In re the Weights and Measures (Units of Measurement) Regulations 1994

And in Re the Weights and Measures Act (Metrication) (Amendment) Order 1994

And In Re the Law of the Constitution

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OPINION

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## 1. Introduction

1. By instructions in writing received from Messrs Bennetts, solicitors, of Harlow in the County of Essex, on 8th December 1999, I am asked to advise the United Kingdom Independence Party on the validity of the Weights and Measures (Units of Measurement) Regulations 1994 and the Weights and Measures Act 1985 (Metrication)(Amendment) Order 1994. These regulations purport to introduce compulsory metrication in the United Kingdom.

2. There is no reason at all why a political party should not seek the advice of counsel. As is well-

known the United Kingdom Independence Party ('UKIP'), as its name implies, pursues a policy of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Community. It is a perfectly proper policy and I wish to say nothing against it, indeed it will be recalled that it was for many years the policy of the governing party. It will also be recalled that aside from sending an observer the Conservative Government of the day resolved to have nothing to with the negotiations which led to the Treaty of Rome. I might add that it would seem from recent opinion poll evidence that the policy has the support of the country. There it is.

3. I have of course disclosed to those instructing me that I am a member of a different party. In accordance with the tradition of the Bar the advice I give is free of party political considerations. I should give the same advice to my own party (the Conservative and Unionist Party) or to any other political party. I suppose that in the course of my career at the Bar I have prosecuted as many cases as I have defended (I have never felt it necessary to keep a count), including trading standards prosecutions. If I were called upon to advise a local authority I should give exactly the same advice about the *vires* of these purported regulations. I should also disclose that I am a member of the British

Weights and Measures Association. No conflict of interest arises.

## 2. Metrication

4. I have read with interest the correspondence passing between Mr. Jeffrey Titford MEP and various trading standards departments in the East of England. The Metric Celsius system of measurement was of course introduced by the French Revolutionary government from 1790, the basic linear unit, the metre, being based on a miscalculation of the surface distance between the North Pole and the Equator through Paris (why anyone would ever want to travel from the North Pole to the Equator via Paris was never made clear). Some Imperial measures continue in use on the Continent down to the present day, a point acknowledged by the Minister in his letter to Mr Titford dated 1st October 1999, a copy of which is enclosed with my instructions.

5. It is sometimes asserted that the metric system has been generally adopted, but that is not right. The world's largest economy (and our largest trading partner), the United States, continues to use English measurements, a point I was able to confirm on a recent visit to celebrate the Thanksgiving holiday - every signpost was in miles and every petrol pump calibrated in gallons (albeit American gallons!). I

understand that a number of states have abandoned moves to convert to metric, a trend likely to be accelerated by the loss of the Mars Climate Orbiter after the Jet Propulsion Laborotory in Pasadena wrongly assumed engine thrust to have been expressed in Newtons as opposed to pounds thrust. I am told that Canada (where the use of metric measurements caused an airliner to crash) is pulling back from compulsory metrication. Imperial measures remain in near-universal use in aviation (save for Russia, where the calibration of aircraft instruments in metric contributed to a mid-air collision) and at sea (eg nautical miles).

6. Metric measurements were made lawful for use in the United Kingdom in 1897, but proved to be of limited utility and the metric system did not gain widespread acceptance. No doubt with a further application to join the European Community in mind the government in 1965 announced a new policy of compulsory metrication. It did not enjoy democratic legitimacy (people and businesses were perfectly at liberty to use metric if they wished, but they declined to do so) and proceeded slowly. Eventually Council Directive 80/181/EEC, as amended by Council Directive 89/617/EEC, provided for compulsory metrication across the European Community and it was in response to these directives that the 1994

Regulations were brought in, their purpose being essentially to outlaw the imperial system and criminalise its use, subject to limited exceptions such as the pint of beer and the pint of milk (but only if sold in bottles). If valid the combined effect of the Regulations would make it a criminal offence in England, from 1st January 2000, for a grocer to sell a pound of apples.

## 3. The Weights and Measures Act 1985

7. This was a consolidation Act, which has a bearing on its interpretation, as a consolidation statute is presumed not to alter the law unless the contrary intention appears (Bennion, *Statutory Interpretation*, 2nd ed., at 442). By section 1 a dual system of weights and measures is expressly provided for and the yard and the pound are defined (curiously by reference to their metric 'equivalents,' although there are no metric equivalents and the new yard is slightly longer than the old.) Schedule 1 expressly refers to Imperial measurements including the mile, yard, foot and inch (in Part 1), the acre, square yard and square foot in Part II, the gallon (ludicrously defined as "4.54609 cubic decimetres"), quart and pint in Part IV and the pound and ounce in Part V.

