UKSC 2016/196

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)
Divisional Court Judgment: [2016] EWHC (Admin) 2768

BETWEEN:

THE QUEEN
on the application of
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Respondents

and

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Appellant

and

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

Interested Parties

and

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

Interveners

WRITTEN INTERVENTION FOR THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN (IWGB)

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1. SUMMARY OF THIS INTERVENTION

1.1 The IWGB submits that the decision of the Divisional Court was correct in law and that the Appeal should be dismissed. In summary, the IWGB submits as follows:

(1) This Court, as the constitutional court for the United Kingdom (UK), must take into account the Scottish constitutional tradition in deciding this appeal: Section 2, §§ 2.1-2.6.

(2) Scottish constitutional law on the prerogative requires this Court to conclude that the UK Government cannot unilaterally give Article 50(2) TEU notification of the UK's intention to

withdraw from the European Union (EU) because it has not (yet) been authorised to do so by the relevant legislatures of the UK: Section 3 §§ 3.1-3.20.

(3) The Scotland Acts 1998 and 2016 have caused profound change in the balance in and structure of the UK constitution, which must be reflected by this court: Section 4 §§ 4.1-4.15.

(4) Scottish constitutional law, as understood against the EU principles of respect for democracy and equality of its citizens and the ECHR principles of fairness and legality, requires that any decision to withdraw the UK from the EU has to be made with the consent of all four of the democratically elected legislatures of the UK: Section 15 §§ 5.1-5.10.

(5) Against this understanding of the constitution, five points are made in conclusion which demonstrate how the Appellant's claim to rely upon the royal prerogative to give Article 50(2) TEU notification without prior legislative authorisation are untenable: Section 6 §§ 6.1-6.21.

2. SCOTTISH CONSTITUTIONAL LAW AND THE UK CONSTITUTIONAL COURT

2.1 Article 50(1) of the Treaty on the EU (TEU) **[1/8]** provides that "*any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*." The proper interpretation of Article 50 TEU is a matter for the CJEU, but it is for this court to determine what the UK constitution requires for the Article 50 TEU procedure properly to be invoked.

2.2 Answering that question shines a spotlight on just what the UK constitution *is*. But UK constitutional law has been the law that dare not speak its name. This is because the 1707 Parliamentary union between England and Scotland undoubtedly created a new State, but it did not create one Nation. Various schemes for a wholly incorporating 'perfect' Union of Scotland and England had, unsuccessfully, been proposed to the English Parliament by James VI, King of Scots, after he had acceded to the English throne in 1603. The 1707 Union differed from these earlier schemes in that, while ensuring the de-politicisation of Scotland, it put into place measures intended to protect - and indeed to strengthen - other aspects of Scotland's distinctive continuing nationhood. Conrad Russell put it thus **[505]** (internal footnote added):

> "That the Scots found a perfect union politically unacceptable, and the English an imperfect union intellectually incomprehensible, provides the basis for the odd mixture of the two which was set up in 1707. The English got the unitary sovereign power which they wanted, and got it in the form based upon the existing English Parliament, with an English majority in it. The Scots got their recognition as a separate sovereign state, both from the form of the Union of 1707 as an international treaty, and from the survival of Scots law and the Scottish church. It is that claim that Scotland is a sovereign nation state which is reasserted whenever the English forget that 1707 was not a 'perfect union' and has recently been repeated in the Claim of Right.[1] Scotland in accepting the Union in 1707 remained a nation and as a result any sovereignty in the British parliament could not be national sovereignty. This has always been hard for the English to understand." [2]

2.3 In the 300 years of that 1707 Union, there is no doubt that that the English constitutional tradition has been the dominant and, at times, overwhelming influence; but a distinct Scottish constitutional tradition has never entirely been lost and may, indeed, be said to have been revived by the devolutionary settlement for Scotland. Dicey and Bagehot, Coke and Blackstone *may* well be reliable guides to the English constitutional tradition, but their views are *not* necessarily determinative or reflective of what the UK constitution now is.[3] Like the English common law, the Scots constitutional tradition is not an

ossuary.[4] One thing is clear, however. When the UK Supreme Court has to speak of UK Constitutional law it enters into perilous waters because the two constitutional narratives and traditions to which the UK is heir - the English historical myth emphasizing the sovereignty of the governing institutions of the State (the Crown, and the Crown in Parliament) and an unbroken continuity since *Magna Carta* in 1215 CE[5]; and the Scottish tradition, since at least the *Declaration of Arbroath* of 1320 CE **[19/210]**[6], of the sovereignty of the people limiting the powers and rights of the Crown (and Parliaments[7]) – may pull in different directions, but yet have to be reconciled if this union polity is to survive.

2.4 Notwithstanding that this matter comes here on appeal from the Divisional Court of England and Wales, this Court is *not* here faced with matters of purely English law. This Court is determining matters concerning the content and extent of the constitutional obligations imposed on all institutions of the now democratically based British (and Northern Irish) State, its Parliaments as much as its courts and Governments, to show respect for those fundamental constitutional norms inherent in a democratic polity. Accordingly, the role of this Court is to be conscious of and take due account of these various narratives and sources for our multiply texted constitution, as was essayed in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3 (HS2) **[7/56]** per Lord Neuberger and Lord Mance at §207 (emphasis added):

> "The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights *and (in Scotland) the Claim of Right Act 1689*, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law."

2.5 The Divisional Court below, guided no doubt by the limited submissions made to it by the parties and interveners, referred only to the (English) Bill of Rights of 1688 **[12/106]**. Article 9 of the English Bill of Rights - which enjoins "*that the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament*" - is cited and relied upon by the courts in Scotland[8] as well as England[9], so it undoubtedly forms part of the UK constitution. But the (Scottish) Claim of Right of 1689 is *equally* a constitutional instrument for and within the UK. It is, after all, on the basis of the Claim of Right's assertion "*that it is the right and privilege of the subjects to protest for remeed of law to the King and Parliament against Sentences pronounced by the lords of Session*" that this Court exercises its jurisdiction to hear appeals from the Court of Session.[10]

2.6 Accordingly, the actions of the UK Government today can properly be measured and declared to be unlawful to the extent of its incompatibility with this Scottish constitutional tradition, on the basis that the Union preserves *both* constitutional traditions, and that the rule of law favours that tradition which offers the stronger protection for individual rights.[11]

3. THE SCOTTISH CONSTITUTIONAL TRADITION: THE CROWN LIMITED BY POPULAR SOVEREIGNTY

Tracing the history of Scottish constitutional law: sovereignty resides in the people

3.1 The Scottish constitutional theory of the power of the Crown being received from the people and limited by the law was first systematically set out by George Buchanan[12] (1506 CE - 1582 CE), the celebrated European humanist scholar and poet, citizen of the Republic of Letters, historian of Scotland, tutor to the

young James VI and constitutionalist who, in his dialogue *De iure regni apud Scotos* (1567) noted, among other things, that in Scotland

> "the people who have granted the king authority over themselves dictate to him the extent of his authority, and require him to exercise as a king only such right as the people have granted him over them"; and
>
> "the power received by our kings from our ancestors was not unbounded but was limited and restricted within fixed boundaries"; and
>
> "if the greater part of the people can pass a law and elect a magistrate, what is to prevent them judging the magistrate themselves or appointing judges to try him... Why should it seem unjust to any man if a free people have provided themselves in a similar or even in a different way with the means of restraining the harshness of tyranny."[13]

3.2 According to George Buchanan, therefore, the law and customs and immemorial constitutional tradition of the Scots in relation to the Crown is one of a limited constitutional monarchy involving:

(i) subordination of the Crown to the law;

(ii) the Crown's answerability before the courts; and

(iii) in the last resort, the people's right of revolt against a monarch in fundamental breach of his or her duties.[14]

3.3 In the 1644 CE work of the Scottish Presbyterian Divine Samuel Rutherford (c.1600 CE–1661 CE) *Lex Rex* **[27/344],** Rutherford answers his Question XLIII on *"whether the King of Scotland be an absolute prince, having prerogatives above Parliament and laws: the negative is asserted by the laws of Scotland, the King's oath of coronation, the Confession of Faith etc*." as follows:

> "The kings of Scotland have not any prerogative distinct from supremacy above the laws. If the people must be governed by no laws but by the king's own laws, that is, the laws and statutes of the realm, acted in parliament under pain of disobedience, then must the king govern by no other laws, and so by no prerogative above law… [I]n treaties with foreign princes, the estates of parliament did append their several seals with the king's great seal, (which to Grotius, Barclaius, and Arnisæus, is an undeniable argument of a limited prince, as well as the style of our parliament, that the estates, with the king, ordain, ratify, rescind, &c.) as also they were obliged, in case of the king's breaking these treaties, to resist him therein, even by arms, and that without any breach of their allegiance, as is yet extant in the records of our old treaties with England and France, &c."

3.4 This position is confirmed in the 1703 Act of the Scottish Parliament anent Peace and War:

> "Our sovereign lady, with advice and consent of the estates of parliament, statutes, enacts and declares that after her majesty's decease, and failing heirs of her body, *no person being king or queen of Scotland and England shall have the sole power of making war with any prince, potentate or state whatsoever without consent of parliament, and that no declaration of war without consent foresaid shall be binding on the subjects of this kingdom,* declaring always that this shall no way be understood to impede the sovereign of this kingdom to call furth, command and employ the subjects thereof to suppress any insurrection within the kingdom or reject any invasion from abroad according to former laws; and also declaring that *everything which relates to treaties of peace, alliance and commerce is left to the wisdom of the sovereign, with consent of the estates of parliament* who shall declare the war. And her majesty, with consent foresaid, rejects, casses and annuls all former acts of parliament in so far as they are inconsistent herewith or contrary hereunto."[15] (emphasis added)

3.5 In "*The Crown Rights of the Redeemer: the Chalmers Lectures of 2007*", the Reverend Dr. Marjory MacLean summarises this Scottish constitutional tradition of popular sovereignty as follows:

> "Turning from the question of what defines sovereignty to the question of what its source is, we find that the characteristically Scottish Reformed approach developed through the thinking of John Knox, George Buchanan, Samuel Rutherford and the framers of the National Covenant of 1638. There are several elements in this Scottish tradition.
>
> First, at its root is a belief in popular sovereignty, by which is normally understood the self-determination of the whole people in the context of their relationship (individual and corporate) with God. In the immediate post-Reformation literature it is difficult to find a clear description of how an articulate and identifiable process of self-determination works, though the process of bonding or banding brought together people of like minds into groups strong enough to effect political and constitutional change.
>
> The second element in the Scottish model is 'fiduciary dominion', the ruler's power (*dominium*) to govern given by the people, who offer their trust (*fides*) but not their sovereignty, which according to the theory remains with them. The ruling power is therefore supreme but constitutionally bound, and cannot arbitrarily change the bounds of its authority or the constraints under which it is obliged to operate.
>
> The third element of the Scottish model is the presence of such constraints on the sovereign people and the holder of fiduciary dominion alike: these have normally been Natural Law and Divine Law, as understood from time to time, and the rule of law."[16]

3.6 This tradition of popular sovereignty within the Scottish constitution reached its apotheosis with the decision by the self-convened Scottish Parliament in 1689 to declare James VII to have *forfeited* the Crown on the basis of its claims that he had over-reached the lawful limits placed on his executive power.[17] The use of the word 'forfeited' was of particular significance because it was consistent with the terms of the 1320 CE Declaration of Arbroath **[19/210]** as well as with the constitutional writings of George Buchanan and Samuel Rutherford.

