PRZEGLĄD KONSTYTUCYJNY, 1/2024, s. 51–70
https://doi.org/10.4467/25442031PKO.24.003.19987
https://ejournals.eu/czasopismo/przeglad-konstytucyjny/

NATALIE FOX

The Impact of Brexit on the British Constitutional Law[1]

1. Introduction

This paper is an analysis of the British constitutional law in the context of the membership of the United Kingdom of Great Britain and Northern Ireland (hereinafter, UK) in the European Union (hereinafter, EU). The objective is to answer the questions of what influence the UK's participation in the EU structures has had on the British legal system and what legal consequences will result from the UK's decision to withdraw from the EU. Undoubtedly, the impact of the UK's joining the EU on the branches of government should be viewed from the perspective of the changes in British constitutional law, doctrine and practice. On the one hand, the UK's membership in the EU has had a significant impact on the shape of the British Constitution. The incorporation of EU law into the British domestic legal order resulted in legal-constitutional axioms, which for centuries formed the British model of constitutionalism, being subject to a comprehensive revision. On the other hand, the expected results of the process of the UK's withdrawal from the

[1] This paper presents the results of Research Project No. 2018/29/N/HS5/00685, financed by the National Science Centre (Poland). The theses of this paper were presented at the XI Word Congress of Constitutional Law (WCCL) titled "Constitutional Amendments and Constitutional Transformation: in Theory and Practice", workshop 10 of WCCL: "Constitutional Transformations". The Congress held in person in South Africa at the University of Johannesburg Faculty of Law from 5 to 9 December 2022.

EU (so-called Brexit[2]), initiated on the basis of Article 50 TEU[3], may only apparently, result in the revitalisation of the state of affairs before the UK's accession to the European Communities.

In fact, there were many challenges facing the British constitutionalism during the UK accession in the EU (1973–2020). The following systemic problems should be included as key constitutional aspects of the participation in the EU structures. The UK's membership in the EU had a profound interference of the European legislation in the national (internal) legal order. The catalogue of sources of the British Constitution was extended to incorporate the implemented EU legislation (*acquis communautaire*), which led to a redefinition of the concept of the uncodified Constitution in the UK, resulting in opening up to foreign and external influences. Securing the principle of the effectiveness of EU law, as well as the need to implement the EU treaty principle of loyalty resulted in a further limitation of the role of the British Parliament (Westminster), strengthened the role of the judiciary (including the Supreme Court of the UK) as a guarantor of the effectiveness of EU law, and revised the content and scope of the powers of the executive (HM Government) by conferring a wide range of the legislative privileges. Along with the gradual "adaption of foreign law", the fundamental principle of the British Constitution, which is the dogma of the legislative sovereignty of the Westminster, was distorted. Not only was this reflected in the recognition of the primacy of the application of the Community law over the national (domestic) law the in UK, which was also binding on British courts, but also in the unprecedented recognition of the binding of the UK Parliament in its legislative activity by an earlier law, i.e., the European Communities Act of 1972 (hereinafter, ECA 1972) and the European Union Act of 2011 (hereinafter EUA 2011) as Acts of constitutional importance. Moreover, the membership of the UK in the EU resulted in the so-called "judicial activism", which consisted in strengthening the position of the judiciary by adapting new exponential formulas in the judicial application of the law. The phenomenon of judicial activism resulted in the formation in the UK of a kind of *quasi*-judicial "soft" control of the constitutionality of the law.

[2] The term "Brexit" is an abbreviation of "British exit from the European Union".

[3] Consolidated Version of the Treaty on European Union, OJ C 2016, 303/01 (hereinafter, TEU).

2. Redefinition of the concept of the British Constitution

A characteristic feature of the British legal system is the lack of a uncodified constitution which is compact, comprehensive and which formally constitutes superior force. The sources of the British Constitution are marked by their considerable diversity and the lack of a constitutionally defined concept of a closed catalogue of sources of law. Notwithstanding that, these sources are characterised by a certain complexity, and the UK Constitution, which does not formally exist as a separate normative Act, is comprised of rules (norms) of various types (both legal and non-legal). The uncodified[4] Constitution, encompassing the entire territory of the UK, and is based on statutory law, *common law* (the precedent system), constitutionally significant maxims and practices of the sphere called constitutional conventions, and constitutional principles (in particular the doctrine of parliamentary sovereignty, separation of powers and rule of law), as well as the views of British constitutionalists (such as Albert Venn Dicey, Ivor Jennings, William Blackstone, Vernon Bogdanor and others)[5]. However, the inclusion of EU legislation into the components of the British Constitution through statutory transformation, i.e. by adopting two implementation Acts, i.e. EUA 1972 and EUA 2011 with a constitutional importance, resulted in EU law being granted the status of source of British Constitution. Thus, the UK Constitution opened up to foreign, external influences, as a result of which its current meaning underwent significant transformations. For example, in contrast to most others, the Constitution of the UK is not entrenched. There is no special procedure for amending it, which would constitute a distinguishing element against the background of other sources of the Constitution. In consequence, it is relatively flexible in the sense that any aspect can be changed by way of ordinary legislation and certain aspect can be modified by constitutional conventions. From a formal and legal standpoint, constitutional rules do not have the highest legal force, and as Patrick Birkinshaw emphasises, the lack of a formal constitution in the UK – understood as a uniform and written

[4] Sometimes it is pointed out in the literature that it is more accurate to refer to the notion of the British Constitution using the adjective "uncodified" rather than "unwritten", because certain components, i.e. statutory law, court decisions (precedents) or the views of constitutionalists are written in nature, but they have not been codified in one or more legal Acts that would be given higher legal force than other sources of law. See: R. Brazier, *Constitutional...*, pp. 154–155; E.M. Barendt, *An Introduction...*, p. 8.

