Book Review

Parliamentary Sovereignty: Contemporary Debates

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Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press 2010), 326 p., ISBN 978-0-521-88472-3

The title of Jeffrey Goldsworthy's newest book leaves few things unresolved. Just as it plainly indicates, the main theme is the doctrine of parliamentary sovereignty. More specifically, this book deals with the doctrine's meaning, nature, continued existence and relevance in contemporary constitutional and jurisprudential terms. However, unlike its predecessor under the similar title *The Sovereignty of Parliament,*[1] this book is far less focused on the historical evolvement of the concept of parliamentary sovereignty. Instead, it relies on a brief historical analysis only to the extent needed to support some of the author's arguments.

A different methodological approach in *Parliamentary Sovereignty* can probably in part be explained by the author's ambition to discuss a wider range of issues and challenges confronting this doctrine. In addition, the book's fragmented structure is also what most likely played a role in determining the scope of the author's research. To be exact, *Parliamentary Sovereignty* represents a compilation of essays dealing with the four principal issues that still represent a stumbling stone for those seeking to construct a comprehensive theory about the exact meaning and implications of the sovereignty of parliament.

As described by the author himself, the first topic consists of a criticism of 'common law constitutionalism', a theory that regards parliamentary sovereignty as a matter of judge-made common law, or that denies parliament's sovereignty in view of some basic common law principles, such as the rule of law [1].[2] The second topic deals with the analysis of parliament's power to abdicate, limit and regulate the exercise of its own legislative authority, and includes a proposal of a novel theory of permissible legislative self-restraint. The third topic examines the ques-

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[1] J. Goldsworthy, *The Sovereignty of Parliament*: *History and Philosophy* (Clarendon Press 1999).

[2] All further references to *Parliamentary Sovereignty* will be presented between square brackets in the main text of this review.

European Constitutional Law Review, 7: 336–343, 2011

doi:10.1017/S1574019611200129

tion of statutory interpretation, placing a particular emphasis on its requisite scope and limitations in view of the doctrine of parliamentary sovereignty. The final, fourth topic represents the author's attempt to defend parliamentary sovereignty against some of the major past, present and future challenges and criticism, especially having in mind some of the recent constitutional developments often perceived as a threat to the doctrine of parliamentary sovereignty.

Goldsworthy's study of these issues, from both a historical and a philosophical perspective, results in a detailed and comprehensive endeavor to explain the doctrine of parliamentary sovereignty and its main implications. The author's determination to present and scrutinize a great number of competing theories dealing with the mentioned issues is most certainly what makes this book a welcome addition to the existing literature on the sovereignty of parliament. However, in order to assess the ultimate success of this book, one should take a careful look at some of the author's main arguments and conclusions, formed as a result of his analysis. Since I believe it is the quality and the persuasiveness of these arguments that will ultimately determine the book's value, instead of describing each of the collected essays, I will focus on some of Goldsworthy's principal claims, elaborated in one or more of the book's chapters.

It is not by chance that *Parliamentary Sovereignty* begins and in its biggest part deals with the critical analysis of 'common law constitutionalism', a theory which the author describes as an intent to subvert parliamentary sovereignty by elevating the judiciary to a position of superiority over parliament [15]. Some of the author's main claims about the nature, existence and implications of parliamentary sovereignty are developed precisely through the criticism of this theory. The author's principal argument, in that regard, is that the central claims of 'common law constitutionalism' are false. To support his conclusion, the author invokes a number of arguments of both historical and theoretical nature, intended to demonstrate that 'Parliament has been for centuries, and still is, sovereign in a legal sense; that this is not incompatible with the rule of law; and that its sovereignty is not a gift of the common law understood in the modern sense of judge-made law' [7].

The first part of Goldsworthy's analysis begins with a brief historical study of the nature, scope and possibilities of expounding the common law, intended to refute the historical grounds of defence of 'common law constitutionalism'. To be exact, under attack is the claim that England's unwritten constitution as a whole, including its basic doctrines such as parliamentary sovereignty, is a matter of common law. Following his attempt to show that 'common law constitutionalism' has weaker historical credentials than often is assumed, the author engages in a criticism of this theory on philosophical grounds. More particularly, the author argues that from a jurisprudential point of view, England's unwritten constitutional norms are not best analysed as a matter of common law. Following a short analysis of the

presently competing conceptions of the nature of the common law, the author concludes that England's unwritten constitutional norms, including the doctrine of parliamentary sovereignty, can hardly be viewed as fitting into any of these conceptions. Therefore, instead of regarding them as a product and a part of the common law, Goldsworthy suggests that the basic norms of the unwritten constitution should be regarded as '*sui generis*, a unique hybrid of law and political fact deriving [their] authority from acceptance by the people and by the principal institutions of the state, especially Parliament and the judiciary' [55-56].

