

**IN THE SUPREME COURT OF THE UNITED KINGDOM**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION (DIVISIONAL COURT)**

**Divisional Court Case Nos: CO/3809/2016 and CO/3281/2016**

**Neutral Citation of Judgment appealed against: [2016] EWHC 2768 (Admin)**

**BETWEEN**

**THE QUEEN**  
on the application of

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

Claimants/  
Respondents

and

**THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

Defendant/Appellant

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**WRITTEN CASE OF  
THE SECOND RESPONDENT  
DEIR SANTOS**

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*This Case is cross-referenced to the Authorities bundles in the format [Volume/Tab]*

**I. INTRODUCTION**

1. Mr Santos successfully contended before the Divisional Court that the Appellant Secretary of State has no power to give notification of a decision by the United Kingdom to withdraw from the European Union ("the EU") under Article 50 of the Treaty on European Union ("TEU") [1/8]. Rather, the decision to withdraw from the EU and give

notification under Article 50 must be made or authorised by primary legislation passed by the Parliament of the United Kingdom (although it will, of course, be for Parliament to decide the form and content of that primary legislation in due course).

2. Mr Santos' case proceeded on two, to some extent interlocking, legal bases. They are:
  - (1) By reason of the fundamental constitutional principle of Parliamentary sovereignty, only The Queen in Parliament (hereafter, simply "Parliament") can sanction (i) the effect that a decision to withdraw and notify under Article 50 would bring about on the rights granted and obligations imposed by Parliament in the European Communities Act 1972 ("the 1972 Act") [1/2] and other primary legislation, including the European Parliamentary Elections Act 2002 ("the 2002 Act") [13/128] and (ii) the reversal of the significant constitutional change wrought by the 1972 Act. Until Parliament has given such sanction, notification under Article 50(2) may not lawfully be given by anybody. This issue is referred to in this Printed Case as the "Parliamentary sovereignty argument".
  - (2) Further and in any event, there is no prerogative power (or the Royal prerogative may not lawfully be used) to give notification under Article 50(2). This issue is referred to in this Printed Case as the "Royal prerogative argument".
3. The Divisional Court agreed with Mr Santos in emphatic terms. It is his submission that the Lord Chief Justice, the Master of the Rolls and Sales LJ were right, for the reasons they gave and others; and that the Supreme Court should accordingly dismiss this appeal.
4. As he did in the Divisional Court, in order to avoid unnecessary repetition of argument, Mr Santos adopts the submissions made on behalf of Ms Miller in respect of the Royal prerogative argument (including as to the interpretation of the 1972 Act and Parliament's intention when passing it) and in general. This Printed Case addresses only Mr Santos' additional submissions on the Parliamentary sovereignty argument, on which those representing him took the lead in the Divisional Court. It is structured in sections as follows:

II The Central Issue

III Mr Santos' case on Parliamentary sovereignty in summary

IV	The doctrine of Parliamentary Sovereignty
V	The 1972 Act (content and effect; and how and why it came to be passed)
VI	Legislation after the 1972 Act
VII	Categories of EU law rights conferred by domestic legislation
VIII	The source of the rights enjoyed by UK (and other) citizens
IX	The effect of a decision to withdraw and notify under Article 50
X	No Parliamentary authorisation for withdrawal and notification
XI	Conclusion

- Before turning to the balance of the written Case, it is important to underline that the issues with which the Court is concerned: (i) do not “challenge” the outcome of the Referendum, or any lawfully taken decision that the United Kingdom should withdraw from the EU and give notification accordingly; do not touch upon the political questions arising in relation to the United Kingdom’s prospective exit from the EU; in particular, do not concern how Parliament should vote in relation to any legislation required, or what form that legislation should take; and only address a legal question as to the extent of Executive power.

## II. THE CENTRAL ISSUE

- As the Divisional Court records, at paragraphs [15] to [17] of its Judgment, there has been some debate about the correct identification of the central issue in this case. Although it is unlikely to be of vital significance to the determination of the issues in this appeal, in Mr Santos’ submission the simplest way to identify and characterize the central issue is as follows.
- The Appellant’s case is that a decision has been made to withdraw from the EU<sup>1</sup> which the Government is now entitled to notify under Article 50(2) by an exercise of the Royal prerogative. Mr Santos’ case is that this is wrong because, as a matter of the United

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<sup>1</sup> The precise basis upon which this is contended is still not entirely clear. In correspondence pressing the Secretary of State on this issue before the hearing in the Divisional Court, he stated that the “decision” was this: “[I]f the Government made clear before the referendum and during the passage of the 2015 Act that it would respect and implement the outcome of the referendum. The directly expressed will of the British people was to leave the EU. The then-Prime Minister confirmed on 24 June 2016 that the Government would, as previously stated, implement the outcome of the referendum and (in the circumstances) bring about the withdrawal of the United Kingdom from the EU. The current Prime Minister, and the Secretary of State, have repeatedly reaffirmed that position on behalf of the present Government”. At paragraph 62(d) of the Appellant’s Case, it is now said that “the decision to leave has already been taken, by the Government, accepting the outcome of the Referendum”.

Kingdom's legal constitutional requirements (directly applying the fundamental doctrine of Parliamentary sovereignty), Parliament is the only body that can authorise the necessary consequence of any decision and notification, namely the effective repeal of laws made by, and the rights enshrined in, various United Kingdom statutes – most particularly the 1972 Act. Put another way, before a notification can be made, it is (as a matter of domestic law) a constitutional requirement that Parliament sanction by primary legislation the destruction of the rights provided for by the 1972 Act (and other statutes), and the reversal of the constitutional change which the 1972 Act effected. Thus, as a matter of legal substance, it is Parliament that must decide that the United Kingdom should withdraw from the EU. It has not done so.

8. Insofar as the Appellant seeks to suggest that there is some legal significance to the fact that Article 50(1) refers to a decision and Article 50(2) makes provision for the notification of that decision<sup>2</sup>, for the reason set out above, there is not. As the Divisional Court held, for the purposes of the issues to be addressed in this case, the two are hardly distinct, but are instead inextricably linked: a decision under Article 50(1) is made to be implemented by notification under Article 50(2) such that the two provisions must be read together – it is, in effect, a decision to withdraw and notify. It is Mr Santos' case that, under the United Kingdom's constitutional law, that decision must be made by Parliament.

9. The central issue:

- (1) Is plainly justiciable, as was eventually conceded by the Appellant in the Divisional Court: see the Judgment at [5]. That remains the Appellant's case on this appeal;
- (2) Arises as a matter of domestic constitutional law (as well as being mandated by Article 50 itself, which provides that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”): see the Judgment at [4]; and

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<sup>2</sup> And there are vestiges of such a suggestion in paragraph 62(d) of the Appellant's Case, stating that the decision has already been made by the Government and suggesting that Article 50(2) is just a matter of timetabling. Below there were at times suggestions that the notification was an administrative act on the international plane which commenced but did not conclude negotiations – a point which appears still to have a half-life in paragraph 62(e) of the Appellant's Case.

- (3) Is a question of English, not European, law: see generally *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 at [16] and [60] [2/18].

### III. MR SANTOS' CASE ON PARLIAMENTARY SOVEREIGNTY IN SUMMARY

10. Mr Santos' positive case on the Parliamentary sovereignty argument is simple. It may be summarised as follows:

- (1) The fundamental principle of Parliamentary sovereignty is a legal doctrine which (in material part) provides that no person or body, other than Parliament itself, has the power or right to override, set aside or nullify primary legislation.
- (2) The doctrine, which was settled at least as long ago as the Glorious Revolution of 1688 at the end of the long struggle in this country to assert Parliamentary sovereignty and constrain the Crown's prerogative powers, also finds expression in Articles 1 and 2 of the Bill of Rights [12/106]. At least insofar as concerns the issues in this case, the doctrine is absolute and admits of no exceptions. Importantly, it confines and defines what may be done by the Executive by use of the Royal prerogative.
- (3) The Appellant accepts (see his Case, paragraph 62(a)), that the United Kingdom's withdrawal from the EU consequent upon an Article 50(2) notification given by the Executive "*will undoubtedly lead to the removal of rights and obligations currently conferred or imposed by EU law.*"
- (4) These rights and obligations are in large part (but not exclusively) contained in the 1972 and 2002 Acts; all of them were granted to UK citizens by the will of Parliament in primary legislation. As a matter of interpretation of the relevant statutes, they were not granted subject to a condition that those rights might be destroyed by a decision of the Executive to withdraw from the EU Treaties by the use of the Royal prerogative.

- (5) Accordingly, taking (3) and (4) together, rights granted and enshrined in statute by Parliament will be undoubtedly and inevitably destroyed as a consequence of the proposed Executive action.
- (6) Since that is the case, and since the proposed Executive action will entirely reverse and nullify the 1972 Act (and the 2002 Act), such Executive action is directly contrary to the doctrine of Parliamentary sovereignty and Articles 1 and 2 of the Bill of Rights, unless there is Parliamentary authority for it.
- (7) Here, there is no such Parliamentary authority, whether under the European Union Referendum Act 2015 (“the 2015 Act”) [1/7] or otherwise. In his Case, the Appellant does not contend to the contrary.
- (8) The Government’s proposed notification by prerogative alone is therefore unlawful. That is sufficient to dispose of this appeal.
11. That way of putting the case – from first principles by application of the doctrine of Parliamentary sovereignty – demonstrates most clearly and straightforwardly why the Respondents and the Divisional Court are right.
12. The Appellant seeks to escape the inescapable operation of the doctrine of Parliamentary sovereignty, as summarised above and explained in detail below, by setting up the foreign affairs Royal prerogative of “making and un-making treaties” as if it were an independent, and monolithic, source of domestic power and authority which can override or nullify primary legislation unless Parliament has expressly provided in a statute that it should be disapplied as regards withdrawal from the EU treaties.
13. He seeks to present that as an entirely orthodox statement of the United Kingdom’s dualist system in relation to international treaties. But in fact, the Appellant’s argument turns the dualist system on its head, suggesting that domesticated rights under a treaty can be removed by prerogative alone despite the fact that they cannot be created in that way. Once treaty obligations are committed to domestic law, those laws cannot be removed by simply withdrawing from the treaty. To argue the contrary misunderstands the fundamental interaction of the doctrine of Parliamentary sovereignty and the Royal prerogative: the former conditions and defines the latter; we have a dualist system precisely

because exercise of the prerogative on the international plane cannot affect domestic law rights.

