Thursday, 8 December 2016
(10.15 am)
Submissions by THE LORD ADVOCATE (continued)
THE PRESIDENT: Lord Advocate.
THE LORD ADVOCATE: Thank you, my Lord. My Lady, my Lords, before I start, my learned friend Lord Pannick has asked me to mention that the case of Matadeen to which you referred yesterday is now available to the court.
THE PRESIDENT: Thank you very much.
THE LORD ADVOCATE: What I propose to do with the court's permission is to seek to summarise my position in relation to the matter I was addressing at the close yesterday and then to make some short submissions on some particular points that have arisen.
If the court could have before it again section 28 of the Scotland Act at MS 4359, volume 12, tab 124.
I am going to articulate a set of propositions.
THE PRESIDENT: Thank you.
THE LORD ADVOCATE: First of all I say that because this is a statutory provision, any question as to its scope and legal effect is in principle justiciable. The question of what legal effect and what meaning to be given to the different parts of in particular section 28(8) is a matter for the court. To say that the subsection is justiciable does not mean that Parliament intended that

the court would decide whether a particular situation is normal. The use of the word "normally" in the context of section 28(7) indicates that there are some situations in which the United Kingdom Parliament will legislate with regard to devolved matters without the consent of the Scottish Parliament. I referred yesterday to the background principles, Article 9 of the Bill of Rights and the Pickin rule.
But that is not an issue that the court needs to address in this case. The question that arises at this stage is whether or not the convention applies at all; namely whether or not a bill to withdraw the United Kingdom from the European Union falls within the scope of the convention. That depends on the meaning and effect to be attached to the phrase "with regard to devolved matters".
Although that is a phrase which is not replicated elsewhere in the Scotland Act, it is a phrase of a character which is capable of resolution by a court. So there is nothing inherent in the phrase itself which makes it unsuitable for adjudication.
I say that if there is a dispute about whether legislation of a particular kind is or is not legislation with regard to devolved matters, it is constitutionally permissible for the court to resolve

that dispute.
In doing that, the court would be saying no more and no less than that the convention is engaged; and that the question of whether legislative consent is required is a constitutionally relevant one. That is what the court, this court, would be saying if it were to indicate that the legislative consent convention is part of the United Kingdom's constitutional requirements for a decision to withdraw from the European Union.
If it is correct, as I submit, that a bill to make that determination would engage the convention, then the constitution passes to the political actors, to the United Kingdom Parliament and indeed no doubt also the Scottish Parliament, to address whether or not this is a case in which exceptionally the United Kingdom would or would not legislate without the consent of the Scottish Parliament.
Or if that consent were not to be given, and one should not prejudge any of these things, or if that consent were not to be given, whether or not it would be for the United Kingdom Parliament to determine whether or not to legislate without -- in the face of that refusal of consent. There would be no legal sanction should the United Kingdom Parliament choose to do that.
I have set out in my case in detail what I say is

the practice in relation to the scope and application of the legislative consent convention. It is perhaps worth making the point that it is a routine part of the way that matters are addressed between the United Kingdom and Scottish governments between -- and it -- between the two parliaments.
I say that looking to that practice, a bill which determined to withdraw the United Kingdom from the European Union would engage the convention, because of the effects that it would have with regard to devolved matters.
In these circumstances, and this comes to the main point in the appeal, in these circumstances it would be surprising if the same result could be achieved by an unilateral action of the Crown under the prerogative. Such action would not be legislation and therefore would not trigger the convention. The result, if the prerogative could be so exercised, would be to elide the need, I say the need for the relevant constitutional actors, those actors who have power to change the law of Scotland, namely the Scottish Parliament and the United Kingdom Parliament, even to address whether the Scottish Parliament's consent should be sought and obtained. I say that if that were the law, and I say it is not the law for other reasons, then that would bypass

an important constitutional requirement of the United Kingdom.

Fundamentally I say this case is about who has the power to change the law of the land. In Scotland there are three legislatures, there is the United Kingdom Parliament, there is the European legislature, there is the Scottish Parliament; and as between the United Kingdom Parliament and the Scottish Parliament, the convention -- convention constrains the United Kingdom Parliament in the exercise of its legal powers in order to respect the authority which the Scottish Parliament has.

LORD MANCE: Can you point to a case, Lord Advocate, where the courts have ever determined the preconditions, the existence or not of the preconditions to exercise of -- or application of a convention, in circumstances where actual exercise is, you accept, entirely a political matter, not reviewable? It is a pretty odd exercise, isn't it?

THE LORD ADVOCATE: I say not, my Lord. I say it is the court adjudicating on that part of the section which is eminently suitable for adjudication by the court.

LORD MANCE: I can see that as a question -- if it led to something, that is a justiciable question, but here you are accepting it doesn't lead to anything, and there

must be presumably many constitutional conventions which depend upon the existence of certain situations. You say that the court can intervene in any of them and determine whether the situation exists and then hand over to the politicians?

LADY HALE: As I understood it, Lord Advocate, and if I have misunderstood I would like to be reassured, you are saying that what the court can interpret are the words, "with regard to devolved matters".

THE LORD ADVOCATE: Yes.

LADY HALE: We cannot say anything about whether this is a normal situation or not.

THE LORD ADVOCATE: No.

LADY HALE: That is for the political actors.

THE LORD ADVOCATE: Indeed. It is the only issue that arises at this stage; after all I accept we don't have a bill, I am proceeding on a hypothesis. But can I say it is part of the current constitutional context within which questions as to whether the Crown can change the law of the land by the prerogative, or indeed whether resolutions of either or both Houses of Parliament can be relevant to the legal question the court has to address, fall to be considered, because part of what the legislative consent convention does is to ensure that where it is properly engaged, the question is relevantly

asked: does the devolved legislature agree or not agree with the effects of this, with regard to devolved matters? That is one of the reasons why I say that ultimately what is required here is an act of Parliament to make the decision under Article 50.

LADY HALE: Do you also say that "with regard to" means something different from "relate to"?

THE LORD ADVOCATE: It is certainly a different phrase, my Lady, and I did make the point yesterday that this phrase doesn't use the language used elsewhere in the Act; it points back to the language used in the -- originally in the memorandum of understanding, and which I say in turn is explicated by the practice which I have set out in my --

LADY HALE: You have to say it means something different from "relate to", I think, don't you? Because this court has given "relate to" -- when considering whether the Scottish Parliament has acted within its powers, it has given "relate to" a very specific meaning. You have to say it means something different.

THE LORD ADVOCATE: Indeed, and I have made the submission that the mere fact, and it is demonstrated by the examples I gave yesterday, that a bill relates to a reserved matter does not necessarily mean that the legislative consent convention is not engaged. That is

seen in the practice that has been followed very notably in the two Scotland Acts, as recognised in the explanatory notes that I took the court to yesterday. It is seen also routinely when the United Kingdom Parliament legislates in an entirely reserved field, but gives powers in that regard to the Scottish Government which is not by any means an unusual circumstance; again, routinely legislative consent is sought and if granted, then the Act proceeds.

LORD REED: If we accept your submissions, it follows that if notification under Article 50 requires legislation, then on your submissions, if that legislation is, with regard to devolved matters, then the convention -- then it falls within the scope of the convention.

THE LORD ADVOCATE: Indeed.

LORD REED: Yes.

If on the other hand we accept that notification does not require legislation, then plainly the convention could not apply. It rather sounds as though the practical significance of this submission depends on the view we take on the primary issue between the appellants and the first and second respondents.

THE LORD ADVOCATE: It does, my Lord. Although, for the reasons I have sought to articulate, I say that if one is testing that constitutional issue in light of our

current constitutional circumstances, then it is the existence of the devolved legislatures, the impact on them, on their competences and on policy areas with which they are concerned, and (Inaudible) of this convention are all part of the current constitutional context for the question -- in which the main question needs to be addressed.

Can I then make a short submission on the phrase "it is recognised that", which my Lord Hodge asked me about yesterday. In my submission, that is a phrase which again refers one back, it tells us that Parliament is referring to something that already exists. It is a phrase -- we have had a search done -- and it is a phrase -- not a phrase that appears to be very much used. It has been used in the context of two constitutional orders which I am afraid I do not have with me but I will make available to the court, the Gibraltar constitution order and the Virgin Islands constitution order. In the former there is a provision that states:

"It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist each and all of the following human rights and freedoms, recognised and declared."

Likewise in the Virgin Islands constitution order,

in a similar context, in relation to the enactment of fundamental rights and freedoms, there is a set of provisions that include:

"Whereas it is recognised that those fundamental rights and freedoms apply subject to respect for the rights and freedoms of others ..."

And so on, namely, and then they are enumerated. So those are examples of the phrase being used, in a way recognising something which is said already to exist, but which is being brought into a particular legal and constitutional framework.

LORD SUMPTION: They are declaratory of some legal propositions in both of those cases, whereas the unusual feature of this subsection is that it is declaratory of a political intention.

THE LORD ADVOCATE: Well, my short submission is that the fact that the provision is declaratory, as indicated by the phrase "it is recognised" is neutral as to the -- or doesn't point to any particular conclusion as to its juridical effect. The juridical effect is -- plainly the status of the rule has changed, it has become part of an act of Parliament.

LORD SUMPTION: Its juridical effect is going to depend on what it is that has been recognised.

THE LORD ADVOCATE: Well I don't say it is irrelevant that

it is now in an Act of Parliament. To take the example of fundamental rights, there is a nice passage in the case of Higgs, which the court has at MS 2763, where Lord Cooke of Thorndon, speaking of the right not to be subjected to inhuman treatment, said:

"It is recognised rather than created by international human rights instruments."

It doesn't mean that it is irrelevant that it is then enacted or brought in with human rights instruments.

I entirely take my Lord's point that at the end of the day, it will be a matter of construction for the court to decide what the implications are of the change in, what I say is a change in juridical status of the rule.

LORD HODGE: Lord Advocate, you are not disputing that what has been recognised is a convention, and that the court cannot adjudicate on the question of what is normal.

THE LORD ADVOCATE: I accept all of that, my Lord.

LADY HALE: Lord Advocate, I think the phrase "it is hereby recognised and declared" is common to a great many Commonwealth independence constitutions. I have just got up the constitution of Trinidad and Tobago, section 4 of which -- with which we are very familiar because we encounter it regularly in another

jurisdiction:

"It is hereby recognised and declared that in Trinidad and Tobago, there have existed and shall continue to exist ... following rights ..."

So it is very common, recognising an existing state of affairs and in that case giving it legal effect.

THE LORD ADVOCATE: I entirely take the point, and my Lord Sumption's point, that it begs questions rather than answers them.

THE PRESIDENT: We ought to let you move on I think.

THE LORD ADVOCATE: Indeed.

Yes, if I could just make two short points in response to issues -- sorry, I should make this point, that if I -- I would be making this submission, even if it wasn't for the statutory enactment, so I say it is not critical, and I point the court to the Patriation Reference case from Canada, volume 25, tab 305.

The approach that I would say of the majority of the court in that case to a question of the justiciability of a convention not dissimilar to the one before this court, did not in my submission depend on any specialty of the Canadian jurisdiction. I draw the court's attention to MS 8846 to 8847 where the Canadian Supreme Court, the majority bites directly on the justiciability

question.
I may say that was a case where the convention was not enshrined in statute. If I am wrong in all of that, and the court were to take the view that the point is not justiciable, then the court would decline to answer the Advocate General for Northern Ireland's second question. The court would say that Mr Justice Maguire was wrong to express a view as to the scope of the convention, and in effect the court would be leaving to other constitutional actors the question of whether or not the constitutional requirements of the United Kingdom include in the present circumstances this convention.
If I could make two short points in response to issues raised by the Advocate General for Scotland, he made a point that there is no bill before us and ordinarily this is a question which would not be addressed without a bill because the question of whether the convention is engaged or not, may depend critically on the particular provisions of a particular piece of legislation; and it is entirely possible, no doubt, that a bill determining to leave the EU could also contain other provisions which (Inaudible).
I have sought to test the matter in a way most favourable to the United Kingdom, by assuming the

simplest possible bill. He pointed out that there was no legislative consent motion in relation to a string of previous pieces of legislation relating to the EU.
I will say it is entirely consistent with the United Kingdom Government's ambulatory theory that changes to the content of EU law were not thought to engage the convention, far less, far less, changes in the institutional procedures of the European Union; and I say that the hypothetical bill withdrawing us from the EU with the significant radical consequences with regard to devolved matters that I alluded to yesterday is quite different in kind. It is really the same point that the court discussed with my learned friend Mr Eadie on Day 1, that we are dealing with something that is not simply a change in scope, it is something which is quite different in kind.
My Lord, Lord Hodge asked me whether the power given to Parliament in Article 18 of the treaty of European Union was given to Parliament exclusively and I do say, I do say that, exclusively to Parliament and to those authorised by Parliament. Against the background of the claim of right, and the Bill of Rights, it would have been extraordinary if the power to change the laws in use within the Kingdom of Scotland, which is the phrase in the Act of Treaty of Union, had been given to the

Crown.
The question of who had authority, as regards Scots law, was a matter of significance to the framers of the union legislation. I say it is not a matter simply of footnoting to note that the power to change the laws of Scotland were given to Parliament and of course to those whom Parliament has authorised, and not to the Crown.
I say that is consistent with what I say is the limiting rule of constitutional law, that sets bounds to the use of the prerogative and precludes the United Kingdom Government from asserting the power to make the significant changes, or to make the significant changes to the laws of the land by virtue of the prerogative that they claim in this case.
Unless there are other matters that I can assist the court with, those are the submissions which I wish to lay before the court.
THE PRESIDENT: Thank you very much, Lord Advocate. Thank you.
Mr Gordon.
Submissions by MR GORDON
MR GORDON: My Lords and my Lady, on behalf of the Counsel General for Wales who sits next to me, I want to make it clear at the outset if I may that the position of the Welsh Government and the Counsel General is that the

result of the referendum to leave the European Union should be respected. Uniquely of those parts of the United Kingdom exercising devolved powers, the vote in Wales, as this court will know, was a vote to leave the European Union. May I therefore put it bluntly. Wales is not here because it wants either to stop or to stall Brexit or the implementation of Brexit. It is here precisely because the constitutional issues at stake go far beyond Brexit, as indeed, with the greatest respect to this court, many of the questions have shown.
In the time available and subject to your Lordship's approval I would like to do three things. First of all, to state what we believe to be the fault line that lies through the whole of the Government's arguments, and the consequences in law of that flawed reasoning, and I can do that very quickly but it is a point that has not yet emerged very clearly.
Secondly, to make some general points about the constitutional principle at stake and why that is so important in the context of devolution.
Thirdly, your Lordships will have seen the two core propositions of law for which we contend at paragraph 4 of our case, to develop those two points.
So can I start with the fault line that we that we say lies through the Government's approach to this case.

As we understand it, the whole case has been advanced on the premise that the treaty-making prerogative is as wide as Mr Eadie asserts. That is to say that the analytical starting point for consideration of the power he claims is a treaty prerogative to make and unmake treaties. Full stop.

Now, at first sound, that seems plausible but it ignores the most basic and elementary constitutional principle of all, which is that whatever else the prerogative may do, it may not dispense with laws passed by Parliament and I will call that, if I may, the dispensing principle: that constitutional principle has been with us since the Bill of Rights, it has never been modified and it cannot be modified by a court in our very respectful submission, even if to do so may be temporarily expedient in the interests of a flexible constitution.

The argument by my learned friend Mr Eadie simply forgets that principle. In forgetting it, he is able to derive false comfort from a raft of cases, De Keyser and all the rest of them, and by doing so he has nothing whatever in terms of principle to answer the case against him and as I hope to show, this can be developed in nine short propositions. I am not going to develop the propositions, I am just going to state them because

they are building blocks to understand why this case is flawed.

First of all, proposition one, this is a case about a claimed power to trigger Article 50 under the prerogative. So it is a claim of a power, a prerogative power. Not a statutory power, the prerogative power.

Secondly, there is no dispute that the Government enjoys a prerogative power to make and unmake treaties.

Third point, perhaps the critical point, however, there are certain general prior constraints, legal constraints that apply to all types of prerogative powers.

Fourth point, the most fundamental prior constraint is that the prerogative may not be used to dispense with laws. That principle is at least nominally understood to be accepted by the Government.

Fifth point, there are other constraints, other legal constraints, and this court will recall Lord Pannick's invocation of many principles. They include the principle that the prerogative may not be used to nullify rights or frustrate statutory schemes, but the dispensing principle goes beyond rights, it goes beyond subverting statutory schemes, and it extends to altering the content, or, as we would put it, striking a line through a statutory provision.

Sixth point, again, in our submission critical, where there is no existing prerogative power, no question of whether Parliament has abrogated or revived the power arises. This is elementary, a child of six, with respect, could understand this point.

THE PRESIDENT: That is very well put.

MR GORDON: I say a child of six could understand this point, because if you tell a child it cannot go out and play in the garden but it can play in the house, it has no power, the analogue, to going out in the garden. If you have not got a particular power to do something, because to do so would violate a prior constraint, you simply don't have the prerogative power. So to accept that there is a treaty-making power, does not mean that there is a treaty-making power to dispense with laws or to subvert statutory schemes, or to crucify human rights.

My Lord, the seventh point, the first stage of analysis, therefore, is whether triggering Article 50 will dispense with laws. We say that it will with reference to the Government of Wales Act 2006. Lord Pannick has put forward arguments we endorse, that fundamental rights are overridden by reference to the European Communities Act. So, proposition eight.

LORD CARNWATH: Mr Gordon, can I stop you. You seem to be

saying there is an important difference between whether you have the power and whether you are abusing the power.

MR GORDON: I do.

LORD CARNWATH: I mean, your child analogy does not really work, because obviously the child is told he cannot go out in the garden, still has the power to go out in the garden, and indeed he may well disobey the constraint and do it. So I am not sure that gets you very far. But in this context, why do you say this goes to the existence of the prerogative power rather than simply being constraint imposed by the common law on the exercise of it; does it matter?

MR GORDON: It doesn't matter, because if Parliament legislates, envisaging the exercise of prerogative power, which is my learned friend's case, you have to ask yourself, can Parliament possibly have legislated for the exercise of an illegitimate power, to which the answer is obviously no. If in fact prerogative power cannot be used to dispense with laws, it is inconceivable that the European Communities Act could have legislated for what Mr Eadie called the rest being the prerogative, to take us out of the European Union.

So the distinction, the semantic, with respect in my submission, distinction between illegitimate exercise of

a power and the existence of a power falls away when one appreciates that there simply could not be a legislative intention to contain within a statute an illegitimate use -- envisage illegitimate use of the prerogative.
LORD CARNWATH: Sorry, I don't want to press you but you said there was a simple principle, which is that you cannot use -- a prerogative cannot be used to dispense with law.
MR GORDON: My Lord, yes.
LORD CARNWATH: That is backed up over centuries. I don't think anyone disputes that.
MR GORDON: Nor do I.
LORD SUMPTION: Why do you need to put it in other forms, like frustrating intention? All these are really different ways of expressing the same point, which is a clear principle of law, that you cannot use the prerogative to dispense with laws.
MR GORDON: My Lord, we rely on the dispensing principle because of its particular application to devolution.
LORD CARNWATH: Yes.
MR GORDON: But you are absolutely right to say whichever one or more of Lord Pannick's principles we take, the analysis will still be the same.
LORD CARNWATH: Yes, I mean I find personally confusing to start talking about frustrating intentions and this sort

of thing, when what you are arguing for is a simple principle that you can not use prerogative to dispense with laws, see Bill of Rights and so on.
MR GORDON: See also my learned friend's case.
LORD CARNWATH: Dispensing with laws in Wales.
MR GORDON: Yes, absolutely.
LORD HODGE: But those are your fourth and fifth propositions that you have given us, in effect, that it is all encompassed in the prohibition against dispensation.
MR GORDON: What I am trying to do is provide a suggested analysis for structuring the arguments that we have heard. The last point is this.
LORD KERR: I think we have only got to seven.
MR GORDON: I am up to nine, my Lords.
LADY HALE: You had got to number seven, you said you had eight.
MR GORDON: I've got nine now. Proposition seven.
THE PRESIDENT: Quality not quantity we are concerned with.
MR GORDON: Proposition seven is the first stage of analysis is whether triggering Article 50 will dispense with laws. That is the overarching principle. Proposition eight, if triggering Article 50 will dispense with one or more laws, that is the end of the matter; the question of abrogation simply does not arise. Why

doesn't it arise? Because there is no relevant prerogative or use of prerogative for it to arise. Nothing is being abrogated. The abrogation has started with the immediate bar to a prerogative power ever being used, capable of being used to dispense with laws.
THE PRESIDENT: I think Mr Eadie would say you are bypassing or eliding a question of importance on this aspect of the case, which he says is the proper construction of the 1972 Act, what is its effect; and he says that properly read and applied in context, it does permit the Government to do this. You are starting almost with the assumption that it doesn't.
MR GORDON: No, I am not starting with that assumption, my Lord.
THE PRESIDENT: Then haven't we got to consider the Act, and consider whether you are right in your assumption or your assumption that the Government cannot change the law, cannot take away rights, whereas Mr Eadie says it is inherent in the statutory scheme that it can.
MR GORDON: Yes, can I come back to your Lordship's question after giving the ninth proposition. The ninth proposition is that if we are right so far, the Secretary of State's reliance on De Keyser and the entire statutory scheme following the 1972 Act, that is all the other acts we have been talking about in this

case, is also misconceived because it jumps the first stage of analysis. That is the prior constraints.
Coming back to your Lordship's question, I have not elided it, because proposition seven is that we say that use of the prerogative will dispense with laws.
Now, if -- and this is why I wanted to put it in that way -- if we are right about that, we win and the Government loses. If the proper construction of the 1972 Act is that, and I will put it in colloquial language and I think your Lordships and your Ladyship will follow it, if there is a clamp on the conduit pipe, so that there are no relevant laws, rights, whatever, that could ever be dispensed with, then I would accept that the Government would win the case.
In other words, there is a question of construction, your Lordship are right but may I at this stage seek to clarify a real confusion that has crept into the language of this case, and that is the use of this word "clamp", because there is no relevant use of the word "clamp" that can relate to the prerogative. Either the prerogative exists when the legislation is enacted or it does not.
There is a relevant use of the word "clamp" on the narrow point of construction, as to whether rights are as contingent as Mr Eadie contends for. So using the

word "clamp" on prerogative is a very dangerous analytical, in our submission analytical mistake. If we are right on this analysis, the only question for your Lordships and your Ladyship, given the concessions that have been made and given what we know about Article 50, what is the real meaning of the 1972 Act.

LORD MANCE: Can I just interpose there. You are focusing in answer to my Lord on the 1972 Act, and looking at the Counsel General's case, I thought that some new issue was being addressed, which related to the devolution legislation. I don't see any focus really on anything else. We have had a lot of argument about the 1972 Act, Mr Eadie has made extensive submissions and Lord Pannick has replied.

But I thought that your case was a separate case, namely to say that even if the 1972 Act didn't -- will allow the use of the prerogative in the way that Mr Eadie submits, nonetheless the devolution legislation makes it impossible; that is also part of your case, is it?

MR GORDON: It is part of it, but I think the most important part of it is this: that the Advocate General for Scotland seeks to knock out our case by saying, if Mr Eadie is right on the construction of the 1972 Act, the dominoes fall and we must lose.

The answer to that is not necessarily but more importantly, you cannot view the 1972 Act in isolation. Because when we get to the devolution legislation, our point, and simple point, is that the detailed machinery of conferment of power in that statute can be read alongside -- in fact all the statutes in relation to this point need to be read in pari materia.

But the simple point here is that the devolution legislation has deliberately prescribed a legislative scheme relating to the competence of the Assembly, a constraint that one cannot act incompatibly with EU law. The Advocate General says you don't need that provision, never needed to legislate that. There was a deliberate choice to put that provision in, and it was put in in full knowledge of the 1972 legislation and what it meant.

So the devolution legislation is highly relevant, both in terms of the framework of that Act, and also in terms of its impact on the proper interpretation of the 1972 Act. That is how we put it.

