

THE GLORIOUS REVOLUTION & THE RULE OF RECOGNITION

THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW. By Richard S. Kay.¹ The Catholic University of America Press. 2014. Pp. xi + 304. \$59.95 (cloth).

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This book by Richard Kay is a joy to read. It is a study of England's Glorious Revolution in the late seventeenth century written by an American law professor with a well-known expertise in constitutional law and constitutional interpretation.³ It works on at least three levels. Firstly, there is the legal history side of the book. Kay started work on this book in the early 1990s, so what you read is the culmination of nearly a quarter-century of research, reading and thought. Those who have little idea of the events leading up to England's Glorious Revolution will learn all the basics. Meanwhile, those who had a pretty solid understanding will learn new things. Kay is good on the importance of oaths back then. Kay is good on how terribly King James II played his hand; how a Catholic King in an overwhelmingly Protestant kingdom made mistake after mistake after mistake until it was too late and he had to flee. Kay is good on the Convention Parliament. Kay is good on the lurking background importance of Cromwell and the events of 1648-1660 to what would happen some three decades later. Kay even helped clear up for me a vague confusion I had never really bothered to sort out. Why is it that you sometimes would read of some event linked to the Glorious Revolution, say the Declaration of Rights, as having taken place in 1688 and at

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3. See, e.g., Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1998); "Originalist" Values and Constitutional Interpretation, 19 HARV. J. L. & PUB. POL'Y 335 (1996); *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009).

other times see that same event being dated to 1689? It was the calendar and from when the start of the new year is dated. While the French had moved over to the more accurate Gregorian calendar in the 1580s, the English were still on the Julian (and would remain on the Julian till the 1750s). Under the latter, the start of the new year was then March 25, not January 1. In addition, by the time of the events of the Glorious Revolution there was a ten day difference between the two calendars. Taken together, some of what we today would say had happened in 1689 would back then in England (or in the 13 colonies, for that matter) be said to have taken place in 1688.

There is a second side to this book, however, because as Kay makes clear “[t]his book is . . . a *legal* history of the Revolution” (p. ix, emphasis in the original). Yes, the history matters, but it matters to Kay because of the way it illustrates just how important law was to the revolutionaries and, relatedly, how crucial legal justifications for their actions were to them. This is not surprising, as Kay’s very first sentence in the book, in the Preface, is: “I came to the study of the Glorious Revolution of 1688-89 from the study of constitutional law” (p. ix). Likewise, it is not surprising that this book can also be thought of as an extended study of constitutional law issues. There are questions related to parliamentary sovereignty. There are questions about what constitute the sources of law. There are all the issues thrown up by the tensions between change and continuity, between those who appeal to theory and those to history, and between the exhilarating attraction of wide-open unconstrained scope for action, as opposed to the comforting safety provided by the constraints of the established law. There is even much discussion of the conduct of judges in resolving these issues, which tangentially brings up all the issues of interpretation which constitutional law scholars ponder on a daily basis. There are all these, plus consideration of the Rule of Law’s consistency with revolutionary change, and more. Despite the focus on events in England nearly 330 years ago, this is very much a book for those interested in contemporary constitutional law.

Then there is the jurisprudential side of this book. On a third level, you can read this book as an exercise in applied legal philosophy. “What counts as law?” is a constant refrain. So too is the desire to mask revolutionary change, to finesse it and pretend that there is continuity, when pretty much everyone knows that there is not. There is the persistence of legal argument in the midst of bootstrap operations at the start of new legal regimes. And

perhaps most perplexingly, there is the fundamental issue of how to understand what H.L.A. Hart dubbed “the rule of recognition.”⁴

I came to read Kay’s book as a law professor who teaches both constitutional law and jurisprudence courses in Australia. Before that, I worked and taught broadly similar courses in New Zealand, Canada, Hong Kong and about the United Kingdom (while living in Hong Kong). I mention that because, on the straightforward plane of knowing the Westminster constitutional model, it struck me that Kay knows more than most British, Canadian, Australian and New Zealand legal academics. He certainly knows the Westminster system inside and out.

