

PARLIAMENTARY SOVEREIGNTY: NEW ZEALAND - NEW MILLENNIUM

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The author examines contemporary debates in New Zealand and Australia over the power of the Courts to disregard Statutes and concludes that such a power, if it exists, ought to be exercised cautiously.

I INTRODUCTION

The early seventeenth century English Court of Common Pleas provides a good starting point for a discussion of parliamentary sovereignty in early twenty-first century New Zealand, as Chief Justice Sir Edward Coke stated:¹

... it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Acts to be void ...

This famous passage, which seems to clearly state that the courts may overturn an Act of Parliament, has from 1610 to 2001 variously been followed, distinguished, exported, discussed, and ignored, but never expressly overruled.² Its sentiments have also been revived in the late twentieth century, most notably in New Zealand by Lord Cooke of Thorndon, as a Court of Appeal judge and later President of the Court. The question of whether courts would ever use the power that Chief Justice Coke asserted in 1610, and Lord Cooke hinted at in 1984, remains of interest, involving the fundamental constitutional

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1 *Dr Bonham's Case* (1610) 8 Co Rep 107; 77 ER 638, 652 (CP).

2 It has, however, only ever been cited in one (unreported) New Zealand case, *Carter v Police* (19 April 1999) High Court, Wellington CP 41/99, Gallen J, where the plaintiff was seeking a declaration as to whether the Parliament of New Zealand existed, and *Dr Bonham's Case* was not relevant to the issue before the court.

issues concerning the proper role of the courts and their relationship with the other branches of government.

This paper will examine the decision in *Dr Bonham's Case* and its treatment by later courts and academics. It will then discuss Lord Cooke's article on "Fundamentals" and the criticism and support that have followed, especially Goldsworthy's recent book defending parliamentary sovereignty and Justice Thomas's views on the other side of the debate. It will conclude, after an examination of the current New Zealand constitutional landscape and the political role of judges, by discussing whether, in New Zealand in 2001, there is any legitimate basis for a court to challenge the sovereignty of Parliament. Or in other words, in this new millennium, would a New Zealand court ever be justified in reviewing the validity of legislation? The answer will be yes; not as a revolution, but rather by the gradual development of the common law and changing constitutional times.

II DR BONHAM'S CASE AND ITS SUBSEQUENT HISTORY

A *Dr Bonham's Case*

Thomas Bonham was a doctor of physic and graduate of Cambridge University who practised medicine in London in the early seventeenth century. Dr Bonham was fined and later imprisoned by the Royal College of Physicians for practising medicine without the necessary licence from the College. Dr Bonham brought an action against the College for false imprisonment. Chief Justice Sir Edward Coke pointed out that under the empowering statute, the College received half of all fines levied by them.³ Thus, they were not only judges but also parties in any case that came before them, and it was an established maxim of the common law that no man can be a judge in his own case. He concluded therefore that:⁴

... when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Acts to be void.

B *The Subsequent History of Dr Bonham's Case*

1 1610 - 1688

Chief Justice Coke's assertion was not confined to *Dr Bonham's Case*. He reiterated his views soon after in *Rowles v Mason*, stating that "... if there be repugnancy in a statute ... the common law disallows and rejects it".⁵ And in *The Case of Proclamations* he said that:⁶

³ 14 & 15 Hen VIII, c 5.

⁴ *Dr Bonham's Case*, above.

⁵ *Rowles v Mason* (1612) 2 Brown 192, 198; 123 ER 892, 895 (CP).

... an Act of Parliament was made, that all the Irish people should depart the realm ... upon pain of death, which was absolutely *in terrorem*, and was utterly against the law.

Sir Henry Hobart, Chief Justice Coke's successor in the Common Pleas, upheld Coke's view of the common law in both *Day v Savadge*⁷ and *Sheffield v Radcliffe*,⁸ but did not refer to him, as he had by then fallen from Royal favour, having been removed from the Common Pleas to the King's Bench in 1613. The Chancellor, Lord Ellesmere, also criticised Coke's *Reports*, and especially *Dr Bonham's Case*, saying that it:⁹

derogateth much from the wisdom and power of the parliament, that when the three estates - the King, the Lords and the Commons - have spent their labours in making a law, then shall three judges on the bench destroy and frustrate all their points because the act agreeth not in their particular sense with common right or reason, whereby [Coke] advanceth the reason of a particular court above the judgment of all the realm ... For it is *Magis Congruum* that acts of parliament should be corrected by the same pen that drew them, rather than to be dashed in pieces by the opinion of a few judges.

Notwithstanding this criticism, he did not deny the existence of such power. Instead, as an opponent of the common law Courts, he advocated its exercise only by the Court of Chancery.¹⁰

Chief Justice Coke was later suspended from office and ordered to "correct" his *Reports*. However, he did not, even after the King demanded an explanation of the dictum in *Dr Bonham's Case*. This defiance was one of the major factors leading to his removal from the bench.

2 *The Glorious Revolution - 1688*

It is generally recognised that the revolution of 1688 marked the end of the doctrine of *Dr Bonham's Case*. Chief Justice Coke had bravely tried to use the common law to curb the King's growing arrogance, telling King James that the King himself was under God and the law.¹¹ But public opinion, expressed through Parliament,¹² was seen as a better safeguard

6 *The Case of Proclamations* (1611) 12 Co Rep 74 (CP).

7 *Day v Savadge* (1614) Hobart 85, 87; 80 ER 235, 237 (CP).

8 *Sheffield v Radcliffe* (1615) Hobart 334, 336 (CP).

9 Louis A Knafla *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, New York, 1977) 306-307.

10 *Earl of Oxford's Case* [1615] 1 Chan Rep 1, 12; 21 ER 485, 488 (Ch).

11 *Prohibitions del Roy* (1607) 12 Co Rep 63; 65 ER 1342, 1343 (CP).

than the operation of the common law, especially given some unpopular judicial decisions in the King's favour,¹³ and the constitutional settlement established the supremacy of Parliament over the King, that is, Legislature over Executive. However Edwards notes that:¹⁴

The revolution of 1688 did not assert the supremacy of Parliament. Contrary to popular belief the Bill of Rights Act 1688 fails to mention it. It is to the decisions of the courts that we must turn in order to discover the legislative limits of Parliament.

3 1688 - 1979

There were traces of Chief Justice Coke's influence after 1688. In *City of London v Wood*, Chief Justice Holt said:¹⁵

... what my Lord Coke said in *Dr Bonham's Case* is far from any extravagancy, for it is a very reasonable and true saying that if an Act of Parliament should ordain that the same person should be party and judge ... it would be a void Act of Parliament.

Yet in the same judgment he also says that the validity of an Act cannot be questioned. Lord Campbell in 1861 also indirectly supported the doctrine in *Green v Mortimer*¹⁶ when he invalidated a private Act of Parliament, and as with *Dr Bonham's Case*, the decision has been explained away as following the rules of statutory interpretation.¹⁷

Blackstone, in some ways, can be described as burying *Dr Bonham's Case*. He said, after conceding that he knew it was "generally laid down that acts of parliament contrary to reason are void", that "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power ... to control it".¹⁸ And when Dicey's theory of parliamentary omnipotence took hold in the nineteenth century, and never let go until relatively recently, this stranglehold left no room for Chief Justice Coke's doctrine at all.

