DRAFT TRANSCRIPT

Wednesday, 7 December 2016

(10.30 am)

THE PRESIDENT: Lord Pannick.

Submissions by LORD PANNICK (continued)

LORD PANNICK: Good morning, my Lady and my Lords, I was completing my fourth submission which is that the 1972 Act, contents and purpose, contains no clear statement that the executive does have a prerogative power to nullify the statutory scheme and indeed if I need to go this far, I say, having regard to the statutory presumptions, that is the Henry VIII clauses, legality and implied repeal, the Act clearly indicates in my submission that the executive does have no such power.

I had reached section 2(2) of the 1972 Act. We deal with that in our written submissions; it is paragraphs 56 to 57, MS 12419. I am not going to take time on repeating that.

The next provision is section 2(4) which I do rely on. I say that since Parliament expressly stated that this Act takes priority, even over a later statutory provision -- therefore there is no doctrine of implied repeal -- Parliament is most unlikely to have intended that the scheme it was creating could be set aside by

a minister. That is the submission.

Then we have section 3(1). We deal with that in paragraph 58 of our written case, MS 12420, and I don't want to add to that, save to refer to the divisional court's judgment, paragraph 93.7. I don't ask the court to turn it up. It is in the judgment, MS 11800, paragraph 93.7, where the divisional court says that if all the treaty rights can be removed by the executive using prerogative powers, section 3(1) would make no sense.

I say that the divisional court rightly concluded, rightly concluded, it is paragraph 94 of its judgment, MS 11801, that the clear implication from all these provisions is that Parliament intended that the Crown did not have prerogative power to take action on the international plane to destroy that which Parliament was creating.

My Lady, my Lords, before I move on to my fifth point, can I briefly return to three matters which were raised yesterday afternoon which I promised to deal with. The first is my Lord, Lord Reed's question about authority that Hansard can be relevant to identifying statutory purpose, and not simply a Pepper v Hart type exercise.

I think we have put on the desks of your Lordships

and your Ladyship a Privy Council case which I don't ask your Lordships to go through. It is called Gopal. And it is paragraphs 3 and 7 which I say support my contention. It is nothing to do with human rights.

However, I should also draw to the attention of the court the judgments of the appellate committee in the Spath Holme case volume 8, tab 75, please don't turn it up, but it is volume 8, tab 75, MS 2991. It is [2001] 2 Appeal Cases, and I do accept there the majority of the appellate committee said Hansard could not be used to identify the purpose of an act. So I draw attention to that.

What I would say, however, is that if in this case this court is going to look, if it is going to look, at what ministers said about the 2015 bill, it would be wrong, in my submission, to exclude what Mr Lidington said in the House of Commons; it would be an artificial exercise to look at some of the statements but not what was said on the floor of the House of Commons. That is my submission and that is the first point.

LORD MANCE: I think there is further authority. I remember Lord Steyn dealing with this point and there is certainly another case --

LORD PANNICK: Yes, Lord Steyn is 2002, I think, it is the local government case your Lordship may have in mind.

LORD MANCE: Saying you could look at -- is there inconsistency between that and Spath Holme? On the face of it, it seems to be.

LORD PANNICK: If it matters, I would say the law has moved on, with great respect, since 2001. Your Lordships and your Ladyship, of course, have many important constitutional issues to decide in this case; I am not suggesting that the court adds to the list the rather important question, the extent to which Hansard can be used in order to determine the scope or mischief of legislation.

THE PRESIDENT: It may have considerable practical importance in more cases than the points we are being asked to decide.

LORD KERR: I think we might say that there is a certain air of unreality, if we are considering what effect the 1972 Act had and what purpose the 2015 legislation had, to ignore what was said about that.

LORD PANNICK: I respectfully agree. The point I make is the point I was making to my Lord, the President, that my case is: look at what the Act actually said; but if the court is to be persuaded by my friends for the appellant that one should look at other material, it is quite artificial to look at some of the other material but not at what Mr Lidington expressly said on the floor

of the House.

THE PRESIDENT: Yes, I mean, the only trouble with looking at what was said on the floor of the House, and as you say, we don't want to go too much into this, is what a minister or somebody else says does not necessarily represent the reason why people vote, or what they believe when they vote.

It is like going into what people say about their contracts when construing their contracts, and that way madness can be said to lie, because you then start looking at everything said in Parliament and balancing up -- it can be a very treacherous course.

LORD PANNICK: It can. Of course the point being made by the appellant is what the Government's intention was, what the Government was putting forward because Mr Eadie draws attention, footnote 4, to what ministers said from time to time: this was our intention.

THE PRESIDENT: That is what Government said but in the end that is -- highlights the problem. We are here concerned with two separate entities, the Government and the legislature.

LORD PANNICK: I entirely accept that, and that is why I put the point, I hope very modestly, it is not my submission, if the court is being told by the appellant: look at what the Government's intention was; it is a bit

more blurred than that. But my submission is what the court should focus on, is what the Act actually said, which is not ambiguous in any way; it is a limited act for a very specific, very important purpose. I don't in any way seek to denigrate the purpose; to hold a referendum is a very important matter. My submission is, however, it has nothing whatsoever to do with the issue before the court, which is who enjoys the power to notify; is there a prerogative power once the referendum has taken place; and that is what I invite the court --

LORD CARNWATH: I suppose what ministers say might be relevant as creating some sort of legitimate expectation as to what they are going to do, but that tells you nothing about the machinery with which they are going to do it.

LORD PANNICK: Absolutely, and this case is nothing to do with legitimate expectation, and any such argument would be exceptionally difficult to sustain.

That is the first additional point. The second point is I promised to answer my Lord, Lord Mance's question about the debate in the 1970s. My Lord said, what was I talking about, this debate in the 1970s on whether Parliament could reverse the 1972 Act. What I had in mind is the Blackburn case, and if your Lordships and your Ladyship look -- I don't ask the

court to turn it up -- at core authorities 2, tab 11, it is MS 302, Lord Denning at page 305 H adverts to what was then a contemporary debate: could Parliament itself go back on what it had enacted?

All I was saying to the court is, it is not my understanding that that is nowadays a point that causes concern, nor could it in the light of section 18 of the 2011 Act, if it was otherwise a point of concern.

The third point I promised to -- I need to come back to is my Lady, the Deputy President, asked about the acts of Parliament which have amended section 1(2) of the 1972 Act to add the new treaties. The court will find what I hope is a helpful annex to our written case. It is MS 12438, and there we set out the relevant acts which have amended section 1, subsection 2 to take account of the new treaties, Maastricht, Amsterdam, Nice, Lisbon and all the others.

What the annex shows is that all of these acts amending section 1(2) were in fact enacted before Parliament ratified the relevant treaty and that is because as the court already heard --

LADY HALE: Before the Government ratified.

LORD PANNICK: Your Ladyship is absolutely right, before the Government ratified, I apologise, and that is because Parliament needed to amend domestic law before the new

EU law treaty came into force which would alter domestic rights.

THE PRESIDENT: Just like the 1972 Act, the Government signs, Parliament, as it were, enacts and then the Government ratifies.

LORD PANNICK: Precisely so.

THE PRESIDENT: Thank you.

LORD PANNICK: Precisely so. If one looks at these acts, some inaud parliamentary approval because of the post 1972 legislation, the 1978 Act and the others.

THE PRESIDENT: Yes.

LORD PANNICK: Some of them need parliamentary approval because they are being added to section 1(2), because they affect domestic law rights. Some of them need parliamentary approval for both reasons, so if one looks, for example, at core authorities volume 1, tab 3, the court will see the European Union (Amendment) Act 2008.

This is the one that addressed the treaty of Lisbon and if the court goes -- sorry, it is MS 117, MS 117, core authorities 1, tab 3. If the court, please, would turn to MS 118, at the top of the page, section 2, it is not set out in detail, but the court can see what it does, is it amends the 1972 Act by adding a new section 1 phrase to S, and if the court then looks on

the next page and looks at section 4, this Act does another job. What it does is it approves the treaty of Lisbon for the purposes of the 2002 Act, that is parliamentary approval, as it says, of treaties increasing the European Parliament's powers.

So each of the two different functions is addressed separately by Parliament, and there are some treaties for which parliamentary approval was not required under the post 1972 legislation, but it was still necessary to add the treaty to section 1(2) of the 1972 Act. If the court would please look at volume 19 of the materials and look, please, at tab 221, which is MS page 6463.

The court will see that that treaty, which was the treaty for accession of Spain and Portugal, that was added to section 1(2) of the 1972 Act, but there was no need for approval under the post 1972 legislation as it then existed, so Parliament is very careful to treat separately the two distinct areas that we are here concerned with.

So that is the 1972 Act. There are, of course, many other relevant statutes in many areas of life, competition law, communications law, equality law, environmental law, and many others, at least some of the terms of which would be frustrated if the appellant terminates the UK's membership of the EU, notifies of

the termination that is to take effect in two years' time unless there is an extension. We have given the example in our written case of the European Parliamentary Elections Act 2002, and we have given extensive analysis of this in the written argument. It is in our written case, in particular, paragraph 17.3 a), which is MS 12394. But it is only an example.

It is no answer for the appellant to say, as he does, that of course these rights lapse when we leave the club -- that is their answer -- but that begs the question, and the question is whether the appellant can lawfully use prerogative powers in such a way as to nullify these statutory provisions.

But there are many other examples. Can I give the court one other example of our concern. It is volume 13 at tab 130, which is MS 4481, volume 13, tab 130, the Communications Act 2003, MS 4481. I am inviting the court's attention to section 4 of the Communications Act 2003 -- 13130 -- section 4 of the Communications Act is headed "Duties for the purpose of fulfilling EU obligations":

"This section applies to the following functions of Ofcom ... (a) their functions under chapter 1 of part 2 ..."

That is electronic communications --

LORD CLARKE: This is section 4A, is it?

LORD PANNICK: No, section 4. It is on MS page 4481.

LORD CLARKE: Sorry, I beg your pardon. My fault.

LORD PANNICK: "Duties for the purpose of fulfilling EU obligations", section 4(1):

"This section applies to the following functions of Ofcom ..."

First of all, their functions under chapter 1 of part 2 which concerns electronic communications, networks and services, their licensing function, and there is a lot more detail, none of which matters. My point is under section 4(2):

"It shall be the duty of Ofcom in carrying out any of those functions to act in accordance with the six Community requirements which give effect among other things to the requirements of the framework directive. Then subsection 4, the second Community requirement is:

"... a requirement to secure that Ofcom's activities contribute to the development of the European internal market."

The third Community requirement is:

"... a requirement to promote the interests of all persons who are citizens of the European Union, within the meaning of Article 20."

My Lords, this simply does not make sense, it

doesn't make any sense if the Secretary of State has a prerogative power to notify and to terminate all our -- all the UK's obligations under the EU treaties. All of that is simply frustrated or nullified and I could make the same point -- I am not going to -- but I could make the same point on dozens, perhaps hundreds of statutes covering vast areas of national life. Parliament has adopted sections in primary legislation that proceed on the basis that the United Kingdom is a member of the EU, and these provisions make no sense if we are not a member of the EU.