LORD MANCE: That is quite a bold submission, isn't it? How can the devolution legislation construe an act passed over 20 years before?

MR GORDON: My Lord, we simply say that -- when I get to it hopefully the submission will be a little clearer, but

we simply say that when you look at the detailed machinery of the Government of Wales Act, what you have is a supervision by Parliament and/or Parliament and the National Assembly for Wales, of all legislative, all changes to competence within schedule 7. It would be astonishing if the prerogative could be used to effect a legislative change much greater than the ones in schedule 7. So as a matter of statutory interpretation, certainly we say that is the effect of the Government of Wales Act.

THE PRESIDENT: That is similar to what the Lord Advocate said towards the end of his submissions this morning.

MR GORDON: Absolutely, but the point being, in our submission anyway, and maybe I don't even have to get into this because we are not revisiting the 1972 Act; that is a matter on which Lord Pannick has argued his case. We say he is right. But in any event, we do respectfully submit that the -- sorry, my Lord -- we do respectfully submit that the construction of the Government of Wales Act 2006 is all of a piece or is likely to be considered to be all of a piece with interlocking legislation. We say that interlocking legislation gives the clue, or actually it decides certainly in our favour what the Government of Wales Act means, but it may be useful in your Lordships and your

Ladyship looking at what the 1972 Act means.

My Lord, may I then move on to say this, that if we are right in this suggested analysis and if your Lordships were with us on the point of construction on the 1972 Act and/or the Government of Wales Act, and/or, I should add, taking up Lord Carnwath's point, any of the other principles that Lord Pannick has developed and articulated, and ditto for Mr Chambers, as far as, then we cannot see how the De Keyser line of cases has any relevance to these appeals.

They are analytically irrelevant because nothing is being abrogated and picking up the language of clamp to deconstruct it, nothing is being clamped because there is nothing to clamp. The principle of non-dispensation has already aborted the possibility of using prerogative power in that way.

So if we are right so far, the difficulties for my learned friend Mr Eadie go even further, because he has not put forward any competing principle. What was astonishing in the divisional court -- we were spectators there because we had a noting brief, we were noting down what was said; at one stage in the argument in the divisional court, Mr Eadie was suggesting to the divisional court that they should prefer the De Keyser line of case law over the common law principle of

legality, but if the De Keyser line of cases is analytically irrelevant, there is nothing to compete with all the principles that have been articulated so far.

What we say is that these points all crystallised when, on the first day, my learned friend Mr Eadie was asked: isn't it important -- asked, I think, by Lord Sumption -- isn't it important to know what we are talking about. The answer is in the transcript, but we had understood Mr Eadie simply to go back in circular fashion to say: well, it is a very wide power; in other words he didn't put forward anything that I can deconstruct because there is nothing to deconstruct.

So that is stage one of my submissions. The fault line running through the Government's whole argument.

The second area that I just wanted to make a few points about is the constitutional principle at stake. Of course in one sense we all think we know what the constitutional principle at stake is. But may I suggest two broad questions which your Lordships and your Ladyship may wish to consider in analysing all these cases, and they are at a very high level, a very general level.

First of all, is there a fundamental constitutional principle against which the legality of using the

prerogative can be tested, an overarching principle, and this court knows what I have suggested.

Secondly, and this is where Sewel comes in, excuse me, independently of the answer to that question, how should the common law approach the legal scope of the treaty-making prerogative in a context such as this?

What I mean by that is, there is no doubt whatever that even if none of the principles I contended for were relevant, that is to say the non-dispensation principle hadn't been breached, none of the other principles had been breached, we are still looking at a situation in which prerogative power is being sought to be used to drive through the most major constitutional change in our system for -- at least since 1972.

One has to analyse, one has to put it in this way, which is the way we do put it, we do not put Sewel in the way that the learned Lord Advocate does. Nothing I say is intended to diminish any of his submissions, any of the force of his submissions.

What we do say is that when one is lacking at the legal scope of prerogative power, it is essential to analyse it against a common law framework. Whether or not the prerogative is a creature of the common law, undoubtedly its limits are bounded by the common law, and there are many ways in which the scope of

prerogative power can be tested against common law thresholds.

One threshold is what the books say, and I am not going to repeat the Diceyian views which now have become perhaps something of a cliche, but are nonetheless important, but the prerogative power is residual. It does not mean it is not important, but it is residual.

One looks at the books first of all to consider what are the criteria of determining the legal scope of prerogative power, but one looks and I agree, we agree with my learned friend Mr Eadie about this, one looks at the fact that we are in a modern evolving constitution.

In the last 50 years or so, it is axiomatic that we have developed a constitutional consciousness; witnessed the development of the common law notion of constitutional statutes; witnessed since 1960 the development of modern judicial review; witnessed the bringing into force of the Human Rights Act. But most of all from our perspective, witnessed the emerging and fragile, at the moment, devolutionary development. And then look at the trajectory of the prerogative against the trajectory of these developments.

We respectfully submit, and one doesn't need to go into detailed documents to arrive at this conclusion, that the prerogative is declining; there is undoubtedly

a wish, we see it as recently as 2008, the Brown Government wanted to make all prerogative powers statutory at one stage. Indeed, I think Ms Mountfield and I were both on a committee which had to respond to a consultation.

The prerogative measured against the trajectory of devolution simply does not match, and yet what is being said here is that as a matter of common law, the prerogative can be used, as I say, without any recourse to Parliament, to drive through the most major constitutional change certainly of the last, I would say, 40 years.

It has become the motor of our constitution, rather than the secondary residual power, but this fits in very much to our argument about Sewel, which I want to make in this way.

Sewel is a convention, nobody doubts it. The convention, and I will use this phrase again, I am sorry because I am fast forwarding to what I am going to say later but the convention is a very important force, constitutional force in our society. The reason why it is such a constitutional force is that it is the glue and the only glue that can really hold an unwritten constitution together.

We do not have rules, we have laws, we have

an aggregation of laws. How does our constitution develop? It develops through incremental practices, and the Sewel convention in the emerging context of devolution is a very important constitutional force. We say, when we get to it, that the courts, the common law, can take cognisance of conventions in a way that has nothing to do with the legal enforceability of those conventions and, with great respect to the advantage Scotland has over us in one sense, has nothing to do with whether it is in a statute. But if it is in a statute, and it soon will be in the Government of Wales Act, we think, if that happens, that shows the way things are beginning to solidify.

So can I come back to what at heart these appeals are really about. They are really about the proper distribution of power between Parliament and the executive in our society. What I wanted to say was each of the organs, each of the institutions of our state, of our constitution, play complementary roles; no one dominates the other but each one dominates the other in its own sphere.

So the judiciary are the total judges of the interpretation of law and the development of the common law. The executive is totally supreme in giving effect to policy, provided that policy is enshrined in law.

And Parliament is supreme in making law.

That is why the overarching principle that I have tried to articulate, under the broad umbrella of the non-dispensing principle, is so important; and the legislative supremacy of Parliament over the executive is an axiom in our society. Indeed, my Lord, Lord Neuberger, in a case decided as recently as 13 July this year, in the context of subordinate legislation said this. It is the Public Law Project case, paragraph 23:

"In declaring subordinate legislation to be invalid, the court is upholding the supremacy of Parliament over the executive."

So, my Lords, what is really clear, if one just has one's feet on the ground for a moment, in the context of the Brexit vote, the Brexit vote split the United Kingdom. It split it into four parts. We have absolutely no quarrel with the vote. It is an United Kingdom vote. And it is a majority for the implementation of Brexit. But the point is this. It is almost the most divisive political event that has happened over the last several decades, and who is going to judge what happens next, according to law?

In our submission, whether one approaches this matter from the perspective of the dispensing principle, or whether you approach this matter from the perspective

of the common law, it must be Parliament. All the recent events have nothing to do with this case, in particular, and I say it very respectfully, but in particular the Referendum Act of 2015 has absolutely nothing to do with the legal issues in this case.

The referendum results, I think, was discussed in argument yesterday. It is a statute that has died, it has fulfilled its purpose and you cannot revive a corpse by tearing up the death certificate. You cannot revive the 2015 Act and give it a separate purpose, which is to in some way become a normative statute, because to do that is to give a statutory power and not a prerogative power. There is nothing in the 2015 Act that can say anything sensible about the prerogative.

LORD MANCE: Can I just ask you then, in relation to the 1972 Act, assume that we were to take the approach that Mr Eadie suggests, namely that the royal prerogative to make and unmake treaties continues to be available, so that effectively the operation of the treaties, at least their direct operation and the regulations under them, ceases; you then have to argue that the devolution legislation makes a difference. You were just arguing that the 2015 Act makes no difference.

What provisions in the devolution legislation make a change in that basic position, on that hypothesis?

Your case refers to the restrictions on competence, by reference to EU law but -- and also the Welsh authorities' inability to continue to fulfil certain functions given them by domestic regulations under EU law, but that sort of change will operate across the country. Lots of people will no longer be bound by EU law, or have EU competences. What is there in the devolution legislation which you say demonstrates that the royal prerogative is no longer available if it is available under the 1972 Act?

MR GORDON: Well, I will come back to it when we get to it but the answer in short, your Lordship may or may not accept the answer because I appreciate that our case is different if you read the ECA in a particular way --

LORD MANCE: If you read the ECA against Mr Eadie and in favour of Lord Pannick, then your case is largely unnecessary, except insofar as you rely on the Sewel convention.

MR GORDON: Yes. Yes.

What I think I would say is that the detail of the Government of Wales Act, and it is not that much detail, it is actually the combinations of sections 108 and 109, so you have the constraint in 108, and I will come to this --

LORD MANCE: I see you are going to come to it, yes.

MR GORDON: 109 essentially sets out a mechanism for changes to legislative competence, and it is a detailed legislative mechanism which depends upon the scrutiny of either Parliament alone, in the sense of enactment of primary legislation, or the joint collaboration, to use a word we used earlier, between Parliament and the Assembly, where it comes to changes within schedule 7 by means of standing orders.

So these are, and I don't want to provide too much of a categoric hierarchy but I think one can see if you have a change to the forestry or agricultural provisions of schedule 7, that is no doubt an important change in many instances, but it is not seismic, but what is seismic is taking out the EU component. And yet this is said, it is said to be Parliament's intention in GOWA, the acronym for the Government of Wales Act, that this can be done by the prerogative. We say that is -- and that is a deliberate choice to put that in the legislation, because the point raised against us by the Advocate General, we didn't(?) need to do it. Well, you did it; and why did you do it? Answer: because it was felt to be important for the permanence of the devolution settlement to contain statutory provisions setting out detailed mechanisms for changes of competence.

So we say that it cannot be other than that Parliament intended in the Government of Wales Act to provide for statutory changes in the event of seismic changes to, radical changes to, legislative competence.

THE PRESIDENT: So even if we reject Mr Pannick's case on the 1972 Act, you say primary legislation would still be needed because of the Government of Wales Act and similarly Scotland and Northern Ireland.

MR GORDON: Yes.

THE PRESIDENT: Thank you.

MR GORDON: We say, and I think your Lordships and your Ladyship will have this point, even if that were wrong, the Sewel convention then comes in, because in any event, there is a radical change in legislative competence.

THE PRESIDENT: On another view you could say the Sewel convention point reinforces the point rather than being a separate point.

MR GORDON: Sorry, my Lord?

THE PRESIDENT: On the other hand, you could say that the Sewel convention argument reinforces the first point rather than being a freestanding point.

MR GORDON: You could, but of course the Sewel convention is also dealing with the potential for changes to --

THE PRESIDENT: Exactly, that is why.

MR GORDON: Absolutely.

My Lord, that is the second stage of our argument, and now I can deal with the third stage relatively quickly, because that is simply developing the propositions in our case, which I know the court has seen.

Core proposition one is to be found at paragraph 20 of our case. There are going to be -- there is a dispensation of laws in the Government of Wales Act, and we set out, first of all, the historical support in the books for the dispensing principle. I don't think I even need to say that because it is uncontroversial, but your Lordships will find that and your Ladyship will find that, between paragraphs 23 to 29 of our case.

I did want to highlight, simply because of certain things that were said yesterday, the Bill of Rights, which absolutely enshrines into our constitution, the prohibition against dispensing with laws, so it is very -- if one can be very fundamental, it is fundamental to our constitution, this principle; and another point that perhaps needs to be highlighted, Lord Sumption has mentioned this in the course of questions to Mr Eadie, but I am not sure it has been focused on particularly, the hearing before the divisional court was rights, rights and rights, and we accept that rights

of course are very very important.

But the dispensing principle goes beyond rights, and not only does it go beyond rights, it actually goes beyond things like new constitutional orders. You don't have to have a constitutional order or a human right for the dispensing principle to remain the axiom of our constitution.

So we say that the Government has accepted the fundamental nature of the dispensing principle but it simply misunderstands it and misapplies it. Indeed, what Mr Eadie said, I think at some stage, it will be in the transcript, is there was a genuine dispute in this case, and in characteristic fairness he said there is a constitutional issue here, no doubt the dispensing principle exists but we have just misapplied it; and he then says, he then prays in aid for that submission the De Keyser line of cases and for the reasons I have suggested, they are wrong.

As to dispensing, paragraph 31 of our case makes it clear which statutory provisions we are suggesting have been dispensed with in the Government of Wales Act and I don't think it is necessary to go through the details, save to say that 108 and 109 are of major importance, and we cite both 108, I think, and 109, so 108 is at paragraph 32 of our case.

THE PRESIDENT: Yes.
MR GORDON: 109, I think is at paragraph 36 of our case.
THE PRESIDENT: Yes.
MR GORDON: What will be of some interest no doubt to this court when one looks at the prohibition at 108(6)(c):
"A provision which falls within subsection (4) is outside the Assembly's legislative competence if it is incompatible with the convention rights or with EU law."
Those are important -- that is an important provision because it is to be contrasted with other international provisions, as we shall see in a moment, which are not embedded in the statute in the same way, and which the Secretary of State has power to intervene with, but they are not written into the fabric of the devolution statutory regime.
My Lords and my Lady, the detail or the grit, if you like, of section 108 is dealing also with other aspects of legislative competence. So the structure is this: in Wales there is not this reserved powers model, it is a conferred powers model; so the Assembly gets the powers it has from what goes into, what comes out of, what is transferred across, within schedule 7, and section 108(c), however, is a red line constraint. So we move then from that to --
THE PRESIDENT: The definition of EU law is lifted really

from section 2(1) of the 1972 Act, isn't it.
MR GORDON: It is.
THE PRESIDENT: So in a sense this argument, you can say, for better or for worse, is linked very closely to the main argument, if I can call it that, based on the 1972 Act?
MR GORDON: It is, and I say two things to that. First of all, the fact that it is linked closely takes us back to the point I made earlier, which was described as a bold submission, but it is of a piece. Why would Parliament in the Government of Wales Act put in a permanent feature of the Assembly's competence when it was unnecessary to do so, unless it thought that what was put into the 1972 Act was permanent membership of the EU, save unless removed by statute.
THE PRESIDENT: The other view would be that if Mr Eadie is right on the 1972 Act, then that carries into, because they have used the same definition, the Government of Wales Act, and if you rely on it to help you -- if it unfortunately doesn't help you because we are with Mr Eadie, then that has the same consequence on the Government of Wales Act; namely the argument does not help you here either.
MR GORDON: I fully understand the point against me, but can we then move to what we say in paragraph 33 of our case,

so section 108(6)(c) places a clear and unqualified restriction on the competence of the Welsh Assembly, but it may not legislate contrary to EU or convention rights, we would say. We place emphasis on the fact that there is no equivalent restriction on legislative competence for types of international obligations, other than those found in section 108(6)(a). Other types of international obligation are separately addressed, but only as set out in section 114(1)(d).
That provision does give, as I foreshadowed earlier, the Secretary of State the power to veto an Assembly act which is incompatible with any international obligation.
So if all we are talking about in the 1972 Act are international obligations, why are they being treated differently as far as EU law is concerned and convention rights are concerned? As I say, your Lordship points correctly to the definition of EU law, I fully accept that, but what we do say is that when you get to 109, we do find ourselves in an interesting quandary, if one is trying to say: doesn't it all mean the narrow conduit pipe in section 2, because if you look, and it is in our case at 36 and I don't need to take you to the section --
THE PRESIDENT: Yes, it is, thank you.
MR GORDON: -- but there it is, you can make an order in

council amending schedule 7, and if you do, one can see that in subsection (4) of section 109, one makes no recommendation to Her Majesty in council unless a draft of the statutory instrument containing the order in council has been laid before and approved by a resolution of each House of Parliament and, subject to an immaterial exception, where it has been laid before and approved by a resolution of the Assembly.
So as I said earlier, this is a very detailed machinery for the amendment of legislative competence and then we have the Sewel convention which your Lordship was -- referred to as possibly reinforcing this argument but the important point is this. If as a matter of statutory interpretation the Government are right, as I said earlier, your Lordships have the point, the most important changes of all to legislative competence can be done by a simple signing of a piece of paper by a Government minister, under some supposed prerogative or asserted prerogative. And we say that simply misses the point.
We also point to the -- lest it be said against us, all you are having surely is removal of a constraint, we refer to the explanatory note, I don't know if the court has the explanatory note to section 109.
THE PRESIDENT: Is that the relevant part summarised in --

MR GORDON: You have a yellow tag on your desk and we have cited it.
THE PRESIDENT: You have. Are there any other relevant parts apart from the one you quote?
MR GORDON: No, it is -- "enhanced" is the word that matters there, my Lord.
THE PRESIDENT: Thank you. Thank you for supplying it.
MR GORDON: We make similar points about the Welsh ministers and your Lordships will have those and your Ladyship will have that point. We make other points about the huge lost swathes of EU law, and Lady Hale put a question about that the other day. We mentioned the interpretation point in section 154, but I fully accept the connection that your Lordships draw between section 2 and GOWA.

What we say is it is not unnecessary in a (Inaudible) connection for the reasons I have given, but also say that GOWA may throw some light on section 2. But apart from that and it should not be forgotten, my Lord, Lord Pannick, has put forward compelling arguments in our respectful submission, Ms Mountfield will do the same no doubt, as to why section 2 does not mean what the Government says it means. Certainly we say you should not construe section 2 alone; you should not forget the Sewel

convention, you should not forget devolution when you are approaching that question -- what other background is important, in my submission.

So then I just wanted, having gone through that and pointed out the dispensing provisions that we say -- sorry, the provisions of the Government of Wales Act that we say are dispensed with, I wanted to come back to the Government's objections and, essentially, the objection in the devolution submission is twofold, and the key point I think I wanted to draw, do your Lordships have the devolution submissions of the Government?

They are -- I don't know if your Lordships have them. If you have -- you do? What I wanted to point to, my Lord, was paragraph 4(3) and 5, where there is a reference at paragraph 4(3) to the Government of Wales Act. What is said, I think, and it is the point made against the Scottish devolution arguments as well --
LORD CARNWATH: Which paragraph, sorry, I beg your pardon.
MR GORDON: My note says 4(3) and 5. The reference at 4(3) is to the exclusion of foreign affairs from the powers conferred on the Welsh Assembly. So that is the first argument put against us. That is the first argument put against us, because I think it is said: well, you have not got anything relating to devolved matters that

affects your competence, or something of that sort.

The simple point here is, and it is the same argument I imagine that the learned Lord Advocate would put, the fact that you have something reserved outside the specific devolved competences is simply a reference to the method to achieve an outcome. What actually matters is the outcome, and the outcome where you exercise a foreign affairs jurisdiction may well be to affect areas of competence of the Welsh Assembly. So that is why the words, "regarding devolved matters", can only sensibly mean, quite apart from the practices of the Sewel convention, one thing: they mean, does an action taken affect the legislative competence of the Welsh Assembly.

But then the devolution submissions go on to say, and I think this is at 5, what is fatal to our case, they say, is that the legislation, far from occupying the field, declines to enter the field occupied by Parliament at all, and demonstrates that nothing in the devolution legislation abrogates the prerogative.

Well, this is the confusion that I mentioned earlier, and we are not talking about an abrogation of the prerogative. So this is reliance which confuses two quite separate principles. The first principle is that Parliament may abolish parts of the prerogative, and

that is known as abeyance. The second principle, however, is that if you have got an existing head of prerogative, you cannot -- if you have not got an existing head of prerogative, it follows that there is nothing to abrogate. So the confusion of principle that runs through Mr Eadie's arguments, run through the devolution submission responses as well.

If you look just very briefly, one sees evidence of this confusion if your Lordships and your Ladyship look at paragraph 57, striking example in the Government's case, the Government's case now, not the devolution submissions, and I will read from it, if I may.
THE PRESIDENT: 57?
MR GORDON: Paragraph 57.
THE PRESIDENT: Of what.
MR GORDON: Of the original case.
THE PRESIDENT: The original case, thank you.
MR GORDON: Sorry if I didn't make that clear. The original case.
THE PRESIDENT: You have now. Yes.
MR GORDON: "The principle properly stated is that prerogative powers can be used to change domestic laws and to deprive individuals of rights in the UK if the powers are part of the prerogative and if the change is not inconsistent with the requirements of an act of

Parliament which occupies the field in question."
That has to be wrong. It is a major part of the Government's case. So you can deprive individuals of rights, you have a power to do it, and that is issue 12 in the statement of facts and issues; you can do it without any authority from Parliament, provided that it is not inconsistent with the requirements of an act which occupies the field in question.
LORD MANCE: That is surely -- why is that incorrect?
MR GORDON: Because it goes right back to the De Keyser line of cases.
LORD MANCE: So really it is correct if you take the double taxation treaties, isn't it?
MR GORDON: With double taxation treaties --
LORD MANCE: You can have a piece of legislation which allows the use of the prerogative, or contemplates it, perhaps, in a way which will switch on or off domestic rights or vary them.
MR GORDON: I think --
LORD MANCE: It is all a matter of construction.
MR GORDON: I think this distinction has been referred to. If one has an Act of Parliament which contains within it the possibility of expansion or contraction, undoubtedly the prerogative may have effects. So it may have effects on law, but what it cannot do in my respectful

submission is dispense with the law itself.
LORD MANCE: It may be you are taking issue with the words "change domestic law". In that situation the prerogative is not -- it is in accordance with domestic law.
MR GORDON: All I am saying, my Lord, is that if -- we are looking at a case in front of the Supreme Court. To put a proposition like that when we have the dispensing principle is plainly in my submission not correct. But it gets worse than that, because pages 35 to 43 of the Government's case are entirely taken up -- if there is any doubt that Mr Eadie's raft is the De Keyser principle, it fades away when one sees the heading, "The application of De Keyser's principles", pages 35 to 43.
This case, at least our case on the dispensing principle has nothing to do with the De Keyser line of cases. And we can see then that all the cases the Government puts against us, paragraphs 40, 45 and 55(b) of its case, 56 of its case, have nothing to do with the dispensing principle.
So one goes, for example, to paragraph 40 of the Government's case; it says the exercise of the prerogative can undoubtedly have effects on "the content of domestic law and the extent of individual rights and obligations which have effect in domestic law".

