NEGLECTING THE TREATY-MAKING POWER IN THE UK: THE CASE FOR CHANGE

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Forthcoming The Law Quarterly Review

I. Introduction

Treaty-making has long moved away from being a relatively infrequent occurrence confined primarily to a narrow array of issues such as peace, friendship, commerce and tariffs on goods, transfers of territory and boundary delimitations. Scholars studying the treaty-making power in a comparative constitutional context underscored the explosion in treaty-making and its changing remit many decades ago.[1] The post World War II period in particular saw a continuously accelerating trend in recourse to treaty-making to regulate all manner of issues in an increasingly interdependent world. It is now difficult to think of an area of national law-making and governmental activity that is not the subject matter of a treaty or treaty derived law. Whether it be public procurement or the environment, taxation or labour standards, health or corruption, finance or food standards, fisheries or telecommunications, data protection or social security, we find treaty-making activity.

This explosion in treaty-making extends to dealing with unambiguously constitutional matters. This is most obviously so through the emergence of the international human rights regime via an array of human rights treaties. They come complete with implementation monitoring bodies, in some cases with an individual complaints procedure, and at the regional level even with international courts endowed with compulsory jurisdiction and power to make binding rulings.[2] Human rights are a staple part of constitutional texts and whilst treaties can reinforce human rights at the constitutional level, and indeed lead to their domestic constitutional adoption,[3] treaties and treaty derived law can negatively affect human rights. A few controversial examples include: the impact of World Trade Organisation obligations

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[1] See e.g. L. Wildhaber, *Treaty-Making Power and Constitution* (Basel: Helbing & Lichtenhahn, 1971), at p.13.

[2] See generally P. Alston and R. Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013).

[3] See T. Ginsburg, Z. Elkins, and B. Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice" (2013) 51 Harv. Int'l L.J. 201.

on the ability of states to fulfil human rights obligations;[4] extradition agreements that can apply in tension with numerous rights of the accused individual;[5] or the United Nations targeted sanctions regime that breached fundamental rights.[6]

Given the palpably accelerating significance of treaties for the domestic constitutional order, it is remarkable that UK constitutional law scholars have neglected the treaty-making power. This neglect has been all the more striking in recent decades given reform proposals that included Bills in Parliament,[7] select committee reports,[8] as well as the green paper and draft Bill that culminated in legislative reform via the Constitutional Reform and Governance Act 2010 (CRAGA).[9] We would, however, be mistaken to presume that Parliament has been attentive to the treaty-making power, for it is equally striking that parliamentarians have shown relatively little interest in actually scrutinising the exercise of the treaty-making power.

This article has three core objectives. The first is to both demonstrate and explain this neglect of the treaty-making power by parliament and constitutional law scholars. This takes place in section III; section II having first outlined the main controls on the treaty-making power. It is suggested that a mutually reinforcing dynamic between scholarly and parliamentary neglect of the treaty-making power has taken hold, the general lack of engagement with the treaty-making power by each constituency helping to explain and reinforce neglect by the other. The primary driver for this neglect flows from the perception that dualism and parliamentary sovereignty combine to shield the UK legal order from treaties, with Parliament as the legitimate gatekeeper offering the route that treaties must take to impact on the UK.

The second core objective, developed in section IV, is to advance the case for taking the treaty-making power more seriously. This is achieved principally by showing that dualist and parliamentary sovereignty orthodoxy does not offer a cogent rationale for neglecting the treaty-making power, rather it helps conceal the reality of

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[4] See M. Trebilcock, R. Howse and A. Eliason, *The Regulation of International Trade,* 4th edn (London: Routledge, 2013), Ch.18.

[5] See H. van der Wilt, "On the hierarchy between extradition and human rights" in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law* (Oxford: Oxford University Press, 2012).

[6] See I. Cameron, "UN targeted sanctions, legal safeguards and the ECHR" (2003) 72 Nord. J. Int'l L. 159.

[7] e.g. Treaties (Parliamentary Approval) HL Bill (1995–96).

[8] e.g. Procedure Committee, *Parliamentary Scrutiny of Treaties* (HC 1999–00, 210).

[9] Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007).

an increasingly permeable constitution. In particular judicial and non-judicial reliance on unincorporated treaties, along with the actual practice of treaty implementation, that stems from how the UK's dualist constitution accommodates the binding nature of treaty commitments attests to the profound impact that treaties have on the constitution and core constitutional principles.

The third core objective is to advance the case for stronger controls on the treaty-making power, which should also contribute to redressing the neglect identified in this article. This argument is developed in section V which builds on prior sections and draws on comparative constitutional insights to propose reforms for the UK consisting of a new statutory framework, including a statutory treaty-making power, located in a Treaties Act, and a joint parliamentary treaties committee overseeing a committee based scrutiny model. The Treaties Act would impose information and consultation obligations in relation to both Parliament and the devolved executives and legislatures; an affirmative parliamentary approval procedure for at least certain significant categories of treaty; parliamentary control over the provisional application of treaties; and an express parliamentary role in treaty termination. These proposals for change would ensure controls over the executive's treaty-making power that are more fitting for a 21st century parliamentary democracy and a model from which other dualist systems could draw inspiration.

II. Controls on the Treaty-Making Power in the UK

The treaty-making power in the UK is a Crown prerogative power – a non-statutory legal power – that includes the capacity to negotiate and enter into treaties as well as to amend and withdraw from them.[10] The power is in practice exercised by the executive branch, falling within the remit of the Secretary of State for Foreign and Commonwealth Affairs who consults with government departments involved in implementing the relevant treaties.[11]

The common law itself imposes a crucial constraint to the effect that treaties neither become part of, nor alter, domestic law in the absence of statutory authorisation. Traditionally a 19th century authority was invoked in support of this

[10] For detailed discussion see I. Sinclair, S. Dickson and G. Maciver, "United Kingdom" in D. Hollis, M. Blakeslee and L. Ederington (eds), *National Treaty Law and Practice* (Leiden: Martinus Nijhoff 2005).

[11] Government departments other than the Foreign and Commonwealth Office (FCO) frequently lead treaty negotiations.

basic tenet of UK constitutional law concerning the treaty-making power,[12] often supplemented since 1937 by the famous dictum of Lord Atkin: "there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."[13] In effect, the common law enshrines the dualist nature of the UK constitution concerning treaties, as recently affirmed by the Supreme Court's *Miller (No.1)* ruling.[14]

This basic tenet of UK constitutional law also helps account for the long-standing practice, and in effect control over the treaty-making power, whereby the government does not bind the UK to a treaty until necessary legislative changes have been made.[15] It is the presence of such implementing legislation, in the unique form of the European Communities Act 1972 (ECA 1972), that was central to the Supreme Court concluding that the prerogative power to withdraw from treaties could not be used to trigger departure from the EU and that statutory authorisation was required.[16] *Miller (No.1)* thus established that there could be judicial control over treaty withdrawal, even if only in the narrowest of circumstances. Prior attempts to use the common law to constrain entry into treaties had proved futile,[17] and Lord Roskill's famous dictum in the *GCHQ* case had included the making of treaties in the non-justiciable category of prerogative powers.[18] While the very notion of non-justiciable prerogative powers has been contested,[19] *Miller (No.1)* did endorse the non-reviewability of the treaty-making power subject to any statutory restrictions.[20]

More recently the Supreme Court in *Miller (No.2)* distinguished between the extent of a prerogative power, or lawful limits of the power, and the mode of exercise

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[12] *The Parlement Belge* (1879) 4 P.D. 129 (Sir R Phillimore).

[13] *A.-G. Canada v A.-G. Ontario* [1937] A.C. 326, at 347 PC. More recently, the leading authority for this point became *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418; [1989] 3 All E.R. 523.

[14] See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, especially at [55].

[15] See Sinclair, Dickson and Maciver, "United Kingdom" in *National Treaty Law and Practice* (2005), at pp.735 and 741.

[16] *Miller* [2017] UKSC 5. For detailed discussion see P. Craig, "Miller, Structural Constitutional Review and the Limits of Prerogative Power" [2017] P.L. 48.

[17] Usually EU treaties e.g. *Blackburn v Attorney General* [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p. Rees-Mogg* [1994] Q.B. 552; [1994] 1 All E.R. 457; *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 936 (Admin); [2008] A.C.D. 70; but see on the 1985 Anglo Irish Agreement, *Ex p. Molyneaux* [1986] 1 W.L.R. 331.

[18] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 418; [1984] 3 All ER 935 at 956.

[19] M. Elliott and R. Thomas, *Public Law*, 3rd edn (Oxford: Oxford University Press, 2017), at pp.561-562.

[20] *Miller* [2017] UKSC 5 at [55].

of the prerogative power within its lawful limits.[21] This allowed the Court to dispense with justiciability objections to reviewing the power to prorogue Parliament on the basis that the extent of that power is justiciable which culminated in the finding that the Prime Minister's advice to prorogue Parliament, and the resulting prorogation in September 2019, was unlawful. This approach to determining the lawful extent of a prerogative power could conceivably have implications for review of the treaty-making prerogative while nonetheless leaving courts free to proclaim that the mode of exercise of that power within its lawful limits is non-justiciable.

The traditionally standard control mechanism over the treaty-making power, as Dicey intimated, was through ministerial accountability to Parliament and indirectly to the electorate.[22] Potential scope for ex ante parliamentary control arose through a constitutional practice known as the "Ponsonby rule". In 1924 the then Under Secretary of State for Foreign Affairs (Arthur Ponsonby) announced the Labour government's intention to lay treaties subject to ratification before both Houses for 21 days after signature and prior to ratification. The expressly articulated objective was to "strengthen the control of Parliament over the conclusion of international treaties…and to allow...adequate opportunity to discuss the provisions…before their final ratification."[23] Future governments, after 1929,[24] followed the practice such that it frequently became referred to as a constitutional convention.[25]

Several changes took place with respect to applying the Ponsonby rule as compared to its original articulation, notably capturing more treaties than simply those requiring ratification as well as exceptions.[26] Since 1997 treaties have been laid with an explanatory memorandum describing *inter alia* the subject matter of the treaty

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[21] *R (Miller) v Prime Minister; Cherry v Advocate General* [2019] UKSC 41; [2019] 3 W.L.R. 589.

