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VICTORIA UNIVERSITY OF WELLINGTON  
*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



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# THE MYTH OF SOVEREIGNTY

*Lord Cooke of Thorndon\**

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*Sovereignty is often characterised by British constitutional orthodoxy as the attribute of an "independent and supreme authority", usually located in Parliament by virtue of the supremacy of legislation. In this article, Lord Cooke dispels the myth that any single organ of government exercises sovereignty as a matter of constitutional law, and instead presents a vision of interaction and collaboration in the exercise of governmental power under modern Westminster constitutions.*

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A few years ago I ended a paper at a seminar in the Law School with a quotation from Bertrand Russell.<sup>1</sup> It turns out to be relevant to begin the present paper with a reference to his son, the fifth Earl Russell, Emeritus Professor of History at King's College, London, and an eminent authority on English constitutional law of the 17<sup>th</sup> century. Conrad Russell, a big, sadly stooped man with piercing eyes and a mane of white hair, a Liberal Democrat peer, was perhaps the finest speaker in the House of Lords when I became a Cross-Bencher in 1996. Last year during a debate on criminal justice Lord Russell and I had a fairly light-hearted exchange.<sup>2</sup> I was moved to mention the common understanding that Sir Edward Coke, Chief Justice, had said that the common law could control Acts of Parliament. It is an understanding of Coke's views held by many distinguished lawyers, not least Lord Reid.<sup>3</sup>

But, Russell then explained, it is a misunderstanding. What Coke said was no more than "some say that the common law could control Acts of Parliament."<sup>4</sup> Suitably impressed, I conceded that the noble Earl knew infinitely more than I; and went on to another subject.

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1 Lord Cooke of Thorndon "Human Rights in Hong Kong" in *The Universal Declaration of Human Rights* (NZIIA, Wellington, 1998) 45, containing papers presented at a seminar arranged by the New Zealand Institute of International Affairs, 15 April 1998, to commemorate the fiftieth anniversary of the Declaration.

2 (30 October 2003) 654 Hansard House of Lords Debates, cols 485, 487–488.

3 This is an inference from his general remarks about "earlier times" in *British Railways Board v Pickin* [1974] AC 765, 782 (HL) Lord Reid.

4 (30 October 2003) 654 Hansard House of Lords Debates, col 488.

Two or three months later, I received in New Zealand an unexpected letter from Russell apologising for a lapse of memory: he had recently verified that Coke had indeed expressed without qualification the opinion generally attributed to him.<sup>5</sup> And he sent me an offprint of a piece he had written for Gray's Inn about constitutional law in Coke's day. Of course, I replied with appropriate forgiveness. Also, I reciprocated with an offprint of a small piece of my own. This letter produced again an unexpected and generous response. Russell wrote among other things that I had lifted him from a profound depression and made him feel glad-hearted again. He looked forward to having some conversation in the House, as did I. Alas no such conversation was to occur. Conrad Russell died recently, aged only 67, perhaps self-destroyed by incessant cigarettes.

One of the other things he said in his second letter was that my own views were not like those of Edward Coke, "a thunderbolt from on high", but more reminiscent of William Noy, who died 1634, in his posthumously published *Maxims* (1641) - "more nuts and bolts". That was kind. If correct, it gives a degree of historical respectability, although I must admit not being able to discern much in Noy pertinent to the subject (unless by implication) and, following research, to being less than enthusiastic about the comparison. For Noy, having begun as a leading anti-monarchical advocate, accepted what was in effect the bribe of the Attorney-Generalship and devoted himself thenceforth to the cause of the royal prerogative, as by exploiting the device of ship money (*Hampden's case*,<sup>6</sup> for example). When he died, his heart was found to be shrivelled like a small leather purse. Nor were his lungs sound: which makes three of us.

In fact my views were and are not dissimilar to Conrad Russell's own. His immersion in the politics of the Stuart era led him to the theme in his works that the rival factions lacked the concepts, the intellectual tools, that are standard in the constitutional discourse of our time, as illustrated by Professor Goldsworthy's scholarly paper.<sup>7</sup> The separation of powers was not articulated as a theory in quite the same way as subsequently evolved in America and France. Control of the purse strings and of religion were great bones of contention; but they had less to do with democracy and freedom than with privilege and faith, as witness the Stuart attempts to impose the Anglican prayer book on the Scots and

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5 No doubt Lord Russell had now in mind the passage in Coke's note on *Dr Bonham's case* (1610) 8 Co Rep 113b, 118a: "In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void".