It is on those grounds that Goldsworthy introduces a reader to the so-called 'consensual change theory', adapted from H.L.A. Hart's theory of law. According to this theory, parliamentary sovereignty is best understood as a product of 'consensus among senior legal officials of all branches of government' [115]. Goldsworthy, thus, suggests that the present doctrine of parliamentary sovereignty can be modified only if the consensus that forms it changes, and that it ought not to be modified without the support of a broader consensus with the electorate [7]. In other words, by perceiving the doctrine of parliamentary sovereignty as a part of the customary rule of recognition formed by legal officials' long-standing consensual practices, the author finds that only a peaceful and consensual change of this rule can be regarded as lawful. Consequently, any unilateral changes of this fundamental rule of recognition, by either the judges or parliament alone, are neither plausible, nor allowed [115].

It is worth noting that, according to Goldsworthy, the suggested theory represent both the most suitable theoretical explanation of the doctrine of parliamentary sovereignty, as well as the best insurance for maintaining 'checks and balances in the process of constitutional change' [116]. The author, therefore, concludes that not only jurisprudential reasons compel us to endorse it, but also the reasons of political morality, particularly, the reasons of democratic principle. All in all, given that it forms the axis of the author's understanding of parliamentary sovereignty, it is not surprising that the 'consensual change theory' is strongly advocated and relied upon throughout the entire book, and especially in the chapters dealing with the question of permissible limitations of parliament's authority.

It is precisely in relation to the question of permissible legislative self-restraint that the author develops and presents another noteworthy theory. Namely, following an examination of different kinds of statutory requirements, as well as conditions of their validity and enforceability, the author proposes a novel theory on permissible kinds of mandatory requirements that purport to regulate the passage and the form of legislation. According to this theory, procedural and formal statutory requirements that neither diminish parliament's continuing and substantive legislative power, nor control or restrict the substantive content of legislation,

should be regarded as consistent with the sovereignty of parliament [174]. Provided that they satisfy the mentioned conditions, these mandatory requirements would not need the support of any 'higher' or 'superior' law in order to be valid, binding and judicially enforceable [200].

Goldsworthy admits that the suggested theory and its implications are inconsistent with Dicey's conception of parliamentary sovereignty and the doctrine of implied repeal. However, he maintains that parliament should be permitted to bind itself with the identified kinds of requirements as to procedure and form, even if this would require a minor change in the customary rule of recognition that underpins Britain's unwritten constitution. By advocating this theory the author, thus, openly calls for a revision of Dicey's conception of sovereignty, as well as a repudiation of the doctrine of implied repeal. However, he does not do so without providing compelling reasons in his support. Namely, it is argued that the adoption of the suggested theory of 'manner and form' requirements would not only preserve parliament's substantive law-making ability, but would also enhance its ability to control its deliberative and decision-making processes [181]. In other words, while respecting the principle of majoritarian democracy, this theory would in fact provide a way of enhancing parliament's sovereign powers.

The final topic that I would like to address here concerns the question of adequate statutory interpretation in view of the requirements imposed by the doctrine of parliamentary sovereignty. Starting with the acknowledgement of the fact that statutory interpretation often consists of a partly creative exercise, Goldsworthy, finds, nonetheless, that there are limits to the kinds of creativity that can be regarded as genuinely interpretative rather than legislative. In his opinion, the kind of judicial creativity that infringes the principle of legislative supremacy crosses that conceptual boundary [231] and, consequently, goes beyond the fundamental object of statutory interpretation, which is to ascertain the legislative intention standing behind a specific statute [264].

More specifically, while strongly rejecting a 'wooden literal approach' [232] as 'a narrow, formalistic and obstructive approach to interpretation' [237], the author nevertheless maintains that parliamentary sovereignty imposes certain boundaries on statutory interpretation. This, according to the author, derives from the fact that the sovereignty of parliament implies not only that parliament retains the ultimate law-making power, but also that every statute enacted by parliament is legally valid and binding. The courts should, thus, interpret every statute 'in a way that is consistent with parliament's legal authority to enact it, and their corresponding obligation to obey it' [225].

