

Lord Hope at the WG Hart Legal Workshop 2011

Sovereignty in Question – 28 June 2011

A view from the Bench

I cannot help feeling that I am at a disadvantage. Here I am, the last to speak on what has been for all of us a very busy day. I have not heard any of the previous speakers on the concepts and other aspects of sovereignty nor have I taken part in any of the panel sessions in which these issues have been explored. I have been occupied elsewhere in the UK Supreme Court hearing a series of cases about the impact of European Convention rights on criminal law and practice in Scotland. So my thoughts have been rather far away from the topic of today's discussions, while you have been thinking of nothing else.

Scotland, however, is the country from which I come, and as a Scots lawyer I have been brought up to regard the issue of Parliamentary sovereignty from a distinctively Scottish viewpoint. So it is on that aspect of the issue of sovereignty in general that I wish to concentrate. And the view from the Bench which I shall be describing is a view which was fashioned north of the Border. It concerns the relationship between the courts and Parliament. What, so far as that relationship is concerned, is Parliamentary sovereignty? Where did it come from? What are its limits? What does it mean?

According to Dicey¹, the sovereignty of Parliament is the dominant characteristic of our political institutions. But, like all constitutional doctrines in our system in the United Kingdom, the doctrines relating to Parliament are the result not of scholarly debate but of history. We have to remember that our revolutions, amongst which was the rejection of the absolute monarchy of the Stuart Kings and their return under a constitutional monarchy in 1688, occurred relatively early in the history of the modern state. They occurred at times when it had not become customary to complete a revolution by framing a written constitution. This is especially so in relation to Parliament. Nothing very much has been written down. There is ample room for debate.

Its current position and powers may be traced back to the struggle for supremacy with the Crown and the King's prerogative. The Bill of Rights of 1688 abolished the right that the Stuart Kings had asserted to suspend laws made by Parliament. The Act of Settlement of 1700 enshrined in our constitution the independence of the judiciary, save that in extremis a judge could be removed upon the address of both Houses of Parliament. And in 1716 Parliament prolonged its own existence, previously fixed at three years, to seven years by the Septennial Act which, as Dicey saw it², was at once the result and proof of Parliament as the sovereign legal power in the state. In the meantime, by the Acts of Union of 1707, the Parliaments of England and Scotland had become united in the Parliament of Great Britain at Westminster. Among other provisions which protected particular aspects of Scottish society such as the church and the universities, by Article XIX it was declared that the Court of Session – the supreme court of civil jurisdiction in

¹ AV Dicey, *Introduction to the Study of the Law of the Constitution*, with an introduction by ECS Wade (10th ed, 1962), p 39.

² *Ibid*, p 48.

Scotland – was to remain in all time coming, with the same authority and privileges as before the Union. This appeared to confer a particular status on that court³, making it immune from the otherwise unlimited power of the new Parliament to do what it liked with it. It may be that one should avoid reading too much into language of the kind found in that Article⁴, but it has been taken as an indication that by 1707, at least, the doctrine that the Scots Parliament enjoyed unlimited sovereignty had not yet emerged. The Inner House of the Court of Session recently⁵ described parliamentary sovereignty – looking at the matter from the Scots viewpoint, of course – as essentially a 19th century doctrine.

The touchstone by which one may measure sovereignty is whether there exists any competing authority which can challenge the legislative authority of Parliament⁶. It is abundantly clear that the Crown lost that right for ever in 1688. But the relationship between Parliament and the judges is, I would suggest, less clear. This is especially so from the Scottish viewpoint. As is well known, Lord President Cooper in *MacCormick v Lord Advocate*⁷ had difficulty in seeing why it should be supposed that, as the principle of the unlimited sovereignty of Parliament appeared to be a distinctively English principle which had no counterpart in Scots law, the new Parliament of Great Britain should inherit all the peculiar characteristics of the English Parliament and none of the Scottish Parliament, as if all that had happened in 1707 was that Scottish representatives

³ See *Lord Gray's Motion* 2000 SC (HL) 46, 58.

⁴ See JD Ford, *The legal provisions in the Acts of Union* [2007] CLJ 106, at pp 128-139.

⁵ *Axa General Insurance Ltd, Petitioners* 2011 SLT 439, para 62.

⁶ Wade and Bradley, pp 44, 50

⁷ 1953 SC 396, 411.

were admitted to the Parliament of England. Lord Russell observed in the same case⁸ that during the two centuries that had preceded the Union of the Crowns in 1603 Scotland was politically in an unsettled and disturbed state and that there was little to suggest that by 1707 the framework of government in Scotland had been so consolidated that the Scottish Parliament enjoyed unchallengeable sovereignty.