[22] See J.W.F. Allison (ed), *The Oxford Edition of Dicey Volume 1* (Oxford: Oxford University Press, 2013), at pp.209–10.

[23] HC Deb 1 April 1924, vol 171, cols 1999–2005.

[24] The history of the Ponsonby rule articulated in *Miller* [2017] UKSC 5 at [58] is inaccurate. It had not become "fairly standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they were ratified". What had become practice by 1892 was for treaties already in force to be presented to Parliament. And the 1924 statement by Arthur Ponsonby did not "follow an indication by the previous government that it did not regard itself as bound by the practice". It was the successor 1924 Conservative government that renounced the predecessor government's commitment, which was reinstated in 1929 when Ramsay MacDonald became Prime Minister again. For the history accurately outlined, see Constitution Committee, *Waging War* (HL 2005–06, 236), appendix 5.

[25] See e.g. F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986), at p.84; *Miller* [2017] UKSC 5 at [58].

[26] See *Waging War* (HL 2005–06, 236), appendix 5.

and why it was proposed the UK should become a party. And since 2000 treaties have been sent to relevant departmental select committees and, if raising human rights issues, to the Joint Committee on Human Rights (JCHR).

The Ponsonby rule's requirement for laying of treaties, along with accompanying explanatory memoranda, was made a statutory requirement by CRAGA, subject to an expressly articulated exemption in undefined exceptional cases.[27] The main novelty was to stipulate the consequences of a parliamentary vote against ratification, giving the Commons a potential veto over entry into treaties so laid, while objections from the House of Lords alone could be overridden.[28] The Lords Secondary Legislation Scrutiny Committee has considered treaties laid under CRAGA since mid-2014, a fortuitous development when the committee was informed that such treaties actually fell within its pre-existing terms of reference.[29]

Statutory rules have subjected certain subsets of treaties to enhanced controls, most notably EU matters. Thus between 1978 and 2011 there was a statutory requirement for pre-ratification approval by Act of Parliament for any treaty revision increasing the European Parliament's powers.[30] Due to legislative reforms, this pre-ratification statutory approval requirement applied to any use of the ordinary treaty revision procedure from 2008, and from 2011 pre-ratification referendum requirements were imposed on the EU treaty revision process.[31]

There is also a type of EU concluded international agreement to which the UK is also a party, "mixed agreements", which are not ratified where they need to have effect in UK law until designated under the ECA 1972 by secondary legislation.[32] In addition to statutory authorisation to trigger art.50 TEU required in effect by the *Miller (No.1)* ruling,[33] EU withdrawal has been subject to stronger parliamentary control than CRAGA alone. Indeed the EU Withdrawal Agreement brought into sharp

[27] CRAGA 2010 ss.20, 24 and 22.

[28] CRAGA 2010 s.20.

[29] See Secondary Legislation Scrutiny Committee – written evidence (PST0015) to Constitution Committee, *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345).

[30] European Parliamentary Elections Act 2002 s.12; European Assembly Elections Act 1978 s.6. The five main treaty revisions, from the Single European Act through to Lisbon, were accordingly ratified following authorisation by Act of Parliament: see European Communities (Amendment) Act 1986; European Communities (Amendment) Act 1993; European Communities (Amendment) Act 1998; European Communities (Amendment) Act 2002; European Union (Amendment) Act 2008.

[31] See respectively the European Union (Amendment) Act 2008 and the European Union Act 2011.

[32] See A. Lang, "Parliament's role in ratifying treaties" (HC Library Briefing 5855, 2017), at pp.15–16.

[33] European Union (Notification of Withdrawal) Act 2017.

relief the inadequacies of the CRAGA regime, at least as concerns ratification of an agreement with such profound implications. A statutory fetter was accordingly placed on ratifying the Withdrawal Agreement in the absence of approval by the Commons (the "meaningful vote"), a debate in the Lords, and an implementing Act of Parliament.[34] Most recently, the Lords EU Committee was tasked in 2019 with reporting on "replacement agreements" that seek to replace treaties concluded by the EU with third parties.[35]

That treaty-making controls exist does not however mean that they are effective especially if Parliament neglects its scrutiny role as demonstrated below.

III. Demonstrating and Explaining Neglect of the Treaty-Making Power

1. Neglect by Parliament

Parliamentary scrutiny of the treaty-making power was rare prior to CRAGA, this forming a key driver for reform. The Government itself highlighted in the reform proposals culminating in CRAGA that "[i]t is very rare for debates to be requested under the Ponsonby Rule" and that it was because Parliament might "wish to hold a debate and vote on some treaties" that the Government was consulting "on appropriate means to put this convention on to a statutory footing."[36] Departmental select committees certainly did not rise to the challenge of scrutinising treaties. Such scrutiny was generally a relatively rare occurrence and it leading to further debate on the floor of either House far rarer still. Thus the only reports on specific treaties prior to CRAGA by the Foreign Affairs Committee were on the high profile EU revising treaties.[37] One instance of scrutiny from the Defence Committee, criticising parliament's role in treaty scrutiny,[38] culminated in a Procedure Committee report and the government undertaking in 2000 that treaties be sent to relevant departmental select committees with opportunity for debates on treaties involving major political, military or diplomatic issues if they request it and are supported by the Liaison

[34] European Union (Withdrawal) Act 2018 s.13.

[35] *Scrutiny of International Agreements* (HL 2017–19, 282).

[36] See *The Governance of Britain-War Powers and Treaties: Limiting Executive Powers* (Cm 7239, 2007), at paras 171 and 21.

[37] See *Foreign Policy Aspects of the Lisbon Treaty* (HC 2007–08, 120); *The Treaty of Amsterdam* (HC 1997–98, 305); *Europe After Maastricht* (HC 1991–92, 223); *The Single European Act* (HC 1985–86, 442).

[38] *NATO Enlargement* (HC 1997–98, 469).

Committee.[39] Revealingly, the latter commitment never actually led to any such requests.

There was more contribution from certain non-departmental select committees. Treaty-making scrutiny in the EU context primarily fell to the EU select committees.[40] And in 2004 the JCHR decided it would report to Parliament on all human rights treaties, or their amendments, where it felt the need to ensure Parliament was fully informed about their background, content and implications.[41] Through to passage of CRAGA, JCHR reports were forthcoming on several treaties,[42] however, only one was debated in Parliament and that owes much to the relevant treaty also being a EU mixed agreement.[43]

Parliamentary scrutiny in the CRAGA era continued much as before with treaties rarely receiving detailed scrutiny through select committee reports or parliamentary debate. A sparsely attended Westminster Hall debate on amendments to, and renewal of, the 1958 Mutual Defence Agreement with the United States took place during the laying period.[44] It did not however lead to a Defence Committee report, nor did any other defence related treaty laid under CRAGA. The Foreign Affairs Committee has also not reported on any treaties laid under CRAGA. The only JCHR report on a treaty so laid concerned the Protocol 15 reforms to the ECHR and its Court, and its request for the government to provide time for debate in both Houses was rejected.[45]

The Lords Secondary Legislation Scrutiny Committee has considered over 90 treaties laid under CRAGA through to 1 October 2019, but only the first one, a bilateral investment agreement, was drawn to the special attention of the House and it was only debated after ratification.[46] Only a fraction of these treaties were even subject to information paragraphs, usually literally a mere paragraph concerning the

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[39] *Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties* (HC 1999–00, 990).

[40] See on European scrutiny in Parliament, P Hardy, "European Scrutiny" in A. Horne and A. Le Sueur (eds), *Parliament – Legislation and Accountability* (Oxford: Hart Publishing, 2016).

[41] *Protocol No 14 to the European Convention on Human Rights* (2004–05, HL 8, HC 106).

[42] *Protocol No 14 to the European Convention on Human Rights* (2004–05, HL 8, HC 106); *Prisoner Transfer Treaty with Libya* (2008–09, HL 71, HC 398); *The Council of Europe Convention on the Prevention of Terrorism* (2006–07, HL 26, HC 247).

[43] See *UN Convention on the Rights of Persons with Disabilities: Reservations and Interpretative Declaration* (2008–09, HL 70, HC 397), and HC Second Delegated Legislation Committee 21 April 2009, cols 3–18 and HL Grand Committee 28 April 2009, cols 20–50.

[44] See HC Deb 6 November 2014, vol 587, cols 291–316 WH.

[45] *Protocol 15 to the European Convention on Human Rights* (2014–15, HL 71, HC 837).

[46] See *3rd Report* (HL 2014–15, 12) and HL Grand Committee 30 July 2014, cols 631–45.

subject matter of the treaty. Meaningful scrutiny this is not. And through to 1 October 2019 no debates had taken place on a CRAGA motion that a treaty should not be ratified.

As noted above, EU related agreements have been subject to stronger parliamentary control, and regarding EU withdrawal this is obviously a post CRAGA development as is also the case for "replacement agreements" which the Lords EU committee has drawn to the attention of the house on ten occasions through to 1 October 2019.[47] Ultimately this does little to detract from the overall picture of Parliament neglecting the treaty-making power.

2. Neglect by UK constitutional law scholars

Both publications and contributions to recent select committee inquiries attest to neglect of the treaty-making power by UK constitutional law scholars. The time period explored for publications is from 1989 through to 1 July 2019. The starting point of 1989 was chosen to accommodate developments that could inspire scholarly inquiry into the treaty-making power which includes both reform proposals identified in the introduction to this article and judicial developments. Thus in 1988 Lord Goff famously stated that he conceived it to be his duty to interpret the law in accordance with the unincorporated ECHR.[48] That same year judicial review proceedings commenced in *Factortame* culminating in "disapplication" of an Act of Parliament to comply with EU obligations.[49]

Strikingly, however, there have been no articles either specifically on the treaty-making power in the UK, or offering it extended treatment as part of a broader article, in any of the five most well-known general UK law journals or the leading constitutional law journal.[50] *Miller (No.1)*, and thus the prerogative to withdraw from treaties, has inevitably generated much commentary.[51] Judicial treatment of

[47] This resulted in four of these treaties being debated on the floor of the Lords: see respectively HL Deb 13 March 2019, vol 796, cols 1107–22 and HL Deb 1 May 2019, vol 797, cols 971–95.

[48] *A.G. v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109; [1988] 3 All ER 545.

