
The Rule of Law: Brexit and Financial Services

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The rule of law is not an arid legal doctrine but is the foundation of a fair and just society and an important contribution to economic growth, as well as offering the best means yet devised for securing peace and co-operation

Lord Bingham, The Rule of Law London: Penguin, 2010.

Introduction:

The decision to leave the European Union, following the referendum in June 2016, highlights how economic and financial issues underpin much of how we are governed. Brexit, when coupled to the 2008 financial crisis has considerable influence over our constitutional and political institutions, given the significance of the crisis on banks and financial institutions. Financial markets and the economy are likely to dominate events for the foreseeable future. Market turbulence is hard to anticipate but it is very likely since uncertainty surrounds the future health of the UK economy as the UK seeks to negotiate a new relationship with the European Union. Britain depends on trade and the success of trade will be a major factor in assessing the effect of the UK's departure from the EU⁽¹⁾. In the area of trade, financial services contribute around £130 billion annually to the UK economy. Financial services account for 7% of GDP and employs around 1.1 million people, the majority live outside London⁽²⁾.

There are around 100,000 non-EU nationals and 60,000 EU nationals employed in the financial markets in the UK. There is a highly skilled workforce with 50% educated to degree level or equivalent. The IMF

(1) House of Lords Library Note, Leaving the European Union: Future UK-EU Relationship LLN 2016/063 (25th November 2016)

(2) House of Lords, European Union Committee 9th Report Session 2016-17 Brexit: Financial Services HL Paper 81.

concluded that “the growth in the UK’s financial sector owes much to the single market” with the UK trade in financial services much greater than the OECD average⁽¹⁾.

It is estimated that one third of the UK’s financial and insurance services are with the EU and almost all the UK Banks’ investments are with the EU. The referendum result in June 2016 has raised many questions about future arrangement for the UK’s financial sector which is the largest in Europe. Its significance has been given some prominence in the discussions about the consequences of leaving, frequently around technical details that often overlook the importance of Parliament and the constitutional importance of the rule of law. The run up to the triggering of Article 50 and the negotiations that will eventually lead to the final exit arrangements provide an opportunity to take stock of what is at stake for the UK economy. Whatever the final exit arrangements are, the role of parliamentary scrutiny will become an important element in ensuring appropriate accountability of the UK government and its future relations with the EU after exit. The significance of the rule of law in ensuring checks and balances on the financial arrangements has wider constitutional significance in the long term for our system of government. Estimates of the economic impact of leaving the EU are hard to make⁽²⁾ but it is commonly assumed that the sensitivity of the UK financial sector is greater than in other parts of the economy. The stakes could not be greater.

London is the wholesale financial centre for the EU. It hosts nearly 360 Banks, many of the major insurance companies and is the largest stock exchange in the EU. Even the three rating agencies have their EU Head Offices in London. The single market has created freedoms that have been transposed in various Directives and are the result of a long process of development. It is not easy to replicate or imagine that what has been achieved will be repeated as much of the current achievement has come from past experience and learning from mistakes and new events.

(1) Karel Lanno, “EU Financial Market and Access after Brexit” CEPS Policy Briefing, 2016 pp.1-2.

(2) Price Waterhouse Coopers, Leaving the EU: Implications for the UK Financial Services London: April 2016.

This takes time and effort. This paper provides a synopsis of some of the emerging issues for financial services and Brexit. There are growing concerns that the UK may lose out to other market capitals such as New York. Brexit raises fundamental issues of national and international importance.

The rule of law and the economic context:

Addressing Brexit, the UK's constitutional arrangements, are vague and uncertain, especially if required to provide prescriptive answers to unforeseen or unexpected events⁽¹⁾. Leaving the EU involves economic and legal issues as well as the role of Government and Parliament. Despite uncertainties and many frustrations, the importance of law in the economic, social and political life of the country has been well recognised by the leading constitutional writers including Dicey⁽²⁾, Maitland⁽³⁾ and Holdsworth⁽⁴⁾. Economic history provides evidence of past attempts to address issues such as the development of relationships such as landlord and tenant, between labour and employment, and companies and between wealth, capital and the population. Law underpinned many of the conditions responsible for wealth creation as well as poverty⁽⁵⁾. Economic development gave rise a range of social and corporate issues that informed Parliament's development especially in the growth of legislation⁽⁶⁾. Lord Bingham noted that that the business and economic community required certainty and predictability, values that are often underpinned by the rule of law. All too frequently, the rule of law has been too narrowly confined to political or legal issues, but its increasing importance to the economy and as

(1) See: *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768

(2) A.V. Dicey (1835-1922).

