Commentary

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A practitioner's appreciation of *The Sovereignty of Parliament*

I am extremely pleased to have the opportunity to comment on *The Sovereignty of Parliament, History and Philosophy*.[1] I do so from the point of view of a practitioner–one whose professional life is taken up with the practical application of the ideas so thoroughly discussed by Professor Goldsworthy and who has had the opportunity to digest the contents and to benefit from their application. The book traces the development of a concept of crucial importance to one in my profession, namely, the extent of the power of Parliament.

Goldsworthy notes that the book was written by a lawyer and intended primarily for lawyers. Non-lawyers may not appreciate the full extent of many of the concepts, but I can attest that *The Sovereignty of Parliament* is appreciated by a wider field. Goldsworthy also makes the point that he is not a professional historian. Nor am I. However, I have a deep interest in history, particularly the periods that the book covers, and I believe that a professional historian would have been proud to have written the work.

In an Australian context very often the question is not whether some initiative should be pursued by legislation, but whether the Parliament has the power to legislate at all. In those jurisdictions where parliament is thought to be sovereign, this question is unlikely to arise to the same extent as it does in Australia. Therefore, although the book concentrates on the Parliament of the United Kingdom, Goldsworthy takes into account recent developments in Australia, Canada and New Zealand. He sheds light on aspects of parliamentary activity not usually fully in the sunlight of public scrutiny.

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1 (Clarendon Press, Oxford, 1999).

In reading the work I had the opportunity to reflect on a number of matters of practical application in my work in the House. There are many examples, but I will focus on two of the more significant matters.

Parliamentary sovereignty in Australia

Goldsworthy focuses on the Parliament of the United Kingdom. However, a great virtue of his book for Australian readers, is that it directs our attention to the extent to which the parliaments of Australia are sovereign, and if they are not, where sovereignty actually resides in Australia.

Goldsworthy's own answer to this question is that 'the doctrine applies in Australia only in a heavily qualified form: Australian Parliaments are sovereign only within limits imposed on them by superior constitutional enactments'.[2] While this has on the face of it some plausibility, it also raises a number of issues that I cannot fully resolve.

Parliamentary sovereignty, if it means anything, must mean something along the lines Goldsworthy suggests:

> Parliament is able to enact or repeal any law whatsoever, and that the courts have no authority to judge statutes invalid for violating either moral or legal principles of any kind. Consequently, there are no fundamental constitutional laws that Parliament cannot change, other than the doctrine of parliamentary sovereignty itself. ... What the Queen in Parliament enacts, is law.[3]

This definition leads to my first question: how qualified must a parliament's power be before it loses its sovereignty? It would appear from Australian constitutional arrangements that all the parliaments in Australia have their powers so heavily constrained that they cannot be considered to be sovereign in any widespread sense.

In the federal realm, it seems clear that the *Australian Constitution* is such that Parliament is not sovereign at all, but acts as a representative body selecting those laws that will advance the welfare of the Australian community. Sovereignty resides somewhere else. Again, the *Constitution* suggests an answer: the people. The reason is hardly surprising. The people adopted the *Constitution*. The people's House expires by effluxion of time three years after its first meeting[4] and the people's representatives must subject themselves to the judgment of the people. Finally, with the exception of powers that may be ceded to the Commonwealth,[5] the only

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2 Ibid 234.

3 Ibid 1.

4 *Constitution*, s 28.

5 *Constitution*, s 51(xxxvii).

way of changing the *Constitution* is through the consent of the people, in accordance with s 128 of the *Constitution*.

This view of where sovereignty resides is supported by an authority who was much admired by those who drafted the *Constitution* a century ago. Lord Bryce asserted that in a country governed by a rigid constitution, which limits the power of the legislature to certain subjects or forbids it to transgress certain fundamental doctrines, the sovereignty of the legislature is necessarily restricted. In that case, the ultimate sovereignty resides in the body which made and can amend the *Constitution*.[6] While learned judges differ over who that body was (although they may agree who it now is), for those of us reading the history of our Parliament, and working in it daily, the answer has always been: the people of Australia.

Parliament, then, has limited powers in what it is capable of doing. One of the issues faced daily by practitioners, who are providing advice to Members on all sides, is to ensure that what a Member or the other House proposes is within the constitutional powers of Parliament, and in particular, the power of a particular House.

The second issue is the extent to which the sovereignty of parliament is compatible with the nature of the *Constitution*, independently of the provisions of the *Constitution*. The Constitution enshrines in the governance of the Commonwealth, the separation of powers. As such, it assumes also the rule of law. Certain elements of the *Constitution* relating to the Parliament are justiciable. Section 57[7] is justiciable, and actions under it have been subjected to judicial review. As a practitioner, I can only express the wish that section 53[8] was likewise felt to be justiciable! The parliamentary drafters and I usually agree in our interpretations of the application of section 53, but others – in particular impatient departmental and ministerial advisers anxious to obtain the passage of legislation – may not always do so.

