Everyone has a part to play.
Improving the UK’s competitiveness post-Brexit by enhancing the Rule of Law
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HOW CAN THE UK ensure that it is competitive? Answering this question will have a significant impact upon the wealth of the country following Brexit. So what is the answer? Political and economic measures will be of vital importance. But there is something else that needs to be put in the mix – the quality of the law and its enforcement. Good law is accessible; it is, so far as possible, clear and predictable; it avoids excessive executive and regulatory discretion. Such characteristics are aspects of the rule of law. They are needed to allow businesses to plan and make investments, and the more in evidence they are, the greater the attractiveness of the UK.

Whatever one’s views on the merits of Brexit, from the perspective of the rule of law it presents both a threat and an opportunity. Over the next few years, a huge amount of UK law will be changed, not least in respect of transposing EU legislation into UK law. What will the new law look like? How will it match up to the requirements of the rule of law?

The danger is that the pressure on both the government’s and Parliament’s time will result in hastily drafted and poorly scrutinised laws that unintentionally subvert the rule of law.

But there is another possibility. Brexit also creates an opportunity to reinforce the rule of law: to reduce excessive executive and regulatory power, to increase predictability and to make laws that are clear and manageable.

This is a significant, perhaps unique, opportunity. The rule of law has been a major cause of businesses investing and basing themselves in the UK. It has provided the predictability and fairness that business needs. If, in the next few years, the UK can demonstrate a renewed commitment to providing that predictability and fairness and if businesses know that (whatever their complaints about specific laws) the direction of travel is towards greater respect for the rule of law, then the UK economy will be all the more attractive for it.

We do not underestimate the challenges faced by legislators and regulators. The issues to which this paper draws attention cannot be solved immediately or completely. But steps can and should be taken to reinforce the rule of law.

Of course, good laws and regulations cannot on their own make the UK competitive or even secure the rule of law. Much more is required and many different people have a role to play. Within the legal arena, for instance, we must not forget the critical role of the courts. Business must have access to a court system that provides swift, efficient and effective dispute resolution. Among other things, this requires a commitment to maintaining the quality of the judicial bench and recognition by judges that, to quote the late Lord Hailsham, “some degree of certainty is at least as valuable a part of justice as perfection”.

In recent years, some judges have clearly felt it necessary to interpret statutes and regulations in ways that deviate from their most obvious meanings to counter a perceived threat to the rule of law or avoid a perceived injustice. In some cases, this is entirely justified. However, judges must be careful that they do not themselves erode the predictability that is a key element of the rule of law.

Business also has a role to play. In 2015, the UN Global Compact published its Business for the Rule of Law Framework and its Guide for General Counsel on Corporate Sustainability (the latter in partnership with Linklaters). In their letter endorsing the Framework, Ricardo Cortes-Monroy of Nestlé, Ritva Sotamaa of Unilever and Ursula Wynhoven of the UN Global Compact suggested that the Framework should act both as an inspiration to businesses around the world to support the rule of law through their own activities and as a platform for General Counsel jointly to further this goal. We at Linklaters agree. Business should be both a beneficiary of the rule of law and a contributor to its enhancement, in the UK and around the world.
The UK has a proud history championing the rule of law. Has it lost ground in recent years? There have been worrying developments and vigilance is required. On the other hand, the favourable reception of Linklaters' 2015 paper on the rule of law in the UK\(^1\) gives cause for optimism. As might be expected, some of our examples of erosions of the rule of law have given rise to debate but we are encouraged by the recognition of the issues within Whitehall. Over the past couple of years there have also been some limited but nonetheless clear moves in the right direction, including, most notably, the dropping of the proposed reversal of the burden of proof under the new Senior Managers and Certification Regime and the replacement of s.94 of the Telecommunications Act 1984 (which we had criticised)\(^2\) by new provisions that are significantly more transparent and secure a degree of independent oversight of governmental decisions.

A legal regime that respects the rule of law is critical if enterprise is to flourish. That is why we at Linklaters want to keep it high up the political, business and legal agendas, and that is why we are seeking to ensure that the opportunity that Brexit provides to enhance the rule of law is seized.

Charlie Jacobs  
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2. ibid., p. 12.
THE FORMER LORD Chief Justice of England and Wales, Lord Bingham, offered perhaps the most authoritative definition of the rule of law. He said that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”. He expanded this into eight principles. The first two are most relevant to this report: that the law must be accessible and, so far as possible, intelligible, clear and predictable; and that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

The rule of law is not an abstract academic subject: it is important for competitiveness. If a country’s legal system allows excessive executive or regulatory discretion (and particularly if that discretion is perceived to be exercised or capable of being exercised in an arbitrary manner) or makes extensive use of vague and uncertain laws or has any other features that result in legal rights and duties being unclear or unpredictable, then there will be a significant legal risk associated with investment in that country. In some extreme cases, this alone might result in the proposed investment being abandoned. In many other cases, it will be a material factor in the ultimate “go/no go” decision or the decision whether to invest in one country rather than in another.

Consequently, the UK needs to ensure that the direction of travel is towards greater respect for, and the enhancement of, the rule of law. If it does so, it will build on its past successes in this area and reinforce the foundations for its ongoing competitiveness and prosperity.

Respecting and enhancing the rule of law is not the responsibility of a single institution or group of people. Everyone has a role to play. Of course, as the body ultimately responsible for the laws of the United Kingdom, Parliament will have a pivotal role to play. However, on a day-by-day basis, the role of the government, various regulators and the judiciary will be crucially important. The wider business community also has its part to play.

Respecting and enhancing the rule of law is not something that can be achieved by simply listing everything that needs to be done, taking the necessary actions and then sitting back and basking in the satisfaction of a job well done. It is a never-ending process and one which will always involve clashes of policy considerations, prioritisation, compromise and imperfection. Nonetheless, we suggest that there are a number of things that can and should be done in the immediate future in order to improve the position in the UK and thus the UK’s economic competitiveness.

Our suggestions are summarised in the table overleaf. They are organised around the idea that everyone – Parliament, the government, various regulators, the judiciary and the wider business community – has a role to play in improving the rule of law.
The rule of law requires that law is accessible, clear and predictable; and that the law avoids excessive executive and regulatory discretion. These characteristics allow businesses to plan and make investments and, the more in evidence they are, the greater the attractiveness of the UK.

Here is a summary of our proposals to improve the rule of law in the UK post-Brexit:

1. **Establish an appropriate balance between primary legislation, secondary legislation and guidance.** Ensure, on the one hand, that primary legislation enshrines policy decisions and permits secondary legislation only where there is detail to be filled in but, on the other hand, ensure that there is not too much detail in the primary legislation such that it requires frequent amendment; and, leaving aside the Henry VIII clauses in the European Union (Withdrawal) Bill (which are beyond the scope of this report), permit Henry VIII clauses only when there is an extremely strong justification, their scope is clearly delineated and their duration is time limited.

2. **Improve Parliamentary processes.** Rationalise and simplify current Parliamentary scrutiny processes: consider replacing Delegated Legislation Committees with an equivalent to the European scrutiny committee system in the House of Lords; consider establishing a “Parliamentary Legislative Standards Committee” with a mandate to promote high quality secondary legislation, potentially in conjunction with the Government Legal Department; consider enhancing the role of the House of Lords in relation to the detailed scrutiny of legislation (including having the skillset, time and inclination to assist in the scrutiny of legislation as one of the most important criteria in the selection of those to be granted peerages and establishing arrangements that enable the Lords to give proper input to the decision of the Commons as to whether or not to accept particular statutory instruments).

3. **Improve Parliamentary capacity.** Establish new support structures and working methods to ensure that MPs’ time is optimally used; provide additional professional support staff for MPs and assist MPs in working out how best to delegate tasks in order to make best use of this resource.

4. **Invest in the professional development of MPs and expert support.** Invest in training programmes for MPs that are of use to them throughout their time in Parliament (and not just at induction); invest in new technology for this purpose to avoid excessive reliance on "in room" training approaches; expand the opportunities for experts outside Parliament to provide input to proposed legislation.

5. **Consider more radical approaches.** Consider the use of incentives to secure greater focus by MPs on legislative scrutiny (such as the current remuneration system in New Zealand).

6. **Increase vigilance in relation to rule of law issues.** Have greater regard to rule of law issues such as the need to avoid excessive executive and regulatory power, the need to increase predictability and the need to make laws that are more manageable; and have regard to the issues referred to in relation to the government and regulators (points 7 to 13 below).
Everyone has a part to play: enhancing the Rule of Law

Government and regulators

- Improve legal and regulatory predictability. Constantly bear in mind the need for law and regulation to be comprehensible and their outcomes predictable; particularly consider the quality of regulatory guidance, the balance between guidance and secondary legislation and the consultation and analysis undertaken prior to the issuance of regulatory guidance.

- Avoid excessive executive and regulatory discretion. Remember that “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion” (Lord Bingham) and that discretion results in a reduction in actual or at least perceived fairness and predictability; attribute greater weight to this downside than has been attributed to it on occasions in the past when considering new legislation and regulation.

- Maintain and enhance the quality of the UK’s judges. Invest in the judiciary with a view to arresting falling morale and filling vacancies; be more assertive about defending the work of the judiciary in the face of media opprobrium.

- Increase legislative drafting capacity. Increase significantly the number of Parliamentary draftsmen and those trained to draft secondary legislation.

- Make the law more accessible. Establish an interactive legal database containing all current legislation with hyperlinks to definitions of defined terms and a “time travel” feature; consider embedding metadata and thus permitting users of the system to receive alerts of amendments to relevant law.

- Reduce the volume of legislation and regulation. Extend the “One in, Three out” approach (or something equivalent) to all regulators with legislative powers; be more sceptical regarding the need for changes in legislation and regulation and regarding the benefits of legislation versus other options.

- Signpost the direction of travel. Recognising that improving the quality of the UK’s laws will be a long process, identify and act on “quick wins”; signpost the direction of travel and ensure that the importance of rule of law considerations is continually emphasised; establish a “Rule of Law Challenge” (an active policy commitment to improve the predictability and fairness provided by legislation and regulation).

The judiciary

- Continue as now to hold to account and defend public and private rights. Hold those exercising executive and regulatory power to account; restrain the arbitrary exercise of power; defend public and private property, contractual and statutory rights.