8. Schedule 3 is headed "Measures and Weights Lawful

for Use for Trade" and again expressly refers to Imperial linear, square, and capacity measures and Imperial weights. It is clear beyond a peradventure of a doubt that the use of Imperial weights and measures for all purposes has been expressly authorised by the Imperial Parliament at Westminster. No amending Act has been introduced. Under the Law of the Constitution no Act of Parliament may be amended save with the authority of Parliament. I turn now to consider what Parliamentary authority there might be for the 1994 secondary legislation.

**4. The Units of Measurement Regulations**

9. These purport to amend the Weights and Measures Act 1985 ('the 1985 Act') by Regulation 4(4), adding a new Regulation 11 to the Units of Measurement Regulations (SI 1986/1082), whereby units of measurement specified in Schedule 3 to the Regulations are deleted. These are all imperial measures. Regulation 6 purports to amend the 1985 Act from 1st October 1995, *inter alia* by removing from Parts 1 and II of Schedule 1 to the 1985 Act all reference to imperial units (Regulation 6(5)(a)). Regulation 7 purports to further amend the 1985 Act from 1st January 2000 by deleting reference to the fluid ounce, pound and ounce. It is the operation of this regulation 7 which has led to the threats to traders

referred to in my instructions, albeit that the prosecuting authorities each express the wish that traders will submit to metrication without the need to trouble the courts.

10. The Weights and Measures Act 1985 (Metrication) (Amendment) Order also purports to amend the Act, but only section 8(2) and Schedules 3 to 7. Critically, **this order leaves Section 8(1) and Schedule 1 untouched.** Section 8(1), which is not purportedly amended in either set of regulations, provides as follows :-

> No person shall use for trade any unit of measurement which is not included in Parts 1 to V of Schedule 1 to this Act, or...

Section 8(2) goes on to deal with having in possession for use for trade measures (eg scales) which are not inlcuded in Schedule 3, which is puportedly amended by Article 3(3). There may therefore be a different legal result depending upon the precise nature of the offence alleged, although the conflict set up by this cumbersome regulatory scheme may be impossible to resolve in favour of the prosecution (if one set of regulations is invalid and other valid it would arguably be legal to sell a pound of apples but illegal to own a set of Imperial scales).

11. The scheme of the regulations is to leave Section 8(1) alone and simply delete imperial measurements from ~~the~~ Schedule 1, which is of course referred to in Section 8(1)(a). The first thing to be said is that this must surely be the most obscure method of amending an Act of Parliament ever devised. Had the Minister intended to mislead Parliament or the public by disguising what he was seeking to do he could not with respect have chosen a more effective method. I have seen pleadings in Chancery which were a model of clarity in comparison.

12. When these matters get to court it will be necessary for counsel to prepare a form of Scott schedule, to be agreed if possible with prosecuting counsel, setting out the original wording of the 1985 Act, the wording contended for by the prosecution (ie as purportedly amended) and the effect of each set of regulations being valid on their own (ie a split result).

5. **The European Communities Act 1972.**

13. The possibility of a split result arises because for reasons which only the Minister could explain he used two different powers. The Units of Measurement Regulations were introduced under the alleged power conferred on the Minister by section 2 of the European

Communities Act 1972. Notoriously this ludicrous piece of legislative drafting puported to bind future Parliaments by means of sub-section (4), "... any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section." That was a nonsense and a constitutional impossibility, because as is well-known our Sovereign Parliament cannot bind its successors and in the event of conflict the later Act takes precedence (subject only to the limited *generalia specialibus non derogant* rule which does not apply here and where in truth there is no conflict at all because the later general words are reconciled with the earlier enactment). If authority were needed for the above proposition it is be found in Dicey, *The Law of the Constitution* (10th ed., Part 1, Chapter 1, *passim*). The law is correctly stated, with particular clarity, by this immortal jurist between pages 64 and 70, passages which I humbly and respectfully adopt in their entirety.

