

SOVEREIGNTY: ASPECTS IN CONSTITUTIONAL LAW AND JURISPRUDENCE

What follows is divided into two parts.

In the first is discussed the possibility of an Australian constitutional lawyer asserting the sovereignty of the Commonwealth whilst denying the same of the States. A recent discussion of the ownership of the Australian territorial sea forms a basis for the argument.

In the second part the more general jurisprudential question of when one can say a community is sovereign is considered. Most of the second part is taken up by remarks on the correct view to be taken of the community's legal system. This is conceived to be a necessary preliminary to an assessment of its sovereignty.

I

The ownership of the territorial sea is an attribute of sovereignty. Australia is sovereign and therefore owns its territorial sea. But of course that is no end of the matter in a federation; for one still has to decide the issue between the polities of the federation.

Two judges of the Australian High Court¹ decided recently² that the answer was the Commonwealth, the central polity, and in each case the reasoning used raises interesting questions about the concept, sovereignty. I propose to discuss that of Windeyer J.

It seems to me it can be reduced to the following propositions:

1. The Australian colonies were not sovereign.
2. The States have not become sovereign.
3. The Commonwealth has become sovereign³.
4. The ownership of the territorial sea is an attribute of sovereignty.
5. Therefore the Commonwealth has succeeded to dominium over the territorial sea.

Now there is no doubt about the meaning of "Commonwealth" in proposition 5, it is clearly the central polity in the federation. But "Commonwealth" is often an ambiguous word in Australian Constitutional law, for it can refer either to the centre or to the whole federation. And it seems to me that there is difficulty in knowing in which sense Windeyer J. uses it in proposition 3. The crucial passage in the reasoning is the following⁴. "The Commonwealth has become by international recognition a sovereign nation, competent to exercise

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1. Barwick C.J., and Windeyer J.
2. *Bonser v. La Macchia* (1969), 43 A.L.J.R. 275.
3. The date is not, and could not really be, specified.
4. *Supra* n.2, 294.

rights that by the law of nations are appurtenant to, or attributes of, sovereignty. It follows, in my opinion, that rights in and over the territorial sea and its sea bed are now vested in the Crown in right of the Commonwealth of Australia."

Taken in isolation perhaps it is more likely that the first use of "Commonwealth" in this passage refers to the whole federation. There are, however, two reasons to doubt this.

In the first place the drift of the reasoning is to present a contrast with the lack of sovereignty of the States; and to contrast the federation (rather than the centre) with the States is a very odd thing indeed.

In the second place, to interpret "Commonwealth" in proposition 3 as "federation as a whole" renders the reasoning a complete non sequitur. For to establish the sovereignty of the Commonwealth (whole federation) is by no means sufficient to give the territorial sea to the Commonwealth (centre). Since the ownership of the territorial sea is an attribute of sovereignty it is sufficient to give it to the federation. But that is not the same thing. In fact the question is a very open one and there are arguments for preferring the States.

It is a question which has to be decided according to the principles of constitutional law. Perhaps it is to international law that one looks to determine whether Australia has acquired the territorial sea in the first place⁵. But it is undoubtedly to constitutional law that one looks to answer the subsequent question: which of the polities within the federation should have dominium? Now in the absence of special provisions in the Constitution it is distinctly arguable that constitutional law must decide that question in accordance with the general scheme of the federation. And that scheme very clearly gives dominium to the States. The *Royal Metals* case⁶ decided that the Commonwealth has dominium in certain circumstances, but that case is posed as an exception to the general scheme and leaves no doubt that generally it is the States that have it. The States' case is not weakened by the fact that the Commonwealth has certain maritime legislative and executive power⁷. (Why should there be any incompatibility between that power and the States' dominium when there is no such incompatibility on dry land?) There are obviously many questions to canvass before reaching a conclusion. For instance the States would have to maintain that as a matter of constitutional law the Commonwealth (centre's) executive *power* in international affairs was irrelevant. And there are problems with the alteration of boundaries⁸. I do not wish in this place to attempt to answer these; only to maintain that the problem is one of complexity and difficulty.

If in proposition 3 "Commonwealth" means centre then much of this complexity is avoided, for Windeyer J.'s conclusion can then stand on the

5. Alternatively, as *Windeyer J.*, thought, to constitutional law, the question being one of devolution from the United Kingdom. Or even, perhaps, to the constitutional law of the original creation of the colonies.