[49] *R. v Secretary of State for Transport, Ex p. Factortame (No.2)* [1991] 1 A.C. 603; [1991] 1 All ER 70. Famously labeled a "revolutionary" outcome: W. Wade, "Sovereignty - Revolution or Evolution?" (1996) 112 L.Q.R. 568.

[50] Based on a manual search of articles in the *Cambridge Law Journal*, the *Law Quarterly Review*, *Legal Studies*, the *Modern Law Review*, the *Oxford Journal of Legal Studies* and *Public Law* between 1989 and 1 July 2019.

[51] e.g. *Public Law* published a "Brexit Special Extra Issue" in 2017 devoting four articles to *Miller* [2017] UKSC 5.

international law other than EU law,[52] particularly unincorporated treaties and especially human rights treaties, has also long given rise to scholarship.[53] But none of this constitutes article length contributions focussing on the treaty-making power. For that we need to turn to the *International and Comparative Law Quarterly*, not the natural forum for UK constitutional law scholars, which has two articles during the identified period neither of which was written by UK constitutional law scholars.[54]

As concerns monographs, none have been published specifically on the treaty-making power during this period, though other aspects of the prerogative relating to foreign affairs, notably the war prerogative, have recently received sustained treatment from a constitutional law perspective.[55] The only monograph giving any sustained attention to the treaty-making power is an important recent work on the broader topic of foreign relations law written by a distinguished international law scholar and practitioner from New Zealand.[56]

Only three chapters expressly focussing on the treaty-making power were discovered in edited volumes. A House of Commons senior library clerk has written a valuable recent chapter,[57] while the other two chapters are in now dated comparative volumes on treaty-making dominated by international law scholars and current and former foreign ministry legal officials.[58] Chapters in edited volumes touching the treaty-making power exist,[59] but none offer detailed engagement.[60]

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[52] Judicial application of EU law was being explored in law journals much before the explosion in writing triggered by *Factortame*, see e.g. T.R.S. Allan, "Parliamentary Sovereignty: Lord Denning's Dexterous Revolution" (1983) 3 O.J.L.S. 22.

[53] For a well-known article on international law in UK courts, mainly focusing on treaties, see P. Sales and J. Clement, "International Law in Domestic Courts: the Developing Framework" (2008) 124 L.Q.R. 388.

[54] An article on CRAGA by an international lawyer formerly at the FCO, see J. Barrett, "The United Kingdom and parliamentary scrutiny of treaties: recent reforms" (2011) 60 I.C.L.Q. 225, and a comparative article by a Canadian international law scholar: J. Harrington, "Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making" (2006) 55 I.C.L.Q. 121.

[55] See V. Fikfak and H. Hooper, *Parliament's Secret War* (Oxford: Hart, 2018) and R. Joseph, *The War Prerogative* (Oxford: Oxford University Press, 2013).

[56] C. McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014) (exploring, inter alia, the treaty-making power in Australia, Canada, New Zealand and the UK).

[57] A. Lang "Parliament and International Treaties" in *Parliament – Legislation and Accountability* (2016).

[58] Sinclair, Dickson and Maciver, "United Kingdom" in *National Treaty Law and Practice* (2005); Lord Templeman, "Treaty-Making and the British Parliament" in S. Riesenfeld and F. Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties* (Dordrecht: Nijhoff 1994).

[59] e.g. R. Brazier, "Constitutional Reform and the Crown" in M. Sunkin and S. Payne (eds), *The Nature of the Crown* (Oxford: Oxford University Press, 1999), at p.352.

[60] Feldman gives valuable attention to the relationship between the international and the UK domestic constitutional order going well beyond the classic examples of human rights treaties and the EU, albeit only briefly mentioning CRAGA: D. Feldman, "The Internationalisation of Public Law and its Impact on the UK" in J. Jowell, D. Oliver, and C. O'Cinneide (eds), *The Changing Constitution*, 8th edn (Oxford: Oxford University Press, 2015).

Turning to constitutional law textbooks, although by definition usually more introductory, the scant coverage is revealing. The treaty-making power is usually dealt with in no more than a few paragraphs – sometimes less[61] – often spread across different sections and/or chapters. Strikingly at least one popular constitutional law textbook does not even mention CRAGA in relation to treaty-making.[62] Indeed, most constitutional law texts barely mention CRAGA, one leading text accords it two single sentence footnotes,[63] another a single brief sentence.[64]

Turning from publications to engagement with select committee inquiries, this has been surprisingly rare. A 2004 Public Administration Select Committee report called for proposals for ensuring full parliamentary scrutiny for the conclusion and ratification of treaties in line with the case made for this by the special advisor, a constitutional law professor.[65] However, no constitutional law scholars submitted written evidence.

Some four years later the call for evidence from the Joint Committee on the draft Constitutional Renewal Bill emerged with specific questions pertaining to the treaty-making process and the provisions that became part of CRAGA.[66] Only two constitutional law academics submitted written evidence mentioning treaty-making, respectively two and four paragraphs of their broader submissions.[67] It would have been intriguing to know if any interest would have been generated from constitutional law scholars if the inquiry had exclusively concerned treaty-making rather than a broad array of constitutional reform proposals including the civil service, protests, the attorney general, judicial appointments and war powers.

Finally, no UK constitutional law scholars submitted written evidence to the recent Constitution Committee inquiry into parliamentary scrutiny of treaties despite that call for evidence coming more than eighteen months after the Supreme Court ruled in *Miller (No.1)*.[68]

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[61] e.g. J. McEldowney, *Public Law*, 4th edn (London: Sweet & Maxwell, 2016), Ch. 4.

[62] N. Parpworth, *Constitutional and Administrative Law*, 10th edn (Oxford: Oxford University Press, 2018).

[63] Elliott and Thomas, *Public Law* (2017), at pp.155 and 561.

[64] McEldowney, *Public Law* (2016), at p.121.

[65] See *Taming the Prerogative* (HC 2003–04, 422).

[66] *Draft Constitutional Renewal Bill* (2007–2008, HL 166–I, HC–551).

[67] *Draft Constitutional Renewal Bill* (2007–2008, HL 166–II, HC 551–II), Professor Tomkins, at pp.29–30, and Mr Mark Ryan, at p.407.

[68] *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345).

3. The reasons for neglect

An overarching explanation for this neglect can be attributed to the UK adopting a dualist approach to treaties along with related maxims and practices. As confirmed recently in *Miller (No.1)*, treaties do not become part of the domestic legal system, nor change domestic law, unless Parliament provides so. Sound constitutional principle grounds this dualist stance, namely, preventing the executive making law on the international plane with direct domestic legal effect without parliamentary authorisation. This is a basic separation of powers point, but in the UK dualism is also grounded in the central attachment to parliamentary sovereignty that would be undermined by executive law-making without parliamentary authorisation. As the Supreme Court stated in *Miller (No.1)* "the dualist system is a necessary corollary of Parliamentary sovereignty".[69] The orthodox dualist position, including Parliament's capacity to legislate incompatibly with treaty obligations, has frequently been judicially affirmed.[70]

This dualist and parliamentary sovereignty orthodoxy, on which the UK's political class and its constitutional law scholars are brought up, continues to be reflected in largely uncontested fashion in constitutional law textbooks, EU and ECHR impact aside. This provides a seemingly cogent rationale for why the treaty-making power need not be of significant concern to parliamentarians and constitutional law scholars. They, it seems, needed only really trouble themselves with treaties where implementing legislation is involved because dualism and parliamentary sovereignty operate as a shield protecting the legal order from the executive's international law-making.

A host of reasons for neglecting treaty-making exist that are more specific to parliament. This is esoteric and complex terrain and it was not until 1997, through explanatory memoranda, that MPs and peers even gained access to an explanation of what the subject matter of a laid treaty was and why the government proposed that the UK become a party. Eye-opening observations suggest many parliamentarians may have been unaware of the pre-ratification laying requirement. Thus one legally educated former practicing barrister stated that he was not aware of the Ponsonby rule

[69] *Miller* [2017] UKSC 5 at [57].

[70] e.g. *R v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696; [1991] 1 All E.R. 720; *R v Lyons* [2002] UKHL 44; [2003] 1 A.C. 976.

until he received a submission about it while he was Foreign Secretary, despite having already been an MP for over 20 years and having served as Home Secretary for five years.[71] If the Ponsonby rule was a new discovery for this long-serving MP, it bodes badly for knowledge of treaty-making controls in Parliament.

Even assuming much improved knowledge, not unreasonably so given the presence of statutory rules today (CRAGA), the current set-up does not incentivise scrutiny. As has been pointed out, "parliamentary scrutiny of legislation is a part time activity for Parliamentarians…[e]ven when they are free to concentrate on events in Westminster rather than their constituencies, MPs face a mass of demands on their time" while "most peers, not being salaried politicians…have, perhaps, even less time than MPs to devote to scrutiny of legislation."[72] If a central task of a legislature, scrutiny of the legislative process, where votes will take place, is arguably deficient in the UK, then why would scrutiny of the treaty-making power take place where time constraints are so tight (21 sitting days), it is extremely unlikely a vote would take place, and changing the treaty text would not be possible?

As concerns MPs, their constituents and the media are, rare exceptions aside, unlikely to show interest in any treaty laid before Parliament, thus hardly incentivising MPs themselves to show interest. Added to this, treaty-making as a core aspect of foreign affairs is traditionally perceived as quintessentially the sphere of the executive. And the UK is a constitutional system where the executive has long been thought to dominate Parliament. If there has been little incentive for democratically elected MPs to step up in this traditionally executive dominated field, it is perhaps unsurprising that the unelected House, with its concomitant legitimacy deficit, was unlikely to do so. Finally, insofar as a body of UK constitutional law scholarship might have alerted parliamentarians to there being something fundamentally amiss resulting from parliamentary neglect of the treaty-making power, no such body of work exists, and thus nor, as we have seen, were they being alerted to this by submissions from constitutional law scholars to parliamentary inquiries.

As for reasons specific to neglect by constitutional law scholars, treaty-making has tended to be perceived as not falling squarely within their remit, which would explain the absence of their contributions to relevant inquiries. The generally

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[71] *Draft Constitutional Renewal Bill* (2007–2008, HL 166–II, HC 551–II), evidence by Jack Straw at p.323.

