Day 2 Article 50 - Brexit Hearing 6 December 2016

Tuesday, 6 December 2016

(10.15 am)

THE PRESIDENT: Please.

Submissions by MR EADIE (continued)

MR EADIE: My Lords, my Lady, good morning. Apologies for a plethora of notes on your desk. Can I suggest that they get tucked in at the beginning of the black 11KBW file you have been in and out of yesterday, and just explain what they are.

THE PRESIDENT: Yes.

MR EADIE: You should, either there or separately, have cross-referenced versions of both of our cases, somewhere, in response to a question that Lady Hale was asking yesterday. Then you have a note, applicants' note on the Constitutional Reform and Governance Act. That is designed to show you all the bits and pieces that preceded that Act and you will see that in that note at paragraph 1(2) and (3), or paragraphs (1), (2) and (3); you have documents that are already in the bundles, otherwise we haven't given you the copies of the remaining documentation referred to, but we have given you the internet link if you want it.

We can easily provide you those if you wish, but rather than flooding you with paper, we have given you those. I hope that's helpful. At the end of that note, we have answered the query that Lord Carnwath raised in relation to section 23 of CRAG in its original form, and we have sought to answer Lord Mance's question about the scrutiny process in Parliament in paragraph 4 of that note.

That is the note on CRAG. You should also have a note on the Great Repeal Bill; I say a note, it is a statement that was made to Parliament by the Secretary of State for exiting the European Union.

LADY HALE: I am afraid I seem to have two copies of your note on EFTA and no copy of any note on the repeal bill.

THE PRESIDENT: I have two copies on the next step s of leaving the European Union.

LADY HALE: I am afraid I seem to have two copies of your note on EFTA and no copy of any note on the repeal bill.

MR EADIE: My Lords, my Lady I have still got a bit to get through, if we may.

LORD MANCE: Yes.

MR EADIE: My Lords, my Lady I have still got a bit to get through, if we may.

THE PRESIDENT: Please.

MR EADIE: Can we make sure you have copies and we will look at those overnight if we may.

LORD MANCE: One point from my side on the different subject of in pari materia which you touched on. It seemed to me there might be some further material to be looked at in that connection, and in particular, there are other cases which we have not got in the bundle, Ashworth v Ballard in 1999, citing Lord Mansfield, I think. We could give you these, but Brown v Bennett was the particular one that is actually a decision of my Lord, Lord Neuberger's in [2002] 1 WLR, which has quite a full discussion.

MR EADIE: Can we make sure you have copies and we will look at those overnight if we may.

LORD MANCE: Yes.

MR EADIE: My Lords, my Lady I have still got a bit to get through, if I am afraid.

Submission three I was on, on the principal submissions on the statutory scheme. Submission three is a broad submission which is that it is fundamentally inaccurate, we submit, to conclude that by the 1972 Act, Parliament intended to legislate, and I am quoting from the divisional court, "so as to introduce EU law into domestic law in such a way that this could not be undone by the exercise of prerogative power".

That is the issue we were talking about yesterday.

In relation to that point, we submit first that it did not do so expressly; secondly, therefore, that if there is such a restriction, if there is such an intention in Parliament to be found from the 1972 Act, it can only be by implication; and if you are approaching the matter as a matter of implication, we submit that the implication is impossible if the later scheme of the legislation is taken into account.

In any event, any implication just viewing the 1972 Act in isolation would have to be based on the fact that it introduced or recognised rights created under treaties, and the implication that is said to flow from that is that therefore you can not drain the Act of significance; it is that point.

We respectfully submit that nothing flows from that fact, that it recognised or introduced those rights in that way, once it is clear, as it is, that the rights in question are created on the international plane, and that they depend upon the continuing relationship between the sovereign states, which were parties to the European Economic Community as it then was. The consequence of that is that the 1972 Act is merely, we submit, providing the mechanism for transposing, and I dealt with that yesterday.

It does not and was not intended to touch the exercise of the powers on the international plane.

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1. Indeed, the relevant provisions of the Act are not directed to that level, international action, at all. They are directed solely to the transposition into domestic law issue. For that reason, the 1972 Act does not even authorise the Government to make the United Kingdom a member. Instead, its fundamental nature is to operate on the clear understanding and application of the dualist principle, and it on any view recognised rights of a particular kind; rights having existence as a result of international processes in which Her Majesty's Government participates in the exercise of sovereign powers. So it is premised on the continuation, the active continuation of that sort of action, by the Government on the international plane. On any view, that aspect of the foreign affairs prerogative was not merely to continue but was an integral part of that legislation. It is that that led to the submission I made yesterday about the rights being in that way inherently limited. The Government could on any view, exercising those powers in that way consistently with the scheme of the Act, have removed rights, have removed a swathe of rights introduced into domestic law through the Act. So the case has to be against us that prerogative powers continue to be available, and recognised as continuing to be available, for all purposes to do with our participation in the functioning of the EU, but somehow nevertheless implicitly excluded the power to withdraw. Just before I come directly to, is withdrawal different in scale or in kind; and it is a matter we have given some further thought to overnight in light of the fact that my Lord, Lord Wilson was interested in it yesterday, can I just divert briefly back into a question that Lord Mance raised yesterday about the Fire Brigades Union case.

1. My Lord, for the basic proposition that you have secretary's exercise of prerogative power, you will recall, was to bring in a new criminal injuries compensation scheme. That was held to be unlawful precisely because it precluded him from exercising his statutory authority under section 171 of the Criminal Justice Act of 1988, which was a duty to consider when to bring in a new statutory scheme; and they set out in the judgment the terms of section 17 which makes that entirely clear.

1. LORD SUMPTION: It is also authority, isn't it, for the proposition that you cannot anticipate legislation, even though the Government commands a majority in the House of Commons and announces its intention of introducing it?

1. MR EADIE: My Lord, for the basic proposition that you have to assume -- take the law as it is currently.

1. LORD SUMPTION: Exactly, so you don't dispute that the Great Repeal Bill is not something that we can take into account in any of the matters we have to decide?

1. MR EADIE: It is not a matter that relevantly goes to a question of interpretation.

1. LORD SUMPTION: No.

1. MR EADIE: It may be relevant to the broader constitutional issues as to whether or not Parliament is going to be involved and if so, how.
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1. further parliamentary involvement.

2. LORD CARNWATH: It is a point that comes out more in the

3. Attorney General for Northern Ireland's case, that --

4. there will be no legislation, where the assumption,

5. I would have thought, is that there will be legislation

6. to deal with all these very complex matters.

7. MR EADIE: There will have to be, on any view there will

8. have to be.

9. LORD CARNWATH: Arguably it might be an abuse of process to

10. go ahead without that anticipation, so it may come in in

11. that sense.

12. MR EADIE: But it also demonstrates dualism in action; it

13. is, as it were, the implementation of the decision taken

14. by the virtue of the prerogative power in exercising the

15. Article 50 notice; the idea that Parliament will not be

16. involved cannot possibly be sustained.

17. THE PRESIDENT: The argument that Parliament can't be

18. involved cannot be won, because Parliament can always be

19. involved if it wants to be. As you say, it is getting

20. involved and if they chose to bring the whole question

21. of an Article 50 notice to them by actually deciding to

22. debate and indeed to legislate, for example, that no

23. Article 50 notice could be served, that is something

24. they can do.

25. MR EADIE: It is really a different way of putting the same

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1. point that the Attorney made in opening: Parliament can

2. look after itself.

3. THE PRESIDENT: Exactly, but that is not the issue which we

4. are deciding.

5. MR EADIE: That is not the issue which you are deciding, but

6. the fact that Parliament is going to get involved is not

7. just that point, that they could get involved if they

8. wanted to because they always can, but it is that in

9. dealing with the domestic consequences of the action on

10. the international plane, Parliament will have to

11. legislate, it will have to legislate to deal with, but

12. that is the usual constitutional way in which things

13. work.

14. LORD SUMPTION: But we cannot decide, I think you accept,

15. that any of the issues before us, on the assumption that

16. by the time that the withdrawal actually occurs, the

17. European Communities Act would have been repealed or

18. significantly modified; that may well be a practical

19. possibility, but it is not something that we can assume

20. in point of law.

21. MR EADIE: You cannot assume that, because it may not

22. happen, apart from anything else.

23. LORD CARNWATH: But we cannot assume that it will not

24. happen. For my part I am not -- having seen (Inaudible)

25. for myself, I am not accepting the suggestion that it is

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1. completely irrelevant.

2. MR EADIE: And I am not accepting that and I am not sure --

3. LORD CARNWATH: I think he probably was.

4. MR EADIE: If that was the impression given, I am not. But

5. it is -- I am perfectly content --

6. LORD SUMPTION: You seem to have given two diametrically

7. opposed answers in the last five minutes to the same

8. question, but we will obviously have to work out which

9. answer we accept.

10. LORD CARNWATH: We will have the transcript.

11. MR EADIE: Let me help you. We do not accept that it is

12. legally irrelevant, but we do accept the point, my Lord,

13. which is that you cannot proceed on the assumption that

14. Parliament will necessarily legislate to introduce or to

15. pass the Great Repeal Bill, because that depends on what


17. LORD REED: The debate that you have been having with two of

18. my colleagues perhaps illustrates another point, which

19. is that when you are talking about a constitution in

20. which there are a number of important institutions, the

21. court being only one of them, thinking in terms of the

22. law, that is only part of the picture, and the court has

23. to be conscious of what competence it properly has to

24. exercise in this field, and what matters are properly

25. matters to be resolved by the political institutions,

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1. including obviously the Government and Parliament.

2. MR EADIE: Yes. We accept that. And assert it, as you

3. know; it was part of the point I built on, and I am

4. going to come back to, about the significance of the

5. 2015 Act, and the Lord Bingham quote from Robinson, and

6. Lord Dyson's proper description of the 2015 Act as being

7. constitutional, a point of significance, we submit.

8. LORD REED: It also relates, I think, to the way in which --

9. this sort of constitutional issue is unusual in this

10. jurisdiction. In the time I have been here, we have had

11. this case and Axa, I think are really the only cases

12. that have raised major constitutional questions; but

13. there are lessons one can gain by looking more widely

14. afield, if one thinks in terms of constitutions as

15. requiring the collaboration of a number of actors, with

16. each having a limited realm within which it operates.

17. MR EADIE: My Lord, yes, we agree with that as well, and it

18. applies not merely to the relationship between courts

19. and Parliament and the proper function of the court in

20. determining those sorts of issues, but it also raises

21. the point I made yesterday, which is that our

22. constitution is built and it is entirely consistent with

23. parliamentary sovereignty that it is built, on the

24. premise that the Government itself, particularly in the

25. sphere of foreign affairs, exercises its own

3 (Pages 9 to 12)
prerogatives. So it has significance in both of those
to emphasise the point I made yesterday, is that
go about answering questions as to the current state of the constitution;
namely by asking what the position is today, not what
the position was 40 years ago.

THE PRESIDENT: I see. We had better let you proceed with
your argument as you had planned to.

MR EADIE: I will try not to give too many inconsistent
answers in the same five minutes if possible.

I was trying to deal with Lord Mance's points
yesterday about Fire Brigades Union, whether it stood
for a broader principle. The point that I was making
was that it doesn't, we respectfully submit. It does
involve the court concluding that the home secretary
could not exercise his prerogative power in the
circumstances in which the legislation said what it did
in section 171(1). We would invite you, without going
back to it, to read or to reread Lord Browne-Wilkinson
on that issue at 554 F, Lord Lloyd at 502 E, and Lord
Nicholls at 506.

They all effectively concluded that it would be
an abuse of his statutory power under section 171 for
the Secretary of State to announce that he would not
introduce the statutory scheme, and to introduce the
prerogative scheme instead. Lord Nicholls specifically
held -- that was Lord Lloyd's analysis and Lord Nicholls
specifically held that it imposed that section, a duty
to keep under consideration when to introduce
a statutory scheme, and by introducing the new scheme,
he had set his face against that. So in short there was
a specific statutory duty to which the home secretary
was subject, and from which he had disabled himself from
exercising.

So there is no broad principle of frustration of
rights or changes to domestic law; the straightforward,
if you will is a -- principle is a straightforward
public law principle, and the House in that case was
only divided on the interpretation of the facts, had the
Secretary of State in fact disabled himself.

So to be analogous, the ECA in our context would
have to contain a provision to the effect that the
foreign secretary either must ratify or should keep
under review when to ratify. There is nothing indeed in
the ratification at all in our particular context. That
is what we say and I wanted to go back on
Fire Brigades Union in that way.

Can I then turn to scale, and I don't mean to
diminish the force of the point that Lord Wilson puts to
me. It is a genuine and real one that the other side
takes. So scale or difference in kind, however you
choose to put the point, you are actually withdrawing,
you are not just altering in a small way, as it were,
the corpus of rights in and out; you are actually
withdrawing, is the force of the point against us.

Our answers to that are these. Firstly, we say, the
ECA does not touch withdrawal. The fact that it is,
that it creates rights which are contingent on the shape
of the corpus of EU rights and that they can be removed
as well as added to, may not provide a complete answer
but it is a step along the way because it shows that
Parliament was contemplating removal of rights. We also
submit, as you know, that it was contingent on the
international relationship between the UK and the other
EU member states remaining the same. For that reason,
the process of withdrawal, the giving, commencing of
that process by giving notice, is not inconsistent, we
submit, with legislative intent.

You have got our point about the basic structure of
the Act and its dualist features, focusing purely on
transposition, not on controlling those international
powers.

That is the view of the ECA in isolation, in answer
to that point, and as you know, our case is you don't
view it in isolation properly; you take into account
also the scheme of legislation in its entirety, so the
subsequent pieces of legislation. We know, I took you
to them yesterday, that the later legislation absolutely
plainly does address and consider what powers to take
back into parliamentary control of whatever kind, and
what powers to leave in the hands of the Government.

It specifically considered, as we saw, in the 2008
and 2011 acts, Article 50, which is the very process of
withdrawal, and we saw yesterday that it made provision
for Article 50(3) as one of the rights, and all of that.

That is the second of the answers. The first is
viewing 1972 on its own; the second is look at the later
legislation; and third is, if the concern
constitutionally is scale or a different kind of thing,
a different kind of change, then the constitutional
answer for that is the 2015 Act and the referendum.

That rather leads into the point that was also made
yesterday about joint effort, have we got mirror-images,
joint effort and matters of that kind. Again, three
short points if I may on that.

Firstly, on any view, there has been a joint effort,
and there will continue to be a joint effort at this end
of the scale. In other words at the withdrawal point,
2015 Act again, the referendum and the continued
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involvement of Parliament in the necessary process of implementing the withdrawal.

Secondly and strictly, what will happen on exit will reflect closely what happened on entry. The decision to enter involved an international act, the signing of the accession treaty, domestic legislation to come into force on entry, the ECA, and the final international act, ratification.

THE PRESIDENT: Yes, but the difference in this case and why the 2015 Act is very important for your case is because an irrevocable step is going to be taken in the form of the Article 50 notice -- because of the Article 50 notice -- because of the Article 50 notice that cannot be gone back on, which is what we are assuming, and that is the difference, that is why the 2015 Act is very important for this argument.

MR EADIE: Exactly so. Exactly so.

But it reflects at least a symmetry, and to some extent it chimes with the point that my Lord, Lord Reed was making, there are various ways the constitution can react; and we know as Lord Mance pointed out yesterday that on entry, or before we signed up to the treaty of accession, I think it was, there were parliamentary motions.

I am going to take you to the Canadian case that Lord Carnwath mentioned yesterday in due course, but we see that that is exactly reflected in that case when we come to it; but there were parliamentary motions, as it were, before the international act was taken. But those parliamentary motions are non-binding legally, as it were. They have no legal effect. They are simply parliamentary authorities to do the thing, but they don't sound in law, they are not primary legislation, they are not secondary legislation; they are simply Parliament's choice as to how to give its permission and the extent to which it wants to get involved.

So if you do the contrast in terms of symmetry between then and now, it might be thought that now is a fortiori, and now is a fortiori in terms of withdrawal, because the giving of Article 50 notice was preceded by primary legislation, namely the 2015 Act. So we do respectfully submit that there is real symmetry -- there is real symmetry there.

LORD MANCE: Doesn't that beg the question as to whether the 2015 Act expected parliamentary consideration of the position in the light of the result of the referendum?

MR EADIE: On any view the 2015 Act involved -- my case, as you know, is that the 2015 Act in effect involved Parliament deciding to put to the final decision of the people the in/out question, and we do respectfully submit, therefore, that -- whether it said things or didn't say things, or whether it was silent or not, it still carries real constitutional significance, as having been passed at a point in time when they knew full well that the only way of achieving one of the things or one of the possibilities on the binary question was to give Article 50 notice. That was the only way in which withdrawal could be effected. You had to take a step on the international plane, how would that work, what would need to be done? You would have to give Article 50 notice. That is the mandated process.

LORD WILSON: Of course the referendum doesn't say anything about when the notice should be.

MR EADIE: It doesn't, and it might be thought not to do so deliberately, because it might be thought that that is one of the paradigmatic decisions which would involve the exercise of expert and experienced judgment from those who would thereafter have the carriage of the negotiations. That is the very political debate that has been raging for the last few weeks or months.

LORD MANCE: Is it realistic to regard an Article 50 notice as an entirely limited notification, the UK is going to withdraw, because the scheme of Article 50 obviously contemplates that that will lead to, at the very least, a framework agreement as to the future. Is it realistic to suppose that the notice will simply be a notice which gives no clue as to what the nature of the direction intended is, what the nature of the agreement wished for is?

MR EADIE: Well, it certainly won't delve into what the possible agreement might look like; it won't delve into how the Government might or might not choose to negotiate. I think all parties here are proceeding on the basis that it will be --

LORD SUMPTION: It will simply implicate the terms of Article 50, won't it?

MR EADIE: A one line. It will just comply with Article 50.

LORD MANCE: Everything else occurs subsequently.

MR EADIE: Yes, and to some extent that flows into the point that is made on the other side, which is to accept that if the Supreme Court decides against our arguments here, then the solution in legal terms is the one-line act. It may be that would lead to all sorts of parliamentary complications and possible additions and amendments and so on, but that is the solution and that is of obvious significance, all of those points are of obvious significance both in relation to the timing of the giving of that notice and in relation to the in fact that negotiations will have to happen.

How are those matters going to occur? Back to
Lord Reed’s point about the delicacy of the balance and which part of the Government has which functions under our constitution; no one is suggesting that the negotiations will or could happen in any other way than by the Government negotiating on the UK’s behalf to achieve the best deal it can.

If the outcome of that is an agreement, it is very likely that that agreement will be subject to the CRAG process; again, that takes one back to the balance, between what Parliament has chosen to control and what it has not.

So that was the second point with a bit of diversion on joint effort, and how that symmetry might or might not properly be viewed. But to some extent there is a broader point, which is the third of the points on joint effort, which is to the extent that there is a symmetry(?), we don’t accept there is but to the extent there is a symmetry(?), that might be thought to some extent inevitable or at least acceptable, because it takes two elements to recognise international law rights in the way set up by the 1972 Act.

You need the general conduit, the general permission and you need the creation of those rights on the international plane. I am not sure you can have a stool with two legs, but if you could, take away one of them and the stool falls, is the third short point in relation to that.

LORD REED: I don't know quite whether you would put it this way, you might not. It occurs to me that a lawyer's way of looking at the 1972 Act might be to ask, does it mean that the result of a referendum gives some -- has some legal consequences for Government. For example it requires them to act on the result of a referendum or, alternatively, does it have a parallel impact on the legal position of Parliament?

Another way of looking at it might be to say that holding a referendum is a political event, that the significance of the outcome depending on things like the size of the turnout, the size and majority one way or another, is inevitably a matter of political judgment, which courts are not equipped to do, and that therefore the outcome of the -- when Parliament passes the 2015 Act, it is setting in train a political process, the outcome of which has to be assessed by the political actors in our constitution?

