Judicial Intervention in Parliamentary Proceedings

Policy Exchange

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About the Author

Sir Stephen Laws KCB, QC (Hon) was First Parliamentary Counsel from 2006-12. As such, he was the Permanent Secretary in the Cabinet Office responsible for the Office of the Parliamentary Counsel (an office in which he had served as a legislative drafter since 1976), for the offices of the Government Business Managers in both Houses and for constitutional advice to the centre of Government. After he retired in 2012, he was a member of the McKay Commission on the consequences of devolution for the House of Commons and subsequently a member of the advisory panel for Lord Strathclyde's review of secondary legislation and the primacy of the House of Commons. He writes on constitutional and legal matters He is a Senior Associate Research Fellow at the Institute of Advanced Legal Studies, an Honorary Senior Research Associate at University College London and an Honorary Fellow of the University of Kent Law School.

About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

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Contents

Foreword

by Robert Lisvane

Our constitution has two "no-tanks-on-lawns" arrangements to keep Parliament and the Courts off each others' territory; or, as Lord Browne-Wilkinson put it in *Prebble v. Television New Zealand*, "astute to recognise their respective constitutional roles". One is Parliament's own *sub judice* rule, reflected in Resolutions of each House; and the other is Article IX of the Bill of Rights, which in somewhat antique but still effective language prevents the Courts – *by law* – from encroaching upon the independence of Parliament.

In this magisterial analysis of the *Wightman* case, Sir Stephen Laws examines what may prove to be an insidious phenomenon: the seeking of legal advice or indeed a ruling (in this case, from the Court of Justice of the European Union) on the revocability of the United Kingdom's notification under Article 50 of the Treaty on European Union. This is a matter which is almost certain to come before Parliament and, when it does so, the existence of such advice or ruling must fetter Parliamentary consideration. That fettering may not take the form of direct intrusion into Parliamentary proceedings, but to the extent that reference to the CJEU solicits a *prima facie* indication of what may or may not be possible, it must impact upon those proceedings.

Sir Stephen acknowledges that *Wightman* may prove to be as ineffective politically as the *Miller* case but, as his examination shows, it has cast the Inner House of the Court of Session in what should have been identified as an uncomfortably political role. Moreover, in its effective intrusion into the EU withdrawal options available to Parliament (absit further legislation widening those options) the Inner House has laid itself open to a charge of failing to recognise the requirements of its constitutional role.

The extraordinary political events of recent times have required us to reset a good few assumptions about Parliament and politics. But the constitutional separation between the Courts and Parliament does not need resetting. This analysis demonstrates why.

Lord Lisvane is a Crossbench peer and a former Clerk of the House of Commons

Introduction

In the case of *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62 ("the *Wightman* case"), a petition was made to the Scottish courts for the exclusive purpose of securing a ruling that would influence the conduct of proceedings in Parliament.

It is yet another example, like the *Miller* case[1], of participants in an essentially political dispute seeking a judicial ruling that they hope will produce a tactical, political advantage for their side of the argument. The willingness of the courts to allow themselves to be used in this way is to be regretted, and indeed deplored — not least because of the risk it poses to public respect for the political processes of Parliament, to the stability of constitutional and democratic government in the UK, and also to the judiciary's reputation for impartiality.

The applicants in the *Miller* case were, of course, successful in their attempt to procure such a ruling; but, despite the extravagant claims that have since been made for that case, it has proved itself in practical terms to have been a largely futile exercise. It lacked any significant, practical effect on the politics it was intended by the applicants to influence. Following the decision, Parliament readily confirmed its approval in legislative form for a course of conduct that it had already approved in a non-legislative form. Beyond that, the Government was made to use up valuable Parliamentary time on securing the required legislation, and also to suffer reputational damage from losing the case. Neither of those things are useful or constitutionally legitimate as the only practical objectives of litigation, even though they may sometimes be included in the unavoidable, incidental effects of it.

The only practical, legal effect of the *Miller* case was to secure — possibly counter-productively so far as the applicants were concerned — that legislative authority in domestic UK law for the consequences of a UK exit from the EU by effluxion of time under Art 50(3) of the Treaty on European Union was granted rather earlier than it might otherwise have been. Predictably, Parliament then duly passed the more detailed legislation which, for practical purposes, was still needed to flesh out that authority, and did so well before the expiry of the Art 50 notification.

Now, in the *Wightman* case, the Scottish courts have accepted an invitation to require legal advice to be provided to Parliament for the purpose of informing Parliamentary proceedings. The proceedings in question are those for which provision is made by section 13 of the European Union (Withdrawal) Act 2018 ("the 2018 Act"), which relates to the outcome of the negotiations between the EU and the UK about UK withdrawal from the EU.

1. *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

The Inner House of the Court of Session has found itself to have what amounts to an advisory jurisdiction, exercisable in the absence of a live legal dispute, and has ruled that a question about the revocability of the UK's Art 50 notification should be referred to the Court of Justice of the European Union ("CJEU") for an expedited answer. As a result, the CJEU is now due to consider the matter on 27th November 2018.[2]

It may be that the *Wightman* case will prove itself as ineffective politically as the *Miller* case; and it certainly has a similar potential to be counter-productive from the petitioners' point of view. The legal reasoning on which the *Wightman* case is based, however, is even more problematic and, from a constitutional point of view, an even greater cause for concern than the *Miller* case.

At least, in the *Miller* case, the legal argument was framed by reference to a proposed exercise of prerogative power by the Government. There was an existing jurisdiction relating to the control of executive power that could be used to justify judicial intervention[3] — even if the only practical effect sought from the intervention was to prescribe the Parliamentary process and timetable for creating a legislative scheme to implement UK withdrawal from the EU.

In the *Wightman* case, by contrast, the reasoning of the members of the Inner House is founded entirely on arguments to the effect that it is the business of the courts to regulate the information or advice available to Parliament for the purposes of a forthcoming Parliamentary debate.

Attempts to formulate the case as a review of executive action were abandoned. The reference is made to the CJEU solely to procure a clear and authoritative answer, in advance of a forthcoming Parliamentary debate, to a legal question that, it has to be inferred, the Scottish court considers would enable better decision-making in Parliament. It is thus avowedly a decision intended to satisfy the underlying political motives of the petitioners and, so far as it is directed at better decision-making, at least potentially to influence the outcome of Parliamentary proceedings.

The reasons why this is so disappointing and wrong — although sadly, since the *Miller* case, not particularly surprising — include a whole range of practical political reasons, as well as the requirements of firmly established constitutional and legal principles. The case raises some quite fundamental concerns about where the line should properly be drawn between the judicial function and the functions of the institutions of the constitution to which political decision-making is allocated, *viz* Parliament and the Executive.

This paper will deal with these reasons in two parts.