LORD HUGHES: Are you saying what would be needed to undo these -- for example the Communications Act, supposing you are right and the service of the notice requires legislation, what kind of legislation? Are you addressing us on that or not?

LORD PANNICK: No, I am not because my submission is a very simple one. My submission is that the Secretary of State cannot proceed along the path of notification without Parliament addressing the problem that will inevitably arise, and I am concerned only with the notification stage. I am coming on to deal with the argument that is going to be there is going to be a Great Repeal Bill and we don't need to worry about it, I will deal with that.

My submission to your Lordships is that the statute book has so many provisions, and this is an example, that proceed on the assumption that this country is a member of the EU, that the Secretary of State cannot by prerogative powers take the step of notifying, leading to us withdrawing, without Parliament itself addressing this issue.

LORD HUGHES: That is very clear. I understand that perfectly. But supposing you are right and Parliament does address the service of the notice, what is the effect of such an address by act of Parliament on the Communications Act 2003, or do you have the same problem with a legislative authorisation of the notice as you do with a prerogative authorisation?

LORD PANNICK: No, because I would accept that if Parliament were to say next week that section 1 of the authorisation Act, the Secretary of State is authorised to notify pursuant to Article 50 of the TEU, then it would be exceptionally difficult to run an argument that there is any legal impediment in him doing so. He would have express statutory authorisation and Parliament no doubt would proceed on the basis, because it would be told to this effect in the parliamentary debates: all of these problems, Communications Act problems and others will be addressed before we actually leave the EU.

LORD SUMPTION: This is not an ambulatory statute, so technically the position is that if we were to, if notice is served and we consequently leave the EU this would remain in force, absurd as it is; no doubt in practice it would be changed, but the problem to which statutes like this give rise is a completely different problem to the one arising from the 1972 Act, isn't it; this is simply something which will look very strange but will continue to have effect until Parliament gets round to repealing it.

LORD PANNICK: Yes.

LORD MANCE: I suppose it might be impliedly repealed or frustrated if there was a statute authorising an Article 50 exit.

LORD PANNICK: Frustration is the point. I entirely accept the point my Lord, Lord Sumption puts to me that it would look a bit strange. My point is that when the court is asking itself whether the Secretary of State really has a prerogative power to notify, it is an important dimension of the argument that that which he seeks to do will frustrate, will render insensible, a large number of statutory provisions.

That is the submission, and that is not just my view, it is the view -- it is not just my submission, it is the view of the Secretary of State himself, because

my friend Mr Eadie handed up to the court yesterday the statement that was made by the appellant, Mr David Davis, to Parliament on 10 October 2016. Does the court still have copies of that? It is the three-page document -- I can't remember, I think Mr Eadie asked the court to put it in the black folder.

THE PRESIDENT: He did.

LADY HALE: The "next steps" document you are referring to.

LORD PANNICK: Yes.

LADY HALE: Yes.

LORD PANNICK: "Next steps in leaving the European Union".

If the court has that --

THE PRESIDENT: Yes.

LORD PANNICK: I am grateful. On the second page, it is the third paragraph of Mr Davis' comment. He says:

"In all, there is more than 40 years of European Union law in UK law to consider and some of it simply will not work on exit."

We respectfully agree and we therefore submit that it is impossible to understand as a matter of law how the Secretary of State can claim a prerogative power to notify. He must, in my submission, obtain a parliamentary authorisation to take steps which will leave large elements of the statute book to be rendered insensible.

THE PRESIDENT: I understand your argument, Lord Pannick; parliamentary authorisation would not extend even to a motion of both Houses after the issue had been fully debated.

LORD PANNICK: Yes, that is the seventh point, which I am coming on to.

THE PRESIDENT: Fine, okay.

LORD PANNICK: I am going to deal with that expressly, my Lord.

THE PRESIDENT: Okay.

LORD PANNICK: Can I come on to the fifth topic which is De Keyser and the other case law.

LADY HALE: Have I been mispronouncing that case all my adult life?

LORD PANNICK: Would your Ladyship like to tell me the correct --

LADY HALE: De Keyser.

LORD PANNICK: I will call it De Keyser.

LADY HALE: I may be wrong, I am often wrong.

LORD PANNICK: You say De Keyser, I say De Keyser.

LORD CLARKE: Down here we think it is De Keyser.

THE PRESIDENT: We can each stick to our own because the transcript will not give away what we have called it.

LORD PANNICK: It is my fifth topic, whatever it is called, and whatever it is called, MS 228 CA 2, tab 10, what it

was concerned with was Parliament impliedly removing a prerogative power. My submission is that that is not the only type of case where the courts will impose limits on the exercise of prerogative power. Here, we submit there simply is no prerogative power to act under a treaty so as to defeat, nullify, frustrate statutory rights. That is one additional principle.

Another principle is where the exercise of prerogative powers would frustrate the provision made by Parliament; that is ex parte Fire Brigades Union, core authorities 2, tab 15, MS 444.

My Lord, Lord Mance made the point in argument, I think it was yesterday, that in ex parte Fire Brigades Union, the majority recognised that it was not a De Keyser type case; see Lord Browne-Wilkinson, and I don't ask the court to go back to it, see Lord Browne-Wilkinson, page 553 F to G; see Lord Lloyd at 573 C to D; and Lord Nicholls, 578 F, his analysis also does not proceed on a De Keyser basis.

So De Keyser in my submission is not, cannot be, an exclusive code as to the limits of prerogative powers.

I also need to address Rees-Mogg, ex parte Rees-Mogg. Here I would ask the court to turn it up; it is in core authorities volume 2 at tab 14 and it is MS

424. The court will recall that the applicant there was seeking to challenge the ratification of the Maastricht agreement; in particular his concern was the protocol on social policy.

Now, it is essential to, in my submission, understanding the case, to recognise that this protocol had no effect in domestic law and therefore did not remove, or indeed extend, domestic law rights, and that is stated by the divisional court at 568. It is MS 440. 568 of the report. Can I take the court to that, please. 568 A, MS 440:

"Would the ratification of the protocol on social policy alter the content of domestic law.

"The protocol itself makes clear that it was not intended to apply to the UK, nor is the UK party to the agreement which is annexed to the protocol. The protocol is not one of the treaties, which for this purpose includes protocols, included within the definition of the treaties in section 1(2) of the 1972 Act. It is specifically excluded by the 1993 Act. It follows that the protocol is not one of the treaties covered under section 2(1) of the 1972 Act by which alone Community treaties have force in domestic law. It does not become one of the treaties covered by section 2(1), merely because by the Union treaty, it is annexed

to the EEC treaty, see section 1(3) of the Act of 1972."

So what was being complained about in Rees-Mogg had no effect on domestic law rights.

LORD WILSON: I think Mr Eadie says that that paragraph is a second free-standing reason for the disposal of the application. Do you agree?

LORD PANNICK: The case has to be understood in its context; I am not avoiding giving an answer to your Lordship's question, but can I come back to that after I have just shown your Lordship one other matter.

LORD WILSON: Do.

LORD PANNICK: Because the other matter is that at the time when the case was brought, Parliament had already approved that which was to be done at the international level. So if your Lordship looks at page 562, which is MS page number 434, the court will find set out just under letter C the text of section 1 of the 1993 Act, section 1 of the European Communities (Amendment) Act 1993, which received royal assent, so it had already received royal assent on 20 July, and the case was brought on 26 July. It provides:

"In section 1(2) of the 1972 Act, in the definition of the treaties and the Community treaties, after paragraph F, there shall be inserted the words ... and ... titles 2, 3 and 4 of the treaty on European Union,

signed at Maastricht on 7 February 1992, together with the other provisions of the treaty so far as they relate to those titles and the protocols adopted at Maastricht on that date and annexed to the treaty establishing the European Community with the exception of the protocol on social policy ..."

So there are two points by way of background, essential background, to understanding what it was the divisional court was deciding in the paragraph on which Mr Eadie relies. The first is that there is no effect on domestic law rights and duties by reason of the protocol on social policy, but secondly, Parliament had approved the treaty, including the protocols.

Now, in that context, one goes to the passage to which Mr Eadie invites attention and what the divisional court are rejecting at 567 G to H is an argument, an ambitious argument, as the divisional court concluded --

LADY HALE: word Their being ambitious counsel.

LORD PANNICK: Very ambitious counsel in 1993. The divisional court rejected what it regarded as an unsustainable argument, that despite the fact that Parliament had given its approval, despite the fact it had no effect, the protocol, on domestic law rights, nevertheless, the 1972 Act curtailed generally what

would otherwise be a prerogative power to amend or add to the EEC treaty. That is what Lord Justice Lloyd is rejecting and the argument is set out at 567 E to G, in particular just above F:

"By enacting section 2(1), Parliament must therefore have intended to curtail the prerogative power to amend or add to the EEC treaty."

That is what he is rejecting, his Lordship, and just above H:

"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 ..."

Et cetera, et cetera. That is the point and my point is this has absolutely nothing whatsoever to do with the issue before this court on this occasion, which is whether or not the Secretary of State has a prerogative power to act on the international plane in a way which will frustrate, nullify domestic law rights and duties and the statutory scheme. That is not what was there being considered. That is my answer and that is why, although I accept -- in answer to my Lord, Lord Wilson's question, although I accept that 567 G to H is a separate answer given by the divisional court to the

answer given at 568 B, it is only by understanding what is said at 568 A to B and what is said at 562 C to E, that one can understand what it was that the divisional court was rejecting at 567 H. That is my submission.

LORD MANCE: Can you just help me understand your argument in 1994 or whenever. The amendment, which you pointed to on page 562, excluded the protocol from the definition of the treaties and yet your argument was, on 567, accordingly the protocol will have effect not only on the international plane but also by virtue of section 2(1) on the 1972 Act on the domestic plane. How so?

LORD PANNICK: That was the divisional court's reaction. That -- I don't want to complain but it may perhaps be an unfair question to ask me to defend an argument that the divisional court said simply didn't get off the ground.

LORD MANCE: I see, it is as simple as that.

LORD PANNICK: I plead guilty, my Lord.

LORD KERR: Not least because you now support the divisional court on this particular point.

LORD PANNICK: Of course I am not inviting this court to say that anything said by the divisional court in the context of what it was deciding was wrong. So that is Rees-Mogg and that is my fifth topic.

My sixth topic is the post 1972 legislation and the

limitations placed on the use of prerogative powers. The court has heard that Mr Eadie relies on the statutory provisions post 1972 and they have imposed various limits on the power of the Crown to act on the international plane. Mr Eadie first referred to part 2 of the 2010 Act, CRAG, and your Lordships and your Ladyship have that at core authorities 1, tab 5, MS page 131. My Lord, Lord Mance I think it was, asked about the green papers and the white paper that preceded the 2010 CRAG legislation. I do invite the court, please, to look at the green paper; the green paper can be found in volume 15 at tab 166. 15, 166. And for the court's note, the white paper appears --

LORD CARNWATH: Do you have the MS number?

