UKSC 2016/196

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

BETWEEN:

THE QUEEN
on the application of

(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

-and-

(1) GRAHAME PIGNEY AND OTHERS
(2) AB, KK, PR AND CHILDREN

Interested Parties

-and-

(1) GEORGE BIRNIE AND OTHERS
(2) THE LORD ADVOCATE
(3) THE COUNSEL GENERAL FOR WALES
(4) THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN

Interveners

APPELLANT'S CASE

I. INTRODUCTION AND SUMMARY

1. The Appellant ("**the Secretary of State**") appeals from the ruling of the Divisional Court ("DC") (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ) that "*the Secretary of State does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the*

[Treaty on European Union] for the United Kingdom to withdraw from the European Union" (Judgment, §111). Although couched in terms of the giving of notice under Article 50 of the Treaty on European Union ("**TEU**"), the substance of the DC's ruling is that the Government had no prerogative power to decide that the UK should withdraw from the European Union ("**EU**"), in implementation of the outcome of the referendum on membership of the EU which was held on 23 June 2016 ("**the referendum**").

2. The Secretary of State submits that the DC was wrong to uphold the Respondents' claims, for the following reasons in summary.

3. The powers of sovereign states to contract with each other on the international law plane are long-established. Within the UK's constitution it is, and always has been, for the Government to exercise those powers and to conduct the UK's business on the international plane. The Government does so in exercise of the prerogative. That is a vital part of the conduct of modern inter-state business.

4. The UK has a dualist constitutional system. Acts of the Government on the international plane may sometimes have impacts, more or less direct, in domestic law. But treaties are not "self-executing". Individual rights and obligations which they create from time to time must be allowed into domestic law by Parliament if they are to be recognised by and enforced in the UK courts.

5. A consequence of that dualist position is that where Parliament has chosen to implement treaty rights and obligations through legislation, that fact carries no implicit restriction on how the Government should or must later act in relation to those treaties on the international plane. Parliament is simply doing that which the dualist system requires.

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6. Parliament is of course sovereign to monitor or constrain action by the Government on the international plane. That is a matter distinct from the question of whether and how Parliament might choose to allow individual rights and obligations created at the level of international law to enter the domestic legal sphere. When Parliament wishes to alter the usual position and impose forms of prior control upon the Government's prerogative powers to enter into or withdraw from treaties (or conduct foreign affairs in other respects), it makes that clear.

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7. The European Communities Act 1972 ("**ECA**") allows into domestic law the EU treaty obligations which the UK has entered into on the international plane. It is the conduit by which those obligations are given effect in domestic law. As such, it carries no implication about any future action or decision on the international plane.

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8. The rights and obligations for individuals to which the ECA gives effect in domestic law are those existing *from time to time under the treaties*:

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a. By definition, those are therefore rights and obligations created, altered and removed as a result of exercises of the Government's prerogative power on the international plane from time to time. Specifically, it is plain that the rights and obligations referred to may be added to, amended, diminished or removed entirely. That will be done by the Government participating on the international plane in the processes of negotiation, agreement and voting which lead to changes in EU law. The fundamental basis on which the ECA proceeds is thus that there will be changes to EU legal rights and obligations through the exercise of prerogative powers; and that these will take effect in domestic law to add to, amend or remove rights and obligations that might previously have existed.

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b. It follows that such domestic legal rights and obligations as exist through the conduit of the ECA from time to time are contingent.

They are contingent on the alteration of those rights and obligations (including their removal) by the Government engaging in the processes for negotiating, agreeing and voting on changes to the EU legal regime – all of which involves exercising the Government's prerogative powers.

9. None of that is made subject in the ECA to a precondition of prior legislative authority whenever (and only if) rights previously existing are reduced or removed. Such a conclusion is impossible as a matter of interpretation; and unsustainable by reference to the shifting nature of EU law since its inception.

10. The DC concluded at the heart of its judgment that there was an overriding principle in play. Its effect, it concluded, was to require legislative authority before the Government could take any step by the prerogative which altered, or might lead to the alteration of, the law of the land. The DC's approach takes well-known and uncontroversial statements that (a) treaties are not self-executing and (b) in general, the Government cannot act inconsistently with or so as to alter legislation; and infers a new interpretative principle of unwarranted breadth which is divorced from the reality of Government action on the international law plane.

11. The true position is that acts of the Government in the exercise of the prerogative can alter domestic law. That can occur in a variety of ways. Specifically, such exercises of prerogative powers can do so, consistently with legislation, as it is with the ECA. It is not consistent with the ECA and its function in a dualist system to reason from the fact that the ECA is the conduit into domestic law for internationally established rights and obligations to a proposition that prerogative powers to alter or withdraw from those international rights and obligations are thereby abrogated.

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12. In these circumstances, and having regard to the long-established and vital nature of the prerogative powers relating to the conduct of foreign affairs including the making and un-making of treaties, the principle to be applied in considering whether those powers have been removed is properly the principle in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508: whether Parliament has evinced an intention to do so expressly or, possibly, by necessary implication.

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13. Parliament has evinced no such intention. On the contrary, Parliament has considered with care and in detail what should be the nature of the controls over the exercise of prerogative powers in the context of treaties. It has done so generally in the Constitutional Reform and Governance Act 2010 ("**CRAG**"). It has done so specifically – in a considered and express set of provisions – in the context of changes to the EU legal regime. Moreover, it decided to provide for a referendum on the very question of withdrawal from the EU Treaties in the European Union Referendum Act 2015 ("**the 2015 Act**") on the clear understanding that the Government would implement its outcome. No part of that legislative scheme suggests that a decision to withdraw from the EU Treaties in implementation of the outcome of the referendum, and the giving of Article 50 notice to that end, requires legislative authority. Indeed, the existing legislative scheme is positively inconsistent with any such proposition.

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14. In summary, therefore, it is submitted that:

a. The Government has legal power to give notice pursuant to Article 50.

b. This is the constitutionally normal and unsurprising position, given the UK's longstanding dualist approach to international law.

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c. The ECA and the other parts of the relevant legislative scheme (including in particular the European Union (Amendment) Act 2008

("**the 2008 Act**"), the European Union Act 2011 ("**EUA**") and the 2015 Act) indicate that the Government's power to give the Article 50 notice has not been removed by Parliament. Certainly, that power has not been abrogated expressly or by necessary implication.

d. The surprising consequence of the DC judgment is that, if the outcome of the referendum is to be implemented, Parliament must decide to confer a new legal power on the Government to make that decision pursuant to Article 50(1) TEU and to give notification of that decision pursuant to Article 50(2) TEU. In other words, if the UK is to withdraw from the EU, Parliament must be asked to answer precisely the same question which was put by Parliament to the electorate and has been answered in the referendum; and must give the same answer in legislative form.

II. THE LEGISLATIVE FRAMEWORK

Article 50

15. Article 50 TEU lays down the procedure whereby a Member State may withdraw from the EU. It provides, so far as material:

> *"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
>
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
>
> *3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

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> *4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union."*

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16. Added by the Treaty of Lisbon with effect from 1 December 2009, Article 50 is the first express recognition in the EU Treaties of the right of a Member State to withdraw from those treaties.[1]

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17. The effect of Article 50(3) is that, once notice is given, the UK will withdraw from the EU Treaties and exit the EU within two years of the notice unless that period is extended by agreement between the UK and the European Council. Before the DC, it was common ground between the parties that an Article 50 notification is irrevocable and cannot be given conditionally. The DC proceeded on that basis (§10); and this Court is invited to do the same. This point is in any event of no practical significance to this appeal. If the DC is correct in its conclusion that the Government has no prerogative power to decide that the UK should withdraw from the EU and to commence the process of withdrawal, that conclusion holds good whether the first step in the process of withdrawal is revocable or irrevocable. Equally, if the Secretary of State is correct that prerogative power to withdraw from treaties can be exercised in relation to the EU Treaties, that conclusion would also hold good whether the giving of Article 50 notice was revocable or irrevocable.

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[1] However, as the DC recognised (§56), there is no doubt that states have always possessed the sovereign right to withdraw from treaties, whether by agreement or otherwise.

The ECA

18. The Treaty of Accession whereby the UK acceded to the EEC Treaties was negotiated and signed by the Government on behalf of the UK on 22 January 1972 using prerogative powers. A resolution was passed by both Houses of Parliament approving the signature of the Treaty. The Treaty itself provided for ratification by the parties "*in accordance with their respective constitutional requirements*" by 31 December 1972 at the latest, and that it would come into force for those of the UK, Denmark and Ireland which had ratified it on 1 January 1973 (art. 2).

19. Ratification of the Treaty of Accession was a matter within the prerogative powers of the Government. There was no formal Parliamentary oversight of treaty ratification at that time. There was a convention, pursuant to the Ponsonby Memorandum, that certain treaties would be placed before Parliament for scrutiny before they were ratified by the Government. The passage of the ECA, giving effect to obligations assumed by the UK under EEC law, was necessary to ensure that the UK did not find itself in breach of the EEC Treaties once they had come into force on 1 January 1973. As the DC stated: "*If this legislation had not first been put in place, ratification of the Treaties by the Crown would immediately have resulted in the United Kingdom being in breach of its obligations under them, by reason of the absence of provision for direct effect of EU law in domestic law*" (§42). But the ECA was not a legal precondition for the signature or the ratification or the coming into force in respect of the UK of the Treaty of Accession.

20. The central provision of the ECA is s. 2(1):

> "*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law,*

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and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

21. Two features of s. 2(1) ECA are to be noted at this stage.

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a. The particular method of implementation of international law which has been chosen by Parliament in the case of EU law is one which gives effect automatically to whatever the corpus of international law rights and obligations happens to be "*from time to time*". The model is "ambulatory" in that changes to the corpus of directly applicable/effective EU law rights and obligations are automatically given effect in domestic law.

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b. Section 2(1) implements only those EU law rights/obligations which are "*to be given legal effect or used in the United Kingdom*". As might be expected, since Parliament does not generally purport to legislate extra-territorially, the ECA does not give effect to EU law rights which are exercisable in or against other Member States. Therefore, a UK citizen wishing to live in France has an EU law right that arises not under the ECA but as a result of the international obligations which UK has agreed with France amongst other Member States. Many of the rights which UK citizens enjoy under EU law are not conferred by the ECA and do not exist in UK domestic law at all.

