REVIEW ESSAY

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LEGISLATION AND ADJUDICATION

Professor Jeffrey Goldsworthy has for many years been the most acute academic supporter of the conventional wisdom about parliament's relation to the courts. A definitive statement of his position has therefore been awaited with anticipation. That statement is now found in *The Sovereignty of Parliament.*[1] It is a very good book (hereafter called S). Its argument is entirely clear; and it is comprehensive. It is one of those books where both friend and foe can applaud its achievement, its clarity and comprehensiveness being such as to illuminate the field for both. I speak as foe; the purpose of this article is to show that Goldsworthy's position is fundamentally mistaken.

I CONSTITUTIONAL BOOTSTRAPS

The issue can be joined fairly easily. Some have argued that parliament could not be the author of its own sovereignty since that would be to hoist itself by its own bootstraps. On this basis they ask: who could the author of parliamentary sovereignty be but the courts? And if this sovereignty rests in the authority of the courts, then may they not also define its limits? (S 239–40) Goldsworthy has various replies to this, one of them being that the same problem would infect a claim by the courts to that power. How could the courts, he asks, be the authors of their own constitutional status? (S 240). Now, almost everyone is agreed that in a functioning legal system there must be an institution with the final power in dispute settlement. More formally, it is (correctly) said that here must be an authoritative closure of the legal system. Goldsworthy's painstaking and very impressive historical research reveals time and time again that this is the philosophical issue at the heart of debates

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1 Clarendon Press, Oxford 1999.

about the sovereignty of parliament. Whether that institution is to be the courts or the parliament is the question.

Goldsworthy holds that the answer is the parliament. His response to the bootstraps problem, subtly and extensively developed throughout the book, is that parliament's power comes not from its own self-definition, but from a fundamental constitutional custom representing the agreement of all the constitutional estates. He means this in a way that corresponds precisely to H L A Hart's conception of the power behind a legal system's fundamental constitutional rule, the rule of recognition (as he called it).[2]

But this won't do at all (for either Hart or Goldsworthy). For where did *this* power come from? It cannot be the work of the constitutional estates' own bootstraps, either individually or collectively. What could the recognition of their power possibly be based upon except its acceptance in the courts?

The injection of the constitutional estates into the problem is certainly an advance. The courts' recognition of the legitimacy (validity) of statutes is not simply a recognition of the legitimacy of parliament (based, say, on simple democratic theory); it is a recognition of the legitimacy of the constitutional system in question – the one actually in place, the construction of which is largely the work of the constitutional estates (including the courts themselves). But they cannot be the foundation of their own power. They cannot themselves close the circle of power in the legal system.

Positivist legal theory has always sought the closure. Where Hobbes closed law in a termination by power itself – a real termination by the physical power of leviathan – modern theorists have closed it in the mere termination of discourse. An example is Kelsen[3] who supposed that you could take the idea of law and instead of grounding it in the world ground it in a failure to ground it in the world. (When his analysis of reality expired he had nothing left but assumption, and instead of apologising, he trumpeted it!) Though his theory was explicitly Kantian (but implicitly Hegelian[4]), it was nothing but the most facile nominalism. So pervasive is the influence of Kelsen in legal thought that it is hardly necessary to recapitulate the theory. He traced what he took to be the law of a community (positive law) through to its origins, the historically first constitution, and having there found that that was all his original definition allowed him to say about the matter he closed the discussion in what he

2 *The Concept of Law* (1961) 245.

3 A Wedberg, *General Theory of Law and State* (1945).

4 The theory was explicitly Kantian (based speciously upon the metaphysics of the theoretical critique), but its real ancestry is Hegelian. It is hard to think that it could ever have been taken seriously were it not that Hegel's very serious idea of the closure of human thought (and law) in the state was still in some sort of place.

called the grundnorm. From then on law was an assumption or postulate. It was binding (and therefore law) only in the sense that under the definitions there was nothing further to say. Hegel found the closure of law (and state) in a profound reflection on freedom. Kelsen found it simply in a reflection on itself.

What I have to do to show that Goldsworthy is wrong about the sovereignty of parliament is show that there is something about the nature of courts that makes them the final determinant of validity (the closure) beyond parliament and beyond the constitutional estates. And I must show that their power escapes the bootstraps objection. This can only be if the closure of the legal system in the courts is a closure in some absolute thing (some absolute which functions as freedom did in Hegel's thought).

II PARLIAMENT

The issue is complicated somewhat in Australia by virtue of the written Constitution and the federal system. Goldsworthy writes primarily about the Westminster Parliament. But every now and then he says (correctly) that his conclusions apply to Australia but with the appropriate federal modification, meaning by this that the Australian parliaments are sovereign within their constitutionally distributed powers. It is certainly true that the quality of Australian legislative power within those limits is the same as that of the United Kingdom[5]; but the issue of sovereignty is muddled somewhat (at least not joined with total clarity) by virtue of there being a power (the Constitution) above them.

By parliament in this article I shall mean the ultimate legislative power in a legal system. So I shall mean the Westminster Parliament in the United Kingdom (I shall ignore the European legislative institutions – if they are in any sense above the Westminster Parliament in the United Kingdom legal system then my arguments will apply to them); and in Australia I shall mean the people constituted into the referendum process of s 128 of the Australian Constitution. The Constitution is a piece of legislation (a set of enacted norms) and I shall take it that the people so constituted are the successors to the creative power of the original legislators of the Constitution. There is nothing especially odd about this conception. Constitutional legislation is a well-accepted power of the United Kingdom Parliament. In Australia my argument must be that the courts have the ultimate power to rule on the substantive[6] validity of referenda under the Australian Constitution.

Of course it will follow from my argument that the courts are the final determinant of the conditions of validity of the Constitution that the tests they apply to a

5 *Hodge v The Queen* (1883) 9 App Cas 117.

