Resilience of the Constitutional Phenomena to Social Threats (the United Kingdom case)

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Abstract. A noticeable trend in constitutional law in recent years has been a broad interpretation that allows referring to the subject of constitutional law, in addition to the provisions enshrined in the written constitution, also the sources of international and common law. This article is focused on the analysis of the risks arising from the recognition of constitutional principles formulated in various unwritten sources, such as traditions, doctrine and judicial interpretation. For this purpose, the experience of the United Kingdom is studied, a country that does not have a written constitution, and the legal system of which is based on constitutional principles enshrined in those various sources. At the same time, the Brexit process has become a clear example of a destabilising situation that has revealed internal conflicts and contradictions of the constitutional principles. The political processes, that accompanied the Brexit process and resulted in a constitutional crisis both at the horizontal (between the parliament and executive branch) and vertical (between the centre and regions) levels, are analysed. Based on the conducted study, it was concluded that the attribution to constitutional principles arising from international law and judicial practice is erroneous and is a dangerous phenomenon for the constitutional law. Consequently, a deep research into the nature of such 'quasi-principles' is required, revealing their place in the legal system of Russia, taking into account the hierarchy of principles, in which the principles arising from unwritten sources and international law should not be placed on the same level with constitutional principles directly enshrined in the Constitution of the Russian Federation.
Keywords: Brexit, parliamentary sovereignty, sovereignty of people, common law constitutionalism, devolution

1 Introduction

The 21st century is becoming a century of globalisation in all fields of public life, which is also reflected in the legal sector. According to I.A. Umnov-Konyukhov, in applying the constitution, the courts broadly perceive the constitutional space and take as a basis the generally recognised principles and provisions of international law, the legal positions of constitutional and international courts [1].

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Such a broad understanding does not stay away from the fundamental constitutional principles either. Moreover, often new 'constitutional' principles result from the activities of the courts to interpret the provisions of the constitution, during which they shape a 'legal position' that has the highest legal force in relation to the legislation and is binding on all authorities of the country.

This trend can also be observed in Russia, where the Constitutional Court of the Russian Federation created a layer of general constitutional law and formulated some constitutional principles of common law [1].

Thus, it has become relevant to analyse the role and place of such 'constitutional' principles in the general system of constitutional law, as well as identify and analyse the risks arising from such an expansive approach to the constitution, its impact on the stability of the entire constitutional system of the country.

2 Materials and methods

The research is aimed at analysing the sustainability of unwritten constitutional principles in the face of contemporary challenges. The most striking example of a country, that has faced such a situation is the UK, which, on the one hand, is an example of a broad understanding of the constitutional space; on the other hand, it faced a crisis situation that led to an imbalance in the entire constitutional framework (during the Brexit process).

The country does not have a written constitution, so the basic (constitutional) principles stem primarily from political custom. Then, during the period of EU membership, the Union law, including fundamental principles and human rights, had direct effect on the territory of the country. Finally, the country's judicial system became the source of the common law constitutionalism.

As a methodological basis, methods to horizontally and vertically analyse the distribution of power formulated by A. Liphart were used [2]. The methodology used by Liphart made it possible to classify the UK as a typical majoritarian democracy (the Westminster model has become synonymous with the majoritarian model). It should be noted that A. Liphart's methodological model was built for a comparative cross-country analysis; however, in this research, A. Liphart's methodological approaches will be used in relation to the analysis of the UK's political processes that accompanied Brexit. Also, this research is based on the classical approach to the parliamentary sovereignty content analysis developed by A.V. Dicey [3], in the part that will analyse the relationship between parliamentary sovereignty and more recent constitutional principles.

3 Results

It should be noted that the Westminster model was based on two key features, the electoral system and parliamentary sovereignty.

