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IN RE THE WEIGHTS AND MEASURES ACT 1985
AND IN RE THE EUROPEAN COMMUNITIES ACT 1972
AND IN RE THE PRICES ACT 1974
AND IN RE THE LAW OF THE CONSTITUTION OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

OPINION

1. Introduction

1. I am instructed by Bennetts, solicitors, on behalf of the United Kingdom Independence Party, a lawful and registered political party in the United Kingdom, to advise further on the constitutional issues arising from the attempted introduction of compulsory metrication without enacting primary legislation. This Opinion is further to my earlier Opinion dated the 22nd day of December 1999 and Supplementary Note dated the 23rd day of January 2000. Attention is drawn to my earlier disclosures of a connection with the British Weights and Measures Association, to whom I have the honour to be Honorary Constitutional Adviser, and the Conservative and Unionist Party (also the Society of Conservative Lawyers). No conflict of interest arises.

2. It so happens that the minister who made the *ultra vires* Units of Measurement Regulations 1994 (SI 1994 No.2867) ("the Units of Measurement Regulations") and the Weights and Measures Act 1985 (Metrication)(Amendment) Order 1994 (SI 1994 No.2866) ("the Amendment Order") held himself out as a Conservative. No constitutional lawyer worthy of the name would alter his view because a minister responsible for an unconstitutional act happened to be a member of his own party.

3. I adhere to my earlier opinion that the Units of Measurement Regulations and the Amendment Order are bad, because the Regulations conflict with primary legislation enacted subsequently to the statute conferring the alleged power and the Order depends upon the validity of the Regulations. Additionally the Order relies upon the improper use of a Henry VIII power. In relation to the Henry VIII power the only argument advanced since my Opinion (see paragraphs 5(1) and 19 *et.seq.* below) in my view strengthens the arguments against the validity of the Order, because it relies on a separate Henry VIII power in the enabling Act which does refer expressly to Imperial weights and measures but which was not used.

4. It is always good practice when writing an opinion to consider contrary arguments and to refer to any authorities which might undermine the position being taken by counsel. I have considered whether or not the legislation incorporating the Single European Act and parts of the Treaty on European Union (Cm 1934), which post-dated the Weights and Measures Act 1985 ("the 1985 Act"), might have a bearing on the matter, not least because Directive 89/617/EEC seeks to amend purported Directive 80/181/EEC and refers to Article 100a of the EEC Treaty, as amended by the Single European Act. The 1985 Act is of course no more safe from Implied Repeal than the European Communities Act 1972 ("the 1972 Act"), but there is no reference to weights and measures in the post-85 legislation, which in any event is amending legislation. Given that an amendment once made becomes part of the original Act it is a moot point whether it can affect primary legislation passed between the original and the amending legislation, although I am an unaware of a case in point. Furthermore, the new Article 100a does not replace the original Article 100 and adds no new substantive powers, concerning itself with procedure (eg qualified majority voting) and derogations. The metrication directive (ie the 1980 directive) was brought in under the harmonisation power contained in the original Treaty of Rome and I do not consider the 1985 Act to have been affected in any way by subsequent amendments to

the Treaty.

5. I am asked to advise generally and I shall do so under the following specific headings :

(1) the commentary on my earlier Opinion and Note appearing in *Trading Standards Review* for July 2000;

(2) observations on behalf of the Minister following the receipt of my earlier Opinion and Note at the Department of Trade and Industry (DTI);

(3) venue and jurisdiction in relation to the proposed legal challenge;

(4) the *vires* of the Price Marking Orders 1991 (SI 1991 No.1382) and 1999 (SI 1999 No.3042) and the Price Marking (Amendment) Orders 1994 (SI 1994 No.1853) and 1995 (SI 1995 No.1441), all purportedly made under s.4
of the Prices Act 1974;

(5) the relevance if any of the Weighing Equipment (Non-automatic Weighing Machines) Regulations 1988 (SI 1988 No.876);

(6) the supposed inability on the part of some Trading Standards departments to test Imperial scales;

(7) compensation for purchase of metric scales and damages generally where Imperial scales are seized;

(8) the *vires* of Directives 80/181/EEC and 89/617/EEC and compliance with community law having regard to the community law principles of proportionality and subsidiarity;