MR EADIE: That is certainly a -- both of those are certain potential ways of looking at the 2015 Act. Can I answer the question, not so much directly but to accept that those are both possible and one can approach the 2015 Act in a variety of different ways, and we have been thinking for obvious reasons, particularly in the light of the questions yesterday, we have been thinking about the true nature and significance for the 2015 Act.

Another, a third way if you will, is to look at it, it might be thought, in this way: you know, just before I get to this point, that our primary case is and remains that the legal significance of the 2015 Act is entirely consistent with the scheme of the legislation as a whole.

So it recognises that the prerogative exists alongside and indeed is the premise for all of the scheme of legislation which governs. So the significance of the 2015 Act is that it is silent, consistently silent, and leaves the prerogative in place; and does so in circumstances where it is perfectly clear how that prerogative would have to be exercised, and that it would have to be exercised using Article 50. That was the only mechanism for doing so; that is our prime case, you know.

You also know that our prime case involves placing reliance upon it inter alia to meet points about scale, and the size of the change and so on, in constitutional terms, in the rather broader terms in which I opened it yesterday. You know that we accepted and positively relied upon, as an accurate description, the description given by Lord Dyson in the Shindler case, of it being part of the constitutional requirements or arrangements.

We respectfully submit that was right. But the alternative way of looking at it is to say this: let's suppose for the sake of argument, and it is an alternative submission obviously, but suppose for the sake of argument that you were against us on the 1972 Act, because you thought, well, you have to look at the 1972 Act in isolation; in isolation if we looked at it the day after it came in, we would say, per Lord Wilson if I am allowed to take the question that was put without ascribing a view at this stage; if you looked at it on that day and in that way, you would say it is too big a thing to leave, to withdraw for the Government to do, Parliament having introduced all these rights, just too big a step, you can't do it. So the implication is you cannot do it under 1972.

What that effectively means for the prerogative, because the prerogative plainly continued to exist before and after the 1972 Act; I will come back to Lord Sumption's question yesterday about whether it was a prior question in a moment; but it continued to exist before and after. So what that would involve is a conclusion by the court, as it were, as a legal construct, that the necessary implication of the Act,
25 LORD CLARKE: Of course, it didn't have to be silent, did it? I mean Parliament could have.
24 THE PRESIDENT: It could have said it was advisory or it could have done what it did in the alternative vote legislation and in the legislation relating to future changes to the European constitution, it could have --
23 can I finish -- it could therefore have said what it did. Lord Clarke's point, which I think is a fair one, is that if Parliament means it to have a legal effect, as in those two statutes, it says so, whereas it doesn't say so in the 2015 --
22 MR EADIE: My answer to Lord Clarke's point, I am grateful to my Lord, can I accept that the Lord Reed political and our remove the clamp are pretty much different ends to the same thing, although they do involve, in my remove the clamp thing, the interposition of the court in what might be thought to be in a constitutionally difficult or inappropriate manner, so that is the distinction between those two legal punch lines.
21 To come to my Lord, Lord Clarke's point, true it is, and I will let my learned friends develop this if they want to, that in relation to the AV, alternative voting referendum, there was the legal consequence set out, but that was because there needed to be. It needed to be set out in that way, because they had to, as it were,
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<td>viewed it in isolation, I am leaving entirely out of you account the latest legislation, but even if that is the prima facie conclusion on 1972, that must be inherently susceptible to change. The 2015 Act comes in and its legal effect is to leave or to remove, if you will, by the same process, by exactly the same process of implication, that which you impose by necessary implication now comes off by virtue of the same process.</td>
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<td>THE PRESIDENT: Another possible interpretation of that line of argument is that when you get to that point, when you get to the 2015 Act, you may say to yourself, picking up Lord Reed's point about the balance between various parts of the Government, it is not for the court to say what the effect of the 2015 Act is, where Parliament has been very carefully silent, but to say that is a matter for Parliament. And therefore if you are right about the -- not if you are right, if it is the case that the 1972 Act has got what you call a clamp, the question whether the 2015 Act, which is studiously silent on what its effect is to be, when there is a referendum, should be left to Parliament and not to us, and therefore it brings you back to saying it should go to Parliament.</td>
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<td>MR EADIE: Yes, and what this debate demonstrates is that there are, perhaps because of its silence, subtle ways in which one can give, as it were, the legal punch line.</td>
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<td>prescribe what would happen as the next step, and the law needed to be changed, and so they set it up in that way. Whereas here, we submit, nothing more is needed to give effect, by way of express statutory language or express statutory provision, to give effect to the outcome of the referendum, if the answer was to withdraw.</td>
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<td>LORD MANCE: Is that a conclusion which you arrive at as a matter of construction of the 2015 Act, or are you suggesting a principle along the lines that my Lord, Lord Neuberger has just suggested, namely that the Act is effectively an unusual form of legislation, if I interpose an adjective, which it is not open to the courts to construe.</td>
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<td>MR EADIE: Am I allowed to say either or both?</td>
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<td>LORD MANCE: I would just like to know what your authority is for the proposition that certain pieces of legislation are not susceptible to construction in this court or indeed in any court.</td>
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<td>MR EADIE: My Lord, you can approach the thing as a matter of interpretation, but you are not in truth interpreting a provision of legislation; you are trying to discover its true constitutional nature and effect, is I think the way I would answer.</td>
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<td>LORD MANCE: That is a matter of interpretation, albeit in</td>
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<td>a constitutional context. Is there any legislation which Parliament passes which is not susceptible to interpretation in a court? It would be a rather unusual piece of legislation, wouldn't it?</td>
<td>conclusion of the divisional court about the statutory scheme has the most serious implications for the usual and long-established exercise by Government of the foreign affairs prerogatives. We have dealt with that in our case particularly at paragraph 61, but you will understand immediately why I say that, because if there is some principle that says whenever you exercise the foreign affairs prerogative, if the consequence is or perhaps may be to have an impact on or even to alter domestic legal rights, you cannot do it, then that is a consequence which is extremely troubling for obvious reasons.</td>
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<td>MR EADIE: Well, you are, of course, able to interpret the provisions of the legislation. This is simply a self-restraining or a self-denying consequence of a characterisation of the act of the kind indicated.</td>
<td>It would be to introduce a much more stringent scheme of control, for example, by reference to a new and newly discovered principle than the scheme that Parliament has seen fit to enact, even in CRAG, with its controls on ratification and the things that need to be done in relation to that. Because the consequence of the divisional court's reasoning on the back of this, if it has an impact on domestic law point, is that you need primary legislation.</td>
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<td>LORD MANCE: But we would only arrive at that self-denying approach if we concluded that that was Parliament's intention. That is a matter of interpretation which is the court's function, isn't it?</td>
<td>LORD MANCE: That treats the European Communities Act as typical of other types of statute, doesn't it? Your example of the territorial waters and the radio licensing is simply an example of a piece of legislation</td>
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<td>MR EADIE: I am not seeking to say this is non-justiciable, I am not running a non-justiciability argument, but there is, we respectfully submit -- the political route, the political outcome as it were, we respectfully submit, is not shut down by a principle that says the courts must be able to interpret legislation, true it is. We accept that.</td>
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<td>THE PRESIDENT: Your point is more that when you are interpreting legislation, you have to look at the nature of the legislation and take into account when -- which has to be taken into account when deciding what its effect is, not merely what it says, but what its effect is.</td>
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<td>MR EADIE: It sits against -- all legislation sits within the framework of our constitution, and the framework of our constitution brings with it doctrines of separation of powers and proper functions of courts and proper functions of legislature and proper functions of Government.</td>
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<td>LORD MANCE: You are going back to the basic consequence issue you were seeking to draw; it was that the 2015 Act removes any limitation on the prerogative, if there was any which was imposed by the 1972 Act. I would have thought, that although that is an important constitutional point, it is nonetheless a point which it is for courts to consider and adjudicate upon.</td>
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<td>MR EADIE: Certainly at that stage it would be. But at that stage -- that is why I said either or both, because the political answer says ultimately, as its punch line: this is for Parliament to decide and not for courts to trespass on as part of our constitutional arrangements; this one ascribes a legal effect and is therefore of course for the courts to determine.</td>
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<td>That is the third submission, which has gone on for a very long time and contains lots of little submissions within it. Apologies for the numbering. The fourth submission is a shorter one, you will be delighted to hear, which is that the reasoning and</td>
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Day 2  
**Article 50 - Brexit Hearing**  
6 December 2016

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<td>arrangements.</td>
<td>that allowed you to impact on domestic legal rights. If</td>
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<td>1 Can I come directly to the fifth of my topics, then,</td>
<td>the answer to that question is no, then all of the</td>
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<td>2 with that lead-in, which is: is there a background</td>
<td>statutory scheme and all of that analysis rather falls</td>
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<td>3 constitutional principle of the kind that the divisional</td>
<td>away.</td>
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<td>4 court identified? Of course that lies at the heart of</td>
<td>LORD SUMPTION: Not just domestic legal rights but domestic</td>
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<td>5 the case against me; it lay at the heart of the</td>
<td>law.</td>
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<td>6 divisional court's reasoning because as we saw, as you</td>
<td>MR EADIE: Domestic law, again, my Lord, I am grateful, but</td>
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<td>7 have seen, they do not in truth, despite that</td>
<td>it is the same effective point that I am going to try</td>
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<td>8 description, treat this as a background principle.</td>
<td>and address if I may.</td>
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<td>9 It was in effect dispositive of the case on their</td>
<td>That is the thrust of the question that was put, and</td>
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<td>10 reading of it, and it was dispositive because it had the</td>
<td>our first submission is that of course one has to</td>
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<td>11 effect of reversing De Keyser, of turning legislative</td>
<td>consider the nature of the prerogative with which you</td>
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<td>12 silence against me, if you will. The question was: no</td>
<td>are dealing. But the prerogative with which we are</td>
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<td>13 longer has Parliament expressed or by necessary</td>
<td>dealing is and always has been recognised as a general</td>
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<td>14 implication taken away a pre-existing prerogative. The</td>
<td>power with specific elements. The general power is the</td>
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<td>15 question was now: has it expressly allowed you to create</td>
<td>power in the Government to conduct foreign affairs. The</td>
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<td>16 a state of affairs on the international plane that has</td>
<td>specific elements are all the things that are necessary</td>
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<td>17 an impact on current domestic legal rights.</td>
<td>to do that.</td>
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<td>18 Can I turn directly in that sphere, and it is the</td>
<td>So the Government can enter into, it can ratify, it</td>
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<td>19 first of the points I wanted to make, back to the</td>
<td>can withdraw from treaties, it can take whatever steps</td>
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<td>20 question Lord Sumption asked me yesterday which is: is</td>
<td>it wants to take on the international plane to vote in</td>
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<td>21 there is a prior question to be asked, do we need</td>
<td>international institutions, to participate in the</td>
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<td>22 therefore to get into any of the legislative scheme, any</td>
<td>process of making international law, or law on the</td>
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<td>23 of that; because the prior question is can you ever have</td>
<td>international plane, eg in the EU. All of those are</td>
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<td>24 a prerogative; did the prerogative ever exist in a way</td>
<td>specific aspects of the general prerogative, frequently</td>
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<td>cast the principle at all. All of that, we respectfully</td>
<td>submit, leads to the question truly being whether the</td>
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<td>1 that kind are imposed, they are imposed in the</td>
<td>general power has been limited or excluded or controlled</td>
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<td>2 legislative scheme that you have seen, both general and</td>
<td>by Parliament.</td>
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<td>3 specific, on a particular step on the</td>
<td>That must be, we respectfully submit, the right</td>
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<td>4 international plane. For example, ratification, in</td>
<td>question to ask and that is the right question, the</td>
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<td>5 CRAG, which is all it seeks to do. They are not imposed</td>
<td>right question in principle, I mean, because that is the</td>
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<td>6 on some ratifications but not others, depending upon the</td>
<td>way the world works: broad principle of prerogative,</td>
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<td>7 consequent impact on domestic law. That simply is not</td>
<td>foreign affairs, specific elements, Parliament taking,</td>
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<td>8 how it works.</td>
<td>as it were, bites out of it. That is the right answer</td>
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<td>9 Thirdly, the Lord Oliver quote from the Tin Council</td>
<td>therefore in principle. You look to the legislation to</td>
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<td>10 case, the JH Rayner case, is not authority, we submit,</td>
<td>see whether control has been imposed. But we also know</td>
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<td>11 against there being a general power. His point was, and</td>
<td>that is the right question, at least, to ask, because of</td>
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<td>12 was only, that the making of a treaty is not capable</td>
<td>the De Keyser line of authorities.</td>
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<td>13 without parliamentary intervention, as he put it, of</td>
<td>In each, the question for the court could have been</td>
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<td>14 changing domestic law to incorporate that treaty. It is</td>
<td>framed, and the answer that the court gave could have</td>
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<td>15 not and was not that the treaty-making prerogative is</td>
<td>been framed as being: well, the prerogative could never</td>
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<td>16 limited to circumstances where it can be exercised</td>
<td>have existed to deprive the individual of his rights,</td>
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<td>17 without affecting domestic law; that was not the way he</td>
<td>and we know that in De Keyser itself, one can take other</td>
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<td>18</td>
<td>examples, Laker, FBU, particularly Laker, FBU is the</td>
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<td>19</td>
<td>criminal compensation scheme so it may be rather</td>
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<td>20</td>
<td>different in this respect but Laker, De Keyser,</td>
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<td>21</td>
<td>Burmah Oil, they all involved interferences with</td>
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<td>22</td>
<td>domestic legal rights.</td>
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<td>23</td>
<td>The answer given by their Lordships was not the</td>
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9 (Pages 33 to 36)
That is my best attempt, as it were, at an answer to certain powers, it would have direct impacts.

in which that structure worked was that if we exercised and there had been parliamentary intervention, the way aware that because of the structure that they created, legal rights, that is the end of it. They were well ingredients act so as to have an impact on domestic control on this by saying: if ever any of these court interpose, as it were, some overarching form of law analysis, and you get to De Keyser, and the question is not has the right existed to affect domestic law; of course the right existed to take it away. The question was in De Keyser, on the assumptions on which their Lordships were operating: has statute law; of course the right existed to take it away. The question was, whether in truly defining that prerogative as a matter of common law, that right to take away had to be accompanied by a concomitant right to compensate. That was the nature of the common law analysis, and you get to De Keyser, and the question is not has the right ever existed to affect domestic law; of course the right existed to take it away. The question was in De Keyser, on the assumptions on which their Lordships were operating: has statute intervened to require the right of compensation; answer, yes, it has, because the 1842 Act and the 1914 Act did so. But they were analysing that in precisely the way that I have indicated. They were not saying: you start with the prior question and if it affects rights, you stop. They were acknowledging that the exercise of the prerogative could indeed affect rights; and the question then was the secondary one, if you will, that -- the important one, which is whether or not Parliament had imposed constraints upon the exercise of that general power. Here, as we know, I am not going to keep repeating the points, Parliament has set up rights, in our context of its particular kind, with its two necessary ingredients, the two-legged stool, one goes, it all falls down. The legislative premise on which that legislation operates is that the prerogative continues, and Parliament well appreciates the continuation of the suite of powers that exists within the generally expressed power to exercise foreign affairs and conduct foreign affairs. That is precisely why it legislated to control the individual ingredients as it did. It didn't interpose control, and nor should the court interpose, as it were, some overarching form of control on this by saying: if ever any of these ingredients act so as to have an impact on domestic legal rights, that is the end of it. They were well aware that because of the structure that they created, and there had been parliamentary intervention, the way in which that structure worked was that if exercised certain powers, it would have direct impacts. That is my best attempt, as it were, at an answer to my Lord, Lord Sumption's question of yesterday. That is the third point. Second point is it is clear that the exercise of prerogative in a variety of spheres can have effect on domestic law in a variety of different ways. Again, I am not going to take you to them, given the time, but I have made already the points about De Keyser and Burmah Oil. There, the taking of property was lawful, through the exercise of prerogative power directly interfering with those rights to property. The only question was, could that impact on domestic rights which occurred through the prerogative, no statutory basis; was that then subject to statutory conditions? So those are examples. Post Office v Estuary Radio, I have mentioned it on lots of different occasions, I described it yesterday, can I just give you the reference to that. That involved altering the extent of territorial waters, and the result of that was to alter directly rights and obligations under domestic law, and indeed to create a broader category of criminal offence, if you will, because the criminal offence applied more broadly to a broader set of waters. LORD SUMPTION: None of these cases are cases where the exercise of the prerogative actually alters the contents of domestic law. The De Keyser and Burmah Oil cases are cases where the law had always been that you can take property for certain purposes; so there was no change of that, it was simply an exercise of an existing legal right. The Post Office v Estuary Radio case was a different kind of case in which the prerogative had simply been exercised so as to create a fact, and the fact was that the territorial waters now extended to a place where the broadcasts were being transmitted from, therefore needed a licence. So neither of them is actually a case, a kind of case, which raises the problem that we have, where the effect of withdrawal from the treaties will be actually to alter the current constitutional rules of the United Kingdom as to what the sources of our law are by removing one of those sources. MR EADIE: My Lord, I accept that they are at least arguably different in kind to the kind of thing that is contemplated by the ECA and our particular legislation that we are considering, and that needs to be viewed on its own terms, so I am going to come to that as my third point. The point I am making here is a slightly lesser one which I fully accept broadens out the point, so it becomes a question of whether or not the law can be altered or affected directly by actions of the
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<td>1. law was rather to create a series of rights and</td>
<td>1. three miles, 12 miles or whatever, that can all be</td>
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<td>2. immunities for those who benefited from the</td>
<td>altered if you legislate on that basis.</td>
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<td>3. characterisation that those international steps would</td>
<td>4. I think the ultimate question here is whether the</td>
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<td>give them.</td>
<td>legislation was enacted on that basis. I was looking</td>
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<td>5. LORD WILSON: So it was a joint effort.</td>
<td>5. overnight at the motions again. If we are looking at</td>
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<td>6. MR EADIE: It was and we are back to that and I am not going</td>
<td>the broad constitutional position, one must bear in mind</td>
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<td>7. to repeat the submissions in relation to that.</td>
<td>6. that the actual decision to join the EU was initially</td>
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<td>8. But it is another example, it is a joint effort, but</td>
<td>7. one which the Government took, but it put it before</td>
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<td>9. it is also another example of a step on the</td>
<td>8. Parliament on a motion where the issue which was, I have</td>
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<td>international plane taken in the exercise of the</td>
<td>just opened them, again, we have the debates here -- the</td>
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<td>prerogative, removing a right that as of yesterday and</td>
<td>issue was whether or not Parliament approved of joining</td>
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<td>before the Government said that you were persona non grata,</td>
<td>the EU, or the EC as it was, or the EEC, so that -- and</td>
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<td>you enjoyed as a matter of English law.</td>
<td>the speeches demonstrate that there were pros and cons,</td>
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<td>14. Now, of course that is not a direct analogy because</td>
<td>and the consequences of doing so were fully thought</td>
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<td>it involves all sorts of specialisms, no doubt, to do</td>
<td>through. So in a sense one looks at the ECA, perhaps</td>
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<td>16. with diplomatic relations --</td>
<td>17. the 1972 Act against that background as well.</td>
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<td>17. LORD WILSON: Yesterday you referred to Lord Millett's</td>
<td>17. MR EADIE: My Lord, I am entirely content for you to look at</td>
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<td>article, and some of us have read it overnight. He in</td>
<td>it at against that background, recognising, as I am sure</td>
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<td>particular reminds us of the case of Joyce,</td>
<td>my Lord does, that those motions, as it were, were</td>
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<td>19. Lord Haw-Haw, who was found guilty of treason, and</td>
<td>political acts if you will. They were -- they did not</td>
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<td>21. Lord Millett says that is only because in the exercise</td>
<td>constitute legislative permission, they were not akin to</td>
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<td>of the prerogative in 1939 this country waged war on</td>
<td>the Bahamas, Barbados, all of that legislation we read</td>
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<td>23. Germany.</td>
<td>yesterday, and if you want to look for the analogue,</td>
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<td>24. MR EADIE: True.</td>
<td>a joint effort, the mirror, how have we done it, the</td>
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<td>25. LORD WILSON: In fact he was prosecuted under the Treason</td>
<td>analogue is 2015.</td>
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<td>1. prerogative; and true it may be that sometimes that</td>
<td>1. Act 1352, so, Mr Eadie, was it not his guilt, his</td>
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<td>2. effect is created by altering a legal fact, and</td>
<td>conviction, a joint effort?</td>
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<td>3. sometimes that legal effect is created, because the</td>
<td>3. MR EADIE: My Lord, it was a joint effort in that sense, and</td>
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<td>4. right in question under domestic law is inherently</td>
<td>4. I think my Lord, Lord Sumption would say in answer to</td>
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<td>5. limited anyway or is contingent upon the exercise of the</td>
<td>5. Lord Millett, were he here, and was giving the</td>
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<td>6. prerogative, eg the right to property being contingent</td>
<td>6. Lord Haw-Haw example: that is just simply creating, as</td>
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<td>7. upon the ability of Government to take and blow up your</td>
<td>7. it were, a state of affairs.</td>
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<td>8. oil wells if the Japanese are advancing.</td>
<td>8. LORD SUMPTION: It is not a legal fact.</td>
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<td>9. So I fully accept that they are different and we</td>
<td>9. MR EADIE: An international fact because you have declared</td>
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<td>10. have another example, just to mention, which is the</td>
<td>war. I accept that there are limitations on lots of</td>
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<td>11. Vienna Convention on Diplomatic Relations. I know my</td>
<td>12. these analogies, and we need perhaps to come directly to</td>
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<td>12. Lord's point would be similar if not the same, and you</td>
<td>our legislation, but what they do illustrate is that you</td>
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<td>13. know the structure of that, and we set it out in our</td>
<td>13. need care, care, care before jumping too readily on a</td>
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<td>14. case at paragraph 40(b), but the structure of that was</td>
<td>big, broad (Inaudible) however superficially attractive</td>
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<td>15. to create, as it were, on the international plane</td>
<td>it may seem, that says: you cannot alter the law, you</td>
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<td>16. an ability or a power within Government, because it</td>
<td>16. cannot affect the law.</td>
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<td>17. could only be Government that exercised it, a power</td>
<td>17. Those statements are all made in their own</td>
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<td>18. conferred by the convention itself on diplomatic</td>
<td>particular context, and if anything, what this</td>
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<td>19. relations in that case to say who was allowed to be or</td>
<td>particular debate illustrates is that the context needs</td>
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<td>20. who was to be treated as being the head of mission, and</td>
<td>to be taken into account in all of these arguments.</td>
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<td>21. who, if anyone, should be deemed to be persona non grata</td>
<td>LORD MANCE: The position is, and I don't suppose that</td>
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<td>22. thereafter.</td>
<td>anyone in court doubts this, you can legislate on the</td>
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<td>23. Those were rights, as it were, on the</td>
<td>basis that domestic rights will depend upon what the</td>
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<td>24. international plane that Government had. They were not</td>
<td>international situation is from time to time. Whether</td>
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<td>25. brought into domestic law. The structure of domestic</td>
<td>we are at war or whether the territorial waters extend</td>
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I know my Lord puts to me, well, is that question begging; we respectfully submit, it is in one sense but it truly isn't in another. It is just as interesting, just as important, constitutionally, it might be thought more so, and it may be that is what gives particular significance to the basis on which Parliament acted; if you are going to look, as it were, as part of the context of the ECA to the non-binding legislative motions, how can it possibly be said that you should not look in addressing the issues that you have today, both at the 2015 Act, and indeed the very statements that were made, the debates, as you rightly put it, in relation to the motion's pros and cons, why should you not look at those and the statements to Parliament. LORD MANCE: I suppose the difference might be that the -- sorry, that the 1971 motions were, or are, background to the 1972 Act, whereas the Referendum Act, as has been pointed out, rather leaves us in the air on one view as to what its significance is, whether in law it should go back to Parliament or whether it is simply left to the executive. MR EADIE: To some extent it does, because it is silent -- it doesn't do the alternative voting thing, but there are perfectly good and sensible reasons for that, and if one is comparing, as it were, constitutional force, that point, it might be thought, is more than counterbalanced by the fact that this was after real controversy and a general election and a variety of different statements about its nature and effect, an act of primary legislative authority by Parliament.

