

You don't have to be a lawyer to spot a problem with the law

One of the most frequent jibes levelled at those of us who have raised questions about the recent High Court judgment on Article 50 is for Remainers to say "You're not a lawyer, are you?" The clear implication is that those who are not lawyers have no right to have a view on the law.

But you don't have to be an historian to know that it was unlikely that the Duke of Wellington deployed Spitfires to give his army air cover at the Battle of Waterloo. And you don't have to be a lawyer to spot a problem with the law. In this case, you just need to have a long memory.

Back in 1993, Lord Rees-Mogg took the government to the High Court seeking to stop ratification of the Maastricht Treaty. Lord Rees-Mogg contended three things:

- 1 – That the Social Protocol was improper under UK law;
- 2 – That the Government was using its prerogative powers to change the law without Parliamentary approval; and
- 3 – That the Government was transferring some of its prerogative powers over foreign policy to the European Commission without Parliamentary approval.

Lord Justice Lloyd dismissed all three contentions. He ruled that:

- 1 – The UK was excluded from the Social Protocol;
- 2 – The Government was free to use prerogative powers to agree any treaty it liked, unless Parliament had specifically restricted its powers beforehand.

3 – The Government was not transferring any prerogative powers to the Commission, but was exercising them by allowing the Commission to make decisions on the Government's behalf.

With hindsight we all know that with regard to point 1, the EU introduced all the social chapter rules by the back door anyway. With regard to point 3, I can only comment that Lord Justice Lloyd was stretching words to the limit of their meaning.

It is the second point that should interest us here. Lloyd ruled that the Government could agree to any terms it liked in a treaty, unless Parliament had specifically said it could not. Since Parliament had done no such thing prior to the Maastricht Treaty, the prerogative powers could be used.

But now we are asked to accept the ruling in 2016 by Baron Thomas that the Government can not use prerogative powers to trigger Article 50 because Parliament has not yet had its say. But if Parliament has not yet had its say, how can it (as per the 1993 ruling) have specifically told the government not to use these prerogative powers.

Now Baron Thomas is no doubt a very clever man and a highly experienced judge. I have no doubt that were this put to him he would be able to come forwards with some very clever reason why – no doubt couched in proper legal jargon – black was white and white was black.

But for us less lawyerly folks, it really does seem that it is OK to use prerogative powers to enforce "more Europe", but not OK to use prerogative powers to ensure "less Europe". One law for the Europhiles, another for the Eurosceptics.