First, it will analyse the practical politics of the current situation. It will explain why the issue whether the question referred to the CJEU is answered now, or left to be answered only if and when it becomes necessary in practice to do so, is essentially a political issue. The issue of timing is one that principally involves balancing different political and litigation risks. It therefore involves decisions that can and should be made exclusively by the political and democratically accountable institutions of

2. Pursuant to section 40(3) of the Court of Session Act 1988, an appeal of an interlocutory nature can be brought only with the permission of the Inner House. The Government sought permission to appeal to the Supreme Court against the Inner House's order for a reference to the CJEU. Permission was refused on 8 November 2018. At the time of writing, an application has now been made to the Supreme Court for leave to appeal to that court against the Inner House's decision, but the outcome of that application is unknown.

3. This though is still not sufficient to outweigh the many other grounds on which the judgment of the majority in that case is open to criticism (including the cogent reasoning in the minority judgments, the artificiality of the intentions attributed to Parliament in relation to the European Communities Act 1972 and the European Union Act 2008 and the general inappropriateness of granting a pre-emptive remedy against a mischief which - as events have demonstrated - was certain not to occur in practice). Nor does the mere existence of an executive power necessarily resolve the issue whether its exercise should, in a particular case, be the subject of political rather than legal accountability.

the constitution, and not pre-empted or taken over by the judiciary.

Secondly, this paper will explain why the constitutional and legal analysis by the Inner House is seriously flawed. The analysis cannot support any supposed duty for the court to take on the responsibility of determining the best time, for the purposes of political decision-making, to seek clarification of the law in question. Only an irresistible duty to protect established and vested rights could begin to justify a decision to ignore the considerations described in Part 1. The correct analysis is that neither the functions nor the powers of the courts extend to providing an authoritative, advisory answer to a hypothetical question on an issue which, if relevant to anything at all, is relevant only to the internal processes of Parliament, and is not yet the subject of a litigable dispute between different parties.

1 Practical Politics

It is necessary to be clear about exactly what the question is that the Inner House has asked the CJEU to answer. The question ("the referred question") is in the following terms—

> *"Where, in accordance with Article 50 of the TEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU".*

The question is confined to a "unilateral" revocation. It is not seriously in dispute that revocation by the UK of its Art 50 notification would be possible if all the other member States agreed to it. Even if a court were to hold that Art 50 does not provide for a negotiated revocation, the agreement of the UK and all the other member States would be bound to be sufficient to make it possible in practice.

So, the referred question is only about whether the UK could force the other member States to accept the continued EU membership of the UK if one or more of them opposed it. It is only an incidental aspect of a bigger question (which is legally easier to answer but, in practical, political terms, unanswerable), namely, whether the option for the UK of remaining in the EU is still available. The referred question is of no significance unless it provides a complete answer to the bigger question, which it does not.

It must be assumed that either the EU or the other member States will wish, in the proceedings in the CJEU on the referred question, to argue against the principle of an unqualified right to unilateral revocation. They can be expected to want to preserve the strength of their bargaining position and control, both in relation to any negotiations in connection with an eventual UK revocation and in relation to the ongoing negotiations about UK withdrawal and the UK's future relationship with the EU after withdrawal.

Even if all the other member States were in principle amenable to a UK revocation, they might still think it in their interests to have the ability to impose conditions for agreeing to it. They might wish to impose conditions that would have the practical effect of limiting the UK's capacity to serve another Art 50 notification later on. They might want to make it a condition of the UK's return to the fold that it foregoes exemptions or financial benefits that it previously enjoyed. The story, so far, of the withdrawal negotiations certainly suggests an inclination on the part of the EU to protect and exploit any superiority in its bargaining position in such circumstances.

A clarifying answer to the referred question, whatever the answer is,

would unquestionably influence the dynamics of any future negotiations about what follows for the UK from any revocation. It is also bound to have some effect on the dynamics of the ongoing negotiations between the UK and the EU about withdrawal and the future relationship.

Maybe an unqualified answer in favour of unilateral revocation would produce a political effect on those dynamics, and on the UK domestic political debate, which would further the political objectives of the petitioners in the *Wightman* case, and which the other member States would also see as to their advantage and so not oppose; but seeking such an effect in the absence of any identifiable and legally enforceable right or liability, and as the sole purpose of litigation, is an abuse of the process of the courts, or certainly ought to be regarded as one.

On the other hand, seeking a premature answer to the referred question also seems more likely to create a substantial risk - as in the *Miller* case – of having an effect that is incompatible with what, it may be assumed, is the political outcome the petitioners really want.

Assessing exactly what the different effect of different premature answers to the referred question would be on the ongoing negotiations about withdrawal and the future relationship is by no means straightforward. While some effect seems inevitable, what it would be can only be a matter of political judgement; and the same is true of any decision to run the risk of what it might be. In addition, the timing of the reference involves further risks relating both to what answers might be contested before the CJEU and to what answer it might give. The decision whether to run those risks is also something that can only be a matter of political judgement.

The risks for the UK that there will be opposition to the principle of unilateral revocability, and the risks of an unsatisfactory answer, are likely to be greater if the referred question is answered while the negotiations relating to UK withdrawal and the future relationship are still proceeding. While they are proceeding, it can be assumed that the EU and other member States will be willing to accept the principle only to the extent that they think that its acceptance will strengthen their bargaining position in those ongoing negotiations.

The political risks in seeking a premature answer to the referred question are also aggravated by any obligation on the CJEU to answer it in a way that best upholds the objectives of the treaties. It would seem excessively optimistic to expect an answer to favour UK interests if it has to be given on that basis while UK interests are aligned — as, in accordance with the legislation passed by Parliament, they currently are — to the negotiation of a UK withdrawal from the EU on terms that are most beneficial to the UK.[4]

In addition, if the UK were in fact proposing to revoke its Art 50 notification, a concern would inevitably arise that it would be vulnerable to being put at a disadvantage after resuming full membership. Having failed in its attempt to withdraw from the EU, it might well want to negotiate guarantees from the EU to protect itself from the exploitation of the weakness its failure would have demonstrated. The likelihood that revocation of the UK's Art 50 notification would give rise to a real, practical,

4. This is all quite apart from the other reasons for avoiding submitting the question to the CJEU at any stage because of the difficulty, in the current circumstances, of seeing that court as a neutral decision-making authority. See e.g. the Commons Library briefing on the Withdrawal Agreement of 23 March 2018, p. 65.

political need for a negotiation of that sort makes unilateral revocation against opposition from other member States an implausible scenario.

There are other less political reasons why asking the referred question prematurely seems more likely, in practice, to tip the balance of probabilities against an unqualified answer in favour of unilateral revocation, or at least against an answer that would be in the UK's best interests.

From a purely technical point of view, the CJEU and indeed any other court that was asked the referred question would approach the task of identifying the intended meaning of the treaty by considering the different practical implications of different possible answers. On the one hand, there would be a case - perhaps out of fairness and respect for democratic decision-making - for allowing a notifying State to change its mind when it had truly and democratically repented of its notification before the relevant expiry date. On the other hand, there would be a risk that acknowledging an unqualified right to unilateral revocation would enable a notifying State to play "cat and mouse" with the two-year time limit in Art 50, and so shift the balance of advantage in any future withdrawal negotiations against the EU.

