PARLIAMENTARY SOVEREIGNTY

Legal Theory and Sovereignty

Legal theory contributes to an understanding of legal and political sovereignty within the constitution. In the overview of the theories of John Austin, Hans Kelsen and HLA Hart which follow, it will be seen that, in each case, the jurist is seeking an explanation of the source of ultimate authority, its identifying characteristics and the manner in which sovereignty is upheld within a legal order. By revealing the characteristics of valid law, it becomes easier to understand the distinction between laws and other rules in society – such as moral rules – which have binding effect, but which do not have the force – and enforceability – of legal rules.

John Austin

Within every civil society – or polity – there will be found, as a social and political fact, one supreme power. The nineteenth century jurist John Austin was one of the earliest ‘modern’ theorists to offer an in-depth analysis of sovereignty, and his work – while much criticised by later writers – still marks a useful starting point for analysis of the concept. Austin’s theory was an attempt to define law in the positivist tradition. Law is nothing more or less than the commands of the identifiable, illimitable and indivisible sovereign body. The sovereignty conferred exhibits itself in the habit of obedience of the people, which in turn is instilled by the fear of sanctions which attach to all laws and thus underpin the legal system. Laws are nothing more nor less than the general commands of this sovereign, to which sanctions are attached.

While the model most closely accords with the criminal statute, it is difficult to endorse in relation to much of the civil law and in relation to those laws which regulate the law making and law enforcing institutions within the state. However, in every state, whether monarchical or parliamentary, unitary or federal, there must be some body which demonstrates the characteristics of a sovereign. For Austin, sovereignty as a legal concept within the United Kingdom lies with the Queen in Parliament: as a political concept, the ultimate sovereignty is vested in the people.

Austin’s analysis of both sovereignty and law is somewhat crude. It is difficult, for example, to adapt his idea of sovereignty to a federal state where, to cite but one example, the distribution of power may confer equal legislative powers on both the individual provincial legislatures and the federal government and provide for judicial review of the constitutionality of primary legislation. Today, his theory is the more difficult to apply when considered in light of the United Kingdom’s membership of the European Union.

HLA Hart

A thorough critique of Austin’s analysis is offered by Professor HLA Hart. Hart portrays the legal system as being one of rules rather than commands. For Hart, Austin’s jurisprudence is tainted by its overtly coercive nature, as exemplified in the command plus sanction portrayal of law. Austin has missed, according to Hart, an important dimension of law: the concept of a rule. Rules, for Hart, are distinguishable from commands in several significant respects. Legal rules may, as with the criminal law, lay down specific prohibitions, breach of which will be met with punishment. Nevertheless, there are laws that do not exhibit the characteristics of prohibition and sanction. Many rules of law confer the power on individuals and groups to act, but evince no element of coercion: rules of contract, of making wills, of entering into marriage, fall within this category. These rules Hart labels ‘power conferring rules’: rules which are permissive and the breach of which will result in a ‘nullity’, a concept which is difficult to conceptualise as an Austinian ‘sanction’.

By distinguishing between rules that stipulate prohibitions and rules that confer powers, Hart is able to construct a theory of law which is represented as a union of primary and secondary rules. Each legal rule within the system is identified according to accepted criteria: what Hart calls the ‘rule of recognition’. At the apex of

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1 1790–1859. See The Province of Jurisprudence Determined, 1832.
2 Positivism being defined as man-made law – as opposed to divine or natural law – enacted by a political superior within the state for the governance of citizens: the law which is posited or laid down.
3 As, eg, the Commonwealth of Australia Constitution Act 1900.
4 See further below and Chapters 7 and 8.
the hierarchy of laws — whether bylaws of a local authority, judicial decisions, delegated legislation or statute — is the ‘ultimate rule of recognition’. This ultimate rule, while involving some complexity and uncertainty, is mostly explained in the form that ‘what the Queen in Parliament enacts is law’.

