The “Metric Martyrs” Appeal Hearing
Divisional Court, Queen's Bench Division
Royal Courts of Justice, Strand
20-22 November 2001

Steve Thoburn v Sunderland City Council;
Colin Hunt v London Borough of Hackney;
Julian Harman and John Dove v Cornwall County Council;
Peter Collins v London Borough of Sutton.

FOREWORD

The following is an account of the “Metric Martyrs” appeal hearing in November 2001, taken long-hand in court by John Gardner. The two Judges presiding were Lord Justice Laws and Mr Justice Crane. Acting for the defence were Michael Shrimpton and Quinton Richards, assisted by Helen Jefferson. Acting for the prosecution (the "respondents") were Eleanor Sharpston QC and Philip Moser (Sunderland), Simon Butler (Cornwall and Hackney) and Fiona Darroch (Sutton).

Present in court were the five traders, Steve Thoburn, John Dove, Julian Harman, Colin Hunt and Peter Collins, their campaign organiser Neil Herron, actor Edward Fox, and BWMA Director Vivian Linacre. Also present were representatives of trading standards, including David Phillips of Cornwall and Tony Northcott of Sutton.

The courtroom itself was wood panelled with shelves of law books on all sides. The room had a high ceiling and a large clock on one wall. Around fifty members of the public were in the gallery each day; at various points, the court was visited by BWMA Patron Lord Monson, BWMA committee members Mike Plumbe, Warwick Cairns and David Delaney, Donald Martin of the Federation of Small Businesses, butcher Dave Stephens (served with an infringement notice for selling meat in imperial units), traders Peter Ellis and Jose O’Ware, UKIP representatives from the north-east, and MEP Nigel Farage.

At the end of the first day of the hearing, Lord Justice Laws summarised the case as a conflict between two statutes: the European Communities Act 1972, giving a minister enabling powers to amend future laws to comply with European obligations, and a later statute, the Weights and Measures Act 1985, running counter to it. Does the minister use the 1972 statute to repeal the 1985 statute, or the latter to repeal the former? The proceedings can be studied in conjunction with *The Shrimpton Emails* (Yardstick 63).

Day One – Tuesday 20th November, 2001

The Appeal started at 10.32am. There was humour when Lord Justice Laws found he had thirteen folders of information when he was told that he should have eleven. "Better than being short", said Michael Shrimpton. There was some discussion as to the order of events. Lord Justice Laws noted that there was a brief reference to himself in Mr Shrimpton's skeleton argument. Lord Justice Laws said that he "wasn't inviting flattery" but asked whether anyone had an objection to him trying the case. No-one objected.

Lord Justice Laws explained that the previous day had been taken up reading skeleton arguments, but there had to be "justice in public". Mr Shrimpton agreed there had to be a balance between the "needs of the court and the need of those present to follow it". By way of introduction, Mr Shrimpton noted that the EC metrication law was now subject to Qualified Majority Voting and that the pint and the mile could be swept away.[1] He also noted that the Leader of Sunderland Council had recently said that traders can sell in pounds, although Mr Shrimpton recognised that this was not the respondents' position.

The day was devoted to Michael Shrimpton's arguments on behalf of the traders. Mr Shrimpton said that there was "no dispute as to fact" in the case: in Sunderland, imperial scales were used; in Hackney, Sutton and Cornwall, pricing was by the pound.

For the first hour of Mr Shrimpton's submission, both judges seemed hostile to his line of argument. Mr Shrimpton said that the 1994 metric regulations were an abuse of "Henry VIII powers" which were intended only for minor matters. Lord Justice Laws said that the Henry VIII powers were a means of allowing the minister to amend acts without going back to Parliament; and Mr Justice Crane said that, since Henry VIII powers were granted to ministers by Parliament itself, how, therefore, could they be illegal?

Mr Shrimpton said that the Henry VIII powers were against the "spirit of the constitution", to be used "only in limited circumstances". Lord Justice Laws said the purpose of the court was not to "blow hot air about spirits" but to decide the law "with teeth".

Mr Shrimpton said there were "certain rules" and limits governing the use of Henry VIII powers. While recognising Parliament as supreme, courts had to fulfil their constitutional role to keep Parliament within constitutional bounds. For instance, Parliament could revoke judicial review, but courts would be bound to reject this as unconstitutional.

Mr Shrimpton went on to argue there were invalid uses of Henry VIII powers in 1972 and in 1985. For example, Henry VIII powers could not be used to over-ride future acts. Lord Justice Laws asked Mr Shrimpton whether he was arguing that Parliament could not set aside future acts, and that the 1994 regulations [passed under the 1972 Act] were therefore extinguished by the 1985 Act. Mr Shrimpton said yes. Mr Shrimpton said that if a minister could over-ride Parliament using Henry VIII powers in order to implement EC directives, then Britain had effectively a puppet Parliament. Lord Justice Laws said these points could be "well made in a political assembly".