3.7 The Bill of Rights 1688 **[12/106]** declares that "*the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal*". This is echoed in the Claim of Right's declaration **[19/211]** that "*That all Proclamations asserting an absolute power to Cass [anglice Quash] annul and Disable laws… are contrary to Law*". But the Scottish constitutional tradition of popular sovereignty which the Claim of Right 1689 was articulating may be contrasted with the (English) Bill of Rights tradition where, as Conrad Russell notes, the prevailing "*theory of legitimacy*" was one "*where authority, however much it might feel the need for consent, was ultimately descending*".[18] Accordingly, rather than speaking of the king being deposed in the Glorious Revolution, the English Bill of Rights employed the legal fiction that the king, in fleeing to France, had chosen to "*abdicate*" his throne, thereby preserving the fiction that the existing constitutional order in England continued. The English Declaration and Bill of Rights 1688 are also to be contrasted with the Scottish Claim of Right 1689 in that the English document makes no reference to James II's oath on entering government that he will "*rule the people according to the laudable laws*". Nor does the English document claim that James II had expressly breached any of the terms of his (English Coronation) oath. And the English document similarly makes no reference - unlike the Scottish text - to James II and VII invading the "*fundamental Constitution of the Kingdom*" and of that constitution properly being understood as a "*legally limited monarchy*". Nor do the English, in terms, accuse the James II of attempting to subvert the constitution that he was in office to uphold, complaining instead only of specific acts of "*arbitrary power*" (namely "*prosecutions in the Court of King's Bench for Matters and Causes cognizable only in Parliament and by diverse other Arbitrary and Illegal Courses*"), rather than the root and branch corruption of power which the Scottish Claim of Right of 1689 had identified.

3.8 In this early modern period, models of constitutional government are expressed in the terms of political theology. The *religious* is *political* precisely because in defining the terms of the Church settlement in a territory you define the source and extent of power of the State.[19] So in Scotland at least, the term "*Papist*"[20] translates into a believer in absolutist government; "*Episcopalian*" into a supporter of constitutionally limited Monarchy; while "*Presbyterians*" hold to a democratic model in which the Elect(ors) delegate defined and limited powers to those whom *they* appoint to hold office.

3.9 The whole point about the 1707 Union is that it constitutionally entrenched the distinct Scottish and English constitutional traditions as embodied in the two nations' separate ecclesiastical settlements. Thus, the "*securing of the Protestant Religion and Presbyterian Church Government within the Kingdom of Scotland*" was expressly declared to be "*a fundamental and essential Condition of the said Treaty or Union in all times coming.*"[21] And it was similarly declared by the English Parliament that the preservation of the Anglican settlement in England also be made "*a Fundamental and Essential part of any Treaty of Union*"[22] with Scotland. And this is not simple antiquarianism or misplaced originalism. The accession oath which was sworn by Elizabeth II before the Accession Privy Council on the day immediately after her accession, and which is renewed by her each year (whether in writing or in person) before the General Assembly of the Church of Scotland is in the following terms:

> "I, Elizabeth the Second by the Grace of God of Great Britain, Ireland and the British dominions beyond the seas, Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as *established by the laws of Scotland in prosecution of the Claim of Right* and particularly an Act entitled an Act for the Securing the Protestant Religion and Presbyterian Church Government and *by the Acts passed in both Kingdoms for the Union of the two Kingdoms*, together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland. So help me God." (emphasis added)

3.10 What this means is that this distinctive Scottish constitutional tradition embodied in the Claim of Right - of the Crown holding power from and in trust for the people assembled "*in a full and free representative of this Nation*", with the Crown bound by the constitution to honour the terms and limits of the sovereign people's grant of that power, and with both the people and the Crown subject to a duty to respect fundamental rights and the rule of law - not only survived the 1707 Union, but was expressly preserved by it and is reaffirmed by the Crown *in personam* every year of her reign.

3.11 This Scottish constitutional tradition of popular sovereignty has most recently been restated and confirmed by the UK Parliament in the terms in Section 1 of the Scotland Act 2016 which inserts a new Section 63A to the Scotland Act 1998 (SA) **[12/124]** in the following terms:

> **"63A Permanence of the Scottish Parliament and Scottish Government**
> (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements.
> (2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.
> (3) In view of that commitment it is declared that *the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum*." (emphasis added).

3.12 The reference in Section 63A(3) SA to the maintenance/abolition of the Scottish devolved institutions of Government, being a matter for "*a decision of the people of Scotland"* - rather than simply saying "*on the*

basis of a referendum held in Scotland" - only makes sense (since there is otherwise no specification in the Scotland Act as to who constitutes "*the people of Scotland*") as a clear and unequivocal reference to, and affirmation by the Westminster Parliament of, this Scottish constitutional tradition of *popular* sovereignty.

No harmonisation of Scottish constitutional law on the Crown and prerogative post-Union

3.13 Although Article XVIII of the 1707 Union allowed that "*Laws which concern public Right Policy and Civil Government may be made the same throughout the whole United Kingdom… by the Parliament of Great Britain*",[23] the Union did not, in fact, result in the harmonisation - and still less in the assimilation - of public law in Scotland with that of England. In 1758 Lord Mansfield ruled in *King v Cowle* 97 ER 587 **[483]**:

> "1st. That this Court has no jurisdiction over the town and borough of Berwick, or any local matters arising there; because it is not to be deemed part of the realm of England, and the King's writ does not run there: consequently, this Court has no authority to remove a record from thence, by writ of certiorari, for any purpose…
>
> Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no [856] clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.
>
> *To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate [of Hanover]*: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny". (emphasis added).

3.14 As one commentator has noted in this regard **[502]**:

> "The reason, therefore, why Scotland is exempt from this jurisdiction [of *habeas corpus*] is, that it extends only over the dominions which prior to the Union were dominions of the crown of England, and Scotland was never part of the dominions of the crown of England. *The King of Scotland came also to be King of England, but this did not make Scotland subject to the crown of England*."[24] (emphasis added)

3.15 It is clear that in the absence of specific statutory provision importing the English understanding of Crown prerogative in specific areas, the pre-Union common law of Scotland has prevailed. This is the basis for the Lord President's decision in *Admiralty v Blair's Trustees*, 1916 SC 247 **[486]** when he states (at p.266):

> "My own views in this case may be expressed briefly in the form of propositions: (First) That *by the common law of Scotland the Crown possesses no prerogative right such as is laid claim to in this appeal*, and, consequently, is not entitled to a preferential ranking in this sequestration. That proposition, I think, was not disputed. (Secondly) That *the prerogative right claimed by the Crown was not imported into the law of Scotland* by the statute of Anne. I can find no words in that statute adequate to that end. *It is, to my mind, inconceivable that a doctrine of the law of England should thus be engrafted on the law of Scotland. We do not know what the law of England on this head is*. It is not averred; and it is not proved. (Thirdly) The statute of Anne did import into the law of Scotland the English process as a means of recovery of Crown debts in Scotland, and particularly the facilities and preference conferred on the Crown by the statute of Henry VIII." (emphasis added)

3.16 Similarly, in *Glasgow Corporation v. Central Land Board*, 1956 SC (HL) 1 **[21/258]** Viscount Simonds observed (at pp. 9-10, 11):

> "[T]he common law of Scotland differs from that of England in regard to the liability of the Crown to be sued and has developed independently in regard to the right of discovery or recovery of documents in possession of the Crown, and that, desirable though it may be that in matters of constitutional importance the law of the two countries should not differ, yet it would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries. … Next, therefore, I ask what is the law of Scotland upon this matter, on the assumption that *Duncan* v. *Cammell Laird & Co.* [1942] AC 624 did not determine it. In the course of the present appeal we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the Court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so. …*It may be that the existence of an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England. If so, this House sitting as the final Court of Appeal from the Courts of Scotland will be jealous to preserve it*." (emphasis added).

3.17 On the position of the Crown in Scotland being subject to the court's ordinary jurisdiction Lord President Hope had already noted in *Edwards v Cruickshank* (1840) 3 D 282 at pps.306–307 **[21/255]**:

> "With regard to our jurisdiction [in Scotland], and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty – persons whether single or corporate; and, *in our noble constitution, I maintain – though at first sight it may appear to be a startling proposition – the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty*. Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or *if he exceed his duty to the injury of the subjects, the law gives redress*. In England the court would proceed, according to the nature of the case, by injunction or mandamus, or a writ of *quo warranto*. In this country [Scotland] a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law. *If it be necessary for a man to declare his rights against the Crown, he brings his action against the Officers of State representing the Crown; for there is no officer, be he high or low, civil or ecclesiastical, that the law will not compel to do that duty which the law imposes upon him*." (emphasis added).

3.18 In *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61 [2009] 1 AC 453 Lord Rodger of Earlsferry, after quoting from this passage from *Edwards v Cruickshank*, observed (at § 106) **[6/54]**:

> "Admittedly, the Lord President's understanding of the position of the English courts turned out to be unduly optimistic. But, on Scots Law, on general principle, and on the substance of the matter, he was surely absolutely right."