6. (1923) 33 C.L.R. 1.

7. See *Windeyer J.*, *supra* n.2, 295.

8. Problems which are as great for the Commonwealth (centre) as for the States.

fact that the ownership of the territorial sea is an attribute of sovereignty (proposition 4). The reasoning is in that event not a non sequitur. For this reason, and because it is interesting, I propose to discuss the proposition in this sense, combining it with proposition 2: "The Commonwealth (centre) is sovereign but the States are not."

What can be meant by "sovereign"? The term is used today in a more extended sense than it was by Austin. For Austin the concept was of the repository of the ultimate or supreme legal power in a community. This was necessarily an independent power (were it not independent it would not be ultimate), but this feature was not often prominent. Today it is; so that it makes sense to say of a community "it is sovereign", stressing the element of independence, but of course giving no substantial indication where in the community ultimate legal power lies. There is a temptation to say that the difference between the Austinian and the extended usages is the difference between saying "it is the sovereign" and "it is sovereign". But this is not quite true, as an analysis of the usages in *Madzimbamuto v. Lardner-Burke*⁹ reveals.

Now in what sense of "sovereign" can we maintain the proposition under discussion: "The Commonwealth (centre) is sovereign but the States are not"? Certainly not in the sense that emphasizes ultimacy (despite s.109 of the Constitution which provides that Commonwealth laws prevail over State laws in the event of inconsistency). The sense in which it might be maintained, and no doubt the sense relevant to the ownership of the territorial sea, is the extended sense, the one emphasizing independence.

A consideration of the proposition in this sense must start with the Statute of Westminster. S.4 provides: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." (S.1 defines "dominion" so as to exclude the States.) And s.9(2) provides:

"Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence."

The statute thus clearly enough purports to give independence in the field of Commonwealth (centre) power, but not in the field of State power.

Now there is an extreme conservative view about the Statute of Westminster and the Australian, and other dominion, revolutions, which states that in legal theory, *and from the point of view of the dominions' constitutional law*, a United Kingdom statute can extend to a dominion without request and

9. [1968] 3 All E.R. 561.

consent. An instance of this view is in *Ex parte Bennett; Re Cunningham*¹⁰. Another is probably Lord Sankey's well-known dictum in *British Coal Corporation v. The King*¹¹, since he must, I suppose, be taken as speaking from the point of view of Canadian constitutional law (though the Privy Council is in extraordinary difficulty where a colonial or dominion revolution is in question in determining its correct point of view). There is a second opinion which recognises that a revolution has taken place and that, at least from the point of view of dominion constitutional law, the United Kingdom is legally powerless. An example of this is in the statement of the majority of the Privy Council in *Madzimbamuto v. Lardner-Burke*¹². This view is usually based on the Statute of Westminster, *qua* statute. There seems good reason to question it; in fact the Statute of Westminster may be highly overrated. The issue is highlighted if we consider a second statute of the United Kingdom purporting to override the Statute of Westminster. Call the second S2 and the Statute of Westminster S1. Can S2 override S1?

There is a powerful, though in some ways defective, argument by H. W. R. Wade in the *Cambridge Law Journal*¹³ to the effect that it can.

Heuston in his article on sovereignty and the odd ways of Oxford men¹⁴ thinks that Wade misses the point since (Heuston says) the question is whether S2 is a statute, i.e. whether it can be identified by the courts as such (rules for identification are logically prior). But that itself obscures the point which is whether a court could possibly, in making the identification, prefer S1 to the ultimate rule on which S1 itself depends for its validity. Unless the ultimate rule is in terms which allow for *its own* amendment by Parliament¹⁵ there is a clear conflict between them, and the question is simply which is to prevail.

Wade does leave himself open to Heuston's criticism since he puts the question in terms of the repeal of S1. But the whole issue must, as Heuston sees, be determined before repeal. In other words the whole issue is raised by the question whether there is a repeal or not. Thus repeal cannot logically be determinative. Wade seems led to this by a certain unwillingness to say that S1 is void; which is odd, since there is a direct conflict between S1 and the ultimate rule, and his view is that the ultimate rule is superior. He seems to have been influenced by an unwillingness to say that the Parliament Acts are void. But the Parliament Acts raise a completely different question and there is no necessity to hold them void at all. They do not purport to limit in any way what the Queen, Lords and Commons can do, thus there is no direct conflict between them and the ultimate rule. The only way a conflict could be raised would be by interpreting the ultimate rule as excluding

10. (1967) 86 W.N. Pt.2 (N.S.W.) 836.

