



Briefing Paper:
Parliament and the Rule of Law in the Context of Brexit

29 September 2016

Bingham Centre for the Rule of Law
www.binghamcentre.biicl.org

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Executive Summary

The UK's departure from the EU raises many contentious issues, some of which are constitutional in nature. This paper focuses on procedural rule of law questions concerning how Parliament can safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum. The international negotiations and law reform process resulting from the UK's exiting from the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done.

In this context, Parliament has an important role to play to safeguard and apply rule of law standards when carrying out its activities of law-making and scrutiny of Government. Parliament can safeguard the rule of law in its law-making by ensuring fidelity to rule of law principles in the content of laws made to give effect to Brexit, and through transparent and stable processes for law-making in the context of Brexit. Parliament should guard against skeletal drafting of legislation and poorly defined Henry VIII clauses because they undermine Parliamentary sovereignty and the rule of law. Laws concerning the following areas warrant particular parliamentary scrutiny because they strengthen the rule of law: anti-discrimination law; freedom of information; and human rights.

The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiation of the agreements for the UK's exit from and future relations with the EU that will have fundamental consequences for UK law, allowing Parliament to scrutinise and approve the negotiations.

Recommendation 1: Parliament and its committees can apply rule of law standards when scrutinising legislation to promote fidelity to rule of law principles.

Recommendation 2: Parliament should scrutinise particularly carefully Brexit-related reforms in anti-discrimination, freedom of information, and human rights.

Recommendation 3: Parliament should ensure that Henry VIII clauses are used sparingly and only in legislation drafted with sufficient detail for legal certainty.

Recommendation 4: Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate.

Recommendation 5: Parliament should have greater resources to safeguard the rule of law—e.g. the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.

Recommendation 6: All parliamentary committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit.

Recommendation 7: UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.

The Bingham Centre stands ready to provide rule of law assistance to Parliament.

This paper contains the following sections:

- I. Introduction
- II. Parliament and the Rule of Law in the Context of Brexit
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I. Introduction

1. This paper aims to inform the work of Parliament by setting out preliminary rule of law issues relating to Brexit. The international negotiations and law reform process resulting from the UK's exiting the EU will present an enormous challenge for the UK Government and Parliament because of the volume and complexity of work to be done. The UK's departure from the EU raises many contentious issues, some of which are constitutional in nature.¹ This paper focuses on procedural rule of law questions concerning how Parliament can respect and safeguard the rule of law in the process of domestic and international law-making required to give effect to the outcome of the June referendum.
2. While there were many and varied reasons that motivated the vote to leave the EU, it is common ground that a core and dominating theme was the wish to restore power over law-making to the UK Parliament, thus putting control over UK law in the hands of those democratically elected by and accountable to the people.² Consistent with that goal, it is crucial that UK constitutional principles are protected, including the rule of law. The rule of law is not an abstract principle, rather, it is a practical concept by which proposed laws should be assessed. It is not the sole preserve of lawyers and courts, but a constitutional principle that Parliament has a role in safeguarding. As the sovereign law-making institution in the UK, Parliament has a vital role to play in applying the rule of law as part of its scrutiny of legislation and Government.

II. Parliament and the Rule of Law in the Context of Brexit

3. In general terms, the UK's exit from the EU will involve:
 - a. Negotiation of agreements on the UK's exit from and future relationship with the EU, as well as negotiating trade agreements with non-EU countries (referred to generally as "**international negotiations**" in this submission); and
 - b. Review of UK laws and an extensive law-making process to deal with EU laws that may otherwise no longer apply following the UK's exit to:
 - i. Clarify which EU laws continue to apply in UK law and the implications of changes to those laws by the EU and future European Court of Justice decisions on those laws, as well as to ensure that any references to EU institutions or laws in UK laws do not render the UK laws ambiguous or unclear; and
 - ii. Establish new UK laws to replace the EU laws that the UK wishes to change.
(Referred to generally as "**Brexit law reform process**" in this submission).
4. There will be overlap in substance and process between the international negotiations and Brexit law reform process. In particular, there will likely be some EU frameworks that the UK will want to remain part of, for example, cooperation on national security. For these matters, the UK will want to negotiate to stay within the EU law and framework such that the law continues to operate in the UK after exit from the EU.

¹ See e.g. Nick Barber, Tom Hickman and Jeff King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', *UK Constitutional Law Blog* (27 June 2016) <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>; Professor Mark Elliott, 'On why, as a matter of law, triggering Article 50 does not require Parliament to legislate', *Public Law for Everyone* (30 June 2016).

² Boris Johnson, 'There is only one way to get the change we want – vote to leave the EU', *The Telegraph* (16 March 2016) <http://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/>; Michael Gove, 'Why I'm backing Brexit', *The Spectator* (20 February 2016) <http://blogs.spectator.co.uk/2016/02/michael-gove-why-im-backing-leave/>; 'Taking Back Control from Brussels' *Vote Leave*, http://www.voteleavetakecontrol.org/briefing_control.html.

5. The international negotiations and Brexit law reform process will pose a difficult challenge in terms of scale and complexity for the UK Government and Parliament. Yet the Brexit law reform process also presents a significant opportunity to improve the clarity of UK law whether EU standards are incorporated or new UK laws made.
6. The rule of law is a recognised UK constitutional principle that must be respected and safeguarded in the processes and outcomes of the international negotiations and Brexit law reform process, and Parliament will play a key role in this context. We base this paper on the eight rule of law principles identified by Lord Bingham and note that the adoption of his formulation by the Venice Commission has given considerable influence to his articulation of the principles. The principles are explained in more detail in Appendix 1.