6 No-one doubts their power to rule on their procedural validity.

Constitutional amendment they will apply also to the legislation of both the Commonwealth and state parliaments. But I prefer to put the proposition in its strongest form. One reason for this is that the argument about the courts' power that occurred in Australian constitutional law in the early nineties miscarried somewhat when the Mason court expressed its conclusions in the form of implications in the Constitution; implications which in a textual sense were highly contestable. The fundamental rights by which they began to invalidate legislation were not expressed in the Constitution. They were not in the Constitution except insofar as they were present in the way a court should read *any* constitution.

III HISTORY

In *Dr Bonham's* case[7] Coke notoriously said that a statute contrary to common right and reason would be void. This has prompted much speculation by scholars as to what at the time was thought to be the power of the courts. Goldsworthy demolishes the speculation. The conclusion of his historical analysis is this (S 235):

> Judges cannot justify taking that step [judicial review of legislation] on the ground that it would revive a venerable tradition of English law, a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by common law or natural law. There never was such an age.

And I think he is right in this in terms of all the historical writings, which he analyses with exemplary accuracy. The problem is not with Goldsworthy's historiography; it is with his conception of history.

Mere historiography writes from a static (and therefore unreflexive) position what was the case at various times in the past. But mere historiography misunderstands history, which is a moving thing, connecting the various times of the past and explaining them. I imply no teleology in saying this; my point is that it is meaning itself which moves diachronically, and there is no meaning at all which doesn't. Mere historiography has no means of explaining how one time changed to another. And worst of all it has no connexion to the future: the mere historiographer must find the idea of an historical future a contradiction in terms.[8]

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7 (1610) 8 Co Rep 113b, 118; 77 ER 646, 652.

8 This is an argument I have had with Goldsworthy for a long time: for my part see Detmold, 'Australian Law: Federal Movement' (1991) 13 *Sydney Law Review* 31, 'Original Intentions and the Race Power' (1997) 8 *Public Law Review* 244 and 'Law as the Structure of Meaning' in Campbell and Goldsworthy (eds), *Interpretation* (forthcoming).

At the end of his historical analysis Goldsworthy (approvingly) quotes James Bryce, speaking in the House of Commons in 1886 (S 228):

> There is no principle more universally admitted by constitutional jurists than the omnipotence of Parliament. This omnipotence exists because there is nothing beyond Parliament or behind Parliament... [We] represent the whole British nation, which has committed to us the plenitude of its authority, and has provided no method of national salvation except through our votes.

Now, is this true? It's true that Bryce said it. And it's true that he was in tune with his times when he said it. Was it for Bryce true? He wasn't lying, of course – I mean, was it *for Bryce* true history? Now, as *we* know, what he said was false. Look at it again, and consider whether his proposition that 'the whole British nation ... has committed to us the plenitude of its authority' is true. It was false: in fact less than half the whole British nation made that commitment. So what was Bryce to say? What if he had said exactly that: 'less than half of the British nation has committed to us the plenitude of its authority'. Would that be true? This question is much more difficult than the previous ones, and the answer to it shows a dimension in history which Goldsworthy completely misses.

No, it would not be true. Such a statement would have been gobbledegook for the time; at best mincing words. Had Bryce said it he would have failed to speak to the spirit of the democratic movement of English history, the very movement which later enfranchised women.

Now consider Goldsworthy's moment in history (the present). What if there had been no enfranchisement of women in our constitutional system, and Goldsworthy was contemplating the endorsement of Bryce's view? I'm thinking of a situation in which the issue of female suffrage is currently controversial (had the nineteenth century's blithe ignorance of women continued, the question for Goldsworthy would have been the same as the question for Bryce). Would Goldsworthy simply endorse Bryce's view without comment (as he has actually done)? Of course not. To do that when the issue is in the open would be to speak falsely. What this reflection shows is that the present moment is not exempt from the movement of history.

In that history women were enfranchised and Goldsworthy's sense of historical movement was not troubled. But why not? Was the enfranchisement of women the end of history?

If it was not the end of history then the present historical moment must also be in movement; and the static doctrine of the sovereignty of parliament that informs Goldsworthy's argument is by that fact historically false. Moreover, present history

is not just in movement, it is in a certain movement. What this movement is is, of course, very controversial; but an historian who fails to take a position in the matter fails to understand any historical moment. I must here add that my argument would be misunderstood by someone who said in an off-hand sort of way: well of course history might change. Of course it might in that sense, which is proposing nothing more informative than anything might happen. My argument is that a certain historical direction is implicit in the (moving) history of this moment; and this something makes it possible to make a more enlightening historical judgement than either (a) just anything might happen, or (b) Goldsworthy's static conception of the sovereignty of parliament.

Goldsworthy's discussion of the seventeenth-century conflict between the king and parliament identifies a movement *in the past* from the authority of parliament as that of 'the king, in parliament' to that of 'the king-in-parliament' (S 230). That movement summarises the constitutional development of that century. More broadly in this line of thought we can view the whole constitutional movement over the last eight centuries in these stages or moments:

1. The king

2. The king, in parliament (after Magna Carta)

3. The king-in-parliament (after the seventeenth century)

4. (The king in) parliament (the present moment, in which the monarch's power is more formal than substantive).

Now, at any of these moments it is wrong to think that the prevailing idea is static, such that a development of it is a breach of it. Certainly, some developments would be breaches. But they would be breaches *of the movement.* Let us call the movement a democratic one, representing the gradual acquisition by the people from the king of the power of their own governance. If the king had won in the seventeenth century and the movement been reversed that would have been a breach. If the state had become theocratic that would have been a breach. If Marx had taken hold in England rather than Russia that would have been a breach. But these things didn't happen, and English constitutional history is a fairly even progression from monarch to people.

