

## ***Brexit and the Balance of Our Constitution***

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The Lord Chief Justice, the Master of the Rolls, and Lord Justice Sales have ruled that the Crown's prerogative of conducting international relations and making and unmaking treaties does not authorize our Government to notify the European Council, pursuant to Art. 50 of the Treaty of European Union, of the United Kingdom's decision and intent to withdraw from the European Union. When inviting me to give this Sir Thomas More Lecture, the Inn suggested I might be willing to reflect on those issues. It is a privilege to have the opportunity to do so in this Honourable Society and this distinguished series of lectures under a name of such far-reaching significance.

### **The Divisional Court Judgment in *Miller***

The primary basis of the Divisional Court's powerfully written and surprising judgment ("the Judgment") is that in enacting the European Communities Act 1972, Parliament "intended to legislate by that Act so as to introduce EU law into domestic law...in such a way that this could not be undone by exercise of Crown prerogative power" [92].

The essential "background constitutional principle", says the Judgment [84], is "that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers". This principle "is the product of an especially strong constitutional tradition in the United Kingdom (and the democracies which follow that tradition...). It evolved through the long struggle...to assert parliamentary sovereignty and constrain the Crown's prerogative powers." [86] And again [87]: "Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again." "By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights." [32]

In giving warrant for the principles of our constitutional tradition which it thus recalls, the Judgment gives pride of place [27] to what Chief Justice Coke and the senior judges said to the King and Councillors in *The Case of Proclamations* (1610): “The King has no prerogative but that which the law of the land allows him, [and] by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”.

### ***The Case of Proclamations* (1610)**

The low-water mark of the Government’s written argument in the Supreme Court appeal is its treatment of the *Case of Proclamations*. It says that the case stands only “for the uncontroversial proposition that the Government cannot purport to countermand laws passed by Parliament”, and cites with approval the remark that Coke’s statements were wider than necessary. Well, they were. But even so, they should be accepted as genuine principles of our Constitution. As I shall suggest, they are entirely compatible with the real case for the Government in this appeal. And it is mistaken to say that the *Case of Proclamations* rules only that the executive cannot countermand statutes. Neither of the Proclamations about which James I asked Coke CJ’s opinion involved any countermanding of statute; they each purported to override common law rights of subjects, in one instance the right to erect new buildings in London, in the other the right to make starch out of wheat. Coke and his fellow senior judges declared such proclamations – or any other prerogative acts --incapable of changing *common law*, *statutes* or even the *customs* of the realm (understood, where these customs conferred or defined legal rights of subjects). He rested that declaration – which was correct then and is just as correct now -- on four historic authorities, of which I shall mention only the two most important, the Statute of Proclamations 1539 (from which we get the term “Henry VIII clause”), and the great treatise on the merits of the constitutional laws of England by one of Lincoln’s Inn’s most distinguished members (if I may say so), Sir John Fortescue, Chief Justice of King’s Bench for 18 years under Henry VI.

Fortescue died in 1479, the year before Thomas More was born. He wrote the treatise cited by Coke, *De Laudibus Legum Angliae* (On the Merits of England’s Laws), early in the last decade of his life, though it first saw print only in 1543, eight years after More’s execution. It says on its first page that its leading categories

come from Thomas Aquinas, who 200 years earlier had distinguished *regal* and *political* as the two leading types of limited, non-despotic governance, “political” being governance specifically limited by more or less specific laws – as we should now say, constitutional government within the frame of constitutional law. The chapter cited by Coke says (again citing Aquinas) that because our constitution is “political”, the Crown cannot “make any change or alteration in the laws of the realm without the consent of the subject”, that is, without the consent of Parliament. Later in the treatise (c. 34), Fortescue introduces the novel category “regal political government” to capture the special characteristic of English governance. We might say this characteristic is its special *balance*; he prefers the old word which Aquinas took from Greco-Roman predecessors, “mixed”. In discussing the benefits of that mixed character, Fortescue again teaches that the Crown “cannot alter the laws, or make new ones, without the express consent of the whole kingdom in Parliament assembled”. The treatise’s only reference to foreign affairs is glancing, no more than the reminder that we need a strong Crown – we might say, a strong executive, the Queen and her ministers – to protect us against the emergencies of invasion from *abroad* (or violence from within).

Coke’s other leading authority was the Statute (or: Act) of Proclamations 1539, which has since been mythologised to give us the modern parliamentary and legal term “Henry VIII clause”, signifying a statutory provision (a clause in an Act of Parliament) authorizing the Government to repeal or amend provisions of that statute or indeed, sometimes, of other statutes. The mythology is that the Statute of 1539 ascribed to royal proclamations in general the force of statutes. And indeed the statement that proclamations “shall be obeyed, observed, and kept *as though they were made by Act of Parliament*” does occur in sec. 1. But that is all subject to a premise and a proviso.

The *premise*, earlier in the same clause, is that the proclamations in question are made not by the Crown’s prerogative – that is, by an inherent constitutional authority, not based on statute -- but “by authority of this Act”, this statute. The *proviso* is what gives Coke the constitutional principle. As Lord Judge, lately Lord Chief Justice, demonstrated last month in an illuminating Oxford Law Faculty lecture on Henry VIII clauses, the force that the 1539 Act gives to proclamations does *not* (says the proviso) authorise them to infringe, break or subvert “any *Acts, common*

*laws standing at this present time in strength and force, nor yet any lawful or laudable customs of this realm*", so that "every [subject]... shall stand and be in the same state and condition, to every respect and purpose, as if this Act... had never been... made ..., except such persons which shall offend any proclamation to be made by the king... concerning any kind of heresies ...". As Lord Judge highlighted, a modern Henry VIII clause gives much more authority to Her Majesty's ministers than Henry VIII's supposedly tame Parliament either attributed to or conferred on him or them in the Statute of Proclamations, leaving aside royal power to repress heresy, an exception which lapsed with the Statute's repeal in 1547.