The dispositive application of this history and its continued relevance to this Appeal

3.19 The contemporary significance, resonance and relevance of this Scottish constitutional tradition - which emphasises that decisions of the Crown are justiciable, that the Crown is subject to the jurisdiction of the court and that if the Crown "*exceed his duty to the injury of the subjects, the law gives redress*" - is obvious to the present Appeal. The Scottish constitutional tradition is that the Crown, and hence the Government, only has such powers as have been granted to it, expressly or by necessary implication, by the people gathered together in a representative assembly.

3.20 The Appellant must therefore be able identify a *legal* basis which gives the UK Government the power to issue the Article 50(2) TEU notification. The inherent prerogative powers of the Crown are insufficient. If the Appellant cannot identify the basis upon which it has been authorised as a matter of law to issue the notification under Article 50(2) TEU, its attempt to do so will be *ultra vires* as incompatible with the UK's constitutional requirements.

4. THE SCOTLAND ACT 1998 AND EU LAW

4.1 The 1998 devolutionary settlement sought to recognise the diversity of the UK as a 'State of Nations' rather than a uniform 'Nation State', by giving formal constitutional recognition to the distinctive historical and cultural identities of Scotland, Wales and Northern Ireland within the Union State. In *R v HM Advocate*, 2003 SC (PC) 21 [2004] 1 AC 462 **[489]**, Lord Rodger of Earlsferry noted that "*the Scotland Act is a major constitutional measure which altered the government of the United Kingdom*" and that "*in enacting a constitutional settlement of immense social and political significance for the whole of the United Kingdom,* [the UK] *Parliament has itself balanced the competing interests of the Government of the United Kingdom, of the Scottish Executive, of society and of the individuals affected*." In *Somerville v. Scottish Ministers*, 2008 SC (HL) 45 **[493]**, Lord Mance (at § 169) referred to the SA and the Human Rights Act 1998 (HRA) as "*essential elements of the architecture of the modern United Kingdom*". And in *H v Lord Advocate* [2012] UKSC 23 [2013] 1 AC 413 **[5/40]**, Lord Hope similarly spoke of the Scotland Act as a UK constitutional statute and observed (at § 130) that:

> "the fundamental constitutional nature of the settlement that was achieved by the Scotland Act 1998 … in itself must be held to render it incapable of being altered otherwise than by an express enactment.

4.2 In *theory*, the UK Parliament's sovereignty remained untouched in this new constitutional framework. There has been no formal divesting of power from the UK Parliament, simply its delegation. Devolution did *not* create a federal structure within the UK. But it is, nonetheless, well to bear in mind Lord Denning MR's observations in *Blackburn v. Attorney General* [1971] 1 WLR 1037 **[1/11]** at 1040 E-G:

> "We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. *But legal theory does not always march alongside political reality*. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can anyone imagine that Parliament could or would reverse that Statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse those laws and take away their independence? Most clearly not. *Freedom once given cannot be taken away. Legal theory must give way to practical politics*. It is as well to remember the remark of Viscount Sankey L.C. in *British Coal Corporation* v. *The King* [1935] A.C. 500, 520 **[487]**:
>
> > '... the Imperial Parliament could, as matter of abstract law, repeal or disregard section 4 of the Statute of Westminster.[25] But that is theory and has no relation to realities.'"
>
> What are the realities here? If Her Majesty's Ministers sign this treaty [of Rome] and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not."

4.3 Section 28 SA **[12/124]** now states, so far as relevant:

> **"28.- Acts of the Scottish Parliament**
> (1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament. ….
>
> (7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.
>
> (8) But it is recognised that *the Parliament of the United Kingdom* will not normally legislate with regard to devolved matters *without the consent of the Scottish Parliament*." (emphasis added).

4.4 This provision might be said to confirm the sovereignty of the UK Parliament, but it is important to note that in so doing – on the basis of the principle *expressio unius est exclusio alterius* - it excludes any use

of the *Crown's* (residual prerogative) powers with regard to devolved matters, at least without the consent of the Scottish Parliament.

4.5 In that regard, compliance with EU law is expressly placed by the UK Parliament on the powers of all of the devolved executives, Assemblies and Parliament. As noted by the Lord Advocate (at §§38 *et seq.* of his intervention) and by the Attorney General for Wales at (§§30 *et seq.* of his intervention), the devolved institutions are enjoined not to breach EU law by passing EU law incompatible measures. But they are also expected to comply with any positive obligations required of them under EU law in areas within their respective devolved competences. The three devolution statutes make similar provision on this matter by specifying that it is beyond the legislative competence conferred on the devolved Assemblies and Parliament to enact legislation contrary to EU law: see Section 29(2)(d) SA 1998 **[12/124]**, Section 108(6)(c) GoW 2006 and Section 6(2)(d) NI 1998. The fact that all of the devolved executives are also bound as a matter of *vires* to comply with EU law is made plain in the case of the Scottish Ministers by Section 57(2) SA 1998 which states that

> "a member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law."

4.6 As Lord Reed noted in *Walton v. Scottish Ministers* [2012] UKSC 44 [2013] PTSR 51 at §80:

> 'These provisions are intended to disable the Ministers from acting in such a way as to place the United Kingdom in breach of its obligations under EU law.'[26]

4.7 Section 126(9)(b) SA **[482]** defines "*EU law*" as:

> "(a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, *and*
>
> (b) all those remedies and procedures from time to time provided for by or under the EU Treaties."

4.8 The focus is not simply on substantive rights afforded to individuals, but also on procedural adjectival rights founded on EU law, including, for example, *Francovich* damages, complaints to the European Commission on competition law issues, direct actions before the CJEU under Article 263 of the Treaty on the Functioning of the EU (TFEU), as well as the opportunity for preliminary references to be made by national courts and tribunals.

4.9 Underpinning these constraints on the Scottish Parliament is the overarching approach to devolution to Scotland that legislative and executive power has been devolved to the Scottish devolved institutions unless it has been specifically reserved to Westminster. Thus, the positive obligations placed on the Scottish Parliament and Government to exercise their powers as required by EU law is confirmed by the terms of paragraph 7 of Schedule 5 SA 1998 **[12/124]** which reserves to the UK Parliament:

> (1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.
> (2) Sub-paragraph (1) does *not* reserve—
>
> (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law
> (b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies"[27] (emphasis added)

4.10 The devolutionary settlement envisages the Scottish Parliament acting so as to implement EU law within the areas devolved to them. Thus, Schedule 2 to the ECA concerning subordinate legislation made for the purpose of implementing any EU obligations under Section 2 ECA was amended by paragraph 15 of Schedule 8 SA to make specific reference in Paragraphs 1A and 2C respectively to Acts of the Scottish Parliament and to Scottish statutory instruments made by the Scottish Ministers. In that regard, and as noted by the Lord Advocate at §32 of his intervention, in Case C-428/07 *R. (Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-6355 **[24/297]**, the CJEU rejected a challenge to the differential implementation of provisions of EU law made under the common agricultural policy in which there was a variation across the UK in the detailed implementation of the EU Regulation concerned.[28] The CJEU was not concerned by that differentiation and applied its past case law to the effect that "*the prohibition on discrimination is not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it*".[29] The effect of this decision is that in areas in which regional or devolved authorities of the Member States are autonomously competent to adopt rules implementing EU law they will, from the viewpoint of EU law, be equated to Member States.[30]

Alteration of devolved legislative competence cannot be done by Crown prerogative

4.11 In *Somerville v. Scottish Ministers*, 2008 SC (HL) 45, the Appellate Committee held that the SA (and hence the devolution statutes generally) provided mechanisms for the enforcement of Convention against the devolved institutions which were distinct from and independent of the HRA. Lord Hope observed (at §22) that the SA used the HRA simply "*as a dictionary for use when dealing with issues about Convention rights*" and that did "*not justify reading into the Scotland Act any of the provisions of the Human Rights Act, such as sec 7(5) HRA, that the Scotland Act itself does not refer to*". In like fashion, the devolution statutes provide a manner of incorporation of EU law rights and remedies which are woven into the (devolved) constitution in a manner which is distinct from, and not dependent on, the provisions of the ECA. The ECA simply provides a "*dictionary definition*" for the "*EU Treaties*" referred to in the SA. The ECA is *not* the portal, conduit, gateway, sluice, channel, mechanism (or whatever other metaphor the UK and NI Governments might choose to use) for the enforcement of EU law rights and obligations against the Scottish devolved institutions. EU law is enforced against the Scottish Parliament and Scottish Government in reliance upon, and only upon, the SA. As Lord Hope noted in *Somerville v. Scottish Ministers*, 2008 SC (HL) 45 at §17:

> "The Scotland Act may reasonably be expected therefore to contain everything that is needed by way of legislation for the proper working out of the system that it lays down… [T]he Act was drafted against the background of the remedies that are available in domestic law to deal with acts that are outside the competence of any body that is exercising powers given to it by statute, informed by decisions of the European Court of Justice as to the need for a domestic remedy in the case of acts that are incompatible with Community law (Case C-6/90 & C-9/90 *Francovich v Italian Republic* [1991] ECR I-5357; *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524; *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561). It did not need to make provision for them because these remedies were already available."

4.12 As a matter of general constitutional principle, it cannot be the case that this delicate balance of rights and duties and devolved powers and responsibilities be subject to the radical change which leaving the

EU will impose simply on the basis of a unilateral exercise of a claimed prerogative power by the UK Government. The withdrawal of the UK from the EU would result in a significant modification in the legislative competence of the Scottish Parliament. And yet, the UK Parliament has made express and precise provision in the SA how to modify the powers of the Scottish Parliament. There is simply no space for any use by the Crown of prerogative powers in this regard because Section 30(2) SA **[482]** prescribes as follows:

> **"30.— Legislative competence: supplementary…**
>
> "(2) Her Majesty may by Order in Council make *any modifications of Schedule 4 or 5* which She considers necessary or expedient."

