Parliamentary Sovereignty and the Constitution

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The doctrine of parliamentary sovereignty of the United Kingdom parliament is often presented as a unique legal arrangement without parallels in comparative constitutional law. By giving unconditional power to the Westminster Parliament, it appears to rule out any comparison between the Westminster Parliament and the United States Congress or the German Bundestag, whose powers are carefully limited by their respective constitutions. Parliamentary sovereignty is thus seen as a unique feature and a result of the unwritten constitution. I shall call this the 'classic' view. Nevertheless, a closer look at the theoretical presuppositions of parliamentary sovereignty shows that this conclusion is unsustainable. If parliamentary sovereignty is to be a legal doctrine (and not a sociological or historical observation), it must rely on a list of powers that belong to parliament as an institution. These legal powers are organised in powers and disabilities and are thus both empowering and limiting. In other words, all legally organised parliaments have limited powers. The Westminster Parliament has constitutionally limited powers, very much like its German and American counterparts.

The classic view is based on Dicey's understanding of sovereignty in terms of a hierarchical order of power, or a scheme of delegation. It follows from the idea that for a constitution to be higher law it needs to be backed by a special, distinct and higher *pouvoir constituant.* Nevertheless, this classic view can be seen to lead to a well-known problem. The doctrine of parliamentary sovereignty appears to be the only thing that parliament cannot change. But then what does it mean to say that parliament is omnipotent? Here is something that it cannot do, namely, change the terms of its own power. Its powers appear thus to be in some sense permanent. There is no lawful constitutional change of these terms. If so, the UK constitution is both the most flexible constitution and the most rigid.

This paradoxical position was exposed in the *Jackson* judgment of the House of Lords.[1] The applicants argued that parliament could not have lawfully passed the Parliament Acts through which the power of the House of Lords was reduced. The logic of their argument was fully in line with Diceyan orthodoxy: Parliament cannot change the terms of its legislative actions. Nevertheless, a unanimous House of Lords rejected this view of parliamentary sovereignty and ruled that parliament can indeed amend the rules of its own procedure. This has the consequence that the acts passed according to the procedures of the Parliament Acts are ordinary laws, even though they are the result of some interference with sovereignty. This is now the law as far as the UK is concerned. But the general issues behind this

The author is grateful to John Allison, Anthony Bradley and David Dyzenhaus for their comments on earlier drafts. The usual disclaimer applies.

1. *Jackson and Others v. Attorney General* [2005] UKHL 56, [2006] 1 A.C. 262 [*Jackson*].

problem merit a more sustained philosophical exploration for they teach us something about constitutions and constitutional change in general. Here the starting point ought to be Dicey's formulation of the problem.

Dicey's View

Dicey defines parliamentary sovereignty as follows:

> The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[2]

Dicey says that the definition has a positive and a negative dimension. The positive side refers to a power, or set of powers, to bring about valid laws. The negative refers to an immunity, or set of immunities, as against everyone, including the courts, to affect the validity or intended effect of Parliament's laws. We may thus rephrase Dicey's account in terms of powers and immunities as follows:

(1) POWER: Parliament enjoys a comprehensive and exclusive *power* of law-making, the power to make, change and unmake any laws.

(2) IMMUNITY: Parliament enjoys a comprehensive and exclusive *immunity* of law-making against any other person or body: its laws are not to be changed or unmade by any other person or body.

Dicey did not use the language of powers and immunities. Nevertheless, he put the matter more or less in these terms when he noticed a positive and a negative aspect (i.e., the power and the immunity), both of which were complete and absolute. After a thorough discussion of the opinions of jurists and the relevant cases that confirmed his interpretation of English law, he concluded as follows:

> Parliamentary sovereignty is therefore an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament. No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts.[3]

Dicey thought that this definition was complete. It has now achieved universal acceptance as a classic statement of the doctrine of parliamentary sovereignty.

But it is not clear that Dicey's theory is successful even in outline. Many distinguished legal theorists and constitutional scholars have noticed that it leaves several questions unanswered. Richard Latham and R.F.V. Heuston observed that this account appears plausible only because it relies on an ambiguity of the term

2. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915; reprinted Indianapolis, IN: Liberty Fund, 1982) at 3-4 [*Introduction*].
3. *Ibid.* at 24-25.

'Parliament.'[4] In a separate argument John Finnis has showed that any account of the foundation of a legal order requires additional tools, which he calls 'rules of identification', in order to account for legislation pre-existing the current Parliament.[5] These objections highlight, in my view, two very serious structural problems with Dicey's account, which I shall explore in some detail.

The first objection is this. What is Parliament and when does it act? As a matter of standard practice Parliament is taken to mean the Lords, Commons and the Queen acting in unison according to standing legislative procedures. This means that a group of people (which does not have as a meeting or collection of individuals any legal or constitutional power), whenever constituted as a public institution qua Parliament (on the basis of some rules and under certain circumstances), enjoys the power to legislate as 'the Queen in Parliament' i.e., the ultimate legislature. When it so legislates, we have as a result an Act of Parliament. So the group does not do what it likes with the law. In order to legislate, it complies with rules of its own composition and with a set procedure. As Richard Latham observed, 'the King, Lords and Commons meeting in a single joint assembly, and voting by majority, or even unanimously, could not enact a statute.'[6] This is because this joint meeting does not follow the procedures of law-making.

Nevertheless, Dicey does not draw the distinction between the group or meeting of individuals and the results of a proper legislative procedure. When he speaks of the right of Parliament to make or unmake any law whatever he speaks as if Parliament can decide how to legislate in any way it sees fit. But no person or group of persons has such a power. Parliament is an institution bound by the rules of its composition and the rules of procedure. When Dicey says that Parliament's authority cannot be challenged, he is right about the result of the work of parliament whenever it takes the form of the Act, but he is wrong about Parliament as an institution. Occasionally, the institution (though not the Act) is thwarted. For example, if Parliament passed a resolution attempting to set aside an Act of Parliament, it would not—legally—have its way. It would also be wrong to say that Parliament is never thwarted whenever it acts as a legislative body, which is perhaps the sovereign manifestation of Parliament (i.e., whenever the two Houses approve of a Bill separately according to the standing rules and receive the Royal Assent). We have no way of determining whether parliament has acted successfully as a legislative body other than by looking if the product of its actions is an Act of Parliament according to the law. So we retrospectively say that something is an Act because the processes and all other conditions have been met was produced by the legislative body. But

4. R. T. E. Latham, *The Law and the Commonwealth* (Oxford: Oxford University Press, 1949) at 522-25, R. F. V. Heuston, *Essays in Constitutional Law*, 2nd ed. (London: Stevens, 1964) at 1-3. For further support for the 'new view' see also Sir Ivor Jennings, *The Law and the Constitution*, 4th ed. (London: University of London Press, 1952) at 146-49 and Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) at 35-57. On Richard Latham's life and work see P. Oliver, 'Law, Politics, the Commonwealth and the Constitution: Remembering R. T. E. Latham, 1909-43' (2000) 11 King's College L. J. 153.

5. John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence: Second Series* (Oxford: Clarendon Press, 1973) at 58.

6. Latham, *supra* note 4 at 523, n. 3.

this is only a roundabout way of saying that the institution Parliament has produced an Act of Parliament by following the correct procedures. 'Institution' and 'Act' remain the only active concepts, and the idea of a 'legislative body' is entirely dependent on them. There is not such a thing, as a sovereign 'legislative body,' that can be contrasted to the institution of Parliament or the Act of parliament.