[72] D. Feldman, "Parliamentary Scrutiny of Legislation and Human Rights" [2002] P.L. 323 at 324–25.

strikingly thin coverage in the textbooks also attests to this and was likely to be reflected in similarly thin coverage in the constitutional law syllabuses under which they studied, that is then replicated by succeeding generations of constitutional law scholars. Treaty-making is often seen as belonging more to international law scholars and international law modules. However, international law is not a compulsory module in the UK legal curriculum thus bolstering neglect of the treaty-making power as the connections between the international and the domestic are less likely to be made. Nor do international law academics necessarily see domestic control of the treaty-making power as a core concern.[73] With both disciplines leaving detailed exploration to the other, the treaty-making power can ultimately fall between the cracks.

A related reason concerns the UK's EU membership. Across increasingly wide areas the EU was endowed with the competence to conclude treaties, either alone (exclusive EU agreements), or combined with its Member States using their own treaty-making capacity (mixed agreements).[74] Put simply, since 1973 there has been both reduced remit for the UK's treaty-making power, given recourse to exclusive EU agreements, and growing complexity involved in studying the UK's treaty-making power because of mixed agreements. This accentuated the sense in which this was not the natural remit of the UK constitutional scholar, but rather another specialist, EU law scholars.

A further reason for neglect is that the treaty-making power directly generates relatively little by way of case law. Court rulings still provide the impetus for much constitutional law scholarship and as they are in short supply in this area a significant driver of scholarship disappears. Most recently the treaty-making power did give rise to the constitutionally momentous *Miller (No.1)* litigation, often said to have its origins in a blog post by constitutional lawyers arguing that parliamentary authorization was required to trigger art.50 TEU.[75] While the ruling has rightly

[73] The 2012 edition of the best known UK international law textbook, for example, did not mention CRAGA, J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012), Ch. 3.

[74] See M. Cremona, "Who Can Make Treaties? The European Union" in D. Hollis (ed), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012).

[75] N. Barber, T. Hickman and J. King, "Pulling the Article 50 'Trigger': Parliament's Indispensable Role" (UK Constitutional Law Association, 27 June 2016) <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>.

generated much debate by constitutional law scholars,[76] this is not yet evidence of more general interest in the treaty-making power.

Finally, the lack of parliamentary scrutiny of the exercise of the treaty-making power, evidenced for example by the scarcity of parliamentary debate and select committee engagement, also means that this potential resource for analysis by constitutional law scholars is missing. This again illustrates that parliamentary and scholarly neglect of the treaty-making power are mutually reinforcing.

IV. The Case for Taking the Treaty-Making Power More Seriously

1. Probing dualist maxims and practice

The dualist maxim that treaties do not become part of domestic law unless parliament provides so gives the reassuring but misleading impression that Parliament is the gatekeeper deciding whether treaties even become relevant in the domestic legal arena. In fact the judiciary deploy unincorporated treaties in a range of ways that have legal consequences.[77] Most obviously through the principle of statutory construction that Parliament intends to legislate compatibly with the UK's international obligations including those in unincorporated treaties.[78] In addition unincorporated treaties can be used to develop the common law compatibly with international obligations.[79] The Court of Appeal has also held that ratifying an unincorporated treaty can give rise to a legitimate expectation that the executive would act compatibly with obligations under the unincorporated treaty,[80] a ruling followed by the Divisional Court to produce what Sales and Clement referred to as "the remarkable result that offences defined by statute were treated as unprosecutable because of the terms of an unincorporated treaty."[81]

[76] See e.g. M. Elliott, J. Williams, and A. Young (eds), *The UK Constitution After Miller* (Oxford: Hart Publishing, 2018).

[77] See generally S. Fatima, *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005), Chs. 8–11.

[78] Recently referred to as a "strong presumption": see *Assange v The Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 A.C. 471, at [115] (Lord Kerr) and [122] and [160] (Lord Dyson).

[79] See Fatima, *Using International Law in Domestic Courts* (2005), Ch. 10.

[80] *R v Secretary of State for the Home Department, Ex p. Ahmed* [1998] I.N.L.R. 570.

[81] Sales and Clement, "International Law in Domestic Courts: the Developing Framework" (2008) 124 L.Q.R. 388 at 409 discussing *R v Uxbridge Magistrates' Court, Ex p. Adimi* [2001] Q.B. 667; [1999] 4 All ER 520. John Laws L.J. later queried whether the act of ratifying a treaty could without more give rise to an enforceable legitimate expectation: *R* (*European Roma Rights Centre*) *v Immigration Officer at Prague Airport* [2003] EWCA Civ 666; [2004] Q.B. 811.

Practitioners and judges dealing with such cases will certainly be under no doubt as to the growing impact of unincorporated treaties, and indeed more generally Lord Mance recently highlighted "the striking increase in reliance on and the potential relevance of international law in domestic courts".[82] However, arguably even more important than judicial usage will be the largely overlooked reliance on unincorporated treaties in various ways that demonstrate the significant impact they increasingly have in the UK, including on the state of the law. Treaties are internationally binding instruments and non-compliance can trigger the UK's international responsibility.[83] In light of this, and that international law knows of no distinction between incorporated and unincorporated treaties, it should be unsurprising to find that UK governments still seek to comply with unincorporated treaties and that they operate as a significant driver of, and constraint on, governmental decision-making. Thus, for example, as noted in one recent case "the UK's international obligations under…[the Council of Europe Convention on Action Against Trafficking in Human Beings]…have been implemented by the adoption of procedures and policies by government ministers".[84]

Litigation also attests to decision-makers having made self-directions to comply with unincorporated treaties for example in relation to the then unincorporated ECHR[85] and the OECD Anti-Bribery Convention.[86] And litigated cases are likely to be only the tip of the iceberg concerning these self-directions. More broadly, a seminal international law text asserted that "Government departments, in carrying out their administrative functions, will usually do so in such a way as to avoid acting in breach of international obligations resting on the UK, even if no implementing statute has been enacted."[87] Indeed, between 1997 and 2015 the Ministerial Code stipulated an "overarching duty to comply with the law *including international law and treaty obligations*", and no distinction was proposed between incorporated and unincorporated treaty obligations. Although the words in emphasis

[82] Lord Mance, "International Law in the UK Supreme Court", February 13, 2017, King's College, London.

[83] That treaties are binding is a basic tenet of international law and applies as against the constitution itself: see arts 26 and 27 of the Vienna Convention on the Law of Treaties 1969.

[84] *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin) [36]; [2014] 1 W.L.R. 1959 at 1968.

[85] *R v Secretary of State for the Home Department, Ex p. Launder* [1997] 1 W.L.R. 839; [1997] 3 All E.R. 961; and *R v Director of Public Prosecutions, Ex p. Kebilene* [2000] 2 A.C. 326; [1999] 4 All E.R. 801.

[86] *R (Cornerhouse) v Director of Serious Fraud Office* [2008] UKHL 60; [2009] 1 A.C. 756.

[87] R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn (London: Longman, 1992) at p.60, fn.27.

were removed in 2015, this led to an unsuccessful judicial review challenge in which the Court of Appeal concluded that the deletion did not involve any change in substance.[88]

Unincorporated treaties will also impact on the legislative process. In fact the JCHR not only assesses Bills for ECHR compliance, but also compliance with unincorporated human rights treaties.[89] This is likely to enhance sensitivity to unincorporated human rights treaties by government departments and parliamentary counsel. The obvious instance of an unincorporated treaty with profound ramifications was the ECHR, which received no parliamentary scrutiny prior to ratification, nor did the decision to accept the right of individual petition and compulsory jurisdiction of the European Court of Human Rights. The 33 adverse judgments between 1975–94 obliged the government "to introduce or amend legislation in 23 instances to bring U.K. statute law, primary and secondary, and 'quasi-legislation', such as prison and immigration rules, into conformity with the European Convention", and "[f]riendly settlements, reports from the European Commission and resolutions of the Committee of Ministers…prompted other legislative responses".[90] The then unincorporated ECHR will also have shaped legislation being proposed and its content independently of any adverse rulings.

While few treaties come complete with a court with compulsory jurisdiction, many unincorporated treaties will have compliance inducing mechanisms. The OECD Anti-Bribery Convention working group and the Aarhus Convention compliance committee are just two of the distinct bodies, outside the better-known sphere of UN human rights treaty bodies, bringing pressure to bear on the UK to bring its law into compliance with unincorporated treaties.[91]

Furthermore, a Ministry of Justice consultation document revealingly stated that "[w]here the Government has accepted international obligations by treaty then those obligations may in practice constrain Parliament's ability to legislate, so long as those

[88] *R (Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855.

[89] A development not without controversy, see J. Hiebert, "Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?" (2006) 4 I.J.C.L. 1 at 18, fn.51.

[90] F. Klug, K. Starmer, and S. Weir, "The British way of doing things: the United Kingdom and the International Covenant of Civil and Political Rights, 1976-94" [1995] P.L. 504 at 506.

[91] See respectively C. Rose, *International Anti-Corruption Norms* (Oxford: Oxford University Press, 2015), Ch. 2, and B. Ruddie, "The Aarhus Convention in England and Wales" in C. Banner (ed), *The Aarhus Convention – A Guide for UK Lawyers* (Oxford: Hart Publishing, 2015).

obligations continue".[92] The tension with all but formalistic accounts of parliamentary sovereignty is palpable here. All the more so as treaty obligations can continue for a very long time indeed, while being very difficult to amend,[93] and yet can evolve over time in ways that contracting parties do not control such as through judicial or quasi-judicial interpretation.[94] One can insist that none of the above detracts from the dualist proposition that treaties do not become part of the law of the land without parliamentary assent. While formally this may still be correct, it conceals a far more complex and nuanced reality in which unincorporated treaties nonetheless impact on the UK including on the state of the law.

Turning to the dualist practice that the government will not bind the UK until necessary legislative changes have been made, this ordinarily means that Parliament will be required to pass government Bills (or accept delegated legislation) to incorporate treaty obligations negotiated by the government without any prior parliamentary scrutiny or input. As Lang points out "[i]n considering treaty-related legislation, Parliament looks at **how** the UK would implement (at least parts of) the treaty, rather than **whether** the UK should ratify it".[95] We should thus resist characterising parliamentary scrutiny of treaty implementing legislation as scrutiny of the treaty-making process itself.