THE PRESIDENT: I suppose you can say, if we were to be considering the case on the basis that the 1972 Act did contain a clamp, as you have put it, and then ask ourselves what is the effect of the 2015 Act, if we are faced with a choice between saying either that it, as it were, takes away the clamp as you suggest, or, as the alternative is, goes back to Parliament to decide what the effect of the 2015 Act is, then really we are saying the effect of the referendum is nothing, because it leaves us in precisely the same position that if it had not taken place, as far as we are concerned, because it is going back to Parliament. MR EADIE: It is going back to Parliament. Those are the alternative analyses.

LORD CLARKE: So it would have the political effect -- the referendum, even on that basis, would have the political effect which we have discussed. MR EADIE: It would and -- LORD CLARKE: That is a very, very significant factor in political terms; the question is what legal effects.

primary legislation; the reason it requires primary legislation is because you are being asked to declare positively unlawful the exercise of the prerogative power to give Article 50 notice as the first step in that process. The more general effects for good or ill, relevant or more or less relevant, were my second point. The third point is the -- is our particular context and our particular context does involve the prerogatives exercise. We are still on the question of whether there is some principle that you cannot have an impact into domestic law or you cannot alter the law of the land by prerogative power.

We know that it is absolutely integral to the scheme of the Act that the Government will be using its prerogative precisely to do that. It will be participating on the international plane in the process of EU law-making. The rights to which section 2 gives effect, from time to time, are those that are created, its word, on the international plane by the Government exercising that power. They are not rights that are created by Parliament, as it were, legislating for those rights. So it is integral to the scheme of legislation, of this legislation, that the Government can, through those processes, operate to change the law.
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<td>LORD HUGHES: Can you set out the mechanics, Mr Eadie, for us if you are right. The various rights and laws, let's call them laws, which come into English law via the 1972 Act, what will be effect of those, whatever they may be, competition, safety standards, compensation for air delay, goodness knows what else, all the things that are directly applicable; what is the effect of those if you are right on those if you are right, when the notice in due course expires? Do they simply lapse?</td>
<td>EU competition law and ignore the fact that since 2002 we have replicated it in English statutes. There are various torts which arose directly from EU competition law. In respect of the period before the lapse, would they continue to be treated as torts?</td>
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<td>MR EADIE: Then they lapse.</td>
<td>MR EADIE: I think they would, because that would be a process of the common law having taken them in. There are complexities, make no mistake but --</td>
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<td>LORD HUGHES: They simply lapse?</td>
<td>LORD SUMPTION: The question is really very difficult, isn't it.</td>
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<td>MR EADIE: They do.</td>
<td>MR EADIE: Yes, there are complexities around precisely how it is all going to work. You have the lapsing point from the direct effect; you have a situation from when you leave the club, the right which is created elsewhere, the vote in parliamentary elections becomes pointless. You have another swathe of legislation where the mechanism for transposition is for the United Kingdom Government on the international plane, anticipating in those processes to agree, for example, directives, but those directives then impose on the international plane on the UK Government an obligation of result, namely to pass domestic law, sometimes using section 2(2) of the ECA itself, to replicate or to create the result. That would be therefore domestic legislation,</td>
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<td>THE PRESIDENT: That is the directly applicable ones.</td>
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<td>MR EADIE: Yes.</td>
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<td>LORD HUGHES: The directly applicable ones. There is a separate question, obviously, about those that have been transposed by the Privy Council under section 2 -- what happens to those?</td>
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<td>MR EADIE: The directly effective ones, they lapse.</td>
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<tr>
<td>LORD HUGHES: They simply lapse?</td>
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<tr>
<td>MR EADIE: Yes.</td>
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<td>LORD HUGHES: Whereupon you say, as I understand it, it is obvious that a good deal of legislative activity of one kind or another is going to be necessary.</td>
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vast swathes of it. Much of that will not simply be deprived of effect. Unlike the EU elections of course, that will be deprived of effect, because we are no longer members of the club, so we are not entitled to vote. But that is not true of a great deal of the health and safety, the employment legislation, the Equality Act, much of that is basically inspired by EU law, although usually goes further than required by EU law.

Now, that law will remain in place, presumably, but it will be affected by, for example, the fact that those who are beneficiaries of those laws will not be able to ask this court or indeed any other court to refer a question to the Luxembourg court in order to ensure that our law continues to keep pace with EU law, so it will be modified, won't it.

MR EADIE: My Lady, I accept that, you are right and my answer to the CJEU point is the same answer that I give in relation to the election to the European Parliament point. It is the same point, but the constitutional significance of the first part of my Lady's question is to be thought about, perhaps, is that it is undoubtedly true, and my Lady said swathes and swathes, and we respectfully agree. Most of European law nowadays is made through directives and regulations.

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directly transposing that. They will remain. The question therefore will be, back to joint effort perhaps but this time in relation to implementation: how is the Government going to shape the new domestic law? The answer to that question, almost inevitably it might be thought, is policy area by policy area. It might well be thought to be a potentially deeply surprising proposition that in some way, shape or form, although we are focusing very hard for obvious reasons on the directly effective law, that come the brave new world, that is truly going to be a point of any significance.

They will look at, I don't know, farming and they will say: here we have, in relation to farming, regulations that directly affected section 2(1), we have a swathe of directives and a bunch of other framework agreements that sit on top of it. They are not going to suddenly say: we leave in place the regulations because they happen to be in place. The directive lapsed and so all that goes out of the window. They are going to say: what are we going to do now about farming?

What that tends to indicate in broader constitutional terms is the breadth and extent in the real world of inevitable future parliamentary involvement in the process.

LORD HODGE: I wonder if I can take you back to the point that you were making a moment ago where you said it was integral to the 1972 Act that the Government would use prerogative powers to alter the law. That is correct in the sense that the Government's involvement in the law-making institutions of the EU will give rise to the new source of law that Parliament has recognised.

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they do. That is the structure of the Act.

As I say, that is not a complete answer because I have to go the stage further, which I imagine is one my Lord, Lord Wilson was interested in, scale and withdrawal, is that a different beast to the beast that is our continued exercise of that sort of power. It is the same point that I think my Lord, Lord Hodge is putting. We respectfully submit it is different, of course, and we recognise that, but it is important in trying to work out to what extent Parliament intended in 1972 to shut its face against us withdrawing.

It is relevant as a step along that road to acknowledge that Parliament had already accepted that as part of our continuing membership, we could on the international plane take steps which would have the direct effect of removing rights.

LORD HODGE: But only through the operation of the EU institutions.

MR EADIE: Certainly but still, nevertheless, the only way we can act through those institutions is by exercising the prerogative powers; that is really the point. I think my Lord, Lord Mance put to me yesterday, it is through the institutions, which is a separate point and us participating in them, but if that is the proposition, we don't agree because it is integral that that is what
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<td>you to act alone in. So I am not sure there is that</td>
<td>Lord Oliver's statement of principle indicated in terms,</td>
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<td>much in the EU institutions point, although of course it</td>
<td>parliamentary intervention. The question we have been</td>
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<td>is accurate to say that.</td>
<td>debating for the last day and a bit is what is the</td>
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<td>To some extent it can also be said if Parliament has</td>
<td>nature of the parliamentary intervention that we have</td>
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<td>authorised the making of EU legislation, then it has</td>
<td>had in our case.</td>
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<td>also authorised, as we know, by the same logic,</td>
<td>We also do not accept that there is any principle</td>
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<td>Article 50, because it specifically considered that and</td>
<td>corresponding to that identified by the divisional</td>
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<td>introduced that and dealt with. My Lords, I had</td>
<td>court, to the effect that the prerogative to make or</td>
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<td>better move on if I am going to finish within the time,</td>
<td>withdraw from treaties cannot be exercised so as to have</td>
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<td>if I may.</td>
<td>the effect of altering domestic law. There is not any</td>
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<td>Fourth proposition, the cases on which the</td>
<td>authority for that proposition. None of the cases that</td>
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<td>divisional court relied do not, we respectfully submit,</td>
<td>they cite are authority for that proposition.</td>
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<td>establish anything like the breadth of principle which</td>
<td>All of the authorities that are cited against us in</td>
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<td>they base their judgment upon. In particular, if I can</td>
<td>support of the proposition that the prerogative may not</td>
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<td>just mention three, JH Rayner, the Tin Council case,</td>
<td>be exercised in a manner which is inconsistent with</td>
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<td>again, I am not going to go back to it in the time, I am</td>
<td>domestic law, domestic law rights, concern a situation</td>
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<td>sure you have all read it; core authorities 3, tab 43,</td>
<td>where the exercise of the prerogative conflicts with</td>
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<td>page 1778 to 1779 is really that little segment of Lord</td>
<td>some separate or pre-existing law. None of them decide</td>
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<td>Oliver, and you need to read it all, that segment. It</td>
<td>that the Government may not withdraw from a treaty where</td>
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<td>is about a page, a page and a half, and you don't just</td>
<td>this will impact upon the domestic law, and we know that</td>
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<td>take the sentence that says: you cannot use the</td>
<td>there are circumstances in which that can be done.</td>
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<td>prerogative to alter the law of the land.</td>
<td>The fifth point is that this is not a wholly</td>
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<td>The basic point that was being made by Lord Oliver</td>
<td>unprecedented or aberrant situation and we know that</td>
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<td>was to recognise the existence of prerogative powers to</td>
<td>because it is, we submit, orthodox, both in the UK and</td>
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<td>make and unmake treaties on the international plane;</td>
<td>in international law, that it is possible for the</td>
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<td>that is really what we are talking about; but then to</td>
<td>1) prerogative to be exercised to withdraw from treaties,</td>
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<td>deal with a separate and distinct aspect of</td>
<td>even if this might have a more or less direct impact on</td>
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<td>transposition. Treaties are not self-executing,</td>
<td>to domestic law.</td>
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<td>absolutely self-evident, and we accept that proposition.</td>
<td>Perhaps in that context, it may be worth just</td>
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<td>So it doesn't provide, as it were, a freestanding</td>
<td>showing you briefly the case which my Lord, Lord</td>
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<td>constitutional principle. Bear in mind, the reason I am</td>
<td>Carnwath was interested in yesterday, which is the Turp</td>
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<td>going through all this is because what they did is treat</td>
<td>case in the Canadian context, volume 26 if you would,</td>
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<td>the constitutional principle as in effect reversing</td>
<td>tab 308.</td>
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<td>De Keyser. The question is whether any statements by</td>
<td>LORD CARNWATH: MS?</td>
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<td>Lord Oliver can properly be taken as having that effect,</td>
<td>MR EADIE: 8950, I am so sorry.</td>
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<td>and we respectfully submit not.</td>
<td>Again it has similarities, this case; it is not in</td>
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<td>The Case of Proclamations and Zamora likewise; it is</td>
<td>any sense directly our situation but it does have some</td>
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<td>uncontroversial that the prerogative cannot be used</td>
<td>interesting points of similarity. In a nutshell, if</td>
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<td>simply to countermand laws passed by Parliament, but</td>
<td>I can just summarise the nature of the facts and then</td>
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<td>that is in truth pure De Keyser and Rees-Mogg, or,</td>
<td>show you the relevant paragraphs very briefly, there was</td>
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<td>indeed, as a general proposition, common law rights.</td>
<td>a protocol signed by Canada on 29 April 1998 and you see</td>
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<td>But one needs to exercise some caution, as we have</td>
<td>that from paragraph 4 -- this is all about the Kyoto</td>
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<td>already seen, in a variety of different and perhaps more</td>
<td>protocol for creating cleaner air and the imposition</td>
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<td>or less subtle ways, and sometimes one can say it is</td>
<td>of --</td>
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<td>altering a fact, and sometimes one can say it is doing</td>
<td>LORD CARNWATH: Climate change.</td>
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<td>something in a slightly special context, and context is</td>
<td>MR EADIE: Climate change, yes, emissions and reductions and</td>
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<td>all, of course.</td>
<td>initially as they noted in paragraph 3, the original</td>
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<td>But as a general proposition one needs to be</td>
<td>convention, the UN Convention on Climate Change, had not</td>
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<td>careful, because it depends whether the executive can</td>
<td>set, as it were, hard edged reduction targets. You see</td>
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<td>truly act to alter the law; it depends upon, as indeed</td>
<td>that from paragraph 3, and the effect of the Kyoto</td>
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\[15\text{ (Pages 57 to 60)}\]
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1 protocol was to introduce those sorts of targets.
2 That protocol is signed on 29 April 1998,
3 paragraph 4. There was a non-binding resolution of the
4 Canadian House of Commons. There is the first parallel
5 in relation to our accession, a non-binding resolution
6 of the Canadian House of Commons calling for
7 ratification on 10 December 2002. See paragraph 5.
8 Paragraph 4, I am so sorry, it is the bottom of
9 paragraph 4, my note was wrong.
10 So non-binding resolution of the House of Commons
11 and then there was legislation ie after that, so the
12 sequence is there, protocol is signed, non-binding
13 resolutions, and then there is an Act, as you see from
14 paragraph 6.
15 LORD CARNWATH: The key thing there was that the Act, the
16 statute passed by the opposition --
17 MR EADIE: To force their hand.
18 LORD CARNWATH: To keep the Government to its Kyoto
19 commitments, and in spite of that, it was held that the
20 prerogative is effective to withdraw.
21 MR EADIE: Exactly. Quite where that takes one --
22 LORD CARNWATH: One may debate whether that was
23 a proposition which would have been supported if it had
24 gone higher, but it is quite a good example of how the
25 prerogative -- the question of abuse of power might have

THE PRESIDENT: Thank you very much.

1 THE PRESIDENT:: You see the parallels, you see the sequence in
2 particular and the sequencing of international acts and
3 legislation and it is an interesting comparison,
4 an interesting analogue, we respectfully submit,
5 precisely because it ends as it were -- it is directly
6 in our context and it ends with the ECA.
7 LORD MANCE: Did the EFTA scheme involve any sort of
8 directly effective rights such as is the subject of
9 section 2 of the 1972 Act?
10 MR EADIE: Not in that way. The domestic implementation, as
11 I understand it, is through the Free Trade Association
12 Act of 1960 and the import duties.
13 LORD MANCE: Is there a slight curiosity here, in that when
14 we signed up to the EEC, we recognised that there were
15 two types of legislative process, one rather less
16 imperative than the other; that is the process of EU or
17 EC legislation by directives, which, as my Lady pointed
18 out, has led to a large body of law in this country
19 which you accept will remain effective after withdrawal.
20 And yet the directly effective rights under the treaties
21 and non-discrimination and all the regulations which are
22 directly effective, are conditional, you say, on
23 membership. So that one body of legislation under the
24 treaty is not conditional, but another body is

THE PRESIDENT: Yes.

1 MR EADIE: It might be worth, if I could invite you just to
2 cast a quick eye down EFTA, then I can be pretty short
3 on it, I think.
4 THE PRESIDENT: You would like us to read the whole note.
5 MR EADIE: Yes, it is only a couple of pages.
6 THE PRESIDENT: If you want to sit down while we do that,
7 you are most welcome.
8 MR EADIE: I am grateful. (Pause)
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MR EADIE: True that it is, but, as it were, that is because of the way in which the directive side of things is transposed, but what will go when we go is the obligation to comply with the directives. LORD SUMPTION: That will, I suppose, effect a legal alteration, even to the extent that rules have been transposed. The alteration will be that whereas before they were entrenched by the fact that they could not validly be amended or repealed without -- inconsistently with the treaties.

MR EADIE: Now they can be.
LORD SUMPTION: That will change, they now can be so they will be less secure rights.

MR EADIE: Now they can be.

LORD MANCE: That is true, my Lord. We don't quibble with that. That is another consequence. I think the point will be less secure rights.