Mr Shrimpton raised another objection in that Parliament is right to "keep an eye" on the Executive when the Executive seeks to amend Parliament's laws. Mr Shrimpton said the Executive secured the European Communities Act 1972 on the basis of certain assurances to Parliament regarding the powers it involved.

Eleanor Sharpston rose to say that it was "super abundantly clear" that imperial was being phased out by EC directives in 1971, 1976 and 1980. Lord Justice Laws asked, "This court has no power to say otherwise?" to which Ms Sharpston said yes (it had not).

Mr Shrimpton said it was not in dispute that the EC metric directive came in under the EC Treaty (Article 100) in 1972. After 1980, qualified voting was introduced, meaning the EC could over-ride the UK. He said that this was not merely a "jury point"; it was right for people in a country to what exactly what their constitution is, and to know that the UK could be over-ridden. The implications were "quite awesome". Lord Justice Laws agreed (impatiently) that the public should know.

Mr Shrimpton said that the representatives of the UK when signing the EC directive were Foreign Office officials, not officials from the Department for Trade and Industry. Lord Justice Laws dismissed this point, saying, "The Crown is the ground". The Judge expressed some impatience and said it was time to get to grips with the case.

[1] This was noted by the journalists present who reported the risk to the pint the following day.

Mr Shrimpton said that the prosecution case was wrong when it said there was "no clash" between the Weights and Measures Act 1985 and the European Communities Act 1972. Mr Shrimpton said there was indeed a clash, and charted the course of acts: 1863 allowing metric contracts; 1897 allowing metric for trade; 1963 provided for joint imperial and metric use. In 1965, although the government announced that it wished Britain to use metric, this was on a voluntary basis and no act was passed. In 1976, the Weights and Measures Act was amended so that 1963 restrictions on Henry VIII orders to add or remove imperial units was removed, although this involved no great statement of principle. In 1979, the metrication policy was abandoned. The Metrication Board was abolished in 1980.

At the same time as the UK government was moving away from metric, EC directive 80/181 was passed to bring in metric and phase out imperial measures. Mr Shrimpton said that this directive was to later clash with the Weights and Measures Act 1985 that consolidated the change in policy in 1979 with former legislation. Mr Shrimpton said that the clash was not immediately apparent, since the Directive's enactment date was set some years in the future (December 31st, 1989).

Mr Shrimpton's explanation of events assumed that both imperial and metric could be used up until the conversion deadline. However, Lord Justice Laws, reading the EC Directive noted that, in the run up to the deadline, metric appeared to be outlawed. Mr Shrimpton said that was in his favour as Parliament had said both systems could be used; he was "right for the wrong reasons" and said he was very grateful to Lord Justice Laws for pointing this out. Mr Justice Crane said wryly, "I'm sure you're grateful" [laughter from the gallery] to which Lord Justice Laws interceded, "You don't have to answer that!" Mr Shrimpton said that he was always grateful for assistance.

Mr Shrimpton went on to explain that supplementary indications would go in 2009. Lord Justice Laws made the observation that since the EC policy was to require metric, a ban on imperial supplementary indications was "disproportionate". This comment brought murmurs of support from the gallery, including Edward Fox. However, the Judge said that this was a moot point until 2009. Mr Shrimpton said that, if they were still practising in 2010, they would recall the conversation.

Mr Shrimpton said that the Weights and Measures Act 1985 did not consolidate UK and EC law, merely the range of UK laws. Lord Justice Laws told him not to make such an obvious point.

There was then an exchange that seemed to BWMA observers to alter the approach of the Judges who were, up to this point, entirely sceptical. Mr Shrimpton pointed out references within the 1985 Act to "multiples", that is, pricing and selling in fixed amounts (e.g. "per 100 feet"). Lord Justice Laws made the observation that appropriate uses of Henry VIII enabling powers could include altering the multiples of units rather than taking out imperial or metric altogether.

Mr Shrimpton agreed with this, saying that minor changes could be made and certain minor units removed or added, but in no way could the Act or its enabling powers be construed as a "metrication law". Mr Shrimpton said that the Act was intended to enforce the correct calibration of scales and a uniform system, that is, uniformity in units, so a pound in Queensland was the same as a pound in Yorkshire. This did not mean the Act was intended to prevent the use of either imperial or metric.

At various points, Mr Shrimpton talked in depth about the Acts, causing Lord Justice Laws to tell him to slow down: "I don't have the ability to think of more than a number of things at any one time". Lord Justice Laws also told Mr Shrimpton on numerous occasions to let him read relevant paragraphs for himself: "Get to the argument after we've seen the material".

In a significant aside, after the many complexities of the law were discussed, Lord Justice Laws remarked, "If a member of the public wanted to know the law on January 1st, 2000…", and left the sentence in mid-air, clearly implying that the law was unclear and obtuse. This led to some excitement in the gallery. The Judge said he was not making a theatrical point. He said that the law had to be accessible, and it was as though there had been an attempt to obscure the criminal element. This time, there was applause from the gallery.