LORD PANNICK: Sorry, MS 5189.

LORD CARNWATH: Thank you.

LORD PANNICK: That is the green paper. The white paper is the next tab, tab 167 and that is MS page 5213 but could I ask the court, please, to focus on the green paper, 5189, volume 15, tab 166 and the particular passage to which I invite the court's attention is at MS page 5207. It is under the heading, "Ratifying treaties".

MS 5207.

"Ratifying treaties", paragraph 31:

"Every year the UK becomes party to many

international treaties. These result in binding obligations for the UK under international law across a wide range of domestic and foreign policy issues. It is right that Parliament should be able to scrutinise the treaty-making process.

"32. The Government's ability to ratify treaties is currently constrained in two ways. Treaties that require changes to UK law need the enactment of prior legislation which, of course [of course] requires the full assent of Parliament [and they give examples] ... many other treaties [many other treaties] are covered by a convention known as the Ponsonby rule which is explained in box 3 ..."

Box 3 is over the page, and the court is very familiar with the Ponsonby rule, that the instrument is laid before both Houses of Parliament as a command paper for 21 days. Back to page 5207, 33:

"The Government believes that the procedure for allowing Parliament to scrutinise treaties should be formalised. The Government is of the view that Parliament may wish to hold a debate and vote on some treaties, and with a view to its doing so, will therefore consult on an appropriate means to put the Ponsonby rule on a statutory footing."

That is what ends up as CRAG, part 2. It is

a statutory enactment of what was the Ponsonby rule, obviously with variations, but that is the purpose and effect of CRAG part 2. It is nothing whatsoever to do with the other constitutional principle, which is recognised in paragraph 32 of that document, that if a treaty is going to require a change to UK law, of course it in any event requires the enactment of prior legislation which requires the full assent of Parliament.

In my submission, therefore, CRAG part 2 is nothing to the point. It doesn't assist in answering the question in this case, which is a question concerned with whether there can be a prerogative power in order to amend the -- in order to frustrate legislation which has been enacted.

So that is the 1972 Act -- that is, sorry, the 2010 Act.

Mr Eadie also refers to the other post 1972 statutes. The court has been taken through them, the statutes that specifically relate to the EU from the first one in 1978, which addressed increases in the powers of the then European assembly, through to the 2011 Act, which is the culmination of this process, requiring not merely an Act of Parliament but in any context a referendum on changes.

Now, my Lords, my Lady, leaving aside the post 1972 statutes, if we get to this point in the argument, then I have submitted that there was and is no prerogative power to take action on the international plane to nullify the statutory scheme created by the 1972 Act, particularly in relation to a statutory scheme which introduced a new source of domestic law. I have submitted that the 1972 Act, having regard to relevant principles of interpretation, that is the Public Law Project case, on Henry VIII clauses, legality, no implied repeal, that the Act is simply inconsistent with any prerogative power to set it aside.

Now, if either of those submissions is correct, I say it would require the clearest of statements by Parliament in any later legislation, that it was intending, Parliament was intending, to create a prerogative power which did not otherwise exist. And I say that nothing in the later legislation comes close to establishing a clear parliamentary statement that a prerogative power that did not otherwise exist now exists.

What Mr Eadie relies on is --

LADY HALE: It would not be a prerogative power, would it, if it was created by statute?

LORD PANNICK: It would be a statutory power.

LADY HALE: It would be a statutory power.
LORD PANNICK: But of course Mr Eadie does not put his case like that. He doesn't suggest that there is any statutory power to notify, he is very clear about this; he is not saying: look at the 2011 Act or any of the other post 1972 statutes, they confer a statutory power. His case is and has to be that the later legislation is, as he puts it, confirmatory of a prerogative power that previously existed.
LORD MANCE: Could it not be a revival of a prerogative power? I mean, you have assumed that the 1972 Act properly construed has the effect of abolishing the prerogative power, eliminating it, but that may require close study of what was actually being decided in the De Keyser and the Fire Brigades cases; on one view, perhaps they might simply be suppressing the prerogative power, and therefore it might be capable of being revived; or they might simply be saying that it was inappropriate to exercise it; do we have to look a little more closely at what they were in fact saying?
LORD PANNICK: My submission at its height is that there is simply, and never has been, a prerogative power in the executive to use treaty-making functions in order to nullify that which Parliament has enacted, and that is the strong submission. If that is right, it is not

a question of reviving a prerogative power; it has never existed. It would need to be created for the first time.

LORD KERR: One should beware of metaphors, of course, but one of the things that has emerged in the course of submissions has been that the 1972 Act constituted a clamp on the power, and the 2015 Act was the means by which this clamp was dismantled. What do you say about that argument?

LORD PANNICK: That the 2015 Act constituted a removal --

LORD KERR: Of the clamp.

LORD PANNICK: I have made my submissions on the 2015 Act. I don't accept that it has any effect, any legal effect on the contents of the 1972 Act or the constitutional principles that apply.

LORD KERR: I think you take an anterior point, don't you, and that is it is not a question of a clamp. Once the 1972 Act invested the rights of the United Kingdom citizens -- with these rights, then that invoked a superior or at least a different principle, namely that those rights cannot be taken away.

LORD PANNICK: They cannot be taken away because Parliament has enacted them, Parliament has provided them, it is basic to parliamentary sovereignty. However, I do accept that a consequence of parliamentary sovereignty

is that Parliament can say something different.

LORD KERR: Yes.

LORD PANNICK: And it is a question of interpretation. All I am saying is that given the significance of that which Parliament did in 1972, and given the other principles of interpretation to which I have referred, it does require the clearest of parliamentary statements post 1972 to vary that position.

THE PRESIDENT: You say they are the clearest possible words, but we have had to spend a lot of time looking at the statute to persuade ourselves or to be persuaded that the 1972 Act did remove, or put into abeyance, or abolish, or whatever, or did not give rise to, however one chooses to put it, a prerogative; but it seems to me that it could well be said that the statute had the effect of putting a clamp on the prerogative, particularly bearing in mind what Lord Bingham said about the importance of our constitution being seen as flexible in the Robinson case. And in those circumstances, you are not relying on an express term in the 1972 Act, in itself to clamp the prerogative. So we shouldn't be too surprised if we can conclude that the 2015 Act impliedly removes or relaxes the clamp.

LORD PANNICK: Yes, but there is nothing in the language of the 2015 Act which can be focused upon, there is simply

nothing there.

THE PRESIDENT: If one sees it in the sort of sense -- the way Lord Wilson puts it, of some sort of partnership between Parliament and the executive, between Parliament and the Government, then it seems to me there may be some force in the argument that says, when Parliament comes to face up to this issue, they say: well, let the British people vote; it is not decisive, of course, because the Government has to decide; but one could say it is Parliament ceding the ground so far as its role is concerned to the people, to a referendum; it has done that; and then it is over to the Government.

LORD PANNICK: The former is, with respect, self-evident, that Parliament is saying that the people are entitled, should be given a voice. Where I would respectfully take issue is the second part of your Lordship's question to me. It doesn't follow in my submission that the people having spoken, they are advising the Government as opposed to Parliament.

THE PRESIDENT: One of the problems if you are right is that, in terms of the law, the referendum has no consequences at all and the whole Referendum Act has no consequences.

LORD PANNICK: It has a very important consequence. Its consequence is a political consequence.

THE PRESIDENT: I know but I am saying as a matter of law -- in the concept of a flexible constitution, that could be said to be a little surprising.

LORD PANNICK: In my submission, it is not surprising, given that that was the intention of Parliament; Parliament intended, in my submission, to establish a referendum which would advise those --

THE PRESIDENT: Advise who, precisely?

LORD PANNICK: Advise both the Government and Parliament.

THE PRESIDENT: Maybe just advise the Government. Parliament was saying: over to you. "advisory" is not in the statute. We find it in one statement, in a ministerial statement; there are lots of other statements one could look at. It is quite dangerous to look at advisory, but if we are into advisory, I am not sure where it takes us.

LORD PANNICK: But one has an Act of Parliament that simply says: there shall be a referendum; it says nothing more, nothing more. What your Lordship is putting to me is that that is sufficient to overturn, if I am otherwise right, what is a fundamental constitutional principle that the Government, the executive, lacks power on the international plane, to set aside an act of Parliament, the 1972 Act, which is nowhere mentioned in the 2015 legislation. That is the first point: an absolutely

fundamental constitutional principle is to be removed, as it were, as an implication; and I would respectfully submit that that would be a very surprising proposition.

THE PRESIDENT: You say as an implication, but that depends how one looks at it; if one looks at the 1972 Act as imposing a fetter by implication on the prerogative, because there is nothing expressly imposing any fetter, then it is not particularly surprising that the fetter is removed by implication.

LORD PANNICK: But the fetter is a fundamental constitutional principle. What your Lordship is putting to me is that such a fundamental constitutional principle, that the executive cannot frustrate or nullify a statutory scheme, can be removed without the clearest of statements, and here we don't have any statement at all. It is not that my friends focus on a particular word, and they say, well, in the constitutional context, the language of the legislation ought to be interpreted in a certain way.

THE PRESIDENT: But as Lord Bingham said, one doesn't look at the language so much as the purpose.

LORD PANNICK: With respect, that is not what Lord Bingham says; he says: within the scope of the language. That is what he says.

THE PRESIDENT: But the problem with your argument, and

I see the force of what you say, is that in law, and I repeat this, as a matter of law, the referendum has no effect. I understand your point that it has a political one, but it could be said to be a bit surprising that in a flexible constitution, an act such as the Referendum Act and an event such as the referendum, has no effect as a matter of law.

LORD PANNICK: But that, with respect, begs the question: what is it that the referendum was designed to achieve. It is open to Parliament to institute a referendum which does have a binding legal effect, and there are many, many examples of where Parliament has done so. Parliament has deliberately chosen a model which does not involve any binding legal effect, and it is a perfectly coherent statutory scheme for Parliament to say that: it is very important that the people be given a voice; this is a highly contentious political issue, and before any steps are taken as to the future of the UK's membership of the EU, the voice of the people should be heard. That is not an event of no significance, but it begs the question: what is to be the consequence?

THE PRESIDENT: I quite accept, just as much as you can say, quite rightly, that it doesn't tell us that the effect is intended to be binding; so anyone arguing against you

can say it does not say it is not intended to be binding; and one comes back to Lord Mance's point, that one has to look at the act, your point in terms of its language; but one also has to look at its consequence. And it may not be binding on the Government, nobody suggests that the Government is obliged to serve an Article 50 notice, and therefore it is not binding. In the other acts you refer to, it is not merely binding, it is binding on the Government. This Act may be enough for the Government to say: Parliament has ceded the issue, as far as Parliament is concerned, to the people; we can now go ahead.