11. [1935] A.C. 520.

12. [1968] 3 All E.R. 572.

13. [1955] C.L.J. 172.

14. *Essays in Constitutional Law* (2nd ed. London 1964), Ch. 1.

15. An unlikely view; if only because the event of offering political allegiance to Parliament is a simpler postulation than that of offering that allegiance to Parliament with power to alter the object of allegiance. The postulation is difficult enough to justify in the first place. It should not be complicated beyond necessity. The Parliament Acts do not, of course, purport to amend the ultimate rule (see *infra*).

delegation; hardly an attractive interpretation since it involves the invalidity of all delegated legislation.

Thus a good case can be made that S1, and thus the Statute of Westminster, is legally ineffective; i.e., the Statute of Westminster is ineffective *as a statute* to support the second view of dominion independence (the one instanced by *Madzimbamuto*).

Now we do not doubt that Australia *is* independent. Where does acceptance of the Wade argument leave us on this point? Simply in a position where we must look beyond the Statute of Westminster, qua statute, to justify independence. No doubt we shall find the Statute of Westminster, qua political act, relevant, but I should have thought not of crucial importance. Of more significance surely is the whole political fact which can be described in simple words, the development of the nation Australia.

To be forced to look beyond the Statute of Westminster for independence is of considerable interest for our discussion of sovereignty. For what, as a political fact, has developed is the nation. And the nation is not the centre. The nation is the centre *and* the states. Thus if the revolution is based on the political development of national independence then logically it ought to obtain for the benefit of the States as much as the Commonwealth (centre). Thus we have the germ of an argument that Australia is independent, not merely as the Statute of Westminster would have it in the field of Commonwealth power, but in State power as well. We might be able to use this argument to refute our proposition that the Commonwealth is sovereign but the States are not; but it at this stage lacks research and documentation and I do not press it since I think there is a simpler refutation.

This is to deny that *either* can be sovereign. S.128 of the Constitution, the referendum section, is, despite the fact that the Commonwealth Parliament has the initiative, neutral between the polities in the federation; in other words s.128 is in no acceptable sense an element of either the central or state polities. Thus an assertion of the sovereignty of either polity has to be an assertion of independence from the referendum. This is clearly absurd¹⁶ and sufficient reason for denying that either polity can be sovereign.

Of course, the referendum process is an element in the structure of the federation as a whole and therefore provides no obstacle to an assertion of its sovereignty; but that, I should think, is the only legitimate way in which the extended sense of "sovereign" can be used in Australian constitutional law today.

Indeed it is hard to see how, generally, the concept in that sense can be applied to anything less than a community.

II

A general view of its legal system is necessary before one can decide whether a community is sovereign, especially in difficult cases. Australia is not now a particularly difficult case, certainly it was more difficult in say 1930. But difficult cases are conceivable. I do not mean "difficult" in the trivial sense,

16. As a legal proposition.

exemplified by the problem one faces at dawn in deciding whether it is night or day (or at the end of dawn in deciding whether it is dawn or day, etc.), though one will experience this sort of problem in the assessment of sovereignty when all the evidence is in and one finds it balanced more or less evenly between dependence and independence. I mean the more significant difficulty of what is to count as evidence one way or the other. For instance in the Australian legal system how did we, or for that matter do we now, count the Privy Council. For this type of problem it is important to have some general view of the legal system.

Obviously the first step is to examine it. But one does not examine a legal system as one examines a tin fence, for the jurist needs a much more acutely developed theoretical method. Without a method of looking he sees nothing.

I propose to examine certain features of H. L. A. Hart's *The Concept of Law*¹⁷ as the basis of developing a general view of a legal system. Obviously, the methodology of looking is the major part of jurisprudence, so what follows can be nothing more than a few preliminary remarks. I shall attempt also to suggest how one might "see" sovereignty.