(3) F.W. Maitland (1850-1906).

(4) W.S. Holdsworth, (1871-1944). G.R. Rubin and D. Sugarman, eds., *Essays in the History of English Law 1750-1914* London: Professional Books 1984. W. Prest, ed., *Lawyers in Early Modern Europe and America* London: Croom Helm, 1981. M.S. Larson, *The Rise of Professionalism* Berkley: University of California 1977.

(5) Sir William Holdsworth, "A Neglected Aspect of the Relations Between Economic and Legal History" (1927) *Economic History Review* Vol 1 (1) 114-23.

(6) D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983) 46 *Modern Law Review* 102

a guide to sustainable economic growth is essential for the future of the UK's financial relationship with the EU. Parliament's constitutional importance is also intrinsic to the working of the rule of law, especially when asked to uphold its values⁽¹⁾. The vote in favour of leaving the EU has resulted in setting up a large number of Government Departments alongside civil service teams set up for that purpose⁽²⁾.

Brexit and Financial Services:

Issues surrounding financial services are one of the most important areas in the forthcoming negotiations for the UK to leave the EU⁽³⁾. They are inextricably linked to the economic well-being of the country. Significantly there is a large element of "inter-linkage" between London and the financial sectors across the EU⁽⁴⁾. There are a large number of foreign institutions that participate in the UK and many non-EU financial institutions use the UK as a hub to access clients in the EU. Negotiations will need to address how the UK has access to EU firms. The EU operates an equivalence doctrine namely that a third country's legal and regulatory framework is taken to be equivalent to the EU but this has limited application. It does not apply across all sectors and is subject to being revoked by the EU Commission. Prospects for using equivalence are difficult once the UK leaves the EU.

The EU has developed considerably in providing an integration of EU financial markets, removing barriers and allowing, since 1999, that there is a single market. Paradoxically the best example of the single market is UK financial services, centred in the City of London. The essence of which is that a financial service authorised in one Member State may trade in another. This is achieved through establishing a local branch on a cross border arrangement. The term "passporting" applies. EU arrangements also apply to the regulatory structures and

(1) Katja S. Ziegler, Denis Baranger and Anthony Bradley, eds., *Constitutionalism and the Role of Parliaments* Hart: Oxford, 2007

(2) House of Lords Library Note: *Leaving the European Union: Machinery of Government Changes* LLN 2016/070 (16th December 2016).

(3) House of Commons Library, *Briefing Papers Number 07628 Brexit and Financial Services* (1st November 2016).

(4) CityUK, *Key Facts about the UK as an international financial centre 2016* (1st November, 2016).

this enable the UK regulatory authorities to be accepted in EU member states. Over layering the EU arrangements are the influence of the Financial Stability Board and the Basel Committee on Banking Supervision.

Their role is critical in the continuation of systems for prudential regulation and oversight of derivatives. Global relations as well as those with the EU are relevant in considering the impact of Brexit. Once the UK leaves the EU the operation of the single passport system will cease for UK firms and this will have considerable significance. Distinctions are made between basic financial services such as banking, investment services and insurance that form a core area and non-core areas such as clearing, settlement, hedge funds and financial data that developed separately⁽¹⁾. Each will need to be specifically addressed⁽²⁾.

