The Unwritten Constitution

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Supporters of Dicey's absolutist theory could not wish for a more scholarly statement of the case for unlimited parliamentary sovereignty than Professor Jeffrey Goldsworthy's *The Sovereignty of Parliament, History and Philosophy*.[1] Advancing both historical evidence in support of the theory and a philosophical basis to justify it, the book provides the intellectual foundation that Dicey's own exposition conspicuously lacked. It is likely to stand as an unchallenged reference on the subject, both by reason of its own qualities and because in all probability the doctrine is obsolescent. It has been fatally breached in the United Kingdom and New Zealand. In Canada it has been quietly jettisoned. In Australia, where it has never applied at the federal level and only in modified form in the States, judicial creativity is outflanking it, chiefly via implications from the Commonwealth Constitution. The High Court's recent denial of special leave to appeal in *Durham Holdings Pty Ltd v New South Wales*,[2] which gives significant support to sovereignty theory with one hand, takes much of it away with the other.

Goldsworthy's thesis is in two parts, which I will discuss in turn:

1. The doctrine of omnipotent parliamentary sovereignty, even if not established as law in the usual sense, is a 'political fact' that constitutes a rule of recognition which the courts did not create and cannot unilaterally change. The author defines the doctrine in Diceyan terms, with minor modifications.
2. Parliamentary omnipotence is a rational, sound and desirable doctrine.[3]

Sovereignty theory as a political fact

Goldsworthy does not contend that there is clearly binding legal authority for sovereignty theory in any decided case or other constitutional instrument. If there were, there would scarcely be any need for a book such as this. Indeed, the author concedes for the purposes of argument that all the

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1 (Clarendon Press, Oxford, 1999).

2 (2001) 75 ALJR 501.

3 Goldsworthy, above n 1, ch 10.

judicial statements expressly affirming it were obiter dicta, because since judges began making those statements in the late nineteenth century, no outrageously undemocratic or evil statute has been enacted. Consequently, the courts have never needed to hold such a statute legally valid.[4]

Obviously, though, the more legal authority that can be found to support the theory and the less to contradict it, the more likely it is to be a 'political fact'. The author has collected in this work all the significant authorities for the Diceyan view and discusses them with calm and lucid scholarship. He also canvasses many of the authorities against the doctrine, and at one point stoically dismembers an earlier article of his own that doubted it.[5] There are, however, a number of important oversights or errors:

1. Though the book's lack of a table of cases makes it hard to be certain about this, some cases (not dicta) supporting the ratio in *Dr Bonham's Case* (that a statute making a person judge in his or her own cause is void) or Coke's wider dictum appear to be missing: namely, *Rowles v Mason*,[6] *Lord Sheffield v Radcliffe*,[7] *Calvin's Case*[8]—decided the year before *Bonham* but consistent with it—*Dr Foster's Case*,[9] and *R v University of Cambridge (Dr Bentley's Case)*.[10] We may thus note Pollock's observation that '[t]he omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time'.[11]

As late as 1795, Kenyon CJ disregarded a statute on the principle that a person should not be made judge in his or her own cause.[12] In *Leader v Moxton*,[13] Blackstone himself overruled the plain words of an Act impairing property rights on the grounds of justice and 'common sense', and with no nonsense about presumptions or rules of construction. None of these cases, *Bonham* included, has ever been overruled and they are the basis for the judicial review of legislation. '[T]he phenomenon of judicial review – not explicit in the Constitution but understood and practiced nevertheless –

4 Ibid 239.
5 Ibid 260-1.
6 (1612) 2 Brownl 192, 198; 123 ER 892, 895.
7 (1615) Hob 334, 336, 80 ER 475, 486.
8 (1608) 7 Co Rep 1a, 12b, 14a; 2 St Tr 607, 629-31; 77 ER 377, 392, 393.
9 (1614) 11 Co Rep 56b, 64b; 77 ER 1222, 1234.
10 (1723) 8 Mod Rep 148, 164; 88 ER 111, 120.
11 Frederick Pollock, 'A Plea for Historical Interpretation' (1923) 39 *Law Quarterly Review* 163, 165.
12 *R v Inhabitants of Cumberland* (1795) 6 TR 194; 101 ER 507.
13 (1773) 3 Wils 461; 95 ER 1157.

