Brexit in the Supreme Court: An Opportunity Missed?

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Mark Dawson Di 24 Jan 2017

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For many UK constitutional lawyers, the Supreme Court's Brexit decision was supposed to be the 'case of the Century'. Not only would it deal with an issue of fundamental importance – the first ever example of a state withdrawing from the EU – but it would also define the future role of the UK's highest Court in policing Britain's legal order. The case's significance was given added impetus by the reaction to the High Court's initial decision on the same issue: a decision sufficiently unexpected to draw accusations by some in the UK media that its justices were 'enemies of the people'.

In the end, this judgment was something of a damp squib. It is telling that the same Secretary of State for Justice who refused to condemn judicial intimidation when the High Court ruled was today full of praise for the independence of the British judiciary ('a cornerstone of the rule of law'). The judgments main ruling – that Parliament had to be politically consulted to trigger Article 50 – had in practice already been conceded by the government following the High Court's ruling (as well as a promise to return to Parliament to ratify any final exit deal). For those hoping for the Court to further box the government in – to make clear that it would have to go beyond a 'thin' bill of approval for triggering Article 50 in favour of a detailed Brexit plan – the Court offered few specifications on the form that parliamentary control over the Brexit process should take. The government will now act accordingly, with the Brexit Secretary already promising Parliament a 'straight-forward' bill, with limited maneuver for amendment. Underlying this judgment was a strict division of constitutional responsibilities, with the Court continuously insisting that the substance of Brexit was a political decision from which judges should steer well clear. No 'enemies of the people' here.

At the same time, the Court unanimously rejected by far the most politically significant departure from the High Court decision – the intervention of the devolved administrations in the litigation during the intervening period. Their argument (discussed here) was that the process of Brexit engaged the Sewell Convention: the practice that the consent of the devolved assemblies is necessary in those areas affecting the exercise of their powers. There are good reasons to think that this principle is more than merely political in nature. The Scotland, Wales and Northern Ireland Acts were major additions to the UK's constitutional landscape, enacting elements of the Sewell Convention in secondary law. No less a figure than the staunchly Unionist last Prime Minister insisted, following the 2014 Scottish independence referendum, that devolution was permanent, 'woven into the very fabric of our United Kingdom'. If the increasing transfer of power and political allegiance to the devolved administrations had not turned the UK into a fully blown federation, it had surely at least limited, not just politically but legally, the unconditional primacy of the Westminster Parliament.

Not according to the Supreme Court. If push comes to shove, the Sewell Convention is merely a 'political constraint' and not a Court enforceable rule. In this sense, the boundaries of power between the central and regional levels are to be politically determined – and ultimately determined by the central political level itself. The Court may have passed up an important opportunity not only to legally embed the UK's more de-centralised political structure but also to provide to itself a more central rule in clarifying the distribution of power within that structure.

The larger question is whether this judicial reflex towards the ultimate sovereignty of Parliament is adequate for the post-Brexit era. Pre-Brexit, the UK was already, as a previous Lord Chancellor, Lord Hailshaw dubbed it, an 'elective dictatorship'. Lacking a written constitution or an entrenched practice of constitutional review, and carrying an appointed second chamber along with a first chamber voted under a majoritarian electoral system, the UK government is already remarkably unencumbered by checks and balances. Exiting the EU – and, if the current PM gets her way, exiting the ECHR system too – will remove a further level of authority (both political and legal) to challenge UK executive action.

This is the context within which today's judgment should be read. For all that this case has been written-up in the

media as a ‘defeat’ for the government, this was a case in which the Supreme Court passed up a significant opportunity to compensate for the UK’s newly imbalanced constitutional framework. One layer of this framework could have been the idea that the devolved assemblies require approval for radical changes to the overall UK constitutional framework (an issue that will remain relevant given the role of the ECHR in undermining Northern Irish devolution in particular). A second layer could have been a Supreme Court willing to more actively procedurally police the process of executive action in the international sphere (see for example Tobias Lock’s observations that the judgment did little to limit the prerogative beyond the EU instance, or comment on the post notification involvement of Parliament). A third layer could have been the integration of international law. This judgment was rather blind to international precedents, including the question (much discussed in this blog) of whether a preliminary reference to the CJEU on a question of interpretation was necessary. In place of these potential layers of constitutional supervision, the Court has only one answer – deference to the sovereignty of Parliament.

In short, this was no ‘judgment of the Century’. Rather, we saw today a cautious Court. This was a Court unwilling to assert or defend the pluralistic nature of the 21st Century British constitutional order.

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