In the rest of this short review, therefore, I will play to my strengths and focus on the second and third sides to this book, the aspects related to constitutional law and to legal philosophy. I will pick out just three themes raised in Kay’s book, note why these three were important back in the late 1600s in England, and then consider them more widely in today’s world.

1. FICTIONS AND FINESSING

The revolutionaries in 1688 were overwhelmingly not outsiders. They had a big stake in the existing system. Core religious differences with King James II, and the birth of a son of his sure to be raised a Catholic, led the makers of the Revolution to act. Yet the failed experiment with Cromwell was within living memory for many of these actors. It worried almost all of them. As Kay puts it, “By 1688, almost everyone had learned that contempt for the law could lead to disaster” (p. 56, internal footnote omitted). Accordingly, there was “a powerful tendency to favor, so far as practicalities allowed, the apparently legal over the openly revolutionary” (p. 56).

With the arrival of William and Mary, James II’s flight to France, and a new but precarious equilibrium beginning to form, the Convention Parliament met during the interregnum. Yet the legal status of this Convention was itself dubious, highly dubious. Indeed the calling, meeting and decision-making of this Convention Parliament of January and February 1689 required some sort of legal justification to be given, since Parliaments were called into being by the King with his issuing of the writs, and that plainly had not occurred. Likewise legal justification was also

4. H. L. A. HART, *THE CONCEPT OF LAW* 97, 99 (1961).

needed for the severing of the hereditary principle, the core constitutional pillar that kings were not chosen nor elected but given by God (as it were). In both instances, the makers of the Revolution were pushed to fall back on fictions and the finessing or ignoring of questions that were otherwise unanswerable. Meanwhile the sort of law that was appealed to and relied upon to justify the new order generally depended upon how much those doing the appealing desired change:

Notwithstanding some undeniable exceptions, those who wished the fewest changes in constitutional arrangements tended to refer to positive law which was specific, concrete and historically identifiable – statutes, judgments, precedents. Advocates of more far-reaching changes in the distribution of constitutional authority were more likely to cite a vaguer and more abstract kind of law – natural law, broad principles, and the practices of an immemorial, and thus unverifiable, past (pp. 57-58).

Loosely speaking, the mapped spectrum of wanting-fewest-constitutional-changes-to-most ran from Jacobites through Tories through Whigs to Radical Whigs. However, all but committed supporters of James at one end and outright and outspoken radical revolutionaries at the other were forced to appeal to constitutional fictions, to finesse the seemingly illegal, and sometimes simply to assert what was patently not the case.

Take the above-mentioned hereditary principle and how the makers of the Glorious Revolution might characterize its seeming breach. The Convention Parliament considered three alternatives. One was an appeal to an “original contract”⁵ (pp. 77-84) between ruler and ruled. If such a contract existed, then its breach by King James II would go some way to justifying the fact the Crown had passed to James’s Protestant daughter Mary and her co-religionist husband William. This type of approach to justifying the inroads made to the otherwise inviolable hereditary principle was very much in line with the thinking of John Locke (pp. 78, 112). Yet, at the time, this option for revolution-rationalizing was seen as too radical by most (including by most Whigs) and downright implausible by some:

William Atwood, a Whig barrister, was a popular and influential apologist for the Revolution. He drew conclusions remarkably similar to those of Locke, asserting, for example, that in the “last resort,” judgment “must needs be in the

5. Today we would talk in terms of a social contract rather than original contract.

people, the question being of the exercise of their original power” so that “their voice is as the voice of God.” But for Atwood this argument was derived “not only from the equity of the law but from the very letter . . .”. In contrast to the “letter of the law,” he distrusted “thin and metaphysical notions” of natural right “which few are masters of and judges of,” and he described the concept of “inherent and unalienable rights of mankind” as “wheedling” (p.79, internal footnotes omitted).

Put bluntly, John Locke and his original contract thinking amounted to little more than fringe players in supporting and justifying the Glorious Revolution (p. 113).

