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 steps of leaving the European Union.

LADY HALE: We will do a swap then.

MR EADIE: That still won't get there.

THE PRESIDENT: Anyway, don't worry, we will sort this.

MR EADIE: So you have a note on CRAG, I am hoping -- does my Lady have that one?

Then a statement by the Secretary of State on the Great Repeal Bill, versions of the case that are cross-referenced and then a note on EFTA which I will come to.

LADY HALE: I now do, because I have done a swap with my Lord.

MR EADIE: I am grateful.

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, 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.

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 very 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.

LADY HALE: Is this part of your third concluding submission?

MR EADIE: It is, I am afraid. The third submission is the big broad one, which is that there is no basis for concluding that the 1972 Act had that effect.

LADY HALE: I just need to know for my note.

MR EADIE: My Lady, yes, so we are not quite diverting, but not quite creating a separate point.

On FBU and the Fire Brigades Union, and whether or not there is some broader principle in there, we respectfully submit that there is not a broader principle in there. We know, I am not going go back to it now, that in Fire Brigades Union, the home

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.

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?

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

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?

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

LORD SUMPTION: No.

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.

LORD SUMPTION: It is valuable to know, but it has no legal significance.

MR EADIE: We don't attach great legal significance to it, or indeed any legal significance to it in that way, so I accept the proposition --

LORD CARNWATH: Can I be clear, do you say it is irrelevant that at some time between your notice and the end of the two-year period, there is going to be legislation dealing with all the things the repeal bill -- is that wholly irrelevant?

MR EADIE: I am going to come to develop that under my submissions on parliamentary sovereignty. We say it is relevant as a fact, it is relevant as a matter of fact that Parliament has been involved, continues to be involved; there have already been opposition motions and there are going to be further opposition motions as I understand it tomorrow or the next day; and there is inevitably going to be parliamentary involvement in the scheme of legislation.

LORD CLARKE: What question is that relevant to?

MR EADIE: It is relevant to the constitutional significance, amongst other things, of (a) the 2015 Act and (b) to the fact that if we are withdrawing, which we are, the giving of Article 50 notice will not, as it were, inevitably will not, involve a leaving without

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

point that the Attorney made in opening: Parliament can look after itself.

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

MR EADIE: That is not the issue which you are deciding, but the fact that Parliament is going to get involved is not just that point, that they could get involved if they wanted to because they always can, but it is that in dealing with the domestic consequences of the action on the international plane, Parliament will have to legislate, it will have to legislate to deal with, but that is the usual constitutional way in which things work.

LORD SUMPTION: But we cannot decide, I think you accept, that any of the issues before us, on the assumption that by the time that the withdrawal actually occurs, the European Communities Act would have been repealed or significantly modified; that may well be a practical possibility, but it is not something that we can assume in point of law.

MR EADIE: You cannot assume that, because it may not happen, apart from anything else.

LORD CARNWATH: But we cannot assume that it will not happen. For my part I am not -- having seen (Inaudible) for myself, I am not accepting the suggestion that it is

completely irrelevant.

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

LORD CARNWATH: I think he probably was.

MR EADIE: If that was the impression given, I am not. But it is -- I am perfectly content --

LORD SUMPTION: You seem to have given two diametrically opposed answers in the last five minutes to the same question, but we will obviously have to work out which answer we accept.

LORD CARNWATH: We will have the transcript.

MR EADIE: Let me help you. We do not accept that it is legally irrelevant, but we do accept the point, my Lord, which is that you cannot proceed on the assumption that Parliament will necessarily legislate to introduce or to pass the Great Repeal Bill, because that depends on what Parliament decides to do.

LORD REED: The debate that you have been having with two of my colleagues perhaps illustrates another point, which is that when you are talking about a constitution in which there are a number of important institutions, the court being only one of them, thinking in terms of the law, that is only part of the picture, and the court has to be conscious of what competence it properly has to exercise in this field, and what matters are properly matters to be resolved by the political institutions,

including obviously the Government and Parliament.

MR EADIE: Yes. We accept that. And assert it, as you know; it was part of the point I built on, and I am going to come back to, about the significance of the 2015 Act, and the Lord Bingham quote from Robinson, and Lord Dyson's proper description of the 2015 Act as being constitutional, a point of significance, we submit.

LORD REED: It also relates, I think, to the way in which -- this sort of constitutional issue is unusual in this jurisdiction. In the time I have been here, we have had this case and Axa, I think are really the only cases that have raised major constitutional questions; but there are lessons one can gain by looking more widely afield, if one thinks in terms of constitutions as requiring the collaboration of a number of actors, with each having a limited realm within which it operates.

MR EADIE: My Lord, yes, we agree with that as well, and it applies not merely to the relationship between courts and Parliament and the proper function of the court in determining those sorts of issues, but it also raises the point I made yesterday, which is that our constitution is built and it is entirely consistent with parliamentary sovereignty that it is built, on the premise that the Government itself, particularly in the sphere of foreign affairs, exercises its own

prerogatives. So it has significance in both of those ways. I suppose the final point to add in relation to that, to emphasise the point I made yesterday, is that it goes to the manner in which you 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

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 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 2015 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 certainly 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,

because of all those big things, is to hold or to put a constraint upon the exercise of the prerogative in a particular way. We know full well that the prerogative would have to continue to be exercised in the foreign affairs sphere in other particular ways, because that is integral to section 2.

THE PRESIDENT: I understand.

MR EADIE: But the concern would be: you cannot withdraw, it is too big a step; so there is, as it were, a clamp put on.

The other way of viewing the 2015 Act is to say: given that that is a legal construct, given that that is a court imposing, as it were, through a process of implication on Parliament an intention, that must be inherently subject to change if the legislation changes.

Take, by way of example, suppose a year after CRAG with all its nuanced schemes of control about ratification, CRAG had been repealed. What would be the effect? The effect would be that the prerogative powers on ratification could continue to be exercised, but now no longer subject to the constraints that Parliament had seen fit to impose in CRAG. You can approach, we respectfully submit as our alternative submission, the 2015 Act in a similar way. You can say: well, there is the 2015 Act, even if by necessary implication if you

viewed it in isolation, I am leaving entirely out of 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.

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.

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.

LORD CLARKE: Of course, it didn't have to be silent, did it? I mean Parliament could have.

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 -- 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 --

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.

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,

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.

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.

MR EADIE: Am I allowed to say either or both?

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.

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.

LORD MANCE: That is a matter of interpretation, albeit in

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?

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.

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?

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.

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.

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.

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.

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.

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

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.

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.

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

which created an ambulatory -- had an ambulatory scope by definition. The double taxation treaties also appear to be on one view in precisely the same category; they are simply treaties which by definition only implement international agreements to the extent that such international agreements are there, so that they are variable.

The argument against you on the European Communities Act is that it is a very special measure, which not merely is silent on the question of withdrawal but by its silence actually excludes withdrawal. It assumes, it proceeds on the basis that a new legal order is now part of the United Kingdom legal order.

MR EADIE: My Lord, it does, and we have addressed that head on and in terms in all the submissions that I have been making, but the reason for the -- well, the significance that we attach, and I will come to this directly, that we attach to the double taxation treaties -- the Post Office v Estuary Radio is slightly different, but double taxation treaties and the EFTA note -- is to indicate that this model, this way of doing things with its potential effect upon rights immediate and direct, as a result of international action, is not some constitutional anathema, but is actually a perfectly acceptable and accepted part of our constitutional

arrangements.

Can I come directly to the fifth of my topics, then, with that lead-in, which is: is there a background constitutional principle of the kind that the divisional court identified? Of course that lies at the heart of the case against me; it lay at the heart of the divisional court's reasoning because as we saw, as you have seen, they do not in truth, despite that description, treat this as a background principle.

It was in effect dispositive of the case on their reading of it, and it was dispositive because it had the effect of reversing De Keyser, of turning legislative silence against me, if you will. The question was: no longer has Parliament expressed or by necessary implication taken away a pre-existing prerogative. The question was now: has it expressly allowed you to create a state of affairs on the international plane that has an impact on current domestic legal rights.

Can I turn directly in that sphere, and it is the first of the points I wanted to make, back to the question Lord Sumption asked me yesterday which is: is there is a prior question to be asked, do we need therefore to get into any of the legislative scheme, any of that; because the prior question is can you ever have a prerogative; did the prerogative ever exist in a way

that allowed you to impact on domestic legal rights. If the answer to that question is no, then all of the statutory scheme and all of that analysis rather falls away.

LORD SUMPTION: Not just domestic legal rights but domestic law.

MR EADIE: Domestic law, again, my Lord, I am grateful, but it is the same effective point that I am going to try and address if I may.

That is the thrust of the question that was put, and our first submission is that of course one has to consider the nature of the prerogative with which you are dealing. But the prerogative with which we are dealing is and always has been recognised as a general power with specific elements. The general power is the power in the Government to conduct foreign affairs. The specific elements are all the things that are necessary to do that.

So the Government can enter into, it can ratify, it can withdraw from treaties, it can take whatever steps it wants to take on the international plane to vote in international institutions, to participate in the process of making international law, or law on the international plane, eg in the EU. All of those are specific aspects of the general prerogative, frequently

recognised from Blackstone onwards, as being a prerogative power available to the Government.

THE PRESIDENT: Yes.

MR EADIE: It has, as we know, been subject to specific limitations, I have taken you to them, in CRAG and in the EU legislation, but it is in nature a general power. That is the first point, part of the answer.

The second part is that when specific limitations of that kind are imposed, they are imposed in the legislative scheme that you have seen, both general and specific, on a particular step on the international plane. For example, ratification, in CRAG, which is all it seeks to do. They are not imposed on some ratifications but not others, depending upon the consequent impact on domestic law. That simply is not how it works.

Thirdly, the Lord Oliver quote from the Tin Council case, the JH Rayner case, is not authority, we submit, against there being a general power. His point was, and was only, that the making of a treaty is not capable without parliamentary intervention, as he put it, of changing domestic law to incorporate that treaty. It is not and was not that the treaty-making prerogative is limited to circumstances where it can be exercised without affecting domestic law; that was not the way he

cast the principle at all. All of that, we respectfully submit, leads to the question truly being whether the general power has been limited or excluded or controlled by Parliament.

That must be, we respectfully submit, the right question to ask and that is the right question, the right question in principle, I mean, because that is the way the world works: broad principle of prerogative, foreign affairs, specific elements, Parliament taking, as it were, bites out of it. That is the right answer therefore in principle. You look to the legislation to see whether control has been imposed. But we also know that is the right question, at least, to ask, because of the De Keyser line of authorities.

In each, the question for the court could have been framed, and the answer that the court gave could have been framed as being: well, the prerogative could never have existed to deprive the individual of his rights, and we know that in De Keyser itself; one can take other examples, Laker, FBU, particularly Laker, FBU is the criminal compensation scheme so it may be rather different in this respect but Laker, De Keyser, Burmah Oil, they all involved interferences with domestic legal rights.

The answer given by their Lordships was not the

one-line answer that says: frightfully sorry, you cannot have this, because the prerogative power to affect legal rights in this way never existed. What did they do? They look to see whether the interposition of the statutory scheme -- they look first of all in Burmah Oil, the common law exercise, to see whether the nature of the prerogative was not you cannot take away -- you could, that was the premise on which they proceeded. That was the nature of the prerogative.

The question for them 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 we 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

prerogative; and true it may be that sometimes that effect is created by altering a legal fact, and sometimes that legal effect is created, because the right in question under domestic law is inherently limited anyway or is contingent upon the exercise of the prerogative, eg the right to property being contingent upon the ability of Government to take and blow up your oil wells if the Japanese are advancing.

So I fully accept that they are different and we have another example, just to mention, which is the Vienna Convention on Diplomatic Relations. I know my Lord's point would be similar if not the same, and you know the structure of that, and we set it out in our case at paragraph 40(b), but the structure of that was to create, as it were, on the international plane an ability or a power within Government, because it could only be Government that exercised it, a power conferred by the convention itself on diplomatic relations in that case to say who was allowed to be or who was to be treated as being the head of mission, and who, if anyone, should be deemed to be persona non grata thereafter.