- Avoid excessive judicial “activism”. Remember that the sovereignty of Parliament, the doctrine of precedent and judicial reluctance to go off in new directions are crucial to the rule of law and specifically to providing the fairness and predictability that business requires; to the extent that Parliament, the government and regulators respond to the challenge of producing laws that are themselves more compatible with the rule of law, normally apply legislation in accordance with its most natural meaning and do not use contentious general principles to subvert this meaning; resist the temptation to change the UK’s constitution by judicial action rather than through democratic processes.

The business community

- Respect the rule of law. As a basic minimum requirement, avoid action that undermines or interferes with the administration of justice or the effectiveness and accountability of institutions; honour contractual obligations and commercial agreements; honour dispute resolution procedures and decisions at all levels; interact with regulators and government authorities in a way that does not subvert the rule of law.

- Support the rule of law. Consider what help might be given to Parliament, the government, regulators and the judiciary in maintaining and enhancing the rule of law; specifically, assist these institutions in better understanding issues that are relevant to the rule of law.

- Join relevant business networks. Consider joining business networks such as that of the Bingham Centre for the Rule of Law; consider joining trade associations, other industry-specific bodies and broader business groupings with a view to sharing ideas and making a contribution to the rule of law.

- Public education. Where relevant, explain the impact of the rule of law on business more clearly and publicly; explain the reasons for particular investment decisions in ways that link the specific issues to general principles of the rule of law.
THE RULE OF LAW is an elusive concept and its connection with economic competitiveness may not be immediately obvious. We should be clear what we are talking about.

Defining the rule of law

Many people confuse the rule of law with democracy or human rights; others see it as code for the rule of judges or of lawyers in general. It is none of these things. The rule of law was established in the UK long before democracy and, conversely, there are many places in the world today which demonstrate that some form of democracy may exist without the rule of law; although some protection of human rights may be regarded as an element of the rule of law, the two concepts are distinct; and judges in a country in which the rule of law is functioning well will not be trespassing into legislative and executive activity. This is not to belittle democracy, human rights or the role of judges. They are all very important and all affect and are affected by the rule of law. The rule of law is, however, a discrete concept of vital importance to society.

Lord Bingham of Cornhill, who served as Lord Chief Justice of England and Wales between 1996 and 2000 and later as senior law lord, and who is widely regarded as one of the most distinguished British judges of modern times, offered perhaps the most authoritative definition of the rule of law. Summing it up in a sentence, Lord Bingham said it means that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”

Lord Bingham expanded this into eight principles:

> The law must be accessible and so far as possible intelligible, clear and predictable.
> Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
> The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
> 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.
> The law must afford adequate protection of fundamental human rights.
> Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
> Adjudicative procedures provided by the state should be fair.
> The rule of law requires compliance by the state with its obligations in international law as in national law.

Ban Ki-moon, then Secretary-General of the United Nations, described the rule of law similarly: “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy

to strengthen the legal foundations for the UK’s continued competitiveness.

Sam Coldicutt
Associate,
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Brexit is focusing public attention on the rule of law in a new way – and this gives us an opportunity to strengthen the legal foundations for the UK’s continued competitiveness.

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Everyone has a part to play: enhancing the Rule of Law
of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

There are, of course, many other ways one could define the rule of law. For example, the World Justice Project, a global organisation that seeks to advance the rule of law worldwide, has its own definition based on four “Universal Principles of the rule of law” and nine primary rule of law factors. While these differ in detail from Lord Bingham’s eight principles, the underlying concepts have significant overlap.

This report is focused on the link between the rule of law and competitiveness. Therefore, the rule of law issues that this report concentrates on are that the law be accessible, intelligible, clear and predictable from a business perspective and that those exercising executive, regulatory or judicial functions are not granted excessive discretion: that is, the first and second of Lord Bingham’s principles.

Defining competitiveness

In its Global Competitiveness Index, the World Economic Forum defines competitiveness “as the set of institutions, policies, and factors that determine the level of productivity of a country.” It continues, “The level of productivity, in turn, sets the level of prosperity that can be reached by an economy. The productivity level also determines the rates of return obtained by investments in an economy, which in turn are the fundamental drivers of its growth rates.”

In other words, improving an economy’s competitiveness drives the growth of that economy and ultimately the performance of its businesses and the prosperity of its people. Improving prosperity and growth is always a government policy objective but it is one with special importance for the UK as it faces the consequences of leaving the European Union and seeks to maximise economic opportunities in its new situation.

Linking the rule of law with competitiveness

In the context of Brexit, there will be plenty of practical issues that the UK will need to focus on in order to improve short-term competitiveness – border controls, trade deals and the like – and there is a risk that the rule of law can be seen as an abstract concept whose effects on economic competitiveness are intangible and only tell over the very long run.

Nevertheless, the rule of law is vital for competitiveness because it produces the confidence necessary for long-term investment. As the United Nations Global Compact says, “For businesses, an operating environment which is governed by the rule of law provides the basis for commercial certainty and creates the foundation for long-term investment and growth, and sustainable development for all.”

Institutional economists such as Nobel Laureate Douglass North have described in more detail the importance of property rights and low transaction costs in economic development, and have pointed to the vital role that stable and predictable laws have in supporting economic growth.

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Friedrich Hayek described the relationship between the rule of law and economic prosperity in *The Road To Serfdom*, in which he said that rule of law “means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.” Hayek goes on to say that such laws “could almost be described as a kind of instrument of production, helping people to predict the behavior of those with whom they must collaborate.” The rule of law thus contributes towards the productive capacity of an economy by providing the “fair certainty” that the business community needs to arrange its affairs with employees, suppliers, customers, the government and other stakeholders.

Think about a business that is considering making an investment in a particular country, perhaps in new production facilities or a new regional hub. It will, of course, consider both the upside potential of the investment and the risks inherent in it. The greater these perceived risks, the less attractive the proposed investment will be. This much is obvious. What is less widely recognised outside the business community is that the risks that need to be weighed include uncertainties arising from the country’s legal system. If that system allows excessive executive or regulatory discretion (and, particularly, if that discretion is perceived to be exercised or capable of being exercised in an arbitrary manner) or makes extensive use of vague and uncertain laws or has any other features that result in legal rights and duties being unclear or unpredictable, then there will be a significant legal risk associated with the investment in that country. In some extreme cases, this alone might result in the proposed investment being abandoned. In many other cases, it will be a material factor in the ultimate “go/no go” decision or the decision whether to invest in one country rather than another. In other words, the greater the respect for the rule of law in a particular country, the lower the risk to which a potential investor will be exposed and the greater the attractiveness of that country for investment.

Of course, different industries have different investment needs and options and will thus assess particular countries differently. Some businesses may be obliged to invest in high risk countries, including those with low respect for the rule of law (the perceived potential returns being compensatingly high). However, the kind of investment that the UK is likely to be seeking in the coming years is investment in industries which can be located not only in the UK but also in many other developed and developing countries. Moreover, these are industries for which rule of law issues are particularly important: research-based, high tech and other innovative industries which need certainty as to their property rights and regulatory status and confidence that they won’t be exposed to damaging retroactive interpretations of vague principles, as well as financial services businesses that need regulatory certainty. If such businesses see a risk that the benefits of their innovation or investment will be taken away from them or that the regulatory boundaries within which they operate are unclear, they will be much less likely to invest in the UK.

Rule of law issues are not binary. Countries cannot be divided neatly into those that respect the rule of law and those that do not. There is a spectrum. By way of illustration, the World Justice Project scores and ranks countries on the basis of 44 indicators across nine primary rule of law factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, Criminal Justice, and Informal Justice. This results in the 113 countries and jurisdictions analysed in its 2016 report having scores for adherence to the rule of law ranging from 0.28 to 0.89 (out of a maximum score of 1.00).  

9  Friedrich Hayek, *The Road To Serfdom*, Chapter 6 “Planning and the Rule of Law”. We should note that Hayek’s thinking on the rule of law evolved significantly over his career.

The strength of the rule of law and, in particular, the degree of fairness and predictability afforded by it thus varies from place to place, as does the actual or perceived direction of travel in relation to these characteristics. This impacts business confidence and investor views of different countries, and hence economic competitiveness.

The UK needs to move in the right direction, and to be seen to do so, thus building on its past successes in the rule of law and strengthening the foundations for generating prosperity.

US Consumer Financial Protection Bureau – an example of the link between the rule of law and competitiveness

The US Treasury has recently recognised the importance of strengthening the rule of law in its comments on the approach to rulemaking of the US Consumer Financial Protection Bureau, an agency of the United States government responsible for consumer protection in the financial sector. In the quotation below (emphasis added), it explicitly links strengthening the rule of law with improving the US’s competitiveness through innovation.

“The CFPB should issue rules or guidance subject to public notice and comment procedures before bringing enforcement actions in areas in which clear guidance is lacking or the agency’s position departs from the historical interpretation of the law.

“The CFPB wields broad authority to impose monetary sanctions through enforcement actions. The CFPB’s excessive reliance on case-by-case enforcement to develop the UDAAP [Unfair, Deceptive or Abusive Acts and Practices] standard, in particular, too often deprives regulated parties of fair notice and chills innovation in financial products and services. Consumers ultimately pay the price in reduced choices or higher costs.

“To create a more stable regulatory environment, the CFPB should adopt regulations that more clearly delineate its interpretation of the UDAAP standard. The agency should seek monetary sanctions only in cases in which a regulated party had reasonable notice — by virtue of a CFPB regulation, judicial precedent, or FTC precedent — that its conduct was unlawful…

“Importantly, this reform would not deprive the CFPB of the ability to target and stop practices not previously understood to be prohibited, as the agency would retain the authority to issue a cease-and-desist order or initiate an enforcement action seeking injunctive relief. If the CFPB concludes a new practice is a problem in the broader market, it should conduct notice and comment rulemaking to prohibit the practice. This reform would give regulated parties the certainty and predictability they need to meet diverse consumer financial needs without fear of unexpected sanctions, while preserving the CFPB’s flexibility to respond to new risks.”

1 Parliament and the devolved legislatures

AFTER BREXIT, it will be the responsibility of the UK Parliament to enact laws in areas that are currently within the competency of the EU. Whether or not one applauds this repatriation of power, it results in Parliament being ultimately responsible for securing and enhancing the rule of law within the UK. This provides an opportunity that needs to be seized: but seizing it will require considerable determination and some innovation on the part of Parliament.

Parliament describes its main functions as being to:

> check and challenge the work of government (scrutiny);
> make and change laws (legislation);
> debate the important issues of the day (debating); and
> check and approve government spending (budget/taxes).12

It is the first and second of these functions that have the most direct impact on the rule of law. Parliament needs to make sure that it appropriately scrutinises proposals made to it, whether for primary or secondary legislation, and that it ensures that they respect and, where possible, enhance the rule of law.