owes its existence to Coke alone', writes Professor Suzanna Sherry.[14] The same is true in Australia.[15]

2. Some important examples of legislation offered as proof of legislative omnipotence are incorrect. The author cites the *Statute of Uses 1536*, *Statute of Wills 1540*, and the 1536 Act expropriating the monasteries, to show that Parliament regularly overrode property rights.[16] But the first two were conveyancing measures that increased the rights of property–owners and had no adverse impact on existing beneficial ownership. As to the monasteries, the larger ones that had not been 'voluntarily' surrendered were forfeited following attainder for treason. Henry VIII's theory was that the abbotts' participation in the Pilgrimage of Grace, a kind of protest rally, amounted to complicity in rebellion. The abbeys were declared forfeited as if they had been the abbotts' personal estates.[17] The legislation that did dissolve the smaller, non-viable monasteries was the product of a revolutionary period, a kind of civil war against the church. Even though it did provide a fairly substantial scheme of compensation (especially for the resident monks and nuns), 'the act was forced through the Commons only by the King's threat to have some of their heads if it failed of passage'.[18] Despotism is no constitutional model.

In 1882 the Privy Council expressly reserved the question whether the Parliament of Canada or of a province had the power to extinguish property rights without compensation. The reservation was significant, as the *British North America Act 1867* (UK) contained no just terms provision.[19] Lord Reid noted in *Burmah Oil* the absence of a single known instance of governmental taking of property without payment.[20] Indeed, not until the 1770s could property be taken in England, even with compensation, without a *special* act of Parliament.[21] Lord Camden CJ (later

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14 Suzanna Sherry, 'Natural Law in the States' (1992) 61 *University of Cincinnati Law Review* 171, 175.

15 *Eastman v R* (2000) 74 ALJR 915, 940 (McHugh J).

16 Goldsworthy, above n 1, 58.

17 Charles H McIlwain, 'Book Review' (1942) 56 *Harvard Law Review* 148; Joseph Tanner, *Tudor Constitutional Documents AD 1485-1603 with an Historical Commentary* (Cambridge University Press, Cambridge, 1948) 58, 63-4.

18 McIlwain ibid; Philip Hughes, *The Reformation in England* (1952), vol 1, 293-4.

19 *Western Counties Rly Co v Windsor & Annapolis Rly Co* [1882] 7 App Cas 178, 187, 191.

20 *Burmah Oil v Lord Advocate* [1965] AC 75, 101.

21 Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (University of Kansas Press, Laurence, Kansas, 1985) 22.

Lord Chancellor) told the House of Lords that Parliament lacked the power to take property without compensation.[22]

3. The book fails to discuss two crucial recent lines of English cases that have eviscerated Diceyism. Starting with *Anisminic*,[23] the courts have disregarded the clear words of privative statutes and have entrenched judicial review of the executive.[24] As the leading constitutional law scholar, Sir William Wade, put it in 1980, '[i]n their self-defensive campaign the judges have almost given us a constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence'.[25] This developed principally in the context of the need to keep administrative agencies and tribunals fully subject to the rule of law.

This development has become accepted as part of British constitutional law. Some years later Wade observed that Parliament had not joined issue with the courts on the matter. Parliament had tacitly accepted a judicial approach which was 'tantamount to saying that judicial review is a constitutional fundamental which even the sovereign Parliament cannot abolish'.[26] Further, judicial review of *legislation* has plainly resumed its former place in the constitutional order: '[t]he policy of the courts thus becomes one of total disobedience to Parliament'.[27] The Home Secretary himself conceded that an explicit privative clause could not bar judicial review on traditional grounds in *R v Home Secretary; ex parte Fayed*[28] – a recognition that the courts have succeeded in entrenching the separation of powers. The Court of Appeal in that case then proceeded to circumvent a clear provision relieving the Home Secretary of the obligation to give reasons.