A second possibility for the makers of the Revolution was to appeal to the law of nations, to suggest that this then nascent sort of international law, somehow or other, trumped the long-established constitutional law of England which had the hereditary principle at its core (pp. 84-88). The trick was to look here for some sort of “legal” basis supporting a general right of resistance. Now at core “the similarity [of these sort of arguments] . . . to those of some home-grown exponents of the abstract contract was painfully clear” (p. 87). Hence, this type of appeal to international law horrified the Tories and won very few takers even amongst the Whigs. This option was also a flop in the Convention Parliament.

The third option was to say, with as straight a face as possible, that King James II had abdicated—that he had vacated the throne when he had fled to France. This was the home of the outright legal fiction, the careful finessing of the seeming rupture in what the Constitution demanded. It was where misgovernment would be transmogrified into voluntary resignation by a “transubstantiating vote” (p. 169) of the Convention Parliament. It was also the option that was overwhelmingly the most popular, for Whigs nearly as much as Tories, and the one that was chosen. Just assert that the hereditary principle had not been breached because King James II had voluntarily abdicated his Crown. When James fled he had effected his own demise. No, his fleeing had done more than that. He had effected his own demise as well as that of his new born son, a Catholic, whose rights were also forfeited and who would henceforth be mentioned as sparingly as possible (p. 279).

Of course it was not just the makers of the Glorious Revolution who could find these three items on the “how to rationalize your revolution” menu. The makers of any revolution—slow-moving, subtle and peaceful ones as much as

the abrupt, overt and violent—might use them. They might attempt to justify their actions 1) by appeal to amorphous natural law principles by way of some sort of hypothetical original or social contract; 2) by appeal beyond domestic law to the norms of international law; or 3) by reliance on the out-and-out fiction that they have not really done anything revolutionary, not really, and when pressed finesse as many precedents and constitutional principles as possible.

We can see this only eight decades later in the successful revolution that followed the American War of Independence. When it came to justifying the American actions, Locke and his theories came into their own for the makers of that revolution. Meanwhile, if we shift to more recent times and the types of nearly imperceptible revolutions occasioned when top judges interpret a written constitution to produce answers few honestly believe that Constitution actually dictated, we will sometimes see appeals to international law⁶ and sometimes the use of outright fictions and finessing. The latter occurs where top judges reach interpretive conclusions that markedly depart from the prior understanding of what the Constitution means.⁷

2. JUDGES AND PARLIAMENT

Before the Glorious Revolution, the monarch was not unconstrained in what he or she could do. Parliament had some checking power, it was just unclear how much. So while it was

the religious issue that provided the political substance of the grievances of 1688, the constitutional point on which issue was joined was the dispensing and suspending powers that James invoked to relieve Catholics of the disabilities imposed by statute. The dispute was yet another iteration of the still-unresolved question of the extent to which royal power could be exercised unilaterally (p. 40).

6. For a sample of cases that do this, see *Roper v. Simmons*, 543 U.S. 551 (2005) in the United States; *Al-Kateb v Godwin* (2004) 219 CLR 562 in Australia; and *R. v. Hape* [2007] 2 SCR 291 in Canada. See also James Allan, *Ineffective, Opaque and Undemocratic: The IOUs of—Too Much—International Law and Why a Bit of Skepticism is Warranted*, 50 SAN DIEGO L. REV. 833 (2013).

7. For the United States, see *Roe v. Wade*, 410 U.S. 113 (1973); in Australia, “implied rights” cases including *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; for Canada, see *Reference Re Supreme Court Act, §§ 5 and 6*, 2014 SSC 21, or *Carter v. Canada (AG)* 2015 SSC 5.

In other words, what was the scope of the king's unfettered regal discretion? Or, in different terms, what was the relative authority of the King and what was that of Parliament (p. 131)?

The Glorious Revolution, the Bill of Rights, and then Parliament's laying down of the line of succession in the Act of Settlement 1701 made it clear that whatever the limits on the King had been before, a good deal more of them existed afterwards. In fact, the trajectory of the coming into being of the doctrine and core British constitutional principle of Parliamentary Sovereignty—a doctrine and principle which was *not* some gift of the judges and the common law, as Jeffrey Goldsworthy has made clear⁸—takes off after the Glorious Revolution. If one's time horizon is the medium-to-long-term, Parliament was the big winner from this revolution.