LORD PANNICK: So the argument being put to me is that the 2015 Act does not have any binding force as against the Government. It doesn't commit the Government. And no one could, I think, seriously suggest it does commit the Government to notify -- the Government could say, we have decided, actually, we don't ...

But nevertheless your Lordship is putting to me it is intended to have a different legal effect, which is to remove what is otherwise the absence of prerogative power on the Government, should it decide to notify, it is now perfectly entitled to do so, even though it would otherwise have no prerogative power to do so.

THE PRESIDENT: Yes, it basically revives the prerogative

power, the point that was being put to you, of course there is nothing to stop Parliament, before the Article 50 notice is served, calling the matter in and reconsidering it; that is a different point.

LORD PANNICK: I am coming on, if I may, to the question of parliamentary involvement.

LORD KERR: You could say this illustrates the dangers of metaphors, because if you regard the 1972 Act as suppressing or placing a fetter on or a clamp on the prerogative, then that begs the question how is that fetter or clamp removed. As I have understood your argument, you submit it is not a question of a fetter, it is a question of the 1972 Act creating a new context; and the new context is that, given that powers, rights, have been given to the British citizens by this means, a new constitutional principle is in play, by reason of the different contexts.

And therefore when one comes to examine the 2015 Act for its efficacy in putting at nought that constitutional principle, you are not addressing the question: are you removing a clamp or dismantling a fetter; you are asking yourself the question: is it sufficient to displace the fundamental constitutional principle which you say obtains?

LORD PANNICK: I respectfully agree. I am relying -- the

1 1972 Act arises in the context of a fundamental
2 constitutional principle which applies generally. It is
3 a fundamental constitutional principle that that which
4 Parliament has created, ministers cannot set aside.
5 Then one has the 1972 Act which adds greater force to
6 the submission for all the reasons that I have sought to
7 give, that it is not just an ordinary Act of Parliament,
8 it is an act of constitutional importance, which
9 contains section 2(4), which makes it even less likely
10 that ministers would have a power to exercise the
11 prerogative.
12 But I respectfully agree, there is no clamp, it is
13 the application of fundamental constitutional principles
14 of the United Kingdom. I do submit that if those
15 fundamental principles are to be removed by Parliament
16 itself, it is necessary for there to be clarity.
17 Whatever else one might say about the 2015 Act,
18 I respectfully submit that it cannot be said that the
19 2015 Act clearly removes the inability of the executive
20 to act so as to frustrate the statutory rights. There
21 is no clarity at all. What one has is an act of
22 Parliament in very simple terms, there shall be
23 a referendum, and that is all it says.
24 LORD WILSON: So in 2015 Parliament says we must have
25 a referendum. Now there has been a referendum, and the

significance of the outcome is enormous, but can one discern in the Referendum Act, Parliament going on to say: and by the way the political significance will be for you, the executive, to weigh; or rather, as you say, isn't Parliament more likely to have said, having called for it, and when it has been done, we will assess the significance of it.

LORD PANNICK: That is precisely my submission, and I do say that, if the case against me is that the 2015 Act has altered the position, has altered what the position otherwise would be, then it is incumbent on those who make that submission to show that Parliament has clearly altered what is otherwise the basic constitutional position, and there is no clarity whatsoever in support of the appellant's position.

One has an act in the most general terms that simply does not address the division of power between executive and Parliament. That is not the subject of the act, that has nothing whatsoever to do with that topic, and I therefore respectfully submit that one cannot discern from this Act of Parliament any alteration of constitutional fundamentals, far less in the context of the 1972 Act.

LORD REED: It might be argued that it is a different type of act from most acts that Parliament passes. Its whole

point is to have political effects. It is not altering anybody's rights, for example, it is not the sort of legislation that Parliament passes day in, day out. It is an act which is designed to result in an event which will have enormous political significance.

The steps that then require to be taken in response to that are inevitably going to be steps taken by Government. It might decide to introduce a bill into Parliament, it might decide not to. Parliament can then respond. If there is a bill introduced, it can decide whether it is going to pass it or not; if there is no bill introduced, Parliament has the means of making the Government accountable to it for that failure.

So looking at it that way, it is an essentially political measure designed to have consequences at the political level between the political actors. If you look at it in that way, really, why is the court -- what role does the court have to play? There is not a legal issue really that arises here, other than our ensuring that the political actors are operating their roles in a lawful manner.

LORD PANNICK: My answer to your Lordship is that there is a role for the court to play. The role for the court is to identify whether or not the Secretary of State enjoys a power to act on the international plane, using his

treaty making, and departing from prerogative, in such a way as it will nullify statutory rights. For all the points that your Lordship makes, the essence remains, and what remains is that, before the 2015 Act, there is a body of statutory rights and statutory principles, the 1972 Act, and after the 2015 Act, all of those provisions remain. They are simply untouched by the 2015 Act.

Also untouched by the 2015 Act is the legal division of responsibility between the executive and Parliament. The Act says nothing about that, and nobody has produced any material whatsoever to suggest that the 2015 Act was intended to touch upon that issue. There is no material before the court in which ministers have said: and the division of responsibility between ministers and Parliament is going to be affected by all of this; none whatsoever.

Therefore I do not accept that the political significance of the 2015 Act, which I do not dispute, in any way touches upon the issue before the court, or touches upon the constitutional question. It was open to Parliament, open to Parliament, if it wished to do so, to say whatever it liked on this topic, and it said absolutely nothing.

For the court to infer matters that are simply not

addressed in the Act, when they touch upon constitutional fundamentals, in my submission, would be fundamentally wrong; it would be wrong for the court to infer, on a matter of this importance and sensitivity, that is the relationship between Parliament and the executive, a radical change of position by reason of an act which says nothing on the subject.

LORD REED: The way I have put it to you, obviously the court's role is to interpret the 2015 Act, but if it interprets it the way that I have put to you for your comments, the result is to allow for a flexible response by Government, depending on the outcome of the referendum, obviously, which is subject to parliamentary control in the normal way.

If we construe it in the way that you are arguing, inviting us to, the consequence is that the court then, as I understand it, has to effectively compel a Government minister to introduce a bill into Parliament, which is constitutionally a novelty, to say the least, and if, for example, Parliament were to pass a resolution in both Houses approving of notification under Article 50, the court would say to Parliament: that is not good enough, we, the court, are telling you that will not do.

LORD PANNICK: Can I come on to that, my Lord, that is the

next point. Let me just deal if I may, try to deal with the point your Lordship has made.

The court is not being asked in my submission to interpret the 2015 Act. There is no language in the 2015 Act which comes close to supporting the contention that is being made by the appellant. There is nothing. The appellant does not focus on any language in the 2015 Act, and in my submission, with great respect, it is a constitutional solecism to say that the court can somehow divine an intention from the 2015 Act, without focusing on the language that the legislation uses.

There are many statements to that effect, that it is simply not the court's role, even in a constitutional context; it is Lord Hoffmann's famous statement, approving the judgment of name Associate Justice Kentridge in the name Zuma case, I can't remember the case where Lord Hoffmann said it but I will track it down, the court has to look at the language of the governing instrument; and this is the 2015 Act; there is nothing in it that the appellant has drawn attention to which begins to support a contention that it touches upon the issues with which the court is concerned.

Indeed, I repeat, it is not the appellant's argument that power to notify is to be derived from the 2015 Act. That is not their case. It is somehow by means of legal

osmosis that the argument is being constructed. There simply isn't anything there; there is nothing there upon which I say this argument can be framed. In my submission, it is not surprising that Parliament has not expressly addressed the question of whether ministers can use prerogative power in order to nullify a statutory provision. The principle is so basic that one would not expect Parliament expressly to address the question.

So I say the 2015 Act is an act of political significance; it is entirely neutral on the issue before the court, as to whether or not the minister has power to notify.

LORD MANCE: On the question of whether all acts must have legal significance, you might -- I am not sure what your answer is in relation to Lord Keen, the submission relating to the Sewel convention, but the Sewel convention as enacted in section 28(8) of the Scotland Act might be said to be an example of a piece of legislation which doesn't have any legal significance. It simply enacts the convention and -- on one view I appreciate it is an issue in this case, and that people are saying it does have legal significance.

LORD PANNICK: I can see the force of that submission. I am entirely neutral, of course, and the court will decide,

but it is not unknown for Parliament to pass legislation that has an exhortatory intention. It doesn't necessarily have a concrete legal consequence, and I repeat, it is not difficult to understand why Parliament was enacting the 2015 Act. The court is not ignorant, of course, of the political realities. The political reality is a highly controversial political issue; it is considered appropriate, and understandably so, that there should be a vote, so that all those political actors understand what are the views of the electorate; but that tells you in my submission absolutely nothing as to what is to follow as a consequence of the vote.

LADY HALE: But the Act did have an effect. The Act had an effect. It provided for the referendum. The franchise in the referendum, which is different from the parliamentary franchise, made it lawful

rest of sentence for the whole of the referendum to do everything. The Act undoubtedly had an effect.

LORD PANNICK: Absolutely.

LADY HALE: The question is whether the result has a legal effect.inaud

LORD PANNICK: Yes, my Lord, Lord Sumption.

LORD SUMPTION: I was going to ask you exactly the same question.

LADY HALE: I am sorry.
LORD PANNICK: I apologise, I am labouring the point but that is the point, that Parliament has spoken. What Parliament required has occurred. This is not a nugatory act of Parliament, and some of your Lordships are putting to me questions that are seeking to divine from the Act a purpose and intention and effect that is simply not there, in my submission.
THE PRESIDENT: I think the case you had in mind where Lord Hoffmann approved name Zuma is name Mattadene inaud
LORD PANNICK: Your Lordship is right, 1999 appeal cases. Your Lordship is familiar with it.
THE PRESIDENT: I have found it. I cannot pretend to be familiar with it.
LORD PANNICK: Lord Hoffmann says, quoting name Associate Justice Kentridge, that even in a constitutional context, even in a constitutional context, it is absolutely vital that what the court does is it looks at the language of the relevant instrument, here the 2015 Act.
What the court cannot do, because otherwise -- I think the term used is divination, what the court cannot do is somehow to infer from the general context a purpose and intention and effect that has no support

whatsoever in word the language. That is creation. That would be, in my submission, objectionable to traditional law-making.

THE PRESIDENT: If the language used by the lawyers is ignored in favour of a general resort to "values", the result is not interpretation, but divination.

LORD PANNICK: Precisely so, and what Lord Bingham said in Robinson is entirely consistent with that, because the statement by Lord Bingham in Robinson is within the scope of the language that is used by the instrument. That is my submission.

THE PRESIDENT: Thank you.

LORD CARNWATH: I am trying to get a word in edgeways here, Lord Pannick. We have jumped from 1972 to 2015. Are you going to come back to the --

LORD PANNICK: My Lord, very, very quickly --

LORD CARNWATH: I would like at some point to get clear your submission as to what happened in 2008, because that is when Article 50 is created, and undoubtedly Article 50 created a new power operating at the international level, which one could assume would be something operated by the prerogative, so a new power which the UK Government has operating in international law; I think we need to ask ourselves what the effect of the 2008 Act was, if anything, on that.

