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# Consultation Response by the Law Society of Scotland

The Role of Parliament in the UK Constitution: The Scrutiny of International and Other Agreements Inquiry

September 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the House of Commons Public Administration and Constitutional Affairs Committee Inquiry into *the Role of Parliament in the UK Constitution: The Scrutiny of International and Other Agreements*.

The sub-committee has the following comments to put forward for consideration.

## General Comments

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### **1. To what extent is the negotiation and ratification of international treaties and entering into other international agreements necessarily a function of government alone?**

Under the UK's constitutional arrangements, the Government is the body which, in exercise of the Royal prerogative, negotiates, signs and ratifies treaties to which the UK wishes to accede. Our system is a dualist system and Parliament has a role in ensuring that the treaties to which the UK has agreed are then implemented and given the force of law. This power is quite distinct from having a role in the creation of the treaty which is ratified. Parliament (and this also applies to the devolved legislatures) has no formal role in the agreeing of treaties nor the binding of the UK by treaty obligations.

Special scrutiny rules do apply to EU treaties which are not covered by the Constitutional Reform and Governance Act 2010. There are a number of Committees which have scrutinised the EU Withdrawal process: the House of Commons European Scrutiny Committee is taking evidence on the EU Withdrawal Agreement negotiations; the House of Lords Home Affairs Committee has looked at the proposed UK/EU security treaty; and finally, the House of Lords European Union Select Committee has taken evidence on Brexit: the Withdrawal Agreement and Political Declaration. The report of the EU Select Committee published on 5 December 2018 (HL Paper 245) draws specific attention to the difference between the UK and the EU in conducting negotiations. In paragraph 310 the report states that "the negotiations on the future relationship should be subject to full Parliamentary scrutiny. [They] noted that at EU level the negotiations are likely to take place under article 217 or 218 TFEU and will be subject to detailed and

transparent scrutiny by the European Parliament. The UK Parliament and British people deserve the same transparency and accountability”. These are views with which we agree.

(a) *What are the implications of the judgement of the Supreme Court in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5?*

It is worthwhile noting that in R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union 2017 UKSC 5, the Supreme Court’s judgement set out ‘two features of the United Kingdom’s constitutional arrangements’:

“...The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament ...The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law unless statute, i.e. an Act of Parliament, so provides”.

“We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation”.

The ruling made it clear that the Government cannot make or withdraw from a treaty that amounts to a ‘major change to UK constitutional arrangements’ without an Act of Parliament.

Applying the principle to this case, the judgment held that the UK Government could withdraw from the EU Treaties only if Parliament ‘positively created’ the power for ministers to do so. This was because the EU Treaties are a source of domestic law and domestic rights which ministers cannot alter using the prerogative alone. Parliament accordingly enacted the European Union (Notification of Withdrawal) Act 2017 to enable the notification of Withdrawal to be made.

In our response to the International Trade Committee’s inquiry into UK Trade Policy Transparency and Scrutiny,<sup>1</sup> we referred to the current EU system where a negotiating mandate is agreed in Council and the European Commission then proceeds to negotiate trade agreements with other countries. It may be helpful to consider whether this idea of a mandate prior to negotiations would have a part in the UK approach to international agreements in future, albeit that negotiations are in practice carried out by relevant civil service teams under the direction of ministers. We note in this context that the International Trade Committee found that, “Allowing Parliament to engage fully with future trade agreements will improve trade policy outcomes. Parliament should be given an opportunity to debate the Government’s Outline Approach on an amendable, substantive motion, before the mandate is set and negotiations commence.”<sup>2</sup>

## **2. What role should Parliament, and the House of Commons in particular, have in relation to international treaties and other arrangements, and what should this role be at different stages,**

<sup>1</sup> <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

<sup>2</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmtrade/1043/1043.pdf> at page 3

## **from considering negotiations through to signing, ratification, implementation, amendment and withdrawal?**

*(a) How should Parliament's role vary in relation to different types, topics and extent of treaties, and for other international agreements?*

The Vienna Convention on the Law of Treaties defines a 'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation' (Article 2(1)(a)).

A treaty is an agreement between sovereign states (countries) and in some cases international organisations, which is binding at international law. Treaties cover a multitude of topics ranging from political and security agreements covering national security and defence commitments (such as arms control treaties), economic treaties (such as the EU treaties or double taxation treaties), environmental treaties, and legal cooperation agreements (such as extradition treaties, human rights conventions such as ECHR or the UN Covenant on Human Rights and Hague Conventions dealing with Private International Law).

We refer again to our response to the International Trade Committee's Transparency and Scrutiny consultation, in which we noted that "UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international trade agreements and consider how these might best be modernised to take account of changes in the UK's political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with trade negotiations in recent years." We also discussed the importance of increasing transparency, thereby facilitating greater scrutiny throughout the negotiation process and noted the EU example of "reading rooms" which facilitate parliamentary examination of ongoing negotiations while maintaining the necessary confidentiality.<sup>3</sup> The same principles may be usefully applied in the context of international agreements more generally.