As the Lord President pointed out, the Treaty by which the new Parliament was brought into being contained some clauses, among which was Article XIX, which expressly reserve to the Parliament of Great Britain powers of subsequent modification and other clauses which either do not contain such a power or which emphatically exclude such a power by declarations that the provision shall be fundamental and unalterable in all time coming. “I have never been able to understand”, he declared, “how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provision.” It has been suggested by Professor Wade that the answer is that the former Parliament of England could not be understood to have given up at the union the attribute of sovereignty which it already had⁹. To Scottish ears that is not much of an answer. Professors Bradley and Ewing, in their book on constitutional law, acknowledged that it cannot be concluded from existing precedents that under no circumstances could the basic rule of legislative supremacy be qualified by judicial decision¹⁰.

⁸ Ibid, p 417.

⁹ Wade and Bradley, p 58; Wade’s introduction to Dicey (10th ed, 1962), p lxxv-lxxvi.

¹⁰ AW Bradley and KD Ewing, *Constitutional and Administrative Law* (12 ed, 1998), pp 82-83; *Lord Gray’s Motion* 2000 SC (HL) 46, 59.

It may be that, as Wade himself thought¹¹, the Lord President regarded the Act of Union itself as a fundamental part of constitutional law and that his regret was that the state of the law was such that even a fundamental provision was subject to alteration by an Act of Parliament which the courts were bound to accept. I find that view hard to reconcile with the words that the Lord President himself used. Professor TB Smith, always eloquent in his advocacy of the Scottish viewpoint, was certainly not of the same view as Wade¹². But the Scottish courts have been reluctant to engage further in this debate.

Lord Keith, sitting as a judge in the Outer House, declined to accept as justiciable the question whether an Act of the United Kingdom Parliament which altered a particular aspect of Scots private law was or was not “for the evident utility” of the subjects within Scotland for the purposes of Article XVIII of the Act of Union, which provided that unless that was so no alteration could be made to the laws of Scotland concerning “private right”¹³. I myself, sitting in the Inner House as Lord President of the Court of Session, declined to deal with a similar argument which had been advanced by a litigant in person. He maintained that he was not obliged to provide information to a community charges registration officer under section 17 of the Abolition of Domestic Rates Etc (Scotland) Act 1987, which he certainly was according to the terms of the statute¹⁴. The introduction of the community charge, popularly referred to as the poll tax in Scotland one year ahead of its introduction in England was, of course, hugely unpopular in Scotland. It led to the collapse of support for the Conservative party in Scotland from

¹¹ Wade’s introduction to Dicey (10th ed, 1962), p lxvi.

¹² *The Union of 1707 as Fundamental Law* (1957) Public Law 99.

¹³ *Gibson v Lord Advocate* 1975 SLT 134, at p 137.

¹⁴ *Murray v Rogers* 1992 SLT 221, at p 226; see also *Pringle, Petitioner* 1991 SLT 330; *Sillars v Smith* 1992 SLT 539.

which it has never recovered. But that was not enough to tempt me then into the very difficult area of whether there are limits to the doctrine of Parliamentary sovereignty. Sitting in the House of Lords' Committee for Privileges on an application for a declaration by that Committee that the Bill which was to abolish the right hereditary peers to sit in the House of Lords violated the rights of the Scottish Peers under the Treaty of Union, I said that the issue as to whether the Westminster Parliament enjoyed unlimited sovereignty did not need to be resolved in that case and was ultimately for the courts to decide¹⁵.

My views have moved on a bit since those days, however, and I am less reluctant than I was then to engage with the subject. There are, of course, two aspects to this doctrine. First, there is the positive aspect. Is Parliament competent to legislate upon any subject matter? It appears now to be accepted that it can make or unmake any law it chooses. As it cannot bind its successors, its successors can unmake any law that it may choose to make. If it were not otherwise, the sovereignty of its successors would be limited. But there is also the negative aspect. Once Parliament has legislated, can a court or any other body pass judgment on the validity of the legislation that it has enacted? Dicey's pronouncements on these two aspects, which show how closely that are linked to each other, were unequivocal¹⁶:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, 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 a right to override or set aside the legislation of Parliament.”

¹⁵ *Lord Gray's Motion* 2000 SC (HL) 46, 59.

¹⁶ *Introduction to the Study of the Law of the Constitution* (10th ed, 1962), pp 39-40.

Having examined the history of the matter, including experience of legislation in respect of matters covered by the Treaties of Union with Scotland and Ireland which, to his mind, revealed the futility inherent in every attempt of a sovereign legislature to restrain the action of an equally sovereign body, he declared¹⁷:

“Parliamentary sovereignty is therefore an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.”