Having been nine years Queen Elizabeth's Attorney-General, Chief Justice Coke knew how far her governance had departed from the principle that proclamations cannot change the law of the land or, without statutory authority, affect the legal rights of subjects. So, relatively early in the reign of the half-foreign King James (whose published writings celebrated *absolute*, regal, non-mixed Crown governance subject only to God and not to the law), Coke summoned up the courage to restore the position asserted by, it seems,<sup>1</sup> both Lords and Commons 70 years earlier when they amended Cromwell's Bill for the Act of Proclamations. The position was at least implicit in Fortescue's exposition of the pre-Tudor constitution, and throughout the *De Laudibus* Fortescue's alter ego keeps reminding his princely young interlocutor that monarchs are always pushing against the legal limitations imposed on them by this constitution – the constitution which in its legal essentials is ours. It took a civil war, partly about what is heresy and partly about what is Crown authority, to vindicate the principles which the Judgment rightly warrants by quotations from the *Case of Proclamations* (which stands a little before that civil war's beginning) and from the Bill of Rights 1689 (which states the war's conclusory outcome and settlement: no royal or executive suspension of or dispensation from the law "without consent of Parliament").

### **History and Empire: Replicating our Constitutional Principles**

But there are wider horizons. Book One of Thomas More's *Utopia* (first published exactly 500 years ago) tells us in its opening line that Henry VIII sent More to Antwerp to negotiate a trade treaty with the envoys of Charles V sovereign

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<sup>1</sup> See G.R. Elton, "Henry VIII's Act of Proclamations", *English Historical Review* 75 (1960) 208-22.

ruler of the Low countries and soon to be ruler of the two great European empires.. Still on the first page, the negotiations pause while Charles's envoys go back to base for instructions: base for them is of course Brussels (*plus ça change...*). Coming out of mass in St Mary's Antwerp cathedral, More meets up by chance with (and right here begins his great fiction) the old seaman Raphael Hythloday (who is going to tell him and us all about the New Island of Utopia). This Hythloday has been on three of the four voyages of the real Americus Vesputius (Amerigo Vespuccio), about which the English and European public knew from the best seller *Mundus Novus* of 1502-3 and from the *Four Voyages of Amerigo Vespucci* (1507). America, made known to us Europeans in 1592 (two years after this Old Hall's construction and two years before More began studying law right here in this room), is now made known to be not Asia (as Columbus supposed) but *novus mundus*, the new world. More makes his creation, Raphael Hythloday, tell how he persuaded Vespucci to leave him as far from Europe as he could, since "the way to heaven is the same from all places" and he would happily leave his bones far from home, since "heaven shelters those who have no grave". But in the event, he says, he came back, circuitously, via Ceylon and south India. For the next 450 years and more, this new opening of European and English aspirations to live both here and out there in the vast world overseas, the opening imagined by More, will help shape many of the actual realities of our political, legislative, executive and judicial actions.

One of its monuments is the Judicial Committee of the Privy Council, which now sits in one of the Supreme Court building's three courtrooms on Parliament Square. Its origin may be traced to the system of appeals to the Privy Council from the Channel Islands, regularised in the middle of Elizabeth's reign. The Long Parliament in July 1641 passed an Act which abolished the Privy Council tribunal known as the Star Chamber and (by s. 2) all similar executive Courts "within this realm of England and dominion of Wales", and then in s. 3 extended the doctrine of the *Case of Proclamations* (and its antecedents) by enacting that "neither His Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority...to examine, draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this Kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." But by "the ordinary course of the law", the

Privy Council had for generations judicially heard and disposed of appeals from the courts of the Channel Islands, whose people are subjects of our monarch but not of the realm of England or even of the United Kingdom. So that jurisdiction survived Star Chamber's abolition and the republican Commonwealth or Interregnum. By the 1680s, the King's Privy Council's prerogative judicial powers were accepted as constitutionally applicable to all the overseas territories in which the Crown acquired jurisdiction. Regulated partly by statute of 1833, this prerogative jurisdiction survives to this day, and you can see it being exercised (mainly by our Supreme Court Justices), sometimes under that very description, prerogative, in the Judicial Committee's online videos.

Judgments of the Judicial Committee (Privy Council, for short) can and do illuminate our constitution. Those who went out to settle in the Crown's overseas territories carried with them, as principles, our mixed constitution and its constitutional balance. These principles, *almost* all of them, have been written down in the Constitutions adopted by the people of these territories before or as they became wholly self-governing and independent countries, in some instances retaining our royal sovereign as theirs. More Constitutions have been written within two miles of these Inns than in any other city in the world, all of them seeking to articulate that balance, popularly known as a Westminster form of governance. Spelled out in these written Constitutions, as binding constitutional rules, are various fundamentals which here in England are still scattered about in ordinary statutes, rules of Parliamentary procedure, or conventions. And which of these provisions of the written Constitution are justiciable in and enforceable by the courts and which are not is also spelled out.

