Introduction

1. This submission argues that there is already a very powerful case for reforming the way in which treaty ratification takes place in the UK and that the case becomes overwhelming if the UK leaves the European Union. It begins by outlining the current general system for treaty-making in the UK and the case for reform, before touching how leaving the EU would bolster that case, and then suggesting potential avenues for reform that focus on parliamentary approval requirements and a joint treaties committee.

The UK’s Treaty-Making System and the Case for Reform

2. The current system for entering treaties in the UK that are subject to the procedures of the Constitutional Reform and Governance Act 2010 (CRGA) requires treaties to be laid before both Houses of Parliament for 21 sitting days prior to ratification.\footnote{Ratification for these purposes is defined in s24(5) CRGA 2010.} This is essentially a statutory version of conventional rules first devised in 1924 (the Ponsonby Rule). There have been ‘improvements’ since 1924\footnote{See for details Waging War: Parliament’s Role and Responsibility (Constitution Committee 15\textsuperscript{th} Report 2015-2016) (Appendix 5).} More treaties are caught by these rules than was the case with the Ponsonby Rule as originally articulated. Since 1997 treaties that are laid are accompanied by explanatory memoranda (now required by s24 CRGA 2010). Since 2000 treaties have been sent to relevant departmental select committees and if a treaty raises human rights issues to the Joint Committee on Human Rights (JCHR). And perhaps most significantly the legal consequences of a vote (via a negative procedure) against ratification in Parliament are now outlined in the CRGA (s20).

3. However, in the over eight years since the CRGA rules pertaining to ratification have been in force (11 November 2010), I am unaware of a single vote in parliament taking place that would even have counted as being on a resolution against ratification for the purposes of s20, much less a resolution actually garnering majority support in either House.\footnote{See also A. Lang, Parliament’s Role in Ratifying Treaties (CBP 5855, 2017).} One might argue that votes on
resolutions should not be a benchmark for the effectiveness of the CRGA. But then the CRGA has also had no discernible impact on parliamentary scrutiny over treaties. As was the case under the Ponsonby Rule, parliamentary debates on treaties so laid are an extremely rare occurrence, unless the treaty is one that requires changes to domestic law.\(^4\)

4. In practice the norm in the UK, today under the CRGA as previously under the Ponsonby Rule, is for treaties laid under those rules not to be subject to any form of debate in the Westminster Parliament, much less a vote of any sort taking place, prior to being ratified by the executive and duly binding the UK as a matter of international law. This is also the essence of the case for reform because it is not constitutionally acceptable for this to continue to be the default position.

5. It is also constitutionally anomalous that we are essentially operating with the logic of rules devised in 1924 (albeit now in statutory form) while the content of treaty-making has radically altered since those rules were conceived. To give just a few examples of this changing remit: Human rights treaties are primarily a post World War II phenomenon, thus well after the Ponsonby rule was conceived, and the UK continues to become party to new human rights treaties at the global and regional level (such as respectively the UN Convention on the Rights of Persons with Disabilities, and the Council of Europe Convention on Action Against Trafficking in Human Beings). International organisations, which are created by treaty, have proliferated at an astonishing rate since the Ponsonby Rule emerged such that now ‘there is hardly a human activity which is not, to some extent, governed by the[ir] work.’\(^5\) What are commonly called ‘trade agreements’ today are not the narrow pre-World War I agreements that focus merely on eliminating and reducing tariffs on goods (such as the famous 19\(^{th}\) century Cobden-Chevalier Treaty between the UK and France). The main focus of “trade agreements” now is no longer tariffs on goods, but rather non-tariff barriers and also services and they frequently include protections for intellectual property rights, state aid rules, public procurement rules, provisions on environmental and labour standards, as well as dispute settlement provisions. Trade agreements today therefore have obvious and

---

\(^4\) See Lang, ibid.

\(^5\) J. Klabbers, An Introduction to International Organisations Law (CUP 2017), p.22–23
immense implications for domestic regulatory autonomy and they alone attest to the inadequacies of (remaining wedded to a regime conceived of nearly a century ago) the CRGA regime. This is not intended as a justification for subjecting trade agreements alone to a more taxing regime than the CRGA 2010. The enormous focus on UK procedures for ratifying trade treaties since the vote to leave the EU and the triggering of Article 50 is understandable, but we should not lose sight of the fact that treaties are put to many controversial uses that have nothing to do with trade.⁶

6. Other democratic constitutional systems have seen bolder moves to accommodate the growing importance of treaty-making.⁷ There are now few constitutional texts that do not at least require parliamentary approval for important and usually widely defined categories of treaty. Other reforms to the role of parliaments that have emerged in descending order of frequency include control over treaty termination, over reservations, as well as information rights. A further response to the changing significance of treaty-making and increasing recognition of its potential impact on the domestic constitutional system, has been the emergence of constitutional review of treaties. Since these powers first emerged in the 1950s we have seen a rapid expansion in constitutional systems in which courts can review a treaty prior to it becoming binding (ex ante review) or, less frequently, even once it is concluded (ex post review).

