and did not in fact change the two methods of legislating which were contained in the Act. Centlivres CJ, delivering the judgment of the court, said: '. . . once it is clear that Parliament means Parliament functioning in accordance with the South Africa Act, the concluding words of the subsection [(2) of s 2 of the Statute of Westminster] carry the matter no further' (at 465).

[7] See (about to be published) F J van Zyl and J D van der Vyver *Inleiding tot die Regswetenskap* 2 ed (1981), especially chapter 7.

sense, and in the South African context, the Government is paralysed in or galvanized into the use of its conferred powers by its right or left wings respectively. That the former exists to the virtual exclusion of the latter is a matter of practical politics and conforms to the political realities to which Dicey[8] refers. Acquiescence, in this sense, is only one aspect of legality.

Depending on which side of the political line we live, we, as an electorate, enjoy, or are the victims of, our acquiescence, that is, of the use the legislature makes of the power that we originally conferred (and are continuing to confer by implication).

A Look at Parliamentary Sovereignty

Introduction

There are two broad ways in which to tackle the exposition of the above heading. One is the traditional method of investigating case law, establishing that the courts will not question an Act of Parliament; that Parliament has the power to outlaw 'blue-eyed babies', and so on. The other is to view Parliament as a law-creating agency and, as such, subject to the 'rules of law-making'.[9] Both methods will be critically employed, and while both are speculative, in the sense that theoretical 'proof' is notoriously difficult, if not impossible, to obtain, each may play its part in establishing the validity of the central thesis of this article that all government is limited,[10] and that limiting measures are compatible with what is traditionally referred to as a 'sovereign Parliament', provided the rules constitutive of that Parliament so allow.[11]

The Traditional Method

Hear the plaintive cry of a traditionalist:

> 'Why has it become the fashion, merely because of *Trethowan's* case [*Attorney-General for New South Wales* v *Trethowan*[12]] . . . to present this simple English theory of Parliamentary sovereignty as if it were full of darkness and doubt, or only some kind of bee in Dicey's bonnet?'[13]

Prior to *Harris* v *Minister of the Interior*[14] writers referred to the sovereignty of Parliament by that name. Latterly it has become

[8] A V Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (1959) 70–85.

[9] 'Rules of law-making' may be considered as rules of law to which the lawmaker (for example, Parliament) must give effect to in order to create valid law. Also see J D van der Vyver (1980) 97 *SALJ* 363 for a lucid and incisive view that parliamentary sovereignty does not relieve Parliament of the 'obligation to honour the procedural provisions contained in (*inter alia*) s 114 of the Republic of South Africa Constitution Act 32 of 1961' (at 365).

[10] E V Walter *Terror and Resistance* (1969) 72: 'A chief who could not feed his people or protect them, it was agreed, or who was too weak or too abusive, would in one way or another lose the community.'

Note the limitations inherent in exceeding the bounds of weakness, abuse, etc. Even the most barbaric dictator is limited in his capacities and, hence, powers.

[11] H L A Hart *The Concept of Law* (1961) 76: 'Yet there is no absurdity in the notion of an hereditary monarch like Rex enjoying limited legislative powers which are both limited and supreme within the system.'

[12] [1932] AC 526. (PC).

[13] H W R Wade 'The Basis of Legal Sovereignty' 1955 *Cambridge LJ* 172 at 184.

[14] 1952 (2) SA 428 (A).

customary to constitutionally distinguish *sovereignty* and *supremacy*. Sovereignty has become the near-exclusive preserve of international law, and 'legislative supremacy' is the term with which constitutional lawyers have decided to replace 'parliamentary sovereignty'.[15] Thus a state may be 'sovereign' but its legislature not.

The basis upon which the traditionalists would support their contention of parliamentary sovereignty and, hence, illimitability is the lack of any testing authority of its enactments. No court may call in question any Act which is on the parliamentary roll. Examples usually proffered are His Majesty's Declaration of Abdication Act 1936[16] and the various Parliament Acts extending the life of Parliament itself. The extreme reluctance of the English judiciary to comment adversely upon legislation is in itself proof to proponents of this view that Parliament cannot be bound. Cases such as *Vauxhall Estates* v *Liverpool Corporation*[17] and *Ellen Street Estates Ltd* v *Minister of Health*[18] are usually cited in support of this point of view.