The powers of the Scottish Parliament and the Welsh and Northern Irish Assemblies are more limited than those of the UK Parliament but they too make and change important legislation. This report focuses on the UK Parliament and much of the detail does not apply directly to these other bodies. However, the principles underlying our suggestions apply to them and, like the UK Parliament, they too need to consider how they can best use their powers in a way that respects and enhances the rule of law.

1.1 The balance of types of legislation

Parliament is involved in scrutinising both primary legislation and some secondary legislation (see Glossary below). The traditional view of the division between primary and secondary legislation is that primary legislation sets out the substance of the law and enshrines policy decisions, whilst secondary legislation fills in technical and implementing details. Primary legislation is debated in Parliament, while secondary legislation may be scrutinised in Parliament (albeit to a much lesser extent, if at all). The system works as long as (i) secondary legislation is restricted to “filling in the details” and (ii) the level of scrutiny of both primary and secondary legislation is adequate.

Glossary

> **Primary legislation** is created by the legislature (i.e. Parliament) and generally consists of Acts of Parliament. These Acts often set out broad principles and delegate authority to the executive (i.e. the government) to make more specific laws relating to the Act in question.

> **Secondary legislation** (or delegated legislation) is primarily created by the executive (i.e. Her Majesty’s Government, led by the Prime Minister and the Cabinet, supported by the Civil Service or regulators). It is generally issued by ministers or regulatory agencies, using powers delegated by Parliament in primary legislation.

> Most secondary legislation consists of **statutory instruments** (or SIs). There are two main ways that statutory instruments can be scrutinised:

  – **Affirmative instruments**, which both Houses of Parliament must expressly approve.

  – **Negative instruments**, which become law without a debate or a vote but may be annulled by a resolution of either House of Parliament.13
Parliament thus needs to consider the appropriate balance between primary legislation, secondary legislation and guidance. This involves ensuring, on the one hand, that primary legislation enshrines policy decisions and permits secondary legislation only where there is detail to be filled in but, on the other hand, ensuring that there is not too much detail in the primary legislation such that it requires frequent amendment. Perhaps the most crucial role of Parliament is to ensure that appropriate authority to make legislation is delegated but that this delegation is not excessive.

It is in this context that so called “Henry VIII clauses” need to be considered (see the box below). Such clauses may well be necessary and useful in some circumstances (such as Brexit) to allow legislation to be modified without taking up precious Parliamentary time. However, giving the government the power to overturn or amend Acts of Parliament is not something that should be done lightly. Such powers may, if inappropriate in scope, constitute a threat to the rule of law: first, because they can lead to law that is insufficiently scrutinised and hence a greater chance that the resulting legislation lacks clarity and creates unpredictability, violating the first of Bingham’s principles; secondly, because the breadth of such powers can blur the line between law and ministerial discretion, threatening the second of Bingham’s principles.

The increasing reliance on Henry VIII clauses over the last century has been described recently in Lord Judge’s Bingham Lecture of May 2017. Lord Judge, who served as the Lord Chief Justice of England and Wales from 2008 to 2013, noted that:

“They [i.e. Henry VIII clauses] are nowadays granted with a benevolence far in excess of their numbers in the 1930s. Yet public concern at that time led the Donoughmore Committee to recommend that “the use of the so-called “Henry VIII clauses”, conferring power on a Minister to modify the provisions of Acts of Parliament… should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds.” As to delegated legislation generally, it concluded that “there is at

12 Source: http://www.parliament.uk/about/how/role/
14 Section 75 (7)(b) says that a Treasury order pursuant to section 75 “may not be made unless a draft has been laid before and approved by resolution of each House of Parliament”. However, section 75 (8) gives the Treasury power if they “think it necessary” to make an order without complying with section 75 (7)(b). Such an order lapses after 28 days if not approved by resolution of each House of Parliament but “the lapse of an order… does not invalidate anything done under or in reliance on the order before the lapse and at a time when neither House has declined to approve the order” (section 75 (8)(c)).
present no effective machinery for Parliamentary control and the consequence is that much important legislation is not really considered and approved by Parliament”. That was in 1932. All I can add is that no notice was taken of Cassandra when she piteously warned against the Trojan Horse.”

The Donoughmore Committee report of 1932 referred to by Lord Judge found that nine Acts of Parliament introduced between 1888 and 1929 contained such clauses. By comparison, according to the Hansard Society, “in the 2015-16 parliamentary session, of the 23 government bills that achieved Royal Assent, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation.”

At the time of publication of this report, there is considerable debate as to the appropriateness of the use of Henry VIII clauses in the European Union (Withdrawal) Bill. The Bill’s purpose is to allow the transposition of EU law into UK law to avoid a legal vacuum at the time of Brexit. The Bill as currently drafted proposes that “A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal”. This is only one of several Henry VIII clauses in the Bill and they have all attracted controversy. Disquiet has centred around the discretion that ministers have to deem something a “deficiency”, the broad scope of powers implied by the word “appropriate” (rather than, say, “necessary”), the appropriateness of the Bill’s proposal for the period within which this power can be exercised, and the sheer amount of secondary legislation that this will introduce into a system that is already sub-optimal at providing sufficient scrutiny (as described in paragraph 1.2 below).

Detailed consideration of the European Union (Withdrawal) Bill is beyond the scope of this report. Our purpose here is to consider the limits on the appropriate use of Henry VIII clauses more generally. We accept that such clauses may be required, not only to deliver Brexit but also at various times in the future. The amount of detailed law that is required to be made and changed as a consequence of Brexit is such that, even if all of our recommendations in relation to Parliament were adopted, Parliament could never handle all of the work. However, while Henry VIII clauses can be a pragmatic way of allowing for nimbleness and flexibility in the legislative process, their inclusion in statute should be accompanied by measures for monitoring their use and reining in excesses. Given the difficulty of transferring power back to Parliament once it is ceded to the executive, failure to control the use of Henry VIII clauses may mean, in the long run, an ongoing transfer of legislative power from Parliament to the executive leading to a decline in democratic oversight and a weakening of the rule of law.

What can be done about this? Given that the Henry VIII clauses in the European Union (Withdrawal) Bill will be the most far-reaching of them all so far – facilitating, as they do, the biggest constitutional change and legal restructuring of the UK in modern times – there is an opportunity to use this occasion to set expectations for how future Henry VIII clauses should be used. Considerable literature exists on this subject, though a good starting point might be the Donoughmore Committee report of 1932, which recommended that the adoption of such clauses should be “justified to the hilt” and that:

“[their] use should be avoided unless demonstrably essential. It can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machinery

16 This is the period starting from the passing of the Act until two years after a day designated by a minister as the “exit date”.
17 We consider the domestication of European Union law in our report entitled “‘The Great Repeal Bill’: Domesticating EU Law”, dated June 2017.
Everyone has a part to play: enhancing the Rule of Law

arrangements vitally requisite for that purpose; and the clause should always contain a maximum time limit of one year after which the powers should lapse. If in the event the time limit proves too short – which is unlikely – the Government should then come back to Parliament with a one clause Bill to extend it.”

In addition, the report states that “the precise limits of the law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it: when discretion is conferred, its limits should be defined with equal clearness.” While these recommendations may not be applicable in their entirety for the Henry VIII clauses that will be used in relation to Brexit, the underlying concepts of limited scope and duration remain important. 18

In summary: our contention is not that Henry VIII clauses be avoided entirely, but rather that their purpose should have extremely strong justification, their scope should be clearly delineated and their duration should be time limited.

1.2 The scrutiny of legislation

There are concerns about the level of scrutiny of all legislation but these concerns are greater in relation to secondary legislation than in relation to primary legislation. Over the last few decades secondary legislation has become ever more prevalent. Most of the UK’s legislation is now secondary legislation. According to the Hansard Society, “between 1950 and 1990, the number of individual Statutory Instruments (SIs) produced each calendar year rarely rose above 2,500.” In 2016, it was reported that “in the region of 3,500 SIs are made each year.” 19 Not only has the absolute number of SIs risen, but the sheer volume of text within these SIs to be scrutinised has ballooned: “the total number of pages of statutory instruments laid has doubled compared with the years before 1990.” 20

While Parliament theoretically has the ability to scrutinise much (though not all) secondary legislation, this does not always happen and the level of scrutiny is in any case generally unsatisfactory. In its report “The Devil is in the Detail: Parliament and Delegated Legislation”, the Hansard Society has reported that the scrutiny procedures “are complex and often illogical, and many parliamentarians willingly admit they don’t understand them”. To quote further:

“Generally speaking, however, DLC [Delegated Legislation Committee] debates are often a waste of Parliamentary time… Members are ill-prepared for the debates, they can often be seen dealing with constituency correspondence, and they may have no knowledge at all of the often technical issues under discussion. The average length of a debate in the 2013-2014 session was just 26 minutes, but can be as short as 22 seconds. They make a mockery of the concept of effective scrutiny.” 21

Excessive secondary legislation is a threat to the rule of law inasmuch as it leads to excessive executive power. That is, as the volume of secondary legislation rises, and the level of scrutiny of this legislation falls, government ministers have increasingly free rein – in effect, to make law by decree. “Law” starts to look increasingly like ministerial discretion, threatening the second of Bingham’s principles. This is particularly pernicious in light of what the House of Lords

18 There has of course been considerable additional commentary on this issue since Donoughmore. An interesting source of further information, which summarises the constitutional standards used by the House of Lords Constitution Committee in its reports of 2001-2015, can be found on pages 7-9 of “The Constitutional Standards of the House of Lords Select Committee On The Constitution” (Second Edition) by Jack Simson Card, Robert Hazell and Dawn Oliver https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit/publications/164
21 Source: The Devil is in the Detail: Parliament and Delegated Legislation, Hansard Society.
Select Committee on the Constitution has called the “trend whereby delegated legislation has increasingly been used to address issues of policy and principle, rather than to manage administrative and technical changes.”

As the House of Lords Select Committee goes on to say:

“Delegated legislation cannot be amended, so there is little scope for compromise. Far less time is spent by Parliament debating delegated legislation than primary legislation, and there is little incentive for members of either House, but particularly the House of Commons, to spend their precious time debating legislation that they cannot change. Finally, established practice is that the House of Lords does not vote down delegated legislation except in exceptional circumstances. The result is that the Government can pass legislative proposals with greater ease and with less scrutiny where they are able to do so through secondary, rather than primary, legislation. These developments have strengthened the Executive at the expense of Parliament’s legislative authority.”