[5] Some jurisprudence sometimes treats the works of the most important, respected British constitutionalists as a kind of additional source of the British Constitution.

Act with the highest legal force – renders the British Constitution the most flexible in the world[6]. Hence, it should be noted that over the centuries, the concept of the British Constitution has undergone numerous changes, constantly modifying its meaning[7]. The established norms (rules) or principles were often a response to changing circumstances and should be considered as a remnant of historically occurring processes.

In fact, although the relative stability of the adopted political and legal solutions in the UK can be observed, the flexible formula of the British Constitution results in a relative openness to external influences. The reception of EU law in the British Constitution resulted in the clash of two distinct legal orders, i.e. the specific British legal order and the autonomous EU order. The principle of dualism applicable in the UK means that it is acknowledged that if, in addition to Acts adopted by national authorities, agreements and other international Acts (including those originating from bodies of international organizations) are to apply, then, in accordance with the doctrine of parliamentary sovereignty, the Acts of international law require appropriate processing into Acts of national law. By the same token, in the UK there is a necessity to use appropriate procedures to transform the rules (norms) of international law into the national legal order. In this way, EU Treaties became part of the British Constitution to the extent that they were adopted in the implementation laws passed by Westminster.

As it is commonly known, in 1973 the UK gained the status of a member state of the European Communities (hereinafter, EC). The developed legal framework for membership in supranational structures was the result of both political and social compromise, which was reflected in the positive statement of the political sovereign (British people) in the form of a referendum. As a result of political disputes related to the European integration process, in 1975 the first British nationwide consultative referendum was held, the subject of which was the issue of further participation in EU structures. Under the Referendum Act 1975, voters decided to remain in the EC[8]. It should be emphasised that in the British constitutional law, the institution

[6] See: P. Birkinshaw, *Constitutions...*, p. 33. In this spirit, see also: E. Jenks, *The Parliament Act...*, p. 32.

[7] Uncodified British Constitution is characterised by a complex and vague form, and its historical development process makes it constantly adapt to changing political and legal conditions.

[8] As a result of the so-called accession referendum, 67,2% of voters were in favor of the UK remaining in the EC. The referendum was held on 5 June 1975. The following referendum question was asked: "Do you think the United Kingdom should stay in the European Community (the Common Market)?".

of referendum was structured differently from the solutions adopted in most EU member states as it has not been assigned a binding form, but it is only of a consultative nature. In the UK, the institution of referendum has so far had limited practical application, owing to the fact that one can indicate only three moments in time for the nationwide referendum. Firstly, the above-mentioned referendum of 1975 on further participation in community structures, secondly, the referendum of 2011 on changing the electoral system for the House of Commons, and thirdly, the referendum of 2016 on the so-called Brexit. Nonetheless, the current constitutional practice reveals that the referendum is becoming an increasingly applied political solution classified as a form of direct democracy, having a significant impact on the British legal order. Notwithstanding the non-binding result of the referendum, it should be emphasised that regardless of the impossibility of binding the Parliament of the Cooperative with any decisions made without its approval, HM Government, based on the referenda held in 1975 and 2016, in both cases acted in accordance with the will expressed by nation in a nationwide referendum formula.

3. Limitation of the doctrine of Westminster sovereignty

In the UK, the doctrine of parliamentary sovereignty is regarded as the most fundamental element of the uncodified British Constitution. In classic exposition of the doctrine, the prominent British constitutionalist, Albert Venn Dicey, described it as "the dominant characteristic of the doctrine", also "the very keystone of the law of the constitution"[9]. It is said that Parliament is able to enact or repeal any law whatsoever, and that the courts have no authority to judge statues invalid for violating either moral or legal principles of any kind. Consequently, there are no fundamental constitutional laws that the UK Parliament cannot change, other than the doctrine of parliamentary sovereignty itself. As a political scientist – Vernon Bogdanor – has put it, "the British Constitution, can be summed up in eight words: 'What the Queen in Parliament enacts is law'"[10]. The British doctrine points to certain legal and political arguments regarding the issue of retaining legislative sovereignty by Westminster from the moment of accession to the EC. In this context, there arose the problem of limiting the fundamental principle of the sovereignty of

[9] See: A.V. Dicey, *Introduction...*

[10] See: V. Bogdanor, *On the Constitution...*, p. 100.

the British Parliament[11]. It cannot be denied that one of the manifestations of the modification of the discussed principle is Community law. In the case of *Blackburn v Attorney General*[12] a British citizen brought an action against the UK's accession to the EC, claiming that Westminster's decision to allow HM Government to join the EC and sign the Treaty of Rome[13] would be contrary to the British Constitution, because as a consequence it will result in an irrevocable and unacceptable renunciation of Westminster sovereignty. In its judgement, the Court of Appeal stated that the decision of the UK to join the Communities did not amount to an unlawful renunciation of parliamentary sovereignty. Furthermore, it pointed out that the very nature of the doctrine of parliamentary sovereignty implies the fact that the British Parliament can pass, amend and repeal any legislation at its discretion, and since it voluntarily chose to recognize Community law, this did not constitute an interference with its sovereignty. What is more, it underlined that control over the exercise of its prerogatives by the UK Parliament does not fall within the competence of the British courts. Nonetheless, as William Huse Dunham points out, the theoretical assumptions of the principle of sovereignty are now becoming literally nihilistic, and at the same time devoid of sense and meaning, and deny the existence (in logic) of any constitution, even uncodified[14]. On the other hand, Lord Steyn, in one of his judgements, highlighted that the classic understanding of Westminster supremacy presented by Albert Venn Dicey's as pure and absolute, can now be deemed obsolete in the modern system. Nevertheless, the principle of parliamentary sovereignty still remains the main principle of the British Constitution[15].