All of this raises important legal and constitutional issues, not least in terms of the procedures for scrutiny of the process of Brexit. The outcome of the negotiations will have implications for the long-term economy of the UK as well as the stability of constitutional and political institutions⁽³⁾. Overarching the negotiations are discordant opinions on the consequences and advisability of leaving the EU. The mixture of difficult technical issues and political division raises the prospect of unintended consequences as well as unforeseen outcomes. Opinions are clearly divided as to the benefits and potential detriments of UK exit. Setting that debate to one side, the key question is how best to manage the new relations that will apply after the UK leaves the EU⁽⁴⁾. Underlining this question are issues about how to secure predictable and stable relations in the financial sector. The importance of financial services comes from the fact that there are over 56,000 financial ser-

(1) See the detailed analysis provided by Karel Lannon, Chief Executive of CEPS, a leading European Think-Tank. LSE Brexit: When it comes to financial services, the UK has much to lose and little to gain from leaving the EU (LSE Blog).

(2) See the detailed analysis of the evidence given to the House of Lords EU Financial Affairs Sub- committee on Brexit Financial Services November – December 2016. HM Treasury Written Evidence (BFS0005);

(3) See: J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* Cambridge: Cambridge University Press, 1928.

(4) Hannah White, *Scrutinising Brexit: Parliament faces its biggest challenge* Briefing Paper, London: Institute for Government, October 2016.

vice firms engaged in financial markets in the UK. A large proportion have to be regulated within the UK. Regulation over this sector.⁽¹⁾ This is a technically complex operation as it requires consistency and fairness as well as cooperation between the different regulatory authorities and standard setting bodies. This cooperation is not only within the EU but also world- wide, reflecting as it does that financial markets are cross-border⁽²⁾. There is also the dynamic of open markets, favoured by some countries against the protectionist policy of others. Underpinning regulatory approaches are the need for consistency and the application of common regulatory standards. Financial markets are also sensitive to sudden changes or unanticipated shifts in regulatory policy. Their economic vulnerability to turbulence in the market exposes the sector to shocks that may create wider financial problems. The shadow of the 2008 financial crisis hangs over the sector as a whole. The regulatory perspective suggests that mitigating market fears and over-reactions is essential if financial regulation is to be effective⁽³⁾. There are particular issues that apply to the financial sector that raise questions about constitutional and legal accountability⁽⁴⁾.

Membership of the European Economic Area (EEA):

Financial firms authorised to provide financial services in an EEA state, are, subject to fulfilment of certain single market directive requirements, entitled to provide those services cross-border into other EEA states. The use of so called “passporting” is based on the assumption of authorisation by a competent authority in one Member State and notification to the competent authority in the other member state where the firm wishes to do business. There are limits on what is included in

(1) The Financial Conduct Authority regulates over 24,000 of the firms within the UK. See The letter from Andrew Bailey to Andrew Tryrie, Chair of the Treasury Committee, House of Commons (28th October 2016).

(2) House of Lords Library Note: Leaving the European Union: Global Free Trade LLN 2016/3

(3) Jill Rutter and Hannah White, Planning Brexit: Silence is not a strategy London, Institute for Government, September , 2016.

(4) The new government departments include: Department for Exiting the European Union, the Department for International Trade. There are a number of Cabinet Committees, the European Union Exit and Trade Cabinet Committee, the Joint Ministerial Committee on EU Negotiations.

the passport arrangements but the principles underlining the passport system are important as there is a framework for giving firms certainty as to the rules and “tradability” over the assets. The benefits of passports are that the EU has established a passport mechanism whereby arrangements to trade in one EU Member State is recognised by the other Member States with no further authorisation required. These arrangements are specific to the individual financial service. There is no single passport that applies to all financial services. In some types of financial services there is not the option of the passport system- for example in the case of a consumer credit passport. This leaves such firms with the option of having to seek authorisation in the Member State they are trading with, or rely on their direct rights under the TFEU arrangements to operate on a cross-border basis. The absence of a passport means the individual financial service has to apply to the specific regulatory body for authorisation. The UK’s regulatory scheme would need to be permitted to authorise UK firms or the UK firms would need to seek authorisation through the regulatory system of the Member State they are hoping to trade in.

The UK is a member of the EU as well as the WTO, so that leaving the single market and with no Free Trade Agreement in place, would leave the UK’s access to the EUs market be governed by WTO protocols. This is likely to be complex and time-consuming and lack of access to passport arrangements will leave considerable uncertainty for many firms. Their retreat from London is a likely consequence. As it is not clear what will be achieved in the negotiations there will also be uncertainty as to how best to prepare for the result of the final negotiations. WTO agreements are also complicated by the fact that the UK will have to seek “equivalence” arrangements or to make use of third country passports whenever possible or even authorisation from each regulator of the jurisdiction where business is being transacted.