English law recognises this fact. This is shown by the famous case of parliamentary privilege, *Stockdale and Hansard*, the facts of which are known to all common lawyers since their first year of university education.[7] In the course of refuting the argument that the parliamentary privilege of the House of Commons escaped any judicial scrutiny, Lord Denman CJ said: 'The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament.'[8] Patteson J said that the House of Commons

> is the grand inquest of the nation, and may enquire into all alleged abuses and misconduct in any quarter, of course, in the Courts of Law, or any of the members of them; but it cannot, by itself, correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents in some Court of Law, or conjointly with the other branches of the Legislator may remedy the mischief by a new law.[9]

This case confirms that in the constitutional tradition of the United Kingdom, the supremacy of Parliament is something defined and limited by law. This law, which must be a fundamental law of the constitution, lays out what parliament is and in what ways it can produce valid Acts of parliament. So there are things that the House of Commons alone cannot do and this means that even the clear intentions of Parliament's dominant component, the Commons, do not have any legal significance. In this sense, and in spite of Dicey's apparent explanation of sovereignty in terms of the commands or intentions of Parliament, the dominant element of the sovereign body is not omnipotent. Its expressed desires or directives do not create law. To say that they do is to confuse the actions of parliament with Acts of Parliament.

Dicey was of course aware of the judicial limits to Parliament's privileges and aware of the difficulty it posed for his view of sovereignty, even though he did not realize their seriousness. He said that 'there exists some difficulty in defining with precision the exact effect which the Courts concede to a resolution of either House.'[10] He takes this to show that a mere resolution of the House of Commons is not law, which is true, but he fails to draw the obvious conclusion: If the House of Commons, which is the principal part of Parliament and the foundation of its power, is denied a superior position as an institution in making law when its desires are clear and indisputable, what is the content and meaning of sovereignty? If the

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7. 9 A. & E. 1. See also D. L. Keir & F. H. Lawson, *Cases in Constitutional Law*, 4th ed. (Oxford: Clarendon Press, 1954) at 127-40.
8. *Ibid.* at 127.
9. *Ibid.* at 130.
10. Dicey, *supra* note 2 at 14.

Commons is at the top of the hierarchy of delegation, why does it need to submit to the procedures of law-making?

The assumption that Parliament is defined by the higher law of the constitution and is not beyond the law, is also made in cases whenever the courts are asked to assess the validity of an Act of Parliament. In the *Wauchope* case Lord Campbell said this:

> 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 into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.[11]

Lord Campbell's words are ambiguous because they refer both to Parliament and to its products, the Acts. Yet the meaning of his words must be that even though courts will not review the propriety of the internal procedures of Parliament, they will look at whether this purported Act is really an Act, i.e., that the Bill at least appears to have passed both Houses and received the Royal Assent. And at least since the *Prince's Case*, the courts will check if the bill was passed according to the standing rules of legislative power.[12] The courts are not just to rely on the word of the Clerk of Parliaments. In the Privy Council case of *Bribery Commissioner v. Ranasinghe*, for example, Lord Pearce said that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law.'[13] So it is the task of courts to ascertain that a legislative Act is truly such an Act, according to the rules regarding law-making. This is a fundamental and uncontroversial part of British constitutional law, which is correctly connected to the ideal of the rule of law but is not covered by Dicey's account of parliamentary sovereignty in (1) and (2), for it appears that parliament's will and intention may be reviewed by the Courts (even though an Act of parliament cannot be so reviewed and challenged).

Sir William Wade correctly took the view that this flaw in Dicey's doctrine was serious and introduced a correction. What Parliament is and how it acts successfully in producing an Act is not a matter of fact to be determined by politics, but a matter for law. Wade presupposes thus a higher constitutional law that organises the relations of statutes with the common law and is therefore prior to both. Without such a rule, there is no way of explaining how we may set aside any statute at all, old or new. This determination is a matter of higher law, not in the sense of higher moral law, as in Corwin's idea of higher law, but in the sense of an organising law.[14] In

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11. *Edinburgh & Dalkeith Ry. [Railway Co.] v. Wauchope* (1842) 8 Cl. & F 710, discussed by Heuston, *supra* note 4 at 17 ff.

12. *The Prince's Case* (1606), 8 Co. Rep. 1a, at 20b. See also *Harris v. Minister of the Interior and Another* 1952 (2) SA 428.

13. *Bribery Commissioner v. Ranasinghe* [1965] AC 172 at 197.

14. See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, NY: Cornell University Press, 1955). The doctrine for higher law, for Corwin, asserts that there are 'certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community'(89).

this sense the law of the constitution is higher law only because it organises the architecture of the legal order as a whole. It is used in this same sense by Bruce Ackerman, when he writes of the process of constitutional amendment as 'higher lawmaking.'[15] Further, if such a higher law exists and determines how we make and unmake our constitution, the question arises as to how this higher law may change.

Wade's conclusion is simple, yet startling in its originality. The rule requiring judicial obedience to statutes is one of the fundamental rules upon which the legal system depends and is not subject to any legal change, since it is not subject to change according to ordinary legislative procedures.[16] Wade concluded that

> if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statue can alter or abolish that rule. The rule is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism.[17]

How can it be that the higher law of the constitution is law that cannot change? Wade's view is *prima facie* very strange. Clearly, this idea is not a 'truism'. There are very many theoretical issues surrounding the idea of a higher law, which Salmond's idea of a judge-based creation, does not resolve. In his later work, Wade repeated that the rules constituting Parliament are so important, that they are beyond its powers. They are a 'constitutional fundamental' that cannot be lawfully changed even by an Act of Parliament. Wade wrote that 'it is futile for Parliament to command the judges not to recognize the validity of future Acts of Parliament which conflict with a Bill of Rights, or with European Community law, if the judges habitually accept that later Acts prevail over earlier Acts and are determined to go on doing so. In this one fundamental matter it is the judges who are sovereign.'[18] This is how Wade explains the legal feature that Parliament cannot bind itself.

Dicey did not consider such points. The fact that the omnipotent Parliament is bound by the rules that constitute itself (and may perhaps be unable to change them) was not part of his view of constitutional change. His view of the immutability of sovereignty was based on logical and factual reasons, not on reasons of law. He wrote that 'fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative capacity.'[19] But if there is no distinction between constitutional laws and ordinary laws, then perhaps Parliament can bind itself after all. Dicey does not deal with this problem.

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15. Bruce Ackerman, 'Higher Lawmaking' in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) at 63. See also Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991) where the idea of higher law is associated with the distinction between normal politics and constitutional politics.

16. H. W. R. Wade, 'The Basis of Legal Sovereignty' (1955) 13 Cambridge L.J. 172 at 187.

17. *Ibid.* at 187-88.

18. H. W. R. Wade, *Constitutional Fundamentals* (London: Stevens, 1980) at 26-27.

19. Dicey, *supra* note 2 at 37.

Defenders of the orthodox view therefore face a dilemma. Either they side with Dicey for whom parliamentary sovereignty is immutable because it is an extra-legal logical and historical fact. Or they side with Wade, for whom the immutability of sovereignty is based on a special constitutional doctrine.