Whether that is right or wrong, none of the cases in paragraph 40(a) to (d) are examples of the prerogative being used to dispense with or even amend a statute.
THE PRESIDENT: We are now really trespassing on points that have already been made, aren't we?
MR GORDON: My Lord, I will not do that. Can I give you paragraphs that we object to and we say have nothing to do with the dispensing principle: paragraph 40, paragraph 45, paragraph 55(b) and paragraph 56. The point being that we ask ourselves, if my learned friend is in error in relying on these cases, what other cases is he putting before you in relation to the dispensing principle?
The only other point I think I want to make before I come to Sewel is the point I made or foreshadowed earlier, which is, we respectfully submit, that it is not a correct approach to say: well, all we need to do is look at section 2, and if that falls away, so does everything else. I made that point but I just want to, as it were, emphasise it.
THE PRESIDENT: Thank you.
MR GORDON: Can I now turn to Sewel and as far as the Sewel convention is concerned, I think that I have already foreshadowed that the importance of the Sewel convention is not, in our submission, its legal enforceability, but

that it represents a dialogue between Parliament and the devolved legislatures.
Now, that dialogue is important for at least two reasons. The first reason is that it is a dialogue between legislatures, and I don't need to emphasise, but I think I ought to, to this court, that the degree of autonomy or sovereignty of a devolved legislature is a sensitive area and it is a growing area for some of the devolved legislatures. There has been case law in the Supreme Court, and perhaps notably, the Axa case.
There is undoubtedly an emerging sovereignty. It is not the same, we know, as Westminster sovereignty, but it is a growing sovereignty of the devolved legislatures, and it is an important area.
The second point is that the Sewel convention in its structure envisages -- it doesn't matter what the word ordinarily or normally means at the moment for this purpose -- a legislative dialogue between two legislatures of different competences, but nonetheless of legislative competence. It, therefore, third point, requires the Westminster Parliament to consider whether it is going to legislate without the consent of the devolved legislature in question.
Now, the fourth point therefore is this. The evaluative decision as to whether to legislate or not is

Westminster. But it is not the prerogative. So if the prerogative can be used to short-circuit this dialogue, it is in our submission to ignore the development, the devolution development, the modern dynamic devolution development on which our constitution is materially predicated now that we have devolution in very strong form.

This, of course, is not an argument on legislative interpretation, nor is it an argument on the legal enforceability of the Sewel convention. It is an argument on the common law approach to the prerogative.

Nor, indeed, as I think I said earlier, does Sewel necessarily stand in isolation when one is building up a common law anatomisation of the Sewel convention. For example, Ms Mountfield, I know, has a historical analysis, and it is going to be directed to the fact that in context, the use of the prerogative has never been used in this kind of way. That is a separate argument, and not one that I intrude on.

But when you look at all the sources of information, the common law attaches to itself to analyse the legal scope of a prerogative power, Sewel is very important in that approach, as is history, as to some extent are the commentators.

If I can take your Lordships very briefly, if I can find it in my own authorities, it is the Agricultural Sector (Wales) Bill case, 2014, it is in the authorities at volume 20. And I wanted to -- it is tab 246, electronic page 6837.

THE PRESIDENT: Thank you.

MR GORDON: I wanted to take the court particularly to paragraph 42. What one sees there is a statement by the Supreme Court, an outline of the history of devolution in Wales, and the three phases, but what I wanted to focus on, or invite your Lordships and your Ladyship to focus on, was paragraph 42.

THE PRESIDENT: Yes.

MR GORDON: "In our view, each of the successive phases of Welsh devolution", so this is the third phase:

"... significantly increased the legislative competence of the Assembly. The distinction is most marked between the second and third phases."

So when I earlier spoke of the trajectory of devolution, this is the kind of thing, this is the kind of incremental process I had in mind. So that means, in our submission, that the constitutional context engaged by devolution is extremely important, an extremely important component element in determining the legal limits of the prerogative. The importance of

constitutional statutes in this context has been stressed, and in our respectful submission, the devolution machinery reflects the passing of constitutional statutes on any view.

So when it is said by the Advocate General as it appears to be, see paragraph 24 of the devolution submissions, that we concede that the Sewel convention is, and I quote from his case, "legally irrelevant", that is a complete misrepresentation of what we do say. We have never said that. It is legally highly relevant.

Of course, the importance of the convention is not in terms of what does it mean in its precision, can it be enforced in any particular case? What it does mean, however, is that it reflects a practice, and it reflects a growing practice.

The practice we set out in our case, so at paragraph 78, the court will have seen our reference to the standing order 29, there has to be a legislative consent memorandum in relation to any relevant bill.

Then at paragraph 79 we have the memorandum of understanding.

Then of course, as I have, I think, mentioned earlier, we get in the future to a Government of Wales bill, if it becomes an act, will have the same provision as is currently in section 28(8) of the Scotland Act.

So we then get to what actually happens, what the Government actually says the practice is. This is all we rely on, this is the point. If one goes to paragraph 86 of our case, DGN, devolution guidance note 17 -- I said 86, it should be 85. If I just read these words, again, it is in our case --

THE PRESIDENT: Yes.

MR GORDON: "The UK Government and the Welsh Government have agreed ..."

So the UK Government and the Welsh Government have agreed.

THE PRESIDENT: Yes, yes.

MR GORDON: "... that the Welsh minister should seek the consent of the Assembly ... such provisions and in context it clearly means modifying the Assembly's legislative competence are included in bills."

Then we can see the standing order which implements the next stage. It is true that the Government -- it just repeats the practice that your Lordships have heard. The Government will not normally ask Parliament to legislate the matters -- without the consent of the Assembly. Then we get the practice, and we give an example in the footnote in our case, dealing with the what actually happens in practice.

What does happen is that the clerk to the Assembly

sends the LCM laid by the Welsh Government to the clerk of the House of Commons, communicating the result of the vote.

The point from all this is not the detail of the practice, but the fact that there is a practice, and the fact that the practice in question is one between legislatures and one which involves communication between the devolved legislature and the Westminster Parliament.

At the end of the day, we are not asking your Lordships and your Ladyship to construe a statute, what we are asking in this argument is for this court, no doubt in combination with other techniques of development of the common law, to evaluate in a case such as the present, of enormous constitutional importance, the weight to be given to the Sewel convention, no doubt other aspects of the common law, in deciding whether the prerogative in this case, whatever the scope of the dispensing principle, can be used to drive through constitutional change of a seismic nature which the prerogative, as far as I am aware, has never carried through before, certainly since 1688.

So I hope I don't need to go to the Jonathan Cape case, your Lordships know what we say about it, and your Ladyship; I am not going to go through it. The point is

the point I have made. But the critical thing, as I said earlier, is that the conventions are, with an uncodified constitution -- we are one of only three countries in the world, I think, to have an uncodified constitution.

LADY HALE: To that we must add the Crown dependencies.

MR GORDON: We must, I agree.

LADY HALE: They don't have written constitutions either but they are independent countries.

MR GORDON: We drafted constitutions for the world after about 1787, and it is only in the 19th century when you get to the Hansard debates that you start debating the virtues of an uncodified constitution.

So where do we go to from all this?

Well, concluding the submissions I make, and I may just finish early with luck, there may be a temptation with the mountains of legal authorities with which this court has been confronted, to think that the issues involved in these appeals are complicated. We suggest they are not.

The dispensing principle is one of the most fundamental constitutional principles that we have. Its existence is not in dispute. The case law on it is clear. The Government's confusion about the effect of that case law does not in any way obscure the clarity of

the principle.

As to the Sewel convention, its effect is equally clear, once it is accepted as we submit it should be that the common law as to the scope of prerogative power has to be applied to our modern and evolving constitutional arrangements. Devolution is at the very core of those evolving constitutional arrangements, and also at the core is the developing notion that an unwritten constitution does not mean the lack of a constitution.

The development of the idea of constitutional statute applies full force to the various statutes giving effect to the devolution settlement in Great Britain since 1997. With that idea comes with the common law corollary that one cannot have implied repeal of a constitutional statute.

Yet in essence, the Government's case as it applies to Wales is that the framework of devolution in Wales may be, by the prerogative, stripped back and radically altered without any statute at all, in disregard of processes designed to ensure the stability of devolution, simply in order to give effect to the popular will expressed in an advisory referendum. That is, we say, not the reflection of a modern constitution; it is a reversal to a wider exercise of prerogative

power and has existed for several hundred years.

My Lords and my Lady, I am going to finish 10 minutes early, and in doing so, unless the court has further questions, I have been asked, a request that I only too happily assent to, to devolve my extra time to Ms Mountfield.

THE PRESIDENT: I am not sure it is yours to give.

MR GORDON: Yes, I don't think I have the competence, my Lord. Can I ask for a schedule 7 addition.

My Lord, those are my submissions.

THE PRESIDENT: Thank you very much, Mr Gordon. Ms Mountfield, I think the fair course might be to let you have five of Mr Gordon's minutes and for Mr Gill to have five minutes also.

MS MOUNTFIELD: Yes, that does seem fair.

THE PRESIDENT: I don't think I need Mr Gordon's consent for that, but if I do I am sure he will give it.

Submissions by MS MOUNTFIELD

MS MOUNTFIELD: My Lords and my Lady, my clients are a group of ordinary British citizens and one Gibraltarian citizen who are all people who will be affected in a very significant way, in very significant aspects of their lives, by a decision to leave the EU and the profound changes this decision will make to the law of the United Kingdom and to their rights as European

citizens. They have been crowd-funded by many thousands of relatively small donations from private individuals.

The issues in this case concern a long-standing constitutional principle, or long-standing constitutional principles. To some the legal arguments in the case may sound dry and antiquarian, and it is true that some of the principles that I rely upon have a long history, but that is not to diminish their importance. As Mr Eadie said, and I agree with him, the fact that a principle is well established does not make it an irrelevant anachronism today. Such principles can have a real and continuing value in contributing to the effective allocation of powers between the limbs of the state and in ensuring that they do not illegitimately intrude on to one another's territory.

On that subject, may I say one word on the role of the judges which has been the subject of intense interest in this case. The applications for judicial review before this court are not, of course, an attempt to persuade judges to usurp the power of any other arm of the state in an illegitimate way. They are certainly not, as Mr Eadie suggested in his closing observations on Tuesday morning, an attempt to persuade this court to undertake an act of judicial legislation.

The court is not being asked to decide whether in

the light of the result of the referendum, the United Kingdom should leave or should not leave the European Union. Nor is it being asked to compel either the Government or Parliament to do anything. All the court is being asked to do is to consider whether as a matter of law, an intended act by the appellant to notify the European Union of a decision to leave on behalf of the United Kingdom would be a lawful act in the absence of express statutory authority. The relief which the respondents seek is for the court to uphold the declaration that the divisional court gave that he does not have such power and so it would be unlawful.

This is an entirely orthodox application for judicial review in that respect, even if it is not and I can't submit that it is, an entirely ordinary one.

So if I could outline our approach. Mr Eadie invites this court to find that the court can trigger Article 50 in exercise of the royal prerogative, even though this will alter domestic law, because it has what he described on Monday, and it is in the transcript at page 75, as an "untrammelled" prerogative power to do it.

We disagree with that. We reject the false assumption that the foreign relations prerogative extends to permitting the Government to dispense with

domestic law and in his written case, paragraph 64, that is MS 12356, the appellant invites you to start your analysis at what we say is the wrong point by asking you simply to assume that there is a prerogative power to change the law, and then, basing yourselves on that assumption, to ask whether this presumed prerogative has been abrogated.

This is an artificial starting point. It is the wrong starting point, and the reason it is the wrong starting point is because it is almost halfway down the analytical track. But it is perhaps a convenient starting point for the appellant, because it bypasses what we say is the biggest hurdle which he faces in this appeal.

As Lord Sumption put it in questions to Mr Eadie on Monday and as Mr Gordon has submitted and as we put in paragraph 7 of our printed case, MS 12482, before you ever get to any question of abrogation, you have to ask a prior question. What are the limits, if any, of the prerogative power to make and unmake treaties? Does the treaty prerogative extend to changing the law on the national plane? Because if it doesn't, then no question of abrogation ever arises. We invite the court to approach this case from what we say is the true starting point by considering two questions.

The first question to address is as to the extent of the treaty prerogative and whether it extends to allowing the Government to effectively dispense with domestic law at all. We say it doesn't and that is my first proposition.

We say it is a fundamental constitutional maxim, not a mere generality, that the King, or, in this case, the appellant exercising the Crown's powers, may not, using the language of The Case of Proclamations, by his proclamation or any other way change the law or remove rights.

We say that the Bill of Rights and indeed the Claim of Right in Scotland and the Acts of Union put it beyond doubt that only the United Kingdom Parliament can change the law.

The second question to consider is whether triggering Article 50 would in fact change domestic law and remove European Union law rights which are recognised by it, contrary to the prohibition on dispensing with law, and we say that it would. That is my second proposition.

We say that European Union law is domestic law, and that rights conferred under it are domestic law rights, and that they are not contingent on an exercise of prerogative power. I will submit that Professor Finnis

upon whose views the Government relies so heavily is wrong to say that section 2(1) of the European Communities Act is no more than a vessel, so that the existence of any domestic law rights is contingent on the exercise of a Government minister's entirely untrammelled general power to remove the very source of them.

That will be my second strand of submissions.

Finally, I will address you briefly on two short matters that have arisen during the course of oral argument.

Turning then to my first proposition, can I establish at once that we do not, of course, deny that subject now to the provisions of CRAG, the appellant has a power to enter, and -- not subject to the provisions of CRAG, to withdraw from international obligations on behalf of the United Kingdom. The court is not faced with a dispute about the existence of a treaty-making prerogative, nor indeed a dispute as to its exercise. This is not a misuse case. The only dispute as far as we see it is as to the extent of the prerogative which exists. The appellant puts the extent of the foreign affairs prerogative in issue, and Mr Eadie said on Monday that the prerogative power in the field of making treaties, ratification of treaties and withdrawal from

treaties is and always has been, he said, always has been, a general power untrammelled by any implication that it cannot be used to change domestic law.

We say there is no prerogative power to change or dispense with the law as it stands outside the prerogative, whether that pre-existing law is contained in the common law or in acts of Parliament. So in that sense it goes beyond the issue of parliamentary sovereignty which Mr Chambers raised. My authority for that, I don't ask you to turn it up, is Lord Hoffmann in Bancoult (No 2), which is core authorities volume 4, tab 54, MS 2225, paragraph 44.

So faced with that dispute between the appellant and the respondents, the correct approach for the court to take, we say, is the one which was identified by Lord Bingham in Bancoult (No 2), and may I ask you to turn that up please --

LORD CLARKE: You have set it out in your case at paragraph 8, haven't you.

MS MOUNTFIELD: Yes. The passage I was planning to take you to is only slightly longer; it starts at 2230 in the electronic manuscript. Paragraph 69, six lines down:

"It is for the courts to enquire into whether a particular prerogative power exists or not, and if it does exist, into its extent. Over the centuries the

scope of the royal prerogative has been steadily eroded ... as an exercise of legislative power by the executive without the authority of Parliament, the royal prerogative to legislate by order in council is indeed an anachronistic survival. When the existence or effect of the royal prerogative is in question, the courts must conduct a historical enquiry to ascertain whether there is any precedent ... the exercise of the power in the given circumstances. If it is law it will be found in our books."

Then after the citation from Entick v Carrington, Lord Bingham refers to De Keyser and to Burmah Oil and he cites there the passage in Lord Reid's speech which Mr Eadie took you to. He explained why Lord Reid was talking about the prerogative as a relic of a past age:

"I would think the proper approach is a historical one ... how was it used in former times and how has it been used in modern times."

So Mr Eadie and I agree that the correct approach is a historical approach, but I submit that it is striking that despite positively commending that approach to you, Mr Eadie did not undertake any such enquiry, but put his claim for a wide untrammelled prerogative to change the law at the basis of general assertion.

In paragraphs 13 to 23 of our written case which is

in the core volume at tab 12, MS 12484 and following, we have undertaken precisely that enquiry. You will have read it, of course, I will not go through it word for word, but in a moment I will seek to draw your attention to some particularly significant parts of it, but before I do that, may I make an overarching observation.

The case before you shows that the appellant confuses two different concepts, which we say should be kept distinct, and it is that confusion which leads to the error in his case. One of the concepts that the appellant submits or advances is uncontroversial, but the second is controversial and we say it is wrong.

The first proposition is that the concept of a prerogative power to affect rights exists. The fact of such prerogative power is not controversial; it is a matter of common law. The appellant submits, and we accept, that there are some residual prerogative powers and that the lawful exercise of some of those powers within their proper boundaries may affect the way in which people enjoy rights.

So, for example, the prerogative to set conditions for Crown servants in the GCHQ case affects what conditions of work those servants have. The prerogative to requisition property where it is necessary to wage a war means that your property rights are attenuated in

time of war. That is what cases like De Keysers were examining. Given the scope, and in De Keysers it was an assumed scope of the war prerogative -- any particular prerogative, in that case, the war prerogative -- has that prerogative been abrogated by statute? That is uncontroversial.

The second concept, which we say that the appellant confuses with the first, is the idea of a prerogative power so wide that it changes the law, or suspends or dispenses with the operation of the law, or alters the sources of it. The confusion in the appellant's case, we say, is to equate the existence of a prerogative power which can have an effect on rights when operated within its scope to the existence of a prerogative power to change or dispense with law outside its scope. The confusion results in a submission which we submit is contrary to the most basic principles of our constitution.

Of course there can be actions in use of the prerogative on the international plane which vary the facts to which the law applies.

Post Office v Estuary Radio is one example; the prerogative is used to change the territorial waters, the scope of the statute or the effect of the statute changes. The Joyce case is another, you declare war,

somebody making a radio broadcast becomes the Queen's enemy and comes within the ambit of the Treason Act.

But we say that is materially different to changing the law which applies to particular facts, let alone the sources of law. For example if the war prerogative includes a power to requisition, as was assumed in De Keyser, that is not the same as empowering the Government in time of war(?) to abolish or alter common law or statutory property rights altogether.

So we dispute the appellant's submission that the prerogative can be used to dispense law, on the basis of the historical enquiry which we have undertaken and set out in our written case. I will take this by reference to the written case, and please could you have it open for this part of my submissions; the relevant passage is on MS 12484 in the second core volume.

THE PRESIDENT: Thank you.

MS MOUNTFIELD: From paragraph 13 we have looked at the general constitutional position concerning the use of the historical prerogative to dispense with law, and separately from paragraph 17, whether it can be said that the treaty prerogative is in some way different or wider.

So the first part of the historical case from paragraph 13 sets out the authorities which show that

the prerogative, any prerogative, cannot be used to dispense with or suspend the law. May I please ask you to cross out the words "the foreign relations" above paragraph 13 in that heading, which is an overenthusiastic autocorrect function, I am afraid.

LORD CARNWATH: Sorry, which words?

MS MOUNTFIELD: Subheading B above paragraph 13, "the foreign relations" should be crossed out. These are the cases which are not about the foreign relations prerogative, and the next heading is about the ones that are about the foreign relations prerogative.

THE PRESIDENT: Thank you.

MS MOUNTFIELD: I will not, can I reassure you at once, take you to all of these, but may I start by showing you the first one, which is The Case of Proclamations, which is in the core authorities volume 2, tab 9, MS 225. This of course is a case that precedes the Bill of Rights and concerned the extent of a King's power by proclamation to prohibit new buildings around London. On page 226, about halfway down the page, you see the holding, which is 226 in the electronic manuscript:

"The King, by his proclamation or other ways, cannot change any part of the common law or statute law or the customs of the realm."

Then at the bottom of the page, they look at some

cases. Four lines from the bottom, Lord Coke observes that:

"We do find diverse precedents of proclamations which are utterly against law and reason, and for that void, and which therefore should not be brought into precedent."

The first example is an interesting one in this context. An act was made by which foreigners were licensed to merchandise within London, but Henry IV by proclamation prohibited the execution of it and said it should be suspended until the next Parliament, which was against the law.

That is the principle of the thing. If by statute it is said people can trade in this country, the royal power cannot be used to suspend that without further parliamentary authority.

That was then put in statutory form in a sense in the Bill of Rights which you have seen, and the Claim of Right, which established that the Crown has no power to dispense with or suspend laws.

So the next step in my historical enquiry is Article 18 of the Acts of Union. I don't think we need to turn it up, it is volume 12, 107. Article 18 is at MS 4161, it is very familiar. But that really puts the point positively, so in the previous authorities it has been

said, the Crown cannot dispense; what the Acts of Union say is that only body with power to change the law, at least as far as Scotland is concerned, is the UK Parliament. And in relation to private law we have the question of evident utility, but even in relation to public law, the only body that can change that law for Scotland is the United Kingdom Parliament.

So then we come forward in time to the 20th century, and you'll see in our written case, I will not take you to it, the case of London County Council v The King, where London County Council intended to give a licence which indicated that the Sunday Observance Act was not going to be enforced. That was quashed because Lord Justice Scrutton held in fairly trenchant terms that the London County Council was in no better position than James II in that respect, and we submit nor plainly is the appellant.

It is not in our written case, I have mentioned it, that Lord Hoffmann in Bancoult (No 2), paragraph 44, MS 2225, said that since the 17th century, the prerogative had not empowered the Crown to change English common law or statute law.

Coming forward again in time to Nicklinson, again, I will not turn it up because I know you will be very familiar with it, it is volume 8, 73, 2965, that was the

case where it was proposed that in order to give effect to European convention rights, a criminal law, the Suicide Act, would be kept on the statute book but ought to be disapplied by an executive act, a policy setting out the circumstances in which it would not be applied.

That proposition was rejected by my Lord, Lord Sumption on the basis that it would be contrary to the Bill of Rights. He also drew attention to Priti(?), which was a case where an individual dispensation from the law was sought from someone whose husband wanted an assurance that he would be immune from prosecution if he assisted her in suicide. That was said it couldn't be done, because it would be a dispensation with the law on a proleptic basis. That is what we submit a notification under Article 50 would be.

We have also set out some New Zealand and Australian authorities. Fitzgerald was the case we cited to the divisional court. That was the case where it was announced that a statutory scheme would no longer be applied, ending the intended passage of legislation to confirm the policy, and that was held to be an unlawful suspension of the law.

THE PRESIDENT: Fairly similar to the Fire Brigades Union.

MS MOUNTFIELD: It is, that is what I was going to say, my Lord. What is said in that case, that it doesn't

matter that we think Parliament intends to change this law later, that is constitutionally irrelevant. What Lord Browne-Wilkinson said in the Fire Brigades Union case, at MS 483, is that it is not for the executive to say that provisions of law, inconsistent with the prerogative(?) act would be repealed when a suitable legislative opportunity arises. It is for Parliament and not the executive to repeal or not repeal legislation. It is their choice.

Then we cite the Hayden case, the last line of that citation, whatever the vestige of the dispensing power which remained at the time of the Bill of Rights, it is no more.

The second part of our historical enquiry from paragraph 17 on MS 12486 addresses any distinction that the appellant may seek to draw between the ordinary position in relation to prerogative powers and the foreign relations prerogative, because it may be argued as with the royal prerogative, the royal prerogative can alter the enjoyment of property or may be able to alter the enjoyment of property in certain circumstances; can the foreign relations prerogative do that as an aspect of its content?

But again, we say that the Secretary of State's submission that his power, prerogative power to enter or

to withdraw from international legal obligations is entirely untrammelled, simply cannot withstand the historical enquiry which Mr Eadie and I agree is the correct approach to this.

There is a strong line of authority to support the orthodox view that the executive may not, by exercise of its foreign policy powers, vary domestic law or to remove rights.

Again I take that from my written case, it has not been challenged, I will not take you to the underlying cases one by one unless you want me to --

THE PRESIDENT: You have taken us to the case in -- the Henry IV case cited in Coke's report of proclamations.

MS MOUNTFIELD: Yes, I have taken you to The Case of Proclamations. I am not going to take you to them unless you want me to, I can take you to the underpinning --

THE PRESIDENT: Basically you say these cases, as it were, speak for themselves. Any particular one you want to take us to?

MS MOUNTFIELD: Yes, I will just draw your attention to the case about the end of the Seven Years' War, and Chalmers' "Opinions of Eminent Lawyers". I will not take you to the point case, but the case arose as a result of the treaty of Paris at the end of the Seven

Years' War and although -- before the Seven Years' War, Newfoundland had been a British territory but French fishermen had had historic fishing rights there, from the treaty of Utrecht. Those were preserved at the end of the Seven Years' War by the treaty of Paris. But almost immediately after that, the Crown wanted to amend the treaty of Paris.

So it asked the law officers if they had -- if it had power to do that, whether the Crown could legally enter into and had any power to endorse such regulation. The law officers said that the Crown could not do that. The reason why not was because it was considered that the articles of the project were not consistent with the 10th and 11th acts of William III, which are not in the bundle but you can have them if you want them. That was the policy of that Act and it was inconsistent with the purposes of the legislation.

