In re The Weights and Measures Act 1985

In re The Law of the Constitution

N O T E

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1. This note is further to my written opinion dated 22nd December 1999 and the letter with enclosures from those instructing me dated 7th January 2000. The enclosures include a series of e-mails (I understand that my opinion has been published on the Internet) from members of the public on which I comment below. I have endeavoured to deal as fully as I can with the points made and the startling developments since my opinion was written. Inevitably this note is a little longer than is usual with a supplementary note from counsel. I apologise to those instructing me for the number of typing errors in the original copy and I trust that they have now received the perfected copy, which I would ask them to treat as definitive (a copy should be supplied to any public body considering my advice in place of the earlier draft). I have not re-dated the opinion as there is no material alteration,

save for slightly more emphatic language on the effect in law of a split result, which on mature reflection would leave the prosecution in an untenable position. I have instructed my clerk not to issue a fee-note in respect of this note. I do not propose to reply separately to those (including Mr Spreadbury) who have been kind enough to send electronic correspondence, but I have no objection to this note being published on the Internet (it is entirely a matter for those instructing me). I am of course aware of the bitter controversy which the proposed prosecutions have created and the interest generated by the first great clash (bearing in mind the Secretary of State's cave-in in *Factortame*) between Parliament and the legislative organs of the European Community since the accession of the United Kingdom to the Treaty of Rome.

2. I am now shown what pretends to be an enforcement notice issued by the Southend-on-Sea Borough Council, seeking to prevent a butcher from selling sausages etc by the Imperial pound. I can only describe this notice, issued directly contrary to law, as an outrageous assault upon the Liberties of Parliament and the Subject. There is nothing in this unhappy document which persuades me to alter my view in any way. The trading standards authority have embarked upon a frolic of their own making and at ratepayers expense too. It is not the case, as has been suggested

to me, that the courts would order an absolute discharge in the event of prosecution - they would not be entitled to convict at all for conduct which is sanctioned expressly by Parliament. An English court (it is not a matter for any other court) would be obliged to acquit and should waste the prosecution in costs for gross constitutional misconduct.

3. My attention has been drawn to a public statement by a trading standards officer in the West Country. Evidently labouring under the delusion that it is possible to entrench an Act of Parliament this official has opined that traders selling in Imperial measures are seeking to place themselves above the law. The true position is that traders continuing to sell in Imperial are complying with the law as laid down by Parliament. The only defiance of the law in the matter is on the part of trading standards officers enforcing metric measurements against the will of Parliament. I fear that my opinion may not have been sufficiently clear and unambiguous and I now seek to develop the point further.

4. In addition to the texts on statute law referred to in my opinion I draw attention to the following statement in Bennion, *Statute Law*, at 205 :

> If there is inconsistency between two Acts,the later prevails.

With respect that is correct.

5. My attention has been drawn to a surprising statement in *Cross on Statutory Interpretation*, 3rd ed., at 116-117, relying upon *obiter* of Nicholls LJ in *Re Marr (A Bankrupt)* [1990] Ch 773 at 784 [1990] 2 All ER 880 at 882 casting doubt upon the Doctrine of Implied Repeal. This statement is contrary to that in the 2nd ed (at 115) where the law is correctly stated, albeit not with the clarity of Maxwell, Dicey or Bennion. Normally the editors of a legal textbook, not least one carrying a name as distinguished as that of the late Sir Rupert Cross DCL FBA, draw attention to departures from previous editions, particularly where they place a new interpretation on previously cited caselaw. With the utmost respect I do not know why the authors of the 3rd edition chose not to refer to the 2nd edition, nor why they have suppressed any mention of the binding caselaw on Implied Repeal referred to in other, more reliable, texts and cited in my opinion. It is to be hoped that these errors in scholarship will be corrected in the 4th edition.

6. *Re Marr (a Bankrupt)* was nothing to do with the Doctrine of Implied Repeal. The Court of Appeal were there faced with construing s.271 of the Insolvency Act 1986, scarcely a masterpiece of precision drafting, since sub-section (1) conflicted with sub-

section (2A). As one of three reasons for preferring subsection (2A) and upholding Mr. Registrar Pimm, Mervyn Davies J. relied on the rule of last resort in *Wood -v- Riley* (1867) LR 3 CP 26, whereby the later of two repugnant sections **within the same Act** is preferred. Correctly the Court of Appeal construed the Act as a whole and applied the rule set out by Lord Herschell LC in *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, whereby the court determines which is the leading and which is the subordinate section, giving effect to the intention of Parliament. Badly drafted though it was, it was tolerably clear that s.271(1) was dominant.