(9) threats against the United Kingdom made by a spokesman for the European Commission on the BBC and the position generally of the United Kingdom against the European Community under public international law;

(10) the international compliance of the Treaty of Rome and its validity in so far as it purports to over-ride United Kingdom primary legislation and the *jus cogens*, in particular the fundamental principle of the self-determination of all peoples, having regard to the decision of the House of Lords in *R -v- Bow Street Magistrates Court ex p General Augusto Pinochet Ugarté* [2000] 1 AC 147, approving for the purposes of United Kingdom law the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor -v- Furundzija* (IT-95-17/1-T 10) and Article 53 of the Vienna Convention on the Law of Treaties;

I hope that I have not left anything out.

6. I had hoped to be able to advise on counsel's opinion in response to my own. There have been a number of suggestions since December 1999 from both local authorities and the DTI that papers have been sent to counsel, although none has been named and no member of the Bar has contacted me on the basis that he or she is in receipt of instructions. I would expect counsel in those circumstance to contact me, if only as a courtesy.

2. Internet

7. If (which is not a matter for me) this opinion is made available on the Internet every effort should be made to ensure that it is faithful to the master copy delivered electronically to those instructing me. I am sure it is right that any publication should be accompanied by a disclaimer. Counsel can only advise, he or she cannot decide and most certainly cannot warrant that a court will not make a mistake of law.

3. *Trading Standards Review*

8. I shall now deal *seriatim* with the points set out *supra* in paragraph 5. Whilst no professional legal opinion has been forthcoming to contradict my own (a matter made the subject of complaint in the article) an article appeared in the *Trading Standards Review (TSR)* for July 2000, by Chris Howell, who is employed by ITSA and is Lead Officer for Legal Metrology. The article is in direct response to my Opinion and Note and has been circulated to many local authorities in the country. Mr. Howell is kind enough to promote me to the august rank of silk, however the Lord Chancellor is of a different view and I remain but a humble polyester. In fairness to Mr. Howell he may have relied on a misdescription of me placed on the Internet. I have of course

asked *TSR* to print a correction.

9. Mr. Howell does not claim any expertise in constitutional law, a concession which with respect I regard as realistic - *ne supra crepidam sutor judicaret*. I do not profess to follow the complaint about delay in enforcing a standard system of weights and measures - the Imperial system is uniform and there are United Kingdom primary standards for all the basic Imperial weights and measures. A pound weighs as much in Surrey as it does in Lancashire or for that matter Queensland. With great respect to Mr. Howell he makes six basic, substantive errors :

(1) he fails to understand the mechanism (Implied Repeal) by which a later Act of Parliament over-rides an earlier;

(2) he fails to apply a strict construction to the Henry VIII powers in the Weights and Measures Act 1985 Act ("the 1985 Act") and in particular fails to read s.1(3) in accordance with the *expressio unius est exclusio alterius* Rule;

(3) he fails to appreciate the relationship between community and municipal law and appears to regard the EU as a sovereign in international law;

(4) he fails to appreciate the constitutional difference between primary and secondary legislation;

(5) he mis-states the composition of Parliament and in particular fails to apply the Doctrine of Threefold Consent which lies at the heart of our Constitution:
(6) he appears to treat *ultra vires* statutory instruments as voidable.

I shall deal respectfully with each of these egregious errors in turn.

4. Implied Repeal

10. The mechanism of Implied Repeal is well known to the law, as I endeavoured to explain, albeit not to Mr. Howell's satisfaction, in my Opinion and Note. As Parliament may not bind its successors a subsequent Parliament is at liberty to legislate as it pleases, a constitutional fundamental recognised by the draftsman of the Human Rights Act 1998, who realised that it could not be made safe against Implied Repeal. The principle is well expressed by Todd (*Parliamentary Government in the British Colonies*, 1st ed. (1880) at 192, cited with approval by Professor Dicey, *The Law of the Constitution*, 10th ed.(1959) at 67-8) :

> It equally is certain that a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from **entire freedom of action at any future time** when it might be needful to invoke the interposition of Parliament to legislate for the public welfare (emphasis added)

11. The great Professor Dicey, the foremost authority on the British Constitution of his or any other age, went on (at 69-70) to describe the over-arching Sovereignty of Parliament in his own words, words which no British or Commonwealth court has ever dared disapprove:

> Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. **There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.**
>
> **No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence**, or receives any countenance, either from the statute-book or from the practice of the courts.
>
> **This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution.** (emphasis added)

12. I advise that the Law of the Constitution is correctly stated in these magisterial passages. The rival to Parliament put forward by Mr. Howell is a group of officials in Brussels, whose decisions as I explained in my Opinion (eg at paragraph 30) have absolutely no force of law at all in the United Kingdom unless Parliament says so. In s.2 of the 1972 Act Parliament did say so, but what Parliament does it can undo and in s.1 of the

1985 Act it over-rode s.2 of the 1972 Act. As Lord Templeman (with respect correctly) said in his speech in *Duke -v- GEC Reliance Ltd* [1988] 2 WLR 359 at 362-3 the alleged entrenching mechanism in s.2(4) of the 1972 Act does no more than emphasise the binding nature in community law of community rights and obligations : *non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a qua constituunter.* "Parliament can do as it pleases" (*per* Lord Greene MR, in *Norman -v- Golder* (1944) 171 LT 369 at 371 (CA)) and in 1985 it pleased Parliament to re-enact Imperial weights and measures in primary legislation, driving a coach and horses through directive 80/181/EEC in the process.

13. As the Court of Appeal held in *Ellen Street Estates Ltd -v- Minister of Health* [1934] 1 KB 590 it matters not that there are no express words of repeal. An Act which is impliedly repealed, either in whole or in this case in part, is no less repealed impliedly than it is expressly, in the same way that the implied term of a contract has no less legal force than an express term. The effect in law of later incompatible legislation is just as if the earlier legislation had been included in a Schedule of Repeals. If the unanimous decision of a strong Court of Appeal, with no less a legal mind than Lord Justice Scrutton presiding, approving an earlier unanimous decision of a powerfully constituted Divisional Court including one of the greatest Common Law judges of the twentieth century (*Vauxhall Estates Ltd -v- Liverpool Corporation* [1932] 1 KB 733) is not authority enough for Mr. Howell (it is for me) he should look at the leading speech of Lord Dunedin in the House of Lords in *Minister of Health v- The King ex p Yaffe* [1931] AC 494, in particular at 503 :

What that comes to is this : The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. **It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been "Posteriora derogant prioribus."** (emphasis added)

14. *Yaffe* is particularly relevant because as the 1st Viscount Dunedin of Stenton (a very strong judge, formerly Lord Advocate, Lord-Justice General and Lord President of Scotland, with 56 years experience in the law when he wrote that speech) explains, secondary legislation cannot prevail against inconsistent primary legislation and earlier legislation cannot prevail against later. Viscount Dunedin, who it should be noted was a Lord of Appeal in Ordinary of nearly two decades standing when he wrote that speech and by then had greater legal experience than **any** judge now sitting in England and Wales or Scotland, also deals with the confirmation point, to which I return below at paragraphs 42 *et. seq.*

15. No-one should make the mistake of thinking that the cases to which I have just referred are the only authorities on Implied Repeal, although they are quite sufficient authority on their own for saying that the Units of Measurement Regulations are bad, with inevitable consequences for the Amendment Order. One can just imagine what Lord Dunedin would have said to counsel trying to persuade him that a set of regulations made under an old Act of Parliament could amend a later Act. The particular value of the Court of Appeal and Divisional Court cases is that the earlier Act expressly sought to bind future Parliaments (see paragraphs 17-22 of my Opinion, which refer back to the majority judgments in the Court of Appeal) and *Yaffe* is given additional value as precedent because the House of Lords were looking at secondary legislative powers. Edward Wilberforce, the father of modern statute law, in his masterly treatise (said with veneration and respect) *Statute Law : The Principles Which Govern the Construction and Operation of Statutes*, lists no fewer than 17 examples of Implied Repeal, including of a treason statute (33 Hen.VIII c.23) and my favourite, concerning the exemption from impressment of harpooners in the important Greenland fishery trade (13 Geo.II c.28)(2nd ed., 1881, at 311 *et.seq.*). The principle applies across all common law jurisdictions and is applied to State legislatures and Congress in the United States, a useful compendium of several hundred older cases appearing in Crawford, *The Construction of Statutes* (1940), p.629 *et. seq.*, including *State -v- Superior Court of King County* (1910) 60 Wash.370, 111 Pac.233, (Supreme Court of Washington State) emphasising that the intent of the legislature must be established from the terms and provisions of the **later** enactment (ie you can just about forget the European Communities Act, because the intent of the legislature in 1972 is irrelevant when determining the intent of the legislature in 1985). The question is : did Parliament intend to continue Imperial weights and measures in 1985? The answer, manifestly, is yes and that is all we need to know about Parliament's intent.