In other words, the author maintains that statutory interpretation ought to be free from any methods that would in reality result in 'a co-authorship of the statute' [259] by judicial interpreters. The intentionalist approach is, according to

Goldsworthy, the best way to achieve this. While it goes well beyond the confines of literalism, by allowing the usage of extra-textual evidence for the purpose of ascertaining the legislative intention, the author claims that this approach does not go so far as to frustrate or usurp parliaments' law-making authority. For these reasons, Goldsworthy sees it as the form of statutory interpretation that is the most compatible with the doctrine of parliamentary sovereignty. While one may or may not share the author's views on this issue, as well as his more general opinions about the role of the judiciary, it should be acknowledged that Goldsworthy's discussion of this topic is both well covered, interestingly presented and rich with arguments in favour of his own theory and against the alternative, competing theories of statutory interpretation.

All in all, both the author's conclusions on statutory interpretation, as well as his theories described above are all relied upon and further elaborated in the book's final chapter, devoted to a defence of the doctrine of parliamentary sovereignty against some recent criticism. In refuting this criticism, Goldsworthy puts a particular emphasis on the analysis of some of the contemporary constitutional developments, often perceived as a challenge to the sovereignty of parliament. In that regard, he examines in particular the expansion of judicial review of administrative action, the operation of the UK *European Communities Act* 1972 and *the Human Rights Act* 1998, as well as the growing recognition of 'constitutional principles' and 'constitutional statutes'. In short, the author concludes that none of the analysed developments should be regarded as incompatible with the doctrine of parliamentary sovereignty.

However, while maintaining that the doctrine has, so far, successfully resisted past and present challenges and criticism, Goldsworthy identifies the most serious potential threat likely to confront parliamentary sovereignty in the near future. This threat lies in 'further development of the tendency to describe important common law principles, and now statutes, as having "constitutional" status that entitles them to special judicial protection' [314]. According to the author, the seriousness of this threat derives from the fact that the ultimate aim of the identified 'campaign' is to arm the judiciary to protect such 'constitutional' principles and statutes from legislative interference [315]. Yet, drawing on the above-mentioned 'consensual change theory', the author concludes that any major constitutional change in that regard may come only as a consequence of a change in a consensus among senior legal officials of all branches of government. Accordingly, any such change is both hard to predict, as well as difficult to achieve.

On the whole, the author's thorough research and his critical analysis of the mentioned topics is what makes *Parliamentary Sovereignty* an instructive, thought-provoking and interesting read. However, despite these undisputable qualities, the book gives rise to certain observations of potential interest to a future reader, as well as some critical remarks.

As far as the former are concerned, there are two things worth noting. As previously mentioned, this book represents a collection of essays, some of which were previously published and only lightly revised for the purpose of this publication. In approaching the book's final chapters, one cannot help but notice a certain amount of repetition in some of the essays, especially when it comes to Goldsworthy's elaboration of some of his main claims described above. However, this minor problem will likely be perceivable only to those readers who will attempt to consume *Parliamentary Sovereignty* as an integral piece of work. Those choosing to read only some of the book's chapters might actually regard this kind of repetition as welcome and desirable.

On the other hand, at certain points in the book, there seems to be a lack of clarity due to insufficient elaboration of some of the discussed issues. This is especially the case in the essays that represent a continuation of long-ongoing debates between Goldsworthy and other academics, given that they sometimes include only a very brief explanation of important theoretical arguments invoked in the course of these debates. Therefore, in order to fully grasp and objectively assess some of the author's responses to his 'opponents', it might be necessary for a reader to consult both some of the author's, as well as his 'opponents' earlier works.

As far as more substantive points are concerned, criticism may be expressed in relation to the author's elaboration of the 'consensual change theory' and some of the unaccounted inconsistencies that seem to exist in this regard. As previously described, this theory may be understood as the core of the author's understanding of the doctrine of parliamentary sovereignty. In short, it argues that parliamentary sovereignty forms a part of the fundamental customary rule of recognition, which came into existence as a result of long-standing consensual practices of legal officials of all branches of government. Being a creature of consensus, the doctrine of parliamentary sovereignty can, according to this theory, be changed only if a consensus that constitutes it changes [115].