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22. The "*Treaties*" given effect through s. 2(1) are defined in s. 1(2) ECA. That is a provision which has been supplemented by amendment over the years as new treaties have been agreed to by the Government exercising prerogative powers. Generally, the requisite amendment to s. 1(2) has been made before rather than after ratification of the relevant treaty. This was not because amendment of s. 1(2) was a legal precondition for ratification of the treaty (contrary to §93(8) of the DC's judgment). Rather, this was because (as outlined below) statutes enacted subsequent to the ECA required express Parliamentary approval for new treaties

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which extended the powers of the European Parliament. For convenience, approval for ratification has been given, and s. 1(2) amended, in the same legislation (see fn 3 below).

23. Another significant feature of s. 1(2) is that certain aspects of certain treaties are excluded from implementation by way of s. 2(1). Section 1(2)(o) and (p) exclude from implementation of the Treaties of Amsterdam and Nice certain specific provisions of those Treaties. Section 1(2)(s) implements the Lisbon Treaty, save for the Common Foreign and Security Policy provisions. The excluded provisions are implemented in domestic law, if at all, by freestanding measures separate from the ECA.[2]

The European Parliamentary Elections Act 1978

24. Section 6 of the European Parliamentary Elections Act 1978 ("**the 1978 Act**") was the first occasion on which Parliament decided to control an aspect of the treaty-making prerogative. It did so expressly. It did so in respect of some but not all EEC treaties:

> *"No treaty which provides for any increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament."*

25. This was thus a specific and limited control of the treaty prerogative. Its concern was to ensure that Parliament had the final say over treaty changes which would result in the transfer of powers from the UK Parliament to the European Parliament. The 1978 Act did not impose any limitations on the exercise of prerogative powers to commit the UK (on

[2] For example, the Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures, discussed in *Assange v The Swedish Prosecution Authority* [2012] 2 AC 471 (esp. §§209-210), which was subsequently implemented by Part 1 of the Extradition Act 2003. It is uncontroversial that, at that time, the excluded Treaty provisions were unaffected by the ECA and were therefore subject to the Government's usual prerogative powers to enter into or withdraw from international agreements.

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the international plane) to new legislation affecting rights or obligations in domestic law. As already noted, this provision, and its successors, explain the subsequent chronology of Parliamentary involvement in the ratification of new EU Treaties, whereby Parliamentary approval for ratification and amendment of s. 1(2) ECA were effected in the same legislation.[3]

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The European Parliamentary Elections Act 2002

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26. Section 6 of the 1978 Act was re-enacted in s. 12 of the European Parliamentary Elections Act 2002 ("**the 2002 Act**"). At this time also, no further restrictions were imposed upon the treaty making prerogative.

The European Union (Amendment) Act 2008

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27. The 2008 Act approved and gave domestic effect to the Lisbon Treaty, which included Article 50. Article 50 did not pass unnoticed. It is mentioned in the Explanatory Notes to the Act as one of the principal changes brought in by the Lisbon Treaty. It is a provision which expanded the role of the European Parliament (because the European Parliament must approve the withdrawal agreement under Article 50(2)); and hence required specific Parliamentary approval pursuant to s. 12 of the 2002 Act.

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[3] See, for example, the European Communities (Amendment) Act 1986, approving (in s. 3(4)) and implementing the Single European Act; the European Communities (Amendment) Act 1993, approving (in s. 1(2)) and implementing the Maastricht Treaty; the European Union (Accessions) Act 1994, approving (in s. 2) and implementing the Accession of Norway, Austria, Finland and Sweden; the European Communities (Amendment) Act 1998 approving (in s. 2) and implementing the Amsterdam Treaty; the European Communities (Amendment) Act 2002, approving (in s. 3) and implementing the Nice Treaty; and the European Union (Amendment) Act 2008, approving (in s. 4) and implementing the Lisbon Treaty.

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28. Also in the 2008 Act, a requirement of approval by Act of Parliament was imposed before ratification of any amendment to the founding treaties made by the ordinary revision procedure, and not just amendments which increased the powers of the European Parliament (s. 5). Further, Parliament imposed for the first time, in s. 6, a series of Parliamentary controls, not on treaty-making, but on decisions to be taken by the Government using prerogative powers under various Treaty provisions. Henceforth, a Minister of the Crown was not permitted to vote in favour of or otherwise support a decision under a range of Treaty provisions, unless Parliamentary approval had been given by resolution of each House. Significantly, no Parliamentary control was imposed in relation to Article 50. Also significant is that on the DC's analysis, s. 6(1)(a) of the 2008 Act, requiring a Parliamentary resolution before approval of a treaty amendment under the Simplified Revision Procedure, would have reduced Parliamentary control over treaty changes (since, on the DC's view, following the ECA, an Act of Parliament was required, at least where a new treaty impacted upon existing domestic rights).

The EUA

29. The EUA contains the most significant and extensive set of legislative controls upon the exercise of the treaty prerogative in relation to the EU Treaties. The EUA repealed s. 6 of the 2008 Act and s. 12 of the 2002 Act and put in place a series of detailed provisions which impose express conditions upon the use of the prerogative to take a wide range of steps under and in relation to EU law. These conditions were introduced with the evident aim of protecting Parliamentary sovereignty, against a backdrop of increasing debate and concern about the UK's membership of the EU, including desire for a referendum on the subject of withdrawal.

30. Under ss. 2-4 EUA, a treaty which amends the TEU or TFEU may not be ratified unless the treaty is approved by an Act of Parliament and, broadly, where it would confer a new competence on the EU, a referendum. Under s. 6, certain types of decision by Ministers exercising their Treaty functions using prerogative powers - essentially those which would extend the reach of EU law - are subjected to control by primary legislation and by referendum. Section 7 governs further decisions by Ministers exercising their Treaty functions using prerogative powers, subjecting them to control by primary legislation but not referendum. These include the strengthening (but not weakening or removing) of rights of EU citizens (s. 7(2)(a)). Under s. 8, a Minister may not vote in favour of or otherwise support a decision under Article 352 TFEU unless one of ss. 8(3)-(5) is complied with in relation to the draft decision, which may require primary legislation or motions in Parliament. Under s. 9, certain notifications provided for under the Lisbon Treaty cannot be given without Parliamentary approval by motion. Notification under Article 50 is not one of the notifications specified. Section 10 lists other types of decision for which a Minister may not vote without Parliamentary approval.

31. This is a detailed and focussed statutory scheme, and significant to the present issues as such. It is also significant because it is not a complete code: the vast majority of voting on the work of the Council of Ministers is not caught by the EUA. Parliament has carefully selected the exercises of prerogative power which it wishes to control, not including Article 50.

CRAG

32. Part 2 of CRAG codifies the Ponsonby Memorandum and provides for Parliament to exercise influence over the ratification of a new treaty by the Government (subject to certain exceptions). The detailed procedures

governing the exercise of this influence, which were the result of careful scrutiny and dialogue between Parliament and the Executive, are contained in ss. 20-23 CRAG. They are not applicable to a treaty to which the EUA applies (s. 23(1)(c)). CRAG does not curtail any prerogative powers in respect of treaty-making: the premise for Parliament's role in treaty ratification is that prerogative powers have been used to negotiate a treaty and will be used to deposit the instrument of ratification which establishes the UK's consent to be bound by the treaty. CRAG procedures do not apply at all to a decision to withdraw from a treaty or to start the process of withdrawal. They apply, or not, regardless of whether the treaty in question would confer new rights which will require implementation by legislation, or would require legislation to take away existing statutory rights in order to comply with the treaty, and regardless of the consequences for existing statutory rights of withdrawal from a treaty.

The 2015 Act

33. The purpose of the 2015 Act was to enable the people directly to express their will on a single, binary, question: "*Should the United Kingdom remain a member of the European Union or leave the European Union?*" (s. 1(4)). There is nothing in the language of the Act or in its legislative history to suggest that Parliament intended that the Government should only commence the process of implementing a "leave" vote, by giving the notification prescribed by Article 50(2), if given further primary legislative authority to do so. On the contrary, the premise of the 2015 Act was the continued existence of the Government's prerogative powers to act on the international plane – including, specifically, to give Article 50 notice as the first step in implementing a "leave" vote. That was also

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the clear understanding of all concerned and the basis on which the people voted in the referendum.[4]

34. The DC characterised the referendum as "*advisory for the lawmakers in Parliament*" (§106). The referendum was advisory for the Government in that the 2015 Act did not provide for the referendum to be self-executing or make statutory provision for the steps which the Government was required to take in the event of a "leave" vote. That is unsurprising given that: (a) Article 50 itself prescribes the formal steps to be taken once a Member State has decided to withdraw from the EU; (b) it would be a matter for the Government to start the formal process of withdrawal by giving notification under Article 50(2), at a time which the Government believed to be in the best interests of the UK; (c) it had not been decided, and Parliament did not itself seek to decide, what outcome the UK should seek to achieve in negotiating its future relationship with the EU. It was not because Parliament or the electorate were proceeding on the basis that the outcome of the referendum would not be given effect to, or could not be given effect to without the further approval of Parliament in yet further primary legislation.

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35. As the DC correctly noted (§105), the Secretary of State does not contend that the 2015 Act provides the source of power to give notification under Article 50. It did not need to. It simply left in place the power that already existed to implement Article 50, namely the Government's foreign affairs and treaty prerogative.

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[4] This was clearly stated on many occasions, both inside and outside Parliament. The Conservative Party manifesto for the 2015 General Election stated (p. 72): "*We will hold that in-out referendum before the end of 2017 and respect the outcome*". The then Foreign Secretary told the House of Commons when introducing the Bill which became the 2015 Act: "*This is a simple, but vital, piece of legislation. It has one clear purpose: to deliver on our promise to give the British people the final say on our EU membership in an in/out referendum by the end of 2017*" (Second Reading, HC, Hansard, 9 June 2015, col. 1047). In a leaflet regarding the referendum which was delivered to every household in the UK, it was stated: "*This is your decision. The Government will implement what you decide*".