**6. Implied Repeal**

14. Not only may Parliament repeal any previous legislation expressly it may do so impliedly and at will, through the simple expedient of enacting legislation which is inconsistent with the earlier enactment. This is known as the *Leges Posteriores*

*Priores Contrarias Abrogant* Rule (see Bennion, *op cit*, at 204, citing *inter alia* Sir Edward Coke, 1 Inst 25b). It is an ancient rule, as old as Parliament itself, of immense constitutional significance, guaranteeing as it does the liberties of Parliament to legislate and by extension the liberties of the British people. The Constitution admits of no higher authority than the Sovereign in Parliament. The *Leges Posteriores* rule is absolute and admits of no exceptions, not even Magna Carta or the Bill of Rights (indeed the Court of Appeal has only recently rejected an attempt to protect the Bill of Rights against the rule and rightly so, with respect, in *ex p Burke*, upholding the judgment of Popplewell J.).

15. The power of the *Leges Posteriores* Rule was recognised by the draftsman of the Human Rights Act 1998. Although not in force (save for minor sections) this legislation was designed to incorporate the controversial European Convention on Human Rights into UK law. Some proponents of the ECHR, seemingly unaware of basic constitutional principles, bizarrely proposed that subsequent parliaments be bound. Of course that was not possible and in the event that a later Act of Parliament is found to have contravened a provision of the Convention the courts are limited to a declaration that the later Act is inconsistent, leaving it to Parliament to bring in amending legislation if it so

pleases, it being a matter entirely for Parliament. Of course Parliament would be free not to amend the legislation, or for that matter to repeal the Human Rights Act, which like the European Communities Act 1972 and the Bill of Rights is an ordinary Act of Parliament subject to repeal both express and implied repeal in the normal way.

16. Section 2(4) of the European Communities Act 1972 was not the only ineffectual attempt to undermine the sovereingty of Parliament by seeking to tie the hands of future Parliaments. His late Majesty King Henry VIII tried it, as recorded by Bacon, cited by Dicey, *op cit* at 64-5n, seeking to provide that no statute made during the minority of a King should be binding until confirmed by the King under His Great Seal at full age. This was as futile as Section 2(4) and was duly repealed early in the reign of our child king, Edward VI. No-one has ever doubted the authority of the King in Parliament in the reign of King Edward VI.

17. The next figure in our island story to try to attack Parliament in this way was David Lloyd-George, who was Prime Minister when the Acquisition of Land (Assessment of Compensation) Act 1919 was passed, s.7(1) of which purported to bind future Parliaments. Surprisingly, with respect, counsel (Mr. Hill) was found who was willing to assert that s.7(1) bound

future Parliaments. In due course a case was stated by an official arbitrator appointed under the Act and the matter came on for argument before the Full Divisional Court (*Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 733). That most distinguished tribnual (with repsect), Mr Justice Avory, had no hesitation in rejecting Mr. Hills' startling submission that a section of an Act passed in 1919 could somehow affect an act passed in 1925. The learned judge ruled as follows (at 743):

> ...we are asked to say that by a provision of this Act of 1919 the hands of Parliament were tied in such a way that it could not by any subsequent Act enact anything which was inconsistent with the provisions of the Act of 1919. **It must be admitted that such a suggestion as that is inconsistent with the principle of the constitution of this country.** (emphasis added)

Avory J. went on to point out (at 743-4) that if the 1925 Act were inconsistent with the 1919 Act "the earlier Act is impliedly repealed by the later."

18. The *Vauxhall Estates* case was heard by an exceptionally powerful Divisional Court. Sir Horace Avory (1851-1935) was perhaps the greatest judge to sit in the King's Bench Division in the century just

ending and acted as Lord Chief Justice when Lord Hewart CJ was ill. His judgment on this occasion was supported by no less a legal personage than Sir Travers Humphreys, of whom the *Biographical Dictionary of the Common Law* records (at 264) that as a criminal prosecutor "he was so fair that he left nothing for the defence to say." His cases at Bar included the prosecutions of Oscar Wilde, Dr. Crippen and the traitor Sir Roger Casement. His judgment in *Vauxhall Estates* (at 745-6) is succint, closely reasoned and correct (with respect) :

> ... In this case the argument for the claimant is that s.46 of the Housing Act, 1925, does not, and never can, apply to this or any other case, inasmuch as it is utterly void and of no effect ... That is certainly an astonishing proposition, and Mr. Hill has based it upon the language s.7,sub-s 1, which provides that : "the provisions of the Act or order by which the land is authorised to be acquired ...shall...have effect subject to this Act," and further that: **"so far as inconsistent with this Act those provisions shall cease to have or shall not have effect."** (emphasis added) He says that these words mean that at no subsequent time shall it be competent for Parliament to alter the law as there laid down, except in