7. The types of reforms identified in the aforementioned paragraph are usually associated with constitutional systems (including the EU) that adopt what is frequently labeled a ‘monist’ approach to treaties, that is treaties are said to become a part of domestic law once they become binding internationally. Unsurprisingly constitutional transformations have been required to accommodate what would otherwise be purely executive led law-making via treaty that can have direct domestic legal effect.

8. The UK in contrast is said to adopt a ‘dualist’ approach such that treaties are not part of the domestic legal system unless

Parliament so provides. And where treaties requires changes to domestic law, UK practice is for them only to be ratified once Parliament has made those changes. One might then suggest that it does not have lessons to learn from the transformations in monist systems as the dualist system is radically different. And indeed the Ponsonby Rule and the upgraded laying requirement outlined in the CRGA 2010 are reforms that certainly go further than is the case with certain other democratic dualist states (e.g. Canada and India).

9. There are several responses that one can advance in relation to the dualist based rationale against the need for further reform or at least lesson learning from monist systems. Firstly, that most other so-called dualist systems do no better than the UK, and often perhaps worse, is hardly a principled justification for retaining the status quo. In any event as noted in the suggested reforms below, one such state (Australia) certainly in practice sees more meaningful parliamentary scrutiny of the treaty making process than is the case in the UK for treaties laid under the Ponsonby Rule and now s20 CRGA 2010.

10. Secondly, the mantra that treaties only become part of UK law where Parliament so provides is excessively formalistic given that unincorporated treaties can still be judicially deployed in certain ways that are not without legal consequence. It also can suggest a sharper contrast with monist systems as concerns the domestic legal effects of treaties than may be the case in practice given that judicial reluctance to enforce treaties, as typified recently in the US, may raise questions about the extent to which such treaties are actually meaningfully part of the law of the land.

11. More importantly, however, even if treaties in the UK could be said not to be meaningfully part of the law of the land unless incorporated, such unincorporated treaties still operate as ‘practical constraints’ on the government and parliament.

---

8 For recent emphasis on this dualist approach in the UK, see Miller [2017] UKSC 5, paras 55-57.
Unincorporated treaties are still binding on the UK as a matter of international law. We would expect that the government and Parliament will not lightly choose to ignore the UK’s treaty obligations under unincorporated treaties. That such treaties may not have required any changes to domestic law when the UK became a party misses the point that they can still operate as ‘practical constraints’ on future courses of action precisely because the UK could otherwise find itself breaching its international obligations. And yet these ‘practical constraints’ (legal obligations as a matter of international law) can have emerged via executive led law-making in which no discussion whatsoever has taken place in Parliament.

12. Finally, in relation to the ‘dualist’ practice of the government not binding itself to treaties that require domestic legal changes until those changes have been made, this is no solution to the democratic deficiency that flows from the treaty-making power. This is not a mechanism for input into what the treaty text will actually provide, but comes only after the treaty has actually been negotiated. Theoretically Parliament could refuse to make domestic changes and the government can then refuse consent to be bound by the relevant treaty. But when does this ever actually happen? What in practice normally happens is that the government, which ordinarily has a majority in the elected house which has primacy over the unelected house, secures necessary changes to domestic law prior to confirming the UK’s assent to be bound by treaties, which the executive wishes the UK to be bound by, and which it has negotiated free from any Parliamentary scrutiny or input.

How Brexit Bolsters the Case For Reform

13. If the UK leaves the EU the case for reform is accentuated because it would ultimately lead to a repatriation of treaty-making powers that were either being exercised by the EU exclusively or along with the treaty-making powers of the Member States through so-called ‘mixed agreements’. Those treaty-making powers are today subject to elaborate scrutiny procedures both at the EU level, including through UK representatives of the Council of Ministers and the European Parliament, and at domestic level.