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III: LEGITIMATE USE OF THE PREROGATIVE IN THE UK'S DUALIST SYSTEM

36. The DC concluded that Parliament by the ECA has introduced EU law rights into domestic law in a manner which cannot be undone by the Government taking action on the international plane to withdraw from the EU Treaties (§92). Indeed, the DC went further and held that Parliament had also precluded the Government from acting as to diminish EU law rights in and against other Member States, which do not have effect in domestic law. It is submitted that those conclusions incorrectly analyse basic dualist principles and the function and effect of the ECA.

(1) The foreign affairs prerogative

37. **First,** it is, and always has been, for the Government to exercise the powers to make, amend and withdraw from treaties and otherwise to conduct the UK's business on the international plane. That does not represent an anachronistic or constitutionally suspect position. It is essential to the conduct of effective government; and represents no more than a proper and necessary division of constitutional responsibility and functions between the Government and Parliament.

38. The prerogative is generally to be regarded as "*a part of sovereignty which Parliament chose to leave in [the Government's] hands*" (per Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 100). That is particularly so in the case of the foreign affairs prerogative, the continued exercise of which was specifically recognised by Parliament in the Bill of Rights: see *McWhirter v Attorney-General* [1972] CMLR 882, §§6 and 8. The DC described the prerogative as a "*relic of a past age*" (§24), words used by Lord Reid in *Burmah Oil* with reference to the war

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prerogative. That description is inapt in the case of the conduct of foreign affairs where the dynamism and flexibility afforded by the use of prerogative powers, without the need for extensive legislative approval, is essential to good administration. The foreign affairs prerogative is a leading example of "a *power to act according to discretion for the public good*" (per Viscount Radcliffe in *Burmah Oil*, at 118, quoting John Locke's "*True End of Civil Government*").[5]

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39. It is commonplace in other common law jurisdictions for treaty-making powers to reside with the executive. That is the case in Canada, Australia and New Zealand. Each of these jurisdictions has some degree of legislative oversight of treaty ratification (that is, treaty-making), but withdrawal from treaties is entirely a matter for the Executive. A challenge to the royal prerogative to withdraw from treaties failed in Canada for that reason (*Turp v Ministry of Justice & Attorney General of Canada*, 2012 FC 893). Even in the USA, where treaty ratification is subject to Senate approval by a two-thirds majority, the power to withdraw from treaties vests exclusively in the executive (see the *Restatement (Third) of Foreign Relations Law* at §339; *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191).

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40. **Secondly**, in the field of foreign affairs, the legitimate exercise of the prerogative can undoubtedly have an immediate and direct effect, altering the content of domestic law and the extent of individual rights and obligations which have effect in domestic law. It may also have important indirect effects on such rights and obligations. For example:

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[5] See also Blackstone's *Commentaries on the Laws of England (1854, 23rd ed., by James Stewart)*, Book 1, Chapter, 7, describing the foreign affairs prerogative as "*wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch*" (p. 292) and stating (pp. 294-295): "*With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels*".

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a. In *Post Office v Estuary Radio* [1968] QB 740, the exercise of prerogative powers to extend the UK's territorial waters had the effect of altering the scope of primary legislation which governed conduct in territorial waters (per Diplock LJ at 753-754), and even to the extent of exposing persons to criminal liability (as in *R v Kent Justices, Ex parte Lye* [1967] 2 QB 153). This was not merely a case of Parliament expressly legislating in such a way as to leave the Government to fill in the gaps (as the DC suggested in §79), but of the prerogative altering the scope of domestic law.

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b. The Vienna Convention on Diplomatic Relations 1961 ("**VCDR**") and the Diplomatic Privileges Act 1964 ("**DPA**"), which gives effect to it, represent another powerful example of the interaction of the foreign affairs prerogative with domestic law to confer or remove important individual rights. The DPA does not incorporate arts. 4 and 9 of the VCDR which govern the *agrément* of the receiving state to accredit a person as head of the diplomatic mission and the making of any diplomat *persona non grata*. Those matters are governed entirely by the prerogative, and by exercise of the prerogative the Government brings into effect for certain individuals, and removes, the substantial legal immunities or privileges which are incorporated under the DPA. Rights recognised in domestic law are regularly altered and removed by the prerogative in this way.

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c. The Government regularly enters into treaties with other states which affect the rights and obligations of British citizens, both in the UK and abroad, and of granting reciprocal benefits to foreign nationals in the UK. In the sphere of commercial interests, for example, bilateral investment treaties typically protect UK nationals investing in the other state party against expropriation without compensation, discrimination and other forms of inequitable treatment in exchange for the recognition of reciprocal rights for

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nationals of the other state in respect of investments in the UK.[6] These are treaty rights, which are not actionable in the UK courts and do not form part of the law of land, although they may produce indirect effects, such as via the enforcement of arbitral awards.

d. More generally, as the DC acknowledged, an unincorporated treaty, concluded using prerogative powers, may produce important effects upon individual rights and obligations through the principle that legislation, and the common law, are to be interpreted in accordance with a presumption of conformity to the UK's obligations under international law (§33). A striking recent example of this impact is *Assange*, in which this Court applied the presumption to construe the Extradition Act 2003 in accordance with the EU Framework Decision to which it was intended to give effect, and which did not have direct effect, so that the phrase "*judicial authority*" included a public prosecutor's office and the extradition of Mr Assange was permitted (§§10, 99, 112, 121-123).

(2) Implementation of treaties in domestic law

41. In the UK's dualist system, treaties are not self-executing and require implementation by Parliament before they may form part of domestic law. As Lord Oliver stated in the *Tin Council* case (*J.H. Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418) at 500A-C:

> *".. as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing.*

[6] For example, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments. This was signed on 14 March 1994 and entered into force on 6 January 1995.

Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."

42. This principle was not expressed as, and does not operate as, a restraint on the power to enter into, or withdraw from, treaties. It addresses the discrete question as to the domestic legal impact of any exercise of the prerogative power to do so. Indeed, Lord Oliver made clear that the conclusion of a treaty was "*outside the purview of the court*" and "*irrelevant*" as a source of rights and obligations.

Models of implementation

43. Where domestic legislation is required to give effect to international treaty obligations, there are different legislative models for achieving this:

    a. Parliament may enact statutory provisions which give effect to the treaty but which make no reference to it. For example, s. 133(1) of the Criminal Justice Act 1988, concerning compensation for miscarriages of justice implements, but does not refer to, art. 14(6) of the International Covenant on Civil and Political Rights 1966 (as recognised in *R (Adams) v Secretary of State for Justice* [2012] 1 AC 48, at eg §14). The Evidence (Proceedings in other Jurisdictions) Act 1975, implements, but does not refer to, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

    b. Domestic legislation may be drafted so as to meet international obligations in its own words (as opposed to simply scheduling the text of the relevant treaty), but making clear that the intention of Parliament was to implement a specific treaty. Examples include the Patents Act 1977 giving "*effect to certain international conventions on patents*" (most notably, the Convention on the Grant of European Patents 1973) and the International Criminal Court Act 2001 giving effect to the Statute of the International Criminal Court. EU law directives are customarily implemented in this way.

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c. Legislation may set out specific terms of a treaty, often by means of incorporating them in a schedule, in order to implement certain obligations arising under the treaty. Examples include the Hague Convention on Civil Aspects of Child Abduction 1980, which is
B scheduled to the Child Abduction and Custody Act 1985; and parts of the VCDR which are given effect by s. 2 of and Schedule 1 to the DPA.

44. Parliament may also give effect to treaties by "ambulatory" legislation
C whereby the effect of international law obligations in domestic law changes as those obligations change at the international level. Legislation may refer to named treaties, or state that treaties may be specified in secondary legislation. Legislation may provide that the relevant treaty obligations have effect in domestic law whatever they may be from time
D to time. The effect of legislation on this model is to transpose agreements negotiated and entered into in the exercise of prerogative power into domestic law without further Parliamentary intervention. The ambulatory model of implementation is an obvious situation where the exercise of the treaty-making prerogative has a direct impact on the rights
E and obligations having effect in domestic law.

45. Section 2(1) ECA is the leading example of this ambulatory model. But there are other examples where the content of domestic law will change automatically upon the termination of international legal obligations:

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a. Section 2 of the Taxation (International and Other Provisions) Act 2010 ("**TIOPA**"), pursuant to which numerous double taxation treaties are implemented in domestic law, gives effect to whichever treaties have been concluded by the Government and specified in an
G Order in Council (which has been approved by the House of Commons alone). The rights enjoyed under domestic tax law (and indeed the reciprocal rights enjoyed in other states) are dependent

upon the Government concluding, and not withdrawing from, double taxation arrangements (and indeed on other state parties not terminating the arrangements). The exercise of the prerogative to make and un-make treaties determines the rights which are enjoyed pursuant to TIOPA.[7]

b. The National Health Service (Charges to Overseas Visitors) Regulations 2015 (SI 2015/238) exempt overseas visitors from charges for health services "*where those services are provided in circumstances covered by a reciprocal agreement with a country or territory specified in Schedule 2*" (reg. 14). Schedule 2 then lists a series of countries and territories with which such reciprocal agreements exist, pursuant to the exercise of prerogative powers. It follows that where a reciprocal agreement is terminated by prerogative power, the citizens of the other country in question will cease to be exempt from charges without the need for prior amendment of the Regulations.[8]

Domestic implementation is a conduit for international law rights

46. Whichever method of incorporation is chosen, the essence of dualism is that the domestic statute is the conduit through which international legal rights and obligations are given effect in domestic law. That is the case with ambulatory legislation, such as s. 2(1), as with other models. In accordance with conventional dualist theory, the function of s. 2(1) ECA

[7] See Professor John Finnis, - "*Terminating Treaty-based UK Rights*", https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/; and "*Terminating Treaty-based UK Rights: A Supplementary Note*" https://ukconstitutionallaw.org/2016/11/02/john-finnis-terminating-treaty-based-uk-rights-a-supplementary-note/.