We cannot ignore this dilemma. These questions as to the role of Parliament as a legislative institution are central to the recent debates over the Parliament Acts 1911 and 1949. As is well known, under circumstances determined by these Acts, Parliament legislates without the assent of the Upper House. The Parliament Acts do not change the composition of Parliament as an institution nor do they change the fact of parliamentary sovereignty (as Dicey himself notes in his short discussion of these acts in the introduction to the eighth edition of his book).[20] The Acts only change the legislative *procedure* by removing the veto of the Lords. But Wade disagreed. He was so insistent on the principle that the legislative procedure requires the assent of all three (because sovereignty is an immutable constitutional fundamental), that he considered the products of the Parliament Acts delegated legislation.[21]

This view has been now roundly rejected by all the judges that looked at the *Jackson* case and finally and conclusively by the House of Lords.[22] As a matter of constitutional law the Hunting Act 2005 is not a piece of delegated legislation but a genuine Act of Parliament on an equal footing with all others. There are important constitutional implications of this judgment. It seems to reject both Wade and Dicey's views. I draw attention to it here to show that Dicey's account of sovereignty is in need of a great deal of refinement in order to arrive at a clearer account of Parliament. The same point was made by Richard Latham, who observed that in the United Kingdom the sovereign is not an 'actual person' but a body whose designation 'must include the statement of rules for the ascertainment of his will, and those rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.'[23] This is not a factual question but a question of constitutional law.

The problem of defining Parliament and fixing its legislative and constitutional powers and immunities is only the first problem with Dicey's view. The second problem has to do with identifying what counts as a law. For Dicey, Parliament has the full power to legislate on any subject. Nevertheless, as John Finnis has explained, a constitutional order is much more than a set of powers to legislate for the future. The constitution also needs rules about the recognition and continuing operation of laws enacted in the past. This existing law was created under the old body or by some other means that at the time was legally recognized. The fact that old law is still valid depends on rules of continuity. Such rules assume that a legal order

20. *Ibid.* at xlii.
21. Wade, *supra* note 18 at 28.
22. *Jackson*, *supra* note 1. For commentaries see Tim Mullen, 'Reflections on *Jackson v. Attorney General*: Questioning Sovereignty' (2007) 27 Legal Stud. 1; Alison L. Young, 'Hunting Sovereignty: *Jackson v. Her Majesty's Attorney General'* (2006) P.L. 187; Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution' (2008) 28 Oxford J. Legal Stud. 709.
23. Latham, *supra* note 4 at 523 [footnotes omitted].

is not fully determined by the person or body, such as it is, that happens to enjoy the power to legislate at the highest level at that time.

This means that a complete account of any constitution must explain not only how new laws are made but also how the old laws still bind, even though they were created under a now obsolete set of constitutional arrangements, e.g. an old Parliament or an amended process. So in addition to the set of power-conferring rules, any constitution needs a separate rule or set of rules which provides not powers but duties to continue respecting earlier laws even though the institutions that created them have now ceased to exist. This has been explained by Finnis as follows:

> But we have seen that there is another element, viz., a rule of identification, which is not a rule of competence since it confers no powers on any existing body, but which identified, and validates, *eo nomine* and for the present, the rules created in the past by a rule-making body that then was, but now perhaps is not, qualified (by a rule of competence) to create those rules.[24]

So the basic constitutional arrangement of the United Kingdom cannot simply include rules empowering Parliament but must also include a set of rules setting out duties *vis á vis* pre-existing laws. It is obvious that such rules of identification are supplemented by rules of change and competences of law-making. Under the doctrine of parliamentary sovereignty, any existing law can be changed by the present parliament. But until they are so changed, the rules of the past remain valid on terms determined at the time they were enacted, which may include a constitution or other legal device now obsolete and repealed. This also suggests that the way in which the pronouncements of the dominant legislature are to be understood and the way they interact with the existing law is also a matter of pre-existing laws. The new legislation takes its place within the pre-existing set of rules and principles, including constitutional principles shaping the relations between the Executive, the Legislature and the Judiciary.

The joint force of these two arguments shows that the classic view of parliamentary sovereignty is at least incomplete. Dicey says that Parliament has an absolute power to make laws and an absolute immunity against the courts. This is widely taken to mean that law in the United Kingdom has only one, or, one dominant source. Jeffrey Goldsworthy, for example, concludes his illuminating historical survey of parliamentary sovereignty by stating that it is the 'rule of recognition' of United Kingdom law. He writes that 'for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in H. L. A. Hart's sense, which the judges by themselves did not create and cannot unilaterally change.'[25] We have identified, though, two other constitutional doctrines that are also part of British law and are essential components of Parliament's competence to legislate. First, the very nature and composition of Parliament depends on existing constitutional law

24. Finnis, *supra* note 5 at 58. The same point is made by Joseph Raz in 'The Identity of Legal Systems' in *The Authority of Law* (Oxford: Clarendon Press, 1979) 78 at 98-102.

25. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at 234.

and is subject to it. Parliament as an institution has a standing duty as against the courts not to act outside the terms of the Parliament Acts, the Representation of the People Acts and the other rules affecting its own composition and procedures whenever it seeks to act as a legislative body. Whenever it acts against this duty, Parliament is faced with a disability, in that its actions are ineffective. A resolution, for example, cannot amend an Act of Parliament. This is the essence of the distinction we normally draw between actions of parliament and Acts of Parliament. This creates a liability, in that the effects of parliament's actions are to be determined by the powers of the courts, as in *Stockdale.* In other words, the courts have the correlative power to hold some actions of parliament as inconsistent with what parliament may do in order to create Acts of Parliament. Actions that violate these organizational rules are not Acts of Parliament and do not develop legal effects, even if they are actions imputed to parliament. These legal relations bind both Parliament as the institution and its individuals members.

Either way, parliament is not only the beneficiary of legal powers but operates under layers of legal duties, disabilities and liabilities as well: the duties to respect the standing rules, the disabilities in creating Acts outside the established procedures and the liabilities in having the courts ascertain what is an Act of Parliament. The classic view, however, is not just incomplete but is also false in that it takes such constitutional questions not to be subject to legal determination. Dicey simply assumes that sovereignty is immutable as a matter of fact. Wade tells us that this is because of some special constitutional doctrine. But both views contradict the *Jackson* judgment, where we find explicit recognition of the powers (and correlative liabilities) of Parliament to shape its own rules concerning the making of laws.

In order to see how *Jackson* defeats the orthodox view we need to look deeper into its structure. The courts are not to set aside an existing Act, as Dicey correctly observes. But the courts have the power and duty to determine if an Act of Parliament exists as a matter of the standing law of the constitution. A similar limitation arises out of the constitutional rules of identification, the rules that address the past. Parliament is under a disability so far as the identification of the past law is concerned, for it is to accept the validity of the existing laws made under the old parliament or under the old constitution, even though the majority of its members may deplore them and wish to change them at once. Again, parliament is bound by a set of legal restrictions which have to do both with the rule of law but also with the separation of powers and the basic liberty of the citizen. Quite simply the immunities that result form these disabilities of Parliament belong to every ordinary citizen of the land and will be vindicated before any court.