MR EADIE: It will not.

LORD MANCE: Marleasing will no longer --

MR EADIE: It will not. LORD MANCE: For good or ill.

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MR EADIE: My Lords, I think given the time, what I would prefer to do if I may is leave double taxation as a point that says double taxation, not least because of the incredible complexity of it, and it would quite some time to walk you through it, and I would probably be asked all sorts of answers I didn't know the answer to.

So in part based on cowardice, can I leave double taxation to be taken from our case. We rely upon it as another example of a similar type to EFTA, indicating in effect that the sequencing can work in that way, that this is not some form of strange aberration or --

THE PRESIDENT: You are not saying it is identical in all respects; it is merely an example?

MR EADIE: I am not saying it is identical in all respects, it is an example, but it does at least serve to demonstrate that one can have that sort of set-up without throwing one's hands up in constitutional horror.

In summary, if I may and before coming to my final brief topic which will be parliamentary sovereignty, can I summarise ultimately where we are on the statutory scheme, and we do submit that it is at least of interest to note the stages in the tightrope walking that the other side's case involves.

Their arguments, we submit, involving -- ignoring legislation altogether, in other words ignoring the legislative scheme altogether, CRAG and EU, on the basis that they say in effect that the prerogative never existed to change the law, and so you don't need to bother with the legislative scheme.

It involves them saying: well, the next stage in the argument, even if that is wrong, is stop the clock at 1972. It involves saying that in 1972, even if you do stop the clock there, you ignore the basic dualist structure on which that Act was fundamentally premised.

It involves saying that you ignore all of the legislation that followed the 1972 Act, and all of the confirmation of the dualist structure which that subsequent legislation entailed, and all of the fact and nature of the controls that that legislation subsequently brought with it.

It then involves saying you also ignore the constitutional elephant in the room with its dualist premise, which is the 2015 Act.

Finally, or perhaps consequentially, it involves saying, ignore also De Keyser, and that line of authority and its careful and principled approach to the alteration of the delicate constitutional balance between the powers of the Government and control by Parliament.

What we respectfully submit is that the divisional court did not properly take a long established constitutional principle and apply its inevitable logic; what they did instead was to take a number of different and generally expressed principles, and invented a new principle. They took those general principles and, if you will, pressed them into service as absolutes, and outside the context in which they were deployed, and in the cases for which those general statements of principle as general statements were sufficient unto the day.

We do submit that the principle that they identified as a background but in truth dispositive constitutional principle as they put it, is not sound and should not have dictated the answer to this case.

Finally, if I may, parliamentary sovereignty as the last topic; it is not a separate point, we submit. It is said that the Government giving Article 50 notice is an affront to parliamentary sovereignty, because Parliament has created rights, and only it can alter them. My submission is that our case fully respects and offers no affront to parliamentary sovereignty.

Four short points on that. Parliament has indicated -- the first of them is
that Parliament has indicated those matters on which it is required to be involved further. It has specified when, it has specified in relation to what, and it has specified how it is to be involved, and the scheme is as described, and Government giving the notice under Article 50 is entirely, it might be thought, expressly, in accordance with that scheme and its specific consideration of Article 50.

Secondly, that consideration by Parliament has included most recently the 2015 Act. I have made my submissions on that, the various ways in which you can view it, the fundamental aspect of it and Lord Dyson’s accurate description of it as being --

LORD MANCE: Not totally accurate, I think you submit, because in a later paragraph, he contemplates that after the referendum, it will go back to Parliament.

MR EADIE: Well, I will go back to that if you wish, but in my respectful submission, he does not contemplate that. To the extent that he says what he says, which the other side alight upon, that needs to be very carefully viewed in the context of the issue that he was actually dealing with in Shindler. He was not addressing how ultimately Article 50 should be given, how ultimately whether it should be parliamentary control or no parliamentary control.

--

LORD MANCE: I will leave it to you; if you have time we can go back to it.

MR EADIE: Perhaps I will see what they make of it and come back to it in reply if I need to. But we respectfully do not accept that, but in any event, you know the bit we do accept and assert.

LORD MANCE: We know that.

MR EADIE: Which is the description of it as being a constitutionally important thing, and we respectfully submit that it was hard to see how parliamentary sovereignty issues could avoid considering that Act. Thirdly, and again, these are broader points, and I am not going to get back into territory involving inconsistent answers to questions asked by Lord Sumption again, but thirdly, just as a matter of note, with the legal submissions having already been made about their legal significance, Parliament is already deeply involved and unsurprisingly involved in the whole process of withdrawal. Of course now hereafter it can choose whatever level of involvement it wishes to have in those matters, but there have, as you know, already been debates concerning withdrawal. There was an opposition debate in October, there was an opposition debate set down for Wednesday, and it is perhaps of some interest that on neither occasion has either party, or has any party, or has anyone in Parliament called for primary legislation to be enacted in advance of the giving of the notice.

Put another way and perhaps rather more contentiously, Parliament does not seem to want the obligation that the divisional court has thrust upon them. But of course it could decide to have more, or to pass legislation on the very subject if it wishes to.

The point is that its interests are protected and its sovereignty is protected by its own decisions and processes, and there is no force in the point that says the court needs to intervene to protect it.

Fourthly, it will inevitably also be involved in all the ways we have been discussing this morning, including in the detail of the legal transformation of withdrawal after notice is given. Article 50 merely starts the process. It effects in itself no change in the law once it is given. Negotiations will be needed. The outcome cannot be known. The aim will be to secure agreement but the negotiations will no doubt be long and arduous.

We do know however, already, that Parliament will inevitably be involved in that process of withdrawal. We have the Great Repeal Bill which you have now seen the announcement in relation to; we have the very likely imposition of some form of hidden legislative control.

CRAG involvement if agreement is reached; and we have got the fact that they will inevitably have to address policy area by policy area, irrespective of the source of EU law, what the brave new world should look like.

So in the end, we respectfully submit, the propositions that we advance are or can be reduced into something which is at least almost as short and simple as the basic case which my learned friend Lord Pannick advances against us. Again, can I just give you five brief submissions in closing, my submissions summarising our case.

Firstly, the prerogative to make and unmake or withdraw from treaties exists today as a key part of our constitution, and as Parliament well knew in 1972 and well knows today.

Secondly, in recognition of that, Parliament has quite deliberately chosen to regulate some parts of those prerogative powers. It has done so expressly and in detail and it is unsurprising it has done so expressly and in detail, setting out the when and the how of those controls and it has not touched the prerogative power to give Article 50 notice again and evidently quite deliberately.

Thirdly, there is no basis, we submit, for the imposition of some form of hidden legislative
presumption on Parliament's intention. The application of the strands of general principle about altering the law of the land relied on by the divisional court in the present context is wrong, we submit. The rights in question are those created on the international plane and they are simply recognised by our law.

Indeed, it is of the very essence of the 1972 Act, if one focuses only on that, that EU rights created on that plane will be altered and removed directly through the exercise of prerogative powers, and that is a step, and a significant step along the road to finding the intention in relation to withdrawal.

So fourthly, we submit that the apparent simplicity of the position that the respondents put forward represents, we submit, a serious constitutional trap. The principle and its application in a context such as the present is at best highly controversial. That is not, we submit, a proper premise, a proper basis for a presumption as a tool for imputing intention to Parliament.

By applying that broad principle, outside its proper confines, we submit that it takes the court over the line, a line which it has been assiduous to respect, between interpretation and judicial legislation. The courts would be imposing in effect a new control of a most serious kind in a highly controversial and, by Parliament, carefully considered area.

Fifthly, the court would be doing so in circumstances in which the 2015 Act and the fact of the referendum undermine any possible suggestion at the very least that the use of that power was objectionable or anything other than entirely consistent with the will of Parliament.

My Lords, my Lady, those are my submissions. I am going to hand over to Lord Keen unless there are further questions I can seek to help with.

THE PRESIDENT: Thank you very much, Mr Eadie. Advocate General.

Submissions by THE ADVOCATE GENERAL FOR SCOTLAND

THE ADVOCATE GENERAL FOR SCOTLAND: Good morning, my Lady, my Lords. In addressing the devolution issues, it is necessary to bear in mind that I am addressing those interveners in the Miller case who have raised points with regard to the devolved legislation, and also responding to the devolution issues that have been put forward in the Agnew and McCord cases for Northern Ireland.

With regard to the latter, I am of course anticipating submissions that are yet to be made, and it may be that on Thursday, I will seek leave to make some short response to any additional points that are made in regard to these matters.

Your Lordships will have the additional written case that has been submitted with regard to devolution issues. In addition I am grateful to my learned friends Dr Tony McGleenan and Paul McLaughlin from the Northern Ireland Bar for producing a written case in respect of the devolution issues from Northern Ireland. I readily adopt that written case as part of my submission in respect of these matters.

In the time available, I am not going to attempt to address each of the issues that are raised in the separate interveners' cases, but what I will attempt to do is to address three themes that seem to percolate through all of these cases. Those are, first of all, sovereignty and the prerogative; secondly, the constitutional status of the devolution legislation, and thirdly, the Sewell convention, and attempts to elevate it into some form of constitutional requirement for the purposes of Article 50.

So taking the first of those, in his written case, at paragraph 30, the Lord Advocate quotes Lord Hope in Jackson v Attorney General on the question of sovereignty. If I can just give references, my Lords,

...
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**THE ADVOCATE GENERAL FOR SCOTLAND:** My Lord, it is, by the

25 ... indeed the law of Burma. He went on at 1345 to observe

23 ... so there appears to be clear authority, legal authority for the proposition that there is no

21 ... that: “When the prerogative took shape, it was that part

20 ... of sovereignty left in the hands of the King by the true

19 ... sovereignty, the King and Parliament.”

18 ... sovereignty, that those writings pertaining to the constitutional law

17 ... law, to consider the devolution legislation. My Lords, first of all Professor Mitchell on

16 ... that: “When the prerogative took shape, it was that part

15 ... to the foreign affairs prerogative as between Scotland and England.

14 ... and the late Lord Rodger appeared for the Lord Advocate.

13 ... Lord Advocate, which is published by WJ Wolffe, now the Lord Advocate, which is

12 ... and the late Lord Rodger appeared for the Lord Advocate.

11 ... the same way as it operates under the law of England.

10 ... the late Lord Rodger appeared for the Lord Advocate.

9 ... of the Sovereign, the King and Parliament.”

8 ... sovereign, the King and Parliament.”

7 ... sovereignty, that those writings pertaining to the constitutional law

6 ... sovereignty, that those writings pertaining to the constitutional law

5 ... sovereignty, that those writings pertaining to the constitutional law

4 ... sovereignty, that those writings pertaining to the constitutional law

3 ... sovereignty, that those writings pertaining to the constitutional law

2 ... sovereignty, that those writings pertaining to the constitutional law

1 ... sovereignty, that those writings pertaining to the constitutional law
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</tr>
</thead>
<tbody>
<tr>
<td>1 United Kingdom is evidently different from some of the examples he had been given.</td>
<td>1 LORD SUMPTION: Sorry, which bundle, again?</td>
<td>1</td>
<td>1</td>
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<tr>
<td>2 &quot;The Scotland Act can be amended more easily than a constitution, a factor which is relevant since the difficulty of amending a constitution is often a reason for concluding that it was intended to be given a flexible interpretation. Although the UK Government's stated policy on legislation concerning devolved matters currently embodied in the memorandum of understanding [which I will come to in a moment] known colloquially as the Sewell Convention, may impose a political restriction upon Parliament's ability to amend the Scotland Act unilaterally, there have nevertheless been many amendments made to the Act.&quot;</td>
<td>2 THE ADVOCATE GENERAL FOR SCOTLAND: It is volume 20, my Lord, tab 246. This was the case of the competence of the Welsh Assembly in respect to certain legislation.</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>3 I think also an earlier reference at MS 1616 at paragraph 58 where he observed:</td>
<td>3 At paragraph 6 which begins at MS 6829, his Lordship observed the description of the 2006 Act as an act of great constitutional significance:</td>
<td>3</td>
<td>3</td>
</tr>
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<td>4 &quot;Insofar as this submission invited the court to adopt an approach to the interpretation of acts for the Scottish Parliament which is different from that applicable to other legislation and different from that authorised by section 101 of the Scotland Act, I am unable to accept it.&quot;</td>
<td>4 &quot;It cannot be taken in itself to be a guide to its interpretation. The statute must be interpreted in the same way as any other statute.&quot;</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>5 He goes on about the point made with regard to the democratic legitimacy of the Scottish Parliament, but not as something which impacted upon the approach to the interpretation. So there is no particular or distinct tenet of interpretation to be employed simply because we are dealing with what in that context is a constitutionally important act.</td>
<td>He refers there to the case of Attorney General v National Assembly for Wales Commission in support of that proposition.</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>So again, it is not that there is any particular or exceptional tenet of interpretation to be employed simply because we are addressing the matter of this particular form of legislation. Now, again, in the context of the Northern Ireland Act 1998, it has been asserted that the Northern Ireland Act is a constitutional statute, and that as a consequence of that, it enjoys some particular enhanced status.</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>The authority usually cited in support of that proposition is, of course, the speech of Lord Bingham in the case of Robinson, and I think your Lordships will find that in core volume 4, tab 81, MS 3272, with</td>
<td>7</td>
<td>7</td>
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<tbody>
<tr>
<td>1</td>
<td>Lord Bingham's observation at 3280.</td>
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<td>2</td>
<td>He didn't actually describe the 1998 Act as</td>
</tr>
<tr>
<td>3</td>
<td>a constitutional statute, but he did describe the Act as</td>
</tr>
<tr>
<td>4</td>
<td>in effect a constitution, and stated that it should,</td>
</tr>
<tr>
<td>5</td>
<td>consistently with the language used, be interpreted</td>
</tr>
<tr>
<td>6</td>
<td>generously and purposefully, bearing in mind the value</td>
</tr>
<tr>
<td>7</td>
<td>which the constitutional provisions are intended to</td>
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<tr>
<td>8</td>
<td>embody. I don't believe anyone would take exception to</td>
</tr>
<tr>
<td>9</td>
<td>that in the context of all those acts which are regarded</td>
</tr>
<tr>
<td>10</td>
<td>as of constitutional significance.</td>
</tr>
<tr>
<td>11</td>
<td>It is also worthwhile noting the observations of</td>
</tr>
<tr>
<td>12</td>
<td>Lord Hoffmann in that case at 3284, where he made the</td>
</tr>
<tr>
<td>13</td>
<td>point that the 1998 Act was framed by the Belfast</td>
</tr>
<tr>
<td>14</td>
<td>agreement, and that was of course an extremely</td>
</tr>
<tr>
<td>15</td>
<td>important, and remains an extremely important political</td>
</tr>
<tr>
<td>16</td>
<td>agreement, which also incorporated an element of</td>
</tr>
<tr>
<td>17</td>
<td>international treaty in the form of the British-Irish</td>
</tr>
<tr>
<td>18</td>
<td>agreement that was appended to the Belfast agreement,</td>
</tr>
<tr>
<td>19</td>
<td>sometimes referred to as the Good Friday agreement.</td>
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<tr>
<td>20</td>
<td>I would have no difficulty with that approach to the</td>
</tr>
<tr>
<td>21</td>
<td>interpretation of any of the devolution legislation, but</td>
</tr>
<tr>
<td>22</td>
<td>can I move on to the conduct of foreign relations and</td>
</tr>
<tr>
<td>23</td>
<td>the context of that legislation. My Lords, the conduct</td>
</tr>
<tr>
<td>24</td>
<td>of foreign relations is a matter expressly reserved in</td>
</tr>
<tr>
<td>25</td>
<td>the devolution legislation, such that the devolved</td>
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<td>1</td>
<td>legislatures have no competence in that matter. The</td>
</tr>
<tr>
<td>2</td>
<td>Scotland Act section 30(1) gives effect to schedule 5</td>
</tr>
<tr>
<td>3</td>
<td>which defines reserved matters. As a point of</td>
</tr>
<tr>
<td>4</td>
<td>reference, that is at MS 4361.</td>
</tr>
<tr>
<td>5</td>
<td>Those reserved matters include, amongst others, and</td>
</tr>
<tr>
<td>6</td>
<td>I quote:</td>
</tr>
<tr>
<td>7</td>
<td>&quot;International relations, including relations with</td>
</tr>
<tr>
<td>8</td>
<td>territories outside the United Kingdom, the</td>
</tr>
<tr>
<td>9</td>
<td>European Union and their institutions and other</td>
</tr>
</tbody>
</table>
| 10 | international organisations."
| 11 | The Northern Ireland Act is in materially identical |
| 12 | terms with the legislative competence of the assembly |
| 13 | being restricted in terms of section 6, where there is |
| 14 | a reference to what are termed "accepted matters". |
| 15 | THE PRESIDENT: Yes. |
| 16 | THE ADVOCATE GENERAL FOR SCOTLAND: Those accepted matters |
| 17 | are expressed in almost identical terms to the |
| 18 | Scotland Act, which is hardly surprising, given the |
| 19 | passage of the legislation in the same year, and |
| 20 | includes express reference to the European Union. In |
| 21 | the same way, the Government of Wales Act 2006 makes |
| 22 | provision to determine competence of the Welsh Assembly, |
| 23 | and provides at section 108 for those matters which |
| 24 | relate to one or more of the subjects listed under the |
| 25 | headings in schedule 7 of the Act, and that includes |