LORD PANNICK: I say no effect for these reasons. First of all, I accept, and it is the Government's case, that the United Kingdom had power to withdraw from the treaties prior to the changes made by Lisbon. It is not suggested by the Government this was a new power; it is a new means, it formalises the process. That is the first point.

The second point is that Article 50 does not say anything about the way in which domestically the state should act. It refers to the constitutional requirements of the state in question.

Thirdly, as Mr Eadie accepted, Article 50 does not have effect as part of section 2(1) of the 1972 Act. Therefore, I submit that it is simply not possible to suggest that what happened in 2008 affects the question of the division of responsibility between the Government and Parliament.

LORD CARNWATH: Except that Parliament in the 2008 Act constrains various exercises of prerogative specifically set out in that Act, doesn't do it to Article 50, and then in the 2011 Act, we get this acknowledgment that Article 50 is within the scope, as it were, but simply a reference to Article 50(3).

LORD PANNICK: What Parliament has done from 1978 onwards is to impose an increasingly rigorous form, set of

controls, and Mr Eadie's argument is that the power -- what he says is the prerogative power to notify is not the subject of any specific restraint, and my answer to that is one would not expect it to be, because it is so fundamental an aspect of constitutional law that ministers cannot use prerogative powers in order to remove that which Parliament has created.

But of course Parliament has not set out expressly that constitutional principle. It is a fundamental common law principle. The later acts are concerned, essentially, to constrain ministers from taking action at international level to expand the scope of EU law. That is the main focus of all the later legislation.

The fact that Parliament has from time to time imposed such constraints cannot establish that Parliament intended to remove a basic constitutional limit. Indeed, if one looks at the authorities, the authorities show that one should be very careful indeed before you use later legislation in order to amend or affect earlier -- the effect of earlier legislation.

My Lord, Lord Mance asked about the authorities and my Lord helpfully referred to two authorities. One in your Lordships' and your Ladyship's House most recently is the JB (Jamaica) case, Lord Toulson's judgment. It is in volume 22, tab 276, JB (Jamaica), MS 7778 and it

is at paragraph 24 and I invite the court to look at that. I don't have time to take your Lordships or your Ladyship to it.

THE PRESIDENT: Sorry, it is as much my fault as anyone else's; we have been rather taking up your time.

LORD PANNICK: I don't complain about that, my Lord; I am happy to seek to try to answer the points the court wants to raise.

My seventh and final topic is the role of Parliament, and the submission that is made by the appellant is there have been debates in Parliament. There have been Select Committee reports, there will be more such debates, and the appellant says it is a matter for Parliament to decide the nature and the extent of its involvement. Of course we agree, subject to an important qualification.

We say it necessarily follows from our submissions, if they are correct, that only an act of Parliament could lawfully confer power on the appellant to notify under Article 50(2). Why is that? Well, because notification would nullify statutory rights and indeed a statutory scheme. The law of the land is not altered by a motion in Parliament; this is a basic constitutional principle. The court knows a motion may be approved in the House of Commons today. I want to be

very clear on this. Our submission is that a motion in Parliament does not affect, cannot affect, the legal issues in this case. This issue arose in the Laker case. Can I take your Lordships back to the Laker case; it is core authorities, volume 2, and it is tab number 12.

THE PRESIDENT: Which page?

LORD PANNICK: MS 307. It is at page 367 of the MS, MS 367. This is Lord Denning, and what Lord Denning explains between E and F is that the action of the Government had been the subject of approval in both Houses of Parliament. E to F. At G, Lord Denning says:

> "... mark you, this approval even by both Houses was not the equivalent of an act of Parliament. It could not override the law of the land ... see Hoffmann-La Roche."

That is the point and I can take the court, if the court wants to see the passages in Hoffmann-La Roche, I won't do so because of time, but it is volume 21, tab 257, MS 7183. So a motion in Parliament simply cannot rectify what is otherwise the legal deficiency in the appellant's case.

If, as we submit, the appellant cannot act on the international plane by the exercise of the prerogative because it will nullify statutory rights, then an act of

Parliament is necessary to change the law of the land.

One other authority that your Lordships and your Ladyship may wish to be reminded of, it is the ex parte Federation of Self-Employed case. Volume 8 of the authorities and it is tab 68.

THE PRESIDENT: Thank you.

LORD PANNICK: National Federation of Self-Employed, volume 8, tab 68, MS 2782. The relevant passage is to be found at MS 2809 in the speech of Lord Diplock, between F and G if your Lordships and your Ladyship have that, at tab 68, Lord Diplock says:

"It is not in my view a sufficient answer to say that judicial review of the actions of officers or departments of central Government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge. They are responsible to a court of justice for the lawfulness of what they do and of that the court is the only judge."

That is the point. It is no answer for the Attorney General to say in his submissions, as he did on Monday, and I quote:

"Parliament can stand up for itself."

With great respect, that is a bad legal argument. The same could have been said in Laker, the same could have been said in ex parte Fire Brigades Union. It is the role of the court and my Lord, Lord Reed asks me about the role of the court, it is the role of the court to address whether there is legal power to act in the relevant respect, and the ability of Parliament to control that which the minister is proposing to do is, with great respect, nothing to the point.

This is as fundamental as any other principle in this case and I invite the court not to accept any suggestion that the legal limits -- I emphasise legal limits -- on ministers' powers are to be left to or influenced by political control, or parliamentary control, short of an act of Parliament.

The appellant then says, well, the procedures under the 2010 Act, the CRAG act, are very likely to apply to a withdrawal agreement. That is not good enough. There may not be a withdrawal agreement and the UK would still leave the EU under Article 50(3). We don't know. If Parliament were to refuse to give approval to a withdrawal agreement, Article 50(3) would still apply. We would still leave. Parliament's approval is not a necessary condition for us to leave.

For the same reasons, the so-called Great Repeal

Bill does not assist the appellant. There is no such bill at present. The court cannot proceed, in my submission, on any assumption as to what Parliament would or might do with a Great Repeal Bill. My Lord, Lord Sumption put to Mr Eadie the court cannot assume that the Great Repeal Bill will repeal the 1972 Act. Mr Eadie agreed, and, with respect, so do we. It may be enacted, it may be rejected. Come what may, the act of notification commits the United Kingdom to leaving the EU with the consequence for statutory rights that we have drawn attention to.

One other very brief point. The court, I know, will have been much assisted by the various analyses by academic lawyers, of real distinction, on both sides of the argument on this appeal. Each side has extracted from the academic analysis the points which support our respective arguments and the court will decide who has the better of the arguments.

My Lords, my Lady, the submission for Ms Miller is that the volume of materials before the court, indeed the volume of lawyers before the court, and the eloquence of my friends the Attorney General and Mr Eadie and the Advocate General for Scotland should not be allowed to obscure the basic principles of constitutional law which I say the appellant's argument

would violate.

Those are the submissions I want to make, unless there are other matters on which I could seek to assist the court.

THE PRESIDENT: Thank you, Lord Pannick. Thank you.

Mr Chambers.

Submissions by MR CHAMBERS

MR CHAMBERS: My Lady, my Lords, I appear on behalf of the second respondent and I gratefully adopt the submissions of my learned friend Lord Pannick. We invite the court to approach this appeal from first principles, based on the fundamental legal doctrine of parliamentary sovereignty. Applying that doctrine, the answer to the issue posed in this appeal is straightforward and the result is clear. It is a three-stage argument which I shall summarise first and then develop.

Stage one is the doctrine of parliamentary sovereignty itself. Parliament is supreme. No person or body apart from Parliament itself can override, nullify or set aside legislation enacted by Parliament or the operation or effect of such legislation.

Stage two is the concession by the appellant that by triggering Article 50, EU law rights will undoubtedly and inevitably be lost. Those EU law rights are enshrined in primary legislation, most notably the

1972 Act and the 2002 European Parliamentary Elections Act. The clear legal effect of those concessions, of that concession, is that by triggering Article 50, those statutes will be nullified and overridden.

Stage three is the absence of any parliamentary authorisation for the executive to override or nullify that primary legislation. In the absence of such parliamentary authorisation, by triggering Article 50, the Government will be acting contrary to the doctrine of parliamentary sovereignty and so the Government will be acting unlawfully.

It follows from these three simple propositions in our submission, that the appellants' appeal must be dismissed. At heart it really is as straightforward as that.

So, starting with stage one, which is the doctrine of parliamentary sovereignty, we have set out in our printed case the relevant principles. I am not going to go through them now, but I do want to highlight some of the core jurisprudential principles behind the doctrine, because they make it clear that the aspect of the doctrine which we rely on is absolute and it admits of no exceptions whatever.

The doctrine itself was forged in the fires of the battlefields of 17th century England, and it arose on

the basis of the clash between Crown and Parliament for supremacy. At the culmination of the Glorious Revolution of 1688, the Bill of Rights was enacted. Now, the doctrine itself long predated the Bill of Rights but it is in the Bill of Rights that the doctrine finds its legislative expression, and if I could take the court first of all to the Bill of Rights, which is in core authorities 1 at tab 106, electronic 4150 at 4152.

At 4150, we have the heading of the Bill of Rights, and then at 4152, suspending power:

"... that the pretended power of suspending laws or the execution of laws by regal authority without consent of Parliament is illegal ..."

word Late dispensing power:

"... that the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal."

Articles 1 and 2 are clear in their terms. No ifs, no buts, no exceptions. Legislation enacted by Parliament is supreme, and the executive cannot act to undo that which Parliament has done. That which Parliament has granted, only Parliament can take away.

The most celebrated exposition of the doctrine of parliamentary sovereignty is that given by Professor

Dicey in his seminal work, "Introduction to the Study of the Law of the Constitution", which was first published in 1885. In our printed case we have cited extracts from the eighth edition of 1915 which was the last edition which Dicey himself wrote. I have described Dicey's exposition as the most celebrated. It is also the most influential and in its relevant respects, Dicey's magisterial exposition still holds good today.

If I could take the court to some relevant extracts from Dicey as quickly as I can, that is core authorities 5 at tab 157, that is electronic 4989. And at 4990, the sovereignty of Parliament is from a legal point of view the dominant characteristic of our political institutions. If you go down to under heading A, "Nature of parliamentary sovereignty":

"Parliament means in the mouth of a lawyer, though the word has often a different sense in ordinary conversation, the King, the House of Lords and the House of Commons. These three bodies acting together may be aptly described as the King in Parliament and constitute Parliament. The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has under the English constitution the right to make or unmake any law whatever, and further, that no person or body is

recognised by the law of England as having a right to override or set aside the legislation of Parliament."

Then if you would go down about ten lines into the next paragraph, there is a section which reads, halfway down the page:

"There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an act of Parliament or which, to express the same thing in other words, will be enforced by the courts in contravention of an act of Parliament."

If you would then, please, move to the next tab --

LORD MANCE: That is the issue, isn't it, whether what is proposed here is in contravention of the 1972 Act?