12 Although it can be noted that Parliament represented only a very narrow section of the public at this time.

13 See, for example, *R v Hampden (The Case of Ship-Money)* (1637) 3 St Tr 825 (CP), and *Godden v Hales* (1686) 11 St Tr 1165 (CP).

14 R A Edwards "Dr Bonham's Case: The Ghost in the Constitutional Machine" [1996] Denning LJ 63, 69.

15 *City of London v Wood* (1701) 12 Mod 669, 687 (CP).

16 *Green v Mortimer* (1861) 3 LT 642 (CP).

17 P Wallington "Sovereignty Regained" (1974) 37 MLR 686.

18 Blackstone *Commentaries on the Laws of England* (9th ed (1783) reprint, Garland Publishing Inc, London, 1978) Vol I, 91.

Dicey said English law denied the existence of "any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional".¹⁹ Dicey's theory made reference to the work of Blackstone, but unsurprisingly, never to *Dr Bonham's Case*. At this time judicial disapproval of *Dr Bonham's Case* also became more emphatic. In *Lee v Bude & Torrington Railway Co*, Willes J said:²⁰

It was once said, - I think in Hobart - that, if an Act of Parliament were to create a man judge in his own case, the courts might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it.

In 1974, Lord Reid described the doctrine as "obsolete".²¹

4 *The Export of Dr Bonham to the United States*

Dr Bonham's Case had a different career in America. In 1647, the General Court of Massachusetts had ordered two copies of Coke's *Reports*, and by the end of the seventeenth century there was, in *Giddings v Browne*, "... the first clear example of an act of legislature being invalidated by the judiciary in America".²² Other examples followed,²³ culminating in the seminal case of *Marbury v Madison* in 1803.²⁴ Plucknett concludes that written constitutions "rendered Coke's doctrine unnecessary",²⁵ but Edwards asserts that:²⁶

Although the American constitution did not expressly provide for judicial review of legislation, the Supreme Court appropriated the power, which it has retained ever since ...

19 A V Dicey *An Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan and Co Ltd, London, 1960) 91.

20 *Lee v Bude & Torrington Railway Co* (1871) LR 6 CP 576, 582 (CP) Willes J.

21 *British Railways Board v Pickin* [1974] AC 765, 768 (HL) Lord Reid.

22 T F T Plucknett "Dr Bonham's Case and Judicial Review" (1926) Harv L Rev 30, 62, citing *Giddings v Browne* 2 Hutchinson Papers (Prince Soc) 1-15.

23 For example, *Robin v Hardaway* (1772) Jeff 109 (CP), discussed in Plucknett, above, 62-68.

24 *Marbury v Madison* (1803) 5 US (1 Cranch) 137.

25 Plucknett, above, 68.

26 R A Edwards "*Dr Bonham's Case: The Ghost in the Constitutional Machine*" [1996] Denning L J 63, 86.

[U]nder *Marbury v Madison*, as in *Dr Bonham's Case*, the common law is, in fact, controlling acts of the legislature.

The Glorious Revolution may have made Parliament sovereign in England in 1688, but in the American colonies Plucknett concluded that:²⁷

... the Revolution meant something different. Parliament was not their hero but a distant and unsympathetic body in whose deliberations they had no part. When it aroused their resentment, therefore, it was natural to remember the teachings of the great Chief Justice ...

It can also be noted that John Marshall, who as Chief Justice decided *Marbury v Madison*, was at age seventeen given a copy of Blackstone's Commentaries by his father. However, Boyer says "for some reason the boy did not take to it", suggesting that he may have been more interested in ideas such as those put forward in *Robin v Hardaway*,²⁸ which was reported by his cousin Thomas Jefferson and cited both *Dr Bonham's Case* and *Day v Savadge*.²⁹

A glance through the legal databases reveals a large number of articles from the United States referring to *Dr Bonham's Case*, and rather fewer from England and Commonwealth countries. Chief Justice Coke appears to have had a greater influence in the United States than in his native England. United States academics such as Plucknett and Boyer perceive the limits of parliamentary sovereignty differently from those brought up in the Diceyan tradition of the supremacy of Parliament. This must in part be due to these historical reasons, and perhaps also because in a federal system the limits on legislatures are more clearly defined.

C What Did Chief Justice Coke Really Mean?

In *Dr Bonham's Case*, Chief Justice Coke cited various cases to support his conclusion that the common law could control Acts of Parliament.³⁰ In a very detailed analysis of these precedents, Plucknett showed that the "books" were either misquoted or misunderstood.³¹ For example, it was only what Chief Justice Coke added to the text of *Tregor's Case* that suggested the common law might override a statute.³² And in citing

²⁷ Plucknett, above, 69.

²⁸ *Robin v Hardaway* (1772) Jeff 109 (CP).

²⁹ Allen D Boyer "Understanding, Authority and Will - Sir Edward Coke and the Elizabethan Origins of Judicial Review" (1997) 37 Boston College L Rev 43, 90.

³⁰ *Dr Bonham's Case* (1610) 8 Co Rep 107; 77 ER 638, 652 (CP) Coke CJ.

³¹ T F T Plucknett "Dr Bonham's Case and Judicial Review" (1926) 40 Harv L Rev 30.

³² *Tregor's Case* (1335) YB 8 Edw III, Pasch 26.

from the one precedent that really did support him, Plucknett concludes that Chief Justice Coke "... added an explanation and a theory all his own".³³ In that case, effect was not given to a statute, but it was just ignored rather than judged to be void. And as Boyer describes it, Chief Justice Coke's dictum seems far less dramatic:³⁴

Significantly, of Coke's four brethren on the Common Pleas bench, only one was persuaded by his reasoning. Two dissented, and it seems that Justice Warburton gave Coke his 3-2 majority only because he concurred in the outcome.

From a close historical and political analysis of the circumstances surrounding the case, Harold Cook has argued that Chief Justice Coke probably did not mean a general statement that common law courts could overturn Acts of Parliament, but that he meant to overturn a royal charter when it seemed unjust.³⁵ Or as Cook puts it, "In other words, the College itself was without authority to punish unlicensed medical practitioners despite the Parliamentary Acts granted to it".³⁶

Thorne has asserted that Chief Justice Coke 's decision is "derived from the common law rules of statutory interpretation",³⁷ but acknowledged that although judges had wide powers of statutory interpretation, "... Coke's disregard of the express words of an Act probably went beyond them".³⁸ Boyer concludes, "[i]t cannot be denied in the end, that Coke acted in the belief that courts could strike down statutes which offended the common law - that is, which the judges in their wisdom found unreasonable".³⁹ Recently, one commentator, in rejecting the possibility of Chief Justice Coke merely applying a rule of statutory interpretation, bluntly put it this way:⁴⁰

Why did they not say in those very words 'a statute contrary to natural equity and reason, or repugnant, or impossible to be performed is to be given a *reasonable construction*?' Is it likely that royal judges, confronting a case involving a statute that had necessarily passed both

33 Plucknett, above, 35-36, citing *The Anonymous Case, Cessavit*, 42.

34 Allen D Boyer "Understanding, Authority and Will - Sir Edward Coke and the Elizabethan Origins of Judicial Review" (1997) 39 Boston College L Rev 43, 84.