We may put these findings as follows:

(3) LIABILITY: Parliament and its members are subject to the supervision of the courts as to the authoritative determination of its compliance with the standing constitutional rules regarding the legal enactment of new Acts of Parliament, on the basis of the constitutive rules of parliament and its standing procedures.

(4) DISABILITY: Parliament is incapable of unsettling the existing laws until it takes positive action to amend them according to the standing procedures. The correlative immunity is held by every ordinary citizen, whose rights and duties can only be changed according to the standing constitutional rules and procedures.

Both (3) and (4) are standard manifestations of the rule of law as it applies to institutions and the legal order as a whole. They are also entailed by the doctrine of parliamentary sovereignty as a legal doctrine, since it does not make sense without them. They are accepted in Britain but are also to be found in all modern constitutions. They are matters of the rudimentary structure of the separation of powers and are both confirmed by *Stockdale.* I think Dicey was aware of them and spent a number of pages explaining their force and outlined a conception of the rule of law as he found them in celebrated authorities. But Dicey effectively thought that the rule of law was an entirely subordinate part of the constitution. I do not think he saw that they are entailed by parliamentary supremacy.

Nevertheless, from the formulation offered above, it appears that parliamentary sovereignty and the rule of law seem to be pulling toward different directions. For (3) and (4) partly deny (1) and (2). They deny not the first part of Dicey's definition of parliamentary sovereignty, namely the broad positive competence to legislate, but its second part, i.e., that 'there is no power which … can come into rivalry with the legislative sovereignty of Parliament' or that 'no limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence. Dicey is strikingly wrong on this. Such powers are evidently in existence and they belong not just to courts but in everyone residing in the legal system. They are enforceable by the courts whenever Parliament seeks to violate its own procedures, or whenever it seeks to arbitrarily ignore the law of the past. The principle of the rule of law requires that Parliament is not omnipotent in the sense of enjoying absolute and conclusive powers and immunities. This is the whole point of the distinction between actions of parliament and Acts of Parliament, which the English courts have always drawn.

This is entailed by the very existence of parliament as a constitutional law-maker. The very constitution of Parliament as a body is fixed according to the law and this depends on law pre-existing the meetings of Parliament. Or at least this is what effectively the arguments by Latham, Heuston and Finnis show. Both as a group of people and as a complex institution, parliament is ordinarily created by prior rules and is therefore bound by legal liabilities and disabilities under the constitutional doctrines of the rule of law and the separation of powers. Whenever Parliament enacts a new Act, it is this Act that escapes supervision and review. But the other actions and procedures of parliament do not escape supervision and review by the courts. Dicey's sweeping definition of parliamentary sovereignty misses this distinction and is, to this extent, false.

That the rule of law and the separation of powers complement parliamentary sovereignty is not surprising. It is in fact accepted by the leading British constitutional theorists today.[26] Under the influence of Diceyan orthodoxy, however, it

26. See most recently, Eric Barendt, 'Fundamental Principles' in David Feldman, ed., *English Public Law* (Oxford: Oxford University Press, 2004) at 30-43. For Barendt, the three principles of the constitution are the legislative supremacy of Parliament, the rule of law and the separation of powers. For an extremely useful account of recent developments regarding these issues see House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament, 6th Report of Session 2006-2007* (HL Paper 151) (London: The Stationery Office, 2007).

is not often acknowledged, that the latter two doctrines organise and ultimately limit the scope of the first. We cannot say that legislative supremacy is prior to the rule of law or the separation of powers. They operate jointly, or not at all.

As we saw above, Wade argued, against Latham and Heuston that Parliament cannot change the 'manner and form' of legislation. This is the hallmark of the continuing view of parliamentary sovereignty, the view that holds that Parliament cannot shape the constitutional fundamentals that put it at the higher place in the hierarchy of sources.[27] But the continuing view differs from the self-embracing view only in that it recognises a disability in Parliament of the form described in (4). Wade argues that as a matter of the standing law, the higher law of the constitution binds Parliament in this sense: 'If no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute.'[28] In other words, the doctrine of parliamentary sovereignty is coupled with a particularly rigid, if rudimentary, doctrine of the separation of powers: the courts will give way to the wishes of the current Parliament.

It is not important to discuss here in any detail the reasons that Wade gives for his particular formulation of the higher law idea. In any event Wade's view gives support to the anti-Diceyan conclusion that sovereignty is legally determined. The 'continuing view' of sovereignty which Wade advocates postulates an identification rule (in Finnis' technical sense described above) which identifies, as part of the British constitution a disability that prevents Parliament from changing the standing rules concerning its composition and procedures (or any other manner and form conditions). So even Wade accepts (implicitly or not, it does not matter) that Parliament is not just a holder of all the powers and immunities in the area of legislation and therefore rejects Dicey's (1) and (2). The conclusion we must draw is that even Wade agrees that Dicey's account of sovereignty is false because it fails to see that sovereignty is something constitutionally created and defined.

Austinian Simplicity

Let us now return to an earlier question. How is it possible that Dicey's argument may be so inadequate yet so very influential? We must pause to comment on and explain the prominence of what appears to us an obvious failure. Dicey was not an inexperienced lawyer or thinker.[29]

The source of Dicey's confusion on this matter is not, in my view, his lack of attention to detail but his reliance on Austin's general theory of a legal system. The character of the Westminster Parliament is defined for Dicey by the logic of sovereignty. The reason why modern lawyers approach these issues with greater

27. For the contrast between continuing and self-embracing views of parliamentary sovereignty see H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) at 149.
28. Wade, *supra* note 16 at 187.
29. See, for example, Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill: University of North Carolina Press, 1980).

clarity than their predecessors is because they have now unequivocally rejected Austin's command theory of law and the associated theory of sovereignty.

It is striking how F. W. Maitland's reflections on the constitution, coming as they do before Dicey achieved his great prominence, were very critical of Austin's theory of sovereignty. Maitland offers a rival view that is much closer to the view presented above because he considered constitutional law as a 'living body, every member of which is connected with and depends upon every other member.'[30] Maitland thought that Austin's view of constitutional law was far too narrow, including as it did only 'those rules which determine the composition of the sovereign body.'[31] But Dicey was an admirer of Austin. Dicey refers to Austin's theory at various places in the course of his exposition of parliamentary sovereignty.[32] As is well known, Austin argued that a legal order existed when a sovereign obeyed the commands of no one and whose commands were obeyed by everyone.[33] In any legal system, Austin assumes, there is only one source of legislative authority, that of the sovereign. The law is expressed through the actions and words of the sovereign, whenever these are effectively communicated to the subjects by way of commands. Austin wrote that 'a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.'[34] In this model, law is derived from the volition of an identifiable political superior.

Dicey observes that Austin's argument focused on the reality of sovereignty, not the legal construction of it: 'Austin owns that the doctrine here laid down by him is inconsistent with the language used by writers who have treated of the British Constitution.'[35] He observes that Austin considers the electors, not the Commons, to be part of the sovereign body. This is the result, Dicey notes, of Austin's confusion of legal with political sovereignty. It is a political fact that the Commons are bound by the electors in important ways. But this is not important for legal sovereignty. Even though Dicey carefully distinguishes his own constitutional theory from Austin's general jurisprudence (and emphasises how in his account sovereignty is a legal, not a political concept), his account of parliamentary sovereignty employs the same idea of the 'sovereign' as the author of voluntary directives that through the force of their irresistible power create the legal order as a whole.[36] His argument

30. F. W. Maitland, 'Sketch of Public Law at the Present Day, 1887-8' in H.A.L. Fisher, ed., *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) 330 at 539. These lectures were completed in 1888 and do not cite Dicey's *Introduction,* the first edition of which was published in 1885.