Protecting the Rule of Law in the Brexit Law Reform Process

7. Two narrow examples illustrate the complexity of decision making that the UK faces across a multitude of areas such as employment, health and medicines, environment, consumer protection, finance and banking, agriculture, and arts and culture:³
 - a. The UK's Tobacco and Related Products Regulations 2016 were made by the Secretary of State under powers conferred by section 2(2) of the European Communities Act 1972 to implement Tobacco Products Directive (2014/40/EU). The Regulations rely on EU institutions and standards: for example, reg 5(3)(a) requires that a container pack of a tobacco product have a health warning that includes a text warning and colour photograph specified under the EU Directive. Does the UK wish to remain in the Directive and if so can the UK successfully negotiate this? If not does the UK wish to incorporate this EU Directive into UK law or make a new UK law? What would be the cost to UK businesses operating in the EU of complying with different standards if the UK sets its own law? If the UK continues to follow the EU Directive, what happens if the EU revises the Directive? The Court of Justice of the EU (CJEU) has already ruled that the Directive is valid, would the UK follow future decisions of the CJEU on the Directive?⁴
 - b. Commission Regulation (EU) No 666/2013 of 8 July 2013 sets ecodesign requirements for vacuum cleaners and forms part of UK law because it is an EU regulation and therefore has direct effect in the UK. It is an example of many technical EU Regulations currently setting standards in the UK. When the UK leaves the EU, will we keep this Regulation by incorporating its standards into UK law, or set our own technical standards for the efficiency of vacuum cleaners? If the UK continues to follow this Regulation, what will be the effect in UK law if the EU amends or replaces the Regulation or the CJEU makes a decision on the Regulation?⁵
8. **The following rule of law principles provide guidance for the Brexit law reform process:**
 - The law must be accessible and so far as possible, intelligible, clear, and predictable.

³ House of Commons Library, *Briefing Paper Number 07213: Brexit: impact across policy areas*, (26 August 2016).

⁴ Tobacco and Related Products Regulations 2016 (UK); section 2(2) of the European Communities Act 1972; Tobacco Products Directive 2014/40/EU of the European Parliament and the Council; Court of Justice of the European Union Press Release No 48/16 (4 May 2016) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf>.

⁵ Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for vacuum cleaners Text with EEA relevance.

- The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
 - The law must afford adequate protection of fundamental human rights.
9. Parliament is charged with the responsibility of making laws. Accordingly, **as part of Parliament's scrutiny of legislation, Parliament should consider the fidelity of new laws to these principles. The rule of law can be enhanced through a careful and robust Brexit law reform process that seizes the opportunity to make UK law as clear and accessible as possible.** In order to promote fidelity to the rule of law, parliamentarians and committees can apply the rule of law standards set out in the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee*. These rule of law standards are discussed and extracted in Appendix 2.
10. The **rule of law principles outlined above also point to areas that warrant particular scrutiny in the legislative reform process necessitated by the UK's departure from the EU.** These areas include anti-discrimination law, human rights law, and freedom of information law, which are discussed in Appendix 3.
11. There is a further rule of law point concerning the process by which laws are made: the process for Brexit law reform ought to enable the law to be predictable and stable. The law can change, and the UK's exiting the EU will necessitate large-scale reforms to UK law. However, **parliamentary processes for such changes to law that are transparent and clear will mean that the outcome will be relatively stable and predictable.**
12. There may be an inclination to pass as much law as quickly as possible to expedite the Brexit law reform process, but such haste would undermine parliamentary legislative scrutiny and the rule of law. For the purposes of legal certainty, it may be best to incorporate as much EU law as possible into UK law so that the Brexit law reform process can take place without undue haste. However, there would need to be clear rules on the effect of EU institutions' decisions on EU laws incorporated into UK law, otherwise the incorporation of EU law may lead to uncertainty with implications for all aspects of life in the UK including, especially, business.
13. **The rule of law also includes principles concerning the exercise of legal power, particularly the exercise of power by the Executive:**
- Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
 - Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
14. These rule of law principles are intrinsically related to the UK constitutional principles of the separation of powers and the sovereignty of Parliament. Parliament makes laws that are implemented by the Executive, and those laws define the scope and limits of power conferred on the Executive. Poorly defined Henry VIII clauses in legislation that is drafted in skeletal form undermine these principles, especially the sovereignty of Parliament,⁶ by enabling the Executive to make laws that define the scope and limits of the Executive's power. A Henry VIII clause enables primary legislation to be amended or repealed by delegated legislation with or without further parliamentary scrutiny.

⁶ The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>.

15. In rule of law terms, ***unnecessarily broad Henry VIII clauses in skeletal legislation threaten these two rule of law principles because such clauses give the Executive almost absolute discretion on questions of legal right and liability rather than defining in law the criteria for resolving the questions.*** Overly broad Henry VIII clauses threaten the latter rule of law principle by conferring power without limits on the Executive that can be exercised unreasonably since the power may be established and defined by the Executive itself. This problem is compounded by the trend towards skeletal drafting of primary legislation that lacks substance and detail for the delegated legislation that it authorises.

Enhancing the Rule of Law through Parliamentary Scrutiny of International Negotiations

16. As argued by Lord Bingham, the rule of law requires compliance by the state with its obligations in international law as in national law. The Executive conducts international negotiations and enters into treaties, while Parliament has responsibility for passing UK laws as needed for the UK to comply with its international obligations.
17. ***The agreements for the UK's exit from and future relations with the EU will have fundamental consequences for UK law and law-making. The UK is a democracy in which Parliament is sovereign, including over the Executive, although the Executive negotiates treaties under its prerogative powers.***⁷ Both Parliament and the Executive must respect the rule of law aspects of these activities.
18. ***The rule of law could be enhanced by a process through which the Executive regularly engages with Parliament before and during negotiations to allow Parliament to scrutinise and approve the negotiations.*** The impetus for such engagement is not only political, but also has a legal dimension because Parliament will need to amend or repeal the European Communities Act 1972 in line with the agreements reached with the EU.⁸
19. The question of the Government's power to send notice under Article 50 is the subject of multiple legal challenges concerning the nature and extent of the Executive's prerogative power, whether prior authorisation by Parliament is required, and requirements that may arise from the unique constitutional arrangements of Northern Ireland.⁹
20. The need for Parliament's scrutiny of international negotiations is discussed in relation to rule of law principles in more detail in Appendix 4, without concluding on the legal questions raised in these cases.
21. Ultimately, concluding an agreement on the UK's future relationship with the EU prior to the UK's leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

Recommendations

22. **Recommendation 1:** When scrutinising legislation, Parliament and its committees can apply rule of law standards from the *Code of Constitutional Standards* — derived from the work of the

⁷ House of Commons Library, 'Brexit: how does the Article 50 process work?' (30 June 2016).