14. Thus, the issue is not, as the Appellant contends, whether there is an unqualified and general foreign affairs prerogative which he can use unless Parliament has expressly precluded him from doing so. The issue is whether his proposed Executive action will override, set aside or nullify primary legislation without Parliamentary authority. If it does, as in the present case, that is an end of the matter and the proposed Executive action in question is unlawful. Under the doctrine of Parliamentary sovereignty, the Appellant needs to show existing Parliamentary approval for Executive action to give a notification under article 50(2), rather than trying to establish that there are no limitations on the prerogative which the Executive is purporting to invoke. The Appellant is looking at the matter from the wrong end of the telescope.
15. Further, the logic, and indeed the letter, of the Appellant's case leads to the conclusion that the Executive, through use of the Royal prerogative, has always – i.e. even without the Referendum – been constitutionally able to decide to withdraw from the EU and give notification under Article 50(2) at any time, and without more. That is, without any scrutiny from Parliament, or a referendum or anything else. That is a startling result, and it cannot be right: for the reasons explained in more detail below, it would amount to the effective repeal by the Executive, on a unilateral and (on the Appellant's case) unreviewable basis, of a (constitutional) statute passed by Parliament (the 1972 Act) and other statutes. That, by a direct application of the doctrine of Parliamentary sovereignty, the Executive cannot lawfully do.
16. As he did in the Divisional Court, the Appellant seeks to ameliorate the baldness of that incorrect proposition by legally unanchored and unstructured appeals to (i) the “flexibility” of the United Kingdom's constitution; (ii) the referendum result viewed in the context of the then Government's stated policy that the result would be implemented (even though he disavows any reliance on the 2015 Act as providing authority for an Article 50(2) notification); and (iii) the fact that Parliament will be involved in the implementation of whatever deal (if any) the Government brings back from Brussels after the negotiations that will follow notification.

17. None of that will do:

- (1) Parliament chose not to legislate that the outcome of the Referendum should be legally binding (in contrast to the decision it has made in relation to other referendums in the United Kingdom, such as the AV referendum of 2011). Accordingly, Parliament's decision to pass the 2015 Act cannot be construed as Parliament's pre-approval of a "leave" result in the Referendum, or as Parliament's decision to withdraw from the EU if there were to be a "leave" result, no matter what policy the Government was (and is presently) stating as to what should follow such a result. The Appellant does not contend to the contrary. But absent such "pre-approval", in a representative Parliamentary democracy such as the United Kingdom's, the Referendum cannot directly empower the Executive to do something which it is not able to do of its own volition. As is explained in more detail below, whilst nobody disputes (least of all Dicey) that the ultimate political sovereign in the United Kingdom is the People (the electors can always vote out their elected representatives), the legal sovereign is Parliament; and this case is about what is legally required.
- (2) The legal position in respect of the present case is, accordingly, exactly as Parliament decided it should be: by not making the result of the Referendum legally binding, it brought about the situation which now obtains – it is legally for Parliament, taking account of the result of the Referendum as it thinks appropriate, to take any decision that the United Kingdom is to withdraw from the EU and to notify in accordance with Article 50. The Appellant's attempt to portray that entirely orthodox consequence of the most basic principles of Parliamentary democracy in the UK as somehow surprising is difficult to comprehend. However "flexible" the United Kingdom's constitution might be, it is not so flexible that the doctrine of Parliamentary sovereignty can be upended and discarded.
- (3) The role envisaged for Parliament by the Secretary of State is, in the critical respects, illusory. For the reasons explained in detail below, once notification is given under Article 50(2), Parliament will have lost any effective choice over whether rights and obligations granted by Parliament should be repealed. The Appellant's case is that the Executive should make the decision that the rights be lost, and trigger that loss, and that Parliament should then enact what the Executive has already decided and



brought about. That is to permit the Executive tail to wag the Parliamentary dog: it is 180 degrees the wrong way round.

#### IV. THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

18. The sovereignty of Parliament is, and has been for over 300 years, the central organising principle, and focal point, of the United Kingdom constitution. To take but a handful of many expressions of the same idea, it was described as “*the very keystone of the law of the constitution*” by A. V. Dicey in *An Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edition, 1915) [15/157] at page 38; as the “*the bedrock of the British constitution*” by Lord Bingham of Cornhill in *R (Jackson) v Attorney General* [2006] 1 AC 262 at [9] [7/60]; and as “*the centrepiece of our constitution*” by Maurice Kay LJ in *R (Jackson) v Attorney General* in the Divisional Court [2005] EWHC 94 Admin at [3] [7/59].
19. It is a legal doctrine, definitively established in the aftermath of the Glorious Revolution of 1688, rather than a construct of the common law. Notwithstanding *obiter* comments in some of the speeches in *Jackson* in the House of Lords, this cannot be in doubt. As it was put by Maurice Kay LJ in *Jackson* in the Divisional Court at [4] and [5], acknowledging that the doctrine does not rest upon a single constitutional instrument [7/59]:

*“Whilst it was acknowledged in the Bill of Rights 1688 and in seminal jurisprudence such as The Prince’s Case & Co Rep la, it is, in the words of the late Professor Sir William Wade, “the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation.” (The Basis of Legal Sovereignty, [1955] CLJ 172, 188).*

*It is accordingly, in the analysis of Professor HLA Hart, “the ultimate rule of recognition” in our constitution, its validity not resting on some anterior legal rule but on accepted practice: (The Concept of Law (1961)).”*

The late Lord Bingham, writing in *The Rule of Law* (2010), said this (at p. 167) [/335]:

*“The principle of Parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.”*

See also the analysis in *Parliamentary Sovereignty in the UK Constitution – Process, Politics and Democracy*, Michael Gordon, 1<sup>st</sup> edition (2015) at pages 201 – 206, especially page 204, and at pages 131 – 137 [16/176].

20. The legislative power of The Queen in Parliament is hierarchically superior to all other legal authority: it is supreme. Legislation enacted by Parliament takes effect over and above any inconsistent rules of common law or prerogative powers. The supremacy of statute, derived from the doctrine of Parliamentary sovereignty, means that all other law, including constitutional rules and principles, operate subject to the possibility that they might be altered, augmented or abolished by Parliament.
21. The seminal definition of Parliamentary sovereignty remains<sup>3</sup> that given by Dicey in *An Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edition, 1915<sup>4</sup>) at page 38 [15/157]:

*“Parliament means, in the mouth of the 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 the right to override or set aside the legislation of Parliament.”*

22. As Dicey himself goes on to elaborate (and as has been affirmed and explained by the courts since<sup>5</sup>), this definition has a positive and a negative side. The positive side is that Parliament may ‘make or unmake any law whatever’ in accordance with which the United Kingdom legislature is entitled to enact legislation relating to any substantive subject-matter. The negative side is the corollary of the positive side: no other institution or body is empowered to override or set aside legislation duly enacted by Parliament (save where Parliament itself has granted that power).

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<sup>3</sup> See the Divisional Court’s Judgment at [22].

<sup>4</sup> The last edition which Dicey himself wrote.

<sup>5</sup> See, for example, the Divisional Court (Lord Judge CJ, David Clarke, Lloyd Jones LJJ) in *Interfact Ltd. v Liverpool City Council* [2011] QB 744 at [2] [5/42].

23. Throughout the remainder of Chapter 1 of his work, Dicey expounds the doctrine, its origins and content. Of particular relevance to the issues in this case are the following points:

- (1) In explaining the fundamentals of the doctrine, Dicey cites Blackstone's *Commentaries*, including, importantly for the issues in the present case, the statement: "True it is, that what the Parliament doth, no authority upon earth can undo" (see page 40).
- (2) At page 87 [/**331**], he re-states the "non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional".
- (3) Dicey goes on to consider the "absence of any competing legislative power" in these terms: "The King, each House of Parliament, the Constituencies and the Law Courts, either have or at one time claimed or might appear to claim, independent legislative power. It will be found, however, on examination, that the claim can, in none of these cases, be made good." He proceeds to dismiss each pretended competing power:
  - (a) He traces (at pages 48 to 52, and 61) the legal history of the subjugation of the Royal prerogative to the supremacy of Parliament from medieval times to the Case of Proclamations and beyond (as to which see further below);
  - (b) He considers the status of "Resolutions of either House of Parliament", demonstrating that "the resolution of neither House is a law" (see page 52). Dealing with the circumstances in which the House of Commons had historically come closest to claiming for its resolutions something akin to legal authority – viz. in relation to its privileges – and, quoting from Arnould, *Memoir of Lord Denman*, ii, p. 70, Dicey stated the conclusion that "no single branch of the legislature can, by any assertion of its alleged privileges, alter, suspend, or supersede any known law of the land, or bar the resort of any Englishman to any remedy, or his exercise and enjoyment of any right, by that law established" (see page 56).<sup>6</sup>
  - (c) In respect of the "vote of Parliamentary Electors", he encapsulated the position thus at page 57:

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<sup>6</sup> See also H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 11<sup>th</sup> ed (2014), at page 20: "A resolution of either House, or of both Houses, has no legislative or legal effect whatever unless an Act of Parliament so provides." [/**338**]

*“Expressions are constantly used in the course of political discussions which imply that the body of persons entitled to choose members of Parliament possess, under the English constitution, some kind of legislative authority. Such language is, as we shall see, not without real meaning. It points to the important consideration that the wishes of the constituencies influence the action of Parliament. But any expressions which attribute to parliamentary electors, a legal part in the process of law making, are quite inconsistent with the view taken by the law of the position of an elector. The sole legal right of electors under the English constitution is to elect a member of Parliament. Electors have no legal means of initiating or sanctioning or 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 electorate. Their opinion can be legally expressed through Parliament and through Parliament alone.”*