7. Unhappily (with respect) Nicholls LJ went on to make an *obiter* remark (at 784), rightly criticised in Bennion, *Statutory Interpretation* (2nd ed at 810), to the effect that the *Leges Posteriores* Rule was obsolete. Here the learned judge with respect fell into patent error because the court was construing one statute not two and the *Leges Posteriores* Rule was nothing to the point. Had counsel cited Bennion the mistake would not have been made - he places the rule in *Wood v Riley* in a different section (Part XXV, Section 355) to the *Leges Posteriores* Rule (Part IV, Section 87). All sections of an Act of Parliament become law at the same time unless otherwise specified. Not only is the *obiter* comment of Nicholls

LJ (*obiter* because the two sections were not repugnant and Lord Herschell's rule could be applied) of no relevance to Implied Repeal but I agree with Bennion that the rule in *Wood v Riley* survives as good law. In the rare case where two sections in a statute really cannot be reconciled and where neither is dominant the courts should continue to apply the section nearer the end, not because one became law later than the other but merely as a convenient rule of thumb, the justification being the principle of legal certainty.

8. Nicholls LJ (again with respect) also fell into error in describing the purposive rule of construction as modern. It was set out in *Heydon's Case* (1584) 3 Co Rep 7a, was well-known to the judges who have applied the Doctrine of Implied Repeal over the centuries and is of absolutely no assistance at all in construing the Weights and Measures Act 1985, the purpose of which was "to consolidate certain enactments relating to weights and measures." Whether a literal, restrictive or purposive construction is applied the words "the yard or metre shall be the unit of measurement of length and pound or the kilogram shall be the unit of measurement of mass (s.1(1)" mean precisely that and no more. There is no mechanism known to the law of England or to the English language whereby the unqualified words "the yard or the metre" (note that the Imperial measure comes first) and "the

pound or the kilogram" mean the "the metre only" or "the kilogram only."

9. The constitutional importance of Implied Repeal, is well illustrated by *R -v- Secretary of State for the Home Department ex p Burke* (QBD, CO/2750/98), referred to in my opinion at paragraph 14. I have now had the opportunity of studying the transcripts of the judgments in both courts, for which I am grateful to the Applicant. Both Popplewell J at first instance (2nd October 1998) and the Court of Appeal (Peter Gibson, Henry and Morritt LJJ, 8th March 1999) on renewal of the application for leave to move for judicial review applied the Doctrine of Implied Repeal to the Bill of Rights 1688. Had they not done so it would have been open to the Ulster Volunteer Force and others to challenge the firearms legislation in force in Northern Ireland on the basis that their right as Protestants to bear arms on the terms set out in Article 7 of the Bill of Rights (which extends to Northern Ireland) had been violated. A clearer demonstration of the constitutional importance of not fettering Parliament with a doctrine permitting entrenchment or limitation of statute could not be imagined.

10. Mr. Burke (whose courtesy to the Court was acknowledged by Peter Gibson LJ and whose good faith

in the matter was not in doubt) was a responsible owner (I think a police officer) of two small-bore pistols, of which he was deprived by the Firearms Act 1997, passed as Henry LJ acknowledges (transcript, p2) in the aftermath of the cold-blooded murders at Dunblane on 13th March 1996. He argued *inter alia* that the Bill of Rights was entrenched and that the Firearms Act 1997 violated his right as a Protestant to bear arms.

11. That was not right with respect because the Parliament of 1688 could not bind its successors. The absence of express words of amendment or repeal was immaterial, just as the absence of express words of repeal in the Weights and Measures Act 1985 is immaterial. Popplewell J says this (transcript, p1):

> It is not in dispute that the Bill of Rights gave the citizen the right to hold arms. The question which is posed is whether the Firearms Act, which does not expressly repeal the Bill of Rights, should be taken implicitly so to have repealed. **The general position in law is this. Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the latter by implication repeals**

the earlier.(emphasis added)

12. The learned judge did not qualify his manifestly correct (with respect) statement of the general law by restricting the rule to statutes other than the European Communities Act 1972. The Court of Appeal correctly upheld Popplewell J. Henry LJ (with whom the other distinguished members of the Court agreed) says this, having remarked that the right to bear arms was qualified even in 1688:

> the submission (Bill of Rights?) is not entrenched; that is to say, **what the law makes, the law can unmake.**(transcript, p5, emphasis added).