35 Although it was authorised by statute.

36 Harold J Cook "Against Common Right and Reason: The College of Physicians Versus Dr Thomas Bonham" (1985) 29 Am J Legal Hist 301, 302.

37 S E Thorne "Dr Bonham's Case" [1938] LQR 543.

38 Thorne, above, 551.

39 Allen D Boyer "Understanding, Authority and Will - Sir Edward Coke and the Elizabethan Origins of Judicial Review" (1997) 39 Boston College L Rev 43, 85.

40 John V Orth "Did Sir Edward Coke Mean What He Said?" (1999) 16 Const Comment 33.

houses of parliament and received the royal assent, would lightly use the word 'void'? In particular, how likely was it when the source, the *fons et origo*, of the idea in question was none other than Sir Edward Coke, the oracle - if ever there was one - of the common law?

These studies of *Dr Bonham's Case* have suggested differing explanations of Chief Justice Coke's famous statement that the common law could overturn an Act of Parliament. It would seem that the Chief Justice used the tools of his trade, precedents, but with the knowledge that he was breaking new ground in the assertion of this power. His own words summed up his approach when he wrote, "Let us now peruse our ancient authors ... for out of the old fields must come the new corne".⁴¹

III LORD COOKE'S FUNDAMENTALS

A *The Obiter Dicta*

By 1979, *Dr Bonham's Case* might reasonably have been regarded as some sort of skeleton in the constitutional closet. However, in what was described as "a quiet revolution which has been occurring on the benches of the Court of Appeal",⁴² Cooke J (as he was then), while never directly referring to *Dr Bonham's Case*, began publicly questioning the supremacy of Parliament. In a dissenting judgment on the issue of whether the Accident Compensation Corporation enjoyed exclusive jurisdiction to determine whether a person had suffered injury by accident, he said:⁴³

It would be a strong and strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred. There is even room to doubt whether it is self-evident that Parliament could constitutionally do so.

Eighteen months later in *Brader v Ministry of Transport* where the validity of the car-less day regulations made under the Economic Stabilisation Act 1948 was questioned, Cooke J noted:⁴⁴

It may be added that the recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function. It is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive.

41 Sir Edward Coke *The Fourth Part of the Institutes of the Laws of England* (1628 ed, reprint, Garland Publishing Inc, London, 1979) 109.

42 John L Caldwell "Judicial Sovereignty-A New View" [1984] NZLJ 357.

43 *L v M* [1979] 2 NZLR 519, 527 (CA) Cooke J.

44 *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA) Cooke J.

The following year, in a majority decision concerning the validity of wage freeze regulations, which prohibited the Arbitration Court from determining disputes of interest, the Court declared:⁴⁵

Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

Cooke J went further in *Fraser v State Services Commission* where the issue was whether an officeholder had a right to a hearing before being suspended. Noting the "fundamental" rule that an officeholder be told what is alleged against him or her and given an opportunity to explain, he said:⁴⁶

This is perhaps a reminder that it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.

Finally in 1984, where the case concerned the ability of the Poultry Board Act 1980 to authorise regulations taking away the common law right to silence, Cooke J, in the strongest terms yet said:⁴⁷

I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

It is perhaps not surprising that *Dr Bonham's Case* is never mentioned, given the ascendancy of "Dicey's Dubious Dogma"⁴⁸ in the New Zealand setting. In Lord Cooke's later article, "Fundamentals",⁴⁹ where his thoughts on parliamentary supremacy are explained more fully, he "finds it necessary to get Dicey out of the way"⁵⁰ and does so with great bluntness and speed, recognising Dicey's "immense historical weight [as] still continuing among those who prefer not to be troubled by much thinking about the subject".⁵¹ Lord Cooke would not "burke the idea of natural law", asking:⁵²

45 *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 (CA) Cooke J.

46 *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (CA) Cooke J.

47 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA) Cooke J.

48 G De Q Walker "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276.

49 Sir Robin Cooke "Fundamentals" [1988] NZLJ 158.

50 Cooke, above, 160.

51 Cooke, above, 161.

52 Cooke, above, 164.

... can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature?

He is there referring to a 1976 House of Lords decision where the majority had described a Nazi decree against Jews as "so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all".⁵³ However, one wonders what the result would have been if the law in question had been an English law. Indeed, one Law Lord in this case and two judges in the Court of Appeal below had felt compelled to recognise the decree.⁵⁴ This division reflects the 1950's jurisprudential debate between Professors Hart and Fuller concerning the grudge informer cases, where people living under Nazi jurisdiction used oppressive laws to settle personal grudges. Hart, the positivist, held that such laws, since they were created in accordance with the operative rule of recognition, were valid, notwithstanding their oppressive or immoral content. Therefore, courts could not punish someone for actions which were permitted by the laws in place. Yet he also thought that to not punish was to condone evil, and so was evil in itself, since there is a moral duty to disobey such laws. In contrast, Fuller argued that post-Nazi judges, in deciding how to punish grudge informers, were obliged to consider the validity of Nazi laws, and this involved considering the morality of the laws in question.⁵⁵ Lord Cooke's sentiments could be said to accord with the one thing that Hart and Fuller did agree on in their debate, beside the fact that the informers should be punished. That is, in some circumstances, even when there is an applicable positive law, people must look outside this law when deciding what to do.⁵⁶

B Heresy? - Honourable Michael Kirby's Criticism

Of course Lord Cooke's *dicta*, described as "some of the most breath-taking ... ever propounded by a New Zealand judge"⁵⁷ have been criticised and most vigorously by the Hon Michael Kirby, a judge of the High Court of Australia. In the *BLF* case, he endorsed Lord Reid's rejection of the *Bonham* doctrine in *Pickin*,⁵⁸ stating that:⁵⁹

53 *Oppenheimer v Cattermole* [1976] AC 249, 278 (HL).

54 *Oppenheimer*, above, 265.

55 H L A Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593; Lon L Fuller "Positivism and Fidelity to Law - A Reply to Professor Hart" (1958) 71 Harv L Rev 630.

56 Richard A Primus "A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought" (1996) 106 Yale LJ 423, 434.

57 John L Caldwell "Judicial Sovereignty - A New View" [1984] NZLJ 357.

58 *British Railways Board v Pickin* [1974] AC 765, 768 (HL) Lord Reid.

... if the legislation is clear, and though the judge considers it to be unjust or even oppressive, it is not for him to substitute his own opinion for that of the elected representatives assembled in Parliament.

In *BLF*, a union had challenged the validity of special legislation which was apparently designed to put beyond challenge the action taken to deregister the union under another Act, and also to terminate the right of parties to costs in pending appellate proceedings. The Court unanimously declared the Act to be valid, although not without reservations. Chief Justice Street noted that although it was open to Parliament to cancel the Federation's registration by an express statute, the method chosen was through barely legitimate legislative interference with the judicial process of the Court by directing the outcome of particular legislation.⁶⁰

Writing extra-judicially, Justice Kirby was unrepentant in his Diceyan positivism, believing that "[j]udges do not have to appeal to natural law notions, as such, to put checks upon Parliament".⁶¹ Instead by the process of statutory interpretation, offending legislation can be read down, in some cases reference can be had to international human rights norms, and in Australia, to implications from the constitution. In his view:⁶²

... the principle of judicial respect for Parliament is to be taken as one that lies so deep that Courts will just accept it so long as Parliament has acted as a Parliament and within power ... it is good that Lord Cooke has sparked this debate but heresy is heresy. And it may be dangerous heresy besides.