⁸ House of Commons Library, 'Brexit: how does the Article 50 process work?' (30 June 2016), 30.

⁹ Owen Bowcott, 'Theresa May does not intend to trigger article 50 this year, court told', *The Guardian* (19 July 2016) <http://www.theguardian.com/politics/2016/jul/19/government-awaits-first-legal-opposition-to-brexit-in-high-court>; Steven McCaffery, 'Brexit set to face legal challenge in Northern Ireland', *The Detail* (25 July 2016) <http://www.thedetail.tv/articles/brexit-set-to-face-legal-challenge-in-northern-ireland>; Jones Cassidy Brett Solicitors, Press Statement (19 August 2016) http://www.mlex.com/Attachments/2016-08-23_8U59768CT7N27FL6/Press%20Statement%20-%20Legal%20challenge%20to%20Triggering%20Article%2050%20-%20Update.pdf.

House of Lords Constitution Committee and produced by the Constitution Unit — to promote fidelity to rule of law principles. Appendix 2 introduces the Code and extracts the standards that relate to rule of law principles.

23. **Recommendation 2:** Parliament should scrutinise particularly carefully Brexit-related reforms in areas of anti-discrimination, freedom of information, and human rights.
24. **Recommendation 3:** Parliament should ensure that Henry VIII clauses are used sparingly, and when used, are carefully drafted and only used in primary legislation that provides appropriate detail and substance for legal certainty.
25. **Recommendation 4:** Committees should explicitly refer to the rule of law in the terms of reference for inquiries on aspects of the Brexit law reform process as and when appropriate. For example, any inquiry on anti-discrimination laws by the Women and Equalities Committee should refer to the rule of law principles of equality before the law and equal protection of the law in the inquiry's terms of reference.
26. **Recommendation 5:** Parliament and its committees should have greater resources to safeguard the rule of law.¹⁰ For example, the rule of law expertise of the Scrutiny Unit could be enhanced through training or additional staff to provide support to House of Commons select committees on rule of law questions as needed.
27. **Recommendation 6:** Many parliamentary committees will very likely have Brexit as part of their work,¹¹ so all committee members should have an opportunity to participate in a closed informal discussion of rule of law principles in the context of Brexit. The Bingham Centre acts as the secretariat for the APPG on the Rule of Law, which regularly holds meetings to discuss rule of law questions that arise in the work of Parliament, and could provide a briefing session drawing on expertise such as Founding Director Professor Sir Jeffrey Jowell KCMG QC.
28. **Recommendation 7:** UK Parliament and Government must engage with devolved institutions, involving them in decisions on international negotiations and Brexit law reform.
29. The Bingham Centre stands ready to provide assistance to Parliament on rule of law questions including, for example, to give oral evidence or facilitate a closed informal session for MPs and Lords on committees to meet and discuss the relevance and application of rule of law principles for their work in the context of Brexit.

III. Skeletal Legislative Drafting, Delegated Legislation, and Henry VIII Clauses

30. This section explains the problems of skeletal legislative drafting and inappropriately broad delegated legislative powers in rule of law terms, and the risk that Brexit will exacerbate these issues. To address this threat to the rule of law, Parliament can use relevant standards in the *Code of Constitutional Standards* and build on the work of the Delegated Powers and Regulatory Reform Committee.
31. There is a trend of skeletal drafting of primary legislation to merely outline the law and Parliament's intention without details. The Constitution Committee has rightly criticised the trend

¹⁰ House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [32].

¹¹ Ruth Fox, 'It's Brexit... So What Now for Parliament?', *Hansard Society* (24 June 2016), <http://blog.hansardsociety.org.uk/its-brex-it-so-what-now-for-parliament/>; Hannah White, 'Parliament's role in the Brexit negotiations', *Institute for Government* (21 July 2016), <http://www.instituteforgovernment.org.uk/blog/14358/parliaments-role-in-the-brex-it-negotiations/>.

of 'vaguely-worded legislation that left much to the discretion of ministers'¹² for its erosion of the principle that the law should be clear and certain.¹³

32. Delegated legislation, also known as secondary or subsidiary legislation, is legislation made by the Executive using power that has been delegated by Parliament in primary legislation. Delegated legislation is necessary because Parliament does not have the time or resources to address detailed administrative matters in primary legislation. Delegated legislation does not receive the same level of parliamentary scrutiny as primary legislation, and is very rarely rejected by either House (Parliament generally does not have the power to amend delegated legislation).¹⁴ Accordingly, provisions in primary legislation that delegate legislative power to the Executive must be carefully drafted and defined for clarity and certainty as to the purpose and scope of the power.
33. The distinguishing feature of Henry VIII clauses is that they give the Executive power to make delegated legislation that includes provisions amending or repealing the primary legislation. Such clauses may sometimes be necessary and appropriate, but there are many instances where they are not.¹⁵
34. Skeletal drafting of primary legislation and use of poorly defined Henry VIII clauses work in opposition to the rule of law principles that legal rights and liability should be determined by application of the law and not the exercise of discretion, and the Government (ministers and public officers) must exercise their powers properly. These principles require that the decision making power of Government should be defined and limited by the laws made by Parliament. Poorly defined Henry VIII clauses in skeletal legislation allow Government almost unfettered ability to set their own rules for their decisions, and thus wield power that looks more like arbitrary discretion than accountable decisions according to law.
35. The enormous task of Brexit law reform will give rise to an understandable temptation to delegate large swathes of legislative power to the Executive by passing skeletal primary legislation that includes broadly drafted provisions that delegate law-making to the Executive, sometimes using Henry VIII clauses. This temptation arises from the scale of the Brexit law reform process, which involves each area that has been affected by EU law, so that delegating large swathes of legislative power to the Executive may appear the easiest and most efficient approach in the extraordinary circumstances. Yet, the pressure from the extraordinary circumstances of Brexit ought not result in fundamental UK constitutional principles being

¹² House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, (23 March 2016), [37].