Just as we have seen in the discussion of Bryce and the enfranchisement of women, it is a false conception of history at any of these moments, and most certainly now when we have the power of retrospection, to speak of these ideas as other than in movement. Take the four moments that I have set out. Someone might say at the third moment that the king-in-parliament is the final moment of the relevant history.

They would have been wrong. Now, I do not mean simply that retrospection has shown them wrong. Their contemporary understanding of the moment would be wrong. They did not understand its dynamism. They did not understand what aspiration (the meaning of what they were doing) it was that was leading the people through their constitutional evolution, *and would continue to lead them.* I should again say here that I imply no teleology. The aspiration is not *to* a certain future state. Aspiration is the character of human action. And it is diachronic: the aspiration of the third moment gets its full meaning by virtue of its connexion to the fourth.

Thus for the third moment, so for the fourth. Goldsworthy's static conception of the fourth misunderstands its nature. Of course the end of history is possible (and Fukuyama has declared it[9]). It is possible that the fourth moment is the final one: the dynamic historical aspiration may simply stop. But anyone who claims that a certain present moment is the last must have a conception of what counts as the last and why their present moment qualifies. For the mere historiographer every present moment is the last.

My own view is that Fukuyama is closer to the mark than most people admit. I think, however, that the end of history will be a lawful not an economic state; it will be when all persons in history – past, present and future – are in lawful relation under the law of love.[10] This is not a goal of history (teleology); it is its condition.

Of course, I cannot go into this issue here. But will say that I do not think we can have a conception of history and its end without analysing its movement in terms of people rather than parliament. It is people that matter. So we return to the franchise. We must look to the moments of franchise, and in particular to the universal franchise which came in the nineteenth and early twentieth centuries (from the Reform Acts to the emancipation of women and the curtailment of the power of the House of Lords). Is that the end? Is that the aspiration that has created history? I think not. At least not quite.

Why is the power of the people in their franchise an important aspiration? Why is it that this whole constitutional movement from king to people is so important? *I will say it is because humans matter.* Settling on that, we can see that the coming of

9 Fukuyama, *The End of History and the Last Man* (1992).

10 The argument for this is part of my manuscript on the law of love (not yet finished). How difficult the condition of the end of history is can be seen from the inclusion of future persons in the problem. To be the end of history any present must treat the whole of the future under the law of love. Here 'love the other as self' means that all future others are as self and are therefore entitled to an equal share of the resources of the planet. And even more complicated is the treatment of past persons. Any present must atone for past evil (unlawfulness) in order to bring, say, Hitler into a lawful relation. And John Howard must say sorry.

universal franchise is a moment of extraordinary historical transformation. Prior to that moment it was quite clear that no such thing as 'humans matter' could be said; that is, it could not be said that the constitutional system was based on the principle that humans matter.

The reason for this is that the franchise was then defined not by humanness but by power. Ask the question at Runnymede. Do humans matter? No, the barons matter, and that can only mean their power – if the principle were that humans matter then all would be enfranchised. Ask it of Cromwell. Do humans matter? No, men of property matter. (Of course, Cromwell would have said that all humans mattered because they mattered to God, but we are following his actions in history, not his prayers.) The limitation of the franchise to men of property means that their property (their power) matters, not their humanness.

But now my philosophy is beginning to overwhelm my history: there is a sense in which the judgements in the last paragraph are too stark. That humans matter actually is in some sense at the bottom of, say, Cromwell's motivation: the king's claim to divine right was an offence to humanness, not property. But history is always limited by the exigencies of its current moment. Even if Cromwell had thought it desirable to construct a universal franchise he could not have done it for many historically contingent reasons, one of the important ones being the lack of universal education. But this is exactly my point. The moments of history are stark realities. If we are to understand the whole we must get beneath the starkness of these moments.

So, what are we to say of our present historical moment, constitutionally speaking? Interrogating Goldsworthy as we have interrogated Cromwell, can we now say that humans matter? In the matter of the franchise, yes, for the only qualification to vote (putting aside peripheral issues of infancy, immigration, mental incompetence and the like) is humanness. But the vote is not the end point of politics or constitutions (and therefore it is not the end of history). We have politics and constitutions not for voting (in itself an irksome chore) but for governance. So our question, do humans matter? is a question about governance not voting.

And so the answer for our present moment must still be no. There is no way that we can say that a majority vote in parliament is the end-point, the perfect instantiation, of the mattering of humans. *By itself* all that establishes is that the 51 per cent of humans who happen to be in the majority matter. It is only when the parliament is the parliament of all the humans including the 49 per cent that we can say it instantiates the proposition that humans matter. The condition of this is well-known. It was set out by John Ely in his book *Democracy and Distrust.*[11] The systemic

11 (1980).

respect for all humans must be such that each one can say of their governance by the 51 per cent: It is my governance; though in fact I disagree with what they are doing in this or that case, the system is a fair one, and I had my opportunity.

Goldsworthy correctly states the present moment.[12] My argument with his position is not as to its historical truth. It is his understanding of that truth which is the issue. He clearly thinks that what obtains historically at this moment (what most constitutional lawyers actually believe) is the end of the argument about history. It is not. The very arguments against which he pitches his conservative history are themselves implicit in that history. The fact that he has seen fit to write his book indicates that his conclusions are not the end of history.

We have now reached the historical end of what can be done solely in parliament and its franchise. Suppose a particular person (Zoe) is in the 49 per cent, and in respect of her we ask Ely's question: is the parliament hers? Parliament itself cannot give the answer. Parliament itself cannot say of her, expressly or by implication, that a particular statute (or the constitutional system) is hers (in Ely's sense). The reason is entirely simple. If parliament did purport to say this, the issue of ownership would transfer itself to the ownership of that statement itself – is it, that statement by parliament, hers? And then another intervention by parliament would be needed, and then another one, and so on (for the power of parliament) ad infinitum.