At some point, after Mr Shrimpton made a point that Lord Justice Laws did not consider relevant, the Judge said, "There is enough to think about in this case as it is".

One of the prosecution arguments that Mr Shrimpton sought to head off was that, if the defence won, many acts based on implied repeal would be rendered unsound. Mr Shrimpton said there were only twenty such acts, and most of a minor nature. Lord Justice Laws dismissed this consideration, saying that, "Judicial hairs will not turn as to the consequences either way". The Court's role was to do its "judicial duty".

Michael Shrimpton said the 1985 Act impliedly repealed parts of the 1972 Act because of its clear language. Ms Sharpston rose to say there could be

no "implied repeal" while ECA 1972 remains in place. Lord Justice Laws said, "I have a lot of difficulty with that".

Lord Justice Laws said that all acts are equal, although he added this was a "big debate". Mr Shrimpton said Britain does not have "constitutional acts", just acts. Lord Justice Laws told him they were not in "year one of law school". Lord Justice Laws said that the issue of parliamentary supremacy was irrelevant, only the mode of operation by the minister was at issue.

The Judge asked whether the 1985 Act "disabled powers in the 1972 European Communities Act". Mr Shrimpton said yes, the 1985 Act "carved out an exception to the 1972 Act". In 1972, the European Communities Act "occupied" the field of weights and measures. In 1985, Parliament "re-occupied" it with the new act. Parliament may or may not have been aware of the EC directives, but the fact is that the 1985 Act was passed and this created a clash with the 1972 Act that would later be used to implement the EC Directive.

Lord Justice Laws said that there was no clash between the 1985 Act and the 1972 Act, because the 1985 Act had provisions for later amendments. Mr Shrimpton said there was a clash, to which the Judge said, "Show me your best case".

With regards to the prosecution's arguments, Mr Shrimpton referred to two of them: that consolidation acts could not impliedly repeal earlier acts; and that there was a hierarchy of laws[2] that placed ECA 1972 above other acts. Mr Shrimpton went through case law: the Housing Act 1925 was a consolidation act which impliedly repealed the Income Tax Act; the Court of Appeal applied implied repeal to an act involving an international treaty; and parts of the New Zealand Human Rights Act were impliedly repealed by a later act, going against the notion of a hierarchy of acts.

Lord Justice Laws was at times impatient when Mr Shrimpton wanted to read out case law. He regarded Mr Shrimpton's submissions as repetitive. Lord Justice Laws would say, "Where do we go from here", and remarked that submissions were "dependent on the weight of arguments, not the weight of books". However, once a point was explained, Lord Justice Laws seemed to recognise its significance; at one point he said, "These are important passages".

[2] This refers to a hierarchy of Acts being caused by, or arising from, Britain's membership of the European Union, as opposed to a native British hierarchy of Acts.

Mr Shrimpton said the 1972 Act was an ordinary act and subject to all the ordinary conventions, and case law showed consolidation acts could repeal earlier acts impliedly. Furthermore, Community law could not be superior to UK law, since Community laws can take effect only through UK law. He also said all Community law was secondary legislation, since it had to pass through the 1972 Act. Lord Justice Laws said, "It may be right, we'll have to see, subject to Eleanor Sharpston's arguments". Lord Justice Laws also said it was a "difficult and important case".

Lord Justice Laws summed the issue up as a conflict between two statutes, the first giving a minister enabling powers to amend future laws to comply with European obligations, and a later statute that runs counter to the first. Does the minister use the first statute to repeal the latter, or the latter to repeal the former?

Day Two – Wednesday, November 21st, 2001

The second day of the Appeal commenced at 10.40am. Lord Justice Laws apologised for the late start, saying that he and Mr Justice Crane had been "anxiously discussing the case".

Mr Shrimpton wished to refer to Judge Morgan's judgement in Sunderland but Lord Justice Laws said it was not relevant as, "We're deciding this case afresh".

Mr Shrimpton referred to Hansard in 1972, recording Parliamentary debates about the effect of ECA 1972: for instance, the "power of Parliament will not be affected because it cannot be affected". Lord Justice Laws said this was not contentious. Following another reference to the supremacy of Parliamentary sovereignty, Lord Justice Laws said, less than patiently, this was "obviously true". However, Mr Shrimpton advised that it was not consistent with Judge Morgan's judgement which stated: "It is an indisputable historical fact that when Parliament passed the 1972 Act she intentionally surrendered her sovereignty to the primacy of EC law and made that part of our domestic law".

(The gallery suppressed its laughter when Lord Justice Laws asked Mr Shrimpton how far down a page a certain Hansard quote was. Mr Shrimpton replied: "Five-eights, no, three-quarters, maybe seven-eights. I'm trying to avoid using the metric system").