[8] The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2015 (SI 2015/2025) removed (by reg. 8) the names of 12 states with whom reciprocal agreements had already been terminated. The timing of the terminations, and the 'tidying up' nature of the amendment is made clear by the accompanying Explanatory Memorandum.

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is to implement into domestic law the EU-related treaty obligations which the Government has entered into, from time to time, on the international plane. It is the legislative mechanism by which those obligations are given effect in domestic law. As such, it does not touch upon, and carries no implication regarding, the power of the Government to enter into or withdraw from commitments on the international plane as appropriate.

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47. The DC's reasoning ignores this important distinction between (a) the transposition of rights and obligations on the international plane into domestic law; and (b) control by Parliament of the exercise of the Government's powers to create, amend or withdraw from such rights and obligations on the international plane. When Parliament chooses to regulate those powers, it does so expressly - as in eg CRAG and the EUA.

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48. A statute such as the ECA says no more about the Government's power to agree, amend or withdraw from the relevant treaty than would an implementing statute on one of the other models described in §43 above. In those other cases, if the Government were to withdraw from a relevant treaty, it would be for Parliament to decide whether or not to continue to provide in domestic law for rules derived from that treaty, bearing in mind that Parliament has not legislated, and could not legislate in the future, for other states to observe the reciprocal obligations arising from the treaty. A similar analysis applies to the EU Treaties.

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49. In the light of its function, properly understood, the proposition that the ECA "creates domestic legal rights", and therefore that (as the DC would have it) withdrawing from part or all of the UK's EU treaty obligations would remove domestic legal rights, is not correct. The rights and obligations for individuals to which the ECA gives effect in domestic law are "*rights... from time to time created or arising by or under the Treaties*", which are to be "*recognised and available in law*". By definition those are

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therefore rights and obligations created, altered and withdrawn from as a result of exercises of prerogative power on the international plane.[9]

50. It follows that, on the implementation model embodied in s. 2(1) ECA (and also s. 2(1) TIOPA), legal rights and obligations which arise from international law and are given effect in domestic law by such legislation have no existence independent of the international legal rules from which they derive. The domestic legislation is a necessary but not a sufficient condition to create legal rights and obligations enforceable in domestic law. The other necessary condition is the underlying treaty obligation. The removal of either will necessarily deprive the right in question of any domestic legal effect. If the Government (or indeed another party to the treaty) chooses to amend or withdraw from the treaty in question, that will affect the corpus of rights and obligations which are given effect in domestic law. But the availability of those rights and obligations was always conditional upon the existence of the underlying international legal rights and obligations. As Professor Finnis has stated, with reference to s. 2(1) ECA and s. 2 TIOPA:[10]

> *"But rights acquired by virtue of s. 2(1) ECA are not "statutory rights enacted by Parliament". They are rights under the treaty law we call EU law, as it stands "from time to time". They are thus subjected to alteration by decisions made in the international realm by EU or EU-related bodies and processes, in which the Crown participates by exercise of its prerogative, for the most part without restraint or pre-authorization by Parliament, let alone by statute. So there are two necessary conditions for the existence, effect and operation of these treaty-based UK rights as rights – yes, "statutory*

[9] *A fortiori*, and contrary to §§66 and 92 of the DC's judgment, the ECA does not create rights for individuals which may be exercised in, and against, other Member States of the EU (as can be demonstrated by the fact that repeal of the ECA would itself have no legal effect on the continuing existence of those rights).

[10] Professor Finnis, *"Terminating Treaty-based UK Rights"*, UK Const. L. Blog (26 Oct 2016), https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/ .

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> *rights" – in UK law. One is that they be rights from time to time created or arising by or under the Treaties. The other is the silent operation of s. 2(1) ECA. The latter necessary condition does not suffice to sustain them as treaty-based UK statutory rights if they cease to be in effect in or under the Treaties, by virtue of something done to or under the Treaties – often something done entirely without pre-authorization, or indeed any authorization, by the UK Parliament.*[11]
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> *For these are not provisions that by themselves define and confer rights. Instead they are provisions that give UK statutory legal effect contingently to such rights as arise on the international (EU or double tax treaty) plane, and that track those rights as they come into existence and go out of existence by actions on the international plane."*

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51. The contingent nature of the rights and obligations given effect by the ECA can also be illustrated by reference to the power of other state parties to withdraw from the underlying international obligations. If Greece were to leave the EU, UK citizens would no longer have an EU law to right to move to Greece, including the right, arising under the ECA, not to be prevented from moving to Greece.[12]

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[11] See also on this point, Professor Adam Tomkins, Verfassungsblog, 6 Nov 2016, http://verfassungsblog.de/brexit-democracy-and-the-rule-of-law/: *"the legal basis of the rights and obligations we enjoy under EU law is EU law, not the ECA. The ECA is merely the vehicle by which those rights and obligations are translated into enforceable rights and obligations in the legal systems of England and Wales, Scotland, and Northern Ireland. Those rights and obligations have force in the United Kingdom because and only because Parliament has said so in the ECA (so much was confirmed in the European Union Act 2011, s. 18). But this does not mean that the underlying source of those rights and obligations is the ECA itself – the underlying source is the EU – and the ECA is the legal vehicle by which those rights and obligations are translated into the UK's legal systems".*

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[12] Similarly, and with reference to a provision which was at the forefront of the Respondents' case before the DC, if the Member States of the EU had, prior to the EUA, agreed a treaty which abolished the European Parliament, s. 8 of the European Parliamentary Elections Act 2002, conferring the right to vote in elections to the European Parliament, would be otiose for lack of underpinning international law.

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52. At the very least, rights of this nature are not the same species of rights recognised in domestic law as have in previous cases been held to be protected from interference by prerogative powers.[13]

53. The DC reached a number of other conclusions regarding the approach to interpreting, and the interpretation of, the ECA (in particular, in §§82-84 and 92-94). The Secretary of State's submissions regarding those conclusions are set out in the Appendix to this Case.

(3) The DC's "background constitutional principle"

54. The DC identified what it described as a general "*background constitutional principle*" that, unless Parliament expressly legislates to the contrary, the Government should not have power to vary the law of the land, or deprive individuals of rights, by use of prerogative powers (see eg §§84, 92).

55. The case law on which the DC relied does not support the existence of such a principle. That case law instead sets out uncontroversial general principles which cannot be transposed into the broad principle identified by the DC:

    a. Lord Oliver in *JH Rayner* was simply setting out the proposition that treaties are not self-executing. That is plain. The constitution is indeed dualist. But it does not mean or lead to the principle on which the DC placed such weight. Indeed, for the reasons developed above, dualism is an important feature of this case, and powerfully supports the position of the Secretary of State.

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[13] As Professor Mark Elliott and Hayley Hooper have explained: "*Critical reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union*" U.K. Const. L. Blog (7 Nov. 2016).

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b. The *Case of Proclamations* (1610) 12 Co. Rep. 74 stands for the uncontroversial proposition that the Government cannot purport to countermand laws passed by Parliament. It does not cater for the vast range of circumstances which have arisen over the following 400 years in which the Government is unquestionably entitled to use prerogative powers to affect individual rights and nor does it deal with the particular situation of the treaty-making prerogative.[14]

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c. *The Zamora* [1916] 2 AC 77 also concerned very different circumstances from those of the present case. The principle derived from the case by the DC – "*No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity*" – was, no doubt, apposite and correct for the purposes of determining the issue which arose in that case (whether legislation pursuant to the war prerogative could extend the circumstances in which the Crown might requisition property at common law). But it provides no basis for a general principle for unquestioning application in all cases, including the present.

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56. The DC's principle does not accord with previous authority outside the foreign affairs field.

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a. The *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) is but one example of the Government acting under the prerogative to alter domestic law and remove individual

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[14] Note also Professor David Feldman's comments on the DC's reliance upon this case (in D. Feldman, "*Brexit, the Royal Prerogative, and Parliamentary Sovereignty*", UK Const. L. Blog (8 Nov 2016): "*The case concerned a proclamation making it a criminal offence to build in certain places on the outskirts of London, and is an early example of judicial control of town planning activities. The dictum was wider than necessary for the case, and was inconsistent with Darcy v. Allin (also known as The Case of Monopolies) (1602) 11 Co. Rep. 84 holding that the Crown could grant a monopoly in a commodity to one person, thereby making it unlawful for other people to trade in it, although the monopoly in question was held to be unlawful because the Queen had been deceived into thinking that granting the particular monopoly would redound for the public benefit. (In his subsequent political career, Coke was a long-standing campaigner for legislation to prohibit the grant of monopolies)*".

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rights. The exercise of the prerogative deprived civil servants at GCHQ of their previous freedom to join a trade union. The House of Lords ruled that this exercise could be subject to judicial review challenge, but rejected the challenge on its merits. There was no suggestion that the prerogative power could not be used at all so as to make the relevant Order in Council or to issue instructions under it to deprive workers of a freedom they had previously enjoyed.

b. Similarly, in *De Keyser's Royal Hotel*, the exercise of the prerogative to seize property would have been lawful but for primary legislation to the contrary.

c. In *Burmah Oil*, the exercise of the prerogative to seize and destroy property would have been lawful but for the failure to pay compensation.

d. The issue and withdrawal of passports, which may have a radical effect on the freedoms of individuals, continues to be a matter governed by prerogative powers: see, recently, *R (XH) v SSHD* [2016] EWHC 1898 (Admin), applying the *De Keyser* test to ascertain whether the prerogative had been abrogated in relevant respects.

57. The principle properly stated is – as in *De Keyser* – that prerogative powers can be used to change domestic law and to deprive individuals of rights in the UK if the power is 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.

58. Within the field of the foreign affairs prerogative, the DC's principle is impossibly broad. That can be demonstrated by the various examples set out in §40 above where, on any view, the exercise of the prerogative can have a more or less direct impact on individual rights and obligations.

