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TREATIES, BREXIT AND THE CONSTITUTION

Submission to the House of Lords Liaison Committee ‘Review of Investigative and Scrutiny Committees’ Inquiry

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Summary

This submission concerns Committees’ role in scrutinising international treaties, and is based on the outcomes of a recent conference on Treaties, Brexit and the Constitution.

Brexit brings a new range of treaty challenges. As the UK withdraws from one body of treaties and seeks to conclude new ones, rights will be lost and gained, regulation will be altered, and foreign policy issues such as trade and fisheries addressed at a domestic level for the first time in decades. This will largely be done by the UK Government with little formal involvement from Parliament.

Currently, for most non-EU treaties, Parliament is notified only when treaties are signed, and then has the power only to object to the UK proceeding to be bound by them (ratification), and to pass any legislation needed to implement them. The Government has no obligation to inform Parliament or the public when it starts negotiations, or to provide updates, let alone take into account any views expressed by Parliament. And Parliament has few structures or processes for scrutinising the Government’s treaty actions. Yet the Government’s action in concluding a treaty results in binding international obligations for the UK, which may be applied by UK courts.

¹ The authors do not claim to speak for Bristol University, Oxford University, or the House of Commons Library.
Many people believe legislatures are inherently ill-suited to detailed engagement in the process of treaty negotiation, ratification and revision, since each participant government has to negotiate a single text on which they agree, and post-negotiation amendment is difficult. However, legislatures such as the Australian, Canadian and European Parliaments have demonstrated that it is possible to combine democratic accountability with sufficient flexibility to allow the Government to strike deals.

Through the European scrutiny process, the UK Parliament holds the Government to account without tying its hands. Yet Brexit will mean losing the limited democratic scrutiny currently provided by the European scrutiny system for EU external agreements, as well as that provided by the European Parliament.

We conclude that it would be a step backwards if there were to be less accountability after Brexit for treaties dealing, in a large part, with exactly the same issues handled through this process.

We therefore make recommendations here which we hope will enable Parliament to retain a similar level of control to that which it currently enjoys over these crucial areas of public policy.

- Parliament should consider creating new mechanisms to scrutinise the Government’s proposed treaty actions – whether simply a specialised secretariat to advise the relevant committees, or additionally a new Treaty Committee in either House or as a Joint Committee.
- Negotiating, approving, enacting and implementing treaty obligations could all be taken into account, as well as issuing reservations and derogations and withdrawing from treaties.
- Parliament should also consider requiring the Government to keep it informed at key stages in the process.

We also consider whether reform might enable a more determined recognition of the devolved nature of the UK under its current constitutional arrangements and how interested parties could contribute to Parliament’s deliberations. Further to the Inquiry’s terms of reference, we consider the scope for inter-parliamentary dialogue, and the potential to develop a national conversation on Britain’s treaty obligations.

Whilst there has historically been little appetite for treaty scrutiny in Parliament, there are signs that Brexit is increasing that appetite. We believe that the opportunity presented by the Lords’ review of its committee system is an ideal moment to meet the challenge that Treaties will soon present.
Introduction

1. This submission concerns Committees’ potential future role in scrutinising international treaties. It is based on the outcomes of a conference on Treaties, Brexit and the Constitution held at Jesus College, Oxford, on 23 March 2018. The authors are hugely indebted to the distinguished academics, practitioners and parliamentary staff who contributed to that conference, but we submit this evidence in our personal capacity, and bear full responsibility for any errors or omissions it might contain.

2. Brexit is a treaty problem. The UK will withdraw from one body of treaties and, it hopes, conclude new ones.

3. Brexit is intended to give UK lawmakers a greater measure of control over laws which are currently made by the European Union. Issues such as agriculture, fisheries and trade are currently closely regulated by European laws, which apply in the UK. After Brexit, in order to regulate international issues like fisheries and trade, the UK Government will need to conclude treaties, instead of relying on EU law-making processes.

4. Treaties often have a direct impact upon often individuals and businesses. They embody important policy choices that may affect the regulatory environment in which individuals and businesses operate. Some treaties create direct individual rights or obligations. The UK has a dualist system of treaty reception. This means, in general, treaty obligations only take effect in domestic law in the UK when legislation is passed to implement them.

