



Evidence to the EU International Agreements Sub-Committee Inquiry on Treaty Scrutiny

Colin Murray and Clare Rice

Author Biographies

Mr Colin Murray (colin.murray@newcastle.ac.uk) is a Reader in Public Law at Newcastle University. He is the principal investigator on the ESRC project *Performing Identities: Post-Brexit Northern Ireland and the Reshaping of 21st-Century Governance* (ES/S006214/1), examining the impact of Brexit on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland).

Dr Clare Rice (clare.rice2@ncl.ac.uk) is a Research Assistant at Newcastle University, working on the ESRC project *Performing Identities: Post-Brexit Northern Ireland and the Reshaping of 21st-Century Governance* (ES/S006214/1). Her interdisciplinary PhD examined power-sharing and equality within the EU, and she also works in the field of legislative studies.

This evidence is presented in a personal capacity and does not represent the views of the ESRC or of Newcastle University.

Given our areas of expertise, we are addressing the Committee's specific questions on:

- How could Parliament best engage with the Government's conduct of treaty negotiations? And how can Parliament best engage with interested stakeholders about treaty negotiations as they proceed?
- What role should the UK Parliament have in ensuring that the Government takes the views of the devolved administrations into account during the negotiation phase of treaties, and how best can it fulfil that role?
- Can examples of good practice be drawn from other parliaments?

PARLIAMENTARY ENGAGEMENT IN TREATY NEGOTIATIONS

- [1] The constitutional foundations of parliamentary scrutiny of treaties must provide the basis of any reappraisal of how scrutiny is conducted in practice. First, international relations (including treaty making) has long been managed by the UK Government as an exercise of the Crown Prerogative. Under the UK's dualist legal order the Government was long free to conclude treaties without a parliamentary ratification process, and Parliament's most significant formal involvement would come in the enactment of any legislation necessary to give domestic effect to such international agreements.¹ As to the specific conclusion of treaties, however, the codification and amendment of the Ponsonby Rule in Part 2 of the Constitutional Reform and Governance Act 2010 allows Parliament to indefinitely prevent the ratification of most treaties. Parliament, however, does not have to debate or vote on treaties, and use of these powers has been rare.²

¹ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 5.

² See R. Masterman and C. Murray, *Constitutional and Administrative Law* (2nd ed) (Pearson, 2018) pp 59-61.

- [2] Second, for as long as the UK was an EU Member State, the UK Parliament's engagement with treaty making was limited by the fact that much of this activity, particularly in areas such as trade and the environment, fell under the EU's remit and therefore these negotiations were conducted by the EU on behalf of the UK and other Member States. The UK Government's engagement in negotiations with other states with a view to establishing treaties as a state external to the EU will inevitably generate increased activity for Parliament to scrutinise.
- [3] In Brexit's aftermath the UK Government will thus be engaged in a wide range of treaty negotiations beyond its "lived" institutional experience. Parliament must play an important role in this new disposition. Given the centrality of accountable and representative government within the UK's constitutional order,³ with the House of Commons being the forum in which all parts of the UK are represented and can hold the UK Government to account for its international relations decisions, Parliament should have the final say on whether or not a treaty negotiated by the Government should be ratified and should, prior to that, be able to hold the Government's negotiations to account through formal scrutiny mechanisms.
- [4] The way in which Parliament engages with treaty negotiations and scrutiny will be heavily influenced by the balance struck between its representative function and efforts at direct democracy which impact upon the UK's treaty obligations. The 2016 referendum on the UK's membership of the EU offers a clear example of the inherent tension between these two concepts. Through the UK Government treating this referendum as directive as opposed to advisory, the 'will of the people'⁴ was effectively given precedence over parliamentary sovereignty. The democratically appropriate means of reflecting this position was to pursue Brexit, even where parliamentarians on a personal level or as a representative of a specific constituency position on the matter did not align with this course of action.
- [5] In addition to his constitutional complexity, there are also practical considerations with regard to parliamentary engagement in treaty negotiations. In the context of the UK's exit from the EU, there will be an increase in the law-making competences of the UK. Further, the reduction in the number of MPs to 600 in response to the Parliamentary Voting System and Constituencies Act 2011 means that Westminster is in a position where there will, in future, be fewer elected parliamentarians to deal with an increasing breadth of areas that will require close scrutiny. Parliament's engagement in ongoing and future treaty negotiations, and processes established to facilitate this, will need to take account of this altered context.
- [6] In terms of parliamentary engagement with interested stakeholders about treaty negotiations, one evident stakeholder remains the EU. For example, trade agreements concluded by the UK could affect the implementation of what goods are considered "at risk" of entering the EU Single Market under Article 5 of the UK-EU Withdrawal Agreement's Protocol on Ireland/Northern Ireland. Beyond this issue, Northern Ireland will find itself in dynamic alignment with certain areas of EU law under the terms of the Protocol, and there will thus need to be scrutiny of these developments.
- [7] Parliamentary scrutiny of the UK's international obligations is thus increasingly important, yet Parliament is arguably in a weak position to fulfil this task. There are not mechanisms in place to allow parliamentarians and committees to review the progress of negotiations (the equivalent, for example, of the "reading rooms" on documents and