Mr Shrimpton said the European Communities Act 1972 was a derivative source of law, derived from Member States; it was not a new source of international law. Mr Shrimpton said the 1972 Act was passed by Parliament on the understanding that it would not alter the sovereignty of Parliament and that Parliament could not bind its successors. Mr

Shrimpton read tracts from Hansard that showed Parliament had anticipated a clash between UK and EU law and secured assurances from the government.[3]

Mr Shrimpton said that local authorities, if in any doubt, should have sought clarification of the law. Lord Justice Laws said the issue was not whether local authorities were in doubt but whether they were right or wrong. Lord Justice Laws said the case "was a very important one", but told Mr Shrimpton not to repeat the same points: "You are not assisting your clients by asking us to look at points not in contention". The Judge said Mr Shrimpton's points on Parliamentary sovereignty were "wholly elementary principles".

On various occasions, Mr Shrimpton expressed his humility and gratitude to Lord Justice Laws.

Mr Shrimpton said the laws of the EU were of "no relevance" and the Court should not even look at the Directive. The Court's duty was to apply the 1985 Act of Parliament. Lord Justice Laws said that the "… heart of this case is the European Communities Act".

QUINTON RICHARDS

At 11.55am, Quinton Richards referred to Article 10 of the European Convention on Human Rights:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …"

Mr Richards argued that the compulsory metrication laws were an infringement of freedom of speech [i.e. preventing the expression of quantity in imperial units]. Although Mr Richards was representing Sutton trader Peter Collins, he argued that his defence applied to all five traders.

Lord Justice Laws said that the events to which Mr Richards referred occurred before the Human Rights Act was passed in October 2000. Mr Richards said that the Human Rights Act was retrospective as well as prospective. However, Lord Justice Laws said he did not see how it was possible for the Human Rights Act to apply since it was not the law of Britain at the time of the events in question.

At a later point, Eleanor Sharpston rose to say that Mr Richards was correct in that the Human Rights Act could apply to the other four traders since it was retrospective. Lord Justice Laws said Mr Richards should have told him at the time. However, Lord Justice Laws said it still made no difference due to the 2010 issue. He said that, as the prohibition on displaying imperial units as supplementary indications did not occur until 2010, the trader was not a victim *now*.

Mr Richards said that the understanding of weights and measures was "essential to the transparency of the market". Mr Justice Crane conferred with Lord Justice Laws for a few moments, after which Lord Justice Laws said that he was "troubled by the concept that he [Mr Collins] is a victim". He asked Mr Richards to show his best case to illustrate how someone could be a victim before a law affecting them came into effect. However, the case law that Mr Richards presented did not satisfy Lord Justice Laws on this point.[4]

Lord Justice Laws said that the metric legislation might lead to a breach of Article 10 in 2010, but it was not one that the Court could consider now as it was a future event. He had read Sunderland District Judge John Morgan's original verdict and this had also said it was a matter for a future court. Lord Justice Laws said that a lot of water could pass under a lot of bridges before 2010.

Lord Justice Laws asked the counsel for Sutton Borough to read out their trading provisions to confirm that supplementary indications were presently permitted. They were.

The Judge said he had "grave doubts" on whether the Court could adjudicate on matters in ten years' time. Mr Richards drew a comparison with someone in danger of having their home repossessed. Lord Justice Laws said that while he could understand psychological impact, no proceedings before the Court could have any bearing on what would happen in 2010.

Mr Shrimpton rose to say that since the Human Rights Act was primary legislation, and the order preventing supplementary indications from 2010 was a statutory instrument (i.e. secondary legislation), the statutory instrument had to fall. Mr Shrimpton said that this should happen now because, although the statutory instrument did not take effect until 2010, it had been made in January 2000. Lord Justice Laws did not agree with this.

ELEANOR SHARPSTON QC

At 12.46pm, Eleanor Sharpston, acting for Sunderland City Council, made a clarification that she never said that the UK lost its sovereignty when joining the European Community, only that

[3] For examples, see Vivian Linacre's note on the ninth page of *Yardstick 63*.

[4] At one point, Lord Justice Laws became particularly cross. On leaving the court, one of the prosecuting juniors remarked, "That was a carve, Quinton".

Parliament accepted certain restraints. Parliament retained sovereignty, she said, in that she could decline to be a member of the club. Parliament could also expressly repeal laws. However, a consolidation act could not impliedly repeal an earlier act. She said she had no objection to the case law presented by Mr Shrimpton since the dispute lay elsewhere.

Ms Sharpston said ECA 1972 brought into play, or "imported", a new legal system. So long as ECA 1972 remained on the statute books, Parliament was bound by it. Moreover, ECA 1972 entitles British courts to look at Community law (contrary to Mr Shrimpton's assertion that courts must look only at UK law). It was, she said, a "new order of international law", and conveys *vires* on a minister to implement EC directives.