The contention of Sir Ivor Jennings[19] and Wolfgang Friedmann[20] that the courts have not provided proof either in favour of or against the sovereignty of Parliament has been countered by writers who have invoked the decision in *Edinburgh and Dalkeith Railway Co* v *Wauchope*[21] as positive proof of the incapacity of the courts to question Acts of Parliament.[22]

Thus 'legal sovereignty' and 'political sovereignty' came to be distinguished in the course of time. The dual function of Parliament as the major governing tool, as it were, was viewed as comprising

[15] H W R Wade op cit n 13 above. [16] 1 Edw 8 c 3.

[17] [1932] 1 KB 733, '. . . where it was held that provisions contained in a later Act . . . repealed by implication the provisions of an earlier Act . . . which attempted to invalidate subsequent legislation so far as it might be inconsistent': E C S Wade and G G Phillips *Constitutional Law* 7 ed (1965) 48.

[18] [1934] 1 KB 590 (CA): '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' (at 597). But *contra* see J D B Mitchell in (1971) 6 *Europarecht* 97.

[19] Expounded in his *The Law and the Constitution* 3 ed (1943) 142, 5 ed (1959) 152.

[20] '*Trethowan's* Case, Parliamentary Sovereignty and the Limits of Legal Change' (1950) 24 *Australian LJ* 103.

[21] (1842) 8 Cl & F 710 at 725 (8 ER 279 at 285). Lord Campbell said: 'All that a Court of Justice can do is to look at the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.' But *contra* see J D B Mitchell op cit n 18 above, at 97nn36, 103.

[22] H W R Wade's point of view is founded on the traditional Diceyan thesis that if there is any limitation of Parliament then it should be viewed in terms of internal political rules and external political restraints, ie such aspects as the vote of the electorate. '. . . [T]his did not prevent him [Dicey] from considering the internal and external limitations which are placed upon the exercise of parliamentary supremacy and thus to distinguish between the legal and the political sovereign': E C S Wade Introduction to *Dicey's Introduction to the Study of the Law of the Constitution* 10 ed (1959) xxvii.

Parliament remained totally illimitable, nevertheless, save for such statements that '. . . theory . . . has no relation to realities' which the Privy Council postulated in *British Coal Corporation* v *The King* [1935] AC 500 at 520, per Lord Sankey LC.

both legal and political relations. This dual function was never successfully defined. The clear impression was that the concepts *legal* and *political* were 'antithetical'. But of what this 'antithesis' comprised and where the delineation occurred, no one could say with certainty. One felt that as far as parliamentary sovereignty was concerned, as soon as the role of the courts had been dealt with, so, too, had the matter of sovereignty.

In this way the 'legal sovereignty' of Parliament became amenable to a *legal* definition, or so it was thought. H W R Wade,[23] in a discussion of *Attorney-General for New South Wales* v *Trethowan*,[24] distinguishes between sovereign and subordinate legislation, the latter depending upon some '. . . ulterior *legal* power for which a legal explanation *can* be given'.[25] He continues by alleging that it has been accepted for all time that Parliament cannot bind its successors in 'manner and form'[26] and no skilful craftsman can overcome this limitation. Hence, *Harris* v *Minister of the Interior*[27] merely showed that the Appellate Division had changed its mind since *Ndlwana* v *Hofmeyr*,[28] and that it had therefore followed the course of political events.[29]

The irony in the abovementioned situation should be apparent immediately. The courts, we have been led to believe, pronounce upon the law, but do not create law as Parliament does. Since the sovereignty on which Parliament depends, we are told, obtains its validity from political events, the courts themselves must, at least in the last resort, be relying upon political events (or the lack of them, in constitutional cases) for the validity of their judicial pronouncements.

[23] 1955 *Cambridge LJ* 172 at 185. [24] [1932] AC 526 (PC). [25] Op cit 189.

[26] Section 5 of the Colonial Laws Validity Act 1865 (28 & 29 Vict c 63) stated that the colonial legislatures had full power to make laws, 'provided that such laws shall have been passed in such *manner and form* as may from time to time be required by any Act of Parliament . . .' (my italics).

[27] 1952 (2) SA 428 (A). [28] 1937 AD 229.

[29] It is significant (but understandable) that H W R Wade uses English experience to provide answers to the problem of parliamentary sovereignty.