> or other of two ways. He admits very frankly that it would be open to Parliament to repeal that sub-section by express enactment, amd he admits that it would be open to Parliament at any subsequent time to amend that sub-section by ~~express~~ implied? enactment. He says, however, that the ordinary rule of construction, which lays down that **where two inconsistent provisions are found in two Acts of Parliament, the one passed subsequently to the other, the later provision shall prevail and shall be deemed impliedly to repeal the earlier provision,** (emphasis added) cannot apply to this sub-section because of its special terms. For my part I fail to follow that argument. If it is once admitted that Parliament, in spite of those words of the sub-section, has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them.

I do not see how that exposition of the law could be

improved upon and I do not propose to attempt the task, contenting myself with respectfully adopting that passage as a correct statement of the law, with inevitable consequences for the Units of Measurement Regulations.

19. Mr. Hill did not rest there. He thought it right (it was a matter for him) to ventilate his argument two years later before the Court of Appeal. Another strong court (Scrutton & Maugham LJJ and Talbot J) threw the argument out. The case is reported as *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 593. Lord Justice Scrutton, having described Mr. Hill's argument (at 595) as "impossible," went on to say :

> Such a contention involves this proposition, that no subsequent Parliament by enacting a provision inconsistent with the Act of 1919 can give effect to the words it uses.

This passage emphasises an important aspect of the doctrine of implied repeal - it rests upon the express will of Parliament. Applying the Weights and Measures Act 1985 requires no more than giving effect to its clear and express words It is nothing to the point that there are no express words of repeal or amendment of the European Communities Act 1972 - as both the Divisional Court (whose decision was upheld in *Ellen*

*Street Estates,* at 596) and the Court of Appeal held words of repeal are not necessary.

20. Neither Scrutton LJ nor Maugham LJ decided the case on the basis that s.7(1) of the 1919 Act did not purport to bind future Parliaments (although the junior member of the court, Talbot J, whilst agreeing with his brother judges, was prepared to adopt such a construction (at 598)). The judgment of Maugham LJ (later a Lord of Appeal in Ordinary) contains an admirably conscise statement of the constitutional position, at 597:

> The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and **it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal.**(emphasis added).

21. So far as I am aware the authority of these decisions has never been called into question in a court of law in England, nor is there any constitutional basis for doubting them. There was no revolution in 1972 - all that happened is that Parliament was persuaded (by doubtful means it must be said) to pass an Act of Parliament. The Parliament of 1985 was no less sovereign than the Parliament of

1972 and it could and what is more did over-ride the European Communities Act and Council Directive 80/181/EEC at will. For the reasons explained by Lord Maugham, Lord Justice Scrutton and Mr. Justice Humphreys the proposition that anything done in 1972 could have a bearing on an Act of Parliament passed more than a decade later is unarguable and contrary to the Law of the Constitution. I would not expect any Member of the Bar of England and Wales to put it forward.

22. I have highlighted these two cases because of the clarity of the judgments, the outstanding quality of the judges who delivered them and because they are precisely in point, given the attempt in 1919 to bind future Parliaments (I agree with the Court of Appeal that section 7 of the 1919 Act is capable of bearing the construction urged by Mr. Hill for the claimants). It should not be supposed however that these are the only authorities on implied repeal. I need only refer to *Maxwell on the Interpretation of Statutes* (at 191 *et seq*), to Bennion (*op cit*)(at 204-5), who does not like the doctrine (or perhaps, with respect, does not like its consequences) but who admits of its existence, to *Odgers Construction of Deeds and Statutes* (5th ed at 260-64), to *Craies on Statute Law*, at 366-8 and Wilberforce, *Statute Law*, at 310-11, which between them set out an overwhelming weight of

authority, sufficient to crush the 1994 Regulations.

## 7. Repugnancy

23. The courts do not favour implied repeal and rightly so. More than mere inconsistency is required. The test is one of repugnancy, for which see the judgment of A L Smith J in *West Ham Church Wardens and Oversees v Fourth City Mutual Building Society* [1892] 1 QB 654 at 658 :

> The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?