This is problematic not only from a separation of powers perspective but also from a rule of law perspective: the lower the scrutiny of secondary legislation, the greater the chance that the resulting legislation lacks clarity and creates unpredictability (thus violating the first of Bingham’s principles).

1.3 What should be done?

So what is to be done? We do not believe that there is a single solution to the problem. However, we believe that there are a series of steps that could be taken and which would, cumulatively, make a very significant difference. These can broadly be divided into actions that improve parliamentary procedure, actions that improve parliamentary capacity, actions that improve parliamentary skills and more radical solutions.

1.3.1 Improving Parliamentary processes

Rationalising and simplifying current Parliamentary scrutiny procedures or, potentially, introducing new procedures that are more fit for purpose could well result in a material improvement in the current situation.

One option would be to replace the ad hoc Delegated Legislation Committees with one that looks similar to the European scrutiny committee system in the House of Lords (i.e. a central committee supported by a number of sub-committees for particular policy areas, all supported by a dedicated secretariat providing briefings and advice).

An instructive model might be the Delegated Legislation Scrutiny Committee recently proposed by the Hansard Society to scrutinise all statutory instruments. The Hansard Society proposes that such a committee “would: be in control of Members not whips, with the chair and members elected in the same way as other select committees; be supported by a set of thematic sub-committees, some of whose members would also be members of relevant departmental select committees… have administrative, legal and research support via a committee secretariat; sift and scrutinise [Statutory Instruments]… and turn over to the whole House for further consideration those SIs of concern, with procedures in place to ensure that any SI reported to the House would have to be debated and voted on. Members would be granted a “conditional amendment” power alongside procedural hurdles to ensure that ministers cannot ignore their concerns.”

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Another option – which could be additional or alternative to a Delegated Legislation Scrutiny Committee – would be to establish a Parliamentary “Legislative Standards Committee” with a mandate to promote high quality secondary legislation, potentially in conjunction with the Government Legal Department. This would be a natural partnership to assess the quality of secondary legislation from a rule of law perspective (rather than from a policy perspective). The establishment of such a committee was recently endorsed by the House of Lords Select Committee on the Constitution.

The Regulations Review Committee in New Zealand might be an instructive model for such a committee. New Zealand’s Regulations Review Committee is a bipartisan committee which (by convention) is chaired by an Opposition member and which “acts on the Parliament’s behalf to ensure that delegated law-making powers are being used appropriately. It examines all regulations, investigates complaints about regulations, and examines proposed regulation-making powers in bills for consistency with good legislative practice. The committee reports to the House and other committees on any issues it identifies. The House can “disallow” a regulation, meaning it no longer has force.”

Whatever is done to enhance the scrutiny of legislation by the House of Commons, it would be sensible to make further use of the House of Lords. The Lords already undertakes much valuable scrutiny work but it could do more.

In order to handle the increased burden, the House of Lords will, like the House of Commons, need to look at its own procedures with a view to improving the effectiveness and efficiency of its scrutiny. More fundamentally, we suggest that consideration also be given to the composition of the House of Lords. Already it has a reservoir of expertise that, in relation to many subjects, is broader and deeper than that of the House of Commons. In particular, there are a number of Lords with business, scientific or other professional experience who can and do bring valuable insights to scrutiny work. It would be helpful if this reservoir were to be expanded. We suggest that having the skillset, time and inclination to assist in the scrutiny of legislation should be regarded as one of the most important criteria in the selection of those to be granted peerages.

Of course, improving Parliamentary processes would not of itself necessarily result in better legislation. In particular, this impact would only be achieved if MPs and Lords were prepared to make greater use of their power of veto over Statutory Instruments, either on the ground that they have not had sufficient time to scrutinise them properly, or on the ground that they are defective from a rule of law perspective. We recognise that the use of the power of veto by the House of Lords would be politically sensitive, probably impossible. However, there is no reason in principle why Parliament should not establish procedures whereby, in general, the output of the Lords’ deliberations on a particular instrument is reported to the Commons in a form readily accessible to MPs when they consider whether or not to accept the relevant instrument.

25 Source: https://www.parliament.nz/en/get-involved/features-pre-2016/document/00NZPHomeNews201204161/the-role-of-the-regulations-review-committee. The detail of any review committee similar to that of New Zealand would require careful consideration. In particular, it is recognised that useful review work is already conducted by the Joint Committee on Statutory Instruments (in relation to issues concerning excess of power) and the House of Lords Delegated Powers and Regulatory Reform Committee (in relation to proposed powers in bills, consistency with good practice and other matters). A new committee could either work alongside these existing committees or subsume them.
1.3.2 Improving Parliamentary capacity

Brexit will result in significant law-making competences that are currently outsourced to Brussels being returned to Westminster. In many areas the EU has “exclusive competence” to legislate (i.e. the EU alone may promulgate legally binding instruments in relation to such areas). These areas include the customs union, competition law, marine conservation and trade policy. In other areas the EU has “shared competence” (i.e. both the EU and its member states may promulgate legally binding instruments in the area concerned, albeit that member states can do so only where the EU has not exercised its competence or has explicitly ceased to do so). These areas include the EU’s internal market, social policy, agriculture and fisheries (excluding marine conservation), the environment, consumer protection, transport and energy.

Currently, Westminster has “outsourced” law-making in these areas to Brussels. Brexit will terminate this outsourcing. It is not at all clear that Parliament is ready to deal with managing these newly repatriated competences on top of managing the “business as usual” requirements that existed prior to Brexit. Therefore, steps may need to be taken to improve Parliament’s capacity to meet these increased demands.

In suggesting an improvement in Parliamentary capacity, we are not suggesting an increase in the number of MPs. Rather, we believe that new support structures, working methods and forms of incentivisation should be used in order to ensure that MPs’ time is optimally used.

Changing the way in which MPs deal with constituency matters may lead to a significant increase in their capacity as scrutinisers of legislation. Lord Norton of Louth’s recent comments on this issue are instructive:

“Constituents look to MPs to put the constituency first. Constituency work takes up an increasing volume of an MP’s weekly schedule. However, there is a difference between pursuing constituency interests and the interests of particular constituents. MPs are well placed to make the case for the economic, environmental and social benefit of their constituencies. Constituents look to them also to take up their particular grievances, even if not related directly to matters for which government has responsibility. Demand is matched by supply. MPs are reluctant to say no to constituents. They see casework as keeping them aware of the problems faced by constituents – it keeps them in touch with the real world. However, most MPs are not trained social workers. Many of the problems brought to them could be better dealt with by professional agencies or by individuals trained to deal with such issues. Insofar as issues could still be pursued via Members, there may be a case for more resources to hire additional caseworkers or someone trained to refer the constituents to the most appropriate authorities. As things stand, the more constituency casework an MP takes on, the less time there is to devote to the particularly important cases and to pursuing the interests of the constituency. There is also an opportunity cost in terms of fulfilling the tasks which only MPs collectively can fulfil and that is calling government to account and scrutinising legislation.”

We appreciate that politics has become more local and this trend is likely to continue. Whatever the ideal, it would be unrealistic to expect that MPs ignore constituency demands. However, it should be possible to help them address these demands in a way that frees up more of their time for legislative scrutiny and also to assist them in making best use of the time that they are able to spend on such scrutiny.

27 Source: https://nortonview.wordpress.com/2016/06/22/mps-and-constituency-service/
In general, MPs have more staff available to them than was the case a generation ago. However, we believe that there is a strong case to invest in further support staff. Such staff could both help deal with constituency matters (whether directly or by referring constituents to appropriate authorities) and assist MPs in the task of legislative scrutiny. Of course, this would only work if those assisting MPs had appropriate training and skills and MPs themselves might need assistance and coaching in working out how best to delegate tasks and otherwise get the best out of their staff. MPs would also need to have the will to engage in legislative scrutiny. However, if appropriate professional staff were available and MPs were skilled in using them, the benefits in relation to legislative scrutiny could be significant and MPs would still be free to intervene directly in constituency matters where appropriate. The new support staff would leverage their time rather than seal them off from constituency matters.

1.3.3 Investment in professional development and expert support

Another way to improve the working of Parliament is to invest in the training and professional development of MPs. As a Parliamentary report 28 has indicated:

“It is fair to say that the skills that win a campaign are not the same as those required for detailed line-by-line scrutiny of legislation or the forensic questioning of select committee witnesses.”

Despite the need for reskilling implied by this observation, the same report noted that:

“according to the General Election Planning Group in May 2011 take-up by Members of briefings and talks was “disappointing”. The Hansard Society, too, has noted that support ‘in principle’ by the main parties of induction and training programmes did not noticeably translate into attendance at those programmes by new Members. Only about 19% of new Members attended at least one session; few individual sessions achieved an attendance of more than six, and a number were cancelled for zero attendance.”

Training and professional development can help to bridge the gap between Parliament’s mission of scrutinising legislation and MPs’ lack of expertise in this task. It may therefore be very helpful to invest in such programmes, using new technology (e.g. video and online interactive approaches) as well as in-room approaches, that take place throughout an MP’s time in Parliament and not just at induction. It is encouraging to see that there has recently been some improvement in the area of training delivery channels – for example, online videos and podcasts were offered after the 2015 election to provide information in more diverse and accessible ways – but more can be done. In addition, professional development programmes should include material on the importance of the rule of law and issues impacting it, as well as the specifics of legislative scrutiny.

Of course, training and other professional development will not completely bridge the skills gap that currently exists. Much proposed legislation is so technical that its implications can only be properly understood by experts. With the best will in the world, most MPs will never develop the necessary expertise even in a few areas. It is thus important that ways be found to give them access to the required expertise (e.g. by facilitating the provision of input to proposed legislation by those outside Parliament). To some extent this is already done but much more is required. The obtaining of the necessary input should be part of the standard procedure of the relevant Parliamentary Committees.

28 Source: “First weeks at Westminster: induction arrangements for new MPs in 2015 - Administration Committee” https://publications.parliament.uk/pa/cm201314/cmselect/cmadmin/v193/v19309.htm
1.3.4 A more radical suggestion

It is arguable that the inadequacies in the scrutiny of legislation are not entirely explained by the inadequacies of Parliamentary procedures, the lack of Parliamentary capacity or the lack of appropriate skills among Parliamentarians: it may be the nature of the task itself. Put simply, the scrutiny of legislation involves tough, detailed and unglamorous work out of the limelight and, as a result, it is not as attractive or immediately rewarding as some other aspects of the roles of Parliamentarians. We have no way of assessing whether or to what extent this might be a factor in the inadequacies of the current scrutiny processes but the possibility is worth exploring.