Thus far we have used the term 'Parliament' without thought as to which Parliament we are referring to. It could have meant the mother of all Parliaments at Westminster or it could equally have meant a colonial Parliament. We have thus by implication equated all these Parliaments. We should therefore have to remedy that by interpolating: 'In its overseas setting, the expression [sovereignty of Parliament] has both political and legal implications which cannot be entirely explained by reference to the historical evolution of the Parliament at Westminster': E C S Wade Introduction to Dicey (op cit n 22 above) xx.

Furthermore, Centlivres CJ could also not agree in *Harris* v *Minister of the Interior* 1952 (2) SA 428 (A) at 464 that to be sovereign the South African Parliament had to be a replica of the British Parliament.

The South African Parliament, the court in effect concluded, '. . . had been cast in a different mould . . .' from that of the United Kingdom Parliament: D V Cowen 'Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa: Part II' (1953) 16 *Modern LR* 273. It was thus not necessary to look at the sovereignty of the United Kingdom Parliament to establish the sovereignty of the South African Parliament. Also: '. . . one should be careful not to regard statements descriptive of the working of the British Constitution as propositions of universal validity': Cowen op cit 287.

Some even thought that the United Kingdom Parliament could redefine itself so that it did not always have to act in the same way; this in the light of *Harris* v *Minister of the Interior* 1952 (2) SA 428 (A).

One questions the artificial distinction between political and legal sovereignty. An answer may be found in the tendency to refer to *parliamentary sovereignty* as *parliamentary supremacy*. In this way the absence of a competing legislature becomes the central meaning of *parliamentary sovereignty*.

In order to explain his thesis historically, H W R Wade[30] notes the twice-shifted allegiance of the courts during the troubled seventeenth century. There is no other explanation, he says, for the courts' refusal to question the validity of Acts of Parliament.

Be that as it may, one álso questions the wholesale importation of the seventeenth century into the twentieth century, with the implication that the validity of those earlier occurrences equally apply now. As vaunted as the theory of the separation of powers was in the seventeenth century, so it is forgotten now. The social contract lies discredited. Burke's freedom of the members of Parliament is lost in the supremacy of the caucus.[31] If that rule of law, on which rests the theory that the validity of statutes may not be questioned by the courts, is anterior to any Act of Parliament and is '. . . above and beyond the reach of statute . . .',[32] is Parliament not limited in its sovereignty by that very rule of law? If courts can indulge in ultimate political acts,[33] could they not also indulge in other more immediate political acts (for example, questioning the validity of statutes)? If so, what validity remains in the statement that courts may not question the validity of legislation? Did Parliament not evolve to counter unchecked executive power?

Dicey sketched the history of the English Constitution from the time of the Norman Conquest as founded on an absolute legislator. Thereafter, political developments mitigated the harsh reality of such autocracy, for '. . . the will of the electorate . . . is sure ultimately to prevail on all subjects to be determined by the British government'.[34] But this is a political fact not of any consequence to the constitutional lawyer, Dicey admonishes. 'The term "sovereignty" . . . is a merely legal conception, and means simply the power of law-making unrestricted by any legal [*sic*] limit.'[35] It is hard to read anything else into this statement (notwithstanding much written on the subject by Dicey) other than that neither the courts nor any power '. . . can come into rivalry with the legislative sovereignty of Parliament'.[36]

Does this interpretation allow Parliament the capacity to pass *any* law it pleases? Apparently in one sense it may, but in another it

[30] 1955 *Cambridge LJ* 172 at 188. [31] See André Rabie (1977) 40 *THRHR* 179.
[32] H W R Wade 1955 *Cambridge LJ* 172 at 187.
[33] 'This is only another way of saying that it is always for the courts *in the last resort*, to say what is a valid Act of Parliament. . . . It is simply a political fact' (my italics): H W R Wade op cit 189.
[34] A V Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959) 73.
[35] Dicey op cit 72. [36] Dicey op cit 70.

may not. For while Dicey states: 'Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation',[37] he has to admit that Parliament is capable of divesting itself of territorial sovereignty, for if he does not, his thesis that Parliament cannot be bound would be violated. But in his admission he must then allow that the Act divesting Parliament of certain territorial sovereignty can be implicitly repealed by a later Act. This he does, but denies that it could occur, because that would only happen in the realm of politics. Yet he insists that Parliament can still enact *any* law. One must, with respect, admire Dicey's deft side-step from legal difficulty into the haven of politics, where no constitutional lawyer may enter.