Changes in the UK’s relationship with the EU are likely to lead to a lessening of the UK’s influence on the way the rules are written and created. The issuing of authorisations will become a critical issue for UK firms and will enhance the risk for regulators and firms at a period of economic instability. Addressing such challenges will require technical dexterity as well as sound economic analysis from regulators and

the UK government. Transparency and oversight are necessary to ensure that there is public confidence in the outcome and Parliamentary scrutiny over the result seems essential. Andrew Bailey of the Financial Conduct Authority (FCA) in a letter to Andrew Tyrie, Chair of the Treasury Committee warns:

Furthermore, in a complex landscape analyses should be based upon an understanding of the links and dependencies across and between these factors, whereby the withdrawal of passporting rights under one Directive may have associated effects in other areas⁽¹⁾.

Non- EEA agreements and UK financial institutions- Switzerland and Canada:

There are likely to be various Free Trade Agreements (FTA), but it is hard to know the content of any agreement. Different models are proposed that may fit the arrangements that are eventually negotiated by the UK. Two models are currently being considered Switzerland and Canada. The former is understood to mean a number of bilateral agreements that give firms certain rights similar but not the same as the single market. However, the Swiss model does not cover financial services with the limited exception of non-life insurance. Even in this case the arrangements do not amount to the equivalence of passporting. This is not an ideal model. It leaves considerable uncertainty as well as complexity in the working out of arrangements.

The Canadian model is based on the EU-Canada Comprehensive Economic and Trade Agreement (CETA) which makes a trade in financial services possible through trade on the same principles as the World Trade Organisation (WTO) and the General Agreement on Trade in Services (GATS). The arrangements fall short of allowing EU passporting arrangements. This means that financial companies in Canada face the same challenges as other non-EU firms in negotiating authorisations. The latter sets the main challenges that face UK financial firms. In fact the requirements of authorisations represent a major problem for many firms that cover a wide spectrum of companies

(1) Andrew Bailey letter to Andrew Tyrie, Evidence to the Treasury Committee (28th October 2016).

and their activities⁽¹⁾. It will require careful negotiation to determine a successful outcome for such companies. The outcome may also have an impact on competitiveness and also on the choices that consumers may have in their financial arrangements.

Underlying the challenges that face the UK are also the likely consequences on markets. In evidence to the House of Lords European Affairs Sub-Committee on Financial Services, the Financial Conduct Authority concluded:

There may be risks to market integrity, particularly if the price formation process were rendered less efficient if, in transition, market liquidity fragmented between the UK and EU27 financial centres. This would be a risk both for the UK and the EU 27 as this fragmentation could lead to systemic risk⁽²⁾.

One important, but perhaps too readily overlooked consequence, is that regulatory cooperation would be difficult to achieve especially in a period of unforeseen changes. Continuity between regulators is not always easy to guarantee. It is not easy to know how post Brexit UK regulators will be regarded and how much influence they will have in shaping the future of regulation. This is an essential question in terms of reputation as well as future political influence. It is also hard to quantify or calibrate but it is essential for the UK to maintain a strong influence in international organisations and institutions.

WTO and EU Frameworks:

There is a framework for market access in financial services under the GATS arrangements supplemented by WTO members. In most cases firms have authorisation under a statutory regulator and this applies from the regulator of the jurisdiction into which they seek market entry. There are a number of important aspects that should not be overlooked. GATS provides a schedule of commitments that apply to managers and the relevant financial depositors with UCITS funds. The UCITS Directive requires that the funds are managed by an EU manager with an EU

(1) Products and services under the Markets in Financial Instruments Directive, Alternative Investment Fund Managers Directive and the Insurance Distribution Directive.

