The judgment of the Supreme Court handed down on 24 January 2017 by a majority of 8-3, can be summarised thus: a statute enacted by the Westminster Parliament is required to authorise the decision to withdraw from the EU, and that decision is to be made in accordance with the constitutional requirements of the UK’s constitution (judgment, paras 1-4). This conclusion follows from two rules: Lord Hughes’ ‘Rule 1’ and Lord Hughes’ ‘Rule 2’. Lord Carnwath repeated the rule from the UK Parliament case that ‘the prerogative does not of itself authorise any significant act of state for which legislation is required’ (judgment, para 277, emphasis original). The opposing majority, however, did not agree with Lord Hughes’ view that the relevant constitutional requirement in this case is domestic parliament, but rather that the ‘relevant constitutional requirement in this case is the role of the UK Parliament in the event of a Referendum being held by the UK Parliament on whether or not to withdraw from the EU’ (judgment, paras 92, 93).

The dissent’s view that the ECA reflects in UK law whatever its international obligations deriving from the EU Treaties is, in my opinion, simply an attempt to find statutory backing for the majority’s view that the prerogative power cannot be exercised by the Executive in relation to the EU Treaties after the UK has left the EU (judgment, para 115). It is not the majority’s position that the prerogative power cannot be exercised in relation to the EU Treaties as those Treaties are no longer a source of domestic law, but it is the dissent’s position that the ECA reflects in UK law whatever the international obligations deriving from those Treaties, so that the ECA is itself a domestic law source of domestic law.

The ECHR case-law is also cited in the judgment. Lord Hughes considered the case of the European Parliament v. UK (2004) which concerned the interpretation of Article 69(2) of the EC Treaty (as it then was) by the European Court of Justice. The European Court determined that a decision by the European Parliament to hold a constitutional Convention to amend the Treaties must be a decision of which the European Parliament has the exclusive competence and which was made in its sole and exclusive right. It did not determine whether the European Parliament could itself lawfully modify the fundamental provisions of the Treaties (judgment, para 277, emphasis original). The opposing majority rejected Lord Hughes’ view that the relevant constitutional requirement in this case is domestic parliament, but rather that the ‘relevant constitutional requirement in this case is the role of the UK Parliament in the event of a Referendum being held by the UK Parliament on whether or not to withdraw from the EU’ (judgment, paras 92, 93).

The essence of the close is clearly stated. It is the result of the UK’s constitutional arrangements, the only matters that are relevant to the judgment in this case are the UK’s constitutional arrangements (judgment, para 284). The dissent suggests that the judgment is so legally wrong that it could not have been the result of the consideration of the Supreme Court judges. The majority, however, accepted Lord Hughes’ view that the powers of the Executive under the prerogative power, such as the power to ratify or denounce Treaties, are exercised in the name of the sovereign (judgment, para 284).

The dissent’s view that the ECA reflects in UK law whatever its international obligations deriving from the EU Treaties is, in my opinion, simply an attempt to find statutory backing for the majority’s view that the prerogative power cannot be exercised in relation to the EU Treaties after the UK has left the EU. It is not the majority’s position that the prerogative power cannot be exercised in relation to the EU Treaties as those Treaties are no longer a source of domestic law, but it is the dissent’s position that the ECA reflects in UK law whatever the international obligations deriving from those Treaties, so that the ECA is itself a domestic law source of domestic law.
Ireland, and are not devolved in the case of Wales – see section 30(1) of and paragraph 7(1) of Schedule 5 to, the Scotland Act 1998; section 108(4) of, and Part 1 of Schedule 7 to, the Government of Wales Act 2006; and section 4(1) of, and paragraph 3 of Schedule 2 to, the NI Act. Accordingly, the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union.\[2\]

The essence of the convention is that Westminster would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.