¹³ See e.g. House of Lords Select Committee on the Constitution, *Cities and Local Government Devolution Bill [HL]; Psychoactive Substances Bill [HL]; Charities (Protection and Social Investment) Bill [HL]* (22 June 2015), [2]-[3]; see also, House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review*, (23 March 2016), [33]-[38].

¹⁴ The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>, 9-11. In fact, legislation made under the European Communities Act 1972 implementing EU law in the UK has been secondary legislation, however the House of Commons EU Scrutiny Committee scrutinises draft EU legislation, and the House of Lords Secondary Legislation Scrutiny Committee scrutinises such implementing legislation and can draw legislation to the attention of the House if it inappropriately implements EU law: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/>.

¹⁵ See e.g. the list of inappropriate Henry VIII clauses in House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review*, (23 March 2016), [39]; see also The Rt. Hon Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII', (12 April 2016, King's College London), <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>.

eroded or disregarded entirely. Rather, constitutional principles should be respected by Parliament and the Government in their response to Brexit.

36. There is also a risk of pressure on the limited resources of institutions responsible for primary legislation encouraging inappropriate reliance on delegated legislation. Government proposals for law are translated into Bills by the specialised lawyers in the Office of Parliamentary Counsel. However, the Office of Parliamentary Counsel only has a team of around 50 lawyers and Parliament only has around 20 lawyers to advise its work, whereas Government as a whole is estimated to have around 2,000.¹⁶ It has been reported that the Government will need additional lawyers to cope with Brexit.¹⁷ The relatively small number of lawyers working in Parliament and the Office of Parliamentary Counsel indicates the limited resources available in the institutions that are responsible for drafting and scrutinising primary legislation.
37. The rule of law standards in the *Code of Constitutional Standards* extracted in Appendix 2 include standards for delegated powers, delegated legislation, and Henry VIII clauses. These standards can assist Parliament's legislative scrutiny concerning the delegation of legislative power.
38. Furthermore, Parliament can build on the work of the House of Lords Delegated Powers and Regulatory Reform Committee, which scrutinises the delegation of powers in Bills as they pass through Parliament and ensures that such delegation is clearly drafted, necessary and appropriate. The Committee's *Guidance for Departments: on the role and requirements of the Committee* is an important and practical resource to promote proper legislative drafting and delegation of powers. The Guidance's principles concerning Henry VIII powers are undoubtedly concordant with rule of law principles, and a sensible process for managing the use of Henry VIII powers is set out the principle:

*Every Henry VIII power ... should be clearly identified. Although the Committee recognises that the appropriate level of parliamentary scrutiny for such powers will not be the affirmative procedure in all cases, where a Henry VIII power is subject to a scrutiny procedure other than affirmative, a full explanation giving the reasons for choosing that procedure should be provided in the [delegated powers] memorandum.*¹⁸

39. Application of this principle allows Parliament to retain proper control over the exercise of powers to change primary legislation.

IV. Engagement with the Devolved Institutions

40. In light of the Sewel Convention, the devolution settlements, and the UK constitution, it is important that the devolved institutions are involved in the decision making on international negotiations as well as consequential adjustments to the devolution settlements.
41. The competences of the devolved legislatures and governments are defined with reference to the EU. Accordingly the reserved and devolved matters will be affected by changes to the application of EU law in the UK, and ought to be revisited and recast to ensure clarity after the

¹⁶ 'About us', Office of the Parliamentary Counsel, <https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel/about#who-we-are> accessed 7 September 2016; Robert Orchard, 'Is Parliament Ready for Brexit?', *Hansard Society* (20 July 2016) <http://blog.hansardsociety.org.uk/is-parliament-ready-for-brexit/>.

¹⁷ Rosamund Urwin, 'Brexit: Why the government is recruiting hordes of experts to help Britain leave the EU', *The Evening Standard* (19 July 2016), <http://www.standard.co.uk/lifestyle/london-life/brexit-why-the-government-is-recruiting-hordes-of-experts-to-help-britain-leave-the-eu-a3299186.html>; Deborah Haynes and Jill Sherman, 'Hiring Brexit experts will 'cost billions'', *The Times* (20 July 2016) <http://www.thetimes.co.uk/article/hiring-brexit-experts-will-cost-billions-khn6mw3j2>.

¹⁸ House of Lords Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the role and requirements of the Committee* (July 2014), [35].

UK leaves the EU. Such change will likely need the legislative consent of the devolved legislatures.

42. The need for legislative consent by the devolved legislatures for changes to devolved matters arises from a constitutional convention: the Sewel Convention. The Convention has been incorporated into legislation for Scotland under the Scotland Act 1998, which was amended by the Scotland Act 2016 to state: 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'¹⁹ The Wales Bill that is currently making its way through the UK Parliament similarly incorporates the Sewel Convention in the same terms.²⁰
43. Legal experts differ on the application and effect of the Sewel Convention as incorporated in the Scotland Act in the current circumstances of Brexit. Some argue that there is no legally enforceable constraint imposed on Westminster by the legislative recognition of the convention, others point to comments from the UK Supreme Court that parliamentary sovereignty may possibly be subject to limited constitutional constraints, and there is uncertainty as to the effect of the word 'normally'.²¹ These questions may fall to the courts to be resolved in due course. For present purposes it is sufficient to observe that the Sewel Convention reflects the strong political imperative for Westminster and Whitehall to engage with the devolved nations, as recognised by Prime Minister Theresa May.
44. Whilst the constitutional and legal arrangements are different for each of the devolved nations, as are the politics and political will in each devolved nation, there are unique issues in relation to Northern Ireland. These include the Belfast or Good Friday Agreement, in which the rights from EU law are arguably embedded,²² and the land border that Northern Ireland shares with the Republic of Ireland. The deep political implications of Brexit for Northern Ireland require special attention, as Secretary of State for Exiting the European Union, The Right Honourable David Davis, has already recognised.²³
45. We note that the House of Commons Standing Order 137A already provides that select committees can communicate evidence to the devolved legislatures, and empowers the Welsh Affairs Committee to invite members of National Assembly for Wales committees to attend and participate in its proceedings (but not vote).²⁴ The House of Commons could consider expanding this latter power to all of the House of Commons select committees, not only those concerned with the devolved nations.