(2) The Financial Conduct Authority (FCA) written evidence to the House of Lords European Affairs Sub-Committee November 2016 evidence BFS0003.

depository. This has implications for the management arrangements. There has to be a managed company established in the EU and also a depository in the Member State of the UCITS. The arrangements also extend to EEA states that are not in the EU such as Norway, Iceland and Liechtenstein. There are “passporting” arrangements but these are limited to EU alternative investment fund managers, that are authorised under an EU regulator. The latter is a key element in being able to manage financial AIFs in another Member State on the basis of establishing a branch in that Member State or on a service basis. The role of the AIFMD is to offer the prospect of a third country passport for managers and funds that are outside the EU. This is an ongoing matter for discussion and the arrangements are not yet in place. In July 2016, the European Securities and Markets Authority (ESMA) has published advice on future regulation but it has not been acted upon.

The Role of UK Financial Regulators after Brexit:

Potentially there will be significant implications for UK Financial Regulators both during the negotiations leading to Brexit and thereafter. Evidence from the Financial Conduct Authority (FCA) suggests that there is an enthusiasm for ensuring that beyond leaving the EU, the FCA is influential overseas and actively engages with international organisations to ensure that global standards are being maintained and followed. This is in line with various open markets being pursued by UK financial firms. Ensuring cross-border access is a key objective. Close co-operation with other regulators is also an important goal. The aim is to minimise the risks of regulatory arbitrage and fragmentation in financial markets. Co-operation between regulatory authorities is essential and establishing a robust framework is key. Achieving this outcome will require considerable efforts and activity.

Withdrawal from the EU does not change the statutory arrangements of the FCA but it will inevitably change the way markets operate and this will need to be factored into the regulatory work of the FCA. The future is uncertain but it is clear it is likely to have consequences that will need to be addressed very carefully.

Overall the question of continued co-operation and influence is likely to be essential for effective regulation but this is also necessary for

any prospect of influence over financial standards globally. That influence is likely to be the key to future success and ultimately effective regulation. Finally, the effectiveness of many UK financial firms as well as regulators will depend on recruiting a skilled and well-trained workforce. This is essential for competitive financial firms as well as regulatory influence. The current financial climate is likely to have to adjust expectations in line with global trading conditions. The role of the USA is critical and if it retrenches from global arrangements this may well effect the prospects for the UK after Brexit.

Operating outside the EU will bring many new challenges and opportunities. The FCA in particular will have intervention powers for incoming “passporting” firms that are regulated within the EU or the EEA. This will require co-operation with the European Supervisory Authorities. Working outside the EU regulatory framework may also give rise to greater flexibility but remains to be seen. There will be some practical limitations on such flexibility as there are responsibilities under the Basel Committee on Banking Supervision.

Underlying any assessment of prospects for the future are uncertainties and difficulties that will accompany future planning and strategy. At risk are many of the UK’s most important financial firms and economic relations. The future influence of UK regulators in the global economy and their contribution to setting regulatory standards is also important, perhaps more than ever before in an uncertain world.

Economic Uncertainties surrounding the Brexit process and the importance of the rule of law and Parliament’s role:

In periods of potential economic turbulence and uncertainty the need to uphold the values of the rule of law is paramount. One aspect of the rule of law is that it has an overarching influence as to how Parliament should behave⁽¹⁾. This is particularly important at the present time. This is a period where politics are highly contested after the unexpected referendum result. The major political parties, including the Government, having campaigned to remain are faced with the difficulty of leaving and of being scrutinised more than at any time in recent

(1) R. Munro, H. White and L. Borjes, Parliamentary scrutiny of European Union legislation: Lessons from other European Countries London: Institute for Government March, 2016.

constitutional history. Lack of clarity as to what the legal effects and the policy consequences of Article 50 negotiations leaves considerable discretion in the hands of the Executive and the negotiating arrangements undertaken by the EU institutions. Policy making is likely to have to operate through contingency planning. Even the date of the conclusion of Brexit is uncertain. Assuming that Brexit is commenced at the end of March 2017, it is possible that the Brexit arrangements will be concluded by March 2019. This date may be extended by a unanimous agreement of the EU 27.