³ See *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41, para 46.

⁴ See V. Bogdanor, 'Europe and the Sovereignty of the People' (2016) *Political Quarterly* 348, 350.

briefings provided as a matter of course by the EU Commission when it is engaged in negotiations). There is also no equivalent to the EU Commission having to follow an agreed mandate for negotiations.⁵ Involvement of parliamentary scrutiny after a treaty has been concluded or at the time of implementation into domestic law is inadequate.⁶ Once an international obligation is in place ministers have long relied upon such commitments as a means to circumvent parliamentary opposition to related domestic legislation.⁷

THE INVOLVEMENT OF DEVOLVED ADMINISTRATIONS

- [8] Brexit has exposed the degree to which the UK's governance order is not as unitary as the doctrine of parliamentary sovereignty suggests. Although the sovereignty doctrine establishes Parliament as supreme, it overlooks the engagement of devolved institutions in Northern Ireland, Scotland and Wales with other countries and international bodies. The devolved administrations are free to diverge on policy within their areas of competence to reflect localised necessity. Westminster is thus not *the* centre of legislative authority in the UK; it is one of several.
- [9] As treaties negotiated and agreed by the UK Government will apply to the UK as a whole, it follows that all perspectives from across the UK should be included and help to inform the UK Government's aims within the reserved competence of international relations. This is particularly pertinent where areas of prospective treaties will bear consequences within the areas of competence of each devolved administration, and where these impacts will be differentiated.
- [10] Although there are representatives within Parliament from each of the constituent parts of the UK, this does not necessarily involve them in Westminster's treaty scrutiny processes. Individual representatives cannot be considered to speak on behalf of the devolved institutions of which they are not part, despite the likelihood of common party-political affiliations. Their contributions to scrutiny of treaties in Westminster cannot be considered as substitutions for scrutiny conducted within the devolved legislatures, for example by the Scottish Parliament's Committee on European and External Relations. The devolved legislatures reflect the full spectrum of political positions and voices specific to their part of the UK, which is not always the case at the Westminster level. Northern Ireland provides a clear example of this, where Sinn Féin's abstentionist policy entails that unionist voices (particularly through the DUP in recent years) have been conflated with reflecting the 'Northern Ireland' position.
- [11] It is important to note also that the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland entail that Brexit will have a very different effect on this constituent part of the UK. There will be an on-going effect of EU law with regard to trade, rights and equalities, which the UK will not be able to overlook in negotiating international treaties. It will be necessary to ensure that the UK's international agreements take account of these commitments.
- [12] In terms of how formal involvement of the devolved administrations can be best achieved, there are a number of potential options. For example, a formal process could be established whereby the devolved administrations are provided with a fixed amount of time to consider the implications of draft treaty agreements and provide feedback to

⁵ For suggestions on how the UK Parliament could provide a "soft" mandate UK Government negotiations, see J. Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making' (2006) 55 *International and Comparative Law Quarterly* 121, 158.