From this perspective, it can be observed that the theoretical approach to the principle presented by Dicey in question is currently limited by its practical application. In fact, the membership of the UK in the EU has changed the doctrine of Westminster sovereignty permanently. Firstly, with the gradual "adaptation" of foreign law (EU legislation), the priority of application of Community law over national law in UK was recognized, which was also binding on British courts. Secondly, it is worth mentioning the unprecedented recognition of the binding of the British Parliament in its legislative

[11] See: N. MacCormick, *Questioning...*, pp. 132–133; N. MacCormick, *Beyond the Sovereign...*

[12] *Blackburn v Attorney General* [1971] EWCA Civ 7, per Lord Denning, § 28.

[13] Two treaties were signed on 25 March 1957 – the Treaty establishing the European Economic Community (hereinafter, EEC) and the Treaty establishing the European Atomic Energy Community (hereinafter, EAEC or Euroatom).

[14] W.H. Dunham, *The Spirit...*, p. 45.

[15] *R (Jackson and Other) v Her Majesty's Attorney-General* [2006] 1 AC 262, per Lord Steyn, §§ 102, 104.

activity by an earlier Acts of statutory law of constitutional significance, i.e. ECA 1972 and EUA 2011, together with the doctrine of parliamentary supremacy and direct effect of EU legislation, undermined the UK's doctrine of implied repeal, according to which, in the event of a conflict between two Acts of the British Parliament, the latter one prevails and implicitly repeals the inconsistent provisions of the earlier statute[16]. The constitutional assumption in question, which makes it impossible for the Parliament to be bound by the action of a previous or subsequent Parliament, guarantees an effective mechanism securing the functioning of the principle of its supremacy. Thus, in theoretical terms, an earlier law may be repealed by an action (declaration) of the British Parliament that such law is to be repealed. However, from a practical point of view, such a situation seemed unacceptable during the period when EU law was in force in the internal, national legal order of the UK. In this context, the unclear wording and specific arrangement of content contained in ECA 1972 potentially created a great challenge to the traditional understanding of the doctrine of supremacy (especially in comparison to the views presented by Albert Venn Dicey). The above resulted from the fact that Westminster, while adopting ECA 1972, imposed binding norms on future Members of Parliament (hereinafter, MPs). Based on the content included in the implementation Acts, legislative Acts of future Parliaments had to be consistent with its provisions in order to have legal effect. Nonetheless, in the light of a strictly doctrinal understanding of British constitutional theory, this would be unjustified. Therefore, the so-called "contemporary sovereignty" remains in opposition to the so-called "ultimate sovereignty", which in relations with the EU resulted in serious restrictions in the form of binding the Parliament with the earlier Act, i.e. ECA 1972 and EUA 2011, as Acts to which the jurisprudence assigned the rank of constitutional statutes[17]. Thereby, during the UK's accession to the EU, the competences of the British Parliament remained limited, in the sense that Westminster could not adopt legislation whose regulations would be at variance with directly effective EU law[18].

[16] See: I. Loveland, *Constitutional Law...*, pp. 31–35.

[17] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), § 59; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, § 207; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, per Lord Bingham of Cornhill, § 11; *H. v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413, per Lord Hope, § 30.

[18] See: D. Irvine, *Human Rights...*, pp. 183–184; *R. v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] AC 1.

Westminster sovereignty was therefore limited both in the political and legal sense. Despite the fact that legal thought is much more advanced on the road to European integration than political thought, as David Charles Miller Yardley points out, before the UK's accession to the EU, its restrictions affected more the political sphere. In turn, the element of legal limitation was introduced in 1972 in conjunction with the adoption of the ECA[19]. From a legal standpoint, the key question was whether the UK's membership in the EU limited the principle of the sovereignty of the British Parliament as a body empowered to make or repeal any law and over whose law no other law is superior[20]. It was initially argued that the traditional doctrine of parliamentary sovereignty had not been limited in a legal sense for no Parliament could oblige a future Parliament to legislate or not to legislate on the subject matter. On the other hand, however, the ECA 1972 contained provisions intended to ensure that the supremacy of Community law could not be overridden by the doctrine of implied repeal by subsequent and inconsistent law – Article 2 (4) ECA 1972. It was apparent that if the British Parliament passed a law that was in apparent contradiction with EU statutory obligations, there would be a serious impasse requiring further political action in order to resolve it. Initially, it was difficult to imagine the circumstances in which this would occur, unless the will to remain in the EU ceased to exist within the HM Government, UK's Parliament or among the British people (which ultimately did and was made evident by the EU 2016 in-out referendum) or there was a sufficient, unilateral will of the HM Goverment to limit the powers of the Court of Justice of the European Union (hereinafter, CJEU) by means of provisions which, obviously, could not be achieved without a possible revision of the Treaties – the Treaty on the European Union (hereinafter, TEU) and the Treaty on the Functioning of the European Union (hereinafter, TFEU)[21]. Therefore, the UK's membership in the EU undermines what Albert Venn Dicey considered the "cornerstone" of the British Constitution, and so the legislative supremacy of the UK's Parliament[22]. One of the British judges, Lord Denning, uttered significant words: "we were all brought up in the belief that, in legal theory, one Parliament cannot bind another and no law is irreversible. But legal theory does not always go together with political reality"[23].