Moreover, as Rawlings rightly noted there is an "awkwardness which arises when Parliament deals with legislation to incorporate into domestic law international agreements" as "Parliament cannot amend treaties and…much of what happens in ordinary legislative process is predicated upon the possibility of amendment".[96] We might well expect Parliament to be even more reluctant to challenge the executive in the context of treaty implementing legislation given foreign affairs is traditionally perceived as the natural remit of the executive branch; terrain in which legislative hold ups and amendments can stand in the way of treaty ratification and, so it might be argued, reflect negatively on the UK's reliability as a partner in international relations. In theory Parliament could refuse to make domestic legal changes such that

[92] *The Governance of Britain – Judicial Appointments* (Cm 7210, 2007), at paras 1.8-1.9.

[93] The EU is an obvious example given unanimity requirements (art.48 TEU), but multilateral treaties with lower thresholds are also not in practice easily amended.

[94] On judicial and quasi-judicial bodies, see J. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005), Ch. 8.

[95] Lang, "Parliament's role in ratifying treaties" (2017), at p.8.

[96] R. Rawlings, "Legal politics: the UK and ratification of the Treaty on European Union: Part 1" [1994] P.L. 254 at 256.

the government is then unwilling to bind the UK to a treaty. This however is a strikingly rare occurrence. Research suggested "only two cases in which UK parliamentary action caused a treaty to fail - in 1852 and 1864",[97] though a more recent instance, still over a century ago, can be identified.[98]

A directly related point is whether future governments and parliaments really are at liberty to repeal or amend implementing legislation while the underlying international obligations remain. Parliamentary sovereignty orthodoxy would underscore legislative freedom,[99] but practical reality would suggest otherwise. One might also ask what of the situation where "after the United Kingdom has become a party to a particular treaty, it is later discovered that it is not able to fulfil its obligations under the treaty"? The answer offered by FCO legal advisors also has potential implications for parliamentary sovereignty: "steps will be taken immediately to bring the United Kingdom into line with the treaty in question".[100]

We should also not assume that implementing legislation means new primary legislation. Treaty incorporation can take place by statutory instrument as is the norm for double taxation agreements.[101] As for extradition agreements, the main statutory regime for giving legal effect to them since 1870 was by orders in council.[102] Despite obvious implications for the liberty of the individual, this was not even subject to the negative resolution procedure. A mere laying requirement applied, the negative procedure only becoming applicable in certain contexts under the Extradition Act 1989, until the 2003 Extradition Act moved to the affirmative procedure.[103] The latter procedure was used to give effect from 2004 to a key aspect of the controversial 2003 UK-US extradition treaty, namely that the US would not need to show a "prima facie case" to obtain extradition, as under the earlier 1972 UK-US Treaty, whilst the UK

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[97] B. Fowler, "Six ways the 'meaningful vote' is noteworthy: The Withdrawal Agreement & Parliament's role in treaty-making" (Hansard Society Blog) <www.hansardsociety.org.uk/blog/https:/www.hansardsociety.org.uk/blog/six-ways-the-meaningful-vote-is-noteworthy-the-withdrawal-agreement-and>.

[98] In 1911 the House of Lords rejected the Naval Prize Bill that sought gave effect to the 1909 London Declaration Concerning the Laws of Naval Warfare. See P. Drew, *The Law of Maritime Blockade* (Oxford: Oxford University Press, 2017), at pp.45–46.

[99] See also *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] A.C. 308; [1941] 2 All E.R. 93 PC.

[100] Sinclair, Dickson and Maciver, "United Kingdom" in *National Treaty Law and Practice* (2005), at p.742.

[101] Double taxation agreements are expressly excluded from CRAGA, see CRAGA 2010 s.23.

[102] From the Extradition Act 1870 through to various amending Acts leading to the consolidated Extradition Act 1989 and the current Extradition Act 2003.

[103] The Bill as introduced used the negative resolution procedure. See Delegated Powers and Regulatory Reform Committee, *18th Report* (HL 2002–03, 102) (recommending using the affirmative procedure).

would still be required to show "probable cause".[104] This took place despite the 2003 treaty itself not having come into force until 2007.[105]

Some EU mixed agreements are implemented by statutory instrument subject to the affirmative procedure, but the tension with parliamentary sovereignty is nonetheless pronounced. Under the jurisprudence of the Court of Justice, beginning after the UK's accession, mixed agreements are "an integral part of EU law" which can accordingly be directly effective and supreme law in the UK.[106] And EU law can require even unimplemented mixed agreements, as with the Aarhus Convention which has not been designated under the ECA 1972, to deploy particularly powerful domestic legal effects in the UK.[107]

Scrutiny shortcomings concerning delegated law-making are well documented,[108] including that it cannot be amended, though as concerns treaties the underlying treaty obligation being implemented would be unamendable in any event. This recourse to treaty implementation through delegated law-making poses a challenge to the emphasis in dualist maxims on parliamentary authorisation for treaties to deploy domestic legal effect. For that authorisation can appear very attenuated indeed at times, even where the rights of the individual are at stake, as extradition agreements that did not individually need parliamentary approval illustrated. But perhaps no better example exists of this than treaty implementing legislation, the United Nations Act 1946, creating a delegated law-making procedure subject to no parliamentary control which is used many decades later to give effect to Security Council resolutions imposing sanctions on individuals and organisations; a use of Security Council resolutions which could certainly not be anticipated when the United Nations was created.[109] That use of the order making powers in the asset freezing context was eventually ruled ultra vires the 1946 Act, culminating in express

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[104] The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334.

[105] It was held up in the US Senate, perhaps unsurprisingly so given the US was already benefiting from the unilateral concessions made by the UK since 2004.

[106] On this case-law, and the consequences for the constitutional orders of the EU's member states including the UK, see M. Mendez, *The Legal Effects of EU Agreements* (Oxford: Oxford University Press, 2013), Ch. 2.

[107] The CJEU has required national courts to apply a powerful form of consistent interpretation vis-à-vis Aarhus Convention provisions: *Lesoochranárske Zoskupenie VLK* (C-240/09) EU:C:2011:125; [2011] E.C.R. I-1255.

[108] See A. Tucker, "Parliamentary Scrutiny of Delegated Legislation" in A. Horne and G. Drewry (eds), *Parliament and the Law*, 2nd edn (Oxford: Hart Publishing, 2018).

[109] See J. Alvarez, *The Impact of International Organizations on International Law* (Leiden: Brill, 2017), Chs. II and VI.

statutory authorization for the treasury to give effect to Security Council directed asset freezing.[110]

2. The impact of treaty-making on the constitution and constitutional principles

The combined neglect of the treaty-making power with acceptance at face value of dualist maxims and practices has ultimately bequeathed us an impoverished account of the UK's constitutional system and some of its core constitutional principles. With the exception of EU law and potentially the ECHR, standard accounts of parliamentary sovereignty continue to provide little if any acknowledgment of the marked tension that treaty law poses in practice for parliamentary sovereignty.[111] Indeed the tension is often effectively dismissed via uncritical recitation of case law underscoring Parliament's capacity to legislate incompatibly with international law obligations.[112] That Dicey himself was not taxed by any potential tension between international obligations and parliamentary sovereignty is hardly surprising,[113] not least because he was writing when the status of international law as law was still contested in many quarters and where treaty-making was both qualitatively and quantitatively limited. That we struggle to find UK constitutional law scholars in the 21st century probing the matter further in light of the radical transformation in the remit and domestic reach of treaty-making since Dicey's time, as well as the judicial and non-judicial uses of treaty law identified herein, is another matter entirely.[114] In contrast a distinguished British international lawyer underscored more than two decades ago that "the reality of…sovereignty ends where Britain's international obligations begin."[115]

As for the separation of powers, increasingly receiving its own dedicated chapter, or at least section, in the textbooks, you will not find acknowledgment of –

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[110] See *HM Treasury v Ahmed* [2010] UKSC 2; [2010] 2 A.C. 534; and the Terrorist Asset-Freezing etc Act 2010.

[111] Elliott shows greater nuance by suggesting that EU law and the ECHR "are, at one level of abstraction, merely two examples of one phenomenon: namely, the capacity of the UK's international obligations to limit Parliament's room for manoeuvre": M. Elliott, "Legislative supremacy in a multidimensional constitution" in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge: Cambridge University Press 2015), at pp.76–77.

[112] Cases often including one or more of the following *Mortensen v Peters* (1906) 14 S.L.T. 227; *Cheney v Conn* [1968] 1 W.L.R. 242; [1968] 1 All E.R. 779; *R v Lyons* [2002] UKHL 44.

[113] Allison (ed), *The Oxford Edition of Dicey Volume 1* (2013), at pp.38–39.

[114] Poole has suggested that Parliament "ought to consider itself bound by a body of law that is not within its control": T. Poole, "The Constitution and Foreign Affairs" (2016) 69 C.L.P. 143 at 171.

[115] E. Lauterpacht "Sovereignty – Myth or Reality" (1996) 73 International Affairs 137 at 149.

much less engagement with – the relevance of the treaty-making power. And yet the executive is making law on the international plane that is of growing importance domestically, as well as potentially withdrawing from international law, in practice largely unencumbered by Parliament. The treaty-making power thus has obvious ramifications for the domestic allocation of powers, impacting on all three branches of government in a manner essentially unexplored in UK constitutional law scholarship.

Another neglected impact of treaty-making, related to separation of powers thinking, is on the evolving territorial constitution. Under the devolution Acts, the UK government is responsible for international relations while the devolved administrations are responsible for implementing international obligations relating to devolved matters, with the government legally empowered to ensure they give effect to the UK's international obligations.[116] The capacity for treaty-making to intrude upon devolved powers is considerable. Such ramifications for internal division of powers have long been a major concern in federal systems,[117] and was, for example, a key driver behind treaty-scrutiny reforms in Australia mentioned further below. The UK's response to this tension consists of non-legally binding agreements providing for consultation with the devolved administrations over the UK's position in international negotiations which impact on devolved areas, as well as the possibility for their ministers and officials to form part of UK negotiating teams.[118] Both the structures and approach to intergovernmental relations in general have been criticised.[119] This is exacerbated by the potential impact of EU departure, particularly as to the role devolved administrations and legislatures will have regarding repatriated treaty-making powers that can impact on devolved matters.[120]

Turning to the rule of law, a constitutional principle given express statutory recognition by the Constitutional Reform Act 2005, we do not see adequate recognition of the tension that exists between the executive being free to make law on the international plane and it not then being domestically directly legally enforceable.