59. In the context of EU law, it is submitted that the principle cannot be correct, or produce the result which the DC arrived at, namely that prior

legislative authorisation was required before any change was made to domestic rights:

a. The ECA contemplates precisely the Government using prerogative powers to "*change the law of the land*", and to add to or remove EU rights and obligations that have become part of domestic law from time to time.

b. This was to be done, in the usual way, through the process of negotiation, agreement and/or voting on new treaties and EU secondary legislation at the international level. In the case of new treaties, these would be added to the list of treaties in s. 1(2) ECA, by amending primary legislation or by Order in Council.

c. None of these international procedures are prescribed or implemented in any sense by s. 2(1) ECA, which serves an entirely different function. None of this is made subject in the ECA to a precondition of prior legislative authority whenever rights previously existing or given effect in domestic law are altered.[15]

d. In any event, as already noted (see §§21, 49-52 above), the rights and obligations which are given effect in domestic law through the ECA are not domestic law rights and obligations in the conventional sense, but are rights and obligations created under international law which are contingent upon the continued adherence by the UK to the underlying international obligations.

60. There is no difference in principle, but only in scale, between a reduction in rights caused by changes to EU Treaties or legislation (through prerogative powers) and a withdrawal from the EU Treaties (through

[15] It should be noted that the DC's principle cannot coherently be restricted to the removal of EU rights that happen to exist at any particular point in time. It must apply (and through the references in the Judgment to changing the law of the land, seems intended to apply) to *any* change to the corpus of EU law rights and obligations, by addition or subtraction, through use of the foreign affairs prerogative.

prerogative powers).[16] In any event, as a matter of political and constitutional reality, Parliament recognised the scale of withdrawal from the EU Treaties, and decided to provide for the referendum on that issue.

(4) The wider implications of the DC's analysis

61. The reasoning of the DC has serious implications for the use by the Government of the foreign affairs prerogative:

a. The current position in legislation is that there are limited constraints on the Government entering into new treaties, in CRAG; but none on the Government withdrawing from treaties.

b. On the DC's analysis, domestic legislation implementing a treaty would occupy the field and inevitably displace the prerogative power to withdraw from the treaty. Parliament would have to make express provision in implementing legislation which permitted withdrawal from the treaty or else authorise withdrawal by *ex post facto* primary legislation.

c. Withdrawal from treaty obligations, although not a common occurrence, would then be subject to far more stringent Parliamentary control than the conclusion of new treaties (cf CRAG).

d. The same reasoning would apply to amendments to a treaty. There is no clear distinction between amendment and withdrawal, since amendment may equally change/reduce the corpus of rights which are given effect in domestic law.

[16] In fact, that difference is more apparent than real. It should be uncontroversial that it would have been open to the Government on 1 January 1973 to agree with the other Member States to repeal all EEC secondary legislation, to enter into a new Treaty dispensing with 99.9% of existing Treaty obligations and to sign and ratify such a Treaty. Section 2(1) ECA would have continued to give effect to EEC law rights as they then were, albeit that they would have been vastly diminished. Parliament may have wished formally to amend s. 1(2) ECA to refer to the new Treaty but this would not have been necessary in order for the wholesale reduction of EEC law rights agreed at the international level to take effect.

e. This would mean that a new treaty which amended an existing treaty would be subject both to CRAG and also, inconsistently, to a requirement for authorisation in primary legislation.

f. The DC's approach may also affect the conduct of negotiations prior to conclusion of a treaty, such as will occur pursuant to Article 50(2). Suppose that the Government wished in the negotiations to preserve for UK citizens one part of the corpus of EU law rights but not another part, that position could have a direct impact on the continued enjoyment of current statutory rights. On the DC's analysis, the Government could not adopt that position and reach agreement on that basis without specific approval in an Act of Parliament. Parliament would be put in the position of "micro-managing" treaty negotiations. That does not currently occur in any international negotiating procedure, including negotiations on changes to EU law, and could not sensibly occur.

IV. THE RESPONDENTS' PRINCIPAL SUBMISSIONS

62. Two submissions which were at the heart of the Respondents' case before the DC are specifically responded to. **First**, the Respondents frequently repeated to the DC that giving notice under Article 50 was equivalent to a bullet being fired which would inevitably hit its target. Hence, it was said, an admittedly international law action would inevitably cause the destruction of domestic law rights.[17] The Secretary of State would respond:

[17] See, eg, transcript, day 1, 13 Oct 2016, p.19, lines 10-19: *"I say my case is very simple. My case is that notification is the pulling of the trigger. And once you have pulled the trigger, the consequence follows. The bullet hits the target. It hits the target on the date specified in Article 50(3). The triggering leads to the consequence, inevitably leads to the consequence, as a matter of law, that the treatise cease to apply and that has a dramatic impact in domestic law."*

a. The UK's withdrawal from the EU - the only target that the "bullet" will strike - will undoubtedly lead to the removal of rights and obligations currently conferred or imposed by EU law. As already noted, the addition to, amendment of and removal of rights/obligations conferred/imposed by EU law by the exercise of prerogative powers has been a central feature of the legal regime from the outset; and the nuanced legislative regime has never provided for prior legislative control over, or authorisation for, withdrawal.

b. Even if the bullet analogy were apt, it would provide no guide to the intention of Parliament in 1972, or subsequently, insofar as withdrawal from the Treaties is concerned. Until the new procedures in Article 50 came into force (following approval by Parliament), any decision by Government to withdraw from the Treaties, or communication of such a decision to the EU institutions, would not have had any legal effects which could immediately be said to be inevitable but would have been considered and implemented over a period of time, during which Parliament would have had ample opportunity to intervene if it had so wished. Once Article 50 came into force, Parliament has been content to leave untouched the prerogative power to notify pursuant to Article 50(2), even though such notification has irrevocable effects.

c. The giving of Article 50 notice does not sit in constitutional isolation. The Conservative manifesto at the General Election promised an "in/out" referendum. Parliament then decided to provide for that referendum and passed the 2015 Act for that purpose. The referendum occurred with the vote for leaving the EU. Then and only then is the Article 50 notice to be given by the Government exercising its prerogative powers. The basic legal consequences of leaving the EU, in terms of impact on rights and obligations existing under the EU regime, have been evident throughout.

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d. The analogy is beside the point. The decision to leave has already been taken, by the Government, accepting the outcome of the referendum. Article 50(2) merely deals with the timetable by which that outcome will be delivered if nothing else is agreed. If the Respondents, and the DC, were correct, the Government was not entitled to decide that the UK should withdraw from the EU regardless of the existence or terms of Article 50 (and whether or not giving notice under Article 50(2) is analogous to the firing of a bullet).

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e. The fact remains that the giving of notice under Article 50 itself changes nothing in domestic law (as Maguire J recognised in the parallel proceedings in Northern Ireland: *McCord's (Raymond) Application* [2016] NIQB 85, §105).

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63. The **second** submission is that whatever the position with the ECA, there are subsequent statutory provisions which confer freestanding rights which will be "*destroyed*" in the event of withdrawal from the EU. Particular reliance was placed upon s. 8 of the 2002 Act which defines the scope of entitlement to vote at an election to the European Parliament (DC, §61).[18] The Secretary of State responds:

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a. Again, given the decision that the UK is to withdraw from the EU, it is inevitable and unsurprising that the UK will no longer have access to the institutions of the EU, including the European Parliament. The

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[18] Section 8(1) of the 2002 Act states: "*A person is entitled to vote as an elector at an election to the European Parliament in an electoral region if he is within any of subsections (2) to (5).*" See, eg, transcript, day 1, 13 Oct 2016, pp.64-65, lines 15-1: "*I gave the example .. of the European Parliamentary Elections Act 2002, volume C, tab 21, the right to stand for election to the European Parliament, the right to vote for members of the European Parliament. That right will be defeated, whatever Parliament may think. It is not a right under the 1972 Act, well, it is by implication, but it is also an express statutory right that is confirmed by the 2002 Act. That right is simply frustrated in its entirety by the giving of notification. Parliament's consideration of that right is simply pre-empted by the notification and its consequences.*"

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UK is leaving "the club" and of course will no longer have access to the institutions of the club.

b. That inevitable consequence is an unlikely basis for an implication from statutory provisions governing access, as a Member State of the EU, to the EU institutions that the Government has lost its ordinary treaty prerogative to withdraw from the EU Treaties.[19]

c. The analysis set out above in relation to the ECA applies equally to subsequent statutory provisions which give effect to rights or obligations derived from EU law. Indeed, it would be surprising if the prerogative to withdraw from the EU Treaties were untouched by the ECA, the principal statute, but had been abrogated by later, subsidiary legislation. The choice of model of implementation of international law rights and obligations should make no difference to the continuing existence of the foreign affairs prerogative in relation to those rights and obligations.

d. The right to vote in European Parliament elections, like rights and obligations conferred and imposed by the ECA, is a contingent right, which is dependent upon the existence of the underlying international law rights and obligations. Hence, s. 8 of the 2002 Act does not require the UK to hold elections to the European Parliament or otherwise guarantee that any such elections will take place (that being dealt with in EU secondary legislation: the Act concerning the election of the members of the European Parliament by direct universal suffrage). If, pursuant to the UK's international obligations, there is to be an election of UK members of the European

[19] The same analysis applies to other "*category (iii)*" rights relied upon by the Respondents. For completeness, the DC was wholly wrong to accept that there is any domestic statutory "right" to have a case referred to the CJEU or to complain to the Commission about an infringement of EU law. Both of these procedures are provided for in the Treaties in non-directly effective provisions of international law (art. 267 TFEU and art. 17 TEU) which are not given effect through the ECA.

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Parliament, then the 2002 Act governs various aspects of that election.

V. THE APPLICATION OF *DE KEYSER* PRINCIPLES

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The correct approach

64. The correct approach to considering whether longstanding and important prerogative powers continue to subsist is the conventional approach, namely to consider whether that power has been overtaken by statute expressly, or, in the alternative, expressly or (possibly) by necessary implication, as in the *De Keyser* line of cases. In circumstances where Parliament has specifically recognised that the usual exercise of prerogative power will have precisely the effect of altering (including increasing, amending or "destroying") EU law rights currently enjoyed, the DC was wrong to identify the principle at the heart of its judgment – that the Government cannot by the prerogative alter the law of the land without express legislative authorisation – and rely upon that principle so as to reverse the conventional approach.