Hart has sought, in *The Concept of Law*, to replace the Austinian theory of sovereignty with a new analysis which sees law as a combination of primary and secondary rules. Hart's attack, which seems generally to have been thought by reviewers to have done for Austin, may or may not be effective; I wish at this point only to note that Hart preserves the relevance of the concept, ultimacy. For his rule of recognition (one of the secondary rules) is described as an ultimate rule, ultimate in the sense that "there is no rule providing criteria for the assessment of its own legal validity", and within it there are criteria of supremacy indicating the ultimately supreme rule or type of rule in the event of conflict. The relationship between this idea of ultimacy and sovereignty in the extended sense, whilst difficult of explication after the rejection of Austin, is none the less an important and close one. But it would be premature at this stage to attempt to analyse it as there are strong grounds on which to question the idea of a rule of recognition.

The difficulty with Hart's rule of recognition is really that rules of law do not conveniently display themselves for recognition. They have to be worked out. The rule of recognition for Hart "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group"¹⁸. This is only really plausible if the words "suggested rule" are glided over. On examination one thinks suggested by whom, and in accordance with what principles or techniques? Not guessed at, surely; not produced by shuffling the statutes, or the law reports; but worked out at length by the (more or less) sophisticated and subtle techniques of legal scholarship. And once one has produced one's "suggested rule" by this method what remains for the rule of recognition? That, for instance, what is passed by the two houses of Parliament and receives the royal assent is law is a rule that could hardly have been put to one

17. Oxford, 1961.

18. *Op. cit.*, 92.

side whilst working out whatever the "suggested rule" is. It is of course pointless having taken principles and rules into account once to do so again when "recognising" them; and similarly pointless to take part into account when suggesting a rule and the other part when attempting to recognise it. Perhaps Hart has in mind the standard court-room situation where counsel has worked out a proposition of law which he presents to the court, hopefully, for its "recognition". But here too the notion is far too simplistic. What is in most cases presented to the court is not a proposition which is capable of recognition in that it stands solely on a principle of constitutional law such as that it has been enacted by the Queen in Parliament, but a proposition derived by reasoning, from one or more such basic propositions. Hart is in trouble here. The idea of a rule of recognition best stands up in the simple clear case. But, except the criminal law, these are just the cases that do not get to court. If he transfers his point to the rest of the community and the countless instances of its obeying the law without the intervention of a court he finds more cases that to the lawyer are clear. But this does not help his rule of recognition. For the method that the community in general uses to discover the content of the law is confused and clumsy; even less like the neat, clear notion of recognition than the method of the court.

Thus recognition is in most cases illusory^{18a}. And what we must really be concerned with is this notion of reasoning; the rules, principles, policies, values, standards and methods by which one, be he judge, solicitor, tax-gatherer, policeman or layman, works out, as best he can, the rules of law relevant to his particular case. This is nothing more or less than what we well know as the legal method. A not very remarkable advance.

This seems to be the general position reached by Ronald Dworkin¹⁹ who has sought to "shake (himself) loose" from models of rules such as Hart's. Dworkin's view is that an explication of law must look beyond rules and must take account of principles, policies and standards. These have a different logic from rules, and Dworkin works this out in subtle detail. An example is the principle that a man shall not benefit from his own wrong. This he argues cannot be explicated as a rule.

But Dworkin's discussion does not show that there are two different levels in the explication of law, and this is really quite critical for his point. One level is concerned with the law as it applies to the community (what the community (including officials *as* officials) gives allegiance to or obeys); the other with the whole range of factors relevant to reasoning about its content (the legal method). No one obeys in any relevant sense the principle that a man should not benefit from his own wrong. A court the logical conclusion of whose judgment was that principle or indeed was anything but a rule would bewilder in a rather fatuous way; so also would a solicitor (whose client might well be expected to decline payment of his bill). Principles standards and policies simply have no place on the first level, which seems exclusively the province of

18a. Illusory, of course, as a means of direct connection to primary rules. The criticism in the text (so far) does not apply to the recognition of juridical *acts*. But Hart's system connected the rule of recognition to primary rules. Later this article distinguishes two levels of jurisprudential explication. Juridical acts are not found on the first level whereas primary rules are.