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[116] See *Devolution Memorandum of Understanding and Supplementary Agreements* (October 2013), *Concordat on International Relations*, D4.8.

[117] See e.g. I. Bernier, *International Legal Aspects of Federalism* (London: Longman 1973), Ch. 5.

[118] See *Devolution Memorandum of Understanding and Supplementary Agreements* (October 2013), *Concordat on International Relations*. A separate non-binding agreement for coordinating EU policy exists with an institutional framework (a Joint Ministerial Committee (Europe): *Concordat on Co-ordination of European Union Policy Issues*.

[119] See Constitution Committee, *The Union and Devolution* (HL 2015–16, 149), Ch. 7.

[120] See *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345), Ch. V.

This continues to be the case for most human rights treaties to which the UK is party given that they are unincorporated and their particularities have led some to argue for an exception to dualism in relation to their judicial application, most recently and powerfully by Lord Kerr in his dissent in the benefit cap case.[121]

Nor have we seen appropriate recognition of the tension for the rule of law, in the form of compliance with international law, posed by parliamentary sovereignty orthodoxy. It was thus surprising when the senior law lord outlined an account of the rule of law with a requirement for "compliance by the state with its obligations in international law" including those "deriving from treaty law"; all the more surprising, given long-standing case law recognising parliament's freedom to legislate incompatibly with treaty obligations, when Lord Bingham asserted that he did "not think this proposition is contentious".[122] Although Lord Bingham's account of the rule of law has rightly been widely praised, we have seen little engagement with the tension between his international law compliance sub-principle and dualist and parliamentary sovereignty orthodoxy.[123]

3. Benefiting from the constitutional law scholars' toolkit

A final point to highlight is that neglect of the treaty-making power by constitutional law scholars in particular not only contributes to a misleading account of the UK's dualist constitution, but also deprives us of the invaluable toolkit, including empirical and comparative methods, that they can bring to bear on all manner of questions pertaining to the treaty-making power and its constitutional implications.

This neglect has arguably been of no small practical consequence. UK constitutional law scholars were largely absent from reform debates. Evidence before parliamentary committees was dominated by international lawyers from – or formerly of – the FCO.[124] During pre-legislative scrutiny of CRAGA, a former FCO principal legal advisor suggested that "[c]urrent arrangements…have proved to be satisfactory

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[121] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449, at [247]–[257].

[122] T. Bingham, "The Rule of Law" [2007] C.L.J. 67 at 81–82.

[123] Lord Bingham developed his account in a monograph that included a chapter on "The Rule of Law and The Sovereignty of Parliament" which acknowledged that "Parliament may… legislate in a way which infringes the rule of law" and that "judges…cannot fail to give effect to such legislation": T. Bingham, *The Rule of Law* (London: Allen Lane 2010), at p.168.

[124] Five current and former FCO lawyers gave written evidence to the Joint Committee on the Draft Constitutional Renewal Bill: *Draft Constitutional Renewal Bill* (2007–2008, HL 166–I, HC–551); three former FCO lawyers, and the FCO, gave written evidence to the Constitution Committee: *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345).

in practice, and seem to strike the right balance between Parliament and the executive in this matter."[125] It seems unlikely that constitutional law scholars with awareness of the growing importance of treaties and the actual practice of treaty-making in the UK could have subscribed to that view.

In fact, already in the early 1990s one constitutional law scholar asserted "no better illustration of the antiquated and deficiently democratic character of the British constitution exists than…the treaty-making power".[126] Perhaps if this had been substantiated with appropriate evidence, and if a body of additional evidence-based research demonstrating this democratic deficiency claim had emerged, reforms might have come about earlier than CRAGA and even taken a bolder form. Indeed, if such evidence-based research had existed, potentially drawing on successful treaty-making scrutiny practices from other dualist states, and been forcefully put forward to the Joint Committee on the Draft Constitutional Renewal Bill, it might have contributed to a bolder point of departure. Instead we are in a situation where the Government in 2019 has defended CRAGA on the basis that "[i]t is less than a decade old and was the subject of wide consultation prior to Parliament agreeing it."[127] And yet the group with an especially pertinent toolkit for addressing treaty-making scrutiny procedures did not meaningfully contribute. Going forward constitutional law scholars need to take the treaty-making power more seriously as they have an indispensable contribution to make in helping us, including Parliament, better understand its ramifications, how it should be controlled and evaluating the actual operation of the controls.

V. The Case and Proposals for Stronger Controls on the Treaty-Making Power: Insights from comparative constitutional practice

1. The case for stronger controls

A core part of the basic case for stronger controls flows directly from issues previously mentioned. The accelerating significance of treaties for the domestic constitutional order was already identified in the introduction, while the preceding

[125] *Draft Constitutional Renewal Bill* (2007–2008, HL 166–II, HC 551–II), at p.434 (Sir Michael Wood).

[126] Rawlings, "Legal politics: the UK and ratification of the Treaty on European Union: Part 1" [1994] P.L. 254 at 257.

[127] See International Trade Committee, *UK trade policy transparency and scrutiny: Government Response to the Committee's Sixth Report* (HC 2017–19, 2027).

section highlighted how dualist maxims and practices combined with parliamentary sovereignty conceal the growing impact of treaty-making on the UK, including in relation to core constitutional principles. The constitutional system is still portrayed as relatively impervious to treaty law absent legislative action and even into the 21st century it is primarily only the EU, and ECHR, that are presented as troubling conventional orthodoxy. Unsurprisingly the existing controls are inadequate precisely because they are addressing an issue the constitutional salience of which has never been fully appreciated.

The centrepiece of these controls, CRAGA, is actually little more than a statutory formulation of conventional rules first devised in 1924. To remain wedded to the essence of rules devised nearly a century ago, when the content and reach of treaty-making itself has so radically altered, is anomalous. All the more so when the rules themselves, as with Ponsonby, only offered at best the illusion of parliamentary input and control over the entry into treaties that was never matched by actual practice. CRAGA has thus far proved no better.

To be sure, CRAGA does not preclude Parliament from assuming a more prominent role in treaty scrutiny. But crucially nor did it incentivise it, with the exception of the belated and hitherto objectively ineffective input from the Secondary Legislation Scrutiny Committee. Indeed arguably CRAGA has a pernicious effect in creating the façade of additional democratic legitimacy for the assumption of treaty obligations, when in reality it enshrines a model in which parliamentary inaction regarding treaties so laid, the standard practice, effectively gives the government free reign. The threshold for parliamentary action to legally constrain that free reign is such that a vote against ratification is required by one or either house, and in that unlikely eventuality the government can still proceed to ratification albeit with the Commons retaining a potential veto.[128]

An additional argument for stronger controls emerges if the UK leaves the EU because treaty-making powers would be repatriated that are currently subject to scrutiny procedures both at the EU level, including through UK representatives of the Council of Ministers and the European Parliament, and at domestic level through the accountability mechanisms deployed for EU law-making. For these repatriated

[128] A government statement explaining why it should nevertheless be ratified is required along with the Commons not voting against ratification again, and there are no legal restrictions on the number of times this can be repeated: CRAGA 2010 s.20.

powers to be subject to CRAGA alone is a downgrading of scrutiny. There would also be a downgrading in the devolved administrations' ability to input into the treaty-making process because they have more say in treaty-making at EU level, including through the Joint Ministerial Committee (Europe), than through the current Concordats on International Relations for treaties laid purely under CRAGA. Hitherto EU membership has concealed the impact of the treaty-making power on the post-1998 territorial constitution, and EU departure brings this into sharp relief.

It is crucial to emphasise that the problem with CRAGA was never simply how weak its controls are in terrain it covers, but also what it does not address. It is silent on treaty termination, and has nothing to say on other critical issues such as Parliament's scrutiny role prior to treaty signature when a treaty could still be changed, provisional application of treaties, treaty reservations and interpretative declarations. Ultimately, the controls in the UK, despite the centerpiece – CRAGA – being of such recent vintage, fall well short of the standard set in many other constitutional systems. There are valuable comparative insights to be gained for designing treaty-making controls that could also create the parliamentary interest, and in turn contribute to scholarly interest, that has been sorely lacking.

The first point to note about comparative constitutional practice, is that an overwhelming majority of constitutional systems require parliamentary approval for at least some, and increasingly widely defined, categories of treaty.[129] While the mere presence of approval requirements is unrevealing as to what happens in actual practice, there are constitutional systems where the role of parliaments is no mere formality for the executive to surmount vis-à-vis signed treaties negotiated without any prior parliamentary input or oversight. The frequently given example where the threat of a parliamentary veto is quite real, and where the approval requirements can thus help shape the treaty text itself, is the United States, and now also the EU.[130] One might have reservations as to whether insights from these two examples can travel,

[129] See P.H. Verdier and M. Versteeg, "Separation of Powers, Treaty-making, and Treaty Withdrawal: A Global Survey" in C. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019), at pp.137 and 139–142.

[130] See M. Mendez, "Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice" (2017) 14 I.J.C.L. 84 at 93–94. However, only a small percentage of international agreements in the US are made with meaningful congressional input: see C. Bradley and J. Goldsmith, "Presidential Control Over International Law" (2018) 131 Harv. L. Rev. 1201 at 1206–17.

given they are two global economic powerhouses with especially powerful legislatures.

