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Is Dicey dicey?

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ABSTRACT – Fin dalla pubblicazione della *Introduction to the Study of the Law of the Constitution* (1885) il pensiero di Albert Venn Dicey ha fortemente innervato la percezione costituzionale del Regno Unito focalizzata sulla sovranità del Parlamento. Ma in realtà di questo enunciato non si ha molta traccia nel pensiero vittoriano né compare in fonti di *statute* law. Nell'epoca della Gloriosa Rivoluzione Shaftesbury asseriva che «*The Parliament of England in the supreme and absolute power, which gives like and motion to the English Government*» (1689), ma da altri punti di vista gli *obiter dicta* di giudici scozzesi quali Lord Cooper («*The principle of unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law*», in Court of Session, McCormick v Lord Advocate, 1953) e Lord Hope («*Parliamentary sovereignty is no longer, if it ever was, absolute*», in UK Supreme Court, Jackson v Her Majesty's Attorney General, 2005) lasciano intravedere che, alla luce dei recenti sviluppi della *devolution*, il dibattito sull'onnipotenza del Parlamento di Westminster possa andare incontro a una svolta antidogmatica di sicuro interesse per il costituzionalista del nuovo secolo.

Is Dicey dicey?*

di *Carwyn Jones***

For nearly a hundred and fifty years, parliamentary sovereignty or supremacy (the terms are used interchangeably) has been taken as immutable and unchanging by the UK Parliament and the courts. As devolution has developed, the concept deserves greater examination to see whether the concept is as sound as it has been supposed.

There is nothing in statute law that defines parliamentary sovereignty. Indeed, before the late Victorian era it had never been expressly advocated in any context. The only mention of anything close to a declaration of sovereignty can be found in the words of the Earl of Shaftesbury who said, in 1689:

> «The Parliament of England is the supreme and absolute power, which gives life and motion to the English Government» [Bradley in Jowell et al (eds.), The Changing Constitution, 6th Edition Oxford University Press].

There could of course be much debate about what this phrase actually means. So soon after the Glorious Revolution, one might think that it was aimed at asserting the rights of a parliament against an overmighty monarchy. The debate is moot though. The English Parliament disappeared in 1707 and its constitutional foundation disappeared with it. There has never been any suggestion that the Treaty of Union simply allowed a takeover of one parliament (Scotland's) by another (England's). A new parliament was established, and the Treaty was silent on whether primacy was given to English parliamentary sovereignty as expressed by Shaftesbury or Scottish popular sovereignty based on the Declaration of Arbroath 1380. The tendency of course has been to assume that English constitutional principles simply transferred to the new state and its parliament.

Our entire concept of parliamentary sovereignty seems to be based largely on the views of one man, A.V Dicey. A distinguished constitutional lawyer for sure,

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through a view he expressed in his Introduction to the Study of the Law of the Constitution (1885). It's worth revisiting his words:

> «Parliament has the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament» [3].

Before we look at those words, it's worth reflecting that Dicey was a product of his age and the Victorian Empire that infused it. He was a vehement opponent of Irish home rule in any form (see England's Case Against Irish Home Rule (1886)). He further maintained that the Imperial Parliament could do anything from taxing the colonies to abolishing the structure of the Church of Scotland. He would have struggled with the Statute of Westminster 1931 which recognised the self-government of (white) dominions.

It only took a few years before MPs were gleefully referring to this concept. After all, why not support a concept that gave you untrammelled power? How ironic then that the legislature, tasked with passing laws, embraced the concept that it could do as it pleased, thus making itself lawless.

What foundation did Dicey have for his view? He was undoubtedly influenced by Coke and Blackstone, but even allowing for the lackadaisical approach of the Victorians referring to the UK as "England", did Dicey really mean to imply that English constitutional law had achieved primacy upon the Treaty of Union? His argument would no doubt have been that the new Parliament of Great Britain simply acquired sovereignty as soon as it was established, a situation that persisted with the Act of Union with Ireland in 1801. He said (at pp. 22-24) that the Treaty of Union placed no restriction on the ability of the UK Parliament to legislate as it saw fit with regards to Scotland, even if this meant breaching the treaty conditions that were agreed when Scotland signed.

The Scottish courts seem however to take a different view. Admittedly, the evidence is scarce, but we can catch a glimpse through the case of McCormick v Lord Advocate (1953 SC 396). The issue at stake was how the newly crowned Queen Elizabeth should be referred to in Scotland. She was after all Queen Elizabeth II in England but the first Queen Elizabeth in Scotland. The court found a neat way through that by finding that as the Treaty of Union was silent on the issue then it was a matter of Royal Prerogative.

It was what was said in judgment however that catches the eye. Lord Cooper of Culross, the Lord President said obiter at p.411 that:

> «The principle of unlimited sovereignty of Parliament is a distinctly English principle which has no counterpart in Scottish constitutional law. The Lord Advocate conceded that the Parliament of the United Kingdom could not repeal or alter certain fundamental and essential conditions of the Act of Union».