This issue of ownership is a commonplace one. If Doe and Roe make a contract to have Zoe horsewhipped she may sue and succeed in the courts on the ground that it is not her contract. No more can the parliament say of their statute that it is Zoe's than Doe and Roe can of their contract. The power of the courts in this constitutional question is exactly the same as their power in contract.[13]

It will be apparent to the reader that the bootstraps/closure argument (part I) has re-surfaced. Parliament cannot lift itself by its own bootstraps to a position of power over Zoe. The question, which as we have seen Goldsworthy identifies, is how it can be that the courts can avoid the same problem. The contract or the statute is not her statute, says Zoe. But if after a decision against her by the courts Zoe is left with the question: how is the courts' decision my decision?, we are not much further

12 The argument I have just put about respect for minorities has never been established in constitutional law. There was a time in the early nineties in Australia when it seemed that it might become established.

13 In Carol Pateman's *The Sexual Contract* (1988) the connexion between the constitutional and the contractual is nicely illustrated. When the king/patriarch was overthrown the brothers (Doe and Roe) made a contract between themselves as to their sex-right over his women (Zoe): this was the sexual contract of Pateman's title, not the social contract of conventional political theory. And, of course, the issue for women, thus treated, was precisely the issue of ownership I am discussing.

advanced in the matter of closure. The issue is: how is an adjudication owned by the litigants without the need for further declaration? The rest of this paper will be concerned to answer this question.

IV LAW MAKING AND LAW APPLYING

We should avoid thinking of the issue between parliament and the courts as one of superiority in the legal system. The courts have no power to make or amend legislation or to make or amend a Constitution. The issue is exactly analogous to contracts. The courts do not make or amend[14] contracts; but they do determine the conditions of their validity. They apply them on those conditions. And when you consider the vast range and diversity of value judgements that go into the *making* of contracts the courts' task of determining the conditions of validity is quite a modest (but expert) one. It is the same with legislation.

Goldsworthy's account of the way I have earlier drawn the distinction between law making and law applying is the following (S 275–6):

> Detmold also argues that there is a crucial distinction between a court refusing to apply a statute on the ground that the statute is unreasonable, and its refusing to do so on the ground that its applying the statute would be unreasonable. This is because for various reasons (stability, democracy, and so on) it is not necessarily unreasonable for a court to apply a statute that is unreasonable. Detmold concedes that the legislature has authority to decide what statutes it is reasonable to enact, but insists that the judiciary necessarily has authority to decide what statutes it is reasonable for it to apply. If a court were to refuse to apply a statute on the ground that the statute was unreasonable, it would be usurping the authority of the legislature. But if it were to do it on the ground that it would be unreasonable for it to apply the statute, it would be deciding a question that only it can, and indeed must, decide. Detmold goes so far as to claim that because these two decisions are different, a judicial decision that it would be unreasonable for it to apply the statute would 'not in any sense challenge the legislative decision' to enact the statute. The court would be deciding a question that Parliament itself had not decided. This suggests that it should not lead to any conflict between the branches of government.

This is accurately stated. He has two criticisms. First, there would be a certain amount of overlap in the reasoning that obtained between parliament's decision to

14 Rectification does not make a new contractual term: it spells out something already implicit in the parties' relation.

enact legislation and the court's decision to apply it. That is true, but if the decisions are different and each is, as I claim, constitutionally legitimate, then mutual constitutional respect is required. Second, he argues that the court's authority to apply the law is granted by the constitutional estates. And if they grant it they may limit it (and indeed have done so). But this simply restates the problem. On Goldsworthy's hypothesis the estates make the jurisdictional law and the court applies it. But the question is now: are the courts to apply that jurisdictional law (restrictive or not)? Without applying it (ie, the law giving them their authority) they could not exercise the jurisdictional power given. The whole issue between what is reasonable in law making and what is reasonable in law applying is embraced in this question (and not answered by Goldsworthy).

For my argument we are left with the question of why the courts are the appropriate ones to undertake the law applying. It is obvious that they are inappropriate law makers: they are not elected, they are not open to lobbies, and they don't have the appropriate facilities for the generation of the required information. But it does not follow from this that they are appropriate law appliers.

The answer lies in the particularity of law cases.

The application of law (the application of anything at all) is always to a particular case. (This reflection connects to our constitutional history (part III): humans matter, but what matters is not the (universal) idea of a human person, it is humans themselves, *particular* humans). It is the court's function to decide particular cases, not the legislature's. Just as they are ill set up to legislate, so they are well set up adjudicate particular cases: they hear arguments from particular parties, and they exclude all others. The particularity of the cases that come before the courts is the critical thing in understanding their function.

Of course, each could perform the opposite function – courts could legislate and legislatures could adjudicate (or indeed, they could each do both) – but that would make a nonsense of our constitutional arrangements. It would postulate a very different history My argument in that event (and Goldsworthy's, for that matter) would be the same: I would be arguing that a parliament deciding a particular case had power to adjudicate on the validity of court statutes.

V RADICAL PARTICULARITY

There is a very common mistake about particularity, and it is made on both sides of the argument about judicial power. From the opposite side to Goldsworthy, (former) Chief Judge Wachtler misconceived particularity in the course of his argument that judicial lawmaking was legitimate.