¹⁹ Section 2 of the Scotland Act 2016; The Sewel Convention is also included in the Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive (2001) available at: http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf.

²⁰ Section 2 of the Wales Bill 2016-17 as introduced into the House of Lords on 13 September 2016.

²¹ See e.g. Sionaidh Douglas-Scott, 'Removing references to EU law from the devolution legislation would require the consent of the devolved assemblies', *The Constitution Unit Blog* (13 June 2016) <https://constitution-unit.com/2016/06/13/removing-references-to-eu-law-from-the-devolution-legislation-would-invoke-the-sewel-convention/>; Kenneth Campbell QC, 'The draft Scotland Bill and limits in constitutional statutes', *UK Constitutional Law Blog* (2 February 2015), <https://ukconstitutionallaw.org/2015/02/02/kenneth-campbell-qc-the-draft-scotland-bill-and-limits-in-constitutional-statutes/>; Mark Elliott, 'The Draft Scotland Bill and the sovereignty of the UK Parliament', *Public Law for Everyone* (22 January 2015), <https://publiclawforeveryone.com/2015/01/22/the-draft-scotland-bill-and-the-sovereignty-of-the-uk-parliament/>.

²² Kenneth Campbell QC, 'Sand in the Gearbox: Devolution and Brexit', *UK Constitutional Law Blog* (5 September 2016) <https://ukconstitutionallaw.org/2016/09/05/kenneth-campbell-qc-sand-in-the-gearbox-devolution-and-brexite/>.

²³ 'David Davis Op-Ed: I will ensure that Northern Ireland's voice is heard in negotiations' (1 September 2016) <https://www.gov.uk/government/speeches/david-davis-op-ed-i-will-ensure-that-northern-irelands-voice-is-heard>.

²⁴ Standing Orders of the House of Commons (10 February 2016).

46. We further note that relations between UK parliamentary committees and the devolved legislatures vary,²⁵ and observe that expanded powers for inter-parliamentary cooperation under the Standing Orders will also need goodwill and mutual respect in order to be used effectively.
47. We believe that the UK Parliament and Government should continue to engage with the legislatures and governments of the devolved nations in relation to both international negotiations and Brexit law reform process.

V. Conclusion: Moving towards Brexit

48. There are already several parliamentary inquiries on foot concerning Brexit. This paper will inform written evidence submitted to a number of inquiries including:
- House of Lords Constitution Committee inquiry: Legislative Process inquiry
 - House of Lords EU Committee follow-up inquiry: Scrutinising Brexit: the role of Parliament
 - Joint Committee on Human Rights inquiry: What are the human rights implications of Brexit?
49. This paper is also being submitted as unsolicited evidence to:
- House of Lords Delegated Powers and Regulatory Reform Committee
 - House of Commons Liaison Committee
 - House of Lords Liaison Committee
 - House of Commons Justice Committee
 - House of Commons Public Administration and Constitutional Affairs Committee
 - House of Commons Women and Equalities Committee
50. Many more specific rule of law questions will arise for the UK and EU as the Brexit process unfolds. The Bingham Centre will remain engaged to promote the rule of law in the process.

²⁵ House of Lords Select Committee on the Constitution, *Inter-governmental relations in the United Kingdom* (27 March 2015), [197].

Appendix 1. What is the Rule of Law? An Explanation of Rule of Law Principles

51. The rule of law principles that are relevant for present purposes are outlined above. This Appendix explains rule of law principles more fully.²⁶

The law must be accessible, intelligible, clear, and predictable

52. When the law meets this requirement, people are able to understand what activity is prohibited and therefore discouraged, and what their rights are so that they are able to claim those rights.
53. Uncertainty on the law discourages business and financial activity, as well as the good operation of UK law generally.
54. Parliamentary processes for legislative scrutiny and law-making can help to alleviate uncertainty by providing clarity on the timetable for the establishment of new laws and on the likely content of those laws.

Laws should apply equally to all

55. This principle means that the law should not have discriminatory provisions, and that the law should not tolerate discrimination. A key example is slavery: equality before the law necessitated the abolition of slavery and explicit legal decision that the law would not recognise a distinction between enslaved and free people. Anti-discrimination law implements this rule of law principle.
56. At the same time, there are categories of people whom the law should treat differently because their position is different. For example, children cannot be prosecuted for crime below a certain age, because children are less mature than adults.

The law must afford adequate protection of fundamental human rights

57. As Lord Bingham said:

A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.²⁷

58. It is not sufficient that laws meet the formal and procedural requirements of being duly enacted, clear and so on. In terms of content, the law must provide protection for fundamental human rights such as the prohibitions of torture and slavery, freedom of expression, freedom of religion, and right to family life. Whatever proposals may be brought forward for a Bill of Rights for the UK, these fundamental human rights remain matters that should be protected across all areas of UK law.

Legal right and liability determined by application of the law and not the exercise of discretion

59. The rule of law can be understood in contrast with the 'rule of man', meaning a society in which one or more individuals rules arbitrarily exercising power unconstrained by law where the ruler(s) are above the law.

²⁶ Drawn from Tom Bingham, *The Rule of Law* (2010, Penguin Books).

²⁷ Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 67.

60. The entitlement of citizens to Government grants such as welfare and the legal obligations of citizens must be sufficiently defined in law, and not subject to the arbitrary exercise of power. By way of a simple example, 'We expect the taxes we pay to be governed by detailed statutory rules, not by the decision of our local tax inspector. He has the duty to apply the rules laid down, but cannot invent new rules of his own.'²⁸
61. Government decision-makers and officials will inevitably need to exercise discretion when making decisions, but the rule of law requires that such discretion should not be unconstrained and, in effect, arbitrary.