### **An example: the Constitution of The Bahamas 1973**

Take the Bahamas, "rediscovered" (as its Constitution recites) in 1492 and first settled by people directly or indirectly from our country about a dozen years after the *Case of Proclamations*. The independence Constitution of The Bahamas (still in force) was agreed on the Strand near here, in Marlborough House, a few weeks after the enactment of the European Communities Act 1972, and was enacted by an Order in Council (SI 1973/1080) made in connection with but *not* under our

Parliament's Bahamas Independence Act of July 1973.<sup>2</sup> The Constitution is enacted by and scheduled to an Order in Council. It sets out familiar principles. The legislative power of the Bahamas is vested in its Parliament. The executive power is vested in Her Majesty, exercisable by the Governor-General and for the most part also by ministers appointed on the advice of the Prime Minister, the person appointed as the one most likely, in the Governor-General's judgment, to command the support of a majority of the lower House. The judicial power is vested in the courts of the Bahamas, with final appeal to the Judicial Committee of the Privy Council sitting in London but under Bahamian law and as a court of the Bahamas, not of the United Kingdom. All state moneys and revenues must be paid into one Consolidated Fund, and nothing can be paid out of it save on a minister's warrant, being money authorized for that purpose by an Act of the Bahamian Parliament. There can be no Parliamentary proceedings about charging the Consolidated Fund for any purpose without Cabinet's recommendation. And in all save eight special cases such as appointment of a Prime Minister, the Governor General must act only on ministerial advice, but the question what advice he acted on, like his action in those special cases, cannot be examined by any court.

### **Treaty making and unmaking by prerogative: a background constitutional principle**

One important element in this dualist system was so well understood that it was not written down in any of the scores of constitutions settled in London between 1963 and today, and so has occasionally had to be articulated judicially by the Privy Council. I say "well understood" because there is something that it is important to have in mind when considering what those who drafted and voted for the European Communities Act 1972 intended (and knew they were doing). The Empire being dismantled in the decade before and the decade after 1972 had been governed from end to end, both here and in the territories overseas, with scrupulous attention to what could be done (whether here or abroad) under the prerogative, as

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<sup>2</sup> The Constitution is scheduled to the Bahamas Independence Order 1973, SI 1973/1080, made "by virtue and in exercise of the powers vested in Her by [section 1](#) of the [Bahamas Islands \(Constitution\) Act 1963](#) and of all other powers enabling Her in that behalf" – that is, under both statutory and prerogative powers.

distinct from what could only be done under authority of Parliament or a local legislature.

Anyway, here's what was said in a Bahamas appeal, *Roberts v Minister of Justice* [2007] UKPC 56, by a strong Judicial Committee (Lords Bingham, Hope, Rogers and Brown and Lady Hale), speaking by Lord Hope:

[Counsel for the appellant] submitted that, as legislation was necessary to enable effect to be given to a treaty in domestic law, Parliament had to pass an enabling statute before [the extradition treaty between the Bahamas and the United States] was ratified. He maintained that the Treaty was null and void because... it... had not been incorporated in the schedule of any [Parliamentary] enactment. Even if the minister had power to ratify it, the Treaty had not been approved either before or after the event by Parliament...

The argument that approval by Parliament was necessary before the Treaty was ratified is misconceived. The right to enter into treaties is one of the prerogative powers of the Crown. No-one other than the Queen can conclude a treaty. In practice, in the case of The Bahamas, this prerogative power is exercisable ... by a Minister acting under the Governor-General's authority. The [Minister] does not require the advice or consent of the legislature to authorise the signature to or ratification of a treaty. ... The signature and ratification by the Minister was all that was needed to give effect to the Treaty in international law. The procedures ... [do] not require participation at any stage in the process by the legislature.

An international treaty does not, of course, by itself form part of domestic law. This is a necessary consequence of the unqualified treaty-making power which resides entirely with the executive. Treaties do not form part of the law of The Bahamas unless and until they have been enacted by the legislature. The assent of Parliament must be obtained before a domestic court can give effect to them. The way in which this is to be done is for Parliament itself to determine. ...

This statement of principle needs little or no elaboration as principle. To



understand its depth and worth, one can read it in the light of the masterly lecture<sup>3</sup> given in London yesterday by Timothy Endicott, Oxford's leading constitutional-legal theorist, about a constitutional reality answering to a standing need, a reality and need hitherto insufficiently articulated by the diet of treatises and cases which our judges read as students and practitioners. The need is for an efficient and unified executive power, democratically responsible in governing 365 days a year while legally constrained from exercising legislative and judicial power. The lecture speaks, too, of the Divisional Court Judgment's failure to acknowledge our constitution's settled ways of meeting this standing requirement of the public good. John Locke, in his *Second Treatise of Civil Government*, called this central, pre-eminent aspect of executive power "federative", a term that has not stuck though what it referred to is as important as ever. Locke chose the term because, though the power or authority deals with many other matters of war and peace, public order and emergency, it is a power manifested day-to-day, and in a model way, in the making, variation, and unmaking of *foedera*, Ciceronian Latin for what Lord Hope's explanation of principle in *Roberts* was about: alliances and treaties.

### **How to read the European Communities Act 1972**

So now, at last, we are getting into a position to see that the Judgment misreads *the* European Communities Act 1972, and misconstrues the legal sovereignty of Parliament; and thus fails as an effort to uphold the rule of law and principle of legality.

We should start where Parliament started, with the Act's long title. In the Judgment, this heads the list of evidence for its interpretation of Parliament's intent in 1972. The parties supporting the Judgment in the Supreme Court do likewise. The Government replies, unpersuasively, that long titles are no reliable guide [App. Para. 5(1)]. In my view that is an own goal. The 1972 Act's long title is reliable and extremely strong evidence that the Act does not have the meaning attributed to it by the Divisional Court and its supporters, and does have the meaning and effect argued for (and in many other respects persuasively and well) by the Government. For it is entitled: "An Act to make provision *in connection with* the enlargement of

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<sup>3</sup> "Parliament and the Prerogative: From the *Case of Proclamations to Miller*", <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Endicott-2016-Parliament-and-the-Prerogative.pdf>

the European Communities to include the United Kingdom...” Contrast that with the long title of the Bahamas Independence Act 1973, or the Barbados Independence Act 1966, or the Fiji Independence Act 1970: “An Act to make provision *for, and in connection with*, the attainment by the Bahamas [or Barbados, or Fiji] of fully responsible status...”