But looking at Lord Cooke's *dicta* in context, it is difficult to see the heresy that Kirby complains of. The language is cautious and guarded, and the context is a time in New Zealand when Parliament was, in reality, being run by the Executive. The Bill of Rights 1688, which established the Parliament's power over the King, did not provide for Parliament to then relinquish it again to the King or Queen (through his or her Ministers). Lord Cooke's *dicta* provided support for the implementation of the New Zealand Bill of Rights Act in 1990, and perhaps that was their function. Rishworth notes "... there is nothing in the *dicta* ... to suggest that Lord Cooke would have withdrawn judicial

59 *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 406 (NSWSC) Kirby P.

60 *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 379 (NSWSC) Street CJ.

61 Hon Michael Kirby "Lord Cooke and Fundamental Rights" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 331.

62 Kirby, above, 353.

enforcement of legislation lightly ... it is reserved for the unexpected case, the grossly unjust law".⁶³

Indeed, the House of Lords was far more revolutionary in 1969 when in the *Anisminic* case the clear words of the statute that the findings of the Commission "shall not be called into question in any court of law"⁶⁴ were simply disobeyed.⁶⁵ Lord Reid would have "expected to find something more specific than the bald statement that a determination shall not be called into question in any court of law".⁶⁶ It must be asked how the statute could have been more specific. It is difficult to accept that their Lordships 'interpreted' or 'read down' the legislation as Justice Kirby would doubtless assert. In any case, they must come a point where 'reading down' legislation is no different to disapplication. In the same way as Chief Justice Coke in 1610 held that a man could not be a judge in his own cause, the House of Lords in *Anisminic* asserted that the power of judicial review of executive action, and thus the fundamental constitutional rule of separation of powers, could not be abolished, even by statute.

Justice Kirby misses the point by believing that the questioning of parliamentary sovereignty equates to a desire to shift political power to an unelected judiciary. It seems more apparent that Lord Cooke is only arguing for a balance between the courts and the legislature. He sees the common law as "built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts".⁶⁷

This is not a threat to Parliament from the courts. It is not an assertion of the right to govern in Parliament's stead, but rather an acknowledgement of the law-making partnership of these two branches of government. In any event, Justice Kirby's deference to Parliament is qualified by requiring Parliament to be acting "within power".⁶⁸ But if Parliament has unlimited power, then it must always be acting within power and this qualification makes no sense, unless he is merely referring to the limits of State legislatures in a federal system.

63 Paul Rishworth "Lord Cooke and the Bill of Rights" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 302.

64 Foreign Compensation Act 1950, s 4(4) (UK).

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

66 *Anisminic*, above.

67 Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164.

68 Hon Michael Kirby "Lord Cooke and Fundamental Rights" in P Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 331, 353.

IV CONSTITUTIONAL CHANGE IN NEW ZEALAND: 1984 - 2001

The constitutional times have changed since Lord Cooke's *dicta* were uttered, necessitating a fresh look at the doctrine of parliamentary sovereignty. Justice Thomas has identified four major themes. These are the recognition of fundamental human rights, the Treaty of Waitangi, the changed electoral system, and the ongoing development of judicial review.⁶⁹

A *New Zealand Bill of Rights Act 1990*

New Zealand now has the New Zealand Bill of Rights Act 1990 (BORA) which guarantees a range of human rights. It does not have superior law status and thus maintains the 'supremacy' of Parliament,⁷⁰ although in a review of its first decade of operation, one commentator has suggested that the courts actually treat it as an entrenched superior Bill of Rights.⁷¹ Whether or not this is so, at the least it has had the effect of providing "a set of navigation lights for the whole process of government to observe".⁷² Although BORA merely affirms the rights listed within it, the courts have used it as the basis for legal remedies in the event of a breach, notwithstanding the removal of a remedies clause at the select committee stage of the Bill's passage.⁷³

More recently, the Court of Appeal has stated that they have the power and sometimes the duty to indicate that a statutory provision is inconsistent with the rights affirmed in BORA.⁷⁴ This is a new role the Court has created for itself, in contrast to the later Human Rights Act 1999 (UK), which explicitly sets out this role of judicial comment on the substance of legislation.⁷⁵ Although these judicial indications of inconsistency do not directly challenge legislation, in a sense they will, because of the inevitable effect such a declaration would have on public opinion and thus political pressure to change the law to conform to the court's decision.⁷⁶ Andrew Butler wonders whether, after becoming

69 Justice E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 9-14.

70 The New Zealand Bill of Rights Act 1990, s 4.

71 J Allen "Turning Clark Kent into Superman: the New Zealand Bill of Rights Act 1990" (2000) 9 Otago L Rev 613.

72 *A Bill of Rights for New Zealand - A White Paper* [1985] AJHR A5.

73 *Simpson v Attorney-General (Baigent's Case)* 1 HRNZ 42 (CA).

74 *Moonen v Film and Literature Board of Review* (1999) 5 HRNZ 224 (CA).

75 Human Rights Act 1999 (UK), s 4(2).

76 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 16; Andrew Butler "Judicial Indications of Inconsistency - A New Weapon in the Bill of Rights Armoury" [2000] NZ L Rev 43, 59.

comfortable with such an advisory role as regards BORA, the courts might then expand this role into other areas, such as whether legislation complies with Treaty principles.⁷⁷ To extend this reasoning, eventually the court may not feel much discomfort invalidating legislation in what they consider to be an appropriate case. By that stage it might be just another small step in the expansion of such a power.

The Human Right Act Amendment Bill 2001 has recently been introduced to Parliament and provides that declarations of inconsistency are the sole remedy for legislation or regulations that are found to be unjustifiably discriminatory and therefore inconsistent with the BORA standard.⁷⁸ It also provides that the Minister must table that declaration in Parliament along with the Government's response. This has followed from the Ministry of Justice *Report on the Re-evaluation of Human Rights Protections in New Zealand*, in which the review team were not able to make a specific recommendation on the subject.⁷⁹ One member proposed that section 4 of BORA be amended to create a procedure by which courts could declare that a statute is incompatible, while leaving Parliament to decide what, if any, action to take.⁸⁰ Others however, felt it would be best for the time being to let the judicial process evolve, as it had the potential to "enhance constitutional values and the level of trust between Parliament and the judiciary", while also noting that, "lack of trust between Parliament, the electorate and the judiciary was one of the main reasons the original proposal to entrench the Bill of Rights was defeated".⁸¹

The Human Rights Act Amendment Bill would therefore seem to represent a halfway measure. A statutory power of declaration would seem to have more force than an 'indication', and combined with a procedure whereby Parliament would be required to respond to such a declaration, this would appear to be effectively a review of legislation by the courts, and provide a legal remedy for those whose rights were infringed by offending legislation. Looking at the proposed amendment in a different way, however, it might be said that Parliament, by expressly defining the court's role in this one area, would make it more difficult for the judiciary to expand the scope of such declarations over time into other areas. So although in the short term these declarations could be seen to be enhancing

77 Butler, above, 58-59.

78 The New Zealand Bill of Rights Act 1990 anti-discrimination standard is incorporated into the Human Rights Act 1993, as the sole anti-discrimination standard to be used for most Government activities.

