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Alina-Paula LARION

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The Brexit Impact on the British Legal Order

Alina-Paula LARION[1]

Abstract

We enrol our approach in the broader context of European Community life dynamics that, after the Treaty of Lisbon (2009), was strongly marked by the challenges culminating in the clear and firm intention of the UK to leave the European Union.
The intent was finalised following a referendum in June 2016 with the activation of art.50 of the Treaty of Lisbon governing the right of states to decide to withdraw from the EU. Thus, on March 29, 2017, the London government began the withdrawal procedures from the EU. There are numerous and complicated economic, social, and legal consequences if the UK maintains its withdrawal position, although until the end of the transitional period (ending on 31 of December, 2020) it is possible to abandon this position and remain in the European Union.
The "Eurosceptic" current is present, escapes from the economic and social spheres to contaminate the level of political life, putting the British in the face of a new dilemma: to remain in the EU with the renegotiation of Britain's position or leaving the Union. The general perception was that the first solution is extremely difficult, so difficult to achieve practically. Therefore, the exit solution was preferred, with extremely serious consequences (some unpredictable) on social, economic and legal realities. The legal consequences are felt on two levels: the one of British modern law and the one derived from the ratification of the European Convention on Human Rights. Under British modern law, the legal sources are in increasing order of importance: common law and statute law. Britain's accession to community life structures had the greatest impact on the British legal order, which had to be harmonized with Community regulations, creating new sources of law.
The present article insists on the major influences of Brexit on the rule of law in the UK.

Keywords:
Equity; House of Lords; the British legal order; Brexit.

[1] Doctor of Law, University „Stefan cel Mare" from Suceava, România, lariona@seap.usv.ro

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Corresponding Author: Alina-Paula LARION
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The Brexit Challenge

Not long ago, in his capacity as President of the European Council, Portuguese Prime Minister Jose Socrates enthusiastically declared that "Europe has emerged from the institutional crisis and is ready to face future challenges" [3, p. 16]. It was October 19, 2007, when the Heads of State and Government of the 27 EU Member States agreed on the compromise solution on the Lisbon reform treaty 2007 (2009). The challenges have delayed too long, but they are relatively easy to identify and apply institutional-legal remedies, until the biggest attempt of the past 10 has come with the clear and firm intention of the UK to leave the EU. It is a premiere in the process of building the European Common House, which is possible due to Article 50 of the Treaty of Lisbon [6], which states expressly that "Any Member State may decide, in accordance with its constitutional rules, to withdraw from the Union (Art. 50 of TEU). The State deciding to withdraw notifies its intention to the European Council. On the basis of the European Council's guidelines, the Union negotiates and concludes an agreement with that State setting out the conditions for withdrawal, taking into account the framework of its future relations with the Union" (Art. 50 of TEU) [7].

All of these episodes were consumed, and by referendum from June 23, 2016, the UK decided at the limit (leaving 51/89% of the British voted in favour of leaving the EU) leaving the European Union. The exit procedure from the continental block was triggered (Art. 50 of TEU was activated).

From the brief description of the steps taken to bring the European Union to Britain's relations with the European Community (afterwards the European Union) [7], important influences on the rule of law in the UK can be identified.

Traditionally, the British legal typology, as perceived over time, has its own strongly marked identity by the presence of jurisprudence among the core sources of the legal system. To this defining note is added the specific structure of the British courts and the special role of the judge who can deal with the problems of discretionary, ad hoc, pragmatic judgment. By comparison, continental civil law is endowed with a "corpus" of well-structured regulations around abstract general principles, "which controls the exercise of discretionary judicial power" [2].

