BOOK REVIEW

J. O. FROSINI
DALLA SOVRANITÀ DEL PARLAMENTO
ALLA SOVRANITÀ DEL POPOLO.
LA RIVOLUZIONE COSTITUZIONALE DELLA BREXIT (2020)

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1. Introduction

"*Dalla sovranità del Parlamento alla sovranità del popolo. La rivoluzione costituzionale della Brexit*" by Justin O. Frosini, is a book that can be read with growing curiosity, page after page, and this seldom happens when it comes to a scientific monograph.

The Author guides us through a historical, political, and institutional path revealing their inner causes, investigating the implicit features, complexity and cryptotypes of the English constitutional system.

Considering and moving from the impressive preface by De Vergottini, I shall only underline one aspect, which the author himself mentions on page 3: the timeline of the events significantly affecting the current constitutional situation is constructed through a "diachronic weighting of the spirit of English constitutionalism". The author refers to Bognetti, who underlines how, in order to fully acknowledge a specific legal framework, one should need "the detection of the core values shaping its structures and contents...that is to say, of the soul that creates its fundamental traits

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in being as it is". And this soul seems to emerge from the engaging pages of the book.
Another important pattern lies in its background thesis, guiding the whole discussion. The Author highlights that most of British citizens voted 'leave' to defend the principle of sovereignty of the Parliament; nonetheless the outcome was the emersion of a general principle of popular sovereignty.
This thesis comes back into the picture throughout the book.
One point seems particularly striking: when the speaker of the House of Commons does not allow a new vote on the agreement reached by Johnson with the European Union because the Commons had already voted on a motion on the same issue. As stated by the government: "Once again the Speaker of the House denied us the possibility to fulfil the British people will".
Coming back to the concept of 'soul' mentioned by Bognetti and recalling Powell, Frosini explains, how in English history Parliament has literally represented the soul of the nation. In no other continental legal system, the legislative assembly has ever gained the same identity: "Remove parliament from the history of England and history itself becomes meaningless".
Wondering whether joining the European Communities in 1972 had effectively undermined this parliamentary supremacy, Frosini denies this is the case, relying on a huge literature on the topic. Additionally, the 1972 law contains an interpretative rule according to which "the future legislative acts of Parliament must not be interpreted in ways that might conflict with the supremacy of European laws owning direct effect". This statement would establish an implicit supremacy clause since the prevalence of the EU law finds its source in a legislative act of Parliament.
In my opinion, the book can thus be discussed around two main points: the referendum (as a political tool and as a source of law), and the interactions between Brexit and devolution. However, the latter can foster the analysis of additional issues, in particular: the role and possible evolutions of the debated Sewel convention, cooperation and connecting institutions within the devolution framework, the role of Northern Ireland. A brief overview on these topics will thus follow.

2. The referendum

In relation to Frosini's thesis, it is worth noting that the spread of anti-Europeanism after joining the European communities was born in a populist, not parliamentarian, key. It someway introduced from the beginning the conflict between the European integration process and the English people's (alleged) economic and social interests, intertwining them with a (recessive) constitutional interest in the preservation of the traditional institutional framework.

How does the referendum fit into this scenario? The reference – made by Frosini – to the mail exchanges between Jenkins and Wilson is highly significant, since the former wrote that "Referendum is the most powerful tool against a progressive legislator this country has ever known since the days of the House of Lords absolute powers".

From this point of view, the referendum can certainly embody a 'conservative' instrument, as well as a link between popular sovereignty and the sovereignty of Parliament, in which the latter is guaranteed through the exercise of the former. But this will not reasonably happen at all. Moreover, the issue is relevant since the particular role the referendum plays within the English constitutional system. The latter also emerges indirectly, considering the relationships with Northern Ireland. In fact, the Good Friday Agreement represents quite an innovation in the way the referendum itself is conceived.

The republican "style" followed in the 1998 Agreement is also envisaged, on the one hand, through the integration between direct democracy tools and the principle of parliamentary sovereignty the act pursues. On the other hand, it places the former on a substantially higher and certainly different level from the limited role it usually plays in English constitutional law. In the British system, a referendum "can only be consultative in character" (see B. Putschli, *The Referendum in British Politics. Experiences and Controversies since the 1970s*, 2007, 94). Hence, notwithstanding its political relevance and ability to deeply influence present and future institutional choices, it is not legally binding, nor it can influence legislative agenda.

In this regard Justin Frosini recalls Bogdanor, who reminds us how "the referendum must not replace the instruments of representative democracy, but only support them": it would therefore be a mere completion of the representative principle.