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65. Accordingly, it is submitted that, the question whether Parliament has abrogated the usual prerogative – or required that a particular type of decision in relation to the EU Treaties should return to Parliament for prior legislative authorisation – is not answered or informed by pointing to the fact that that decision might or will have an effect on the rights currently enjoyed. It can only be answered or informed by applying the well-established approach of asking whether, in the relevant legislative scheme, Parliament has evinced an intention to require prior legislative authorisation for the decision in question. And that question is to be answered not by reference to the DC's flawed interpretive assumption; but rather by applying *De Keyser* principles and focussing on the facts that, both generally and in legislation applying to the EU Treaties,

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Parliament has clearly and directly addressed when it would and would not require such prior legislative authorisation.

66. The original and enduring test is that of Lord Parmoor in *De Keyser* (at 575-576). This identifies the requisite intention of Parliament to abrogate the prerogative only where a matter has been directly regulated by statute:

> *"The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.*
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> *I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced."*

67. The DC accepted that test but took the view that direct regulation by statute was not the only kind of situation in which abrogation may be found (§97). However, the other cases cited by it – *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 and *Laker Airways v Department of Trade* [1977] QB 643 - were, like *De Keyser*, also situations where Parliament had deliberately legislated so as to regulate a particular form of Government activity and to require it to be done under certain conditions. In each case, the relevant legislation was held to exclude a continuing prerogative power to perform the same activity but without being subject to the same conditions or indeed any conditions (see, *Laker*, at 706H-707B 728B-D, 722F-G; *Fire Brigades Union*, at 554E-G, 578F). There is no analogy between that situation and the circumstances of the present case, where the ECA does not expressly regulate, and impose conditions upon, the power of the Government to enter into and withdraw from international obligations.

68. The *De Keyser, Laker* and *Fire Brigades Union* line of authority was also relied upon by the Respondents before the DC as establishing a broad principle that use of the prerogative may not frustrate or substantially undermine a provision of primary legislation. Having regard to the facts and the terms of the judgments in those cases, they do not stand for any such broad principle which could be uncritically applied to use of the foreign affairs prerogative. But even if there were such a principle, it would not be of assistance to the Respondents in the present case, once the limited purpose of the ECA (or subsequent legislation) is understood. A statutory provision which allows into domestic law treaty obligations by which the UK is bound from time to time is not frustrated or undermined by action taken to reduce or even withdraw altogether from those treaty obligations.

69. There are reasons of principle as well as authority why the appropriate question in the present context is whether Parliament has expressly restricted the Government's treaty-making power in relation to the EU Treaties. This is a sphere where Parliament has intervened expressly and directly in the past, from the 1978 Act onwards, culminating in the detailed scheme of the EUA. It may be presumed that any additional restrictions on the prerogative will also be express and direct. That was the *ratio* of the DC's ruling in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB 552. The claimant in that case challenged the decision of the Foreign Secretary in 1992 to ratify the Protocol on Social Policy which formed part of the Maastricht Treaty. His second ground of challenge was that the Minister could not use the prerogative to ratify the Protocol, which it was said would be given effect in domestic law through section 2(1) ECA. He argued that in enacting section 2(1) Parliament had intended to curtail the prerogative power to amend or add to "*the Treaties*" as defined in section 1(2), if not expressly

then by necessary implication (at 567F). Lloyd LJ, giving the judgment of the Court, stated:

> *"We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms, such as one finds in section 6 of the Act of 1978. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the E.E.C. Treaty."*

70. It was accordingly part of the *ratio* of *Rees-Mogg* that, specifically in relation to EU law, whether the prerogative is available to the Government to change rights on the international plane depends upon whether the legislature has expressly proscribed its availability. For that reason alone, the claimant's second ground of challenge failed. It failed too for a further reason, namely that since the Protocol was not one of the Treaties covered under s. 2(1) ECA it could have no force in domestic law (at 568B). However, contrary to §90 of the DC's judgment in the present case, this was an additional but not a necessary part of the reasoning of the Court in *Rees-Mogg*, and still less was it the nub of its reasoning. It is submitted, further, that in circumstances where the prerogative is intended to be used to implement the will of the electorate expressed in a referendum, nothing less than an express legislative restriction should suffice to prevent that.

71. If, contrary to the above submissions, it is sufficient in the present context for the prerogative to be abrogated by necessary implication, whether that has occurred must be judged with reference to the well-known dictum of Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, §45:

> *"A necessary implication is not the same as a reasonable implication…A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between*

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> *what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation"*

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Application of *De Keyser* principles to the ECA

72. There is neither express language in the ECA nor language from which a necessary implication might be drawn to the effect that the Government's usual treaty-making prerogative has been excluded. The ECA is premised on the continued exercise of prerogative powers, including the powers which if exercised would remove current rights. The EU legislative scheme as a whole, with its express and careful controls on certain changes to the EU regime, is simply inconsistent with an implication that the usual prerogative powers are abrogated.[20] See, further, the Appendix to this Case, addressing the DC's textual analysis of the ECA.

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Legislation subsequent to the ECA

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73. The DC's approach to the *De Keyser* question - reversing the normal question and then finding the relevant question to be conclusively answered by the ECA, as at 1972 - caused it to ignore a series of statutes which expressly regulated the exercise of the treaty-making prerogative in relation to the EU Treaties and so were inconsistent with the conclusion that the ECA had excluded that prerogative in 1972.[21]

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[20] The submission that the proper application of *De Keyser* principles to the ECA leads to the conclusion that the prerogative to withdraw from the EU Treaties has not been abrogated does not depend upon examination of subsequent legislation. That subsequent legislation is nevertheless relevant and puts the position beyond any doubt.

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[21] Professor Finnis has also criticised this aspect of the DC's reasoning: "*Intent of Parliament unsoundly Constructed*", Judicial Power Project Blog, 4 Nov 2016 at

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74. It is submitted that the relevant question is whether the prerogative (in relevant part) exists today; more precisely, whether the prerogative to withdraw from the EU Treaties has been excluded either generally or in circumstances where the electorate has decided in a referendum that the UK should withdraw from the EU. That is a question to be asked and answered at the present time and in the context of legislation presently applicable. It is also the question to be posed in relation to each of the relevant pieces of legislation: did Parliament evince an intention to exclude the prerogative power to withdraw from the EU Treaties following a "leave" vote in a referendum provided for in primary legislation. Further, as a constitutional statute, the ECA must be construed in the light of present constitutional circumstances (see, by analogy, *Robinson v Secretary of State for Northern Ireland* [2002] N.I. 390: also, in the case of a written constitution, *Edwards v Attorney General of Canada* [1930] AC 124, p. 136, per Lord Sankey LC).

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75. The later parts of the legislative scheme are relevant to the interpretation of the ECA on well-established principles. **First**, the ECA must be construed in the light of the 2008 Act in particular because the 2008 Act materially amends the ECA. Under modern practice, the intention of Parliament when effecting textual amendment of an Act is usually to produce a revised text of the Act *which is thereafter to be construed as a whole*: see *Bennion on Statutory Interpretation*, (2013, 6th ed.), Code §78, p.264, approved in *R v Brown* [2013] 4 All ER 860, §§34 and 36. Here, the 2008 Act specifically approved the Lisbon Treaty, including Article 50, and added that Treaty to the list of Treaties in s. 1(2) of the ECA (s.2 of the 2008 Act).

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http://judicialpowerproject.org.uk/john-finnis-intent-of-parliament-unsoundly-constructed/.

76. **Second**, each of the 2008 Act, the EUA and the 2015 Act aid the construction of the ECA, because they are legislation *in pari materia.* Where a later Act is *in pari materia* with an earlier Act, provisions of the later Act may be used to aid the construction of the earlier Act: see *Bennion*, Code §234, p.658, approved in *Bloomsbury International Ltd and others v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546, §10. Acts are *in pari materia* where they deal with the same subject matter on the same lines: *Bennion*, p.553. Here, each of the statutes summarised in §§18-35 above was of direct relevance to the exercise of the treaty-making prerogative in relation to the EU Treaties.

77. **Third**, just as the Acts subsequent to the ECA may properly inform the construction of the ECA, so too should the later legislation be taken to have been enacted in the knowledge of the ECA and to reflect its key principles. This flows from the presumption of consistency by virtue of which the courts will assume, unless the contrary is shown, that when the legislature operates in an area in which there is already legislation, the new legislation will be enacted in the knowledge of the existing legislation and will reflect its key principles unless there is a good reason for departing from them. The starting presumption is that Parliament should be taken to have acted consistently: *Minter v Hampshire Constabulary* [2014] 1 WLR 179, §15.

78. Accordingly, it is submitted that answering the question whether the treaty-making prerogative has been excluded by the ECA must involve having regard to subsequent legislation and recognising that:

    a. Parliament was aware of, and indeed had given specific approval to, Article 50, without imposing any limitations upon its exercise (see the 2008 Act).
    b. Parliament has expressly provided for a detailed set of controls on the use of the prerogative without touching the prerogative to

withdraw from the Treaties (or otherwise, save as provided in this or other legislation such as CRAG, to change the nature of the rights and obligations which are applicable to UK citizens through the conduit of the ECA (see in particular the 2008 and 2011 Acts)).

c. The ECA has not occupied the field (*contra* DC, §94): the treaty-making prerogative remains, subject to certain statutory restrictions (in CRAG and the EUA). Those limited restrictions upon the treaty-making prerogative in relation to EU law would have been unnecessary, indeed misconceived, if the ECA had removed that prerogative.

d. Parliament has provided for the UK people to vote in a referendum on whether the UK should remain a member of the EU, against the background of a clear understanding that the Government has promised to implement its result by providing notification under Article 50 TEU.