11 Recent work has pointed to ‘only two cases in which UK parliamentary action caused a treaty to fail - - in 1852 and 1864’: see B. Fowler, ‘Six ways the “meaningful vote” is noteworthy: TheWithdrawal Agreement & Parliament’s role in treaty-making’, Hansard Society Blog (10.12.18).
through the array of accountability mechanisms that exist (and are actually deployed) vis-à-vis EU law-making.\(^\text{12}\) Therefore for such repatriated powers to merely be subject to the procedures of the CRGA would in practice amount to a radical downgrading of the scrutiny to which the exercise of such powers had previously been subject.

14. Crucially there would also be a downgrading in the capacity of the devolved institutions to have input into the treaty-making process. This is because the devolved institutions have more say via treaty-making taking place at EU level, including through the Joint Ministerial Committee (Europe), than they would via treaties laid purely under s20 CRGA and the current Concordats on International Relations.\(^\text{13}\)

Possible Reforms

15. This submission focuses on two main types of reform while retaining treaty-making as a prerogative power.\(^\text{14}\)

16. **Requiring parliamentary approval for the entry into, and withdrawal from, at least certain categories of treaty**

17. Parliamentary approval for at least certain important and usually widely defined categories of treaty is now the norm for most constitutional systems including the EU since the Lisbon Treaty. However as noted above this is not the case for systems that adopt UK style dualism. There is still a powerful case for this bolder reform to take place in the UK on basic democratic grounds that flow from points made above: the breadth and significance of treaty making renders this form of internationally binding executive law-making of growing importance in an increasingly interdependent world, and yet parliament, in practice, usually need neither approve treaties, nor have any meaningful input in the treaty making process, notwithstanding the important

\(^{12}\) See V. Miller, *EU External Agreements: EU and UK procedures* (CBP 7192, 2016) who also notes that in the case of mixed agreements that need to have effect in UK law they are designated as EU treaties via s1(3) of the European Communities Act 1972 and are thus subject to the affirmative resolution procedure.

\(^{13}\) See the *Devolution Memorandum of Understanding and Supplementary Agreements* (October 2013).

\(^{14}\) There is a powerful and principled case for replacing this prerogative power with a statutory power given its non-democratic foundations. In fact the Governance of Britain Green Paper (2007, CM 7170) itself (perhaps inadvertently given the proposals that it outlined) stated that basing the treaty making power on prerogative is ‘out of date...[i]n a modern 21st century parliamentary democracy’
international and domestic ramifications they have.

18. It should not however be assumed that because parliamentary approval requirements exist elsewhere that they result in more than a yes-no vote on purely executive negotiated treaties over which the parliament will have had no prior say. However, there are legislatures that have converted their approval role into much more than a rubber stamp. There are perhaps no better examples of this today than the EU and the United States where parliamentary approval requirements have been used as mechanisms to input directly into the shaping of treaty-text under the not empty threat that the necessary parliamentary approval may not otherwise be forthcoming.

19. It is with a view to actually scrutinizing the pre-signature stages of treaty-making as in the EU and US, and potentially having input into the actual content of the treaty, that should drive the case for the UK adopting parliamentary approval requirements. One must however also recognize that the capacity of the European Parliament and the US Congress to have tangible input is related to the fact that they are especially powerful legislatures for global economic powerhouses and they do not sustain a government in contrast to the Westminster Parliament.

20. There is also a case for having expressly articulated information rights not only to give further meaning to any parliamentary approval requirements, but also potentially with respect to treaties that would not need parliamentary approval (as is the case in the EU under Article 218(10) TFEU).

21. Ultimately, even to adopt an affirmative resolution procedure for at least certain significant categories of treaty would offer added value over the negative procedure that is currently deployed for the treaties laid under s20 CRGA, for at least this should lead to debates and by definition votes.

22. There would of course be definitional controversy over which treaties to include within such requirements, but this has not proved beyond the capabilities of dozens of other constitutional systems. The most common categories include, amongst others, treaties modifying domestic law, military treaties, treaties on joining international organisations, treaties affecting domestic spending, trade treaties and treaties affecting the rights and obligations of citizens. It would also be possible to have an
exceptional cases exemption to the parliamentary approval requirements, albeit perhaps one more tightly defined than the free reign accorded the executive by s22 CRGA 2010.