[19] See: D.C.M. Yardley, *Introduction...*, p. 11.
[20] See: A. Lester, *The Impact...*, pp. 228–229.
[21] See: P. Birkinshaw, *European...*, pp. 60–61.
[22] See: D. Oliver, *Constitutional...*, p. 83; M. Ryan, S. Foster, *Unlocking...*, p. 192.
[23] *Blackburn v Attorney General* [1971] EWCA Civ 7, § 28.

4. Judicial activism and the changing of the mentality of UK's judges

Modifications of the principles shaping the political framework for the functioning of the British system and related to EU membership are generally consistent with the trend initiated in the second half of the 20th century aimed at the disunification of a relatively stable system. Already in the pre-accession period, the phenomenon of devolution, as well as the acceptance of the citizens' participation formula in the form of a referendum, were an important announcement for the modification of British constitutional law[24]. However, it was with the British membership in the EU that significant transformations occurred in the system of exercising state power, including judicial power. Changes related to decision-making at the EU level influenced the political position of many constitutional bodies. The changing relationships between the three branches of government in the UK resulted from the existing impacts of EU legislation on British constitutional law.

With respect to this phenomenon, first of all, it was possible to observe in the UK that its membership in the EU resulted in the reduced powers of the legislative authorities while strengthening the role of the executive branch of government. The increase in the position of the executive (HM Government) at the expense of the reduction of Westminster's powers is probably the greatest impact on internal constitutional regulations after the UK's accession to the EU. It is particularly acute when it comes to the democratic scrutiny by national parliaments of legislative and political decisions taken by the EU institutions[25]. But, secondly, what is equally important is that the position of the judiciary (including the UK's Supreme Court) has been strengthened through the phenomenon of judicial activism consisting in adapting new exponential formulas in the judicial application from the law (using pro-European interpretation). British judges were obliged to increasingly refer to both national legal order and EU law in their judgements. EU legislation therefore broke the principle of Westminster's supremacy and modified the systemic position of the judiciary, as the phenomenon of judicial activism resulted in the formation in the UK of a kind of *quasi*-judicial 'soft' control of the constitutionality of the law.

What is noteworthy is the fact that the autonomous legal system developed by the EU should have been in close correlation with national British

[24] See: V. Bogdanor, *Devolution...*, pp. 185–189; F. Vibert, *British...*, p. 60.

[25] Based on ECA 1972, EU bodies had been empowered to regulate British problems in matters where the EU has jurisdiction.

primary and ordinary legislation (in particular with statutory law). As a consequence, there was a gradual adjustment of British legislation to the Community legal order[26]. During the period of the British membership in the EU, the principle of presumption of compliance of national law with EU law was established in the formal and legal sense[27]. From the point of view of constitutional law, there was a fundamental shift in British jurisprudence, which was related to the recognition and application by the courts of the principle of primacy of Community law over national law. Not only were British courts obliged to comply with Community law, but also to refrain from applying British legislation to the extent that it was at variance with EU law. Thus, UK's judges had a final power to derogate inconsistent EU law with the domestic (national) legislation (i.e., statutes)[28]. It is emphasised in the British doctrine that the recognition in the UK of the principle of supremacy (primacy) of EU law and its direct effect over national law resulted in a change in thinking about the British Constitution, a shift in the judicial mentality of British judges. British courts played a significant role in interpreting domestic law in line with EU legislation. However, an additional impediment was the fact that the normative provisions contained in the Treaties, i.e. the TEU and the TFEU, do not explicitly refer to the relations between EU law and national legal orders. They also lack guidance on how UK's courts and national authorities should deal with conflict situations. The pivotal role in this context was played by EU rules and the established judicial decisions (both of the CJEU and British courts).

In addition to the need to comply with EU law itself, it was also the duty of British courts to properly interpret national law in a way that ensured its compliance with Community law. Hence, in the UK, pursuant to Article 2 (1) and Article 4 ECA 1972, national courts are obliged to interpret British legislation in the light of Community (EU) law. The courts were obliged, firstly, to interpret EU Treaties, regulations and directives in accordance with CJEU rulings, secondly, to refer to the CJEU against unclear provisions of EU law and, thirdly, to interpret all domestic legislation, wherever possible, so that

[26] See: P. Craig, *Constitution...*, p. 144.

[27] Under Article 2 (4) ECA 1972 EU law was given force and effect and it was regulated that laws passed or to be passed in the future must be consistent with EU law.