It is legitimate, Wachtler wrote,

largely because of the nature of the judicial process; it is directly attributable to the courts' narrow but profound connection to the 'relations of fact which exist between things', from which law springs. As the intimacy of this connection wanes ... the legitimacy of judicial lawmaking necessarily diminishes.[15]

Wachtler is quoting his great predecessor, Cardozo (who in turn is quoting the Belgian jurist, Van der Eycken), and shares Cardozo's view that judges make the law Any theorist taking that view faces a very well-known problem concerning the legitimacy of adjudication: law making by legislatures is legitimate for various reasons but the most significant is that they are democratically accountable where the courts are not; so how can courts claim legitimacy, particularly in the constitutional field when their 'law making' often overrides the democratic law-making of legislatures? So reasons Wachtler. His answer is to show that judicial law making serves a different and necessarily non-democratic function:

> Legislatures ... view the world through a wide-angle lens, and, because their rules are by necessity designed for future and not present application, the lens through which it views the 'relation of fact', while broad, also is clouded by prognostication.
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> It is the court, however, that applies law directly to real persons. It is in court where the collision between law and real-world events takes place. It is the judge who must, in every case, consider the discrete predicaments of specific persons, look these persons directly in the eye, and explain how the law affects them.[16]

Now there is muddle. 'Real persons' and 'specific persons' are particular persons, the subjects of the intimacy of this judge's eye contact. But there are two meanings of this intimacy; more precisely, two meanings of particularity. There is descriptive particularity and there is radical particularity.

Suppose I describe an event in broad terms as a, b and c; I attribute to the event the universals, a b and c, which, let us say, are automobile, collision and truck (thus my description of the event is: an automobile collided with a truck). The event is particular, but a b and c are universal, as can be seen from the form they would usually take in legislation: any automobile that has any collision with any truck ...

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15 S Wachtler, 'Judicial Lawmaking' (1990) 65 *New York University Law Review* 1, 19–20.

16 Ibid 17–18.

Now, this broad and general description may be made more particular in the descriptive sense of the term. Let us suppose that I proceed from a, b and c, and go on for a thousand pages describing the particular collision in a great deal of detail: sun in such and such a position, automobile driver drinking, brakes of truck in such and such a state (thirty pages here) and so on. My point is that this second description, though much longer and much more specific, is still a description in universal terms: a b c ... n (as we shall now represent the more particularised description) is a set of universals just as a b c was. And it doesn't matter how far I take this, even down to the molecular structure of the materials involved, I still state universals. I do not by my process of descriptive particularisation (our first sense of the term) get to the real particular, the radical sense of particularity (our second sense). In fact the radical particular was there (by reference) all along: *the radically particular event, that single event in the world, was there (referred to) no less in the broad description (a b c) than in the very long more specific one (a b c ... n).*

And the point is exactly the same for Wachtler's 'real persons'. Persons can be described more and more particularly (the first descriptive sense), but beneath this (however far it goes) they are radically particular.

To clarify this radical sense of the particularity of humans, suppose at some time in the future Hegel (the philosopher of universality) were to be reconstructed. Perhaps certain DNA structures have been recovered from his burial place and with a very great enhancement of our biological engineering techniques (and a little informed speculation) we have been able to come up with an exact recipe for a Hegel. This recipe is an extremely complex description. And it is universal; it is not a recipe for Hegel, the particular person, but for a hegel (as we should now write it). It is descriptively, not radically, particular.

Now what if we were to make two hegels? There are now three hegels, and one of them is Hegel. We can now clearly distinguish the universal description of Hegel (the recipe) from the particular person, Hegel. Even with three hegels the distinction is clear: there is one descriptive particularity (one recipe) but three radical particulars, three hegels, one of which is Hegel.

To complete our analysis of the particularity of humans, suppose as well as our cloning of Hegel we make two copies of Kant. There are three hegels one of which is Hegel. And there are now three kants one of which is Kant. A hegel and a kant are descriptively different. But Hegel and Kant are radically (particularly) as well as descriptively different. The other four persons (the other two hegels and two kants)

are radically different, too, but here we see the point. The six are radically particular, but two pairs of three are descriptively the same.[17]

We can now connect this analysis of Hegel to the events of the court case we were discussing (a b c and a b c ... n). Consider a named event, the Battle of Waterloo. We might learn everything there is to know of this event and make some movies of it (event clones). We would still have to distinguish the radically particular event, the Battle of Waterloo, from the clones. A court case is always about the radically particular event rather than a description of an event.

Like Wachtler, Goldsworthy misses the distinction between the two forms of particularity. Of an earlier version of my argument here he says (S 277):

> He also argues that the most fundamental difference between those functions is that 'legislation deals in universals (classes of cases) whilst adjudication decides particular cases'. He claims that '[u]niversals do not contain particulars', and therefore that '(universal) legislation is not the decision of all its (contained?) particular cases'. No matter how carefully a universal is defined, whether or not a particular case 'comes within' it is necessarily a further question that must be decided by a court. Therefore, a judicial decision that a statute should not be applied in a particular case cannot conflict with Parliament's decision in enacting the statute. 'Parliament has only decided the (universal) rule ... it has not decided the particular case'. But this is puzzling. It is true that in enacting a universal rule, Parliament might overlook or fail to foresee a legitimate objection to its application in some particular case, and on that ground, a court might reasonably hold that Parliament could not have intended it to be applied in that case, which is excepted from the rule by implication. But, otherwise, it is difficult to understand why, if a universal is a 'class of cases', all cases that belong to the class do not automatically, without the need for any judicial decision, 'come within' it. Moreover, it is difficult to make any sense of what Parliament is doing in enacting a universal rule, if it is not declaring that, subject to implied exceptions, the rule should be applied in all particular cases that come within its terms.

But what is (perhaps) contained in the universal rule (the 'one that should be applied in all the particular cases that come within its terms') are all the descriptively particular cases. It is nonsense to think that the radically particular events and

17 I first presented the Hegel cloning idea in 'Australian Constitutional Equality: the Common Law Foundation' (1996) 7 *Public Law Rreview* 33. It is appropriate that I repeat it here as I first thought of it when I read Peter Goldsworthy's *Honk if You are Jesus.*

persons are contained in the universal. Indeed, most of the events do not exist at the time of the legislation. And many of the radically particular humans do not exist either. Some do. It would be logically possible [18] for legislation to take this form:

> No one shall do X; and this applies to Doe, Roe, Zoe (here list all the citizens by name).