There are, however, relatively small states in which parliamentary controls over entry into treaties are quite real and where the veto is no empty threat.[131] Indeed, there is a realisation that parliamentary controls can be rather meaningless if confined to voting on already finalised treaty texts. To that end, controls have extended to information and consultation rights over the commencement and progress of treaty negotiations including in relation to negotiating mandates.[132] Parliamentary controls have also developed on reservations – used to exclude or modify the legal effect of treaty provisions –[133] including approval requirements, parliamentary initiation of reservations and conditioning treaty approval on reservations.[134] Nor has the growing practice of provisionally applying treaties prior to their entry into force, which arose to bypass delays created by domestic parliamentary consultation or approval requirements,[135] fully escaped domestic democratic controls. Requirements from notification and consultation, to constraining when provisional application is permissible, as well as parliamentary veto rights, have been imposed.[136]

Parliamentary controls have also emerged on treaty termination, traditionally viewed as an unbridled executive power even while the entry into treaties was being expressly constrained by the constitutional text. But beginning in the 20th century, and accelerating sharply in recent decades albeit still representing a minority of states, constitutional texts have expressly accorded the legislature a treaty termination

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[131] e.g. Switzerland, see R. Kunz and A. Peters, "Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland" in A. Albi and S. Bardutzky (eds), *National Constitutions in European and Global Governance* (The Hague: Asser, 2019).

[132] In relation to Switzerland, see Kunz and Peters, "Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland" in *National Constitutions in European and Global Governance* (2019), at pp.1514–16; for the EU, see A. Ott, "The European Parliament's role in EU treaty-making" (2016) 23 Maastricht Journal of European and Comparative Law 1009 at 1019–23.

[133] On reservations and interpretative declarations, see A. Aust, *Modern Treaty Law and Practice*, 3rd edn (Cambridge: Cambridge University Press, 2013), Ch. 8.

[134] For examples in Council of Europe States, see *Treaty Making*: *Expression of Consent by States to Be Bound by a Treaty* (The Hague: Kluwer, 2001).

[135] See R. Dalton, "Provisional Application of Treaties" in *The Oxford Guide to Treaties* (2012), at p.223.

[136] For examples in Council of Europe States, see *Treaty Making*: *Expression of Consent by States to Be Bound by a Treaty* (2001); for the EU, see Ott, "The European Parliament's role in EU treaty-making" (2016) 23 Maastricht Journal of European and Comparative Law 1009 at 1025–26.

approval role for at least certain treaties, as well as infra-constitutional rules, political practices and judicial rulings to the same effect.[137]

One objection to potential insights from the aforementioned developments is that they are usually associated with constitutional systems adopting a "monist" approach whereby treaties become a part of domestic law. Such controls might be said to be fitting where treaties automatically deploy domestic legal effects, but not so where they do not as in the UK. The most powerful response to this kind of claim is that the controls noted above have taken hold in dualist states. Thus Sweden deploys parliamentary approval requirements for entry into, and termination of, a wide category of treaties.[138] Unincorporated human rights treaties are subject to parliamentary approval, as was the case, for example, with the ECHR, the two covenants, and the Rights of the Child Convention, in marked contrast to the UK where the same treaties were not even the subject of parliamentary debate much less parliamentary approval. Furthermore, stronger controls also exist in Commonwealth states adhering to a dualist approach. Antigua and Barbuda imposed parliamentary approval requirements for a broad range of treaties decades ago.[139] And South Africa moved to a parliamentary approval requirement for nearly all treaties over twenty years ago.[140] The most frequently mentioned dualist Commonwealth example is Australia, which combined a treaty-laying requirement with a parliamentary treaties committee over two decades ago. Although lacking the veto of CRAGA, the Australian model amounts to stronger control in practice because it actually requires treaty scrutiny to take place. The Australian treaties committee has since scrutinized well over 800 treaty actions including entry into and withdrawal from treaties, treaty amendments, reservations, and treaty implementing legislation, while producing over 180 reports, hundreds of public hearings with thousands of witnesses and far more submissions.[141] In short, we can point to dualist states where the constitutional response to the democratic deficit to which treaty-making gives rise ensures greater

[137] See Verdier and Versteeg, "Separation of Powers, Treaty-making, and Treaty Withdrawal: A Global Survey" in *The Oxford Handbook of Comparative Foreign Relations Law* (2019), at pp.148–50.

[138] See I. Cameron, "Swedish Parliamentary Participation in the Making and Implementation of Treaties" (2005) 74 Nord. J. Int'l L. 429.

[139] Ratification of Treaties Act 1987 (Antigua and Barbuda).

[140] 1996 Constitution, s.231. Treaties are referred to a relevant parliamentary committee that must state whether it recommends approval or rejection: *Rules of the National Assembly,* 9th edn (2016), rules 341–342.

[141] See *A history of the Joint Standing Committee on Treaties: 20 years* (Report 160, 2016).

control than in the UK. But even if that were not so, and there are certainly dualist states that do no better than the UK and often perhaps worse,[142] that is hardly a principled justification for retaining the status quo.

Nor can such a principled justification be found in the oft-cited views of Blackstone underscoring the wise placing of prerogative powers "in a single hand by the British constitution, for the sake of unanimity, strength and dispatch" and who dismissed the idea of a legislative approval role for treaties for "who would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly."[143] Democracy has come a long way since the 18th century, which would in itself warrant far greater parliamentary control over the treaty-making power than merely the ex post facto tool of parliamentary impeachment highlighted by Blackstone. Moreover, the remit of treaty-making, and its concomitant ramifications for the domestic constitutional order, have been transformed in a way that Blackstone could obviously never have foreseen. Indeed, this transformed treaty-making remit helps explain the emergence and spread of parliamentary controls, including approval requirements, well after Blackstone's death. Such comparative constitutional developments do not detract from the fact that the executive remains tasked with conducting foreign policy, rather they actually show us how ex ante democratic controls and the executive branches' treaty-making power can be reconciled.

2. Reform proposals for the UK

i) A new statutory framework located in a treaties act

Statutory controls over the treaty-making power should not be hidden away in a statute, CRAGA, dealing with an array of unrelated issues including, amongst others, parliamentary standards, the civil service, the tax status of MPs and peers, and transparency of government financial reporting to Parliament. Recent reforms to dissolution were fittingly attributed their own short statute with an appropriately informative short title.[144] Controls over the treaty-making power should also be located in a specific Treaties Act, as is the case in many other constitutional systems. This might contribute to better understanding of, and potentially interest in, the treaty-

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[142] e.g. Canada, see McLachlan, *Foreign Relations Law* (2014), at pp.167–171.

[143] See D. Lemmings (ed), *The Oxford Edition of Blackstone: Commentaries on the Laws of England Book 1* (Oxford: Oxford University Press, 2016), at pp.162–63.

[144] Fixed-term Parliaments Act 2011.

making power and controls on its use by Parliament and constitutional law scholars, as well as assist greater public awareness of this immensely significant area.

In terms of the actual content of a Treaties Act, six core changes as compared to CRAGA will be proposed. The first is to replace the treaty-making prerogative power with a statutory treaty-making power for the executive. The Governance of Britain Green Paper actually stated that "[t]he Government believes that the executive should draw its powers from the people, through Parliament" and that basing the power to ratify treaties on the prerogative is "out of date…[i]n a modern 21st century parliamentary democracy";[145] surprising admissions given that that Government only ever proposed to place the Ponsonby rule on a statutory footing and that the source of the power was simply never part of this reform debate, nor accordingly was it expressly defended. This is not the place to engage with broader arguments concerning reform of prerogative powers,[146] and the argument for a statutory treaty-making power can only briefly be outlined here. The essence of the argument is that an existing general statutory framework regulates an aspect of this particular prerogative power (entry into treaties); these controls have proved demonstrably inadequate; a case for statutory reform can accordingly be made; in such a context there is a principled case for also replacing a power lacking democratic legitimacy with a statutory power that comes with the express democratic seal of approval that attaches to Acts of Parliament.

One obvious argument against replacing the treaty-making prerogative with a statutory power is that this would expand the scope for judicial review. But it does not actually necessarily follow that this would be so. That ultimately depends on the approach taken by courts to reviewing a statutory treaty-making power and what the position on review would be were it to remain a prerogative power. As noted earlier, although the non-reviewability of the treaty-making power subject to any statutory restrictions was endorsed in *Miller (No.1)*, the bold approach to determining the extent of a prerogative power in *Miller (No.2)* suggests that justiciability objections might conceivably not be insurmountable even absent statutory restrictions. In any event, if a statutory treaty-making power expanded the scope for judicial review, and a case for this can be made given the capacity of treaties to impact negatively on

[145] *The Governance of Britain* (2007), at paras 14 and 17.

[146] For the briefly articulated argument that all prerogative powers should be replaced with statutory powers, see: A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), at pp.132-134.

domestic constitutional values,[147] suitable judicial restraint could be expected in this core terrain of foreign affairs.[148]

The second change is to move away from Parliament only being presented with a finalised treaty. Information and consultation obligations concerning the opening of negotiations and their progress are needed to ensure Parliament is not being presented with a *fait accompli*. This can provide an opening for meaningful public input into the treaty-making process, largely precluded if consultations only take place post signature. Moreover this would help redress parliamentary neglect of the treaty-making power. It is unrealistic to expect parliamentarians to engage with treaties when they are faced with finalised texts that come into force without any action required.

A third change is to place on a statutory basis more elaborate information and consultation obligations vis-à-vis both the devolved executives for treaty-making impacting on devolved matters, than those currently found in the international relations concordats, and crucially also the devolved legislatures which are wholly ignored in the current set-up. The new Treaties Act would thus have the symbolic value of recognising the UK's transformed territorial constitution, a sharp contrast with the silence of CRAGA.

A fourth change is to use an affirmative procedure for at least certain significant categories of treaty, the rest remaining subject to the negative procedure. This would at least lead to some debates, ideally not confined to parliamentary committees, and by definition votes. It is an essential step towards ensuring that MPs and peers take greater ownership of their role scrutinising the executive's international law-making and would reinforce Parliament's capacity to potentially influence the treaty text, precisely because its approval of the treaty would be necessary. There would be definitional controversy over which treaties to include within approval requirements, but dozens of other constitutional systems, including of the dualist variety, have managed this.[149] Indeed, the categories are often expressly

[147] See generally Mendez, "Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice" (2017) 14 I.J.C.L. 84.

[148] On judicial restraint, see generally J. King, "Institutional Approaches to Judicial Restraint" (2008) 28 O.J.L.S. 409.

[149] Common categories include 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. See Verdier and Versteeg, "Separation of Powers, Treaty-making, and Treaty Withdrawal: A Global Survey" in *The Oxford Handbook of Comparative Foreign Relations Law* (2019), at pp.140–41.

outlined in the constitutional text and thus subject to a more rigorous amendment procedure than ordinary legislation, in contrast to the proposal for the UK outlined here.