Schedule 7 SA then states that Section 30(2) SA is subject to Type A procedure which is defined in the Schedule as follows:

> "**Type A**: No recommendation to make the legislation is to be made to Her Majesty in Council unless a draft of the instrument— (a) Has been laid before, and approved by resolution of, each House of [the UK] Parliament, [and] (b) as been laid before, and approved by resolution of, the [Scottish] Parliament." (emphasis added).

4.13 An example of the use of this power is seen in the making of the Scotland Act 1998 (Modification of Schedule 5) Order 2013/242, paragraph 3 of which inserted a new paragraph 5A into schedule 5 SA to provide that paragraph 1 of Schedule 5 SA did *not* reserve a referendum on the independence of Scotland from the rest of the UK if and only if the requirements in sub-paragraphs 5A(2) - (4) of that schedule were met.

4.14 At §17 of his Case, the Appellant accepts that the effect of giving notice under Article 50 TEU is that "*the UK will withdraw from the EU Treaties and exit the EU within two years*" and the Lord Advocate states in his intervention that, if the UK exits the EU, then the Scottish Parliament and the Scottish Ministers no longer have the power (currently conferred on them under and in terms of paragraph 7(2)(a) of Schedule 5 SA 1998) to make laws, or do any other acts, with a view to "*observing and implementing … obligations under EU law*" because no such obligations can exist. The only way in which such change can be effected is through the "Type A" procedure as defined above because, in other words, the UK Parliament has "*occupied the field*". The change *cannot* be done by the UK Government unilaterally exercising Crown prerogative.

4.15 If the Crown did have power unilaterally to trigger Article 50 TEU in the exercise of its prerogative, this would cut across and render as naught Section 30(2), Schedule 7 and paragraph 7(2) SA. It would be wholly incompatible with the express intention of the UK Parliament in that regard. It would be unconstitutional because it would frustrate Parliament's will and usurp its role. As Lord Browne-Wilkinson observed in *R* v *Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 at 552D-E

> "It would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme… It is for Parliament, not the executive, to repeal legislation."

5. SCOTS CONSTITUTIONAL LAW, EU CITIZENS AND THE EUROPEAN DEMOCRATIC TRADITION

5.1 In *R (Jackson) v Attorney General* [2006] 1 AC 262 **[7/59]** Lord Steyn observed (at §102) that:

"We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision [1991] 1 AC 603 made that clear. *The settlement contained in the Scotland Act 1998 also point to a divided sovereignty*. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 , created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which *the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction*." (emphasis added.)

5.2 There are estimated to be some 3.3 million citizens of other EU Member States who, in reliance upon their EU free movement and citizenship rights, have moved to the UK to live and work. The CJEU has observed on numerous occasions (notably in Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097 at §§12-14) that the free movement of workers is "*one of the fundamental objectives of the Treaty*" and that "*free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community*". The fundamental rights which are protected as a matter of EU law are now set out in codified form in the Charter of Fundamental Rights of the EU (CFR) **[14/149]**. This document makes plain that not only are the classic individual civic rights[31] and freedoms[32] paralleling those contained in the ECHR protected as a matter of EU law, but that EU law goes further in protecting specific rights inherent in the concept of human dignity,[33] of equality,[34] solidarity (both in the workplace and in relation to civil society as a whole[35]) and the political rights inherent in EU citizenship.[36] Further, Article 151 TFEU specifies as among the objectives of the EU's social policy "*the promotion of employment, improved living and working conditions…, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion*". Among the rights which have been created under reference to these principles include:

(1) the right of employees to be informed and consulted in EU-wide (groups of) undertakings, whether by the establishment of a European Works Council or other procedures: European Works Council Directive 2009/38/EC **[26/324]**;

(2) worker involvement on the governing boards of companies incorporated under EU law (*Societas Europaea*): European Company Directive 2001/86/EC **[26/323]**;

(3) the right of employees to be informed and consulted through their trade union workplace representatives to promote social dialogue between management and labour: Information and Consultation of Employees (Social Dialogue) Directive 2002/14/EC **[26/326]**;

(4) the rights of workers posted from their home state to work in another member state to claim the protections of universally applicable collective agreements concluded in their country of posting: Article 3(1) Posted Workers Directive 96/71/EC **[26/319]**;

(5) the rights of workers on business transfers to protection and preservation of their acquired employment rights including those contained in collective agreements, and to have their workplace representatives to be consulted and informed on transfer and for the status and functions of those representatives where the entity transferred preserves its autonomy to be maintained post transfer: Articles 3(3), 6(1) and 7 of Acquired Rights Directive 2001/23/EC **[26/322]**; and

(6) the rights of workers representatives to be consulted in the event of collective redundancies: Collective Redundancies Directive 98/59/EC **[26/320]**.

5.3 These collective bargaining and representation rights in the workplace also fall within the ambit of Article 11 ECHR[37] which provides as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society."

5.4 This reference to "*prescribed by law*" incorporates the Convention principle of legality. In *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79 [2016] 1 WLR 210 **[23/280]** Baroness Hale and Lord Reed observed (at §3):

> "[T]he Convention concept of legality entails more than mere compliance with the domestic law. *It requires that the law be compatible with the rule of law*." (emphasis added).

5.5 The European Commission's Communication on "*A new EU framework to strengthen the rule of law*" COM(2014) 158 final (Brussels, 11 March 2014) noted at page, 4 (emphasis added):

> "[R]espect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly *and respect of the rules governing the political and electoral process*."

5.6 On disapplication of the EU Treaties to the UK/withdrawal of the UK from the EU, citizens of other EU Member States living and working in the UK will no longer be exercising their EU right to "*free access to employment*" in the UK. They will no longer be able to claim the protections of Article 18 TFEU (repeated in Article 21(2) of the CFR) which provides that within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. They will no longer be able to claim the rights set out in the CFR whose purpose was to ensure that while applying and implementing EU law Member States did so in a manner that is compatible with basic fundamental rights applicable at the EU level. They will no longer have the security of their collective bargaining and representation rights in the workplace being secured as a matter of EU law. They will necessarily lose these EU law based rights as currently enjoyed, regardless of whether they are grandfathered or replicated or otherwise somehow continued after the UK exits the EU because these will no longer be EU law protected rights and will therefore no longer be afforded the primacy which they currently enjoy over all and any contrary national legislation or Governmental action. Thus, even where the substance of the right may not change (as unlikely as that will be), the way in which it is exercised by EU migrants in the UK will. In his Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, Advocate-General Jacobs famously observed (at §46) that:

> "… a Community national who goes to another member State as a worker or self-employed person under Articles 48, 52 or 59 EEC is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals or the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values… In other words, he is entitled to say "*civis europeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights."

5.7 The right of EU free-movers to vote in other Member States' municipal and European Parliamentary election was central to the realization of this vision of EU citizenship.[38] Post exit from the EU, an EU migrant worker in the UK will not be able to claim rights of (EU) citizenship vis-à-vis the UK authorities. It will become meaningless for the purposes of UK law. Their status, such as it is, will revert to the common law category of "alien *ami*", here under sufferance[39] rather than as of right.[40] Yet the right of such EU citizens to respect for their private and family lives as protected by Article 8 ECHR is necessarily engaged by any notification under and in terms of Article 50(2) TEU. In order to be

Convention compatible, the manner in which such notification is given has to be in accordance with the rule of law and compatible with the principles of fairness protected by the procedural aspects of Article 8 ECHR.

5.8 Unilateral notification by the UK Government without reference to or authorization by the UK legislatures would not be compatible with the procedural and fairness aspects protected by the ECHR. This becomes clearer yet when it is noted that, despite the fact that the UK's continued membership of the EU directly affected their EU law derived rights, the franchise created by the European Union Referendum Act 2015 excluded citizens of other EU Member States *(*other than those holding Irish, Maltese or Cypriot nationality) who were lawfully resident in the UK or in Gibraltar, no matter the length of such residence. Viewed objectively, their disenfranchisement from the referendum did not comply with the Convention standards of fairness which "*requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests*": *R (Gudanaviciene) v Director Legal Aid* [2014] EWCA Civ 1622 [2015] 1 WLR 2247 at §71.

5.9 Citizens of all other EU Member States who are lawfully resident in Scotland, Wales and Northern Ireland do, however, fall within the franchise for the devolved legislatures. The Scottish Parliament, and Welsh and Northern Ireland Assemblies are answerable to this constituency, whose rights are undoubtedly directly immediately and significantly affected by any decision for the UK to leave the EU. In *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41, the Grand Chamber of the ECtHR said at §58 that the rights guaranteed by Article 3 of Protocol 1 (A3P1) ECHR to vote in elections to the legislature (which includes elections to the Scottish Parliament[41]) are "*crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law*".

5.10 It is submitted that not only is it consonant with, but required by, the Convention principle of legality, the rule of law, and the Scottish constitutional tradition of popular sovereignty that this court therefore find and declare, not only that the Appellant does not have power under the Crown's prerogative to give notice pursuant to Article 50(2) TEU to withdraw from the EU, but that the devolved legislatures and assemblies together with the UK Parliament, in full representation of the four nations and people of the UK (including the EU citizens from other Member States who have made their home here) be involved in the making (by the passing of an Act in the UK Parliament further to legislative consent motion) and notification of such a decision. Respect for our democratic constitution, and for the preservation of the Union, demands no less.

6. THE UNCONSTITUTIONALITY OF THE APPELLANT'S CLAIMS FOR THE PREROGATIVE

6.1 The Appellant's theory seems to proceed on this basis of these claims:

(1) It is the UK Government acting in the Council of Ministers (and *not* the Crown in Parliament) which is responsible for the creation and modification of EU law rights.

(2) Direct effect *within* national legal systems and primacy *over* purely national laws are essential (and distinctive) attributes of right created under EU law

(3) When acting domestically within the ambit of EU law, the UK Government powers *necessarily* take on these attributes of primacy and direct effect.

(4) The UK Parliament's function is simply to provide a mechanism for the domestic recognition and enforcement of EU law rights. Unlike the UK Government, the UK Parliament has no power to change their substance.

(5) The UK Government is therefore not answerable or accountable to Parliament when it gives or takes away EU law rights.