Application of *De Keyser* principles: summary

79. In summary, on ordinary principles of statutory interpretation, and application of the conventional *De Keyser* approach:

a. Parliament has repeatedly legislated in the area of treaty making in relation to the EU Treaties and has repeatedly not sought to deal with the particular question of giving notice under Article 50 or otherwise withdrawing from the EU Treaties. It had the specific opportunity to do so in relation to this very issue (in the 2008 Act) then again when enacting the 2015 Act. Its intention in relation to this aspect of the prerogative is plain.

b. Parliament's limited intervention in this field triggers the *Rees-Mogg* principle and requires further express intervention to touch the prerogative power to withdraw from the EU Treaties, which there has not been.

c. A necessary implication cannot be spelled out from the fact that Parliament has provided for EU law rights and obligations, as they are from time to time, to have effect in domestic law and has legislated to limit the availability of the prerogative in relation to matters other than withdrawal from the EU Treaties. The positive inference is precisely to the opposite effect. Parliament cannot be taken to be doing anything other than leaving the field (here, at least withdrawal or commencing the process of withdrawal) unoccupied.

d. It follows that the relevant prerogative power (commencing the process of withdrawal from the EU) is untouched. [22]

VI: THE ROLE OF PARLIAMENT

80. A conclusion that the Government retains the power to commence the process of the UK's withdrawal from the EU Treaties offers no affront to Parliamentary sovereignty. Parliament has paved the way for the taking of the decision to withdraw from the EU by providing for the referendum in the 2015 Act. The Court will be aware that Parliament is already deeply involved in the question of the terms of withdrawal from the EU, following the Government's decision to accept the outcome of the referendum. There have, for example, been debates in Parliament on an

[22] A further reason why the *De Keyser* principles would not exclude a prerogative power to give notice under Article 50 has been highlighted by Professor Paul Craig, namely that the giving of notice itself has no legal effect in domestic law: "*The invocation of Article 50(1) has no legal effect as such on the ECA 1972, nor does the 1972 Act say anything about the procedure for withdrawal from the EU Treaties … To be sure if the withdrawal agreement is concluded then the ECA 1972 will have nothing to bite on and will be duly repealed. The repeal will, however, be through a statute enacted in the proper manner by Parliament. It is of course inevitable that if the UK decides to withdraw from any treaty then the legislation that duly incorporated the treaty into UK law will be repealed. To regard this as coming within the* De Keyser *principle would however radically change it. The new principle would be that the executive could not exercise the prerogative power to begin the process of amending or withdrawing from a treaty, because this very initiation would impact on, or cut across, the legislation through which that treaty had earlier been incorporated into UK law. There is to my knowledge no case that comes close to establishing that proposition*": 'Brexit: A Drama in Six Acts' [2016] EL Rev 447, 463.

opposition motion regarding Article 50 and select committee scrutiny of issues relating to withdrawal from the EU. It would be open to Parliament to vote on resolutions regarding notification under Article 50 or indeed to pass legislation which inhibited or prevented the Government from proceeding to notify under Article 50.[23] It is entirely a matter for Parliament to decide the nature and extent of its involvement.

81. Further, Parliament will be involved inevitably and in detail in the future. The procedures under CRAG are very likely to apply to a withdrawal agreement concluded pursuant to Article 50(2). Just as Parliament legislated, in the ECA, to enable the UK to comply with the EEC Treaties upon joining the Communities, Parliament will be invited to legislate for the position following withdrawal:

a. Parliament will be asked to consider a Great Repeal Bill, the effect of which would be to establish as domestic law rights and obligations, where possible and appropriate, EU law rights and obligations which are currently given effect through s. 2 ECA.
b. Parliament will also consider the amendment or repeal of the ECA.
c. Parliament must be involved in legislating in relation to freestanding statutory law which implements EU directives and other EU law instruments and then in considering the future of the current EU law rights and obligations which are incorporated pursuant to the Great Repeal Bill.

82. The DC placed much emphasis upon the principle of the sovereignty of Parliament, as characterised by Dicey, as the doctrinal basis for its

[23] By way of example, the Terms of withdrawal from EU (Referendum) Bill, a Private Member's Bill, introduced on 6 July 2016, would require the holding of a referendum to endorse the exit package proposed by the Government for withdrawal from the EU prior to the UK giving notification under Article 50.

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conclusion that the Government should not be permitted to implement the outcome of the referendum without further primary legislation (§§20, 22). In fact, Dicey's account of the constitution was more subtle than the DC allowed and afforded far more significance to the will of the

B electorate. According to Dicey, the origins of Parliamentary legal sovereignty can be traced to the first emergence of popular representative power, hence Parliament is the residuary of representative government which *"should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation"* (*An Introduction to the Law of the*

C *Constitution* (1915, 8th ed., p.285)). His new introduction to the 8th edition discussed the use of referendums, describing them as *"the people's veto"* and recognising the additional power which they would give to the electors, *"the political sovereign of England"*.[24]

D 83. Contrary to the approach of the DC, the legality of the use of the prerogative in the present case, to implement the outcome of a referendum, cannot be answered by rote application of 17th century authorities addressing the conflict between a Parliament representative of the popular will and an authoritarian king. Nor by recitation of a partial

E Diceyan theory of Parliamentary sovereignty without recognition that the usual democratic objections to use of the prerogative do not apply in the circumstances of the present case.[25]

84. The correct approach to Parliamentary sovereignty is, rather, one which

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[24] Dicey was in fact the earliest constitutional scholar to argue in support of the use of referendums, which he did with increasing vigour from 1890 onwards, precisely to give greater emphasis to the popular will within the constitution (see, R. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980, UNC Press), pp.105-110).

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[25] As to which, see: *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513, 552E per Lord Browne-Wilkinson and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, §35 per Lord Hoffmann.

constitutional responsibility described above - including the existence and exercise of prerogative powers.

85. Whilst the Secretary of State relies upon longstanding and well-established principles regarding exercise of the foreign affairs prerogative, the supposed conflict between those principles and the doctrine of Parliamentary sovereignty cannot be resolved in a vacuum, without regard to the outcome of the referendum. It is submitted that the DC was wrong to relegate, almost to a footnote, the outcome of the referendum (§108) and to dismiss it as merely "*a political event*" which was of no significance to the question before it.

VII. CONCLUSION

86. For these reasons, it is submitted that the appeal should be allowed, for the following amongst other **REASONS**:

1) The Government has always had the prerogative power to make, amend and withdraw from treaties. That is an essential part of the effective conduct of foreign affairs and an integral part of the modern UK constitution. It is a power that has been exercised on numerous occasions to shape and re-shape EU law, pursuant to the various processes by which that is done at the EU level.
2) The exercise of such prerogative powers does not, without any Parliamentary intervention, create rights and obligations on the domestic legal plane. The UK's system is a dualist one.
3) The fact that, consistently with dualism, Parliament has chosen through legislation to provide a conduit into domestic law for changes to treaty rights and obligations on the international plane carries no implication that Parliament intended to preclude or constrain such changes on the international plane. Such legislation simply represents the necessary operation of the dualist system.

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4) Whether Parliament intends to constrain the exercise of prerogative powers to make, amend or withdraw from treaties (or to take any other step that might lead to a change to rights and obligations on the international plane) is a discrete and logically distinct question. When that is Parliament's intention, it can be expected so to indicate with clarity – specifying both the matters which are to be controlled and the manner of control. It can be expected to do so because it is thereby abrogating important and long-standing powers. It has in fact imposed such controls in clear and express terms. It has done so generally (in CRAG) and it has done so specifically in the context of the EU (through successive pieces of legislation creating a careful and nuanced scheme of legislative control).

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5) The *de Keyser* principles – asking whether Parliament has expressly (or by necessary implication) abrogated prerogative powers – are long-established and correct.

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6) There is no principle, the effect of which is to reverse the *de Keyser* principles, that Parliament needs expressly to authorise the exercise of any prerogative power the effect of which is to change the law of the land.

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7) Prerogative powers may properly do so. There are examples of their doing so, more or less directly, even outside the context of legislation such as the ECA. The ECA makes specific provision for changes to EU law effected by the exercise of prerogative powers to take automatic effect in domestic law. On that basis, and since 1972, EU rights and obligations have been added to, amended and taken away through the exercise of prerogative powers; and those changes, without further legislative intervention, have been effective in domestic law.

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8) The withdrawal from the EU is a significant constitutional and legal change. Recognising that constitutional and political reality, Parliament decided to set up the referendum in the 2015 Act asking

the very question the Respondents contend needs to be put again to Parliament. The giving of Article 50 notice is the mechanism, and the only mechanism, for commencing the process of withdrawal. Such a notice represents a constitutionally appropriate and lawful exercise of prerogative power, no different in principle to the prerogative powers that have been exercised for many years in the EU context – and unsurprisingly left untouched by the EU legislative scheme, including most recently the 2015 Act itself.

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HER MAJESTY'S ADVOCATE GENERAL FOR SCOTLAND

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18 November 2016

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APPENDIX

The DC's interpretation of the ECA

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Constitutional status

1. The DC's approach to the proper interpretation of the ECA was conditioned by the fact that the Courts have described the Act as a "*constitutional statute*" (in *Thoburn v Sunderland City Council* [2003] QB 151 and *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, §207): see Judgment, §§44 and 88. According to the DC, the constitutional status of the ECA meant that it required to be interpreted having regard to "*background constitutional principles*", and that made it all the less likely that Parliament would have intended that the rights given effect by the ECA could be removed by the Government through the use of prerogative powers.

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2. However, the constitutional status of a statute is conferred by the common law (*Thoburn*, §69) and not, as the DC suggested, as a result of the intention of the legislature with regard to that statute. Constitutional status entails that the statute in question is protected from implied repeal, by operation of the common law (*Thoburn*, §63) and not because "*Parliament has indicated that it should be exempt from casual implied repeal*" (DC, §88). The fact that a statute may be designated as "*constitutional*" by operation of the common law tells one nothing of what Parliament intended for the interpretation of the statute itself and still less whether Parliament intended to abrogate a related prerogative power. Moreover, since the concept of the constitutional statute was not developed until many years after the passage of the ECA, Parliament could not have intended the ECA itself to be interpreted having regard to that concept.