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<tbody>
<tr>
<td>1</td>
<td>conduct of foreign relations.</td>
</tr>
<tr>
<td>2</td>
<td>So again, it is perfectly clear and express on the</td>
</tr>
<tr>
<td>3</td>
<td>face of this legislation that the matter of foreign</td>
</tr>
<tr>
<td>4</td>
<td>relations and foreign affairs, and in particular the</td>
</tr>
<tr>
<td>5</td>
<td>matter of our relationship with the European Union, is</td>
</tr>
<tr>
<td>6</td>
<td>not within the competence of the devolved legislatures.</td>
</tr>
<tr>
<td>7</td>
<td>I will submit that these reservations are fatal to</td>
</tr>
<tr>
<td>8</td>
<td>reliance on the devolution legislation as giving rise to</td>
</tr>
<tr>
<td>9</td>
<td>any necessary implication, or indeed any other</td>
</tr>
<tr>
<td>10</td>
<td>indication that the Government cannot exercise its</td>
</tr>
<tr>
<td>11</td>
<td>foreign affairs and treaty prerogative in the ordinary</td>
</tr>
<tr>
<td>12</td>
<td>way.</td>
</tr>
<tr>
<td>13</td>
<td>Therefore, it respectfully appears to me that there</td>
</tr>
<tr>
<td>14</td>
<td>is nothing in this legislation that could abrogate the</td>
</tr>
<tr>
<td>15</td>
<td>exercise of the foreign affairs prerogative, and that</td>
</tr>
<tr>
<td>16</td>
<td>the court is not assisted by lengthy (Inaudible) that</td>
</tr>
<tr>
<td>17</td>
<td>attempts to bring the exercise of that prerogative or to</td>
</tr>
<tr>
<td>18</td>
<td>qualify the exercise of that prerogative, by reference</td>
</tr>
<tr>
<td>19</td>
<td>to the devolved legislation.</td>
</tr>
<tr>
<td>20</td>
<td>Now, there are --</td>
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<tr>
<td>21</td>
<td>LORD CLARKE: You mean the answer is the same in Scotland as</td>
</tr>
<tr>
<td>22</td>
<td>it is here?</td>
</tr>
<tr>
<td>23</td>
<td>THE ADVOCATE GENERAL FOR SCOTLAND: Essentially the same.</td>
</tr>
<tr>
<td>24</td>
<td>And in Northern Ireland and in Wales.</td>
</tr>
<tr>
<td>25</td>
<td>Now, various attempts are made in the interveners'</td>
</tr>
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<th>Text</th>
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<tr>
<td>1</td>
<td>cases to try and circumvent that issue. They point out</td>
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<tr>
<td>2</td>
<td>that there are of course express references to EU law in</td>
</tr>
<tr>
<td>3</td>
<td>the devolved legislation, and that is absolutely true,</td>
</tr>
<tr>
<td>4</td>
<td>because of course that legislation assumed that the</td>
</tr>
<tr>
<td>5</td>
<td>United Kingdom was a member of the EU, but of course</td>
</tr>
<tr>
<td>6</td>
<td>that legislation does not require that the</td>
</tr>
<tr>
<td>7</td>
<td>United Kingdom should be a member of the EU.</td>
</tr>
<tr>
<td>8</td>
<td>Indeed, the Lord Advocate rightly put the matter in</td>
</tr>
<tr>
<td>9</td>
<td>this way at paragraph 66 of his own case, where he said</td>
</tr>
<tr>
<td>10</td>
<td>that the references to EU law and the devolution</td>
</tr>
<tr>
<td>11</td>
<td>legislation, and I quote, &quot;simply reflected the fact</td>
</tr>
<tr>
<td>12</td>
<td>that by the time that the devolution statutes were</td>
</tr>
<tr>
<td>13</td>
<td>enacted, EU law had become the law of the land in each</td>
</tr>
<tr>
<td>14</td>
<td>of the United Kingdom's jurisdictions&quot;.</td>
</tr>
<tr>
<td>15</td>
<td>So be it.</td>
</tr>
<tr>
<td>16</td>
<td>It is of significance that EU law is defined in the</td>
</tr>
<tr>
<td>17</td>
<td>devolved legislation in an equivalent ambulatory fashion</td>
</tr>
<tr>
<td>18</td>
<td>to that set out in section 2, subsection 1 of the ECA.</td>
</tr>
<tr>
<td>19</td>
<td>That is, section 126(9) of the Scotland Act 1998 adopts</td>
</tr>
<tr>
<td>20</td>
<td>the following definition, at MS 4374 --</td>
</tr>
<tr>
<td>21</td>
<td>LORD MANCE: That is the significant point, isn't it? The</td>
</tr>
<tr>
<td>22</td>
<td>fact that foreign affairs are reserved to the</td>
</tr>
<tr>
<td>23</td>
<td>United Kingdom Government doesn't necessarily mean that</td>
</tr>
<tr>
<td>24</td>
<td>it didn't, in the devolution legislation itself, commit</td>
</tr>
<tr>
<td>25</td>
<td>itself to exercise or not to exercise the prerogative in</td>
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<tr>
<td>intention was to freeze EU laws at 1998 for the purposes</td>
<td>Article 50 notification would alter the distribution of</td>
</tr>
<tr>
<td>of Northern Ireland.</td>
<td>powers between the Northern Ireland assembly and the</td>
</tr>
<tr>
<td>My Lord, in these circumstances, it doesn't appear</td>
<td>United Kingdom by eliminating the constitutive role that</td>
</tr>
<tr>
<td>that the continued references to EU law in the devolved</td>
<td>EU law currently plays in the definition of competences</td>
</tr>
<tr>
<td>legislation really take the interested parties' case</td>
<td>under the Northern Ireland Act.</td>
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<tr>
<td>anywhere. They also attempt to make something of the</td>
<td>I have already touched upon that, my Lords, and it</td>
</tr>
<tr>
<td>fact that there is a restriction on the competence of</td>
<td>doesn't appear to me that that takes the case anywhere.</td>
</tr>
<tr>
<td>the devolved legislatures to legislate contrary to EU</td>
<td>Thirdly, it is argued that notification would</td>
</tr>
<tr>
<td>law, and there are, of course, specific provisions for</td>
<td>frustrate the purpose and intention of the Act, as it</td>
</tr>
<tr>
<td>that in the Scotland Act, the Government of Wales Act</td>
<td>would run contrary to the continued application of EU</td>
</tr>
<tr>
<td>and the Northern Ireland Act.</td>
<td>law in Northern Ireland, and more particularly would</td>
</tr>
<tr>
<td>I would just observe, my Lord, that even if they</td>
<td>impact upon the operation of cross-border bodies.</td>
</tr>
<tr>
<td>were not there, that prohibition would exist in any</td>
<td>This is quite a complex area, and it is a point that</td>
</tr>
<tr>
<td>event because of the status of EU law. It would not be</td>
<td>was majored upon by those appearing for Agnew before</td>
</tr>
<tr>
<td>possible for the Scottish Parliament or the Scottish</td>
<td>Mr Justice Maguire. It is possible that one could deal</td>
</tr>
<tr>
<td>Government to proceed contrary to EU law. So those are</td>
<td>with this at some considerable length, but in view of</td>
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<tr>
<td>there as a point of emphasis and in order to ensure that</td>
<td>the time available, what I would say is this: that the</td>
</tr>
<tr>
<td>the exercise of these devolved powers does not conflict</td>
<td>line of argument is simply unfounded. The relevant</td>
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<tr>
<td>with the UK's legal obligations as set at the level of</td>
<td>implementation bodies that are referred to, one in</td>
</tr>
<tr>
<td>the EU.</td>
<td>particular which is relied upon is the special EU</td>
</tr>
<tr>
<td>Certainly these restrictions say nothing about the</td>
<td>programme body, are not fixed and determined for all</td>
</tr>
<tr>
<td>exercise of the prerogative in foreign affairs. As</td>
<td>time coming by the Northern Ireland Act.</td>
</tr>
<tr>
<td>I say, they are strictly unnecessary.</td>
<td>What I would ask is that I might respond to any</td>
</tr>
<tr>
<td>In addition to the foregoing, each of the</td>
<td>point that is made by my learned friends with regard to</td>
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<td>interveners appears to argue that withdrawal from the EU</td>
<td>this issue in reply, but shortly put, first of all, they</td>
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<td>will somehow have an impact on domestic law, and they</td>
<td></td>
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THE ADVOCATE GENERAL FOR SCOTLAND: Can I do that, my Lord.

THE PRESIDENT: We will have, of course, the transcript of what you say today.

THE ADVOCATE GENERAL FOR SCOTLAND: Indeed.

THE PRESIDENT: You were going to give the transcript reference. I am sorry to interrupt you.

LORD CARNWATH: It is not covered by Mr Justice Maguire's judgment, is it?

THE ADVOCATE GENERAL FOR SCOTLAND: Mr Justice Maguire did make a summary point with regard to this, and can I just say, my Lords, it is a little surprising in my respectful submission that the divisional court was quite so dismissive of Mr Justice Maguire's analysis of the case in Agnew, which was carefully argued and carefully presented, and expressed very clearly in my respectful submission by Mr Justice Maguire, but that is perhaps another point.

THE PRESIDENT: You were going to give Lord Mance the reference. If you want to give it to us after the short adjournment --

THE ADVOCATE GENERAL FOR SCOTLAND: Can I do that, my Lord.

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THE PRESIDENT: Of course you can.

THE ADVOCATE GENERAL FOR SCOTLAND: Can I move on from the Agnew point, which I suspect will be developed by reference to the special --

THE PRESIDENT: One point, if I can interrupt, would be to annotate your submissions as recorded on the transcript by cross-referencing -- that may be the best way to do it, but let's leave that for the moment.

THE ADVOCATE GENERAL FOR SCOTLAND: I do not have the passage from Mr Justice Maguire to hand, so I will do that, my Lord. On this part of the case, my Lord, there is the McCord reference which essentially is in these terms: does the giving of notice pursuant to Article 50 of the EU impede the operation of section 1 of the Northern Ireland Act 1998?

Here it appears to be argued on behalf of McCord that the sovereignty of the Westminster Parliament is now attenuated in some way by the devolution Acts and indeed by the Belfast agreement, which is a critically important political agreement, and has to be seen in that context. But it respectfully appears to me that this submission pays no regard to the fact that constitutional balance between affording the devolved institution scope to legislate on transferred matters while retaining sovereignty over reserved matters is a constant theme of all the devolution legislation.

THE ADVOCATE GENERAL FOR SCOTLAND: Exactly so, my Lord, and again, I don't want to develop that too far, but what McCord attempts to suggest is that section 1 of the Northern Ireland Act is directed to maintaining Northern Ireland within the EU, when in fact, of course, it is concerned with a more binary decision, which is whether Northern Ireland should cease to be part of the United Kingdom and form part of united Ireland. There is no means by which you can suggest that the Belfast agreement, is considering the issue only in the particular context of whether Northern Ireland should remain as part of the United Kingdom or united Ireland.

I would respectfully observe that that correctly states the relevant position.

So in summary, my Lord, the devolved legislation actually takes the court nowhere in the determination of the issue which it has to decide in the present case. There is no means by which you can suggest that the exercise of the foreign affairs prerogative, which is what we are actually here to address, is in any way impinged or qualified by the devolution legislation.

Can I move on, from the legislation as such, to the operation of the Sewell convention. This is perhaps where the Lord Advocate seeks to make as much as of a case as he can, with regard to the idea that somehow the constitutional requirements of Article 50 are...
Paragraph 2 at 9563, paragraph 2:

The memorandum of understanding, and just go to

THE ADVOCATE GENERAL FOR SCOTLAND: If we look, my Lords, at

THE PRESIDENT: We are making a lot of headway and we will

THE ADVOCATE GENERAL FOR SCOTLAND: It is, my Lord, page 18

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: Then at MS 9567,

THE PRESIDENT: Yes.

THE ADVOCATE GENERAL FOR SCOTLAND: "However, the UK

THE ADVOCATE GENERAL FOR SCOTLAND: "The United Kingdom Parliament retains authority to

THE PRESIDENT: Yes, we looked at this earlier.

THE ADVOCATE GENERAL FOR SCOTLAND: We touched upon this

THE ADVOCATE GENERAL FOR SCOTLAND: "This memorandum is a statement of political intent

THE PRESIDENT: 71.

Lord Reed in the case of Imperial Tobacco v Lord

Lord Hodge in the case of Imperial Tobacco v Lord

THE ADVOCATE GENERAL FOR SCOTLAND: And MS 10127. A20, did you say?

THE ADVOCATE GENERAL FOR SCOTLAND: And MS 9567. There is a question whether that makes a difference.

THE ADVOCATE GENERAL FOR SCOTLAND: A28, my Lord, tab 346. In fact I have already touched upon by my Lord,

THE PRESIDENT: We do not know until we see it. We are not there, but if we go

THE PRESIDENT: 71.

THE ADVOCATE GENERAL FOR SCOTLAND: A28, my Lord, tab 346. Lord Hodge in the case of Imperial Tobacco v Lord

Lord Hodge in the case of Imperial Tobacco v Lord

THE ADVOCATE GENERAL FOR SCOTLAND: "The United Kingdom Parliament retains authority to

THE ADVOCATE GENERAL FOR SCOTLAND: "This memorandum is a statement of political intent

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: Then at MS 9567, paragraphs 14 to 15:

The relevant quotation can be found in volume A29, tab 388 --

THE ADVOCATE GENERAL FOR SCOTLAND: A28, my Lord, tab 346, beginning

THE ADVOCATE GENERAL FOR SCOTLAND: It is at page 18, and

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: "However, the UK

THE ADVOCATE GENERAL FOR SCOTLAND: "The United Kingdom Parliament retains authority to

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: A28, my Lord, tab 346, beginning

THE ADVOCATE GENERAL FOR SCOTLAND: "The United Kingdom Parliament retains authority to
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| restriction upon Parliament's ability to act, no more and no less than that. In our case, we also make reference to the Rhodesian case, the southern Rhodesian case of Madzimbamuto. I am not going to take your Lordships to it, you have it in the case, but in my submission essentially Lord Reed in that case was making the same point that: here you have a convention but it is just that, it is no more than that; it is not some qualification or inhibition upon parliamentary sovereignty. The Lord Advocate does seek to make the case that somehow a convention can transmogrify into a legal requirement, and he makes reference, amongst other things, to the Crossman Diaries case, the Jonathan Cape case. It is at CA4, volume CA4, tab 245. I am not going to go to it, but I simply draw your Lordship's attention to a commentary, a very helpful commentary on that case, from Professor Bradley in one of his works, and that can be found at volume A31, tab 416, MS 10531, where he puts the Jonathan Cape case in its proper context. It is a context that clearly conflicts with the approach adopted by the Lord Advocate. There is reference, particularly in the McCord case, to a great deal of Canadian material which is not of any great assistance, but again, I would just mention in passing a decision of the Supreme Court of Canada in the Manitoba reference case in this context. It is at volume A25, tab 305, MS 8783, and it is a passage that I am not going to quote, from MS 8795 to MS 8799. Essentially, the majority judgment of the Supreme Court in Canada is that there is no authority for the proposition then being advanced that a convention can crystallise into law.

That chimes very readily with the Dysian observation that conventions are not in reality laws at all, since they are not enforced by the courts. So, my Lords, the Sewell convention is a political convention concerning the legislative functions of the Westminster Parliament. It is, as I say, essentially a self-denying ordinance on the part of Parliament. It was never intended to be a justiciable legal principle, and as my Lord, Lord Reed has already correctly observed, it is a political restriction on Parliament's ability to legislate in respect of devolved matters. The correct legal position is that Parliament is sovereign, and may legislate at any time on any matter, and that is specifically set out in the devolved legislation itself, section 28(7) of the Scotland Act, section 5(6) of the Northern Ireland Act, section 107(5) of the Government of Wales Act.

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| In my respectful submission the Lord Advocate is plainly wrong as a matter of constitutional law to assert, as he does, at paragraph 30 of his printed case that I took your Lordships to at the outset, that the freedom of the United Kingdom Parliament is constrained by the constitutional conventions which apply when Parliament legisitates with regard to devolved matters. That, in my respectful submission, is clearly not the case. Now, to take up my Lord, Lord Reed's point, nothing in that analysis is affected by the amendment of section 28 of the Scotland Act by section 2 of the Scotland Act 2016. Section 2 of the Scotland Act 2016 has the headnote, "Sewell convention". It was not taking the matter any further than the expression of the convention that we have already seen. That is now section 28(8) of the Scotland Act 1998, which says that -- so again I pause to observe: "It is recognised that the Parliament of the United Kingdom will not normally [again, I emphasise "normally"] legislate with regard to devolved matters without the consent of the Scottish Parliament." LORD SUMPTION: But it cannot be described as a purely political force once it is enacted in a statute. THE ADVOCATE GENERAL FOR SCOTLAND: It is a statutory expression of that political convention, my Lord, which is what it was intended to be in light of the Smith agreement that was entered into and -- from the foundation and reason for the amendments to the Scotland Act 1998. LORD SUMPTION: Do you submit that its incorporation in an act of Parliament makes no legal difference to its effect? THE ADVOCATE GENERAL FOR SCOTLAND: I do, my Lord, yes, and it was made perfectly clear during the passage of the Scotland Act 2016 that the intention was simply to incorporate in statutory form the existing convention and no more than that, and indeed there were attempts both by the -- in the House of Commons and in the House of Lords to amend the proposed clause 2 in order to extend it to incorporate aspects of the practical operation of the convention, and those amendments did not proceed. THE PRESIDENT: Surely if it is a convention, it must be questionable -- if it is a parliamentary convention, it may be questionable whether the courts can rule on it. Once it is statutory, then it is plain that we can.

THE ADVOCATE GENERAL FOR SCOTLAND: You can look at its interpretation -- THE PRESIDENT: Indeed we have to.
Now, I would just observe this, my Lord. A great deal is made by the Lord Advocate in his case of the legislative consent procedure. The idea of the legislative consent motion. But the Sewell convention in fact says nothing about LCMs; it says nothing about the practice by which consent, if required or sought, should be given with regard to legislation that relates to a devolved matter.

So although LCMs are the currently preferred procedure, that is a matter entirely for the internal standing orders of the devolved legislatures. The seeking of an LCM is commenced and controlled entirely by the devolved legislatures, not by Parliament. If the devolved legislatures wish to indicate their consent in some other form, then they are perfectly free to go and do that.

Conversely, there have been instances where, for example, the Welsh Assembly has put up a legislative consent memorandum and then refused to pass a motion in circumstances where the UK Parliament did not consider that it was legislating with regard to a devolved matter, but the Welsh Assembly wished to make a political statement that they felt that they were, and that happened, I believe, with regard to the Agricultural Workers Bill at an earlier stage.

Again, I emphasise a point that has already been made, the issue of the Sewell convention and of legislative consent motion simply does not arise in this appeal. This case does not concern the passage of legislation and that, in my respectful submission, is a complete answer to the rather surprising proposition made by the Lord Advocate that there is an issue properly in dispute between the parties with regard to that matter. That is a point he seeks to make at paragraph 84 of his case.

At the end of the day, the Sewell convention is wholly irrelevant to this appeal and indeed to the conduct of foreign affairs. I would just note that in his written case, the Lord Advocate provides an annex setting out where legislative consent motions have been sought or have been passed with regard to devolved legislation, and it is perhaps notable that what is absent from the annex is the European Communities (Amendment) Act 2002, the European Parliamentary Elections Act 2002, the European Union (Amendment) Act 2008, the European Union Act 2011 or indeed the European Union Referendum Act 2015.

So it would be somewhat surprising if those had been overlooked, if they do have the relevance in the context of a constitutional convention that the Lord Advocate now seeks to argue.
The conclusion of the Article 50 case advanced by the Lord Advocate is that there is by virtue of the Sewell convention a constitutional requirement, using the terms of Article 50, that must apply before the United Kingdom – and takes steps in terms of Article 50 to leave the EU. However, the Lord Advocate makes no effort in his case to explain how a convention which provides in terms that it does not apply as a rule in all circumstances, could even be a requirement, let alone a constitutional requirement and therefore there is doubt as to where that case actually goes.

In my respectful submission, there is no substance in the case that is being advanced there by the Lord Advocate. I mentioned a moment ago the Counsel General for Wales' argument that the exercise of the prerogative would be an avoidance of the Sewell convention or would, as he puts it, short-circuit the Sewell convention and in my respectful submission that simply cannot be right. The convention could not apply to legislation authorising the issue of the Article 50 notification, because it is a reserved and not a devolved matter, so nothing in general is being avoided.

The convention cannot be enforced in law in circumstances in which it might appear to fall within the purview, where there is a bill of the Westminster Parliament which might affect devolved competences. So it cannot possibly apply in regard to the invocation of the prerogative. It just does not follow. In any event, if there was a dispute on that, it would not be justiciable.

In summing up on the question of the Sewell convention my Lords, what I would say is this: it is not necessary and certainly not appropriate to consider the functions of the Sewell convention in the context of this appeal. No basis for that has been made out. My Lords, I was going to move on to certain particular points that arise in the context of Northern Ireland and the consideration of the Northern Ireland Act against the background of the Belfast agreement, because as Lord Hoffmann observed in the Robinson case, the Belfast agreement essentially frames the (Inaudible) constitutional statute. In view of the time available, I will just make one short observation.

The Belfast agreement, which can be found in the Northern Ireland materials at volume 1, tab 14 at MS 20372 provides at paragraph 7 for parties to address any difficulties that would arise in the context of the agreement being implemented. If I could just turn to that. All it indicates, and I invite your Lordships to consider it, is the inherently flexible nature of the Belfast agreement to deal with events that had not been anticipated at the time the agreement was entered into. The Belfast agreement is not a legally enforceable agreement in one sense, but it is a critically important political agreement which does have appended to it an international treaty in the form of a British-Irish agreement. We entirely concur with Lord Hoffmann's observations, that it (Inaudible) the Northern Ireland Act, but there is nothing in the Belfast agreement that fixes in all time coming something such as the joint implementation bodies which are referred to in the Agnew case, for example, and that should be borne in mind.

The second distinct question that arises in the Agnew reference concerns section 75 of the Northern Ireland Act 1998, which is the equalities provision. It is the equivalent of section 149 of our own equalities Act, and I am content there to adopt the analysis of that case, which is set forth at pages 50 to 63 of the written case that has been provided to me by Dr McGleenan and sets out why that is not relevant to the determination of the present issue. My Lords, that, rather swiftly and briefly, is all that I would have to say at this time with regard to devolved legislation in the context of the present appeal. Could I just make one further observation. My Lord Mance referred to the Referendum Act 2015 as leaving us in the air. In my respectful submission, it does no such thing. One has to consider the foreign affairs prerogative today in light, not just of the 1972 Act but also in light of the 2015 Act. Both are of constitutional significance.

