The recent publication of the SA Law Commission's working paper and draft bill on group and human rights has elicited a lot of interest and wide-ranging comment. The report of the commission did not merely pay lip service to the question of human rights in South Africa. The law commission must be congratulated on this excellent document. Understandably one of the issues with which the report deals is the doctrine of parliamentary sovereignty. This is the doctrine which has been the cornerstone of South African constitutional law and which has led to the violation of many individual rights. The aim of this article is to point out, that seen in its proper context and in a pure democracy, parliamentary sovereignty, a bill of rights and judicial review are not incompatible, although they are all geared towards the effective protection of the rights of the individual.

If democracy is the government of the people by the people for the people, there is no better way of ensuring this than by checking a sovereign parliament with a bill of rights, which bill of rights must be policed by a fearless and independent judiciary. And democracy is what we are striving for. Moreover, a controlled parliament is in line with the doctrine of separation of powers. It has often been said that the vesting of governmental powers in separate organs is to prevent the concentration of too much power in the same hands which leads to the atrophy of the liberty of the individual. If power is vested in separate organs, this ensures that they control each other and this redounds to the benefit of the individual. And I take it that this doctrine has to be taken seriously.

Parliamentary sovereignty

As students we were taught that parliament is sovereign. It can make any law; it can even say that children with brown eyes should be killed, and it shall be done. This was reinforced by a provision in the Constitution Act which precludes the courts from pronouncing on the validity of an Act of parliament.

The classical formulation of parliamentary sovereignty is that of Dicey. This entails that no Act of parliament may be declared invalid by a court of law. Parliament cannot bind its successors as to form and content of subsequent legislation. Moreover, there is no distinction in law between ordinary statutes and those of constitutional importance (A V Dicey An Introduction to the Study of the Law of the Constitution 10 ed (1959) 39 et seq). The fact that Dicey expressed these views on parliamentary sovereignty must be seen in its proper historical context. In its English context parliament was taken as representing the interests of the people as against executive excesses. It was, therefore, a form of bill of rights. It is a notorious fact,
however, that in South Africa parliament has never been truly representative of all the people of the country, but merely a small minority. The majority was excluded on the basis of colour and race. The doctrine of parliamentary sovereignty was, therefore, applied to achieve a different objective from the one it was sought to achieve in England. Parliamentary sovereignty was a political strategy whereby the disenfranchised majority was precluded from opposing the prevailing legal and political dispensation. If they did, they would be breaking a law made by a sovereign parliament. Such a law was like the laws of the Medes and Persians which could not be changed.

As J D van der Vyver puts it ("Parliamentary sovereignty, fundamental freedoms and a bill of rights" 1982 SALJ 574):

"Importing to South Africa a sovereign legislature divorced from the restraints of the conventional determinants of its traditions was like letting loose on our roads a smashing British sports car without brakes and with a pretty unscrupulous driver at the wheel."

My thesis is that in a democratic society parliament cannot have unlimited powers. The sovereignty it has is sovereignty in a hierarchical and not in a substantive sense. It is sovereign in the sense that there is no higher law-making body than it. If democracy is regarded as the government of the people by the people for the people, parliamentary sovereignty will always be limited. It is limited by the people. Sovereignty ultimately lies with the people. This is evidenced by the fact that parliamentary representatives are elected by the people and are supposed to be responsible and accountable to the people. A further implication of this is that members of parliament can have no greater powers than the people give them. Moreover, it is a well-known principle that no one can give more powers than he himself has. If parliament acts against the wishes and interests of the people, it acts beyond its mandate and must be changed.

A parliament with unlimited powers is, therefore, a legal monstrosity, a leviathan. It is undemocratic and autocratic. The reason why the doctrine of an omnipotent parliament succeeded in South Africa was as a result of the political set-up which has prevailed in this country.

Today, however, it has become obvious that to pass a law is one thing, but to make it earn the respect and obedience of the people is another. You cannot compel respect for law. It is something which comes from the people because of the belief that the law is fair and just. Although law can never completely dispense with the element of sanctions, reliance on coercion alone without society’s approval leads to the law’s being discredited in the eyes of those who are adversely affected by that law. An important ingredient for the effectiveness of the law is the element of legitimacy, namely, the feeling on the part of the people that the parliament which formally enunciated the law is theirs, is mandated by them and carries their approval (H R Hahlo and E Kahn The South African Legal System and its Background (1968) 4).

Seen in this light, therefore, the people are the lawmakers. They make or unmake the law by their actions they either strengthen or weaken that law; they approve or disapprove of the law already made by parliament. This is why it has been widely accepted in South Africa that South African law is suffering a legitimacy crisis (L J Boulle South Africa and the Consociational Option (1984) 59).

