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AN ANALYSIS OF PARLIAMENTARY SOVEREIGNTY IN CONTEMPORARY UNITED KINGDOM

AUTHORED BY - SOHAN PRASAD

INTRODUCTION

AV Dicey's definition originated from his book in 1885,¹ the UK has made significant progress since that time. It has joined various international treaties such as the European Convention on Human Rights (ECHR)² and has produced landmark judgements regarding the principle of Dicey, while also conducting major changes to its internal legislative functions with its territories. This essay shall seek to analyse relevant recent authorities to understand whether this principle as defined by Dicey is still prevalent in contemporary UK.

THE MILLER CASES

Contemporary case law provides strong evidence in favour of Dicey's definition being prevalent in present-day UK. In *Miller/Cherry* heard in the Supreme Court, where the issue of whether the Prime Minister had lawfully exercised his prerogative power to prorogue Parliament for a period of 5 weeks in order to exit the European Union (EU) without a deal was argued.³ While the judgement cemented a very strong and unanimous claim that the principle of Parliamentary sovereignty exists in contemporary UK, it was contended by the government that exercise of prerogatives in a political nature such as this case did not fall within the purview of the Court.⁴

However, the applicants rebutted that the prorogation of Parliament would have meant that the European Communities Act 1972 (ECA) would have been repealed, as the UK would have exited the EU while Parliament was prorogued.⁵ Dicey's definition specifically, requires that no body or

¹ Albert Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885, 10th edn, Macmillan 1959) pp 39-40.

² European Convention on Human Rights 1950.

³ *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland (Miller No.2)* [2019] UKSC 41, [2020] A.C. 373.

⁴ *ibid.*

⁵ *ibid.*

person has the right to override or repeal legislations of Parliament.⁶ Recognizing this and citing the *Case of Proclamations* to support its decision, the supreme court held it to be unlawful for the executive to prorogue Parliament whensoever and for howsoever long it pleased, as it would go against the principle of Parliamentary sovereignty and in this case would be used as a means to repeal legislation of Parliament without its consent.⁷ Therefore, by preventing the executive from indirectly repealing Parliamentary legislation, in *Miller/Cherry* the Court provided strong evidence to support the existence of Dicey's definition in contemporary UK.⁸

Similarly, another strong argument that enforces the view that Dicey's definition is still present in contemporary UK would be in *Miller (No 1)*.⁹ The issue concerned was whether the government could trigger Article 50 of the Treaty of the European Union (TEU) without Parliamentary consent through exercise of prerogative power to leave treaties.¹⁰ While it was argued by the applicants that it is crucial for Parliamentary consent prior to exercising this prerogative power as it directly affects an act of Parliament, the ECA.¹¹ It was contended by the government that there wasn't any need for Parliamentary consent as it is a power that is reserved for the executive to utilise – an argument that was supported in the minority judgement by Lord Reed who indicated that as there was no act requiring such a consent, it was not required.¹² However, the majority disagreed with this contention and held that concerning the principle of Parliamentary sovereignty, the executive must take Parliamentary consent before triggering Article 50 of the TEU as it would have a direct impact on the status of an act of Parliament – the ECA.¹³ Therefore, as Dicey's definition accords only Parliament with the power to repeal, override, make and unmake any legislation,¹⁴ and with the Court recognizing this,¹⁵ this case proves to provide strong evidence of the notion of Dicey's Parliamentary sovereignty in existence in contemporary UK.

⁶ Dicey (n 1).

⁷ *Miller/Cherry* (n 2).

⁸ *ibid.*

⁹ *R v (on the application of Miller) v Secretary of State for Exiting the European Union (Miller No.1)* [2017] UKSC 5, [2018] AC 61.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

¹⁴ Dicey (n 1).

¹⁵ *Miller* (n 8).

THE HUMAN RIGHTS ACT

Although the Miller cases provided strong evidence to support the principle's contemporary prevalence, the Human Rights Act 1998 (HRA) strengthens the argument further.¹⁶ While section 3 of the act requires that Parliament's statutes should be read in line with convention rights of the ECHR, and section 4, empowers courts to issue declarations of incompatibility against Parliament's statutes.¹⁷ Critics of the HRA have argued that the statute acts as a supra-national controlling mechanism which clashes with the principle of Parliamentary sovereignty.¹⁸ It is rebutted by supporters of the HRA that since section 4 only accords power to issue declarations and not invalidate any legislation, it is complying to the notion of Parliamentary Sovereignty.¹⁹

However, this was only meant for primary legislation – not for secondary pieces of legislation.²⁰

The government in response to such critics, recognizing the diceyan principle, argued that since these secondary legislations were merely complementary to the main act from Parliament, it did not go against the principle to strike such pieces of legislation down.²¹ Considering that to date only 46 declarations have been issued,²² shows that there is an immense respect of the courts towards the sovereignty of Parliament and that the HRA respects Dicey's principle and preserves the principle in contemporary Britain.²³ Thus, the HRA provides strong statutory evidence that shows the existence of the principle in contemporary UK.

DEVOLUTION

However, the matter of Devolution may provide evidence suggesting that the principle has weakened, contrary, to what the Miller cases and the HRA have shown. The Westminster Parliament – the seat of the country's main Parliament – originated after the merging of the Scottish and English Parliaments into one through the signing of the Act of Union 1707.²⁴ While,

¹⁶ Human Rights Act 1998.

¹⁷ Keith Ewing, 'Brexiteer and Parliamentary Sovereignty' (2017) MLR 80(4) 711.