Parliament as a Law-creating Agency

We have looked at the question in issue from above, as it were, by regarding Parliament as a mechanism, a gigantic automatic machine, its infallibility and inviolability guaranteed; and we have found it wanting.

The thesis contained in the following pages depends for its validity on the acceptance of the view that 'the sovereignty of Parliament' as a theory is merely a species of the theory of 'the sovereign'. As such, the sovereign obtains his power *ex post facto*, so to speak. He remains in power to rule by default, in that his subjects, at best, tolerate his rules. Should his laws not have significant (who is so bold that he can read *majority* for *significant* in our troubled times?) support he will lose the power to legislate.

In the final analysis, therefore, whatever the legislator is called his name connotes the way he acts, that is, legislates. The way in which the legislation is put on the statute book is subject to a myriad of variations, but the fact that the legislation actually arrives at this point is the signification that the body which performs the act of *legislating* relies upon its power to do so. Whether the legislator has that power per se will depend on the efficacy of the legislation immediately after it has been put on the statute book, and not on whether the legislator is sovereign or illimitable.

It is not good enough to declaim 'Oh, but that's a revolution'. One cannot have law valid and untouchable one moment, and then, upon revolution having taken place, declare that that law had never been law, or that that law had been valid for the very same people for whom the revolutionary law now applies, without conceding that there was a spacio-temporal moment at which the applicable law was in fact not law.

The efficacy of the law can be tested in a variety of ways: for instance, by referendum; by the people's absolving themselves of

[37] Dicey op cit 69–70.

the power to legislate in favour of a group of people; by revolution; by petition. Each of these methods presents a theory of legal validity of what makes a law valid. Hence the statement of Hart's, that to establish what is law is '. . . to show that it was made by a legislator who was qualified to legislate under an existing rule and that either no restrictions are contained in the rule or there are none affecting this particular enactment'.[38]

Thus I believe that sovereignty is at issue whatever the form of the act of legislating. The theory of sovereignty relies for its validity upon law being the product of a legislator '. . . who receives habitual obedience but yields it to no one . . .'.[39] Therefore we have merely to establish that this need not necessarily be so for the theory of the sovereignty of Parliament to have been dealt a severe, if not mortal, blow.

This critique of the illimitability of Parliament will, to a large extent, consist of a consideration of H L A Hart's concept of sovereign and subject contained in his *The Concept of Law*. I propose to look at the problem of parliamentary sovereignty from the grass roots up, as it were; examining the status of the law itself, which the subject of this investigation purports to create, and attempting to establish whether it does or does not yield to anything in its law-making activity.

It is my belief that as a law-creating agency Parliament serves a purpose, and implicit in it lies the notion of *service*, that is, submission. An investigation into the end-purpose of such a submission lies within the province of political science and ethics. But the questions, 'To what is Parliament (as a law-creating institution) subject, if at all?' and 'How can Parliament, when it legislates, be subject to something and yet be sovereign as well as legislatively supreme?', are those questions that the constitutional lawyer must answer today.

Hart believes that the traditional theory of sovereignty is dependent on the habit and obedience of the subjects of the law vis-à-vis the law itself. By rejecting the importance of habit and obedience he is also questioning whether law is subject to the illimitability of the sovereign (in our context, Parliament). The importance of this is that we do not have to be hidebound in our approach to the subject.[40]

[38] H L A Hart *The Concept of Law* (1961) 69. [39] Hart op cit 66.

[40] I propose to maintain that it is unnecessary for the purpose of this article to distinguish between sovereign, Parliament, supreme legislative authority, legislator, etc, simply because by the alternatives I mean merely the agency upon which has been conferred the authority to enact laws. (Even the despot has been given the grudging acquiescence of his subjects to enact his decrees.) This does not mean, however, that the 'legislator' cannot play the role of 'sovereign' in international law. The question is one of relation, ie on the one hand, the relation between lawmaker and subject and, on the other, the relation between international equals. True sovereignty must reside with the electors (as Austin would have it), if by sovereignty one describes the *raison d'être* of constitutionalism, ie the proper governing of the

Hart accepts that the theory of sovereignty does not allege the total absence of restraints but only the lack of legal limits. In so far as habit and obedience are considered the pillars on which the theory of sovereignty (and, to me, theory of *parliamentary sovereignty*) rests, he tries to show that sovereignty is something other than what we have come to expect of it. Rather than use a Diceyan-type analysis of the timelessness of Parliament's absolute sovereignty to justify valid law, he asks us to look at the law to justify the former.