[28] See significant cases e.g., *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 1)* [1990] 2 AC 85; *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603; *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1; *Macarthys Ltd v Smith* [1981] 1 QB 180; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

it remains in compliance with EU law. Consequently, the case law developed by the CJEU played the role of an auxiliary (in relation to EU legislation), but binding on national courts, source of resolving doubts regarding the practical meaning of EU law. This resulted from the normative regulation Article 3 (1) ECA 1972, which, apart from binding British courts in the interpretation of EU law, also recognized the case law of the CJEU as an integral part of the British system[29]. What is noteworthy is the fact that all courts of the Member States should interpret the EU Treaties in the same way, applying the same principles (pro-European interpretation) to ensure a uniform interpretation throughout the EU (so-called Europeanization of law).

Undoubtedly, an important obligation resulting from the UK's membership in the EU was the need to accept the requirement to adopt and apply the entire EU *acquis communautaire* – "foreign" to national legislation. In principle, EU law should uniformly regulate the legal spheres of activity of EU Member States, which it often does in a way that is different from the adopted national legislative provisions. The influence of the European factor, both EU legislation and the Human Rights Act of 1998 (hereinafter, HRA) implementing the European Convention on Human Rights (hereinafter, ECHR), resulted in the opening of the British Constitution and UK's courts to new possibilities of interpretation. The analysis of case law and the views of the doctrine revealed that as a result of the purposeful (teleological) interpretation of EU law, as well as the application of ECHR regulations, British courts adopted a more active approach to the interpretation of legislation. The legal and constitutional position of British courts in terms of jurisdictional control has changed in favour of independent and free interpretation of statutes while limiting the principle of Westminster sovereignty. The prohibition of questioning the legality of legislative Acts by judicial bodies was overcome by the development of a *quasi*-judicial form of "soft" control of the constitutionality of law. As a consequence of issuing precedent rulings, which reflected the acceptance of the superior role of EU legislation, the fundamental assumptions of the British Constitution were violated. Thus, it is quite clear that the principle of primacy of EU law has significantly influenced the way British judges adjudicate.

The indisputable influence on the strong position of the judiciary in the UK has the high authority of judges representing the highest judicial instances. It is the legal culture of British origin that requires appointing the

[29] EU rules and the established case law of the CJEU were an important element of the British Constitution.

most outstanding lawyers to the most prominent judicial offices and showing restraint when it comes to being guided by party interests in the matter of judicial nominations. The views of UK's judges of higher courts may be questioned, but it should not be denied that these are those who are the embodiment of a very high level of legal knowledge, have great argumentative skills and a unique ability to take an analytical approach to solving constitutional problems. The development of the social image of a judge was also largely related to the application of EU law, which was specific in its nature.

5. Referendum constitutional crisis

In June 2016 the UK decided to leave the EU[30]. The in-out referendum result has given rise to the most profound constitutional change in decades. Nevertheless, the exclusively politically binding decision of the British society, could not naturally result in reversing the processes which had shaped the UK's systems in an evolutionary manner for decades. The referendum and its aftermath have exposed the extent to which the foundations of the British Constitution have been eviscerated. While some doctrine officials saw the decision to hold a referendum on EU membership as triggering a severe constitutional crisis, others argued that the political and democratic dilemmas arising from Brexit were symptoms of a broader constitutionally complex issue, with roots reaching far beyond the 2016 EU referendum[31]. On the one hand, controversy was stirred by the simple fact that the sovereign authority took the decision that they did, as Prime Minister David Cameron had counted referendum voters rejecting the proposal for withdrawal, something which did not in fact happen. On the other hand, interest again arose in legal circles in the topic of a newer, and still fragile, constitutional convention that 'decisions of fundamental importance bearing on the constitution of the UK should be preceded by holding a referendum, regional or national, before legislation is introduced and passed into law by the national Parliament'[32]. Referendums as a form of direct rather than parliamentary democracy on questions of exceptional national or regional significance have not been

[30] The 2016 EU in-out referendum was held in accordance with European Union Referendum Act of 2015. The British voters were asked whether the UK should remain in or leave the EU.

[31] See: M. Gordon, *The UK's Sovereignty*..., pp. 333–343.

[32] See: Lord Windlesham, *Britain*..., p. 103.

typical in British constitutional practice[33]. However, in recent years new uses have been made of this process, which is becoming a more and more frequently used systemic solution classified as a form of direct democracy, and which significantly affects the British legal order.

The UK left the EU at 23:00 GMT on 31 January 2020. In the aftermath of the referendum on the UK's withdrawal from the EU, the discretionary freedom of the UK's Parliament was *de facto* limited, and in practice the referendum lost its strictly consultative nature. From a political standpoint, the will of the sovereign expressed in the 2016 in-out EU referendum constituted the foundation for the decision by Theresa May's HM Government about the intention to withdraw from the EU. However, from a legal point of view, the main subject of interest both in the British doctrine and in the case law following the events that occurred was the initiation of the Article 50 TEU procedure. The cited provision constitutes the legal basis for such action, for in accordance with the regulations contained therein, any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements (Article 50 (1) TEU). A member state expressing a desire to leave the EU is obliged to formally notify this intention to the European Council in order to commence negotiations and conclude a Withdrawal Agreement (Article 50 (2) TEU). Owing to the fact that both the method and the form were not specified in the EU Treaty regulations, three problems have arisen in UK's political practice related to the proper procedure for notifying the intention to withdraw. Firstly, due to the lack of a formal (codified) constitution, it was necessary to clearly determine what the 'constitutional requirements' in this regard were. Secondly, whether HM Government had the independent competence to trigger Article 50 (2) TEU and thirdly, a fundamental question arose regarding the role of the UK's Parliament in this respect, which prompted a political and doctrinal discussion, as well as the one requiring the intervention of court decisions.