It is undeniable that at present the written right has a considerable weight, but the perception that English law remains a right of precedent is unshakable. Especially in the mentality of insular lawyers, English law remains a right of precedent on the basis of which this system is structured

and survives. Judicial decisions, with a centuries-old history, sometimes of the solutions to be adopted. The legal literature draws attention to the fact that "even before a law or common rule of law, judges prefer to rely on court judgments that have previously applied them, rather than directly applying the text or rule governing the location of matter" [5, p. 249]. Therefore, over time, the conception that perpetuated was that "the meaning of the law is that given by the courts" [1, p. 59] , and the solution adopted in common law "has a mandatory value erga omnes". It should be noted, however, that not all judgments have judiciary precedence, but only the decisions of the Privy Council of the House of Lords.

In this mixture of legal and parliamentary forms, he finds the expression of the most plastic feature based on common law, that is, to be a right made especially by judges [4, p. 299].

But the judicial precedent does not cover the wide variety of sources of modern British law. Like the great legal systems and common law, "it absorbs and organizes pre-existing customs on British territory, so that with the fourteenth century one can speak of a general consuetude as a source of law to be replaced by the previous jurisprudence" [4, p. 299]. However, local customs have been maintained until today, with specific features, if they have sufficient durability, come from "immemorial times" and are rational, but the role and importance of the custom is decreasing. They are maintained as common local rules in restricted areas, neighbourhood relations, and the use of waters, pastures or other common land. To these can be added the ecclesiastical customs. In a broader spectrum of this source of British law, the commercial traditions are part of a major role in building the circuit of material and moral values. As everywhere in the world of world trade, the trade patterns have been a priority in the attention of participants in this kind of relationship, having a special protection as well.

As for written law, its importance has increased, even since the nineteenth century. Thus, direct and delegated legislation has gained grounded importance. Specific to British law is the lack of a clear delimitation between constitutional law and administrative law. Therefore, compliance with the delegated legislation is controlled through the courts (tribunals). In other words, "English legal power exercises control over the legislative and executive power", with the same instruments by which private individuals are controlled.

It is therefore appreciated that in modern British law, legal sources are, in the increasing order of importance of common law and statute-law. It is an original system that contains three normative sub-sites that often make it difficult not only for the litigant but also for the judge. Sometimes regulations are parallel, contradictory. Therefore, in the face of a concrete

case, "the judge should inquire what decisions were made previously in identical or similar cases giving the precedent the judicial precedent [4, p. 301].

What is interesting to decipher, especially after joining the European Community, is precisely the problem of resistance and survival of these sources under the impact of mandatory harmonization with the norms of community law and of internal modelling factors. All this adds to the ratifications of the European Convention on Human Rights (ECHR), to the increasing complexity of social, political and economic relations that require their regulation in a dynamic and efficient procedure. All this has disturbed the usual British legal order with traditional patterns resistant to time and historical connotations.

Of course, Britain's accession to the European Economic Community had the strongest impact on the English legal order, which had to adapt to Community regulations by creating and accepting new sources of law. As in all accession treaties, the United Kingdom's Accession Treaty is subject to the principle of Community law priority over British national law.

The rigorous and effective application of this principle has had major influences on both the British constitutional legal order (by limiting the powers of Parliament) and other branches of public or private law. In the sphere of private law, the major consequences were felt especially in the juridical condition of the person (physical or juridical). In labour relations, for example, Community law has required the recognition of equal rights for part-time employees with those of full-time employees. The concept of minimum guaranteed salary in the economy has also been imposed.

The free movement of persons in the European Community area has favoured the phenomenon of migration, which has drawn unprecedented odds. Besides the positive aspects, the mentioned phenomena (especially migration) generated tensions, conflicts, and dissatisfactions that pushed the country to the point of withdrawing from the EU.

These tensions have also been fuelled by the system of granting social benefits or other facilities to immigrants. To all this, as a source of Euroskepticism, the perception that some Britons are losing their jobs to immigrants.

On the other hand, it is undeniable that the free movement of people and labour has brought real benefits to the British economic and business environment. There are just a few examples to illustrate the major impact that the UK out of the EU will produce in the sphere of private law.