Those were rights, as it were, on the international plane that Government had. They were not brought into domestic law. The structure of domestic

law was rather to create a series of rights and immunities for those who benefited from the characterisation that those international steps would give them.

LORD WILSON: So it was a joint effort.

MR EADIE: It was and we are back to that and I am not going to repeat the submissions in relation to that.

But it is another example, it is a joint effort, but it is also another example of a step on the international plane taken in the exercise of the prerogative, removing a right that as of yesterday and before the Government said that you were persona non grata, you enjoyed as a matter of English law.

Now, of course that is not a direct analogy because it involves all sorts of specialisms, no doubt, to do with diplomatic relations --

LORD WILSON: Yesterday you referred to Lord Millett's article, and some of us have read it overnight. He in particular reminds us of the case of Joyce, Lord Haw-Haw, who was found guilty of treason, and Lord Millett says that is only because in the exercise of the prerogative in 1939 this country waged war on Germany.

MR EADIE: True.

LORD WILSON: In fact he was prosecuted under the Treason

Act 1352, so, Mr Eadie, was it not his guilt, his conviction, a joint effort?

MR EADIE: My Lord, it was a joint effort in that sense, and I think my Lord, Lord Sumption would say in answer to Lord Millett, were he here, and was giving the Lord Haw-Haw example: that is just simply creating, as it were, a state of affairs.

LORD SUMPTION: It is not a legal fact.

MR EADIE: An international fact because you have declared war. I accept that there are limitations on lots of these analogies, and we need perhaps to come directly to our legislation, but what they do illustrate is that you need care, care, care before jumping too readily on a big, broad (Inaudible) however superficially attractive it may seem, that says: you cannot alter the law, you cannot affect the law.

Those statements are all made in their own particular context, and if anything, what this particular debate illustrates is that the context needs to be taken into account in all of these arguments.

LORD MANCE: The position is, and I don't suppose that anyone in court doubts this, you can legislate on the basis that domestic rights will depend upon what the international situation is from time to time. Whether we are at war or whether the territorial waters extend

three miles, 12 miles or whatever, that can all be altered if you legislate on that basis.

I think the ultimate question here is whether the legislation was enacted on that basis. I was looking overnight at the motions again. If we are looking at the broad constitutional position, one must bear in mind that the actual decision to join the EU was initially one which the Government took, but it put it before Parliament on a motion where the issue which was, I have just opened them, again, we have the debates here -- the issue was whether or not Parliament approved of joining the EU, or the EC as it was, or the EEC, so that -- and the speeches demonstrate that there were pros and cons, and the consequences of doing so were fully thought through. So in a sense one looks at the ECA, perhaps the 1972 Act against that background as well.

MR EADIE: My Lord, I am entirely content for you to look at it as against that background, recognising, as I am sure my Lord does, that those motions, as it were, were political acts if you will. They were -- they did not constitute legislative permission, they were not akin to the Bahamas, Barbados, all of that legislation we read yesterday, and if you want to look for the analogue, a joint effort, the mirror, how have we done it, the analogue is 2015.

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.

MR EADIE: Quite, and that is the nature of the debate before you, but my learned friend's case, let's make no mistake about it, involves putting the self-same question back to Parliament. It accepts that a one-line Act would do it. The self-same question goes back: is that truly to be taken as a sensible intention of Parliament? It would be simply to advise them so they could consider the same question, but they could have done that anyway.

LORD SUMPTION: Go back on a completely different basis politically, which was no doubt the intention.

MR EADIE: Then we just get into the debate about politics and law again.

LORD SUMPTION: Indeed.

LORD REED: We are not being asked simply to send it back to Parliament. I mean, Parliament approving a motion wouldn't do. What we are being asked to do is to compel the Government to introduce a bill in Parliament, which Parliament hasn't itself asked for.

MR EADIE: That is true. That was part of our concern about remedy, and it is a concern that has been considered in a number of cases, Wheeler and those other cases that considered that sort of issue. But it would require on my learned friend's case not just parliamentary involvement, as my Lord, Lord Reed rightly points out,

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.

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?

MR EADIE: Then they lapse.

LORD HUGHES: They simply lapse?

MR EADIE: They do.

THE PRESIDENT: That is the directly applicable ones.

MR EADIE: Yes, that is the point being put to me --

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?

MR EADIE: The directly effective ones, they lapse.

LORD HUGHES: They simply lapse?

MR EADIE: Yes.

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.

MR EADIE: Yes.

LORD HUGHES: Right.
MR EADIE: We say -- I will come back to it, but the same answer applies because it is dependent on the fundamental continuance of the relationship between the United Kingdom and the other members of the EU and our membership of that organisation. The same essential answer applies in relation to those rights that are conferred, as it were, separately under domestic law. The right to vote in European parliamentary elections is the paradigm example, which would lapse for the same reason. The legislation would technically remain upon the books, but we would no longer be members of the club, as it were, and therefore not in a position to elect the members of the committee.
LADY HALE: Forgive me.
LORD HUGHES: Would they lapse, you say, because they do not in truth derive their force from the 1972 Act, but from the international order which is given legal effect by it?
MR EADIE: From the twin effects of both of those together --
LORD HUGHES: The joint effort. Thank you.
MR EADIE: Exactly.
LORD SUMPTION: Do they lapse in relation to things that have already happened? Suppose, for instance, you take

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?

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 --

LORD SUMPTION: The question is really very difficult, isn't it.

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,

secondary legislation, achieving the result that the directive sets. That legislation would, if everything else was left, stay in place, and there may be also difficult questions that my Lord, Lord Sumption raised, what happens if, inspired, as it were, by European law, the common law has moved to a particular place.

But I think my answer, until someone shouts at me, would be that the common law can develop by reference to whatever principles and inspiration it wishes. Once it has acknowledged something, it will be for it to continue to recognise it or to take it away because the inspiration had gone and that fundamentally undermines it in the view of the court. That would be a matter for you. It is no doubt those complexities that led to the --

LORD CLARKE: Years of future excitement.

MR EADIE: It leads to the eternal optimism that might be thought to underpin the statement on the Great Repeal Bill, and the pause that then occurs when working out how that is going to be delivered, because there may be real complexities involved in that exercise, which I am sure will involve years of entertainment to come.

LADY HALE: In a sense you have moved on to it, because there are vast swathes of domestic law which have been enacted in domestic law as a result of EU obligations,

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 which 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 perhaps about, which 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

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.

MR EADIE: Yes.

LORD HODGE: But Parliament, by recognising a new source of law, has authorised the use of the prerogative in this area as one member state among others, and it is rather like the double taxation treaties there. In the 2010 Act, Parliament authorised the alteration of the law by orders in council.

MR EADIE: My Lord, it does.

LORD HODGE: Which is very different, I think, from the alteration of the law by the withdrawal from the treaties altogether.

MR EADIE: My respectful submission is it is not a complete answer, and I don't advance it as such, but it is a thoroughly good indication. If the proposition is that it is absolutely constitutionally anathema for the Government to act on the international plane, forget about 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

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, we are not acting alone and that is true; but you cannot, as it were, take the first step in withdrawal, by definition that is a matter for

you to act alone in. So I am not sure there is that much in the EU institutions point, although of course it is accurate to say that.

To some extent it can also be said if Parliament has authorised the making of EU legislation, then it has also authorised, as we know, by the same logic, Article 50, because it specifically considered that and introduced that and dealt with that. My Lords, I had better move on if I am going to finish within the time, if I may.

Fourth proposition, the cases on which the divisional court relied do not, we respectfully submit, establish anything like the breadth of principle which they base their judgment upon. In particular, if I can just mention three, JH Rayner, the Tin Council case, again, I am not going to go back to it in the time, I am sure you have all read it; core authorities 3, tab 43, page 1778 to 1779 is really that little segment of Lord Oliver, and you need to read it all, that segment. It is about a page, a page and a half, and you don't just take the sentence that says: you cannot use the prerogative to alter the law of the land.

The basic point that was being made by Lord Oliver was to recognise the existence of prerogative powers to make and unmake treaties on the international plane;

that is really what we are talking about; but then to deal with a separate and distinct aspect of transposition. Treaties are not self-executing, absolutely self-evident, and we accept that proposition.

So it doesn't provide, as it were, a freestanding constitutional principle. Bear in mind, the reason I am going through all this is because what they did is treat the constitutional principle as in effect reversing De Keyser. The question is whether any statements by Lord Oliver can properly be taken as having that effect, and we respectfully submit not.

The Case of Proclamations and Zamora likewise; it is uncontroversial that the prerogative cannot be used simply to countermand laws passed by Parliament, but that is in truth pure De Keyser and Rees-Mogg, or, indeed, as a general proposition, common law rights. But one needs to exercise some caution, as we have already seen, in a variety of different and perhaps more or less subtle ways, and sometimes one can say it is altering a fact, and sometimes one can say it is doing something in a slightly special context, and context is all, of course.

But as a general proposition one needs to be careful, because it depends whether the executive can truly act to alter the law; it depends upon, as indeed

Lord Oliver's statement of principle indicated in terms, parliamentary intervention. The question we have been debating for the last day and a bit is what is the nature of the parliamentary intervention that we have had in our case.

We also do not accept that there is any principle corresponding to that identified by the divisional court, to the effect that the prerogative to make or withdraw from treaties cannot be exercised so as to have the effect of altering domestic law. There is not any authority for that proposition. None of the cases that they cite are authority for that proposition.

All of the authorities that are cited against us in support of the proposition that the prerogative may not be exercised in a manner which is inconsistent with domestic law, domestic law rights, concern a situation where the exercise of the prerogative conflicts with some separate or pre-existing law. None of them decide that the Government may not withdraw from a treaty where this will impact upon the domestic law, and we know that there are circumstances in which that can be done.

The fifth point is that this is not a wholly unprecedented or aberrant situation and we know that because it is, we submit, orthodox, both in the UK and in international law, that it is possible for the

prerogative to be exercised to withdraw from treaties, even if this might have a more or less direct impact on to domestic law.

Perhaps in that context, it may be worth just showing you briefly the case which my Lord, Lord Carnwath was interested in yesterday, which is the Turp case in the Canadian context, volume 26 if you would, tab 308.

LORD CARNWATH: MS?

MR EADIE: 8950, I am so sorry.

Again it has similarities, this case; it is not in any sense directly our situation but it does have some interesting points of similarity. In a nutshell, if I can just summarise the nature of the facts and then show you the relevant paragraphs very briefly, there was a protocol signed by Canada on 29 April 1998 and you see that from paragraph 4 -- this is all about the Kyoto protocol for creating cleaner air and the imposition of --

LORD CARNWATH: Climate change.

MR EADIE: Climate change, yes, emissions and reductions and initially as they noted in paragraph 3, the original convention, the UN Convention on Climate Change, had not set, as it were, hard edged reduction targets. You see that from paragraph 3, and the effect of the Kyoto

protocol was to introduce those sorts of targets.

That protocol is signed on 29 April 1998, paragraph 4. There was a non-binding resolution of the Canadian House of Commons. There is the first parallel in relation to our accession, a non-binding resolution of the Canadian House of Commons calling for ratification on 10 December 2002. See paragraph 5. Paragraph 4, I am so sorry, it is the bottom of paragraph 4, my note was wrong.

So non-binding resolution of the House of Commons and then there was legislation ie after that, so the sequence is there, protocol is signed, non-binding resolutions, and then there is an Act, as you see from paragraph 6.

LORD CARNWATH: The key thing there was that the Act, the statute passed by the opposition --

MR EADIE: To force their hand.

LORD CARNWATH: To keep the Government to its Kyoto commitments, and in spite of that, it was held that the prerogative is effective to withdraw.