5. However, treaties can affect the rights and duties of UK citizens, regardless of whether Parliament incorporates them in legislation. Where possible, judges interpret legislation so as to make it consistent with the UK’s international obligations, including treaty obligations. The same principle guides the development of the common law. Parliament’s omission to give domestic effect to treaties also affects UK citizens, who do not enjoy the rights that their government has secured for them. Such an omission also potentially places the UK in breach of its international obligations and thus affects the UK’s international relations.

6. Over the last 46 years, the UK’s membership of the European Union has relieved pressure on Parliament’s treaty procedures. Foreign

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3 See e.g. Attorney-General v Guardian Newspapers [1990] 1 AC 109 House of Lords
policy problems in areas of EU competence, such as trade and fisheries, were addressed either by EU law, within EU member states, or by the EU concluding treaties with third States and then legislating to implement. The UK itself did not need its own treaties. Although Parliament carefully scrutinised EU powers, non-EU treaties attracted far less attention.

7. The Brexit negotiations have brought Parliament’s treaty powers back into the foreground. The process has also drawn an unfavourable comparison between Parliament’s powers and those of the European Parliament. Although Parliament ultimately decides whether to change domestic law to implement a treaty, it has limited access to information, and limited input into treaty negotiation or approval.

8. It is government practice not to ratify a treaty unless it has already secured any necessary implementing legislation. Hence, Parliament can effectively stop ratification by refusing to pass legislation. However, this only applies to treaties that require implementing legislation, and by then would be too late to change the terms of the treaty. Parliament is therefore left with decisions only on the ‘how’, not the ‘why’ or the ‘what’, of treaty obligations.

9. The new statutory treaty procedures in the Constitutional Reform and Governance Act 2010 take only minimal steps to improve this, and Parliament has never used these powers.

10. The politics of the Brexit negotiations suggest growing support for greater Parliamentary involvement in treaty behaviour. The Miller case reaffirmed the principle that only Parliament has the constitutional authority to authorise treaty changes in domestic law that bear on existing legal rights. Resolutions or votes cannot change domestic law, nor amend existing rights. Since then, the Government’s European Union (Withdrawal) Bill has been amended to require Parliament to pass a statute approving the final terms of the UK’s withdrawal from the EU before Ministers could use their power to make delegated legislation to implement a withdrawal agreement.

11. Since the UK joined the EU, it has made significant changes to its own constitution. In 1972 the UK was a unitary state and fisheries, for example, were the responsibility of the Minister of Agriculture, Fisheries and Food in London. Today, issues such as agriculture and fisheries are divided between London, Cardiff, Belfast and Edinburgh. At present, the Joint Ministerial Committee

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4 R (Miller & Dos Santos) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (Supreme Court).
(JMC) on EU Negotiations and the Joint Ministerial Committee on Europe provide scope for the devolved governments to provide input on UK treaty matters. The devolved governments have expressed a desire to strengthen the machinery of the JMC, particularly in the aftermath of the EU referendum. There is no comparable institution which enables devolved legislatures to participate in treaty scrutiny, perhaps in cooperation with Westminster.

12. Brexit will increase the pressure on Parliament’s treaty procedures. A greater number of treaties will require more exacting scrutiny and those treaties will include politically controversial matters. Governments already face challenges in persuading the public that compromise is needed to achieve foreign policy goals. If people are not satisfied by the compromises embodied in the Treaty of the EU, there is little reason to suppose that they will be satisfied by the presence of chlorinated chicken in supermarkets, or the need to grant freer movement of people in return for market access. Unless the Government can convince other states that it can translate international obligations into domestic law, it will find it harder to persuade them to conclude treaties.

13. Accordingly, there is a growing body of opinion that Parliament should create new mechanisms to scrutinise the Government’s proposed treaty actions. This could be simply providing a specialised secretariat to monitor and advise on treaties and inform the relevant committees; or it could involve establishing a new Treaty committee in either House or as a Joint Committee, to sift and/or scrutinise, inquire into and report on proposed treaties.

