Limiting the Constitutional Space of Scotland and Northern Ireland

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During the weekend, there have been reports suggesting that Nicola Sturgeon will be soon calling a second Scottish independence referendum. Such development will mean that her Governmentsomehow abandons the idea of a differentiated Brexit. Such idea was developed in the December White Paper which advocated that Scotland could remain in the EU Single Market without seceding from the UK. Similarly, Taoiseach Enda Kenny has asked for a special provision in any Brexit deal to allow Northern Ireland to rejoin the EU should it be united with the Republic. He did so, notwithstanding the fact that a special deal for Northern Ireland is the declared goal of the UK government. Clearly, such political developments mark a change in the strategy of those political leaderships. They now seem to tacitly suggest that it is more possible for those devolved nations to achieve their goal of remaining in the EU single market by seceding from the UK.

But why does the noble idea of a differentiated Brexit, that could absorb some of the tensions created by UK's future withdrawal from the EU, seem to lose traction even within the political elites of Scotland and Northern Ireland? One possible answer to this question might be that the UK political and constitutional framework does not provide for a supportive environment. In fact, the judgment of the Supreme Court in*Miller* points to the limits of the UK political and constitutional order to accommodate the demands of the devolved nations.

In that case, the Court considered *inter alia* whether the UK Parliament is under an obligation to seek the consent of the devolved legislatures and especially the Scottish Parliament before passing the relevant legislation to leave the European Union. In particular, it was asked whether section 2 of Scotland Act 2016 which has codified the Sewel convention meant that the Westminster was constitutionally obliged to ask for the consent of the Scottish Parliament in order to trigger Article 50 TEU.

The eleven judges of the UK Supreme Court unanimously decidedthat the statutory footing of the convention does not change its legal nature. According to the Court, the UK Parliament was 'not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts' [148]. It is still a political convention. That conclusion 'follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection' [148].

The deference that the judges have showed is very much in accordance with the traditional role of judiciary in a constitutional order whose foundational principle is parliamentary sovereignty. If the Court had decided differently, it would have signalled a seismic change in the UK constitutional politics. The Court would have recognised that the federalisation process that the British constitutional order has undergone during the last decades can be understood as a 'significant crack in what has traditionally been a monolithic acceptance [...] of Westminster's untrammelled legislative power' as Tierney has pointed out.

Notwithstanding, I would still argue that – politically speaking at least – this approach might unintentionally trigger even more radical constitutional developments.

Bell and Lerner have examined different methods of successful constitution making in societies where the different ethno-religious segments have contrasting aspirations as to their political and constitutional future. At the moment, the UK is such a society to the extent that two out of the four constituent nations envisage their political and constitutional future as

part of the single market. To this effect, the Scottish Government has advocated the idea of a differentiated Brexit, an idea that is also discussed with regard to Northern Ireland. If the Court had accepted the justiciability of the Sewel Convention, it would have provided for a very important lever to the devolved nations to achieve their goal. The Scottish and Northern Irish legislatures could have offered their consent to trigger Article 50 on the condition that the UK government would accept their demand for a differentiated Brexit.

By unanimously rejecting their argument, the Court (unintentionally) restricted the sub-constitutional space of Scotland and Northern Ireland to achieve their political aspiration of remaining in the single market. In fact, the decision has cast serious doubt on whether the devolved nations can achieve their goal of a differentiated Brexit within the current constitutional framework. Such doubt is rather strengthened by the fact that the system of UK intergovernmental relations does not seem to allow the two nations to influence the UK negotiating position in a meaningful way. So, the judicial decision might be used by political actors as supporting evidence to their argument that only an independent Scotland and a reunified Ireland may remain in the EU single market.

To a certain extent, the political consequences of this decision might bear certain similarities to the ones triggered by the 2010 decision of the Spanish Constitutional Tribunal on the Catalan Statute of Autonomy. In that case, the Spanish judges stroke down a number of articles of the Catalan Statute as unconstitutional. They did so, despite the fact that the *Estatut* had been approved by the Spanish Parliament and by the Catalan people in a referendum. Although, the Spanish Court did not show the deference to the political branch that their UK counterparts have showed, the political ramifications of the judgment and the strategical choices of the Spanish political elites have cast serious doubt on whether the Catalans could achieve their aspiration of greater political and constitutional autonomy within the current constitutional framework. Following that decision, the Catalan movement for independence has grown to such an extent that President Puigdemont has vowed to hold a referendum on independence in 2017.

The recent statements of Nicola Sturgeon and Enda Kenny might be pointing to a similar direction…

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