19. "The Model of Rules", 35 U. of Chic. L.R., 14 (1967).

rules. Dworkin's point can be sustained for an explication of law on the second level, for principles policies and standards are certainly part of the legal method. So also of course are rules, rules of constitutional law and what we might call with Hart primary rules, these latter if only because they are often analogues. But for an explication of law on the first level Dworkin's arguments are not convincing and the model of rules must be judged adequate. The realization of this is of some considerable importance in understanding the nature of legal obligation (for it is made much more elusive by the wholesale corruption of the rule model). But we cannot take this any further here for we are concerned only with the rule of recognition and its ultimacy.

Now it is evident that the rule of recognition is entirely of the second level. Dworkin's criticism of it must therefore be accepted. In its place, as will by now be clear, we have nothing more startling to offer than the legal method.

The defence of the concept of law as a model of rules on the first level might not be one that Hart himself would have offered since it involves the abandonment of the rule of recognition. There is another defence to the Dworkin criticism not involving that abandonment which an examination of Chapter VII of Hart's book suggests he might offer. This is to insist that his explication is concerned with the clear, purely rule-governed, case. The rule sceptic, he says, is only welcome *on the fringe*²⁰, i.e. in the difficult, controversial cases. This defence is of interest to us since it involves the partial preservation of the rule of recognition with its element of ultimacy.

We have already seen one difficulty with such a defence. Clear cases generally do not get to court, and though there are more clear cases outside the court the legal method there is, because it is clumsier, less capable of conforming to the model of recognition. Another (related) general criticism of this defence of Hart's which I wish to argue here is that the limitation prevents one seeing that jurisprudential explication is relative to situation in the legal system; i.e., that it must vary according to whether one is considering the situation of a judge, or a solicitor, or a policeman, or a layman, and so on. There is, for one concerned only with the clear rule-governed case, no point in looking for differences relative to situation because by definition there will be none—each situation will be governed by the clear rule applicable. Hart says²¹: "predictions of judicial decisions have undeniably an important place in the law. When the area of open texture is reached, very often all we can profitably offer in answer to the question: 'What is the law on this matter?' is a guarded prediction of what the courts will do". But because prediction is relevant only in the area of open texture, "on the fringe", he does not pursue the point. This is a pity, for he is able elsewhere to argue with force that a judge's decision cannot sensibly be explicated as a prediction of itself. And this is true even in the area of open texture. The technique of prediction, then, is relevant in one situation but not in another. How can jurisprudential explication remain impervious to this? Should it not be presented as relative to situation?

What is the justification for jurisprudence looking beyond the judicial situation?

20. *Op. cit.*, 150.

21. *Op. cit.*, 143.

I can see no reason why the justification cannot be presented by a simple appeal to numbers; applications of the law on the judicial level are far exceeded in number by those in other public, and what we might call private, situations. Analysis corroborates this and reveals no satisfactory reason why jurisprudence should be so limited.

Compare the case of A who sues, has his rights or duties declared by a court, accepts this as a definition of his obligation, and acts accordingly, with that of B who does precisely the same except he is content with his solicitor's advice. Each has a reflective internal attitude to his rights and duties as defined, and (perhaps) a profound sense of obligation. In the first case this is clearly to the law. What is it if not to the law, in the second? And if it is to the law in the second case is not this the province of jurisprudence?

Truth or correctness is not a feature distinguishing the two cases. The court's decision might be wrong, and the solicitor's advice right. (The only case in which correctness could conceivably be a distinguishing feature would be that of a supreme court bound by its previous decisions and not given to overfine distinctions; only then do you have something approaching an *institutional* guarantee of correctness). That the court's decision is authority or precedent does not, of course, affect this. That is merely contingent; and in any event, it is in our system simply not true that the opinion of the profession has no authoritative weight.

Nor can we be impressed by the facts that a solicitor is privately employed by the citizen and a judge publically by the state; for this is not necessarily true. Consider the cases of a privately appointed arbitrator or a public defender; or the case of a barrister, who is neither wholly private nor wholly public.

There is a passage in *The Concept of Law* where Hart, for a different purpose, discusses the distinction between judicial and private statements of the law. And as is quite common with him he draws on the analogy of a game. Since his purpose is different it is not clear that he would, on the basis of this passage, resist the claim that the explication of the law must notice both the public and private situations. But in this context the game analogy misleads and to see this is illuminating. For one sees that the private situations are important in law in a way usually not possible in games. Hart says²²:

“When an official scorer is established and his determinations of the score are made final, statements as to the score made by the players or other non-officials have no status within the game; they are irrelevant to its result.”