In accordance with the political tradition of the UK, the competence to submit an application (notification of intention) to leave the EU rests with the British Prime Minister[34], although the fundamental question in this respect

[33] In UK, it's important that holding a referendum was not a constitutional or legal requirement. In accordance with the British constitutional law, the Parliament in its sovereignty could have decided to withdraw (or not) without using this form of direct democracy. Formally, the practice of organising a referendum in the UK is contradicted with the principle of sovereignty.

[34] The authority empowered to notify the EU of the intention to withdraw under Article 50 (2) TEU was the Prime Minister of the UK, exercising this competence in the exercise of a prerogative power formally vested in the Crown, but in practice exercised by His Majesty's Government.

concerned the role of the Westminster in the withdrawal procedure. In the doctrine, Nicholas Barber, Tom Hickman and Jeff King were the first to raise the argument that prior consent in a statutory form is required to take further necessary steps in the withdrawal procedure[35]. An additional confirmation of the adopted assumption was the role of the British Parliament established in the literature, measured by its importance for the political system. It was pointed out that the power of the Parliament depended less on its absolute legislative power and more on its ability to effectively implement public opinion in the political forum[36]. Due to the above, an interesting aspect of the discussed issue was the impact of the results of the 2016 in-out EU referendum on the future possible decision of the British Parliament. Two circumstances need to be taken into account here. Firstly, as indicated in the doctrine, despite the non-binding nature of the referendum result, the Parliament generally respects the position expressed by citizens. This results *per se* from the contemporary realities of political life. The outcome of the referendum did not leave – despite a slight majority of votes – any decision-making leeway in terms of Westminster's reinterpretation of the will of the British people. In other words, the UK's Parliament should feel bound by the results of voters' advisory participation[37]. Secondly, attention should also be paid to the aspect of coherence of the decision taken in the referendum with the values guaranteed by the EU[38]. In this context, the conducted analysis revealed a certain systemic contradiction manifested in two moments. On the one hand, British constitutionalists expressed the belief that it was impossible to provide the British institution of referendum with a binding character. However, on the other hand, Theresa May's government ascribed to itself the right to formally launch the procedure for the UK's withdrawal from the EU structures without the consent of the Westminster.

Thus, the intervention of the UK's Supreme Court was necessary, which supported Westminster by issuing a judgement in the *Miller Case I*[39] of 24 January 2017, providing an answer to a question regarding which the constitutional requirements were legally undefined. The case concerned whether HM Government's trigger of the Article 50 (2) TEU procedure required Westminster's consent. In other words, the questionable issue in this

35 See: N. Barber, T. Hickman, J. King, *Pulling...*

36 See: A.W. Bradley, K.D. Ewing, *Constitutional...*, p. 77.

37 See: H. Siddique, *Is the EU Referendum...*; R. Bellamy, *Was the Brexit...*, pp. 126–133.

38 Both accession and withdrawal from the EU are characterised by the nature of the voluntary decision taken by the Member States.

39 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

case was whether, under the royal prerogative, the Crown (executive power) had the power to initiate the process of the UK's withdrawal from the EU. The ruling was made as a result of an appeal against the judgement of 3 November 2016 issued by the Divisional Court of the Queen's Bench Division of the High Court of Justice[40], which claimed that the case was the subject of judicial review and HM Government did not have the competence to initiate the withdrawal procedure. If, under UK constitutional law, the Crown does not have the prerogative power to notify its intention to withdraw to the European Council under Article 50 (2) TEU, then in the court's view, in accordance with the provisions of Article 50 (1) TEU, HM Government cannot, on behalf of the UK, acting solely within its prerogatives, decide to withdraw "in accordance with its own constitutional requirements". By the same token, the courts in the UK are responsible for upholding the values and principles of the British Constitution and ensuring their effectiveness. Their specific task is to define the legal limits of the powers granted to the various branches of government and to determine whether any exercise of power has exceeded those limits. Moreover, courts cannot avoid this responsibility merely on the ground that the issue raised is political in nature. What is more, both the UK Parliament and the courts must make decisions regarding the interpretation of the British Constitution, which are inherently political[41]. Therefore, it is important to stress that British courts can, and even should, significantly strengthen the activist attitude in jurisprudence, without agreeing to the diminution of their role, which was also built, among others, through judicial challenges to legislation in relation to the application of EU law.

6. European Union (Withdrawal Agreement) Act 2020

The Brexit process (2017–2020) had been the most protracted issue in recent years. The "unprecedented nature' and implications of the UK withdrawal

[40] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

[41] Likewise, after the September 2019 judgement in the so-called *Miller Case II*, judges were accused in both the scientific and media debate of making a typically political decision. The importance of this judgement was to defend not only the powers of the UK's Parliament as such, but the entire system of parliamentary government with the principle of political accountability of HM Government. In the above-mentioned judgment, the UK's Supreme Court addressed the question whether there was an extraordinary postponement (so-called prorogation) of the UK's Parliament. See: *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41.

from the EU has required an assortment of unequaled measures. However, it should be stressed that the entire political class in the UK is characterised by a certain cautiousness and restraint when it comes to rapid changes and respect for tradition, as a result of which there is also no social consent for radical actions to be taken. The Brexit negotiations had such a chaotic and unpredictable character. The situation was changing very dynamically, and it was not certain until the end whether this process would draw to a close and when[42].