That said, being a judge in revolutionary times is an employment fraught with danger. Kay does an excellent job outlining some of these difficulties. Take the pre-revolutionary judges of the King's Bench who heard the *Godden v Hales* case in 1686, an important case on the dispensing power in which all but one of the judges agreed in the judgment given in favor of the King. These judges ended up on the wrong side of events; they had given a judgment on a highly contentious issue that would be mentioned and condemned in Prince William of Orange's invasion declaration. Similarly, "[t]he participating judges, William Garroway would later claim in the Commons, were guilty of 'a breach of their oath, and a great one'" (p. 41, internal footnote omitted). In fact, Kay devotes a good chunk of the fourth chapter of this five-chapter book to the subsequent treatment of the judges who had participated in that case. In general terms, it will surprise no one to learn that having been a judge who had been dismissed by James, or who had resigned, in no way hurt one's post-revolutionary prospects in later William and Mary days. If your usual framework for thinking about the role of judges in revolutionary times is Apartheid South Africa, England in 1688 and 1689 offers a nice change.

Meanwhile, what can be said of parliamentary sovereignty in today's world? This is the core notion, uncontroversially at the heart of the British Constitution until well past World War II, that there are no legal or constitutional constraints on what the elected parliament can do, only moral and political limits. Now parliamentary sovereignty no doubt waxed after the Glorious

8. JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT* (1999).

Revolution. Yet in quite recent times it has appeared to wane in the United Kingdom. There was Britain's entry into the then European Economic Community, now European Union, formalized with the passage of the European Communities Act 1972.⁹ There was the House of Lords *Factortame*¹⁰ case, making clear that in the light of that statute, certainly on day-to-day matters, English law would be read as consistent with European law—meaning that this 1972 statute's incorporation of such law could trump later statutes (or at least those not explicitly taking the U.K. out of the E.U.), thereby driving a truck through the doctrine of implied repeal. There was the Blair government's innovation of a statutory bill of rights.¹¹ This statutory bill of rights, unlike the entrenched American or Canadian models, does not allow statutes to be invalidated, or struck down. And yet by means of a New Zealand-style “reading down provision”—or “read all other statutes as consistent with the enumerated rights if it is at all possible” directive to the judges¹²—and a Declaration of Incompatibility provision,¹³ the power balance between Parliament and the unelected judiciary has altered significantly. Some U.K. legal academics, such as Aileen Kavanagh, now say that the top British judges are just as powerful as top American ones.¹⁴ There were also the Blair government's Scotland Act¹⁵ and Judicial Appointments innovations,¹⁶ and the Cameron government's fixed terms between elections legislation.¹⁷ And of course there was the Blair/Brown government's signing of the Lisbon Treaty.¹⁸

9. European Communities Act 1972 (U.K.).

10. *R v. Secretary of State for Transport, ex p. Factortame Ltd* [1989] 2 All ER 692.

11. The Human Rights Act 1998 (U.K.).

12. *Id.* at § 3.

13. *Id.* at § 4. The judges are made the arbiters of what is rights-respecting and then can declare that some statute is, in their view, not rights-respecting. The legislature is thereafter left with the option of doing nothing, and hence, given this framework, being deemed to be taking away people's rights. Or the legislature can amend the infringing statute. Well over two dozen such declarations have been made. To the best of my knowledge the Parliament has stood up to the judges only once.

14. See AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE U.K. HUMAN RIGHTS ACT* (2009).

15. Scotland Act 1988 (U.K.). This statute is repealable in theory. Parliament has the legal and constitutional power to do so. But it is not able to be repealed as a matter of political practice. There is no plausible way for the Parliament in London to take back these “more powers to Scotland” reforms.