But then as soon as someone is born we have someone to whom the legislation is not stated to apply. It would have to be re-enacted daily! It is logically impossible for it to name persons in the open, ongoing way Goldsworthy wants. The best a statute can do is something like this:

> No one shall do X; and this applies to any citizen now alive or subsequently born.

But now the argument has slipped again to descriptive particularity. This statute is not working by name (radical particularity) but by descriptive particularity ('any citizen....'), and it is a further question whether the description applies to a given radically particular person. (Of course, the just-stated form is what any statute now does anyway by implication.) By contrast, adjudications are always named, and there is no further question of application.

Some theories of sovereignty push their way through this logic by brute force. Quite recently the English doctrine of the omnipotence of parliament was expressed to be such that a Frenchman could be punished by English law for smoking in the streets of Paris.[19] This appears to cancel the question of application because under the theory the statute applies to every human on earth. It still doesn't cancel the question, but I shall not pursue it for the theory was a mere flattery of parliament, not a serious piece of legal thought.[20]

From the passages quoted by Goldsworthy from my writings it may look as though I am suggesting that before a statute can be said to apply to me there has got to be a ruling by the court. This is not so. Application is the *place* of judicial power. In the ordinary course of events officials will apply it to me and I will accept it, or, more likely, I will simply obey it, ie apply it to myself. In saying that these events are the place of judicial power I mean that they are the place of judicial contest *if* I wish to make them such (by court challenge).

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18 But not constitutionally so: the statute would exercise judicial power. I am, however, talking at the moment only of the logic.

19 W Jennings, *The Law and the Consitution* (3rd ed, 1943) 149.

20 If that seems a little too hasty a judgement I discuss the issue at some length in Detmold, 'Law as Practical Reason' (1989) 48 *Cambridge Law Journal* 436.

Returning to Wachtler's argument, it can be seen that he leaves adjudication entirely out of his description of the judicial process. Suppose a court does make the law in the descriptive particularising way: from the prognostication (Wachtler's term) 'where a, b, c, consequence x', the 'collision between law and real-world events' (also Wachtler) leads the court to make 'where a, b, c ... n, consequence y'. All we have by this development is a further piece of (illegitimate) legislation. But the more important point is that the court has not yet adjudicated, for adjudication is in the application of what is now 'where a, b, c ... n, consequence y' to the (radically) particular case, and that has not yet occurred. The whole of adjudication is in this step, which a theory of adjudication as descriptive particularisation in a legislative mode leaves entirely out.[21] It is no good saying that after descriptively particularising the case the court is in a position to adjudicate; it always was in that position for the (radical) particular is no less a case of the original a, b, c than it is of the present, descriptively more particularised, a, b, c ... n. (Compare two statements of *Donoghue v Stevenson*,[22] the famous case of the snail in the bottle: 'manufacturer, good, foreign substance, consumer' and 'manufacturer of ginger beer, bottle, snail, Scottish widow'; both are *equally* true descriptions of the case.)

Further, in failing to adjudicate a court would be failing the purpose of our having judicial institutions, for it would make no connexion of law to the particular parties in the case. No matter how specifically particularised the norm had become, the parties would be left to apply 'where a b c .... n' to their case themselves. Nothing could be more subversive of our legal institutions than to have them cut out and parties left entirely to their own devices at this absolutely critical point.[23]

VI ALYOSHA KARAMAZOV

I suspect at the heart of Goldsworthy's position is the view that the best we can do for all individuals in the legal system is to stick with the finality of parliamentary democracy. He has an excellent discussion of *Stockdale v Hansard*[24] here, showing how close the Westminster system came to breakdown over the crisis between the courts and the Commons (S 222–4). Humans matter, and he wants to avert such a constitutional disaster. But even if he is right about the consequences (and in the mature constitutional communities of the United Kingdom and Australia I don't for one minute think he is) he is wrong about their constitutional significance. He is wrong about the constitutional law and at the same time the philosophy of consequences.

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21 See further ibid 437–42.

22 [1932] AC 562.

23 There is a fuller version of this argument in Detmold, *Courts and Administrators* (1989) 86–110.

24 (1839) 2 Ad & E 221.

In western philosophy there are three distinct ways of expressing the view that humans matter. First, they matter to God. Second, their happiness is the end of moral thought and is to be measured on a utilitarian calculus (the greatest happiness for the greatest number). Third, they are ends in self, not means to the ends of another (Kant).

I am not going to discuss the first. The issue between the second and the third is the most fundamental issue in the moral philosophy of the last two centuries. It is also the very constitutional issue we are discussing. Further, when it is recognised as that constitutional issue the great moral philosophical debate of these two centuries is resolved. An issue which the discipline of philosophy has not been able to resolve is actually resolved by law.

'If you could purchase perpetual happiness for humankind by the torture of one innocent child, would you do it?' With this question, which Ivan Karamazov asked of his brother, Alyosha, the issue between utilitarianism and Kantian respect is joined.

Alyosha answered no.

This is good constitutional law. We would expect nothing less from the common law courts who pride themselves on many things, not least: *fiat justitia ruat coelum* (let justice be done though the heavens fall). In our constitutional system the achievement of (some instalment of) perpetual happiness (not to say, the propping up of the heavens) is the responsibility of legislature and government. The protection of the child, however, its protection as end in self, as something of *absolute* value, is the function of the courts.

I made this argument in some depth in *Courts and Administrators*.[25] I there expressed the issue in terms of the radical autonomy of particular humans, intending that in a totally Kantian sense. The contrast I drew was between radical autonomy, which, constitutionally speaking, was for the courts, and good government, which was for the parliament and the government. Radical autonomy, I thought, was the absolute point of closure which legal theory had been looking for (part I of this article).