This has been evidenced by a lot of violence that erupted in the country recently. This does not mean that the laws passed by the present legislature have not complied with the formal requirements of validity. It simply means that notwithstanding compliance with those formal requirements many of them are not acceptable to the majority of the people.

A further implication of this is that whatever changes are made in the law in the name of reform will not receive the acclaim that many think they should. The simple reason is that they are not regarded by the majority of the black people as being made by them. As B O Nwabueze has pointed out (Judicialism in Commonwealth Africa (1975) 230):

"Democracy is not just ruled by an elected majority.
The ideal and processes implied in the concept are more complex and subtle than that. Essentially, it connotes self-government, that is to say, government conducted by the people as a collective and as individuals. The 'self' there refers not only to the people as a free and independent community but also to the attribute of personal participation by the several individuals comprising the community. Democracy is thus a form of government in which the highest premium is placed on the participation of the individual in government. The primary meaning of democracy, ... is that all those affected by a decision should participate in making it."

As pointed out already, black people have been excluded from participation in government. The legislature in the past not been reputed for promoting or protecting the rights or interests of the black people. It is, therefore, difficult for many black people to accept that the present parliament will promote their interests without them. They will need a lot of convincing evidence.

A bill of rights

A bill of rights may play a significant role in this situation. Although it used to be contended that a sovereign parliament is incompatible with a bill of rights, it is now accepted that this need not be so. A sovereign parliament can be subject to a bill of rights and yet remain sovereign if sovereignty is understood in the light of what has been said above.

Describing the inclusion of a bill of rights in the American Constitution, Alexis de Tocqueville characterized it as (Democracy in America (1835) 107)

"one of the most powerful barriers that has ever been devised against the tyranny of political assemblies".

This view is based on the assumption that parliamentary majorities may sometimes be wrong. As a result it is necessary to keep them in check. Unfettered parliamentary power is based on the erroneous belief that parliamentary representatives are always altruistic and serve the best interests of the electorate.

Although views often differ on the function and efficacy of a bill of rights, in my view a bill of rights is there not necessarily for creating rights, but primarily to provide more effective protection of fundamental rights. Providing for the protection of those rights in a bill of rights dispenses with the argument which might be raised on what are the interests of the people. Once the people have adopted a bill of rights, it is deemed to enshrine their interests. This question is pertinent particularly in a heterogeneous society such as we have in South Africa. Moreover, because the danger of abusing power is ever present, a bill of rights is there to keep a further check on the elected representatives. It provides a standard against which the conduct of the government can be measured. In the absence of such a standard the temptation on the part of the government to act arbitrarily and to abuse its power is great, and any criticism thereof is merely an expression of opinion. A bill of rights also has an educative function for the members of the government and for the public in general.

In this context the words of D V Cowen are apposite (The Foundations of Freedom (1961) 81):

"Secondly, a bill of rights should become the basis of the political education of the community, with really profound effects upon the whole character of national life. The values embodied in a bill of rights provide a standard to which people can appeal when power is abused. Moreover, were these values properly taught in the schools in the civic classes, they would become an important cohesive element in society. Indeed, from this point of view, it would be difficult to overestimate the importance of the role which the United States Constitution has played in establishing the fact of American nationhood. No one who has studied American society, even for a comparatively short period, can fail to be impressed by the central position of the Constitution in the affection, the thought and the imagination of Americans. No enumeration of the characteristics and qualities which go to make up a 'good American' would be complete without reference to the United States Constitution and its Bill of Rights."

The ideal of individual participation in government has also to be assured in some form for the system of government to be fully democratic. As they are determined by a majority, the processes of delegation and periodic elections do not effectively assure individual participation. It is in this context that the terms of the delegation acquire vital importance in a democracy. In the words of Nwabueze (op cit 231):

"Democracy presupposes that the delegation is not to be free and unencumbered, but should rather be subject to terms designed to safeguard the position of the individual, to enable him to intervene where the safeguards are being transgressed. If the size and complexity of modern society make it inexpedient for every individual to participate personally in decisions which affect him, then his fundamental rights as an individual need to be protected against those elected to the governing bodies. This is a function of a constitutional guarantee of individual rights, otherwise known as a bill of rights. Such a guarantee or a bill of rights becomes an essential feature of a modern constitution. A government of the people by the people is not fully democratic unless the instrument constituting it also guarantees and protects the basic rights of the individual."

It is often contended that constitutional guarantees are not effective because a determined government, backed by the people, can always violate them. Although constitutional safeguards do not in themselves constitute an impregnable shield, they do play a significant role. They make (Cowen op cit 119)

"the way of the transgressor, of the tyrant, more
difficult. They are, so to speak, the outer bulwarks of defence."