The Government (ministers and public officers) must exercise their powers properly

62. In the UK, Parliament makes laws and the Executive (the Government) applies those laws.
63. Lord Bingham rightly said:

*This is important. When Parliament, by statute or statutory regulations, empowers a specific officer (such as a secretary of state or the Director of Public Prosecutions or the Director of the Serious Fraud Office) or a specific body (such as a housing authority, a social services department, a county council, a health authority, a harbour board or the managers of a mental hospital) to make a particular decision, it does not empower anyone else. It expects that officer or body to follow any guidelines on policy that may have been laid down, but expects that the officer or body will exercise his or its own judgment, having regard to any relevant experience and the availability of resources. It does not expect, or intend, that the decision should be made by some judge who may think that he or she knows better. But there is a presumption that the decision made will be in accordance with the law.'*²⁹

64. The accepted tests for judicial review of Government decisions reflect this principle by enabling courts to overturn a Government decision where it is unlawful and has therefore departed from the intention of Parliament. The court does not substitute its decision for the Government official's decision, rather, the court sets the decision aside if, for example, the decision-maker exceeded their power.
65. This rule of law principle supports and reinforces parliamentary sovereignty by articulating the need for the Executive to act in accordance with the intentions of Parliament.

Dispute resolution

66. Given that everyone is subject to and entitled to protection by the law, a consequential rule of law principle is that 'Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.'³⁰
67. Cost and delay of court proceedings are enemies to the rule of law. Legal aid serves an important role by enabling poor litigants to have access to the legal system.
68. The more affordable and expeditious dispute resolution is, the better the rule of law is served, albeit that this goal may remain elusive.

²⁸ Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 50.

²⁹ Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 61.

³⁰ Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 85.

Adjudicative procedures provided by the state should be fair

69. This principle may be described as the right to a fair trial, however, the rule of law principle extends beyond the context of criminal law to all public and civil law trials.
70. The independence of the judiciary and legal profession are necessary requirements for trials to be fair.
71. Various rules serve to protect the fairness of trials. In the criminal law context, these rules include that trials should be conducted in public, and an accused is to be presumed innocent until proven guilty,

The rule of law in the international legal order

72. In order to realise a rules-based international order, it is important that states comply with their obligations under international law. Lord Bingham explained that

although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so.³¹

³¹ Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 110.

Appendix 2. How Parliament Can Use Rule of Law Standards: Code of Constitutional Standards

73. Rule of law principles provide broad high level guidance for law-making, but need a systematic tool for implementation. In order to promote the fidelity of legislation to the rule of law, parliamentarians and parliamentary committees should use the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee*³² produced by the Constitution Unit when undertaking legislative scrutiny.³³ Many of the Code's standards translate broad rule of law principles into specific standards — the standards from the Code that concern rule of law principles are extracted below.
74. The Code was produced through analysis of reports by the House of Lords Constitution Committee and the principles contained in the Code are drawn directly from the Committee's work. Accordingly, the Code contains 'parliamentary constitutional standards' which have the following advantages that make them well-suited for legislative scrutiny:
- First, they are parliamentary in the sense that they are articulated by a parliamentary actor and not, for example, by judges or government or other outside bodies. Second, they are 'constitutional' because they are based on principles or norms relating to the working of constitutional relationships and procedures. Third, they are not politically partisan.*³⁴
75. In our view, the Code is not a complete list of rule of law principles, for example there are no standards relating to non-discrimination. Nonetheless, the rule of law standards in the Code are a ready tool to promote fidelity to the rule of law in the Brexit law reform process.

Rule of Law Standards from the Code of Constitutional Standards³⁵

1) The rule of law

1.1 Retrospective legislation

- 1.1.1 Enacting legislation with retrospective effect should be avoided.
- 1.1.2 Provisions that have retrospective effect should be drafted as narrowly as possible.
- 1.1.3 Individuals should not be punished or penalised for contravening what was at the time a valid legal requirement.
- 1.1.4 Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake.
- 1.1.5 Laws should not deprive someone of the benefit of a judgment already obtained.

³² Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of The House of Lords Select Committee on the Constitution Available* (2nd Edition, August 2015) at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/164>.

³³ The Bingham Centre's recommendation for rule of law standards to be used in legislative scrutiny echoes recommendations for the use of scrutiny standards by the House of Lords Constitution Committee, Political and Constitutional Reform Committee, Professor Robert Hazell, Professor Dawn Oliver, and the Hansard Society: Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards', in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 71-75.

³⁴ Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards', in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 61-62.

³⁵ We have extracted all of the standards in the Code that relate to Lord Bingham's rule of law principles, including those not explicitly categorised as 'rule of law' standards in the Code.

1.1.6 Laws should not prevent a court from deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced.

1.1.7 Retrospective legislation should only be used when there is a compelling reason to do so.

1.1.8 A legislative power to make a provision which has retrospective effect should be justified on the basis of 'necessity', and not of 'desirability'.

1.2 Legal certainty

1.2.1 The rule of law requires laws to be reasonably certain and accessible.

1.2.2 General warrants should be avoided.

1.2.3 Laws that include a variable monetary penalty should include an upper limit.

2) Delegated powers, delegated legislation and Henry VIII powers

2.1 Defining the power

2.1.1 Delegations of legislative power should be framed as narrowly as possible.

2.1.2 The policy aims of a ministerial power should be included in the bill itself.

2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.

2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the bill.

2.1.5 Ministerial powers should be defined objectively.

2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.

2.2 Safeguards in delegation of legislative powers

2.2.1 Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety.

2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a bill then they should be included.

2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.

4) Individual rights

4.1 General principles

4.1.1 The restriction of individual rights should be proportionate.

4.1.2 Provisions that restrict the liberty of the individual should be drafted as narrowly as possible.

4.1.3 Provisions that restrict the liberty of the individual should be accompanied by sufficient limits and protections.

4.1.4 Severe restrictions on the liberty of the subject should only be the result of a criminal conviction.

4.1.5 Statutory powers that allow a minister to impose significant constraints on the liberty of the individual should be subject to direct judicial oversight.