How do the Acts of 1966, 1970 and 1973 (and there are many others before and since) make provision *for*, as well as *in connection with*, the new status? It is almost all done in these Acts' first section:

1(1) On and after 10<sup>th</sup> July 1973 (in this Act referred to as the appointed day) Her Majesty's Government in the United Kingdom shall have no responsibility for the government of the Bahamas. (2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend...to the Bahamas as part of their law...

So here is perhaps my main point. The entire Judgment, like the whole written argumentation of those supporting it in the Supreme Court, presumes to treat the European Communities Act 1972 as if its long title read: “An Act to make provision *for, and in connection with*, the enlargement of the European Communities to include the United Kingdom...”, and as if its first section read:

1(1) On and after the 1<sup>st</sup> January 1973 (in this Act referred to as the appointed day) the United Kingdom shall [and here I adopt the language of article 1 of the Treaty of Accession] *become a member* of the European [Communities] and Party to the Treaties establishing these Communities as amended or supplemented.

But no such clause appears first, second or anywhere in the 1972 Act or in any Act of the United Kingdom.

Our sovereign Parliament has rigorously abstained from enacting that we are to be or are members of the European Communities or Union or parties to their Treaties. It has from first to last deployed the resources of our constitutional balance with its two interlocking dualisms: of international law and domestic law, and of executive power and legislative power. Treaties are made and unmade exclusively by the executive power: that is a principle of our constitution. Treaties can have no effect in or on domestic law beyond what Parliament in the exercise of its supreme legislative power *authorises*. Whether that authorised effect *continues* --

in relation to a particular treaty provision, or in relation to the whole treaty -- depends (unless the treaty's provisions have been written into a statute) on the continuance of that treaty provision or of the whole treaty. That continuance is a matter for foreign governments and entities, or for our executive Government in its conduct of our foreign affairs. If Parliament wishes (as in rare cases it does) to make an exception to that straightforward universal, default position, it does so explicitly, as we shall see.

The 1972 Act contains no such exception. From the first words of its long title onwards, it treats the enlargement of the European entities by inclusion of the United Kingdom as something partly accomplished already by the signing of the Accession Treaty, and to be accomplished fully by that Treaty's ratification, both signing and ratification having been or to be acts of the Crown, of Her Majesty's Government, actions which the 1972 Act in no way whatsoever purports to authorise or permit.

According to the Judgment ([66] with [42]), it is "highly formalistic" and "divorced from reality" to say that the Act does not authorise the ratification of the Accession Treaty, or to say that it is that ratification of that set of Treaties, not the Act, that confers EU rights on British citizens in France. But I suggest that, precisely "as a practical matter", the formalities which Parliament chose to deploy and preserve make quite plain to an alerted legal-constitutional eye that Parliament intended to work *strictly* within the confines of a well-established dualistic model, a constitutional and legal reality and truth of our law.

It is with respect quite wrong, both as law and as a statement of the constitutional and political realities of 1972, for the Judgment to say [66] that "Parliament intended to bring into effect, and did bring into effect" the rights of British citizens under EU law, or that it was "switching on the direct effect of EU law in the national legal system by passing the ECA 1972..." [87]. It intended, rather, to *enable* the United Kingdom to comply with its international, European obligations to the citizens of Britain and other member states (and thus secure the rights of those citizens correlative to those obligations) *if and when* those obligations and rights arose as the effect of our Government's choice to ratify the Treaty of Accession whereby the United Kingdom joined the European Treaties and Communities. In the event, given the preconditions and authorizations established by Parliament in the

1972 Act, *that ratification* – not statutorily authorized, but under the Crown's prerogative -- *switched on* the European, international-law Treaty rights *and* their double, the statutorily authorized UK legal rights, as from 1 January 1973, the date provided for by the Accession Treaty (not by the Act).

### **Parliament's legal intent**

The Judgment says it is interpreting the intent of Parliament in the light of background constitutional principles. But read in the light of background principles and practices -- those highlighted by the Judgment and those left by it in shadow -- Parliament's intent can, as a practical matter, be quite sufficiently gathered from precisely what it said, read as those who drafted, promoted and voted for it meant it to be read. *They* knew the difference between making provision for and making provision in connection with, a difference they had many times seen sharply drawn in their instruments, their constitutionally significant Acts. (They also knew, as we shall see, what it is to revoke a treaty, which element in our constitution has the authority to revoke, and what may be done to subject such revocation, exceptionally, to preconditions.)

Accordingly, we find that the 1972 Act's real s. 1 is nothing like my imaginary s. 1 (making provision *for* accession), a provision which those who support the Judgment evidently *wish* Parliament had included and in effect deem it to have included, though nothing like that is to be found. The real s. 1 simply describes the meaning of the word "Treaty" and "Treaties" in the Act. For *everything* in Part I of the Act is going to be about the domestic effect (the "legal effect... in the United Kingdom") of treaties -- made without any Parliamentary authority -- *if they are* ratified. Of course, only ratified treaties that have the approval of each House or of an Act, and so are in the original or revised list in s. 1, will achieve that domestic effect. But, to repeat, nothing in the Act either commits or authorises the Government to ratify the Treaties and make the UK a member. The only relevant date in the Act is 22 January 1972, when the Government signed the Accession Treaty; there is no commencement date given for the Act, just the date of royal assent (17 October 1972). There is no reference to 1 January 1973, the date fixed by the Accession Treaty for our membership if the Crown should ratify the Treaty, which it chose to do on 18 October 1972.