16. Constitutional Reform Act 2005 (U.K.). This statute created the Judicial Appointments Commission.

17. Fixed-Term Parliaments Act 2011 (U.K.).

18. European Union (Amendment) Act 2008 (U.K.).

After all of those changes, in what sense can we say today that the United Kingdom parliament is sovereign? Certainly it is so in a less full-blooded sense than half a century ago. Yes, were Parliament to enact legislation to leave the European Union, that law would prevail.¹⁹ So there is parliamentary sovereignty in that sense. Yes, Parliament alone is free to repeal the Human Rights Act.²⁰ So there is parliamentary sovereignty in that sense, one not shared by the legislatures of Canada and the United States. Yes, in theory the Westminster Parliament might rescind Scottish devolution, though the real life chances of that ever happening hover barely above zero. Still, all that and more conceded, today's parliamentary sovereignty looks to be an enervated version of what existed a mere half century ago. In today's world, in my opinion, if you are looking for non-emasculated parliamentary sovereignty you need to look to New Zealand rather than Britain.

3. THE RULE OF RECOGNITION

Any revolution severs to some extent or other what had been until then that jurisdiction's "rule of recognition." As I noted above, that term was coined by the legal philosopher H.L.A. Hart,²¹ and it refers to a jurisdiction's ultimate test of legal validity, the ultimate ground of legal authority where law runs out and morality and politics are what must be appealed to for justification.

We have seen already how the hereditary principle was severed in the Glorious Revolution, though that breach was finessed and disguised as far as was plausible. That was a breach of a core element of the then rule of recognition. And then there were the substantive obstacles in the path of establishing a new monarchy, and so in part at least a new rule of recognition. These "arose most acutely in connection with the design and administration of the oaths to the new king and queen" (p. 144). How did the conscientious man who took his earlier oath to King James seriously, how did that man swear now that William and Mary were the "lawful and rightful" (p. 146) sovereigns, as the traditional oath demanded? The only pathway out of this

19. The Conservative Party has promised a referendum on this issue, which if it delivered a 'leave' result, would presumably also deliver that outcome via legislation.

20. And indeed a significant portion of the Conservative party wishes to do just that. See Helen Warrell, *Conservative Party Sets Sights on Scrapping Human Rights Act*, FINANCIAL TIMES (May 11, 2015), <http://www.ft.com/cms/s/0/c2ac1f5a-17f0-11e4-962b-00144fcab7dc.html#axzz3a6pvlgSB>.

21. HART, *supra* note 4, at 97, 99.

dilemma was to redesign the oath, and make no reference to “rightful and lawful” nor include any promise of continuing loyalty to William and Mary’s “heirs and successors” (p. 146). Instead, the oath was pared down to a bare minimum, where one would “sincerely promise and swear that [he] will be faithful and bear true allegiance to [William and Mary]” (p. 146). Such are the foundations on which successful revolutions, and revamped rules of recognition, are built.

As Kay puts it, this “streamlined oath was one manifestation of the *de facto* theory of allegiance” (p. 146). It side-stepped the issue of whether William’s title was legal or not, merely specifying what the oath taker would do. Better yet, it worked as a gloss on the law of treason, it being a serious problem for subjects in times of civil strife and revolution to decide exactly who was the king. “The *de facto* doctrine provided a defense for those who ended up choosing incorrectly” (p. 147).

Of course every new rule of recognition starts with events that were not themselves authorized under the old rule of recognition. Or, in Kay’s blunter terms, “[a]ll law . . . starts with revolution. It follows that, to the extent that a society values the rule of law, the illegal origin of every legal system subverts its own legitimacy” (p. 272). Yet, this slowly fades with the passage of time. “At some point the revolution ceases to be seen as a rupture in the old law but as the founding of a new one” (p. 272). How quickly this occurs will vary, no doubt depending in part upon how the previous rule of recognition was perceived. Yet, as time passes the rationale for that revolution can safely become ever more radical. In the year 1709 in England the Whigs attempted to re-characterize the Revolution’s rationale from being “a simple application of accepted legal rules to unusual circumstances [to being] an exercise of justified resistance against an oppressive king” (p. 274), in the course of the impeachment of the preacher Henry Sacheverell. It was too soon. The attempt failed. “[T]hey could not overcome the force of the legalist explanation” (p. 276). “Popular opinion was on Sacheverell’s side” (p. 279). He escaped with no fine and no imprisonment, the toast of the town. In the parliamentary elections that followed soon afterwards, the Whigs were crushed.