MR CHAMBERS: My Lord, precisely, that is the issue. That is going to be my stage two, which is looking at the rights to see whether or not there is a contravention, but your Lordship is absolutely correct, on the principle, the question is will there be a contravention.

LORD MANCE: Just because rights are lost, which is your stage two, does not mean to say that they are lost in contravention of the statute which granted them; it may be that they are conditional or ambulatory.

MR CHAMBERS: My Lord, it could be, if they are conditional,

but the point is this, if they are granted by Parliament -- a right is a right, if it is a statutory right, that is something granted by Parliament. The effect will be to override or nullify that primary legislation, because the rights which are afforded by that legislation will have been taken away.

THE PRESIDENT: It depends, doesn't it; I mean, if the legislation said so long as the executive agrees, for example, there would be no problem.

MR CHAMBERS: My Lord, that is absolutely correct. That is my stage three, which is, is there any parliamentary authorisation.

So, for example, there would be parliamentary authorisation if the statute, there was a Henry VIII clause or whatever it may be, made specific provision, for example, for rights to be taken away.

So it is a three stage argument and I am on stage one, which is just setting out the principle, before I get to my stage two and then stage three. In stage three I will also be making submissions on the 2015 Act.

LORD MANCE: Yes, they could be conditional upon something other than a specific decision to take them away; they could be conditional upon -- any event but in particular they could be conditional on membership of the EU.

MR CHAMBERS: My Lord --

LORD MANCE: The EU existing.
MR CHAMBERS: Yes, that is an example. The one I was going to draw your Lordships' attention to was the argument under the European Parliamentary Elections Act where what is said: well, what if there is no EU Parliament? In our submission, that does not matter. What matters is if there is a right to vote or to stand for elections to the European Parliament which has been granted under the 2002 Act, that is a domestic statutory right which, even if it cannot be exercised, has still been granted by Parliament, and it is Parliament's choice whether or not that right should be taken away.
LORD SUMPTION: The rule that the prerogative cannot take away rights is not limited to statutory rights, is it?
MR CHAMBERS: My Lord, it is not limited to statutory rights; we would say it applies to all rights, including common law rights.

I was going to move quickly to tab 331, which is the next tab, and it is electronic 9343.

LORD KERR: What is that number again, please?
MR CHAMBERS: Electronic 9343, we are still in Dicey but it is spread over two tabs, I am afraid. The relevant extract is 9343. The very bottom of the page:

"Thirdly, there does not exist in any part of the British empire any person or body of persons, executive,

legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution on any ground whatever, except of course it being repealed by Parliament."

Then if we go back to the previous tab, which is 157, sorry to jump around but it is just that it is spread over two tabs, if we then go, please, to page 5005, in the electronic numbering, you will see halfway down the page:

"Two points are, however, well established. sentence First, the resolution of neither House is a law ..."

This is a substantial -- result of the case of Stockdale v Hansard, a point which my learned friend Lord Pannick was on, and then specifically relevant to the question of the role of the people in terms of political power and legal power. If you move on, please, to 5010, you will see at the top of the page, the vote of the parliamentary electors and halfway down that page:

"The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating or sanctioning or of repealing the legislation of

Parliament. No court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate. Their opinion can be legally expressed through Parliament and through Parliament alone."

Then in the same vein --

LORD SUMPTION: That needs to be modified, at any rate to some extent, in an age of referenda.

MR CHAMBERS: My Lord, I am going to come to that but in our submission, the answer is yes, if Parliament has authorised a binding referendum. But if there is no binding referendum which has been authorised, this still obtains.

LORD HODGE: Does that include the first sentence you read out?

MR CHAMBERS: "The sole legal right of electors under the English constitution is to elect members of Parliament."

That is correct because it would be for Parliament then to confer rights on the people to hold a referendum, for example, but the sole legal right is to elect.

LORD MANCE: There is an anonymous and slightly droll publishers' note at the next section of Dicey, 9322, which says the word "referendum" is a foreign expression derived from Switzerland. 30 years ago it was almost

unknown to Englishmen, even though they were interested in political theories.

MR CHAMBERS: Certainly Dicey changed his view on referenda because he was terribly against Irish home rule, and he wanted referenda introduced to try and defeat Irish home rule. He didn't succeed.

LORD SUMPTION: He wanted a referendum in England about Irish home rule.

MR CHAMBERS: That's correct. He didn't get it.

My Lords, and my Lady, 5024, halfway down the page:

"The matter indeed may be carried a little further, and we may assert the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country ... this is a political, not a legal fact. The electors can in the long run always enforce their will, but the courts will take no notice of the will of the electors. The judges know nothing about any of the will of the people, except insofar as that will is expressed by an act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as

important as the legal sense or more so but the two significations, though intimately connected together, are essentially different."

The final extract is over the page on 5026, five lines from the bottom:

"The electors are a part of and the predominant part of the politically sovereign power but the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament."

Now, the appellant says that he does not dispute what he terms the general principle of the doctrine of parliamentary sovereignty, and he goes on to say that nevertheless it is the case that the executive can by the use of the prerogative alter the law of the land, including that set out in statute.

Now, from a parliamentary sovereignty purpose, that striking proposition is, we submit, simply wrong. The doctrine of parliamentary sovereignty is not a general principle, it is the fundamental legal doctrine upon which our constitution stands.

As we have explained in our written case, and as the courts of the highest authority have said over the centuries, the doctrine of parliamentary sovereignty conditions and refines and defines other relevant

concepts. Most importantly in this context, the issue and the extent and use of the prerogative.

The United Kingdom's dualist approach to international treaty-making upon which the appellant so heavily relies is a product and a reflection of that fact. The UK's dualist approach exists precisely because the executive cannot alter domestic law by the use of the foreign affairs prerogative and the use of the prerogative of withdrawal. There has to be authorisation by Parliament.

The two relevant authorities for that, which I will not ask you to turn up but I will simply ask you to note, is Rayner, that is core authorities 3, tab 43, page 500 in the report at letters B to D, electronic 1179; and Higgs, which is core authorities 4, tab 260 at page 241 of the report, electronic 7244.

Now, contrary to the submissions made by my learned friend Mr Eadie, parliamentary sovereignty is not a new or a newly discovered principle. It has been well established and operated for over 300 years. But it does not in any way represent a challenge to the way in which the Government operates on the international plane. Nor will it require in the future any parliamentary micromanagement of what the Government does on the international plane. This is because it

does not impact treaties which do not require implementation in domestic law. It does not impact on the exercise of power by Government on the international plane which is authorised by Parliament. For example, participation of ministers in the decision-making of EU institutions. The doctrine does not impact on the use of the prerogative in respect of the myriad of examples which are given by the appellant in his case, for example Post Office v Estuary Radio, or in relation to the inaud of diplomats, so that is stage one.

That brings me to stage two, which is the appellant's concession, which is in paragraph 62A of his printed case, the page reference is 12353, and the concession is that the triggering of Article 50 "will undoubtedly lead to the removal ... rights and obligations currently conferred or imposed by EU law".

LORD MANCE: Could you just give that page again.

MR CHAMBERS: That is 62A of the appellant's printed case, the page reference is 12353.

The appellant's description of these rights as being conferred by EU law is not an accurate description of the source of these rights as a matter of domestic law. For the purposes of the doctrine of parliamentary sovereignty, the source of the relevant rights in

domestic law is absolutely critical. Of course the source of the EU law rights which are being referred to here are primarily the 1972 Act and the 2002 Act.

Now, those rights were directly conferred in domestic law by those two acts of argument. These rights are available in domestic law only because Parliament has expressed its will by primary legislation that this be so.

Now, in this context, it is important to have a full appreciation of the circumstances in which and the reason why Parliament decided to enact the 1972 Act at all.

LORD CARNWATH: Could I just pick up on a point where these rights come from. In the case of name Musef, we had to deal with a rather unusual situation where one had a decision made by a United Nations body in the terrorism context which then took effect under a European regulation, which then in turn came into domestic law via the 1972 Act.

Now, I said in agreement with my colleagues that that was something which arose not from domestic law, although it was brought into domestic law, it is a sort of typical example of the conduit approach.

MR CHAMBERS: Yes.

LORD CARNWATH: Is that the correct analysis in your view,

or is that an oversimplification?

MR CHAMBERS: My Lord, with respect, that is not the correct analysis.

LORD CARNWATH: I put it to you because it is relied on by -- in one of the papers -- cases before us.

MR CHAMBERS: Yes. Under our dualist approach, for any rights to be conferred in domestic law, requires the intervention of Parliament.

LORD CARNWATH: I accepted that. That was one of the issues in the case, was whether that had been done effectively, given the particular power interfered very drastically with the rights of a citizen of this country.

MR CHAMBERS: Yes.

LORD CARNWATH: Now, are you saying we got it wrong or --

THE PRESIDENT: Do you need to see the case, really, in order to answer that?

MR CHAMBERS: Yes inaud the general principle as I say in our dualist system requires the intervention of Parliament in order to create these rights. These rights are not just being transposed through a conduit; the domestic legal order is being changed by the 1972 Act.

LORD CARNWATH: It may be, as my Lord says, better to have a look at the case. I think it is in the papers somewhere, because it is mentioned by the lawyers

inaud .

MR CHAMBERS: Perhaps I can come back to that after the adjournment so that we can speed on.

In 1971 the Government was proposing that we join the then EEC and to do that, they were proposing that the UK sign the accession treaty.

Now, joining the EEC would have two important consequences for the UK. The first is that membership would necessarily involve the UK in the significant fiscal obligations of membership. These fiscal obligations could only be sanctioned by Parliament, by primary legislation. We saw that happened in section 2(3) of the 1972 Act.

Membership would also involve changes to domestic law and again that could only be achieved by Parliament through primary legislation.

So it was that on 28 October 1971, Parliament was asked to give its consent in principle to the UK joining the EEC. The terms of the relevant parliamentary resolution, which were referred to by my Lord, Lord Mance earlier, were identical, they were put separately to both Houses and the terms are important. The court will find them in volume 17 of the authorities at tab 193, and the electronic reference is 5787.

LORD CLARKE: You set this out in your case, don't you?

MR CHAMBERS: My Lord, we have set out the terms of the resolution. I want to just show your Lordship also a short passage in the debate which we have not set out in the case. I just wanted to first of all take you to that.

LORD CARNWATH: Sorry, the page again?

MR CHAMBERS: It is page 5787, and you will see the terms of the resolution:

"This House approves Her Majesty's Government's decision in principle to join the European Communities on the basis of the arrangements which have been negotiated."

So by these resolutions the Houses of Parliament were being asked to give their consent in principle to the Government's in principle decision to join the EEC; in other words if the resolutions were passed, Parliament could next expect the introduction of a European Communities bill to give effect to the in principle decision to join the EEC. But if those resolutions had not been passed, the UK's proposed membership of the EEC would have been stopped in its tracks.