He explains more fully, at page 70ff.:

*“It should, however, be carefully noted that the term 'sovereignty'... is merely a legal conception and means simply the power of law making, unrestricted by any legal limit. If the term sovereignty be thus used, the sovereign power under the English constitution, is clearly Parliament. But the word sovereignty is sometimes employed in a political rather than in a strictly legal sense. That body is politically sovereign or supreme in a state, the will of which is ultimately obeyed by the citizens of a state. In this sense of the word, the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy, independently of the King and peers, the body in which sovereign power is vested. Where as things now stand, the will of the electorate and certainly the electorate and the combination of the Lords and the Crown is sure, ultimately, to prevail on all subjects to be determined by the British government. The matter, indeed, may be carried a little further and we may assert that the arrangements for the constitution are now such as to ensure that the will of the elector shall, by regular and constitutional means, always in the end, assert itself as the predominant influence in the country. But 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 been 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...”*

And at page 73:

*“Nothing is more certain than that no English judge ever conceded or under the present constitution, can concede that Parliament is in any sense a “trustee” for the electors, of such a feigned “trust” that the courts know nothing. The plain truth is that as a matter of law, Parliament is the sovereign power in the state....It is, however, equally true that in a political sense, the electors are the most important part of, we may even say are actually the sovereign power, since their will is, under the present constitution, sure to contain ultimate obedience. ... The electors are part of and a 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.”*

(4) Dicey concludes, at pages 66-68:

*“Parliamentary sovereignty is therefore an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever, which in the judgment of Parliament, is a fit subject for legislation. There is no power which under the English constitution can come into rivalry with the alleged sovereignty of Parliament.”*

24. In respect of the position of the Courts in relation to Parliamentary sovereignty, Dicey considers both (i) judge-made law, stating that *“English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges”* (see page 58) and (ii) the suggestion that the Courts could overrule (or that Parliament may not validly pass) Acts of Parliament which are *“opposed to the principles of morality”*, concluding that *“there is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament”*. Whilst that is the better legal view<sup>7</sup>, the present case does not concern any question of what may be the disputed role or power of the Courts in relation to legislation that is oppressive (such as, for example, an Act abolishing judicial review itself) which were raised *obiter* by, for example, Lord Steyn in his speech in *Jackson*; accordingly, we need say no more about that topic. The same is true of what may remain of the academic debate on the question of whether Parliament can bind its successors and what academic implications that has for Dicey’s conception of Parliamentary sovereignty.
25. Rather, insofar as is relevant to the issues in this case, Dicey’s account of the doctrine of Parliamentary sovereignty is definitive. It means that no-one (no *“person or body of persons, executive, legislative or judicial”*<sup>8</sup>) has the power to override, set aside, nullify, suspend or dispense with the legislation of Parliament or its operation, save for Parliament itself, by primary legislation, repealing it. Of course, that includes the Executive by way of the pretended exercise of the Royal prerogative.
26. In that context, it is important to note that the doctrine was forged in the fires of the battles throughout the 17<sup>th</sup> Century between the Executive and Parliament, that is between

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<sup>7</sup> See, in addition to Dicey, Lord Hoffmann in *R v Home Secretary ex parte Simms* [2000] 2 AC 115 at 131 [9/79] (*“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... The constraints upon it doing so are ultimately political, not legal”*); and the late Lord Bingham writing extra-judicially in *The Rule of Law* (2010), Chapter 12, especially the conclusions at page 168 [335]

<sup>8</sup> Dicey at p. 86-87 [331]

the use of the Royal prerogative as against the assertion of the supremacy of legislation. Accordingly, the doctrine of Parliamentary sovereignty embodies the principle which limits and defines what can lawfully be done by prerogative power. Although the doctrine was born before the Bill of Rights, the great settlement that emerged from the struggles of the Glorious Revolution definitively established the doctrine. The doctrine finds statutory expression in the Bill of Rights itself. Section I, Articles 1 and 2 and Section II of the Bill of Rights [12/106] provides that neither statutory laws nor their execution can be dispensed with or suspended without the consent of Parliament:

“Section I Art. 1: *“That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without the Consent of Parlyament is illegall.”*

Art 2: *“That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authorities as it has beene assumed and exercised of late is illegall.”*

Section II: *“Noe Dispensation by Non obstante [Crown licence to do something notwithstanding any law to the contrary] of or to any Statute or any part thereof shall be allowed but the same shall be held void and of noe effect Except a Dispensation be allowed of in such Statute.”*”

27. At least insofar as it delineates the boundary between what may be done by the Executive and what may only be done by Parliament, the doctrine of Parliamentary sovereignty has been affirmed and applied in numerous cases of the highest authority, including in the context of the area of the prerogative with which the present case is concerned (the foreign affairs prerogative of treaty making). Those cases are legion, but to take a few examples:

(1) In *The Case of Proclamations (1610)* 12 Co. Rep. 74 [1/9] Sir Edward Coke reports the view of the senior judiciary that:

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

(2) In *The Zamora* [1916] 2 AC 77 at 90 [9/87] Lord Parker of Waddington said:

*“The idea that the King in Council, or indeed any other branch of the executive, has power to prescribe or alter the law to be administered by the courts of law in this country is out of harmony with the principles of our Constitution.”<sup>9</sup>*

- (3) In *JH Rayner (Mincing Lane) v DTI* [1990] 2 AC 418 [5/43] Lord Oliver of Aylmerton stated, at 500B:

*“As a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”* (emphasis added)

- (4) In *R v Secretary of State for the Home Department ex p Fire Brigades Union* [1995] 2 AC 513, at 552E [2/15] Lord Browne-Wilkinson said:

*“It is not for the executive...to state as it did in the White Paper that the provisions of the Act of 1988 “will accordingly be repealed when a suitable legislative opportunity occurs”. It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body”*

- (5) In *Higgs v Minister of National Security (Bahamas)* [2000] 2 AC 228, at 241 ([10] to [13]) [260] Lord Hoffmann said this, in relation specifically to treaty-making:

*“10. .... The Crown [via the making of a treaty] may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government.*

*11. But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: see *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418. ....*

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<sup>9</sup> The Executive of the day understood the significance of the ruling: the Attorney General advised that ‘the Executive, cannot alter the law of the Court. Orders in Council which purport to do so are *ultra vires* and *pro tanto* a nullity’ (see the ‘Report of the “Zamora” Committee’ FO 800/918).

12. *The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law: see the classic judgment of Sir Robert Phillimore in The Parlement Belge (1879) 4 P.D. 129. They may have an indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273....*

13. *The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17<sup>th</sup> century.”*

- (6) In *Jackson* [7/60] in the House of Lords, Lord Bingham said, at [9]:

*“Then [in 1911], as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.”*

- (7) In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 [6/54] in the context of the particular power at issue in that case, Lord Hoffmann said (at [44]):

*“The Crown has no authority to transport anyone beyond the seas except by statutory authority. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases: see *R v Bhagwan* [1972] AC 60. The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not empowered the Crown to change English common or statute law.”*

- (8) In *R (Nicklinson) v Ministry of Justice* [2015] AC 657 [8/73] the courts had to deal with the question of the extent to which the Director of Public Prosecutions could or should publish an assurance or a policy that said a person assisting with the applicant’s suicide would not be prosecuted under the Suicide Act 1961. Lord Sumption, in the Supreme Court, said this, at [241]:

*“The Code [for Crown Prosecutors] and associated guidelines may be “law” in the expanded sense of the word which is relevant to article 8.2 of the Convention. But they are nevertheless an exercise of executive discretion which cannot be allowed to prevail over the law enacted by Parliament. There is a fine line between, on the one hand, explaining how the discretion is exercised by reference to factors that would tend for or against prosecution; and, on the other hand, writing a charter of exemptions to guide those who are contemplating breaking the law and wish to know how far they can count on impunity in doing so. The more comprehensive and*



*precise the guidelines are, the more likely they are to move from the first thing to the second. As Lord Bingham observed in R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800 at para 39, the Director has no power to give a “proleptic grant of immunity from prosecution”. This is not just a limitation on the statutory powers of a particular public official. It is a constitutional limitation arising from the nature of the function which he performs. The Bill of Rights declares that “the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal.””*

28. The *dicta* from Lord Oliver in *Rayner* and Lord Hoffmann in *Higgs* quoted in subparagraphs (3) and (5) above are direct expressions of the fact that the doctrine of Parliamentary sovereignty (and the rule encapsulated in the Bill of Rights) conditions, confines and defines the extent to which the general prerogative power of treaty making and withdrawal exists or can be exercised.
29. The Appellant’s contentions to the contrary in his Case<sup>10</sup> are simply wrong: his analysis reverses the true position and betrays a fundamental misunderstanding of the extent of the relevant Prerogative power. As the Divisional Court put it (at [85]), this means that the Appellant’s case is flawed at a basic level. His mistake is to treat the Royal prerogative of “making and un-making treaties” as if it were an independent, and monolithic, source of domestic power and authority unconditioned by other constitutional principles – vitally, in this case, the doctrine of the Parliamentary sovereignty. From that erroneous starting point, he asserts the constitutionally misconceived proposition that the Executive exercising the treaty “making and un-making” prerogative can override or nullify primary legislation (or the common law). That is, with respect, a proposition which only has to be stated to be rejected.
30. The Appellant purports to give examples in his Case (see paragraphs 40 and 45) of his proposition in action – but none of the examples given in the Appellant’s Case in fact involve an exercise of the prerogative to nullify or override a statute (or the common law):
  - (1) The case of *Post Office v Estuary Radio Ltd* [1968] QB 740 [6/51] (referred to in paragraph 40(a) of the Appellant’s Case) does not assist the Appellant<sup>11</sup>: it is not a

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<sup>10</sup> At paragraphs 3-5, in Section III (especially paragraphs 36-40 and 54-61) and paragraph 64.