31. *Ibid.* at 531.

32. Dicey mentions Austin and discusses his ideas while presenting the doctrine of parliamentary sovereignty in *Introduction* pages 18, 26, 27, 28, 29 and elsewhere. He speaks of the 'commands' of Parliament in page 268: ('the commands of Parliament, consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation.').

33. See John Austin, *The Province of Jurisprudence Determined,* ed. by Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995).

34. *Ibid.* at 21.

35. Dicey, *supra* note 2 at 29.

36. Dicey discusses the differences between his constitutional theory and Austin's jurisprudence in *Introduction*, *ibid.* at 26-30.

for the unchanging nature of sovereignty is what he calls a 'logical reason,' which is entirely Austinian. He writes that 'limited sovereignty' is in his view 'a contradiction in terms.'[37] He also notes that '[a]ll that can be urged as to the speculative difficulties of placing any limits whatever on sovereignty has been admirably stated by Austin and by professor Holland.'[38]

So for Dicey, the sovereignty of Parliament and not the rule of law is 'the dominant characteristic of our political institutions.'[39] Just like the sovereign in Austin's legal system, the sovereign in the British constitution can change any law whatever, so that 'there is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative character.'[40] This leads Dicey to deny that the distinction between higher and ordinary law, drawn in other constitutional traditions, applies in the case of the United Kingdom.

He cites approvingly Alexis de Tocqueville's suggestion that in the United Kingdom the Parliament is both a legislative and a constituent assembly and agrees with him because 'there is under the English [sic] constitution no marked or clear distinction between laws which are not fundamental to constitutional and laws which are fundamental or constitutional.'[41] Whatever Parliament wishes, it becomes the law. By fixing on a single source of law, the system retains thus a remarkable simplicity. This is why Dicey explicitly denies that there is higher law limiting or organising it. The doctrine of sovereignty for Dicey is a result of both logic and fact. In this sense Dicey's view is not exactly the continuing view defended by Wade (although it reaches the same conclusion). Sovereignty is not a matter of legal rules but perhaps an immutable fact or a 'sacred mystery of statesmanship.'[42]

Nevertheless, as we saw above, it is clear that such a theory cannot explain British constitutional law or any (modern or developed) law at all. The Austinian idea of sovereignty is just inapplicable to the modern legal order, where offices and competences are divided among many different persons and bodies. As we saw above, Parliament and its powers are constituted by prior legal rules of constitutional nature. Wade has carefully explained how the order of priority of statutes over the common law and the priority of later statutes over earlier ones (i.e., the doctrine of implied repeal) rely on something higher than statute, which he takes it to be a constitutional fundamental.

Once the idea of a fundamental law is in place, the key question is in what way this law defines Parliament and its powers. We need to know what counts as Parliament, the institution, and what constitutes the actions of that institution that we take to mark the creation of laws. Austin never dealt with such questions because

37. Dicey, *ibid.* at 24, n. 48. At page 27 he says that 'the term "sovereignty", as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit.'
38. *Ibid.* note 2 at 18.
39. *Ibid.* at 3.
40. *Ibid.* at 37.
41. *Ibid.*
42. *Ibid.* at cxxvi. Dicey uses this phrase to criticise his predecessors.

he hid them behind the supposed political reality of sovereignty. They emerge, however, even within his own system, whenever he wishes take the holder of sovereign to be not a single person but a body or group. For, when does such a body act? When all the members agree? When a simple majority? How many members should have been warned about an imminent vote? These questions arise also with the idea that the composite body Queen in Parliament may be sovereign.

This cannot just be a pattern of facts. Austin assumes that the sovereign is obeyed by everyone (because of his skills or strength or cunning, makes no difference). His power is a feature that helps us explain what law is: it is the order created in a political society whenever an effective sovereign exists. But one cannot turn this simple description of fact into a theory of the constitution. We cannot replace the person of the sovereign with a highly complex body such as the Queen in Parliament. What constitutes this body, who it is composed by and by what procedures it acts in the various ways that it does act, cannot be a matter of fact or a pattern of practice. Answering these questions invites a set of sophisticated criteria. And Austin's theory is not conceptually equipped to provide them.

Austin did not see it this way, of course. As is well known, he believed that a composite body could be sovereign.[43] But he was very confused over this, as was shown by Latham.[44] A group of men cannot be held to be acting in any relevant sense, unless there are some procedures for identifying its actions. This is why at the basis of a body's actions lies a general rule outlining its proper procedure. This introduces a degree of rule-based complexity that cannot be captured by the Austinian scheme.

In an effort to defend the orthodox view of parliamentary, some recent constitutional theorists have revived this Austinian simplicity of sovereignty. They have argued that even though Parliament is legally sovereign as a body, the rules that determine when and how it acts are not themselves legal rules. This argument effectively says that there is no higher law in the United Kingdom, at least not a higher law defining Parliament in the sense we have been using it here. For this view, the Westminster Parliament is very much like the Austinian sovereign. Its composition and process lies beyond the law, they are at most rules of 'positive morality.' Hence, Richard Ekins recently wrote that 'neither the rule of recognition nor the common law specifies how Parliament legislates.'[45] This entails that 'Parliament was not constituted by law and the way in which it may act is not prescribed by law.'[46] But then what is the legal component of parliamentary sovereignty? Ekins argues that the

43. Austin wrote as follows: 'In the case of an aristocracy or government of a number, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts,' John Austin, *supra* note 33 at 184. But how are we to determine if and when this body is constituted and expresses its will? There is a need for having and respecting rules of procedure that are prior to and binding on the body itself. So a body cannot be sovereign, in Austin's original sense.

44. Latham, *supra* note 5 at 523-24.

45. Richard Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 Law Q. Rev. 91 at 105.

46. *Ibid.* at 101.

legal doctrine involves only the basic rule that Parliament enjoys the highest legislative authority, but does not extend into specifying how this is to be exercised or what counts as Parliament. As a result, the courts do not have, strictly speaking, jurisdiction to pass judgment on the validity of the Parliament Acts. Even though these Acts purport to be law, they are in fact, for Ekins, only a 'decision-making procedure that supplements joint assent'.[47] For that reason, it is something that courts should not touch, but allow the Speaker to resolve without judicial supervision:

> The 1911 Act is a statute and is the duty of courts to interpret statutes. This statute, however, concerns the process by which the Queen, Lords and Commons legislate. Thus, while the matter may be prima facie justiciable in that it involves statutory interpretation, it is in the end non-justiciable because the interpretive question touches too closely on how Parliament acts, which is a matter that the courts ought to leave to legislators.[48]

Ekins' proposal thus returns us to the simplicity of Dicey's model. It gives a defence of propositions (1) and (2) and assumes that Parliament is beyond the law, or at least the definition of Parliament is beyond the law so that we do not need a legal account of Parliament as an institution implied by (3) and (4).