MR EADIE: Exactly. Quite where that takes one --

LORD CARNWATH: One may debate whether that was a proposition which would have been supported if it had gone higher, but it is quite a good example of how the prerogative -- the question of abuse of power might have

1 come into it.
2 MR EADIE: Quite.
3 LORD SUMPTION: The prerogative in this case having been
4 exercised would presumably -- I have not gone through
5 all the subsequent facts, but presumably the Act giving
6 effect to Kyoto would have been unaffected by the
7 withdrawal from the treaty on the international plane.
8 LORD CARNWATH: It is more subtle than that. Yes, I suppose
9 if the Act ... sorry, I was -- I didn't want you to
10 spend too much of your short time. It is a case which
11 interests me partly because I am interested in the
12 climate change aspects.
13 MR EADIE: I will not take too long on it --
14 LORD CARNWATH: It seemed to me one of the interesting
15 examples of the prerogative being used in the
16 circumstance where Parliament had actually said exactly
17 the opposite argument, and yet it was held that the
18 prerogative (Inaudible).
19 MR EADIE: Yes, and it might be thought --
20 LORD CARNWATH: Your case is a fortiori in the sense that
21 you could say ...
22 MR EADIE: That struck us as being the similarity, although
23 of course one can pick away at it, as it were, on the
24 basis that there are specialities in the Canadian
25 constitution. There were some issues that were declared

to be non-justiciable and so on. There were interesting parallels, both -- that is the central one, there it is, an act of Parliament which requires the protocol to be kept to, effectively, and then they withdraw from the protocol. Then subsequently there is an act.

But there is also a sequencing interest there, which is the Government acting on the international plane, in effect to commit Canada under the previous administration, then the legislation, then another act on the international plane, which was, as you say, directly contrary to the legislation itself and then a repealing act, ultimately, as one sees from paragraph 12 but my Lords, my Lady, there it is.

If you want it, it is in tab 26.

EFTA, we have dealt with, if you have the separate note in relation to that.

THE PRESIDENT: Yes.

MR EADIE: It might be worth, if I could invite you just to cast a quick eye down EFTA, then I can be pretty short on it, I think.

THE PRESIDENT: You would like us to read the whole note.

MR EADIE: Yes, it is only a couple of pages.

THE PRESIDENT: If you want to sit down while we do that, you are most welcome.

MR EADIE: I am grateful. (Pause)

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

conditional; is there an oddity there?

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: That is true, my Lord. We don't quibble with that. That is another consequence. I think the point my Lord, Lord Mance was putting to me is doesn't it all feel a bit adventitious, because you have one body of rights which are already domestically implemented in that way and will stay, as it were. But the key point is that when we go, the obligation to continue to comply, to continue to achieve as a result will also go.

LORD MANCE: Marleasing will no longer --

MR EADIE: It will not.

LORD MANCE: For good or ill.

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 take me 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

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 or would take 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,

to save time rather than taking your Lordships to and quoting from the particular cases, it is MS 12583, paragraph 30 of his written case.

Building on this reference, he then goes on to say that Lord Cooper's dictum that the principle of unlimited sovereignty of Parliament is a distinctly English principle, which has no counterpart in Scottish constitutional law, quoting of course from Lord President Cooper in MacCormick v Lord Advocate in 1953. That passage from Lord Cooper's judgment is often cited as a possible exception to the question of parliamentary sovereignty, but it has never gained traction in any court of law as far as I am aware.

It is, of course, repeatedly referred to in a political context, and I quote from an essay published in 2013 by my learned friend Mr Aidan O'Neill QC, in the Juridical Review of that year, where he observed:

"Lord Cooper's words, though oft cited by Scottish legal nationalists, have never, in the 60 years or so since they were written, resulted in the courts accepting the validity of any challenge to any provision of an act of the Union or Parliament for its incompatibility with the requirements of the 1707 Union. It may be better, therefore, to regard these remarks as a form of poetic or romantic licence."

My learned friend Mr O'Neill then submits a written case on behalf of one intervener, the Independent Workers Union of Great Britain, which could be described as poetic or romantic licence, and I refer to part three of that case.

THE PRESIDENT: Yes.

THE ADVOCATE GENERAL FOR SCOTLAND: I refer to part three of that case, which goes on at some length to establish what he considers to be the sovereignty of the people under Scots law, rather than the sovereignty of Parliament. Again I shall give the reference. I do not intend to take your Lordships through it. It is MS 12658 in core volume 2.

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: What is, however, useful is that in paragraph 3.4 of that written case, my learned friend cites an act of the Scottish Parliament of 1703, (Inaudible) peace and war, which expressly states that:

"Everything which relates to treaties of peace, alliance and commerce is left to the wisdom of the sovereign."

In other words, four years after the claim of right, the Scottish Parliament made it perfectly clear that the prerogative right in respect of foreign affairs remained

the prerogative right of the sovereign. I have in fact provided a copy of the relevant Act which is in very short terms, as acts of the Scottish Parliament often were at the time.

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: It is not in the bundle, I apologise for that, but for completeness your Lordships do have a sheet with it.

THE PRESIDENT: It is an unusual pleasure to find a statute that runs to less than half a page.

THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, it is, by the standards of the Scottish Parliament, quite wordy.

My Lords, moving from sovereignty, if I may briefly touch upon the question of the prerogative, the equivalent in the law of Scotland and England concerning the control and exercise of prerogative powers was specifically accepted by the House of Lords in the case of Burmah Oil v Lord Advocate which has already been referred to. The case can be found in volume A4, tab 34, or at MS 1313.

I briefly quote from Lord Reid at MS 1336, where he observed that it does not appear that as regards the issues on the appeal, there is any material difference between the law of Scotland and the law of England, and indeed the law of Burma. He went on at 1345 to observe

that:

"When the prerogative took shape, it was that part of sovereignty left in the hands of the King by the true sovereign, the King and Parliament."

These points were also underlined by Lord Hodson and Lord Upjohn, and so there appears to be clear authority, legal authority for the proposition that there is no material distinction between the exercise of the foreign affairs prerogative as between Scotland and England.

I would just finally observe in passing a point made by Lord Keith in the case of Lord Advocate v Dumbarton District Council in 1989, a case with which my Lord Hodge may be familiar as he appeared for the respondent, and the late Lord Rodger appeared for the Lord Advocate.

Context is everything, I appreciate, but the court had to address the matter of how the Crown prerogative survived in the context of statutory provision, both north and south of the border. The case is at A21, tab 265, and at MS 7384. Because this is a short quotation, I will not take your Lordships to the case, but Lord Keith, after a very lengthy consideration of historical and minute detail on the development of the law, said this:

"In my opinion the law has developed to a point where it is not helpful to refer to writings of greater

or less antiquity which discuss the prerogatives of the Crown."

It would appear in light of that that one can take the position as having been settled in the case of Burmah Oil. Some later writings are referred to by the Lord Advocate in his case. I would simply notice this, that those writings pertaining to the constitutional law of Scotland that we have make it perfectly clear that the foreign affairs prerogative was considered to be operative under Scots law, very much in the same way as it operates under the law of England.

I would simply mention these references for your Lordships, first of all Professor Mitchell on constitutional law, it is at volume A37, tab 504, that is the supplementary MS at 908; Professor Tomkins in volume A37 at tab 507; and also an interesting article published by WJ Wolffe, now the Lord Advocate, which is to be found in volume A31 at tab 420.

My Lords, can I move on from questions concerning the sovereignty and prerogative, as it operates in Scots law, to consider the devolution legislation. My Lords, there is no dispute that the devolution statutes comprise very significant pieces of legislation. Nothing in the issue of Article 50 or its notification or indeed withdrawal from the EU altogether alters the

existence of the devolved legislatures, or the essential structure and architecture of the devolution settlements.

Much emphasis is laid by the various intervening parties on the status of the devolution legislation as constitutional statutes, and I quite accept that they are to be regarded as constitutional statutes, just as the Referendum Act of 2015 should be so regarded, as Lord Dyson has already observed in Shindler.

I would make one reference to the Inner House decision, that is the Scottish Court of Appeal decision in Imperial Tobacco v Lord Advocate which is at volume A5, tab 41, MS 1592, and in particular to the observations of my Lord Reed in that case where he was invited to take a particular view of the interpretation of the Scotland Act or of any act enacted by the Scottish Parliament on the basis that they had been democratically elected. The passage, I think, is at MS 1619.

THE PRESIDENT: Thank you. Paragraph?

THE ADVOCATE GENERAL FOR SCOTLAND: Paragraph 71, my Lord, and he observed that the Scotland Act is not a constitution but an Act of Parliament. There are material differences. The context of the devolution of legislative and executive power within the

United Kingdom is evidently different from some of the examples he had been given.

"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."

I think also an earlier reference at MS 1616 at paragraph 58 where he observed:

"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."

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.

I recollect that Lord Hope said something similar in the Supreme Court case in Imperial Tobacco. I regret that the Supreme Court case has not been incorporated into the bundle, but your Lordships may well be familiar with at that case. Lord Hope made his observations at paragraph 16 of the report.

THE PRESIDENT: Thank you.

LORD SUMPTION: What is the case called?

THE ADVOCATE GENERAL FOR SCOTLAND: Again, it is the Imperial Tobacco case, my Lord, against the Lord Advocate, as heard before the Supreme Court.

I have a recollection of having lost the case, my Lords.

THE PRESIDENT: They tend to be the cases one forgets. It is paragraph 16, you say.

THE ADVOCATE GENERAL FOR SCOTLAND: Paragraph 16, my Lord.

THE PRESIDENT: Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, Lord Reed also made some observations in the Agricultural Sector (Wales) Bill case, which is at tab 246 of volume A20, MS 6827, if I can invite your Lordships to bring that up.

LORD SUMPTION: Sorry, which bundle, again?
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.

At paragraph 6 which begins at MS 6829, his Lordship observed the description of the 2006 Act as an act of great constitutional significance:

"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."

He refers there to the case of Attorney General v National Assembly for Wales Commission in support of that proposition.

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.

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

Lord Bingham's observation at 3280.

He didn't actually describe the 1998 Act as a constitutional statute, but he did describe the Act as in effect a constitution, and stated that it should, consistently with the language used, be interpreted generously and purposefully, bearing in mind the value which the constitutional provisions are intended to embody. I don't believe anyone would take exception to that in the context of all those acts which are regarded as of constitutional significance.

It is also worthwhile noting the observations of Lord Hoffmann in that case at 3284, where he made the point that the 1998 Act was framed by the Belfast agreement, and that was of course an extremely important, and remains an extremely important political agreement, which also incorporated an element of international treaty in the form of the British-Irish agreement that was appended to the Belfast agreement, sometimes referred to as the Good Friday agreement.

I would have no difficulty with that approach to the interpretation of any of the devolution legislation, but can I move on to the conduct of foreign relations and the context of that legislation. My Lords, the conduct of foreign relations is a matter expressly reserved in the devolution legislation, such that the devolved

legislatures have no competence in that matter. The Scotland Act section 30(1) gives effect to schedule 5 which defines reserved matters. As a point of reference, that is at MS 4361.

Those reserved matters include, amongst others, and I quote:

"International relations, including relations with territories outside the United Kingdom, the European Union and their institutions and other international organisations."

The Northern Ireland Act is in materially identical terms with the legislative competence of the assembly being restricted in terms of section 6, where there is a reference to what are termed "accepted matters".

THE PRESIDENT: Yes.

THE ADVOCATE GENERAL FOR SCOTLAND: Those accepted matters are expressed in almost identical terms to the Scotland Act, which is hardly surprising, given the passage of the legislation in the same year, and includes express reference to the European Union. In the same way, the Government of Wales Act 2006 makes provision to determine competence of the Welsh Assembly, and provides at section 108 for those matters which relate to one or more of the subjects listed under the headings in schedule 7 of the Act, and that includes

conduct of foreign relations.

So again, it is perfectly clear and express on the face of this legislation that the matter of foreign relations and foreign affairs, and in particular the matter of our relationship with the European Union, is not within the competence of the devolved legislatures. I will submit that these reservations are fatal to reliance on the devolution legislation as giving rise to any necessary implication, or indeed any other indication that the Government cannot exercise its foreign affairs and treaty prerogative in the ordinary way.