The reason I draw your legislation to that one is because it was not about only the rights of British subjects, or indeed necessarily on soil that was protected by Britain. It was about using a treaty power to amend that which was seen to be the purpose of a statute, and it was said that that couldn't be done.

Then we have George III adopting an act of Parliament to enable him to enter treaties to end the

wars with the American colonies, because he was not sure, or because I invite you to find that it was assumed that he would not have power to do that, cutting across domestic law rights in the absence of an act of Parliament.

Then we have the Phillimore principle that my Lord, Lord Pannick took you in the Parlement Belge case. It is worth observing that that -- Sir Robert Phillimore's judgment's in case was in fact overturned on appeal, but the reason it was overturned on appeal was because the Court of Appeal considered that the prerogative did extend to deciding that a ship was a property designated for public purposes, and that was a conclusive fact. Once that was decided using the prerogative, that was a fact that altered the application of the prerogative, but it was not to take away from the general principle that Sir Robert Phillimore had set forward.

THE PRESIDENT: Thank you.

MS MOUNTFIELD: Then the case of Littrell v United States of America. I need to just correct one point in my written case there, at the top of page 12489, the Court of Appeal did not in fact allow an appeal against the first instance judgment. What happened was that a judge at first instance dismissed an application or struck it out, on the basis that the Status of Forces agreement

did not give the appellant the rights -- on analysis did not give the appellant the rights that he sought.

That was upheld by a High Court judge but the Court of Appeal said that was wrong; they shouldn't have looked at the Status of Forces agreement at all, it was not part of domestic law, and they upheld the result, they upheld the strike-out because of state immunity.

THE PRESIDENT: They disapproved the reasoning.

MS MOUNTFIELD: Yes, but the relevant passages for your Lordships' note are Lord Justice Rose at MS 10932 and Lord Justice Hoffmann -- I have the internal reference here which is 93 B to 94 F, upholding Lord Justice Phillimore but there are two reasons why I don't draw the whole of that case to your attention. One is time and the other is because the first instance judge who was told he was wrong was a deputy High Court judge, Sir Robert Carnwath sitting as a deputy High Court judge.

But there is an interesting passage in Lord Justice Hoffmann's speech again in there, where he talks about how if the Status of Forces agreement had been a question of domestic law, of course a court could look at it to look at the facts, and to look at -- somebody was a member of the force that had the benefit of that agreement. It was not saying you could never look at

a treaty for that factual purpose; you cannot construe it or consider that it confers rights.

What I say is that all those cases are entirely consistent with the passage in the speech of Lord Oliver's in the Tin Council case, which I think has been drawn to your attention by almost every counsel, but what we say is that that is authority for the causal link, between the inability of the Crown to alter domestic law by making or unmaking a treaty, and the prerogative power and the respect that the court will give to that for the power of the Crown to make foreign own affairs, or the executive to make foreign affairs.

They will do it because it confers no rights in domestic law. There is nothing for the domestic court to look at; simply irrelevant as a source of rights.

THE PRESIDENT: Yes, I see.

MS MOUNTFIELD: The cases which the appellant relies on simply do not bear the meaning he ascribes to them. That is in our written case at paragraphs 20 to 23 and we also adopt Lord Pannick's submissions on this point.

May I draw your attention, without turning it up in view of the time, to the McWhirter case, which is in core volume 3, tab 46, and starts at 1847. The appellant relies on this in their written case to suggest that the continued exercise of an untrammelled

foreign relations power is specifically recognised in the Bill of Rights. That is right, it does say that, but it doesn't support the appellant's submission that the foreign affairs prerogative is untrammelled, and extends to changing domestic law. Indeed, we say it goes against that.

McWhirter was an application for judicial review, brought by somebody who opposed our entry to the European Union, and he opposed the Crown's decision to sign the treaty of accession, because the Crown was divesting itself of the entire and perfect and full exercise of regal power and government; and that was rejected. But the reason it was rejected was that the signing of the treaty had no effect on domestic law, and because it was the passing by Parliament of the European Communities Act and the subsequent ratification if the bill was adopted, and not the executive act of signing the treaty which would be the basis for the domestic law which would then be applied by the domestic courts.

You see that from the passages that Mr Eadie invited your attention to in the speech of Lord Denning at paragraph 8, and Lord Justice Phillimore at paragraph 8.

Finally, I should mention the Hales case that was raised by Mr Larkin, and on that we say that is

a pre-Bill of Rights case, and indeed arguably one of the causes of the passage of the Bill of Rights. It was overtaken by it, and we have put in a short clip of new materials. At tab 3 of that there is an interesting lecture by Professor Bradley about that case where he draws attention to the history, and suggests that the court which gave judgment in that case had been put under considerable external pressure, and the judges had been handpicked by one of the parties to the litigation, the latter of which at least cannot be said about this court.

LORD MANCE: What does this look like?

MS MOUNTFIELD: It is tab 3.

LORD MANCE: That.

MS MOUNTFIELD: Yes, I don't invite you to look at it now, but it is a lecture that explains the history of the Hales case, and it is quite interesting, the sort of pressure that the King put the judges under.

So we accept that those authorities are not conclusive. Some of them relate to varying common law rights, and we are talking about varying statutory rights; some of them are only indicative, and none of the older authorities are judicial in nature. But we say that they do provide at least a clear indication that there is an orthodox position on this question.

The later cases we refer to, or authorities we refer to, are judicial. Can I also add to my list Higgs, which was cited by Lord Pannick; that is V21, tab 260, MS 7231, the speech of Lord Hoffmann. We also invite your attention to the view of Sir William Holdsworth, the Vinerian professor of English law, in an article in the 1942 Law Quarterly Review, volume 33, tab 456, MS 11316.

He starts by observing that Blackstone's statement to the effect that there were no limitations on the treaty-making power of the Crown was not an accurate statement of law in the 18th century:

"Two very definite limitations upon it were then and are now recognised. Though the Crown and the Crown alone can make a treaty, if the terms of the treaty involve the imposition of any charge on the subject or an alteration in the rules of English law, they cannot take effect without the sanction of Parliament. These two limitations are the result of the constitutional settlement effected by the great rebellion and the revolution."

We say the appellant has simply failed to engage with this material or to provide any authority that, properly read, rebuts it.

Having undertaken this historical enquiry, we ask:

can the appellant's case on the existence of a prerogative to change the law be sustained? As Lord Camden said in Entick v Carrington: if it be law, authority for it will be found in our books; but there is not any, and the silence of the books disproves the appellant's case on this point, which is the point that he invites you simply to assume in his favour.

It follows, we submit, that the foreign relations prerogative cannot be used to change the law or to vary the sources of law which apply in the domestic sphere.

We submit that once the European Communities Act has become law and the European Union treaties have effect as sources of UK law, prior parliamentary authorisation is required to enter into or to resile from an EU treaty, and the provisions of the European Communities Act cannot be dispensed with in any other way.

We say that is an absolutely basic constitutional principle, what one of the constellation of professors on the UK Constitutional Law Association blog described as "constitutional law 101". So it is perhaps unsurprising that when modern judges have even fleetingly considered the issue of the United Kingdom leaving the European Union, they have not considered it as some point to be determined or left over for argument

in some later case, but simply assumed that any decision on withdrawing from the European Union would be one for Parliament.

I am not going to go through the references, they are on our written case at paragraph 27: four cases, the dicta of three eminent constitutional judges. We have set out there what Lord Dyson said in the Shindler case. Mr Eadie suggested that it didn't -- Lord Dyson was not suggesting it would be for Parliament to decide whether the UK would leave the EU, that is not our reading of paragraph 19; but I do accept, of course, that none of these was a case where the judge was being called on to decide the point, but I do say it is significant that what these judges assumed was consistent with what I say was the orthodox position; I do say it is significant that are no dicta to the contrary.

That is the end of my first point. There is no prerogative power to change the law, there is nothing to abrogate. Mr Eadie's submissions on the De Keyser principle are, as Mr Gordon suggested, in effect to say that the Government can change the constitution in a radical way, because Parliament has never said that it can't.

Or, to put it at a perhaps more facetious level -- we are on the last day of the case -- Mr Eadie's

submissions are the equivalent of arguing that because none of the attempts to catch the Loch Ness monster succeeded, the Loch Ness monster still roams free.

So I turn to my second proposition which is that -- sorry, before that, I should say that if I were wrong on that, and I did need to rely on the principle of abrogation, then we would say that the European Communities Act did abrogate or clamp any prerogative power which may have existed; and if I did need it, and I say I don't, there are alternative submissions on that in our submissions for the first instance hearing, at paragraphs 29 through to 50. They start in the first core volume at 12152, and we would rely on those if we needed them.

The second point then is to say, well, if there is no power to dispense with or change the law, would the appellant, if he triggered Article 50, in fact dispense with law and remove EU law rights? We say yes. We say this firstly because EU law is part of domestic law, so far as this court is concerned. The reason it is part of domestic law, and the only reason it is part of domestic law is because the core Parliament has so willed.

That is the consequence of our dualist legal system and the rule of recognition; it is supported by the

observations of Lord Mance in Pham, which are in paragraph 27 of our written case, and also by Lord Reed in HS2, paragraphs 78 to 79, which are at MS 535. We assume that that is common ground, but Lord Pannick took you to section 18 of the European Union Act 2011, and it is worth pointing out, if I dare make one more citation from Hansard, which has not always gone down well; but the Halsbury's Statutes edition at section 18, on page 153, does note Lord Howell introducing the bill, and saying that: the common law is already clear on this, Parliament is sovereign, EU law has an effect in the UK because, and solely because Parliament wills that it should be; the purpose of this section is to put that beyond speculation.

My Lord, Lord Kerr said: what is article 18 doing; it is putting what is already the common law beyond speculation, so it has a declaratory effect.

So any suggestion, we submit, that EU law, the law of the treaties and the rights arising from time to time under the treaties is in some way not domestic law is contrary to the express statutory provisions which confirm the pre-existing common law.

But despite this common ground on the rule of recognition, the appellant's case is that EU law rights are nonetheless not domestic rights, because, he says,

they are contingent on an exercise of executive prerogative to have any life at all. The executive chooses not to exercise the prerogative to bring those rights into play or to take away the ball, they are not rights anymore.

So again, I use the language of a vessel, he says that when Parliament passed the European Communities Act in 1972, it just created an empty vessel which the minister could at any time fill or empty at will by using his foreign relations prerogative. If that was the case, I submit it is the broadest Henry VIII clause in history. But on his case, the Secretary of State says that except so far as he was constrained by post European Communities Act statutes, then at any time he could have increased the flow of EU law or decreased it or turned it off altogether, without any need for further statutory authority, through what he described as the conduit, section 2(1) of the Act.

So if the appellant decides to leave the EU, he suggests, as I understand it, that that is not dispensing with the law, because the European Communities Act can stay on the statute book, and so can any EU law rights which exist under the treaties. It is just that the treaties have become a nil class(?) because they no longer apply to the United Kingdom.

That is his argument, as I understand it, but it is not right, and it is not right on the language of the Act, and it is not right when you look at statutory intention. On the statutory language, we accept that this is an ambulatory statute, but it is not ambulatory in the way that the appellant says it is. We deal with this in our written case at paragraphs 55 to 58, MS 12500, but what we say is that section 1(2) of the Act sets out a list of what the treaties are, for the purposes of the European Communities Act, and the treaties, capital T, are treaties specified by Parliament in primary legislation. That is the source of the law in the domestic sphere, and that is a matter which is in control of Parliament. If it's not a capital T, treaty, as defined by Parliament, it is not a treaty.

In section 2 of the Act, section 2(1) provides for what the effect of those treaties will be in domestic law. Although it is very familiar, and we have gone through it a lot of times, can I just ask you to turn it up while I talk about it. It is in MS 18 in the first core volume, and it says that:

"All such rights, powers, liabilities, obligations ... from time to time created or arising by or under the treaties" --

THE PRESIDENT: We have read this.

MS MOUNTFIELD: Yes.

"... as in accordance with the treaties ... without further enactment to be given legal effect ... shall be recognised and available in law."

And so on.

That is what a Community law right is, because that is what Parliament says in section 2(1). It is significant, I say, that the words "from time to time" come under the rights et cetera which flow from the treaties and not the treaties; it is the rights from time to time, not the treaties from time to time. The scope of the treaties having been established by section 1(2), the conduit, in section 2(1), is for the rights from time to time under the treaties but not the treaties themselves.

Those have been fixed by Parliament. Given that they have been fixed by Parliament, what follows is that the directly affected rights which are created by the treaties themselves are immutable, rights of free movement and non-discrimination and so on, because they are rights under the treaties; and the treaties are the treaties that Parliament says are the treaties.

So it is true that the content of rights created or arising under the treaties by EU legislative acts like

regulations, or directly effective provisions of directives might change from time to time, but insofar as those changes become part of domestic law, that is a result of Parliament's decision in section 2(1) to give automatic effect to EU legislative acts and decisions of EU legislative bodies. It is not the direct consequence of the actions of the UK Government exercising its prerogative power in the field of international affairs.

That is the point in the Youssef case which you discussed with some of my learned friends yesterday, the Security Council resolution given effect through an EU regulation. Paragraph 34, which is supplementary MS 679, we consider to be an authority in our favour.

The appellant's reading also ignores the statutory purpose. Lord Mance asked if the European Communities Act was neutral as to whether United Kingdom was a member of the EU. We say clearly not, and on that point we rely on the submissions of Lord Pannick and Mr Chambers.

THE PRESIDENT: Yes.

MS MOUNTFIELD: The consequences of the case advanced by the appellant -- the argument is not only wrong, it does have very serious consequences, under this Act, but also for the whole relationship between the executive and

Parliament. As to this Act, if the appellant is right, then by the sweep of the executive pen, the appellant can dispense with a whole swathe of domestic law rights, many of which are fundamental in character and which could not be restored by a future Parliament or indeed by any other UK constitutional actor acting unilaterally.

We have set out some of those fundamental rights in the annex to our written case, MS 12507. I have been asked to say particularly that my clients, and those that support them, consider that their EU citizenship is a fundamental part of their identity. So that if they are to be deprived of it, it is their elected representatives in Parliament who should in law be responsible for that.

I said there might be other wider consequences and can I give you one example of that, very briefly. If the Government is right, then it is certainly arguable, perhaps probable, that the executive could effectively dispense with the Human Rights Act and the convention rights which it incorporates into domestic law without the prior consent of Parliament.

I don't have time to deal with that point in any detail, but we have put the relevant provisions in the additional bundle and the short point is that section 1

defines what the convention rights are, but section 21 says that those rights are the rights in force from time to time -- as they applied to the UK from time to time. So if under Article 50(8) of the convention, the executive in the exercise of the prerogative denounces the convention, those rights as they apply in the UK are no rights, they can stay on the statute book, they can stay in schedule 1 but they are not of any effect. The Human Rights Act would technically be in force but it would be a dead letter.

LORD CARNWATH: Can I ask you one point on that, it may not matter, but before the Human Rights Act, there was a right of petition, individual petition to the Court of Human Rights, which was granted by executive power without any statutory underpinning, I think -- (Inaudible). I take it that before the Human Rights Act, it would have been possible for the Government, by executive prerogative action, to withdraw from the -- and effectively take away your individual right of petition, but the difference is that now it is guaranteed by statute.

MS MOUNTFIELD: Yes, because they were not domestically enforceable rights. They had a persuasive effect --

LORD SUMPTION: But they were individual rights --

MS MOUNTFIELD: They were individual rights in international

law which as a matter of policy --

LORD CARNWATH: Is that not comparable to your rights -- or individual rights as an EU citizen, which is a European right?

MS MOUNTFIELD: No, because they are only rights in domestic law and recognised by these courts because Parliament says so, so they are domestic rights.

LORD CARNWATH: It is the Act which makes the difference, yes.

MS MOUNTFIELD: Yes. That is another example of the significant wider constitutional consequences.

Can I, in my very short remaining time, which I am very grateful I have, pick up on two points which arose in argument over the last couple of days.

First, on the 2015 Referendum Act --

LORD REED: If I can just interrupt, just thinking aloud, I suppose if rights were created under the prerogative, then they could equally be taken away under the prerogative, and I am thinking of the criminal injuries compensation scheme which originally was created under the prerogative.

MS MOUNTFIELD: Yes, they are not statutory rights, so they can be taken away. If the prerogative -- yes, if the Crown in the GCHQ case can take away your right to strike, it can also give you back your right to strike,

or decide you are going to get very good pay and conditions, take it away again, it is not a contractual right, it is a prerogative power.

LORD REED: Yes, and there, the Crown is not acting in a particular capacity as an employer vis-a-vis its employees, for example, but it is creating a scheme of rights for the entire population which it can then take away again at its own hand.

MS MOUNTFIELD: Yes, but it is a very unusual situation, that, and that is a prerogative which has now disappeared, as prerogatives tend to do, when Parliament gets involved.

THE PRESIDENT: You were going to turn to the 2015 Act.

MS MOUNTFIELD: The 2015 Act. Can I just address the suggestion that was put by my Lord, Lord Neuberger, in particular to Lord Pannick, that the 2015 Act could in some way revive or legitimise the use of the prerogative power if it existed -- put into abeyance by the 1972 Act and subsequent legislation, and of course this would only arise if we were wrong on the extent of the prerogative.

THE PRESIDENT: Yes.

MS MOUNTFIELD: But even in those circumstances, it would be necessary to appreciate that assuming it was the European Communities Act which had put the prerogative

into abeyance, it was also the European Communities Act which created European Union law rights which are described as fundamental rights, and also created rights which -- or a scheme of law which was being described as constitutional by our courts.

So it would be necessary to accept, as this court has recognised, that the European Communities Act and the devolution acts are constitutional statutes. That means that if some later statute were to operate, so as to undo the effect of the European Communities Act and to bring back the prerogative which had been previously held in abeyance, it would require clear and express statutory language to do that.

That language would be required under the principle of legality, the Simms principle, and also because of the principle set out in relation to constitutional statutes by Lord Justice Laws in Thoburn. There is no such express language, and to hold that the 2015 Act by implication had such an effect, that would be an act of judicial legislation.

If Parliament had intended a particular result of the 2015 referendum to have a particular constitutional consequence, it would have stipulated that, as it had with other referenda, and you have been told about the alternative vote referendum, but may I also draw your

attention, without turning it up, perhaps, to the provisions of section 1(2) of the Northern Ireland --
THE PRESIDENT: We saw that, we commented on that yesterday.
MS MOUNTFIELD: Yes. The final point, my Lord, is about Lord Carnwath's question on Wednesday in the transcript at page 46, about Article 50(3). He pointed out that in seeking to constrain the manner in which the United Kingdom's vote could be exercised, Parliament made specific reference in the schedule of the 2011 Act to Article 50(3).
Can I explain very briefly why this says nothing either way about the United Kingdom's own invocation of Article 50. It is quite a complicated point but I think I have crystallised it.
You will recall that under the main provisions of in European Union Act 2011, a complicated system of controls was imposed on the ability of ministers to transfer powers. Essentially it had to have either a referendum and an act of Parliament or an act of Parliament. I am not going to deal with that complicated system of controls, it is most clearly in section 4(1)(k). But the provisions to which they applied are in schedule 1, which is at volume 1 of the core volume, tab 6, MS 141. It is a final reference but can I ask you to turn it up, please.

You will see there -- 155, I am so sorry, 155 on the memory stick. You will see at the bottom of that list of provisions, Article 50(3), the decision of the European Council extending time during which treaties apply to state withdrawing from the EU. What matters in my submission is the heading:
"The treaty provisions where amendment removing need for a unanimity, consensus or common accord would attract a referendum."
That is one of the ones in that list. What that means for the purposes of this case is that when it included that provision in this schedule, Parliament was not contemplating the regulation of the conditions under which the UK itself could invoke Article 50, or indeed the circumstances in which UK could give or withhold approval or extension of time if another member state was intending to leave the EU.
What it was is it was just part of a list of provisions in respect of which the United Kingdom Parliament provided by statute that the Government could not agree to give up an existing veto power under the treaties without a referendum.
As Lord Pannick said and we agree, it is unsurprising that the 2008 and 2011 acts were silent on the constitutional arrangements which would permit the

United Kingdom to trigger Article 50, because it is so long established and so fundamental a constitutional principle, that the Government cannot dispense with law without parliamentary authority; and it is, or at least it was until the appellant put it in issue in this case, elementary.
So the People's Challenge --
LORD CARNWATH: But just picking up that point, I know that is what Lord Pannick said, but there is nothing in the contemporary papers to suggest that that was in anyone's mind, and as far as one can see from the discussion there was in the select committee and so on, this withdrawal in 2008 was simply seen as something which confirmed parliamentary sovereignty and therefore did not (Inaudible) specific provision. But I don't think there is any suggestion at that stage that anyone was discussing the sort of issues we have been discussing here.
MS MOUNTFIELD: I say they were not discussing them because it was so obvious --
LORD CARNWATH: You say it was so obvious, but that is your interpretation.
MS MOUNTFIELD: I say it flows inexorably from that entire history, from the civil war --
LORD CARNWATH: I understand the way you put it, but the

point I am asking is there is nothing in the contemporary papers to suggest that was actually given any --
MS MOUNTFIELD: There is nothing to suggest that it occurred to anyone that withdrawal from the EU could be undertaken without a statute, when it had taken a statute to take us in.
Yes, and I am reminded that the CRAG green paper -- I don't have the reference, you were given it yesterday, I think by Mr Chambers, the CRAG green paper specifically referred to that point.
I have run out of time. The People's Challenge respondents seek to uphold the divisional court's judgment in this case, not only for its relevance and importance to the issues before this court, but because of its importance in a democratic society which is based on the separation of powers and the rule of law, of the constitutional orthodoxy which the divisional court's judgment upholds, and we respectfully invite you to dismiss this appeal.
THE PRESIDENT: Thank you very much, Ms Mountfield.
Mr Gill. We will sit a little bit late to give you your 20 minutes.

Submissions by MR GILL

MR GILL: That is very kind. I hope to be finished in time.

A great deal has been said and I do not propose to repeat it. Except to say I wish I had said all those wonderful things that you have heard from Lord Pannick, Mr Chambers and those who have gone before me this morning.

But I adopt them of course, gratefully.

A reasonable amount of what I had intended to say and which is in a speaking note which I hope has found its way to the bench --

THE PRESIDENT: Thank you very much, we have it, yes.

MR GILL: -- has been covered by Mr Gordon QC this morning, so that will perhaps helpfully shorten things even further.

My Lords, my Lady, the first thing to say at the outset, I think is this. I will make a few introductory comments and then deal with three points. But the first thing I think one has to keep hold of is that hard cases make bad law. This case is not hard. Some people are trying to make it very, very hard. The reason why they are trying to make it very hard and putting their counsel in the position of contortions, where they are saying one thing one minute and another thing the next, is because nobody ever thought that the 2015 Act was

ever intended to confer any prerogative power at all.

The reason for that is, or one reason for that may be, when I say nobody, I mean the Government, two important actors, the Government and the legislature, and the one reason for that may be this: it is a political point made by those who voted leave. It is that nobody ever thought there was going to be a leave vote. That is why -- the idea even that there was going to be any need to even consider the prerogative. That is why the statute is simply drafted as it is in the limited way. But this will be something that I may touch on briefly in due course.

At the outset, a few opening points which are reflective of what Mr Gordon said, but I just wish to highlight them in this way. Firstly, if the rule of law is to mean anything, even sovereigns must be constrained by it. The prerogative is no more than a creature of the common law. It is not that you cannot use the prerogative to dispense with laws; there is simply no prerogative to dispense with laws; it is not a question of its use or abuse, it just doesn't exist.

That was the position before the 1972 Act. The 1972 Act did not change that position. I am not going to go into the 1972 Act or the legislation. Others have dealt with that. No question of a clamp arises.

The non-dispensing principle that Mr Gordon talks about remains and no question of a clamp at all arises.

Those are the opening comments. The three areas that I do want to deal with are the areas which affect -- two of them which affect those clients who I particularly represent and then the third point will be to say something about the flexible interpretation point, which gets back to the 2015 Act point.