What's clear from these words is that the court did not accept the Diceyan view of the constitution, and more, importantly, neither did the UK government's own Scottish Law Officer. The UK Parliament can either do as it sees fit, in which

case it is sovereign, or there are restrictions on it regarding Scotland, in which case, it is not. At the very least, in not expressly ruling out any challenge to parliamentary sovereignty the Court has left it open for a future Court to consider.

The issue has not been dealt with substantively since but, it would seem to me, that if a senior Scottish judge could express those views in the days when Scottish nationalism was politically weak, it would be unlikely that a court would take a different view in the present time.

What then of parliamentary sovereignty across the UK? The answer is unclear. There have been signs that the Supreme Court is aware of the debate about the absolute nature of parliamentary sovereignty but the issue still rests tantalisingly unsettled. The case of Jackson v Her Majesty's Attorney General provides several examples of obiter comments from some Supreme Court justices which give an indication of where the debate might go in the future.

Take Lord Steyn. In Jackson he said this:

> «[…] it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances, involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolis» [101].

On the face of it, this commentary calls into question the idea of parliamentary sovereignty. Even though Lord Steyn couches his question in terms of "exceptional circumstances" this still undermines the concept. Parliament is either absolutely sovereign i.e. it can do as it likes, or it isn't in which case there are restrictions upon it even in exceptional circumstances. Sovereignty does not admit restrictions upon it in any circumstances, exceptional or not.

Following, Lord Hope said:

> «Parliamentary sovereignty is no longer, if it ever was, absolute […]. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, the English principle of the absolute legislative sovereignty of parliament […] is being qualified. That your lordships have been willing to hear this appeal and give judgement upon it is another indication that the courts have a part to play in defining the limit of Parliament's legislative sovereignty» [104].

Lord Hope further opined that Parliament should not be able to pass legislation that:

> «[…] is so absurd or unacceptable that the populace at large refuses to recognise it as law» [120].

The fact that Lord Hope had Scottish roots led him to an exposition of Scots constitutional law. He expressly talks about the English principle of

sovereignty and, by reason, rejecting the interpretation of Dicey's ideas as having application in Scotland. His second comment, bringing "the populace" into his argument is a possible reference to the popular sovereignty central to Scots constitutional theory. He seems to say that English constitutional principles should not apply in Scotland and that the English principle is being eroded in any event.

He returned obiter to this point in AXA General Insurance and other v. Lord Advocate and others where at para. 50 he said:

> «The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion».

Lady Hale also declared in Jackson that:

> «The courts will of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing government action affecting the rights of the individual from all judicial scrutiny» [159].

Again, Lady Hale seems to reserve to the courts the ability to guard the rule of law even against a Parliament that seeks to subvert it. That is not consistent with parliamentary sovereignty as the UK Parliament, acting on that principle, would be able to abolish judicial review, the courts or even the rule of law if it wished to. That is the logical conclusion of accepting parliamentary sovereignty.

Conclusion: What is the Status of Parliamentary Sovereignty?

Little has been said about parliamentary sovereignty by the courts in the years since Jackson but it is clear the courts have aired views questioning the concept. What then is its status?

Parliamentary sovereignty is based on the views of Dicey and not on statute law. Parliament has never expressly declared itself to be sovereign nor defined what that means. In s.38 of the EU Withdrawal Act 2020) there is a reference to "recognising" the sovereignty of the UK Parliament but I don't believe that takes us any further. That section was written in the context of leaving the EU as is clear when reading the whole section. Further, the term "recognises" is one normally used in the context of public international law which suggests that the reference here is to state sovereignty as understood in that field rather than parliamentary sovereignty in the Diceyan sense. Nor does the section attempt to define what the concept means. It looks more like political graffiti rather than an attempt to clarify the law.

The fact that a concept it mentioned in statute does not make it justiciable. For example, s.2 of the Scotland Act 2016 and s.2 of the Wales Act 2017 both make the Sewel Convention part of the law, but that convention can be ignored by the UK government whenever it sees fit.

The executive, legislature and the courts have accepted the principle in the main (at least outside Scotland). There are those who would argue that this gives the principle the status of settled law. I disagree. It seems to me that parliamentary sovereignty, like so much else in our constitution, is a convention. If the courts decided that they no longer wished to respect it in its entirety or at all, there would be no barrier to them in doing so.

There is no legal barrier that is so absolute that forbids the courts from reviewing any Act of Parliament beyond a convention respected by judges over the last two centuries.

There is no legislation that declares that the UK Parliament can do as it sees fit without scrutiny from the courts and we have seen, from the obiter comments in Jackson, that there is scope for such scrutiny in the future.

We have to wait for that momentous case in the future when the Supreme Court decides whether it accepts that parliamentary sovereignty now is as Dicey understood it in the 19th Century. However, as we observe constitutional development during the 21st century and the weaknesses of an unwritten constitution based substantially on conventions without the force of law, we might ask ourselves whether the time has come for something more certain. The question is whether we are content to continue with a constitution that, at its heart simply declares that there is a Parliament at Westminster that can pass whatever law it wishes, even abolishing the common law and the courts if it so chose or a written constitution.

That's a debate for a future article.