Now, it is argued against us that as a consequence of the 1972 Act and in particular section 2, the executive was restrained in the exercise of the foreign affairs prerogative. It certainly didn't disappear, it was used constantly for the next 43 years in order to bring EU law into our domestic domain, but one has to look at the foreign affairs prerogative in the context not only of the 1972 Act but the 2015 Act. What was Parliament doing? Parliament was aware of Article 50. Parliament was aware of the foreign affairs prerogative. Parliament passed the Referendum Act for
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<td>the purpose of letting the people decide whether or not we would leave the EU, and as my Lord Clarke observed, Parliament was silent as to whether and when Article 50 would be triggered by the giving of notice. It was silent on the matter.</td>
<td>might say that if Parliament passes the act and a week later, for no apparent reason, the Government decides to withdraw, and then that is an abuse of a power, if on the other hand the Wilson Government holds a referendum as it does, and if it had gone the way that this one has gone, it then decides to withdraw, then there is a rational and a basis with support in a principle of a constitutional principle of democracy for exercising power, and you see the point I am making --</td>
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<td>It knew that it was open to the executive to exercise the foreign affairs prerogative, particularly after the 1972 Act. If Parliament wished to intervene to prevent the executive exercising that prerogative, it would do so. It is a matter for Parliament. Parliament has remained silent and in my respectful submission, and with all due respect to the court, it is not for the court to fill in that which Parliament declined to. Parliament could decide tomorrow to prohibit the executive from exercising the foreign affairs prerogative in order to give notice under Article 50.</td>
<td>THE ADVOCATE GENERAL FOR SCOTLAND: This is why analogies can be so dangerous, because we try and analyse what has happened. We know the foreign affairs prerogative survives the 1972 Act. It has been exercised constantly for 43 years with regard to EU law, so the term clamp is perhaps an exaggeration, and it might be more appropriate to say, as my Lord indicates, that post the 1972 Act, it might be seen as an abuse of that foreign affairs prerogative to exercise it in order to take us out of the EU; but clearly there could be no such abuse after the Referendum Act 2015 and the result of the referendum was known.</td>
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<td>THE ADVOCATE GENERAL FOR SCOTLAND: With respect, my Lord, any clamp is only with regard to whether in the context of a statutory provision to enter, to accede to the EU,</td>
<td>So it is not a case of the foreign affairs</td>
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<td>there should be implied some limitation on the foreign affairs prerogative to leave, but of course once we get to the Referendum Act of 2015, its purpose was to determine the question of whether or not we should leave.</td>
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<td>THE PRESIDENT: I see.</td>
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<td>THE ADVOCATE GENERAL FOR SCOTLAND: You cannot then infer that the clamp would remain and as I say, if Parliament wanted to determine that that prerogative should not be exercised, Parliament could decide that tomorrow, it could have decided that yesterday, and as my Lord Clarke observed, Parliament decided to remain silent on that, and in my submission for a very particular purpose and for a very particular reason. Unless there is anything I can assist with --</td>
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<td>LORD REED: Since you have chosen to go down this road, I could ask you a follow-up question. It occurs to me that if there is a clamp, one way of envisaging it is in terms of legal powers. Either the prerogative remains or it does not in relation to withdrawal from the EU treaties. Another way of looking at it might be looking at it in the same sort of way that it was discussed in Laker as being to do with whether the power is being properly exercised or abusively exercised, in which event one</td>
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29 (Pages 113 to 116)
THE PRESIDENT: Thank you very much. I think some rearranging of the personnel is to be done over the adjournment. I hope everyone will have enough time to have lunch, but we will resume again at 2.00 and I think we are due to hear from the Attorney General for Northern Ireland.

Thank you very much. We will adjourn until 2.00.

THE PRESIDENT: Could you give me that page number again.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Could I ask your Lordships and your Ladyship to look at the Northern Ireland Act 1998 --

LORD KERR: And the Northern Ireland Act is at 20001.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Section 1 is at 23674 for devolution issues one to three and then over the page at 5 is number four. The McCord question referred by the Court of Appeal, one finds in the McCord core volume 1 page 23674 is question four and over the page at 75 --

THE PRESIDENT: Could you give me that page number again.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is 23674 for devolution issues one to three and then over the page at 5 is number four. The McCord question referred by the Court of Appeal, one finds in the McCord core volume 1 page 24232.

THE PRESIDENT: Thank you.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am conscious, all the submissions that address devolution questions three and four, that is whether the prerogative, if it is operative, has been significantly interfered with by aspects of the 1998 Act, I am sure that does it justice, and the section 75 point, I am content to rely on our written submissions in respect of that and to adopt the written submissions on behalf of the Secretary of State for Northern Ireland, which are rather fuller than my own. These are all submissions that address devolution question one and two and the McCord question. And then I would like to conclude with making some general observations because obviously the outcome of, if I can call it the Miller litigation, is relevant, particularly for the Northern Ireland case, especially as respects the second devolution question. Can I start with the McCord question.

THE PRESIDENT: Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The McCord question asks, potentially, whether the triggering of Article 50 by the exercise of prerogative power without the consent of the people of Northern Ireland impedes the operation of section 1 of the Northern Ireland Act 1998. Can I ask the court to look at Northern Ireland authorities, volume 1, at tab 3, where one finds the
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I am now going to turn, my Lady and my Lords, to the first of the High Court devolution issues and that is whether any provision of the Northern Ireland Act excludes expressly or by necessity implication the operation of prerogative power to give notice under Article 50, and I am going, if it is convenient, to approach that under four headings. Firstly I am going to look briefly at the assistance that one has to the interpretation of the Northern Ireland Act 1998, and secondly and thirdly I am going to look at the Belfast agreement and the British-Irish agreement, and then fourthly I am going to, I hope speedily, go through the 1998 Act and draw attention to the EU aspects that might be said to be contained within it.

So firstly, then, to the interpretative approach to the Northern Ireland Act 1998. Lord Bingham in Robinson famously, and I know the court has been over this, observed that the Northern Ireland Act 1998 is in effect a constitution, which Lord Hoffmann in the same case was a little bolder and described it as a constitution. He suggested that these provisions should be interpreted generously and purposively. For the note, Robinson is in core volume 4 at tab 81.

THE PRESIDENT: Thank you.

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THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Can I make a summary, which -- I can go through the authorities in some detail if this is required but can I say that it seems to me that the trend of constitutional interpretation since 2002 has been to place perhaps rather more emphasis on a purposive interpretation than a generous one, and your Lordships and your Ladyship will have seen the reference in our printed case to the Local Government Byelaws case and to the Recovery of Medical Costs for Asbestos Diseases case. Famously in the Asbestos Diseases case, there was -- argument on behalf of the Welsh Government for a generous interpretation was rejected, and in summary, the position seems to be that merely because a statute is quite properly to be classed as a constitutional statute, it really does not mean that it is interpreted in any different way. The emphasis is on the purpose. Of course the purpose --

LORD KERR: Is there a distinction to be drawn between the use of the expression, constitutional statute, or as Lound Bingham put it, a constitution? THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Of course in the HS2 case, this court has assigned a particular significance to constitutional statutes in that they are protected against implied repeal. When one looks at the

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trend since 2002, and of course I bear the scars of Robinson on my back, it seems to me that constitutional -- whether or not an act of the Westminster Parliament is a constitution or not, that does not attract to it significantly or materially different rules of interpretation.

LORD REED: I wonder if it may depend on the issue. The more recent cases that you have referred to, to do with mostly Welsh devolution, have been cases where there was a question of where to demarcate the powers of the devolved budget on the one hand and the powers reserved to Whitehall or Westminster on the other, and in that situation you cannot really take a generous view on one side of the equation without taking a narrow view on the other.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I respectfully agree.

LORD REED: The court has simply applied ordinary principles of statutory interpretation. On the other hand, in Robinson and also I think in the Scottish case of Axa, the court had a more fundamental issue to deal with; obviously in Robinson whether or not the assembly could be established in accordance with the statutory timetable, and in Axa about the scope for judicial review of devolved legislation. The court did take

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mostly Welsh devolution, have been cases where there was a rather more -- generous is one way of putting it, but a different sort of approach, conscious of the fact that these were constitutional fundamentals of new institutions that it was having to decide.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Well, I would suggest that there is a distinction between the Robinson case and the Axa case. Axa, at least insofar as I understand my Lord's reference, is really about the decision of the court about the extent of the irrationality standard of review, because otherwise Axa should be a question about competence, in relation to the classic limitations on all of the devolved parliaments' EU law, the conventions and so forth.

Robinson is an enormously important case and I will tie, I hope, this in towards the end of these submissions, but if I can flag up the issue, it is that Robinson is about letting government work.

LORD REED: Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Government is to be carried on.

THE PRESIDENT: Lord Bingham says that in terms.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Yes, he does, paragraph 11 and 12 of Robinson.

THE PRESIDENT: Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I will come back
to it in the conclusion, because I do think that is
enormously important for this case overall.
LORD KERR: Just to go back to my question, is there any
distinction as are they to be assimilating
a constitutional status according to the statute, or is
it to be regarded as a constitution?
THE ATTORNEY GENERAL FOR NORTHERN IRELAND: A constitution
will also benefit from the status of constitutional
statute, and not every constitutional statute is
a constitution. The Human Rights Act, enormously
important constitutional statute, isn't a constitution.
The Northern Ireland Act 1998 is a plainly
a constitution, and the House of Lords has told us so,
so I am not sure there is a huge distinction,
particularly bearing in mind the approach to
interpretation will always be context specific, but may
not in fact differ from the approach one would take to
another statute. That is plainly not constitutional in
nature.
So if I can then turn to the Belfast agreement, that
is in the Northern Ireland authorities, tab 14. It is
the first volume, sorry, my Lords, of the Northern
Ireland authorities at 14.
(Pause)
It is not a particularly good omen, I am afraid.

Lord Kerr: The MS number is 20,342 if that is of any
assistance.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is, I am very
grateful. I was not proposing to take the court through
that, simply to draw attention to the fact that at the
end of the tab, one has the British-Irish agreement. So
at MS 20373.

THE PRESIDENT: Thank you. Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The Belfast
agreement is not an international agreement; it is
a political agreement hammered out after extensive
negotiations. It has an interplay with the
British-Irish agreement which we will come to, but, and
since the Northern Ireland Act was enacted, at least in
part to give effect to it, the Belfast agreement is
plainly relevant to the interpretation of the Act.
There are some references, of course, to
European Union law in strand two.

LORD CLARKE: In what two?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Strand two in
the Belfast agreement at paragraph 17.

THE PRESIDENT: Have you got the page number?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: 20357.

LORD MANCE: 54, isn't it -- oh, I see --
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1. law.
2. Of course as I have mentioned, the Belfast agreement
3. is not a statute, not drafted as a statute; it is
4. a political text. In Robinson, if I could ask the court
5. to perhaps keep the Belfast agreement open and this time
6. to keep it open at strand one, at paragraphs 3 and 4 of
7. strand one, which are at page 20348. Then if the court
8. would look very briefly at the passage from the opinion
9. of Lord Hoffmann in Robinson at paragraph 26, so that is
10. core authorities, volume 4. And the report begins at
11. 3272.
12. THE PRESIDENT: Yes.
13. THE ATTORNEY GENERAL FOR NORTHERN IRELAND: If one goes to
14. paragraph 26, this is Lord Hoffmann, 3284:
15. "The agreement provided that the assembly was to be
16. the prime source of authority in respect of devolved
17. responsibilities and would exercise full legislative and
18. executive authority."
19. That is Lord Hoffmann's quotation from paragraph 3
20. of strand one.
21. Of course, almost certainly my fault because
22. I should have pre-emptively attempted to correct him,
23. but when one looks at the Northern Ireland Act, that
24. flatly contradicts what one finds in that provision. If
25. one looks at section 23 of the Northern Ireland Act, at

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1. Northern Ireland authorities volume 1, page 20068, 23,
2. subsection (1):
3. "(1) The executive power in Northern Ireland shall
4. continue to be vested in Her Majesty.
5. "(2) As respects transport matters, the prerogative
6. and other executive powers of Her Majesty in relation to
7. Northern Ireland shall, subject to subsection (3) ..."
8. It deals with the Civil Service Commission, the
9. exercise, on Her Majesty's path, of any minister or
10. Northern Ireland department.
11. So not only does in this important respect the
12. Northern Ireland Act not implement this aspect of strand
13. one, it flatly contradicts it.
14. So the purpose of that really is --
15. LORD CLARKE: Which was the bit you should have corrected in
16. Robinson?
17. THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is
18. paragraph 26 of Robinson, where Lord Hoffmann quotes
19. paragraph 3 of strand one of the Belfast agreement.
20. LORD KERR: Your point in a nutshell is that was not
21. translated into the Northern Ireland Act.
22. THE ATTORNEY GENERAL FOR NORTHERN IRELAND: And flatly
23. contradicted by it.
24. It points to the use of caution, that must be
25. exercised, we respectfully submit, when attempting to

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1. competence, on the competence of ministers, but -- and
2. it does also confer certain powers and duties on the
3. Secretary of State for Northern Ireland. No provision
4. in the Northern Ireland Act purports to limit or has the
5. effect of limiting the powers of the United Kingdom
7. There is no provision of the 1998 Act, nor any part
8. of the Belfast agreement, nor the British-Irish
9. agreement which, however they are constructed and taken
10. apart singly or collectively, which imposes any
11. constitutional requirement, the word used in the
12. claimant's case, which the UK Government must satisfy
13. before giving notice under Article 50.
14. I won't open it to the court but the North/South
15. Cooperation (Implementation Bodies) (Northern Ireland)
16. Order 1999, and that is in tab 8 of the Northern Ireland
17. authorities, does no more than give effect to another
18. international agreement which is set out in schedule 1
19. to those regulations.
20. Article 1 of that agreement establishes the special
21. EU programme body, and part 5 of the regulations gives
22. domestic effect to the agreement as respects the EU
23. programmes body.
24. To suggest that anything in the 1999 regulations
25. prevents the prerogative being used to give notice under

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33 (Pages 129 to 132)
THE ATTORNEY GENERAL FOR NORTHERN IRELAND:  Then can I look through them, you may run into a bit of time trouble. It is up to you; I find any barking in any of it.

THE PRESIDENT:  If you are going to take us through all of them, you may run into a bit of time trouble. It is up to you; I am aware how attenuated your time is.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND:  A cutely to you; I am aware how attenuated your time is. If you are going to take us through all of them, you may run into a bit of time trouble. It is up to you; I am aware how attenuated your time is.

THE PRESIDENT:  Lord Steyn in Jackson for example.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND:  Indeed.

THE PRESIDENT:  Lord Steyn in Jackson for example.
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<td>the exercise of political judgment, they permit</td>
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<td>Act, and I must say it is not clear to me that there is,</td>
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<td>a flexible response to differing and unpredictable</td>
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<td>to stand for election to the European Parliament, that</td>
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<td>events in a way which the application of strict rules</td>
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<td>right could not be taken away by the giving of notice</td>
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<td>would preclude.&quot;</td>
<td>4</td>
<td>under Article 50. If, depending on the timing of that</td>
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<td>That is an approach I respectfully commend to this</td>
<td>5</td>
<td>notice, the events contemplated by Article 50 had not</td>
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<td>court.</td>
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<td>occurred before the date of the 2019 election to the</td>
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<td>With respect, the first claimant is wrong, we say,</td>
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<td>European Parliament, anything that the 2002 Act required</td>
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<td>as she does in her printed case, the outcome of the</td>
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<td>to be done would have to be done. There would be</td>
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<td>referendum and the Government's stated position with</td>
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<td>a proper complaint of domestic illegality if it were not</td>
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<td>respect to that are not matters for the court. In our</td>
<td>10</td>
<td>done. On the other hand, no rights that are derived only</td>
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<td>political constitution, these constitutional features</td>
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<td>from the 2002 Act alone are lost by withdrawal from the</td>
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<td>cannot be overlooked.</td>
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<td>treaties. If the treaties ceased to apply pursuant to</td>
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<td>So while, of course, the determination by the</td>
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<td>Article 50(3), that doesn't mean that use of the royal</td>
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<td>prerogative to get notice has repealed or undermined the</td>
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<td>requirements of the United Kingdom were met if</td>
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<td>2002 Act. It simply means that with the inapplicability</td>
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<td>notification under Article 50 is given under the royal</td>
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<td>a particularly useful part of the statute book or</td>
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<td>far as the court can quite properly be asked to look at</td>
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<td>a useful portal, which is the term which we use in our</td>
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<td>that question, a determination of this nature should be</td>
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<td>printed case. Since this an abstract case, because giving notice</td>
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<td>regarded as constitutionally proper unless shown to</td>
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<td>gives rise to the consequences in terms of</td>
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<td>conflict clearly with statute.</td>
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<td>representation and Government participation in Europe,</td>
<td>35 (Pages 137 to 140)</td>
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<td>Or, to put the matter another way, unless it can be</td>
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<td>but notice by itself has no effect whatsoever and the</td>
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<td>shown by the claimant, or those on that side, that some</td>
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<td>assumption that -- and, certainly, one can see that</td>
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<td>statute expressly, or where by necessary implication,</td>
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<td>has taken away the prerogative in that sphere.</td>
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Day 2  
Article 50 - Brexit Hearing  
6 December 2016

I do not understand what you are saying about
restoring the position by necessary legislation, which
could not just be domestic, it would have to be
international agreements to restore some of the
reciprocal arrangements and so on, wouldn't it?
THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Of course, but
if it is necessary, and that is why I return to the 2002
Act, because plainly if notice had been given a month
before the elections, the relevant period for giving
notice of one's intention to stand as a candidate in the
2019 elections -- it would be absurd, one would imagine, for
Government to run an election that was going to
plainly serve no useful purpose when the two-year period
had run its course but the Government couldn't dispense
back to Godman-Hales with the 2002 Act, it would have to
do something about it by another Act of Parliament.
So my point, my Lords and my Lady, is simply that,
that there might well be work to be done by Parliament
and Government but the assumption that it wouldn't be
done is one that it is not proper to make.
So, my Lords and my Lady, unless there is anything
else, those are our submissions.
THE PRESIDENT: Thank you very much, Mr Attorney. Thank
you. We appreciate you managing to accommodate your
submissions in that relatively short time.

answer to my Lord, Lord Wilson yesterday.
The appellants' argument, however, if correct, would
mean that the 1972 Act, far from having a constitutional
status, would have a lesser status than any other act,
with a lesser status than the Dangerous Dogs Act because on
the appellants' argument, Parliament has made this
fundamental constitutional change to domestic law only
for as long as the executive does not take action on the
international plane to terminate the treaty commitments.
We say that in the context of an act of Parliament,
which expressly states, expressly states in
section 2(4), that its provisions take priority, even
over other legislation, the words "passed or to be
passed", it would, with respect, be quite extraordinary
if nevertheless the 1972 Act could be set at nought by the
effects of the government acting without parliamentary
authority.

LORD SUMPTION: When you say in the first sentence of your
submissions that your case is that the executive cannot
alter rights and duties, are you actually limiting it to
rights and duties in the sense of the content of the
substantive law, or are you including the change which
arguably would be brought about if we left the union, to
our constitutional arrangements to the question what is
our source of law, as opposed to the question what are

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its contents.

LORD PANNICK: The two are plainly connected, but I take
your Lordship's point.

LORD SUMPTION: You are not limiting yourself to the --
LORD PANNICK: I am certainly not, because the 1972 Act, as
your Lordship well knows, did not merely introduce
rights and duties; it created a new source of rights and
duties that is part of its constitutional status.

So I say this is an even stronger case than some of the
cases that appear in the books, where the courts have
said that this prerogative power cannot be used to amend
domestic law, this is an even more fundamental question.