Plainly those provisions of the Weights and Measures Act 1985 which expressly authorise the use of Imperial weights and measures cannot be reconciled with community law, which seeks to outlaw those self-same weights and measures and force the European system of measurement upon us by means of criminal sanctions, indeed force a change to our way of life, so central are our much-loved and familiar weights and measures to the British way of life.

## 8. The *Factortame* litigation

24. I have not left out of account the *Factortame* litigation, during the course of which the Divisional Court purported to issue an injunction to the Minister not to obey Part II of the Merchant Shipping Act 1988. The background to the case (in which I was instructed as counsel, at the very end, by certain UK fishing interests, who were desirous of intervening under Order 53, but who did not pursue the application) was that our fishing stocks were being depleted by Spanish fishing vessels operating in British waters using the Red Ensign as a flag of convenience. Quite properly Parliament outlawed this abuse and the Spanish fishermen then sought to invoke community law, their intention being to use European community law to allow them to sail in British waters under the British flag, seizing a marine resource which under international maritime law belonged to Britain, against the will of the British people as expressed by their democratically elected Parliament. The litigation which resulted (and which has just led to a further judgment of the House of Lords (16th December 1999) on the issue of damages) has been the most controversial since *Darnel's Case* (1627) 3 St. Tr. 1, where the wrongful refusal of the judges to uphold the common law and grant Habeas Corpus to John Hampden and others helped plunge the country into the Civil War (in which Colonel Hampden was to play a most gallant role, ultimately sacrificing his life in the cause of

Parliament and freedom). In *Factortame* the judges with respect arguably went further than the judges in *Darnel's Case*, because they refused to apply the Act of Parliament. With the utmost respect that was unconstitutional and provided Parliament with grounds for removing them (all higher judiciary appointments are subject to removal for constitutional misconduct). The judges were fortunate that Parliament was either supine or asleep.

25. I need not consider the *Factortame* litigation in detail for the elegantly simple reason that the case was not fully contested by the Law Officers, who chose not to argue the obvious defence (with respect) of implied repeal. The result is that the implied repeal point was not argued, indeed I have that on the authority of one of the counsel for Factortame Ltd, who was present in the House of Lords, who told me when I was brought in to advise the UK fishing interests that one of the members of the panel (the late Lord Brandon of Oakbrook), a specialist in maritime law, queried the failure to argue the point.

26. The leading authority on the doctrine of *stare decisis* under the law of England is Cross and Harris on *Precedent in English Law*. The law is correctly set out at pages 158-161 of the 4th edition, citing authorities such as *Baker v The Queen* [1975] AC 774

(PC) and the decision of the Court of Appeal in *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch.397. These are modern authorities but there is nothing new or remotely difficult with the concept that decisions without argument are not binding, the rule being set out in *R v Warner* (1661) 1 Keb 66, the authority of which to my knowledge has never been called into question in any English court in the one-third of a millennium since.

27. The decisions in *Factortame*, which are mostly taken up with the community law points in any event, are not binding. The decisions on implied repeal to which I have referred are however binding, in my opinion at every level of the judicial system.

28. The proposition that the courts would refuse to apply the Weights and Measures Act 1985 involves saying that after having had the benefit of full argument on the law of the constitution (which neither the Divisional Court nor the House of Lords had in *Factortame*) the judges would wilfully and deliberately defy Parliament. Such a state of affairs has never occurred in all our long constitutional history and is unthinkable. It is not for the judiciary to choose which laws they will obey and which they will not, nor is the political opinion of any individual judge or magistrate on whether we should have metric or

Imperial measurements or (as Parliament has laid down) both), or should or should not be members of the Europoean community a relevant consideration. The consequences of defying community law are for Parliament to consider. As with the Human Rights Act 1998 the courts are limited to declaring that the act is inconsistent with the international (ie community) law provision. The executive if so advised can then cure the defect either by bringing in amending legislation and persuading Parliament to accept it, or persuading the European authorities to revoke Directives 80/181/EEC and 89/617/EEC, or withdrawing from the European Community, so that the repugnancy disappears.

## 9. Community Law

29. Community law is clear : the UK is under an obligation to yield to metric and abolish the Imperial system. I have even seen a suggestion from a civil servant (in a circular referring to a letter of mine in the *Daily Telegraph*) that the Directives have direct effect and should be applied without more by the courts, an entirely novel suggestion given that there is an Act of Parliament standing in the way!