6.2 Essentially the Appellant's position comes down to no more than this: as a matter of UK constitutional law, those EU law rights which are recognised to be enforceable before the courts were created and are maintained by exercise of the Crown prerogative. They can therefore be interfered with and removed in part or wholesale by exercise of that same prerogative. As Scripture says (Job 1:21): "*The Lord gave, and the Lord hath taken away*". The Appellant's position is, in effect, that the Divine Right theory of James VI and I [42] survived the constitutional upheavals of the 17th century, the Glorious Revolution and the Treaty of Union and/or was given new life by the UK signing the Treaty of Rome. This is not an account of the constitution which can be upheld. IWGB submits that there are a further five counter-points (at least) which expose the flaws in the Appellant's analysis and justify this Court in rejecting his appeal against the decision of the Divisional Court. They are as follows.

(a) Entering Treaties is *not* the same as exiting them

6.3 The Divisional Court stated at §30 of its decision (without referring to any supporting authority) that:

> "Another settled feature of UK constitutional law is that, as a general rule applicable in normal circumstances, the conduct of international relations and the making *and unmaking* of treaties on behalf of the United Kingdom are regarded as matters for the Crown in the exercise of its prerogative powers." (emphasis added).

6.4 No-one questions the fact that, under the UK Constitution, the UK Government is afforded the power to represent the UK in the international sphere (see, *inter alia*, First Respondent at §§24 *et seq.*; Lord Advocate at §52) and, indeed, to negotiate agreements with other international legal persons which once duly concluded in accordance with our constitutional requirements, will bind the UK as a matter of international law. And once an international legal obligation has been entered into, the customary international norm which requires State parties to a Treaty to ensure conformity of their domestic laws to their Treaty obligations comes into play.[43]

6.5 However, even if it could be said that the executive (the UK Government), in negotiating and concluding international Treaties does so in exercise of the prerogative, it certainly does not follow from that that the executive has power under the prerogative unilaterally and un-reviewably to *withdraw* from them, particularly where provisions of those Treaties have been given effect to in national law by the legislature. The Appellant (at §39) relies on a Canadian first instance *Turp v. Ministry of Justice & A-G of Canada*, 2012 FC 893, as authority for its claim that "*withdrawal from treaties is entirely a matter for the executive"*. But the Treaty in question in that case was the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* which falls into the classic understanding of a Treaty as a legal framework regulating only legal relations between States. It was and is not a treaty which

was ever intended or habile to create rights for individuals.[44] This a distinction which was highlighted by Judge Pinto de Albuquerque observed in his concurring opinion in *Al-Dulimi and Montana Management Inc. v. Switzerland* [2016] ECtHR 5809/08 (Grand Chamber, 21 June 2016) at §7:

> "7. Individuals being the epicentre of international law, human rights are today the central factor of legitimation of international law. Like a new universal Esperanto, the language of international human rights law is individual-centred, not State-centred. The primary role of sovereignty is the responsibility to protect human rights."

6.6 Consistently with this approach, *Turp* confirms (at §18) Canadian Supreme Court case law to the effect that, in the face of a Charter rights challenge, decisions of the Government in the exercise of the prerogative, even on matter of "high policy" concerning the proper defence of the realm, are subject to review by the courts.[45]

6.7 In any event, the need to distinguish between the exercise of a power to conclude Treaties and the exercise of a power to withdraw from Treaties follows from the logic of the dualist approach as outlined by Lord Atkin in *AG Canada v. AG Ontario (Appeal No. 100 of 1936)* [1937] AC 326 at §§347-8 **[3/30]**. On his analysis, the executive forms inchoate and ineffective obligations - at least from the point of view of persons without international legal personality - when it enters into Treaties. Those inchoate and ineffective obligations are perfected into rights and duties at a national level only by the intervention of the legislature. The executive acts first in committing the UK to a Treaty, the legislature then acts, if it so wishes, to realise these international commitments and make them obligations as a matter of national law. It is the legislature, not the executive, which makes the law and ties the Treaty provisions into our national constitution. *In casu*, the legislature did just that through (*inter alia*) the (ambulatory) ECA 1972.

6.8 However, it follows that, in accordance with its constitutional requirements, if the UK desires to exit such a Treaty (which has been accepted by the legislature and put into effect in national law), the *unmaking* of the obligations so made requires, as a matter of logic as much as of the constitution, that the legislature first acts to repeal the national rights and obligations which it has made to give effect to the Treaty. That having been done, it is then open to the executive to take the steps required at the international level to allow the UK as a state to exit from the Treaty and no longer to be bound by it as a matter of international law. In other words, the logical and constitutional process to unmake a Treaty which has domestic effect is to *reverse* the steps taken to enter into it in the first place, *not* to repeat them in the same sequence as the Appellant (illogically and unconstitutionally) insists.

(b) The prerogative and the deprivation of individuals' rights

6.9 As authority for its claim that the prerogative *may* be used to remove individuals' rights, the Appellant's Case at §50 points to: *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 **[4/34]** and *Attorney-General v. De Keyser's Royal Hotel Ltd*. [1920] AC 508 **[1/10],** both of which cases concerned the war powers prerogative and its use, *in time of war*, to commandeer or to destroy property in defence of the realm. But in those two cases, the courts found the Crown's invasion of individual property rights to be unlawful because no compensation was paid. *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 **[3/36]** concerned the withdrawal of trade union rights from a group of civil servants for the avowed purpose of safeguarding national security, but since this was allowed for under statute (s.121(4) Employment Protection Act 1975 and s.138(4) Employment Protection (Consolidation)

Act 1978), it does not support the Appellant's claims. Mention is also made of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 **[6/54]** which concerned the Crown's authority to legislate for Crown colonies, though as Lord Mansfield noted in relation to this power in *Campbell v Hall* (1774) 1 Cowp. 204:

> "if a King (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; *but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament.*"

6.10 *R (XH) v SSHD* [2016] EWHC 1898 **[8/66]** on the Crown's power to issue or deny passports is also relied upon by the Appellant. Certainly Blackstone's "*Commentaries on the Laws of England* states (in vol. 1,137; **[27/329]**) "*that the king indeed, by his royal prerogative, may issue out his writ ne exeat regnum, and prohibit any of his subjects from going into foreign parts*". But any such or related decision (such as withdrawal of a UK passport) can be challenged by British citizens against their own UK Government as unlawful, notably insofar as incompatible with the directly effective "*right of exit*" guaranteed by Article 4 of the Citizenship Directive 2004/38/EC. So even this prerogative power is subject to fundamental rights review before the courts.[46]

6.11 In sum, none of these cases support the Appellant's claim that the prerogative may be used to invade individual rights beyond review by the national courts. In any event, none of these cases concerns the UK Government's Treaty making powers and its conduct of "*the UK's business on the international plane*" which the Appellant says is the basis upon which it proposes to invoke Article 50 TEU.

6.12 In any event, this Court needs to take care to differentiate the day to day conduct of foreign relations from the entering into binding legal obligations by the UK in the international sphere. The Appellant's claim that both are equally properly governed by unreviewable Crown prerogative is based on a model under which individuals could neither derive rights nor have obligations imposed on them by Treaties, since individual rights and duties could exist only in the realm of, and under the conditions provided by, domestic law.[47] But as we have seen, public international law is no longer simply concerned with the regulation of the law between States, and EU law certainly is not.

(c) Finnis' Natural law theory of EU law rights does not reflect the UK constitution

6.13 Lord Oliver's analysis of international law in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*: *International Tin Council* [1990] 2 AC 418 at 500C-D **[5/43],** and the justification given there for allowing the UK Government free rein in the sphere of international law does not have quite the same purchase in the case of EU law. As Lord Steyn noted *In re McKerr* [2004] 1 WLR 807, HL(NI)) at §50: "*The rationale of the dualist theory, which underpins the International Tin Council case, is that any inroad on it would risk abuses by the executive to the detriment of citizens.*"

6.14 In the present case, however, the risk of abuses by the executive to the detriment of citizens lies in the Appellant's claim to have, without prior legislative sanction, an unfettered prerogative right, immune from judicial review, to withdraw from the EU. Although having its origin in international treaties, EU law is a "*new legal order*" which is quite unlike the general system of public international law (see in that regard, *inter alia*, §§5 *et seq.* of the First Respondent's Case and *et seq.* §§31 of the Second Respondent's case). EU law forms a system of supra-national law which permeates the domestic legal

systems of all EU Member States. The Full Court of the CJEU most recently reiterated this long held position in its Opinion 2/13 "*On the proposed accession of the EU to the European Convention on Human Rights*" ECLI:EU:C:2014:2454 (at §§157-8: emphasis added; footnote in original):

> "157. As the Court of Justice has repeatedly held, *the founding treaties of the EU, unlike ordinary international treaties, established a new legal order*, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and *the subjects of which comprise not only those States but also their nationals*.[48]
>
> 158. The fact that the EU has *a new kind of legal order*, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences."

6.15 As the Full Court also observed in its *Opinion 2/13* (at §170), another essential characteristic of the EU legal order is that EU law has to be followed over and against apparently competing obligations placed upon the Member State by (non-EU) general public international law, whether customary or (non-EU) Treaty based.[49] The Appellant appears to rely on these aspects of EU law to create a wholly novel concept of Acts of Parliament as simply "*conduits*" for pre-existing international rights and obligations to flow into, and be given effect in, national law without becoming "*statutory rights*" and instead retaining their character as international law rights (see, *inter alia*, §§46 *et seq.* of the Appellant's Case). The Appellant's analysis becomes particularly strained in relation to the right to vote in the European Parliament, describing this (at §63d) as a "*contingent right which is dependent upon the existence of underlying international law rights and obligations*", a claim which is difficult to reconcile with the decision of this Court in *R (Chester) v Secretary of State for Justice/McGeoch v Lord President of the Council* [2013] UKSC 63 [2014] AC 271 **[22/274]** to reject "*the conclusion that European law recognises all EU citizens as having under European law an individual right to vote in European parliamentary elections*": per Lord Mance at §62.