LORD KERR: It is a second dimension beyond merely the
constitutional status, and you can recognise that there
is a constitutional status, whatever that slightly
amorphous term means, but your point is that this Act of
Parliament created an entirely new source of laws, and
even if you don't regard it as an act of constitutional
status, that aspect alone invests it with a particular
significance.

LORD PANNICK: That is my submission, and my submission is
that it is inherently unlikely in that context that
Parliament, when it enacted the 1972 Act, can possibly
have intended that something so fundamental, so
fundamental change, could be set aside by a minister.

Your Lordships and your Ladyship will be well aware
that there was in 1972 a debate, which we hear much less
of nowadays, as to whether Parliament itself could have
revised the 1972 Act. I think we all now accept that,
course, Parliament, by reason of parliamentary
sovereignty, can do what it likes, but the idea that
ministers could revoke this fundamental change to our
constitutional order, in my submission, is inherently
unlikely. It would require the strongest of indications
in the materials for the court, in my submission, to
accept any such proposition.

The enormity of the proposition for which my friends
contend is that they say the Secretary of State can
nullify what is otherwise part of domestic law, and
a central part of domestic law, as indicated in the
scores, hundreds of statutes which implement EU law,
despite the fact that so many of the obligations under
the 1972 Act are obligations imposed on ministers
themselves; so the idea that ministers could revoke this
scheme, again, is even less plausible.

Now, I respectfully submit that the submissions that
the court has heard from the appellants are wrong in
principle. And they are wrong in principle for seven
main reasons. Can I identify them and then seek to
develop each of the points if I may in turn.

LORD MANCE: Can I ask you, before you do that,
order that Parliament has created.

Our case, as my Lord, Lord Sumption put to Mr Eadie,
our case is that there is no relevant prerogative power
in this context. The appellants' proposed conduct
exceeds the permitted limits of his prerogative power.

The third head of argument that I have is I say that
the court should pay regard, I say respectfully, the
court should pay regard to important principles of
statutory interpretation which are relevant in this
case. These principles show that it is for the
appellant to demonstrate that Parliament has clearly
conferred a power to nullify a statutory scheme, and
I am thinking of the case law on Henry VIII powers, on
the principle of legality, and on the principle of no
implied repeal and I will develop that submission.

The fourth head of argument that I have to put
before the court is that in any event, in the light of
the purpose and the content of the 1972 Act, Parliament
did not intend that what it had created could be
nullified by a minister exercising the prerogative.

LORD WILSON: You have obviously chosen your words
carefully; Parliament did not intend that the
prerogative was used; so you are not saying that
Parliament did intend that the prerogative should not be
used; or am I being too pedantic?

LORD PANNICK: Yes, your Lordship is right --
LORD MANCE: It would be interesting to have a reference or
cross-reference.

LORD PANNICK: Indeed. My Lords and my Lady, there are
seven points I want to make. The first point is the
European Union Referendum Act 2015. I say it does not
assist the appellants' arguments on the issue in this
appeal, and the issue is the scope of the appellants'
prerogative power.

Second, I want to make some submissions as to why
the prerogative power to enter into or resolve from
treaties cannot validly be exercised so as to nullify
statutory rights or obligations, far less, to take
my Lord, Lord Sumption's point, a new constitutional
LORD PANNICK: Your Lordship is never pedantic. The fourth proposition is that there are principles of statutory construction, and so the appellant has to show something clearly. But I am quite happy to bear the burden if I need to. I say, if necessary, I can persuade the court that Parliament clearly intended that ministers should not have this power.

LORD KERR: Your point is, if the background is that it is for the appellant to demonstrate that it did intend, then you don't really have to address the question of whether or not it formed a positive intention.

LORD PANNICK: Absolutely. If I need to, I say I can demonstrate from the contents of the legislations, as from its purpose, that Parliament itself had imposed a clear system of parliamentary control on changes to the treaties. It is therefore, I say, most unlikely that Parliament can have intended that if the whole scheme is set aside, it can be done without parliamentary control.

The fifth point, is I say, with respect, the appellant is wrong to regard De Keyser as somehow setting out an exclusive principle as to the limits on the use of prerogative powers. I say there is no relevant prerogative power here and in any event, ex

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LORD MANCE: Is your point that if one is looking for the answer for the appellant to say that Parliament of course can choose how to be involved; it will later be involved in various ways. The fact of the matter is that notification will cause the nullification of statutory rights and obligations and a statutory scheme of fundamental importance. There is no prerogative power to notify and only an Act of Parliament can give such authorisation.

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The first point, my Lords, is the 2015 Act. The 2015 Act says nothing whatsoever about the consequences of a referendum decision. As the court has heard, when Parliament wishes to make a referendum binding, it says so, and there are many examples, section 8 of the Parliamentary Voting System and Constituencies Act 2011 is one example, MS 4611, volume 13, tab 136; that was the alternative vote.

If Parliament meant the 2015 Act to have a legal effect, it could and it would have said so. My friend Mr Eadie nevertheless submits, and I wrote what he said down, he said the 2015 Act "gave the decision on withdrawal to the people".

Well, I respectfully submit that is impossible to understand as a legal proposition. Indeed, it is particularly difficult to understand when the Government resisted an amendment to give legal force to the referendum and explained why they were doing so.

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Can I invite the court's attention, please, to authorities volume 34. It is tab 479 and MS page 11688. Volume 34, tab 479 and it is MS page 11688.

THE PRESIDENT: We are looking at a debate, are we?

LORD PANNICK: Your Lordships are.

THE PRESIDENT: We are looking at a debate, are we?

LORD MANCE: Your Lordships are.

LORD REED: This is justified on what basis?

LORD PANNICK: It is justified on the basis that it is well established that the court may have regard to Hansard to identify the purpose of a statute. The authority for that not in the bundles is what my Lord, Lord Reed said for this court in the SG case [2015] 1 WLR 1449, paragraph 16.

LORD REED: That was specifically in the context of assessing proportionality of legislation in relation to the European Convention on Human Rights. The Strasbourg court does look at Hansard and British courts have followed suit.

LORD PANNICK: I can give your Lordship other authorities.

LORD REED: I think other authorities might be better.

LORD PANNICK: Can I show your --

THE PRESIDENT: We can look at it at the moment de bene esse, but in due course you will take us to --

LORD PANNICK: I will.

LORD MANCE: Is your point that if one is looking for the

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LORD PANNICK: I say it is well established, one can look at Hansard in order to identify the purpose, the mischief, at its particular --

LORD MANCE: Shall we look at it then.

THE PRESIDENT: I think the trouble is, if I am right in my recollection, Mr Eadie suggests there are other passages where other things are said in Parliament on this point.

LORD PANNICK: He has not cited it, no.

THE PRESIDENT: I think he referred to some.

LORD PANNICK: Your Lordships will take a view on whether it assists or it doesn't assist. It is at tab 479 and a specific amendment was proposed, and it was proposed by Mr Alex Salmond, and it is called amendment 16. Your Lordships see it at the bottom of page 11688:

"The chief counting officer shall declare ... the result of the referendum if the majority wish the UK to leave the EU ... the chief counting officer may declare that a majority wish the UK to leave the EU only if a majority of total votes passed in a referendum are against the United Kingdom remaining and a majority of the votes cast in the referendum in each of England, Scotland, Wales and Northern Ireland are against the United Kingdom ..."

That was the proposed amendment to the bill, and it was addressed by the minister at the previous tab.

LORD HUGHES: Sorry, Lord Pannick, I am not following, it is my fault; did you say that this was going to demonstrate that it was an amendment to give the referendum legal force?

LORD PANNICK: Yes.

LORD HUGHES: Why does it do that? It tells you how to count it.

LORD PANNICK: The purpose of the amendment, as I understand it, was to specify what result would be, but I take your Lordship's point, but can I show your Lordship what was said about this at 478, which is the previous tab, and if your Lordships go to page 11687, and in the left-hand column, column 231, halfway down, the court will see the second paragraph, in line 5, he says he is going to start by addressing amendment 16, and he makes the point that he is not surprised that the amendments should be moved. Then he says:

"Amendment 16 does not make sense in the context of the bill. The legislation is about holding a vote. It makes no provision for what follows ... the referendum is advisory ..."

That is simply the point I want to make, and I say that is entirely consistent with the contents of the Act. It did not address any consequence, far less, far less, did it address the process by which the UK would leave the EU if the people voted as they did to leave. In particular, it did not address the respective roles of Parliament and ministers, and my submission, the very simple submission, my submission is that whatever the proper legal scope of prerogative power in this context, it is entirely unaffected by the 2015 Act.

I can understand a submission that the referendum result justifies the use of prerogative power to notify, but the court is not concerned with justification, there is no issue as to justification. The question for the court is one of law. The question is: does the appellant have a prerogative power to notify under article 50(2).

This is not, as Mr Eadie submitted, to deny an effect to the referendum. The referendum is plainly an event of considerable political significance, but my answer to -- in particular to my Lord, Lord Reed is that the political significance, whatever it is, is not, with respect, a matter for the court, and it is not a matter for the court because it is irrelevant to the legal issue of whether ministers enjoy a prerogative power to set aside the 1972 Act.

In any event, if, as I shall submit, if the proper interpretation of the 1972 Act is that ministers have no power to nullify its terms by the exercise of the prerogative, the court would need a much clearer statement by Parliament in 2015 that the inhibition is removed by anything in the 2015 Act. Both the Attorney General and Mr Eadie said yesterday that if the divisional court judgment is correct, then Parliament is to be asked the same question, they said precisely the same question, that was put by Parliament to the electorate, and which the electorate answered in the referendum.

Now, the court will recognise of course, it is entirely a matter for Parliament what issues it may wish to consider if a bill authorising notification is put before it. But I do submit, respectfully, that the court cannot assume that the question put to the electorate in the referendum, should we remain or should we leave, is the only question which Parliament may wish to consider.

Since the appellant raises the point, we are entitled to say that Parliament may wish to express a view on what information it needs from ministers before approving notification. Parliament may wish to impose conditions or requirements on the Government,
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1. either substantive or procedural. By procedural I mean reporting back to Parliament. I emphasise these are matters for Parliament. I am not inviting the court to rule on them; I am simply responding to the submission that if the divisional court is right, the same question is being put to Parliament as was put to the electorate, and that in my submission it doesn't assist the court on the scope of the prerogative power that is enjoyed by the executive(?).

THE PRESIDENT: Before we move on, we were taken by Mr Eadie, and I think you should have an opportunity to deal with it, it is volume 18, tab 203, MS 6312. He cited what Mr Hammond, the Secretary of State for Foreign Affairs, said: "This is a simple but vital piece of legislation which has one clear purpose ... deliver on our promise to give the British people the final say on our EU membership." My answer to that is there are various statements at various times.

LORD PANNICK: My answer to that is there are various statements. The President: That was my point.

LORD PANNICK: But since the point has been raised, I am, I hope, entitled to point to different statements.

Mr Eadie, if it assists the court, will show the court more statements in this context. I respectfully submit that what really matters is the content --

THE PRESIDENT: I quite agree with that. That is more or less what I was suggesting.

LORD PANNICK: I would respectfully accept that, my Lord.

LORD REED: If the question is the scope of the prerogative, then clearly the outcome of the referendum cannot affect that. If a question is whether a prerogative which exists is properly being exercised, then a referendum result could be a relevant consideration to that question.

LORD PANNICK: If the question is, is it an abuse of power --

LORD REED: Quite.

LORD PANNICK: -- then I take your Lordship's point, but we are submitting that there is simply no prerogative power to interfere, frustrate, nullify a statutory scheme.

That is how I put the case, but I entirely understand your Lordship's point. Once we are into questions of abuse(?), of whether it is proportionate, the court will plainly give the broadest of discretion, and that is not our case. It has never been our case. So that is how I put that point.

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<td>a British carrier. It followed, submitted the Attorney,</td>
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| 1        | 2        | begin. |
| 2        | 3        | Now, it is of course rare to find examples of the |
| 3        | 4        | treaty-making prerogative being used by ministers in |
| 4        | 5        | an attempt to frustrate statutory or common law rights |
| 5        | 6        | without authorisation from Parliament. This is a rare |
| 6        | 7        | phenomenon and it is rare because ministers normally |
| 7        | 8        | recognise and respect the basic constitutional |
| 8        | 9        | principles that are set out from The Case Of |
| 9        | 10       | Proclamations onwards, but there are examples in the |
| 10       | 11       | books of ministers stepping over the line or the Crown |
| 11       | 12       | stepping over the line. |
| 12       | 13       | Two particular examples in the papers, one of them |
| 13       | 14       | is the example that Lord Hoffmann refers to in Higgs. |
| 14       | 15       | It is the Parlement Belge case, perhaps we could just |
| 15       | 16       | take a moment to look at Parlement Belge, it is |
| 16       | 17       | volume 24, it is tab 294, and it is MS page 8392. |
| 17       | 18       | THE PRESIDENT: Would you give me that reference again. |
| 18       | 19       | LORD PANNICK: Yes, my Lord, it is volume 24, tab 294, MS |
| 19       | 20       | page 8392. |
| 20       | 21       | If the court has that authority, tab 294. |
| 21       | 22       | LORD CARNWATH: It is in core volume 4. |
| 22       | 23       | LORD PANNICK: I am grateful, I had not spotted that, thank |
| 23       | 24       | you. |
| 24       | 25       | No, it is not. Not in mine. |
| 25       |          | LORD CARNWATH: Well, it is in my index but not actually in |

| 1        | 1        | my file. (Pause) |
| 2        | 2        | LORD PANNICK: The court will see the headnote: a packet |
| 3        | 3        | conveying mails and carrying on commerce, that is |
| 4        | 4        | a ship, does not, notwithstanding she belongs to the |
| 5        | 5        | sovereign of a foreign state, officers commissioned by |
| 6        | 6        | him, come within the category of vessels which are |
| 7        | 7        | exempt from the process of law: |
| 8        | 8        | "It is not competent to the Crown without the |
| 9        | 9        | authority of Parliament to clothe such a vessel with the |
| 10       | 10       | immunity of a foreign ship of war so as to deprive a |
| 11       | 11       | British subject of his right to proceed against her." |
| 12       | 12       | This is the judgment of Sir Robert Phillimore, and |
| 13       | 13       | the relevant passage is at 154. In the penultimate |
| 14       | 14       | paragraph on that page, MS page 8417, page 154, |
| 15       | 15       | Sir Robert says: |
| 16       | 16       | "If the Crown had power without the authority of |
| 17       | 17       | Parliament by this treaty to order that the |
| 18       | 18       | Parlement Belge should be entitled to all the privileges |
| 19       | 19       | of a ship of war, then the warrant which is prayed for |
| 20       | 20       | against her as a wrongdoer account of the collision |
| 21       | 21       | cannot issue, and the right of the subject, but for this |
| 22       | 22       | order unquestionable, to recover damages for the |
| 23       | 23       | injuries done to him by her is extinguished. This is |
| 24       | 24       | a use of the treaty-making prerogative of the Crown |
| 25       | 25       | which I believe [he says] to be without precedent and in |

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(+44)207 4041400
LORD SUMPTION: In that case, it would have been lawful if the argument failed on its merits.

LORD MANCE: It is difficult, but was it a case which -- where the events took place outside the jurisdiction?

LORD PANNICK: They did take place outside the jurisdiction.

LORD MANCE: It was taking away the rights of a British citizen.

LORD PANNICK: Yes, and the court notes the concession, accepts it is a concession but it is cited by Lord Justice Lawton, and rightly so, as a statement of principle: you cannot use the prerogative to take away the rights of a citizen -- by the prerogative. That is simply not acceptable, so as I say, it is not easy to find cases in the books, because these are rare events, but there are cases and they are all, in my submission, to the same effect.

Now, in this respect as to what the scope of the prerogative is, we for our part commend to the court the valuable historical analysis in Ms Mountfield's written case, she will speak in due course, in her written case for the Grahame Pigney group of interested parties, core volume 2, it is MS 12483 and following.

LORD MANCE: Can I just press you on that. This took place, did it not, in respect of lobster factories on the coast of Newfoundland.

LORD PANNICK: It did.

LORD MANCE: It is a Privy Council appeal from the courts of Newfoundland, so it took place within the relevant jurisdiction.

LORD PANNICK: Your Lordship is right, it took place within the jurisdiction.

LORD MANCE: It is simply authority for the proposition, isn't it, therefore, that was established in Entick v Carrington.

LADY HALE: I was going to say, Entick v Carrington is the source of the doctrine.

LORD MANCE: It is not to do with foreign acts of state; it is dealing with the suggestion that you can -- it is a Crown act of state which is not admissible within your own jurisdiction.

LORD PANNICK: I accept that. I cite it also for the proposition that it is no defence to what is otherwise an unlawful act, that the individual concerned is acting pursuant to a treaty which has been agreed on the international plane. That cannot affect the rights, whatever they are, that are enjoyed in the domestic level.

LORD MANCE: Because the royal prerogative in respect of foreign affairs has very limited -- well, is essentially external. There are some domestic prerogatives but not...
LORD PANNICK: Indeed. The proposition for which I contend, which is there accepted, is the proposition relevant to the circumstances of this appeal.

Now, my friend -- and Mr Eadie, and the appellant refers in his written case, to a number of other examples of the use of prerogative powers, and we have addressed them, each of them, in our written case at paragraph 29, beginning at MS page 12402. The court will understand that I do not have time to address all of them in oral argument. We have set out our responses.

I respectfully adopt what my Lord, Lord Sumption put to Mr Eadie: none of these examples concern the use of the prerogative to alter the content of domestic law, in particular, by removing a source of our domestic law. Whether one looks at Post Office v Estuary Radio or any of the other examples, we say they simply do not assist on the issue before the court.

May I comment, however, on the new example that is on the issue before the court.

Whether or not the Court of Justice was right in its view of the EFTA Act, that Act does not create, does not create, in national law, rights which are incorporated from international law. It doesn't incorporate any rights created on the international plane, far less give them priority; there is no equivalent of section 2(1), section 2(4) or section 3(1).

THE PRESIDENT: It reads a bit like a sort of implementation of a directive, almost.

LORD PANNICK: What it does is it gives power to the minister. It gives the minister power to make regulations, no more than that, and therefore I say that a decision to notify under EFTA does not raise, cannot raise, the same issues as to destruction of statutory rights as in this appeal, and of course it is also unrealistic, I say respectfully, to look at the EFTA notification in isolation. We were leaving EFTA because of course we were joining the EU.

LORD SUMPTION: Did the statutory powers conferred by the Act relate to the fixing of duty levels?

LORD PANNICK: Yes, they did.

LORD SUMPTION: That was not a power that was derived from the general Customs and Excise Act but from that specific Act.

LORD PANNICK: No, it was a specific power to deal with the tariffs that were applicable, and your Lordship will see it at 35/480.

My Lords, my Lord, Lord Carnwath referred to the Canadian case of Turp and my friend Mr Eadie took the court to it this morning. Can I ask your Lordships to go back to it at volume 26, tab 308 and it is MS page 8950, volume 26. Tab 308, MS 8950. And I take the court to it just for this reason. If the court would go, please, to MS page 8953, the court will see paragraph 8 of the judgment, this was a judgment at first instance of the federal court.

At page 8953, paragraph 8, the judge, Mr Justice Simon Noel, referred to an earlier judgment on the relevant Act, the KPIA, and at the end of paragraph 42 of that earlier Act, which the judge refers to, we see the final sentence: "If Parliament had intended to impose a justiciable duty upon the Government to comply with Canada's Kyoto commitments, it could easily have said so in clear and simple language."

That judgment, see paragraph 9, was upheld by the federal court of appeal and the Supreme Court refused leave to appeal.