It is also worth mentioning the report carried out by the *Select Committee on the Constitution of the House of Lords* in 2010, '*Referendums in the United Kingdom*', in which the main *rationales* of referendums in the United Kingdom are briefly and effectively discussed. Specific focus is devoted to the use of the referendum on issues falling among "constitutional matters". One of the conclusions the Select Committee reached is quite significant: "*The balance of the evidence that we have heard leads us to the conclusion that there are significant drawbacks to the use of referendums. In particular, we regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day. Referendums may become a part of the UK's political and constitutional practice. Where possible, cross-party agreement should be sought as to the circumstances in which it is appropriate for referendums to be used*."

From a different perspective, referendums seem crucial for the system in all those cases affecting parliamentary sovereignty, some way envisaging a defence against it and a form of popular control over its potential limits. This happened in the first occasion of a positive result as well (i.e.: confirming membership in the European Community and the Single Market, see Frosini, 29).

Currently, we are witnessing the replication in the judicial context of the value referendum owns in the system as a whole. Paradigmatically, on the Brexit referendum, when (page 90) the High Court, in the *Miller v. Secretary of State* 2016 took the opportunity to reconfirm the mere consultative nature of referendum, though not obliged to do so given that the question concerned, as is well known, the limits to the exercise of the royal prerogative. The court shows that with the Referendum Act 2015 the Parliament did not delegate to the British people the decision whether the United Kingdom should have stayed or not in the EU.

Therefore, with reference to the book thesis, one can ask whether, rather than a mere opposition between parliamentary sovereignty and popular sovereignty, we are witnessing a general crisis of the British model of separation of powers. The triangulation of the conflict involving executive-parliament-judges well represented by the attack promoted by the media against the judiciary in the aftermath of the Miller sentence (and with respect to which the government did not take a strong position, indeed), also emerged in 2019. The Supreme Court, on the question relating to the *prorogation* requested by Johnson, emphasized that if the matter is justiciable, a judgment on it does not conflict with the

principle of separation of powers. On the contrary, the Court will grant its balance, ensuring that, through the *prorogation*, the Government would not prevent the Parliament from carrying out its functions.

Undoubtedly, this conflict shows an instrumental use of popular consensus carried out by the government, in addition to evident distortions driven by the media. These schemes seem less known in British parliamentarism but quite recurrent in other systems, especially in times of crisis of political representation. From this point of view, the considerations on the role of fake news are crucial (pages 40 and 80).

Hence, one might wonder if the United Kingdom's constitutional system and the constitutional culture, have been transformed by Brexit (and its consequences) or mostly by the decades of belonging to Europe.

The distinction between endogenous and exogenous innovations is not that stark, since one should also investigate interplaying multiform leverages. The advent of judicial review, the different role of judges, determined also (although not only) by external influences and the belonging to a European constitutional framework have played an important role in Brexit in the preservation of the parliamentary sovereignty.

3. The interactions between Brexit and Devolution

The transformation of a system from centralized to decentralized, especially when legislative functions are involved, may require a set of institutional changes of the state as a whole: an effective system of intergovernmental relations, adequate tools for participation, a system of constitutional litigation in case of conflicts arising from shared competences and to protect the prerogatives of local entities. Indeed, in the United Kingdom the accommodations of the central institutions (Westminster and Whitehall) to devolution have been minimal. The Westminster Parliament sovereignty has not been questioned, and no joined decision-making processes have been established between Westminster and *devolved legislatures* (G. Saputelli, 2020, *DPCE online*). Overall, the system of connections and participation is weak and shows a hierarchical setting of relations between central and devolved

institutions. British centralism has not been dissolved, and judicial review of legislation, a fundamental constitutional innovation for the United Kingdom led by the progressive transformation due to the membership of the EU and the Council of Europe, is limited to devolved legislatures. In fact, Lady Hale in 2018 declared: "I think that the only conclusion I can draw is that devolution of legislative – as opposed to executive – power turns the United Kingdom Supreme Court into a genuinely constitutional court" (*Devolution and The Supreme Court – 20 Years On Scottish Public Law Group 2018*, Edinburgh, Lady Hale, President of The Supreme Court 14 June 2018). Nevertheless no one, even in light of the events that Frosini describes in his work, could ever consider the Supreme Court as a "Court of Nations". This would mean, quoting Wechsler (H. Wechsler, *The Political safeguards of federalism: the role of the states in the composition and selection of the national government*, 1954), a *judicial safeguard of federalism*' (an expression meant to identify in the political safeguards of federalism the real guarantees of the US federal system/model?).