Now, this was made clear by Mr Heath, the then Prime Minister, and if I could just take you to two very short passages, first of all at 5846, electronic 5846, which

is towards the very end of this tab, 193, for those who have it in paper form. 5846, at the very top of the page, this is Mr Heath winding up the debate:

"I do not think that any Prime Minister has stood at this box in time of peace and asked the House to take a positive decision of such importance as I am asking it to take tonight. I am well aware of the responsibility which rests on my shoulders for so doing. After ten years of negotiation, after many years of discussion in this House and after ten years of debate, the moment of decision for Parliament has come. The other House has already taken its vote and expressed its view. Frontwoodsmen have voted in favour of the motion ... I cannot over-emphasise tonight the importance of the vote which is being taken, the importance of this issue, the scale and quality of the decision and the impact it will have, equally inside and outside Britain."

So that was the momentous occasion which was the word presager to the 1972 Act. If you then go to 5849, at the very bottom, four lines up, this is still in Mr Heath:

"It is well known that the President of France, supported by the Chancellor of Germany, has proposed a summit meeting of heads of Government ... This meeting will settle the European approach."

Then over the page:

"If by any chance the House rejected this motion tonight, that meeting would still go on and it would still take its decisions which will affect the greater part of western Europe and affect our daily lives but we would not be there to take a share in those decisions."

So if the resolutions had not been passed, the reality is that the Government would not have been able to go on to sign the accession treaty because if it had done so, it would have been acting directly contrary to the will of Parliament if those resolutions had been rejected. Of course if they had been rejected, there would have been no European Communities bill. However, the resolutions were passed and they led to the signing of the accession treaty on 22 January 1972 and the introduction of the European Communities bill which became an act on 17 October 1972. So that is the context in which the Act was passed.

In our submission, everything from then on has to be seen through the prism of the 1972 Act. On the very next day, sic? 18 January, the UK ratified the accession treaty and these dates are no coincidence. Prior to ratification, it was necessary for Parliament to pass legislation which would enable the UK to meet its fiscal obligations and would enable the UK to change

domestic law.

THE PRESIDENT: As a matter of domestic law, would it have been open to the executive, to the Government, to decide not to ratify the treaty once the 1972 Act had been passed?

MR CHAMBERS: My Lord, strictly speaking, as a matter of law, it may have been. Our submission is that if Parliament had expressed its will that the UK join the EEC through these resolutions, if it then passed the Act which makes provision for that joinder, then we would say it would in fact be unlawful for the executive to go against the will of Parliament, because the 1972 Act makes express provision for our entry into the EEC, so that domestic law could be altered, so once the Act was is passed, that is it.

LORD MANCE: My Lord's question related to whether there was an obligation to enter into the Act.

THE PRESIDENT: No, ratify the treaty.

LORD MANCE: To ratify the treaty. But once it was ratified, then at any rate the rights were created. I suppose therefore that there are two stages we have to consider it at.

MR CHAMBERS: Yes.

LORD MANCE: It is really the latter which is the critical one.

MR CHAMBERS: It is the latter, it is the 17 October enactment, 18 October ratification.

THE PRESIDENT: Of course that is the history once it has been ratified, but I just wondered whether that tiny 24 hours or whatever it was, the position there throws any light on the subsequent position; and it seems to me in some ways that you may well be right, consistently with your argument, there was an obligation to ratify.

MR CHAMBERS: Yes, we would say it would have been an abuse of power under Fire Brigades Union principles if there was no ratification.

THE PRESIDENT: I see the force of that, thank you.

MR CHAMBERS: Article 2 of the accession treaty itself mandated that the accession treaty be ratified in accordance with the UK's "own constitutional requirements", obviously a familiar phrase. We say those constitutional requirements included the passing of the 1972 Act by Parliament.

Now, the correct constitutional position, so far as ratification is concerned, is clearly set out by the late Lord Templeman writing extra-judicially in 1991, in his article, "Treaty-making and the British Parliament -- Europe".

The court will find that in volume 28, tab 351, electronic, 9688, and I would ask you to turn that up,

please. This is an article published in the Chicago-Kent Law Review, volume 67. You see the title page at 9688. If we go to 9689:

"Under English law the capacity to negotiate and conclude treaties falls entirely to the executive arm of the Government. Nominally Parliament plays no role at all in the process."

If we drop down a few lines:

"An understanding of how treaties are entered into and implemented in British law depends on an appreciation of the division between the international aspects of treaty-making and the domestic aspects of implementation. Parliament has very little involvement in the former but almost complete control over the latter aspect."

Then at 9690, halfway down the page:

"The theoretical powers of Parliament in relation to treaty making may be summarised as follows ...

"(2) Parliament may prevent a treaty being ratified if the Government submits the treaty to Parliament before ratification. However, if the House of Commons carried a vote against ratification, this result would also lead phrase to the fall of the Government.

tohere "(3) otherwise conflict with English common law or United Kingdom statutes, Parliament may

ensure that such provisions are not effective by refusing to pass such a statute that gives to the treaty. Enactment of the necessary provisions would lead to the fall of the Government. The threat of defeat means that the Government will always do in its power to all in its power to ensure that when negotiating a treaty, the provisions of the treaty will be acceptable from the majority of the legislature into the electorate."

Then over the page at 9691, above the heading "Negotiations and conclusion of a treaty ^check."

"In practice the approval of a treaty by the Government which maintains the support of a majority in the House of Commons will be ratified and the effect of a treaty will be given if the effect in English law by the passage of the Parliament through statutory incorporation through provisions of the treaty and 9693, under the heading parliamentary appear probation and approval of a treaties ^check Parliament will need to be involved where taxation is imposed or where a grant from public funds is necessary to implement the treaty where existing domestic law is affected ... then he gives a few more examples.

At 9694, under the heading "Ratification of treaties," the last line of the page:

"It is also envisaged that between the time of negotiation and the act of ratification, the legislature of state may require to be given an opportunity to scrutinise the proposed international agreement, even in those states where legislative involvement is greater than in the UK in order to give the necessary approval of the treaty and then a reference to article 14 of the Vienna convention and then ratification, once an opportunity for the sovereign to confirm in a the representative did in fact have free powers to conclude a treaty, is now a method of submitting treaty making powers of the executive to some control of the legislature, so the slate may give proper scrutiny to the treaty before it allows the Government to bind the state to it."

Then under the heading "Ponsonby rule" Lord temple man sets out on page 9695 at footnote 11 the preface by Mr Ponsonby to the Ponsonby rule and at the beginning he says:

"It has been the declared policy of the labour part for some years to strengthen the control of Parliament over the conclusion of international treaties and agreements and to allow this house adequate opportunity to cuss discuss the provisions of these instruments of before their final ratification."

As matters now stand there is no constitutional obligation to compel the Government the day to submit treaties to this house before ratification except in cases where a bill or financial resolution has to receive parliamentary sanction before ratification."

So there a distinction being drawn between on the one hand bills where there is a constitutional obligation, treaties to put them before Parliament because they contain fiscal obligations or change the law of the land and separately the treaties which do not require to be so put forward but are under the new pons by rule which is coming. We had that at 9696 and at the top of the page I come therefore to the inauguration of a change in custom and procedure and then about eight lines down he says:

"There are two sorts of treaties, there is the present treaty out of which the bill or financial resolution arise which necessarily comes before Parliament and in regard to which no change is necessary."

But will is another sort of treaty out of which no bill arises and that the sort of treaty which according to the present practice need never have been brought before the house at all."

That then becomes the Ponsonby rule.

So we are dealing with the accession treaty with a situation where there was in our submission a constitutional obligation to bring it before Parliament so that domestic law could be changed.

There is just one further reference. My learned friend Lord Pannick took you to the green paper in relation to CRAG. There is also a relevant passage in the white paper, which is at bundle 15, tab 167. That is electronic 5213 the relevant electronic page number is in this document we are looking at the white paper, 5282 and it is paragraph 119 of the white paper. Under the heading treaties in domestic law:

"In the UK international treaty rights and obligations are not automatically incorporated into international law on ratification, they are given effect in national law where necessary by primary or secondary legislation. The Government practice is not to ratify a treaty until all the necessary domestic legislation is in place, to enable it to comply with the treaty, since to do otherwise could put the UK in breach of its international obligations. Parliament, including where necessary the devolved legislatures had the opportunity to debate enabling legislation et cetera, this practice applies equally to all EU treaties that require enabling legislation. Most parliamentary debates take place

under this process rather than the Ponsonby rule."

LORD CLARKE: Can you just say again what paragraph that was.

MR CHAMBERS: 119, my Lord, forgive me.

LORD CLARKE: That is all right. Thank you.

MR CHAMBERS: So even before the Ponsonby rule came into effect in 1924, there was this constitutional requirement we submit for Parliament's consent to be given to ratification of the accession treaty. Now neither the Ponsonby rule nor CRAG apply to treaties which are required to be implemented under domestic law. And contrary to my learned friend Mr Eadie's submissions, CRAG and the subsequent legislation is nothing to the point on the question of withdrawal from a treaty under Article 50. There is this prior fundamental lock, we would submit, and that lock is brought about by the fact that the EU treaties require implementation in domestic law.

Now the reason I go through all that history at quite some length is for two reasons. First it demonstrates, we submit, the interaction of the doctrine of parliamentary sovereignty and the UK's dualist approach to international treaties. The treaties could have no impact on domestic law without the 1972 Act but it was an absolutely essential feature of the treaties,

as international law instruments, that much of them should have and should be given effect in domestic law. So the 1972 Act was essential. If the treaties could not have had effect in domestic law, without Parliament passing the 1972 Act, so it must be that the effects of those treaties in domestic law can only be removed by Parliament and not by the executive. The key point about the dualist system from a parliamentary sovereignty perspective is that, when the UK enters into a treaty which requires domestic implementation, Parliament remains in control of the process. It remains in control of if the necessary enabling legislation is passed or not. Parliament has a free choice. If parliament refuses to pass the legislation, the treaty is not ratified.

Now the corollary of Parliament having that control is that parliamentary control must equally apply to the withdrawal process. It is for Parliament to choose whether it will repeal the legislation which implemented the treaty in domestic law.

For that reason, Parliament remains in effective control, whether the UK withdraws from the treaty or not.

The difficulty with the appellant's argument is that the triggering of Article 50 by the Government alone

will bypass that parliamentary control and it will rob Parliament of any substantive choice as to whether or not to repeal the 1972 Act.

LORD MANCE: Isn't there a missing middle or -- in that proposition? Take the example of the double taxation treaties and the legislation giving effect to them, it gave effect to them, I think you argue, on the basis that the double taxation treaties would confer domestic rights as long as they were in existence, ie it remained in the executive's power what double taxation treaties to enter into and whether to abrogate them. So that merely because treaties would not have an effect without an act does not mean to say that they could only be disapplied by an act, the initial act may itself contemplate, permit, their disapplication because it has a limited effect, the initial act and the question in this case comes down to whether the 1972 Act is that sort of limited legislation.

