Commentary

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Praise for the book

It is one of the happy aspects of academic life to be asked to comment on a book which constitutes an outstanding contribution to knowledge and scholarship. That is so even if it leaves little for a commentator to argue about or criticise. Professor Goldsworthy's book falls into that category.[1] I suspect that my complimentary assessment of this book will be shared even by some who may disagree with his views. The book is made even more enjoyable to read because it is like taking a familiar walk through English constitutional and political history made all the more easier to undertake because of the lively and clear writing style employed by its author.

I believe Goldsworthy has sustained the main historical and philosophical arguments advanced in this book. In my view he has shown that the doctrine of parliamentary sovereignty cannot be explained as only the product of misconceived nineteenth century thought and isolated judicial *dicta*. So far as the nineteenth century is concerned, it would be more correct to say that the developments which occurred during that era merely provided a democratic dimension to the doctrine given the extension of the franchise and other changes that ensured that by the end of this period the British Parliament became more representative of that nation.

As to the isolated *dicta* and the otherwise dearth of judicial authority, one is reminded of the remark that '[t]he clearer a thing is, the more difficult it is to find any express authority or any *dictum* exactly to the point.'[2] The reason why the principle did not require further judicial support

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1 It will be clear from my comments that I disagree with the critical aspects of the review of the same book by Ernst Wilheim, (2001) 29 *Federal Law Review* 115.

2 *Panama and South Pacific Telegraph Company v India Rubber, Gutta and Percha and Telegraph Works Co* (1875) LR 10 Ch App 515, 526 (James LJ) quoted with approval by Lord Halsbury LC in *Keighley, Maxted & Co v Durant* [1901] 1 AC 240, 245. It is, in any event, probably the case that there is no longer a shortage of judicial authority concerning British parliamentary sovereignty: Colin Munro, *Studies in Constitutional Law*

is that it was an ultimate rule of recognition which the most *senior* officials in fact applied in administering the law as evidenced by their actions and pronouncements, to use the legal theory advanced by Professor Herbert Hart[3] as qualified by Goldsworthy by the addition of the term emphasised in italics.[4]

There have been other attempts to justify the doctrine and also to explain the judicial *dicta* to the contrary but Goldsworthy's analysis is I think more comprehensive and this is so not only because he takes account of modern thinking which has developed since the publication of those works.[5]

Without wishing to detract from the tribute I have paid to this book, I should indicate that I am not necessarily suggesting that the book will persuade the growing number of judges and academics who, as Goldsworthy has acknowledged, have criticised and questioned the existence of the doctrine of parliamentary sovereignty.[6]

The future

As Goldsworthy emphasised in his introductory chapter his book was not directly concerned with all of the potential challenges that confront the doctrine of parliamentary sovereignty in the United Kingdom today and like all histories his had to end somewhere. His does so at end of the nineteenth century.[7] One of the advantages of a persuasive historical analysis which sets straight the record of the past is that it will help us to contemplate the future more clearly. In this I have in mind the challenges posed for the future of the doctrine in the United Kingdom. I also have in mind the challenges for the doctrine in Australia even if, as Goldsworthy is forced to concede, the doctrine can only have a heavily modified application in this

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(2nd ed, Butterworths, London, 1999) 142 and see also the cases discussed at 142-149.

3 H L A Hart, *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994).

4 Jeffrey Goldsworthy, *The Sovereignty of the Parliament, History and Philosophy* (Clarendon Press, Oxford, 1999) 238 fn 4. The theory advanced by Hart is discussed in ch 2, s 1, and ch 10, s 2.

5 See, for example, J W Gough, *Fundamental Law in English Constitutional History* (Clarendon Press, Oxford, 1961 reprint) which concentrates on the historical aspects of the doctrine of parliamentary sovereignty.

6 See, for example, the judgments of Laws LJ in the case referred to below in n 22 and also, more recently, the case referred to below in n 19. Sir John Laws was one of the judges mentioned by Goldsworthy in this regard: above n 4, 2.

7 Ibid 8.

country.[8] In particular, if the doctrine is now thought by an increasing number of judges and lawyers to be unsuitable for modern times, who can change it and how?