Approval requirements would add to pressures on parliamentary time, a necessary price to pay for appropriate democratic input and oversight, but also one that should not be exaggerated. Typically the UK is negotiating around thirty or so treaties a year,[150] likely to increase in the Brexit context, however, only a fraction would need approval in a model based on significant categories of treaty requiring approval. Calls for the devolved legislatures and executives to have veto rights over at least certain agreements,[151] notably trade, would currently be a step too far. Even in federations, veto points over treaty-making for individual constituent states is a rare exception,[152] and they are also absent in more decentralised systems than the UK, like Spain.[153]

A final point to note about parliamentary approval requirements is a perceived relationship with judicial applicability, given that direct judicial application of treaties in monist states was usually a corollary of a parliamentary approval requirement. However, in none of the dualist states with parliamentary approval requirements noted above, and more dualist examples can be adduced,[154] does this alter the domestic legal status of treaties. In other words, the parliamentary approval hurdle can be kept quite distinct from treaty incorporation. Approval requirements could nonetheless inspire arguments for greater judicial scope to give effect to unincorporated treaties and, indeed, even the negative procedure of CRAGA was relied on for such an argument involving unincorporated human rights treaties.[155]

A fifth change is to impose some parliamentary control over provisional application of treaties, an issue overlooked by recent committee inquiries despite the fact it can circumvent CRAGA.[156] At minimum, information and consultation rights

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[150] See V. Miller, "Brexit: Parliamentary Scrutiny of Replacement Treaties" (HC Library Briefing 8509, 2019).

[151] Especially by the Scottish government: see *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345), at para.131.

[152] e.g. Belgium, see P. Popelier and K. Lemmens, *The Constitution of Belgium* (Oxford: Hart Publishing, 2015), at p.130.

[153] On "quasi-federalism" and treaty approval requirements in Spain, see V. Ferreres Comella, *The Constitution of Spain* (Oxford: Hart Publishing, 2013), at pp.47–48, Ch.7, and pp.62–63.

[154] e.g. Denmark, Norway and Iceland, see D. Bjorgvinsson, *The Intersection of International Law and Domestic Law* (Cheltenham: Edward Elgar, 2015), Chs. 3–4.

[155] B. Malkani, "Human Rights Treaties in the English Legal System" [2011] P.L. 554.

[156] On provisional application circumventing CRAGA, see Miller, "Brexit: Parliamentary Scrutiny of Replacement Treaties" (2019), at p.24.

should apply, but arguably Parliament, or at least the Commons, should be able to reject provisional application in the absence of compelling reasons. Such requirements all exist elsewhere precisely to constrain abusive recourse to provisional application of treaties.

A sixth change would be an express parliamentary role in treaty termination. A compelling democratic symmetry rationale exists for parliamentary approval to withdraw from treaties that required parliamentary approval for entry, as attested to by the growth in constitutional systems adopting this stance. This would be fitting if the UK adopted a parliamentary approval procedure for at least certain categories of treaty. A negative procedure could apply for other treaties. The democratic symmetry rationale is less persuasive with the negative procedure because it means Parliament could preclude the government from terminating a treaty, even though Parliament never approved the treaty. However, for the statutory regime to remain silent on treaty termination except for those requiring approval, leaves considerable legally unchecked power over potentially momentous withdrawal decisions.[157] The very narrow scope for legal control, as *Miller (No.1)* illustrated, is arguably further reason for reform so that parliament's role is not left to judicial determination.

Two final general points to make concern flexibility and the role of the Lords in relation to entry into and termination of treaty commitments. Firstly, additional flexibility can be ensured through an exceptional cases exemption, by analogy with s.22 CRAGA, so that in certain circumstances entry into and termination of treaties can take place without being subject to the affirmative or negative procedures. Crucially a flexible exemptions clause serves to minimize objections to treating parliamentary control over treaty withdrawal fully coterminously with treaty approval, for it can accommodate "sound policy reasons to afford the executive the authority to act unilaterally in withdrawing from treaties" such as "emergency situations".[158] Secondly, an override can be included to ensure that the elected house takes primacy in the event that the unelected house voted against a treaty ratification or termination.

ii) A joint treaties committee

[157] On whether Parliamentary authorisation would be required for ECHR withdrawal, see G. Phillipson and A. Young, "Would use of the prerogative to denounce the ECHR 'frustrate' the Human Rights Act? Lessons from Miller" [2017] P.L. 150.

[158] See Verdier and Versteeg, "Separation of Powers, Treaty-making, and Treaty Withdrawal: A Global Survey" in *The Oxford Handbook of Comparative Foreign Relations Law* (2019), at p.149.

Calls for a treaties committee have been made for some time.[159] It is submitted that a joint treaties committee would be the best option as, like the JCHR, it can combine the added expertise from the Lords with the greater legitimacy that flows from elected members. Drawing its membership from both houses also helps redress the neglect of the treaty-making power apparent in both houses.

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 committees, is easily resolved, as it can be designed to ensure far greater treaty scrutiny by other committees than currently. The joint treaties committee can operate a sifting approach with treaties being referred to appropriate subject specialist committees where they exist, such as the JCHR for human rights treaties, and the International Trade Committee for trade agreements.[160] The joint treaties committee could still deal with other treaties and even aspects of treaties falling primarily within the remit of another committee by working closely with relevant committees to divide up tasks. Disseminating scrutiny across committees is crucial to ensuring that more parliamentarians are directly involved in varied facets of the treaty scrutiny process.

This proposed treaties scrutiny committee model ensures parliamentary scrutiny of treaty actions is actually taking place, with invaluable expertise being developed, unlike the current system. Combined with CRAGA, it offers more than the Australian model where no veto exists. However, it would not go far enough towards ensuring controls commensurate with the significance of the treaty-making power in the absence of the kinds of changes to the statutory regime proposed above. Even members of the Australian treaties committee have criticized its remit in practice being confined to the post-signature phase,[161] and we have seen other committee scrutiny systems where no parliamentary debates resulted from that scrutiny.[162] The aforementioned shortcomings are precisely why a committee based treaty scrutiny model, overseen by a treaties committee, should be combined with the kind of

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[159] See most recently *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345).

[160] The latter recently proposed that it is the most suitable committee to deal with trade agreements: *UK Trade Policy Transparency and Scrutiny* (HC 2017–19, 1043).

[161] See the reflections by long-standing members Parker (labelling the system "flawed" because of this) and Thomson (a former chair of the committee): *A history of the Joint Standing Committee on Treaties: 20 years* (Report 160, 2016), at paras 63–64 and 65–66.

[162] On New Zealand, see M. Harris and D. Wilson, *McGee Parliamentary Practice in New Zealand*, 4th edn (Auckland, Oratia, 2017) at pp.690–91.

statutory overhaul suggested above. Only then can Parliament meaningfully input into the treaty-making process, without scrutiny being confined in practice to a specialist treaties committee and a number of other subject specific committees.

The more obvious issues that should fall within the remit of the treaties scrutiny model proposed above include scrutiny of negotiations, treaty approval and withdrawal, provisional application of treaties, reservations and interpretative declarations, treaty amendments, treaty implementing legislation, and invocation of any exceptions included in the statutory regime such as in relation to entry into, or termination of, treaty commitments. It could also offer a valuable mechanism for collaborating with the devolved legislatures and their committees in relation to scrutiny of treaties impacting on devolved powers.

VI. Conclusion

This article has demonstrated and explained why despite the profound and growing constitutional ramifications of the treaty-making power it continues to be neglected in the UK by both parliament and constitutional law scholars. It has also advanced the case for taking the treaty-making power more seriously not least because the UK's dualist constitution is becoming increasingly permeable as it is obliged to cope with a qualitative shift, and substantial increase, in treaty-making. This was the first aspect of the case for change in the subtitle to this article. The second and related case for change concerns the framework for controlling the treaty-making power. The shortcomings of the current CRAGA framework were highlighted both as a matter of its design and the practice thereunder which further illustrates neglect of the treaty-making power. Comparative insights were drawn upon, including from dualist states, to propose stronger controls consisting of a new statutory framework, with treaty-making as a statutory power for the executive, and a committee based scrutiny model overseen by a joint treaties committee. These reform proposals would also help redress the neglect identified in this article.

The UK's potential departure from the EU, especially the repatriation of trade related treaty-making powers, has driven calls for reforming scrutiny procedures by parliamentary committees.[163] This focus is perhaps understandable given the desire to

[163] See *Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship* (HC 2017–19, 1240); *Parliamentary Scrutiny of Treaties* (HL 2017–19, 345); *UK Trade Policy Transparency and Scrutiny* (HC 2017–19, 1043).

replicate EU trade agreements and conclude new trade agreements. However, the treaty scrutiny procedures need reform independently of Brexit and trade agreements, and this risks being lost sight of in the current political climate with its overriding trade focus. Treaties can be put to many controversial uses that have nothing to do with trade, the 2003 UK-US extradition treaty mentioned above being a case in point, and yet inadequate and frequently no parliamentary scrutiny of treaty-making remains the striking norm in the UK.

That a reform agenda may gain momentum does not mean any reforms to treaty-making in general, rather than just the currently hot topic of trade agreements, will occur. Ministers resist constraining prerogative powers and the reform rhetoric characteristic of opposition rarely carries over to office. A Government in 2019 has already rejected the International Trade Committee's call for a yes/no vote on future trade agreements, while asserting that CRAGA remains "the appropriate mechanism for Parliament to take a role in ratification".[164]

The bolder reforms proposed in this article are thus likely to find resistance. This however is all the more reason to take the treaty-making power seriously. Hitherto the mutually reinforcing dynamic between constitutional law scholars and parliament has been characterised by neglect of the treaty-making power. Attentiveness to the treaty-making power and its ramifications for the UK could give rise to a mutually reinforcing dynamic that might in time lead to stronger controls of the kind proposed in this article. In the meantime it would at least encourage greater use of existing controls by parliament, and constitutional law scholarship that investigates the treaty-making power and better reflects the constitutional challenges it poses.

[164] Albeit recognizing changes in relation to trade treaty practices, see *UK trade policy transparency and scrutiny: Government Response to the Committee's Sixth Report* (HC 2017–19, 2027).