Therefore, it respectfully appears to me that there is nothing in this legislation that could abrogate the exercise of the foreign affairs prerogative, and that the court is not assisted by lengthy (Inaudible) that attempts to bring the exercise of that prerogative or to qualify the exercise of that prerogative, by reference to the devolved legislation.

Now, there are --

LORD CLARKE: You mean the answer is the same in Scotland as it is here?

THE ADVOCATE GENERAL FOR SCOTLAND: Essentially the same. And in Northern Ireland and in Wales.

Now, various attempts are made in the interveners'

cases to try and circumvent that issue. They point out that there are of course express references to EU law in the devolved legislation, and that is absolutely true, because of course that legislation assumed that the United Kingdom was a member of the EU, but of course that legislation does not require that the United Kingdom should be a member of the EU.

Indeed, the Lord Advocate rightly put the matter in this way at paragraph 66 of his own case, where he said that the references to EU law and the devolution legislation, and I quote, "simply reflected the fact that by the time that the devolution statutes were enacted, EU law had become the law of the land in each of the United Kingdom's jurisdictions".

So be it.

It is of significance that EU law is defined in the devolved legislation in an equivalent ambulatory fashion to that set out in section 2, subsection 1 of the ECA. That is, section 126(9) of the Scotland Act 1998 adopts the following definition, at MS 4374 --

LORD MANCE: That is the significant point, isn't it? The fact that foreign affairs are reserved to the United Kingdom Government doesn't necessarily mean that it didn't, in the devolution legislation itself, commit itself to exercise or not to exercise the prerogative in

a particular respect, and your argument is that it didn't, because essentially the references to the EU are ambulatory.

THE ADVOCATE GENERAL FOR SCOTLAND: Precisely so.

I accept, my Lord, that the devolved legislation can act as the ECA does, as a conduit, whereby rights and obligations that exist in EU law, or exist in EC law, can flow into Scots law, just as they flow into English law, and indeed flow out again, because one has to remember that the conduit created by section 2(1) flows in two directions; it not only brings in rights and obligations but it takes them out again according to what is done at the EU level, in exercise of the foreign affairs prerogative, to determine regulations and directives under EU law.

I should just add, my Lord, that so far as Wales is concerned, the definition that I have just alluded to at section 126 of the Scotland Act appears essentially in the same form at section 158 of the Government of Wales Act, and materially equivalent wording is adopted by section 98 of the Northern Ireland Act, albeit for some reason the words "from time to time", which we know appear in section 2(1), do not appear in section 98; but I don't suppose anyone is going to argue that the intention was to freeze EU laws at 1998 for the purposes

of Northern Ireland.

My Lord, in these circumstances, it doesn't appear that the continued references to EU law in the devolved legislation really take the interested parties' case anywhere. They also attempt to make something of the fact that there is a restriction on the competence of the devolved legislatures to legislate contrary to EU law, and there are, of course, specific provisions for that in the Scotland Act, the Government of Wales Act and the Northern Ireland Act.

I would just observe, my Lord, that even if they were not there, that prohibition would exist in any event because of the status of EU law. It would not be possible for the Scottish Parliament or the Scottish Government to proceed contrary to EU law. So those are there as a point of emphasis and in order to ensure that the exercise of these devolved powers does not conflict with the UK's legal obligations as set at the level of the EU.

Certainly these restrictions say nothing about the exercise of the prerogative in foreign affairs. As I say, they are strictly unnecessary.

In addition to the foregoing, each of the interveners appears to argue that withdrawal from the EU will somehow have an impact on domestic law, and they

point to a range of EU secondary legislation that has effect in Scots law or in Wales or in the law of Northern Ireland, but again with respect, what we are dealing with is the impact of the United Kingdom's withdrawal from the EU. This secondary legislation may go at that time, but it may well go even if we don't withdraw. It is open to the United Kingdom Government in the exercise of the prerogative to agree to regulations that have direct effect, to agree to directives under EU law, which will have the effect of revoking existing domestic law rights and obligations which flow from or through the conduit of section 2(1), or the conduit of the devolved legislation.

So again, there is simply nothing in this point.

If I could turn for a moment to the Agnew case, the Agnew printed case presents three arguments in respect of the Northern Ireland Act, and these begin at paragraph 80 of their case. If I can just summarise them very briefly, the first seems to be that Article 50 notification would deprive Northern Ireland's citizens of rights granted by the Northern Ireland Act 1998. Strictly speaking, what it would deprive them of are rights that would flow into Northern Ireland by virtue of the conduit which allows for EU law rights to arise.

The second argument advanced in Agnew is that

Article 50 notification would alter the distribution of powers between the Northern Ireland assembly and the United Kingdom by eliminating the constitutive role that EU law currently plays in the definition of competences under the Northern Ireland Act.

I have already touched upon that, my Lords, and it doesn't appear to me that that takes the case anywhere.

Thirdly, it is argued that notification would frustrate the purpose and intention of the Act, as it would run contrary to the continued application of EU law in Northern Ireland, and more particularly would impact upon the operation of cross-border bodies.

This is quite a complex area, and it is a point that was majored upon by those appearing for Agnew before Mr Justice Maguire. It is possible that one could deal with this at some considerable length, but in view of the time available, what I would say is this: that the line of argument is simply unfounded. The relevant implementation bodies that are referred to, one in particular which is relied upon is the special EU programme body, are not fixed and determined for all time coming by the Northern Ireland Act.

What I would ask is that I might respond to any point that is made by my learned friends with regard to this issue in reply, but shortly put, first of all, they

seek to rely upon the Belfast agreement --

LORD MANCE: Have you got some response in writing on this?

THE ADVOCATE GENERAL FOR SCOTLAND: There is a response in the form of the case that Dr McGleenan has prepared, 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.

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 TEU 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 PRESIDENT: It comes back to the point you opened with, effectively.

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 not scope for introducing into that binary question the question of its status within the EU.

So the case simply doesn't get off the ground in that context, and in that regard I would notice that Mr Justice Maguire addressed this point at paragraph 152 of his judgment. That is in volume 1 of the Northern Ireland material, tab 14, MS 20372, where he observed:

"The court is unaware of any specific provision in the Good Friday agreement ... 1998 Act which confirms the existence of the limitation which the applicant contends for and which establishes a norm that any change to the constitutional arrangements for the Government of Northern Ireland and in particular withdrawal by United Kingdom from the EU can only be

effected with the consent of the people of Northern Ireland. While it is correct that section 1 of the 1998 Act does deal with the question of the constitutional status of Northern Ireland, it is of no benefit to the applicant in respect of the question now under consideration, as it is clear that under this section, and the relevant portion of the Good Friday agreement, being 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

qualified by the consequences of the devolved legislation. The convention, as your Lordships will be aware, takes its name from the statement of Lord Sewell when he was minister of state in the Scotland office during the second reading of the Scotland bill in 1998. The relevant quotation can be found in volume A29, tab 388 --

LORD CLARKE: This is set out in your case?

THE ADVOCATE GENERAL FOR SCOTLAND: It is, my Lord, page 18 and MS 10127, and shortly stated:

> "As happened in Northern Ireland earlier in the century [he is referring to the period between 1920 and 1972, of course] we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."

LORD MANCE: Can you just give me a MS reference to your case.

THE ADVOCATE GENERAL FOR SCOTLAND: MS 10127.

LORD HODGE: I think you asked about your case reference.

THE ADVOCATE GENERAL FOR SCOTLAND: It is at page 18, and I do not have a MS number on the copy of my case, I regret, my Lord.

Now, although Lord Sewell was speaking in the particular context of the establishment of the Scottish

Parliament, an equivalent convention applies in relation to the Welsh and Northern Irish assemblies and in that context, it is appropriate to look at a memorandum of understanding which was entered into by the respective governments in 2013. Your Lordships will find that memorandum of understanding at A28, tab 346, beginning at MS 9560. It may be appropriate just to look briefly at the memorandum of understanding because it is referred to in the --

LORD CLARKE: A20, did you say?

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

LORD CLARKE: I beg your pardon.

THE ADVOCATE GENERAL FOR SCOTLAND: And MS 9560.

I apologise if I am going through this at something of a rate of knots.

THE PRESIDENT: I understand your position.

THE ADVOCATE GENERAL FOR SCOTLAND: I hope, of course, your Lordships might be able to go back to the transcript and make some headway with what I am trying to say.

THE PRESIDENT: We are making a lot of headway and we will make even more headway when we see the transcript, thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: If we look, my Lords, at the memorandum of understanding, and just go to paragraph 2 at 9563, paragraph 2:

"This memorandum is a statement of political intent and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. Nothing in this memorandum should be construed as conflicting with the Belfast agreement."

THE PRESIDENT: Thank you.

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

"The United Kingdom Parliament retains authority to legislate on any issue ... whether devolved or not ... it is ultimately for Parliament to decide what use to make of that power."

THE PRESIDENT: Yes.

THE ADVOCATE GENERAL FOR SCOTLAND: "However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except the agreement of the devolved legislature."

My Lords will notice with regard to devolved matters, that is the first question that would arise, is any piece of legislation with regard to devolved matters, but we don't know until we see it.

Secondly, even if it is with regard to devolved matters, what is Parliament expressing? It is expressing what amounts to a self-denying ordinance,

albeit a qualified one. If it is with regard to a devolved issue, and we are not there, but if we go past that, then normally we will not legislate in respect of that. But it is our self-denying ordinance, and indeed, that was brought out by an observation that in fact I have already touched upon by my Lord, Lord Reed in the case of Imperial Tobacco v Lord Advocate, which is at volume A5, tab 41, MS 1592, but particularly paragraph 71 at MS 1619.

THE PRESIDENT: Yes, we looked at this earlier.

THE ADVOCATE GENERAL FOR SCOTLAND: We touched upon this earlier but just to go back for a moment.

LORD HODGE: That is the reference to the Sewell convention.

THE ADVOCATE GENERAL FOR SCOTLAND: And making it clear, my Lord, in my respectful submission that this is a political --

LORD SUMPTION: Which paragraph are you referring to?

THE PRESIDENT: 71.

LORD REED: I did write that some years before the 2016 Act had been passed, and no doubt the issue you will have to come on to address is whether that makes a difference.

THE ADVOCATE GENERAL FOR SCOTLAND: I would just observe, my Lord, that it doesn't, but I will come on just to make that point. Clearly, what my Lord says in my submission remains true, that this is a political

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.

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 legislates 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.

THE ADVOCATE GENERAL FOR SCOTLAND: I have no difficulty with that; it is a question of where that takes one.
LORD CLARKE: It depends what is meant by normally.
THE ADVOCATE GENERAL FOR SCOTLAND: What is meant by "recognised as" or what is meant "by regard to", but ultimately it will be for Parliament to decide whether or not it adheres to the convention as interpreted by the court.
LORD REED: It strikes me as part of the problem about regarding it as imposing a justiciable obligation is the fact that the obligee would be Parliament. It doesn't impose an obligation on the Government.
THE ADVOCATE GENERAL FOR SCOTLAND: It doesn't impose an obligation on Parliament, strictly speaking.
LORD REED: But the institution which it is said will not normally legislate, et cetera is Parliament.
THE ADVOCATE GENERAL FOR SCOTLAND: Indeed. Indeed.
Just to take up my Lord Reed's point, it does not appear to me there is any practical change as a result of section 28(8) emerging into the Scotland Act 1998.
THE PRESIDENT: I think the point being made is that if the issue before us is whether it has to go to Parliament or not, the Sewell convention is concerned with what Parliament will or will not do, and therefore if it does not go to Parliament, we don't get to the Sewell

convention anyway.

LADY HALE: Article 9 of the Bill of Rights might be a bit of an impediment to our -- I think that is the point that my Lord was making.

THE ADVOCATE GENERAL FOR SCOTLAND: I began with that point that in the context of this appeal, this case, we don't even get close to addressing the Sewell convention, and indeed the legal irrelevance of the Sewell convention is actually expressly accepted by the Counsel General for Wales in his printed case at paragraph 70.