I suspect that Goldsworthy and I are among the few teachers in constitutional law in Australia who continue to subscribe to the doctrine of parliamentary sovereignty, albeit in a modified form in Australia, as a description of the *existing law.* That does not, however, necessarily indicate how either of us would vote in a referendum to alter the *Australian Constitution* for the purpose of introducing a judicially enforceable bill of rights. I think Sir Garfield Barwick was right in thinking that 'unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility'.[9] In effect the arrangements originally devised presuppose *trust* rather than *mistrust* of our governmental institutions. This view of "constitutionalism" or, as some would argue, the absence of constitutionalism, is hardly in line with what I suspect is the modern view shared by many of our colleagues. Perhaps that modern view finds a significant echo in the remarks of Sir Anthony Mason made shortly after he became Chief Justice of Australia when he observed that: '[o]ur evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will.'[10]

I suggest that it is as if we are discovering , one century later, that the country wears a suit of ill fitting constitutional clothes and the issue arises as to how and who is legally and constitutionally able to change them.

One challenge to parliamentary sovereignty in modern times has had a more pressing immediate relevance to the position of the United Kingdom Parliament. I have in mind the ability of a parliament to override the rules of public international law. There is little doubt about the accepted orthodoxy as is illustrated by the case of *Mortensen v Peters*[11] in the United Kingdom and, more recently, *Horta's* case[12] in Australia. But the problem today is that there is now a tendency amongst some legal philosophers to talk in terms of a diffusion of sovereign authority and power between

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8 Ibid 1, 234 fn 4, 279.

9 *Attorney–General for the Commonwealth; Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 24. See also to the same effect Sir William Harrison Moore, *The Commonwealth of Australia* 2nd ed, (Melbourne: Charles F Maxwell, 1910) 612 – 3, 614–5. I am grateful to my colleague, Professor George Winterton for alerting my attention to the remarks contained in the latter book.

10 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 163.

11 (1906) 14 SLT 227, 230.

12 *Horta v The Commonwealth* (1994) 181 CLR 183, 195.

nations and international bodies such as for example the merging of the United Kingdom into the European Union.[13]

There are enough indications in the history described in Goldsworthy's book to show that the rule of recognition in relation to parliamentary supremacy is and was not immutable. It is possible to point to a number of instances to show that the operation of the rule must have suffered from some aberrations and could not have been constant. There was of course the initial uncertainty that hung over the development of the English Parliament's exclusive authority to make and alter the law. That uncertainty was not fully dispelled until the resolution of the struggles between the Stuart Kings and the Parliament which gave rise to the Civil War and the Glorious Revolution. The uncertainty revolved around whether the legislative authority was that of the King alone which he chose to exercise only in Parliament or that of the King–in–Parliament as a composite institution.[14] The brief and temporary establishment of a republic under the rule of Oliver Cromwell during the interregnum should be classed as an example of aberration at least during that period and before the restoration of the Stuart Monarchy in 1660. Another instance of the same phenomenon must also include the convening of the Convention Parliament following the deemed abdication of James II in 1688.[15]

The purpose of these examples is not to contradict the general recognition of parliamentary sovereignty. Rather it is to indicate that the forces that brought about that same recognition must be capable of bringing about a recognition of its change or modification. Goldsworthy has of course recognised that possibility himself.[16] He does advert to the change that might one day result from the membership of the United Kingdom in the European Union. But as he says that day has yet to arrive and it will not do so until the point is reached when it is recognised that the United Kingdom Parliament lacks the constitutional power to legislate in breach of the terms of that membership.

Goldsworthy denies, as others have, that the same process has already begun with developments such as the *Factortame* case[17] since they

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13 Neil McCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1.

14 Goldsworthy, above n 4, 53.

15 As to which see Frederic Maitland, *The Constitutional History of England* (Cambridge University Press, London, 1911) 283-5, who treats the events that occurred as amounting to a revolution, however necessary or desirable.