If it is the case, then incentives to encourage participation in the process might be an option. These could be negative incentives (e.g. docking pay for failing to attend Parliament and participate in the process of scrutiny and debate without leave, as happens in New Zealand) or (albeit less likely from a political perspective) positive incentives (e.g. economic rewards for proactive participation in legislative scrutiny).

1.4 The ultimate purpose

Of course, improving the ability of Parliament to scrutinise legislation is not an end in itself. The end is the improvement of the quality of the UK’s legislation and specifically the enhancement of the rule of law. In scrutinising legislation, MPs and Lords need to have particular regard to the need to avoid excessive executive and regulatory power, the need to increase predictability and the need to make laws that are more manageable. In Section 2, we move on to consider these issues in the context of the role of the executive and regulators.

In summary

Parliament can enhance the rule of law by:

> Establishing an appropriate balance between primary legislation, secondary legislation and guidance.
> Improving Parliamentary processes.
> Improving Parliamentary capacity.
> Investing in professional development and expert support.
> Considering more radical approaches, such as the use of incentives.
> Increasing vigilance in relation to rule of law issues.
Everyone has a part to play: enhancing the Rule of Law
THE EXECUTIVE BRANCH of government is in practice responsible for the drafting of the overwhelming majority of legislation (whether primary or secondary) and its presentation to Parliament. It should, therefore, have regard to the need to enhance the rule of law and, specifically, to the need to avoid unpredictability and excessive executive and regulatory discretion. It also has several other crucial responsibilities: first, a responsibility in relation to the judicial system; secondly, a responsibility in relation to the accessibility of UK law; thirdly, a responsibility to avoid unnecessary legislation; and, fourthly, a responsibility to signpost the direction of travel.

In addition, in recent years, power to make secondary legislation has been conferred on many regulators, such as the Financial Conduct Authority and other industry-specific regulators. Consequently, they too need to focus on the rule of law in the exercise of their legislative function.

2.1 Improving legal and regulatory predictability

Asking our Parliamentary draftsmen or those writing secondary legislation to secure absolute certainty is asking the impossible. No language has such mathematical precision that it secures certainty in all situations. Furthermore, it is impossible to avoid requiring that value judgements be made by those enforcing or applying the law. For example, the English law of negligence is based on the concept of “reasonable care”, which requires that someone (normally a judge) decides what is or is not “reasonable” in a particular situation, based on the facts. In short, we should not fool ourselves into believing that absolute certainty is possible or even always desirable.

Nonetheless, there are significant rule of law concerns with much modern legislation. In particular, there has been a trend towards the use of vague, uncertain or convoluted language and inappropriate division between primary legislation, secondary legislation and executive and regulatory guidance (see the examples given on page 22). Many of the more egregious examples of this are of UK origin. However, others emanate from the EU. In any event, Brexit offers an opportunity to reassess the situation and recalibrate the UK’s approach to rule of law issues.

It is important not to overstate the extent to which Brexit will alter the position. Some of the criticism to which EU legislation has been subject over the years has related to policy issues that are beyond the scope of this report and some criticism of EU legislation has been unjustified. Furthermore, Brexit will not give the UK carte blanche to recast its legislation exactly as it wishes. First, in the short term there is a limit to how much change is possible or, bearing in mind that change itself creates burdens and uncertainties for those it affects, is desirable. The result that the European Union (Withdrawal) Bill rightly envisages is that, save where specific amendments are effected, the entire corpus of applicable EU law will be transposed into English law with effect from the time of Brexit. Secondly, even in the longer term, there will be limits on the amount of change that can be made because the UK will naturally wish to ensure that in many areas its laws and regulations are harmonised with those of other countries (both inside and outside the EU), since this will improve the free flow of international trade and enable co-ordinated action against wrongdoing and undesirable practices. Hence it is unrealistic to think that the problems identified in this report can be addressed overnight or, indeed, ever be completely addressed.
That said, there are a number of rule of law problems with EU legislation that the UK should be able to deal with post-Brexit. Many of these are the almost inevitable result of the multi-national, multi-lingual, multi-legal system legislative process of the EU or other EU-specific issues that will not (or, at least, should not) constrain the UK in the future. The Appendix to this report explains some of these issues and gives examples of the kind of resulting problem that the UK should be able to address in the future.

There are a number of matters relating to regulatory guidance and the consultation process prior to the making of regulations and the issuance of guidance that are particularly ripe for reform. For example:

> Even in areas in which continued harmonisation of regulation is necessary, EU guidance could be complemented with more precise and helpful guidance with a view to enhancing comprehensibility and predictability in a UK context without in any way detracting from the wider harmonisation.

> In addition, some parts of the guidance could be incorporated into new Statutory Instruments with a view to ensuring that the fundamentals of the law are included in legislation whilst accepting that there is a role for guidance relating to the detail of the practical implementation of the law.

> Brexit may also provide an opportunity to improve the process by which regulatory guidance is issued. Some EU-wide regulatory guidance is the subject of insufficient consultation and analysis: for example, while the European Securities and Markets Authority (ESMA) generally consults with business and conducts cost-benefit analyses on the technical standards and regulatory guidance that it issues, the “Q&A” documents that it issues in order to explain these standards and guidance often do not benefit from such processes. This is problematic because in a heavily regulated industry such as finance these Q&A documents are common, and effectively have the force of law. The UK may be able to improve on this situation, with corresponding benefits to business and investors.

The process for consultation in relation to primary legislation could also be improved. Currently, there is frequently consultation on policy in the form of Green Papers and White Papers. However, there is often insufficient opportunity for comment to be made on the precise wording of a bill prior to its presentation to Parliament. Providing greater opportunities for such comment could materially assist in the identification of unintended consequences or other issues arising from proposed new legislation.
Examples of sub-optimal EU guidance in financial services regulation and data protection regulation

The updated Markets in Financial Instruments Directive (aka MiFID II) which is due to apply in European member states from January 2018 is an extremely lengthy and complex set of regulations containing many areas of ambiguity.

MiFID II requires investment banks and brokers to unbundle the cost of investment research services from investment execution services. Investment management firms are required to pay for such research services separately to execution services.

This is a significant change in business model for both these types of firm and requires a clear definition of “investment research”. None is given in the primary or secondary legislation, although recitals to secondary legislation offer a description. The European Securities and Markets Authority (ESMA) has offered guidance on what may or may not be deemed “research” but areas of ambiguity remain. For example, “minor non-monetary benefits” can continue to be provided without the cost having to be unbundled. So if investment research were freely accessible – for example, via a public website – would this sidestep the rules on the unbundling of research on the basis that the ease of access to it by all market participants reduces it to a “minor non-monetary benefit” for any particular market participant? Further guidance implies this is so in certain limited cases but offers no explanation as to whether these are special cases or intended as establishing a more general principle.

Another example comes from the General Data Protection Regulation which will apply in all EU member states from May 2018. Clear and timely guidance on the Regulation is important as it will lead to a step change in sanctions, with fines of up to €20m or 4% of annual worldwide turnover. However, many aspects of this law are still uncertain. For example, the Regulation is intended to take a risk-based approach so that it is only necessary for businesses to appoint a data protection officer or carry out privacy impact assessments if the processing is “large scale”. Despite the fact this is a fundamental concept, European regulators have so far only provided very limited guidance on what “large scale” means in practice. Businesses planning for this new law would greatly benefit from a more concrete description of this term.

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The rule of law is a culture which must be nurtured and actively promoted. This report makes clear that this is a shared responsibility. It is not just the task of courts and lawyers. Governments, parliaments, businesses all have an important role to play in ensuring that the rule of law is not only defended but positively advanced.

Murray Hunt
Director,
Bingham Centre for the Rule of Law

Finally, in this connection, it should not be forgotten that the rule of law concerns with modern law are not limited to EU legislation and regulations. Indeed, only one of the numerous examples of problems given in our 2015 report on the rule of law related to EU law. Matters that have never been within the competence of the EU require as much attention as those that have. Irrespective of the nature of proposed legislation or regulations, those proposing and drafting and those scrutinising and approving it must constantly bear in mind the need for legislation and regulation to be comprehensible and their outcomes predictable (see the box below for an example of unpredictability arising from over-broad UK legislation). This objective may well come into conflict with other sensible objectives and prioritisation of these objectives will be necessary. Our suggestion is that the objective of clarity and predictability needs to be higher up the list of priorities than it appears to have been over the past couple of decades.

The problem of over-broad UK legislation

As its name suggests, the Proceeds of Crime Act 2002 was primarily intended to assist in the thwarting of money laundering, but it criminalises things that have nothing to do with this. For example, according to the ordinary English meaning of its words, a teenager who is given what he or she knows is a pirated copy of music by a friend commits the offence of acquiring criminal property. This has presented the courts with a dilemma. In 2012, Mr Justice Mitting said that he could “not conceive that Parliament intended” to criminalise such conduct and, on this basis, he decided that the Proceeds of Crime Act should not do so. He did not seek to square the wording of the Act with his conclusion. By comparison, in an almost identical case a year earlier, Mr Justice Lloyd Jones had reached the opposite conclusion.

The issue we are focused on is not so much who was more “correct” in their approach. It is rather that in this situation the judiciary was in the unenviable position of having either to uphold the letter of a law that goes well beyond the government’s stated objective of thwarting money laundering and, in so doing, confer huge practical power on the prosecuting authorities, or to ignore the letter and thus, to a degree, ignore the sovereignty of Parliament. Neither option advances the rule of law.
2.2 Avoiding excessive executive and regulatory discretion

Anyone exercising executive authority (including Ministers of the Crown and regulators) or charged with law enforcement (including the police and prosecutors) must be invested with sufficient power to perform their functions and must be able to exercise discretion. That is the nature of executive and regulatory authority. Law enforcement agencies need sufficient discretion to be able to prioritise their work and to apply common sense and a sense of proportion in the discharge of their functions. It would be wrong to seek to remove such necessary powers and discretion or, through inappropriate use of legal constraints or judicial oversight, to produce a situation in which it is judges rather than government ministers, regulators and law enforcement authorities who are exercising power and discretion. Nothing in the concept of the rule of law would justify such an approach.