Problems

14. Ultimately, we face two kinds of problems – problems of democratic accountability and problems of foreign policy. Each problem presents opportunities for reform.

15. First, the constitutional problem we face is a problem of democratic accountability to Parliament. As we repatriate EU competences, we will increasingly need to make policy by treaty. In turn, litigation in our courts will increasingly be framed by treaties, rather than by EU law. It is important that Parliament’s procedures for scrutinising these new rules employ the same exacting care we apply to legislation. For reasons we set out over the next twelve paragraphs, we do not believe our current structure is equal to the task.
16. A connected problem of democratic accountability is the highly centralised procedure for treaty scrutiny in the UK. It is common for regions to have formal input into treaty negotiation and accession. Our present treaty procedures were devised before Britain devolved power to the regions. The devolved administrations are currently demanding a more formal and substantive role in shaping international agreements that affect them. But the devolved legislatures will also have an interest, though mechanisms for them to be involved are even further from being fully explored.

17. Second, if we will fail to manage the politics of issues such as trade, food safety and ecology then we will face foreign policy problems. We will find it harder to negotiate treaties, and their terms will be less favourable to us. If the terms of a treaty prove unacceptable to the general public, Parliament may simply decide not to enact legislation to implement the treaty. That could leave the government unable to ratify the treaty, or, if it had already done so, it could leave the UK in breach of its international obligations. Public outcry might also persuade Parliament to try to unpick the provisions of a treaty that has already been implemented, as in our first Case Study, below. Unless the UK’s international partners know the Government has the full faith and confidence of Parliament when it negotiates agreements, and unless that confidence is reasonably durable, our international negotiations are going to get harder.

18. Behind these two challenges lies a deeper problem of engagement. We hear unanimous reports that there has historically been a lack of appetite in Parliament for scrutinising treaties. Perhaps international agreements are considered to be in the domain of the Government. Perhaps Parliament’s having the final say breeds complacency. Because Parliament ultimately decides whether to embody treaty obligations in legislation, perhaps it does not feel the need to engage with the front-end of that process. Furthermore, when the Government initiates a debate on a treaty, it is usually because implementing legislation is required. This means the debate is focussed on the Bill and not on the treaty itself. For these reasons, and others too, there is a sense that Parliament has already been able to engage with treaties when it wishes to.

19. Further, we hear unanimous reports that parliamentarians are not generally familiar with the treaty process. For example, terms such as “approval” and “ratification” are used interchangeably. This lack of information can lead to apathy.
20. A final problem is that treaties are coming to the fore at a time of acute political sensitivity over Parliament’s powers in respect of one set of treaties in particular. Britain’s withdrawal from the European Union Treaties is of the greatest importance. However, the way Britain negotiates, signs, ratifies and implements future treaties could be just as important. It is a broader and deeper issue than that litigated in *Miller*\(^5\). We ought to be able to consider this issue dispassionately, without rehashing that debate.

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**Case Study 1: UK-US Extradition Treaty of 2003**

21. The UK–US extradition treaty was signed on 31 March 2003 and came into force in April 2007, following ratification by the Senate. It was laid under the Ponsonby Rule, and legislation was passed to implement the UK’s obligations under the treaty, but it was only when extraditions began that Parliament seriously responded to arguments that the treaty created asymmetrical obligations. Four years after the treaty came into force, and more than seven years after signature, the Home Secretary commissioned an independent inquiry into the Treaty’s provisions.\(^6\) Thereafter, the Joint Committee on Human Rights recommended that the Government urgently renegotiate this article “to exclude the possibility that extradition is... granted in cases such... where the UK ... authorities have ... made a decision not to charge ... an individual on the same evidence adduced by the US authorities”\(^7\) among other concerns.

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**The Constitutional Reform and Governance Act 2010 – An Inadequate Solution**

22. A veto on the final form of implementing legislation is not the same as scrutiny of treaty-making. Negotiation, signature, withdrawal, derogation; and issuing reservations and interpretive declarations could all potentially require parliamentary scrutiny. Indeed, this may be required by the decision of the Supreme Court in *Miller and Dos Santos v. Secretary of State for Leaving the European Union*\(^8\). The decision not to sign a multilateral trade or

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\(^5\) *Ibid*


\(^8\) Note 4 above
climate treaty, for example, might also demand parliamentary scrutiny.