So the Act which was being displaced by the prerogative, was an act which imposed no justiciable duty upon the Government. So it was not an act that created any obligations at all in domestic law, and therefore it doesn't assist my friends to show that it is open to the appellant by the exercise of a prerogative power to displace legislation which does, 1972 Act --

LORD CARNWATH: I agree it doesn't deal with that point, because it didn't create a body of law, which was your main point, but I think it does assist in the sense that, insofar as you are relying on frustrating some more generalised intention upon, then here is a case that the executive is using --

LORD PANNICK: It is a very weak contention by Parliament, if it didn't intend even to create a justiciable duty in domestic law, it is the statutory scheme that is at best exhortatory, no more than that.

LORD CARNWATH: We don't want to get into a debate about that. But it seems to me important to draw a distinction -- I mean, some of your cases are talking about frustrating intentions, which is rather woolly in this respect, whereas I think the much better way of putting your case is the way you put it earlier on in response to my Lord, Lord Sumption about interfering with a body of law, a source of law.

LORD PANNICK: I take your Lordship's point but that is my
1. The third principle that we draw attention to is the
2. exclusion of implied repeal. The status of the
3. 1972 Act, and indeed what it expressly says in
4. section 2(4), is that the doctrine of implied repeal is
5. excluded. Only a clear later statute will be recognised
6. by the court as demonstrating a parliamentary intention
7. to repeal or amend the 1972 Act, or do something
8. inconsistent with it.
9. That of course was the principle in Factortame, that
10. is what Factortame was all about and Mr Eadie accepts
11. the constitutional status of the 1972 Act and he accepts
12. the common law principle and the principle in
13. section 2(4), that the 1972 Act is not subject to
14. implied repeal, but he says this tells us nothing of
15. relevance to the present case.
16. The answer is given by the divisional court at
17. paragraph 88 of its judgment, being in core volume 1, at
18. MS page 11796, if I could just take the court to what
19. the divisional court said at paragraph 88, it is the end
20. of paragraph 88. The divisional court says this:
21. "Since enacting the ECA 1972 as a statute of major
22. constitutional importance, Parliament has indicated it
23. should be exempt from casual implied repeal by
24. Parliament itself. Still less can it be thought to be
25. one is concerned as to what Parliament itself intended.
### Article 50 - Brexit Hearing 6 December 2016

**LORD PANNICK:** Well, I say those principles are applicable, more force.

**THE PRESIDENT:** Does this play into your argument on the 2015 Act as well?

**LORD PANNICK:** Certainly, my Lord, yes.

**THE PRESIDENT:** It seems to me you may be able to make something of this point insofar as it says the 2015 Act impliedly changes the landscape.

**LORD PANNICK:** Your Lordship is absolutely right. If these principles, as we submit, are relevant in this context, then one does need the clearest of statements by Parliament in the 2015 Act, in order to show that Parliament intended to authorise the Secretary of State by the use of the prerogative to remove, frustrate, nullify that which Parliament had created, absolutely.

**THE PRESIDENT:** I suppose it depends how one sees the 1972 Act. If one sees it as impliedly imposing some legal effects, as Professor Vivien Hart says, then perhaps the 2015 Act, in order to show that Parliament has approved and authorised; this is, to move to the purpose and the contents of the 1972 Act, it is also, I say, the reason why the new legal order, as recognised by the 1972 Act, recognises a body of rights created at international level which take effect in national law and which national courts are obliged to protect and enforce. That is the first feature of this new legal order. The second feature is that those rights and duties created in national law take priority over inconsistent national law and they take priority whether the inconsistent national law was enacted previously or subsequently. That is section 2(4).

**THE PRESIDENT:** Thank you.

**LORD PANNICK:** That is my third point. My fourth point is to move to the purpose and the contents of the 1972 Act itself.

**THE PRESIDENT:** Yes.

**LORD PANNICK:** We say, if one looks at the purpose and the contents of this legislation, far from there being a clear parliamentary indication of an intention to authorise the Secretary of State to do what he is otherwise not entitled to do; that is how I put it.

**THE PRESIDENT:** Thank you.

**LORD PANNICK:** That is my third point. My fourth point is to move to the purpose and the contents of the 1972 Act itself.

**THE PRESIDENT:** Yes.

**LORD PANNICK:** We say, if one looks at the purpose and the contents of this legislation, far from there being a clear parliamentary indication of an intention to authorise the Secretary of State to do what he is otherwise not entitled to do; that is how I put it. Again, there is no other example of that in domestic law. These features of EU law were established well before we joined the EEC. I have mentioned van Gend en Loos, volume 2, tab 24, MS page 754. There is also the Costa case, Costa v ENEL, core authorities 5, tab 96, MS page 754. There is also the van Gend en Loos case, it is a new legal order; MS page 764, I don't ask the court to turn it up, MS page 764, it is core authorities 5, tab 24.

**THE PRESIDENT:** Does this play into your argument on the 1972 Act?

**LORD PANNICK:** Yes.

**THE PRESIDENT:** Thank you.

**LORD PANNICK:** That is my third point. My fourth point is to move to the purpose and the contents of the 1972 Act itself.

**THE PRESIDENT:** Yes.

**LORD PANNICK:** We say, if one looks at the purpose and the contents of this legislation, far from there being a clear parliamentary indication of an intention to authorise the Secretary of State to do what he is otherwise not entitled to do; that is how I put it.

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**THE PRESIDENT:** Thank you.

**LORD PANNICK:** That is my third point. My fourth point is to move to the purpose and the contents of the 1972 Act itself.

**THE PRESIDENT:** Yes.
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<td>1</td>
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<td>LORD HUGHES: It is a public declaration of dualism, is it?</td>
<td>46 (Pages 181 to 184)</td>
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<td>2</td>
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<td>LORD PANNICK: It is, but it is a recognition that as part of the dualist theory, Parliament has acted, and once Parliament has acted, only Parliament can remove that which Parliament has incorporated into domestic law.</td>
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<td>That is my submission.</td>
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<td>LORD HUGHES: That is your submission; it depends entirely on whether the whole basis of the 1972 Act is that it lasts as long as we are members, which we are no doubt going to come to.</td>
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<td>LORD PANNICK: I am coming to the substance of it.</td>
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<td>LORD MANCE: Indeed, that is what I say.</td>
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<td>LORD PANNICK: Indeed, that is what I say.</td>
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<td>LORD PANNICK: It gives the weight to Parliament as the progenitor of the rights, rather than treats Parliament as a conduit at any rate.</td>
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<td>LORD PANNICK: Indeed, that is what I say.</td>
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<td>1 LORD PANNICK: The provisions briefly.</td>
<td>1 LORD PANNICK: But can I take you, the court, through these</td>
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<td>2 THE PRESIDENT: As source rather than communicator</td>
<td>2 THE PRESIDENT: Yes.</td>
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<td>3 or the conduit.</td>
<td>3 LORD PANNICK: The starting point is the long title.</td>
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<td>4 LORD PANNICK: Indeed.</td>
<td>4 THE PRESIDENT: Yes.</td>
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<td>5 Reference has been made on a number of occasions to</td>
<td>5 LORD PANNICK: -- to the 1972 Act:</td>
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<td>6 the decision of the appellate committee in the Robinson</td>
<td>6 &quot;An act to make provision in connection with the</td>
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<td>7 case, the Northern Ireland case. Perhaps we should look</td>
<td>7 enlargement of the European Communities to include the</td>
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<td>8 at it. It is core authorities number 4 and it is tab</td>
<td>8 United Kingdom&quot;.</td>
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<td>9 number 81 and it is MS page 3272. The relevant passage</td>
<td>9 Now, our point is that it cannot be consistent with</td>
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<td>10 that has been referred to in the speech of Lord Bingham</td>
<td>10 the long title, speaking as it does of the enlargement</td>
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<td>11 is at 32 -- it is paragraph 11, which appears on</td>
<td>11 of the EU, for the executive to use prerogative powers</td>
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<td>12 page 3280, thank you. The relevant part of that has</td>
<td>12 to reduce the size of the EU by taking the</td>
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<td>13 been referred to is in the fifth line. It is talking</td>
<td>13 United Kingdom out. I say it is no answer for my</td>
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<td>14 about the Northern Ireland Act 1998, of course:</td>
<td>14 friends to say that the long title says nothing about</td>
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<td>15 &quot;The provisions should, consistently with the</td>
<td>15 withdrawal. That is precisely the point. Parliament</td>
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<td>16 language used, be interpreted generously and</td>
<td>16 decided to make permanent provision in national law</td>
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<td>17 purposively, bearing in mind the values which the</td>
<td>17 consequent on the UK becoming a member of what is now</td>
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<td>18 constitutional provisions are intended to embody.&quot;</td>
<td>18 the EU, permanent, that is, unless and until Parliament</td>
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<td>19 Our submission is that the values inherent in the</td>
<td>19 decided otherwise.</td>
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<td>20 1972 Act were a commitment by Parliament, unless and</td>
<td>20 Nor, in my submission, is it an answer for Mr Eadie</td>
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<td>21 until Parliament changed its mind, but a commitment by</td>
<td>21 to say, this is an argument based on Professor Finnis'</td>
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<td>22 Parliament to the inclusion of EU law as part of</td>
<td>22 lecture, that the long title says &quot;in connection with&quot;,</td>
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<td>23 domestic law. Those are the values that Parliament was</td>
<td>23 and not &quot;for and in connection with&quot;, and the court has</td>
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<td>24 signing up to in 1972, with all the profound legal</td>
<td>24 seen the contrast, the point made about the contrast</td>
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<td>25 consequences which that entails, as seen, not just in</td>
<td>25 between the 1972 Act and, for example, the</td>
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Barbados Independence Act.

We for our part respectfully agree with the point that was made yesterday by my Lord, Lord Mance, that the 1972 bill was being considered against the background of earlier parliamentary debates and votes on the very subject of whether it was appropriate for this country to join the EU, and we have put on the desks of your Lordships and your Ladyship, I hope it has arrived, the passage from the second reading of the 1972 bill.

LORD CLARKE: This is Mr Enoch Powell, is it?

LORD PANNICK: It starts, Mr Geoffrey Rippon, who is the Chancellor of the Duchy of Lancaster, who speaks for the Government, and then Mr Enoch Powell raises a point of order. The point of order goes on a bit on and then at column 269, your Lordships and your Ladyship will see, at the bottom of 268, Mr Rippon begs to move that the bill be now read a second time. At column 269, in the second, third and fourth paragraph, Mr Rippon sets out the history. The only reason we have put this before the court is it confirms what was mentioned by my Lord, Lord Mance.

LORD MANCE: It takes place against the background of the previous debate --

LORD PANNICK: Yes.

LORD MANCE: -- and decisions of the House about the principle of membership.

LORD PANNICK: Yes, it just gives the relevant dates. It might be a useful source of the material.

THE PRESIDENT: Can it not be said that, insofar as this "for and in connection with" take goes anywhere, insofar as it does, that until this Act was passed, it is clear that the accession was not going to be ratified, and to that extent, it would have been appropriate to say "for and in connection with"?

LORD PANNICK: Well, yes, but the ratification, of course, takes place on the international plane.

THE PRESIDENT: I know, but nonetheless it was not going to happen unless the bill became an act.

LORD PANNICK: Yes.

THE PRESIDENT: Therefore, whatever may be the background, the "for and in connection" point, for what it is worth, still has some mileage; that is all I am saying to you.

LORD PANNICK: Yes. Well, my answer to that, my Lord, is that everybody understood and appreciated that the parliamentary approval by the Act would be followed; that was what Parliament intended. It would be followed by a ratification, and I say the point does not answer -- Professor Finnis' point, with great respect, does not answer the relevant question. The relevant question is this: once Parliament has recognised that
questions, what was the position in 1972 as to whether
Parliament can have intended that what it had created
could be set at nought by the existence of the
prerogative, and whether or not anything that has
happened since any of the later legislation, to which
I will come, has altered that position. But I don't
accept, with respect, that the existence of
Article 50(2) of itself can possibly make a difference
to --
LORD CARNWATH: That is a debate we are going to have when
you get to it, and no doubt I am obviously very
interested to see how you put that, but all I am say is
it is not very surprising to find the elements in 1972
which you are highlighting, that was reflecting the
position at the time.
LORD PANNICK: But that is still the Act. It is the Act of
Parliament which remains and which continues the
legal order by which these important rights and duties
are part of domestic law, and therefore I say it must be
fundamental to analysis what is the purpose of the Act,
not just when it was created but going forward and what
does the Act say.
LORD KERR: Your argument is that it establishes a starting
point and the question is whether there has been any
departure from that starting point.
LORD PANNICK: Yes. I am grateful, my Lord, yes, and I say,
for the reasons I have given, there has to be a clear
indication of a departure, not anything less than that.
Section 1, we address section 1 of the 1972 Act in
our written case at paragraphs 59 to 63, MS 12421.
I say it is very important that section 1, subparagraph
(2) provides that, if there is to be an amendment to the
treaties, it requires a new treaty; or rather there has to
be a qualification under the Act that the new treaty has to
be included in section 1(2) if it is to have any effect
in domestic law. It is not left to the executive to
take such action as it sees fit on the international
plane. What it does on the international plane is
irrelevant to domestic law unless Parliament itself has
included the new treaty as part of section 1(2), and we
have set all this out in paragraph 60 of our printed
case and I am not going to take time on that, unless it
would assist.
I simply make this point, which is we say the core
point. It would really make no sense for an Act of
Parliament to be required, as it is, to authorise
an amendment to section 1(2), to add a new treaty, when
this will alter domestic law, but for no Act of
Parliament to be required if ministers are to notify
that we are going to leave the EU and destroy the whole
of the structure. That makes no sense at all. It means
that parliamentary involvement is required for the
lesser but not for the greater. It is required for
an amendment but not for a destruction.
LORD REED: It is interesting if we are trying to understand
the context in which the 1972 Act was enacted, the
passage you gave us from Hansard goes on with the
responsible minister quoting the previous Prime Minister
to tell us that:
"It is important to realise that if the law is
mainly concerned with industrial and commercial
activities, with corporate bodies rather than private
individuals, by far the greater part of our domestic law
would remain unchanged."
That is then endorsed in the next couple of
paragraphs. It is been enacted in a very different
world.
LORD PANNICK: I entirely understand. It is a different
world but perhaps what is relevant, following on from
what my Lord puts to me, is that the scheme of the Act
was not changed. It remains the case, and remains the
case today, that if there is to be an alteration of the
treaties, that has no effect in domestic law unless
section 1(2) is amended.
LADY HALE: Lord Pannick, I am a little bit puzzled about
your saying an Act of Parliament was required to add to
the treaties, because I am looking at section 1(3) --
LORD PANNICK: But that is different, my Lady.
LADY HALE: That is different, is it?
LORD PANNICK: That is different. It is different because
that deals with ancillary treaties. There
a distinction, if we go to it -- let me find the core
authorities. Is your Ladyship looking at tab 2 or
tab 1?
LADY HALE: I am looking at tab 1, the enacted version.

LORD PANNICK: Your Ladyship will see that section 1(2) concerns "the Treaties", capital T, and at the end of section 1(2) it says, after original B:

"... and any other treaty [lower case] entered into by any of the communities with or without any of the member states or entered into as a treaty [lower case] ancillary to any of the Treaties [capital T] by the United Kingdom."

Then (3) is defining these ancillary treaties:

"If Her Majesty by ordering council declares the treaty [lower case] specified in the order is to be regarded as one of the community Treaties [upper case] as herein defined, the order shall be conclusive that it is to be so regarded."

The explanation of that is that there are treaties, lower case, which are ancillary to the main community Treaties, but what has happened on all occasions when the main Treaties have been amended, is that they have been the subject of express parliamentary approval under section 1(2) before ratification. That is the explanation of the distinction between the --

LADY HALE: But what you are saying is that a new Treaty, with a capital T, has been approved by an Act of Parliament?

LORD PANNICK: Yes, all of them -- Lisbon, Maastricht. All of them have been approved by Act of Parliament. The caveat to that is the power under Article 48.6 under the 2008 Act where there is the simplified amendment procedure, but that of course existed from 2008 until it was repealed in 2011.

So there is that distinction but, in any event, what this shows is parliamentary control. However one puts the point, whatever the overlap or the distinction between 1(2) and 1(3), the point I make is that Parliament in 1972, and ever since, has required parliamentary control if there is to be any variation in treaties. Of course --

LORD SUMPTION: You are agreed with Mr Eadie on that. You both say there is a great scheme of parliamentary control here. He says that shows that what is not specifically mentioned is left unenforced; you say that in the spirit of the thing you have to carry it through to all powers. But you are both agreed on the construction of the Act.

LORD PANNICK: We are, and I respectfully commend my approach to your Lordships.

LORD SUMPTION: I rather thought you might.

LORD PANNICK: Which will not surprise your Lordship, because, I say, it would be quite extraordinary if...
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<td>LORD CARNWATH: I don't think you understand me.</td>
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<td>If on your premise you need to find a UK domestic law statutory base for it, then if you look at section 2(1), arguably this a power created by EU law which is effective. Obviously, if you don't need a domestic law base for it, it doesn't matter but if on your premise you do, why is section 2(1) not such a --</td>
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<td>LORD PANNICK: First of all, it is no part of the case against me --</td>
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<td>LORD CARNWATH: I understand that, I would just like to understand it myself, because it has been raised in some of the commentaries.</td>
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<td>LORD PANNICK: It is no part of the case against me that section 2(1) provides a statutory basis for notification and my answer is that that is correct and it is correct not least because Article 50 is not part of domestic law, but also because Article 50 does no more than recognise that it is a matter for the domestic constitutional requirements of the member state concerned and therefore Article 50 of itself cannot provide any basis, if one does not otherwise exist, in</td>
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<td><strong>TEU</strong> which contains Article 50. Mr Eadie stated in answer to a question from my Lord, Lord Mance, he stated, my friend, that Article 50 &quot;is not part of domestic law and it does not have direct effect&quot;, he agreed: &quot;Article 50 requires notification to be in accordance with the constitutional requirements of the member state. It does not alter those constitutional requirements.&quot; Therefore it cannot assist the Government's case, in my submission. Section 2(1) of the 1972 Act, the phrase &quot;from time to time&quot; recognises that the rights and duties consequent on EU membership will change. They will evolve. They will evolve through the acts of the EU institutions, the Parliament, the Council, the Commission, the Court of Justice, and in section 2(1) is simply intended to give effect to this feature of EU law. My Lord, Lord Sumption put to Mr Eadie, my friend Mr Eadie, that section 2(1) is concerned with changes to the content of EU law, it is not concerned with nullification of the whole statutory scheme and we say that is so. My Lord, Lord Reed put to my friend that his difficulty is he is proposing to make the conduit seen in section 2(1) redundant, and we would respectfully agree. My friend expressly confirmed in answer to my Lord, Lord Mance, that the words &quot;from time to time&quot; do not mean membership from time to time, and we respectfully agree. LORD CARNWATH: Could I just ask you to clarify this. Article 90, the provision for notice, Mr Eadie I think says, well, that is an international law provision and therefore does not need a base in domestic law and doesn't have one. LORD PANNICK: Did your Lordship say Article 90? LORD CARNWATH: Article 50, sorry. But if you do need a base in domestic law, why doesn't section 2 provide it? LORD PANNICK: My Lord, because, as my friend Mr Eadie accepted, Article 50 has no direct effect. It is not part of domestic law. LORD CARNWATH: But that is on his premise. LORD PANNICK: It is my premise as well. LORD CARNWATH: This all part of the prerogative. You cannot have it both ways. If you say you need a domestic base for it, why does -- LORD PANNICK: It is nothing to do with the prerogative, in my submission. It is a question of EU law, whether</td>
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If you could let us have 11.

LORD PANNICK: My Lord, I think I have another hour and a half and I will ensure I finish within that time.

THE PRESIDENT: That is very good of you. Thank you very much, Lord Pannick.

In that case the court is now adjourned and we are due to resume again tomorrow morning at 10.30, when your argument, Lord Pannick, will continue.

LORD PANNICK: Thank you.

THE PRESIDENT: Thank you very much. Court is now adjourned.

(4.31 pm)

(The hearing adjourned until 10.30 am the following day)

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