His repeated use of the words “England” and “English” where he must surely have been referring to the Parliament and constitution of the United Kingdom is rather irritating to a Scotsman. But, as his editors Wade and Bradley point out¹⁸, there was for him no definite assignable part of the law of the country which could be recorded as the constitution of the United Kingdom. He would have been unshaken by the arguments that were advanced in the various Scottish cases to which I have referred in his belief that the English judges do not claim or exercise any power to repeal a statute, and that there is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament.

It seems to me, however, that there is a problem about this approach. No theory about the sovereignty of Parliament can be proved, in the way that other legal concepts may be, by a chain of elucidatory decisions¹⁹. This is partly because the cases in which the issue may properly be raised are so rare. The Scottish cases to which I have referred illustrate this feature of the doctrine’s lack of exposure to detailed and exacting judicial scrutiny. It

¹⁷ Ibid, pp 68-70.

¹⁸ Ibid, p xxx.

¹⁹ JDB Mitchell, *Constitutional Law* (1964), p 49.

was all too easy to find ways of dealing with the issue in some other way so as to avoid a confrontation with Parliament which, in truth, the judges would rather not have. Such precedents as there may be were decided long ago, reflecting political facts and circumstances as they were then, not those of today. Experience of the way the system has operated in practice shows that Parliament has been pre-eminent in the development of our modern constitution. It has been virtually the sole source, either directly or indirectly, of legislation and has been free from the restraints of any other system of law. In rare cases, such as under the United Nations Act 1946, the executive has power to legislate by Order in Council without the need to secure the approval of Parliament²⁰. But it was Parliament itself which created this exception. It is a universal rule that in practice no legislation of any kind, whether direct or indirect, may be made or enacted without the authority of Parliament. The authority of the devolved legislatures on Scotland, Wales and Northern Ireland on matters that it decided not to reserve to itself was conferred on them by the Parliament at Westminster.

It appears then to be the case that it is simply because of the *apparent* absence of limitations that the belief has grown up that Parliament may pass any law at all whatever without any limitation. The limitations on its powers that are the result of the European Communities Act 1972 were self-inflicted, as it was its own legislation that imported the treaty obligations under the EC Treaties into domestic law. So too are the carefully circumscribed limitations which have been built into the Human Rights Act 1998 as part of the exercise of bringing home rights recognised by the European Convention on Human Rights. Those particular cases aside, as they tell us nothing about the position at

²⁰ See *A v HM Treasury* [2010] 2 AC 728; *R v Forsyth* [2011] 2 WLR 277.

common law, it is clear that the ability of Parliament to do what it likes is not confined by international law²¹ or the laws of logic or any other system of norms such as morality. It could, if it wished, declare that the development of pleural plaques as a result of exposure to asbestos dust which, in the light of the agreed medical evidence, the House of Lords held gives rise to no actionable loss or damage²² should nevertheless sound in damages and thus be actionable. Whether the devolved legislatures in Scotland and Northern Ireland which have passed legislation to this effect had legislative competence to do this is the subject of current litigation in the UK Supreme Court²³. But no-one would regard legislation to that effect by the Westminster Parliament, if it chose to take this step, as open to challenge on the ground that it lacked the power to legislate.

There is little reason, then, to doubt the soundness of what Dicey had to say on the positive aspect of the matter. The more difficult issue is as to what he said about the negative aspect. Is it true – leaving aside the special case of legislation that is incompatible with EU law or with Convention rights, as to both of which the judges have an undoubted function in controlling the activities of the legislature – that no person or body has the right to override or set aside the legislation of Parliament? Here we are, I think, in uncharted territory. The traditional answer, of course, is that no judicial review of legislation enacted by parliament is possible. In *Mortensen v Peters*²⁴ Lord Justice General Dunedin said: “For us, an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.”

²¹ Eg *Mortensen v Peters* (1906) 8 F (J) 93, 100 per Lord Dunedin.

²² *Rothwell v Chemical Insulating Co Ltd* [2008] 1 AC 281.

²³ On appeal from *Axa General Insurance Ltd, Petitioners* 2011 SLT 439.

²⁴ (1906) 8 F (J) 93, 100-101.

There is Scottish authority to that effect dating from the middle of the 19th century²⁵, which predated a forceful declaration to the same effect in England²⁶. Lord Guthrie, sitting in the Outer House in *MacCormick v Lord Advocate* was quite explicit on the point. He said that no Scottish court had ever held an Act of Parliament to be ultra vires and that it had never been suggested that it could do so²⁷.