79 Ministry of Justice *Re-Evaluation of Human Rights Protections in New Zealand* (Wellington, 2001) <http://www.justice.govt.nz/pubs/reports/2000/hr_reevaluation/part_2.html> (last accessed 3 August 2001).

80 *Re-Evaluation of Human Rights Protections in New Zealand*, above, para 52.

81 *Re-Evaluation of Human Rights Protections in New Zealand*, above, para 53.

already appropriated judicial power, on a long-term view, Parliament might well be fettering any further judicial developments.

B Treaty of Waitangi

The changed status of the Treaty of Waitangi in recent times as a now fundamental part of New Zealand's (unwritten) constitution may also place a limit on Parliament's ability to amend or revoke the rights contained in it. The status of the Treaty may mean that British ideas of Sovereignty are inappropriate to describe the New Zealand constitution. It is beyond the scope of this essay to examine the constitutional place of the Treaty, but if it is a "fundamental constitutional document",⁸² then it is questionable whether the rights conferred in it can be modified or revoked by Parliament. According to Justice Thomas, that question can only be answered by the courts if Parliament seeks to do so one day by legislative means.⁸³ And since Parliament, meanwhile, seems content to leave it to the common law to determine what these rights are, by inserting very broad provisions into legislation requiring recognition of the Treaty,⁸⁴ a future court may well be resistant to their abrogation by a future Parliament.

C Introduction of MMP

New Zealand has also seen major changes in the electoral system. The introduction of Mixed Member Proportional representation (MMP) in 1993 was seen as likely to slow down the passage of legislation by making negotiation and compromise between coalition partners necessary, and by making the system less friendly to executive power;⁸⁵ a reaction against previous administrations. Times may have changed, but sometimes not by very much, as Taggart describes the Education Amendment Act 1998. This was passed under budget urgency in less than two days without reference to Select Committee or to the Legislation Advisory Committee, and without a section 7 Bill of Rights report from the Attorney-General. Such steps were arguably required, as Part II of the amendment was completely unrelated to Part I (which concerned the budget matter of bulk funding for schools) and allowed polytechnics to amalgamate with universities. It also allowed the government to extricate itself from pending litigation, in which review was sought of the Minister of Education's decision to recommend the amalgamation of Wellington Polytechnic and Massey University. The amalgamation was arguably contrary to the

82 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, 184-185 (CA) Cooke P.

83 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 9.

84 See, for example, the Conservation Act 1987, s 4, and the Resource Management Act 1991, s 8.

85 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 11.

scheme of the Education Act 1989. In addition, since the amending Act effectively stopped the litigation in its tracks, it was a possible breach of section 27(3) of the Bill of Rights Act 1990, which provides that every person has the right to bring civil proceedings against the Crown and have them heard in the same way as proceedings between individuals.⁸⁶ This example shows that dubious legislation can still be rushed through Parliament bypassing such constitutional safeguards that exist.

Even though the legislature may not have totally changed, the different electoral system is another reason why British ideas of parliamentary sovereignty may not be as appropriate as they once were, if indeed they ever were appropriate, given the lack of an upper house to act as a check on a Parliament that has been called "the fastest law-maker in the west".⁸⁷

D The Expansion of Judicial Review

It is no coincidence that the judges who publicly challenge parliamentary sovereignty are active in the administrative law field. As such they are quite comfortable with the concept of reviewing executive action on the basis of, or as Justice Thomas refers, "under the guise of", giving effect to Parliament's will.⁸⁸ The *ultra vires* principle is necessary to accommodate the coexistence of judicial review and parliamentary sovereignty because it means all limits on statutory discretionary power derive from the intention of Parliament. Justice Thomas says however, that it is a "... convenient rationalisation. It cannot explain away all instances of judicial intervention, and, at times, certainly serves to allow the judiciary to conceal the real justification for developments in judicial review".⁸⁹ This recognises the fine line that exists between the review of a power granted pursuant to an Act, and review of the Act itself. As *Anisminic* and other cases show,⁹⁰ sometimes the courts are in fact acting contrary to Parliamentary intention.⁹¹ Judicial review can only be reconciled with parliamentary sovereignty if courts are enforcing limits on executive power that Parliament has intended. Otherwise the imposition of independent common law limits involves the courts declaring unlawful the very powers that Parliament has intended to confer. If the somewhat artificial *ultra vires* principle is discarded, as Justice

⁸⁶ Michael Taggart "Déjà vu All over Again" [1998] NZLR 234.

⁸⁷ Taggart, above, 234, quoting Sir Geoffrey Palmer.

⁸⁸ Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 13.

⁸⁹ Thomas, above, 13.

⁹⁰ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

⁹¹ See, for example, *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL).

Thomas would advocate, then judicial review becomes an independent principle of the common law and is separated from the carrying out of Parliament's will.⁹²

The Law Commission has recently published a study paper containing an argument by its president, Justice Baragwanath, that the Judicature Amendment Acts 1972 and 1977, which provide procedures parallel to those in the common law, should for the most part be repealed. The substantive law of judicial review would be left to the common law.⁹³ One of the main reasons for this recommendation is that the scope of the common law remedy has expanded greatly since these Acts were passed, contrary to the expectation that the statutory grounds for review would replace the common law. This has led to a range of overlapping options seen as "... at best, awkward and potentially confusing and therefore productive of injustice".⁹⁴ The paper argues that no attempt at codification should be made and judicial review should be left to judicial development.⁹⁵ This would give the courts the potential to greatly increase the scope of judicial review and could make it difficult for a future Parliament to limit the extent of the courts' supervisory role. However, the Law Commission clearly stated that the paper is published as a work of legal scholarship only, and does not represent a statement of the Commission's views, and so the recommendation may be unlikely to progress.⁹⁶

The judiciary sees its role in this area as the protection of individuals against the overwhelming power of the state, and so judicial activism increases at times of increased executive power given at the expense of the legislature. Or as Lord Woolf put it, "if one chain slackens, then another needs to take the strain".⁹⁷ If the judiciary perceived an overwhelming need for the protection of individual rights, or to procedural safeguards against egregious legislation, which are the province of judicial review now in the sphere of executive action, then an extension of judicial review might be the avenue chosen to declare an Act unconstitutional or invalid. *Dr Bonham's Case* itself could be seen as a review of the decision-making powers given to the Royal College of Physicians pursuant

92 Thomas, above, 13-14.

93 Law Commission *Mandatory Orders Against the Crown and Tidying Judicial Review* (NZLC SP10, Wellington, 2001).

94 Law Commission Study Paper, above, 18.

95 Law Commission Study Paper, above, 23.

96 However, in apparent contradiction, the new Legislative Advisory Committee *LAC Guidelines: Guidelines on Process and Content of Legislation* (Wellington, 2001) <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html> (last accessed 8 August 2001) 43-44 state that this is a Law Commission proposal.

97 Rt Hon Lord Woolf of Barnes "Judicial Review- The Tensions Between the Executive and the Judiciary" (1998) 114 LQR 579, 580.

to statute. Four out of the five cases in which Lord Cooke questioned Parliament's legislative power were applications for judicial review, as was the *Anisminic* case. This is the context in which it may be likely for courts to extend their supervisory jurisdiction from executive to legislative action.