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3. At the same time, the DC took no account of a more obvious consequence of the constitutional status of the ECA: that it ought to be interpreted and applied with reference to the factual and political context of the present case. That approach is demonstrated by *Robinson v Secretary of State for Northern Ireland* [2002] N.I. 390, where the Northern Ireland Act was regarded as part of the constitution of Northern Ireland and was interpreted in order to achieve a "*continuing form of government against the background of the history of the territory and the principles agreed in [the Belfast Agreement]*" (*per* Lord Hoffmann at §25), which had been reached in an attempt to end "*decades of bloodshed and centuries of antagonism*" (*per* Lord Bingham at §10). The interpretation arrived at was informed by the fact that the UK constitution allows a flexible response to events as they develop and took account of the need to prevent the collapse of the Northern Ireland Government. As Lord Bingham also noted in *Robinson*, §12:

> *"It would no doubt be possible, in theory at least, to devise a constitution in which all political contingencies would be the subject of predetermined mechanistic rules to be applied as and when the particular contingency arose. But such an approach would not be consistent with ordinary constitutional practice in Britain. There are of course certain fixed rules, such as those governing the maximum duration of parliaments or the period for which the House of Lords may delay the passage of legislation. But matters of potentially great importance are left to the judgment either of political leaders (whether and when to seek a dissolution, for instance) or, even if to a diminished extent, of the crown (whether to grant a dissolution). Where constitutional arrangements retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude."*

The DC's textual analysis

4. The DC made, in §93, a number of textual points regarding the interpretation of the ECA which, in its view, indicated that Parliament had positively intended to exclude the Government's prerogative power to withdraw from the EU Treaties. It did not, and could not, find that

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Parliament had done so expressly. Nothing in the ECA purports to exercise any such control despite the fact that, as the DC recognised in §56, Parliament must be taken to have had the possibility of withdrawal in mind in 1972. Instead, the Court held that eight aspects of the ECA provided, *"separately and cumulatively"* the necessary implication required. None of those reasons, cumulatively or separately, support such a conclusion.

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5. Adopting the sub-paragraph numbering of the DC's §93:

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(1) The long title to the ECA – *"An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom"* – is not a reliable guide to Parliamentary intention as to the purpose of the Act. This is emphasised by *Bennion*, p.679): *"It owes its presence to the procedural rules governing parliamentary Bills. The interpreter of the Act therefore needs to realise that the long title is drafted to comply with these procedural rules. It is not designed as an interpreter's guide to the contents of the Act. It is a parliamentary device, whose purpose is in relation to the Bill and its parliamentary progress…Once the Bill has received royal assent, the long title is therefore vestigial."*

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In any event, it is self-evident that the ECA made provision in connection with the UK's membership of the EEC: as explained above, the ECA was necessary to enable the UK to comply with its obligations under the EEC Treaties once they came into force. Nothing in the long title says anything about withdrawal or the period of membership. Indeed, given that the long title is to make provision for enlargement of the Communities to include the UK it is more likely that provision for withdrawal would have been outside the scope of the Bill and therefore not a matter covered by the ECA at all.

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(2) The heading of section 2 is an admissible aid to construction, but account must "*be taken of the fact that its function is merely to serve as a brief, and therefore possibly inaccurate, guide to the content of the section*": *Bennion*, p.696. It is, as Lord Reid held in *DPP v Schildkamp* [1970] AC 1, 10, a poor guide because it merely indicates the main subject with which the section deals. Again, the heading – "*General implementation of Treaties*" - is a perfectly accurate summary of the main aim of s. 2 but says nothing about how it might affect undoubted prerogative powers to withdraw from the Treaties. That conclusion is only enhanced when it is recalled that the "*Treaties*" to which the heading refers include, in s. 1(2)(s), the TEU containing Article 50.

(3) As already explained, the wording of s. 2(1) makes clear that the rights and obligations given effect by the section may increase or decrease from time to time through the exercise of prerogative powers. There is nothing in the language of the section to require continued membership of the EU. The final sentence of §93(3),[26] although apparently intended as a point against the Secretary of State, is readily comprehensible as a point in his favour.

(4) The phrase "*enforceable EU right*" in s. 2(1) is to be read in the light of the wording that such rights and obligations are to be "*enforced, allowed and followed accordingly*", i.e. as they exist from "*time to time*". It is wrong to assert, as the DC does in §93(4), that Parliament intended to introduce EU rights into domestic law and that such rights would continue to be in place in relation to the UK under the relevant Treaties. The second proposition simply does not follow

[26] "*Read according to their natural meaning and in their proper context, the words quoted above refer only to EU law rights, remedies and procedures etc that exist in the Treaties themselves or by virtue of EU legislation passed from time to time*".

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from the first, when the section is read as a whole, and in the light of the applicable constitutional principles, including dualism.

(5) The same point applies to §93(5) when the DC moves from the proposition that s. 2(2) shows an intention of Parliament that "*it was legislating to give effect to EU law in domestic law*" to the *non sequitur* that "*the effect of its legislation should not be capable of being undone*" by exercise of the prerogative. Nothing in s. 2(2) says any such thing; the effect of the provision is entirely contingent on there being EU law which requires implementation.

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(6) Section 2(2) is certainly available to make provision for the removal of EU-related rights or obligations hitherto present in domestic law. If there is cause for legislation pursuant to s. 2(2), the legislator *may* have regard to the "*objects of the EU*" but that tells one nothing about whether Parliament was providing that, absent further legislation, there must always be EU law to implement by s. 2(2).

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(7) Section 3(1) of the ECA on the role to be played by the CJEU in determining the meaning of EU law adds nothing to the analysis. It may presuppose or assume the continued existence of questions of EU law which fall to be determined, and in that sense Parliament did not act in vain. But nor can a provision about determining the meaning of EU treaty obligations reasonably be interpreted as requiring that such obligations continue to exist. Further, the DC wrongly regarded s. 3(1) as providing for the ability to seek a reference under art. 267 TFEU. That arises from art. 267 itself. Section 3(1) is merely a domestic procedural provision that a question of EU law is to be treated as a question of law (i.e. rather than fact, as foreign law would ordinarily be) and that those questions of law shall be determined in accordance with the CJEU's jurisprudence.

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(8) Finally, the DC relies upon the structure of s. 1 ECA, in which the Treaties are defined in s. 1(2) and ancillary treaties may be added by Order in Council under the procedure set out in s. 1(3). It is said that this Parliamentary control of including further treaties entered into under the prerogative is a strong indicator that the treaty prerogative was generally controlled by the ECA. This does not follow. The provisions of s. 1 are a statutory recognition of the constitutional principle of dualism. Addition to the list of Treaties in s. 1(2) was never a precondition for the UK to ratify and so become bound by new Treaties: that was a matter for the prerogative alone and is now subject to specific conditions in the EUA. However, treaties intended to have effect in domestic law require implementation, and s. 1 is the mechanism by which that is achieved under the ECA. Section 1(3) is a powerful reminder that Parliament has not required all new international obligations entered into by the UK concerning the EU to be the subject of primary legislative amendments to s. 1(2). The ancillary treaties to which it refers are entered into under the prerogative, given domestic effect where necessary under an Order in Council (subject to affirmative resolution) and could be withdrawn from without any Parliamentary oversight.[27] Finally, the limited implementation of certain of the Treaties by s. 1(2) highlights that the prerogative cannot have been fully abrogated. Section 1(2)(o) and (p) exclude from implementation of the Treaties of Amsterdam and Nice certain specific provisions of those Treaties. Section 1(2)(s) implements the

[27] These treaties, and orders giving effect to them, may have significant effects: for example, the European Communities (Definition of Treaties) (Change in Status of Greenland) Order 1984 (SI 1984/1820), giving effect to the withdrawal of Greenland from the EU; see also the European Communities (Definition of Treaties) (Agreement between the European Community and its Member States and the Swiss Confederation on the Free Movement of Persons) Order (SI 2000/3269), giving effect to important rights of free movement under the EU-Switzerland Treaty.

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Lisbon Treaties, save for the Common Foreign and Security Policy provisions. Those parts of those Treaties are left to the international plane, to which the prerogative alone applies. The effect of the DC's reasoning would therefore be to create an artificial and unhelpful divide between the undoubted prerogative to withdraw from the CFSP provisions of the Lisbon Treaty and the abrogated prerogative to withdraw from the remainder of that Treaty.

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Other points on the ECA

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6. The DC was wrong to hold that the Government could not have ratified the Treaty of Accession unless and until Parliament had enacted the ECA (§41) and that "*the enactment of the ECA 1972 was a necessary step before ratification of the relevant Treaties could occur, as Parliament knew*" (§66). As explained further below, it was only in the European Parliamentary Elections Act 1978 that Parliament started (expressly) to place restrictions upon, and exercise control over, the Government's prerogative power to ratify EEC-related treaties.

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7. The DC also erred in its conclusion that "*Parliament intended to bring into effect, and did in fact bring into effect by enacting the ECA*" rights which are enjoyed in and against other EU Member States; "*... they are nonetheless rights of major importance created by Parliament*" (§66). That conclusion misunderstands the role of international treaties in creating the rights in question, over-states the limited purpose of the ECA and ignores the clear wording of s. 2(1) (which gives effect only rights which "*in accordance with the Treaties are to be given legal effect or used in the [UK]*". Even if these rights were to be lost as a result of withdrawing from the EU (which depends upon the outcome of the Article 50(2) negotiations), that would not represent the use of the prerogative to remove rights conferred by Parliament.

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8. See also, for one of many possible analogous cases, the DPA giving effect to the VCDR. The DPA ensures that certain immunities and privileges which the UK is obliged to recognise under the VCDR are part of UK domestic law. But privileges and immunities that arise abroad (for example, those to which a British diplomat in France may be entitled under the VCDR) are not created by the UK Parliament and nor are they part of the law of the land. They arise on the plane of international law and are creations of the VCDR. They may also arise, as juridically distinct constructs, on the plane of the domestic law of the foreign States (France in the above example) that incorporated them in their domestic law. It would be an obvious mischaracterisation of the DPA 1964 to regard it as Parliament conferring rights on British diplomats abroad or bringing into effect such rights in other signatory states. The DC's analysis betrayed a serious misunderstanding of the workings of international law in this regard.

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