Commentary

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I take it that my role as a commentator is not to review Professor Goldsworthy's account of the doctrine of parliamentary sovereignty but rather to comment on his defence of the doctrine against the claims of its critics. In taking up the role which I perceive has been allotted to me, I shall not forego the opportunity of paying a tribute to the author's scholarship which has yielded an account of parliamentary sovereignty which will be of great value to lawyers (for whom the book is primarily written), academics, scholars, parliamentarians and others.

There is, as the author makes clear, a fundamental disagreement about the nature or status of the doctrine. Critics of the doctrine, of whom Lord Cooke of Thorndon, formerly President of the New Zealand Court of Appeal, is one, often regard it as a common law doctrine. Champions of the doctrine, such as Sir William Wade, assert, however, that the doctrine is as much a political fact as a rule of law. The author is to be accounted as one of Sir William Wade's supporters on this point,[1] a stance which is evidenced by the author's defence of HLA Hart's theory of law.[2] According to Hart, the existence of the most fundamental rules of a legal system depends not exclusively on judicial acceptance but on a consensus among the most senior officials of all branches of government, legislative and executive as well as judicial. It is this theory of law that lies behind the Wade view of the doctrine, though Wade acknowledges that judges are justified in appropriate circumstances in qualifying or departing from the doctrine.

The problem here is that there is no clearly established instance of the judges making a substantial departure from the doctrine on their own, that is, without the consensus of the most senior officials. Goldsworthy refers to two well-known examples – the surrender by the United Kingdom Parliament of its capacity to legislate for Australia and the enactment by that Parliament of s 2(4) of the *European Communities Act 1972* (UK)

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1 Though he accuses Wade of 'wobbling' because Wade says that the doctrine 'lies in the keeping of the courts' and that it cannot be 'altered by any authority outside the courts': Jeffrey Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press, Oxford, 1999) 244.

2 Ibid, ch 10.

requiring the courts not to apply statutory provisions that are inconsistent with directly applicable laws of the Community. In the first case, the surrender was designed and effected by the United Kingdom and Australian Parliaments and accepted by senior officials and certainly commanded popular support in Australia and, most probably, in the United Kingdom. The courts have not yet had occasion to decide whether the legislation is effective but it can scarcely be doubted that the judges, especially Australian judges, will accept the legislative surrender of capacity as valid.

In the case of the *European Communities Act* the House of Lords accepted that s 2(4) was effective and that effect should be given to the provision according to its terms.[3] The House of Lords' decision on this point came under strong criticism from Wade,[4] not because it was necessarily wrong, but on the ground of the inadequacy of the discussion and the reasoning of Lord Bridge of Harwich. In the event there was a spirited exchange between Wade on the one hand and Trevor Allan[5] and John Eekelaar[6] on the other hand.

In *Factortame*, the House of Lords applied s 2(4) which provided that European Community law was to prevail over Acts of Parliament 'passed or to be passed', refusing to apply the later inconsistent *Merchant Shipping Act 1988* (UK), 'disapplying' that Act and granting an injunction prohibiting the Minister from complying with the Act. This was an instance of Parliament fettering its future action, contrary to a central tenet of the doctrine of parliamentary sovereignty. Supporters of the *Factortame* decision have sought to explain it on the basis that s 2(4) simply enunciates a rule of construction to be applied to later statutes. Wade argues that, even on this basis, the 1972 Act imposed a restriction on the Parliament of 1988.

If this be so, Acts such as the *Acts Interpretation Act* 1901 (Cth), which establish the meaning of words and expressions when used in other statutes, passed and to be passed, subject to the manifestation of a contrary intent, must likewise operate to restrict later parliaments. Yet judges for at least a century have given effect to such statutes without raising any question as to their operation or as to parliamentary sovereignty.

Wade says that *Factortame* is to be explained on the footing that the judges changed the rule of recognition, which is itself a political fact, in the

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3 *R v Secretary of State for Transport, ex parte Factortame Ltd.* (No 2) [1991] A C 603.

4 H W R Wade, 'Sovereignty – Revolution or Evolution' (1996) 112 *Law Quarterly Review* 568.

5 T R S Allan, 'Parliamentary Sovereignty: Law, Politics and Revolution' (1997) 113 *Law Quarterly Review* 443.

6 John Eekelaar, 'The Death of Parliamentary Sovereignty – A Comment' (1997) 113 *Law Quarterly Review* 185.

light of the United Kingdom's entry into the European Community with all the legal consequences that such entry entailed. He claims that the ultimate allocation of legislative competence is 'a political fact which the judges themselves are able to change when they are confronted with a new situation which so demands'.[7]

Wade's critics target his description of *Factortame* as a 'revolution'. In this respect, they may have a point in that Wade himself accepts that the decision, despite its inadequate reasoning, can be supported as a justifiable change in the rule of recognition. Even so, there is a case for saying that a departure from the 'non-fettering' element of parliamentary sovereignty by the House of Lords borders on the revolutionary.