6.16 This analysis is one which is suggested by the legal philosopher, Professor John Finnis (§50 of the Appellant's Case). It is wrong, however. UK constitutional law does not allow for a new "*species of rights*" (§52 of the Appellant's Case) pre-existing as *noumena* in the international sphere, prior to their realisation as *phenomena* in the domestic sphere through the "*conduit*" of the ECA which doesn't *create* rights; but instead makes the ethereal, material. Professor Finnis' view, in line with his legal philosophy[50], assumes a "*natural law theory*" of natural rights existing above, before and beyond the positive law. Such a theory is wholly inimical to our constitutional and legal traditions, whether the Hartian idea of an "ultimate rule of recognition" whose validity rests, not on some anterior or higher order rule but on the practice of courts, legislatures and officials,[51] or the Scottish tradition of popular sovereignty delegating limited power to the Crown. As Lord Mance observed in *Pham v. Home Secretary* [2015] UKSC 19 [2015] WLR 1591 at §80:

> "For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act."

(d) The UK Government is *not* the British State, nor international law the preserve of States

6.17 The conclusion of binding international Treaties in public international law is not the preserve solely of independent "*sovereign*" States. A variety of non-State bodies can enter into binding international Treaties, provided that they have been granted the competence to do so as a matter of their constituting law. Thus, supra-national organisations such as the EU - whose competences are defined and limited by the Treaties which created it - have international legal personality[52] and can accordingly enter into multi-lateral Treaties in their own right as well as in conjunction with its Member States.[53] And sub-national bodies can also conclude international treaties: see, for example, Article 32(3) of the German Basic Law (the *Grundgesetz*) which states that "*insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government*" ("*Soweit die Länder für die Gesetzgebung zuständig sind, können sie mit Zustimmung der Bundesregierung mit auswärtigen Staaten Verträge abschließen*"). One example of such an international Treaty is the 1960 Steckborn Convention **[26/314]** concluded between the *Land* of Baden-Württemberg, the Free State of Bavaria, the Republic of Austria and the Swiss Confederation on the protection of Lake Constance (the *Bodensee*) against pollution. Further, EU law itself already makes express provision in Regulation 1082/2006 for the creation by regional and local authorities within the Member States of "*European Groupings of Territorial Co-operation*" which are transnational bodies with legal personality created to facilitate territorial co-operation with other bodies in other Member States and/or with neighbouring overseas countries or territories associated with the EU (OCTs) and/or with neighbouring third countries outside the EU.

6.18 In his partly dissenting opinion in *Muršić v. Croatia* [2016] ECtHR 7334/13 (Grand Chamber, 20 October 2016), Judge Pinto de Albuquerque took from this development the idea - which is wholly consonant with the Scottish constitutional tradition outlined above - of the authority of international law, and specifically of international human rights law, as coming from below rather than as bestowed from sovereigns above. He noted at §24-5 (footnotes in the original):

> "24... In the Council of Europe's legal order, State consent is framed within the context of a cosmopolitan perspective of the universality of human rights and a dialogic understanding of the common heritage of values of European societies. 25. In the Council of Europe, the recognition rule is no more a *Lotus-type*, [54] State-centred, narrowly bilateral, exclusively voluntaristic, top-down norm-creation mechanism, but a democratic-type, individual-centred, broadly multi-lateral, purposefully consensual, bottom-up norm creation mechanism which involves European States and other European and non-European non-State actors. Distancing itself from an outdated *jus inter gentes*, the Council of Europe legal order has become a truly *jus gentium*, based on a participated, accountable and multi-level international law-making system which is not the preserve of States.[55]"

6.19 The UK Government from time to time is *not* the UK as a State. Instead, "*from the perspective of international law, the "State" encompasses all the organs of the State, the judiciary as well as the executive and legislative*".[56] The UK Government acts in the international sphere *on behalf of* the UK State. As the agent, the UK Government can only lawfully conduct itself in that sphere when acting within the limits of the competence which has been permitted it under the UK constitution. The UK Government is therefore *not* exercising its own self-standing arbitrary prerogative or power when it negotiates treaties and other international agreements. The Appellant's claim at §38 of its Claim that it

alone has "*a power to act according to discretion for the public good*" in the making, amending or withdrawing from treaties concerned with the creation of individual rights is unsustainable.

(e) The UK Government is *not* the EU legislature

6.20 Contrary to the Appellant's assertion at §59a-b of its Case, the ECA does *not* contemplate the UK Government "*using prerogative powers to 'change the law of the land'… by voting on new and EU secondary legislation at the international level*". Simply put, it is the EU legislature which creates or amends "*EU secondary legislation at the international level*", *not* the UK Government. Depending on the Treaty basis for the EU secondary legislation at issue, the EU legislature may be the Council alone, the Council and the European Parliament jointly or in participation with each other, or the Commission in the case of with detailed implementing regulations. The Council acts by qualified majority voting, except where the Treaties provide otherwise: Article 16(3) TEU. What this means is that the UK Government may in Council vote against the adoption of a measure but that measure will still become EU law.

6.21 This is indeed what happened in the case of the Working Time Directive: see Case C-84/94 *United Kingdom v. Council* ECLI:EU:C:1996:431 [1997] ICR 744. The Working Time Directive 93/104/EC was implemented into UK law (by the Working Time Regulations (SI 1998/1883)) despite the UK Government's objections to it at an international level, because the UK Parliament determined that UK should comply with the requirements of EU membership. The Crown has no prerogative here. It is acting as part of an international legislature, as Parliament has permitted it to do.

(f) Summary

6.22 The Appellant's Case depends on a series of assertions or assumptions, none of which, on examination, are well founded. The making of Treaties is different from withdrawing from them. International law not simply the preserve of States. The foreign affairs prerogative has not, on examination, been used lawfully to deprive individuals of their rights in the domestic sphere. Natural law theory does not reflect the UK constitution. The UK Government is *not* the British State, nor is the UK Government the EU legislature. Once these weaknesses in the Appellant's Case are exposed, their arguments are seen to be unconstitutional and should therefore be rejected by this court.

7. CONCLUSION

7.1 Since, in accord with Scottish constitutional law and tradition (supported by the EU principles of democracy and equality and the ECHR principles of legality and fairness):

(a) UK constitutional law requires the Appellant to be able to identify the source of grant of authority by the people (through the UK legislatures) to notify the EU of the UK's withdrawal from the EU; and that he is not able so to do; and (in any event)

(b) Use of the Crown prerogative in the manner proposed by the Appellant would frustrate and render as naught the provisions of the Scotland Act 1998 anent EU law, and separately its provisions concerning modifications to the legislative competence of the Scottish Parliament

the Appeal must be dismissed, and the decision of the Divisional Court upheld.

Aidan O'NEILL QC **Peter SELLAR, Advocate**

[1] In 1989, on the 300th anniversary of the Claim of Right 1689, the self-styled "Scottish Constitutional Convention", a pressure group of Labour and Liberal politicians and sympathetic academics and other representatives of civil society seeking to further the cause of devolution to Scotland in the latter days of the Thatcher administration, produced a new Claim of Right 1989 which read: "*We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs, and do hereby declare and pledge that in all our actions and deliberations their interests shall be paramount. We further declare and pledge that our actions and deliberations shall be directed to the following ends: to agree a scheme for an Assembly or Parliament for Scotland; to mobilise Scottish opinion and ensure the approval of the Scottish people for that scheme; and to assert the right of the Scottish people to secure implementation of that scheme*."

[2] Conrad Russell, *James VI and I and his English Parliaments* (OUP, 2011), Ch. VII, "The Union", pps. 126-7 **[505].**

[3] See *Jackson v. Attorney General* [2006] 1 AC 262 per Lord Hope at page 303-4 §§104, 106 **[7/60]**: "*Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified… [E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: Thoughts on the Scottish Union, pp 252-253, quoted by Lord President Cooper in MacCormick v. Lord Advocate, 1953 SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality*."

[4] In *MacCormick v. Lord Advocate*, 1953 SC 39 IH **[5/45]**, Lord President Cooper observed: "*The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions*."

[5] See Lord Sumption, "*Magna Carta* then and now" (9 March 2015) https://www.supremecourt.uk/docs/speech-150309.pdf accessed 23 November 2016: "*Magna Carta as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke… Coke transformed Magna Carta from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it. … [W]hen we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not*."

Sed contra Lord Neuberger "*Magna Carta* and the Holy Grail" 12 May 2015 https://www.supremecourt.uk/docs/speech-150512.pdf accessed 23 November 2016 at § 26: "*There can be little doubt that the 'lawyer's view' of Magna Carta is partly mythical. Of course, there is nothing wrong with myth. As the late Tom Bingham put it in The Rule of Law (2010): The significance of Magna Carta lay not*

only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important that the actuality."

[6] The Declaration of Arbroath 1320 makes two important constitutional claims about kingship and popular sovereignty in Scotland. First, it notes, that "*it was the due consent and assent of us all have made Robert Bruce our Prince and King*". Secondly, it asserts that the continued kingship of Robert Bruce was conditional on his maintaining the integrity and independence of the Scottish nation, for *"[I]f he should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours and make some other man, who was well able to defend us, our King*".

These constitutional claims are prefigured in the 1317 CE *Remonstrance of the Irish Princes* also sent to Pope John XXII which takes a similarly negative view of the actions of the English Crown in Ireland, in noting: "W*e call to our help and assistance Edward Bruce, illustrious earl of Carrick, brother of Robert by the grace of God most illustrious king of the Scots, who is sprung from our noblest ancestors. And as it is free to anyone to renounce his right and transfer it to another, all the right which is publicly known to pertain to us in the said kingdom as its true heirs, we have given and granted to him by our letters patent, and in order that he may do therein judgment and justice and equity which through default of the prince Edward II the King of England have utterly failed therein, we have unanimously established and set Edward Bruce up as our king and lord in our kingdom aforesaid*".

[7] See *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 **[4/31]** *per* Lord Hope at §50: "*The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion. For Lord Bingham, writing extra-judicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not open to them to change it: The Rule of Law (2010), p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, "Who are the masters Now?" (6 April 2011), said at § 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in R (Jackson) v Attorney General [2005] UKHL 56 [2006] 1 AC 262 §71, the warning that Lord Hailsham of St Marylebone gave in The Dilemma of Democracy (1978), p 126 about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in § 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish*".

See too *Moohan and others v. Scottish Government* [2014] UKSC 67 per Lord Hodge at §35 [**22/270]**: "*I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful. The existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament*."

[8] See e.g. *Coulson v HM Advocate* [2015] HCJAC 49, 2015 SLT 438 (Lords Menzies and Brodie and Lady Clark of Calton) at §§20-1.