He makes clear that he is not arguing that the Welsh Assembly has a legally enforceable right to veto any Westminster legislation authorising Article 50 to be triggered, although he then argues that the use of the prerogative to trigger Article 50 will circumvent the application of the convention, a point that I will come back to in a moment.

The Lord Advocate in his intervention does, however, maintain that a legislative consent motion of the Scottish Parliament is, as he puts it, a constitutional requirement within Article 50 alongside an act of the Westminster Parliament before a valid decision in the United Kingdom could be made with regard to withdrawal from the EU.

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

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.

It knew that it was open to the executive to exercise the foreign affairs prerogative, particularly after the 2015 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.

THE PRESIDENT: The argument the other way would be if on this hypothesis, which I think is the case, we accept that the 1972 Act imposed some sort of clamp, then your argument could be turned against you by saying that if Parliament had wished to remove the clamp in the 2015 Act, they could have said so and they didn't.

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,

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.

THE PRESIDENT: I see.

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 --

LORD REED: Since you have chosen to go down this road, could I 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

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 --

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

LORD REED: The clamp is not necessarily an on/off switch. It could be to do with ideas about abuse of power.

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.

So it is not a case of the foreign affairs

prerogative being limited or cut down or clamped. It is simply a question of whether it would be proper and appropriate for the executive to exercise the prerogative in particular circumstances, and the circumstances that we have to address are those which exist today in light of the 2015 Act, which is of considerable constitutional importance and the decision made in the referendum, knowing that if Parliament wanted to intervene and limit the exercise of that prerogative right, it is free to do so and has chosen to remain silent.

THE PRESIDENT: Is that a convenient moment then? I think you have --

THE ADVOCATE GENERAL FOR SCOTLAND: I think that is the terminus for me.

THE PRESIDENT: Okay, and as you say, subject to time and sorting it out with Mr Eadie and the Attorney General, you will have some possibly more specific points to make in answer to the submissions that are made on the devolution issues.

THE ADVOCATE GENERAL FOR SCOTLAND: I am sure my Lord Kerr knows that the question of cross-border bodies is one of some complexity, and I have simply given a garbled summary, but if I am required to come back on that, I will speak to my learned friend Mr Eadie about time

for that.

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.

(1.05 pm)

(The Luncheon Adjournment)

(2.05 pm)

THE PRESIDENT: Mr Attorney.

Submissions by THE ATTORNEY GENERAL FOR NORTHERN IRELAND

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: My Lady, my Lords, this (Inaudible, off microphone), with four questions, and they are set out in the bundle at 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 at page 24232.

THE PRESIDENT: Thank you.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am conscious,

my Lady, my Lords that obviously time is tight. In respect of 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 doesn't do 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, and at tab 3, where one finds the

Act. I should say and I hope it is of assistance and I hope that I stick to it, that the only authorities volumes that I will be referring to are Northern Ireland authorities, volumes 1 and 9.

THE PRESIDENT: 1 and 9.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: 1 and 9 and core authority volumes 1 and 4.

THE PRESIDENT: That is helpful, thank you.

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

LORD CARNWATH: Just a moment we are just trying to catch up with Northern Irish volumes, are they in the memory stick somewhere.

LORD HODGE: Can you give us the MS numbers.

LORD KERR: It is in a separate electronic file.

LADY HALE: There are three electronic files, the main one, an additional one in Miller, and the Agnew.

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

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Section 1 is at MS 20044. And the McCord case is about section 1 of the 1998 act.

Now, section 1 deals with three things. Officially it confirms the existing status of Northern Ireland as part of the United Kingdom. Secondly it provides that

there is to be no change in that status without a majority of people voting that way in a referendum held for that purpose; schedule 1 makes provision for that. Then thirdly, in subsection (2), it makes provision for effect being given to the wishes of the majority if the majority, voting in such a poll, express a wish to leave the United Kingdom.

It is entirely and exclusively about the status of Northern Ireland within the UK, and we say that not even the most daring eisegesis transforms the provision that is addressed solely to the status of Northern Ireland as part of the United Kingdom into a provision that is also somehow about the EU membership of the United Kingdom.

Naturally, a variety of factors will come into play to determine the relative electoral attractiveness of the options that are available to voters in Northern Ireland if a poll is held under section 1 of the Act, but they -- any factor that makes it more or less attractive to vote one way or another in a poll held for the purposes of section 1, does not, to use the words of the McCord issue, impede the operation of section 1 of the 1998 Act. In fact that is precisely what section 1 is designed to accommodate and to address.

So we say that the answer to the McCord question is simply no.

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 necessary 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.

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 Lord 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

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 hand, 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

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.

I break the rule very early on, it is --
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 --

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: This is dealing with the North South Ministerial Council, the council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework:

"... arrangements to be made to ensure that the views of the council are taken into account and represented appropriately at relevant EU meetings."

So one can even see from, if one likes, the prose style of paragraph 17 of strand two, it is not drafted as a statute. It is a political agreement and it bears that stamp on its face. Paragraph 17 apparently assumes that relevant background that both Ireland and the United Kingdom will be members of the European Union.

But the consideration that is referred to in paragraph 17 can continue to occur whether or not the United Kingdom remains in the European Union as long as Ireland does. Paragraph 16 of strand two might indeed be denuded of effect if both Ireland and the United Kingdom were to leave the European Union, but as long as one state remains, there will in all likelihood remain EU matters to be discussed.

The two work streams under paragraph 17 to consider, arrangements to be made, are of course subject to

a criterion of relevance, and even if the UK were to withdraw from the European Union, there would still be matters with a European Union dimension to discuss, and it could still be appropriate for the views of the North South Ministerial Council to be represented at relevant EU meetings.

LORD WILSON: It is difficult for you in the short time available to know what to major on, but Dr McGleenan has dealt with this in detail and so have you. We have read all this. There are these references, and the argument is they simply don't carry the argument far enough.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I won't spend more time on this.

I then ask the court to look then towards the end of the tab at the British-Irish agreement which is the international law agreement, and of course the trite proposition that it is binding as a matter of international law does not itself have domestic effect; and the only reference, of course, is in the third recital, as friendly neighbours and as partners in the European Union, 20373; and again, no operative part of the British-Irish agreement can be remotely construed as containing the least commitment to remaining in the European Union; and even if it did, absent some domestic limitation, binding only at the level of international

law.

Of course as I have mentioned, the Belfast agreement is not a statute, not drafted as a statute; it is a political text. In Robinson, if I could ask the court to perhaps keep the Belfast agreement open and this time to keep it open at strand one, at paragraphs 3 and 4 of strand one, which are at page 20348. Then if the court would look very briefly at the passage from the opinion of Lord Hoffmann in Robinson at paragraph 26, so that is core authorities, volume 4. And the report begins at 3272.

THE PRESIDENT: Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: If one goes to paragraph 26, this is Lord Hoffmann, 3284:

"The agreement provided that the assembly was to be the prime source of authority in respect of devolved responsibilities and would exercise full legislative and executive authority."

That is Lord Hoffmann's quotation from paragraph 3 of strand one.

Of course, almost certainly my fault because I should have pre-emptively attempted to correct him, but when one looks at the Northern Ireland Act, that flatly contradicts what one finds in that provision. If one looks at section 23 of the Northern Ireland Act, at

Northern Ireland authorities volume 1, page 20068, 23, subsection (1):

"(1) The executive power in Northern Ireland shall continue to be vested in Her Majesty.

"(2) As respects transport matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to subsection (3) ..."

It deals with the Civil Service Commission, the exercise, on Her Majesty's path, of any minister or Northern Ireland department.

So not only does in this important respect the Northern Ireland Act not implement this aspect of strand one, it flatly contradicts it.

So the purpose of that really is --

LORD CLARKE: Which was the bit you should have corrected in Robinson?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is paragraph 26 of Robinson, where Lord Hoffmann quotes paragraph 3 of strand one of the Belfast agreement.

LORD KERR: Your point in a nutshell is that was not translated into the Northern Ireland Act.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: And flatly contradicted by it.

It points to the use of caution, that must be exercised, we respectfully submit, when attempting to

use the Belfast agreement as an aid to construction. It is undoubtedly of use but it must be approached with some caution.

LORD MANCE: Sorry, which bit of paragraph 26 do you say is wrong -- is it 26 really?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: It is the quotation, he quotes with apparent approval a passage from paragraph 3 of strand one about the assembly being the source of the legislative and executive authority.

LORD HUGHES: Full executive responsibility, is it?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Again, it is the standard constitutional position that all prerogative and executive authority comes from the Crown. One can perhaps see why a political agreement took a different view, but when it came to drafting the statute, which is what matters, the correct constitutional orthodoxy was expressed.

While of course the constitutional status of Northern Ireland is given protection, as respects membership of the United Kingdom in section 1, there is no protection in the 1998 Act, or any provision even addressing membership of the European Union. Consistently with its status as a constitution for Northern Ireland, the Northern Ireland Act, in a number of places, imposes limitations on legislative

competence, on the competence of ministers, but -- and it does also confer certain powers and duties on the Secretary of State for Northern Ireland. No provision in the Northern Ireland Act purports to limit or has the effect of limiting the powers of the United Kingdom Government in international affairs.

There is no provision of the 1998 Act, nor any part of the Belfast agreement, nor the British-Irish agreement which, however they are constructed and taken apart singly or collectively, which imposes any constitutional requirement, the word used in the claimant's case, which the UK Government must satisfy before giving notice under Article 50.

I won't open it to the court but the North/South Cooperation (Implementation Bodies) (Northern Ireland) Order 1999, and that is in tab 8 of the Northern Ireland authorities, does no more than give effect to another international agreement which is set out in schedule 1 to those regulations.

Article 1 of that agreement establishes the special EU programme body, and part 5 of the regulations gives domestic effect to the agreement as respects the EU programmes body.

To suggest that anything in the 1999 regulations prevents the prerogative being used to give notice under

Article 50 is to ignore the role of the prerogative in creating the EU programmes body.

Plainly the Northern Ireland Act 1998 can only be amended by or under another Act of Parliament, and we say simply that notifying the European Council under Article 50 will amend not a comma or a full stop of the 1998 Act. That is true of all of the Act's provisions, but I can look at perhaps nine of them, because they seem to have, in the eyes of the Agnew claimants, a particular significance, so that is section 6, section 7, section 12, section 24, section 27, section 98, section 14 and sections 26 to 27.

Starting with section 6(2) --

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: I am acutely conscious of that, my Lord, so can I simply make that -- the claim that these expressly or by necessary implication dislodge the prerogative is defeated by a simple reading of those provisions.

THE PRESIDENT: Speak for themselves effectively.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I respectfully commend such a reading.

LORD KERR: The syntax and punctuation remain intact.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: They do, and much more than that, my Lord.

THE PRESIDENT: In a sense, we are looking for a dog that doesn't bark; we are looking for no bark and you say we will not find any barking in any of it.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Yes, and again, the argument here is not one of textual exegesis; it is one of eisegesis; it is putting stuff in that simply is not there.

THE PRESIDENT: Thank you.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Then can I look perhaps to -- and tie together some general themes. In the United Kingdom, we have an essentially political constitution. That is to say we don't have a written constitution of the kind, for example, contemplated by my Lord, Lord Neuberger in his Lord Rodger memorial lecture, written text which can only be interpreted authoritatively and definitively by our independent judiciary.

Our constitution is shaped by historic and daily practice, and whether or not something is constitutional is primarily determined, we say by Parliament. In our constitution courts do not make or remake the constitution and legitimate judicial law-making, and of course it occurs, but especially in the constitutional

sphere, must be interstitial.

Obviously I will not take the court to the Bill of Rights or to Godman-Hales, but if I can give a thumbnail in relation to Godman-Hales, the point with Godman-Hales was that Godman-Hales was the then constitutional orthodoxy. It was orthodox to dispense from the operation of penal statutes. The judges in Godman-Hales, and there was a judicial consensus in favour of the King dispensing power, in favour of Colonel Hales. The revolution, and it was a revolution, was one effected by the convention, by the convention Parliament, and where revolutions occur in our constitutional order, they are the product of the representative institutions.