23. Our current procedures for scrutiny are based on a constitutional convention laid down in the 1920s. The Ponsonby Rule is a constitutional convention that dictates that international treaties normally have to be laid before Parliament before ratification. The Constitutional Reform and Governance Act 2010 (CRAG) gave the convention the force of law. The treaty provisions of the CRAG Bill did not attract widespread or acute interest. There were 11 responses to the Public Consultation on the Bill, of which several were former FCO legal advisers. Debates on this part were poorly attended: between 12 and 24 Members were present at any one time. The Bill then went into wash-up before the 2010 general election; most of its clauses were never properly debated.

24. The final form of the Act reflects that contemporary lack of interest. Section 20 of CRAG empowers Parliament to prevent the ratification of a treaty by affirmative resolution. However, no resolution has ever been tabled under CRAG. No meaningful debate has ever taken place during the s.20 period. CRAG does not even contain the power to table a motion against ratifying a treaty. It grants parliament no very limited information about the treaty. Section 24 requires government to lay an Explanatory Memorandum. However, Parliament has never specified what the memorandum must contain and they are often no more than two sides of paper. In sharp contrast to the templates for secondary legislation, the explanatory memoranda for treaties are often no more than two sides of paper. CRAG contains no right to a debate on treaty provisions and the Government has no obligation to provide parliamentary time. Even if a motion could be secured, this would give Parliament the choice of taking the treaty or leaving it. And even then, CRAG does not apply to all treaties⁹.

⁹ See s 23, which exempts treaties under certain statutory regimes.
Case Study 2 – UK-Colombia Bilateral Agreement for the Promotion and Protection of Investments of 2014

25. This treaty was laid in accordance with CRAG. Following a House of Lords Secondary Legislation Scrutiny Committee report, Lord Stevenson of Balmacara tabled a Motion to Take Note of the Treaty, which was debated on 30 July 2014.10 The debate reflected the input of civil society groups.11 But, because the motion did not contain a resolution that the treaty should not be ratified, the treaty was duly ratified, in compliance with CRAG, on the 10 July 2014, three weeks before it could be debated. Lord Stevenson noted “we are in a situation that is slightly perverse in the sense that the treaty has already been enacted and we are not in the position of asking the Government to reconsider it”.12

Case Study 3: UK–Libya Prisoner Transfer Agreement of 200813

26. This treaty was laid before Parliament for the full Ponsonby period. However, due to what has been described as a clerical oversight by both governmental and parliamentary officials, the treaty came to the attention of the Joint Committee on Human Rights well into the 21-sitting-day period. The JCHR complained to the FCO in writing, but the Government did not extend that period. For this reason, the treaty was not properly scrutinised by the JCHR.

Case Study 4: Protocol 15 to the European Convention of Human Rights

27. In this case, the JCHR received the explanatory memorandum for the treaty in good time and prepared a report. The report recommended that the UK should ratify the treaty, and commended the Government on a negotiation which successfully amended the Preamble to the Convention. Nevertheless, it stressed that, in view of the importance of the Protocol,

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10 https://publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-gc0001.htm HL GC 631
11 http://www.colombiancaravana.org.uk/uk-colombia-bilateral-investment-treaty-was-ratified-by-the-house-of-commons-on-thursday-10-july-2014/
12 Note 9 above at GC644
Parliament ought to debate the matter. The Government refused to provide government time for a debate, and responded that it was for the Committee to propose a motion and secure time for a debate on it. It appears that the Government was not necessarily unwilling to debate the treaty (which the JCHR was not opposed to in principle) but it was not willing to use its own time for Treaty business.

**Recommendation: New Mechanisms for Parliamentary Scrutiny**

28. Parliamentary Committees could potentially play a vital role in addressing the problems outlined above.

29. At present, no single Committee has responsibility for monitoring or scrutinising the Government’s treaty actions. This is not least because treaties are handled by many different government departments – not only the FCO. Several Committees have, however, taken an interest in specific treaties or types of treaty, including notably the Joint Committee on Human Rights.