On the other hand, as Lord Bingham indicated, the rule of law requires that “questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion”. Furthermore, the rule of law requires that law-making be clearly separated from executive, regulatory and law enforcement functions. This appears to have been forgotten on occasions in recent years (see the box below).

The separation of law-making from the executive and law enforcement functions

Legislation has increasingly been expressed in broad terms going well beyond the scope of the underlying problem. On occasions, in response to concerns, assurances have been given that the prosecuting authorities will not take action in relation to situations falling outside the purpose of an Act. Despite such assurances, broadly drafted laws have the effect of allowing prosecuting authorities to decide what the law is. This creates uncertainty and leaves significant unregulated power in the hands of these authorities (see the example relating to the Proceeds of Crime Act 2002 on page 23).

In addition, regulatory authorities have ever-increasing powers to impose penalties which may be very substantial. In November 2014, five banks were ordered to pay a total of £1.1 billion for failing to control business practices in their forex trading operations. Such fines are eye-watering, but their level alone is not the issue. The issue is that there is no understandable scale of penalties and it is therefore almost impossible to predict the likely level of penalties. The guidelines relating to the use of powers to impose penalties (normally issued by the regulatory authority itself) are too vague to provide any meaningful constraint or certainty.
It is by no means only EU legislation and legislation derived from EU requirements that is at fault. However, as in other areas impacting the rule of law, the new constitutional settlement that Brexit will bring about makes this an appropriate time to reassess the direction of travel. It is excessive governmental, regulatory and judicial discretion that we are concerned with, not any use of discretion itself. A purist approach that sought to get rid of any ability to exercise discretion would be impractical and disproportionate; and while regulators’ dual role as lawmakers and enforcers may be an issue from a “separation of powers” perspective, it also offers benefits from the feedback loop between evolving business conditions and lawmakers. On the other hand, discretion should be carefully monitored and should be subject to checks and balances. Decisions to confer discretion should be based on a pragmatic mix of considerations, including the proposed recipient’s level of democratic accountability, their ability to exercise disproportionate influence beyond the specific matter over which discretion is offered, the need for agility and pragmatism to deal with evolving market conditions, their subject matter expertise, their institutional capacity and their underlying culture and incentives.

There are always attractions in a proposal to deal with a problem by conferring discretionary powers on the executive or a regulator but the perceived benefits need to be weighed against the downside in terms of actual or perceived fairness and predictability. Greater weight needs to be attributed to this downside than has been attributed to it on occasions in the past.

### 2.3 Maintaining the quality of the UK’s judges

Ensuring that the quality of the UK’s judges is maintained is crucial to the improvement of the rule of law – both from the point of view of the quality of the judicial process and from the point of view of the reputation of the UK. If there were to be a decline in the quality of the judiciary (particularly the senior judiciary) then much of the benefit of the other changes that are advocated in this paper would be lost. Indeed, a perception that the quality of the judiciary was declining would have a material impact on investor perception of the attractiveness of the UK as a place to locate businesses. In addition, the rule of law in the UK is one of the reasons that the UK is an international hub for litigation and why foreign litigants buy UK legal services to fight cases here (a recent report highlighted that over 70% of litigants in the commercial court now come from overseas).\(^{31}\)

Lord Judge has highlighted the economic benefit that this has brought to the UK:

> “A significant percentage of the UK’s GDP is a result of London being a commercial center – for court and for arbitration, with all the knock-on effects. It’s a wonderful compliment to our system and not an accident that it’s become a hub. It’s because of the high quality of our judges, our process and our legal profession. If that quality declines, then there are plenty of other places that would like to take over the work, like Singapore and Hong Kong and a number of courts in the Middle East. It’s a very competitive market, and it will only continue to come to London while litigants from abroad believe that they’ll get the best form of justice here. So it’s very important that we maintain the standard, in particular of judicial appointments to our own commercial court.”\(^{32}\)

It is thus of serious concern that there is an obvious problem in filling judicial vacancies and at least a perception that a smaller proportion of the best legal minds are going to the bench than was the case in the past: external commentators have written that there is a “shocking shortfall in recruitment.

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to the High Court and circuit benches” and that “the number of “outstanding” candidates for the High Court [is] dropping.”

Some of the reasons for this are implicit in the findings of the 2016 Judicial Attitude Survey:

> “An overwhelming majority (78%) of salaried judges say they have had a loss of net earnings over the last 2 years”; “63% said the judicial salary issue is affecting their morale”... “61% said the change in pensions has affected their morale”

> “A majority of judges (76%) feel they have experienced a deterioration in their working conditions since 2014”

> “Very few feel valued by the UK Government (2%) or media (3%)”

> “Judges are evenly divided over whether they would leave the judiciary if it was a viable option, but the proportion of judges in 2016 that said they would leave if it was a viable option (42%) has almost doubled from 2014 (23%).”

> “A large proportion of the salaried judiciary say they might consider leaving the judiciary early over the next 5 years: 36% are considering it and 23% are currently undecided.”

> “A substantial proportion (43%) said they would either not encourage suitable people to apply (17%) or were not sure if they would do so (26%).”

The issue of pay and conditions is echoed by the Review Body on Senior Salaries, whose 2017 annual report suggests that “given low morale in the judiciary generally... the government should carefully explore the scope for pay and pension flexibilities, as found in the private sector, in order to support recruitment and retention within the judicial workforce.”

A decision by the government to invest in our judiciary would help arrest falling morale, help with filling vacancies and thereby improve the UK’s international competitive position. Reinforcing the respect in which the judiciary is held also has its role to play. Given the recent media controversy over the High Court finding against the government in relation to triggering Article 50 to commence the process of Brexit, it may very well be that the perception of the respect with which the government holds the judiciary would be improved if in future the government – in particular, the Lord Chancellor – were more assertive in defending the work of the judiciary and the rule of law in the face of media opprobrium. It should be borne in mind that judges themselves do not have the ability to publicly defend themselves.

2.4 Increasing legislative drafting capacity

Primary legislation is normally drafted by Parliamentary draftsmen, of whom there are only a limited number. The volume of proposed new legislation places considerable pressure on their time, which is frustrating for those who are promoting legislation and also results in the amount of time spent refining some proposed legislation being considerably less than would be desirable. In other words, inadequate time is spent on ensuring that draft legislation is as good as it could be prior to its introduction to Parliament. Furthermore, the difficulties in producing primary legislation are a further incentive to make use of secondary legislation even in circumstances in which it is undesirable from other points of view.

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35 The Review Body on Senior Salaries provides independent advice to the government on the remuneration of holders of judicial office and other senior public appointments.


37 It is informative to note that the Office of the Parliamentary Counsel – a group of government lawyers who specialise in drafting legislation – has reduced in headcount from approximately 80 in 2008 to 65 as at the time of writing this report.
Secondary legislation is drafted by a wider range of people but again resources are constrained and this may adversely affect the end product. Bearing in mind the volume of secondary legislation, the lack of sufficient numbers of adequately trained high quality draftsmen is of real concern.

We recognise that public finances remain tight but the incremental cost of adding to the number of draftsmen would be small and the benefits would be considerable. Hence, we urge that an investment in additional resource be made.

2.5 Making the law more accessible

The accessibility of accurate legal texts is fundamental for the rule of law. Unfortunately, successive governments have invested too little in making the law accessible. Although there is an official website setting out UK legislation (legislation.gov.uk), it is not well enough resourced to keep up with legislative changes – and a legal database that cannot offer certainty as to the current state of the law is of very limited use. The former President of the Supreme Court, Lord Neuberger, recently had the following to say about it:

“[The] updating service to deal with amendments and repeals is little short of lamentable, with amendments and repeals sometimes not being recorded more than six years after the event. It should not cost much for the UK government to ensure that its legislation website is kept up-to-date, so the current legislation is freely available to everyone.”

Although many law firms and large businesses can and do subscribe to private databases and are thus not reliant on the public database, access to the law should not depend on ability to pay and the law should in principle be available freely and easily to everyone who is subject to it.

Brexit will accentuate this problem of legal accessibility in the UK unless the government commits to change. The UK will adopt much EU law as UK law and the government will need to make this accessible to the UK public. UK and EU law will begin to diverge immediately. Depending on the outcome of negotiations with the EU, differences will accumulate over the longer term as the UK and the EU adopt separate legislative plans. With EU legislative competences returning to the UK, keeping pace with changes will become even more difficult without better resourcing.

In a digital age, accessibility is no longer simply about keeping legal texts current. With technology that is currently available, the government could make it much easier for businesses and concerned citizens to access the law. The legal database Perspective, produced by Wilmington plc for use in the notoriously complex field of pensions law, is a good example. Instead of simply setting out the law as it currently stands, it makes it interactive. All defined terms are hyperlinked to their definitions, even if they are found in another piece of legislation. References are similarly hyperlinked. One click will bring up the history of the provision, secondary legislation made under its authority, related case law and any explanatory notes. Even more impressive is the ease with which its “time travel” feature can be used: the website uses formatting to show simultaneously which provisions in a piece of legislation are in force, are scheduled to come into force, have been repealed, have been inserted and even have been inserted and then repealed, all from the perspective of any point in time (past, present and future). The government may decide there is no call to replicate all of these features for the entirety of UK law but it should recognise that there is room for innovation and creativity in making the law less daunting for those who would use it.

38 Source: https://www.supremecourt.uk/docs/speech-170703.pdf
Another way of making the law more accessible would be to embed metadata. UK legislation could be tagged such that users with similar tags in their own documentation would be alerted to amendments or relevant case law. This could find obvious application where contracts have been drafted in light of particular legislative provisions as well as in compliance manuals. The government might even be the greatest beneficiary if it upgraded “Judge Over Your Shoulder” ("JOYS") in this way.  

2.6 Reducing the volume of legislation and regulation

The flood of new laws introduced over the last few decades has been incessant, rising from around 2,200 UK Acts and Statutory Instruments per year in the 1950s to 1980s up to 3,300 in the 1990s, 3,600 in the 2000s and 3,100 in the 2010s.  

Major law firms have entire departments to keep their lawyers up to date. Legal publishers employ teams of lawyers to update and cross-reference their online resources. Major banks, utilities and other businesses devote considerable resources to tracking the regulations to which they are subject.  

This is a significant problem. Quite aside from the absolute cost, individuals and smaller business organisations are at a considerable disadvantage when it comes to understanding, let alone abiding by, the legal framework and even the largest organisations find it increasingly difficult to keep up with what is expected of them. This problem is exacerbated if the law is continually changing, as is the case with (for example) immigration law, pensions law and many other forms of law that affect businesses. In short, the flood of new law and regulation is anti-competitive and imposes a considerable cost on business which is well in excess of the theoretical cost of compliance with particular measures.  