And then the real s. 2 sets out the Act's main business:

*General implementation of Treaties*

2(1) All such rights [etc.] *from time to time* created or arising *by or under the Treaties*, and all such remedies and procedures from time to time provided for *by or under the Treaties, as in accordance with the Treaties* are without further enactment to be given effect or used in the United Kingdom, shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

So all Community rights about which the claimants and the Judgment speak – whether they be UK legal rights or legal rights of UK citizens in France -- are defined as rights arising by or under treaties as they stand, if they stand, from time to time.

Subsections (2) and (3) provide machinery for giving effect by Orders in Council or ministerial regulations etc. to "Community obligations" (as just defined in subsec. (1)). Subsec. (4) provides that such ministerial enactments may include "any such provision (of any such extent) as might be made by Act of Parliament" (shades of "Henry VIII"). Then it famously adds "and any enactment passed *or to be passed*, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section" -- a sentence in which the word "enactment" now includes not only Orders in Council and ministerial orders but also Acts of Parliament present *and future*. It is this – and as far as Parliament's intention went, only this – that entitles us to call the 1972 Act a statute of constitutional significance.

For, to make s. 2 workable, s. 2(4) must be read, and was certainly intended to be read, as meaning that if in future Parliament intends a new statutory provision (a later Act) to prevail over the European Community rights and obligations given effect here by s. 2(1), Parliament must make its intention to do so plain. Thus the so-called doctrine of implied repeal, the constitutional principle that provisions of later statutes inconsistent with an earlier provision impliedly override it, must be set aside or strongly modified where the earlier provision is something in or given effect by this part of the 1972 Act.

So the 1972 Act was intended to be read and applied not as a statute to make Britain a part of Europe, but as a statute to arrange for the appropriate legal effects

of being taken into Europe by a treaty made and ratified not by or under statute but by Her Majesty's Government acting under the prerogative of making and unmaking treaties. In the exercise of its sovereign power, Parliament could easily have acted otherwise, with no more effort than it took me to transpose s. 1 of a contemporaneous Independence Act into my imaginary s. 1 of the European Communities Act that was never passed, never put before Parliament.

### **The model followed in ECA 1972 and subsequently**

In choosing to put our law on the thoroughly compartmentalised dualistic basis that it did, Parliament was acting according to a well tried model. I will recall the features of that model, which (as I have shown elsewhere) were misunderstood and misstated by counsel in the Divisional Court and by those judges who spoke about the matter during oral argument – so much so that the Judgment itself ignores the whole matter, thus consolidating its misreading of Parliamentary sovereignty and of the texts and sovereign intent of the Parliament of 1972, and thus also the Parliaments of 1978, 2008, 2010, 2011 and 2015.

The shaping of Parliament's intent in 1972, and of its treaty-applying technique, begins in 1870, I would say, with the Extradition Act 1870. An extradition treaty provides that the Crown's agents may arrest anyone in the realm and convey them abroad in order that they can be tried and punished by some foreign power: a drastic impact on the rights of subjects or friendly resident aliens. Between 1174 and the making of the first UK-US extradition treaty in 1794 England made only five extradition treaties,<sup>4</sup> and between then and 1870 only three more. The pre-1870 technique can be exemplified by the Extradition Act 1862, "An Act for giving effect to a Convention between Her Majesty and the King of Denmark for the mutual surrender of criminals".<sup>5</sup> The statute recites that the Convention, the treaty with Denmark set out in full in the Act's schedule, *has been signed and ratified* and "it is expedient that provision should be made for carrying [it] into effect", that is, effect in the UK, its law and its courts. On the requisition of the Danish Ambassador, persons here can be arrested and brought before one of our courts; if our courts are satisfied that the person is accused or convicted of an offence specified in the treaty,

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<sup>4</sup> House of Lords Select Committee on Extradition Law, *Second Report*, 25 February 2015, chap. 1 fn. 9.

<sup>5</sup> 25 & 26 Vic. c. 70.

and that there is sworn evidence against him that would justify committing him for trial here if he had done the alleged acts here in this country, he may be extradited, delivered up to the Danish authorities. If the proceedings take more than two months, the Act grants the detainee the right to apply to a judge for release. The Act's last section simply says "7. This Act shall continue in force during the continuance of the said [treaty]." The treaty itself provides that either state can terminate it by simply giving the other state six months' notice. In other words, it is Parliament's intent that its statute's provisions can, like the Convention, be deprived of force by simple prerogative executive act, without any notice to, let alone pre-authorization, by Parliament.

In 1870 a new statutory framework was introduced, still in force in 1972. The essentials are in s. 2 of the Extradition Act 1870, an Act meant to apply in an ambulatory way, that is to any extradition treaty arrangements entered into, modified, or revoked in the future:

"Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state. ... Every such Order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement. Every such Order shall be laid before both Houses of Parliament within six weeks... and ...be published in the London Gazette.

There is thus no requirement that either the treaty arrangements or the Order in Council have any pre-authorization or subsequent approval by Parliament or either House. Still less is there any requirement of authorization of the termination of the treaty arrangements by the Government, a termination which extinguishes the force of the Order and the effect of the statute in relation to that foreign state. Scores of treaties, all impacting severely on the rights of some of our citizens, were made effective in our law by s. 2 of the 1870 Act, some of them still in force.