Therefore, Frosini's thesis challenges the role parliamentary sovereignty and popular sovereignty have played vis-à-vis local autonomies. Indeed, the Parliament and the central government both seem to have regained centrality in detriment of the latter, whose promotion stems, so to speak, from the European pattern. In fact, in the 1970s the first devolution *rationale* was rooted in the success of nationalist parties and, therefore, in political and strongly ideological dynamics that in 1997-1998 might not have had strong motivations considering the low electoral endorsement of the independence parties (first and foremost the Scottish National Party). In turn, the Blairian devolution in the 1990s was based on economic and development reasons closely linked to the European Union agenda, to the gathering and use of EU funds, to the increasing importance of regional government in the EU context. Analysing the Brexit effects from the devolution perspective, the United Kingdom's exit from the EU has both strengthened the centrality of the Whitehall government, confirming its pivotal role

in relations with nations, as well as the inherent shortcomings of the devolution process, as developed since 1998 onwards.
The particular British system and its *unwritten constitution* (or rather, *uncodified*, as Frosini points out on several occasions) have certainly guaranteed flexibility, but have not proved sufficient in providing tools able to manage conflicts.
The above has shown the limits of a perspective that grounds the guarantee of autonomy on the central government's self-restraint. Tools and offices capable of constitutionally solving the tensions between all institutional levels, thus safeguarding the prerogatives of sub-national bodies, and encompassing their collaboration and participation in central government decisions are still needed. As far as the author's investigation is concerned, the abovementioned interaction between Brexit and devolution can be articulated in three main points.

3.1. The Sewel convention

As is well-known, although devolution has profoundly affected the UK constitution, the process has been essentially carried out through continuously redefined asymmetrical negotiations. Moreover, the relations between the State and the regional autonomies have never been addressed as a whole, as well as the issue concerning constitutional legitimacy.
First and foremost, Brexit intersects this scenario with the Miller sentence of 24 January 2017, which declares that the consent from the Nations is not required for the adoption of this legislative act, due to the lack of a "legal veto". In support of this assertion, judges reiterated the scope of the Sewel convention: "*we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law*".

Hence, the Sewel Convention is and still remains a *political convention* never converted "into a legal rule justiciable by the courts" (these are the words expressed by the Supreme Court).
Therefore, despite the situation of institutional conflict with Scotland in 2018, the EU Withdrawal Act (UK EUWA) was also approved by Westminster: in this regard, the central government argued that the "exceptional" circumstances allowed Westminster to approve the legislation without the consent from Scotland. In the history of intergovernmental relations, it was the first time for an act of Westminster to be adopted despite the denial of the *devolved legislatures*.
The entry into force of the UK Withdrawal Act – which amended the devolution settlements (such as Annex No. 4 to the Scotland Act 1998) in order to include it (EUWA) among the Acts that cannot be amended by national assemblies – resulted in the subsequent 'unconstitutionality' of the parts of the Scottish Bill in conflict with the UK EUWA. Precisely, these sections were under the responsibility of the Scottish Parliament at the time they were issued (in March 2018) but turned 'unconstitutional' following the approval of EUWA (June 2018) and its entry into force.
Tensions between the central government and the devolved administrations arose again on the occasion of the approval of the European Union (Withdrawal Agreement) Act 2020 (EUWAA) providing for the ratification of the Brexit Withdrawal Agreement and for its implementation in the national law. Although more focused on the role of devolved legislatures than the previous EUWA, in January 2020 again all nations denied consent, showing the strong flaws in intergovernmental relations. Once more, the problematic aspects concerned the regulatory power of the central government and the risk of massive interference with devolved legislatures (Saputelli, 2020). Nonetheless, the act was quickly approved, since the approaching European deadline, and without any further negotiations with the territorial levels.
From this perspective, the Nations do not seem to have overlapped or prevailed over the sovereignty of Parliament. Indeed, government centralization is emerging.

The old question of the viable, desirable reform of the Sewel Convention comes back into the picture, also "affected" by Brexit, taking into account that: "*The Sewel Convention has been a fundamental underpinning of the relationship between the four legislatures of the UK since 1999, but it has been broken by Brexit. As well as managing the immediate political backlash that will follow the passing of the WAB, the UK government must now seriously engage with the case for reforming the convention if it wants to ensure the sustainability of the union in the long term*". (J. Sargeant, *The Sewel Convention has been broken by Brexit - reform is now urgent*, *Institute for Government (think tank*), January 21, 2020).

3.2. Cooperation and connecting institutions

As already mentioned, one of the main issues surrounding devolution has always concerned the insufficiency of the existing forms of cooperation and instruments of connection between State and Nations. This is inevitably exacerbated by the exit from the EU, which emphasizes the need to establish a new "common framework" for the United Kingdom to replace what was previously ensured by an 'EU common framework'. The difficult dialogue and collaboration are strengthened and the weakness of intergovernmental relations as well as the substantial absence of fora of connection between central institutions and Nations have become a problem requiring urgent solutions.