In the sphere of public law, the negative influences of Britain's withdrawal from the EU are overwhelming. It is hard to assume, almost

impossible, a Great Britain isolation, its relations with the EU and the other states of the Union, and will receive legal configurations hard to describe at this time, with many risks and unknowns. That is why it relies on a personalized relationship of Great Britain with European Community structures, the fruit of negotiations to be carried out in the future.

An entirely new source specific to the British legal system is equity, which emerged as a response, a measure of elasticity of the common law's rigidity. Concretely, equity brought corrections to the rules of commerce when they were deficient, obsolete, and incomplete, in the expression of a Romanian doctrinal "sclerosis" [5, p. 255]. Perpetuating for a long time, the right created by precedents becomes perceptive to the social impulses, hostile to any evolving society. It becomes a brake that can bring considerable damage, "Common law has not escaped this danger. For the orderly restoration of things, it has emerged since the middle ages, equity "[5, p. 255].

Essentially, the equity was guided by the reason that in the face of an unjust law (in the case of common law) those affected could ask the king to correct the unfairly act. Over time, the number of deflections increased, it was necessary to organize a genuine court for their settlements, called the Court of Chancellor, because in fact it was not the king who solved the complaints addressed to him, but to his Chancellor.

Thus, the equity can be described as a kind of "common law" safety valve that by creating legal justice remedies to help overcome procedural constraints in determined cases. What is to be mentioned is that the Chancellor's intervention was never perceived as the power of access to modify common law, but merely to adapt it to the needs of the moment. It is not always possible to adapt the solution without opposing*, sometimes even in conflict, the two legal orders. Disputes over the settlement of possible conflicts between equity and common-law have lasted for centuries, making it possible for legal regulations to provide legal remedies in fairness designed to overcome procedural constraints in a given case.

But the British order has seen major reshuffles and re-evaluations, not only through the assumption of Community law. Another source of law with a major impact is the transposition into English law of the provisions of the European Convention on Human Rights (ECHR) (the ECHR provisions have been introduced with some exceptions). Upon accession to the Convention, the British legal order had, with some exceptions, legal armaments and its regulations. In this way, the Convention became a source of law by promulgating the normative act known as The Human Rights Act (HRA) adopted in 1998 and entered into force in 1999. It is a premiere for the dynamics of British legal life because it makes an enumeration and

systematization of human rights and fundamental freedoms, which until that moment were nominated and defended by normative acts such as statutes or simply recognized by the judge (in most cases). The adoption of this normative act was not without detentions, tensions, severe criticism (some criticisms somewhat justified, they used the pretext that at the moment of its assimilation by Great Britain, the ECHR was overcome in some of its decks, which made it even more difficult to harmonize it some of the issues related to the promotion and protection of human rights, remain outside the Convention, as a rule, through protection against discrimination on the basis of sexual orientation). It was imposed, however, because the positive reaction was the majority. The major dilemma has been created in relation to the role of law-makers of the English higher courts, which, if they were supposed to, had to apply the HRA to individual cases. As we have seen, the introduction of ECHR regulations into the British legal order has been made with some exceptions and reservations (most important being Articles 14 and 15).

In this void of the Convention, the English legislator could adopt normative acts that flagrantly violated the ECHR provisions. The areas covered by these normative acts were: the right to free movement or other prerogatives of the person's status. It is representative, in this respect, of the Anti-Terrorism Crime and Security Act 2001, which contradicts the ECHR. Referring to the Supreme Court as a Supreme Court of Appeal, the House of Lords found (declared) the non-compliance of this act with the HRA (1998) in cases where several suspected terrorists were detained and then arrested without trial (ASZS- Others vs. the Secretary of State for the Home Department in 2004). The above-mentioned measures and other such have led to the abolition of the Anti-Terrorism Crime and Security Act 2001 - a normative act of the same degree (this is The Prevention of Terrorism Act 2005).