Thus, since 1945, competition had taken place between the two parties, which alternately received the majority of seats in parliament, set up the government and elected the prime minister. This situation remained low until the early 2000s, when elections to the European Parliament contributed to the emergence of new parties, and the growth of Euroscepticism contributed to the strengthening of the UK Independence Party (UKIP). It resulted in dramatic changes. Earlier, voters completely identified themselves with one party depending on their social status; now electoral preferences began to change depending on a series of factors. Thus, Fieldhouse and co-authors identified five of them, i.e., the immigration shock after the EU enlargement in 2004, the financial crisis of 2007-2008, coalition government (2010-2015), referendum in Scotland in 2014. and the Brexit

referendum in 2016 [4]. Accordingly, the volatility of elections sharply increased (up to 17.8% in 2015) [5], and the basis of the Westminster model, the party majority, was undermined. The 2019 elections were also significant in that 'it didn't matter anymore whether to be middle or working class, only Brexit mattered' [6]. As a result, the Conservatives led by B. Johnson were backed by not only their traditional supporters but also the supporters of the Labour.

Thus, the 'European question' led to the destabilisation of the traditional constitutional model, which also affected the pattern of coordination between the legislative and executive authorities.

Based on the A. Liphart's methodology, the model can be classified as majoritarian if the opposition has minimal influence on shaping the agenda and decision-making in parliament. Until 2016, the opposition influence index was 0.1. However, under the government of T. May it was 0.5 [5]. This is explained by the fact that T. May, after the early elections, had to set up a minority government (for the second time in the post-war history), and a split in the Conservative Party itself occurred due to Brexit. During this period, the deputies of the House of Commons, with procedural mechanisms, ensured that the final version of the agreement on exit from the EU should be approved by the Parliament (the Greve Amendment) [7]. When voting for the agreement, the government for the first time in history suffered a devastating defeat three times.

The deputies themselves characterised the situation as a 'British parliamentary coup' (P. Wishart), a 'constitutional crisis' (K. Clarke), a collapse of the party system (D. Phillips). Indeed, the scale of intra-party differences and inter-party cooperation in the Parliament was such as has never been seen in the history of Great Britain [8].

At the same time, T. May relied on what British scholars called 'May's Doctrine' and characterised it as a 'completely new' and 'very dangerous constitutional doctrine' [9]. Its essence was a reference to the 'will of the people' expressed in a referendum, as an imperative mandate, transferred to the executive branch and not subject to any further discussion or agreement with parliament. Therefore, the government initiated the exit procedure using the Royal Prerogative and planned to use the 'powers of Henry VIII' by giving the ministers the right to make the necessary changes in national legislation without the Parliament's involvement. That is, the government relied on the doctrine of people's sovereignty rather than parliamentary sovereignty.

It should be noted that since 1975 referendums have become part of the political and constitutional space of the UK. This trend was especially pronounced in matters of devolution, since the emergence of the autonomy of the regions is based on the results of referendums, and the legislation provides for the regions' inhabitants' the right to put concerning their independence questions to a referendum. Thus, for 45 years, referendums have become firmly rooted in the political system of the country as a source of law on the most significant constitutional issues [10]. However, it was the Brexit process that highlighted this conflict between the constitutional principles of parliamentary and people's sovereignty.

Against this background, the position of the judicial power in two disputes initiated by the civil activist D. Miller is interesting. In the first case, she appealed against the fact that the T. May's government began the exit procedure without parliamentary approval, in the second case, the prorogation (a break between parliamentary sessions) established by Prime Minister B. Johnson in 2019. In both disputes, the country's Supreme Court unequivocally rallied to the parliament's defence stating that the actions of the government, while consistent with the constitutional principles of its activity, should not violate other constitutional principles contained in the common law, parliamentary sovereignty and accountability. However, while protecting the parliament from the executive branch, the Supreme Court also emphasised the role of the courts in shaping constitutional principles.

This decision fully fits into the 'common law constitutionalism' doctrine that has been developed over the years of EU membership, with the help of which judges and legal scholars in the UK in recent decades have themselves undermined parliamentary sovereignty, in particular, by assigning the right to divide laws into higher (constitutional) and ordinary ones [11].