4.1.6 Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights.

4.1.7 Interferences with the fundamental common law right to freedom of expression should be justified appropriately.

4.2 Access to justice

4.2.1 Laws should respect the constitutional right of access to justice.

4.2.2 A bill should not interfere with the common law right of access to justice when it is not necessary to meet the bill's stated purpose.

4.2.3 A statutory power granted to a public body to deprive an individual of a significant right should be subject to a reference by the public body to a court.

4.2.4 Laws should respect the constitutional principle that individual liberty is to be protected by the courts.

4.3 Due process and procedural fairness

4.3.1 Laws that create a power to make administrative decisions that affect individuals should meet the minimum standards of procedural fairness.

4.3.2 The common law principle of natural justice: audi alteram partem (hear both sides before making a decision) should be respected.

4.3.3 The right to a fair trial should be respected.

4.3.4 Laws that confer upon the executive coercive sanction powers should include safeguards for ensuring that fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight.

4.3.5 Laws that create a public decision-making process should ensure that affected citizens have recourse to an effective appeal system.

4.3.6 Laws which impose restriction on the freedom of individuals backed by sanctions should include basic due process safeguards.

4.3.7 Laws should respect the right of an individual detained in a police station to free legal advice.

Appendix 3. Policy areas that protect the rule of law

Non-discrimination

76. UK equality and anti-discrimination laws have benefited from and been enhanced by the influence of EU law. These laws on equality and anti-discrimination help to safeguard the rule of law principles that everyone should be equal before the law and receive equal protection under the law. The below discussion is not exhaustive, and merely illustrates by a selection of examples the influence of EU law on UK equality and anti-discrimination laws.
77. A key example of EU law's influence is the Equality Act 2010 that implements the following EU Directives:
- a. 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
 - b. 2000/78/EC establishing a general framework for equal treatment in employment and occupation,
 - c. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),
 - d. 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.³⁶
78. EU law has enhanced disability rights in the UK including extending employment protection to all employers, requiring assistance for disabled people when travelling, and requiring that Braille labelling is included on packaging for medicinal products.³⁷
79. Protection from employment discrimination for people on the grounds of religion or belief, sexual orientation and age was established under the EU Equal Treatment Directive 2000/78/EC, whereas such protection had not previously existed under UK law.³⁸
80. Furthermore, UK anti-discrimination law has been developed by decisions of the Court of Justice of the EU that reinforced and strengthened anti-discrimination law.³⁹
81. UK anti-discrimination law poses few impediments to Parliament or ministers passing discriminatory legislation. EU law and human rights law have in effect provided legal protection for the right to equal treatment in the UK, however once the UK leaves the EU an important part of this protection will fall away.⁴⁰

Freedom of Information

82. General access to information held by a public authority is set out under the Freedom of Information Act (FOI Act), however, the UK Environmental Information Regulations 2004 incorporates EU Directive 2003/4/EC on public access to information on the environment. The

³⁶ Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 *The Equal Rights Review* 11 <http://www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf>.

³⁷ 'Impact of EU membership on equality and human rights' Equality and Human Rights Commission, <https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights>.

³⁸ 'Impact of EU membership on equality and human rights' Equality and Human Rights Commission, <https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights>; Equality and Diversity Forum, 'The EU Referendum and Equality' <http://www.edf.org.uk/blog/wp-content/uploads/2016/04/EU-referendum-briefing-v3.pdf>.

³⁹ Colm O'Conneide, 'Equality rights in a post-Brexit United Kingdom', *Bright Blue* (29 July 2016), <http://humanrights.brightblue.org.uk/blog-1/2016/7/29/equality-rights-in-a-post-brexit-united-kingdom>.

⁴⁰ Colm O'Conneide, 'Equality rights in a post-Brexit United Kingdom', *Bright Blue* (29 July 2016), <http://humanrights.brightblue.org.uk/blog-1/2016/7/29/equality-rights-in-a-post-brexit-united-kingdom>.

Regulations cover a wider range of bodies than the FOI Act, including those performing functions of public administration or controlled by an authority.⁴¹

Human Rights

83. Currently, the Human Rights Act is the primary instrument that protects human rights and reflects the rule of law principle that the law protects fundamental rights. However, EU law has also contributed to the protection of fundamental rights in the UK.⁴²
84. In some instances, EU law has provided the basis for human rights standards and tests in the context of surveillance, intelligence gathering and security measures, particularly given the need for counter-terrorism measures. The *Digital Rights Ireland* decision by the Grand Chamber of the CJEU found that the EU Directive on the retention of electronic data communications was invalid because it breached the EU Charter of Fundamental Rights. Similarly, the CJEU is currently considering whether UK bulk data collection powers are incompatible with the right to respect for private life.⁴³
85. As a matter of the rule of law and international cooperation on security issues, it is important for the UK to meet these human rights standards:
- a. In line with the rule of law principle that the law should protect fundamental rights, it is important that laws on data surveillance do not breach fundamental rights;
 - b. The decision of the CJEU in the *Schrems* case found that the data protection laws of non-EU countries must be 'essentially equivalent' to European law to permit simplified transfers of personal data between countries. Accordingly, UK data protection laws will need to meet EU standards to facilitate intelligence and security cooperation between the UK and EU countries. Data sharing also has economic consequences as it affects e-commerce.⁴⁴
86. Similarly, the decision of the CJEU in *Kadi* upheld the right to be heard, right to effective judicial review, and right to property in the context of listing individuals to be subject to sanctions.⁴⁵ These kinds of natural justice or due process rights (the rights to be heard and to judicial review) are central to the rule of law. Accordingly, as the UK leaves the EU special attention should be paid to ensure these kinds of rule of law principles and fundamental human rights continue to be upheld.

⁴¹ Patrick Birkinshaw, 'Regulating Information' in Jeffrey Jowell, Dawn Oliver and Colm O'Connell Eds, *The Changing Constitution* (8th Ed 2015), p 392-393; note also the role of Directive 2007/2/EC implemented in the UK's INSPIRE Regulations 2009.