There is no comfort in these judgments for those who argue contrary to the Law of the Constitution that the European Communities Act 1972 is entrenched. The extraordinary and quite unconstitutional (with great respect) suggestion, extra-judicially, by Lord Wilberforce in 1966 to the effect that 'constitutional' statutes such as the Act of Union with Ireland ~~Act~~ 1800 could be entrenched in part by being made safe from Implied Repeal (see Bennion at 205) was not considered or followed by the Court of Appeal and rightly so (it was a notorious comment and the judges must have been aware of it). One may as well say that the devolution legislation is entrenched. (Again with the utmost respect Lord

Wilberforce's other foray into constitutional law, being his speech in *Zamir v Secretary of State for the Home Department* [1980] AC 930, was equally disastrous, *Zamir* being rapidly and rightly reversed - see *Khawaja and Khera -v- Secretary of State for the Home Department* [1984] AC 74)

13. Ill-considered as it was the Firearms Act 1997 was nonetheless law and overrode the Bill of Rights, notwithstanding the moral and intellectual superiority of the Parliament of 1688 over that of 1997. The mischief was not the weakness of statutory controls over small-bore firearms, which Hamilton did not use to commit the murders (Cm 3386, para.1.3) but the failure of Central Scotland Police to enforce the existing law. A statute is valid law however, useless and unnecessary though it might be. The answer to such legislation is to repeal it.

14. To use the helpful (with respect) terminology of Henry LJ, Parliament, which made the European Communities Act in 1972, unmade it in part in 1985 when it enacted legislation contrary to the law of the European Communities. As Popplewell J. explained Parliament is so powerful that it need not name or refer to the instrument it is overruling, or go to the lengths of one of King Richard III's Parliaments which provided (see Bennion, at 201) that an earlier Act was

to be "annulled and utterly destroyed, taken out of the Roll of Parliament, and be cancelled and burnt, and be put in perpetual oblivion," although this could be a useful precedent for when the European Communities Act 1972 is repealed. Nothing could be less relevant than the failure to mention the 1972 Act or Directive 80/181/EEC in the Weights and Measures Act 1985. So much of community law that related to metric weights and measures simply ceased to be part of "the corpus juris or body of law" (*ibid.*) in the United Kingdom once Her Majesty gave Her Royal Assent to the 1985 Act.

15. Perhaps no-one should be surprised that Parliament tore up an EEC Directive in 1985. Unlike 1972 the country had the benefit of strong leadership, with a Prime Minister of international stature at the height of her powers. Whilst in 1972 we were in decline by 1985 our glorious Armed Forces had performed a magnificent feat of arms in the South Atlantic. Morale was high, boosted by the return of prosperity. The successful alliance with America was winning the Cold War with the Soviet without it must be said much help from the EEC. The Anglo-European relationship was already falling apart.

16. In reply to those who have observed that the lesson of *Factortame* (which was of course a series of

decisions) is that the courts may defy Parliament with impunity it should be pointed out that the Parliament of the United Kingdom is the most powerful in the world, with mighty reserve powers, normally only exercised in time of national emergency. It is a legislature of unlimited competence, save that it cannot bind its successors, who are of equal competence. Its aegis is global - as recently as 1982 Parliament passed an Act with legal effect in Canada (at Canada's request of course). It is not bound by international law, indeed numerous statutes have breached treaty obligations without anyone ever calling their validity into question. It may pass retrospective legislation and laws with extra-territorial effect and has the power of life and death. It may authorise torture, for example in the case of Guy Fawkes who in 1606 was subjected to extreme torture prior to execution, on the authority of Parliament, no doubt as an example.