There is also an argument that a stable corpus of law is intrinsically beneficial from a rule of law perspective: if new legislation comes hot on the heels of recent legislation in a particular area (e.g. as it has in immigration law over the last several years), then predictability is undermined as businesses never get to the stage of being at the “new normal”.

Modern society is complex and it is unrealistic to expect that modern law will be short and simple. However, it is necessary to ask whether we have reached the point of diminishing returns. The UK government’s initiative to cut business regulation via what is now a “One in, Three out” policy is a commendable one and has achieved some tangible results. Furthermore, as the figures quoted above indicate, since 2010 the number of statutory instruments promulgated each year has declined, albeit from an historic high and, in some cases, for reasons unconnected with the concerns expressed in this report. Nonetheless, more needs to be done.  

First, the “One in, Three out” approach (or something equivalent) needs to be adopted by the various autonomous or quasi-autonomous regulators which now legislate in a significant number of areas.

Secondly, and more fundamentally, we suggest that there should be a greater scepticism regarding the need for change in regulation. Of course, there is almost always a plausible reason for particular legislation. The issue is whether there is sufficient reason. To be more precise, we suggest that the downsides of the
in incessant flood of new regulation are being inadequately weighed in the balance for and against particular proposals. This balance needs to be redressed.

Finally, we suggest that there be a greater scepticism about the benefits of legislation versus other options. There is, of course, always an argument to be made in favour of legislation in contrast to what will inevitably be described as “voluntary” options. However, again, we suggest that the downsides of the legislative option have been inadequately weighed in recent years and the balance needs to be redressed.

Almost everyone recognises the need for an appropriately regulated society (and specifically an appropriately regulated business community). The issue is not whether there should be appropriate regulation but whether a long-term reduction in both the quantity of regulation and the speed of its change could in fact result in a better regulated society as well as one in which the benefits of an increased respect for the rule of law are reaped.

### 2.7 Signposting the direction of travel

Of course radical improvements in the quality of the UK’s laws cannot be achieved overnight. It will be a long process. However, there are a number of “quick wins” that could establish the UK government’s bona fides: consider some of the examples given in this report. More fundamentally, the government could, in a high profile way, signpost the direction of travel and ensure that the importance of rule of law considerations is continually emphasised.

In recent years, the UK government has stressed that the UK is “Open for Business” and, through what is now its “One in, Three out” approach and “Red Tape Challenge”, has sought to relieve business of unnecessary regulatory burdens. We suggest that a third limb be added to this: a “Rule of Law Challenge”. In other words, an active policy commitment to improve the predictability and fairness provided by legislation and regulation.

The “Open for Business” approach, the “One in, Three out” policy and the “Red Tape Challenge” have been widely noticed and appreciated by the business community. The same would be true of a Rule of Law Challenge. Indeed, many large businesses are more impacted by the predictability and fairness issues inherent in the rule of law than by red tape. Consequently, a Rule of Law Challenge would be widely noticed in the senior echelons of investors in the UK. In short, it would have an impact upon the perceived attractiveness of the UK for investment and hence on the competitiveness of the UK.

### In summary

The government and regulators can enhance the rule of law by:

- Improving legal and regulatory predictability.
- Avoiding excessive executive and regulatory discretion.
- Maintaining the quality of the UK’s judges.
- Increasing legislative drafting capacity.
- Making the law more accessible.
- Reducing the volume of legislation and regulation.
- Signposting the direction of travel.
3

The Judiciary

THE JUDICIARY HAS a vital role in the upholding of the rule of law. The courts must be available to hold those exercising executive and regulatory power (and any other power, for that matter) to account; they must restrain the arbitrary exercise of power; and they must defend public and private property and contractual and statutory rights. All of this is fundamental to the rule of law and the judiciary has recognised this and acted accordingly, including undertaking such unglamorous tasks as the reform of civil procedure with a view to making the courts more accessible and efficient. Our focus, however, is on another issue: the role of the judiciary in securing predictability.

The view that judges simply apply the law to particular facts is naïve. If it were as simple as this, our appellate courts would be empty. In reality, to a certain extent, it is inevitable that judges create law. Indeed, large areas of English law are entirely judge made, the law of contract being a good example of this. The issue is not whether judges should make law but the extent to which they should do so and the scope of the self-imposed constraints within which they operate. To use colloquial language, the issue is how “activist” the judges should be.

As many judges down the years have recognised, judicial activism can create uncertainty and thus undermine the rule of law as well as the sovereignty of Parliament and democracy. Viscount Simonds famously warned of the risks of “a naked usurpation of the legislative function [by judges] under the thin disguise of interpretation.”

In recent years, there have been occasions where UK judges are perceived to have become more activist and more prepared to depart from the most obvious meaning of primary and secondary legislation and use general principles to support alternative interpretations or even implicit limitations on what is said. This development, whilst arguably understandable in the specific cases, carries material rule of law concerns, particularly as regards legal certainty and, in the UK, the blurring of the respective roles of the judiciary and Parliament.

The development has not, however, taken place in a vacuum. To some extent, it has been a response to the style and approach of much modern legislation:

> First, legislative deficiencies and tortuous drafting (including in domestic law) have invited judicial intervention, not least in an effort to uphold the rule of law. Whilst this approach has its merits, it also has its downsides (see, for example, the issue relating to the Proceeds of Crime Act 2002 described on page 23).

> Secondly, as Lord Denning pointed out as long ago as 1974, the drafting style adopted within continental European legal systems and adopted by EU law (see the Appendix) necessitates a different approach to statutory interpretation from that historically adopted in the UK, and this approach necessarily requires greater judicial involvement.

Our legal system is one of the UK’s great exports and it is highly desirable that we keep it that way. The judiciary has a vital role in continuing to uphold the rule of law not least by providing certainty in the way in which judges interpret the law.

Kathryn Ludlow
Partner Consultant,
Linklaters LLP
“Seeing these differences, what are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. To quote the words of the European Court in the Da Costa case ([1963] CMLR at 237), they must limit themselves to deducing from ‘the wording and the spirit of the treaty the meaning of the Community rules…’ They must not confine themselves to the English text… They must divine the spirit of the treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same.”

The onus is on Parliament, the government and regulators to deal with the first of these issues. It is within their control. The second is harder to address (since most EU laws will necessarily and rightly be carried over en bloc into domestic law) and will never be wholly resolved (since the need for regulatory harmonisation will require that the UK continue to follow many EU approaches). Hence, to some extent, judges will continue to have to deal with these issues and hence adopt a more “creative” or purposive approach to statutory interpretation than might ideally be desirable.

However, the judges need to be careful. In the UK, the sovereignty of Parliament, the doctrine of precedent and judicial reluctance to strike out in new directions are crucial to the rule of law and specifically to providing the fairness and predictability that business requires. The onus is on the UK’s judges not to undermine this by their own actions.

Specifically, if Parliament, the executive and regulators respond to the challenge of producing better laws, then the spotlight will fall on the judges. They will need to respond to the challenge by normally applying the legislation so produced in accordance with its most natural meaning and not use contentious general principles to subvert this meaning. They will also need to remember that, whilst in the USA laws are subordinate to the Constitution and may be struck down on that basis, this is not the position in the UK. There is a case for a written UK constitution but this needs to be the subject of democratic debate and it is not for the judiciary to pre-empt this debate.

In summary

The judiciary can enhance the rule of law by:

> Continuing, as now, to hold to account those exercising executive and regulatory power, to restrain the arbitrary exercise of power and to defend public and private rights.

> Avoiding excessive judicial “activism”.

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44 H P Bulmer Ltd and Anor v J Bollinger SA and others (1974).

45 The UK doctrine of precedent is the legal principle to the effect that the judgments of higher courts are binding on lower courts. The effect of this doctrine is to ensure that judgments of the higher courts add to the corpus of law and provide certainty in future cases.
ALL LEGITIMATE BUSINESSES benefit from the rule of law but not all of them recognise “that there is a compelling business case for respecting and supporting the rule of law” (to quote the United Nations Global Compact “Business for the Rule of Law Framework”). Indeed, some do not appear even to recognise that such respect and support is part of being a responsible business and many more fall into the trap of regarding the rule of law as being the responsibility of particular groups of “professionals”: politicians, regulators, law enforcement agencies and the judiciary. They thus expressly or implicitly draw the conclusion that they have nothing to contribute to the maintenance of the rule of law beyond, perhaps, political lobbying.

This is disappointing because, given the link between the rule of law, business certainty and economic growth (see the Introduction to this report), the business case is incontrovertible and, given the importance of the rule of law to society as a whole, the connection with responsible business conduct is not hard to see. Furthermore, there is much that business can and should be doing in this connection.

The United Nations Global Compact’s “Business for the Rule of Law Framework” helpfully divides business action in relation to the rule of law into two categories: respect and support.

4.1 Respect for the rule of law

“Respect” refers to respect for universal principles (within which the United Nations Global Compact includes human rights and anti-corruption principles). It comprises “doing no harm” and is a basic minimum requirement. There is a danger that businesses may, without reflection, only think of their activities outside the UK in this connection, especially their activities in emerging and undeveloped markets, but businesses have an equally important role to play within the UK. This goes beyond merely avoiding breaching the criminal law. Businesses need to ask themselves whether they are taking any action that undermines or interferes with the administration of justice or the effectiveness and accountability of institutions; whether they are honouring contractual obligations and commercial agreements; whether they are honouring dispute resolution procedures and decisions at all levels; and whether their approach to interaction with regulators and governmental authorities with whom they deal is such as to subvert the rule of law.

4.2 Support for the rule of law

“Support” refers to “voluntary action taken by businesses that goes beyond the responsibility to respect by making a positive contribution to help strengthen legal frameworks and promote more accountable institutions.” Clearly, many small and medium-sized businesses will find it difficult to do much on their own in the way of support but larger businesses should be able to do a great deal. The “Business for the Rule of Law Framework” contains a number of suggestions and case studies which should provide ideas.

More generally, businesses could consider how they might be able to help Parliament, the government, regulators and the judiciary in maintaining and enhancing the rule of law. Leaving aside what may be regarded as day-to-day business interaction, too often the relationship between businesses and these institutions is confined to lobbying. It would be helpful if businesses could look at the relationship through a different lens: how can we help these institutions better understand issues that are relevant to particular proposed laws and to the rule of law?