Ms Sharpston said Parliament was protected from the power of ministers to issue statutory instruments, by procedures that allowed scrutiny and challenge; statutory instruments could have no effect unless approved by Parliament. Both statutory instruments providing for metrication had been approved.

Lord Justice Laws said Mr Shrimpton's argument was not that the 1985 Act repealed the 1972 Act, but that the minister had no *vires* under the Henry VIII powers to amend the 1985 Act. Ms Sharpston said the 1972 Act was not a "substantive" act but a "vehicle" and "extremely important". Lord Justice Laws said that, according to Mr Shrimpton, there were no exceptions to the rule: whether the EU was the "subject matter" was irrelevant. The issue appeared to be the scope of the constitutional rule that Mr Shrimpton relied upon.

After lunch, there was the following exchange. Lord Justice Laws: "If the price of Parliamentary supremacy is that Parliament can divest itself of its supremacy, how can it still be supreme? The baby of European law cannot be bigger than the mother of the European Act". Ms Sharpston: "My answer to that has to be that if it is a divesture of sovereignty, it is one subject to Parliamentary statute snatching it back". Ms Sharpston said the limitation of Parliament's sovereignty is accepted by its membership of the European Union, and ECA 1972 gives European law value. However, Parliament could at any stage repeal the Act.

Lord Justice Laws: if Parliament cannot abandon its express power, how can it abandon its implied power? Ms Sharpston took the court through a number of cases, including a 1964 judgement of the European Court where a law derived from the European Treaty over-ruled a national law. Ms Sharpston said that the European Community Act 1972 created its own legal system and replaced internal legal systems. It had real powers that limited or transferred sovereignty and created a new body of law that combines the national states. It was therefore impossible for national states to recall precedents to conflict with EC law, because the law could not vary from one state to another. Ms Sharpston said law from the Treaty could not be over-ridden by domestic provisions without calling the European Union into question.

Lord Justice Laws said at one point, "I'm not sure the Court of Justice will accept that". He said there may be situations where conflict arises but he saw "no reason why the law of the UK should give way to the law of the EU".

Ms Sharpston said the protection of the ultimate sovereignty of Parliament lay in its ability to withdraw Britain from the EU by repealing ECA 1972. Lord Justice Laws asked: what if a future EC law said the EU should exist in perpetuity and Member States had no power to withdraw. Ms Sharpston said that Parliament would have to decide, as with previous treaties, whether it was prepared to incorporate provisions of those laws. Lord Justice Laws asked: what would happen if Parliament agreed, and then there was an election and the new Parliament passed an act to withdraw. Ms Sharpston said that Parliament could pass the act and withdraw, but it would become a matter for the European Court. Lord Justice Laws asked whether the later act was good and valid in domestic laws. Ms Sharpston said it would be. Lord Justice Laws said that would concede that UK law prevails in the event of a clash.

Ms Sharpston said that while Britain remained a “member of the club”, it must comply with the rules. It could reassert its sovereignty by an express act or ultimate expression: "We denounce this treaty".

Lord Justice Laws asked what if Parliament said the Common Fisheries Policy had no effect. Ms Sharpston said the act could be passed but it would not go unchallenged; it would be referred to the European Court in Luxembourg. Mr Justice Crane asked: what would a British court do? Ms Sharpston said in the circumstances of an express act, and unable to seek guidance from Luxembourg, the court would have to decide which act to enforce. Lord Justice Laws said an English court would have to obey the main legislature, regardless of the consequences to its EC partners; the alternative would be that they are not obliged to enforce UK law. Ms Sharpston said that if Parliament wanted to change from its EC obligations, one would expect express language.

Lord Justice Laws summed up Ms Sharpston's points by saying the sovereignties of Parliament and Europe could be reconciled via express repeal. Ms Sharpston said that would be a way forward. Lord Justice Laws asked whether it had to be express, not

implied, no matter how strongly implied. Ms Sharpston said yes. Lord Justice Laws asked, "If Parliament tore up the European Communities Act by mistake, that would be undemocratic?" Ms Sharpston said yes.

Ms Sharpston said the 1985 Weights and Measures Act was only a consolidation act of existing material, including measures to apply the metrication programme. She went through the history of the EC directives and the UK's accession to the EU. At the point of Britain's joining, Ms Sharpston said, it was clear that the rules on metric were part of the wider rules of the EC that the UK accepted. In fact, these rules were adjusted or "softened" for the UK, so that the metrication implementation timescale was extended by five years until 1989.

Lord Justice Laws asked whether the 1971 Directive was phrased for metrication.[5] Ms Sharpston said yes, Annex One contained metric measures. Lord Justice Laws asked whether the public was told that the accession treaty would mean metrication. Ms Sharpston said she was not a representative for the Department for Trade and Industry. Lord Justice Laws mused that the public were not told. Ms Sharpston said she thought there had been public discussions. Lord Justice Laws said it was not something that was likely to have been advertised in the Saffron Waldon Travelling Library [laughter]. Mr Justice Crane said that to some extent it was up to the media. Ms Sharpston said the metrication papers were not secret files.