So starting with the two areas that affect my particular clients and it is in the opening note, in the speaking note, my Lords, my Lady, the submissions that have been made, which amount to basically what Mr Gordon has reiterated this morning, are said basically to force a technical position, that you are just asking for an act of Parliament when really something else will do, some other form of parliamentary involvement will do.

We say our position is anything but abstract or technical. It is very, very real. Not only does the use of the prerogative, claimed use of the prerogative, now affect whole swathes of laws; they affect the most fundamental rights which affect vulnerable classes of persons that are set out in our printed case, facts as to precisely how my clients will be affected. I am not going to have time to go over that, but it is set out in the case. Very real examples of what the law changes

will mean for them.

Now, that being the position, we say that the parties who we represent, the AB parties, they are representative of two classes of persons -- this is paragraph 6 of the speaking note -- EU nationals living in this country and those who derive rights of residence from them, principally their family members; and secondly, children, whose continued presence in this country depends on the exercise of them or their carers and family members, of rights derived from EU law.

And I have in mind British children who as EU citizens need carers who are non-British or non-EU even, who therefore, as a result of EU law, need their carers with them, who are then given what are called Zambrano rights, derivative rights of residence.

These classes of persons, and the first class, EEA and their family members, is of course a very large class, are very, very significantly affected by the position.

Now, for the reasons that are set out in our written case, we say that the effect of what the Government now wants to do, is now forced to do, not having thought about it beforehand, is to say that they will use the prerogative to give the Article 50(2) notice; having themselves made an Article 50(1) decision; they don't

say the 2015 referendum decision was the decision, they say they themselves, the Government, will make and have made, the decision; and that they will give the Article 50(2) notice under the royal prerogative. And they say that they will give it without there being any prior safeguarding of the rights that would otherwise fall on the day of withdrawal.

We say that is simply a complete breach of the non-dispensing principle, whatever label one wants -- Mr Gordon referred to this morning.

So what does that mean for the class of people that I represent, the EEA nationals, when you don't put in place a protective scheme for them as to what their position will be on the day of withdrawal. What it means is, and I put it like this, paragraph 11: be ready to pack your bags and go on that day. It is that stark, because we are not going to give you any guarantees, in fact we are going to use you as a bargaining chip.

Not only are we not going to put any rights in place in the domestic legislation which protect you in some sense, we would like you to stay but we are giving you no guarantees whatsoever; that is the current position. We say that on the current law, and I am only dealing with law, not -- the current law, not as to what may happen, that is simply not possible, or lawful.

Of course things may change in the future, paragraph 12, of course protections may be given. This was Mr Eadie's response in the court below, and he has not dealt with it in his written case, and I assume that this will remain his response in his reply. His response was that: Mr Gill is putting it in too exaggerated a way, of course we will find ways of protecting people in due course.

Due course is not good enough for me or for the children that I represent. They need to know what is their position now. Children in particular are entitled to know because of the duties to which we have signed up to under the UN convention, rights of the child, which therefore impose upon us obligations under Article 4 of that convention for progressive implementation of the convention in national law. Children are entitled to know what is going to be their position. Their parents are entitled to know what long-term arrangements are we going to make for them.

Bear in mind, this may not be two years on the law, bear in mind, this is a point made in the speaking note, on the Secretary of State's case, if this is all about prerogative power, what they could do is they could negotiate with the other member states now, behind the scenes, I have no problem with that; they can do that on

an international level anyway. They could have some sort of agreement, withdrawal agreement lined up in principle, draft agreement.

They could then, on 1 January, give a notice, having made a decision for 50(1) purposes, and under 50(2), give the decision on 1 January; on 2 January they could sign their withdrawal agreement.

On the law as it stands, and on their case, that could be the effect. Where does that leave the rights of the EEA nationals or their families, people who have been here and the children in particular? It drives a coach and horses through all those rights.

It may take two years, it may take longer than two years. That in a sense is even more cruel because it actually prolongs the uncertainty.

Not only this, paragraph 15, we say it is not just about taking away rights; it is about exposing the class whom I represent to criminal liability and summary removal. Again, there was no dispute about this in the court below. I have been saying this, we have been saying this, from a very early point and the other side have never disputed this. Their position is: we will find some way of sorting this out. I am not going to have time to take you through the legislation on this. It is set out in our printed case at paragraphs 42 to

55.

THE PRESIDENT: Thank you.

MR GILL: The relevant section is section 7 of the Immigration Act 1988 which in effect says that, if I just read it out very fast, on MS 12533:

"A person shall not under ... Immigration Act ... require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable right or any provision made under section 2(2) of the European Communities Act ..."

The immigration -- EEA regulations 2006 are that instrument, and therefore the rights flow, not from the Immigration Act 1971; they flow from section 7 of the ECA 1972, section 7 of the Immigration Act 1988, and the EEA Regulations 2006, outside of the remit of prerogative power.

THE PRESIDENT: Mr Gill, I should just point out that you are well over halfway through your submissions and you said you had three points and this is the first.

MR GILL: My Lord, I think the other two, I hope will be a bit shorter.

THE PRESIDENT: That is fine.

MR GILL: The second one certainly will be.

THE PRESIDENT: Thank you.

MR GILL: The position then is that for the reasons that are

set out on 12533 and 12534, it is, what will happen is that on the day of withdrawal, and you will just have to go through the legislation, I am afraid, but believe me, I am right, that on the day of withdrawal, my clients are here without leave, they are committing a criminal offence, unless Mr Eadie stands up and says: no, I am telling you they are not going to be committing a criminal offence. And he has never said that so far. I would be very happy to hear him say that but he has not said that.

If that is the position, then Case of Proclamations, tab 9, middle of page 266, the quote which is at the bottom in our footnote 40:

"... King cannot change any part of the common law nor create any offence ... proclamation which was not an offence before without Parliament ..."

And the Jones case, my Lords, the references to this --

THE PRESIDENT: They are helpfully in paragraph 17 of your speaking note, thank you.

MR GILL: Yes, and it is MS 2852, and it talks about creeping situation which brings about a criminal offence, can't do it, it says without Parliament, it is that clear.

Now, that, therefore, for those reasons, we say

means that this is about -- even if Lord Pannick were to fail on a broader argument, this argument on its own would stand.

THE PRESIDENT: Understand.

MR GILL: As to then the children's point.

THE PRESIDENT: This is your second point.

MR GILL: This is the second point. I am going to come back to the flexible interpretation point.

My Lords, the children point is really set out at paragraphs 20, 21 and 22 of the speaking note and --

THE PRESIDENT: This is really a sort of extreme, as it were, category of the first, is it really?

MR GILL: It is, it is, absolutely it is.

THE PRESIDENT: Thank you.

MR GILL: But there are a great many family lawyers extremely concerned about what this is going to mean in relations to Brussels 2(a) and all sorts of other regulations to do with the enforcement of orders across Europe, and what protections are going to be put in place.

Of course Mr Eadie did submit in the court below, we will find some other way, there will be other mechanisms of human rights provisions of one sort or another, possibly Hague convention in relation to this. But they are not the same, and this is what the divisional court

said, those measures are not the same, and there are many ways in which I can explain why they are not --

THE PRESIDENT: It is a bit like the Fire Brigades point, the fact that the Government says it is going to introduce legislation, you say is nothing to the point.

MR GILL: That is right.

THE PRESIDENT: I see.

MR GILL: But this really explains it very graphically. As to the flexible construction point, if I can just have three or four minutes in relation to that.

THE PRESIDENT: You have it, of course, yes.

MR GILL: My Lords, this, we say, is a red herring in this case. This case is not about flexible constitution at all. It has nothing to do with it. This is about a very clear constitutional point which is the bedrock of our constitution. We do not need to struggle to make the constitution flexible in order to give effect and meaning to that fundamental principle that Mr Gordon and Ms Mountfield and others have talked about.

The flexible constitution point, and the only authority cited in support of this is the Robinson point, was being used by Lord Bingham in a certain way only and we have set this out, if I just skip a bit, on page 11 of the speaking note, at letter J:

"The appellant's submission is built on the idea of

a flexible constitution, which is derived from Lord Bingham's very limited use of that concept in Robinson. However, Lord Bingham was only able to refer to the need to adopt flexibility because of the flexibility which he derived from other statutory sections. Robinson is therefore a traditional exercise in construction of a statute, guided by the need to make the statute work in a flexible constitution."

But the appellant seems to be asking the court to go way beyond this, and to drag out of the 2015 Act, when he accepts the language simply is not there at all, but to drag out of the 2015 Act, in combination with some other things which are ministerial statements, some indication that Parliament must have intended to cede its control over this. This is set out in paragraph 25. 25 and 26. But -- okay.

At 25 it says for the purposes -- the appellant's submission really is this. For the purposes of interpreting legislation in order to decide whether the executive has been given a prerogative power, such that this exercise will nullify a large body of laws given by Parliament of our fundamental human rights and freedoms, including exposing people to criminal liability, he says the court is entitled to have regard to (1) what the 2015 Act does not say, as opposed to normal principles

of construction of language; (2) to couple that with the appellant's asserted interpretation of a background context, and in particular with statements made by ministers that it would be their intention to act in accordance with the outcome of the referendum, despite other statements to the contrary. (c) to infer therefrom by using this notion of a flexible constitution, and that is all it is, that the Parliament must have intended to confer upon the executive the power to give the Article 50(2) notification, simply on the strength of a vote if it was to leave the EU.

This is a novel and far-reaching proposition, indeed, it is outlandish and seeks to avoid the principle of legality; avoid the words of the 2015 Act; seeks to read in extra words which are simply not there; completely defeats the Hoffmann principle in Simms; and would require, if Mr Eadie is right, actually, and this is bottom of page 9, actually look at a lot of other things like evidence; what did people mean when they said what they did in such and such statement and so on? What did Parliament actually mean? It is just a complete nonsense when one gets into how you are actually about to deal with it.

As to Parliament standing up for -- this is what I will finish on -- as to Parliament standing up for

itself, why should Parliament have to say anything? Why should it have to react to what could be politically mischievous conduct -- usurping the executive? Why should Parliament and the judiciary not assume that the executive and the people of this country know the law? Why should it be assumed against Parliament, and against almost half of those who voted in the referendum, and perhaps all of those who did not, that Parliament understood and agreed to the proposition that by enacting 2015 Act in the terms that it did, it was in fact ceding the legal question, the legal decision? Why should that be assumed?

My Lords, my Lady, the other points are simply there set out in the rest of that paragraph and we say in paragraph 27, whilst I accept Lord Reed's point that the notion of a flexible constitution can be useful, this case is about something far, far more fundamental than that. The court may be facing a certain amount of pressure, it is a 11-bench court; this is no time to turn a flexible constitution into a slippery one and let go of its bedrock fundamentals.

My Lord, those are my submissions.

THE PRESIDENT: Thank you very much indeed, Mr Gill.

Well, we have reached just after 1.00. We will resume again at 2.00 and we will be hearing from

Mr Green then, I think. Thank you very much. Court is now adjourned.

(1.05 pm)

(The Luncheon Adjournment)

(2.00 pm)

THE PRESIDENT: Final shake of the kaleidoscope of the front bench. Mr Green.

Submissions by MR GREEN

MR GREEN: I am most grateful, my Lord. My Lady, my Lords. I appear as an intervener, on behalf of the Expat Interveners who are distinctly affected by the removal or the prospect of removal of the rights that will be lost as a result of the triggering of Article 50, rights which Parliament is not able to replicate for them beyond these shores.

In the time I have available, I shall not trespass upon the submissions already made and gratefully adopt those of my learned friends Lord Pannick, Mr Chambers and Ms Mountfield and Mr Gill, and I am rather hoping, my Lords, my Lady, that those submissions that I do not manage to develop fully may develop rather better in the minds of the court than perhaps if I develop them myself.

Briefly the key issue on which I wish to focus is the anterior question identified by Lord Kerr and

mentioned indeed by Lord Sumption on the first day, as to whether there was ever any relevant prerogative; and to answer that question by relying, of course, on the principles advanced by Mr Chambers and Lord Pannick and my learned friends, but also specifically by reference to a facet of the 1972 Act upon which attention has not yet fully focused, and that is the conferral of legislative power on the EU institutions. Because of course it is right that the 1972 Act invested rights or conferred rights on individuals and obligations and so forth domestically; but it is also true, and, we respectfully submit, vitally important to a proper understanding of whether there was a prerogative at all; and a proper understanding of the legislation that follows which I will come to, to identify structurally and constitutionally what was happening in 1972 when the legislative competence was conferred on the EU institutions.

In summary our submissions are these.

First of all, Parliament gave its consent to EU institutions with the participation of representatives of member states in accordance with the provisions of the treaties listed in the 1972 Act. It gave its consent to the making of law which would have direct effect, not in the technical term but in the real term,

within the United Kingdom.
It gave statutory authorisation to the Government of the day to participate in that process. Indeed it went further; it gave statutory authorisation to representatives of governments of other countries potentially to outvote the United Kingdom and legislate.
It is through the prism of that analysis that we respectfully make one short but, we say, important submission, and that is that the upward-facing facet, if I can call it that, of conferring legislative competence on the EU institutions, reflected a fundamental constitutional change.
It can be summarised thus: the legislative power which Parliament was conferring on the EU institutions was, prior to the Act, only Parliament's to confer, because it was only Parliament's to exercise. We respectfully say that, because it was only Parliament's to exercise and only Parliament's to confer upon those institutions, it is only Parliament's to take back. We respectfully say that that analysis is dispositive of the appeal and we respectfully invite the court so to find.
That analysis is also important when one comes to consider the subsequent legislation which your Lordships and my Lady have already heard submissions on, namely

the 2008 and 2011 acts, because those acts, properly understood through the prism of conferral of legislative competence and the voluntary limitation of sovereignty of the United Kingdom in that respect, those acts are in fact, to my Lord, Lord Carnwath's points, in pari materia in the sense that, together with this aspect of the 1972 Act, the conferral of legislative competence, those acts regulate the legislative competence so conferred.
My Lords, it is quite important to distinguish between different aspects of that legislative competence and we respectfully say that the appellant starts in the wrong position. Because the acts, because the 1972 Act, specifically lists the treaties to which effect is given in section 1(2), and because primary legislation therefore needs to be amended to add a new treaty to that list, from the very beginning, Parliament had control over whether any additional treaties could be included in the scheme which it created through the 1972 Act.
What is salient about the 2008 and 2011 acts is that Parliament then seeks to control not the addition of treaties but the way in which the legislative mechanisms which it has itself authorised, operate internally within the European Union institutions; and through that

prism a picture immediately emerges which we say, with respect to the appellant, is not just inconsistent but irreconcilable with the appellant's overarching case.
The reason for that is this: that we see a picture in the 2008 Act and the 2011 Act, of increasing control where the legislative facility internal to the EU institutions is increased. Therefore Parliament is seeking to control that which might only otherwise have happened by the addition of a new treaty by primary legislation in section 1.
That analysis is quite important because if I can use possibly slightly evocative phrases, the section 1 listing of the treaties, and I respectfully adopt my learned friend Ms Mountfield's submission on this, the words "time to time" that we find in section 2, refers to time to time, the rights derive from the treaties which Parliament has listed in the 1972 act. Section 1 operates as, if I may say so, the castle walls, so that no new treaty may be admitted other than with the assent of Parliament.
Then what the 2008 and 2011 acts are seeking to control is the operation of, without any disrespect to the EU institutions, what some people might view as the Trojan horse provisions, which are quite different in nature. They are provisions where internally treaty

changes and competences may be taken by the Community effectively for itself. The procedures are varied, but that is the essence of what those two acts were directed to achieve.
My Lords, it is significant that the ordinary revision procedure which is one of the procedures to which those acts relate, specifically contemplates the increase or reduction of competences which your Lordships will find at page MS 222, core authorities at the very front.
I think those provisions are actually in there because of Article 50 being rather important in this case, but we helpfully have Article 48 beginning at 221 and at the top of 222 --
LORD SUMPTION: Which statute are you referring to?
MR GREEN: I am so sorry, my Lord, this the treaty of the European Union. It is the very first tab in core authorities volume 1; at the very top it has the number 8 on it.
LORD SUMPTION: I see.
MR GREEN: At the top of page 222, the court will see there the provision made by Article 48 for the ordinary revision procedure, a procedure which is not just increasing but also reducing the competences conferred on the union in the treaties.

LORD SUMPTION: The ordinary revision procedure was not new with Lisbon.
MR GREEN: My Lord, no.
LORD SUMPTION: That was the old tradition of inter-governmental conferences and the new treaty. It is the simplified revision procedure that is new.
MR GREEN: My Lord, yes and the point I am seeking to make is not the novelty of the ordinary procedure, but the increasing parliamentary control over participation in the legislative processes of the Union in relation to the use of these various procedures.

So that the underlying submission is simply this, that not only do we respectfully say that the constitutional architecture of the conferral of legislative power that belongs to Parliament upon the EU institutions, not only do we say that that conferral is a very important facet to add to my Lord, Lord Kerr's observation about the point being advanced by Lord Pannick, that investing rights on individuals might be an anterior point by which there could be said to be no relevant prerogative; we say the conferral point puts that almost even more strongly because it was only ever Parliament's power to exercise, only ever Parliament's power to confer and only ever Parliament's power to take back.

But we then go further and say that the direction of travel of the 2008 and 2011 acts, which insofar as they regulate the legislative power of -- the exercise of the legislative power conferred, those acts themselves are swimming in a different direction to that contended for by the appellant.

My Lords, my Lady, we also respectfully say, and I adopt my learned friend Ms Mountfield's submission, that there was a consistent understanding, insofar as one can be discerned, from the courts that it would be Parliament that would decide whether to leave the European Union, as it has now become. In that respect we rely on Blackburn which predates the 1972 Act, because it is in 1971, all the way through to Shindler which postdates the 2015 Referendum Act.

The court will already have identified the materials to which my learned friends Lord Pannick and Mr Chambers have already referred in terms of the green paper and the command paper.

So there was a consistent understanding in the background that it would be Parliament that would leave the European Union. So as to my Lord, Lord Mance's questions as to whether the 1972 Act was neutral or perhaps agnostic as to the United Kingdom joining the European Union, as it has now become -- the European

Community as it was then -- the answer, when viewed through the prism of the conferral of legislative power of Parliament, can only be: no, it was not neutral, at all.

The conferral of the sovereign legislative power of Parliament on the EU institutions speaks only to the Act being consistent and only consistent with the United Kingdom joining the European Community.

My Lords, as to the 2015 Act and its significance, my Lady, Lady Hale has already identified, of course, that the Referendum Act did have legal consequences in that a referendum was held and the political significance of that has already been identified. But we would respectfully say that at the moment that Parliament exercises the legislative choices which we say properly belong to Parliament as to the consequence of the referendum, Parliament might do that a number of different ways. Parliament might mandate the Government to trigger Article 50, or it might grant a power to the Government to trigger Article 50.

If it were to grant a power, and I think this maybe speaks to the analysis that my Lords, Lord Reed and Lord Carnwath were canvassing, if it were to grant the Government a power, there is no doubt whatsoever that the referendum undertaken under the 2015 Act would be of

very considerable significance in the exercise of the Government's power and the lawfulness of the exercise of that power in deciding, if it did, to notify under Article 50.

But that is a very different matter to the question which is before this court, which is whether or not there is a prerogative power for the Government to notify under Article 50, and that is not the question asked by the 2015 referendum, and it is not the question upon which the people have spoken.

The question before this court is a legal question, and we respectfully say that because of the nature of the 1972 Act in doing everything that has already been described in the field of rights, which are extremely important, but also conferring legislative power on the European Union institutions as it did, for those reasons, the only answer to the question of whether there was any relevant prerogative in 1972 can be that there was none.

This point was squarely before the divisional court, and the sheet of references refers to the relevant part in core volume tab 8 where that point was taken.

We respectfully invite this court to understand the divisional court's treatment of its general appraisal of the normal rules that apply when the Government acts on

the international treaty plane, in the exercise of the prerogative powers, as setting the background from which it then clearly distinguished this case, for the reasons that my learned friend and I have hopefully satisfactorily identified as completely distinct. My Lords --
LORD CLARKE: What was the role of the 2008 Act in all this?
MR GREEN: My Lord, the 2008 Act brought in, your Lordships will see it in core volume 1 at tab 4, and your Lordship, this goes to the Trojan horse point, if I can put it in those terms, at page 119, at section 5, "Amendment of founding treaties":
"A treaty which satisfies the following conditions may not be ratified unless approved by act of Parliament. Condition one is that the treaty amends ... [it lists the treaties its] condition two is that the treaty results from the application of article 48(2) to (5) of the treaty on European Union."
LORD SUMPTION: The Trojan horse provision is section 6, not section 5. Section 5 describes what had always happened when a treaty was amended and replaced by a new one.
MR GREEN: My Lord, I was just coming to section 6. Your Lordship is quite right, that the act or control of participation in the process is found in section 6, which refers specifically to the simplified revision

procedure at paragraph A and paragraph B, article 48(7) of the treaty where the voting basis for the procedures can be changed.
LORD MANCE: Why was section 5 necessary?
MR GREEN: Well, my Lords, I think the answer to that is to put beyond doubt any situation in which a -- to be simply consistent with the provisions in the 1972 Act whereby the Parliament required any new treaty to be approved by an Act of Parliament, and on that same footing, carrying that through into the 2008 act, it would equally require treaties where they amended those treaties to be approved by an Act of Parliament, so my Lord, Lord Sumption is right.
LORD SUMPTION: That would have been the effect, wouldn't it, of the 1972 Act anyway, because unless the 1972 Act was amended by legislation, the new treaty wouldn't be one of the treaties for the purposes of the 1972 Act.
MR GREEN: My Lord, indeed that is right. So we respectfully say that the -- it is effectively codifying going forward in a picture of increasing control.
LORD CLARKE: But it sort of clarifies section 2.
MR GREEN: It effectively clarifies it for the amendment purpose rather than the mere listing.
LORD SUMPTION: I assume what they were concerned about is that if they only regulated the Trojan horse provisions

in section 6, somebody might submit that by implication they had decided that treaties, new treaties didn't need it.
MR GREEN: My Lord I think it appears to be an attempt to codify both together for that reason.
LORD MANCE: Section 5 is dealing with the ordinary revision procedure, because it refers in section 5(3) to article 48, subparagraphs (2) to (5); that was the ordinary revision procedure.
MR GREEN: Indeed.
LORD MANCE: Was the ordinary revision procedure in the previous treaties?
MR GREEN: My Lord, effectively it inherited -- it was originally, I think, either the cooperation procedure or the -- I think it was originally called the cooperation procedure and that developed and became the ordinary procedure.
LORD MANCE: I mean, the ordinary revision procedure may have been seen as a further type of Trojan horse, especially, I don't know if one compared the provisions of the previous procedure with this; this might be of a different nature or it may be that -- anyway, it would be interesting to chase that back a little, just to see why, but you can't do it now, probably.
MR GREEN: My Lord, no. If it would be helpful for us to do

a quick diagrammatic note --
LORD MANCE: It would be interesting to see why they suddenly focused on this procedure if it simply replicated the previous one.
MR GREEN: I think the answer may be the codification point that Lord Sumption identified, which is if you purport to start fine-tuning controls in one respect, you do not want it to be said that you have implicitly permitted other variations which are not so Trojan, rather more fundamental.
LORD CARNWATH: Indeed, exactly what is being said in relation to Article 50, you are codifying these things but then (Inaudible) Article 50, therefore you don't want to control that?
MR GREEN: Sorry, my Lord?
LORD CARNWATH: The argument you are putting is indeed the argument that has been put in relation to Article 50, because it is said, rightly or wrongly, that this Act clearly indicated the things that they wanted to control but they didn't indicate an intention to control Article 50. Arguably it is much more fundamental.
MR GREEN: My Lord, yes, but if one starts from the position that there has always been a prerogative to get rid of domestic rights and to take back legislative competence that Parliament has conferred on another institution, if

you start from that premise, which we respectfully say is utterly unrealistic, then you do get to that point, but we respectfully start from a different premise, that there has never been such a prerogative power.