6 *Rex v Hampden* (1637) 3 State Trials 825.

7 Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7.

the apparent belief even of John Locke, writing somewhat later, in the outcome of civil war as the definitive expression of God's will.<sup>8</sup> In short, although there were struggles for power, the truly animating motives were of self-interest: the pocket and the soul. To ask where lay sovereignty, except on the throne for the time being, would seem to have been an academic and scarcely important question. Perhaps it still is.

Although the contrary became fashionable, particularly because of Dicey, today constitutional scholars may increasingly be reluctant to answer current issues by appeals to some doctrine of sovereignty. "The sovereignty of Parliament" is a catchphrase beloved of some sections of the media and some politicians; incongruously, it got into the Supreme Court Act 2003 in New Zealand.<sup>9</sup> But it does not survive in-depth analysis. In international law, there are said to be sovereign states, yet even that concept is gradually being undermined by developments such as the European Union and devolution within the United Kingdom. Within a national polity the sovereignty concept may be largely replaced by one of interaction, of checks and balances, of some degree of competition. In New Zealand, the leading academic exponent of this approach is Professor Philip Joseph of the University of Canterbury, with his "Parliament, the Courts and the Collaborative Enterprise".<sup>10</sup> Collaboration there certainly should be, as in the field of human rights, and it is a distortion to see the legislative and judicial arms of the state as constantly in conflict.

Some struggle and occasional tension does remain. This is not unhealthy. Reciprocal influence is an ongoing process. Neither the government, nor Parliament, nor the courts have a monopoly of wisdom. Facile appeals to the will of the people can invite uninformed and unthinking responses. Democracy does not mean simple majority rule; an objective and unbiased assessment of minority interests must also be attempted. Of course, it is difficult and challenging but, unlike politicians whose concern is naturally with policy, judges have as their primary role impartiality. The two vocations are essentially different, despite from time to time an inevitable overlap in some grey areas.

In the pattern of functional distribution of state power is there any room for real sovereignty? I am inclined to think not. Let us consider the candidates in turn.<sup>11</sup>

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8 Locke is more fully quoted in Lord Cooke of Thorndon "The Law Lords: An Endangered Heritage" (2003) 119 LQR 49, 52-53.

9 Supreme Court Act 2003, s 3(2).

10 Philip Joseph "Parliament, the Courts and the Collaborative Enterprise" (2004) 15 KCLJ 321.

11 In the list of candidates I do not include "the people". Although the theory of the sovereignty of the people has some impressive support - from Justice Michael Kirby, for instance - I join with Professor Goldsworthy in thinking it impossibly vague. Also, as Edmund Burke pointed out, elected Members of Parliament are not delegates or agents of the electors.

First, the government for the time being. In his story of the Oxford English Dictionary *The Meaning of Everything*,<sup>12</sup> Simon Winchester writes of the reception accorded to the editor Sir James Murray when in the garden of a dwelling he had acquired in the Banbury Road he caused to be constructed something like an air raid shelter wherein he and his assistants would labour. Across the fence he was confronted by a furious neighbour, protesting with gibbering raving. It was A V Dicey, who suffered from lack of control of the muscles. But Dicey, albeit misguidedly stubborn in his campaign against Irish Home Rule, was not mad. The mere mention of his work is enough to make the point that the executive does not control the state by virtue of some special status. The rule of law means executive subjection to law. We need not spend time on the notion that the executive is sovereign, as even Sir Robert Muldoon found out.

Next, the legislature. Parliament has vast powers, yet it is reasonably clear that they cannot confidently be asserted to be unlimited. Plainly there are very wide fields, such as the economy and taxation, which the courts recognise to be, in general, fairly within the exclusive province of Parliament. But if an Act of Parliament purported to disestablish the judiciary, replacing the judges with security of tenure by a hierarchy of administrative tribunals holding office at ministerial pleasure, it is at best doubtful whether the courts would enforce it. Some approach to such a situation in fact arose in England recently from a Bill purporting to abolish judicial review in refugee asylum cases;<sup>13</sup> it had to be significantly modified as a result of objections led by two former Lord Chancellors from opposite sides of the political spectrum, Lord Mackay of Clashfern and Lord Irvine of Lairg. As Earl Russell put it in one of his letters already mentioned, they killed the clause. The House of Lords played its constitutional role effectively. So too in the unlikely event of measures effectively excluding the democratic process itself, abnegating Parliament's democratic function. Other examples, not all hypothetical, can be given, as I shall seek to show shortly. In the end, it may become a question of degree, but the possibility cannot be excluded of an abuse of parliamentary power so extreme as to be constitutionally impracticable and unenforceable.