### **3. How effective is section 2 of the Constitutional Reform and Governance Act 2010 for enabling parliamentary scrutiny of international treaties and other agreements?**

*(a) What changes, if any, should be made to the legislation?*

The processes of the Constitutional Reform and Governance Act 2010 (the 2010 Act) are as follows:

Part 2 (sections 20-25) of the 2010 Act requires the Government to lay before Parliament most treaties it wishes to ratify (section 20), along with an Explanatory Memorandum (section 24). This is a statutory expression of the Ponsonby Rule which had governed parliamentary scrutiny of treaties since 1924.

The 2010 Act enables parliamentary disapproval of treaties by statute by which the House of Commons can block ratification. Under the Act the Government cannot ratify a treaty for 21 'sitting days' (days when

<sup>3</sup> For further discussion, see our response *ibid*

both Houses are sitting) after it is laid before Parliament. If within the 21 sitting days either House agrees a motion that the treaty should not be ratified, the Government must lay a statement setting out reasons for wanting to ratify. If the House of Commons resolves against ratification, a further 21 sitting day period commences during which the treaty cannot be ratified. If the House of Commons again resolves against ratification during this 21 sitting day period, the process is repeated. This can continue indefinitely which means that the House of Commons block ratification. It is worth noting that these powers have not yet been used.

We note that neither House has yet resolved against ratification of a treaty under these provisions.

### *Exclusions*

The 2010 Act contains a number of exclusions and limitations. Some types of treaty are excluded from the 2010 Act.

The 2010 Act does permit an opportunity to scrutinise treaties but does not require scrutiny, debate or a vote on treaties. Furthermore, it is not clear and transparent. We consider that process should be more straightforward and direct.

There have been some calls for a process that results in more debates and votes on treaties, involving committees, but as yet Parliament has not introduced provisions for systematic scrutiny of treaties. We take the view that such arrangements are necessary and should be implemented in good time to deal with the consequences of Brexit.

## **4. How much information and resources are needed for Parliament to scrutinise treaties and other international agreements effectively?**

It is difficult to assess in the abstracts the information and resources which Parliament needs to scrutinise treaties. Each treaty is different and the resources needed will vary from case to case. What we can envisage is that Parliament will need the maximum information available advisers of significant expertise and sufficient research and clerking staff to deal with this important and exacting work. Time is an essential resource: relevant committees and Parliament as a whole need time analyse, take evidence upon, report and debate if they are to ensure treaties and other international agreements are given thorough consideration. That will mean advance notice and allocation of time to be able to achieve the best scrutiny possible.

See further our comments in relation to transparency at question 2.

## **5. What role should devolved governments and legislatures, Crown Dependencies and Overseas Territories have in relation to international treaties and arrangements?**

The devolved legislatures and administrations have not played a formal role in negotiating treaties. The Scotland Act 1998 Schedule 5, paragraph 7 provides that:

“1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.”

As we have stated elsewhere, we believe it is important to ensure a “whole-of-government” approach in terms of the negotiations with the EU in relation to the Withdrawal Agreement. The concept is also of particular relevance to other international agreements - including trade agreements - which may or will have an impact on domestic law. In this context “whole of government” should be interpreted as “whole of governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government as well as professional bodies, the universities and civic society groups.

#### *The Concordat on International Relations*

Cooperation between the UK Government and the Devolved Administrations is specifically recognised in paragraph D1.4 of the Concordat on International Relations which is part of the Memorandum of Understanding between the UK Government and Devolved Administrations and which states:

“The UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements (including UN Conventions)”

and paragraph D1.5 which states:

“The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish Ministers and that the exercise of these responsibilities is likely to have implications for international relations. This Concordat therefore reflects a mutual determination to ensure that there is close co-operation in these areas between the United Kingdom Government and the Scottish Ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts.”

In addition to the Memorandum and Concordats there are a number of significant relations between officials which enable exchange on policy developments, evidence building, contacts and related matters on a practical and day to day basis.

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international agreements and consider how these might best be modernised to take account of changes in the UK's political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with treaty negotiations in recent years.

In order to create a comprehensive and inclusive international and trade policy, conduct negotiations and implement agreements, it would be helpful were the UK government to engage with the devolved administrations and legislatures.

In our recent response to the International Trade Committee's UK Trade Policy Transparency and Scrutiny inquiry,<sup>4</sup> we set out a range of options for involvement of the devolved administrations as follows:

- A. requiring the consent of the devolved administrations to any UK negotiated trade position;
- B. normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
- C. having a procedural structure for the devolved administrations' involvement similar to that in the European Union Withdrawal Act 2018 for "common frameworks" (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
- D. as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc. and allowing them to have a scrutiny and comment role (as noted above).

With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention or a memorandum of understanding.

Where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in negotiations. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters. This will be important where agreements impact upon devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate confidence-building and good-faith collaboration across the UK Government and devolved administrations. Such structures may

<sup>4</sup> *ibid*

provide, for example, for devolved participation in the design of negotiation mandates and the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to agreement, implementation and minimising risks to UK-wide implementation of trade agreements.



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