CENTRO STUDI SUL FEDERALISMO

comments
no. 100 – 27 January 2017

BREXIT ACCORDING TO THE UK SUPREME COURT: THE *MILLER* JUDGMENT

***Federico Fabbrini* ***

On 24 January 2017, the Supreme Court of the United Kingdom (UK) delivered a major judgment deciding the process that the UK must follow to withdraw from the European Union (EU). As is well known, on 23 June 2016 the British people voted 52% to 48% in favor of leaving the EU – precipitating one of the most dramatic constitutional crisis the UK had ever faced. Following resignation of David Cameron, and the formation of a government led by Theresa May, the new Prime Minister committed to carry out the will of the British people. Yet, if her predecessor had miscalculated electoral politics, she failed to anticipate constitutional constraints. While the government planned to autonomously trigger Article 50 TEU – the provision which regulates withdrawal of a member state from the EU – litigation started on the need to obtain parliamentary approval before doing so. In November 2016, the High Court of England and Wales ruled that the government could not invoke its royal prerogatives to notify Article 50 TEU, since the effect of that decision would be to ultimately deprive UK citizens of EU rights originally attributed to them by Parliament per the approval of the European Communities Act 1972 (ECA 1972) which gave effect to UK membership to the EU. In a separate case in Northern Ireland, instead, the High Court rejected the argument that the devolved legislatures had to give their consent to UK withdrawal from the EU, and while emphasizing the importance of the Good Friday agreement between the UK and Ireland, it denied that the people of Northern Ireland had to approve withdrawal by majority because of the special status of the region.

Cases were consolidated on appeal and heard by the newly established Supreme Court of the UK. In *Miller*, the Supreme Court ruled 8 to 3 that the government could not trigger Article 50 TEU without parliamentary legislation, but it unanimously held that consent by the devolved legislatures was not needed. The UK Supreme Court summarized the constitutional background to the dispute, and emphasized how "Parliamentary sovereignty is a fundamental principle of the UK constitution." The Court clarified that "[t]he Royal prerogative encompasses the residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation." According to the Court, however, while the UK government enjoyed prerogative powers in foreign affairs, because of the principle of dualism only Parliament could give domestic effect to treaties within the UK. As the Court explained, the ECA 1972 represented an act of "constitutional character" since it served as the "conduit pipe" to incorporate within UK law all EU law – a body of norms with direct effect and supremacy over all other sources of UK law. The Supreme Court thus affirmed the High Court judgment that an act of the executive could not displace rights and privileges accorded to UK citizens by an act of Parliament, when the latter enacted the ECA 1972.

According to the majority of the Supreme Court, neither ECA 1972 nor subsequent legislation justified the government's view that it could notify withdrawal from the EU without parliamentary approval. As the Court stated, "by the 1972 Act, Parliament endorsed and gave effect to the [UK]'s membership of [the EU] in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties." In fact, "a complete withdrawal [...] will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. [...] It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source

in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources." Moreover, the Court rejected the view that subsequent legislation – and notably the EU Referendum Act 2015 – could have endowed the government with a royal prerogative it did not possess when ECA 1972 was enacted. As the Court pointed out, "[w]here, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation."

Hence, the Court made a relevant clarification on the nature of the June 2016 referendum – confining it to the sphere of the political: "the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the [UK] from the [EU] without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance." Otherwise, the Supreme Court also minimized the legal impacts of constitutional conventions in the UK system. Answering the questions coming from Norther Ireland, the Court rejected the view that the Northern Ireland Act 1998, read in conjunction with the Good Friday agreements, required consent from the devolved legislature, or by the people of Northern Ireland, before the UK government could trigger Article 50 TEU since "within the [UK], relations with the [EU], like other matters of foreign affairs," are left to the UK government. Moreover, the Court also excluded that it could enforce the so-called Sewel Convention, a practice according to which the Parliament of the UK will not normally legislate with regard to devolved matters without the consent of devolved legislatures. As the Court ruled, citing Canadian cases in support, judges "are neither the parents nor the guardians of political conventions; they are mere observers." Hence, without underestimating the fundamental role that constitutional conventions play in the operation of the UK constitution, the Court concluded that: "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."

The judgment of the UK Supreme Court in *Miller* slightly complicates the UK government plan to start the official withdrawal from the EU. While the House of Commons had agreed already in December 2016 to a resolution calling on the executive to activate Article 50 TEU before 31 March 2017, the Supreme Court was crystal clear that if "ministers cannot give Notice [of withdrawal] by the exercise of prerogative powers, only legislation which is embodied in a statute will do. A resolution of the House of Commons is not legislation." Following *Miller*, the UK government resolved to quickly introduce a short bill in Parliament, allowing it to trigger Article 50 TEU. It seems likely that the House of Commons will approve this piece of legislation, under the electoral pressures of the referendum. Some delays in the legislative procedure may instead emerge in the House of Lord, which is unelected and less inclined to accommodate the government's will. However, in the peculiar UK parliamentary system, it is plausible that after debates also the House of Lord will eventually approve the government bill, allowing Brexit to move forward. In this context, the main question mark is whether the UK Parliament will seek to impose restrictions on the government negotiating strategy. In a major speech delivered just days ahead of the UK Supreme Court ruling, in fact, Prime Minister May had outlined her grand strategy and expressed her intention to pull the UK out also of the EU single market. This position would represent a blow to British economic interests and, following the decision of the UK Supreme Court in *Miller*, the UK Parliament may want to express its view on it.

* *Professor of Law at the School of Law & Government of Dublin City University*