This argument is no doubt prompted by the real anxiety that if we allowed the idea of higher law to determine how Parliament was constituted, then Parliament would not be the exclusive holder of all the available powers and immunities that Dicey attributes to it. There would have to be a higher rule determining first what Parliament is and, second, under what conditions it can legislate and this open up the fundamental rules of constitutional law to legal interpretation, implied by (3) and (4). It would also open up the problem of constitutional amendment through a special or ordinary legal process. All such issues may then become controversial and open to legal judgment.

The worry is real and the implication is correct. Dicey's doctrine promises a certain simplicity and perhaps determinacy because it takes sovereignty to be a matter of logic and of fact—something that lies beyond legal interpretation. But the solution proposed is far worse than the supposed problem. Ekins draws a distinction between the doctrine of parliamentary sovereignty, as a narrowly conceived legal doctrine, and the definition of Parliament, as something which is not law but fact. This distinction is strange and sits uneasily in our public law. It has no other function but to save Dicey's doctrine from its obvious flaws and inconsistencies. No political theory of the constitution, say a democratic or liberal or welfare theory, is called upon in its support. There has never been any support for such a distinction in the courts. As the cases of parliamentary privileges show, Parliament does not escape the scrutiny of law. In a long list of cases, from the *Case of Proclamations*, to the *Prince's Case* down to *Jackson*, it has been held that the powers of Parliament and the other political institutions are subject to the ordinary law of the land, be that criminal law or the law of tort or another area of law. Under Ekins' proposal, Parliament would be excluded from the rule of law.

47. *Ibid.* at 108.
48. *Ibid.* at 112-13.

In a famous statement, Lord Bridge said that 'the maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.'[49] Ekins return to Austin's view of sovereignty is entirely inconsistent with this passage. The argument is also inconsistent with the very recent *Jackson* judgment (something which is noticed by Ekins but to which, surprisingly, he gives little weight). Not only did the House of Lords unanimously consider the application justiciable, but it also unanimously confirmed that the matter of the procedures of Parliament is a matter of law to be determined through ordinary legal arguments, which in this case turned out to be statutory interpretation. *Jackson* is not an isolated instance but follows a long list of authorities supporting the conclusion that parliamentary sovereignty is not beyond the law.

A Higher Law

If we reject the Austinian idea of a sovereign body that is mysteriously and extra-legally constituted, we are back to the idea of a higher law defining what counts as Parliament and outlining the scope of its powers. What goes under the higher law of the Constitution? One suggestion is that the higher law is very simple. It only identifies the all-powerful body which, precisely as described by Dicey, has the sole power to legislate. This remains faithful to Dicey's model, even if it abandons one of its arguments. Jeffrey Goldsworthy has explored the idea that the orthodox view can be defended by removing the Austinian background and replacing it with the idea of higher law following Hart's rule of recognition. As a matter of that higher law, Goldsworthy argues, the Westminster Parliament is sovereign 'if it has unlimited power as to the substance of legislation, even if it is governed by judicially enforceable norms that determine its composition, and the procedure and form by which it must legislate.'[50] This accepts part of the 'new view,' whose main argument was from the start the logical requirement of a higher law defining Parliament, but does not accept Heuston's view in its entirety, because it rejects the view that under the higher law of the constitution Parliament can amend its own rules. In this view (3) and (4) are correct, but their content is minimal.

Goldsworthy is ambiguous as to how constitutional doctrine treats its own amendment. He does not believe that ordinary statute can change such higher laws. But he also considers Wade's view, that no one can change it, 'debatable.'[51] Goldsworthy seems to treat this problem as entirely one of politics and advises caution: 'By unsettling what has for centuries been regarded as settled, the courts would risk conflict with the other branches of government that might dangerously destabilize the legal system.'[52] So he leaves this question legally indeterminate, making

49. *X Ltd. v. Morgan-Grampian Ltd.* [1991] AC 1 at 48.
50. Goldsworthy, *supra* note 25 at 16.
51. *Ibid.* at 245.
52. *Ibid.* at 246.

his answer sound much closer to Wade rather than Latham. We may then say that for the orthodox view, as defended by Goldsworthy, the higher law of the constitution includes the powers and immunities of Parliament as well as a single disability on the part of Parliament in changing these higher rules. Under this account, when we introduce the idea of higher law, we do not compromise the most important dimension of Dicey's position: courts are never to challenge the authority of an Act of Parliament.

At first sight it seems that this defence of the orthodox view follows from Hart's view on the rule of recognition as a matter of judicial practice. Hart's view was that the establishment of a rule of recognition is a complex fact that has to do with the role of the officials and the acceptance by them of certain standard rules. Nevertheless, as we have already seen, it is not obvious that what goes into the rule of recognition is just the resolution of the contest for power between the courts and the legislature. Goldsworthy sees this question as one of ultimate power in exactly this way, hence the higher law is a simple determination. He says that what is at stake in this debate is 'the location of ultimate decision-making authority.'[53] This is why this account of the higher law of the Constitution is not that different from Dicey's. It is a theoretically sophisticated version of the same idea, entailing that under the higher law we have a rule that allocates all the powers in one person or body, this time legally defined. But this view misunderstands the functions of constitutional law as higher law. The constitution does a lot more than referee a contest between two rival sources of power.

Here we must return to Finnis' idea of rules of identification that are not rules conferring power of legislation. The higher law in a constitutionally organised state is not simply a rule about powers. Goldsworthy's view overlooks the effect that pre-existing legal structures have on the very existence and exercise of law-making power. It overlooks the other organisational principles that join parliamentary supremacy at the summit of British law. The highest constitutional principles include duties and disabilities as well as powers and immunities so as to allow the continuity of law in a way not envisaged by the powers of the present legislator. And once such principles co-exist, they start interacting with each other in important ways. The powers and immunities depend on the duties and liberties, and vice versa. These rules support each other not in the way of the links of a chain, but rather as the legs of a chair. We do not know what Parliament is until we have taken into account all of the relevant rules and principles, including those about the possible amendment of standing rules. This recalls perhaps Trevor Allan's view of the constitution as a common law body of rules and principles and argumentative techniques that jointly give shape to the constitution.[54] There is a very strong analogy between the view taken here and Allan's view. Nevertheless, the point made here does not rely on the premise that the rules are made by judges. The point is rather that, whoever

53. *Ibid.* at 3. See also Jeffrey Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 N. Z. J. Pub. & Int'l L. 7.

54. T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press,1993) and T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

is responsible for its creation and continuing authority, the constitution must, if it is to make any sense as higher law, include not only powers for the legislature to legislate but also disability and liability rules limiting that legislature as an institution and as a group of persons. Parliamentary sovereignty does not make sense without such organisational rules outlining offices and competences.

This argument is not related to the procedural point that judges interpret statutes and therefore have the last word. Allan's view is that in the absence of a written constitution, all constitutional law is common law and therefore subject to the interpretive role of the courts: 'For it is when we turn to the interpretative power of the courts, accompanied by their necessarily exclusive authority in the application of statutes to particular cases, that we discover the dual nature of sovereignty in the British constitution, properly understood.'[55] For Allan, the higher rules of the constitution emerged through judicial law-making through the substantive elaboration of a 'consistent and coherent corpus of common law, binding private citizen and public official alike: its contents provided the fundamental principles of legitimate governance with which the executive must comply, and which governed the interpretation and application of statute.'[56] Allan, for example, argues that the rule of parliamentary sovereignty, conceived as a rule of 'absolute or unqualified sovereignty,' is unhelpful, since it does not help us interpret the content of any statute: 'Satisfied by the avowed application of duly enacted statutes, and violated only by their explicit rejection, the rule has little or no bearing on what an Act is understood to mean.'[57] Allan concludes: 'A rule of "recognition" identifies a statute as a source of law; but the practical consequences are, necessarily, a separate matter of normative legal theory.'[58] This may or may not be the case, but the argument I am making here is quite different.