E Justice Thomas's "Tentative Thoughts"- A Contemporary Constitution

The most recent judicial opinion expressed on the relationship between Parliament and the courts in New Zealand is that of now retired Court of Appeal judge Justice Edward W Thomas. Delivering the Victoria University Law Faculty Centennial Lecture in 1999, he said:⁹⁸

[t]he possibility that courts may review the validity of extreme legislation is part of the ongoing development of a dynamic constitution rather than a reassertion of the authority of cases long since gone and regularly disavowed.

Justice Thomas draws support for his thesis from Lord Cooke and also from the extra-judicial views of some prominent English judges who have questioned the doctrine of parliamentary sovereignty, at a time of largely Executive-run Governments in Britain during the 1990s, and of increasing activism in the field of judicial review as courts have sought to limit Executive rule. Lord Woolf's approach, which he admits as being "... a shadow reflection of a trail blazed by Sir Robin Cooke", also recognises that the courts and Parliament are partners in upholding the rule of law and that courts will sometimes be required to take a stand in upholding that principle.⁹⁹ His view is that, if Parliament "did the unthinkable", then rather than relying on restrictive readings of statutes, there would be "advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold".¹⁰⁰ But Justice Thomas does not subscribe to the view that Parliament has never enjoyed sovereign power because fundamental law is supreme over statute law, as Chief Justice Coke and Lord Cooke suggested. For him, there is too much authority to the contrary.¹⁰¹ Nor does he see the need to rely on the idea of a higher-order law such as has been suggested by Sir John Laws and Sir Stephen Sedley.¹⁰² Rather, democracy means the people are sovereign

98 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 36.

99 The Rt Hon Lord Woolf of Barnes "Droit Public - English Style"[1995] *Public Law* 57, 68-69.

100 Woolf, above, 69.

101 Thomas, above, 18.

102 Sir John Laws "Law and Democracy" [1995] *Public Law* 72; Sir Stephen Sedley "Human Rights: A Twenty-First Century Agenda" [1995] *Public Law* 386.

and there is no place for the language of supremacy, either of Parliament or the Courts. Both institutions have separate constitutional roles in protecting representative government, the rule of law, and fundamental human rights.¹⁰³

F Where Does This Leave Dr Bonham's Case?

Believing that it would require "a traumatic departure from established legal methodology to resurrect the authority of *Dr Bonham's Case*", Justice Thomas would prefer to leave the answer "up in the constitutional air".¹⁰⁴ His view is that the resulting uncertainty achieves a balance of power between Parliament and the courts:¹⁰⁵

Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament's conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power.

This uncertainty answers Justice Kirby's criticisms of unelected judges invalidating laws made by elected representatives. Again there is no assertion that the Court of Appeal rules New Zealand, but rather the judiciary would seek to curb Parliament's power in the interests of justice and only in extreme circumstances. Justice Thomas perhaps provides the meaning of Justice Willies' dictum in *Lee v Bude and Torrington Railway Co* to the effect that *Dr Bonham's Case* "... stands as a warning, rather than as an authority to be followed".¹⁰⁶ Surely the courts would not issue a warning if they had no power to assert it against Parliament.

Despite Justice Thomas' views, there is still a place for *Dr Bonham's Case* and Lord Cooke's *dicta*. Chief Justice Cooke's and Justice Cooke's utterances are products of their times; the reigns of both King James and Prime Minister Robert Muldoon; when the balance between the power of the legislature, the executive, and the courts was threatened. The *dicta* are important because they provide support for a future court in extreme circumstances. Because of the way in which the common law works, a court would look to authority. Indeed, Sir Edward Coke based his decision in *Dr Bonham's Case* on precedent that was, even by 1610, of great antiquity. McHugh says:¹⁰⁷

103 Thomas, above, 30.

104 Thomas, above, 7.

105 Thomas, above, 8.

106 *Lee v Bude and Torrington Railway Co* (1871) LR 6 CP 576, 582 (CP) Willies J.

107 Paul G McHugh "The Common-Law Status of Colonies and Aboriginal Rights: How Lawyers and Historians Treat the Past" (1998) 61 Sask L Rev 393, 401.

The present ... is an eternal one to the common law. Its own internal logic requires that the common law has always been able to treat a case from, for example 1774, as having just as much argumentative worth as one from 1974. The common law reconstructs its past as one of doctrinal coherence in which a contemporary state of affairs is perpetually immanent.

Courts are restricted to deciding issues that come before them. As such their role is reactive, so it would be left to be Parliament to test the limits by enacting a statute that was likely to receive a frosty judicial reception. Therefore, although Justice Thomas would seem to advocate a balance of power by means of a vacuum, the advantage of this approach is that Parliament must either exercise legislative caution, or be very clear in what it is seeking to do by legislative means, and aware of the possible risk of conflict with the courts.

Interestingly, the newly released Legislative Advisory Committee (LAC) *Guidelines* require legislation to comply with fundamental common law principles.¹⁰⁸ Although stating that an Act of Parliament will override the common law in the event of inconsistency, the guidelines also state that courts will be reluctant to interpret legislation in a manner that conflicts with the common law. It is therefore "the responsibility of the Executive and of Parliament to avoid imposing such pressures on the courts as to risk constitutional brinkmanship".¹⁰⁹ The *Cabinet Manual* further states that Ministers must confirm compliance with the *LAC Guidelines* when bids for Bills to be included in the programme are awarded.¹¹⁰ This seems an explicit recognition of the 'uncertainty' that Justice Thomas sees as providing the balance of power in our constitutional arrangements. In other words, because Parliament is unsure of how the courts would react if confronted by legislation that was inconsistent with common law principles, they will avoid such a situation occurring.

Lord Irving, while highly critical of judicial questioning of Parliament's powers, admits that if the situation arose:¹¹¹

... it would be for the judges of that time, and not of today, to decide how they should properly respond ... and [they] might gain some comfort in their endeavours from the extra-judicial writings of distinguished judges of today.

108 Legislative Advisory Committee *LAC Guidelines: Guidelines on Process and Content of Legislation* (Wellington, 2001) <http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_3.html> (last accessed 8 August 2001) 43-49.

109 *LAC Guidelines*, above, 45.

110 *Cabinet Manual* (2001, Cabinet Office, Wellington) 68.

111 Lord Irving of Lairg "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] Public Law 59, 77.

Mann has said that the real question would be whether the judges had "the strength of character".¹¹² Thomas J asserts that he has, and sees, no need to seek support from previous judicial authority. But a future court might need more assistance at a difficult time. They may, as Caldwell says of Lord Cooke, "... be grateful that a Court of Appeal Judge who lived in a time of peace and relative freedom had the strength of character to provide the basis for nullifying an Act of Parliament".¹¹³ And they may be grateful to his self-described "quite well known forebear, Sir Edward Coke"¹¹⁴ for the statement that, as Jennings says, "if the occasion arose, a judge would do what a judge should do".¹¹⁵

V GOLDSWORTHY'S DEFENCE OF PARLIAMENTARY SOVEREIGNTY

A History

In a recent and extensive work, Professor Goldsworthy sets out to challenge the critics of the doctrine of parliamentary sovereignty.¹¹⁶ Tracing the doctrine from the age of Bracton to the end of the nineteenth century, he concludes from the historical evidence that the sovereignty of Parliament has been accepted for at least several centuries by all three branches of government, and therefore, is not the creation of nineteenth century academic lawyers, such as Dicey. Consequently, he states that judges could not invalidate an Act of Parliament.¹¹⁷

... 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.