The difficulties of harmonizing the ECHR regulations with the origins of English law, as they originate, also arise from some issues of legislative technique in one case and the other. By its very typology, the European Convention on Human Rights provides some framework regulations, with a higher degree of generality, with a brief enumeration of the solutions. Internal legislation, in general, is more detailed, more precise, and English law sources excel in this regard. A general wording can leave room for discretionary interpretations, which can escape from the side and the sprite of the Convention.

120789/*-These and other pretexts fuelled anti-European current, which eventually succeeded in removing Britain from the EU. The hot spots of anti-ECHR feelings remain related to the fight against counter-terrorism

and illegal immigration in relation to which ECHR regulations seem more relaxed. Article 6 of the Convention enshrines and protects the right to a "fair trial" which relates to acts of terrorism and immigration, puts the courts in difficulty. As we have seen, in some cases, the English courts have detained and even arrested some people, without subjecting them to "a fair trial" - after the Convention's expression. Of course, such a measure is justified by the extreme social danger of the deed and the need for rapid intervention to help the victims and prevent other disastrous effects.

Recognizing that the English legal system is subject to challenges and tensions, the current Prime Minister (Theresa May), originally representing the optimistic trend, felt that the source of legal controversies was not necessarily the Union law, but especially ECHR regulations that "link the hands of parliament, contributes nothing to our prosperity, weakens our security by preventing the deportation of dangerous aliens, and does not change the attitude of governments like Russia' regarding human rights".

So, the dissatisfactions and regrets of joining European Community structures come more from the ECHR than from the imperatives of European Union law. In identifying the consequences that Britain's outflow is forced to bear, the role and place of Parliament's Acts must be reviewed in this equation.

Nowadays, the position of these acts, in the implementation of the British legal order, has seen such changes that the British legal doctrine places the Act of Parliament on the first place, without detracting from the value of jurisprudence, legal custom or delegated legislation. As far as the latter is concerned, it must be stated that it exceeds Parliament's regulations as volume and complexity, which gives rise to some advantages but also risks of overcoming the will of the parliament.

To prevent or mitigate such effects, rigorous judicial scrutiny of the legislation delegated by the courts is exercised, which may abolish, in the cases before it, certain regulations that have been developed by exceeding the empowerment law. By means of secondary legislation, Community regulations have been introduced into British law. That is why we can expect a substantial emptying of the normative content of the law order, with consequences that are difficult to predict.

Conclusions

Great Britain's relations with the European Community had an original, sinuous journey. At the beginning of the communitarian process, the British free trade tradition was totally disagreeable with the new form of

community life, which in the 1960s signed its act of birth on the continent. The privileged relations with the USA and the profitable economic ties with the Commonwealth states have encouraged the association to create a free trade area that has not produced the expected effects. By comparing the advantages and disadvantages of participating in the community model, England is heading towards this structure, whose member becomes, in the third attempt, in 1973.

Start-up enthusiasm declines, while worries and prudence become so extensive that demand for and re-enactment of conditions for staying in the Community, especially in the agricultural and financial fields, is being sought. After negotiations, it seems that the UK is in line with the requirements of community life, although in the later evolution there have been no tensions (some explosive, such as a serious break from the UK and France in agrarian policy).

And in other "key" moments of the evolution of the European Community construction, the UK has made a "separate opinion", such as the objectives of adopting the single currency (Euro) and joining the Schengen Area, which it considered not yet ready. To all this, there were added other challenges that prompted the British to seek derogations from Community regulations. All this has fuelled the idea of abandoning the race to strengthen the community process. The Treaty of Lisbon [6] gave to British the legal framework in which they could do so.

Discontents and regrets about joining European Community structures come more from the ECHR area than from the imperatives of EU law, from the difficulties of harmonizing ECHR regulations with sources of English law, given the details of legislative technique in one case or the other.

There are numerous and complicated economic, social, and legal consequences if the UK will maintain its withdrawal position, although it is possible to leave this position and stay in the EU by the end of the transition period.

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