But Professor JDB Mitchell, who taught constitutional law at Edinburgh University in the 1960s, was of the opinion that the authorities are not all one side on this point or consistent within themselves²⁸. There is, he said, an interplay of political ideas and political facts in the creation of such ideas or rules of law as we have on this subject. Without a written constitution to guide us, a process of evolution in the development of ideas is inevitable. This is as true of the position in our constitution of the judiciary as it is of Parliament.

In the past the courts did not prove themselves to be strong bulwarks against claims by the Crown under the prerogative. It was left to Parliament to do this by asserting its authority. But it is far from clear today, when it comes to providing a bulwark against an excess of the exercise of power by the executive, that Parliament can be relied upon in way that would make it unnecessary to look to the judges to do this for us. Under our system, as it has evolved, a party must command a majority in the House of Commons if it is to enter into government. An executive which has that majority can in theory, and

²⁵ *Middleton v Anderson* (1842) 4 D 957 at 1010, per Lord Mackenzie.

²⁶ *Lee v Bude and Torrington Junction Railway* (1871) LR 6 CP 576, 582, per Wiles J.

²⁷ 1953 SC 396 at p 403.

²⁸ JDB Mitchell, *Constitutional Law* (1964), p 66-67.

usually in practice, get the House of Commons to do whatever it – the executive – likes. The sovereignty of Parliament is in the hands of the executive. The House of Lords, constrained by the Parliament Acts and by the Salisbury convention by which it will not obstruct legislation for which the elected government sought and has obtained a mandate in its manifesto, will always give way, eventually, to the elected House. So when we think of the sovereignty of Parliament we should really be thinking of what this means about the power that this gives to the executive. The executive is, of course, subject to the will of Parliament. But in practice, nowadays, between elections we have what Lord Hailsham famously described in his 1976 Dimpleby Lecture as an “elective dictatorship”²⁹. Is the executive really to be free to pass through Parliament, which is under its control, whatever measures it likes? There may now be grounds for thinking that a shift has taken place and that the possibility of judicial review, albeit only in the most extreme circumstances, needs to be re-examined.

As will be well known to most of you, the case of *R (Jackson) v The Attorney General*³⁰, in which the issue was whether the Hunting Act 2004 was a valid Act of Parliament, provided judges in the House of Lords with an opportunity of expressing views on the more general issue of Parliamentary sovereignty. The real issue in that case was one of statutory interpretation, as to the effect of the Parliament Acts. But some of us said things about the broader issue which have been regarded as controversial and, by two very distinguished judges, as quite wrong. Lord Steyn³¹ said that the classic account given by Dicey about the doctrine of the supremacy of Parliament can now be seen to be

²⁹ Lord Bingham, *The Rule of Law*, p 26.

³⁰ [2006] 1 AC 262.

³¹ *Ibid*, para 102.

out of place in the modern United Kingdom. It was, he said, a construct of the common law. The judges had created the principle, and that it was not unthinkable that the courts might have to qualify a principle which had been established by the judges on a different hypothesis of constitutionalism. He took as an example an attempt to abolish judicial review or the ordinary role of the courts³². Scottish lawyers, recalling the words of Lord President Cooper in *MacCormick v Lord Advocate*, would take as an example an attempt by the Westminster Parliament to abolish the Court of Session in Scotland and subject Scots law to the jurisdiction of the English courts. In my speech I said that the rule of law enforced by the courts was the ultimate controlling factor on which our constitution is based³³.

In a recent lecture³⁴ the Master of the Rolls, Lord Neuberger of Abbotsbury, took issue with these propositions. He concluded that the doctrine of Parliamentary sovereignty remains as it was declared to be by Dicey. Although he recognised that the judges have a vital role to play in protecting individuals against the abuses and excesses of an increasingly powerful executive, he said that we cannot go against Parliament's will as expressed through a statute. That, with respect, seems to be to a dangerous doctrine unless one can be absolutely confident that the increasingly powerful executive will not abuse the legislative authority of a Parliament which, ex hypothesi, it controls because of the absolute majority that it enjoys in the House of Commons. I think that he is right to regard a fundamental reordering of the constitution to limit Parliamentary sovereignty as

³² See also Jeffrey Jowell, *Parliamentary Sovereignty under the New Constitutional Hypothesis* [2006] Public Law 562, 573 where judicial review is described as a building block of our constitutional democracy.

³³ Ibid, para 107.

³⁴ The second Lord Alexander of Weedon lecture, *Who are the Masters now?* - 6 April 2011.

a matter for a written constitution. But it is questionable whether it would require a fundamental re-ordering of the constitution for the judges to refuse to accept as law a statute which struck at the heart of the rule of law itself.