The UK Parliament⁽¹⁾ has responded eventually to the uncertainty, after some months of inertia. There are at least 30 inquiries being undertaken by Parliament, 13 in the House of Lords and 18 in the House of Commons. Some are in the process of being prepared while others have been published⁽²⁾. The House of Lords European Union Committee 9th Report on Brexit: Financial Services⁽³⁾ provides important recommendations and analysis of the issues facing financial services. This is against a backdrop of stubborn government resistance to any parliamentary scrutiny. Parallel to the UK's Parliament activities, the EU Parliament, whose assent is needed for Brexit, will also be engaged in substantial scrutiny and information gathering about the negotiations and their completion. MEPs are likely to be given access to the EU Commission's meetings and to the progress of the negotiations. This will leave MEPs potentially better informed and knowledgeable than their counterparts in the UK Parliament. The contrast between the two Parliaments could not be clearer.

(1) T. Bingham, *The Rule of Law* p 19 reference to the Petition of Rights on 7th June 1628 :They do therefore humbly pray your most excellent majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without common consent by Act of Parliament.

(2) House of Lords Library Note: Leaving the European Union: Machinery of Government Changes LLN 2016/070 (16th December 2016) There are a number of key committees involved with Brexit- The House of Commons, Exiting the European Union Committee, the International Trade Committee as well as many other specialist committees covering sectoral issues such as agriculture. The House of Lords Committees include the Liaison Committee, the European Union Committee. There are a number of specialise committees and sub-committees including human rights as well as police and security cooperation.

(3) House of Lords European Union Committee 9th Report of Session 2016-17 Brexit: financial Services HL Paper 81 (15th December 2016).

The main benefits of undertaking Parliamentary scrutiny are that the full significance of the many complex areas of discussion, particularly financial and economic, will receive a wide canvass of expertise and analysis. Select Committees, empowered since the election of independent chairs, could provide a resilience that will empower negotiation rather than enfeeble it. Parliamentary scrutiny will also enable the final agreement to have the benefit of legitimacy leading to the eventual ratification by the UK Parliament. The necessary connection between scrutiny in the UK Parliament and the EU Parliament is one that cannot be avoided. Achieving credibility over the economic and financial stability of the UK is paramount⁽¹⁾.

Parliamentary select committees have also an important opportunity to develop their methodology and techniques of inquiry beyond the mainly retrospective analysis that is too often the norm. Setting proactive terms of engagement will facilitate finding evidence, evaluating data and engaging with analysis that will not only bring government to account but simultaneously empower the government of the day to negotiate in a more effective manner. Empowerment will also come from the process of allowing engagement with other stakeholders and MPs. This has the potential to take a wider perspective on financial and economic sectors. There are powerful incentives. Summoning witnesses, hearing evidence and questioning ministers should not be undervalued. There are also opportunities that hold their own rewards. Engaging with the public and media has the potential to enhance Parliament's reputation and provide an important connection with public concerns. Financial sectors require assurances that their voice is being heard and this may give rise to an improvement in substantive negotiating issues.

There are, however, concerns that the large number of select committee inquiries may dissipate their effectiveness. The solution is to seek co-ordination of the findings as well as in the collation of the evidence. There are two Committees that may prove decisive. The Liaison Committee is pivotal in ensuring co-ordination of the various inqui-

(1) Swati Dhingra, Gianmarco Ottaviano, Thomas Sampson, and John Van Reenen, *The Consequences of Brexit for UK trade and living standards* London LSE Working Papers Brexit02. (Centre for Economic Performance LSE, 2016)

ries. This can be taken forward by effective communication between the various committees and a pro-active approach to management. It might also be possible to identify and address any gaps in the inquiries as well as ensuring coherence in the findings and recommendations of the committees. There is also a need to give particular priority to certain sectors, particularly in the area of finance and economics. Taking this approach is tied to engagement with appropriate expertise and information. This has a broad appeal of strengthening Parliament as well as the Government's negotiation strategy. The newly created Brexit Committee, set up to monitor the Brexit department responsible for the co-ordination of Brexit negotiations is also likely to be pivotal. This is a new committee with untried membership and a new remit that is unprecedented. It remains to be seen how effective it is in addressing the ongoing constitutional challenges.