LORD CARNWATH: That has been what we have been talking about for the last three days.

MR GREEN: My Lord, that is in a sense why I respectfully focus on the 1972 Act and its significance, in terms of constitutional structural change, what that Act effected.

THE PRESIDENT: Yes.

MR GREEN: My Lords, there were many other things to say. I simply mention in passing the final point on the 2011 Act which is section 18, which insofar as it assists, suggests at least that the basis for the rights to remain effective in domestic law was the 1972 Act itself; and we respectfully say it is striking it doesn't say: so long as the treaties shall remain in force on the international plane; or wording to the contrary.

So we respectfully say that there is an utterly consistent picture from Blackburn through the parliamentary materials that my learned friends have identified, all the way through to Shindler, and with section 18 appearing in 2011, that the premise of the

statutory scheme is that only Parliament may authorise notification under Article 50.

My Lords, my Lady, unless I can help the court further, those are our submissions.

THE PRESIDENT: Thank you very much, Mr Green. Thank you.

I get the impression, Advocate General, that you go first, is that right?

Submissions in reply by THE ADVOCATE GENERAL FOR SCOTLAND

THE ADVOCATE GENERAL FOR SCOTLAND: Indeed, my Lady and my Lords.

If I am short, it is not because I wish to appear in any way dismissive of the submissions by my learned friend the Lord Advocate, by my learned friend Mr Gordon, and by my learned friends for the Northern Ireland Bar, Mr Scoffield and Mr Lavery; it is because I stand between you and my learned friend, Mr Eadie.

My Lords, could I shortly address one or two issues that have been raised with regard to the devolved legislation. First of all, with regard to Northern Ireland, the Government is fully and obviously firmly committed to the Belfast agreement and the institutions that are thereby established. We have sought to explain in detail in our printed case why the trigger of Article 50 and the United Kingdom's exit from the EU

will not undermine any of that. We have already responded to the applicant's written arguments in that regard.

My learned friend Mr Scoffield made quite a lot, as anticipated, of the North South Ministerial Council and implementation bodies, and in particular the special EU programmes body. In order to respond to that, my learned friends, Dr McGleenan and Paul McLaughlin of the Northern Ireland Bar have prepared a short note as I anticipated when I originally addressed the court, and I wonder if your Lordships have a copy of that. I don't propose at this stage to take your Lordships through it in detail.

THE PRESIDENT: Right.

THE ADVOCATE GENERAL FOR SCOTLAND: It is perhaps sufficient for me to say that clearly these bodies and in particular the special EU programmes body do not rely directly upon the terms of the Northern Ireland Act 1998 and indeed that particular body continued in existence after 2006 because of the coming into existence of an international agreement of 25 July 2016 between the British and Irish governments.

THE PRESIDENT: Yes.

THE ADVOCATE GENERAL FOR SCOTLAND: So I commend the note to your Lordships but as I say, I would not propose to go

through it in any detail.

THE PRESIDENT: We will read it, as we will all the written material that has been handed up to us. Thank you.

THE ADVOCATE GENERAL FOR SCOTLAND: One further point to observe in this context is that, and this applies to all of the devolved legislation, it assumes but does not require membership of the European Union.

Can I turn briefly to some of the points made by my learned friend Mr Gordon on behalf of the Counsel General for Wales and I would make two short points. If we are correct about the 1972 Act, then it doesn't appear in my submission necessary for us to go to the devolved legislation; if we are wrong about the 1972 Act, then it doesn't appear to me to be necessary for us to go to the devolved legislation.

On one further point, my Lords, my learned friend --

LORD CLARKE: That would be because you have either lost or won, all down the line.

THE ADVOCATE GENERAL FOR SCOTLAND: Indeed so, and it is reflected in the terms in which the devolved legislation addresses the matter of EU competences.

LORD HODGE: In short you say there is one trench, and if that trench is stormed, there is not a second trench.

THE PRESIDENT: On either side.

THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely.

LORD REED: There is a point that would then arise that the Lord Advocate raised, in relation to the Sewel convention.
THE ADVOCATE GENERAL FOR SCOTLAND: That is what I am going to come on to, my Lord.
LORD REED: And indeed his opposite numbers in Wales and Northern Ireland.
THE ADVOCATE GENERAL FOR SCOTLAND: That is where I am going. There is one point I was going to make before I come to on the Sewel convention, because that is what I believe I should address at this stage, and that is my learned friend Mr Gordon's suggestion that somehow it was improper for the prerogative to be employed in circumstances where it would elide the application of the Sewel convention with regard to legislation that impacted upon the devolved institutions and the devolved areas of the United Kingdom.
My Lords, in my respectful submission, that proposition doesn't stand up to very much in the way of scrutiny. Whenever we agree to the making of a further regulation with direct effect, under European law, we do so in exercise of the prerogative and that regulation takes direct effect in all of the devolved areas of the United Kingdom, as well as in England.
Furthermore, I would just notice that, for example,

in regard to the Scotland Act, section 57 expressly provides that in the matter of making regulations under section 2(2) of the European Communities Act 1972, that function is to be available to the ministers of the Crown in relation to any matter, and shall continue to be exercisable by them as regards Scotland for those purposes.
So there are a number of instances in which either by exercise of the prerogative or the exercise of the power under section 2(2) of the 1972 Act, that changes can be made in the competence of the devolved legislatures, and changes can be made in the law, the rights and the obligations arising in those devolved areas.
Can I turn then to the Sewel convention and the first point that I would seek to make --
LORD SUMPTION: Which sections of the Scotland Act were you referring to?
THE ADVOCATE GENERAL FOR SCOTLAND: Section 57, my Lord.
LORD SUMPTION: Thank you.
LORD MANCE: So any matters including devolved matters?
THE ADVOCATE GENERAL FOR SCOTLAND: Exactly.
LORD SUMPTION: Presumably there is no other basis on which you could do it, since regardless of the outcome of any consultation or co-legislative procedure, you would

still have to give effect to EU law? But does that apply if you are withdrawing in the same way?
THE ADVOCATE GENERAL FOR SCOTLAND: In my respectful submission, it would apply in the same way, but that goes back to an analysis of the 1972 Act which we have already heard about. I don't want to intrude on the territory of my learned friend Mr Eadie. I am quite happy to do so but ...
LORD MANCE: This is dealt with in practice by consultation, isn't it; the devolved administrations are asked to make representations on the subject --
THE ADVOCATE GENERAL FOR SCOTLAND: It is interesting that my Lord should put it in that way, because obviously -- my learned friend Mr Gordon mentioned it, there is dialogue between the various administrations, not a convention. This is where I come to an important point about the way in which my learned friend the Lord Advocate seeks to present his case, because he tries to draw together not just issues that might touch upon a convention, but to incorporate within that simple matters of dialogue or practice that have gone on for a number of years with regard to relations between Westminster and the devolved administrations.
It comes up because of the way in which matters are expressed, in particular in the Lord Advocate's written

case. In our printed case, and in the printed case for the Attorney General for Northern Ireland and in the printed case of the Counsel General for Wales, reference is made to the Sewel convention. We can understand what the content of the Sewel convention is. It finds its origins in the statement by Lord Sewel during the passage of the Scotland Act 1998; the same wording appears in the Smith Commission report and the same wording is then to appear and does appear in section 28(8) of the Scotland Act as amended by section 2 of the Scotland Act 2016.
However, my learned friend the Lord Advocate refers to what he terms the legislative consent convention, and in my respectful submission, there is no such thing. Now, this is not a point of pedantry. What my learned friend the Lord Advocate seeks to do is to subsume within his legislative consent convention those matters that are dealt with, for example, by the memorandum of understanding between the governments, and those matters that are dealt with in the devolved guidance notes, prepared by officials for the relationship and control of the relationship between Westminster and the devolved administrations. So in respect of Scotland it is DGN 10, in respect of Wales it is DGN 17, in respect of Northern Ireland it is DGN 8.

Now, I would just notice, and this is in the papers, that during the passage of the Scotland Bill 2016, various attempts were made to amend clause 2 in order to incorporate within what was then the Sewel convention as properly understood, references in addition to the contents of DGN 10, DGN 8, DGN 17 in order to expand the convention that was then going to be expressed in statutory forms.

None of those amendments proceeded, and one of the points made in response to these attempts at amendment was that the practice that was followed between officials of the respective administrations was something that could change from time to time and should not be set in any form of statute. Whereas the convention itself could be and was to be.

There was a further aspect to that, which was that so far as these considerations were concerned, the standing orders which dealt with what are termed legislative consent memoranda and legislative consent motions were the standing orders of the devolved administrations. They had nothing to do with Parliament at Westminster.

These were mechanisms that the devolved administrations had developed in order to deal with the application and operation of relationships between the

devolved administrations and Westminster.

And yet, and I invite you to go back to the Lord Advocate's case, because at one point he suggests that his legislative consent convention is the Sewel convention, but I invite you to go back to his written case, where it becomes increasingly apparent that he has brought into that new convention, if I can call it that, a great deal of procedural detail and practice that is actually contained within the DGN, the devolved guidance notes.

Indeed, in response to a question yesterday from my Lord, Lord Reed, when asked about the language of section 28(8) of the Scotland Act 2016, my learned friend the Lord Advocate answered, and I quote:

"... it points back to language which appears in the memorandum of understanding and which has been articulated in practice."

With respect, it does not. It refers directly back to the statement made by Lord Sewel which was repeated in the Smith Commission report and incorporated in section 28(8) of the Scotland Act.

Once we understand that, we can put in context what is actually meant by the convention and its operation. With regard to the position of Wales and Northern Ireland, of course there is no statutory expression of

the Sewel convention, although I notice that my learned friend the Lord Advocate said this morning that even without section 28(8), his position would remain the same.

I would observe, and reference was made to this in our written case, that if one wants guidance, as regards such a convention, one can look perhaps no further than the Privy Council case of Madzimbamuto that I referred to in my opening submissions to the court, and in particular the observations of Lord Reed with regard to the relevance and application of such a convention.

Now, I accept that in one sense section 28(8) of the Scotland Act does alter the position of Scotland but not, I would suggest, very much. My learned friend the Lord Advocate says there must be some legal content to the convention, although it is not clear how this could play a legal role. I would respectfully observe that, when my Lord, Lord Hodge raised the point about section 28(8) and its incorporation into statute, he observed that it may have been there to preserve what had been a convention, so that if it was to be intruded upon, it would have to be intruded upon by primary legislation. In other words it was to be seen as fixed.

That is why it was restricted to the very particular terms of the Sewel convention itself and not extended to

embrace practice, practice notes, or dialogue between the respective administrations. Indeed, there are precedents for that. The Ponsonby convention, for example, was finally, after many, many years, incorporated in statutory form, I would infer in order that it could be seen to be fixed and only intruded upon by primary legislation on the part of Parliament.

Just because it is incorporated in statutory terms and in order to be preserved in present features does not mean the convention is justiciable, and I would emphasise a number of points which underline this.

First of all, the language of section 28(8) itself, the Sewel convention, is the language of political judgment. I don't seek to expand upon that at this time, and I did make submissions on this point before.

Section 28(7) --

LORD KERR: It is not so much political judgment as political undertaking, is it not?

THE ADVOCATE GENERAL FOR SCOTLAND: Judgment, my Lord, in my respectful submission; remember, this is a matter for Parliament and Parliament's judgment, in my submission.

LORD KERR: Does it not convey an undertaking?

THE ADVOCATE GENERAL FOR SCOTLAND: Not on the face of it, my Lord. It is, as I expressed it before, a self-denying ordinance expressed by a sovereign

Parliament, albeit in qualified terms.
LORD KERR: That is interesting. So it is not giving any undertaking at all as to how Parliament will address the question of whether it should legislate?
THE ADVOCATE GENERAL FOR SCOTLAND: I would simply express it as a self-denying ordinance expressed in qualified terms, my Lord.
LORD KERR: Could I ask you also, you say it doesn't reflect the memorandum of understanding; if that is right, what is the significance of it not reflecting the memorandum of understanding?
THE ADVOCATE GENERAL FOR SCOTLAND: Merely this, my Lord. The memorandum of understanding, like the DGNs 8, 10 and 17, fix the practice that is going to be followed by the respect governments in order to maintain dialogue, in order to maintain communication, and in order to maintain coherence in circumstances where there are two sources of legislation for particular parts of the United Kingdom. But more particularly, and more narrowly, the Sewel convention is an expression of what Parliament will do. It is an expression of its self-denying ordinance.
One has to bear in mind it follows section 28(7), which reiterates the absolute sovereignty of the Westminster Parliament. It is then followed by the

words "but it is recognised", and I simply pose rhetorically the question, recognised by whom? It is recognised by the sovereign Parliament.
That is not consistent with a justiciable matter.
But perhaps there is a more significant point to make, and it was one brought out by my Lord, Lord Mance, which is there is on the face of it no possible remedy if the sovereign Parliament does not adhere to the Sewel convention, and it might appear to be an unduly narrow and civilian approach to matters, but if there a right there is a remedy. If there is no remedy, is there a right?
In my respectful submission, even as you begin to pursue the idea of a remedy, you come up against Article 9 of the Bill of Rights and against the Claim of Right, and one cannot go past that, it is perfectly clear. So in light of this, while Article 50 may refer to constitutional requirements, it is quite impossible to see how the Sewel convention can constitute one of those constitutional requirements.
At one point my learned friend the Lord Advocate said: well, I will take any proposed bill in its narrowest terms, and I will then test matters by reference to that.
Well, let us suppose that there is a bill to

authorise the giving of notice under Article 50 to the EU. That is not on any view a bill with regard to devolved matters. So applying the Lord Advocate's own test, it is really quite impossible to see how the Sewel convention can be elevated into a constitutional requirement for the purposes of Article 50.
LORD HODGE: Can I clarify one matter, please, Advocate General. In section 28(8), after the introductory words, "it is recognised that", everything that is then said is almost verbatim the words used by Lord Sewel. Is it the Government's position, the UK Government's position, that all of those words, including the words "with regard to devolved matters" are non-justiciable; is that your position?
THE ADVOCATE GENERAL FOR SCOTLAND: Yes.
LORD HODGE: It is, thank you.
LORD CARNWATH: The assumption presumably in a case where Westminster does legislate for a devolved matter is that it is legislating for a matter which would be within the competence of the devolved legislature. On no view, it seemed to me, at the moment, could withdrawal from the EU, however many effects it has on other devolved matters, itself constitute a devolved matter in respect of which there is a parallel right to legislate in both legislatures.

THE ADVOCATE GENERAL FOR SCOTLAND: Indeed so, my Lord. Indeed.
Relations with the EU are, of course, expressly reserved from the Scottish Parliament.
LORD SUMPTION: That seems to me to be the main difficulty about the notion that because withdrawal has knock-on effects on other matters that are devolved, it must be -- entitled to special treatment.
THE ADVOCATE GENERAL FOR SCOTLAND: I concur on that, my Lord, and it applies in respect of Northern Ireland, albeit the structure is in respect of the excepted matters, the result is the same and it also applies, it would apply in respect of the Government of Wales Act as well. So one arrives at the same conclusion, that this is not a matter for the devolved administrations in that context. I am not seeking to equiparate the wording in section 28(8) with the wording of section 29, and the question of what it relates to.
In my respectful submission the wording is quite distinct because of the origins of the Sewel convention dictating the terms of section 28(8) of the Scotland Act.
It underlines that what was introduced was a matter of political judgment and no more than that.
LORD MANCE: You have really got to read (8) with (7),

haven't you.
THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely, my Lord.
LORD MANCE: When you look at (7), any argument that (8) is legally enforceable amounts to saying that (7) doesn't mean what it says.
THE ADVOCATE GENERAL FOR SCOTLAND: There is then a question as to whether your Lordships are even required to answer --
THE PRESIDENT: It could be that (8) is carved out of (7), couldn't it? One reading.
LADY HALE: But could read "excepted".
THE PRESIDENT: But except -- exactly.
THE ADVOCATE GENERAL FOR SCOTLAND: My Lord, if one reads them together, with respect, it is quite apparent, as I indicated before, we are dealing with the absolute sovereignty of the Westminster Parliament --
THE PRESIDENT: -- also Article 9 of the Bill of Rights and the equivalent.
THE ADVOCATE GENERAL FOR SCOTLAND: And the expression of a self-denying ordinance that keeps us well away from Article 9 of the Bill of Rights.
THE PRESIDENT: It is somewhat uncomfortable to find it in a statute at all if you are right.
THE ADVOCATE GENERAL FOR SCOTLAND: There are occasions where one finds expressed in a statute something that is

not justiciable but is declaratory essentially.
THE PRESIDENT: Yes, slightly odd use of a statute.
THE ADVOCATE GENERAL FOR SCOTLAND: It is, my Lord, but then it is worthwhile just pausing to notice the origins of section 28(8). The Smith Commission was a political commission between all the political parties in Scotland. Lord Smith produced a report and the Government undertook to implement the recommendations in the report in the Scotland Bill 2016, and it did so virtually line by line. So it was the expression of a political agreement within statutory form, and that is why I would respectfully suggest it is rather unusual in that context.
Your Lordships actually have various extracts from Hansard concerning the debates on clause 2. I am not going to go to them, I still have memories of them, but it was perfectly apparent why clause 2 was going to be incorporated.
THE PRESIDENT: We have the point.
LORD MANCE: Is the key one the one which is actually set out in the footnote in Halsbury, Lord Dunlop, parliamentary under-secretary of state, saying that it is not justiciable and so on, yes.
THE ADVOCATE GENERAL FOR SCOTLAND: It was said on a number of occasions, my Lord.

LORD REED: If I remember correctly, the Government in fact undertook to implement the recommendations before the recommendations had been made, with the consequence that it was committed to implementing even a purely political recommendation if such a recommendation were made.
THE ADVOCATE GENERAL FOR SCOTLAND: Absolutely, and one of the points made during the course of the Scotland Bill 2016 was that we were attempting to put into statutory form material that had not been prepared by lawyers, but politicians. That posed a challenge, not only in respect of clause 2, but in respect of certain other aspects of the 2016 bill.
My Lords --
THE PRESIDENT: I think we should move on, it is my fault, I started it.
THE ADVOCATE GENERAL FOR SCOTLAND: Indeed and I am conscious of time, so I am just going to sum up in this way, my Lords, that it is not necessary in my submission for the courts to answer the second devolution issue that has been brought from Northern Ireland. In my respectful submission the court may be entitled to hold that what the Lord Advocate describes as the legislative consent convention is not a constitutional requirement in terms of Article 50.
Unless I can assist the court further, I would rest

my submissions there. I am obliged, my Lords.
THE PRESIDENT: Thank you, Advocate General, thank you. Mr Eadie.
Submissions in reply by MR EADIE
MR EADIE: My Lords, my Lady, really the final lap this time. You have had what I am sure we all hope are useful submissions from all the parties in these appeals, including, it might be thought, particularly useful submissions from Mr Gordon this morning on child rearing, distinguished, it might be thought, by their overstatement of parental power, but I will be short as I possibly can.
Can I start with the basic case, and it is as well, we submit, to be clear about the nature of the issue and what it is that our case does and does not assert or entail.
We do not assert, and our case does not entail, a power to repeal or amend or in any other way to alter the Dangerous Dogs Act. By the Dangerous Dogs Act, I mean any act equivalent to the Dangerous Dogs Act. We do not assert a general power to alter the law of the land or to alter common law rights by exercise of the prerogative.
We do assert a specific power to notify under Article 50(2), and so to start the process of

withdrawal, notwithstanding that that will result in changes to domestic law, which was introduced to implement those treaties.

It is plain, we submit, that Parliament can intervene -- I use the word "intervene" deliberately because that was the word used in the JH Rayner case by Lord Oliver -- in a particular context to set up domestic law, and to cater for its alteration as it sees fit, and no one denies its authority, its sovereignty, if you will, to do that.

It can do that by express provision, of course. Its legislation and the techniques it uses, are, it is trite, to be considered in their proper constitutional context, including, we submit, a clear understanding that under our constitution, there are other sources of power. Other organs of the state that share the responsibility of Government. That is why it is often highly significant to consider what powers Parliament in its legislation has left in place under that regime, under that constitution.

What that introductory section leads to and what it indicates, we submit, is that the true question in this case is as to the nature of the parliamentary intervention that there has in fact been in this case. By this case, I mean our own very particular and very

special legislative context.

What does that parliamentary scheme, properly viewed and considered, tell the court about the single issue at the heart of this appeal? Namely, has Parliament decided that prerogative power cannot be used to give Article 50 notice, or has Parliament decided that it can be used to give Article 50 notice?

LORD SUMPTION: Or has Parliament decided neither of those things, but left it to the ordinary law governing the exercise of the royal prerogative.

MR EADIE: My Lord, that is why I started precisely where I did, because in my submission, once you recognise that there are different sources of power and that Parliament can intervene in that way, and we are not making the submission that has been attributed to us, that is precisely why I set up the question in the manner that I did, making it in effect a question about what Parliament has decided to do.

Now, if Parliament has decided, and I am going to take you back to some of the legislation, to set up an intricate regime in a variety of different ways, it might be thought to be tolerably surprising if the answer to this appeal is the one that my Lord poses, which is in effect the a priori point that has been taken against me again this morning, in the light of the

interventions that my Lord has made in the course of this appeal.

LORD KERR: But my Lord's point to you surely is that underpinning your argument is that Parliament must have decided one way or the other.

MR EADIE: My Lord, Parliament does not have to decide. The question for the court is whether it has in fact done so, having regard to the nature of the legislative regime which is in place in the particular context.

LORD KERR: What if it has not decided? What then?

MR EADIE: My Lord, if it has not decided, then you are thrown back on to the nature of the prerogative power, of course.

LORD SUMPTION: Do you accept that if Parliament has not decided one way or the other what the answer to that question is, then having regard to the way you introduced your submissions, you lose?

MR EADIE: My Lord, if Parliament has not intervened in any way --

LORD SUMPTION: If Parliament has not decided implicitly or expressly whether an Article 50 notice can be given by ministerial authority, one way or the other, do you accept that that means you lose?

MR EADIE: If you ignore all the EU legislation, if you ignore CRAG, if you ignore all the rest of the

legislative regime, we do not assert a power to amend the Dangerous Dogs Act.

LORD SUMPTION: By the Dangerous Dogs Act, I take it you mean the European Communities Act.

MR EADIE: No -- because that drags back in the very legislation that your question sought to exclude.

THE PRESIDENT: I think what is being put to you, which you may say is a non-question, is if, when we look at the Act, we come to the conclusion that Parliament has not decided to exclude the royal prerogative or has decided to let it continue or apply, we cannot decide which, or Parliament has not gone either way, then what? Or do you say we have to interpret the Act one way or the other?

MR EADIE: My Lord, I do.

THE PRESIDENT: You say it is a non-question.

MR EADIE: Yes, that is the legislation that governs.

LORD MANCE: We are looking for hypothetical intention effectively, aren't we.

MR EADIE: You are.

LORD MANCE: I just want to ask one point, because I came across actually a textbook on European law written by the current President of the court and I notice actually in relation to the treaties before the treaty of Lisbon that he asserts, bluntly, that under European law there

was no right of withdrawal before Article 50 was introduced.

Now, of course, from our parliamentary, in our parliamentary system, we would say that you can always repeal the 1972 Act, but it just puts a slightly different complexion, if that was the attitude, on the position, the background to the 1972 Act, if it was recognised at that stage that -- I don't know whether it was, or whether --

MR EADIE: I think my answer to that is that that would open up an area which was controversial before the divisional court, which I don't much want to get back into --

LORD MANCE: On what basis is it common ground here that there could be withdrawal?

MR EADIE: The divisional court put it ultimately -- we put in a note on the Vienna convention on the law of treaties and how that might work and whether we could leave unilaterally. I think the way they left it was rather compromised by saying -- I put it wrongly. The way they left it in their judgment, I think, was a compromise solution, as it were, which was to acknowledge that we could have left at the very least by consent, and then have moved on, and therefore withdrawal was in the minds of those --

LORD MANCE: It is a bit difficult to say withdrawal was in

the minds -- if it could only be done by consent at that stage, I would have thought it was the last thing that was in your mind when you were getting married.