### **The prime model: double-tax treaty arrangements**

Extradition treaties are concerned not with conferring rights but with taking them away (subject to some procedural safeguards and rights). More interesting for our purposes is the class of treaties that began to be made in 1946 – by 1972 there

were many scores and now there are over 120 – treaties each of which directly or indirectly confers on individuals or companies some 60 or 70 valuable substantive rights, as the House of Commons' leading public lawyer, Sir John Foster QC, reminded the Commons a week before the unveiling and introduction of the European Communities Bill in January 1972. These are double tax agreements. Our governments used not to favour them, but at the end of the Second War they changed policy. These are treaties that are worth nothing at all unless they operate to create rights, immunities of individuals, and obligations and disabilities for tax authorities, in our realm and in our law. These legal effects were first provided for by the Finance (No. 2) Act 1945, s. 51(1), replaced by the Income Tax Act 1952, s. 347(1), replaced in turn by the Income and Corporation Taxes Act 1970 [ICTA] s. 497(1). Nowadays it's s. 2 of the Taxation (International and Other Provisions) Act 2010 [TIOPA], but I shall stay with the provisions in force at the time Sir John Foster was speaking, and the Government was busy drafting the 1972 Act. The compartmentalised statutory and prerogative framework is essentially unchanged since 1945. So, ICTA 1970:

497.-(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation ... and that it is expedient that those arrangements should have effect, then, ... the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide ... for relief from income tax and corporation tax... [and so forth].

and (2) The provisions of [ss. 500-511] shall apply where [such] arrangements ... have effect... [and so forth].

(7) Any Order in Council made under this section may be revoked by a subsequent Order in Council, and any such revoking Order may contain such transitional provisions as appear to Her Majesty to be necessary or expedient.

(8) Before any Order proposed to be made under this section is submitted to Her Majesty in Council, a draft thereof shall be laid before the House of



Commons, and the Order shall not be so submitted unless an Address is presented to Her Majesty by that House praying that the Order be made.

Here we have, full-grown, the prime model for ss. 1 and 2 of the European Communities Act of two years later. Like s. 1 of the 1972 Act, an Order in Council identifying a particular double tax treaty does not bring the treaty into effect internationally and is not the source of its effect in domestic law, our law. The source of the treaty's effect in our law is the statute and its effect-giving provision, in 1972, s. 2(1) ECA; in 1970 s. 497(1) ICTA. Sec. 497(1) gives effect, quite explicitly, not to the Order in Council but to the treaty (the "arrangements with the government of a [foreign] territory"), and then also to a number of valuable rights for taxpayers under ss. 500-511, rights contingent on those treaty arrangements beginning and continuing to apply to those taxpayers.

A look at any of the relevant Orders in Council (each of them country-specific) confirms that -- like s. 1 of the 1972 Act and any Orders in Council (or later Acts) that from time to time add to its list of treaties -- these double-tax treaty Orders do not pretend either to enact or to bring into force anything. Each is purely declaratory, making the declaration foreshadowed in s. 497(1), that double tax arrangements have been made with such and such a foreign government and that it is expedient that they have effect.

Just *when*, if ever, such an Order does begin to have effect depends first on the terms of the treaty and then on the unpredictable post-signature conduct of the foreign government; if that government's ratification (its notification that its internal procedures have been completed<sup>6</sup>) is later than the Order in Council, neither s. 497(1) nor the Order in Council bring the arrangement into effect until that second ratification is given and the treaty arrangements become operative in international law by virtue of their own terms. The treaties always state the date they will begin taking effect in our domestic law: standardly they stipulate the April 6<sup>th</sup> or April 1<sup>st</sup> next following the treaty's commencement – this can be what turned out, with the UK-Russia treaty, to be more than two years after the Order in Council, because of Russia's delays. And the treaty (not Parliament) will provide that after five years either state party can terminate it on six months notice, and that such

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<sup>6</sup> See Constitutional Reform and Governance Act 2010, s. 25(3), (4).

termination takes effect in UK law on the 1 April following the termination. The making of the treaty, like the making of a replacement treaty, is notified to the House of Commons (but not to the House of Lords) by the draft Order in Council, and the House's approval by resolution is needed before the Order can be made, without which the UK cannot give the notification of completion of internal procedures (notification which counts as ratification.<sup>7</sup>) But the *unmaking* of the treaty without replacement – like the unmaking of an extradition treaty -- need not even be notified to the House of Commons, let alone authorised. `

And that unmaking will terminate the scores of statutory rights under UK law, not to mention many valuable rights of UK persons and entities under the reciprocal treaty-based law of the foreign state. The pillar of the Judgment is, as you remember, that “By making and unmaking treaties the Crown.... cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights.” Very well, but that “intervention of Parliament” may well be through Parliament's one-off initial construction of an *ambulatory* scheme like the three we have been considering – schemes for giving domestic (and ancillary international) effect to treaties and international provisions not yet made or applicable to the UK, *if, when and for so long as* they become and remain applicable. In that way, Parliament “intervenes” by choosing to establish that individual domestic legal rights defined by such treaties and international provisions can come into existence, and cease to exist, without any *further* Parliamentary interventions.

### **Attempted rebuttals**

About all this, the Written Case for the second respondent, says<sup>8</sup> four things. First: that the Order in Council would “continue to grant relief under the arrangements it incorporates even if those arrangements, on the international plane, have been amended or revoked”. But this contention flies in the face of the statute which – not the Order in Council – gives relief to arrangements with a foreign government, not to former arrangements no longer in existence; arrangements which, moreover, always provide for the cessation of their UK effect a short defined period after their revocation. Sec. 2(1) of the European Communities Act 1972 is

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<sup>7</sup> Ibid.