30. Nor is there extensive expertise on international law and treaties in the staff of either House. A specialised Treaty Secretariat could support existing Committees by monitoring, analysing and advising on proposed treaties. Experience from other countries, such as Australia, shows that secretariats of this kind build up knowledge and expertise over time, as well as constructive relations with government officials.

31. Additionally, Parliament could establish ad hoc committees for particularly important or controversial treaties.

32. Or it could set up a new Treaty Committee in either House or as a Joint Committee, to sift and/or scrutinise, inquire into and report on proposed treaties. A Commons Committee would have greater perceived democratic legitimacy; a Lords Committee might be more able to find time on the floor of the House, and might contain greater expertise. There could be both; or a Joint Committee could combine these respective advantages, and our evidence suggests that the Joint Committee is the generally preferred approach.
33. Different categories of treaty would need different procedures, according to how important and/or controversial they are. For example, it would be counter-productive for Parliament to have to scrutinise every ‘template’ treaty on social security, mutual taxation or mutual legal assistance. The EU Act 2011 is a salutary example: it requires Parliament to pass an Act wherever more powers are to be granted to the EU; but this results in Parliamentary time being taken up with mundane matters such as archives. In any scenario, the risk would be that greater scrutiny would be seen as interfering with the Government’s proper role and result in delays.

34. A vital component is access to information. The European Parliament, for example, has gradually increased the requirement for the other EU institutions to provide it with timely information throughout the treaty-making process, and this is what makes its democratic scrutiny possible. In the UK, the only obligation is to provide an Explanatory Memorandum for every signed treaty laid before Parliament. There is no template for what these should cover, and they can be very brief.

35. Should a Treaty Committee simply sift treaties and send them to the relevant specialist Committees for scrutiny, or should it be able to conduct inquiries and make recommendations itself? The former would ‘mainstream’ treaties and take advantage of specialist subject knowledge; the latter would build up expertise in and awareness of treaties generally. Or there could be a hybrid model, in which a Treaty Committee sifted all treaties and sent as many as possible to specialist Committees, but handled some treaties itself, such as overarching treaties or those without a clearly responsible Committee.

36. Should a Treaty Committee have a ‘scrutiny reserve’ for treaties? At present, UK ministers in the EU Council are not supposed to agree to the EU opening negotiations on, or signing, an international agreement unless the scrutiny committees in both Houses have released the relevant documents from the scrutiny reserve. There could be a post-Brexit replacement for the scrutiny reserve, to apply to new UK international agreements, potentially giving Parliament some additional formal role more towards the opening phases of the negotiations.

37. One way for the views of the devolved legislatures on treaties to be taken into account would be for them to be connected to a new UK Treaty Committee. Federal states such as Australia provide some models as to how the consequences of entering into treaties for sub-state entities are raised in the national Parliament. Such a committee would also provide a focal point for interested parties to
lobby their representatives on treaty matters (see Case Study 2 and Footnote 13.) A UK Treaty Committee has the potential to promote inter-parliamentary dialogue on treaty matters and to develop the national conversation on Britain’s treaty obligations.

Conclusions

38. This submission has set out some proposals for how Parliamentary Committees might deal with the treaty problems of Brexit. According to our evidence, the best option is a new Joint Treaty Committee, with the following features:

- a specialised secretariat
- an obligation on the Government to provide information at key stages of the treaty negotiation process.
- a remit covering all treaty actions including negotiating, concluding, issuing reservations and declarations, derogations, and withdrawing, at least for certain categories of treaty
- the power both to sift treaty actions for other Committees to scrutinise and to conduct inquiries and make recommendations itself, and
- links to the devolved legislatures

As we have set out, there are of course many other options and variations. And there may be concerns that any increased scrutiny is inappropriate and would risk delay. However, in our view the most important thing is that Parliament is aware of the treaty issues of Brexit, and seriously considers options for democratic scrutiny of treaties to replace and perhaps expand on those that will be lost with Brexit.

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