Hegel, however, who had thought a great deal about closure, had rejected Kant. He had started as a Kantian (in an early essay on the life of Jesus he had Jesus speaking Kant's philosophy) but he ended rejecting him. His mature objection to Kant's position is expressed in *The Philosophy of Right* as an objection to its lack of concreteness.[26] But the real concreteness of Kant is to be found in the common

25 Above n 23. See particularly 164.

26 Ibid, in the discussion of s135 and its elaboration in Addition 86.

law, which is the law of particularity, not in Hegel's universality.[27] I would now say that the absolute which founds legal systems is the common law of contract. This is still Kantian – the way to respect a person as end in self is to contract with them not steal from them[28] – but it is concrete in that it brings the philosophy of freedom down to the world of particular human relations.[29]

VII THE PRACTICALITY AND CONCLUSIVENESS OF JUDICIAL POWER

Specifically, in Kantian terms, if I am to respect the other as end in self I must contract with them. There is no other way. There is no other way for humans to be respected as ends in self than under the common law of contract. So the closure of law in the absolute individual is a closure in the law of contract. If I impose myself on the other, if I take what I want from the other by trick or force (this I call stealing), I treat them or their property as a means to my end (my end being whatever it is that causes me to steal). An end-in-self is (by definition) absolute. So we may say that the individual human is the absolute end point of law, around which a legal system can close.

The question now arises, how does the court have power over these (absolute) individuals before it. How does it adjudicate without imposing itself contrary to the Kantian condition? We have partially answered this question by saying that the closure is in the (courts') law of contract. The full answer lies in the nature of human practice.

Law is practical when it is applied in the practical decision of at least one human person. Particular application is the only way to the practicality of law. Thus the Roman legal system is no longer a case of practical law because (if this is in fact the case) it is no longer applied as law by anyone. (It is still played as a game in some law schools – a game is practical, but a different sort of practical.)

Suppose we are in the last days of another legal system. The parliament is surrounded by the tanks of revolutionary forces who are calling on it to surrender. It passes one perhaps last law, 'No tanks shall congregate outside parliament without permission', and promulgates it on the front door. Is this statute law?

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27 Detmold, above n 17, 45–8.

28 The whole of the common law turns on this. In respect of anything at all that one person wants from another they may contract with them or they may steal it. The latter is tort. Every further exposition of the common law is the detail of the distinction between contracting and stealing. Ivan Karamazov's question to his brother, Alyosha is confused both by the abhorrence that we have of torture and the special case of children. A much more rigorous version is: would you purchase perpetual happiness for humankind by the commission of a small tort on an adult?

29 Detmold, above n 17, 47–8.

The answer must be, it is and it isn't. The sense in which it *is* law is theoretical. Suppose the revolution proceeds and the tanks destroy the parliament. If we were to write a history of that legal system we might well say (given that outcome of the stated confrontation) this law was its last law (if our historiography was content with Hart's theory as its basis, holding that at the moment of promulgation a rule of recognition identifying the statute as law was still in place). The sense in which it *isn't* law is the practical sense: it is (on the just-stated outcome of the revolution) applied by no-one. We must here be careful to distinguish various sorts of practicality. Each member of parliament makes a practical decision when they vote for the law. This does not mean the law they passed is itself practical – their activity is a case of practical law making, we might say, rather than practical law. (But was it law they made? Yes and no we reply, on the grounds we have just maintained, nevertheless asserting the Parliamentarians were engaged in a practical activity – the activity of law making – rather like a farmer sowing crops which might or might not come to fruition.)

The tank commander looks at the promulgation and decides the practical question for the law or against it. This is a much underrated moment in legal theory. It is the moment of practice, and therefore the whole point of practical law, and in it lies the distinction between judicial and legislative power. The whole point of practical law? Surely, the whole point of law! The reader may by now harbour suspicion as to the status of the theoretical in the distinction between the theoretical and practical. What is this theoretical conception of law (Hart's, for example) beyond the practical? In my view nothing at all, except as a certain stage of thought in a fully practical conception of law, and I will now so treat it.

Suppose the tank commander decides for the law and orders the army back to barracks. This moment of practice is conclusive. The action is done. Before it is done it is entirely theoretical – every factor going into the decision is theoretical. This is all a theory of anything ever is: systematic thought about what to do (it is entirely possible that the tank commander has read Hart's *Concept of Law*, and says to themself, theoretically, 'Yes, there is a rule of recognition still in place'.) When the act is done it is conclusive. After it is done there is, of course, a new moment and a new theoretical question. 'Will I reverse my obedience to the law?', muses the tank commander. But *it* is done. Afterwards there is an infinite sequence of ensuing 'its'. The practicality of law is a constant and ongoing thing; as is the practicality of anything: will I throw this ragu out and start again? Will I serve it now? and so on. But each 'it', each practical decision, is in itself conclusive – the practical is conclusive, we might say – and that is its connexion to judicial power.

The individual's decision to apply law is the moment of practice and the moment of judicial power. The earlier theoretical moment is the moment of legislative power; and that is the difference between the two. Of course, this moment of practice is

one where the courts are available to be called in by the (particular) individuals involved, should they wish it.

If there were no judges the distinction between the two moments, the citizen's and the law maker's, and the distinction in their legal quality would be quite clear. We could call this a separation of powers, but that would not prove anything much. What we have to prove is that when judges enter the picture they attach to the conclusive practical moment of the citizen, not the earlier legislative one.

If a judge's decision were an act of will seeking to impose itself on a citizen it would (as well as infringing the Kantian condition) be theoretical just like the legislative one. The judge's decision would be a conclusive act of law *imposition* (and as such conclusive for the judge) but it would not be conclusive of the law. It would be no more conclusive than a legislature's act – it would make no difference that one sought to impose itself on many citizens (legislation) and the other on only one (adjudication).