16 Goldsworthy, above n 4, 244.

17 *Reg v Secretary of State for Transport; Ex parte Factortame (No 2)* [1991] 1 AC 603. In that case and also *Reg v Secretary of State for Employment: Ex parte Equal Opportunities Commission* [1995] 1 AC 1 the House of Lords recognised that courts could disapply British Acts of Parliament but failed to

were only concerned with the way the Parliament can be required to express its legislative will.[18] The argument is that this is not an indispensable part of parliamentary sovereignty. This has not been accepted by all as I have tried to show elsewhere.[19]

The issue remains as to what would now be needed to recognise a change in the sovereignty of the British Parliament. He has warned of the dangers of the judiciary as only one branch of the government bringing about a unilateral change of that kind, at least without there being a break in legal continuity or in other words a revolution.[20] Would an Act of Parliament by itself suffice, or should there be a referendum as well, despite the absence of a tradition of the sovereignty of the *people* as a *legal* rather than *political* doctrine in the United Kingdom? Would many years of disuse during which the Parliament continued to assert in theory, but never exercised in fact, the authority to legislate in breach of the United Kingdom's obligations as a member of the European Union, suffice to show a shift in the ultimate rule of recognition even without a referendum?

Relevance to Australian constitutional law

As interesting as all this may be for the United Kingdom, there remains the issue of its relevance to Australian constitutional law. Of course the problem of legislating inconsistently with international law is not peculiar to the United Kingdom even if Australia has yet to become a member of an international or supra–national union of countries akin to the European Union. But, as indicated before, Goldsworthy mentions in several places, that the doctrine of parliamentary sovereignty can only apply in a heavily modified form in this country.[21]

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explain the precise basis for exercising this authority. It is worth mentioning that the House of Lords also subsequently recognised that damages could be awarded to persons who suffered damages as a result of the enactment of a disapplied Act of Parliament: *Reg v Secretary of State for Transport; Ex parte Factortame (No 5)* [2000] 1 AC 524.

18 Goldsworthy, above n 4, 244–5, 259 fn 99.

19 Geoffrey Lindell, "*Invalidity*, *Disapplication* and the *Construction* of Acts of Parliament: Their Relationship with Parliamentary Sovereignty in the light of the European Communities Act and the Human Rights Act" (1999) 2 *Cambridge Yearbook of European Legal Studies* 399, esp 407–8 and also the judicial authorities discussed at 410–4. Compare now *Thoburn v Sunderland City Council* [2001] EWHC 195 (Admin) which was decided by a Divisional Court of the English Queens Bench and where the main judgment was delivered by Laws LJ: see especially [60]-[70].

20 For example, Goldsworthy, above n 4, 6.

21 Above n 8.

Like me, Goldsworthy relies on the traditional interpretation accorded to the grant of legislative power to make laws for the peace, welfare and good government or variations of the same formula in relation to its application to Australia.[22] The modification is of course made necessary by the existence of Australia's written constitution which ensures that Commonwealth and State parliaments must comply with the express and implied limits on the legislative powers distributed between them in that instrument. As a unanimous Court emphasised in *Lange*:

> The Constitution displaced or rendered inapplicable the English common law doctrine of the general competence and unqualified supremacy of the legislature.[23]

The extent to which the High Court has departed from the doctrine is shown by its willingness to imply restrictions on legislative powers from the express provisions, text and structure of the *Constitution*.[24]

But leaving aside for a moment the scope of the substantial modification to the doctrine of parliamentary sovereignty, it may at first seem that the Goldsworthy thesis was recently vindicated in *Durham*

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22 In relation to the *Commonwealth* Parliament, see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153 and the *State* Parliaments see *Union Steamship Co Ltd v King* (1988) 166 CLR, 9-10. In the latter case, a unanimous High Court referred with approval to a number of well known nineteenth century Privy Council cases which were taken as having decided that within the limits of the grant, the power to make laws for the peace, order and good government conferred by the Imperial Parliament on the Australian colonial legislatures was as ample and plenary as that possessed by the Imperial Parliament: ibid. Compare the rather surprising and conflicting views expressed by a Divisional Court of the English Queens Bench in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, 1104-1105 [57]–[59] per Laws LJ, 1107 [69]-[71] per Gibbs J.