Judicial review

The safeguard of a constitutional bill of rights would be rendered practically useless if an individual who avers that his guaranteed right has been violated by the legislature or executive is not able to appeal to a body independent of these organs, whether the ordinary courts or some other kind of tribunal. Review of governmental Acts by an independent body in the interest of maintaining the efficacy of the constitutional guarantee of individual rights is thus also an essential and important mechanism of democratic government. Nwabueze (loc cit) says:

"Being at the instance of an aggrieved individual, the democratic virtue of such a review is that it assures the individual's personal participation in government, thus imparting greater reality to the concept of self-government."

In South Africa, however, the principle of judicial review has not been popular. It was long discredited by President Kruger. I do not share the view of President Kruger who regarded it as a principle of the devil, who introduced it in Paradise to test God's law, unless one were to regard parliament as being equivalent to God. I have just said that the view that parliament can do anything is insupportable. Parliament may be inclined to do anything if left without a body which will call it to order. This does not mean that that body is supreme. All it does is to call the elected representatives to respect the fundamental law of the land. This is what is meant by the supremacy of the law. A bill of rights purports to be a higher or fundamental law (Jaconelli Enacting a Bill of Rights (1980) 155)

"exempt from the normal processes of express or implied amendment and repeal".

If "constitutional justice" is defined as (M Cappelletti Judicial Review in the Contemporary World (1971) 1)

"that condition in which citizens may trust their government to uphold certain rights considered inviolable, it is clear that judicial review of statutes is only one way of attaining this happy state".

The review of governmental Acts, by an independent tribunal and in accordance with the limitations prescribed by the basic instrument of government, is the people's own device for the control of the power they have entrusted to their elected representatives.

"Being a practical incident of the terms and conditions upon which the majority in the legislative and the executive holds its power, the review of governmental Acts in terms of the constitutional limitations

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upon government is indeed a constituent element of majority rule; to regard it as antithetical thereto is to misconceive the true basis of majority rule." (Nwabueze op cit 231.)

What is seen as a major problem is that when the court holds a legislative or executive Act unconstitutional and void, it necessarily frustrates the will of the legislature or executive. What is more, the legislation may have been supported by an overwhelming majority vote of the legislature or even by a unanimous vote. It is said to be antithetical to the democratic theory of majority rule that an unelected body should be able to frustrate the will of an elected legislature on matter of policy, and that accordingly

"the checking function, being a 'counter-majoritarian force' is undemocratic".

The counter-majoritarian argument asserts that the concept of the "people" in relation to the limitations imposed on government by the constitution is a "myth", an "abstraction" and one that obscures (Nwabueze op cit 232)

"the reality that when the supreme court declares unconstitutional a legislative Act or the action of an elected executive, it thwart the will of the representatives of the actual people of here and now; it exercises control not on behalf of the prevailing majority, but against it".

This argument is fallacious. The idea of the people, with its imperfections and limitations, is as real as any in relation to the two processes of delegation and periodic elections. If a constitution has been adopted, it binds not only the generation of people who adopted it but also posterity. The latter, however, have a right to refuse to be ruled by their ancestors long dead. They can exercise their right to alter the constitution as a whole or to amend it.

Although this is their birthright, non-exercise of it indicates approval of, or at least acquiescence in, what the people of the past have bequeathed to them. Even though a constitution may have been made two hundred years before, it has a continuing basis in current popular consent and approval. It may further be contended that although democracy does not mean reconsideration of decisions once made, it does mean that a representative majority has the power to effect a reversal. If this means that a representative majority has competence to reverse the limitations imposed upon it by the constitution, then this is the exact antithesis of a constitutional democracy. A constitutional democracy does not grant all power to the majority.

"It is a rule by the majority according to predetermined rules. A representative majority that is not bound or limited by rules beyond its power to reverse is not a democratic body, but an autocratic and arbitrary one." (Nwabueze loc cit; Jaconelli op cit 166.)

Although the review of governmental Acts by the court is a people's institution, it is said to be nonetheless undemocratic unless the personnel of the court are responsible to the people. Power, especially critical power, is unsupportable without responsibility, which is attained only through the process of elections. This argument is misconceived if it equates responsibility with accountability. Although periodic elections are indispensable to democracy as they enable the people to give practical expression to their changing outlook and wishes on government, the idea of responsibility is wider than that. Responsibility demands not only that the government be accountable to the people through the electoral and other communication processes, but also that the actions of the government should respond to the needs of the people as revealed in public opinion. This should, therefore, be among the factors informing policy.