THE PRESIDENT: Speak for yourself.

MR EADIE: I am not going anywhere near that one.

I sincerely hope Mrs Eadie is not watching.

My Lord, I think that is the way the divisional court left it. It is a controversial issue, no doubt, as to whether or not withdrawal could have happened in another way.

LORD MANCE: In fact, Professor Lenaerts, or President Lenaerts, does consider the Vienna convention and he discounts it. He says it wouldn't -- but anyway I've got your position, you say at least by consent.

MR EADIE: At least by consent. If there needed to be a submission, our submission on the Vienna convention was that we could have done it unilaterally, and indeed Parliament was certainly contemplating it, it might be thought. That they were is illustrated by the fact that three years later, they were worrying about a referendum to come out.

LORD MANCE: That is presumably under a different change of government.

MR EADIE: It may be under a different change of government --

THE PRESIDENT: Anyway, it proceeded before the divisional court, and nobody is challenging it here, that the United Kingdom could have got out, albeit by agreement with the then other members of the Community.

MR EADIE: That was the way the divisional court left it, and the controversial issue is could we have done it another way.

THE PRESIDENT: Then you come back, in answer to Lord Sumption's point, you have to take the Act as you find it and come to a conclusion one way or the other.

MR EADIE: Exactly so, and you take the scheme of legislation. It is going to be very important how you approach the scheme of legislation, and I am going to come to that, but for the moment, and just on the basic approach, our submission is that Parliament can control Government's prerogative powers, it can decide what domestic legal effects should be attached to the exercise of those powers. Those two things are different and distinct.

In relation to the latter, in other words what legal effects should be attached to the exercise of the powers, and that that is for Parliament, it is evident, we submit, and no one has really quibbled with this, that parliamentary intervention, Lord Oliver's word again, can create the situation in which serious

domestic legal impacts, to put it neutrally, flow from Government acts on the international plane; and that those serious impacts, flowing back into domestic law as a result of Government action on the international plane, do not need, they never have, parliamentary intervention again, prior to them doing that.

So one can take examples which you are well familiar with now, you can take the Post Office v Estuary Radio case, the territorial waters was left by Parliament if you want to analyse it that way, in the hands of the Government. When those are extended, without prior parliamentary intervention, the nature and the scope of the criminal offence to which that Act gave rise, so a pretty extreme example, expanded.

You can take the Lord Haw-Haw example that Lord Millett gave in his article, and Lord Wilson put to me when I was opening the appeal, that isn't that different because the prosecution in that case was under the Treason Act.

True, of course, that is exactly the way the prosecution would have happened, but if Lord Haw-Haw had been broadcasting in 1938 a series of broadcasts that were adulatory of Adolf Hitler, he would have committed no treason and no criminal offence.

The reason his offence was committed was because in 1939 Her Majesty's Government had declared war on Germany, a state of war. You may say that that is an international fact, that was the point that was put to me by Lord Sumption, but we respectfully submit that that is a difference and not a distinction, so far as this is concerned, this aspect of the matter is concerned. In the Haw-Haw case, in the Post Office v Estuary Radio case, of course it created a different state of legal facts on the international plane, if you will, but those different international legal facts only were created and only arose because of the exercise of Government prerogative power on the international plane.

LORD WILSON: I think what is said is that the prerogative can certainly bring individuals into or out of laws that have been made, and that is said to be quite different from this proposed situation.

MR EADIE: My respectful submission is it is not so very different.

LORD REED: I wonder, I mean the real point being made, I think, is this, that it is very simple. There is a common law rule that the Crown cannot, under the prerogative, alter the law of the land. EU law is the law of the land; therefore the prerogative cannot be used to alter the effect of EU law in the

United Kingdom. That is the synergism.

As I understand it, your analogy with the Dangerous Dogs Act is designed to illustrate that EU law is not the law of the land in the same sense as the Dangerous Dogs Act is. You cannot under the prerogative alter the Dangerous Dogs Act; you can, you say, alter EU law precisely because it is not part of the law of the land in that sense.

MR EADIE: Precisely because it is not the law of the land in that sense; that is in truth coming close to the Finniss/Millett analysis, if I can put it that way without disrespect in adding titles, but also to illustrate a basic truth, which is that Parliament has intervened. And so you have the mechanism set up in the 1972 Act, you have the various forms of legislative control, so it goes to both of those things.

The reason that I introduced the Dangerous Dogs Act and my learned friend Lord Pannick introduced the Dangerous Dogs Act into the debate was to draw the distinction between parliamentary intervention, as it were, which creates a situation under which international acts by Government in the exercise of prerogative powers flow back into domestic law, and the Dangerous Dogs Act which has nothing of that form of parliamentary intervention about it.

LORD REED: But if, for example, there were an EU regulation called the dangerous dogs regulation, you would say that could be deprived of effect in the UK by exercising the prerogative, because it is not part of UK law, it is -- what is part of UK law, as I understand your argument, is the 1972 Act, and that gives effect to the EU law within the UK.

MR EADIE: My Lord, exactly so, exactly so. That is the nature of the argument, for good or ill. That is the nature of it.

LORD SUMPTION: Whereas the position would be different if it was the dangerous dogs directive.

MR EADIE: It would. It would. It would be different if it was a purely domestic Dangerous Dogs Act, so I should have clarified that by Act, I meant domestic legislation rather than Act on the EU level; if it is dangerous dogs regulation it flows back in through 2(1) and it becomes directly effective. My Lord, Lord Sumption is of course right, if it is the dangerous dogs directive, it requires free-standing secondary legislation no doubt enacted using section 2(2) of the 1972 Act.

But those are fundamental constitutional distinctions, and what they illustrate is that there is a different species and form of parliamentary intervention in each of those situations. What that

also illustrates, we respectfully submit, is the basic proposition that all depends on the nature of the parliamentary intervention that there has been. If one wants to break that down a little more in our foreign affairs context, in the sphere of foreign affairs, that requires consideration of two separate things, to do with the nature of parliamentary intervention.

(a), has Parliament intervened to control the exercise of the prerogative power itself, on the international plane, and (b) what is the nature of the parliamentary intervention in relation to the effects that the exercise of prerogative power on the international plane might have, in domestic law.

LORD MANCE: Can I just go back, behind regulations and directives, because that is the result of the European law, but the basic point which was surely decided by the 1972 Act was that Parliament was prepared to entrust legislation to a different order of institution, and that required a parliamentary choice, didn't it? It is slightly odd, isn't it, to think that that could be undone by an executive decision; Parliament has introduced a new source of law-making.

MR EADIE: My Lord, that is, as it were, a question that can only be answered by properly looking at both of the aspects that I have just identified and tracing it

through the legislative scheme as a whole. I mean, you know my basic submission on the 1972 act not to jump too far ahead, but you know the basic submission that I make about that, which was it was all to do with transposition. It didn't give us, as it were, permission to ratify, it didn't seek to control the exercise --

LORD MANCE: It was a radical thing for Parliament to do to effectively -- you can use the word delegate or assign or confer -- legislative authority on different bodies, it was a submission we heard earlier today and it is -- it required a parliamentary choice, it required a parliamentary decision; and it is a point I am putting, that it is a bit odd to think that that could be undone by an executive decision?

MR EADIE: My respectful submission in answer to that, and I will come to the scheme of the 1972 Act in due course, but my respectful submission in answer to that is that that depends on what the 1972 Act was doing --

LORD MANCE: You say it is all embraced within your submissions about the 1972 Act being a simple conduit which can be cut off.

MR EADIE: A simple conduit and not controlling the exercise of prerogative power on the international plane, and so not surprising in that way that it left that other side

of things to Government. But to come directly to the point my learned friend Mr Green was making, which I think was the one my Lord was putting to me, which you heard today about it conferring legislative authority on other international institutions, with the greatest of respect, that is not on any view what the 1972 Act could possibly have been doing. Parliament has never purported to legislate, to confer legislative competence in that sense on other sovereign states or other institutions.

What it does is to set up a scheme in the 1972 Act under which actions by the United Kingdom Government and other sovereign states on the international plane may create effects flowing back into domestic law. It is not purporting to authorise in a legislative sense another sovereign state to act in any way, shape or form, still less an international institution such as the EU. It is dealing with the consequences of the exercise of power by the UK Government, and that is the limit of its competence legislatively, by the UK Government on the international plane.

Now the fact that that involves them liaising with, dealing with, negotiating with, making agreements with, cooperating in a legislative process within the EU, is neither here nor there. It doesn't alter the basic

characterisation.

LORD REED: Are you saying then that the relevant source of law remains statute? Namely the 1972 Act.

MR EADIE: In relation to the effects in domestic law, yes.

LORD REED: And that is confirmed by section 18 of the 2011 Act?

MR EADIE: Exactly so.

LORD CARNWATH: That is why I thought -- no one else seems to be interested in Youssef, but that case is a very good example, the proceedings of the UN committee, which -- there is no question of us authorising the UN committee to do anything, it is just that once it has effect, it then comes into UK law via --

MR EADIE: Via EU law and the regulation.

LORD CARNWATH: -- and the Act, so it is a really good example of that process going on.

MR EADIE: Exactly so, my Lord, and lest it be thought we were not interested in Youssef, we are for that very reason.

LORD CARNWATH: Thank you very much.

MR EADIE: I am grateful.

What this analysis also illustrates is the staggeringly obvious constitutional truism which is that context is everything, so it is no good turning up with The Parlement Belge or Walker v Baird and burning down

lobster factories in Canada; what you actually have to do is to look at the legislative scheme that is before you and work out what the nature of parliamentary intervention in the particular sphere, in the particular context, has been.

What you cannot do is to derive a big, broad proposition which is uncontroversial, that says, as a general proposition, the Government can by prerogative alter the law or create a new source of law, I will come back to that, but -- and then say: and that solves the problem in this case; it plainly doesn't. The question is what has Parliament done, what has the parliamentary intervention created.

Of course the reason that I am passionately concerned about the suggestion that there is an a priori answer to this case of that kind is because the consequences for Government and for the pursuit of foreign affairs by Government, of the discovery by the courts of a principle that effectively says that the prerogative power to conduct our foreign affairs cannot be exercised if it would, might, potential, has the potential to affect domestic law; what is the difference between affect domestic law and alter the law of the land; if that is the principle, uncertain in its scope as that description I hope has indicated, then that does

have very, very serious consequences.
LORD KERR: But the argument is that if it arises where rights are given by act of Parliament, you have left that qualification out of your formulation.
MR EADIE: There are two -- I don't want to keep going back and repeating the point, but I respectfully submit there are two separate things: have they controlled the exercise of power on the prerogative plane, can you do that; and the second thing is what has the parliamentary intervention told you about the nature and consequences and effects of any such exercise. Of course I accept I've got to confront that; that is why I started where I did with the Dangerous Dogs Act and the exploration of the issues surrounding it.
LORD KERR: The argument is really put rather simply. Parliament has given the citizens of the United Kingdom these rights; they cannot be taken away, other than by act of Parliament. Now, do you accept the first of those propositions and if not, why not?
MR EADIE: My Lord, no. My submission, as you know, and I am not going to go back over the all the points I made in opening but my submission, as you know, is that this is a particularly special type of right; it is contingent, it is inherently limited and it depends on my two-legged stool. It depends, of course, on

parliamentary intervention to create the conduit, but as section 2(1) itself positively and expressly asserts and says, these are rights that are created on the international plane. How are they created on the international plane? By the United Kingdom Government exercising its prerogative powers within the EU institutions.
LORD KERR: Even though they come through the medium of the 1972 legislation, you say that it is possible to argue that they are not given to the citizens of the United Kingdom by Parliament?
MR EADIE: Well, again, one can put it any which way. They are in the sense that Parliament has intervened to create the conduit. That is a necessary but not sufficient condition for the continued existence of the right.
LORD KERR: You can call it a conduit or whatever you like, but the ultimate question has to be confronted. Were they or were they not given by Parliament?
MR EADIE: My Lord, Parliament plainly enacted the 1972 Act and it created the conduit that it did so as to allow -- sorry, my Lord.
LORD REED: Not at all, carry on.
MR EADIE: I have made the point.
LORD REED: I thought your answer was: yes, they are rights

given by Parliament, but they are rights which were given on a conditional basis, the condition being the continued membership of the EU.
MR EADIE: So that is the consequence of section 2.
LORD REED: Precisely. That is what it says, such rights as in accordance with the treaties are ...
MR EADIE: From time to time exist.
LORD REED: Are to be implemented in the UK.
MR EADIE: So again, I will come back to the point, but the direct answer to my Lord, Lord Kerr is contingent, inherently limited. Contingent upon two things: one, our participation in the EU processes to create the rights and obligations from time to time, shrinking as that corpus of rights does, or expanding as it does and has done over the years; and secondly and more fundamentally, contingent upon our continued membership of the EEC or what it became, the European Union.
LORD KERR: That is building quite an edifice on the phrase "from time to time", because "from time to time" in a different connotation could equally mean as the rights are adapted by the treaties.
MR EADIE: My Lord, it is not only building it on that. It is building it on the nature and the structure of the Act, it is building it on what it was doing by way of transposition and what it was leaving to the royal

prerogative to deal with. It goes to all the fundamental points I made about the 1972 act when opening. I don't want to go back over --
LORD KERR: Sorry, we have probably taken it as far as we can.
MR EADIE: It is helpful to have the questions.
LORD SUMPTION: Would it help you if you are right about this, because obviously what comes through your conduit pipe is the question of EU law, but whether the conduit pipe exists is a question of English constitutional law; and you have to show, surely, that a ministerial decision can, to use Lord Mance's words, effectively alter the sources of EU law, in other words alter -- of English law, British law, it has to alter the constitutional question: what are the sources of our law; and not just the question: what rights happen to exist?
MR EADIE: I respectfully submit, I have to show that the nature of the parliamentary intervention that there has been in this context, from 1972 onwards, allows the Government to continue to exercise its prerogative powers on the international plane, and I have to show that the nature of that parliamentary involvement can and does, as it were, with Parliament's permission, create effects into domestic law.

I say that is not a question of analysing it as though there were some freestanding constitutional principle which provided the answer. I say that the correct approach to answering that question is not to ignore the entire legislative scheme and come at it on the basis that there is an a priori constitutional principle in play.

The reason that the constitutional principle is advanced in the way it is by my learned friend Lord Pannick and others is because, when they get to the statutory scheme, the argument becomes extremely difficult for them. For reasons I will develop, they have a great deal of difficulty explaining away what on earth Parliament thought it was doing if they are right in the 2008, the 2011 and now the 2015 Act.

So what they do is to say: you don't need to go anywhere near that, you don't go near De Keyser, you don't go near the legislative scheme that Parliament has seen fit to enact; and the solution to this case involves standing back, sweeping all that away and just saying: there is the constitutional principle.

So we fundamentally do not accept that way of approaching the case. We say that the right way of approaching it is to look at the legislative scheme in its entirety and to ask what that scheme tells you about

Parliament's intention on the base question that I identified at the outset.

THE PRESIDENT: What you say ultimately, I think, is that the statute creates the conduit pipe, but Parliament effectively, by the way it has designed the Act, is to say: we have control of the conduit pipe, but the Government has control of what goes through the conduit pipe.

MR EADIE: Yes.

THE PRESIDENT: So if the Government pulls out of the treaty, the conduit pipe stays there, the statute stays there, but nothing comes through.

MR EADIE: It is the empty vessel argument.

THE PRESIDENT: That is how we read it.

MR EADIE: That is how you do it, on the 1972 Act?

THE PRESIDENT: Yes.

MR EADIE: The reason I have started here, I have to go a bit, but the reason I have started here is because I am aware, I am well aware that the point has been made on a number of occasions by Lord Sumption, with the usual conviction and convincing nature of it, but with the reason I started there is because there is quite a fundamental question about basic approach, and about precisely how the court should go about analysing the basic question that I identified at the outset. We do

respectfully submit that that is right way of doing it.

Look at the statutory scheme as a whole, don't sweep it away, it is not answered by identifying an uncontroversial, basic constitutional question. The true question is what does Parliament intend looking at that scheme, and can I move to the nature of the approach.

If that is, if you are at that place, and I appreciate that some of you may not be, but if you are, what is the correct way of looking at the legislative scheme, and before you -- if you get to that place, that does not seem to be an unduly controversial issue. We submit that the correct approach to that question is to consider the statutory scheme as a whole (a), and (b) as it exists today.

That means considering as a scheme CRAG and all the relevant EU legislation as it has developed today, and then you ask: having regard to that scheme, would it be unlawful for Her Majesty's Government to give Article 50 notice? The reason that my learned friends don't much like that is because they would much rather stop the clock in 1972, but the fact of the matter is that they haven't really sought to challenge in any significant way that as the correct approach to the question of: how do you go about considering this legislative scheme?

I advanced a whole succession of arguments, none of which have been quibbled with by my learned friends or any of them, as to why that was the correct approach in principle in this appeal. Because the question is about the present state of the division of responsibility between our pillars of state, legislative, executive, and indeed judicial, and that demands a current answer and not a historic one. Because it is a constitutional question that is raised by this appeal, and so it is to be answered per Robinson and Lord Bingham in the light of the current state of the constitutional arrangements.

That is no doubt why the devolved administrations were interested in supporting this approach, because if you freeze the clock in 1972, they don't have their devolved legislation, but we respectfully submit it is correct. It is a constitutional question to be answered in the light of current constitutional circumstances, because it will, we submitted, as you will recall, be wholly artificial to address the question of triggering Article 50 to implement the referendum, without any reference to the very legislation which established the referendum.

Because it is common ground between us that the valid exercise of prerogative powers is a matter to be considered itself from time to time, and according to

the legislation then in force; and in any event, and this is quite a long way down the sequence of arguments, because the 2008 Act, to take but one example, amends the 1972 Act.

So even if you were on ordinary principles of legislative interpretation, that would be the right answer, and because, although I don't want to spend too long on this, the in pari materia principle applies. Again, I am not going to go back to the cases that my Lord, Lord Mance identified in relation to that. It might be thought that the true principle to be derived from those cases is, it all depends what you mean by materiae(?). But my Lord will have his own views on that, I am sure, not assisted we respectfully submit, by another case which I lost in this court, called JB (Jamaica), which some of you may recall well.

LADY HALE: I think it has a name now.

MR EADIE: Has it got a name other than JB (Jamaica)?

LADY HALE: Yes, I think it is called Jamar Brown.

MR EADIE: That is helpful.

But we respectfully submit that paragraph 24 of that doesn't actually advance matters unduly in relation to that.

Our submission is as a matter of basic approach, you don't freeze the clock at 1972; you look at the

statutory scheme as a whole and then you make your mind up.

LORD WILSON: Mr Eadie, there have been brief references over the last few days to our right to vote in European parliamentary elections. Some of us may have thought that in the big scheme of things, perhaps that is rather unimportant, but perhaps it does have an importance, because, correct me if I am wrong, that is securely founded on a conventional domestic statute which you are proposing to repeal or empty of content. If you are saying look at everything, should we briefly look at that too?

MR EADIE: My Lord, you can briefly look at it, or you can look at it in detail. Our answer will be the same. Our answer is that is of course a freestanding piece of legislation, and it will continue to stay on the books, as it were, after withdrawal and after the two-year period, even if no agreement is reached. So it sits a bit like regulations that are made to implement directives but in primary legislative form.

Our respectful submission in relation to the 2002 Act is that its fundamental premise is that we continue to be members of the club, so it is of course different in form, but my answer is essentially the same.

Can I turn briefly to the scheme itself and its

relevant components. I have a bit still to get through. I have made my submissions in answer to Mr Green, and whether or not in truth what Parliament was purporting to do in 1972, which is where we start.

My Lord, I am sorry, I am reminded by Mr Coppel very helpfully that we have dealt with, I think, the question, or certainly that 2002 Act in paragraph 63 of our case. Can I leave that there.

I have answered Mr Green in relation to the 1972 Act, and of course one can seek to examine and to imply matters into it, both parties are deeply divided and hold deeply divided views about its effects and about the correct implications for the exercise of the prerogative power to withdraw from 1972.

Of course my learned friend Lord Pannick becomes a bit ambivalent at this point because when he gets to 2015 he insists upon language as a matter of interpretation, but when he goes to 1972, because there is no language dealing with -- jolly good reason -- the exercise of the powers to withdraw or ratify or anything else terms of international plane actions, he is prepared to imply and to look at purpose and effect.

But, leaving that on one side, you know our basic case in relation to the 1972 Act. We submit that the ECA is legislation which was fundamentally designed to

implement -- it's an implementing statute -- to implement UK treaty obligations. It was not seeking to control, it contained no provision seeking to control, the prerogative -- in other words, the action by Government on the international plane. There is nothing of that kind in it. So that is one part of the dual analysis that is of interest.

What about actions on the international plane? The second part of that, the distinct part, is what about domestic rights, how do they all work? My submission on that is it creates rights, certainly, or recognises rights, more accurately, but of a very special kind, contingent, inherently limited, created and taken away on the international plane, as the corpus of rights expands, and contingent at a more fundamental level on the premise, which is our continued membership of the EU, or of the EEC as it then was, and both my learned friend Ms Mountfield and my learned friend Lord Pannick promised, as it were, to answer that feature of the 1972 Act. Lord Pannick promised to answer Finniss, I think is the way it was put, in response to a question that Lord Hughes asked and Ms Mountfield promised that she would deal with that answer, and neither did so. Neither has explained why it is that that analysis is wrong, the Finniss/Millett analysis, contingent or

inherently limited rights.
The third point we make about the Act is that its character is not changed by the thought that it introduces a new source of law into our domestic system. It is not changed because that doesn't fundamentally change the nature of the best. A new source of law involves simply asking the same question in a slightly different form. Can you alter domestic legal rights and obligations and, if so, how. We do respectfully entirely agree with the point that was made, I think, by Lord Reed, which is to put to Ms Mountfield, and she accepted it -- and it is significant that she accepted it -- if rights can be created under the prerogative, was the question, do you accept that they can be taken away by exercise of the prerogative? To which the answer which was given was yes, and we respectfully submit that that was a correct answer given to that question.
We do note that it was not, we submit, a constitutional necessity for Parliament to legislate by the ECA as a precondition for ratification, just to focus on that issue which has been addressed and you thought about, I know. True it is that the position was that there were non-binding legislative motions, to put it that way, by the Houses of Parliament that preceded

it but it was not a condition of ratification. That is of the essence of the latest Finniss article, which is in our little black bundle, drawing the contrast between the way in which this Act was structured -- it's the long title point -- and the way in which the Bahamas, Barbados and other independence was created. There was nothing in the Act which said you either have a power to or you are required to ratify this treaty. The reason that was done is because it is Governmental practice.
So we respectfully agree with the statement that my learned friend Mr Chambers took you to from the CRAG consultation paper, MS 5282, paragraph 119, where it was said the Government's practice is not to ratify a treaty until all the necessary domestic legislation is in place to enable it to comply with the treaty, since to do otherwise could put the UK in breach of its international obligations. That is a perfectly understandable practice but it is not the same as saying that you need prior legislative authority before you can take that step on the international plane and, with respect to Mr Chambers' submissions and Lord Templeman's article, to which he also took you, is entirely consistent with that analysis. So there is no implication here that the Government could not take steps on the international plane to reverse ratification

without parliamentary approval.
We know, linked to this point -- I am not going to go back to the detail of it because you have it in the note -- but we know that in schedule 3 of this very Act, Parliament repealed a series of bits of legislation, including the EFTA Act of 1960. That is precisely an example of the Government withdrawing from a treaty, the EFTA treaty, and it is a far more telling example than my learned friend Lord Pannick was prepared to contemplate. Of course the EFTA convention did not create directly effective rights in the same way as the ECA, but it is an example of the Government giving notice to withdraw from a treaty without the prior consent of Parliament and doing so notwithstanding that leaving EFTA would inevitably bring to an end rights recognised in domestic law in order to comply with EFTA, and then Parliament acting subsequently, as it were, to sort out the domestic legal effects of that Government action on the international plane. So classic dualism in action.
All of that, withdrawal from EFTA, parliamentary intervention thereafter, repealing the 1960 Act and sorting out the domestic legal consequences, and so on, all of that expressly recognised in the very ECA itself, the very Act that we are talking about, so you have

an act which is said by Lord Pannick to create implication on withdrawal giving effect by repealing it as the final stage in a sequence of actions which started with Government withdrawing on the international plane from EFTA, and that we do respectfully submit is telling.
You have all those submissions on the 1972 Act and I am not going to go back to those. What I wanted to focus on was the later legislation, because we do respectfully submit that that later legislation is absolutely key to the issues that arise here, and I start with the basic point, which is that later legislation, whether it is CRAG or whether it is the EU specific legislation, is constitutional, to use that sense. You cannot characterise the 72 Act as constitutional without including all the other pieces in the stream of legislation governing this issue. If the one is, the others must be too. We respectfully submit that they are.
So when you are considering issues as to whether you are more like Thoburn or more like HS2, you are truly dealing with understanding how various bits of legislation, all of which can properly be characterised as constitutional, hang together.
I wanted to focus very briefly on two of the pieces

of legislation, 2008 and 2011, and ask what do they indicate about the division of constitutional responsibility in relation to the giving of notice under Article 50. That is our issue, and it is on those pieces of legislation that I wanted to focus.