Historically, the judicial role in the shaping of the constitution has been modest, and judges, as Lord Bingham famously pointed out, did not establish the doctrine of parliamentary sovereignty and they cannot by themselves change it. That is tab 108 of the rule of law. Obviously, speaking extra-judicially, others, clearly members of the court have taken a different view.

THE PRESIDENT: Lord Steyn in Jackson for example.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: Indeed.

Now, the enduring value, we say, of the Robinson

decision, the decision of the majority in Robinson, is what it says about larger constitutional principles. I want to draw attention to two of them. In Robinson, core authorities volume 4, the report beginning 3272, paragraph 11.

THE PRESIDENT: Yes.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: At 3280 and Lord Bingham, perhaps channeling the first Duke of Wellington, includes as a constitutional ideal that government should be carried on.

The majority in Robinson was surely right to adopt an approach that approved a constitutionally plausible course of conduct. Paragraph 12 is one which I particularly, with respect, commend to the court:

"It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of ... pre-determined mechanistic rules to be applied as and when the particular contingency arose, but such an approach would not be consistent with ordinary constitutional practice in Britain."

Then of course one sees how this has become dated with the advent invent of fixed Parliaments.

The last sentence is important:

"Where constitutional arrangements retain scope for

the exercise of political judgment, they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude."

That is an approach I respectfully commend to this court.

With respect, the first claimant is wrong, we say, as she does in her printed case, the outcome of the referendum and the Government's stated position with respect to that are not matters for the court. In our political constitution, these constitutional features cannot be overlooked.

So while, of course, the determination by the Government of the United Kingdom that the constitutional requirements of the United Kingdom were met if notification under Article 50 is given under the royal prerogative is of course a justiciable question, in so far as the court can quite properly be asked to look at that question, a determination of this nature should be regarded as constitutionally proper unless shown to conflict clearly with statute.

Or, to put the matter another way, unless it can be shown by the claimant, or those on that side, that some statute expressly, or where by necessary implication, has taken away the prerogative in that sphere.

Our constitution, quite rightly, does not acknowledge executive supremacy any more than it does judicial supremacy but it does acknowledge the present and historic capacity of the executive, accountable as it is to Parliament to shape our constitution. The English constitution before 1707, the Irish constitution before 1800, the Scottish constitution before 1707, and now the constitutions of Great Britain and the United Kingdom have been shaped primarily by the interplay between the Crown and representative institutions. Practice or convention are important elements of the UK constitution but obviously must yield to statute.

Of course public law barristers in private practice -- and this is in part a confession -- are fond of yielding to the Archimedean temptation that a well placed litigation lever can move the world, and of course there are occasions when litigation can produce extraordinary results, but this should not normally occur in constitutional matters. Constitutional change in a constitution such as ours is primarily and overwhelmingly a matter for the politically accountable actors in it.

I want to conclude, my Lady and my Lords, by saying something about what we say is the skewing and

distorting effect created by the bullet from the gun analogy. It is of course all rather slower than that. The gap between pulling the trigger and what happens at the end is an enormously important gap, and possesses some significance, but can I invite the court to consider this. Assuming that the two-year period prescribed by Article 50(3) is not extended, and assuming, as all of the claimants appear to do, the consequences for the three categories of rights in paragraphs 58 to 61 of the divisional court judgment, those consequences are not the result of notification under Article 50 but would be, on the claimant's case, consequences of leaving the European Union. Of course the law cannot be changed, save directly or indirectly by Act of Parliament. Yet the assumption, and we say it is an unjustified assumption, on which the divisional court rests is that any law, that is statute, that would be necessary to avoid these consequences if indeed they exist would not be made.

This could be tested a little through the European Parliamentary Election Act 2002 and that is in core authorities 1, beginning at 6550. As matters stand at present, the next election to the European Parliament will be held in 2019. Insofar as there is a domestic law right in suitably qualified persons under the 2002

Act, and I must say it is not clear to me that there is, to stand for election to the European Parliament, that right could not be taken away by the giving of notice under Article 50. If, depending on the timing of that notice, the events contemplated by Article 50 had not occurred before the date of the 2019 election to the European Parliament, anything that the 2002 Act required to be done would have to be done. There would be a proper complaint of domestic illegality if it were not done.

On the other hand, no rights that are derived only from the 2002 Act alone are lost by withdrawal from the treaties. If the treaties ceased to apply pursuant to Article 50(3), that doesn't mean that use of the royal prerogative to get notice has repealed or undermined the 2002 Act. It simply means that with the inapplicability of the treaties, the 2002 Act is no longer a particularly useful part of the statute book or a useful portal, which is the term which we use in our printed case.

Since this an abstract case, because giving notice gives rise to the consequences in terms of representation and Government participation in Europe, but notice by itself has no effect whatsoever and the assumption that -- and, certainly, one can see that

giving notice may give Government and Parliament more work to do -- but the assumption that that necessary work, if it exists, won't be done, is one on which the claimants' case rests and we say it is a platform which, when examined, falls away.

LORD MANCE: Does that amount to saying that it is necessary to restore precisely the present position and that this will be done?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: No, not at all. But take for example --

LORD MANCE: Then it must follow that you are accepting that there is some effect of the notice which is given?

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: No. Notice in itself has no effect.

LORD MANCE: Of course not, it is notice plus time. We know there a two-year period but --

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: The question is, what happens? So, for example, I think the 2002 Act is a useful case study, so plainly if for whatever reason notice is delayed and the 2019 elections come around, then individuals who are interested can dust down their copies of the treaties and the 2002 Act, and say, "I would like to stand", and --

LORD MANCE: That simply demonstrates that, during the two-year period, the position remains unchanged. What

I don't understand is what you are saying about restoring the position by necessary legislation, which couldn't 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.

THE ATTORNEY GENERAL FOR NORTHERN IRELAND: I am very grateful.

THE PRESIDENT: Thank you.

Lord Pannick.

Submissions by LORD PANNICK

LORD PANNICK: My Lords, my Lady, the case for Ms Gina Miller is that the prerogative power to enter into and terminate treaties does not allow ministers to nullify statutory rights and duties.

In any event we say, Parliament did not intend that the rights and duties, which it had created by the 1972 Act, could be nullified by ministers acting on the international plane.

The court has heard that the case for the appellant is that the 1972 Act is a conduit. It is said it creates only contingent rights and obligations -- that is paragraph 63(d) of the appellant's written case, MS page 12356 -- and these rights are said to be contingent on the decision of the appellant to exercise prerogative powers to terminate the EU treaties.

My Lords, and my Lady, I say at the outset that the courts have rightly recognised that the 1972 Act has a constitutional status. It creates a new source of domestic law, and indeed it gives priority to it. My friend Mr Eadie accepted this constitutional status in

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, 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 actions of a minister 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

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 and 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 revoked the 1972 Act. I think we all now accept that, of 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, Lord Pannick, you said that in 1972 there was a debate whether Parliament itself could revoke the 1972 Act; did that find expression or reference in any case or are you simply referring to something else?

LORD PANNICK: No, I am simply speaking of the academic debate that there was at the time, but I am not aware of any case.

LORD MANCE: Can you give us a reference?

LORD SUMPTION: Was it not part of Mr Blackburn's submissions?

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 resile 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

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 context. 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: Your Lordship is never pedantic. The fourth point follows from the third, because the third 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

parte Fire Brigades Union recognises, as my Lord, Lord Mance, pointed out yesterday, that whether or not De Keyser applies, it is not open to ministers to use prerogative powers to frustrate a statutory scheme.

The sixth submission I want to make is, I say, Mr Eadie's reliance on the post 1972 statutes cannot assist him. If, as we submit, there was no prerogative power to nullify the 1972 Act after it was enacted, the question is whether Parliament intended by the later legislation to confer a new power to that effect.

I say only the clearest of statements by Parliament to that effect could create a new prerogative power. I say that the post 1972 legislation is very far from containing any such clear statement and in any event, the absence in the later legislation, the absence in the later legislation of any relevant restriction, Mr Eadie relies on the absence of any provision, cannot assist him because the lack of a prerogative power to frustrate a statutory scheme is so basic a constitutional principle, that one cannot infer from the absence of an express provision to that effect that Parliament intended to remove that basic common law restriction. Parliament didn't need to address the point, it is so obvious, it is so basic.

Seventh, and finally, I am going to say it is no

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.

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.

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: 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

mischief or the aim of the statute, the aim was shown to be advisory by this statement?

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 Minister for Europe, Mr David Lidington, and in 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,

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 is not the case.

My friend Mr Chambers is going to have more to say on the 2015 Act, but that is what I want to say. 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."

LORD PANNICK: My answer to that is there are various statements at various times.

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 Chambers, 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.

That is the first point.

The second point, my Lords, is the limits of prerogative power relating to treaties, and the appellant relies on the well-established, and it is well established, prerogative power to enter into and resile from international treaties. Mr Eadie emphasised the continuing importance of that prerogative power, and nothing that I say is intended to dispute those propositions.

My case is that the appellant fails to recognise the well-established limit on that prerogative power, and the limit is that that prerogative power relating to treaties cannot be used to nullify, to frustrate, domestic law, in particular, rights or a scheme created by Parliament. The limitation is based in part, importantly in part, on the principle of parliamentary sovereignty. Again, Mr Chambers is going to deal with parliamentary sovereignty, and with the general case law relating to it, and we have addressed that in our written case, paragraphs 20 to 21, but I am not going to take time in relation to that.

Now, we say that the crucial point is that the reason why the Crown enjoys a broad power in the making and unmaking of treaties is precisely because what is agreed on the international plane cannot affect, does

not affect, the content of domestic law.

The prerogative power in relation to treaties is not an independent and overarching power. It is a power which is defined and limited by the other principles of our constitutional law; in particular, parliamentary sovereignty. These propositions that the power in relation to treaties is limited by the inability of the prerogative to change domestic law are supported by high judicial authority.

The court will have seen, and I will not go back to it unless I am asked to do so, Lord Oliver's statement for the appellate committee in JH Rayner, core authorities 3, tab 43, MS page 1779; and the statement by Lord Hoffmann for the board in the Privy Council in Higgs, Higgs v Minister of National Security, which is core authorities 4, tab 260, MS page 7244. Lord Hoffmann there speaks of it being the corollary, that is his word, the corollary of the unrestricted treaty-making power that it cannot change the law of the land.

My criticism, my respectful criticism, of the appellants' submissions is that they emphasise the scope of the prerogative power in the context of treaties, but they seek to avoid what Lord Hoffmann described as the corollary: the power ends where domestic law rights

begin.

Now, it is of course rare to find examples of the treaty-making prerogative being used by ministers in an attempt to frustrate statutory or common law rights without authorisation from Parliament. This is a rare phenomenon and it is rare because ministers normally recognise and respect the basic constitutional principles that are set out from The Case Of Proclamations onwards, but there are examples in the books of ministers stepping over the line or the Crown stepping over the line.

Two particular examples in the papers, one of them is the example that Lord Hoffmann refers to in Higgs. It is the Parlement Belge case, perhaps we could just take a moment to look at Parlement Belge, it is volume 24, it is tab 294, and it is MS page 8392.

THE PRESIDENT: Would you give me that reference again.

LORD PANNICK: Yes, my Lord, it is volume 24, tab 294, MS page 8392.

If the court has that authority, tab 294.

LORD CARNWATH: It is in core volume 4.

LORD PANNICK: I am grateful, I had not spotted that, thank you.

No, it is not. Not in mine.

LORD CARNWATH: Well, it is in my index but not actually in

my file. (Pause)

LORD PANNICK: The court will see the headnote: a packet conveying mails and carrying on commerce, that is a ship, does not, notwithstanding she belongs to the sovereign of a foreign state, officers commissioned by him, come within the category of vessels which are exempt from the process of law:

"It is not competent to the Crown without the authority of Parliament to clothe such a vessel with the immunity of a foreign ship of war so as to deprive a British subject of his right to proceed against her."