This factor creates an obvious risk that the way the CJEU answers the referred question will be different depending on whether it has to be answered (as the opinions in the Wightman case assume) before the CJEU is able to see whether the UK, in seeking a revocation, is really asking for a permanent return to the fold, or just to prolong the negotiations. There are more than two possible scenarios. There is a whole spectrum of possibilities between, at one extreme, true repentance with a commitment to remain a member for ever and, at the other, a cynical attempt to reboot the two-year negotiating period. There are also many possible scenarios in which other member States might find reasons for wanting to oppose a proposed UK revocation.

If the referred question fell to be answered only when there could be no doubt about the UK's good faith in seeking to revoke, and when it is clear that there were no other circumstances to provide a legitimate justification for opposition from other member States, then the CJEU would be able to confine its answer to the circumstances that then existed. It could - and almost certainly would - leave open what the answer would be in other hypothetical cases, not least to preserve its freedom to find a way to block "cat and mouse" tactics in future.

Answering the question now, on the other hand, will require the CJEU effectively to legislate for hypothetical situations that in future might or might not arise in the UK's case. It would need to formulate general rules for when it would not be possible to use unilateral revocation for tactical purposes in a withdrawal negotiation. The reference to "conditions" in the referred question suggests that the Inner House actually had that possibility in mind. Abstract rules would be difficult to formulate with precision. A high hurdle might be set, and an element of imprecision or discretion would almost certainly be retained, to avoid any rule from being "gamed" in future.

It is this difficulty of legislating for rules to apply in hypothetical future scenarios that must make it more likely that the CJEU will conclude, in the case of the Inner House's premature reference, that tactical revocations can only effectively be prevented by requiring the agreement of the other member States to any proposed revocation, and that there is therefore no right to revoke unilaterally.[5] In any event, a clear and helpful answer at this stage seems very unlikely.

My own view is that the UK's national interest, whether in the case of withdrawal or in the case of a decision to stay in the EU, would be best served by not asking the referred question now. A better option for the UK, if it were to decide to remain in the EU, might be to attempt to revoke the Art 50 notification only in circumstances that would challenge the other member States, or anyone else with legal standing, to decide only at that point whether the circumstances could legitimately justify contesting the lawfulness of the revocation.

However, even if I am wrong about that, it is nevertheless clear that asking the question of the CJEU at all carries political risks for UK interests, and that those risks are increased or diminished according to when the question is asked. Even if a political case can be made for taking those risks now, balancing those risks, and the issue whether and when they should be taken, and what is in the UK's best interests, are quite obviously all political issues. They are not issues that can or should be answered by legal analysis or in litigation.

This is not a case where these risks are merely incidental to the outcome of litigation on a different, substantive legal question in which legal rights and liabilities are engaged. The only matter the Inner House has considered and determined is whether the referred question needs, for the purposes of political decision-making, to be answered now.

5. For a broader discussion of how the CJEU might approach the referred question, see: Armstrong, Kenneth: *Can an Article 50 Withdrawal Notice be Revoked? The CJEU is Asked to Decide*, VerfBlog, 2018/10/08:. See also footnote 21 below. The argument for a requirement of unanimous agreement by the other member States in the case of a revocation is, of course, reinforced by the existence of the comparable requirement, expressly included in Art 50, for the case of postponement of a withdrawal by an extension of the two year negotiating period,

2 Legal and Constitutional Analysis

A decision of the Scottish courts

Any analysis by an English lawyer of the legal and constitutional aspects of the *Wightman* case has to recognise that the decision was by a Scottish court.

One of the major aspects of the case is the one that is referred to by the Inner House as the issue of "Parliamentary privilege". That, though, is just a technical characterisation of a much more fundamental issue of principle about the appropriate demarcation between the matters that should be resolved in a political forum and those that are appropriate for judicial adjudication. That issue, in turn, involves important questions about the extent to which those matters must be separated and isolated from each other, and generally about the scope of Parliamentary sovereignty.

It is often assumed, relying (amongst other things) on dicta in *McCormick v Lord Advocate* [1953] SC 396 and *Gibson v Lord Advocate* [1975] SC 136, that the approach of the Scottish courts and Scots law to the concept of Parliamentary sovereignty is less full-hearted than that of the courts of England and Wales - or at least from what precedent suggests has traditionally been thought to be the appropriate approach in England and Wales. In addition, Art IX of the Bill of Rights 1689, forbidding the courts from questioning proceedings in Parliament, (which, when enacted, applied only to the English Parliament and exemplifies — but does not exhaustively codify - the relevant constitutional principles) is differently worded from the equivalent provision made for the pre-Union Scottish Parliament in the Scottish Claim of Right Act.

It may also be the case that there are important distinctions between the scope for declaratory remedies in the courts of England and Wales and the availability of such remedies in Scotland.[6]

There may be scope for argument about the different nature of the legal relationship between the UK Parliament and the courts in England and Wales and in Scotland, respectively, and also, perhaps, about the availability of declaratory remedies in each jurisdiction. However, there is also a very strong case for thinking that, whatever the position where the issues are confined to only one of those jurisdictions, the law of the UK requires comity of treatment in all the courts of the UK for matters relating to the UK Parliament and to the UK legal system as a whole.

The *Wightman* case, like the Miller case, concerns an Act of the UK Parliament that extends to all parts of the UK and relates to a matter

6. Para. 69 of the opinions in the *Wightman* case appears to refer to a jurisdiction of the Scottish courts to give legal advice to public bodies, which would have no exact equivalent in England and Wales. Indeed, it is a sort of jurisdiction which in the past (when proposed for England and Wales) has been forcefully opposed in Parliament by senior members of the judiciary. See the discussion of clause 4 of the Rating and Valuation Bill, which would have allowed the Government to obtain advisory opinions from the High Court on points of law, in Lord Hewart CJ's *The New Despotism*, (London, 1929), pp. 119ff.

exclusively reserved to that Parliament. It is to be expected that the Supreme Court would not, in those circumstances, want to allow there to be different approaches to those matters in England and Wales and in Scotland.[7]

It may also be worth noting that the proceedings in the *Wightman* case were the product of an extended forum-shopping expedition that had already taken in London and Dublin, with a related excursion to the Netherlands. The Supreme Court might be expected to think it undesirable for the fundamental principles of the UK constitution to become the plaything of tactical forum-shopping around the UK and Europe.

The European Union (Withdrawal) Act 2018

The starting place for a legal analysis of the Inner House's decision in the *Wightman* case is the 2018 Act, and section 13 of that Act in particular. The argument accepted by the Inner House is that the referred question needs to be answered because the answer would be relevant to the decisions to be made in some at least of the Parliamentary proceedings for which that Act provides.