Hart analyses the problems surrounding the nature of sovereignty. In *The Concept of Law* (1961), Hart discusses the concepts of *continuing sovereignty* and *self-embracing sovereignty*, an issue which, as will be seen further below, has attracted continuing academic debate. Hart argues that the conventionally understood Diceyan concept of sovereignty is an interpretation which has been accepted as the criterion of legal validity, but that that interpretation is ‘only one arrangement among others, equally conceivable’ (p 145). The Diceyan view is that Parliament enjoys continuing sovereignty — that is to say, that each Parliament, irrespective of time, has equal legislative competence to that of any other Parliament. However, Hart argues, Parliament’s sovereignty could be interpreted to be a form of *self-embracing sovereignty* — a sovereignty which would permit the exercise of power to delimit Parliament’s legislative powers in the future. This power, however, being the ultimate power, would be exercisable only once. Hart draws the analogy with God in the following manner:

...on the one hand, a God who at every moment of his existence enjoys the same powers and so is incapable of cutting down those powers, and, on the other, a God whose powers include the power to destroy for the future his omnicompetence. [p 146]

In the former case, God enjoys continuing sovereignty; in the latter, self-embracing sovereignty. Furthermore, neither of these interpretations, Hart instructs:

...can be ruled out as wrong or accepted with confidence as right; for we are in the area of open texture of the system’s most fundamental rule. Here at any moment a question may arise to which there is no answer — only answers. [p xxx]

The Validity of Law and the Effectiveness of Law

In addition to identifying the characteristics of valid law, each of the above theorists also seeks to explain the relationship between — and distinctions between — the concepts of validity and effectiveness. The importance of the distinction between validity and effectiveness of law lies in explaining the ultimate source of authority or Sovereignty within a state. One question which frequently arises is whether, if a law is ineffective (perhaps because it is morally disapproved of by a majority of citizens, or because it is regarded as futile), that law loses its validity within the legal order. The commonly agreed position adopted by Austin and Hart is that such a law — provided that it conforms with the constitutional criteria for law — remains valid despite being ineffective. However, it is also a point of agreement that if a legal system were to cease to be effective overall — that is to say, if a state of anarchy existed — then the ultimate sovereign power would be under threat, and would probably be forced to change. The people, in rejecting the ultimate power within the state, would be taking back the power that they had entrusted to the sovereign. Accordingly, it can be seen that the legal sovereign is dependent ultimately upon the political sovereign power in society — the people.

The effectiveness of law, while it does not *per se* determine legal validity, nevertheless interrelates with law’s validity. Under the constitutional theory of the United Kingdom, an Act of Parliament does not become invalid under the doctrine of desuetude (disuse). As a result, statutes of great antiquity — although never or seldom used — retain the force of law, and may be relied upon at any time. Equally, a statute — of whatever date — is valid if it meets the criteria of validity, irrespective of whether or not it is effective in achieving its objectives. This is the point made by Sir Ivor Jennings in relation to the banning of smoking on the streets of Paris. A more realistic example of the relationship between the effectiveness and validity of law stems from the system of local taxation in the 1980s. The government decided that the existing system of taxation based on the rateable value of properties — irrespective of the number of persons living in the property — was inequitable. Accordingly, the government introduced the Community Charge (or Poll Tax) which levied a flat rate of tax on each person within a local government area. The system was first introduced in Scotland and was met with condemnation and evasion. As a result of its ineffectiveness — based on the rejection of the law by the people — the government

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5 Unless expressly repealed. See eg the Statute Repeals Act 1998, which repeals ecclesiastical leases legislation dating from the early sixteenth century.

was forced to change the law. The law did not become invalid as a result of its ineffectiveness: rather, the ineffectiveness created a political reason as to why the law should be repealed.

If that one instance of an ineffective law is extrapolated to the legal system as a whole, the manner in which effectiveness affects validity can be seen more clearly. If a legal system comes under strain to a significant degree, a point will be reached at which there is civil unrest, anarchy or revolution. The law will cease to be effective. The law, however, under the theory of sovereignty, remains valid. At some point on the scale between general effectiveness and more or less total ineffectiveness – and the point cannot be precisely determined – the underlying explanation for the validity of law will cease. Effectiveness, accordingly, can be seen to be the prime condition for meaningful statements about validity.7

In a revolutionary situation there is a point where the basic norm – or sovereign power – changes. The ultimate validity of law depends on its effectiveness. When there is a revolution, the basic norm may change, brought about by a change in the power structure within a society ultimately creating a new basic norm.