¹⁸ Jelena Sanfey, 'The Effect of the European Communities Act 1972 and the Human Rights Act 1998 on the UK's Constitutional Order Considering the Principle of Parliamentary Sovereignty' (2009) 11 Rev Eur L 51.

¹⁹ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).

²⁰ *ibid.*

²¹ *ibid.*

²² Ministry of Justice, *Responding to human rights judgments*, (CP 763, 2022).

²³ Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, (2021-22, HL 31, HC 89) 111.

²⁴ Act of Union 1707.

until 1997 the power to legislate was withheld by the Westminster Parliament,²⁵ this changed when the Government of Wales Act 1998,²⁶ Scotland Act 1998(SA)²⁷ and Northern Ireland Act 1998²⁸ were passed into law. Each act decentralised legislative authority from Westminster to separate ‘devolved’ assemblies,²⁹ a move considered by critics as the end to concepts of UK constitutionalism produced by Dicey, including his principle on Parliamentary sovereignty.³⁰

However, there was support for devolution stating that by maintaining Parliamentary sovereignty, Westminster could revoke any such devolved power whenever it pleased and emphasised the existence of veto clauses to block laws originating from devolved assemblies.³¹ Considering the claims made by critics and supporters, a recent decision in 2023 by the government to use section 35 of SA for the first time to veto a Scottish Parliamentary bill which would have overridden a Westminster bill brings into question Dicey’s principle and its prevalence since Devolution.³² When Dicey stated that the law-making power be strictly with the ‘Parliament’ and that no other body may override it,³³ at that time it was the Westminster Parliament, but with devolution bringing into existence various legislative assemblies, there is no longer the existence of a singular legislative body for the nation.³⁴ Thus, it can be said analysing the critics and supporters, that the first limb of Dicey’s principle is weakened, the usage of the first veto by Downing Street substantiates the point that the process of devolution, has resulted in the weakening of the Diceyan principle.³⁵

THE LORD ADVOCATE’S REFERENCE 2022

Case law in a 2022 decision further signifies the threat posed by Devolution to the Diceyan theory of Parliamentary sovereignty. In the case of *REFERENCE by the Lord Advocate*, the supreme court had to adjudicate whether a bill from the Scottish Parliament granting the power to the

²⁵ Civil Service, ‘Devolution: Factsheet’ (2019)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770709/DevolutionFactsheet.pdf> accessed 12 March 2023.

²⁶ Government of Wales Act 1998.

²⁷ Scotland Act 1998.

²⁸ Northern Ireland Act 1998.

²⁹ *Factsheet* (n 25).

³⁰ Alex Schwartz, ‘The Changing Concepts of the Constitution’ (2022) 42 OJLS 758.

³¹ David Torrance, ‘Introduction to devolution in the United Kingdom’ (House of Commons Briefing Paper 8599, 25 January 2022).

³² David Torrance, Doug Pyper, ‘The Secretary of State’s veto and the Gender Recognition Reform (Scotland) Bill’ (House of Commons Briefing Paper 9705, 3 March 2023).

³³ *Dicey* (n 1).

³⁴ *Factsheet* (n 25).

³⁵ Brigid Hadfield, ‘Devolution, Westminster and the English question’ [2005] PL 286.

Scottish government to independently hold another referendum on Scottish Independence formed a ‘reserved category’ that only Westminster Parliament could legislate on.³⁶ While it was held that the bill did form part of a category involving reserved matters that are withheld by the Westminster Parliament, it was strongly contended by the Scottish government that the bill did not make the result of such a referendum legally binding and as such it should have the right to pass the bill.³⁷ The implications this decision has on the Diceyan theory is vast. Dicey’s first limb of the principle required that only the Westminster Parliament had the power to make any law whatsoever,³⁸ but through devolution, and as indicated in this case, the exclusive power Parliament has on making laws is restricted to matters reserved for it, allowing for much of its powers to become ‘devolved’ and therefore shared with these assemblies,³⁹ thereby, weakening the Diceyan theory’s first limb.⁴⁰ This weakening also occurs in the second limb, which states that no other body or person can override or repeal a bill of Parliament,⁴¹ as demonstrated in this case however, by going ahead with this statute albeit non-binding, the Scottish Parliament – a body – other than Westminster Parliament aimed at trying to challenge the Act of Union 1707 an act of Westminster Parliament,⁴² which according to Dicey cannot happen under Parliamentary sovereignty.⁴³

CONCLUSION

In conclusion, Dicey’s principle of Parliamentary sovereignty in contemporary UK is weakened. While the Miller cases prove to be strong evidences to support the existence of the full principle contemporarily and further substantiated through the statutory evidence of the HRA. The process of devolution that the UK has undergone in recent years, wherein the powers of Parliament have been decentralized to devolved assemblies, has strongly impacted Dicey’s first limb that no other body or person can make or unmake any laws. Devolution also impacted the second limb, showcased through the decision to veto a Scottish bill and then the supreme court case considering the validity of a Scottish Independence Bill – both instances presented clear threats to the ability of Parliament alone to override and repeal its statutes. Thus, Dicey’s principle of Parliamentary sovereignty no longer exists as strongly as it once did when he first theorized it.

(1849 words)

³⁶ REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31, [2022] 1 WLR 5435.

³⁷ *ibid.*

³⁸ Dicey (n 1).

³⁹ Lord Advocate’s Reference (n 35).

⁴⁰ Dicey (n 1).

⁴¹ *ibid.*

⁴² Lord Advocate’s Reference (n 35).

⁴³ Dicey (n 1).

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