What needs to be emphasised about the 2018 Act, though, is that it provides final legal endorsement for only one option for the future of the UK's relationship with the EU: the so-called "no-deal exit" on 29th March 2019. Some may have political regrets about that, but it is nevertheless the effect of the Act.

So far as the law of the UK enacted by Parliament is concerned, the no-deal outcome is not only the default option — as the opinions in the Inner House recognised — it is currently the only option for which there is comprehensive statutory cover already in place. Other possible outcomes that the *Wightman* opinions say should be open for further Parliamentary consideration — a withdrawal with a deal and not leaving the EU — could be adopted only if provided with further statutory backing in primary legislation. No such legislation has yet been presented to the UK Parliament, let alone enacted. In addition, the only alternative to a no-deal exit that is even contemplated by the 2018 Act is withdrawal with a deal.

The 2018 Act provides that, before any negotiated agreement with the EU about the arrangements for UK withdrawal from the EU can be ratified, the House of Commons must first have been provided with and approved both a negotiated withdrawal agreement and a framework for the future relationship between the UK and the EU ("FFR"). The substance of both the withdrawal agreement and the FFR must have been agreed in principle with the EU. The need for further primary legislation in the case of that option arises because the 2018 Act also makes it a condition precedent for ratification of any withdrawal agreement that a further Act of Parliament has been passed by Parliament containing provision for implementing the agreement.

Further primary legislation would also be needed before a decision to halt the UK's withdrawal from the EU could take effect. Even if the logic of the *Miller* case would not already have required it - and it clearly would — the provisions of the 2018 Act defining "exit day" make it impossible[8] for

7. Implicit support for a unified legal approach to the UK Parliament can be found in the *Miller* case, in particular, in the reliance on Art IX of the Bill of Rights 1689 when construing the statutory codification of the legislative consent convention for Scotland: op. cit. para. 145 of the judgment. See also *Axa General v Lord Advocate* [2011] UKSC 46, applying English authorities on Parliamentary sovereignty to Scotland.

8. This is both because of the reasoning in the *Miller* case and because of the rule of law responsibility of the UK government not deliberately to put the UK in contravention of those international obligations to which it would remain subject after exit day if it did not leave the EU. Those obligations – if contravened as a result of the commencement of the repeals in the 2018 Act on that day – would threaten to create unacceptable uncertainty in the domestic law regime.

the Art 50 notification to be revoked without further primary legislation to prevent any legal consequences of UK withdrawal from taking effect in UK law on that day. That would be the case irrespective of whether revocation is possible in EU law and of whether the agreement of the other member States is required for a revocation.

In the nature of legislating in the UK Parliament, where constitutionally and in practice the Government has the initiative when it comes to primary legislation, it is the Government that has the constitutional responsibility for formulating and introducing the legislation that would be needed to give legal authorisation to either of the supposed alternatives to the default option of a no-deal exit.

In addition, the political realities would require the passage of legislation to authorise or require the revocation of the Art 50 notification to be preceded and sanctioned either by a second referendum or by a general election. A second referendum could only be held after the passage of primary legislation to provide for it. It is unlikely that it would be politically practicable, without enormously prolonging the time needed to get it through Parliament, for legislation providing for a second referendum to contain the provisions needed for implementing answers to the referendum question.[9] So, in the referendum case, primary legislation would need to be passed both before the referendum and also — at least if it resulted in a decision to remain in the EU — afterwards.

Section 20 of the 2018 Act confers power on the UK Government to postpone exit day by statutory instrument, subject to getting the agreement of both Houses of Parliament. That power, though, is exercisable only if the two-year period in Art 50 has been extended with the unanimous agreement of the other member States. The power to postpone exit day could not be used to put a permanent halt to the withdrawal process. That would necessarily involve an unlawful misuse of a power conferred for a different purpose. In practical terms, the scheduling of European Parliamentary elections for May 2019 also imposes inhibitions on how, in practice, the postponement power could be exercised. Further primary legislation might be needed for a postponement that overlapped with the timetable for those elections.

Section 13 of the 2018 Act provides for further Parliamentary processes in three cases where the activation of the default option of a no-deal exit would become more likely, or inevitable. Those cases ("the no-deal cases") are—

a the failure of the House of Commons to agree to a motion to approve a negotiated withdrawal agreement and FFR that have been submitted to the House for approval;
b a statement by the Prime Minister before the end of 21st January 2019 to the effect that no agreement in principle can be reached with the EU on the substance of a withdrawal agreement and FFR;
c the absence of any agreements in principle on a withdrawal agreement and FFR at the end of 21st January 2019.

9. The inclusion in the referendum Bill of a provision authorising or requiring the revocation of the Art 50 notification in the event of a vote in favour of remaining in the EU would be technically straightforward; but the scope for amendment and argument that the inclusion of that provision in that Bill would open up, and the issue of what (if any) provision should be made for other possible answers to the referendum question would be likely to create enormous handling problems for that Bill.

Section 13 does not make any express provision for the case in which the ratification of a withdrawal agreement becomes impossible because of the failure of Parliament to pass an Act containing provision for its implementation, or for the case where the agreement is not ratified because of an adverse vote under Part 2 of the Constitutional Reform and Governance Act 2010 (ratification of treaties).

The process in the 2018 Act for each of the no-deal cases is similar. They differ as regards their timetables. The different timetables allow for the fact that the rejection by the House of Commons of a negotiated withdrawal agreement and FFR does not necessarily preclude an attempt to negotiate a revised and approvable agreement and FFR, and of course for the fact that the third case runs up very close to the exit day deadline.

What is required in each of the no-deal cases is that the Government should submit a statement to Parliament on how it proposes to proceed. The House of Commons must then be given an opportunity to debate those proposals on an unamendable motion stating that the House has considered the Government's proposals.

The 2018 Act also provides for proceedings in the House of Lords both in relation to the approval of any negotiated withdrawal agreement and FFR, and in relation to the no-deal cases. However, except so far as the passage of the Bill to implement the withdrawal agreement is concerned, the House of Lords is given only an advisory role, not a decisive one.

This is the context in which the Inner House in the *Wightman* case identifies the issue to which the referred question is relevant. The issue identified seems to be whether there is a legitimate policy option (viz involving the unilateral revocation of the UK's Art 50 notification) which should be capable of being considered, in an informed way, as an alternative to the options that will be available to Parliament in the course of the proceedings required by section 13 of the 2018 Act.

The focus in at least two of the opinions in the Inner House is on the proceedings in the House of Commons under section 13(1)(b) of the Act to approve a negotiated withdrawal agreement and FFR.[10] Those are the only proceedings under that Act that can give rise to a vote with an immediate substantive, legal effect on the process. The Inner House did not specifically consider the extent to which the question might also be relevant to proceedings on the passage of the Bill to implement any withdrawal agreement or to the treaty ratification proceedings that will also be necessary (if an agreement is reached with the EU) under Part 2 of the Constitutional Reform and Governance Act 2010.