As for *Dr Bonham's Case*, Goldsworthy says that even if Chief Justice Coke did advocate a power to declare a statute void, he later changed his mind when he said, "... the power and jurisdiction of the Parliament, for making of Laws in proceeding by Bill ... is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds".¹¹⁸ The meaning of this statement has also been debated by scholars whose

112 F A Mann "Britain's Bill of Rights" (1978) 44 LQR 512.

113 John L Caldwell "Judicial Sovereignty - A New View" [1984] NZLJ 357, 358.

114 Sir Robin Cooke "Bill of Rights Launch" [1993] NZLJ 123.

115 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 160.

116 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999).

117 Goldsworthy, above, 235.

118 Goldsworthy, above, 112, citing Sir Edward Coke *The Fourth Part of the Institutes of the Laws of England* (reprint, Garland Publishing Inc, London, 1979) 36.

different interpretations accord with their own view of the relationship between Parliament and the courts. For example, Allan, a critic of parliamentary sovereignty, prefers the view of McIlwain that Coke's conception of the supremacy of Parliament was different from the modern sense of a total absence of limits, and this later statement of Chief Justice Coke should be understood in the context of Parliament being a superior court with both legislative and judicial functions which were not clearly distinguished.¹¹⁹ Furthermore, Allan asserts that since Blackstone cited this statement of Sir Edward Coke in support of parliamentary sovereignty, while also accepting that "Acts of Parliament that are impossible to be performed are of no validity", he was confused. His emphasis on the separation of powers and the fundamental rights of Englishmen are contradicted by his apparent support of Parliament's sovereign and uncontrollable authority, and Allan says Dicey "simply perpetuated Blackstone's confusion".¹²⁰ It seems therefore, that whether or not Chief Justice Coke changed his mind is still as moot a point as his apparent assertion that the courts could challenge the validity of an Act of Parliament.

B Philosophy

Goldsworthy also examines philosophical debates about parliamentary sovereignty, and adopting a Hartian analysis,¹²¹ concludes that parliamentary sovereignty is a rule of recognition which judges did not create, and so cannot change, unilaterally.¹²² The most senior legal officials, including judges, have for a very long time recognised as legally valid whatever statutes Parliament has enacted, and have often said that they are bound to do so. Thus they have adopted the internal point of view towards the sovereignty of Parliament which is, according to Goldsworthy, a central component of the rule of recognition in the British legal system.¹²³ Up to this point, it might be said that Justice Thomas would agree since he states that, although open to change by ongoing constitutional development, Parliament has enjoyed sovereignty because "the doctrine has been endorsed so often by the courts".¹²⁴ This internal point of view may be doubted

119 T R S Allan *Law, Liberty, and Justice: The Legal Foundations of the British Constitution* (Oxford University Press, Oxford, 1993) 269, citing C H McIlwain *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England* (Yale University Press, New Haven, 1910).

120 Allan, above, 269.

121 H L A Hart *The Concept of Law* (2 ed, Clarendon Press, Oxford, 1994).

122 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 236-239.

123 Goldsworthy, above, 238.

124 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 18.

however, when it is noted that, not only has parliamentary sovereignty come under increasing judicial criticism, including by Justice Thomas, but that the oft-cited judicial 'endorsement' has come from cases of dubious authority. Wilson says about these cases that:¹²⁵

... it is a strange feature of writing on this subject that the strongest statements of the principle in all its glory, cited without comment in all the books, are from three cases on private railway Acts ... Somewhat surprisingly these three cases, all of which, besides being relatively trivial, centred on alleged failures of procedure and not the contents of the legislation, are constantly cited for the much wider proposition that the courts will not listen to any challenge on the validity of an Act of Parliament on any ground whatever.

Goldsworthy admits, "courts can initiate change, provided that the other branches of government are willing to accept it", and cites as an example, the exercise of judicial review of royal prerogatives.¹²⁶ He believes that the courts have been permitted to expand their authority to control the exercise of power by executive government only because its attitudes as well their own have changed. But it could equally be said that the courts have appropriated this power and the executive has acquiesced in the appropriation. Goldsworthy does not believe the other branches of government would accept a unilateral rejection of parliamentary sovereignty by the courts. However it can also be argued that they might not protest, particularly if the rejection was a slow and gradual one.

Hart's rule of recognition itself can be criticised. Barber argues that assuming one ultimate supreme rule at the top of the English legal system does not adequately reflect the reality of the English constitution.¹²⁷ He contends, using examples of parliamentary privilege¹²⁸ and European Community law,¹²⁹ that the English constitution contains multiple unranked sources of law, which can be irreconcilable but will nonetheless fit within the system, if they do not, or do not often produce conflict. This must be even more

125 Geoffrey Wilson "Postscript: The Courts, Law and Convention" in Rt Hon Lord Nolan and Sir Stephen Sedley *The Making and Remaking of the British Constitution* (Blackstone Press, London, 1997) 95, 115. The cases are: *British Railways Board v Pickin* [1974] AC 765 (HL), *Lee v Bude & Torrington Railway Co* (1871) LR 6 CP 576 (CP), and *Edinburgh and Dalkeith Railway v Wauchope* (1842) 8 Cl & F 710 (CP).

126 Goldsworthy, above, 245.

127 N W Barber "Sovereignty Re-examined: The Courts, Parliament, and Statutes" (2000) 20 OJLS 131, 136.

128 Barber, above, 137, discussing *Stockdale v Hansard* (1839) 9 Ad And E 1; 112 ER 1112 (QB) and *Bradlaugh v Gosset* (1884) 12 QBD 271 (QB).

129 Barber, above, 139, discussing *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] AC 603 (HL).

so in New Zealand as regards the Treaty of Waitangi and its treatment by the courts.¹³⁰ In this context McHugh says: "The political system - including its legal sphere - acknowledges now what previously it sought to suppress, namely the presence of dispersed sites of political authority within the existing constitutional framework".¹³¹ Under such an analysis, parliamentary sovereignty and judicial review of legislation in appropriate future circumstances, can both be accommodated under present constitutional arrangements. If the legal system is not hierarchical, but instead contains various sources of law which sit side by side, it is far less radical for the judiciary to reject the doctrine of parliamentary sovereignty than under Goldsworthy's analysis.

The best that citizens can expect from Goldsworthy's conclusions are that judges could only challenge Parliament morally and not legally. Judges, therefore, have no greater powers to resist an extreme law than ordinary citizens, who would also be morally entitled to disobey such a law. This positivist stance of Goldsworthy, following Hart, whereby laws of even totally evil content are valid, but should not be obeyed, is open to criticism. As Primus says, "[a] positivism that does not counsel obedience to bad laws is barely worth debating", since it no longer has any normative significance.¹³² Justice Thomas asserts that because of the power imbalance between citizen and state, and in a situation where the legislature is subservient to the executive, the judiciary represents "the most immediately available and authoritative resource to discern and publicly proclaim the unconstitutionality of legislation".¹³³ The judicial declarations of inconsistency, discussed above in the Bill of Rights context, represent a step in this direction. And as a normative proposition, such a judicial position must be preferable to the one which positivism advocates. But if Goldsworthy is correct, then a superior law Bill of Rights becomes highly desirable. He asserts that if Judges could invalidate Acts of Parliament now then there would be no need for a judicially enforceable Bill of Rights. However, leaving the issue open until circumstances dictate an answer, has the advantage that, at best, the courts would succeed in reining in a potentially despotic Parliament. At worst, the courts could at least make the attempt, and if it failed, a constitutional crisis would ensue, out of which a written Bill of Rights would undoubtedly be born.