Yet “[l]ittle by little . . . it became safer to describe the Revolution accurately—as the overturning of one legal system and the inauguration of a new one” (p. 279). By the 1760s, Blackstone was doing it; Samuel Johnson was doing it; by the

1790s, Edmund Burke was too. The rule of recognition had changed and it was now acceptable to say so.

For the legal philosopher, however, there is the fundamental issue of how to understand our rule of recognition. As Larry Alexander puts it: “[W]hat *is* our rule of recognition? I regard that question as one of the two most difficult questions in legal philosophy.”²² Hart famously saw the rule of recognition as a source-based test that focused on officials; to find the ultimate test of legal validity you look to see, from amongst the pool of social rules in a jurisdiction, which ones *officials* accepted, and were prepared to apply as *legal* rules. The criteria the officials accept as determinative of legal validity give us a jurisdiction’s test of legal validity.

The attractive thing about Hart’s rule-based concept of law, with his account of the rule of recognition recounted from the outsider’s vantage,²³ is that it can be applied to any legal system, ever. Application of the Hartian framework is not restricted to some nice benevolent Western legal system. You can apply it to feudal systems, Stalinist Russia, the United States today, anywhere. Dworkin, by contrast, with his theory of law built out of a theory of how best to interpret, offers a legal theory of next to no application in non-democracies, or indeed in any jurisdiction without an independent (and possibly a common-law-based) judiciary. His can be applied only to a miniscule fraction of the legal systems the world has seen.

The near universal applicability of Hart’s theory is, to my way of thinking, a big advantage. Yet Alexander points out a problem for Hart. “One would think, however, that citizens as well as officials would have to accept those criteria, lest the officials would be nothing more than ‘the gunman writ large’ vis-à-vis the citizens.”²⁴ As Alexander explains in a footnote, Hart had attacked Austin’s (and, I might add, perhaps indirectly, also Bentham’s) command theory of law, not least because it “could not distinguish laws from the threats of gunmen.”²⁵ And any rule of recognition test focused on what officials accept certainly seems vulnerable, in many jurisdictions, to being collapsed into the gunman writ large scenario—the very one Hart tried to evade

22. Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014) (emphasis in the original).

23. See JAMES ALLAN, *THE VANTAGE OF LAW: ITS ROLE IN THINKING ABOUT LAW, JUDGING AND BILLS OF RIGHTS* (2011).

24. Alexander, *supra* note 22, at 642 (internal footnote omitted).

25. *Id.* at 642 n.106.

by moving to a rule-based concept of law. In other words, the widespread applicability of Hart's understanding of the rule of recognition comes at a cost, some would say a hefty cost.

Alexander's alternative, to look at what criteria "citizens as well as officials"²⁶ would accept, seems to me to take us back to a theory of Dworkin-like levels of applicability. In a nice, benevolent, democratic, Western jurisdiction, such as the United States, we can ask what the people (as well as officials) have accepted as determinative of legal validity. I doubt, though, that the question is worth asking in North Korea. Of course, even limited in the way Alexander does to a jurisdiction such as the United States, finding an answer may surpass us all. As Alexander makes clear, popular acquiescence when top judges depart from the prior understanding of what a Constitution means is not enough, not unless people knew it in fact was a departure. And how do we test for that?

The rule of recognition is a slippery concept. This may just be one of those "pay your money and pick your poison" situations. If forced to choose, I think on balance I prefer Hart's understanding, though any choice carries costs. Yet my larger point is that Kay's wonderful book throws issues such as these into the seventeenth-century setting of the Glorious Revolution and makes you think again about them.

As I said to start, the book is a joy to read. If I were pushed to find fault, it would be with the index, which was a tad truncated given the nature of the book. But that is the merest of quibbles. This is a book worth buying.

26. *Id.* at 642.