Nor does the Inner House appear to be putting any weight on whether the referred question would also be relevant to the debates on the non-amendable and non-substantive motions that are required by section 13 of the 2018 Act in relation to Government proposals submitted to Parliament in the no-deal cases. It would certainly be surprising if the case had decided that the referred question must be answered authoritatively for the purpose of Parliamentary proceedings the outcome of which can have no direct legal effect.

10. Paras. 27 & 37 of the opinions. Para. 54 in the opinion of Lord Drummond Young suggests, perhaps, that he thinks the referred question is relevant generally to all future decision-making by Parliament on UK withdrawal from the EU.

So, the reasoning of the *Wightman* case is that the decision on whether to approve a withdrawal agreement, and maybe subsequent substantive decisions on UK withdrawal, can only properly be made if there is legal certainty about the alternative option, namely, of legislating to authorise or require a revocation of the UK's Art 50 notification. It seems, though, that the Inner House's decision in that case can only be justified if the judges also think - although they do not explain why - that the required certainty should extend to whether it would be possible to go ahead with the revocation against the wishes of one or more other member States.

It is important to recognise that, unlike in the situation with which the courts were presented in the *Miller* case, Parliament has now spoken in statutory form both on how the withdrawal process is to be completed, and, implicitly, on whether and how it might be halted. The legislation passed by Parliament itself has not provided any mechanism for enabling Parliament to require the process of withdrawal to be halted or, expressly, for that option to be the subject of a debate. The option could be adopted only by changing the law with primary legislation; and when and how withdrawal could be stopped would necessarily depend on the terms of that legislation.

The reasoning in the *Wightman* case accepts the petitioners' arguments that Parliament must be given the opportunity of exploring a third option (viz not leaving the EU) because of the serious and extensive legal and practical implications of allowing the default option to go ahead. It is necessary, it is implied, for Parliament to re-consider an alternative to the outcome it has itself already provided for in the 2018 Act.

It is difficult to see this as anything other than a critical dissent from the policy enacted in the 2018 Act. It certainly fails to take account of the fact that the provisions of that Act are the direct result of a complex and controversial process of political debate and compromise in Parliament, during the passage of the Bill for the 2018 Act. That process specifically excluded the possibility of a meaningful vote against a no-deal outcome if no other withdrawal option were available. The courts should not be re-opening that debate.

The opinions in the *Wightman* case appear to involve a fundamental misconception about the effect of the 2018 Act, the nature of Parliamentary sovereignty and the role of the courts. Parliament has already provided by statute for a new status quo in relation to the UK's future relationship with the EU. The only stage at which the new status quo contemplates that the option of stopping the withdrawal process could arise is when the Government comes forward with the proposals it is required to make in each of the no-deal cases. The 2018 Act does not specifically require a proposal for halting the withdrawal process to be considered at that stage. Equally, though, it has not excluded the possibility, nor could it.

The provisions of the 2018 Act are constructed on the constitutionally incontrovertible assumption that, if Parliament were persuaded that the only way forward was to seek to halt the withdrawal, it would be for the Government to bring forward proposals to Parliament about how that could

be achieved. As already explained, proposals to halt the withdrawal process would be bound to involve a mechanism for securing authorisation for the revocation in a public vote, as well as in primary legislation. It might also, at that stage, involve negotiations with the EU.

That structure for future decision-making is not only what the law provides, it also represents a reasonable and realistic way of accommodating the role that it is constitutionally appropriate for Parliament to play in national policy-making. It recognises the established constitutional settlement under which the role of government is to initiate and develop policy and legislative proposals, sometimes in response to Parliamentary opinion, and it is Parliament's role to scrutinise and confer legitimacy on those proposals and to hold the government to account.

Parliament has specifically legislated in the 2018 Act on the assumption that uncertainty about unilateral revocability will continue until any need to attempt revocation arises, or perhaps — for the reasons explained in Part 1 of this paper — that it is better if the uncertainty does continue until then. In those circumstances, and in the meantime, it is the constitutional duty of the courts to accept and respect the new legal status quo and the structure for decision-making for which the 2018 Act provides, as well as the assumptions on which it is built.

The 2018 Act effectively and clearly confers the initiative on the Government to come up with an alternative in the no-deal cases if, when the default option becomes likely or inevitable, an alternative is needed. That situation would arise if, at that stage, the no-deal exit provided for by the law as it stands were no longer politically acceptable to Parliament. The Inner House's view that the matter should be considered in a different way at a different time is both inconsistent with the structure of decision-making prescribed by an Act of Parliament that the courts are bound to respect, and an unwarranted interference with Parliament's internal processes. There is an ongoing and lively political and procedural debate about whether Parliament should have been provided with more than the "binary choice" for which the 2018 Act provides, and whether the process for the proceedings under that Act can or should be conducted in a way that allows that.[11] There may or may not be a political case for that; but it is not for the courts to make it or to endorse it, because, from a purely legal point of view, the answer was provided by section 13.

Sovereign right of Parliament to consider every option

None of this means that the 2018 Act, or the respect the courts owe it, in any way diminishes Parliament's sovereignty or its ability to influence Government in relation to the UK's withdrawal from the EU. Parliament retains its ability, at any time it chooses, to insist on a change of direction by Government. That cannot be taken away.

However, that ability exists — so as to supplement the processes for which the 2018 Act does expressly provide — only to the extent that it always exists where a body of opinion in Parliament would like the Government to change direction and bring forward proposals for new legislation.

11. See the inquiry being conducted by the Commons Procedure Committee into the "Motions under section 13(1) of the European Union (Withdrawal) Act 2018".

Government always has to take account of Parliamentary opinion, and to decide whether to accede to it, in the light (amongst other things) of whether it would otherwise run the risk of losing the confidence of the House of Commons and falling from office, or of suffering other intolerable Parliamentary obstruction to its business (involving e.g. its capacity to secure its Budget or its legislative programme). In the no-deal cases, votes of no confidence triggering a general election or government resignation might be a real possibility if the Government could not come up with proposals that are inconsistent with what a majority in the House of Commons is willing to support.

This constitutional fact of life is precisely why Parliament does not need the assistance of the judiciary to ensure that it has the opportunity, in the proceedings under the 2018 Act or at any other stage in the process, to consider the option in which the UK does not withdraw from the EU. It is a lawyerly fallacy to assume that Parliament can consider a matter, and exercise influence over government on that matter, only by means of procedures expressly applicable to that matter. That is not how Parliament works.

The notion that it might be the function of the courts to decide what information needs to be available to Parliament for the purposes of a debate on a vote of no confidence in the government of the day[12] is, if anything, even more shocking than that they should regulate the conduct of proceedings on proposals for legislation, or of proceedings for which section 13 of the 2018 Act expressly provides.

Relevance of the referred question

Nothing in legislation can stop Parliament from insisting that the Government tries to halt the withdrawal process, or at least embarks on a political process that would have that as its ultimate objective. But the question whether remaining in the EU is possible using a unilateral revocation or only by negotiation (or even only by an application to re-join), is irrelevant to when and how Parliament considers the option of doing so.