Looking at the sovereign's pronouncements in terms of rule creation, Hart distinguishes between the rule laden with serious consequences upon its transgression (for example, a law of the sovereign) and a rule ordinarily so referred to, but, in truth, one on which only moral considerations rest (for example, a request of the sovereign to his spouse). Hence he concludes that though in *area* the sovereign (or Parliament in our sense) is not limited, in *form* it is.

Writing of the position in South Africa, Cowen[41] says that the fact the Parliament was bound to follow the rules of the Constitution in passing different sorts of law was

> '. . . not incompatible with Parliamentary sovereignty; unless it be thought that in the case of a sovereign legislature, there can be *no binding rules of law whatever* governing its structure and mode of functioning—a proposition which is surely unsound even in regard to the Parliament of the United Kingdom. On this point, I can do no better than quote Sir Frederick Pollock, who, in commenting on Bodin's (often misunderstood) maxim that the sovereign is *legibus solutus*, makes it clear that every composite sovereign must have rules in accordance with which it declares its will, and "in making new rules it must proceed according to the existing ones".'

Elsewhere[42] he states:

> 'Now, it is a fundamental legal principle that in all cases where legislative power is vested not in one person, but in a number of persons, that number must combine for action in accordance with certain rules prescribing the manner in which their will is to be ascertained.'

It will be noticed that even where Hart[43] refers to the singular Rex I, the type of rules mentioned by him qualify for the treatment meant in the abovementioned extract, since the internal political restraints to which Dicey refers remain.[44]

The limitations on the sovereign should not be viewed as obligations on the sovereign, but rather *as the lack of authority*. Should the sovereign exceed the bounds of these limitations, the legislation is void.[45]

subjects. As such, it (sovereignty) appears a tautology and even an encumbrance to constitutional law, since the lawmaker must obviously have been created not for its own sake, but for the subjects, and hence must have been created by them.

[41] (1953) 16 *Modern LR* 273 at 290.

[42] D V Cowen *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act* (1951) 6.

[43] *The Concept of Law* 66.

[44] *Contra* E C S Wade Introduction to Dicey (op cit n 22 above) xxxviii.

[45] Although 'legislation' does not appear in inverted commas, one would prefer it to have been, for legislation cannot become void. It either is or has always been void or it is not or has never been void.

H W R Wade[46] is of the opinion that legislation cannot be void; legislation can only be repealed. This point of view must obviously prevail for those who deny absolutely that there are any legal restraints on Parliament. However, the point which Hart is making is that instead of the bland point of departure being that Parliament is not limited, it must rather be conceded that Parliament (the sovereign) could very well be limited *legally*. He says: '"Limits" here implies not the presence of *duty* but the absence of legal power.'[47]

The following rather lengthy extract is proffered without apology, for no one can put the thoughts contained in it as well as Hart:

> 'Such restrictions on the legislative power of Rex may well be called constitutional: but they are not mere conventions or moral matters with which courts are unconcerned. They are parts of the rule conferring authority to legislate and they vitally concern the courts, since they use such a rule as a criterion of the validity of purported legislative enactments coming before them. Yet though such restrictions are legal and not merely moral or conventional, their presence or absence cannot be expressed in terms of the presence or absence of a habit of obedience on the part of Rex to other persons. Rex may well be subject to such restrictions and never seek to evade them; yet there may be no one whom he habitually obeys. He merely fulfils the conditions for making valid law. Or he may try to evade the restrictions by issuing orders inconsistent with them; yet if he does this he will not have disobeyed any one; he will not have broken any superior legislators' law or violated a legal duty. He will surely have failed to make (though he does not break) a valid law. Conversely, if in the constitutional rule qualifying Rex to legislate there are no legal restrictions on Rex's authority to legislate, the fact that he habitually obeys the orders of Tyrannus, the king of the neighbouring territory, will neither deprive Rex's enactments of their status as law nor show that they are subordinate parts of a single system in which Tyrannus has supreme authority.'[48]

Absence of legal power implies the non-granting and non-receipt in the very first instance of legislative powers. Thus the legislative creature, which already exists, has since its birth been subject to the rules, the very cause of its creation, its *raison d'être*. To counter this point, H W R Wade[49] argues that the rule of law underpinning parliamentary illimitability is the one which states that Parliament cannot bind itself. It is as though he were advocating an English *Grundnorm*,[50] based on a *petitio principii* of almost supreme proportions.