There is no doubt that the judges are responsible as they are responsive to the needs of the people

"not so much to their immediate material needs, but to their need for principle in government, for those enduring values which are the ultimate end of government, and which serve to give lasting meaning and purpose to the life of the people".

This is because the legislature and executive, preoccupied as they are with the expedient resolution of pressing problems, have often failed to take account of society's fundamental presuppositions, establishing them as active principles of the constitutional system according to which propriety of actions of the legislature and executive are to be judged. In this way the court serves the ends of democratic government (Nwabueze op cit 233).

Judicial decisions may also be regarded as responsible to the attitude of the public towards the contentious issues of the day. Although considerations of what is good or desirable for society are primarily a matter for the political organs, there is no reason why the courts should not be concerned with them. In any case the judiciary forms part of the third branch of government. Moreover, policy in its widest sense should be among the factors informing judicial decisions.

If the powers of government are vertically divided, there is a need for an umpire to resolve demarcation disputes between the various governmental units.

"With their traditions of independence and relative insulation from political pressures, it is not surprising that the courts should emerge to play the role of umpire."

It is a logical corollary of a rigid division of powers that if a governmental unit exceeds its authority, its actions should be declared void. This demonstrates a clear need for judicial review of legislation (Jaconelli op cit 204). In any case if the court's interpretation is regarded as wrong, this will be exposed by enlightened academic criticism and if need be by a
constitutional amendment. This does not mean that the judiciary should be elected. The office of a judge requires special qualifications and ability which cannot adequately be assessed by the electorate, the judgment of which may be influenced by other considerations. The process of election is often characterized by party or group interests and by political campaigning. This may adversely affect the image of a judge as an impartial and independent arbiter of the rights of the individual. Judicial review also finds support in the idea of natural rights which may not be submitted to the vote. They are placed beyond the reach of the legislative majorities. Just like the principle of one man one vote, which is fundamental to Western liberal democracy, it could similarly be contended that freedom of speech or freedom of association is equally fundamental to the workings of Western democracies and hence a suitable object of protection from the legislature by means of judicial review. There is no doubt that limitations upon government and their enforcement by the court imply a distrust by the people of their elected representatives. Such a distrust is said to have a tendency to weaken the democratic processes by causing laxity and irresponsibility in the legislature and apathy in the electorate. In response to this contention the words of Cowen are particularly appropriate, namely that (op cit 118)

“when entrusting power to human hands, it is essential not to believe in the sweet reasonableness of man”.

Judicial review can, therefore, be defended as democratic. If some of the arguments in defence thereof may be inconclusive, it is because of the (Jaconelli op cit 210)

“contradictions which exist within the modern Western concept of democracy, in that it demands respect for both the wishes of the legislative majorities and the rights of individuals and minorities”.

Conclusion

Parliamentary sovereignty in its proper context developed with the purpose of asserting the absolute supremacy of the people over the absolute and despotic rulers. It was an assertion that the people
ARTICLES

are sovereign. Obviously for practical reasons the people as a whole could not exercise this power. It could be done indirectly through elected representatives.

It is clear that parliamentary sovereignty was not an end in itself but a means to an end. Properly exercised it could serve as a type of bill of rights. If improperly applied it could lead to a new form of despotism or rule by a certain oligarchy especially if a certain section of the population were not entitled to elect representatives.

In a situation of this kind a bill of rights coupled with judicial review provides an answer. Although a bill of rights may not be a panacea for all the ills of the country, it may contribute to making the way of a transgressing parliament difficult. It, therefore, assists in taming power. The taming of power is conducive to democracy and general human welfare.

Footnotes

1 A number of workshops have been organized around the country to discuss this document.
2 s 59(1) of the Republic of South Africa Constitution Act 32 of 1961; now s 34(3) of Act 110 of 1983.
4 Harris v Minister of Interior 1952 (2) SA 428 (A); Attorney-General for the New South Wales v Tretborn (1931) 44 CLR 394, (1932) AC 526.
6 Kotze Memoirs and Reminiscences (1949) xli-xlii. He discredited the principle at the swearing-in ceremony of the new chief justice after dismissing former Chief Justice Kotze. He warned other judges not to follow the example of Kotze CJ.
7 Jaconelli (op cit 201); Cappelletti (op cit 98), has the following to say:

“So it is that in spite of its nearly universal appeal, judicial review remains an enigmatic institution. It operates principally in states with democratic philosophies; yet it claims the right to frustrate, in certain situations, the will of the majority. Its decisions are often pre-eminently political, yet they are made by men not themselves responsible to the electorate. The theoretical power of the judge of constitutionality is awesome, yet in the end he has neither sword nor purse and must depend on others to give his decision meaning.”

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