Moreover, there is another respect in which the provisions of the 2018 Act make it very unlikely that the answer to the referred question will turn out to be relevant in practice to any of the Parliamentary proceedings required by that Act.

It is very likely that the proceedings in Parliament required by section 13 in the no-deal cases will run very close to their deadline, which is finally triggered on 21st January 2019 and requires the final stages of the proceedings under section 13 to take place, probably, in early February 2019. It is obvious, even if it were not implicit in the structure of the 2018 Act, that majority support in Parliament for the revocation of the Art 50 notification could not crystallise until the time for negotiating a withdrawal agreement and FFR had run out and it was clear that any withdrawal deal and FFR rejected by the House of Commons could not be renegotiated into something that would be acceptable.

At that stage, there is a complex set of permutations of what could happen; but the short point is that it is very difficult, if not impossible, to construct

12. A possible implication of the wider category of matters to which Lord Drummond Young appears to think the referred question may be relevant (para. 54 of the opinions) and of the fact that Parliamentary influence over matters relating to UK withdrawal is not confined to procedures specifically applicable to those matters.

a plausible scenario for any of the no-deal cases in which there would be sufficient time before exit day on 29th March 2019 both to hold a second referendum or a general election and to pass the necessary legislation to authorise or require the revocation of the Art 50 notification.[13]

A general election would be quicker than a second referendum, because no legislation is required first. It is also always technically possible, if need be, for legislation to pass through Parliament very quickly. However, the rapid passage of a Bill through Parliament, even in the immediate aftermath of an overwhelmingly conclusive general election result, does still require a degree of acquiescence from all sides; and it is impossible to imagine any plausible scenario in which, in this case, that would be forthcoming or could be negotiated.

So, it is now as certain as it can be that the revocation of the UK's Art 50 notification (with or without the agreement of other member States) would only be possible, in practice, if exit day is postponed. As all the other member States have to agree to a postponement, it is therefore immaterial whether they would also have to agree to the revocation: because only a postponement to which they had agreed would make a revocation possible. The veto, if any State wanted to exercise it, would be exercisable at the earlier stage. Alternatively, a member State could make withholding its veto on postponement subject to receiving undertakings from the UK that would, in practice, require it to secure the agreement of all the other member States, or the one in question, before proceeding to any subsequent revocation.

It is principally this factor,[14] rather than the current policy intentions of Government (which was the argument made and rejected in the *Wightman* case) that makes the referred question purely academic.

Even if it were possible to construct a scenario that would give rise to an opportunity to revoke the Art 50 notification before 29th March 2019, it would necessarily be so speculative and implausible for that factor alone to be quite enough to exclude a jurisdiction to address it. There are numerous other, as yet unanswerable, questions that would need to be answered (or the answers to which would have to be speculatively assumed) before the referred question could be clearly and conclusively answered.

In summary, the scenario that has to be assumed before the referred question could become a real, practical legal question to which a clear answer could be provided is as follows—

a The Government (perhaps following a general election) would have to form the view, consistent with Parliamentary opinion, that it needed to initiate the process of halting UK withdrawal from the EU.

b That view would have to have been endorsed by a public vote in a general election or by another referendum, or both - with a referendum only possible after the passage of legislation through Parliament to provide for it.

c Legislation would have to have been introduced by the Government

13. See , in particular, the October 2018 Report on the "Mechanics of a Further Referendum on Brexit" by the Constitution Unit of University College, London.

14. Of course, the analysis of this factor would require a court to consider matters that you would normally expect a court to think of as outside the range of things to which it is appropriate for a court to have regard. But that merely strengthens the case for thinking that the question itself, which involves determining whether a particular matter is relevant to a Parliamentary debate, is itself inappropriate for judicial determination.

and passed by Parliament to amend the 2018 Act to stop UK withdrawal on 29th March 2019 and to authorise or require the revocation of the UK's Art 50 notification.

d The circumstances in which the duty or power to revoke is imposed or conferred by that legislation would have to include the case where revocation is opposed by other member States.

e Any conditions of the revocation in those circumstances that are included in that legislation - perhaps to get it through Parliament or to get it through against the required timetable - would have to have been satisfied.

f All this would have had to have happened before 29th March 2019.

g The revocation in all those circumstances would have to be opposed by one or more member States for reasons that might represent more or less objectively legitimate reasons for blocking revocation.

h Even if the CJEU had already said that a unilateral revocation would be possible subject to certain conditions, the circumstances would have to exist that would enable the CJEU to determine (presumably on a renewed reference) that the conditions that had to be satisfied before it could be lawful had in fact been satisfied.

This list involves numerous further possible permutations of the surrounding context for each of the assumptions that has to be made, all of which might be relevant to how the question is answered.

Furthermore, there does appear to be another more fundamental misconception in the *Wightman* case about the nature of political decision-making. It is a misconception that is very characteristic of lawyers - of whom of course I am one — and is one of the reasons why the judicial regulation of policy-making and of Parliamentary proceedings is so inappropriate.

Political decision-making does not, as many lawyers and the *Wightman* opinions seem to assume, involve the listing of the legally available options and then deciding between them. Instead, it involves deciding where you want to go and then on the steps that are most likely to get you there. This way of thinking is, of course, encouraged by the availability of sovereign legislative power to remove legal obstacles on the way; but it is also dictated, even where there are legal constraints, by the fact that policy-making involves making judgements and taking risks with unknowable future circumstances, not just operating on or seeking to rectify an ascertainable, existing state of affairs.

So, the opinions of Parliamentarians on the option of seeking to remain in the EU are very unlikely to be affected, one way or the other, by knowing whether a unilateral revocation of the Art 50 notification is legally possible.

What is going to be important to the political decision-makers in Parliament and in government is the likely balance of potential advantages and disadvantages for the relationship between the UK and the EU in the two different cases: where the UK withdraws from the EU and where it halts the process of doing so. They are going to choose between those first,

and only then worry about how best to implement the choice.

Knowing in advance how other member States might react to an attempt to revoke the Art 50 notification might be incidentally helpful in assessing what the relationship between the UK and EU would be if the UK remains in the EU. But it is not going to be possible to get a reliable indication of the likely impact of a revocation on that relationship from an application to the CJEU - nor, in practice, in any other way while the withdrawal and future relationship negotiations are proceeding. Nor is it going to be possible to find out whether the relationship between the EU and the UK after a unilateral revocation is likely to be better or worse than after a negotiated one. In practical terms, the question whether unilateral revocation is legally possible is at best peripheral and insignificant compared to the answers to these other unanswerable questions.

There may be a point at which Parliamentarians may wish to indicate to Government what their preference would be between accepting the risks of leaving (with or without whatever withdrawal agreement and FFR has been negotiated) and the risks associated with trying to stay in the EU. One risk attached to the latter option may be that another member State might object to the UK's continued membership. The proposition that, in those circumstances, the crucial or important question, in balancing out the risks, is whether such an objection could be legally disregarded or would need to be overcome in some other way is, in practical political terms, implausible and verges on the absurd.