Cowen[51] would agree with the statement of Centlivres CJ[52] that '[i]n the case of the Union, legal sovereignty is or may be divided

[46] 1955 *Cambridge LJ* 172. [47] *The Concept of Law* 68. [48] Loc cit.
[49] 1955 *Cambridge LJ* 172.
[50] Indeed, Edward McWhinney has taken up the cudgels here by castigating Centlivres CJ in *Harris* v *Minister of the Interior* 1952 (2) SA 428 (A) for not having seen the obvious *Grundnorm* in the desire of the people of the four provinces to create an accord evidenced by a Constitution: 'The Union Parliament, the Supreme Court and the "Entrenched Clauses" of the South Africa Act' (1952) 30 *Canadian Bar R* 692 at 718–20; 'Race Relations and the Courts in the Union of South Africa' (1954) 32 *Canadian Bar R* 44 at 49 (reprinted in Edward McWhinney *Judicial Review in the English-speaking World* (1956) 96 at 100).
[51] (1953) 16 *Modern LR* 287–8.
[52] In *Harris* v *Minister of the Interior* 1952 (2) SA 428 (A) at 464E.

between Parliament as ordinarily constituted and Parliament as constituted under sec 63 and the proviso to sec 152'. Thus the rule-conferring authority contained in this statement stipulates that unless the South African Parliament acts within these limitations it will not be making valid law. A more obvious example of a limitation on a legislature would be hard to find. As Hart says, the sovereign (or legislature) is subject to '. . . disabilities contained in rules which qualify him to legislate'.[53]

Linked to the immediately preceding point is Hart's observation that the '. . . simple doctrine of sovereignty . . .'[54] obscures the nature of law. One should not pursue the meaning of the terms 'sovereignty' or 'illimitability' to establish whether the legislator's acts are law.[55] One should merely need to establish whether the rule on which the law depends for its validity has not limited or will not limit the effect of the law. Once this has been done, one may legitimately enquire whether the law-making agency, Parliament, is sovereign to the extent that the traditional theory of sovereignty of Parliament (as in the United Kingdom) alleges. Thus it will become immediately apparent whether the laws which Parliament passes are subject to any higher power, or whether the law-making process only is qualified.[56]

Whether the legislature, Parliament or sovereign is or is not subject to another authority does not mean that that institution has or has not unrestricted authority within its own jurisdiction. Such a relation between competing legislatures merely sets up a comparison between one legislator and the other. The relation between a legislator and its 'subjects' is not at issue[57] in this particular instance. Furthermore, Hart says that although the legislator can repeal his legislation, he can still be restricted in his legislation by a Constitution.[58] The distinction here is between a legally unlimited sovereign, as in the United Kingdom, and one, though limited, supreme in the system.[59]

The fact that the legislator is not in the habit of obeying other agencies is not conclusive proof that he is legally unlimited. It is only of '. . . some indirect evidential importance'.[60]

[53] *The Concept of Law* 69. [54] Op cit 68.
[55] The problems of (non-) binding legislation '. . . cannot be settled by an airy reference to the "sovereignty" of Parliament': Sir Ivor Jennings *The Law and the Constitution* 3 ed (1943) 148.
[56] A good example is the sort of question that occurred in *MacCormick* v *Lord Advocate* 1953 SC 396, turning on the interpretation of the Act of Union with Scotland of 1706.
[57] This is, interestingly enough, the *only* relation with which we should be concerned. The meaning of 'constitutionalism', as contained in statements such as the following, indicate a relation *only* between subject and legislator: 'The organisation of competition for the exercise of power and the subjugation of this competition to precise rules is constitutional. Another, probably more important form of constitutionality, is the subordination of governmental decisions to these rules': Raymond Aron *Democracy and Totalitarianism* (1965) 234. What could possibly also have been added is that the rules for the making of the laws of the legislator (ruler) laid down by the subjects are the Constitution itself.
[58] When it is considered that a Constitution is merely an agreement between the subjects and ruler, this statement is as clear and unobjectionable as can be.
[59] With the implication that there could be a wider legal system to which the legislative authority is subject.
[60] Hart *The Concept of Law* 69.