Lord Bingham of Cornhill in his celebrated book *The Rule of Law* said that he could not accept that Parliamentary sovereignty was created by the common law³⁵:

“It is true of course that the principle of parliamentary sovereignty cannot without circularity be ascribed to statute, and the historical record in any event reveals no such statute. But it does not follow that the principle must be a creature of judge-made common law which the judges can alter: if it were, the rule could be altered by statute, since the prime characteristic of any common law rule is that it yields to a contrary provision of a statute. To my mind, it has been convincingly shown that the principle of parliamentary sovereignty has been recognised as a fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by the judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle, and they cannot, by themselves, change it.”

I cannot find fault with anything in this passage, apart from the last few words in the last sentence. But it seems to me to overlook the fact that under our legal system a law does not simply exist. It has to come from somewhere. It is either enacted law, for which Parliament is the source, or it is a product of the common law made by the judges. There is, as Lord Bingham says, no statute to which the principle can be ascribed. Parliament has not passed any law declaring, in so many words, its own sovereignty. It is because officials at the highest level, including the judges, have refrained from calling its sovereignty into question that the traditional view has grown up, which the judges have endorsed in the exercise of their common law powers, that it is a fundamental principle that Parliament's sovereignty is absolute.

³⁵ *The Rule of Law*, p 167.

But I do not think that we can ignore the fact that times have changed since Dicey. It seems to me that there is a very real question as to whether we can continue to rely on Parliament to control an abuse of its legislative authority by the executive. It is an uncomfortable fact that Parliamentary sovereignty and the rule of law are not entirely in harmony with each other. So long as Parliament respects the rule of law there is no problem. But to assert that Parliament can enact whatever laws it pleases runs the risk that the rule of law will be subordinated to the will of the government. I think that Lord Bingham recognised this when he said that our constitutional settlement has become unbalanced by the fact that the power to restrain legislation favoured by a clear majority of the House of Commons has become much weakened. He accepted that this was not a problem that will go away if we ignore it. In the last paragraph of his book he wrote these words³⁶:

“One may hope that the sovereignty of Parliament and its relationship with the rule of law may be seen as a matter worthy of consideration if, as I suggest, there are some rules which no government should be free to violate without legal restraint.”

But the solution to this problem, as he saw it, was the substitution of a codified and entrenched constitution, not a conflict between the judges and Parliament.

Of course, conflict between the judiciary and the legislature is undesirable. But circumstances could arrive where we are left with no alternative. A government which had no regard for the rule of law, seeing it as an impediment to the action it wished to take, would hardly be likely to facilitate the enactment of a constitution that gave the rule

³⁶ *The Rule of Law*, pp 169-170.

of law pre-eminence. Politicians with an absolute majority in a democratically elected legislature who regard the rule of law as an impediment to progress may be tempted to use the mandate that their majority gives them to override its effect under the umbrella of democracy. My point in *Jackson*, and I think the point that Lord Steyn was making too, is that the ultimate safeguard against such abuses of the legislative power of Parliament lies in the power of the judges. After all, other countries such as the USA, Canada and Germany believe that rights are better protected when judges, rather than politicians, have the last word. It does no harm to our unwritten constitution for the judges to indicate to the executive arm of government that it should not assume that the sovereignty of Parliament, over which it has control, is entirely unlimited. The absence of a general power to strike down legislation which it has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case where the survival of the rule of law itself was threatened because their role as the ultimate guardians of it was being removed from them.

I cannot leave this topic without acknowledging the contribution to this debate of Professor Jeffrey Goldsworthy, who will be one of the keynote speakers on the last day of this workshop. He has argued powerfully³⁷ that sovereignty is the product of long-standing consensual practices among senior officials within our legal system, including those within the executive, which emerged from centuries-old political struggles and that it would require legislation for radical change to be brought about. I think that his answer to the argument that *in extremis* the power of the judges is the ultimate safeguard is that

³⁷ *The Sovereignty of Parliament, History and Philosophy* (1999); *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).

there are things that a majority in Parliament either would not want to do or for political reasons would never do, and that it is not the business of the courts to add the threat of judicial invalidation to the moral and political imperatives that prevent Parliament from doing them.

I suppose that what lies between us in the end of the day is the extent to which we can be confident that those imperatives will always prevail. There is no need for a deterrent if the feared-for event will never happen. But I think that to make the assumption would be a hostage to fortune. Our constitutional arrangements are so uncertain and so fast-moving that I would rather not make it³⁸.

28 June 2011

Lord Hope of Craighead

³⁸ I am grateful to my judicial assistant Peter Webster for his help in preparing this paper.