Supposed duty to provide unsolicited legal advice to Parliament

Moreover, it more than verges on the absurd, and is an inappropriate intrusion by the courts into what is properly the exclusive business of Parliament, for the courts to take responsibility for giving unsolicited legal advice to Parliament about the legal viability or necessity of proposals for something that can only be achieved by new legislation.

If it were accepted that the courts had a duty to do that - or even just a power - it would impose a massive burden of new types of political litigation on the courts and constitute a very severe risk to the stability of our constitutional settlement, and to public confidence in the judiciary.

That would still be true even if the giving of advice were limited by conditions that do not apply to the advice that is mandated by the *Wightman* case – for example if the advice could be given only when Parliament or one of its Houses, or the Executive, had asked for it, or if it could be given only when the detail of the legislative proposal to which it relates had been formulated.

There is hardly any legislative proposal that does not depend on the making of some assumption or other about the existing law, including law that Parliament would not intend to change even if it were an obstacle.[15] The implication of the reasoning in the *Wightman* case is that every proposal for primary legislation in the UK Parliament, however contingent or lacking

15. See e.g. the arrangements in the Human Rights Act 1998. There is no facility for the UK Parliament to get an opinion from the courts on the compatibility with the Convention of a Bill before Parliament. The procedure set out in section 19 of that Act confines any issue about that to proceedings in Parliament.

in detail, could be made to take an advance trip to the courts for advice about its legal premises, and that that would be required whenever those premises were challenged by a single Parliamentarian.

It is clear that, in deciding whether it had jurisdiction, the Inner House relied heavily on the fact that one of the applicants in the *Wightman* case was a member of the House of Commons.[16] It was that, the judges thought, which ensured that the petition was made by someone with legal standing in the matter.[17]

There is of course – and understandably – no existing mechanism for Parliament collectively to seek a consultative opinion from the courts on a legal matter relevant to a forthcoming debate or proposal for legislation. Parliament, though, is sovereign; and, in the unlikely event that it thought it appropriate to do so, it could certainly decide to create one – if need be, using primary legislation to do so. In the meantime, though, it is difficult to think of a clearer example of something that offends against Parliamentary privilege than an appeal by an MP to the courts against the failure of Parliament to seek advice on a legal matter from the courts, or to create a mechanism for doing so.

There are, it is true, some existing statutory mechanisms in sections 32A to 35 of the Scotland Act 1998 for enabling questions to be submitted to the courts about proposals for legislation in the Scottish Parliament. The correct inference is that these provisions clearly demonstrate the need for express statutory authority for the exercise of such a jurisdiction. One of a number of quite startling implications of the *Wightman* case is that the jurisdiction that the Court of Session has now found itself to have would, in future, be available for circumventing the statutory restrictions that apply under the Scotland Act 1998 to the circumstances in which, and the persons by whom, those mechanisms may be initiated.

It is also open to question whether it is either appropriate or constitutional – in the absence of legislation for the purpose - for the courts unilaterally to usurp the traditional constitutional role of the Law Officers of the Crown as the legal advisers to Parliament on proposals for legislation.[18]

Usurping legislative functions

The constitutional and legal principles about the extent to which it is appropriate for the courts to involve themselves in the legislative process are clear, and are also clearly relevant in this case. They were set out in unequivocal terms by Lord Morris of Borth y Gest in *Pickin v British Railways Board* [1974] AC 765—

> *"It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in*

16. Paras. 28 & 39 of the opinions.

17. It is worth noting that most common law jurisdictions police the boundaries between judicial functions and those of the political decision-makers - the executive and legislature - by denying the courts an advisory role in relation to the actions of other branches of government. Those jurisdictions that do confer an advisory role on the courts, like Canada, confine it to where some other branch of government asks for the advice. Furthermore, unlike the jurisdiction assumed in the *Wightman* case, those jurisdictions are specifically conferred by the constitution or otherwise by express legislative provision, and are not invented by the courts in relation to the legislature. As a secession case, the Canadian case of *Reference re Secession of Quebec* [1998] 2 SCR 217 is perhaps of particular interest in the current context, but it was only possible because of the jurisdiction specifically conferred on the court originally by the Exchequer Court Act 1875 and now by section 53 of Canada's Supreme Court Act 1985.

18. See the House of Commons standard note on the role of the Law Officers of the Crown, 1 August 2014.

> *the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach.*"

What is obvious from these dicta, and that case more generally, is that the rules that require the courts to refrain from interfering in Parliamentary processes are rules that secure that the courts do not undermine the doctrine of Parliamentary sovereignty by usurping Parliament's legislative functions.

It is unfortunate, in those circumstances, that the opinions in the *Wightman* case, particularly that of Lord Drummond Young,[19] having recognised that Parliamentary privilege requires the courts not to "interfere with or criticise the legislature", nevertheless come to the conclusion that it is not interfering with Parliament to require Parliament, for the purposes of its proceedings, to be provided with authoritative legal advice for which it has not asked.

The constitutional position is that it is Parliament that has the responsibility and the right to determine both the factual and the legal premises on which it makes decisions and, in particular, on which it exercises its legislative functions. There may be consequences if it gets them wrong; but it is not the function of the courts to ensure, in advance, that Parliament gets them right. It is a very common experience for government, its drafters, and Parliament, to find that they have to make policy and frame legislation in a state of some uncertainty about the existing law. That is an unavoidable part of the process, given that the operation of the law on a specific case can only ever be totally clear once the case has become the subject of a legal dispute, and a court has decided how the law applies to the actual facts of that case.

Furthermore, in this connection, how can it possibly be thought not to be an unwarranted interference with Parliament's internal processes, and a breach of privilege, for the courts to seek to determine or prescribe the topics that would be relevant and "in order" in a debate in the House of Commons? That is for the Speaker alone. The law cannot and should not seek to pre-empt or prescribe his rulings.

Lord Drummond Young's opinion states that "determining the law as it now exists is a function that is unsuited to a legislative body such as Parliament"; and it then goes on to suggest levels of integrity and reasoning in Parliament that he clearly thinks are inferior to those in the courts. As explained above, determining and making assumptions about the existing law in an abstract and hypothetical way (rather than in its application to individual cases involving known or provable facts), and making similar assumptions about legislative proposals, is an essential part of the process of enacting nearly every piece of new legislation. It is something in which Parliament actually has plenty of experience and expertise. How is it not criticising Parliament for a court to hold that Parliament's processes need to be improved by the provision of advice or information that the court has unilaterally decided is relevant to Parliament's decisions, and that it considers Parliament is not up to getting right or obtaining for itself?