From the purely procedural side (see Saputelli, 2020), Brexit seems to have increased the opportunities for participation and intervention for the Nations. On the one hand, the creation of the JMC EU *Negotiations* in 2016, a new inter-ministerial committee on Brexit issues, on the other hand, in 2018, the *Ministerial Forum* on EU negotiations, another intergovernmental body devoted to the discussion of negotiations with the European Union. In comparison with the previous lack of formal, institutional meetings between the different tiers of government, the Brexit process seems to have at least urged to do so.

However, in terms of effectiveness and results, many questions remain unanswered, considering the persisting institutional conflicts and the decision-making processes have been delayed or hindered by the management difficulties due to the dialogue complexity.

3.3 Northern Ireland

Frosini does not specifically address the question of Northern Ireland, but it appears more or less explicitly; in fact, the relationship between the sovereignty of Parliament and the sovereignty of the people clearly impacts the Northern Irish question, amplified by the long-term effects that Brexit could have on the Good Friday Agreement. It is known that Northern Irish devolution, unlike the other cases – especially the Scottish one, which can more easily be compared in terms of the breadth and intensity of the devolved powers – is based on an international law agreement, and therefore establishes a treaty regime between two sovereign states, providing Northern Ireland with a special status. Additionally, the Republic of Ireland recognizes the political and constitutional status of Northern Ireland by legitimizing its existence. This international law agreement, on the other hand, derives from a particular regime of international protection regarding one of the territories parts of the agreement, in particular Northern Ireland. In this case, international protection is represented by the role that European Union has played in building the peace process and in envisaging a consensual way of managing powers.

According to the Agreement the Westminster Parliament (and, more generally, the British institutions) is not authorized to exercise powers in Northern Ireland if not compliant with the Agreement itself. Northern Ireland, in fact, unlike Wales and Scotland, can, through the Northern Ireland Act 1998, strengthen the confederal nature of the link with the United Kingdom to the point of unilaterally leaving the Kingdom, thus exercising a right to secession (or to self-determination). This appears quite different from the perspective of procedural and democratically negotiated secession that has affected, and still impact on, the Scottish case. In fact, it is well-known that Schedule 1, in point 2, provides the Secretary of State for Northern Ireland with the option of a direct referendum concerning the secession from the United Kingdom, at any time the majority of the holders of the right to vote, in such a consultation, would presumably be in favour of ending Northern Ireland's participation in the United Kingdom and therefore of entering a United Republic of Ireland. Moreover, although the European matter is reserved by all *devolutions* to London, European issues have become an important part of the regional Assemblies and their policies agenda as well. As it has been underlined, it is

possible to detect a broad convergence between the competences devolved to the Northern Ireland Assembly since 1998 and the matters of European relevance, between 60% and 80% according to estimates on the legislation produced by the Stormont Parliament as stemming from European institutions (E. Stradella, 2017, *Federalismi*). A significant European dimension of *devolution* in Northern Ireland should therefore be recognized from an objective point of view, due to the intersection between community competences and devolved competences in substantive relevant areas. To this complex situation, the major shortcomings already deriving from Brexit should be added: on the one hand the economic effect of a significant increase in trade with Ireland and a decrease of up to a third of those with the United Kingdom, on the other, the beginning in March 2021 of the infringement procedure against the United Kingdom (followed by a suspension). Moreover, the subsequent repeated tensions between the British Government and the European Union on the Northern Ireland protocol, which cast shadows on the sustainability of the protocol as the only tool able to keep in force the Good Friday Agreement.

4. Frosini's thesis and the aims of the withdrawal

Whether Brexit has fostered a "constitutional revolution", rather than a "constitutional restoration" that its supporters seemed to promote, can be verified in the argumentations proposed by the Author. He develops a focused and never redundant analysis of the institutional political events, assisted by a robust knowledge of the context, always essential in a comparative investigation, but particularly important when it comes to the United Kingdom.

Brexit certainly restores, at least symbolically, the traditional control on which the *leave* referendum campaign was largely based: *taking back control* was one of the slogans used by its supporters.

This also emerges from the EU-UK Trade and Cooperation Agreement (December 2020), which embodies the United Kingdom's wish to prevent any form of subordination to supranational structures, and the bilateral nature of mutual obligations between equally ordered entities, only based on international law.

Indeed, the real question concerns who, within the form of government, shall really enforce control. Further, after reading the documented analysis conducted by Frosini, one may ask if rather

than towards the sovereignty of the people – which today in the United Kingdom may resemble the sovereignty "of the peoples", since the *quasi-federal* nature that characterizes relations with at least some of the *nations*, despite the cautious approach of the Supreme Court – the transition is leading towards an "executive sovereignty". This tendency, across systems of government, seems a shared feature of contemporary constitutional orders, progressively strengthened by the pandemic emergency as well.