Yet the book does not refer to *Anisminic* at all. Nor does *Baigent's Case*,[29] the most important and recent of the New Zealand anti-Diceyism cases, receive a mention.

4. The other massive blow that the English courts have delivered to sovereignty theory is *Factortame 2*,[30] which stands for the propositions that

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22 *Parliamentary History of England*, vol XV1 (TC Hansard, London, 1806-20) 168.

23 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

24 H W R Wade, *Administrative Law* (Oxford University Press, Oxford, 6th ed, 1988) 728, 729.

25 H W R Wade, *Constitutional Fundamentals* (Stevens, London, 1980) 68.

26 Wade, *Administrative Law*, above n 24

27 Ibid.

28 *R v Home Secretary; ex parte Fayed* [1998] 1 WLR 763, 771-2, 773-4.

29 *Simpson v Attorney-General* [1994] 3 NZLR 667 ('Baigent's Case').

30 *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 AC 603.

(a) the British Parliament can bind its successors as to the substance of future legislation, and (b) the validity of an Act of Parliament is subject to judicial review in the English courts. While the case arose in the context of European Union legislation, the contrary of those two propositions has always been taken as the very definition of parliamentary sovereignty.[31]

There have been attempts to reconcile *Factortame* with sovereignty theory by treating it as merely establishing a rule of construction whereby later statutes will be read (whatever their words) as compatible with rights accorded by European law.[32] But, as Wade points out, nothing in Lord Bridge's language suggests that he regarded the issue as one of statutory construction, nor does his reasoning fit well with any theory based on statutory construction. Indeed, 'the new doctrine makes sovereignty a freely adjustable commodity whenever Parliament chooses to accept a limitation'.[33] Professor Craig likewise concludes that '[t]he reasoning of Lord Bridge does not therefore fit well with that articulated by the traditional theory'. Other scholars share this assessment.[34]

Sir William Wade considers that a 'constitutional revolution' has occurred, and that while a rule of construction approach could find favour as an explanation of *Factortame*, 'in reality it can only be camouflage for the fundamental change which has evidently occurred'.[35] Craig points out that while *Factortame* deals only with the effect of European Union law on the powers of Parliament, the case makes it more likely that the courts will accept limitations on sovereignty in other areas, especially those related to civil liberties:

> [W]e may well find that ... the modern embodiment of a balanced constitutional order is one which does not afford unlimited power to Parliament ... [S]ome species of rights-based constraints must feature in any convincing principled picture of twentieth century government.[36]

Goldsworthy's brief discussion of *Factortame* tries to treat this revolution as a matter of form rather than substance. He argues that since Britain has not yet lost its authority to withdraw from the European Union (a belief not shared in Brussels or other European capitals, incidentally), it

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31 Goldsworthy, above n 1, 16.

32 Referred to in H W R Wade, 'Sovereignty – Evolution or Revolution? (1996) 112 *Law Quarterly Review* 568, 569-70; Paul Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame* (1991) 11 *Year Book of European Law* 221, 251.

33 Wade, ibid, 573.

34 Craig, above n 32, 252; R Edwards, '*Bonham's Case*: The Ghost in the Constitutional Machine' [1996] *Denning Law Journal* 63, 82.