In 2020, an agreement was reached enabling the completion of the UK's withdrawal procedure from the EU. In addition to the adoption of the Political Declaration defining the framework for future relations with the EU[43], the European Union (Withdrawal Agreement) Act of 2020 (hereinafter, EUWA 2020)[44] was adopted in the UK, which received royal assent on 23 January 2020. On its basis, the agreement negotiated by HM Government was implemented into the national legal order Withdrawal Agreement concluded on behalf of the EU by the European Council, acting by a qualified majority, after obtaining the consent of the European Parliament[45]. The signing of the Withdrawal Agreement together with the Political Declaration formally put an end to the Brexit negotiations. The Protocol on Ireland and Northern Ireland[46] was also attached to EUWA 2020, which allowed to avoid the so-called "hard border" by maintaining the Good Friday Agreement of 1998, thereby securing the integrity of the EU single market. EUWA 2020 formally ratified and incorporated the Withdrawal Agreement into UK domestic law.

The constitutional implications of the adopted regulations will most likely become transparent in the next dozen or so years. However, some provisions already imply constitutional difficulties. Article 7 (A) EUWA 2020 provides that the Withdrawal Agreement have a legal effect when used in the UK. The

42 See: N. Fox, *Transparency...*, pp. 193–220.

43 The Political Declaration delineating the framework for the future relationship between the European Union and the United Kingdom (C-384 I/02) was adopted on 12 November 2019.

44 Hereafter, EUWA 2020, it is an act to implement and make other provisions in connection with the agreement between the UK and the EU under Article 50 (2) TEU, which sets out the arrangements for the UK's withdrawal from the EU (23 January 2020).

45 Under Article 50 (2) TEU in accordance with Article 218 (3) TFEU. The Withdrawal Agreement was agreed on 17 October 2019, and signed by Prime Minister Boris Johnson on 24 January 2020. The European Parliament voted on the Brexit Agreement on 29 January 2020, then it entered into force on 1 February 2020.

46 The Protocol on Ireland/Northern Ireland, commonly referred to as the Northern Ireland Protocol, is the part of the EU-UK withdrawal agreement that ensures that a hard border is avoided on the island of Ireland after the UK formally left the EU on 31 January 2020.

British courts therefore interpret the EUWA 2020 in the same way as they interpreted EU law when the UK was a member state. In turn, Article 8 EUWA 2020 grants the Ministers of the Crown some limited powers to adapt and remove laws. As a consequence, certain "deficiencies in the retained EU law" may emerge[47]. The Ministers of the Crown have the power to create statutory instruments under delegated legislation by issuing regulations that can prove extremely helpful in regulating a number of legal issues where there will be loopholes in the legislation. This means that Ministers of the Crown can introduce changes to British law, which functioned as the EU law before Brexit, but after Brexit, EU institutions will no longer be able to interfere with these laws. Many of the provisions of EUWA 2020 also have a different constitutional significance, causing more political than legal effects. First of all, it refers to the regulations concerning parliamentary scrutiny and control over the withdrawal process. For example, the regulation of Article 38 (1) EUWA 2020 explicitly stipulates that the UK Parliament remains sovereign, "notwithstanding" the provisions on directly applicable or directly effective EU law continuing to be recognised and available in domestic law by virtue of sec. 1A or 1B European Union (Withdrawal) Act of 2018[48] (savings of existing law for the implementation period) or sec. 7A EUWA 2018 (other directly applicable or directly effective aspects of the withdrawal agreement). Accordingly, nothing in this Act derogates from the sovereignty of the UK Parliament. This regulation is somewhat misleading in the sense that after the withdrawal act is passed, the UK Parliament no longer has the freedom, except, of course, theoretically, to legislate contrary to the terms of EUWA 2020. Nevertheless, Article 29 EUWA 2020 provided a mechanism for parliamentary committees to flag issues related to EU law arising during the transition period. From the perspective of the rule of law, this is considered legitimate as it is linked to the need for further parliamentary scrutiny of EU law-related legislation after Brexit[49]. At this moment of the history of the United Kingdom of Great Britain and Northern Ireland, Brexit process is done. On 31 January 2020, the UK left the European Union after the last 47 years of the accession.

[47] See Article 27 of the EUWA 2020.

[48] Hereinafter, EUWA 2018. EUWA 2018, it is an Act to repeal ECA 1972 and make other provisions in connection with the UK's withdrawal from the EU (26 June 2018).

[49] See: J.S. Caird, *The European...*

7. Conclusions

Brexit is a significant phenomenon, serving a deep change in the British constitutional law. The expected results of the process of withdrawal of the UK from the EU, initiated on the basis of v 50 TEU, may only apparently result in revitalisation of the current *status quo* of individual state institutions. On the one hand, Brexit as a hybrid phenomenon, that is, both legal and political, is the next stage in the debate on the place and role of the EU. On the other hand, in the age of globalisation and establishing network links, the participation of states in supranational organisations can result in irreversible modifications of both the place, the scope and meaning of constitutional law. In a simplified way, it can be stated that individual legal systems in a multi-centric system are "open". A reflection of this phenomenon is the shaping of the foundations of the system in an indirect manner. The changes taking place are irreversible because they concern the foundation of competences and the position in the system of individual national authorities. Thus, the paradigm of the constitution in the material sense ceases to be merely a peculiarity of the system of the UK.