<sup>11</sup> The facts, in summary, were these: the Defendant had a radio mast in the sea without a licence. That would have been a criminal offence under a 1949 Act if the mast were within territorial waters; and the issue was whether the mast was within territorial waters. That turned on whether “territorial waters” were fixed at their 1949 extent, or comprehended the extent of such waters at the time of the action – there having been an extension of territorial waters by exercise of the prerogative in the meantime.

case of prerogative power being used to alter the law of the land without Parliamentary approval. In that case, Diplock LJ stated that the Crown's prerogative powers included power (without Parliamentary authority) to extend territorial sovereignty and jurisdiction to land and sea over which it had not previously claimed it; and that the courts would recognise that without more. But, on the facts of that case, the exercise of that territorial sovereignty did not affect rights enshrined by law at all: outside territorial waters there were no relevant "rights" enshrined by law, whether restrained or unrestrained by any parliamentary prohibition (because Parliament has no sovereignty over the territory); all that happened was that once territorial waters were extended, the defendant came within the scope of a scheme of regulation established by Parliament<sup>12</sup>. Put another way, as the Divisional Court did in the instant case at [79] of the Judgment, the phrase "territorial waters" in the 1949 Act – properly interpreted in its own context – meant "territorial waters" as they were at the relevant time and not as they were at the time of enactment of the 1949 Act. Thus, the legislative scheme comprehended and authorised that the extent of "territorial waters" would depend on the exercise of the prerogative to extend sovereign territory. Whatever impact the exercise of the prerogative to extend the territorial waters of the United Kingdom had on domestic law rights, it was not one which occurred without Parliament's consent.

- (2) The supposed analogy which the Appellant seeks to draw with the Vienna Convention on Diplomatic Relations 1961 ("the VCDR") [315] and the Diplomatic Privileges Act 1964 ("the DPA") [214] in paragraph 40(b) of his Case<sup>13</sup> is similarly misconceived. The scheme of the DPA, so far as is relevant for present purposes, is to give effect in domestic law to those provisions of the VCDR which confer privileges on foreign diplomats once they have been sent to the United Kingdom by the foreign sending State and while they remain here as a diplomat. Article 4 of the VCDR provides that the sending State must ensure that the *agrément* of the United Kingdom has been given for the diplomat it proposes to accredit as head of mission to the United Kingdom. Article 7 provides that (subject to exceptions) the sending State may freely appoint diplomats to the mission. Article 9 provides that the receiving state may notify the sending State that the head of mission or any member of the diplomatic staff of the mission is *persona non grata*, with the consequence that

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<sup>12</sup> And therefore, in this context, needed a licence for a mast.

<sup>13</sup> A point not taken by the Appellant in the Divisional Court.

the diplomat will be recalled or will be refused recognition as a member of the mission. Articles 4, 7 and 9 have not been incorporated into domestic law. In this context, it would be inapt for them to have been incorporated: whether or not a diplomat comes to, or remains in, the United Kingdom is peculiarly a matter for agreement between governments at international level. Domestic law only becomes relevant when the foreign diplomat is in the United Kingdom as a diplomat. The legislative scheme of the DPA envisages that someone may cease to be a diplomat while in the United Kingdom (including by the Article 9 *persona non grata* route) and makes provision for what is to happen (and how the individual's rights are to be affected) when they cease to act as a diplomat (see Article 39 of the VCDR, which is incorporated into domestic law by s. 2(1) of the DPA). The legislative scheme of the DPA also makes provision to control the granting of additional, and the restriction of, privileges and immunities enjoyed by individuals while they are in this country as diplomats (see ss. 2(6) and 3 of the DPA). Accordingly, properly interpreted in its proper context, the legislative scheme of the DPA comprehends and authorises that the persons to whom the privileges and immunities provided for by the Act apply will be decided upon by the Government. Put another way, Parliament has said in the DPA (when construed with the VCDR) that only foreign diplomats who are in the United Kingdom with the continuing consent of the Government may benefit from the privileges and immunities which the DPA provides. There is nothing surprising about that in the field of diplomatic relations. Again, whatever may be the impact on an individual diplomat's rights of the Government declaring him or her *persona non grata* under Article 9, it is not one which occurs without Parliament's consent.

- (3) The examples in paragraphs 40 (c) and (d) of the Appellant's Case do not even purport to refer to treaty obligations incorporated into domestic law. It is uncontroversial, as the Divisional Court noted at [33] and as Lord Hoffmann explained in *Higgs* at [12] [260], that the exercise of the treaty making prerogative on the international plane may have certain indirect effects in relation to domestic law.

- (4) The Appellant's reliance on points arising out of double taxation treaties (at paragraph 45 of his Case) does not assist either. Three responses are proffered by Mr Santos in answer to this point<sup>14</sup>:
- a. In English law, double taxation treaty provisions are given domestic legal effect through Orders in Council (which must be approved by the House of Commons) under s. 2(1) and 5(2) of the Taxation (International and other Provisions) Act 2010 ("the TIOPA") [13/135]. The text of the relevant treaty provisions are set out in full in a schedule to the relevant Order in Council; accordingly, the tax arrangements are given domestic legal effect by way of an autonomous United Kingdom legal instrument, which is unaffected by any termination of the treaty on the international plane. The Order in Council will continue to grant relief from taxation under the arrangements it incorporates even if those arrangements, on the international plane, have been amended or revoked.
  - b. In fact, Parliament has provided a statutory mechanism by which double taxation treaty provisions are (i) brought into effect and (ii) amended or revoked. The procedure for the latter is set out in s. 5(1) of the TIOPA and also requires an Order in Council (to be approved by the House of Commons). That scheme – of secondary legislation – is another example of Parliament itself authorising and mandating the mechanism by which such treaties are given effect, replaced or revoked in domestic law: it is a Henry VIII clause. Operation of that system does not offend – indeed it respects and reflects – the doctrine of Parliamentary sovereignty.
  - c. Even if the above were wrong, to the extent that it is right to conceive of double taxation treaties which have been incorporated into domestic law as conferring rights, it would not be lawful for the Executive to destroy those rights by withdrawing from the relevant double taxation treaty without Parliamentary approval. To the extent that the Appellant suggests otherwise in paragraph 45(a) of his Case, he is wrong.

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<sup>14</sup> And there are almost certainly more, as is apparent from the slew of academic articles and blogs which have been published rebutting Professor Finnis' argument (which is quoted and relied upon by the Appellant in this regard) and which support the Divisional Court's reasoning more generally.

- (5) The Appellant's similar reliance (Appellant's Case, paragraph 45(b)) on a new point arising from the National Health Service (Charges to Overseas Visitors) Regulations 2015 ("the NHS Regulations") [243] is similarly misplaced. The NHS Regulations were made under section 175 of the National Health Service Act 2006 ("the NHS Act 2006") [232]. Section 175 states that regulations (made by SI) may provide for the making and recovery from non-British residents ("overseas visitors") of such charges as the Secretary of State for Health may determine in respect of certain health services provided to overseas visitors under the NHS Act 2006. The power to make regulations under section 175 is accordingly very wide. The scheme of the NHS Regulations is to make it mandatory for overseas visitors to be charged for health services, unless the NHS Regulations provide for no charge to be made. The NHS Regulations provide for a variety of circumstances in which an overseas visitor is not to be charged, one of which (regulation 14) is that citizens of countries listed in Schedule 2 with relevant reciprocal health agreements are not to be charged. These reciprocal health agreements are arrangements between the Government and the government of the relevant foreign (non-EU) country. The Appellant submits that where a reciprocal agreement is terminated by prerogative power, the citizens of the other country in question will cease to be exempt from charges without the need for prior amendment of the NHS Regulations. But, once again, that submission does not assist the Appellant. This is another case where the legislative scheme enacted by Parliament comprehends and authorises that circumstances in which foreign citizens may be charged will be decided upon by the Executive: Parliament, through section 175 of the NHS 2006 Act, authorised the Secretary of State to make provision for charges to overseas visitors in such manner as he "may determine" in the regulations. The Secretary of State determined (in regulation 14) that the liability of such visitors to charge should depend on the existence or not of a reciprocal agreement.
- (6) The case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] QB 552 (DC) [2/14] relied upon by the Appellant heavily in the Divisional Court and at paragraphs 69-70 of his Case in this Court, does not advance his argument either. The judgment in that case says nothing about the existence or exercise of the prerogative in circumstances where it would affect the

content of domestic law or conflict with the doctrine of Parliamentary sovereignty – for the reasons given by the Divisional Court at [90] and [91] of the Judgment.

- (7) Finally, at paragraph 56 of his Case, the Appellant seeks to give further examples – outside the context of the treaty making prerogative – which he asserts support his case. They do not: Mr Santos adopts Ms Miller’s submissions in this regard.

## V. THE 1972 ACT

### THE CONTENT AND EFFECT OF THE 1972 ACT

31. The 1972 Act makes provision as set out in the Divisional Court’s Judgment at [45] to [54] (see also [1/2]). We do not repeat those well-known provisions here, but underline:
- (1) How far-reaching and constitutionally significant they are: these provisions give effect in United Kingdom domestic law to the “new legal order” described in **Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*** (1963) ECLI:EU:C:1963:1 [2/24] including not only the transposition into domestic law of the vast panoply of rights and obligations arising by and under the Treaties, but also, whilst the 1972 Act remains in force, the primacy of EU law over past and future primary legislation passed by Parliament and the recognition of what is now the CJEU; and
- (2) The consequent status of the 1972 Act as a constitutional statute – as explained by the Divisional Court at [43] and [44] of the Judgment and in ***Thoburn v Sunderland City Council* [2003] QB 151** (especially at [62]) [2/22] and ***R (oao Buckinghamshire CC) v Secretary of State for Transport* [2014] 1 WLR 324** (especially at [207]) [2/16].