<sup>8</sup> Written Case for Second Claimant Dos Santos, para. 30(4), which actually, concerns the 2010 successor (TIOPA) to the more relevant 1970 provisions.

even clearer about the issue, since it gives domestic legal effect only to the Treaties as they are in force “from time to time”, that is, only as long as they are in force. This compensates for and renders irrelevant the inexplicitness of art. 50 of the Treaty of European Union, which makes provision for the cessation of the Treaties in relation to a member state without trying to specify when that cessation would take effect in that member’s domestic law.

Secondly, this Written Case says Parliament provides a statutory mechanism for, and authorising, the revocation of double tax treaties, involving a new Order in Council approved by the Commons. But that too is mistaken. No statutory provision is made for revocation without replacement, because none is required. There is statutory provision for revocation of one Order in Council by another. But this will be needed only if there is need for new arrangements to take effect in place of the old.

Thirdly, conceding in advance that its first two points may be wrong, the Written Case says that, if such treaties create any rights at all, the Executive cannot lawfully withdraw from the treaty without “Parliamentary approval”. By an Act of Parliament? Nothing in this whole s. 497 scheme involves more than a resolution of the House of Commons. In any event, there is no reason whatever to accept this third claim, even though the treaties do of course create rights, very specific, numerous, and valuable, and result in others under provisions such as ss. 500-511 of the 1970 Act. The Written Case for the other (first) respondent steps in at this juncture to say that such withdrawals (revocations without replacement) are “very rare indeed”.<sup>9</sup> But of course, as both Written Cases say in other contexts, one instance is enough. Indeed, it is enough that they are possible, and apparently at least two have occurred, one in 1971 (in relation to the Virgin Islands) and the other in 1988 (unilateral UK revocation of the double tax treaty with the Netherlands in relation to the Dutch Antilles, a treaty approved by the House of Commons in 1970).

Fourthly and finally, the Written Case for the second respondent rather plaintively says: “there are almost certainly more [arguments], as is apparent from the slew of academic articles and blogs which have been published rebutting Professor Finnis’ argument” – that would be the slew from which the Written Case took the best, insufficient though they are.

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<sup>9</sup> Written Case for Lead Claimant Miller, para. 29(5).

## **Summary on Parliament's intent in 1972**

So are we left with the main facts. Parliament chose not to make provision "for" the UK to become or be a member the Communities or Union. It chose to let the Crown, the executive government, make the UK a member by treaty acceding to existing treaties. What Parliament did was make consequential provision "in connection with" membership, namely provision for the importation of the laws and rights etc. created in, by and under the European Treaties – those ones that Parliament listed in sec. 1 from time to time and by s. 2(1) gave domestic effect to just to the extent that they exist as a matter of European law from time to time. That provision strictly followed the dualist model, in which treaties and all other international arrangements are made and unmade by the executive alone, under the Crown's prerogative, without need for prior approval, authorisation or permission.

Thus the intent which the Judgment ascribes to Parliament, that withdrawal from the Treaties be invalid unless previously authorized by Act of Parliament, is simply, even starkly, fictitious. It is a fiction imposed upon Parliament without due attention to the evidence of the 1972 Act's real intent, an intent that is reliably gathered from its wording, its content, and its antecedents in the business of giving ambulatory domestic effect to treaties, effects that are intended to walk in the footsteps of treaties and of the international (EU) provisions made in and under them. The effects are meant to, and do, vary domestically as the treaties come into being, alter, and cease to apply to the United Kingdom internationally.

Sec 2(1) can indeed be thought of as a conduit through which EC now EU law flows from many taps on the international level, through myriad pipes within (so to speak) the one conduit, into our law. But the metaphor is imperfect because when one or another tap is turned off, or if all taps were turned off at once, by transactions on the international level, not only does the water cease to flow in; the water already arrived on the domestic level ceases to exist (as if it were electricity switched off) unless it has been changed into domestic law by some statute which enacts it specifically, and not simply generically and contingently as s. 2(1) does like its double-tax treaty analogue (in 1970 s. 497(1)).

## **Parliament starts making specific exceptions to the default model**

Early on, in 1978, Parliament got a bit cautious about the implications of this open-ended model. It started to pick out limited kinds of international transaction that it would not allow the Government even to ratify without first getting Parliament's approval. *1978, re-enacted in 2002*: "No treaty which provides for any increase in the powers of the European Parliament shall be ratified by the UK unless it has been approved by Act of Parliament." *2008*, in the Act approving the treaty containing art. 50: requirement of approval by Act of Parliament before ratifying any amendment to the founding treaties by the ordinary revision procedure; requirement of approval by resolution of each House before a minister of the Crown can support any decision under a range of EU treaty provisions, elaborately specified. Nothing about preconditions for action under art. 50. *2011*, the European Union Act: a raft of new limitations on the exercise of the prerogative of international affairs and treaty-making in relation to the European Union, imposing Parliamentary controls on a number of kinds of ministerial actions which would – speaking broadly -- increase the rights of European citizens (and thus of UK citizens under s. 2(1) of the 1972 Act), but – again speaking summarily -- no controls on weakening or removing any or all such rights.

Parliament's position throughout is plain. The prerogative power of treaty making, treaty operation, treaty adaptation and amendment, and treaty withdrawal remains what it has always been – plenary authority on the international plane, with whatever effects on the domestic plane are entailed by the way that Parliament, in the exercise of its sovereignty, chose to give domestic effect to the treaty. Where that domestic effect has been made by Parliament to be contingent upon the existence of international provisions and rights, and correlated with them one-to-one -- as in the double tax agreements model in force in 1972, the extradition treaties model, and the European Communities Act itself -- then it is, under our law (background principles and all), in that manner contingent and correlated, by authentic sovereign intent and enactment of Parliament.