And further down²³:

“The player, in making his own statements as to the score after the introduction of an official scorer, is doing what he did before: namely, assessing the progress of the game, as best he can by reference to the scoring rule. This, too, is what the scorer himself, so long as he fulfils

22. *Op. cit.*, 139.

23. *Op. cit.*, 140.

the duties of his position, is also doing. The difference between them is not that one is predicting what the other will say, but that the players' statements are unofficial applications of the scoring rule and hence have no significance in computing the result; whereas the scorer's statements are authoritative and final."

The fact is that most legal problems are answered without reference to a court. In this majority of cases we cannot possibly say that the private statements involved are "irrelevant to" or "have no significance in" the result, for if they are not relevant or significant nothing is. The game analogy is misleading for the simple reason that a scorer usually adjudicates upon every relevant event leaving no room for effective private judgments, whereas a court does not.

It is true that a court decision is final between the parties, and that it is occasionally enforced against a party's will. But finality is rarely an issue and usually there is no need of enforcement. Neither these, nor the other distinctions noticed, seem sufficient to exclude the private situations from an explication of law. The consequence is, as we have seen, that a complete explication must be presented relatively.

We have also seen that this relativity turns on the element of prediction. I am not, of course, arguing that prediction accounts for the whole of the legal method. Hart has effectively disposed of that view. But it is a significant element. The legal method used by, for instance, a solicitor is different from that used by a court since the former has the element of prediction of the latter. To that extent the legal method is relative to situation and no complete account of law can be presented in absolute terms. Now, the insistence that jurisprudence is concerned with the predictive elements of the legal method can certainly be carried too far. A prediction, for instance, that a judge will decide in such and such a way because he is insane is hardly part of the legal method. But there is a range of personally directed considerations, certainly short of this point, but expanding with the growth of the scientific understanding of human nature, from which the legal method can properly draw; considerations, obviously, of respectable but differing philosophic and legal standpoints, but also of somewhat less respectable personal traits of officials which justify neither the officials' dismissal nor exclusion from the province of jurisprudence. One cannot, with consistency, both exclude these officials from the province of jurisprudence and fail to call for their being dismissed or at least ignored.

We have dealt, in the main, with two situations—the court's and the solicitor's; but the number of conceivable, distinct, situations in a system is very great indeed. On examination a criss-cross of personally directed considerations is evident. The citizen confronting his tax-gatherer (with or without his solicitor) uses a legal method which might draw upon considerations directed personally to the tax-gatherer, his superior officer, a board of review and the courts; whilst the tax-gatherer does the same (with sometimes less, sometimes more, expertise) except that (and herein of course lies the crux of the relativity in the system) his method makes no personal reference to himself. And similarly with a citizen confronting a policeman ("Will he order me to move on? If he does, should I accept that order as one that

I have an obligation to obey? Or is it something, the legal validity of which the courts will not accept?"); or a planning authority; and so on.

Relativity thus pervades the whole system. The criticism of Hart's limiting himself to the clear rule-governed case has been that this is, in consequence, overlooked.

But whatever the merits, generally, of Hart's confining himself in this way, it is a confinement which obviously cannot be accepted by one concerned to present a complete account of the sovereignty of a community. For an exclusion of the doubtful cases is an exclusion of precisely those cases in which the courts (and other institutions whose responsibility it is to determine what the law is) are significant. In rule-governed cases by definition they are not. But how, generally, should we proceed to assess the sovereignty of a community?

Had we accepted in its entirety Hart's concept of law we should certainly have looked to the rule of recognition. The rule of recognition identified institutions and we should in the first place have selected certain of these, and in the second have assessed sovereignty with reference to their location. There would, I think, in the initial selection have been three tests applied to these institutions. The only ones to have been selected would have been (a) law-making rather than law-applying²⁴, (b) supreme and (c) with power at the moment of analysis. With the substitution of an expanded legal method for the rule of recognition there is no reason to think that the same technique of identifying the institutions specified by the legal method cannot be used; and with the same three tests, though we have to bear in mind that the legal method is both expanded in nature and relative to situation.

The justification of the first test is obvious, provided that it is discriminating enough to recognise that some institutions such as the courts, and including the police, both make and apply the law, and that it selects aspects of these institutions accordingly.