### HOW AND WHY THE 1972 ACT CAME TO BE PASSED

32. As the Divisional Court correctly held at [41] and [42], and contrary to the Appellant’s Case (at paragraphs 18 and 19), Parliament played an essential role in approving and effecting the United Kingdom’s entry into the (then) EEC: the passing of the 1972 Act

was a necessary step in the accession process. Without it, the United Kingdom would not, and could not consistently with its legal obligations, have joined what is now the EU:

- (1) On 28 October 1971 the House of Commons<sup>15</sup> and the House of Lords<sup>16</sup> separately resolved that “*This House approves Her Majesty’s Government’s decision of principle to join the European Communities on the basis of the arrangements which have been negotiated*”. The resolutions by the Commons and the Lords of 28 October 1971 were essential because the proposed Accession Treaty imposed fiscal obligations on the United Kingdom and, separately, required changes to domestic law. Provision for satisfying these fiscal obligations and changes to domestic law could only be achieved through Act of Parliament and so, from the outset (and before the Accession Treaty was even signed) Parliamentary approval, in the form of primary legislation, was always going to be necessary. The resolutions of 28 October 1971 therefore paved the way for the United Kingdom’s signature to the Accession Treaty: if the votes on those resolutions had gone against the Government, the Accession Treaty would not have been signed by the United Kingdom (as it was on 22 January 1972) and the European Communities Bill would not have been introduced into Parliament (as it was on 25 January 1972), not least because the Government could not have met the fiscal obligations of EEC membership.
- (2) The United Kingdom’s signature to the Accession Treaty [13/141] imposed no legal obligations on the United Kingdom, whether under international law or domestic law and it did not come into effect immediately: (i) the Accession Treaty would only bind the United Kingdom under international law once ratified by the United Kingdom “*in accordance with [its...] constitutional requirements*”<sup>17</sup>, and (ii) it would only become part of domestic law once the 1972 Act had received Royal Assent<sup>18</sup>.
- (3) But, further, the Accession Treaty could not in fact be ratified until the 1972 Act had received Royal Assent, because the United Kingdom’s membership of the EEC imposed fiscal obligations on the United Kingdom and entailed changes to domestic

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<sup>15</sup> By 356 votes to 244 votes: HC Deb. 28/10/71 vol. 823 cols. 2076 and 2217 [17/193].

<sup>16</sup> By 451 votes to 58 votes: HL Deb. 28/10/71 vol. 324 cols. 849 and 953. [17/192].

<sup>17</sup> By Article 2, instruments of ratification were to be deposited by 31 December 1972 and, if that was done, the Treaty was to come into effect on 1 January 1973.

<sup>18</sup> In accordance with the well-established principles of our dualist system, as set out in *JH Rayner* at 499-500 [5/43] and in *R v Lyons* [2003] 1 AC 976 at [13], [27] and [40] per Lord Hoffmann [8/72], and summarised by the Divisional Court in the Judgment at [32] and [33].

law to give effect to elements of (what is now) EU law and, in particular, the conferral of EU law rights directly on individuals in the United Kingdom.

- (4) As Lord Templeman writing extra-judicially made clear in *Treaty-Making and the British Parliament – Europe* (67 Chi-Kent L. Rev. 459 (1991)) at page 463 [351] in 1972 Parliament needed to be involved prior to ratification of a treaty where a grant from public funds was necessary to implement the treaty and/or where existing domestic law is affected by the treaty. Even before the Ponsonby Rule came into operation in 1924, treaties which required a grant from public funds or changed domestic law (such as the Accession Treaty) always had to have Parliamentary approval before they were ratified by the Executive. This is clear from the passages from Arthur Ponsonby's statement to the House of Commons in 1924 (when the Ponsonby Rule was established) where Mr Ponsonby described it as a "constitutional obligation" to submit treaties which contained fiscal obligations to Parliament prior to ratification, and that this constitutional necessity was unaffected by the new Ponsonby Rule (see the extract from Mr Ponsonby's statement quoted at pages 465-466 of Lord Templeman above).
- (5) Without Parliament, and only Parliament, having decided on a number of essential features of EEC membership, the United Kingdom simply would not, and could not consistently with international law, have become a member of the EEC. Without the 1972 Act any ratification of the Treaties would have put the United Kingdom in immediate and fundamental breach of those very Treaties, as the Divisional Court found at [42] of the Judgment. For example, only Parliament could decide to subjugate United Kingdom law to EU law in the relevant respects (see s. 2(4) and s. 3(1) of the 1972 Act [1/2]); only Parliament could decide to authorise the fiscal obligations taken on by the United Kingdom as an EEC member state (see s. 2(3) of the 1972 Act); only Parliament could decide to confer directly on United Kingdom citizens EU law rights, which membership under the Treaties entailed. In all these respects Parliament had to, and did, take the requisite decisions.
- (6) Primary legislation was therefore one of the "constitutional requirements" of the United Kingdom, required (by Article 2) for ratification of the Accession Treaty [13/141], which led to the United Kingdom joining the EEC. Indeed, the long title



of the 1972 Act is “*An Act to make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar*”; and section 2(1) of the 1972 Act expressly refers to and gives domestic legal effect to the Accession Treaty.

- (7) On 17 October 1972, the 1972 Act received the Royal Assent. Thereafter, on 18 October 1972, the United Kingdom was in a position to, and did, ratify the Accession Treaty. On 1 January 1973, the United Kingdom formally became a member of the then EEC and the Treaties were incorporated into domestic law by the 1972 Act.
- (8) Accordingly, the 1972 Act was an essential instrument through which the United Kingdom joined what is now the EU. Irrespective of whether the signature and subsequent ratification of the Accession Treaty were formally acts done under the Royal prerogative, they had to be, and were, mandated by Act of Parliament. Without the decision of Parliament by the 1972 Act, the United Kingdom would not have become a member of what is now the EU.

## VI. LEGISLATION AFTER THE 1972 ACT

33. In respect of each of the subsequent EU Treaties (the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon), the process by which the United Kingdom has acceded has been the same as it was for the 1972 Act:

- (1) On each occasion, the relevant Treaty has (by its terms) not taken effect until ratification by each member state in accordance with its “*constitutional requirements*”.
- (2) In the United Kingdom, that has included an Act of Parliament to make the desired alterations to domestic law. In each case, prior to ratification, Parliament has adopted assenting legislation, amending s. 1(2) of the 1972 Act to bring the relevant parts of the new Treaty within the ambit of the Treaties to which the 1972 Act applies. A table setting out the timetable in respect of each relevant piece of legislation is attached as Appendix 1 to this Printed Case (and at [18/204]).

(3) So, without, in each case, Parliament passing the assenting and amending legislation, the United Kingdom could not have ratified the relevant Treaty and it would not have taken effect (either in the United Kingdom or at all).<sup>19</sup>

34. The 1972 Act (and the Acts implementing the subsequent EU Treaties) are not the only Acts of Parliament which confer domestically enforceable EU law rights. To take one further, and important, example, the 2002 Act [13/128] gives United Kingdom citizens the right to stand for election to the European Parliament, and also the right to vote in European Parliamentary elections (“EP Rights”): section 1 provides that there shall be 73 members of the European Parliament elected for the United Kingdom in respect of 12 electoral regions; and section 8 states who is entitled to vote in European parliamentary elections.

## VII. CATEGORIES OF EU LAW RIGHTS CONFERRED BY DOMESTIC LEGISLATION

35. As the Divisional Court noted, whilst a simplification of the position, the multitude of present rights conferred by Parliament and currently enjoyed by United Kingdom (and other) citizens, can be divided into the three categories proposed by Mr Santos to the Divisional Court, and adopted in the Judgment at [57] to [61]:

(1) Category (i) Rights: rights (such as, for example, employment law rights and equality rights) which Parliament would be able to replace or replicate if it wished to do so after the United Kingdom’s withdrawal from the EU. (It is right to note that, in some cases EU Directives and other EU laws have been implemented by free-

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<sup>19</sup> The Appellant’s assertion (at paragraph 22 of his Case) that express Parliamentary approval was only required for ratification of EU Treaties post-1972 because other legislation required Parliamentary approval for Treaties extending the powers of the European Parliament is wrong: when a new Treaty extended the powers of the European Parliament, express Parliamentary approval was indeed needed (and was given in a separate section of the legislation directed specifically at that purpose). But in each case, express Parliamentary approval was also required because the new Treaty altered the rights etc recognised under the 1972 Act. That, too, was given in a separate section of the legislation directed specifically to that issue and would in all cases have been necessary whether or not there was also a requirement for approval for an extension of the powers of the European Parliament. By way of example: the European Communities (Amendment) Act 1993, s. 1(1) [12/119] added the relevant parts of the Maastricht Treaty to the list of Treaties in section 1(2) of the 1972 Act; and s. 1(2) gave Parliament’s separate approval of the Treaty for the purposes of s. 6 of the European Parliamentary Elections Act 1978 [12/112] (approval of treaties increasing the Parliament’s powers); the European Communities (Amendment) Act 2002 [13/127], s. 1(1) added the relevant parts of the Nice Treaty to the list of Treaties in section 1(2) of the 1972 Act; and s. 3 gave Parliament’s separate approval of the Treaty for the purposes of s. 6 of the European Parliamentary Elections Act 1978.

standing domestic primary legislation. The rights implemented in this way no longer depend on the 1972 Act as their statutory basis in United Kingdom law; but by no means all category (i) rights have been so implemented – and those which have not do depend on the 1972 Act for their effect in domestic law – see Section VIII below).