35 Wade, above n 32, 575.

36 Craig, above n 32, 250, 253, 254-5.

can still legislate contrarily to European Union regulations 'if it uses a particular form of words, to ensure that its intentions are unmistakable'.[37] But Parliament's intention *was* unmistakable in the legislation struck down in *Factortame*, and the ever-receding possibility of Britain's leaving the European Union could not save it. Despite initial attempts to explain *Factortame* away as merely establishing a rule of construction, the weight of scholarly opinion and the direction of later cases show that a common law constitutional revolution has occurred.[38]

The revolution will quicken as a result of the United Kingdom's devolution process. The *Scotland Act 1998* (UK) may seem bizarre to Australian eyes, establishing not so much a quasi-federation as a kind of self-governing colony arrangement, but it does provide for 'constitutional' appeals to the Privy Council in cases involving the division of powers between Westminster and Edinburgh. This will accustom British lawyers and judges to thinking in constitutionalist terms. Before long they will acquire a taste for it. That trend will be reinforced by litigation under the *Human Rights Act 1998* (UK), for even before that Act took effect, English judges were starting to speak of 'constitutional rights' in a more than purely rhetorical sense. In that environment the old Diceyan theory will look increasingly archaic and crude.

5. The author maintains that American revolutionary constitutional law and doctrine took legislative omnipotence as its starting-point and that even the adoption of written constitutions was not itself enough to change that attitude, even when they included explicit bills of rights. He accepts as representative Gibson CJ's rejection of judicial review in an 1825 Pennsylvania case.[39]

While there are indeed cases and other contemporary statements to support that view, it was a minority position. In most of the original states, as well as some others that had not yet adopted entrenched just terms provisions, the courts held that even in the absence of an express constitutional safeguard, a statute acquiring property without compensation should be declared invalid. This limitation on legislative power stemmed from the common law and natural law. The courts in these cases placed considerable reliance on Blackstone, whose *Commentaries* contain as much language inconsistent with Parliamentary onimpotence as supporting it, a fact usually overlooked by Diceyans. The earliest example of this body of doctrine is *Giddings v Brown*, in which a Massachussetts court recognized

37 Goldsworthy, above n 1, 244-5.

38 *R v Employment Secretary; ex parte Equal Opportunity Commission* [1995] 1 AC 1, 27; *R v Criminal Injuries Compensation Board* [1995] 1 All ER 870, 880; *R v Secretary of State for Transport; ex parte Factortame Ltd (No 5)* [2000] 1 AC 524.

39 Goldsworthy, above n 1, 212.

as a 'fundamental law' that property cannot be taken 'to the use of or to be made the right or property or [of?] another man without his free consent'.[40]

An 1809 Virginia case rejected so much of Blackstone as appeared to support omnipotence theory in *Currie's Administrators v Mutual Assurance Society*.[41] Marshall CJ in the United States Supreme Court observed in *Fletcher v Peck* that '[i]t may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; if any be prescribed, where are they to be found if the property of an individual fairly and honestly acquired may be seized without compensation?'[42] He went on to invalidate a Georgia statute accordingly.

A fuller exposition of the common law right to compensation had to await New York's Chancellor Kent. The acknowledged leader of the American bench and bar at the time, Kent was described by Dicey himself as a man of 'extraordinary capacity'.[43] In *Gardner v Newburgh*,[44] Kent declined to enforce a statute taking away riparian rights without compensation, relying on the authority of Blackstone and the natural/international law writers Grotius, Puffendorf and Bynkershoek. This principle was adopted by later cases in New York, New Jersey, New Hampshire, Maryland, Virginia, Georgia, Arkansas and Iowa. There are repeated references to the principle's common law origins: '[i]t came to us with the Common Law ... At Common Law, the Legislature can compel the use of private property, but ... they cannot seize it without such tender [of compensation]'.[45] It was 'a great doctrine established by the common law',[46] 'a great common law principle'.[47] Compensation for acquisition was 'a doctrine of immutable justice that cannot be controverted or disregarded' that 'comes to us as an inheritance of the common law'.[48] From these cases developed a robust and coherent body of principle that was repeatedly approved by the United States Supreme Court, which emphatically affirmed its common law origins in *Chicago, Burlington & Quincy RR Co v*

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40 Unreported (1657). See John Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, Oxford, 1992), 14; Thomas Grey, 'Origins of the Unwritten Constitution' (1978) 30 *Stanford Law Review* 843, 866.