The argument is, I think, deeper. The sovereignty of parliament must, if it is to make any sense at all as a constitutional doctrine, be part of a complex set of rules explaining how the powers of parliament are organised and exercised and how they fit with laws made before that parliament and outside the present constitutional arrangement. The law-making powers of parliament, such as they are, are only one element in the larger edifice of the constitution. For the constitution to do its work we must add a great deal many other doctrines and principles. All these doctrines, of course, are to be interpreted by courts, whose starting point must be that parliament, like other bodies or ordinary persons, has both powers and disabilities (as indeed do the courts themselves). So when Allan says: 'legislative supremacy, or parliamentary sovereignty, therefore entails a counterbalancing judicial sovereignty,'[59] he is right, but only through this further premise. The entailment

55. *Constitutional Justice*, *ibid.* at 13.
56. *Ibid.* at 17-18.
57. T. R. S. Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 Cambridge L.J. 685 at 686.
58. *Ibid.* at 687.
59. *Ibid.* For the debate between Allan and Goldsworthy, see T. R. S. Allan, 'Texts, Context and Constitution: The Common Law as Public Reason' and Jeffrey Goldsworthy, 'The Myth of the Common Law Constitution' both in Douglas Edlin, ed., *Common Law Theory* (Cambridge: Cambridge University Press, 2007) at 185, 204. See also T. R. S. Allan, 'Constitutional Justice

is a matter of the coherence and completeness of any constitutional order, not of the necessary further application of the doctrine by courts in concrete circumstances. The issue is one of the general constitutional structure of a political society governed by the rule of law, not a consequence of the practical finding that the courts have the last word. Any person or body interpreting the constitution, including parliament itself, are to make the same conceptual assumptions about the powers and disabilities of parliament.

This point is actually parallel to the criticism very effectively made by Hart against Austin's command theory. Among other things, Hart noticed that Austin's idea of the sovereign made it impossible to secure the succession of a sovereign. Austin's theory, Hart noted, was incapable of offering a legal standard for identifying the constitutional successor to the sovereign. The problem identified by Hart was that of defining the relevant political office or institution by means of rules of identification. Such pre-existing are required to allow the powers of lawmaking to pass from one person to another. Austin needed, thus, a set of higher rules to supplement the actual powers that he recognized in the existing (as a matter of fact) sovereign. This leads us to the solution endorsed by Latham and Heuston. At the foundation of the British constitution lies not a person or body but a set of interacting rules whose contents do not consist in the allocation of powers alone, but also provide for the recognition of the various public institutions, including the legislatures and the courts. Such rules are not of course all made by the legislature in place.

Finnis explains the principle as follows: 'A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.'[60] This means that in the British context, the work of the present parliament is dependent on the existing landscape formed by the rules of public law developed through the practice of the courts and by previous statutes. Parliament is a public institution operating under the law, very much like all other public bodies. For this body to work as an institution several other principles or rules must already be in place. This set of principles must be part of a well-ordered constitution.[61]

If the higher law of the constitution includes both powers and duties of the kind just described, we could perhaps organise its contents as follows:

i) *Principles of composition* determine who is to become an officeholder of public institutions. They include the rules on Royal succession, the election of Members of the House of Commons and the appointment of Peers. This part of the constitution defines the composition of Parliament as a group of persons.

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and the Concept of Law' and Jeffrey Goldsworthy, 'Unwritten Constitutional Principles' both in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 219, 277.

60. Finnis, *supra* note 24 at 63.

61. Neil MacCormick makes a very similar distinction between 'rules of change' and 'rules of recognition' in Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 83 ff.

ii) *Principles of procedure* determine how the group may reach decisions in the name of the institution (including rules concerning the manner and form of law-making, such as the Parliament Acts 1911 and 1949). This part of the constitution defines Parliament as an institution.

iii) *Principles of competence* determine the effect of the institutions' decisions in the legal order as a whole (including the principle that Acts of Parliament take precedence over the common law, the principles concerning implied repeal and the rules concerning statutory interpretation, the limitations posed by the Human Rights Act and by European Union law). This part of the constitution defines the powers of Parliament and outlines the way in which Acts of Parliament and the other sources of law are to be understood.

iv) *Principles of identification* tell us what past rules are identified as continuously binding, even though they were made before the current officeholders were created or their institutions took shape. They will include the principles recognizing the continuous effect and development of the common law. This part of the constitution specifies the disabilities and liabilities limiting Parliament as an institution as well as the liberties and duties of its members, covering all the principles (i)—(v), including itself.

v) *Principles of succession* determine how current law may be changed, including the principles governing the amendment, suspension or replacement of any rule. (These principles may be a sub-category of principles of competence under (iii) but they need not be, since constitutional change need not be in the hands of any institution).

Once presented in this way, it is easier to see that none of these sets of principles is more fundamental than the others, although they are fundamental in relation to all other rules addressed to the ordinary citizen. They make sense as a whole and resist the attempt to make one set of them dominant. There is no way in which one of them may be taken to be the foundation of the unity of the system, incorporating and determining all the others. For if we started with (iv) the principles of identification and said that they were the foundation of all true law, we would be contradicted by the fact that the rules of competence under (iii) would create new rules that changed the law for the future (and may even change the rules of identification themselves). A good example of such a change, where the rules under (iii) encroach on (iv) is invoked by Finnis, who reminds us that the Interpretation Act 1889 reversed the earlier rule of English law that the repeal of a repealing Act revived the Act originally repealed.[62] If, conversely, we start with (iii) the rules of competence and we took them, like Goldsworthy, to be dominant, we would be faced with the problem that the very composition and identity of the body enjoying these powers relies on rules of identification. So, competence and identification are in continuous tension, each one undermining the effects of the other.

The same applies to the principles of succession. Their supposed dominance is undermined by their dependence on both (i) and (ii) and (iv). These rules can of course themselves be changed, but until changed determine the content and effect

62. Finnis, *supra* note 5 at 61.

of (v), since the rules of change need to take place through institutions and procedures defined by (i) and (ii). In normal circumstances, namely in a legal order that lives on and develops through time by continuously creating and amending laws, institutions, public offices and roles, these constitutional principles can only exist together or not at all. This mutual dependence of all the basic principles of the system on all the other basic principles leads Finnis to draw the conclusion, which constitutional lawyers may find surprising, that '*the legal system, considered simply as a set of "valid rules,"* does not exist, since considered simply as a set of rules, of interdependent normative meanings, there is nothing to give it continuity, duration, identity through time.'[63] Similarly, Joseph Raz concludes that the 'identity of legal systems depends on the identity of the social forms to which they belong' and that 'the criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations, but by other considerations as well, considerations belonging to other social sciences.'[64] It is the political society that gives the legal system its identity and not the other way round.