But the judge's decision is not something seeking to impose itself. Its conclusiveness of law (its pure judicial power) lies in the fact it is seeking to attach to that in the citizen which is already willed, and in that sense already imposed by the citizen themself. I can expound my point in reference to contract.

I make a contract with you to buy my pen for one dollar. Two decisions are made there by two parties in relation to each other, *and the essence of contract is that there is no third decision.* No judge decides that the pen is worth not one, as the contract says, but two dollars and gives judgment accordingly. A judge who did that would wholly misunderstand the nature of contract. Contract can actually be defined as the exclusion of any third decision. It is the same with the parliament and the Constitution. The constitutional judicial power is to impose nothing on a citizen that they have not already willed (in Ely's sense). No *judge* rewrites a contract. Equally, no judge rewrites a constitution. (On the other hand law makers do: the parties often rewrite a contract, and the people occasionally rewrite a constitution: s 128).

But then if judges are imposing nothing why have judges?

VIII WILLING AND BACKSLIDING: THE PROFESSION OF JUDGING

Suppose dithering came to be recognised as a serious form of mental illness. People with it were incapable of acting decisively. They would make a decision and then undecide it, thinking that something else (maybe just sitting quietly) might be better. Now this would indeed be a severe illness – such persons in extreme form are incapable of human life, which necessarily entails a constant execution of decisions – they would not get up in the morning, and if (somehow) they got up they would be

found standing sadly by their bed, and so on. Professional intervention would be called for. These professionals would be the equivalent of judges. They would not impose a will on their patient, but rather reinforce something already willed. I do not know what techniques they would use, but in the first instance their practice might look rather like an examination in chief, or even cross-examination, in court.

The only difference between these professionals and judges is that judges deal with relational ditherers, ie backsliders, those unable to stick to a relational decision such as a contract, or a marriage (standing sadly by the bed of a broken marriage). And in respect of judges, an equivalent reflection on the nature of human life holds. Human relations necessarily involve the execution of relational decisions, the paradigm of which is a contract. One incapable of executing relational decisions is incapable of human relations, and of human life itself. And the professional who deals with the social illness of relational dithering is the professional called the judge; and like the one dealing with ordinary dithering they do not impose a will on their patient, but rather, reinforce something that is by the patient already willed (ie, they enforce contracts).

Being already willed, the citizen/patient's decision is practically conclusive (were it not for the aforesaid illnesses, of both the ordinary and relational type). This is the conclusiveness of judicial power. Judicial power could never be the conclusiveness of the power of the judge, for as power it must always be theoretical, awaiting the citizen's final (conclusive) decision. The only conclusiveness is that of the human decision, which it is the purpose of judicial power to support.

Breach of contract is easily shown to be a case of relational dithering. Someone makes a contract and breaks it. They have made a decision and are unable to stick to it. The application of valid legislation to a recalcitrant citizen is obviously the same. On the other side, invalid legislation (which it is the purpose of judicial power to oppose) is a derivative of this: the legislature has failed to keep its side of the constitutional bargain (almost all theorists give an account of constitutionalism in contractarian terms).

What of tort and crime? Tort and crime are functions of the law of contract.[30] They are nothing but failures to contract in respect of whatever it is that the tortfeasor is doing (tortiously). However that does not in itself show that there is in place a conclusive will in the tortfeasor which it is the purpose of the judicial power to support. I think there is (but cannot in this paper show it[31]). The picture which I want to draw (from which tort and crime are derivative) is of a world in which all human desires (and wills) get their perfect relational place. First take the road as a

30 See Detmold, above n 17.

31 I show it in my manuscript on the law of love, not yet finished.

paradigm. For one little section of the world's roads and for one little time all the drivers drive without tort. Now, suppose the whole world is like this in respect of all human interaction. The condition of this is the willing of all persons to lawful community. Then one person commits a tort. The purpose of the judicial power is to reassert the previous state of (always conclusive) human will. But how is this the will of the tortfeasor, who appears to have willed in the opposite direction? It is the tortfeasor's *prior* will if it is the case that they have willed the community. And, assuming that the community is a legitimate one, they have done this unless they are a community (relational) ditherer.

It is probably necessary to expand the idea of dithering from dithering about the execution of a naturally formulated will to the inability clearly and decisively to form a natural human will (such as the will to community) in the first place. But the personal ditherer whom we first considered is not someone in whom we could clearly distinguish an incapacity of execution from an incapacity to decide in the first place.

And why enforce? (ie, why have judges?) If ordinary dithering were contagious it would be no surprise to find that its treatment was enforced by the community. That others were involved would be sufficient justification. With relational dithering others are by definition involved, so enforcement is in order.

The community, we can say, wills that there shall be judges. And individual judges will that that shall be their work. But these wills are no more constitutive of the substance of human law than a physicist's will to practise as a physicist is constitutive of physics. No will of the judge is part of human law.

To conclude: Just as the only will that a judge requires to enforce a valid contract is the will of the parties, so the only will required to enforce a valid statute against someone who disagrees with it is the will implicit in their free attachment to the constitutional community in question.[32] If there is no free attachment of the citizen in question (if for example they are a member of a slave class, or are otherwise excluded from the life of the community) the statute cannot be validly applied to them. This is the sole condition of the constitutional validity of statutes.

32 Free attachment does not mean a single act of consent as one might consent to a social contract; it means the sum of all the free attachments made to the transactions and relations of the community. So when I make a contract, or freely go to the theatre, or to work, or when I freely vote for parliament, I make particular and free attachments of myself to my community; and when the whole goes reasonably well for me I am a reasonably free citizen of my community. See Detmold, above n 23, 128–32.