[9] *See e.g. Pepper v Hart* [1993] AC 593; *R v Chaytor* [2011] 1 AC 684; *Makudi v Baron Triesman of Tottenham* [2014] QB 839.

[10] See *Lyal v Henderson* 1916 SC (HL) 167 per Lord Kinnear at pps.181–182: "*[A]lthough there was at one time a somewhat violent controversy as to the existence of the right to appeal from the Court of Session to the Scottish Parliament, it was at an end before the Union; it had been finally established that an appeal lay to the Scottish Parliament, and the right so to appeal is one of the rights maintained in the Claim of Right of 1689. Then it is quite as clearly established that the right to appeal to the Scottish Parliament had been transferred to the Parliament of Great Britain after the Union. That the Parliament of Great Britain exercises its appellate jurisdiction through this House is again a matter as to the history of which it is unnecessary to inquire; it is absolutely established by a persistent practice of centuries. I think, further, that the series of enactments by which appeals from Scotland are regulated proceed upon the same assumption. They do not*

confer a right of appeal as if any intervention of Parliament were necessary for that purpose, but, assuming that the aggrieved suitor may appeal to this House de jure, they interpose to regulate or restrict that right in particular circumstances.

[11] See *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46 **[4/31]** *per* Lord Reed at §§152-3: *"152… Lord Steyn said in R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539 at p 591: 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.' 153 The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in HM Advocate v R [2004] 1 AC 462, §121, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In Robinson v Secretary of State for Northern Ireland [2002] NI 390, §11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted 'bearing in mind the values which the constitutional provisions are intended to embody'. That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law..."*

[12] For the degree to which Buchanan's political thinking is indebted to the European intellectual tradition see Francis Oakley "On the Road from Constance to 1688: The Political Thought of John Major and George Buchanan" (1962) 1 *Journal of British Studies* 1-31 **[28/349]**.

[13] Roger Mason and Martin Smith *A Dialogue on the law of kingship among the Scots – a critical edition and translation of George Buchanan's De iure regni apud Scotos dialogus*" (1567) (Ashgate: Aldershot, 2004) at pps. 55, 103, 132.

[14] William Ferguson *The identity of the Scottish Nation: an historic quest* (Edinburgh: Edinburgh University Press, 1998) at p.42: *"[T]he Declaration [of Arbroath]... has had a chequered history. Known only in some manuscript versions of the Scottichronicon it became lost to sight. It was for example, unknown to George Buchanan, whose political theory it would have confirmed. It did not surface again until the late seventeenth century, when it was first printed by Sir George Mackenzie of Rosehaugh, the eminent lawyer and antiquarian. Not surprisingly an English translation of the declaration was published at the Revolution of 1688 to support those who opposed the divine right theory of kingship*."

[15] Among statutes repealed by, because inconsistent with the 1703 Act, was the Prerogative (Scotland) Act 1661 where the Scottish Restoration Parliament had declared: "*That the power of arms and making of peace and war or treaties and Leagues with foreign Princes or Estates Doth properly reside in the Kings Majesty his heirs and Successors And that it was and is their undoubted right and theirs alone to have the power of raising in arms the subjects of this Kingdome and of the commanding ordering and disbanding or otherwise disposing thereof and of all strengths forts or Garrisons within the same as they shall think fit The subjects always being free of the provisions and maintenance of these forts and armies unless the same be concluded in Parliament or Convention of estates*."

[16] Reverend Dr. Marjory MacLean *The Crown Rights of the Redeemer: the Chalmers Lectures of 2007* (Saint Andrew Press, Edinburgh, 2009) at p.198.

[17] The legitimacy of these actions and claims of the 1689 Scottish Parliament were was expressly confirmed by subsequent Scottish statutes, notably in the Scottish Act of 16 September 1703 which provides: "*Our sovereign lady, with advice and consent of the estates of parliament, ratifies, approves and perpetually confirms the first act of King William and Queen Mary's parliament, dated 5 June 1689, entitled act declaring the meeting of the estates to be a parliament, and of new enacts and declares that the three estates then met together the said 5 June 1689, consisting of noblemen, barons and burghs, were a lawful and free parliament, and it is declared that it shall be high treason for any person to disown, quarrel or impugn the dignity and authority of the said parliament. And further, the queen's majesty, with consent foresaid, statutes and declares that it shall be high treason in any of the subjects of this kingdom to quarrel, impugn or endeavour by writing, malicious and advised speaking, or other open act or deed, to alter or innovate the Claim of Right or any article thereof."*

[18] Conrad Russell, *James VI and I and his English Parliaments* (OUP, 2011), Ch. VIII, *"Religion and Political Ideas"*, p.143 **[505]**.

[19] The first Supremacy Act 1534 explicitly tied the office of head of the English church to the English imperial crown, stating that the king and his successors "*shall be taken, accepted and reputed the only supreme head in earth of the Church of England called Anglicana Ecclesia… annexed and united to the imperial crown of this realm*".

This position was confirmed in *R v Dibdin* [1910] P 57 per Darling J at 78 **[23/288]**:"[T]*he Church of England [is] a reformed Church acknowledging the King as being in all causes, ecclesiastical as well as civil, within his dominions supreme, and the King rules by and in accordance with statutes of the realm*."

[20] The Act of Settlement 1701 originally provided that: "*all Papists and persons marrying Papists, shall be excluded from and forever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof"*.

This provision was passed against a background that the post-1603 Stuart kings (James VI and I, Charles, I, Charles II and James VII and II) all had Catholic mothers and all had Catholic wives. By contrast the two reigning Stuart queens (Mary II and Anne) both married Protestants and their mother was Protestant. With effect from 26 March 2015, the prohibition against any member of the Royal family succeeding to, or holding, the Crown for "*marrying a person of the Roman Catholic faith*" was repealed with the bringing into force of section 2 of the Succession to the Crown Act 2013, but the prohibition against "*Papists*" inheriting the throne remains.

[21] Article XXV of the Union with England Act 1707 **[12/107]**.

[22] Article XXV of the Union with Scotland Act 1706 **[12/107]**.

[23] Article XVIII of the 1707 Union **[12/107]** provides: "*That the Laws concerning Regulation of Trade, Customs and such Excises to which Scotland is by virtue of this Treaty to be liable be the same in Scotland from and after the Union as in England and that all other Laws in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain With this difference betwixt the Laws concerning public Right, Policy and Civil Government and those which concern private Right That the Laws which concern public Right Policy and Civil Government may be made the same throughout the whole United Kingdom but that no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland*."

[24] "Note on the Power of the English Courts to Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and On the Position of Scotland in Relation to that Power" (1896) 8 *Juridical Review* 157 at p.158 **[502]**.

[25] Section 4 of the Statute of Westminster 1931 provides that:*"No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof".*

[26] *Walton v. Scottish Ministers* [2012] UKSC 44 [2013] PTSR 51 per Lord Reed at §80.

[27] Further detail of the relationship between EU law and the devolved institutions can be found in a Memorandum of Understanding between the UK Government and the devolved authorities and in supplementary agreements thereto, in particular the March 2010 "*Concordat on co-ordination of European Union policy issues*" as referred to by the Lord Advocate at §§33 - 34 of his intervention.

[28] Regulation 1782/2003/EC establishing common rules for direct support schemes under the common agricultural policy, and establishing certain support schemes for farmers.

[29] See in this regard Joined Case 185/78-204/78 *Firma J van dem en Zonen* [1979] ECR 2345 at §10; Case C-177/94 *Perfilli* [1996] ECR I-161 at §17; and Case *Schempp v Finanzamt Munchen V* [2005] ECR I-6421 at §34.

[30] Koen Lenaerts and Nathan Cambien "Regions and the European Court: giving shape to the regional dimension of the Member States" (2010) *European Law Review* 609 at pps.633-4.

[31] Title VI of the EU Charter on “Justice” comprises: Art 47 CFR right to an effective remedy and to a fair trial; Art 48 CFR presumption of innocence and right of defence; Art 49 CFR principles of legality and proportionality of criminal offences and penalties; Art 50 CFR right not to be tried or punished twice in criminal proceedings for the same criminal offence.

[32] Title II of the EU Charter on “Freedoms” comprises: Art 6 CFR right to liberty and security; Art 7 CFR respect for private and family life; Art 8 CFR protection of personal data concerning the individual; Art 9 CFR right to marry and right to found a family; Art 10 CFR freedom of thought, conscience and religion; Art 11 CFR freedom of expression and information; Art 12 CFR freedom of assembly and of association; Art 13 CFR academic freedom in the arts and sciences; Art 14 CFR right to education and access to vocational and continuing training; Art 15 CFR freedom to choose an occupation and the right of an EU citizen and duly authorised non-EU nationals to seek and engage in work in any Member State; Art 16 CFR freedom to conduct a business; Art 17 CFR right to property; Art 18 CFR right to asylum in accordance with the Geneva Refugee Convention and the European Treaties; Art 19 CFR protection against collective expulsions or individual removal, expulsion or extradition where there is a serious risk of the individual being subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment.

[33] Title I of the EU Charter on “Dignity” comprises: Art 1 CFR respect for human dignity as 'inviolable'; Art 2 CFR right to life, including an absolute prohibition on the death penalty or executions; Art 3 CFR right to the integrity of the person, incorporating the principle of free and informed consent to medical procedures, and absolute prohibition on “eugenic practices”, on “making the human body and its parts as such a source of financial gain” and on “reproductive cloning of human beings”; Art 4 CFR prohibition of torture and inhuman or degrading treatment or punishment; Art 5 CFR prohibition of slavery and forced labour and human trafficking.

[34] Title III of the EU Charter on “Equality” comprises: Art 20 CFR formal equality of all before the law; Art 21 CFR prohibition against discrimination 'based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'; Art 22 CFR respect for cultural, religious and linguistic diversity; Art 23 CFR substantive equality in the workplace between women and men; Art 24 CFR the rights of the child to protection and care as is necessary for their well-being; Art 25 CFR the rights of the elderly to lead a life of dignity and independence, and to participate in social and cultural life; Art 26 CFR right of persons with disabilities 'to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.'