This is the judgment of Sir Robert Phillimore, and the relevant passage is at 154. In the penultimate paragraph on that page, MS page 8417, page 154, Sir Robert says:

"If the Crown had power without the authority of Parliament by this treaty to order that the Parlement Belge should be entitled to all the privileges of a ship of war, then the warrant which is prayed for against her as a wrongdoer on account of the collision cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe [he says] to be without precedent and in

principle contrary to the laws of the constitution."

There is a bit more detail but that is the point, that is the principle. Another example to which the court has already been referred but can I please take the court back to it is Laker Airways and Laker Airways is core authorities 2 at tab number 12, MS 307. The court has already seen this authority.

What I want to show the court, if I may, is the argument from the Attorney General, Mr Sam Silkin, which appears in the report at page 727, MS 391. If your Lordships have that page, MS 391, page 727, at B, this is the judgment of Lord Justice Lawton:

"The Attorney General based his submission on the well known and well founded proposition that the courts cannot take cognisance of Her Majesty's Government's conduct of international relations. Laker Airways' designation as a British carrier for the purpose of the Bermuda agreement was an act done in the course of conducting international relations ... the Civil Aviation Act did not apply ... that Act nowhere refers to designated carriers. An airline might be granted a licence to operate a scheduled route but not become a designated carrier. It could not by any legal process compel the Secretary of State to designate it as a British carrier. It followed, submitted the Attorney,

that the withdrawal of designation must be within the prerogative powers exercisable by the Secretary of State on behalf of the Crown."

Lord Justice Lawton rejects that submission at the bottom of the page:

"The Attorney General's answer to the question was that the Secretary of State was empowered to act in this way [that is, take away the designation] because there was nothing in the Act which curbed the prerogative rights of the Crown in the sphere of international relations. Far from curbing these powers, by section 19(2)(b), Parliament recognised that the Crown had them."

The content of section 19(2)(b) appears in the judgment of Lord Justice Roskill at page 719, letters B to C, MS page 383. It is there set out if the court is interested. Going back to Lord Justice Lawton, his Lordship says:

"This is so but the Secretary of State cannot use the Crown's powers in this sphere in such a way as to take away the rights of citizens, see Walker v Baird."

That is another example, although I recognise, of course, there are two strands of reasoning in Laker, the other being that the act had occupied the field.

It may just assist to look at Walker v Baird, which

is volume 9 of the authorities, tab 88 and it is MS 3409. Volume 9, tab 88, MS 3409. The facts of the case appear in the advice from Lord Herschell at 495, MS page 3413, middle of the page, page 495, Lord Herschell:

"The respondents by their statement of claim alleged that the appellant wrongfully entered their messuage and premises and took possession of their lobster factory and of the gear and implements therein and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory. By the statement of defence, the appellant said he was captain of the HMS Emerald and the senior officer of the ships of Her Majesty the Queen."

Missing four lines:

"He said he was giving effect to an agreement embodied in a modus vivendi for lobster fishing in Newfoundland during the said season, which as an act and matter of state and public policy had been by Her Majesty entered into with the government of the Republic of France."

That was the defence. We have an agreement with France.

Then page 497, picking it up if I may at the bottom of 496, MS page 3414:

"In their Lordships' opinion, the judgment below was clearly right ... unless the defendant's acts can be justified on the grounds that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or an agreement entered into between Her Majesty and a foreign power ... the suggestion that they can be justified as acts of state or that the court was not competent to enquire is wholly untenable. The learned Attorney General who argued the case before their Lordships on behalf of the appellant conceded he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of the treaty."

The proposition he contended for was a more limited one and the more limited one was that the treaty was for the purpose of putting to an end to a state of war, and that argument failed on its merits.

LORD SUMPTION: In that case, it would have been lawful if Walker had been a foreigner. I think that is right, isn't it? Walker v Baird is the main authority for the proposition that the act of state does not apply to those owing allegiance to the Crown.

LORD PANNICK: Yes, I take your Lordship's point.

LORD SUMPTION: If he had been French, it would have been fine.

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 KERR: 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

in this context.

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 given this morning, and that is the way in which the UK withdrew from EFTA, because there are significant distinctions between the EFTA regime and the 1972 Act. The most crucial of which is that the EFTA Act, which I won't take your Lordships to but it is in volume 35,

at tab 480, and it is supplementary MS page 4, 35/480, supplementary MS 4, 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

point on Turp.

Looking at all the material, and the court has all the material, we say there is no relevant prerogative power in this case. The prerogative cannot be used to remove rights and duties created by Parliament, far less to remove a whole body of law. That is our second submission.

Our third submission is that in any event, there are relevant principles of statutory construction. The consequence of those principles is that the appellant must show, the burden is on him, he must show that Parliament has clearly conferred on him a power to defeat statutory rights and duties, to defeat a body of law that Parliament has created.

There are three relevant principles to which we draw the attention of the court, or more accurately we remind the court about. The first principle is the principle applicable in relation to Henry VIII powers, that is a delegated power conferred by Parliament on a minister to use subordinate legislation to amend or repeal primary legislation.

The court has looked at this, the court is very familiar with this, the court has looked at it recently. The case is the Public Law Project case, it is volume 23, tab 277. Volume 23, tab 277, MS page 7791.

THE PRESIDENT: Yes.

LORD PANNICK: The Queen on the application of Public Law Project v Lord Chancellor, and because the court is so familiar with this, I can take it very quickly. The court in the judgment of my Lord, the President, speaking for the court, addressed the principle at page 395, MS page 7799, paragraph 27, where my Lord cited with approval and applied the observation of Lord Donaldson, Master of the Rolls, in McKiernon. This is just under letter C:

> "Whether subject to the negative or affirmative resolution procedure, subordinate legislation is subject to much briefer, if any, examination by Parliament. It cannot be amended ... the duty of the courts being to give effect to the will of Parliament ... it is in Lord Donaldson's judgment legitimate to take account of the fact that a delegation to the executive of power to modify primary legislation must be an exceptional course and if there is any doubt about the scope of the power conferred upon the executive or upon whether it has been exercised, it should be resolved by a restrictive approach."

Our submission is that the courts will be even more reluctant to recognise a power in the executive to defeat statutory rights or a statutory scheme, when

Parliament has conferred no such express power on the executive. Ministers cannot sensibly claim to have a greater power to interfere with primary legislation by use of the prerogative than they would have if Parliament had expressly conferred a Henry VIII power. That is the submission.

The second principle is the principle of legality. And I won't tire the court by going through the authorities. They are very, very familiar. Morgan Grenfell, and ex parte Pierson in particular. Morgan Grenfell is core authorities 2, tab 17, it is MS page 570, Lord Hoffmann at paragraph 8 approving what he had said in the Simms case; and Pierson is volume 9, tab 78, MS page 3093.

The point is this. Since the courts presume that Parliament did not intend itself to defeat or frustrate fundamental statutory rights, or basic common law principles, unless Parliament has clearly so provided, all the more so, I say, will the courts conclude that Parliament did not intend to authorise the use of prerogative powers to defeat important rights and principles created by Parliament, unless Parliament has itself clearly so provided.

The test cannot be a looser test, where one is concerned about the powers of the executive, than where

one is concerned as to what Parliament itself intended.

The third principle that we draw attention to is the exclusion of implied repeal. The status of the 1972 Act, and indeed what it expressly says in section 2(4), is that the doctrine of implied repeal is excluded. Only a clear later statute will be recognised by the court as demonstrating a parliamentary intention to repeal or amend the 1972 Act, or do something inconsistent with it.

That of course was the principle in Factortame, that is what Factortame was all about and Mr Eadie accepts the constitutional status of the 1972 Act and he accepts the common law principle and the principle in section 2(4), that the 1972 Act is not subject to implied repeal, but he says this tells us nothing of relevance to the present case.

The answer is given by the divisional court at paragraph 88 of its judgment, being in core volume 1, at MS page 11796, if I could just take the court to what the divisional court said at paragraph 88, it is the end of paragraph 88. The divisional court says this:

"Since enacting the ECA 1972 as a statute of major constitutional importance, Parliament has indicated it should be exempt from casual implied repeal by Parliament itself. Still less can it be thought to be

likely that Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative power."

I can't improve on that.

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 so.

THE PRESIDENT: I suppose it depends how one sees the 1972 Act. If one sees it as impliedly imposing some sort of fetter or clamp, then it might be easier to see the 2015 Act as removing it, but if we see it through your lens, then the argument on the 2015 Act may have more force.

LORD PANNICK: Well, I say those principles are applicable,

those principles of interpretation, of construction, they themselves are important constitutional principles, and what they come to is that they mean that it is necessary for my friend to show that there is some 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 statement that the rights could be removed by executive action, the position is to the contrary; there is no clear statement to that effect; and if I need to, I say there are a number of strong indications that Parliament intended that the appellant did not enjoy any such power.

Our first point under this head is we say that the appellant has failed to recognise the nature and the significance of the 1972 Act in domestic law. It has failed to recognise the new source of law that Parliament has approved and authorised; this is, to

quote what the European Court of Justice said in 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 new legal order as implemented by the 1972 Act has at least three important characteristics. The first of them is that the new legal order agreed at international level does not just create relations between states, or even as with some international treaties, the European Convention on Human Rights is an example, it does not merely confer rights on individuals in international law. My Lord, Lord Mance explained for the Court of Appeal in the Ecuador case that international treaties do sometimes confer rights on individuals at the international level. That authority is core authorities 4, tab 290, MS 8295.

The new legal order is far more than that. 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).

There is no other example that I am aware of of that in our domestic law.

The third feature of this new legal order is that the proper interpretation of the scope and meaning of these rights and duties created at international level but now part of the national law, is that their scope and meaning is conclusively determined by a court of justice in Luxembourg whose rulings take priority over those of domestic courts, however senior. That is section 3(1).

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 3794.

My Lords and my Lady, there is an irony to these legal proceedings, and the irony is that the new -- the features of the new legal order and the constitutional status of the 1972 Act is both one of the main reasons why the appellant wishes to notify under article 50(2), he wishes to remove the powerful effect of EU law in domestic law, but it is also, I say, the reason why the

appellant cannot so act without the authorisation of Parliament. It is Parliament itself which has brought this new legal order into effect.

The court has seen -- I won't go through it -- that when we joined the EEC, what happened was that the 1972 Act was brought into force before the treaty of accession was ratified and we have dealt with this at paragraph 7 of our written case, MS 12387, and I will not take further time on that but we do say, and the court has put questions to Mr Eadie on this subject, we do say that just as Parliament needed to legislate before we joined, so parliamentary authorisation is required before steps are taken to remove those rights from domestic law.

There is one other statutory provision that the court may think throws some light on this, and that is section 18 of the European Union Act 2011.

If your Lordships, please, would go to core authorities, volume 1, at tab 6, it is MS page 153. Core authorities, volume 1, tab 6, the European Union Act 2011, MS page 153.

THE PRESIDENT: Yes.

LORD PANNICK: Your Lordships and your Ladyship will see section 18 of the European Union Act 2011, and the heading is of significance:

"Status of EU law dependent on continuing statutory basis".

Not dependent on whether prerogative powers may or may not in the future be exercised; it is dependent on "continuing statutory basis".

Then the substance:

"Directly applicable or directly effective EU law [that is the rights, powers, liabilities et cetera] referred to in section 2(1) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised as available in law by virtue of any other act."

Now, I can see that that begs questions, but nevertheless it is a strong indication that Parliament thought and was reaffirming that it is Parliament that is in control here. That is the purpose of that provision. It is very difficult in my submission to reconcile that statement by Parliament with a contention that no -- that all depends on whether or not ministers may decide to exercise prerogative powers.

THE PRESIDENT: It is interesting to read the footnote which tells you, although having criticised you impliedly for reading what was in Parliament, here I am looking at what is in Parliament.

LORD PANNICK: Parliament is sovereign.