41 (1809) 4 Va (Hening & Munford) 315, 346-7.

42 (1810) 6 Cranch 86, 134-5.

43 A V Dicey, *Law of the Constitution* (10th ed, Macmillan, London, 1965) 5.

44 (1816) 2 John Ch 161; 7 Am Dec 526.

45 *Parham v Justices of the Inferior Court of Decatur County* (1851) 9 Ga 341, 349.

46 *Sinnickson v Johnson* (1839) 2 Harrison 129; 34 Am Dec 184, 187.

47 *Young v McKenzie* (1847) 3 Ga 31.

48 *Loughbridge v Harris* (1871) 42 Ga 501, 504.

Chicago.[49] Though it was later superseded in most states by explicit constitutional protections and by the Fourteenth Amendment, to this day the common law safeguard remains alive and operational in North Carolina and New Hampshire, which have no such constitutional provision.[50]

The earlier cases in this series, which were decided at a time when the American courts were still strongly influenced by English law, are evidence of the state of the common law at the time. There are no English cases to contradict them, probably because there seemed to be no need to challenge any Acts of Parliament. The strong influence of Whig principles on the British Parliament in the 150 years after 1688 meant that, for example (as Lord Radcliffe observed in *Burmah Oil*)[51] no statute attempted to take property without compensation.

These cases show that the idea of a customary, unwritten but binding constitution was a familiar part of the common law in the early nineteenth century (and specifically at the 1828 cutoff date for the reception of English law in New South Wales).[52] Indeed it was more familiar at that time than that of an enacted constitution.[53] One sees this in Blackstone, but even more in his Cambridge contemporary Thomas Rutherforth, who wrote that the only way of knowing a nation's constitution was to 'acquainting ourselves with the history and customs of that nation. A knowledge of its present customs will inform us what constitution of government obtains now'.[54] The American courts saw the Fifth Amendment as doing no more 'than declar[ing] a great common law principle, applicable to all governments, both State and Federal, which has existed from the time of Magna Charta, to the present moment'.[55] Deane J also saw the Bill of Rights as declaratory.[56]

Dr Haig Patapan has pointed out that the distinction between an entrenched or controlled constitution and an uncontrolled or unwritten one

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49 (1896) 166 US 226, 263-38; *Pumpelly v Green Bay Co* (1871) 80 US 166, 176-9; *Mugler v Kansas* (1887) 123 US 623, 668; *West River Brige Co v Dix* (1848) 47 US 507, 531.

50 *Gray v City of High Point* (1932) 203 NC 756; 166 SE 911; *City of Winston-Salem v Yarborough* (1994) 451 SE 2d 358, 361; *Bristol v New-Chester* (1826) 3 NH 524, 535.

51 [1965] AC 75, 117.

52 *Australian Courts Act 1828* (Imp) 9 Geo IV c 83.

53 Grey, above n 40, 865.

54 T Rutherforth, *Institutes of Natural Law,* (J Bentham, London, 1756) vol 2, 95.

55 *Young v McKenzie*, above n 47, 41-42.

56 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 617.

did not become a familiar one until the late nineteenth century, as a result of the academic writings of James Bryce.[57]

6. The Canadian Supreme Court has undermined sovereignty theory to the point of extinction in a series of cases asserting that the constitution rests on unwritten common law principles from which specific legal rules may be inferred that bind federal and provincial governments and legislatures. The Court implies that it is from these unwritten constitutional principles—such as democracy, federalism and the rule of law—that the written constitution in Canada derives its legal authority.[58] 'If it was once the fundamental rule of Canadian constitutional law that parliaments were sovereign and supreme', writes Professor Mark Walters, 'that is no longer the case'.[59] Arguments denying that conclusion are no more convincing than the efforts to explain away *Factortame* as creating a mere rule of construction.