- (2) Category (ii) Rights: rights enjoyed by British citizens and companies (or any person entitled to remain in the UK and able to rely on EU rights) in relation to their activities in, or between the United Kingdom and, other Member States (such as, for example, the right to work in an EU state and the right to provide or receive services) which are potentially replicable by Parliament depending on the deal that emerges from the Article 50 and subsequent negotiations with the EU. Since this depends on what the Government is able to negotiate with the 27 remaining member states (i.e. what the latter are willing to agree to and the European Parliament is prepared to approve), these rights are not within the unilateral gift of Parliament; and
- (3) Category (iii) Rights: rights which will, because of their very nature, be lost irreplaceably when the United Kingdom withdraws from the EU – i.e. which could not be replicated by Parliament on any basis. These include the EP Rights to stand for election to the European Parliament and the right to vote in such elections. Further examples are the right to seek a reference to the CJEU and the right to seek to persuade the EU Commission to take regulatory action in relation to matters within the United Kingdom, such as to investigate and provide a remedy in respect of a violation of EU competition law by a private company or investigate and pursue a failure of the United Kingdom to implement EU legislation.<sup>20</sup>

## VIII. THE SOURCE OF THE RIGHTS ENJOYED BY UNITED KINGDOM (& OTHER) CITIZENS

36. The Appellant argues<sup>21</sup>, in essence, that the 1972 Act (and indeed the 2002 Act and other relevant statutes) do not “create domestic legal rights” or that the rights which they

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<sup>20</sup> The Appellant’s assertion in footnote 19 that the Divisional Court was “wholly wrong” to accept that there are any domestic statutory rights in these terms is bizarre: the relevant provisions of the Treaties (Article 267 of the TFEU[13/137] and Article 17 of the TEU [311] ), and the legal consequences which flow from them and their operation, are given legal effect in the United Kingdom by s. 2(1) of the 1972 Act.

<sup>21</sup> Especially at paragraphs 46-52 and 63 of his Case.

enshrine are not “granted by Parliament”. Their source, it is said, is not the domestic legislation. Rather, so the Appellant asserts, they are “EU law rights” which are merely transposed into domestic law by “the conduit” of the 1972 Act or the 2002 Act and are “contingent” upon the continued existence of the “underlying” EU law rights and institutions. “By definition”, it is said, those rights can be “created, altered and withdrawn” as a result of the exercise of the prerogative on the international plane. Indeed, the Appellant goes further, arguing that the “*ECA does not give effect to EU law rights which are exercisable in or against other Member States*” and that these rights arise “*as a result of the international obligations which UK has agreed with...other Member States*”<sup>22</sup>.

37. These submissions are wrong, and were rightly rejected by the Divisional Court:

- (1) As regards the rights in all three categories implemented by the 1972 Act, the rights and obligations apply in the United Kingdom and are available to British citizens only because Parliament has enacted by primary legislation that that should be so. Those provisions of European Union law “*as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom*” are, by virtue of Parliament’s enactment of s 2(1) of the 1972 Act, part of United Kingdom law. They “*shall be recognised and available in law, and be enforced, followed and allowed accordingly*” (emphasis added). They are, as Kerr LJ put it in *Jensen v Corpn of the Trinity House of Deptford* [1982] 2 Lloyd’s Rep 14, at 26 [1/261], “*part of the corpus juris of the member states*”. They are as much a part of United Kingdom law as any other statute law. Further, insofar as some EU law obligations required further enactment, Parliament provided the power to do so by secondary legislation: s. 2(2) and 2(4) of the 1972 Act.
- (2) The circumstances in which, and the reason why, the 1972 Act came to be passed by Parliament – summarised above in Section V above – underline the correctness of that submission. It is simply untenable to suggest that the source and availability to British citizens (and, indeed, others in this country) of the relevant EU law rights and obligations does not depend critically on the 1972 Act or that they are not rights and obligations which Parliament has willed (by primary legislation) that the British people should enjoy. As Laws LJ said in *Thoburn*, at [66] [2/22]: “*what is the legal*

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<sup>22</sup> Paragraph 21(b) of the Appellant’s Case

*foundation within which those substantive provisions [of EU law] enjoy their primacy, and by which the relation between the law and institutions of the EU law and the British state ultimately rests? The foundation is English law [i.e. the 1972 Act]” (original emphasis).*

- (3) Indeed, the Government itself promulgated a declaratory provision to that very effect, which was enacted by Parliament when it passed s. 18 of the European Union Act 2011 (“the 2011 Act”) [1/6]. It provides:

*“Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act” (emphasis added)*

The provision was explained in paragraphs 118-124 of the Explanatory Notes to the 2011 Act [403]. In particular, at paragraphs 118-120, the notes said:

*“Section 18 is a declaratory provision which confirms that directly applicable or directly effective EU law falls to be recognised and available in law in the United Kingdom only by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act of Parliament... This reflects the dualist nature of the UK’s constitutional model under which no special status is accorded to treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU Treaties and judgments of the EU Courts provide that certain provisions of the Treaties, legal instruments made under them, and judgments of the EU Courts have direct application or effect in the domestic law of all of the Member States, such EU law is enforceable in the UK only because domestic legislation, and in particular the European Communities Act 1972, makes express provision for this. This has been clearly recognised by the Courts of the UK. As Lord Denning noted in the case of *Macarthys Ltd v. Smith* ([1979] 1 WLR 1189): “Community law is part of our law by our own statute, the European Communities Act 1972. Community law is now part of our law: and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.” This declaratory provision was included in the Act in order to address concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts. By providing in statute that directly effective and directly applicable EU law only takes effect in the UK legal order through the will of Parliament and by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.”*

- (4) To say, as the Appellant seeks to do at paragraphs 46 - 52 of his Case, that the rights are “EU law rights” or that the 1972 Act is “a conduit”, takes the analysis no further:

their content may derive from the EU, but the 1972 Act made the relevant EU law into UK law. Although much is made of the fact that they are rights which are “contingent” on the existence of the EU and the United Kingdom’s membership of it, again, this takes the argument no further: true it is that the rights are in some sense “contingent” – if Greece withdrew from the EU, the rights would be diminished<sup>23</sup>, if every other country withdrew from the EU such that there was no longer an EU, the rights would cease to exist at all – but Parliament cannot control what Greece does; the United Kingdom’s constitutional settlement says nothing about the interaction between the United Kingdom Parliament and the state organs of the Hellenic Republic. These rights being “contingent” on the existence of the EU with the United Kingdom as a member is not the same thing as saying that the rights incorporated into domestic law by Parliament can be destroyed by the deliberate action of the Executive without reference to Parliament. They cannot be, including for the reasons relating to the meaning and interpretation of the 1972 Act set out by the Divisional Court at [93].

- (5) The same is as true of the source of category (ii) rights as it is of the source of category (i) and (iii) rights. As the Divisional Court held (at [66]), “*Parliament knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition by British citizens of rights under EU law which they could enforce in the courts of other Member States*”. The category (ii) rights are rights which Parliament brought into effect by enacting the ECA 1972 and “*although these are not rights enforceable in the national courts of the United Kingdom, they are nonetheless rights of major importance created by Parliament*” (Divisional Court Judgment at [66]).
- (6) The Appellant’s argument to the contrary (at paragraph 21(b) of his Case) confuses the question of what is the source of category (ii) rights conferred on British citizens with the questions of against whom those rights can be exercised and in which Member State’s courts one can enforce them. The source of the category (ii) rights of British citizens is the 1972 Act, without which, they could not be enjoyed – even though those rights are exercised or enforced in other Member States under their legal system. Moreover, the Appellant’s submission simplifies the reality of EU law,

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<sup>23</sup> See paragraph 51 of the Appellant’s Case, where the example of Greece is given.

which is in many spheres to be implemented and given effect in more than one state at the same time.

- (7) As regards the rights conferred by the 2002 Act (in category (iii)), they are – beyond argument – granted by Parliament, as provided for in the relevant sections of that Act. That is their only source. Whilst they are of course “contingent” on the EU institutions to which they refer continuing to exist (and again, there might be circumstances beyond the control of this country in which those institutions ceased to exist), that tells us nothing about, and cannot possibly permit, the Executive deliberately removing their relevance for the United Kingdom and so hollowing out entirely rights expressly granted by Parliament and only Parliament.

38. The Appellant’s argument based on the phrase “from time to time” in s. 2(1) of the 1972 Act traverses much the same ground; and is wrong for the same reasons. Further and in any event:

- (1) First, it does not deal with rights arising out of enactments other than the 1972 Act – for example, the EP rights granted by Parliament in, and enjoyed by citizens under, the 2002 Act. There is no “from time to time” provision in the 2002 Act; there is no scope whatsoever for an argument that it was Parliament’s intention that the rights granted therein should be provisional upon Executive action withdrawing the United Kingdom from the EU.
- (2) In any event, even in relation to the 1972 Act, it is simply not what the phrase “from time to time” in s. 2(1) means. That is for all the reasons set out compellingly by the Divisional Court at [93]. Set against the relevant constitutional and legal background (including the status of the 1972 Act as a constitutional statute<sup>24</sup> and the principle of legality), it would be wholly contrary to the obvious legislative intent and purpose of the 1972 Act, to read the phrase “from time to

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<sup>24</sup> In paragraph 2 of the Appendix to his Case, the Appellant makes an odd point, gleaned from the academic blogosphere, that the designation of a statute as having constitutional status is a matter of the common law and not because Parliament has “intended” that it should be so. That misses the point: the reason that the common law recognises certain statutes as being “constitutional” is a recognition of the particular significance of such statutes in light of their content and effect. One consequence of that significance is that Parliament is not to be taken as having repealed part of so important a statute by implication. Another – perfectly obvious – consequence of that significance is that Parliament is not lightly to be taken – without very clear words in the statute itself or a later one – as having provided that such fundamental rights should be swept away by Executive action without Parliamentary scrutiny or oversight.

time” in s. 2(1) as authorizing the destruction by Executive fiat of the very rights which, by that section, Parliament brought into domestic law. Rather, as a matter of plain language as well as obvious intention, the phrase “from time to time” conditions, and refers to, the rights and obligations etc arising from EU membership under the Treaties, which will change over time and to which s. 2(1) gives effect<sup>25</sup>. It does not comprehend a “time” when there are none at all because the United Kingdom has withdrawn from the EU.

- (3) Mr Santos adopts the submissions of Ms Miller in response to the Appellant’s more detailed points (set out in the Appendix to his Case) on the Divisional Court’s interpretive analysis at [93] of the Judgment.

