Book Symposium

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The Sovereignty of Parliament, History and Philosophy

Author's Introduction

It is a great honour that *The Sovereignty of Parliament, History and Philosophy*[1] has been chosen for discussion at the first Book Symposium to be held at an Annual Conference of the Australian Society of Legal Philosophy. I very much appreciate the willingness of the five distinguished commentators to read and comment on the book, and thank them for their constructive and stimulating observations.

The book consists of ten chapters. The first two chapters introduce the issues and define the key concepts 'Parliament' and 'sovereign', the next seven examine the historical development of the doctrine of parliamentary sovereignty, and the final chapter analyses the philosophical foundations of the doctrine.

History

The historical chapters trace the development of the doctrine, and the reasons for it, from medieval times until the end of the nineteenth century. They stop there because my aim was to assess arguments that the doctrine lacks deep roots in British history, and was invented by legal positivists in the late eighteenth and nineteenth centuries. Some reviewers have complained that the book mentions later developments only in passing, but to make my case I did not need to explore them in depth.

The historical chapters aim to dispel a number of myths that are still popular among lawyers despite having been discredited by historians. My conclusions include:

1. The concept of sovereignty was not as foreign to medieval thinking as many people have assumed. It is not true that in medieval times law was thought to be immutable, and that the so-called 'High Court

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1 (Clarendon Press, Oxford, 1999).

of Parliament' was regarded as a judicial rather than a genuinely legislative body.[2]

2. The doctrine of parliamentary sovereignty is much older than is often appreciated, and has other and deeper roots than Thomas Hobbes's political writings. It developed from the authority of the medieval monarchy, augmented when the Crown assumed supremacy over the Church in the early sixteenth century. It is certainly not a latter-day invention of legal positivists.[3]
3. Sir Edward Coke's apparent denial of parliamentary sovereignty in *Dr Bonham's* case was not the culmination of a tradition in which judges declared statutes void. It was an innovation based on an anachronistic reading of some medieval precedents, and in any event, Coke later changed his mind when he wrote his *Institutes*.[4]
4. The major constitutional contest in sixteenth and seventeenth England was not between the sovereignty of Parliament and that of the common law, but between the sovereignty of Parliament and that of the King – and the former emerged triumphant.[5] But royal sovereignty was very close to parliamentary sovereignty anyway, since royalists agreed that the King's God-given authority was at its highest 'in Parliament'.[6] I quote numerous statements from both sides of the political spectrum testifying to the authority of the 'King in Parliament' being legally limited only by the inalienable nature of sovereignty itself.[7] Of course, everyone agreed that in a moral sense its authority was limited by natural law, but there is no evidence of substantial support for the notion that the judiciary had supreme authority to enforce that 'law'.
5. The modern doctrine is Lockean, rather than Hobbesian, in character. Partly because the Americans claim Locke as their constitutional progenitor, it is often overlooked that he was in fact a proponent of parliamentary sovereignty. He did argue that legislative authority was limited, but only by moral limits enforceable by rebellion and the dissolution of government, not by legal limits enforceable by judicial means.[8] This theory was common to Whigs and Tories in the following century, and was popularised by Blackstone.[9] That explains the apparent contradiction between Blackstone's endorsement of

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2 Ibid 20-1, 23, 28 and 38-44.
3 Ibid, passim.
4 Ibid 111-7.
5 Ibid chh 4 and 5.
6 Ibid 95.
7 Ibid 91-6 and 124-41.
8 Ibid 151-2.
9 Ibid 173-88.

parliamentary sovereignty, and his statement that human laws contrary to God's law are void.

6. In chapter nine, which summarises the historical evidence, I list ten different reasons, not all of them consistent with one another, why statesmen, lawyers, and political thinkers at various times accepted Parliament's sovereign authority.[10] They are:
   - As a matter of either logical or practical necessity, there had to be a single, ultimate and unlimited law-making power in the kingdom;
   - With the consent of his subjects in Parliament, the King exercised an absolute power to make law, conferred by and subject only to God;
   - Parliament was the highest court in the land, the authority of last resort from which no appeal was possible, which could make new laws as well as interpret and apply old ones;
   - If its authority were limited, Parliament might be unable to take extraordinary measures needed to protect the community in emergencies;
   - Every generation must be equally free to make and change its laws, as contemporary circumstances might require;
   - All subjects were represented in Parliament, and were therefore deemed to consent to its acts and to be estopped from disputing them;
   - Parliament's decisions reflected the collective wisdom of the entire community, which, if not infallible, was far superior to that of any other agency in the state;
   - The ability of the King, Lords, and Commons to check and balance one another was the best possible safeguard against tyranny;
   - Judges could not to be trusted with authority to nullify Parliament's judgments; and
   - To limit Parliament's powers to prevent it from abusing them would be to adopt a cure much more dangerous than the highly improbable disease of parliamentary tyranny.

Philosophy

The stated aim of the final chapter, on the philosophical foundations of the doctrine, is not to defend it against the argument that it has outlived its usefulness, and should be abandoned in favour of a Bill of Rights. The aim is to refute arguments of two kinds: (1) that the doctrine is not really part of the law at all, either in Britain or, in a heavily modified form, in Australia;

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10 Ibid 234.

and (2) that even if it is, the courts have legal authority unilaterally to abolish it, without the need for legislative or popular involvement in the process of constitutional change.

In discussing the legal status of the doctrine, I deal with Dworkinian arguments which assert that the content of the law is determined, not by social facts, but by the intrinsically normative 'interpretation' of official practices, and therefore depends on underlying principles of political morality. For that reason, I argue that underlying principles can be identified which are capable of providing the doctrine with at least a rational, and arguably a fully satisfactory, justification. But again, that argument is not intended to refute the case in favour of a Bill of Rights.

The most significant themes of the philosophical argument are these:

1. Parliamentary sovereignty is not a doctrine of common law, in the modern sense of something the judges have made and can therefore unilaterally change. It is constituted by a historically evolved consensus among the senior officials of all branches of government, and therefore no single branch has authority to change it.[11]
2. Although officials accept the doctrine because they also accept deeper principles of political morality, such as democracy and equality, it does not follow that those principles are legal principles to which the doctrine is legal subordinated, and by which it is legally limited. They are better construed as extra-legal principles of political morality.[12]
3. It can in any case be argued that these deeper principles justify the doctrine of parliamentary sovereignty, because: (a) for any question that arises in any legal system, there should be a decision-maker whose decisions are final and conclusive for legal purposes, in the sense that there can be no appeal from them; (b) the danger that such a decision-maker will make grossly immoral decisions is inescapable – whether it is a legislature or a court; (c) it can reasonably be argued that, at least in some kinds of communities, this final decision-maker should be a democratically elected legislature.[13]
4. An argument to this effect could amount to a Dworkinian interpretation of the British legal system. In other words, the doctrine of parliamentary sovereignty is consistent with, but not necessarily based on, legal positivism.[14]
5. Just like citizens, legal officials including judges may be morally permitted (or even required) to disobey a grossly immoral statute, but

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11 Ibid 238-46.
12 Ibid 235-59.
13 Ibid 254 and 261-71.
14 Ibid 254 and 271-2.

it does not follow that they have legal authority to declare the statute invalid (a thesis of legal positivism that is also consistent with Dworkin's theory of law).[15]

6. If judges were morally permitted to disobey a grossly immoral statute, they might also be permitted to lie about the law by claiming legal authority to declare the statute invalid. They might thereby succeed in changing the consensus underlying the legal system – in other words, their lie might become true. But it would not follow that it was true all along.[16]

15 Ibid 263-7.
16 Ibid 267.