Thus, the assumptions on which the British constitutional system is based are no longer so widely accepted, nor do they reflect the reality of contemporary political system assumptions. The process of the withdrawal of the UK from the EU had resulted in some modifications at both, legal and political level. Brexit contributed also to the partial revision of the UK's Parliament position in relation to the executive branch, which was confirmed in the judgments, i.e. *Miller Case I* and *Miller Case II*. So far British courts tended to yield to the executive branch when it came to international affairs, trying to keep themselves out of a field they perceived as unsuitable for judicial decision-making. Reversing certain constitutional changes after Brexit in the UK it is not possible.

Abstract

Brexit as a hybrid phenomenon, that is, both legal and political, is the next stage in the debate on the place and role of the European Union (EU). The analysis of the impact of EU legislation on the shape of British constitutional law requires establishing the admissibility of reversing existing constitutional modifications. The author will argue that the age of globalisation and establishing legal network links, the participation of states in supernational organisations can result in irreversible modifications of the scope and meaning of constitutional law. In a simplified way,

individual legal systems in a legal pluralism are "open". The changes taking place are irreversible because they concern the foundation of competences as well as the system position of individual national authorities.

Keywords: Brexit, the doctrine of parliamentary sovereignty, Article 50 TEU, British constitutional law, United Kingdom, Human Rights Act, judicial activism, European Union

NATALIE FOX https://orcid.org/0000-0002-4513-7997
Doctor and Adjunct Professor at the Chair in Comparative Constitutional Law of the Faculty of Law and Administration of the Jagiellonian University in Krakow; e-mail: natalie.fox@uj.edu.pl.

References

Barber N., Hickman T., King J., *Pulling the Article 50 "Trigger": Parliament's Indispensable Role*, U.K. Constitutional Law Blog, 27 June 2016, < https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ >, accessed: 8 December 2023.

Barendt E.M., *An Introduction to Constitutional Law*, Oxford 1998.

Bellamy R., *Was the Brexit Referendum Legitimate, and Would a Second One Be So?*, "European Political Science" 2019, no. 18.

Birkinshaw P., *Constitutions, Constitutionalism and the State*, "European Public Law" 2005, vol. 1, no. 11.

Birkinshaw P., *European Integration and United Kingdom Constitutional Law*, "European Public Law" 1997, vol. 3, no. 1.

Bogdanor V., *Devolution: Decentralization or Disintegration?*, "The Political Quarterly" 1999, vol. 70, no. 2.

Bogdanor V., *On the Constitution of the United Kingdom*, in: *Comparing Constitutions*, ed. S.E. Finer, V. Bogdanor, B. Rudden, Oxford 1995.

Bradley A.W., Ewing K.D., *Constitutional and Administrative Law*, Harlow 2003.

Brazier R., *Constitutional Reform: Reshaping the British Political System*, Oxford 2008.

Caird J.S., *The European Union (Withdrawal Agreement) Bill and the Rule of Law*, U.K. Constitutional Law Blog, 16 January 2020, < https://ukconstitutionallaw.org/2020/01/16/jack-simson-caird-the-european-union-withdrawal-agreement-bill-and-the-rule-of-law/ >, accessed: 9 September 2022.

Craig P., *Constitution, Constitutionalism, and the European Union*, "European Law Journal" 2001, vol. 7, no. 2.

Dicey A.V., *Introduction to the Study of the Law of the Constitution*, Indianapolis 1982.

Dunham W.H., *The Spirit of the British Constitution: Form and Substance*, "The University of Toronto Law Journal" 1971, vol. 21, no. 1.

Fox N., *Transparency and Government Accountability in Brexit Negotiations*, in: *Accountability and the Law. Rights, Authority and Transparency of Public Power*, eds. P. Mikuli, G. Kuca, London 2022.

Gordon M., *The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond...*, "King's Law Journal" 2016, vol. 27, no. 3.

Irvine D., *Human Rights, Constitutional Law and the Development of the English Legal System. Selected Essays*, Oxford–Portland–Oregon 2003.

Jenks E., *The Parliament Act and the British Constitution*, "Columbia Law Review" 1912, vol. 12, no. 1.

Lester A., *The Impact of Europe on the British Constitution*, "Public Law Review" 1992, vol. 3, no. 4.

Loveland I., *Constitutional Law, Administrative Law, and Human Rights. A Critical Introduction*, Oxford 2015.

MacCormick N., *Beyond the Sovereign State*, "Modern Law Review" 1993, vol. 56, no. 1.

MacCormick N., *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford 1999.

Oliver D., *Constitutional Reform in the United Kingdom*, Oxford 2003.

Ryan M., Foster S., *Unlocking Constitutional and Administrative Law*, London 2019.

Siddique H., *Is the EU Referendum Legally Binding?*, The Guardian, 23 June 2016, < https://www.theguardian.com/politics/2016/jun/23/eu-referendum-legally-binding-brexit-lisbon-cameron-sovereign-parliament >, accessed: 8 December 2023.

Vibert F., *British Constitutional Reform and the Relationship With Europe*, in: *Constitutional Futures: a History of the Next Ten Years*, ed. R. Hazell, Oxford 1999.

Windlesham Lord, *Britain and the European Constitution*, "Parliamentary Affairs" 2007, vol. 60, no. 1.

Yardley D.C.M., *Introduction to Constitutional and Administrative Law*, London–Dublin–Edinburgh 1995.