Ms Sharpston concluded by saying that anything Parliament can do, a minister can do under section 2, subsection 2 of the 1972 EC Act.

Day Three – Thursday, November 22nd, 2001

Ms Sharpston said that the European Communities Act had internal *vires* (section 2.2) to implement UK Community obligations. She said the Court had to consider: what did Parliament actually intend section 2.2 to do? She argued that it must have been placed there to do what it does. Lord Justice Laws said if there was "statute prohibiting its own repeal", it would be good, "but we know it would be bad".

At some point, Ms Sharpston said that section 3.1 allowed for any dispute to be resolved within Community law; Lord Justice Laws said this did not refer to a domestic court considering domestic law.

Mr Justice Crane, the previous day, had asked whether there were any other acts that had "future connotations". Ms Sharpston said she could provide an example in the Human Rights Act that made provisions for changes to future Acts in order to ensure compatibility; Parliament had put in place a technique to incorporate an international treaty with a special nature. Lord Justice Laws said he had a difficulty with that, since the institutions of the EU were "merely the product of EU parliamentarians". He said what is needed is a principle which could put it in legal terms. Ms Sharpston said there were certain areas where constitutional law does not equate express repeal and implied repeal, and where express repeal was specifically required. Repeal could not be made on the basis of a judicial decision on what might have been an oversight. The repeal had to be "democratic" i.e. made expressly.

Lord Justice Laws said the 1985 Act and section 2.2 of the European Communities Act 1972 may appear to be in conflict. He said that the question was not which act had greater force, but whether an administrative rule could work against amending legislation in the future. Mr Shrimpton's view, he said, was that using Henry VIII powers to amend future primary legislation was bad.

Lord Justice Laws said what "sticks in the craw" of a lot of people was that an "ancient and treasured way of doing things can be got rid of without an act of Parliament". Ms Sharpston said she sympathised, but that the 1985 Act contained *vires* and the minister chose to use them.

Lord Justice Laws said that the way in which the criminal offences was created was "shameful". He said that the word "Byzantine" had been mentioned [in the Sunderland judgement] but he considered that to be unfair to the late Roman Empire. Lord Justice Laws said that, had he been the judge sitting in the case, he would have regarded any prosecution as "systematically abusive". He added, "It does look very troublesome".

Ms Sharpston cited various authorities or judgements. Lord Oliver, for example, had said that if Parliament had failed to comply with EC law, this is a result the court must avoid. Ms Sharpston provided an example of an act amended after 1973 using the 1972 Act, and quoted references that said anything short of an expressed statement would justify a court in removing the inconsistency.

Lord Justice Laws reiterated his concern about the "lack of accessibility". Ms Sharpston said that the statutory instrument stated what it was doing.

Ms Sharpston gave an example of a 1992 act being amended by secondary legislation under section 2.2 as there was a "mechanism within the act for

[5] Most readers will be aware of EC Directive 80/181 (1979); this was preceded by Directive 71/354 (1971) to which the British government had to agree in early 1972, in order to join the Common Market; see *Ministers' Metrication Conspiracy*.

amendment". She said the draftsman must have had section 2.2 of the European Communities Act in mind. Ms Sharpston also gave an example of a Henry VIII power being used in a "broad way", as opposed to Mr Shrimpton's view that they were narrowly restricted. Ms Sharpston said it was not clear that the 1985 Act was intended to reoccupy the area held by the 1972 Act. She said provision could be made in acts to say they could not be amended by the 1972 Act.

PHILLIP MOSER

At 12.13pm, Philip Moser for Sunderland (Ms Sharpston's junior) rose to speak. He corrected Mr Shrimpton on the repeal of a particular Henry VIII power. One had been repealed but not the one Mr Shrimpton referred to. Mr Shrimpton conceded this.

Mr Moser referred to section 1 of the 1985 Weights and Measures Act:

"The yard or the metre shall be the unit of measurement of length, and the pound or the kilogram shall be the unit of measurement of mass, by reference to which any measurement involving a measurement of length or mass shall be made in the United Kingdom".

Mr Moser posed the question, "What does section 1 actually mean?" Mr Moser said, according to Judge Morgan, section 1 was a "defining section" and does not have the power to permit the pound. Mr Moser said if section 1 fell, then Mr Shrimpton's entire case falls. Mr Moser argued that the meaning of the section was affected by the term "by reference to". He said the inclusion of this phrase meant the section was a defining section. Lord Justice Laws said it was included for grammatical reasons [laughter].

Mr Moser said that the pound is still in use as a supplementary indication, and in the home for kitchen and bathroom scales. Lord Justice Laws said there was nothing to stop people from creating their own units in the home [more laughter]. Lord Justice Laws said, under English law, "everything is allowed which is not forbidden, except for public authorities where everything is forbidden which is not allowed". The Lord Justice said it "was not much of a point", and that section 1 was "assuming an existing legality". Mr Moser said it was assuming that the pound could be used as a "supplementary indication in trade".