These two doctrines work so as to dilute power, and in so doing dilute sovereignty. Perhaps the best characterisation is that the people own sovereignty, whilst the branches of government administer it on the people's behalf.

Another aspect of the sovereignty of parliament arises in Parliament's relationship to the executive arm of government. That members of the executive arm of government sit in Parliament may appear superficially problematic in our bicameral system. Problematic, perhaps, because the membership of one House is determined on the basis of proportional

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6 Bryce, *Studies in history and Jurisprudence* (1901), quoted by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140.

7 Regulating disagreements between the Houses.

8 Setting out the powers of the Houses with respect to legislation.

representation, which has resulted in the absence of a government majority in the Senate for many years. This does make parliamentary life in Australia an interesting experience. However, if the executive arm of government dominates one House, what prospect is there for parliamentary sovereignty – in the sense that Parliament can act independently of the executive arm? Commentators who characterise the House as an executive rubber stamp are not aware of the various subtleties at work in the House. More directly related to Goldsworthy's book, the bargaining and the compromising mean nothing until the Crown's advisers in the House of Representatives convince the majority in that House to support the final compromises, which must have been accepted in the Senate.

Parliament, at the end of the day, holds the purse strings. It exercises, for the people an immediate control over the operation of the executive government. The separation of powers is maintained. This is why, to inject a personal note, that the officers of both Houses discharge their duties independently of the executive government of the Commonwealth.

Parliamentary privilege

Goldsworthy's consideration of the 'doctrine' of parliamentary sovereignty casts light on some dimly lit recesses where the powers of Parliament are not well understood and, for the most part, have not been fully tested in the courts or in the public domain. In particular, this is true in the area of parliamentary privilege. In the remainder of my commentary I shall concentrate on this aspect of parliamentary sovereignty.

To put this discussion into context, Goldsworthy states that 'a legislature has sovereign law-making power if its power to change the law is not limited by any norms, concerning the substance of legislation, that are either judicially enforceable, or written, relatively clear, and set out in a formally enacted legal instrument'.[9] This sovereignty in law-making applies even if the legislature is governed by judicially enforceable norms that govern its composition and the procedure and form by which it must legislate. In discussing *Stockdale v Hansard*,[10] Goldsworthy indicates that the United Kingdom House of Commons has still not conceded the courts' jurisdiction to be the final arbiter of its privileges.

Recent developments in Australia suggest that the effect of federal legislation, in the cause of clarification of privileges, has been to make certain aspects, previously within Parliament's sole jurisdiction, potentially justiciable. By enacting the *Parliamentary Privileges Act* 1987 (Cth) the

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9 Goldsworthy, above n 1, 16.

10 *Stockdale v Hansard* (1839) 9 Ad and E 1; 112 ER 1112, as cited at Goldsworthy, ibid 242.

Australian Parliament sought to clarify the traditional position of the Parliament in respect of judicial questioning of proceedings in Parliament. At the same time, there has been raised the prospect of courts challenging some provisions of the legislation, as to evidence that a court may or may not receive, as impinging on the separation of powers. Here I will concentrate on the relationship between charters of rights and responsibilities, sometimes entrenched in constitutions, and the concept of parliamentary privilege, so vital to the exercise of the functions of Parliament.

Parliamentary privilege has long been regarded as an essential shield available to a parliamentary institution, and derivatively to individual Members of its Houses, to enable them to perform their duties. Privilege has also been an effective sword in deterring reflections or other actions by those on the edge of the parliamentary process. Often, the mere mention of the 'P' word has been more persuasive when logic and reasoning have been struggling to carry the day. It has seemed that this latter purpose is better served if the understanding of privilege remains imprecise and less well-defined.

There is, however, much misunderstanding surrounding the notion of privilege, and just what it involves. What is commonly referred to by the term 'privilege', is actually two distinct types of protection. One sort is immunities; the other sort resides in the power to punish as a contempt any act or omission which obstructs or impedes any Member or officer in the discharge of parliamentary duty.

If the rights and immunities established as privileges are breached, sanctions may attach as punishment for a breach. Similarly, certain acts or omissions may be found to be contempts, and sanctions may apply. This is the situation in Australia. It is an area in which the Parliament is legislatively sovereign, by virtue of section 49 of the Constitution. It might become problematic, however, if a bill of rights or charter of freedoms were to be enacted.