19. See para. 65 of the opinions.

Hypothetical and academic questions

These arguments also provide a context for the view of all the judges in the *Wightman* case that the referred question was not a "hypothetical" question, and so did not fall to be excluded from the court's consideration on the basis of the classic passage (cited in the *Wightman* case) from the judgment of Lord Justice Clerk Thomson in *Macnaughton v Macnaughton's Trs* [1953] SC 387, 392:

> *"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."*

The concatenation of circumstances that are set out above and would need, hypothetically, to exist before the referred question would become a live, practical legal question makes it very difficult to understand quite how the Inner House managed to conclude that the referred question was not hypothetical.

The opinions do, perhaps, suggest that the Inner House confused the concept of whether the referred question was relevant to an issue before Parliament with whether it could be regarded as academic or hypothetical.

A high proportion of proceedings in Parliament involve hypothetical questions. That is because proceedings in Parliament tend to be about the virtues of different policies in a future that can only be imagined, and cannot be proved as fact. But the relevance of a hypothetical question to a political question about policy or legislation is not a reason for making it something that a court must answer before Parliament can consider it; and in this case, as I have explained, the relevance of this hypothetical question to the identified proceedings is no more than peripheral and quite possibly non-existent.

It is perhaps the confusion of the concept of relevance with whether a question is hypothetical that resulted in the Inner House failing to address the essence of the principled objection to authoritative judicial pronouncements of the law in cases where, as here, it is necessary to speculate about the circumstances in which the question might arise in practice: in other words, to answer it on the basis of different hypotheses.

The Lord President, in the Inner House, Lord Carloway, describes the traditional inhibition on the courts answering hypothetical and academic questions as existing for "practical reasons, that are principally resource driven" [20]; but there is something much more important than that behind the restriction.

The principled objection to the courts answering hypothetical questions is simply this: that the process of authoritatively stating the law applicable to generalised, hypothetical, future situations is a process better known as legislation. That is what legislation does. In the UK context, for the courts to seek to state the law for future hypothetical situations, without statutory

20. Para. 22 of the opinions.

authority to do so, is to usurp the legislative role of Parliament. To ask the CJEU a question the answer to which will necessarily be legislative in nature is to invite it to stray beyond its judicial function.[21].

In the UK this argument against the courts attempting to give authoritative answers to hypothetical questions is both illustrated and encapsulated in the fundamental doctrine of *stare decisis*. Under that doctrine the elements of judicial reasoning that have authoritative force are those that are necessary for arriving at the court's decision on facts established in the proceedings before the court; speculation in "obiter dicta" about how the law would be applied in other hypothetical cases that might arise in future definitively is not.[22]

It is in this context that it is necessary to question the Lord President's view that it is the function of the courts, as a third pillar of the state, "to provide rulings on what the law is and how it should be applied."[23] He goes on "That is their fundamental function. The principle of access to justice dictates that, as a generality, anyone, who wishes to do so, can apply to the court to determine what the law is in a given situation."

In so far as this is intended to justify the answering of hypothetical or academic legal questions it goes too far and is mistaken. The rule against answering such questions is not, as he suggests, an exception to that fundamental principle. Instead, it is itself a fundamental element of defining the constitutional role of the courts in the first place. They do not exist to exercise jurisdiction in the absence of any dispute, or to carry out a legislative function or to operate as an enforcement authority. The very important role of the courts is the resolution of disputes about facts or law that arise in connection with the practical application of law to situations that actually exist; and it is also constitutionally confined to that. It is unclear how any principle of access to justice can be relevant to a situation in which there is not yet any dispute in relation to which justice needs to be dispensed.

In the *Wightman* case there was no extant dispute about the application of the law to known or ascertainable facts for the court to resolve, and it should therefore have refused jurisdiction.

21. This argument is powerfully put by the UK Government in its Policy Paper in response to the *Wightman* case published on 6 November 2018. And see also e.g. *Foglia v Novello* [1980] ECR 745.

22. See also the arguments of principle against an advisory jurisdiction contained in the passages from the New Despotism referred to in footnote 6 above. The essence of those arguments is the inherent unfairness of determining the outcome of some future dispute in the absence of at least one of the parties to the dispute. A similar unfairness arises in this case from the difficulty (which is described in Part 1 of this paper) that the UK and the other member States would have in determining exactly where their interest would lie in relation to the different potential answers to the referred question, were it to become relevant to a dispute between them. The UK, at least, is unable properly to participate in proceedings in the CJEU on the referred question because it cannot yet be certain what it wants from them. The essential precondition for the application of the conventional methodology for a judicial tribunal to determine a legal question is missing: a contest between two parties with different and conflicting interests in the different potential answers to the question. It is fundamentally unjust to make it necessary for anyone – in this case the UK and the EU - to participate in litigation, and to take sides, on an issue that is not yet in dispute between them.

23. Para. 21 of the opinions

Summary and Conclusions

The decision of the Inner House in the *Wightman* case is highly regrettable and wrong on several grounds.

Constitutionally, the courts should seek to avoid being drawn into what are essentially political disputes, unless there are overwhelming legal reasons why they cannot avoid it. No such reasons exist in the case of the question whether the UK's Art 50 notification is unilaterally revocable or in relation to whether or when that question needs to be answered to best facilitate political decision-making.

Asking the referred question prematurely, while the question remains hypothetical, makes the likelihood of a negative or otherwise unsatisfactory answer more likely. There are risks involved that require the assessment of the UK's best interests. For this reason, the timing for asking the question should not be determined in litigation, but politically.

The question of what would be possible if other member States were to oppose unilateral revocation by the UK of its Art 50 notification is a hypothetical question which involves a highly implausible hypothesis and, in practice, is only peripherally relevant (if at all) to whether the policy of seeking to remain in the EU is still available and should be adopted.

The referred question cannot be properly answered without knowing in which of a plethora of different scenarios the UK would be seeking revocation and in which the other member States would be objecting to that. Alternatively, the answer would need the CJEU to legislate for every possible scenario.

Furthermore, the referred question is not relevant to the issues that form part of the decision-making structure and sequencing already provided for in statutory form in the 2018 Act, which it is the duty of the courts to respect.

Constitutionally, it is not the function of the courts to give unsolicited legal advice to Parliament on the premises for passing legislation, or for policy proposals that might lead to legislation, or indeed for any other purpose. Nor is it appropriate or practicable for them to accept a jurisdiction to do so, or to commission the advice from elsewhere. Constitutionally any such jurisdiction could be conferred only by Parliament itself.

It is certainly not the function of the courts to inform the debate on issues that might form the basis of a motion of no confidence in the Government. The courts should not seek to pre-empt or prescribe decisions on the relevance of particular matters to proceedings in Parliament. In the House of Commons that is the exclusive prerogative of the Speaker.[24]

The reference to the CJEU in the *Wightman* case is an unwarranted

24. In the House of Lords, the control of House procedure is vested exclusively in the House itself.

interference with Parliamentary proceedings. It involves a usurpation of functions that properly belong to Parliament alone. As an attempt to regulate the conduct of Parliamentary proceedings with a view to ensuring a better outcome, it amounts to an inappropriate and unconstitutional criticism of Parliament. It oversteps the established parameters of the judicial function.

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Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

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