## **Consistency with background constitutional principles**

All this is wholly consistent with the letter and spirit of the *Case of Proclamations*. Action under the Crown's prerogative on the international plane,

including revocation of treaties and the supposedly irrevocable triggering of Art. 50 to exit from the European Treaties, does not and cannot “change any part of the common law, or statute law, or the customs of the realm”, or (in the Divisional Court’s words) “vary the law of the land” by prerogative. It is all action which “the law of the land allows” – the principle of our constitution recalled in *Roberts v Minister of Justice* – allows as legitimate prerogative authority to the Queen and her ministers. Such action on the international plane can of course affect the domestic legal rights of citizens, including their rights under statutes such as the Income Tax Acts or the European Communities Act, and affect them drastically. But it has that effect only and entirely because of the way that Parliament has *chosen*, when it does, to create those rights.

Parliament does this, as we have seen, mainly by defining those as simply the domestic double of rights existing on the international plane “from time to time”, that is, as “statutory rights” *because and while* they are rights on the international plane. Secondly it has created statutory rights that have no precise international counterpart, yet are wholly contingent on the existence of international arrangements brought about by the Crown’s international actions -- such as the statutory rights (in ss. 500-511 of the 1970 Act)<sup>10</sup> contingent on *there being a* relevant double tax agreement; or the statutory rights created in 1978 and 2002 to vote in elections for members of the European Parliament elections *at such times if any* as such an election of UK members is possible under EU law.

By choosing in 1972 and ever after to abstain from saying that the UK is to be a member, and to abstain from saying that the UK is to participate in European Treaties, Parliament has chosen *not* to do what it chose to do when it set up a compensation scheme for injured firemen, or a licensing scheme for civil aviation. Those statutes ousted the prerogative *pro tanto*. The European Communities Act is a scheme elegantly designed not to oust the prerogative but to replicate a historic and wholly functional element in our constitution’s balance. It is a (logically not visually) beautiful deployment of our constitution’s double or triple dualism between executive and legislature, prerogative and statute, international and domestic. The Judgment implicitly regards the scheme’s explicit shape as regrettable and vulnerable, and seeks to impose on it an implication which is simply

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<sup>10</sup> Now much more extensive in ss. 18-134 of TIOPA 2010.

foreign to its careful and precise, wholly deliberate design. The Judgment is vulnerable and regrettable, I respectfully suggest, because (as the effect of a genuinely judicial but legally mistaken analysis) it imposes *on Parliament* an alternative, judicial design.

### **But what if...?**

But what if the referendum had passed by only one vote? Or, as the Oxford and London academics put it when they first published the argument adopted by the Judgment, what if the Prime Minister just woke up one morning, no Parliamentary debate or referendum anywhere on the horizon, and fired off an art 50 notification?

The idea that art. 50 notifications are irrevocable and hit the target of withdrawal like a bullet that cannot be recalled after being fired is, I believe, fanciful. One must speculate that the Government goes along with it lest contesting it result in reference of the question to a Court whose “perceived” foreignness, to say no more, was wind in many Leavers’ sails. But let’s accept the fancy, as I have been accepting it all along. Let’s also forget, here, that there was no art. 50 in 1972, or in 1975 when Parliament first staged a referendum on leaving. The general point is that our entire mixed and balanced constitution is intended to prevent outlandish outcomes (and does sufficiently prevent them). It does so not by judicial construction of suddenly discovered “implications of law” to cut off in advance all possibility of such outcomes materializing (or rather, lawfully materializing), but instead by Parliamentary control of Government through the ordinary mechanisms. Prime Ministers and the ministers they recommend to the Queen must enjoy the confidence of the House of Commons and will be dismissed whenever it is apparent to her that they have forfeited it to others, and the Commons can quite promptly turn off the payments out of the Consolidated Fund without which ministers cannot govern. (Professor Endicott’s lecture on 30 November explores all this, much more searchingly and revealingly.) In any of the imagined eventualities, the ministry would be replaced and the notification withdrawn (and its fancied irrevocability exposed, one way or another, as the bugaboo it is).

And the present situation is utterly remote from any of those imaginary scenarios. Parliament by majorities of five or six to one in each House legislated to set up a referendum which ministers had assured each House, explicitly, would

enable the question of Remaining or Leaving to be settled by the people *and not by Parliament or either House*.

The “What if...?” argumentation, as Judge Sir Gerald Fitzmaurice said in the European Court of Human Rights in 1975,<sup>11</sup> is “the cry of the judicial legislator all down the ages”. Parliament’s “failure” to include art. 50 in its list of treaty provisions about which it has restrained the Crown’s prerogative is imagined to expose us to risk of untoward, even outlandish consequences, consequences that the judges now – when no such consequences are even faintly in prospect – must step in to prevent by putting art. 50 on that list, on their own. As I have suggested tonight, that is not applying the law, but inventing a new field of litigation and of unheard-of judicial action to change, in quite unpredictable ways, both a settled principle of our constitution and the conduct of our foreign affairs, a field almost (but not quite) uniquely unsuited to judicial intervention.

The principle of legality would, I fear, be damaged if the Supreme Court, having been presented much more clearly and fully than the Divisional Court was with the evidence of Parliament’s steady though discriminating respect for the principle of constitutional dualism at the intersection of international affairs with domestic law, were to reject that, like the Divisional Court, as mere formalism, and were to appeal to a realism which people can accurately sense corresponds neither to our real situation nor to the real political choice long embodied in *our* constitution, like now so few other democratic constitutions – the choice to govern ourselves through a Parliament that is sovereign over written and justiciable law.

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<sup>11</sup> *Golder v UK*, 21 February 1975, plenary ECHR; separate judgment para. 37(c).