Lord Justice Laws asked whether the EC Directive required criminal penalties. Mr Moser said not, as enforcement was a matter for the UK. He referred to a Dutch case where the European Court ruled implementation was a matter for Member States. Lord Justice Laws noted that there was no opposing argument from Mr Shrimpton as to proportionality or implementation. Mr Justice Crane noted that Mr Thoburn had made a principled stand. Lord Justice Laws said one is offended when an important principle is not accessible, particularly in criminal law. However, he added that was not part of the case.

Lord Justice Laws asked about the offences of short weighing and obstruction. Mr Simon Butler (Cornwall and Hackney) said that if Mr Shrimpton was right, the offence of obstruction against John Dove would fall, as the officer was not acting in pursuit of her duty when removing price tickets. He said, however, that the short weighing offence against Colin Hunt would remain.

[Earlier, Mr Shrimpton had made the submission that the short weighing was a mistake arising from the use of metric scales when pricing and trade was in imperial].

Lord Justice Laws asked whether the law had been readily accessible to the appellants. Counsel for the respondents said that the local authorities had explained the law.

MICHAEL SHRIMPTON'S RESPONSE

In the afternoon, Michael Shrimpton replied to the respondents' arguments. He said that provisions under the European Communities Act 1972 could not affect acts in the future since Parliament's power is a "present power and cannot be projected into the future". Arguments about treaties were irrelevant because, whereas the Executive [government] is bound by treaties, Parliament is not; a treaty is not part of UK law unless incorporated. Mr Shrimpton quoted an authority as saying "Parliament may do as it pleases". Mr Shrimpton made reference to acts relating to Canada and Sierra Leone that reversed previous acts.

Mr Shrimpton said that the constitutional crises would be "enormous" if a Court made a distinction between implied and express repeal. Lord Justice Laws said that the real distinction was between provisions that were specific or general.

There was some discussion on the use of the word "implied". Although Mr Shrimpton had been using the term "implied repeal" in the sense that the 1985 Act did not expressly refer to the 1972 Act, he said that the words contained within the Act were express in the sense that they were "clear" [when permitting imperial units].

Lord Justice Laws asked whether there was a clash in view of the regulations allowing the use of imperial as supplementary indications. Mr Shrimpton said supplementary indications were a red herring. He said there was no immediate clash in 1995 because the provisions that came into effect

that year affected only pre-packed foods or loose non-food goods. With regards to pre-packed foods, these were supplied mainly by supermarkets that supported metric conversion and used it anyway. With reference to loose goods, such as carpets, the clash was avoided since carpet retailers used metric with imperial as supplementary indications.

Mr Shrimpton said that it was only after December 31st, 1999 that the "parallel tracks" of UK and EU law converged, and metric law applied to traders dealing in foods sold loose. Parliament said traders could use the pound, EU law said they could not. By using Henry VIII powers to implement the EC Directive, a system that had been used for 1,500 years had, "without any meaningful debate", been swept away, affecting "every shop, marketplace and gallon in the Bentley" [laughter].

Lord Justice Laws asked whether Parliament knew what it was doing [with regards to the clash between UK and EU law]. Mr Shrimpton said that the Courts must assume that Parliament knows what it is doing, even if it does not.

Lord Justice Laws asked why the Henry VIII powers under section 2.2 of ECA 1972 were not available to the minister. Mr Shrimpton said because it was looking to the future. Mr Justice Crane asked Mr Shrimpton if his view was that section 2.2 could not be projected to the future to bind Parliament's successors; Mr Shrimpton said no, it could not. Lord Justice Laws said a later act may use provisions to deny section 2.2. He added that section 2.2 does not purport to project powers to bind future Parliaments, merely to allow ministers to amend acts, subject to clauses in acts denying 2.2's intervention.

Mr Shrimpton responded that allowing governments the use of Henry VIII powers to override future acts was "incredibly dangerous". He described the scenario of governments, anticipating that future governments might repeal their acts, putting in clauses specifically for the purpose of allowing them to reverse repeal once they were returned to power. This would mean they would not have to go back to Parliament to seek new acts. Mr Shrimpton said this would "unravel the fabric of the constitution" and represent a "defiance of Parliament". He said there was no greater abuse of a Henry VIII power, since it "placed the Executive above Parliament".

In 1994, ministers used powers projected forward from the 1972 Act to wreak the 1985 Act; then used coercive powers of the state to enforce the wrecking amendment. Mr Shrimpton said that a possible reason why the minister did not go to Parliament to repeal the 1985 Act was because, "he was afraid he could not get it through". If the government failed to comply with its EC obligations, it would be "quite proper" for the European Court to rule there had been a breach of European laws. In these circumstances, Mr Shrimpton said, although Parliament may be expected to enact new legislation, it may not be willing to do this for democratic reasons i.e. the public do not support it.