Finally, but also important is the role of the courts and their significance is far from clear. The Supreme Court decision in the Miller⁽¹⁾ case is eagerly awaited if only because it will set out some general parameters for judicial discretion in the coming months. In many cases UK courts, have acted with self-restraint, especially when policy and economic matters are being discussed. This was clearly illustrated in the aftermath of the 2008 financial crisis. In R(application of SRM Global Master Fund LP) v Treasury Commission⁽²⁾ (The Nationalisation of Northern Rock), claimants sought judicial review of the decision to nationalise Northern Rock. The standing of the claimants was that they were all share-holders of Northern Rock. Their complaint was that the valuation of Northern Rock at the date of nationalisation was unfair. Northern Rock was a going concern, although insolvent and that the conditions of the support provided by the Bank of England as the Lender of Last Resort imposed high interest rates on Northern Rock for the monies provided by the Bank of England. This had the effect of making the valuation of the mortgage portfolio of Northern Bank unfairly benefit the Government through providing a profit for the Bank of England loans. The financial support provided by the Bank of England deprived shareholders of their profits and the provisions for compensation to existing shareholders was unfair. The case argued by the claimants

(1) R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768

(2) [2009] All ER (D) 139

was that through the economic device of loans and guarantees, the Bank of England secured for the taxpayers expropriation through nationalisation of Northern Rock but without adequate compensation to the Northern Rock share-holders. The case made out by the claimants was rejected. Stanley Burton LJ held that without Bank of England intervention Northern Rock would have ceased trading. The Government through the Bank of England could have withdrawn support – there was no duty to provide financial support and no legitimate expectation to do so. There was no requirement to give such support and the compensation scheme for the shareholders had to accept Northern Rock's valuation based on the loans provided. The claim was dismissed. This is a good illustration of the self-restraint shown by the courts in matters of policy and economics⁽¹⁾.

Another example is when the courts are invited to consider matters relating to public spending particularly how the public purse is best protected. The decision of the Supreme Court in the *HSE v Wolverhampton City Council*⁽²⁾ considered the responsibilities of public authorities when deciding to exercise a discretionary power to achieve a public objective. The main question was whether or not costs to the public ought to be taken into consideration. The Supreme Court considered the responsibilities on public bodies and their application to the case in question. Planning permission for a block of four student residences had been applied for and granted. In the course of construction, the Health and Safety Executive (HSE), concerned about gas storage on site, applied for an order to revoke planning permission against Wolverhampton Local Authority. In refusing the application, the Council considered costs and came to the view that if planning permission were revoked the cost of compensation that would be payable would be high and consequently refused the HSE's application. The HSE brought judicial review proceedings against the Council. The High Court refused that part of the claim. The Court of Appeal allowed the HSE appeal and held that the Council has to make its decision in isolation from the economic circumstances of the decision. The Supreme Court adopted

(1) Dimitrios Kyritsis, "Constitutional Review in Representative Democracy" (2012) *Oxford Journal of Legal Studies* Vol. 32 no.2 pps. 297-324. *R(Jackson) v Attorney General* [2005] QB 579.

(2) *HSE v. Wolverhampton CC* [2012] UKSC 34

a different approach, and decided that a public authority was entitled to take into account the cost to the public purse. Section 97 required the authority to satisfy itself that revocation is expedient including consideration of the development plan and other “material considerations”. As the payment of compensation is a relevant matter, the cost to the public purse has to be considered. In general principle, a public body has to take into account public spending.

It is to be expected that tackling financial and economic disputes will require considerable dexterity but judicial oversight is likely to be paramount in ensuring the rule of law is upheld.

Conclusions:

Linking debates about Brexit to the overarching concerns of the rule of law is timely. The rule of law provides an essential framework for the discussion of many aspects of Brexit including the role of Parliament, the importance of the courts and the values of justice and fairness. Lord Bingham noted the historical importance of the rule of law to the earliest commercial life of the nation. History has a resonance with the present. Lord Mansfield made some observations over 250 years ago, that were pertinent. “The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense drawn from the truth of the case.” Later on he concluded that in all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule if established one way or another. Because speculators then know what ground to go upon.