⁶ See, House of Lords European Union Committee, *Brexit: Parliamentary Scrutiny* (2016) HL50, para 18.

⁷ See, for example, Baroness Scotland, HL Deb, vol. 676, col. 455 (5 Dec 2005).

the UK Government through a formal arrangement. This would ensure each devolved administration would have the opportunity to scrutinise prospective UK positions on issues or draft agreements, and draws upon the operation of the Joint Ministerial Committee (EU Negotiations) during Brexit. A shortcoming with this arrangement, however, was that the devolved administrations found that they had little scope for meaningful input into the UK Government's negotiation strategy.

- [13] Another approach could be to ensure the inclusion of representatives of the devolved administrations on a rolling basis throughout the preparatory and negotiation phases of treaty agreements being created. This would allow for both *ex ante* conversations with political representatives and officials in each of the devolved territories and continued engagement with the devolved administrations throughout treaty negotiation processes should happen where appropriate. This approach is reflected in the inclusion of representatives from the Northern Ireland Executive in UK teams involved in the implementation of the Protocol on Ireland/Northern Ireland under the terms of the *New Decade, New Approach* deal.⁸
- [14] An evident challenge with involving the devolved administrations to such an extent would be the sharing of information with them in order to facilitate constructive dialogue. Where confidential documents are involved, this could be problematic as sharing sensitive material across multiple administrations with diverging political views would risk information leaks, and could weaken confidence in negotiating partners. As such, it would be necessary to determine formal mechanisms for preserving confidentiality (such as a "reading room" arrangement).
- [15] The adoption of a Westminster-centric approach to treaty scrutiny risks as many shortcomings as a Whitehall-centric approach to treaty negotiations. With regard to Northern Ireland in particular, the scrutiny of treaties will remain inherently intertwined with considerations of EU law, because of Northern Ireland's unique post-Brexit position as provided by the Protocol on Ireland/Northern Ireland.

EXAMPLES OF ESTABLISHED PRACTICE

- [16] The European Parliament's arrangements provide a framework for how complex treaties can be scrutinised by multiple bodies within a legislature and the procedures required to facilitate the sharing of essential information. As this structure provided for scrutiny of numerous international treaties applicable to the UK while it was a member of the EU, it provides an example that the UK Parliament can draw upon. Its committees are able to closely scrutinise the progress of negotiations against an agreed mandate, and facility is made for MEPs to consider draft texts in reading rooms during the negotiation process. The EU Commission's interactions with MEPs and member states illustrates that negotiations on complex treaties can proceed without denying stakeholders opportunities to engage with the process. Article 218 TFEU also allows the European Parliament to reject treaties which are proposed to it.
- [17] Belgium utilises a model for ratifying international treaties reflective of the federalist constitutional arrangements of the country, which is divided into regions and according to language communities. A key element of this arrangement that is relevant for the UK is that for international treaties conducted at the federal level which impact upon competences of the federated entities, approval must be gained from these levels before a treaty can be formally ratified.⁹ One possible option for the UK, building on the Belgian

⁸ Annex A, para. 9.

⁹ The Belgian Constitution, Art. 167

example, could be that approval must be obtained from all of the devolved administrations before a treaty can be ratified. The formalisation of any such move would need to take account of the Sewel Convention, and its provision for the UK Government to override objections by the devolved institutions in exceptional circumstances.

CONCLUSIONS

- [18] A fundamental problem arises where parliamentary sovereignty, which implicitly places an onus upon Westminster with regard to scrutiny of treaties, is confronted with the complex challenges resulting from the UK's existing constitutional arrangements. While Westminster may be the primary forum for the scrutiny, the views of the devolved administrations need to be incorporated into this process, for practical and democratic reasons. Ultimately, Parliament needs to have enhanced powers with regard to the negotiation and ratification of treaties and a formal mechanism is needed for the involvement of the devolved administrations in UK negotiations. It should also be possible for Parliament to prevent the ratification of a treaty or suggest amendments.

5 June 2020