46 Several of these issues are derived from the United Nations Global Compact’s “Business for the Rule of Law Framework”, p. 9.
The strength of the rule of law in the UK is one of the fundamental factors that has driven businesses to invest and succeed here. As this report suggests, businesses don’t just have to be passive beneficiaries of the rule of law. They can play their part in enhancing the rule of law alongside Parliament, policymakers and the judiciary, not only for economic success but also to benefit wider society.

Carolyn Fairbairn
Director-General, CBI

We have urged that Parliament seek more expert input when reviewing proposed legislation (see paragraph 1.3.3 above) and that the process for consultation prior to the promulgation of legislation and regulations and legislative and regulatory guidance be improved (see paragraph 2.1 above). These proposals will only improve the quality of the UK’s laws if those who are experts in the relevant areas or who are able to provide useful comment as part of a consultation take the time and trouble to provide input and thus to assist Parliament, the executive and regulators in their task. Much of the necessary input needs to come from business. Providing it will, in the short term, have a cost attached to it but the long-term benefits to business will be considerable.

4.3 Business networks

The UK-based Bingham Centre for the Rule of Law launched a “Business Network” in January 2017. The network aims to support the Centre’s initiatives on the rule of law, whilst identifying and addressing specific challenges in the countries where they operate. This initiative is not by any means limited to the UK but it does not exclude the UK and the involvement of a number of FTSE 100 and other large companies (including BP, BT, Diageo, HSBC, Nestlé, Rolls-Royce, Shell, Unilever and Vodafone) is encouraging since it indicates the importance that major businesses are according the rule of law. It would be good to see more businesses joining the network, actively sharing best practice and together grappling with issues.

Trade associations, other industry-specific bodies and broader business groupings also have a role to play. Like the Bingham Centre’s “Business Network”, they may assist in the sharing of ideas and they may enable smaller businesses to make a contribution to the rule of law that would otherwise be impossible.

4.4 Public education

Businesses do in fact make investment decisions based on the level of respect for the rule of law in particular countries. We know this from our own experience of working with multinational corporations and financial institutions over many years. We were thus surprised to discover that many outside the business world do not immediately recognise this and thus do not understand the link between the rule of law and competitiveness until it is explained to them.

This lack of comprehension is disturbing for business as a whole but the remedy to the problem is in its own hands. Businesses need to explain the issues more clearly and more publicly, and it would be helpful if the reasons for particular investment decisions were more widely known and, rather than comments being limited to the very specific issues impacting on a particular decision, those issues were linked with the general principles of the rule of law. One way that businesses could communicate on how rule of law issues might drive international investment is through their wider communications in relation to “ESG” (Environmental, Social, Governance) issues, a broad set of subjects which are becoming an increasingly important part of businesses’ dialogue with stakeholders and wider society. However it takes place, such communication will help Parliamentarians, ministers, civil servants and regulators develop a more informed understanding of the types of law and regulation that create significant problems.
We recognise that some businesses are reluctant to raise rule of law issues for fear of appearing hostile to the regulators and parts of government with which they have to deal. This fear is understandable but needs to be overcome. It should be possible to adopt a collaborative, non-confrontational approach which, although potentially uncomfortable in the short term, yields long-term benefits for all concerned.

**In summary**

Business can enhance the rule of law by:

- Respecting the rule of law.
- Supporting the rule of law.
- Joining relevant business networks.
- Engaging in public education.

The UK’s world-class legal services sector is a vital national asset. It is an integral and crucial part of the ecosystem which makes the UK a truly, globally-leading international financial centre… This report is an important and timely reminder that strengthening the rule of law is an opportunity to underpin and enable not only financial services, but also the UK’s economy more widely post-Brexit.

Gary Campkin
Director of Policy & Strategy,
TheCityUK
Everyone has a part to play: enhancing the Rule of Law
IMPROVING THE COMPETITIVE position of the UK is a critical public policy goal. Respecting and enhancing the rule of law will make an important contribution to securing this goal by giving business increased confidence in the fairness and predictability of the UK’s legal system. But enhancing the rule of law will require focus and determination from everyone: members of the two Houses of Parliament, the executive and regulators, the judiciary and business.

Those drafting, scrutinising and approving, interpreting and enforcing laws do not have an easy task: they need to weigh often conflicting policy considerations and to deal with the inevitable limitations of language and their inability to foresee all circumstances. They never have a completely free hand in their task.

This will not change when the UK leaves the EU. Furthermore, many will continue to argue in favour of precisely the things that we have cautioned against in this report. It will be suggested that broad discretion is needed to cope with unpredicted problems; that the government needs to be able to amend laws quickly (even with retroactive effect in some cases) in order to cope with fast-moving situations; that principles and guidelines are more flexible and useful than precise legislation; and that the flood of legislation is necessary and inevitable.

There is something to be said for all of these points. We are not offering a downside-free option. The rule of law can be inconvenient: it may prevent action being taken when those in authority (possibly for good reason) want to take it; it may result in it being more difficult on occasion to take effective action in relation to perceived wrongdoing; and it may result in a need to change the law as circumstances change. But these downsides need to be weighed against the upside benefit of enhancing the rule of law, especially the long-term economic benefits that are brought by the fairness and predictability provided by the rule of law.

Brexit will not at a stroke give the UK the ability to change its laws completely, and such wholesale change would in any event be undesirable. But it will provide a once in a generation opportunity to make material improvements. This opportunity needs to be seized. The policy balance reflected in our laws needs to be tilted back towards respect for the rule of law, and thereby support the UK’s continuing and growing prosperity post-Brexit by providing businesses with the certainty and fairness they need to invest, employ and transact in the UK.

If this is done, if we strive better to respect and enhance the rule of law, the rule of law will enhance our prosperity.
Everyone has a part to play: enhancing the Rule of Law
CURRENTLY, MUCH EU law lacks precision and creates serious uncertainty. Some of the issues are of a superficial nature. The characteristics of “EU English” come within this category. This is a form of English that has developed in EU institutions which differs in important respects from “British English”, with the result that words used in the English texts of EU legislation may not have the meaning that an English reader would expect. This is an annoyance but little more. It may result in the unwary being misled but it does not take long to come to grips with the characteristics of EU English and so it is not a matter of great substantive concern.

What is much more serious is the uncertainty that remains even after the superficial issues have been surmounted: the lack of precision that is inherent in the relevant law.

Some place the blame for this uncertainty on the more purposive legislative approach of the civil law countries that were the founder members of the EU. There is some truth in this but it is by no means the whole truth. This civil law approach is more principles-based and less precise than the characteristic UK legislative approach. However, there are a number of other reasons for the problem, some of which are inevitable granted the nature of the EU.

Firstly, the EU legislative process, in some cases at least, has elements that are closer to the negotiation of an international treaty than the enactment of domestic legislation. The impact of this is well described by the European Commission Legal Service:

“Although in theory a piece of EU legislation should be relatively coherent and easy to assess, in practice that is not necessarily the case. Indeed a legislative text is often the result of compromises between competing interests and objectives being pursued by the EU institutions, the national governments and others taking part in the process. Unsurprisingly, as the practice in the law-making process proves, legitimate concerns for the quality of legislation may be outweighed by the need to find a compromise acceptable to all the parties. In such situations national authorities, sometimes already under strain due to ongoing infringement proceedings, face interpretative issues of the relevant acquis [body of law]… In fact, the need to approve a measure without explicit dissent or with the consent of the twenty-eight governments may give rise to strained compromise wording, leading quite often to ambiguous texts.”

Put bluntly, in many cases, the EU legislative process only works because texts are kept relatively general and short and, in some cases, deliberately vague language is used that may mean different things to different people.

If the EU legislative process were less dependent upon negotiation among member states (i.e. if the EU behaved more like a single state), this problem might be ameliorated. However, other problems would remain. In particular, legal precision requires linguistic precision and this is compromised by the need for a version of every EU legislative instrument to be produced in each of the official languages of the EU, each such text being equally authoritative. With the best will in the world, it will not be possible for the words used in each text to carry exactly the same nuance. Worse still, unless one is fluent in all the EU languages, the resulting legal issues may not be immediately apparent.

More subtly but even more damagingly, basic jurisprudential structures of the various legal systems of member states of the EU are not the same. It is simply not possible to effect a one-to-one mapping of the legal concepts in two different legal systems. Some examples are given below. The EU Legal Service itself has drawn attention to this issue, quoting the European Court of Justice:

APPENDIX

Issues with EU legislation

“...it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.”

**Conceptual differences**

> French law includes the concepts of _faute_, _grief_ and _raison d’ordre public_. These terms may be translated as “fault”, “objection, point or argument” and “overriding reason of public policy” respectively. However, these English terms do not refer to English legal concepts that are the same as the French legal concepts to which the French terms refer. Hence the use of either the French or the English terms (or the equivalents in any other EU language) in EU legal texts potentially leads to uncertainty and confusion. Furthermore, the courts of France (or any other EU country) will inevitably interpret the EU texts with a different legal and conceptual framework in mind from the framework in the minds of their English counterparts.

> The word “damage” is particularly troublesome when it is used without precise definition (e.g. in the definition of “environmental damage” in Article 2 of Directive 2004/35/EEC). The legal concept of “damage” varies from jurisdiction to jurisdiction and it is by no means clear what is meant by it when used in EU texts.

> The same is true of the word “contract”, where used without being defined (e.g. in Directive 93/13/EEC). The legal concept of a contract is recognised in most, if not all, legal systems but precisely what comprises a contract varies considerably from place to place. Hence the use of the term in EU texts results in material uncertainty.

**Inconsistent terminology**

Some legal instruments use different terms to refer to the same legal construct or the same term to refer to different legal constructs. It is particularly problematic if a legal text refers to the same concept using different terms which refer to different legal concepts in different countries (e.g. Directive 85/577 in English includes references to: “cancel”, “waive”, “renounce”).

It is also a problem if legal texts covering related matters use different terms to refer to the same concept or the same term to refer to different concepts (e.g. in consumer protection rules, the “right of withdrawal” is regulated differently in Directives 85/577/EEC, 94/47/EC, 97/7/EC and 2002/65/EC).

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50 These examples are taken from: http://ec.europa.eu/dgs/legal_service/seminars/20140703_gombos_speech_en.pdf

51 These examples are taken from: http://ec.europa.eu/dgs/legal_service/seminars/20140703_gombos_speech_en.pdf
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