17. No court of law may inquire into the validity of an Act of Parliament (entirely different considerations apply of course to secondary legislation, made not by Parliament but by delegates such as ministers or local authorities, which even a magistrates court may hold to be invalid - see *DPP -v- Hutchinson* [1990] 2 AC 783). This principle **extends to the European Court of Justice**, whose authority in the

United Kingdom is derived **solely from Parliament.** Under the reference procedure used twice in *Factortame*, firstly by the Divisional Court on the substantive issue and secondly by the House of Lords on the issue of interim relief, using what was then Article 177 of the Treaty of Rome (see now Article 234), the Luxembourg court simply provides an opinion on community law. Not only is the court not competent to overturn an Act of Parliament (only Parliament can do that) but the community provision concerned can only take effect in this jurisdiction if it is backed by an Act of Parliament. As I explained in my opinion that is not this case because the 1985 Act stands in the way.

18. The authority of Parliament remains unaffected by the *Factortame* decisions. With the utmost possible respect to the judges concerned the High Court of Parliament has full constitutional authority not only to remove them from office for misconduct but to order them to be taken into custody and tried at Bar, indeed Parliament could if it so wished provide for the judges of the European Court to be tried in England for committing an act of interference in the internal affairs of the United Kingdom in violation of the principle of comity of nations. In 1996 The House of Commons gave a First Reading to a Bill, the Fishery Limits Bill, clause 11(9) of which provided for penal

sanctions against judges of the Luxembourg Court should they seek to interfere with the operation of the Act. Prior to *Factortame* the last judicial officer in England seriously to question the authority of the King in Parliament was Sir Thomas More, who was very properly executed in 1535.

19. The suggestion that our Sovereign Parliament was in effect nothing more than a puppet legislature and that one of its statutes was invalid was as offensive as it was unconstitutional, with immense respect to the judges concerned. I make no suggestion however that it would be appropriate in this case for penal or other sanctions to be visited, although it is of course entirely a matter for Parliament.

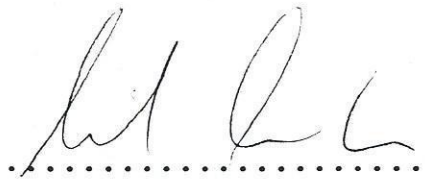
20. These observations are I think a complete answer to the points taken in the e-mails supplied by those instructing me. Whilst this not the place for a detailed treatment of the subject of leaving the EU I cannot leave the material provided to me without respectfully correcting the misleading impression given in the electronic extract from Hansard (House of Lords, 12th May 1999, Baroness Symons) to the effect that negotiations to leave the EU would "be extremely complicated" and that "UK and EU law are intricately interlocked." The reality is that EU law is not organic and has been superimposed, sometimes clumsily.

There is nothing complicated about leaving the European Union. It could be accomplished by a short Act of Parliament with transitional arrangements, providing say for regulations based on EU instruments to be replaced by negative resolution procedure over a two-year period where necessary (not all EU law is bad).

21. With respect I do not know from whence the Minister gets her idea that "detailed and protracted negotiation" would be necessary. The United Kingdom is already a State Party to the GATT and WTO agreements and trade with EU member states could simply be conducted under the auspices of the WTO, with no/low tarriffs and independent and tested machinery for dispute resolution. Unilateral termination of the Single European Act and the Treaties of Maastricht and Amsterdam is governed by Sections 2 and 3 of the Vienna Convention on the Law of Treaties, which entered into force on 27th January 1980. The Convention (Article 62 of which provides for termination in the event of a fundamental change of circumstances) was based on and is broadly reflective of existing practice and I see no objection to extending it to the Treaty of Rome, there being a non-retroactivity clause in the Vienna Convention itself (Article 4). The United Kingdom would also be able to invoke the *jus cogens*, in particular the fundamental

doctrine of the inalienable right of all states and peoples to self-determination, confirmed by various treaties and declarations including the Charter of the United Nations, to which all member states of the EU are signatories. Of course we could leave by agreement, but unilateral termination would be simpler and quicker. There could be no international legal challenge because the jurisdiction of the ICJ is already ousted and *a fortiori* the ECJ's authority would no longer be recognised by the UK.

22. Of course I would be only too willing to provide further clarification if requested. Those instructing me were kind enough to arrange for me to appear on television to discuss the general principles. I have no objection to further television appearances but in accordance with the usual practice if a prosecution is commenced and I am instructed either by the prosecution or the defence it would no longer be right to accept such invitations. I should add that I took the precaution of consulting the Bar Council before the broadcast and have acted in accordance with their entirely sensible guidelines. There it is. I advise accordingly.



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Michael Shrimpton, Esq.

Dated this 23rd day of January in the Year 2000.