There is substance in Allan's point that it is simply unsatisfactory to announce a change in the rule of recognition, without engaging in a discussion of the reasons for making the change, even if the reasons can be labelled 'political necessity'. After all, the obligation to give reasons must be all the stronger when the change is fundamental. As it happens, the House of Lords, in accepting the 'rule of construction' answer to the problem (which, in my view, is what their Lordships did), adopted a sensible approach, one which preserved the possibility of express repeal or qualification, thereby preserving democratic government, yet in practice acknowledging, to some extent, the supremacy of Community law. At the same time the decision did relatively little damage to the doctrine of parliamentary sovereignty. It cannot reasonably be suggested that *Factortame* abolishes the 'non-fettering' element of the doctrine for all purposes. Far from it. Apart from Acts Interpretation Acts, there are examples where common law rules of construction require the legislature to state its intention in express terms, or at least in unambiguous terms, if it wishes to achieve a particular result. And, increasingly, statute-based bill of rights régimes are erected on the basis of attributing a presumptive intention to future legislative enactments, a legislative intention to which the courts give effect.

Again, it can be said that this is a sensible development both in terms of what it achieves and also in terms of doctrinal development of constitutional law. Legal principles and concepts do not exist in a vacuum. In the ultimate analysis their purpose is to serve underlying policy goals or to resolve conflicting goals which may be political, social, moral or economic. If the 'non-fettering' rule stands in the way of attaining legitimate political goals by means of erecting an appropriate legal framework, then a legal or constitutional doctrine which is not constitutionally entrenched or dictated must give way to the extent necessary.

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7 Wade, above n 4, 574.

What has been said so far does not resolve the problem of identifying the true nature of parliamentary sovereignty. But it does tend to suggest that there is some substance in Lord Cooke's view that the doctrine, whatever its origins may have been, is now a common law doctrine and that, as such, it can be qualified and re-moulded by the judges.

It may be acknowledged that the judges will not qualify a fundamental doctrine such as parliamentary sovereignty unless there is a broad consensus supporting such a qualification among the most senior officials or to use another inexact but broader term, the governing elite or upper echelon in the community. To say that, however, seems to me to say no more than that the judges would treat a departure from the doctrine in the same way that they would treat a departure from any fundamental principle of the common law save that any departure from parliamentary sovereignty would excite an exceptional degree of hesitation.

Here the example of the *Acts Interpretation Act* and its judicial analogues is instructive. The *Acts Interpretation Act* would not have been preceded by a Hartian consensus, though it might be said that senior officials would not have been concerned. But can we say the same of a judicially fashioned presumptive rule of construction that a statute will not, in the absence of express or unambiguous words, abrogate or curtail fundamental rights? Yet that is precisely what the courts have done not only in Australia but elsewhere.[8] Rules of construction of this kind are unquestionably sensible because they tend to compel the legislators to address important issues which might otherwise escape their attention and because they offer some protection to fundamental rights and interests. But the effect of these rules is to limit the way in which a future Parliament can express itself if it is to achieve a particular result. The effect is the same whether the rule is sourced in statute or judicial decision.

Indeed, there is a strong case for saying that the courts in applying some strong presumptive rules of a fictional kind (because they do not reflect the actual legislative intent) are violating parliamentary sovereignty. A striking instance of this class of presumptive rule is provided by the refusal of the English courts to give substantial effect to privative clauses. So, in *R v Hull University Visitor, ex parte Page*, the majority of the House of Lords accepted 'the general rule' that any misdirection or error of law made by an administrative tribunal or inferior court can be quashed for error of law.[9] Only in relation to courts would a privative clause be given effect. The presumptive rule seems to have become conclusive in relation to administrative tribunals despite its evident fictional character.

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8 See, for example, *Coco v The Queen* (1984) 179 CLR 427.

9 [1993] AC 682, 702.

It seems to me that our general understanding of the rule of law supports the view that the judges have the capacity and power to qualify the doctrine of parliamentary sovereignty if they decide to do so, even if the consensus of the most senior officials cannot be established. Take a case such as *Australian Capital Television Pty Ltd v Commonwealth.*[10] It was a decision which was strongly criticised, not least by most senior officials. The effect of the decision was to limit the otherwise plenary powers of the Commonwealth Parliament. The justification was based on an implication of a freedom of communication as to government and political matters in the Australian Constitution, a justification which would not be available in the case of the United Kingdom which has no written constitution.

But if we were to suppose that the House of Lords, before the *Human Rights Act 1998* (UK), upheld a restriction on the power of the United Kingdom to enact a particular law, there being no antecedent consensus one way or the other, there is no reason to suppose that the absence of such a consensus would necessarily affect the constitutional validity of the decision. If the decision was radical in the extreme and lacking in rational argumentation, the opposition to it might well result in a confrontation between the legislature and the judiciary. But there are, in all probability, other situations in which a less radical qualification of parliamentary sovereignty would not excite much resistance. Of course it could then be suggested that there existed the necessary consensus. But this scarcely seems to establish that the doctrine is not a common law doctrine and that the courts cannot change it.

At a more substantial level, it has seemed to me that, if the English Parliament were to legislate so as to establish a dictatorship for a lengthy or indefinite period of time, the courts would be justified in striking the legislation down on the basis that it violates the very conception of parliamentary democracy which is the core of the English common law tradition. The example can be dismissed as extreme. Extreme it is. But, to repeat an expression I have used before, parliamentary sovereignty is the servant not the master of the English constitution. However fundamental the doctrine may thought to be it is nevertheless capable of qualification in the hands of the judges in order to preserve the core elements of the common law tradition. There comes to mind Sir Owen Dixon's expression 'the common law as an ultimate constitutional foundation',[11] though I do not suggest that my use of the expression accords with his views.

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10 (1992) 177 CLR 106.

11 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.