Ultimate validity and effectiveness: an illustration

The relationship between the ultimate validity of a legal system and effectiveness is well illustrated by the position in Rhodesia, as it then was, in the 1960s. Until 1965, the governance of Rhodesia was under the sovereignty of the United Kingdom, with Rhodesia enjoying self-governing powers to the extent allowed under the Constitution of Rhodesia. By convention, the United Kingdom Parliament would not legislate for the colony without the express request or consent of the Rhodesian Parliament. In 1965, however, the Prime Minister of Rhodesia, Mr Ian Smith, issued a unilateral declaration of independence from the United Kingdom and asserted the full right of self-government. The response of the United Kingdom’s government was to reassert its own powers, reaffirming its right to legislate for Rhodesia in the Southern Rhodesia Act 1965 and thus overriding the convention. Between 1965 and 1979, when a constitutional conference resulted in full independence being conferred on the renamed Zimbabwe,8 there was thus doubt as to which Parliament represented sovereignty within the state of Rhodesia.

The case of Madzimbamuto v Lardner Burke (1969) provided the opportunity to test the revolutionary position in relation to sovereignty. Madzimbamuto had been detained on order of the government of Rhodesia under a provision enacted by the Rhodesian government post-UDI (the unilateral declaration of independence). Challenging the legality of his detention, Madzimbamuto claimed that the Act was ultra vires the powers of the Rhodesian government. On appeal to the Privy Council, the traditional doctrine of parliamentary sovereignty was affirmed. Lord Reid declared:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do these things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.

Accordingly, the sovereignty over Rhodesia remained – from the English courts’ point of view – that of the United Kingdom Parliament. The Rhodesian government had de facto power; de jure power remained with the United Kingdom. An impasse was thus reached: to the government of Rhodesia – and ultimately the Rhodesian courts – the alleged sovereignty of the United Kingdom was an irrelevance. To the United Kingdom, however – as illustrated by Madzimbamuto’s case before the Privy Council – the ‘basic norm’ of the constitution of Rhodesia remained the sovereign power of Westminster.9 Nevertheless, from the point of view of the judges within Rhodesia, there was a dilemma: how to react to legislation promulgated by the de facto sovereign power. From 1965 to 1968, the Rhodesian courts refused to acknowledge the lawfulness of the Smith government, following the view of the Privy Council that, since the government was unlawful, so too were all of its acts. However, to continue to deny the force of law to any acts of the unlawful government was to produce uncertainty and doubt. The doctrine of necessity was employed by the judges to give legal effect to what was constitutionally invalid. Gradually, the continuing effectiveness of the Smith regime was to result in recognition of the validity of its Acts, thus further revealing the complexities in maintaining a clear separation between the

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7 See Kelsen, 1967, p 214; Hart, 1961, Chapter VI.
8 Under the Zimbabwe Act 1979 and SI 1979/1600.
9 See, inter alia, Harris, 1980, p 125; Raz, 1979, Chapter 7; Stone, 1963; Brookfield, 1969.
criterion of legal validity and effectiveness. In a revolutionary situation, a change in the basic norm, or grundnorm, will take place when the judges accept the new source of sovereign power.

The Ultimate Rule is Extra-Legal

When one comes to search for the ultimate higher authority which itself validates the basic norm, a logical impasse is reached. Accordingly, it is necessary to look outside this discrete structural system in order to find the authority which confers ultimate validity. On a domestic basis, we find this validating force in ‘juristic consciousness’ – in other words, the acceptance of legal validity by the judges. For Hart, the ultimate rule of recognition is validated by the sociologically observable fact of official acceptance. By this, Hart means that the officials’ – and most importantly the judges’ – acceptance of authority can be seen in operation whenever one observes a court of law. A judge may perhaps personally disapprove of a precedent case or of a statutory provision, but his acceptance of its validity is demonstrated by his application of the law. Expressed differently, it is the judges who uphold and reinforce the sovereignty of Parliament – the basic norm of the constitution.

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10 See Dias, 1968.