LORD HUGHES: It is a public declaration of dualism, is it?
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. That is my submission.
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.
LORD PANNICK: I am coming to the substance of it.

I am submitting first of all that if one looks at what the 1972 Act was intended to achieve, it was intended to achieve a constitutional revolution in legal terms, and that it is inherently implausible that Parliament intended in 1972 when it created this constitutional reform, when it recognised this new source of legal rights and duties, that it intended that it could all be set at nought by the exercise of prerogative powers.

LORD SUMPTION: The purpose of section 18 was presumably to pre-empt the argument that the primacy of EU law meant that you could never withdraw.
LORD PANNICK: That was, indeed.
LORD REED: We looked at it in the HS2 case and we

interpreted it as effectively ensuring that the van Gend en Loos/Costa v ENEL doctrine did not form part of UK constitutional law.

LORD PANNICK: I say it is an assertion of parliamentary supremacy, that Parliament has created and Parliament may take away, and that is the value that I place on it.

LORD MANCE: It was probably not dealing with withdrawal, was it, because by then the treaty of Lisbon had given a base for withdrawal, or the base anyway. It was probably designed to demonstrate that even if we remained a member, it was still open to Parliament to do what it wanted.

LORD PANNICK: Yes.

LORD MANCE: Now, that might lead to a breach at the international level and trouble with the Commission and others but that is the --

LORD PANNICK: I recognise the limits of the submission, but I say it is at least consistent with my submission that Parliament regards itself as in charge in this area.

LORD MANCE: You can certainly say that it gives the weight to Parliament as the progenitor of the rights, rather than treats Parliament as a conduit at any rate.

LORD PANNICK: Indeed, that is what I say.

THE PRESIDENT: It treats Parliament as the source rather than the communicator as it were.

LORD PANNICK: Parliament as the source?
THE PRESIDENT: As the source rather than the communicator or the conduit.
LORD PANNICK: Indeed.

Reference has been made on a number of occasions to the decision of the appellate committee in the Robinson case, the Northern Ireland case. Perhaps we should look at it. It is core authorities number 4 and it is tab number 81 and it is MS page 3272. The relevant passage that has been referred to in the speech of Lord Bingham is at 32 -- it is paragraph 11, which appears on page 3280, thank you. The relevant part of it that has been referred to is in the fifth line. It is talking about the Northern Ireland Act 1998, of course:

"The provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."

Our submission is that the values inherent in the 1972 Act were a commitment by Parliament, unless and until Parliament changed its mind, but a commitment by Parliament to the inclusion of EU law as part of domestic law. Those are the values that Parliament was signing up to in 1972, with all the profound legal consequences which that entails, as seen, not just in

the 1972 Act but in any other, any number of other pieces of legislation which Parliament has enacted. There is a reference, my friend Mr Eadie drew attention to the statement by Lord Bingham as to flexibility. I think it also appears in that paragraph.

THE PRESIDENT: At the end of paragraph 12.

LORD PANNICK: I am grateful. Flexible response. Yes, flexible response. Our submission is the values are very clear in the 1972 Act. I say that however flexible our constitution, it cannot be bent so that ministers are able through the exercise of the prerogative to take away that which Parliament has created.

The same point, I submit, can be made by reference to the Axa case. The Axa case appears in volume 4, it is the main authority of volume 4, and it is at tab number 31, and it is MS page 1205, in the judgment of Lord Hope of Craighead, with whom the other members of the court agree.

LORD WILSON: Paragraph, sorry?

LORD PANNICK: It is paragraph 46 in Lord Hope's judgment, talking about the Scotland Act and it is simply the passage where Lord Hope says:

"The carefully chosen language in which the provisions are expressed is not as important as the general message that the words convey."

Then he deals with the particular matters, and I say again, the general message that is conveyed by the 1972 Act is very clear indeed as to Parliament's commitment to the new source of law.

It does not advance the appellants' argument for him to point out that as part of the EU legislative processes, the Crown, through ministers, has a role as a member of the Council of Ministers. Parliament recognised when it implemented EU law into domestic law, it recognised that EU law confers a legislative competence on the institutions of the EU, and as part of that, through the Council of Ministers, of course the representatives of the Crown, Her Majesty's Government have that legislative competence, or rather they play a part in the legislative competence of the Council of Ministers, but in so acting, ministers are exercising powers under the treaty framework which Parliament adopted and gave effect to by section 2(1) of the 1972 Act. So I don't accept that that can assist my friends.

Now, we have addressed for our part the contents of the 1972 Act at paragraphs 48 through to 65 of our written case. It begins at MS page 12415.

THE PRESIDENT: Yes.

LORD PANNICK: But can I take you, the court, through these

provisions briefly.

THE PRESIDENT: Yes.

LORD PANNICK: The starting point is the long title --

THE PRESIDENT: Yes.

LORD PANNICK: -- to the 1972 Act:

"An act to make provision in connection with the enlargement of the European Communities to include the United Kingdom".

Now, our point is that it cannot be consistent with the long title, speaking as it does of the enlargement of the EU, for the executive to use prerogative powers to reduce the size of the EU by taking the United Kingdom out. I say it is no answer for my friends to say that the long title says nothing about withdrawal. That is precisely the point. Parliament decided to make permanent provision in national law consequent on the UK becoming a member of what is now the EU, permanent, that is, unless and until Parliament decided otherwise.

Nor, in my submission, is it an answer for Mr Eadie to say, this is an argument based on Professor Finnis' lecture, that the long title says "in connection with", and not "for and in connection with", and the court has seen the contrast, the point made about the contrast between the 1972 Act and, for example, the

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

all -- that this new legal order should be introduced into domestic law, can Parliament have intended, really intended, that the executive could thereafter defeat that which Parliament had created, by the act of withdrawing the UK from the EU without parliamentary authorisation. That is the real question. And I say --

THE PRESIDENT: I understand that is your point, yes.

LORD CARNWATH: Can I ask you, I mean, I tried to sort of slow Mr Eadie down when he was spending a lot of -- speed him up actually, he was spending a lot of time on this, and he was rather stopped. I, for my part, don't see how helpful it is, trying to look at the intention of Parliament in 1972. There was no doubt that they were incorporating a new legal order in the United Kingdom, and that was the intention. No one was contemplating the possibility of withdrawal and there was no provision in the treaty for withdrawal.

Presumably, if anyone had asked, they would have said we can do it under the Vienna convention but obviously we will have to go through the process of negotiation, and at the end of all that we will pass whatever legislation is needed. You know, that is fairly obvious, but it doesn't really help one as to how one looks at the matter when many years later, one has this Article 50 being brought in, which creates

a completely new situation, because it enables a notice to be served with this cut-off. So how helpful is it to look at 1972 to find out what was intended in 2008?

LORD PANNICK: It is not the position of the appellant, nor is it our position, that the United Kingdom could not leave the EU in 1973 or 1974. That is not the position.

LORD CARNWATH: No, but the point is whether it could do it by prerogative or whether it would need an Act of Parliament, and I have no doubt that, in 1973, there would have been a parliamentary debate, the Government would have proceeded and it would have been negotiated and at the end of it all there would have been an Act of Parliament.

LORD PANNICK: Article 50 in my submission, the existence of Article 50, does not change the position as to prerogative power.

LORD CARNWATH: We will come to Article 50.

LORD PANNICK: Can I just make the submission, my Lord. Since your Lordship asked the question, the reason why Article 50 does not alter that is because we all agree that Article 50, although it gives a power to leave the EU, it refers to the constitutional requirements of the member state and we all agree that that is a matter for domestic law. It doesn't alter that question.

Therefore, I say, the real question, the two real

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 which creates and 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, subparagaph (2) provides that, if there is to be an amendment to the treaties, it requires a new treaty; or rather there is a requirement 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.

There is one qualification to that and it is the

qualification that Article 48.6, which your Lordships saw, 48.6 of the TEU, provided a simplified revision procedure. It was obviously thought in Brussels that it should be easier to amend the treaties and Parliament responded to that, and your Lordships saw this, and your Ladyship saw this, in section 6(1) and (2) of the 2008 Act.

THE PRESIDENT: Yes.

LORD PANNICK: Parliament's response was to say, if the simplified amendment procedure was used, then you didn't any longer need primary legislation to bring that change into domestic law. It was sufficient to have a motion in both Houses. But nevertheless you still needed Parliament to act and it was because Parliament thought that a motion sufficed that this change occurred.

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 unfettered; 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

Parliament had intended that parliamentary control for variation was required but had not intended there to be any parliamentary control in respect of nullification.

THE PRESIDENT: I see the force of that, but it could be said that it is one thing to say "We will join a club on certain terms, and we want to keep control of what those terms are, but if you want to withdraw that is fine."

LORD PANNICK: Yes, it could be said, but for the reasons I give I say, with great respect, that unrealistic that Parliament can have intended to maintain such control but nevertheless to have intended that the whole scheme should be open to nullification by the minister without prior parliamentary authorisation. That is the way I put it and that was the approach that the divisional court adopted.

The divisional court's reasoning, particularly on section 1(3), appears at paragraph 93.8 of their judgment. It is MS page 11800 and it is paragraph 93.8 of the judgment. It is the end of 93.8, looking at 11800, the last four lines, they says:

"Moreover, the fact that Parliament's approval is required to give even an ancillary treaty made by exercise of the Crown's prerogative effect in domestic law is strongly indicative of a converse intention that the Crown should not be able by exercise of its

prerogative powers to make far more profound changes in domestic law by unmaking all of the EU rights set out in or arising by virtue of the principal EU treaties."

That is the point. Parliament should not be assumed to have strained at a gnat that has swallowed a camel. That is the point.

I am grateful to Mr Thompson, if one looks in the consolidated version of the 1972 Act, it helpfully sets out all the amendments to section 1(2), and indeed all the amendments to section 1(3). If the court is interested in that, you will find all the detail there set out.

So that is section 1. Then the next indication is the heading to section 2.

THE PRESIDENT: Yes.

LORD PANNICK: The heading to section 2 is "General implementation of treaties", and the treaties as I have indicated are those specified in section 1(2) and I say it would conflict with that heading as an indication of purpose if the minister could use prerogative powers to remove the UK from the treaties, so that the rights and obligations they create are no longer implemented in national law. This is concerned with implementation in national law.

I say it is no answer that the treaties include the

TEU which contains Article 50. Mr Eadie stated in answer to a question from my Lord, Lord Mance, he stated, my friend, that Article 50 "is not part of domestic law and it does not have direct effect", he agreed:

"Article 50 requires notification to be in accordance with the constitutional requirements of the member state. It does not alter those constitutional requirements."

Therefore it cannot assist the Government's case, in my submission.

Section 2(1) of the 1972 Act, the phrase "from time to time" 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 "from time to time" 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

Article 50 is a provision of EU law which has effect in national law, and it only has effect in national law if it is directly effective and it is not a directly effective provision, it is not intended --

LORD CARNWATH: I don't think you understand me.

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 --

LORD PANNICK: First of all, it is no part of the case against me --

LORD CARNWATH: I understand that, I would just like to understand it myself, because it has been raised in some of the commentaries.

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

domestic law for the notification. Article 50 is completely neutral as to the domestic law basis and power for making the notification. It doesn't assist.

That, as I understand it, has been accepted by the Government at all stages and I say they are plainly right to accept that. That is my answer to your Lordship.

So that is section 2(1), and we say that section 2(1) is intended to implement the rights under the treaties. The rights from time to time created or arising under the treaties cannot in my submission sensibly mean the absence of rights under the treaties.

That may be enough for today, or probably more than enough for your Lordships for today.

LORD CLARKE: Could I just ask one question, which is purely for my own personal benefit. I don't know if anybody else would like to have a printed copy of the transcript, but speaking for myself I should like one if it were possible.

LORD PANNICK: Certainly. I am sure we can facilitate that.

THE PRESIDENT: I dare say, all for one and therefore one for all. 11 each -- or one each, rather.

LORD MANCE: Preferably with four pages on one.

THE PRESIDENT: Yes, could it be the mini one, with four pages printed on one. I think we would appreciate that.

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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