Again Hart[61] returns, in an oblique way, to the rules by which the legislator governs, for in referring to sovereignty of the electors (subjects) he says:

> '. . . the difference between a legal system in which the ordinary legislature is free from legal limitations, and one where the legislature is subject to them, appears merely as a difference between the manner in which the sovereign electorate chooses to exercise its sovereign powers.'

Thus once more he maintains that the definition of the legislature, or the rules by which it is constituted, determine its *sovereignty*. These rules cannot merely be viewed as part of the habit of the population's obedience. If the legislator can be seen as a single person who has to act in a certain way to make a law, this can be the case. 'But, where the sovereign person is not identifiable independently of the rules, we cannot represent the rules in this way as merely the terms or conditions under which the society habitually obeys the sovereign.'[62]

What Hart is saying is: Some legislatures are limited. To view sovereignty, in the case of those legislatures that are not limited, as the source of the law's validity, is to admit that the elected persons create their own constitutive rules. But as a theory this is unsound, for it does not explain the seat of sovereignty in those legislatures which are limited. He therefore advocates a return to a theory of the sovereignty of the electorate. In this respect the theory of habitual obedience does not play a part.

> 'What is required instead is the notion of a rule conferring powers, which may be limited or unlimited, on persons qualified in certain ways to legislate by complying with a certain procedure.'[63]

Conclusion

The governed will allow the ruler (Parliament) only so much scope as they wish and no more.

The ruler's legal norms are valid not because they are valid (the *petitio principii* of illimitability), but because the governed acquiesce in the ruler's power. Its power is conferred. Conferred power is not habitual obedience. Obedience is logically subsequent and denotes subservience to conferred power. Obedience implies coercion, while acquiescence, at least implicitly, implies agreement. Coercion refers to the effectiveness of the enforcement of the ruler's norms, not their validity. Hans Kelsen's 'minimum effectiveness' should therefore refer to an aspect of legality and certainly not the *Grundnorm*, the *raison d'être* of conferred power. An electorate cannot be coerced to confer legitimacy on a ruler's norms. This is a logical impossibility, since it has already conferred power on the ruler. An electorate can only acquiesce in the norms of the ruler (Parliament), although it can be coerced to obey its laws.

[61] Op cit 72. [62] Op cit 75. [63] Op cit 75.

While the governed confer power on the legislator, this is not to be dismissed as the mere political realities to which Dicey alludes. This is *the* reality, the logical explanation for a revolution, a referendum or a national convention (that is, the time when the Founding Fathers meet).

While continuing to acquiesce in the ruler's norms, the electorate requires that the ruler complies with its constitutive rules, without which the ruler enacts invalid norms affecting both those who have and those who have not conferred constitutive rule-creating power. The constitutive rules are not merely 'entrenched' constitutional titbits. They also include answers to questions such as: 'Is the ruler representative of those over whom he exercises conferred power?' and 'Has the class[64] of those from whom conferred power emanates (the governed) grown to include those who have not conferred power?' A negative or affirmative answer respectively to either of these questions would indicate that the constitutive rules founding valid law have not been complied with, with regard to those who have not conferred power. To those who have conferred power on the ruler and who acquiesce therein, this does not apply. The same legal norm could, therefore, be both valid and invalid. This is not an absurdity, since the validity of the ruler's norms depends upon conferred power.

Whether authority is underpinned by being logically or temporally prior, or written or unwritten, is immaterial. The basic truth is that power is conferred. That such authority may be explicated in written Constitutions (Parliament may (not) . . .) has only evidential relevance and is not the power per se but evidence of power conferred by the class of those who originally conferred power and who continue to acquiesce therein.

P J Laubscher*

PRIVACY—150 YEARS AGO

'No man has a right to pry into his neighbor's private concerns . . . but . . . when he comes forward as a candidate for public admiration, esteem, or compassion, his opinions, his principles, his motives, every action of his life, public or private, become the fair subject of public discussion': William Cobbett (1763–1835), quoted by George Spater in *The Times Higher Education Supplement* No 463 (18 September 1981) p 13.

THE PAST

'The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it': Justice Oliver Wendell Holmes *Collected Legal Papers* (1920) 138.

---

[64] As in the laws of logic.

* BA (Witwatersrand) LLB (SA), Advocate of the Supreme Court of South Africa.