As to the second, there is a risk of confusing supremacy with ultimacy²⁵. "Ultimacy" means that there is no legal rule or principle providing justification for the rule or principle (or institution) in question. "Supremacy" means that in the event of conflict the rule, principle, or institution will prevail over all others in the community. Sovereignty in the extended sense looks to supremacy rather than ultimacy. No institution that was not supreme would be regarded as relevant to sovereignty, whether or not it was ultimate. The sense in which we take "supreme" is of crucial importance for to it will correspond the type of sovereignty revealed by our analysis. Take for example a referendum procedure that requires a very large majority. If we are interested in a strictly legal sovereignty then no institution whose will could be over-borne by the referendum could be supreme. We might however be interested in a less strictly legal, more politically relevant, sovereignty; in which case we should be unlikely to deny supremacy to an institution merely

24. "Law-applying" is used in a way that includes law-finding; though there are obvious differences. All law-applying necessarily presupposes law-finding by the same institution. Most law-finding is followed by law-applying.

25. See Hart, *op. cit.*, 102-104.

because of a practically impossible referendum. Or, were we to reject the view proposed in the first part of this article that the Australian revolution against the authority of the United Kingdom Parliament obtains for the States as well as the Commonwealth, we might favour a politically relevant notion of supremacy which recognises the convention against the exercise of United Kingdom power and thus does not count its parliament as supreme even in the State sphere.

The third test represents an interesting hangover from Austin's analysis. We are not inclined to deny that Australia is sovereign on the ground that the currently binding common law (which in certain senses is supreme²⁶) is largely the product of law-making institutions located outside the community. The reason seems to be simply that these institutions have no current power. But the designation by our legal method of current English courts (in their law-making characters) is a different matter. For the same reason we should not count the absence, for the States, of a provision such as s.2 of the Statute of Westminster (removing for the Commonwealth the possibility of repugnancy to old United Kingdom statutes) as a reason against Australian sovereignty.

The legal method on which we draw for the selection of institutions has been seen to be wider than Hart's in that, for one thing, it embraces principles as well as rules. The relevance of this for the analysis of sovereignty can be demonstrated by a consideration of the position of the courts. One does not, of course, have to subscribe wholly to Bishop Hoadly's oft-quoted aphorism about the interpreter being to all intents and purposes the law-giver. One can simply recognise its partial truth in order to maintain, in the area of open texture, the relevance of the courts to an analysis of sovereignty. How, in Australia, could the High Court or the Privy Council be overlooked in the case of an ambiguous referendum passed under s.128? Now, courts' decisions are either binding or persuasive²⁷. In the former case a *rule* is specified. If the courts designated by it are supreme they would, in their law-making characters, be relevant to an analysis of sovereignty. Hart's rule of recognition would have revealed this. In the second case not a rule but, on Dworkin's arguments, a principle is specified; something that is not of all-or-nothing application but, rather, of more or less weight. Hart's rule of recognition was not, as Dworkin shows, adequate to embrace a principle like this. But the expanded view of the legal method is, and an institution which makes law in a merely persuasive way must be taken into account in an assessment of sovereignty²⁸. To argue that this institution is irrelevant because subsequent institutions are free to choose to resist the "persuasion" is to miss the whole force of Dworkin's argument. In fact they are not.

Having identified the institutions of relevance we are then in a position to assess sovereignty by considering their location. If an institution (or institutions) of sufficient significance is located outside the community (the word

26. See Sir Owen Dixon's discussion in (1957) 31 A.L.J., 240.

27. Though sometimes irrelevant.

28. The way in which such an institution could be supreme in the sense specified earlier is difficult to explain. For since its relevance is a principle not a rule, it is entitled merely to weight and hence can be out-weighted. But even when out-weighted it loses no force (if it is a supreme principle). When, on the other hand, a rule is overridden by a superior rule it loses all force.

'outside' is not used in a purely geographical sense) then that community is not sovereign. What is sufficient is difficult to say, but as has been suggested earlier the difficulty is trivial; in fact not worth resolving if there be any doubt on the matter. In case this appear a little cavalier, reflect that the writer is committed (by ink spent) to the view that the prior questions, how, and what, institutions are to count, and why, are not trivial.