7. For Goldsworthy, sovereignty theory's status as a political fact depends on a consensus of the most senior officials of the legal system, of 'people who are able to force others to comply with this fundamental law,' of the 'political nation' (which term does not, apparently, include the voters).[60] Yet as he concedes at the outset, the dogma is increasingly being challenged, by judges as well as academics. In *Durham*,[61] the High Court did not repudiate its earlier reservations about sovereignty expressed in *Union Steamship*.[62] Their Honours simply did not see the legislation before them as an extreme case. Between the lines of the judgments and the transcript it is plain that the State's depriving a mining company of three-quarters of the market value of its coal deposits did not arouse in the majority a sense of injustice. The 26 million dollars the plaintiff had received was not trivial or token compensation and the company was still solvent. While the majority rejected the idea of common law limits on state legislative power to acquire property without just or adequate compensation, the reasons of Kirby J plainly – and those of the other four majority justices faintly – foreshadow the idea of limitations based on implications from the Commonwealth Constitution, as in *Kable* and

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57 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, Cambridge, 2000) 14.

58 *Reference re the Secession of Quebec* [1998] 2 SCR 217; *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319; *Manitoba Provisional Judges' Association v Manitoba* [1997] 3 SCR 3. See Mark Walters, 'The Common Law Constitution in Canada; Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 1.

59 Walters, ibid 2.

60 Goldsworth, above n 1, 233, 237.

61 *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR at 503-4.

62 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

Stephens.[63] That is potentially a much more open-ended source of restraints on parliamentary power than the common law, which only clearly supports a prohibition on making a person judge in his or her own cause and acquiring property without compensation.

In Scotland there has probably never been a consensus about the validity of an Act that purported to repeal the entrenched provisions of the union agreement. The Court of Session reserved the point in two cases, and some senior academics have repeatedly said judicial review might be available in such situations.[64] Professor J D B Mitchell was sceptical about the whole doctrine which he said 'if it exists, is a post-Union development linked with the ideas underlying the reforms of 1832'.[65]

Further, there is no reason to suppose that political facts are immutable or that the category is closed. One political fact recently recognized by members of the High Court is that the sovereignty of the people is the ultimate source of legitimacy for all government. A consensus of the elite does not sit well with that premise, and the people have never been given the opportunity to adopt or reject the dogma of parliamentary omnipotence. If the shocked disbelief of law students when confronted with Dicey's theory is any indication, most citizens are probably unaware of it. That is unsurprising, as politicians are continually assuring the people that the common law is sufficient protection for their fundamental rights. If it came to a vote, there is not the slightest chance that the people would accept the servile status that Diceyan absolutism implies. Another equally inescapable political fact is the rise since World War II of the human rights movement and its influence on domestic law. The experience of twentieth century totalitarianism has forever discredited the crude absolutes of legal positivism, at least so far as applied to the problem of government.

8. Finally, like all Diceyan absolutists, Goldsworthy fails to come to grips with the problem of extreme cases, such as the hypothetical statute commanding that all blue-eyed babies be killed. He does consider that courts would have no moral obligation to enforce an evil enactment. But when it comes to their *legal* obligation, he changes the subject or otherwise fails to answer the question. This is a major flaw in his argument, because

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63 Ibid 504, 516. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

64 *McCormick v Lord Advocate* [1953] SC 396; *Gibson v Lord Advocate* (1975) SLT 134, 137; TB Smith, *A Short Commentary on the Law of Scotland* (W Green & Son, Edinburgh, 1962) 49-60; TB Smith, *Studies Critical and Comparative* (W Green & Son, Edinburgh, 1962) 10-18; JDB Mitchell, *Constitutional Law*, (W Green & Son, Edinburgh, 2nd ed, 1968) 70-3, 87.