30. The law of the European Community is not however a relevant consideration for our courts because they

are not permitted to apply it unless authorised by Parliament. That is because the United Kingdom, in common with all advanced and successful countries, is a dualist jurisdiction, where international law has no effect unless and until it has been incorporated into international law (see eg the decision of the House of Lords in *Brind* [1991] 1 AC 696). In an ordinary case the courts are authorised to apply community legal instruments by the European Commnuities Act 1972. In this case there is no Parliamentary authority because a later enactment has impliedly repealed the European Communities Act 1972 and in accordance with the Law of the Constitution it is the duty of the courts at every level to apply the later Act.

31. It is sometimes asserted that we knew about the so-called supremacy of community law when we signed up to the Treaty of Accession. That is partly true, although it is tolerably clear that Parliament and the country were kept in the dark. It is also true to say that there is a rule of international law, reflected in Article 46(1) of the Vienna Convention on the Law of Treaties, whereby sovereign states are taken to know the manifest features of the constitutions of all other state parties to a treaty. The rule that one Parliament may not bind its successors is a manifest doctrine of the Constitution of the United Kingdom of fundamental importance, within the meaning of Article

46(1) of the Vienna Convention. It is scarcely to be suposed that the delegates of the Six were so lacking in competence as to be unaware that the perfect incorporation of an international treaty in the United Kingdom is an impossibility (and rightly so). Our community partners cannot be heard to complain.

~~41.~~ 32. It is possible u~~i~~nder community law to levy penalties for non-compliance, but that cannot apply to the United Kingdom in this case, because no penny piece of the public revenues may be expended without the sanction of Parliament, which is plainly lacking in the instant case. The Luxembourg court could decide upon a penalty but until the Weights and Measures Act is repealed or amended there is no mechanism by which public funds could be used to pay it.

## 10. *Vires* of the Regulations

~~42.~~ 33. I advise that the Weights and Measures (Units of Measurement) Regulations 1994 are *ultra vires*, null and void and of no legal effect whatsoever. I need hardly go on to consider the *vires* of the Weights and Measures Act (Metrication)(Amendment) Order 1994, because the prosecution would be left in such an impossible position once the first set of regulations had ~~is~~ gone that they could scarcely continue - indeed no

prosecution should be commenced and any local authority which did so would be engaged in unconstitutional defiance of Parliament. The draftsman of the second set of regulations was so clearly labouring under the delusion that the first set were valid that it is strongly arguable that they fall *a fortiori*.

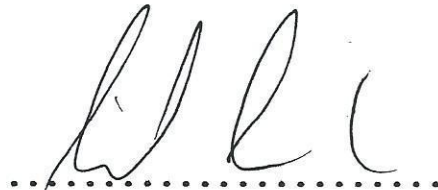
34. ~~43~~. There is a further difficulty and it is this. No doubt with a view to avoiding proper Parliamentary scrutiny (which is the whole purpose of these powers) the Minister chose to use the Henry VIII clauses in the 1985 Act. These despotic powers (named after King Henry VIII for that reason) were roundly condemned by Lord Hewart of Bury, a most distinguished Lord Chief Justice, in his splendid text, *The New Despotism* and I would wish neither to add anything to nor subtract anything from that which the Lord Chief Justice said. These clauses are construed tightly against ministers and rightly so. I have never heard of a Henry VIII power being used to such devastating effect and certainly not in a consolidation statute, which is presumed not to alter the law! I am very doubtful indeed that this power has been used properly and I advise that the second set of regulations is also *ultra vires*, although they are so tightly bound up with the first set, which is so clearly *utlra vires*, that we need hardly consider the Henry VIII point.

11. **ECHR**

35. ~~44~~. I am very doubtful about the Article 10 point, but I do not need to consider it in detail, given the effect of my earlier advice.

12. **Conclusion**

36. ~~45~~. No prosecution should be commenced and if one were it would be as misconceived, unconstitutional and improper as any prosecution ever brought. I can only advise of course and I cannot speak for the courts, but I cannot conceive that they would be willing to defy Parliament in the way that the minister suggests that they should. If the Minister wishes to make it an offence to sell a pound of apples he should first go to Parliament and get an Act which says so. This one does not and the futile attempt to amend it by reference to an earlier Act is of no legal consequence. I advise accordingly.



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Michael Shrimpton,

of Gray's Inn,

Barrister.

Dated this 22nd day of December 1999

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O P I N I O N

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