This structure of the higher law of the constitution introduces a degree of complexity to the creation of institutions of constitutional law which is shared both by the written and the unwritten constitution. For the way in which the various principles relate to each other is a continuous interpretive project. No single set gives the answer to a constitutional dilemma: our work must take into account all of them at once. Constitutional interpretation is not therefore the identification of an intention—say the intention of Parliament—but the process of deliberation, balancing and adjusting of a set of various jointly applicable principles. This is well known in the case of the US constitution, which provides for rules on the composition of Congress, on the procedures for law-making, on the competence of the various bodies as well as rules of continuity and explicit rules for its own amendment. All such principles are part of the same document and are therefore to be read and understood alongside each other. The process of interpreting and understanding the written constitution depends on understanding how these principles interact with one another in the course of actual disputes that go through the courts.

Neil MacCormick has put this very well when he argues that '[t]here has to be reciprocal matching between the criteria for recognizing valid law, and the criteria for validly exercising the power to enact law (including any special procedures required for validity of a legislative change that changes provisions of the constitution itself)'[65] The device of the written document that puts together a set of the principles taken to be equal parts of the higher law of the constitution makes explicit the anyway necessary interdependence of the basic rules. But there is no material difference between written and unwritten principles. A well designed written constitution will have the same features as a well worked out unwritten constitution—developed by judicial decisions and Acts of Parliament. The route taking us there is different, but the process of constitutional deliberation is similar.

63. *Ibid.* at 69.
64. Joseph Raz, *The Concept of a Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980) at 189.
65. MacCormick, *supra* note 61 at 85.

In both cases the higher law of the constitution is a set of mutually supporting principles.[66]

The Westminster Parliament occasionally takes this view itself. The House of Lords Constitution Committee defines the Constitution, for the purposes of the exercise of its functions at least, as 'the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.'[67]

The Constitution as Higher Law

This point shows something of great significance for constitutional law in general, not just for the United Kingdom. The constitution, written or unwritten, is not the ultimate foundation of the legal order. It is not its basis or bedrock. As we have just seen, the basic principles of a constitutional order are many and their relations complex. Not all of them can be included in the written document (for the document itself needs rules of interpretation and amendment). These principles are mutually supporting and yield results through a process of deliberation. So the intellectual constructions of constitutional law proceed the other way round than Dicey suggests. They move from the particular to the general. For the particular cases will tell us how the rules of procedure may affect the rules of competence. Even when a written text of a constitution is available, its understanding and application is the result of a complex deliberation that uses all the available materials of the legal order in order to make sense of its most abstract organising principles. It is a construction that starts from the legal materials and gradually builds answers to the questions posed by (i)-(v) using, if available, the constitutional text in the process. But the constitutional text alone is incapable of answering all of these questions by itself. In this sense the constitution is the result of the common law not in the sense that it is made by the judges, but in that it is made and remade in the process of deciding particular cases in specific contexts. The point has been well developed by Ronald Dworkin, who observed that any 'claim about the place the Constitution occupies in our legal structure must … be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice.'[68] This also means that the constitution has a necessary historical dimension. If the constitution is thus extrapolated from particular cases, the knowledge of the

66. For some interesting reflections on this see Michael J. Perry, 'What is "the Constitution" and Other Fundamental Questions' in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 99.

67. House of Lords Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Method of Working, First Report of Session 2001-2002* (HL Paper 11), (London: Stationery Office, 2002) at ch. 2, par 20. In the same Report, the Committee states that the 'basic tenets' of the United Kingdom are: Sovereignty of the Crown in Parliament, the rule of law, encompassing the rights of the individual, Union State, Representative Government, Membership of the Commonwealth, the European Union, and other international organisations.

68. Ronald Dworkin, 'The Forum of Principle' in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 37.

constitution requires also knowledge of its history and of the mechanisms through which constitutional rules continuously develop and change through time.[69]

So we need to reverse the argument made by Wade. Wade acknowledges that the higher law of the constitution is created thorough the practices of the common law, even though is not part of the common law. It is not subject to statute, for it determines the validity and force of all statutes. But Wade wrongly concludes that it is not only higher in the sense of fundamental, but higher also in the sense of a bedrock or starting point in our reasoning. He says that 'when we are dealing with the fundamental doctrine under which the judges declare what statutory directions they will accept, we are dealing with a unique principle which is more than just an ordinary rule of law. Not only is it part of the network of legal rules; it is also the peg from which the network hangs.'[70] But there is no such peg. This is true of the United Kingdom constitution, as much as it is of other constitutional orders.

If the arguments made here are correct, then Maitland's view seems to be far closer to the truth than Dicey's. The constitution is open to the same interpretive constructions and arguments as the rest of the law. This makes constitutional law relatively open-ended, but this is precisely how it achieves stability and continuity. This theoretical argument is I think what animates Trevor Allan's analysis of English public law in practice. And this argument has recently been further strengthened in a wonderful work of historical and comparative scholarship by John Allison. In his recent work *The English Historical Constitution*, Allison shows in great detail how competing interpretations have jointly shaped the English institutions of public law, through various elaborations and European loans of the idea of the crown and the doctrines of the separation of powers, parliamentary sovereignty and the rule of law. Allison concludes that

> what is constituted at the centre of the historical constitution is not a principle but an overarching mode of change that respects continuity, at least in form, and the reassurance it affords. That mode is not derived from normative theory but has evolved in legal and political practices of conservation and innovation by which the institutions of government are controlled and facilitated as they evolve, and stability is secured or re-established.[71]

The orthodox view has been resistant to the fluidity and openness that this interpretive and historical view of the constitution entails. This is why, I believe, Wade endorses the strange view that the constitution cannot be changed at all, even through an Act of Parliament. Wade tried to insulate the rules of identification under (iv) from the normal effect of rules of power under (iii) and (v)—just like Dicey had tried to insulate the principles of power (iii) and amendment (v) from the effect of the principles of identification. But both these answers fail, because they provide a conception of the English constitution that is both unfamiliar and

69. This point is brilliantly shown for the case of the British constitutional settlement by J. W. F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007).
70. Wade, *supra* note 18 at 32.
71. Allison, *supra* note 69 at 235.

unrealistically rigid. The constitution depends on both sets of principles equally and simultaneously.

Allison suggests that the historical constitution is not the result of a single normative theory. This is true, but it should not be taken to mean that normative principles are not constantly at work (including a normative principle of fidelity to the materials). If the constitution is thus the interpretive construction of the law, it is also partly a construction of the political morality that sustains and justifies the main institutions of the state. The process of legal deliberation in constitutional law proceeds through the working out of such principles. This is evident in the most recent constitutional judgments of the House of Lords, including *Jackson.* And here we find the deeper reason for the enduring similarities between the written and the unwritten constitution. In any modern liberal democracy, constitutional law and its doctrines seek to make pubic and articulate the foundational principles behind the idea of public institutions of government. It is the attempt to establish a public order of rules that can be justified for a society of equals. But the attempt is not static, nor does it escape controversy. The content of the higher law of the constitution is thus derived as the interpretation of a moral requirement, the contents of which are of course open to various different interpretations and its results change over time. The standing of the constitution does not, therefore, derive from the superior power or the legitimacy of the authors of the constitution in the sense of a '*pouvoir constituent.*' It is the result of the various and often competing legal interpretation of our institutions by the various officers, judges and political players that are involved in the standing processes of law and government. These interpretations and conversations continue to shape and give ever changing meaning to our public institutions.