Setting the agenda for the future will require careful consideration of the many potential impacts of Brexit for the financial sector⁽¹⁾. The Institute for Government has identified four main options for UK and EU relations after Brexit. The first is EEA membership but this requires acceptance of freedom of movement. The benefits of EEA are that Member States provide services to other Member States without having to

(1) There is also a question of Brexit having differential impacts on the different nations, See: Akash Paun and George Miller, Four-nation Brexit London: Institute for Government, (October 2016)

be concerned about regulatory equivalence. The merits of this option will ensure that the UK will be able to maintain financial services.

Second, the operation of a Free Trade Agreement. This would involve several different permutations. There are many service sector agreements. Settling on the appropriate arrangements for financial services will take some time and effort. For example, the trade agreement between the EU and Canada does not include financial services. There are other models such as Switzerland for insurance and public procurement but there is not one for financial services.

The third option is membership of a Customs Union. The benefits are restricted as none of the Customs Union arrangements cover services and are confined to trade in goods. Membership does not give any preferential access to the EU's services market.

The fourth option, in the event of a "hard Brexit" would be adopting World Trade Organisation (WTO) rules. It is likely that the UK might lose its passporting rights and will then require acquiring authorisation from each individual member state. This will take some time and cost to achieve. Selecting the most appropriate option is a matter for public debate as well as government negotiation.

The House of Lords European Union Committee in its recent 5th Report⁽¹⁾ concluded that there should be a transitional arrangement and that the government should focus on its future trading relations with the EU and WTO. One option is to trade under WTO rules but this is not straightforward. An early decision should be made about the value of a Customs Union such as where there are trade arrangements under WTO rules are likely to take some time to finalise. The EU has been influential in developing WTO rules and this influence is one that will need to be considered in any negotiation. The same House of Lords European Union 9th Report on Financial Services pointed to the imperative that the Government "gains a detailed understanding of how firms are likely to be affected by changes to their rights of access to EU markets⁽²⁾." The main passporting arrangements are complicated, many firms not realising the extent to which they are reliant upon the

(1) House of Lords, European Union Committee 5th report 2016-17 Brexit the options for trade HL Paper 72 (13th December 2016)

(2) Ibid. para 2 p. 39.

current arrangements. Underpinning such uncertainties are questions about future relationship with the EU especially in areas of insurance and banking. Access to and maintaining international standards is a key element in any future relationship. Staffing is also critical and having the ability to hire the most qualified staff will inevitably require access to skilled migrants. The House of Lords Committee reinforced the need for certainty and clarity over how the interests of various stakeholders are to be met. Finally, the value of UK financial services to the EU needs to be fully researched and presented as a clear negotiating strength⁽¹⁾.

The UK decision to exit the EU will also have considerable implications for the devolved nations⁽²⁾ and this is likely to impact on their economy as well as the financial relations within the UK⁽³⁾. Underpinning future strategy is the desire to set up free trade agreements that will encourage the UK to participate in global free trade. Setting high expectations underpins the need for suitable forms of accountability and oversight. Upholding the rule of law is set to define the future of the UK in a way that rekindles the spirit of our constitutional inheritance. Unchartered change, increasing uncertainty and fragility in economic markets are certain to raise questions about additional costs and added burdens from Brexit. Deciding on whom the many burdens should fall and how the distribution of costs might be fairly weighted sets new and unexplored challenges for existing institutions and values. In this uncertain time having fundamental values of justice and fairness might help set priorities and become a predictable and useful guide to how the future might be enjoyed in a tolerant society that lives up to the spirit of the law. The rule of law should prevail and protect citizens especially the poorest and most vulnerable.⁽⁴⁾

(1) Ibid, para 20 p. 41.

(2) Akash Paun and George Miller, Four Nation Brexit, Briefing Paper London: Institute for Government, 2016

(3) House of Commons Library, Briefing Paper Brexit: Devolved Legislative Business Number 7815 (30th November 2016). House of Commons Library Number 04033 Public expenditure by county and region (30th November 2016).

(4) Swati Dhingra, Gianmarco Ottaviano, Thomas Sampson and John Van Reenen, The Consequences of Brexit for UK trade and living standards LSE: London; Centre for Economic Performance, March, 2016.