On the 2008 Act, if I may, a couple of short points. Firstly, we know that in 2008, by 2008, Parliament is focused directly and explicitly on the controls that are to be imposed on the exercise of prerogative powers of a variety of different kinds. The controls are explicit and the scheme of control is nuanced. That is significant because it indicates precisely what one would expect -- it is not just whether but how Parliament is to be involved in different types of decision that is covered by that legislation. Previously untrammelled.

Lord Pannick referred to section 6(1)(a) of the 2008 Act and the simplified revision procedure for amending the treaties and sought to dismiss that as indicating merely that Brussels thought that amendment should be easier and Parliament still, in any event, needed to be involved. In fact, for the first time, Parliament had, as it were, power to veto treaty amendments conferred upon itself and of course those amendments are amendments which not only did not involve increases in

EU competences, the point that I think Lord Mance put to me on a couple of occasions in opening. It doesn't just go to increasing EU competences. So that is not the sole theme of this legislation. Not only does if not involve increases, but it could not do so. I am not going to take you back to it now, but if you go back to Article 48.6, third paragraph, MS 222, you will see that it positively could not by that process increase EU competence.

So the true significance of this part of it is that this is but part of a raft of controls specifying the thing to be controlled and the nature of that control, and you will recall that section 2 stands in contrast to other bits of the Act and just says motion, "parliamentary motion".

On my learned friend Lord Pannick's case, section 6 has to work, despite the fact that, on his argument, it would reduce parliamentary control. Reduce it down from primary legislation as a requirement to mere parliamentary motion. That is the first significance.

LORD MANCE: When you say "can't increase competences", it can increase the way in which competences, or change the way in which competences are exercised, can't it? Isn't that the point of Article 48.6?

MR EADIE: 48.6, third paragraph, my note says.

LORD MANCE: It certainly says "shan't increase the competences", but that means extend the areas in which you may act, but you may nonetheless act in a particular area by --

MR EADIE: They already have competence to increase.

LORD MANCE: Yes -- by a different route, for example a different qualified majority or a qualified majority instead of unanimity.

MR EADIE: My Lord, I think you are right. So it can in a sense but can't in others, if that makes sense? What you can't do is to expand sideways.

LORD MANCE: I just wondered, under section 6(1) of the 2008 Act, all these provisions of the Lisbon treaty, are they new?

MR EADIE: The short answer to that is I don't know. We can find out and let you know.

LORD SUMPTION: Isn't the position that they are new to this extent, that most of them provide for an option to use a different legislative procedure or a different voting system in a way that dilutes the blocking power of individual member states? That is actually the vice with which that part of the Act is concerned with.

MR EADIE: Yes. This is the Trojan horse point. I don't think I dispute that basic analysis.

LORD MANCE: So your argument that here they were being

introduced for the first time, really, is met perhaps by the point that this was the first time they needed to be met by any legislation?

MR EADIE: My Lord, what I meant by the first time is that this is the first time there is legislative control, which there didn't have to be, on this sort of exercise and this is the Minister of Crown being precluded from doing stuff on the international plane. That is what I meant by the first time. My Lord may be right, it is the first time Parliament has chosen to intervene in this way. It may have been triggered in a particular way but its significance is that, before this, subject of course to the earlier 78 Act and the 2002 Act that I went through earlier in opening, this is the first time they have imposed that control.

So there are really two points about this Act I made in opening, you will recall; (1) they are controlling -- it doesn't terribly matter what it is -- but they are controlling particular things that are the exercise of prerogative powers on the international main, and (2) they are doing so in a variety of different and nuanced ways. This one is parliamentary motion, and go back over to the previous page and there you have examples of primary legislation being required. So it is a different thing that is controlled and it is

a different mechanism of control. Look at section 5. So you have got the how and the what. That is the first point.

The second point is that, as we know, Article 50 is introduced in Lisbon. Parliament noted it as a principle change and it approved Lisbon because it increased -- and Article 50 it focused on -- because it increased the competence of the European Parliament. It then decides what to do about. What are we going to do about Article 50? How are we going to control that, or are we? Answer: despite other controls of various kinds, nothing on Article 50, is the short and bald(?) point, and the only proper inference, we respectfully submit, is that Parliament decided therefore to leave this power to be exercised by Her Majesty's Government along with all the other prerogative powers that are not controlled in that sphere by this piece of legislation, day to day business of the foreign affairs prerogative, giving of notice; they were, that is Government were, the only organ which could if physically and legally do so and no control was imposed over that decision, despite the fact that Parliament was directly focused on it in 2008.

We know also in that respect, that Lisbon -- this is perhaps a third point -- including Article 50, was added

to the list of treaties in the 1972 Act and approved by Parliament in section 4 of the 2008 Act, and we respectfully submit that that is significant because it is a recognition at the very least thereafter, and pace the debate I had with my Lord, Lord Mance about whether withdrawal was a gleam in the eye of those who signed up to the 72 Act in 72, pace that, it is a recognition of the inherently limited nature of the rights and indeed of the basic structure and purpose of the 72 Act. From now on, the rights in section 2 are inevitably subject to Article 50 and we know that Article 50 is about the fundamental premise, as I described it. It is about withdrawing, the fundamental contingency of withdrawal is now catered for and brought within the statutory scheme.

So we do respectfully submit that that is significant and it is entirely consistent with our scheme of analysis, which is that the royal prerogative powers, which the 72 Act had done nothing to take away, remain, subject to the parliamentary controls, specific and nuanced as they are, in the 2008 Act. It is not a statutory power, Article 50, as such but it involves Parliament in legislation recognising its existence and acknowledging its effect and all of that, we submit, is critical to the consideration of the statutory scheme as

a whole and what it tells one about Parliament's intention on the division of constitutional responsibility in relation to Article 50. This was the very mechanism by which the very thing which is now challenged was to be done. Parliament decided, as it did, no control. It so decided recognising because it is absolutely obvious that, if Article 50 notice is given, then the process of withdrawal is commenced, the bullet is fired at the target, with all the potential effects that that has on directly effective rights and obligations and on other legislation like the 2002 Act, whose practical impact may remain or would be, as it were, taken away when we leave the club. But the idea that Parliament didn't know or cannot be taken to have known that that was the effect of Article 50 simply could not be sustained, we respectfully submit.

If the respondents are correct, Parliament always intended that the Government could not give such notice, from 1972 onwards, without primary legislative authority. They say that was the effect of the ECA and, if that is right, given the controls that are introduced in 2008, it is, we respectfully submit, inexplicable why Parliament was not included. They made provision for the sorts of things that required primary legislative authority. Why would they not have included Article 50

within that if that is their view? And it is not an answer to say they were operating on the basis of an assumption that the power could not be used. That, as we know, is a highly controversial and contestable assumption with the debate still raging years afterwards in the Supreme Court with 11 of you listening. It doesn't explain in any event why it is that Parliament would not have set out quite clearly on the face of this piece of legislation that primary legislative authority was required.

My Lord, Lord Carnwath, invited my learned friend Lord Pannick back onto the 2008 turf of the 2008 Act and its treatment of Article 50, and he gave three answers in that exchange, if we have understood him. Firstly, he said Article 50 merely expresses the power that United Kingdom has always had to withdraw from treaties. We respectfully agree but it is no answer to the points I have been making and it is important that he accepts that Article 50 reflects the prerogative power to withdraw from treaties because that was the position on that analysis in 1972 just as much as in 78, but Article 50 is now the mechanism, but point is that answer does not, that answer, address the key significance of this legislation, which is that it imposed a series of controls over prerogative powers,

some of them and not this one.
LORD SUMPTION: Do you say its object was to codify all the circumstances in which parliamentary control would be required?
MR EADIE: My Lord, we know that the scheme of the legislation developed and that they turned back to the issue again in 2011, so I don't make the submission that it was intended to codify, but the idea that the selection that Parliament made here is not significant, I respectfully submit, is an improbable one.
LORD SUMPTION: Because of the greater significance of Article 50?
MR EADIE: Exactly so.
LORD SUMPTION: But an alternative view was that both 2008 and 2011 were directed at a highly specific problem, which was the use of the internal procedures created by the Lisbon treaty in order to effect changes which would previously have required a treaty change, and therefore would have escaped the requirement that a new treaty had to be added to the 1972 Act by amendment.
MR EADIE: My Lord, we respectfully would not accept that thesis. We would not accept the thesis because we respectfully submit that it has a broader purpose than that. It has the purpose of Parliament intervening to make decisions about what it does and does not want to

control. You may say it had a particular focus in doing that. There were particular things that particularly concerned it, but fact of the matter is that it addressed both what it wanted to control, how it wanted to control it, and we know that, when we come to 2011, I know my Lord will say "It is an example of the same beast", but it specifically focused on Article 50 and introduced Article 50(3) in schedule 1, as we know.

Anyway, my Lord, Lord Carnwath, put those matters to my learned friend Lord Pannick. That was his first answer. The second answer was that it is not directly effective and so effect is not given to Article 50 by section 2(1) and Lord Hodge put to me that Parliament had approved the various legislative procedures at EU level and that indeed is true, even though they are international procedures between states and not directly effective in domestic law either. But the point is that Parliament also approved in the same way the non-directly effective provisions of Article 50. So you have a direct, as it were, parallel between those two.

Then my learned friend Lord Pannick finally in answer to Lord Carnwath said Article 50 indicates nothing about the way the Government has to act or Parliament has to act domestically, it simply referred back to constitutional requirements. Our short answer

to that is the same one: that is not the point. The point is that the domestic legislation, 2008, 2011, are key parts of those constitutional requirements and they, that is the domestic pieces of legislation and not Article 50 in terms, say a very great deal about the controls Parliament has and has not chosen to impose.

We make effectively the same points in relation to 2011. The whole topic of what to control, the nature of the control is revisited, it is considered afresh and considered with care, and we know that it deals with Article 50 specifically in schedule 1. We respectfully submit the correct analysis is therefore the one that I have indicated.
LORD CLARKE: Yours is really a jury point, isn't it? If you look at the first statute, you accept that there is no evidence that they thought about Article 50 in relation to the first of the two statutes but you say, well, common sense suggests they must have, members of the jury, and in the second one you are slightly better off because there is a reference to Article 50.
MR EADIE: My Lord, you will not be surprised to hear me say I do not accept it is a jury point.
LORD KERR: Nothing wrong with a jury point if it is a good one, Mr Eadie.
MR EADIE: It is a good one either way.

LADY HALE: We are at least jury-sized.
MR EADIE: You are at least jury-sized. That is true.

But you have my submission on the nature of it, these were selections that Parliament was making in the very context and indeed the idea that they didn't think about Article 50 --
LORD CARNWATH: Well, you were told, it was in the explanatory notes specifically.
MR EADIE: The point that I have just been handed -- it is one of the principle changes, what are we going to do about it?

The 2015 Act, the final part of the jigsaw, and it is against that background, 2008, 2011, that you arrive at 2015. Can I start with two preliminary points, and I am just going to give you references, given the time, if I may. Firstly, the point about whether Lord Dyson in paragraph 19 of Shindler was or was not assuming. We dealt with that in our case below, our skeleton below -- if you really want it, MS 12227 -- but the short point is the one that they were not deciding or turning their minds to that issue.

Secondly, in relation to comparator legislation, because we know the 2015 Act was silent, we respectfully submit that there is a jolly good reason why the AV Act, the Alternative Voting Act, contained the legal

consequences within it, and that was because there was no prerogative power to alter the actual voting system, so you needed provisions in legislation to work out what those consequences are. By contrast in our situation at 2015, you have the freestanding source of power under the prerogative to give the Article 50 notice. So we respectfully submit that that is the short answer, that is the short answer to that.

Then Mr Chambers made comparison with the 1975 referendum and how that might have been set up and purported to rely upon a statement by a minister of some ambiguity all those years ago; (a) it was a statement by a minister of some ambiguity all those years ago, is the first answer. The more significant answer perhaps is that that was well before any legislation remotely similar to the 2008/2011 Acts which directly focused on the nature of parliamentary controls over specific prerogative powers and their exercise. So we submit that 2015 sits in the context of 2008 and 2011 and it sits in the context of Article 50 existing. It was the necessary first step in the process of withdrawal, it was the prescribed and the mandated process for withdrawing. If we are going to do withdrawal, that is how we have to do it, and, moreover, the 2015 Act asks the very withdrawal question and sets up the referendum

to answer it.

We pointed out that, on the respondent's case, the effect of the 2015 Act was to require the self same question to be put back to Parliament. The very question they asked in the referendum. My learned friends Lord Pannick and Mr Chambers, and I think all of the other respondents, perhaps with the exception of Mr Gill, accept that a single line would do. A single line act would sought the legal problem.

That created a difficulty which Lord Pannick realised. It created a difficulty because that made no sense in the context of legislation in which Parliament had already decided to put that very question to the people in a referendum and had set up an act for the purpose of doing that, and so the answer which he was driven to in order to explain away that constitutional strangeness, to put it at its lowest, was that that might be or might not be the only question that Parliament was interested in. Parliament might be interested in other questions but that is not an answer. It is not an answer because it bears no relation, the possibility that Parliament might introduce amendments and the Lords want to discuss negotiating strategy, all of that, it has nothing to do with his legal case. His legal case is you need primary legislative authority

just to give the notice. It is no good saying you have to go back because they might want to ask other questions, that is the solution, as he accepts, to his legal case and we respectfully submit therefore that the answer he gave is no answer at all, and indeed we submit that the 2015 Act speaks volumes about the intention of Parliament.

Is the result of no legal significance? We respectfully submit that would be very surprising and you know what our primary case is, namely that it is consistent with the scheme of legislation. It left the royal prerogative power to give notice in the hands of the Government, it introduced no form of control of the kind we saw in 2008 and 2011, and the reason for that is because the royal prerogative exists and existed to give effect to the outcome of the referendum.

We also say, as you know, alternatively that, even if the 72 Act had the effect that it did on the royal prerogative, the 2015 Act is still highly legally important. A flexibility of the constitution is important -- and I am not going to go back on that, Robinson. It is language and not divination, of course, but you have plenty of language in the 2008 and the 2011 Acts to work through and we know that in the context of the 2015 Act, Parliament chose to set up the referendum

as it did.

Can I address one other question just before finally coming to the significance of yesterday's events and that is that no one I think is suggesting that, in our particular context, the foreign affairs prerogative or indeed any ingredient of it has been destroyed. That is not the nature. We are not abeyance. We are a control on exercise. We are not abeyance or abrogation or cutting down or destruction because, even if Parliament had given express authority, that authority would be in nature to exercise the very power, in other words the power on the international plane to withdraw. No one is suggesting that the power to make or unmake treaties, to withdraw from treaties, has gone. So what we are truly dealing with here is not destruction forever, we are -- and it was the Lord Reed analysis I think -- but we are dealing with, on any proper view of it, we are dealing with a situation in which it is the exercise of prerogative that is controlled and, if that is the right analysis, then it is perfectly possible and we respectfully submit the most convincing analysis, if we are wrong on the 72 Act, the most convincing analysis at that stage becomes, if it is all about the exercise of the prerogative, the 2015 Act significance is perfectly obvious, because no one asserts -- and Lord Pannick

accepted in questioning with Lord Reed that, if there was power, if the power continued to exist and it was a question of exercise, then after the 2015 Act, no one could possibly say that it was improper or even remotely unlawful for the Government to exercise that particular power.
LORD MANCE: I don't quite follow that because, if the prerogative could not be exercised except with authority in the form of an Act of Parliament, then it is not the prerogative that is being exercised, it's the parliamentary authority.
MR EADIE: But they leave the prerogative in place, is the argument. The point I am really on here is, what happens if you are against me on 72? How does that work? What is the significance then of 2015? The analysis then goes, we submit, if it is all about exercise, then 2015 is not as it were reinventing something which has died -- exhuming the body, as someone I think put it -- it is simply, and again wary of my Lord, Lord Kerr's metaphors point, it is simply indicating that hereafter the exercise of the royal prerogative is entirely proper.
My Lords, the motion. May I just briefly tell you --
LORD CARNWATH: Sorry, I don't want to delay things but I do

need to clarify a point which arose on the first day, a sort of slight difference between myself and Lord Sumption about the relevance of the subsequent legislation, because I think we need to know whether there is a difference between you and the Attorney General for Northern Ireland, and indeed Lawyers for Britain, because the point made by Mr Justice Maguire is that, yes, this will result two years down the line in changes to the law, but that will be governed, or is intended to be governed, by the legislature -- and I think one would add you cannot control that but it is in the control of Parliament.
Now, that is a point which I think is taken by the Attorney General for Northern Ireland but it is not a point which you have taken. I understand you don't need it on your hypothesis, but are you distancing yourself -- you do refer, it comes into paragraph 105 of the Mr Justice Maguire's judgment, to which you do refer to, apparently with approval, in your case but I just want to know whether that is something you disassociate yourself from or whether it is part of your case if only as a fallback?
(Pause)
I know it is a difficult question to answer, but that is really the reason why I stepped in on the first

day.
MR EADIE: I was thinking gifts and Greeks.
LORD CARNWATH: Yes, I thought you might be. Yes. If you don't want to say anything more about it --
MR EADIE: Can I say we are tolerably neutral about it. If it helps us, it helps us.
LORD CARNWATH: Right.
THE PRESIDENT: You want to deal with the motions.
MR EADIE: You should have a copy of the motions before you on your desk, and we have given you both, because there have been two. I referred to one in October, 12 October, so the one with big writing on it -- it looks like that -- that is the one that happened yesterday.
THE PRESIDENT: What do you say about them?
MR EADIE: My Lord, you see the resolution, the nature of the resolution, and you see in effect that it indicates the view of the house.
THE PRESIDENT: Yes.
MR EADIE: You see the majorities.
THE PRESIDENT: Yes. Yes.
MR EADIE: You see in particular the call from the House of Commons from the Government, final line, to invoke Article 50 by 31 March 2017.
THE PRESIDENT: Yes.

MR EADIE: The other one, which is the 2016 one, the only bit that you really need -- the rest of it is history and how you got to the place where it ended up -- is the final paragraph, "resolved", because again it was an opposition day motion which the Government amended and was then passed by the house --
THE PRESIDENT: Thank you.
MR EADIE: -- in that way and we respectfully submit that that is highly significant. It provides the sharpest of focuses. No doubt it is not legally binding but that doesn't mean it is not legally relevant. It provides the sharpest of focuses on the nature of the issues now in play because Parliament has given, or the House of Commons at least has given, specific approval to the Government to give that notice and indeed it has called on them to do so by a particular date. It has done so as it did at the outset all of those years ago, in precisely the same way.
So if one is worrying about joint effort and have you got a mirror -- we respectfully submit you already had the mirror because you had primary legislation in the 2015 Act -- but you have an even more perfect mirror now, you have not just got the 2015 Act, you have got this resolution by the House of Commons.
It is impossible, we respectfully submit, in those

circumstances to pray in aid broad considerations of the kind my learned friend Mr Chambers urged upon you about parliamentary sovereignty. Parliament has indicated its view and has done so clearly, and has done so clearly, and has done so --
LORD WILSON: Well, the House of Commons.
MR EADIE: The House of Commons, exactly.
THE PRESIDENT: But the Queen in Parliament has not.
MR EADIE: Because the House of Lords has not.
THE PRESIDENT: No, the Queen in Parliament has not. There is no statute. The argument is that, if you are wrong on your interpretation of the Act, you say this helps you?
MR EADIE: My Lord, I respectfully submit that it is significant but not, as it were, as directly legally binding. I certainly do not make that submission.
THE PRESIDENT: That is not quite the question.
Do you accept that, if you are wrong on the interpretation of the 1972 Act and the 2015 Act and other subsequent acts do not help you, then this motion does not help you?
MR EADIE: I do. On that premise, I do.
THE PRESIDENT: Thank you.
MR EADIE: But I nevertheless respectfully submit that it is a matter that the court can take into account and that

it is legally relevant to the answering of that question because what it does in a nutshell --
LORD CLARKE: Well, it is good grist to your general mill.
MR EADIE: I am going to be accused of making another jury point but, my Lords, you see where it takes you. It takes this court effectively into a place where, if you declare the exercise of the prerogative unlawful, positively unlawful in that way, you are not just leaving the matter in the usual way to the executive and to Parliament to sort out, you are in effect, and this is the only thing that could be done, requiring primary legislation. So in order to withdraw to give affect to the referendum --
THE PRESIDENT: Well, we are not requiring it. We are saying the law of this country requires it.
MR EADIE: My Lord, that is true and I accept that, but the reason I make the point is because primary legislation would thereafter be the only way to go, and so the Government would in effect have to introduce a bill to Parliament in essence to confirm that which at least the House of Commons has already called upon the Government to do.
LORD SUMPTION: If the resolution was enough for your purposes, you would not be proceeding with this appeal.
MR EADIE: My Lord, we might have got to day three --

(Inaudible) at 7.00 last night.
THE PRESIDENT: If you had said it was enough for your purposes, I dare say Lord Pannick and others would have taken issue with that.
MR EADIE: I hope you will appreciate, I have not made that submission.
THE PRESIDENT: No, you haven't.
LORD HODGE: Mr Eadie, what the resolutions might be said to focus is the point that we are dealing with, what is the correct legal mechanism by which it is done, and nothing else.
MR EADIE: Exactly so, that was my final -- I don't want to make it an in terrorem submission because they never go down well, particularly up here, but that is indeed the position.
My Lords, I am sorry, I have been a little bit longer than I thought.
THE PRESIDENT: You had quite a lot of questions towards the end.
Thank you very much indeed, Mr Eadie.
LORD PANNICK: My Lord, could I make one uncontroversial, I hope, point which is on behalf of all the lawyers, to thank the court staff for the quite extraordinary efforts that they have made to accommodate all of our demands, many of them I am sure unreasonable, before and

during this appeal. It is genuinely appreciated by all of us.
THE PRESIDENT: That is much appreciated, Lord Pannick, thank you.
We would like to thank everyone involved in the presentation and the preparation of this case, including the advocates for keeping to their allotted time. We know that a great deal of work has been done behind the scenes to ensure that -- the very large number of documents that have been made available to us in a well-organised form and in a very tight time schedule. We are very grateful for that.
In addition to counsel, we are also grateful to all those inside and outside the court who have been converting our legal discussions into a more accessible form for members of the public. It bears repeating that we are not being asked to overturn the result of the EU referendum. The ultimate question in this case concerns the process by which that result can lawfully be brought into effect.
As we have heard, that question raises important constitutional issues and we will now take time to ensure that the many arguments which have been presented to us orally and in writing are given full and proper consideration. Having said that, we appreciate that

this case should be resolved as quickly as possible and we will do our best to achieve that.

Thank you again, everybody. The court is now adjourned.

(4.10 pm)

(The hearing concluded)

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