Mr Shrimpton responded to Ms Sharpston's reference to the 1998 Human Rights Act as another Act that can amend future acts; Mr Shrimpton said the same argument applied: Henry VIII powers could apply only to pre-1998 legislation. Parliament could breach the European Convention on Human Rights if it wanted to, and Mr Shrimpton cited an instance from 1531 where Parliament authorised the boiling in oil of the Bishop of Rochester. Lord Justice Laws said 1531 pre-dated the European Convention on Human Rights [laughter].

With regards to Mr Moser's construction point, Mr Shrimpton said that the 1985 Act was not an elegant act, but its wording was "quite clear". The preservation of the pound and yard was in section 1.1, and the pint, gallon, foot and inch was preserved by section 1.4. Parliament had no intention to lose the pound, and section 1.1 was unamendable by internal *vires*; the draughtsman knew this authorisation could not be touched, so used the section 2.2 powers of the ECA 1972.

Mr Shrimpton also referred to Judge Morgan's Sunderland judgement which said, "… it would be difficult to have a common market with two ways of measuring mass"; Mr Shrimpton said that in fact the UK and the US had two ways of measuring and were economically successful.

Mr Shrimpton said the Treaty of Rome is a treaty, not a source of law, and named European countries that had not incorporated it into their constitutions. Britain had not incorporated it into her constitution, but into the European Communities Act. Treaty laws could thus apply only within the bounds of Britain's national law and sovereignty. In contrast, Ireland had incorporated the Treaty into her constitution; therefore, there could be no breach in sovereignty.

Mr Shrimpton said that the EC, or the Common Market as it then was, was aware of Britain's internal rules in 1972, and that Britain could never fully incorporate the Treaty of Rome since it could only be combined with the British constitution via Parliament, and no Parliament could bind its successor. Any clash that might later arise was a matter for governments to resolve, not the courts.

Lord Justice Laws asked Mr Richards whether he had any further submissions. Mr Richards said he had not.

The Court closed at 3.30pm.

The Verdict, 18 February 2002

The verdict on the appeal was delivered three months later on 18 February 2002, again at the Royal Courts of Justice. Lord Justice Laws and Mr Justice Crane rejected the appeal. A note of proceedings was again made by John Gardner.

Lord Justice Laws and Justice Crane entered the Court at 9.07am. Lord Justice Laws apologised for the judgement taking so long, saying that points had occurred to the Court that, had they proved good, would have assisted the defendants. Their Lordships had sought further submissions from the parties but, in the event, the points did not prove good.*

Lord Justice Laws said that for reasons given in the written judgement, the appeals were being dismissed.

There were three issues to be dealt with by the Court that morning: providing answers to questions raised in the case; matters of costs; and a further appeal to the House of Lords.

On the first point, the judges considered it wasteful to address every question raised in the case and decided to address the general point: were the metric regulations valid or not? For reasons given in the written judgement, they held that the regulations were valid.

On the matters of cost, Lord Justice Laws heard submissions from lawyers representing local authorities who argued that since the traders had chosen to appeal their convictions, they had exposed themselves to further costs. They said that local authorities had no choice but to apply the law and should not be expected to pay the bill. They further said that costs should be made against the Metric Martyr Defence Fund which existed to support the traders.

Michael Shrimpton, defending the traders, argued that there should be no order for costs against the traders for four reasons:

i) It was pertinent that each of the local authorities had chosen traders of limited means but not any of the supermarkets that broke metric regulations. Mr Shrimpton said that the local authorities had the opportunity to ensure equality of arms by proceeding against supermarkets but proceeded where there was no equality.

ii) The appeal had been of enormous constitutional importance and went beyond weights and measures. Mr Shrimpton said that it raised issues surrounding the 1972 European Communities Act which should not have been left until thirty years after Britain had entered the EU; therefore, funding the case should be a matter for central government, not individuals or ratepayers.

iii) Costs should be assessed by reference to the defendant's means.

iv) Mr Shrimpton pointed out that the Appeal, while lost, had been successful on a number of the points that it had sought to argue; for instance, the 1985 Weights and Measures Act meant what it said when it permitted imperial units.

Lord Justice Laws remarked that the traders, "did not have to come here [the appeal court]". Mr Shrimpton said that the appeal process was an entitlement. However, the judges held that the defendants should pay the costs of the Appeal. These costs would not be reduced. They said that the defendants had proceeded to Appeal and were aware of the costs if unsuccessful.

On the final matter of appealing to the House of Lords,† Lord Justice Laws said he would certify one question of public importance, namely, "Whether the European Communities Act 1972, or any part thereof (and if so which part) is capable of being impliedly repealed?"

The proceedings concluded, having taken about an hour.

* These points related to supplementary indications.

† See *Yardstick 63* for an account of the House of Lords Appeal Committee hearing, held on 15 July 2002.