65 Mitchell, ibid, 70.

no-one has ever argued that Parliament's power was limited except in relation to legislative outrages, though as *Durham* shows, opinions differ on where that category begins and ends. It is only in extreme cases such as *Kable*[66] or *ACTV*[67] that the courts are prepared to engage in the legal acrobatics needed, under current constitutional structures, to bring about a civilized result.

The rationality and desirability of absolute sovereignty

Chapter 10 of the book is Goldsworthy's defence of absolute legislative sovereignty on jurisprudential and political philosophy grounds. He rejects, as was noted earlier, the argument from extreme cases. He contends that a consensus among the senior officials (including judges) of a legal system is a rational basis for a rule of recognition. In its own terms that contention is valid. But, as was argued above, the idea that a nation's constitution is whatever the ruling elite says it is at a given time conflicts with the logically prior political fact of popular sovereignty. Elite consensus cannot be a source of political legitimacy in a democratic society.

Next, the author argues that limitations on legislative power derived from the common law, or for that matter from a bill of rights, place too much power in the hands of unelected judges, who may not be as well placed as legislators to make wise decisions. Further, '[t]here cannot be an infinite regress of limits together with legal institutions charged with enforcing them. At least one institution, charged with enforcing limits to some other institution's authority, must be trusted',[68] and that institution should be the elected Parliament. But allowing the legislature absolute power tends, as McIlwain observed, to 'create an unnatural separation between governor and governed'.[69] We see the practical effects of this separation in *Durham* – the parliamentarians would never have passed an Act acquiring property at less than a quarter of its value if the Act had applied to their own property. We see it also in the federal parliamentary pension scheme, or indeed in the whole phenomenon of politics as a lifetime pensionable career, another fundamental development that the people were never given the opportunity to approve or reject, and would probably have rejected.

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66 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

67 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

68 Goldsworthy, above n 1, 257.

69 CH McIlwain, *The High Court of Parliament and its Supremacy* (Oxford University Press, Oxford, 1910) 370.

In any event, the bleak choice between giving ultimate power to an unelected judiciary and giving it to an unloved legislature is a false dichotomy. There is a third way. If Diceyans are serious about their objections to the undemocratic aspects of judicial review they could advocate some system such as that contained in Article VI, s 16 of the California Constitution, which provides that Supreme Court judges, although appointed by the Governor, must have their appointments confirmed at the next election and must if challenged face non-competitive election every 12 years of their term. A similar system is established by Article 79 of the Japanese Constitution and is scrupulously observed. California and several other American states also have a system for the citizen–initiated 'recall' of judges, whereby the people themselves may prepare a petition for the removal of a judge which, if signed by the required percentage of voters, obliges the government to hold a binding ballot on the question at the next election.[70] In the 1890s the Australian Labor Party adopted the concept of the recall, not merely as policy but as a founding objective of the party. It remained officially so until removed in 1963 at the behest of Don Dunstan. Dicey himself became a strong advocate of Swiss–style direct democracy shortly after publishing *The Law of the Constitution* later in his career,[71] so even he might not necessarily have had overwhelming objections to the recall device. In practice, few judges have ever been removed by these means. But this approach, though a rather blunt instrument, provides a legitimately democratic solution to the problem of extreme cases and their interaction with judicial review. Sovereignty theory does not.

At all events, some principled solution to the problem of lawless law must be found. Ignoring it is not a long-term option. As Gustav Radbruch, a former partisan of legislative sovereignty who reformed following World War II expressed it, '[w]hen laws consciously deny the will to achieve justice, for instance if they grant or retract human rights from people according to caprice, such laws are devoid of validity ... and even lawyers must then find the courage to deny them the nature of law'.[72]

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70 Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988) 197.

71 Geoffrey de Q Walker, *Initiative and Referendum: The People's Law* (Centre for Independent Studies, St Leonards, NSW, 1987) 23-4, 97-8.

72 B van Niekerk, 'The Warning Voice from Heidelberg – The Life and Thought of Gustav Radbruch' (1973) 90 *South African Law Journal* 234, 248.