Scottish Indyref 2

Towards Another Constitutional Crisis

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On Tuesday 28 June, First Minister Nicola Sturgeon addressed the Scottish Parliament about her plans for a second independence referendum. According to the proposed Bill, the referendum will take place on 19 October 2023. The announcement reopened the age-old debate about the 'festering issue' whether Holyrood does possess the power to organise such referendum without the explicit consent of Westminster.

The Power to Organise an Independence Referendum

The Scottish Parliament has had the power to enact primary legislation from the very beginning. Its legislative powers are defined negatively. According to section 29 of Scotland Act 1998, it has residual powers over the legislative competences that are not explicitly allocated to Westminster. The latter include the constitution of which 'the Union of the Kingdoms of Scotland and England' is part. This means that '[a]s a matter of UK law, the Scottish Parliament cannot pass a declaration of independence'. However, referendums are not listed as a reserved matter. Therefore, there is a question to be asked whether Holyrood can lawfully 'hold a referendum about whether another constitutional institution should do so'. This means that the constitutional right of the Scottish legislature to organise another independence referendum is – at a minimum – disputed.

This is why before Tuesday's announcement, there was discussion about whether Nicola Sturgeon would opt for a 'clever legal wheeze' to circumvent the problem. 'Asking voters if they believe the Scottish government should begin independence negotiations with London, could be allowed', it was reported. However, in the Bill they published, the Scottish Government did not choose this route. Instead, they opted for the same very clear question as in 2014: 'Should Scotland be an independent country?'.

Judiciary as an Umpire

Knowing that such Bill will almost certainly be judicially challenged, if it is passed by the Scottish Parliament, Nicola Sturgeon asked the Lord Advocate to consider whether she should make a reference of the provisions in the Bill to the UK Supreme Court 'pre-emptively'. Indeed, the reference was filed with the Supreme Court the same evening. To do that, the Lord Advocate relied on paragraph 34 of Schedule 6 of the Scotland Act. This allows law officers in Scotland to refer 'any devolution issue' to the Supreme Court. To make things more complicated, there is an interesting debate about whether the Supreme Court would consider the question posed by the Lord Advocate as hypothetical and refuse to judge it on its merits as the Bill has not been enacted yet. But even if that is the case, given the firm will of the Scottish Government to organise such referendum, it seems almost unavoidable that the Court will be asked to rule on this question one way or the other in the not too distant future.

I have argued elsewhere that on balance, I think that the unilateral organisation of such independence referendum is outwith the competence of Holyrood. The Lord President of the Court of Session in *Keatings* has arguably (and cryptically) hinted to that. 'It may not be too difficult to arrive at a conclusion' about whether a law allowing the organisation of independence referendum relates to a reserved matter. But even if the Supreme Court decides differently, a consensual and orderly secession of Scotland from the UK needs the approval of Westminster, as Ciaran Martin has convincingly explained. This is why the declared aim of the Scottish Government remains the

same. They would prefer to achieve a similar political agreement to the one that led to the 2014 independence referendum. However, in the current political constellation, the consent of the British Government does not seem forthcoming.

The Rumbling of Approaching Events

To address the almost unavoidable future stalemate, Nicola Sturgeon said that if no legal avenue is provided for a consensual and democratic secession of Scotland, the Scottish National Party will treat the next General Election as a *de facto* referendum. What has not been clearly spelled out, however, is the following:

- Will the Scottish governing party consider a majority of pro-independence Scottish MPs under the first-past-the-post system or a 1% majority of the popular vote as necessary to declare a win in such a *de facto* referendum?
- If win is indeed declared what would be the next concrete steps that the Scottish Government will be taking in order to honour the mandate and achieve independence?

Interestingly, the Catalan independentist movement also tried to use a parliamentary election as a *de facto* referendum. Following the 2014 non-binding consultative independence referendum, the then President of the *Generalitat* (Catalan Government) Artur Mas declared that the 2015 regional elections were to be turned into an alternative vote for independence. In fact, a number of pro-independence parties including the left-of-centre *Esquerra Republicana de Catalunya* (Republican Left of Catalonia) and the right-of-centre *Convergència Democràtica de Catalunya* (Democratic Convergence of Catalonia) ran together under the *Junts pel Sí* (Together for Yes) platform. Intriguingly, the results of those elections returned a pro-independence majority in the Catalan Parliament although the pro-independence parties did not manage to achieve an overall majority in the popular vote. That pro-independence parliamentary majority led to the organisation of the contested 2017 referendum.

One might argue that analogies with Catalonia are somehow misleading as the current Spanish constitutional settlement does not seem to recognise their right to external self-determination (ie. secession) as the Spanish Constitutional Court has repeatedly held. The United Kingdom, on the other hand, is – ostensibly at least – a voluntary union of different nations with a recognised right to self-determination.

In the case of Northern Ireland, Westminster has formally conceded that it can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this. Articles 1 of the legally binding British-Irish Agreement (which is part of the Belfact/Good Friday Agreement and registered with the Secretariat of the UN) and of the Northern Ireland Act 1998 recognise such right in no uncertain terms. Schedule 1 of the Act describes under which circumstances a referendum for the reunification of Ireland can and should be called by the UK Secretary of State. In *Re McCord*, the High Court of Justice in Northern Ireland discussed and clarified the aforementioned Northern Ireland Act provisions. It held that the UK Secretary of State for Northern Ireland has 'a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland.' If it appears to her that a majority would be likely to vote for a united Ireland, then, she is under a duty to call a poll. Interestingly, a border poll cannot be organized earlier than seven years after the holding of a previous referendum over the same issue.

In the case of Scotland, however, such an avenue for a lawful, consensual and democratic secession does not readily exist. It is in the hands of the parliamentary majority in Westminster to provide it. This leads to a potential paradox. Scotland is a nation within a voluntary union with a recognised right to self-determination but no apparent and meaningful way to exit from it in a lawful way unless the UK Parliament experiences a damascene conversion.

If that is the case, this is a recipe for a permanent constitutional crisis. To avoid this issue continuously festering and dominating the constitutional and political life of this nation, serious consideration should be

given to the institutionalisation and proceduralisation of the right to secede for Scotland. The Northern Ireland arrangement could provide for some inspiration at least. Such proceduralisation of the right to secede would be in conformity with the vision of the UK as a voluntary union. More importantly, it could allow the 'two governments of Scotland' to end this endless tug of war and the Scottish people to decide about their constitutional future.

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