39. Accordingly, by a direct application of the doctrine of Parliamentary sovereignty, none of the rights enumerated, in any of the categories, can be overridden or nullified without Parliament’s approval by primary legislation. If just one such right is, the Appellant’s appeal must necessarily fail.

#### **IX. THE EFFECT OF A DECISION TO WITHDRAW AND NOTIFY UNDER ARTICLE 50**

40. The Divisional Court set out the text of Article 50 at [9] (see also [1/8]), and we do not repeat it here. In the Divisional Court it was common ground that a notice under Article 50(2) could not be withdrawn and could not be given conditionally (as recorded in the Judgment at [10]); and that, in any event, irrespective of whether that was so, it did not matter to the result of this case. The Appellant’s Case maintains that position: see paragraph 17.

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<sup>25</sup> This is a process which the 1972 Act comprehended and authorised. From inception, the Treaties provided that what is now the EU should be a separate legal corpus with its own legislative, executive and judicial institutions (including the Council of Ministers) upon which Member States conferred competencies, as laid down in the Treaties. In enacting the 1972 Act, Parliament agreed to the implementation, directly into domestic law, of alterations to EU law rights and obligations brought about through the activities of the EU institutions in exercise of the “pooled sovereignty” which is inherent in the EU model (and sanctions the participation of Ministers in that process). Of course, where the change is brought about through a treaty change, no effect is given to it unless and until Parliament passes primary legislation amending the definition of the Treaties in s. 1(2) of the 1972 Act (or, in the case of ancillary treaties, by Order in Council under the procedure Parliament has enacted in s. 1(3) of the 1972 Act) – see Section VI above. Contrary to what appears to be being argued principally in paragraphs 8 to 9, 59 and 60 of the Appellant’s Case (but also elsewhere), none of that has anything to say about withdrawal from the EU (in fact, quite the reverse); nor does it involve alteration of domestic law by the Executive without Parliamentary approval and nor does it offend the doctrine of Parliamentary sovereignty.



41. The consequence is that, once notice is given, it will result in the complete withdrawal of the United Kingdom from membership of the European Union and from the relevant Treaties at the end of the two year period, subject only to an agreement on an extension of time between the United Kingdom and the European Council (acting unanimously) as set out in Article 50(3), or the earlier making of a withdrawal agreement between the United Kingdom and the European Council (acting by a qualified majority and with the consent of the European Parliament).
42. What is the resultant effect on the different categories of rights enshrined in statute? It is this:
- (1) Category (i) and (ii) rights: Whatever happens in the future, an Article 50(2) notification will lead to the withdrawal of the United Kingdom from the EU: accordingly, once notification has been given, there will be no effective choice but to repeal the 1972 Act because it will be entirely hollowed out by that withdrawal. It is only thereafter that the question of what, if anything, to replace that legislation with will arise.
  - (2) Depending upon what transpires during the withdrawal negotiations<sup>26</sup> (in respect of category (ii) rights) and what legislation the Government decides to promulgate (in respect of category (i) rights), rights in categories (i) and (ii) may cease to exist or may be replaced or replicated in some form by new legislation. If they cease to exist, they will have ceased to exist without Parliament's consent. But even if they are replaced or replicated, the old rights will have gone and the new rights will be different rights under different arrangements and on a different legal basis to the present: they will no longer have as their source the 1972 Act and there will no longer be a right to seek authoritative rulings from the CJEU regarding the scope and interpretation of the rights which had previously been granted under the 1972 Act or any obligation on the English Court to apply the wider jurisprudence of the CJEU in interpreting those rights. While Parliament will have a choice as to whether it enacts whatever is put before it in these respects<sup>27</sup>, it will not (even if no deal is put before it or if it rejects the proposals) be able to go back to the *status quo*

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<sup>26</sup> What emerges will depend upon what deal can be negotiated with the remaining 27 member states of the EU (and approved by the European Parliament).

<sup>27</sup> See paragraph 81 of the Appellant's case.

*ante*: it will have been deprived of any effective choice about the first step in the process, that is the repeal of, or overriding and nullification of, the 1972 Act.

- (3) The category (iii) rights: whatever the outcome of the Article 50 negotiations and whatever legislation Parliament subsequently enacts, the category (iii) rights above will be irretrievably lost. From the moment notification is given under Article 50(2), it is inevitable that when withdrawal takes effect under Article 50(3), United Kingdom citizens will no longer enjoy the right to vote in European Parliamentary elections and will no longer be eligible to stand for or take up a seat in the European Parliament; they will no longer be able to seek a reference to the CJEU or to seek to persuade the EU Commission to take relevant regulatory action. There is nothing that the United Kingdom Parliament can do to stop this from happening. This will have happened solely as a result of a Government decision and notification under Article 50(2), and Parliament will have been by-passed altogether.
  
- (4) To illustrate by reference to the 2002 Act [13/128]: the 2002 Act will remain on the statute books, but the rights granted under that Act will have been entirely hollowed out, lost. It is no answer to say that Parliament could simply repeal the 2002 Act after notification or withdrawal: the decision will already have been taken (by the Government at the notification stage) to deprive United Kingdom citizens of their EP Rights. Parliament will have lost the choice whether or not to repeal the 2002 Act, which would become simply an administrative formality (and, indeed, it would not matter – as a matter of substance – whether it was repealed or not). Parliament will have been presented with a *fait accompli*, being required to act as the servant of the Executive and not its master, in direct contravention of the doctrine of Parliamentary sovereignty. As it was put by Lord Browne-Wilkinson in the *Fire Brigades Union* case (quoted above [2/15]), in the context of the facts of that case, “...it is not for the executive...to state as it did in the White Paper that the provisions of the Act of 1988 ‘will accordingly be repealed when a suitable legislative opportunity occurs’. It is for Parliament, not the executive, to repeal legislation.”
  
- (5) Much of this does not appear to be seriously disputed by the Appellant. The Appellant accepts (at paragraph 62(a) of his Case) that the United Kingdom’s withdrawal from the EU consequent upon an Article 50(2) notification given by the

Executive “*will undoubtedly lead to the removal of rights and obligations currently conferred or imposed by EU law*”. That reflects the Divisional Court recording, at [51] of the Judgment, that “*it is common ground that if the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU there will no longer be any enforceable EU rights in relation to which [section 2(1) of the 1972 Act] will have any application. Section 2(1) would be stripped of any practical effect.*” The Appellant also accepts that the EP Rights will be lost upon withdrawal: see paragraph 63(a) of his Case and the Judgment at [62]-[63].

- (6) But insofar as it is in dispute:
- a. It is no answer to say, as the Appellant still seeks to do (see paragraph 62(e) of his Case), that the giving of notification does not itself change anything in domestic law: it sets in train the process by which that will inevitably happen.
  - b. It is no answer to say, as the Appellant seeks to do at paragraph 63(a) of his Case, that the UK is “*leaving 'the club'*” and so will obviously no longer have access to EU institutions such as the European Parliament. That is nothing to the point: the fact that it follows from notification, and withdrawal from the EU, and that the EP rights will be lost are statements of the problem with the Appellant’s proposed course of action, not an answer to it.
  - c. It is no answer to say, as the Appellant seeks to do in paragraph 80 of his Case, that it would be open to Parliament to vote on resolutions regarding notification under Article 50 or to pass legislation which inhibited or prevented the Government from proceeding to notify under Article 50. That is not the point. Under the doctrine of Parliamentary sovereignty, it is unlawful for the Government to give notification under Article 50 without the authority of Parliament. The Government must therefore positively seek and obtain the authority Parliament before triggering Article 50.
43. Accordingly, the notification of a decision that the United Kingdom is to withdraw from the EU is a quasi-legislative step. The inescapable consequence of that is that Parliament must be the body to sanction that course: since the current EU law rights and obligations were granted by Parliament, they can only be removed by Parliament (even if they are

replaced to some degree or other by something similar). That follows ineluctably from the doctrine of Parliamentary sovereignty itself.<sup>28</sup>

44. Although Mr Santos entirely agrees with, and adopts, the Royal prerogative argument advanced by Ms Miller, by reference to the *Laker Airways* and *Fire Brigade's Union* line of cases, the present case is in fact simpler and stronger than that line of cases. Those cases are only examples of a wider principle. Whatever may be the rules by which the Courts may determine when a prerogative power has been abrogated by legislation covering the same or similar subject matter as the prerogative covered, the present case is one where the threatened Executive action will directly override and nullify – effectively repeal – primary legislation. It is four-square within the ambit of what the negative limb of the doctrine of Parliamentary sovereignty enjoins, and is a direct breach of the Bill of Rights.
  
45. Further, even without consideration of the different categories of rights or the specific rights themselves, it is plain that an act which would withdraw the United Kingdom from the EU would be contrary to the doctrine of Parliamentary sovereignty and a breach of the Bill of Rights, unless done with Parliamentary authorization. The plain intent and effect of the 1972 Act was to make legally effective the United Kingdom's membership of the EU and to bring about the constitutional change in the United Kingdom associated with EU membership: the whole Act is directed at that very thing for all the reasons set out by the Divisional Court at [92] to [94], and [41] to [42] of the Judgment, and as set out above in Section V. Just as Parliament's approval through the 1972 Act was necessary to make these changes, so equally Parliament's approval (through primary legislation) is needed to reverse them. A withdrawal by use of the Royal prerogative simply cannot be squared with the intention, meaning and effect of the 1972 Act. It would – in the simplest sense – override and nullify, dispense with and suspend the entire enactment and its operation (or “execution” to use the word employed in the Bill of Rights).
  
46. None of the above is a “*rote application of 17<sup>th</sup> century authorities addressing the conflict between a parliament representative of the people with an authoritarian king*” as the Appellant submits in paragraph 83 of his Case; nor is it an incorrect approach to the doctrine of Parliamentary sovereignty as suggested in paragraph 84 of the Appellant's Case. It is the proper and

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<sup>28</sup> Although this is in fact true of a whole panoply of rights secured by primary legislation, Mr Santos need only identify one right to succeed in his case. His case does not depend on the volume of rights which are swept away.

constitutionally lawful application of the fundamental doctrine of Parliamentary sovereignty, as enshrined in the Bill of Rights.