MR CHAMBERS: My Lord, yes. I am coming on to that but specifically as far as the double taxation treaties are concerned, under TIOPA ^check of course there is the enabling legislation and then orders in council are made and so the Government has authority.

LORD MANCE: Yes, that is because TIOPA says that and I mean TIOPA could have been formulated differently perhaps but

for good reason no doubt it was formulated as it was.

MR CHAMBERS: It could have been but we have the 1972 Act and when I come to the point, my stage 3, we will say there is nothing in the act to deal with that.

LORD MANCE: Yes.

MR CHAMBERS: Secondly, the reason I go through this history, is because it throws into stark reality in our submission, our respectful submission, the fallacy in the appellant's proposition that the EU law rights enshrined in the 1972 Act are somehow not domestic statutory rights or they are a conduit, to use my Lord, Lord Carnwath's point.

It is absolutely essential to the whole function and the purpose of the 1972 Act, and to the operation of the treaties themselves, and to the UK's membership of the EU that these rights are precisely that, domestic law rights. That is fundamental to being a member of the EU. They have to be put into domestic law and only Parliament can do that.

That is how the position has been understood by the courts in this country over a number of years and I give two examples, again without asking the court to turn them up but just for your note. The first is Thoburn in core authorities 3, tab 22, it is paragraph 66 of the judgment, electronic page 746, and the second one is

McWhirter, which is paragraph 6 of the judgment, which is in core authorities 3, tab 46, electronic 1849.

The position is also clear we submit from the European Union act of 2011, section 18, which my learned friend Lord Pannick took you to yesterday. That is the declaratory provision which says that EU law rights fall to be recognised and available in law only, and I stress the word only, because of the 1972 Act.

LORD WILSON: I have to say that I still don't really understand what Parliament was getting at --

MR CHAMBERS: I am just about to hopefully enlighten your Lordship because I am going to take the court now to the explanatory notes which is helpful on this, certainly in the parliamentary sovereignty context.

LORD WILSON: You set them out in your case and having read it this morning I still don't understand it.

MR CHAMBERS: Then I am determined to make sure your Lordship reaches the short adjournment hopefully with a better understanding.

The explanatory notes are in volume 30 of the authorities, tab 403. And it is electronic 10362, they start at 10352 and the relevant provisions are paragraphs 118, 119 and 120 and that is at page 10362. Perhaps I could just ask the court to read very quickly 118, 119 and 120 and I hope that will answer my Lord,

Lord Wilson's question. If not, I will do my best to answer any further questions.

(Pause).

Does my Lord, Lord Wilson have the relevant passage.

LORD WILSON: Yes, I do.

MR CHAMBERS: So we see from that in parliamentary sovereignty purposes, the reason this has been done was because although it was thought the doctrine of parliamentary sovereignty was sufficient to ensure that EU law was not supreme in the parliamentary sovereignty sense, section 18 is declaratory, and it is really belt and braces, to make it absolutely clear to everybody that EU law rights solely take effect under English domestic law through the will of Parliament.

It is --

LORD WILSON: What has been said to the contrary which concerned Parliament?

MR CHAMBERS: My Lord, I imagine various noises in certain sections of the House of Commons by certain MPs who may have been concerned about what they might term the encroachment -- this was --

LORD SUMPTION: It had been suggested at one stage had it not that the doctrine of primacy combined with the statements of principle in cases like Costa and NL did have precisely that effect and indeed Ms Sharpston

^ made a submission to that effect in the divisional court in Thoburn which was rejected.

MR CHAMBERS: Yes. My Lord, that is very helpful. Of course there is also Factortame which is in a similar vein.

LORD MANCE: There is the long standing discussion between constitutional courts around Europe and the European Court of Justice As to which is supreme in areas falling within the scope of the local constitution, isn't there, it is the same point?

MR CHAMBERS: My Lord, it is.

LORD SUMPTION: It generally resulted in the conclusion which is the same as the one that exists here, generally on the local constitutional arrangement ^check.

MR CHAMBERS: Yes.

My Lord, moving on, the appellant's argument based on the phrase from time to time" in section 2(1) of the 1972 Act in our submission, does not detract from parliamentary sovereignty and you have our printed case on that, I will not ask you to turn that up but it is paragraph 78 ^check of our printed case, 1240 ^check but I do want to deal with one particular argument which was in fact raised by Lawyers for Britain in its written intervention and that argument to a certain extent was taken up to a certain extent by Mr Eadie. The argument

is that from the passing of the 2008 act, the rights given by section 2(1) must be read as rights granted from time to time subject to the operation of Article 50.

Now, you have heard from my learned friend, Lord Pannick in relation to that, and the broad point is that Article 50 throws you back to domestic constitutional requirements but, I want to add this, that the introduction of Article 50 specifically in the context of the doctrine of parliamentary sovereignty and the 1972 as considered by Parliament. It was considered by the House of Lords Select Committee on the constitution, during the passage of the bill which eventually became the 2008 act. And the Select Committee's report is at volume 17 of the authorities at tab 198.

LORD CLARKE: Does this get a mention in your case?

MR CHAMBERS: My Lord, it does I believe get a mention in our case. I will just check, certainly we have referred to it below but I believe it is in our case as well. I will give your Lordship the reference. It is electronic 5977. This is 17198 and it actually starts at 5917 which is the sixth report of the Select Committee, it is a report with evidence and if you start, please, at page 5922 and paragraph 6, you will see that the committee wrote to the foreign secretary to

ask him to set out the Government's view of how the Lisbon treaty would affect the UK constitution and his reply is produced and the court will find that at 5974, and the relevant passage is at 5977 and it is the final two paragraphs above the heading "Courts and the judiciary" the Lisbon treaty has no effect on the principle of parliamentary sovereignty. Parliament exercised its sovereignty in passing the 1972 Act and has continued to do so in passing the legislation necessary to ratify subsequent EU treaties. The UK Parliament could repeal the 1972 Act at any time and the consequence of such repeal is that the UK would not be able to comply with its international and EU obligations and would have to withdraw from the European Union. The Lisbon treaty does not change that and indeed for the first time includes a provision specifically confirming member state's rights to withdraw from the European Union."

That then led to the committee's relevant conclusion in paragraph 95 of the report itself, which is at 5943 and in paragraph 95 the (Inaudible) say this:

"We conclude that the Lisbon treaty would make no alteration to the current relationship between the principles of primacy and European Union law and parliamentary sovereignty. The introduction of a

provision explicitly confirming member states' rights to withdraw from the EU underlines the point that the United Kingdom only remains bond by European Union union law as long as Parliament chooses to remain in the union."

Now, in our submission, that explains at a general level why there was no need for any parliamentary control under article -- control of Article 50, under section 6 of the 2008 act. Because Parliament was proceeding on the basis that under the doctrine of parliamentary sovereignty, it was for Parliament to decide whether or not to remain in the EU.

So my Lords, that is the position in relation to the 1972 Act. The point can also be illustrated in relation to the European Union elections act 2002 and there, I don't ask you to turn it up but for your note it is at core volume 1, page 128, electronic 4434, the rights granted under that act, rights to stand for election and to vote, are conferred by the 2002 act itself. There is no reference made to rights deriving from a different legal system, or rights obtained in any other instrument ^check, in other words the source of the rights in every sense is legislation enacted by Parliament. And that is all that is required to engage the doctrine of parliamentary sovereignty.

I have already dealt with the existence of the European Parliament point and my learned friend, Lord Pannick, has dealt with the other point which arose on this, which is the rights are contingent on the executive deciding to exercise the prerogative to withdraw. That, as Lord Pannick submitted, simply begs the question of whether the executive can give an Article 50 notification without the approval of Parliament.

For parliamentary sovereignty ^check so far as the 2002 Act is concerned, the rights which are granted to citizens take effect of and function under the domestic legal order. It is precisely because those rights take effect under the domestic legal order that the principle of parliamentary sovereignty has been engaged. It is important to note that the "from time to time" argument could not in any event work in relation to the 2002 act and nor could the supposed impact of the advent of Article 50 have any impact on the 2002 Act because the point there is there is no warrant to make those rights contingent on the introduction of Article 50, the 2002 act is such that the rights are set out in stone.

So just before the short adjournment, I can now return to the core of my stage two argument, which is that once it is understood that the source of the

relevant rights in domestic law is primary legislation passed by Parliament, then the legal effect of the appellant's concession in paragraph 62 A of his case can be properly understood because what it amounts to is that rights granted by Parliament under primary legislation will undoubtedly and inevitably be lost or removed by notification under Article 50.

Not just EU law rights, but rights granted by Parliament under acts of Parliament.

So that brings me to stage three which is whether Parliament has authorised the executive to bring about the inevitable loss of rights. And under the doctrine of parliamentary sovereignty, the authorisation of Parliament is needed because only Parliament can override, set aside or nullify legislation. It is important here to underline that the appellant does not claim any parliamentary authorisation, he says he doesn't need it, he says that the prerogative power suffices but this in our respectful submission goes back to the flaw in the appellant's argument because the appellant's approach we submit betrays a fundamental misunderstanding of the doctrine of parliamentary sovereignty. Looked at through the prism of parliamentary sovereignty, the prerogative is nothing more than a label for executive action. The prerogative

can only be exercised through executive action. And executive action is unlawful if it contravenes the doctrine of parliamentary sovereignty and given that in this case, in our submission, the exercise of the prerogative will lead to this loss of rights in primary legislation, the only question which remains is whether or not there is parliamentary authorisation and under the doctrine of parliamentary sovereignty, that is the correct approach to the issue but the appellant seeks to persuade the court to look at matters from the wrong end of the telescope. The appellant says that the starting point is to look to see whether there a prerogative and, if there is, he says the issue becomes whether or not the prerogative power has been limited by Parliament in the relevant respect.

But that in our submission looks at the matter completely the wrong way round because it terms the turns the doctrine of parliamentary sovereignty on its head. No once it has been accepted as it has here that executive action will override primary legislation, the correct approach in our submission is for the executive to show that Parliament has authorised the loss of rights in question.

It is not a question of looking to see if there a prerogative power that has or has not been limited, it

is for the executive to show in clear terms that Parliament has authorised the loss of statutory rights intended to be brought about by this executive action.

So just to finish this point off, in answer to a question my Lord, Lord Reed raised yesterday, and that was whether or not the referendum result could provide a basis for the rational use of the prerogative, if there was a prerogative. Well, we submit this case does not involve the question of whether or not what the appellant proposes to do is a rational use of the prerogative, without parliamentary authorisation, the proposed executive action is not lawful, so there is simply no prerogative at all in our submission in that respect.

THE PRESIDENT: Is that a convenient moment.

MR CHAMBERS: My Lord, I was just about to ask.

LORD CARNWATH: Could I immense the Musef case if you want to come back to, I think it is at 36, 496 in the supplementary bundle, MS 67.

MR CHAMBERS: That is very helpful, thank you.

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

We will resume again at 2.00 with Mr Chambers. Thank you.

(1.01 pm)

(The Luncheon Adjournment)