23 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 564. A simple and uncontroversial example to illustrate this modification relates to the inability of the Australian Parliament to pass valid legislation to extend its own life beyond the maximum duration fixed by the *Constitution* under ss 5, 13, 14, 28 and 57. Compare the ability of the British Parliament to prolong its own existence upheld by the English Court of Appeal in *Norman v Golder (Inspector of Taxes)* (1944) 171 LT 369.

24 This is illustrated by the decisions on representative government and the separation of powers. The Court's approach leaves open considerable potential for implying some of the guarantees found in a judicially enforceable bill of rights despite Sir A Mason's cautionary remarks about the relevance of the Framers' rejection of a Bill of Rights in the *Australian Constitution*: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 ('*ACTV*').

Holdings Pty Ltd v New South Wales.[25] The High Court rejected in that case arguments based on the common law and other fundamental limitations which sought to deny State Parliaments the authority to legislate for the acquisition of property without adequate compensation. This was done without resolving the doubts left open in the *Union Steamship* case regarding the validity of laws that violated 'some restraints by reference to rights deeply rooted in our democratic system of government and the common law'.[26] In short whatever the position is as regards those laws, the legislation involved in that case was not thought to fall in that category.

Kirby J was the only member of the Court to explicitly reject the kind of limits on parliamentary sovereignty refuted by Goldsworthy for reasons which are consistent with and are also the same as some of the reasons advanced by Goldsworthy.

That said, Kirby J left open the possibility that extreme Australian State laws might not be recognised as 'laws' at all as envisaged by s 107 of the *Australian Constitution.* This serves to highlight the significance of the qualification to parliamentary sovereignty discussed above. For him the answer to some extreme laws might well lie in '*implications derived from the Constitution*, not in the assertions of the judges that the common law authorises them to ignore an otherwise valid law of a State.'[27] The sting, as it is sometimes said, lies in the tail.

I have elsewhere indicated the importance of the existence of a written and rigid constitution and how this was illustrated by the remarks quoted above from *Lange.*[28] It was also illustrated by Dawson J's recognition that the words 'directly chosen by the people' in s 24 of the

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25 (2001) 75 ALJR 501.

26 (1988) 166 CLR 1, 10.

27 (2001) 75 ALJR 501, 516 (emphasis added). His Honour also thought that the limitations he had in mind could be reinforced by the contemporary realisation that the foundation of the Australia's *Constitution* lies in the will of the Australian people: ibid. See now also his Honour's judgment in *Pfiefer v Stevens* [2001] 76 ALJR 269, 286-8 [113]-[123].

28 Geoffrey Lindell, "Expansion or Contraction? Some Reflections About the Recent Judicial Developments on Representative Democracy" (1998) 20 *Adelaide Law Review* 111, 143 and see also 145–6. An earlier example is provided by the majority decision in the *University of Wollongong v Metwally* (1984) 158 CLR 447 which denied to the Parliament the ability to retrospectively express its intention not to override State laws. An important strand in the majority reasoning is that they saw s109 of the *Constitution* as providing protection against injustice and treating it as some sort of constitutional guarantee, for example, Deane J at 477 and see also by the same author, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, Sydney, 1994) 1, 25.

Australian Constitution give rise to a need for a genuine choice by electors in the election of their representatives and how this could result in the invalidity of measures that deal with or influence the casting of a vote. This was so despite his close adherence to the traditions of parliamentary sovereignty and the significance which he usually attached to the absence of a Bill of Rights in the *Australian Constitution*.[29]

The way the High Court has derived implications from the *Constitution*, especially in modern times, should serve as a sufficient reminder of how unnecessary it may be to rely on the kind of arguments refuted by Goldsworthy in order to invalidate truly horrible laws, whatever such laws may be. This will be so especially if judges adopt methods of interpretation which ignore the old suit of constitutional clothes that I spoke of earlier and prefer to see the *Australian Constitution* as an important mechanism for *mistrusting* the exercise of power by our governmental institutions.

29 *ACTV* (1992) 177 CLR 106, 186–7. See also his dissenting judgment in *Langer v The Commonwealth* (1996) 186 CLR 302.