47. It follows from the above, and from the logic of the Divisional Court's Judgment, that only primary legislation will suffice to authorise an Article 50 notification: only an Act of Parliament can abrogate rights granted by Act of Parliament. As Dicey explained, "*the resolution of neither House is a law*" – see paragraph 23(3)(b) above.

#### **X. NO PARLIAMENTARY AUTHORISATION FOR WITHDRAWAL AND NOTIFICATION**

48. In light of the above, the only way in which the Appellant could justify a right to trigger the Article 50 procedure would be to rely on existing Parliamentary authority to do so. But the Appellant does not claim, indeed specifically disavows, any such authority: he relies solely on the Royal prerogative, which necessarily precludes empowerment by Parliament.

49. The Appellant is correct that Parliament has not granted the executive power to withdraw from the EU:

- (1) The 1972 Act contains no such power (and its interpretation militates against the existence of such a power);
- (2) The subsequent legislation implementing EU Treaties into domestic law contains no such power;
- (3) There is no such power in the 2002 Act (in respect of the rights granted therein); and
- (4) There is no such power in the 2015 Act [1/7]. In respect of this last point, the Divisional Court recorded that the Appellant was right not to contend that it gave him a statutory power to trigger the Article 50 process because such an argument would have been "*untenable as a matter of the statutory interpretation of the 2015 Referendum Act*": see [105] of the Judgment.

50. Notwithstanding the Appellant's express disavowal of the 2015 Act as a source of relevant authority – by which he abandoned any argument that it was relevant, as a matter of *law*, to the *legal* issues in this case – he criticises<sup>29</sup> the Divisional Court for “dismissing it” as a political event; and seeks – in a legally unanchored and unexplained way – to suggest some significance for the Referendum to the legal issues in this case.
51. That is a mischaracterization of the Divisional Court's approach to the Referendum and, indeed, to Dicey's conceptions of political – as opposed to legal – sovereignty; and it requires correction.
52. The United Kingdom is a representative democracy in which Parliament is – legally – sovereign. Accordingly:
- (1) Referendums are rare, are governed by the Political Parties, Elections and Referendums Act 2000 [13/126], and each one requires its own enabling primary legislation;
  - (2) A referendum is advisory only and the result is not legally binding – on anyone – unless the relevant enabling legislation provides otherwise – i.e. unless Parliament itself decides otherwise.
  - (3) Not only is that the correct legal position, but it was well understood by the relevant constitutional actors, including the Government<sup>30</sup> and Parliament<sup>31</sup>, before the passage of the 2015 Act.

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<sup>29</sup> In paragraph 85 of his Case.

<sup>30</sup> The House of Lords Select Committee on the Constitution, in its 12<sup>th</sup> Report of Session 2009-10 entitled “Referendums in the United Kingdom” (“the 12<sup>th</sup> Report”) [18/199], said (in paras. 193 – 194), under the heading “Advisory or binding referendums”: “Despite referendums in the UK being legally advisory, a number of witnesses pointed out that in reality referendums might be judged to be politically binding... Professor Bogdanor explained that ‘a clear majority on a reasonably high turnout would leave Parliament with little option in practice other than to endorse the decision of the people’ (p 47). In practice, however, the UK Parliament can square the circle by passing legislation which does not come into effect until a referendum is held, or by agreeing to be bound by the result in enabling legislation. Professor Bogdanor thought that it would be possible in the UK to ‘frame a referendum provision by which legislation was required to come into effect with a ‘Yes’ vote, and required to be repealed with a ‘No’ vote, in other words, a mandatory referendum (p 47).” The Committee's recommendation was expressed in paragraph 197 of the 12<sup>th</sup> Report (repeated in the recommendations summarised in Chapter 7), as follows: “We recognise that because of the sovereignty of Parliament, referendums cannot be legally binding in the UK, and are therefore advisory. However, it would be difficult for Parliament to ignore a decisive expression of public opinion.” In the Government's Response to the 12<sup>th</sup> Report as set out in the House of Lord's Select Committee on the Constitution, 4<sup>th</sup> Report of Session 2010-11 entitled “Government Response to the Report on Referendums in the United Kingdom” [18/201], the Government responded as follows: “The Government agrees with this recommendation. Under the UK's constitutional arrangements Parliament must be responsible for deciding whether or not to take action in response to a referendum result.” (emphasis added)

53. The Referendum was held pursuant to the provisions of the 2015 Act, section 1(1) of which only required the Referendum “to be held”.
54. Accordingly, when passing the 2015 Act, Parliament made the informed decision that the result of the Referendum would not be legally binding. Parliament could have chosen to make the result legally binding, as it did with the AV referendum in 2011 [13/136]. But it did not: instead, Parliament chose to retain its sovereignty to decide whether or not the United Kingdom should withdraw from the EU in the light of the referendum result. That remains the case no matter what the Government’s policy was – or how unequivocal the Government was that the outcome of the Referendum would be respected and implemented. Government policy and the will of Parliament as expressed in legislation are not the same thing. No one can know whether, had the Bill for the 2015 Act proposed a binding referendum, Parliament would have enacted it. Accordingly, the Appellant’s submission (in paragraph 80 of his Case) that by passing the 2015 Act Parliament “paved the way” for the taking of the decision to withdraw from the EU, is nothing to the (legal) point.
55. None of that alters the fact that it will be for Parliament to take into account the result of the Referendum. Nor does it downplay the political significance of the Referendum result. Rather, it is an expression of the constitutional settlement in the United Kingdom, with its representative Parliamentary democracy. In paragraph 82 of his Case the Appellant misunderstands the distinction between legal sovereignty and political sovereignty. The legal doctrine of Parliamentary sovereignty is the ultimate legal fact upon which the United Kingdom’s constitution and system of laws is based. The power of the people (expressed through Parliament) is the ultimate political fact upon which the United Kingdom’s constitution and system of government is based. As Dicey explained: sovereignty in the

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<sup>31</sup> In the House of Commons Briefing Paper on the European Union Referendum Bill (which became, when passed, the Referendum Act 2015) dated 3 June 2015, briefing paper number 07212 (“the Briefing Paper”) [18/202], in section 5 (page 25) said: “*The Bill requires a referendum to be held on the question of the UK’s continued membership of the European Union (EU) before the end of 2017. It does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a vote to leave the EU should be implemented. Instead, this is a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions. The referendums held in Scotland, Wales and Northern Ireland in 1997 and 1998 are examples of this type, where opinion was tested before legislation was introduced. The UK does not have constitutional provisions which would require the results of a referendum to be implemented, unlike, for example, the Republic of Ireland, where the circumstances in which a binding referendum should be held are set out in its constitution. In contrast, the legislation which provided for the referendum held on AV in May 2011 would have implemented the new system of voting without further legislation, provided that the boundary changes also provided for in the Parliamentary Voting System and Constituency Act 2011 were also implemented.*”

political sense resides in the People; sovereignty in the legal sense resides in Parliament. This case is about what is legally required.

## XI. CONCLUSION

56. The Respondent Deir Dos Santos respectfully submits that the Appeal should be dismissed on each and every ground advanced for the following, among other,

### REASONS

- (1) BECAUSE by reason of the fundamental constitutional principle of Parliamentary sovereignty, only Parliament can sanction (i) the effect that a decision to withdraw and notify under Article 50(2) would bring about on the rights granted by Parliament in the 1972 Act and other primary legislation, including the 2002 Act, and (ii) the reversal of the significant constitutional change wrought by the 1972 Act; and Parliament has not done so;
- (2) BECAUSE further and in any event, there is no prerogative power (or the Royal prerogative may not lawfully be used) to give notification under Article 50(2);
- (3) BECAUSE of all the facts and matters set out by the Divisional Court in its Judgment; and
- (4) BECAUSE of all the facts and matters advanced by the First Respondent, Ms Miller.



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## Appendix 1: Parliamentary Progress of Bills implementing EU Treaties

	European Communities Bill 1972	European Communities (Amendment) Bill 1986	European Communities (Amendment) Bill 1993	European Communities (Amendment) Bill 1998	European Communities (Amendment) Bill 2002	European Union (Amendment) Bill 2008
	Treaty of Rome	Single European Act	Treaty on European Union – Maastricht	Treaty of Amsterdam	Treaty of Nice	Treaty of Lisbon
Date Treaty signed	22 Jan 1972	17 Feb 1986	7 & 12 Feb 1992	2 Oct 1997	26 Feb 2001	13 Dec 2007
Commons First Reading <sup>1</sup>	25 Jan 1972	27 Mar 1986	7 May 1992	30 Oct 1997	21 Jun 2001	17 Dec 2007
Commons Third Reading	13 Jul 1972	10 Jul 1986	20 May 1993	19 Jan 1998	17 Oct 2001	11 Mar 2008
Commons Time Spent	30 days	7 days	29 days	8 days	5 days	13 days
Lords First Reading	14 Jul 1972	11 Jul 1986	24 May 1993	20 Jan 1998	18 Oct 2001	12 Mar 2008
Lords Third Reading	20 Sep 1972	3 Nov 1986	20 Jul 1993	21 May 1998	28 Jan 2002	18 Jun 2008
Lords Time Spent	9 days	5 days	12 days	8 days	6 days	12 days
Total No. of Divisions	102	10	88	5	4	122
Total Parliamentary Time Spent	39 days	12 days	41 days	16 days	11 days	25 days
Royal Assent	17 Oct 1972	7 Nov 1986	20 Jul 1993	11 Jun 1998	26 Feb 2002	19 Jun 2008
Date Treaty Ratified	18 Oct 1972	19 Nov 1986	2 Aug 1993	14 Jun 1998	25 Jul 2002	16 Jul 2008
Date Treaty Effective	1 Jan 1973	1 Jul 1987	1 Nov 1993	1 May 1999	1 Feb 2003	1 Dec 2009

<sup>1</sup> Source of information on Parliamentary debates: House of Commons Briefing Paper No. 03341, 15 June 2015