⁴² Colm O'Connell, 'Human Rights and the UK Constitution' in Jeffrey Jowell, Dawn Oliver and Colm O'Connell Eds, *The Changing Constitution* (8th Ed 2015), p 129-131 and 132.

⁴³ C-698/15 R (Davis, Watson, Brice & Lewis) v Secretary of State for the Home Department; the case concerns the *Data Retention and Investigatory Powers Act 2014*, but has relevance for the Investigatory Powers Bill.

⁴⁴ Emily Taylor, 'Brexit' Could Put Data Sharing in Jeopardy', *Chatham House* (10 March 2016), <https://www.chathamhouse.org/expert/comment/brexit-could-put-data-sharing-jeopardy>; Steve Peers, 'How would Brexit affect data protection, privacy and surveillance laws in Britain?', *Inform's Blog* (11 May 2016), <https://inform.wordpress.com/2016/05/11/how-would-brexit-affect-data-protection-privacy-and-surveillance-laws-in-britain-steve-peers/>.

⁴⁵ *Kadi and Al Barakat International Foundation v. Council and Commission* [2008] ECR I-6351; Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) EJIL 1015.

Appendix 4. Parliament's Scrutiny of International Negotiations

87. The Executive tends to resist efforts by Parliament to scrutinise international negotiations prior to their completion. This resistance is based on the concern held by negotiators that the more they reveal outside of negotiations, the weaker their position is in negotiations.⁴⁶
88. The Constitutional Reform and Governance Act 2010 incorporated into statute the Ponsonby Rule that treaties, once signed, are published and laid before Parliament for 21 sitting days, and must not be ratified if either House resolves that the treaty shall not be ratified. However, the Government can effectively disregard such a vote by the House of Lords, and if the House of Commons resolves that a treaty should not be ratified then the Minister can lay before the House a statement explaining why the Minister thinks the treaty should nonetheless be ratified, and the 21 day period starts anew.⁴⁷
89. Parliament also plays an essential role at the intersection of domestic and international law, because it debates and passes legislation that gives effect to treaty obligations in UK law, such as the European Communities Act 1972.⁴⁸
90. As such, the Government will need Parliament's support for the outcomes from its international negotiations. The most controversial treaty will be the agreements on the UK's exit from and future relationship with the EU. The Constitution Committee recently found that it is 'constitutionally appropriate' that Parliament should play a central role in the Brexit negotiations with the EU.⁴⁹ The rule of law could be enhanced through a process in which the Government engages with Parliament in advance of and throughout the negotiating process rather than presenting the agreements or elements thereof to Parliament as a finished product.⁵⁰
91. There are good reasons for international negotiations to be conducted in secret so that strategic advantage is not lost by allowing the opposing negotiators to know your vulnerabilities.⁵¹ However, the international negotiations for Brexit will have such fundamental consequences for UK law and policy that a mandate from Parliament could strengthen the clarity and certainty of the negotiators' position. Absent a parliamentary mandate, decisions by the Executive in the negotiations risk effectively dictating or foreclosing options for Parliament's law-making.
92. As noted by the House of Lords EU Committee, current parliamentary scrutiny can be highly flexible with respect to confidential matters through mechanisms such as committees holding private hearings, confidential briefings, and private meetings.⁵²
93. Additional mechanisms for the Executive to engage with Parliament prior to and during international negotiations should be considered and explored. For example, the Joint Committee on the Draft Constitutional Renewal Bill suggested a 'soft mandating' mechanism whereby the

⁴⁶ Sionaidh Douglas-Scott, 'What does 'Brexit means Brexit' mean (if anything)?', *The Constitution Unit* (16 August 2016), <https://constitution-unit.com/2016/08/16/what-does-brexit-means-brexit-mean-if-anything/>; see e.g. Select Committee on European Scrutiny Minutes of Evidence: Rt Hon Margaret Beckett MP, Ms Shan Morgan and Mr Anthony Smith (7 June 2007), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/640-i/7060703.htm>.

⁴⁷ Part 2; per https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml some international treaties are not subject to ratification, but discussions so far have indicated that the Brexit treaty will be subject to ratification.

⁴⁸ See also Lord Norton of Louth, 'Parliament: A New Assertiveness?' in Jeffrey Jowell, Dawn Oliver and Colm O'Connell Eds, *The Changing Constitution* (8th Ed 2015), p 179-180.

⁴⁹ Constitution Committee, *Report: The Invoking of Article 50* (13 September 2016), <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/44.pdf>.

⁵⁰ House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [18].

⁵¹ House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [20].

⁵² House of Lords European Union Committee, *Scrutinising Brexit: the role of Parliament* (22 July 2016), [21].

relevant minister and officials would meet the committee before negotiations to agree a general bargaining position, and the minister would update the committee during negotiations.⁵³

94. The rate of decision making in the negotiations with the EU will almost certainly accelerate over the two years following notice under Article 50, with the last months and weeks being the most crucial. It would be prudent, therefore, for Parliament to set in legislation rules and processes for the negotiations that take this acceleration into account. The possibly frenetic pace at the end of the two years will limit the capacity of the Government and Parliament to engage and consult with each other at that time. A clear mandate from Parliament in advance on the nature and scope of the Government's decision making could provide certainty and guidance in the final stretch of negotiations.
95. Ultimately, concluding an agreement on the UK's future relationship with the EU prior to the UK's leaving the EU is crucial to provide certainty and stability for UK law and policy. Without such an agreement, there will be extreme uncertainty across UK law and policy from trade to national security; from financial regulation to environmental law.

⁵³ Joint Committee on the Draft Constitutional Renewal Bill, Joint Committee on the Draft Constitutional Renewal Bill (31 July 2008), [236]; Arabella Lang, 'Parliament and International Treaties' in Alexander Horne and Andrew Le Suer Eds, *Parliament: Legislation and Accountability* (2016), 262.

About the Bingham Centre

The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill — a great judge and passionate advocate of the rule of law. A London-based organization working internationally, the Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

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