23. An alternative suggestion to a list of categories that merits consideration would be some variant of the model followed in relation to statutory instruments under the European Union (Withdrawal) Act 2018 whereby parliamentary committees can make recommendations for use of the affirmative procedure over the default negative procedure.\textsuperscript{16}

24. Finally, there is also a case for giving Parliament an express role in relation to treaty termination. The \textit{Miller} ruling would appear to only ever require statutory authorization for treaty withdrawal in the rarest of instances such as with respect to the ECHR and perhaps not even then.\textsuperscript{17} Recent constitutional texts have increasingly come to expressly stipulate parliamentary approval for termination to mirror the procedures for entering into the treaty, and silent constitutional texts have also been interpreted in this fashion.\textsuperscript{18} There is an obvious democratic symmetry rationale for requiring parliamentary approval to withdraw from legal texts that required parliamentary approval for entry. And this would certainly be fitting if the UK moved in the direction of an affirmative procedure for at least certain categories of treaty. Flexibility could be provided for in relation to treaty termination via an exceptional cases style provision by analogy with s22 CRGA.

25. If the UK remained with the negative procedure of the CRGA 2010, which does not currently address the issue of treaty termination, one might suggest that the democratic symmetry rationale does not work appropriately. To apply the negative procedure to termination would mean that the government could be precluded from terminating a treaty by the House of Commons, even though the treaty was never approved by the House of Commons and indeed need not even have been the

\textsuperscript{16} See Professor Howarth oral evidence session Constitution Committee Inquiry on Parliamentary Scrutiny of Treaties (21/11/18).
\textsuperscript{17} On ECHR termination see G. Phillipson and A. Young, “Would use of the prerogative to denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from Miller” [2017] \textit{Public law} 150.
\textsuperscript{18} See Mendez supra note 7, and Verdier and Versteeg, supra note 15
subject of a debate in either house. However, an exceptional cases clause for treaty termination by analogy with s22 CRGA could serve to address such concerns in the event that a negative procedure were added for treaty termination.

**A Joint Treaties Committee**

26. Calls for a specific treaties committee have been made for some time including by the Wakeham Commission and by the Joint Committee on the Draft Constitutional Renewal Bill.\(^1^9\) They were of course not heeded and concerns voiced during pre-legislative scrutiny about the practical impact that the CRGA 2010 would actually have on scrutiny in relation to treaties laid thereunder have to date proved correct.

27. A joint treaties committee as had been proposed by the Joint Committee on the Draft Constitutional Renewal Bill would be preferable as like the JCHR it would be able to combine the added expertise that can be found in the House of Lords with the added legitimacy that flows from having elected members. Many of the issues raised in the questions in the call for evidence for this inquiry could fall within the remit of such a committee (amendments, derogations, treaty implementation legislation, withdrawal, negotiating mandates), as well as others that were not expressly raised but are nonetheless of considerable importance (such as reservations and the provisional application of treaties).

28. Such a committee could be served by a treaties secretariat and would build up invaluable specialist expertise. Indeed if the UK proceeds to leave the EU and there were a dismantling of the existing scrutiny mechanisms of the European Select Committees in the Commons and the Lords, then in a sense we might already have an available pool of invaluable expertise acquired by committee members and committee staff in relation to the scrutiny of EU concluded treaties.

29. A concern that under this model treaties would become the preserve of a specialist committee to the detriment of the potential scrutiny work of other parliamentary committees should be relatively easy to resolve. There is no reason why scrutiny in

relation to particular treaties could not be dealt with by a subject specialist committee such as the JCHR in relation to human rights treaties, or the new Commons International Trade Committee in relation to trade agreements. Nor is there any reason why a joint treaties committee should not be able to work closely with other parliamentary committees to divide up tasks in relation to scrutiny of the treaty-making process. In short, the invaluable expertise that could be built up via a Joint Treaties Committee would be of benefit to both houses in general in their scrutinizing of treaty actions, as well as the broader public.

30. The Australian Joint Standing Committee on Treaties (JSCOT) that was set up in 1996 has often been lauded as a model for the UK not least because, like the UK, Australia is also a dualist system. It has done commendable work and a comparable committee in the UK would surely have achieved more for actual scrutiny than the legislative reform signaled by the CRGA 2010 has in the eight years that it has been in operation. However, although the remit of JSCOT does not exclude consideration of treaties during negotiation,\(^{20}\) as I understand it, the practice has been exclusively focused on the post-signature and pre-ratification stage. The UK would need to pursue a bolder strategy to ensure that there is scope for actual input into the treaty-making process well before signature. Indeed if the UK does leave the EU and treaty-making power is repatriated a Joint Treaties Committee that only operated in practice post-signature would actually amount to a downgrading of the scrutiny to which those powers would otherwise have been subject when the UK was an EU member (see also para. 13 above).

31. Finally, a Joint Treaties Committee can work with the need for parliamentary approval requirements for certain treaty actions. It can bring its expertise to bear such that any parliamentary votes can then operate on a more informed basis than would otherwise be the case.

\(^{20}\) McLachlan, supra note 9, at 164.