Then as to the courts. Despite the quite widespread pejorative misuse of the term "activist", judges cannot initiate action and, as already touched on, disclaim responsibility for decision-making in many spheres of the nation's life. Certainly the courts make common law, developing it usually by a gradual process of accretion and modification, sometimes, though, by giant strides. Some of the latter were the theme of my 1996 Hamlyn

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12 Simon Winchester *The Meaning of Everything: The Story of the OED* (Oxford University Press, Oxford, 2003).

13 Immigration Bill 2004 (UK).

Lectures, *Turning Points of the Common Law*,<sup>14</sup> a discussion of four great cases in which the House of Lords, reversing the English Court of Appeal, changed the law applied in most of the English-speaking world (*Salomon*,<sup>15</sup> *Woolmington*,<sup>16</sup> *Hedley Byrne*<sup>17</sup> and *Anisminic*<sup>18</sup>). As regards legislation, however, the conventional judicial approach is confined to interpretation in the ordinary sense. Clearly no suggested sovereignty or supremacy of the courts has any place in this approach.

I have borrowed the description "conventional" from the leading speech of Lord Bingham of Cornhill in conjoined appeals decided recently: *Attorney-General's Reference No. 4 of 2002: Sheldrake v Director of Public Prosecutions*.<sup>19</sup> These cases bring out very well the elusiveness of the concept of sovereignty. They are concerned in part with section 3 of the Human Rights Act 1998 (UK) whereby the courts are enjoined to interpret a statute compatibly with Convention rights "so far as it is possible to do so".<sup>20</sup> In one case, the defendant had been convicted under an Act of 1988 of being in charge of a motor car in a public place with excess breath alcohol. In the other, the defendant had been charged under the Terrorism Act 2000 with belonging to and professing to belong to a proscribed organisation. Both Acts provided for certain defences. On a conventional interpretation both placed on the defendant the onus of proving a statutory defence on the balance of probabilities. A main issue in both cases was whether the provision about defences could be read down so as to impose on the defendant merely an evidential burden – that is to say, no more than evidence or material raising an issue, casting the ultimate or persuasive onus of proof beyond reasonable doubt on the prosecution.

The House held unanimously that the breath alcohol provision should not be so read down, but, by a majority of three to two, that the terrorist provision could and should be. The reasons for the distinction cannot conveniently be summarised here. Suffice it to say that they included the relative seriousness of the offences and the relative difficulties of proving a defence, even only on the balance of probabilities. The important point for our purposes is that the two statutes were not seen as obscure or ambiguous. Lord Bingham's specific statements to that effect were in a speech concurred in wholly by Lord Steyn and

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14 Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997).

15 *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

16 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL).

17 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

18 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

19 *Attorney-General's Reference No. 4 of 2002: Sheldrake v Director of Public Prosecutions* [2004] UKHL 43.

20 Compare New Zealand Bill of Rights Act 1990, s 6.



Lord Phillips of Worth Matravers, and on this point of principle by Lord Rodger of Earlsferry; possibly also to that extent by the former Northern Ireland Lord Chief Justice, Lord Carswell. Succinctly, Lord Bingham concluded by saying that to treat the terrorism section as imposing an evidential instead of a legal burden was not the intention of Parliament when enacting the 2000 Act but was the intention of Parliament when enacting section 3 of the 1998 Act.

That decision has an affinity in the field of fundamental common law human rights with other recent decisions of the House of Lords, differently constituted.<sup>21</sup> And it may confront disciples of the concept of sovereignty with a dilemma. Can the United Kingdom Parliament of 2000 be classified as sovereign if, by virtue of an Act of a previous Parliament, it was powerless to achieve its intention, however clearly articulated? At least in the field of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>22</sup> the concept hardly works. It is difficult to see how anyone who gives the matter serious thought could be confident that it works in any field. The argument for the concept tends to reduce to dogmatic assertion. The only undoubted sovereign is the Sovereign, and constitutional development has effectively shared out most of her powers. The question of whether Parliament is sovereign cannot receive an affirmative answer now or probably ever. It reflects a common illusion, tidy but superficial.

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21 *R (Anufrijeva) v Home Secretary* [2004] 1 AC 634 and *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763. These cases are discussed in my paper "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, to which the present paper is a companion.

22 European Convention for the Protection of Human Rights and Fundamental Freedoms (3 September 1953) 213 UNTS 222.