Parliamentary sovereignty and entrenched law

When Canada[11] repatriated its constitution, it also constitutionally entrenched the *Charter of Rights and Freedoms*. This gave specific constitutional expression of basic rights to its citizens. The rights and freedoms of the *Charter* cannot, subject to reasonable limits prescribed by

[11] Comment on the Canadian experience is drawn from J P Maginot, *Parliamentary Privilege in Canada* (2nd ed, McGill-Queens University Press, Montreal, 1997). My review on this work appeared in *The Parliamentarian*, Oct 1998, 412-3.

law and justifiable in a free and democratic society, be infringed by arbitrary actions of a government in the federal or in a provincial legislature.

On the other hand, parliamentary privilege exists to allow legislative bodies and their members to carry out their constitutional functions while protected from the executive, the courts, and the public, particularly for what is said or done during or incidental to parliamentary proceedings. Of special interest on this point is the *Donohoe case*,[12] where the basic right of freedom of the press was countered by the right of the Nova Scotia House of Assembly to exclude strangers (to use the parliamentary term for visitors) from its deliberations and precincts.

The conclusion was that if the courts find a privilege to be constitutionally inherent, the court will not subject its exercise to review in the light of the *Charter*. In litigation between a person and the legislative body, the court will look into the validity of the privilege ancillary to delivering justice as between the parties.

South Africa has faced similar challenges. The National Assembly has been loath to penalise a member for knowingly using another member's electronic voting card, or for abusing travel facilities, for fear of a suspended member launching successful litigation on the ground of the member's constitutional right to attend Parliament.

Dilution of sovereignty in Australia

In Australia, there was a surrender of an element of sovereignty in the passage of the *Privileges Act*. The *Privileges Act* expressly limits the capacity of a House to protect its Members against what had previously been regarded to be contempts.

Under the *Privileges Act*, the essential elements of an offence have been defined, and contempts by defamation have been abolished. Section 4 provides:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Section 6 provides that words or acts shall not be taken to be an offence against a House by reason only that those words are defamatory or

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12 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* (1993) 1 SCR 319.

critical of the Parliament, a House, a committee or a member (although this does not apply to words or acts in the presence of a House or committee).

One possibly unintentional effect of the operation of the *Privileges Act* relates to the Presiding Officer of either House. While previously a reflection on the Speaker outside the House was treated and punished as a contempt, now such action would most likely be justiciable. The result has been to treat such a reflection as a matter of order, or to turn a blind eye.

On Goldsworthy's view of parliamentary sovereignty, it might be argued that the Parliament could only be said to have surrendered an element of its sovereignty if the detailed provisions in the *Privileges Act* had become entrenched in the Constitution, by means of a referendum under section 128—the Constitution being the only law which Parliament cannot amend of itself. Clearly, the *Privileges Act* is an ordinary enactment which Parliament is able to amend or repeal. Nevertheless, now the *Privileges Act* is in place the sensitivities associated with the area of privilege might make any move to repeal the *Privileges Act* difficult, hence the proposition that its passage has effected a surrender of an element of sovereignty.

Legislative intrusion on separation of powers

I conclude by making a brief observation on the extent to which the *Privileges Act* may impinge on the separation of powers. Of particular interest is the extent to which the Commonwealth Parliament has legislated to determine what may or not be available to a court in the process of its examination.[13] Section 16[14] of the *Privileges Act* purported to be declaratory only. For the avoidance of doubt, it declared that art 9 of the Bill of Rights 1688 applied to the Commonwealth Parliament. However, the meaning of *proceedings in Parliament* was declared to include 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.[15] The problem appears to arise from the words 'incidental to'.

The situation prior to passage of the *Privileges Act* was that courts could require the production of documents etc and argument could occur as to any use to which they might be put. The *Privileges Act* has specifically excluded[16] the production of in camera evidence or documents prepared in

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13 For an excellent discussion of the application of art 9 of the Bill of Rights, see G M Kelly, '"Questioning" a privilege: article 9 of the Bill of Rights 1688' (2001) (Autumn) *Australasian Parliamentary Review* 61–99.

14 Parliamentary privilege in court proceedings.

15 Section 16, *Privileges Act* (emphasis added).

16 See in particular, sub-s 16(4).

connection with in camera evidence, and I do not believe that there is any problem with this. However, a number of recent cases have given rise to concerns and uncertainty as to the extent of parliamentary versus judicial power, and their appropriate separation.[17]

Conclusion

It will be apparent from this commentary that I discovered much food for thought in Goldsworthy's *The Sovereignty of Parliament.* Much of the thought was of practical application. I am grateful to him for the work he has produced, and for the opportunity to provide comment on it.

[17] See *Rowley v O'Chee* (2000) 150 ALR 199; *Crane* v *Gething* (2000) 169 ALR 727; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; and *Katter* v *Laurance* (1996) 141 ALR 447. I support the sentiments expressed by Kelly, above n 13, that clarification of the law in this area would have been greatly advanced if *Katter* v *Laurance* had ultimately made its way to the High Court. The matter is of practical application to me in advising members of the application to particular circumstances of parliamentary privilege.