[35] Title IV of the EU Charter on “Solidarity” comprises: Art 27 CFR workers’ right to information and consultation within their employment; Art 28 CFR workers’ and employers’ right of collective bargaining and action, including strike action; Art 29 CFR workers’ right of access to placement services; Art 30 CFR workers’ right to protection in the event of unjustified dismissal; Art 31 CFR workers’ right to fair and just working conditions, having regard to their health, safety and dignity, including, specifically, the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave; Art 32 CFR prohibition of child labour and the protection of young people at work; Art 33 CFR right to protection from dismissal from employment for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child; Art 34 CFR right to social security and social assistance in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment; and the right to social and housing assistance for the poor; Art 35 CFR right of access to preventive health care and to benefit from medical treatment; Art 36 CFR right of access to services of general economic interest; Art 37 CFR right to a high level of environmental protection in accordance with the principle of sustainable development; and Art 38 CFR right to a high level of consumer protection.

[36] Title V of the EU Charter on “Citizen’s Rights” comprises: Art 39 CFR right to vote and to stand as a candidate at elections to the European Parliament; Art 40 CFR right to vote and to stand as a candidate in Member States’ municipal (local) elections; Art 41 CFR right to have one's affairs handled impartially, fairly and within a reasonable time by the EU; Art 42 CFR right of access to EU documentation; Art 43 CFR right to access the European Ombudsman for alleged EU maladministration; Art 44 CFR right to petition the European Parliament; Art 45 CFR right to freedom of movement and of residence with the EU Member States' territories; Art 46 CFR right to diplomatic and consular protection from EU Member States of which the citizen is not a national.

[37] See *Demir and Baykara v. Turkey* (2009) 48 EHRR 54 at §140 **[25/302]**.

[38] See Article 20(2)(b) TFEU of the FEU Treaty and articles 39 and 40 of the Charter of Fundamental Rights of the European Union (CFR **[14/149]** as discussed in *R (Chester) v Secretary of State for Justice/McGeoch v Lord President of the Council* [2013] UKSC 63 [2014] AC 271 **[22/274]** and in C-6013 *Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648 [2016] 1 WLR 1223.

[39] See *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61 [2009] 1 AC 453 per Lord Mance at §152 **[6/54]**: *"152 The common law position relating to aliens differs significantly. 'One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s 231; book 2, s 125': Attorney General for Canada v Cain [1906] AC 542, 546; and see Chalmers Opinions of Eminent Lawyers, vol 1, p 4 and R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74, 111F-G, where Lord Scarman proceeded on the basis that 'an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode'."*

[40] In *Johnstone v. Pedlar* [1921] 2 AC 262 Lord Phillimore at pages 295-6 summarised the legal position at common law of "*the citizen or subject of a friendly State residing in this country*": "*As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character from his State. If his State is at war with ours his individual friendliness avails him nothing unless it enures to procure for him the special favour of licence from the King. If his State is in amity with ours he is considered an alien ami even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his individual hostility disentitle, him to the rights conferred by law upon an alien ami, once he has entered this realm with permission from the King. The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in Musgrove v. Chun Teeong Toy [1891] AC 272; and that permission may in some respects be conditioned. Every State may, according to international law, make special laws regulating the acts and property of aliens within the realm. By the common law of England and Ireland an alien could not hold real estate, not even chattels real, for more than a short term. The droit d'aubaine existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts. But an alien ami is never exlex, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien ami, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalised subject*."

[41] See *Smith v. Scott*, 2007 SC 345, RAC/IH where the Registration Appeal Court in Scotland had declared the blanket disenfranchisement of prisoners from to the electorate to the Scottish Parliament to be incompatible with the Convention right to vote under A3P1 ECHR.

[42] See James VI and I *The Trew Law of Free Monarchies or The Reciprock and mutuall duetie betwixt a free King and his naturall Subjects* (1598) in which he elaborates his fundamental thesis that "*The King is above the law, as both the author and giver of strength thereto*" by claiming that the Crown may use its Royal Prerogative even to suspend Acts of Parliament, noting: "*According to these fundamental laws already alleged, we daily see that in the Parliament (which is nothing else but the head court of the King and his Vassals) the laws are but craved by his subjects, and only made by him at their rogation and with their advice: for albeit the king make daily statutes and ordinances, enjoining such pains thereto as he thinks meet, without any advice of parliament or estates, yet it lies in the power of no parliament to make any kind of law or statute, without his sceptre [that is, Royal authority] be to it, for giving it the force of a Law.… [But] where the King sees the law doubtsome or rigorous, he may interpret or mitigate the same, lest otherwise summum jus be summa injuria [the greatest right be the greatest wrong]: and therefore general laws made publicly in parliament may upon known respects to the King by his authority be mitigated, and suspended upon causes only known to him. And likewise as I have said a good king will frame all his actions to be according to the law; yet he is not bound thereto but of his good will, and for good example-giving to his subjects*."

[43] See, *inter alia*, the 1925 Advisory Opinion of the Permanent Court of International Justice on "*The Exchange of Greek and Turkish Populations*", *PCIJ Reports Series B* No 10 at 20: "*[There exists] a principle which is self-evident according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken*."

[44] See Case C-366/10 *R (Air Transport Association) v Energy Secretary* [2011] ECR I-13755 [2013] PTSR 209, CJEU (Grand Chamber) at §§75-77: *"[B]y adopting the Kyoto Protocol the parties thereto sought to set objectives for reducing greenhouse gas emissions and undertook to adopt the measures necessary in order to attain those objectives. The Protocol allows certain parties thereto, which are undergoing the process of transition to a market economy, a certain degree of flexibility in the implementation of their commitments. Furthermore, first, the Protocol allows certain parties to meet their reduction commitments collectively. Second, the Conference of the Parties, established by the Framework Convention, is responsible for approving appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol. 76 It is thus clear that, even though the Kyoto Protocol imposes quantified greenhouse gas reduction commitments with regard to the commitment period corresponding to the years 2008 to 2012, the parties to the Protocol may comply with their obligations in the manner and at the speed on which they agree. 77 In particular, article 2(2) of the Kyoto Protocol, mentioned by the referring court, provides that the parties thereto are to pursue limitation or reduction of emissions of certain greenhouse gases from aviation bunker fuels, working through the ICAO. Thus, that provision, as regards its content, cannot in any event be considered to be unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings…"*

[45] *Operation Dismantle Inc. v Canada* [1985] 1 SCR 441 **[25/304]** per Wilson J at 472: *"[I]f the court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the court would have to decline. It cannot substitute its opinion for that of the executive. Because the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the court should in the same way refuse to involve itself. However, I think that would be to miss the point, to fail to focus on the question before us. The question before it is not whether the government's defence policy is sound but whether or not it violates the appellant's rights and freedoms under Section 7 of the Canadian Charter of Rights and Freedoms. This is a totally different question. I do not think that there can be any doubt that this is a question for the courts…. [I]t seems to me that the legislature has assigned the courts as a constitutional responsibility the task of determining whether or not the decision to permit the testing of cruise missiles violates the appellant's rights under the charter. … It is therefore, in my view not only appropriate that we decide the matter; it is our constitutional obligation to do so.*"

[46] *MR v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin) per Ouseley J at 15-17 confirming that the cancellation of a passport restricts travel, and engages EU law.

[47] See e.g. *Walker v. Baird* [1892] AC 491 **[9/88]**. In that case the officers of the Crown had, with the authority of the Government, seized a lobster factory in Newfoundland belonging to British subjects. An action was brought in the Courts of Newfoundland against the officers engaged. The Superior Court of Newfoundland held that, in an action of this description, in which the plaintiffs are British subjects, for a trespass within British territory in time of peace, it was no answer to say in exclusion of the jurisdiction of the municipal Courts that the trespass was an act of State. An appeal to His Majesty in Council was dismissed. Lord Herschell said that the suggestion that these acts could be justified as acts-of State was wholly untenable.

[48] See, in particular, judgments in *Van Gend & Loos*, 26/62, EU:C:1963:1, p.12 **[2/24]**; *Costa v Enel*, 6/64, EU:C:1964:66, p.593 **[10/96]**, and Opinion 1/09, EU:C:2011:123, §65.

[49] Opinion 2/13 "*On the proposed accession of the EU to the European Convention on Human Rights*" ECLI:EU:C:2014:2454 (at § 170): "*The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in Internationale Handelsgesellschaft, EU:C:1970:114, paragraph 4, and Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraphs 281 to 285)*".

[50] See John Finnis *Natural Law and Natural Rights* (Oxford, OUP, 1980).

[51] See *R (Jackson) v Attorney General* [2006] 1 AC 262 **[7/59]** per Lord Hope at §§125-6: *"125 …In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey [The Law of the Constitution, 10th ed. (1959)] at p 3, likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. … 126 As Professor Hart, The Concept of Law, p 108, indicates, the categories which the law uses to identify what is law in these circumstances are too crude. There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling 'law' and for applying it accordingly. It must never be forgotten that this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve."*

[52] Article 47 TEU states that: "*The Union shall have legal personality*"**.**

[53] Articles 216 to 219 TFEU **[13/137 in part]** accord a general competence to, and set out the procedures for, the EU to conclude international agreements – binding on the institutions of the Union and on its Member States – with one or more third countries or international organisations, "*in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*".

See Case C-327/91 *France v Commission* [1994] ECR I-3641 at §28 and Case C-263/14 *European Parliament and Commission v. Council of the European Union* ECLI:EU:C:2016:435 in which the CJEU Grand Chamber annulled (prospectively) the EU-Tanzania international agreement under the CFSP anti-piracy Operation ATALANTA.

[54] *Lotus Judgment* No. 9, 1927, PCIJ, Series A, No. 10, at p.18: "*The rules of law binding upon States ... emanate from their own free will* ..."

[55] This is not a new claim (see on the role of other subjects in international law, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: ICJ Reports* 1949, p.178, and also Lauterpacht, "*The Subjects of International law*", in Lauterpacht (ed.), *International Law, The Collected Papers of Hersch Lauterpacht*, *volume I: The General Works*, Cambridge, CUP, 1970, §48).

[56] R. Higgins "*The Relationship between International and Regional Humanitarian law and Domestic Law*" (1992) 18 *CLB* 1268 at 1268 **[28/352].**