With regard to the former, they did not recognise the implied abolition principle, based on the parliamentary sovereignty principle, as formulated by A.V. Dicey and meaning that there can be no laws of different legal force, since only the Parliament has the right to adopt, amend and abolish any law. The principle of implied abrogation means that in the event of a conflict between later and earlier laws, the former supersedes the effect of the latter.

However, after the adoption of the European Communities Act 1972, they began to recognise the principle of precedence of the EU law in the country. This had several consequences. First, the courts ceased to apply the principle of implied repeal to this act. Secondly, the concept of constitutional principles of the common law began to take shape in the jurisprudence, basic principles that have greater legal force than the law of parliament.

In the context of Brexit, the problem of the correlation and conflict of constitutional principles recorded in different sources (tradition, common law, doctrine, etc.) was clearly manifested.

Finally, another area of analysis of the constitutional model of the state – the relationship between the centre and regions – was also affected by Brexit so much that it necessitated discussion of the issue of the territorial integrity of the state.

In the absence of a written constitution, the status of autonomous regions and the distribution of powers are enshrined in acts of the national Parliament. This distribution is based on the principle of 'non-intersection' of the powers of the regions and centre [12]. At the same time, in accordance with the Sewell Convention enshrined in those acts, the 'British Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislatures'. At the same time, for 20 years, the autonomy of the regions has been constantly expanding and the national government did not virtually interfere with this.

As a result, a political and legal collision arose. From a legal point of view, the British Parliament can at any time cancel the acts it has adopted on granting autonomy to the regions. From a political point of view, the 'permissive autonomy' approach allowed regional administrations to claim that devolution be 'rooted' in the political system and strengthened by a lot of political agreements (concordats), thus creating a political 'territorial constitution' [13].

Brexit highlighted this collision, as the country's parliament refused to take into account the regions' opinion and froze the transfer of powers returned from the EU to them. The Supreme Court sided with Parliament, stating that the Sewell Convention is a political declaration and not a legally binding rule, although it is enshrined in law. Nevertheless, the country's government had to create fundamentally new institutional mechanisms for coordinating decisions and a unified regulatory framework between the centre and regions, which is a sign of the federal nature of relations.

4 Discussion

The analysis carried out shows that the lack of a single written source of constitutional principles leads to the absence of a single coherent system of interrelated and non-contradictory principles. There is a problem of classifying certain principles as constitutional (for example, should the negative principles of human rights protection

enshrined in international law [14] and positive rights in social and other spheres [15] be considered constitutional?). Therefore, sooner or later, under the influence of external or internal challenges, that destabilise the existing constitutional system of the country, internal conflicts and contradictions between constitutional principles of different origin, are revealed. It seems that this is an extremely dangerous constitutional phenomenon, since it can lead to a constitutional crisis (if contradictions between the branches of power arise horizontally), a change in the form of the territorial structure, and even become a threat to territorial integrity (if contradictions between the centre and regions arise vertically).

The UK experience shows that the only source of constitutional principles recognised, guaranteed and protected by the judicial system should be a single written constitution of the country.

5 Conclusion

The purpose of the research was to analyse the sustainability of unwritten constitutional principles in the face of both external and internal challenges. It showed that constitutional principles, that derive from not a written constitution but other sources of law can reflect the subjective nature of such sources and come into conflict with each other. In the absence of regulatory certainty, there may be doubts about the constitutionality of the principles and priority ranking in the event of a conflict. These problems are clearly manifested in the event of the emergence of destabilising factors and can have the most negative constitutional and political consequences.

Thus, it seems that the attribution to constitutional principles arising from international law and judicial practice is erroneous and is a dangerous phenomenon for constitutional law. At the same time, it is necessary to study the nature of such ‘quasi-principles’ and their place in Russia’s legal system.

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