130 See, for example, *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

131 Paul McHugh "Sovereignty This Century - Maori and the Common Law Constitution" (2000) 31 VUWLR 187, 209.

132 Richard A Primus "A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought" (1996) 106 Yale LJ 423.

133 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 16.

VI POLITICS

The major criticism of judicial review of legislation is that it is undemocratic for unelected judges to overturn what an elected Parliament has enacted. As Goldsworthy puts it:¹³⁴

What is at stake is the location of ultimate decision-making authority - the right to the 'final word' - in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves ... and this would amount to a massive transfer of political power from parliaments to judges.

Indeed, the United States Presidential election in 2000 provides an example of what could be considered undesirable judicial supremacism, where the Supreme Court judges, in effect, decided the result in favour of the Republican candidate by a vote of five to four along party lines.¹³⁵ But Goldsworthy's criticism is too extreme, as it fails to take into account what the judicial critics of parliamentary sovereignty actually advocate, such as Lord Woolf who sees the limits as "of the most modest dimensions which I believe any democracy would accept".¹³⁶

Furthermore, as a matter of reality in New Zealand, judges are more and more frequently called upon to make political decisions. Parliament has accepted such developments, even encouraging them, as in the Bill of Rights arena, although they are not new, but have been gathering momentum towards the end of the twentieth century and the beginning of the twenty-first. Wade has said that judges are "... up to their necks in policy, as they have been all through history ...".¹³⁷

Barber argues that in the Westminster system, judges wield political as well as legal power. According to his thesis "in some situations they appear to be accorded political authority by the constitutional system to make decisions contrary to the existing law".¹³⁸ Thus they can alter the law, contrary to the law, and are obeyed. If it could be shown that they are justified in acting this way, it would show that this is a legitimate authority. That is, not only do they make decisions contrary to the law, but that they are right to do so.

134 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 3.

135 *Bush v Gore* (2000) 531 US 1.

136 Rt Hon Lord Woolf of Barnes "Droit Public-English Style" [1995] Public Law 57, 69.

137 H R W Wade *Constitutional Fundamentals* (Stevens and Sons, London, 1989) 78.

138 N W Barber "Sovereignty Re-examined: The Courts, Parliament, and Statutes" (2000) 20 OJLS 131, 151.

Two examples illustrate this proposition. In *R v R*,¹³⁹ the marital rape case, the House of Lords expanded the law of rape to include liability for husbands who raped their wives. In the statute, rape was defined as 'unlawful', non-consensual sexual intercourse. Lord Keith declared that the word 'unlawful' added nothing to the meaning of the section, notwithstanding that the statute, which was only fourteen years old (and had also been reviewed), contemplated legal non-consensual sexual intercourse, such as the common law rule that a husband could not rape his wife. The House of Lords changed the statute for moral reasons only, contrary to the normal interpretation of criminal statutes in favour of the defendant, stating that "in modern times any reasonable person must regard [the immunity] as quite unacceptable".¹⁴⁰ *Factortame* shows,¹⁴¹ according to Barber, that notwithstanding the view that an earlier Parliament could not bind a later Parliament, the earlier Act governed. Since these decisions are obeyed by all the other constitutional actors, this may mean that judges can deny the sovereignty of Parliament to achieve a particular moral objective (such as abolishing a husband's immunity for raping his wife), or political objective (Britain's ability to take part in the European Union).

Barber states that "[the courts'] authority does not run out when their legal power is exhausted". The truth of this statement is established by the decisions in *Factortame* and *R v R*, where "the force of these decisions flowed from the judges' political legitimacy, not from their application of the law".¹⁴² On this analysis, it is arguable that a judicial challenge to parliamentary sovereignty, even if contrary to law, is judicial authority based on political legitimacy. Otherwise on Allan's analysis, principles already in the law justify such decisions, or else they are illegitimate political decisions.¹⁴³ He can find good legal reasons for the *Factortame* decision without having to call it a "revolution".¹⁴⁴

Accepting Barber's proposition makes it easier to reconcile the orthodox view of judicial deference to Parliament with the constitutional truth, which is that a purely legal analysis does not adequately explain the relationship between the courts and Parliament.

VII CONCLUSION

Whatever Chief Justice Coke really meant in *Dr Bonham's Case* remains a matter for speculation. However, because of its dramatic and unambiguous language, it will always

139 *R v R* [1992] 1 AC 599 (HL).

140 *R v R* [1992] 1 AC 599, 616 (HL) Lord Keith.

141 *R v Secretary of State for Transport, ex parte Factortame* (No 2) [1991] AC 603 (HL).

142 Barber, above, 152.

143 T R S Allan "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 LQR 443.

144 See, for example, Sir William Wade "Sovereignty - Revolution or Evolution?" (1996) 112 LQR 568.

be cited for the proposition that a court may strike down an Act of Parliament in appropriate circumstances. New Zealand jurisprudence also contains a series of *dicta* to essentially the same effect from a judge described as "New Zealand's most distinguished jurist ever".¹⁴⁵ Such cases may be criticised or explained away, nevertheless, they remain on the books, and in reality, as merely a warning to Parliament to legislate cautiously, rather than as an assertion of judicial supremacy.

Critics such as Goldsworthy offer persuasive arguments, particularly on a historical analysis and a picture that is painted of a small group of the unelected elite wielding political power gained undemocratically. But this is not what the judges seem to advocate. The argument is instead for a law-making partnership between Parliament and courts. 'Partnership' is a now familiar concept in the New Zealand constitutional context. The Crown and Parliament accepts it is in partnership with Māori. The electoral system under MMP makes Parliament, by necessity, a place of partnership, negotiation, and compromise. The positivist notions of command and obedience are not suited to the language of partnership, and therefore, along with the idea of parliamentary omnipotence, may be obsolete, belonging only to constitutional history. A changing conception of sovereignty from a hierarchy to a division of power, which is in any case a more fitting description of a modern democracy, makes judicial review of legislation a far less radical development.

Jennings says that because it is difficult to prove a negative, it is "virtually impossible to prove that there are no principles of the common law which Parliament cannot repeal".¹⁴⁶ The other side of the coin is that it might be as impossible to say that the judiciary could *not* overturn an Act of Parliament. If a judicial challenge to an Act of Parliament occurred in future, it might not be seen as a revolution, but as a natural development of both New Zealand's constitutional arrangements and of the common law.

Justice Thomas says, "[t]he debate continues. Lawyers, being lawyers, look for a definitive answer".¹⁴⁷ A definitive answer might be comforting, but for now there is not, and arguably should not be one. The debate is more important than the answer.

145 Kevin Norquay "Time Catches up With NZ's Greatest Jurist" (12 May 2001) *The Dominion*, Wellington, 17, quoting Sir Geoffrey Palmer.

146 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 159-160.

143 Justice Edward W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5, 6.