If there truly exists such a consensus regarding the doctrine of parliamentary sovereignty, then this presumably implies that there is a wide-reaching agreement among senior legal officials of all branches of government about the doctrine's defining features. However, such a general agreement and a common understanding do not seem to exist. Quite on the contrary, both legal academics, as well as legal officials seem to quite heavily disagree on how parliamentary sovereignty came into being, what its meaning is and how it affects the exercise of not only the legislative, but also the judicial function. Even though not explicitly acknowledged, this seems to be quite elaborately described in *Parliamentary Sovereignty*.

The most indicative example that seems to depict this inconsistency between theory and practice can be given in relation to the author's very claim that parliamentary 'sovereignty is not a gift of the common law understood in the modern

sense of judge-made law', but a product of long-standing consensual practices of legal officials of all branches of government [7]. If such a consensus existed, then legal officials would presumably know its content. More importantly, they would know and acknowledge the fact that it is their long-standing consensual practices, and not the judge-made common law, that define and will continue to define the meaning and implications of the doctrine of parliamentary sovereignty.

However, as demonstrated by the author himself, neither is the case. Contrary to the expected common knowledge and acknowledgement of these supposedly existent consensual practices, it seems that legal officials of all branches of government in fact profoundly disagree about not only the origins of the doctrine of parliamentary sovereignty, but also its meaning and possibilities of revising and altering it in the future. More particularly, while some strongly reject [97], others accept 'common law constitutionalism' as the accurate account of the doctrine of parliamentary sovereignty.[3]

It should be noted that these kinds of disagreements are noticeable not only in relation to the questions of whether parliamentary sovereignty is or should be a matter of judge-made common law. They are identifiable throughout the book and in relation to all of the major topics discussed by the author. In that regard, both the author's historical surveys, as well as his jurisprudential analysis, seem to demonstrate that no general consensus exists in relation to any major features and implications of the doctrine of parliamentary sovereignty.

In other words, instead of reassuring the reader that parliamentary sovereignty rests on a wide-reaching agreement, Goldsworthy's analysis seems to unintentionally prove that this doctrine is in fact underlined by wide-reaching disagreements. The lack of any description of the exact terms of the supposedly existent long-standing consensus among legal officials seems to additionally confirm this conclusion. On the whole, while the 'consensual change theory' may indeed appear as the best one from the point of view of the principle of democratic governance, it does not seem to provide an entirely plausible jurisprudential explanation of past and present constitutional practices.

[3] In that regard, the author acknowledges that today, 'common law constitutionalism' has become so popular that even the British government has endorsed it (*see Parliamentary Sovereignty*, p. 14). Furthermore, he provides examples showing that not only legal academic and government officials, but also a number of judges endorse this theory (*see* p. 2). Some of the cited judicial decisions, such as *Jackson* v. *Her Majesty's Attorney General* [2005] UKHL 56 and *Thorburn* v. *Sunderland City Council* [2003] QB 151, are particularly indicative in that regard. In addition to this contemporary evidence of divergent views as to the origins, meaning and possibilities of expounding the doctrine of parliamentary sovereignty, Goldsworthy's historical analysis also seems to prove that these fundamental issues surrounding the doctrine have for centuries been a subject of debates among legal academics, practitioners and officials (*see* p. 18-47).

It should be noted that this objection is to a large extent inspired by one of R. Dworkin's well-known objections to H.L.A. Hart's theory of law. More particularly, it is similar to Dworkin's identification of the existence of the so-called 'theoretical disagreements' in law,[4] which turned out to be one of the most severe criticisms not only of Hart, but also the entire positivist account of law.[5] Given Goldsworthy's extensive reliance on Hart's theory of law, as well as his quite elaborate description of Dworkin's work, it is somewhat surprising that the author has failed to acknowledge the possibility of making a similar kind of objection in relation to his own 'consensual change theory'. More importantly, it is surprising that *Parliamentary Sovereignty* seems to provide no evidence or arguments capable of refuting this kind of criticism. In the absence of such evidence or arguments, it seems difficult to wholeheartedly endorse the 'consensual change theory' as an acceptable and accurate explanation of the doctrine of parliamentary sovereignty.

[4] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), p. 5.

[5] For a more detailed discussion of the 'Hart-Dworkin' debate and the problem of existence of 'theoretical disagreements' in law, *see* S.J. Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' (February 2, 2007) U of Michigan Public Law Working Paper No. 77, <http://ssrn.com/abstract=968657>.