16. The draughtsman of the Act of Union with Scotland 1706 was no less ambitious than the draughtsman of the 1972 Act, providing in Article 25, which refers to essential and fundamental requirements of the Union, that every professor of a Scottish university should subscribe to the Confession of Faith. Essential and fundamental it may have been in 1706 but in 1853 the requirement was swept away by the Parliament of the

United Kingdom in the Universities (Scotland) Act. Like language in the Act of Union with Ireland 1800 was intended to entrench the union of the established Church of England and Ireland (Dicey, *Law of the Constitution*, 10th ed., at 66), but the religious union between England and Ireland was swept away by the Irish Church Act 1869.

17. Only a litigant in person would argue that the 1853 or 1869 Acts were invalid or that the Anglo-Scottish-Irish Parliaments of 1853 and 1869 were bound by their predecessors in 1706 and 1800, or that the Republic of Ireland has no legal existence because the Irish Free State (Agreement) and Constitution Acts 1922 conflicted with the Act of Union with Ireland, which they undoubtedly did. It matters not whether the later Acts repealed the earlier expressly or by necessary implication - repeal them they did. As the High Court of Australia stated in 1907, "the latest expression of the will of parliament must always prevail" (*Goodwin -v- Phillips* (1907) 7 CLR 1, at 7, cited with approval in *Craies on Statute Law*, 7th ed. (1971) at 366).

5. Other Statutes Impliedly Repealed

18. It was held in *R v Davis* (1783) 1 Leach 271 that the Stealing of Deer Act 1776 impliedly repealed the famous "Black Act" of 1722, without there being any express words of repeal, a matter of considerable interest to the defendant because the penalty under the later Act was a maximum fine of £20 and under the earlier death by hanging. In *Re Drummond* [1891] 1 Ch. 524 the Married Womens Property Act 1882 was held to have impliedly repealed an Act of 1833. Similarly s.58 of the County Courts Act 1846 was impliedly repealed by the Nuisance Removal Act 1848 (*R v Harden* (1852) 22 LJQB 299). The Wild Birds Protection Act 1872 was impliedly repealed by the Preservation of Wildfowl Act 1876 (*Whitehead -v- Smithers* (1877) 2 CPD 553). These and other examples are all to be found set out with approval in *Maxwell on Statutes* (12th ed, 1969, at 193-6). Section 10 of the County Courts Act 1875 impliedly repealed s.45 of the Supreme Court of Judicature Act 1873 (*The Dart* [1893] P 33 (CA)). Section 7 of the Mortmain and Charitable uses Act 1891 impliedly repealed the Gifts for Churches Act 1803 (*Re Douglas* [1905] 1 Ch.279).

6. Section 1(3) of the 1985 Act

19. Mr. Howell states that if Parliament had not envisaged changing to metric only it would not have provided a power in s.1(3) of the 1985 Act to add or remove units of measurement from Schedule 1 (I note the absence of reference to Hansard). This argument is a double-edged sword, because the minister did not use the power in s.1(3). As Mr. Howell accepts the purported power used for the Amendment Order was that contained in s.8(6), which nowhere refers expressly to Imperial measures, in stark contrast to s.1(4), limiting the power in sub-section (3). Even worse for Mr. Howell, with respect, s.1(4) states that the sub-section is "without prejudice to section 8(6)(b) below." When we look again at s.8(6) we see that (b) refers back to limited measures such as the ounce troy and 125 ml measures (except for alcohol). It is s.8(6)(a) on which the Minister is relying, which presumably the draughtsman intended to be prejudiced by s.1(4)! If that was his intention he has succeeded.

20. How is the minister's position improved by the fact that the 1985 Act provides for two Henry VIII powers: one (s.1) which refers expressly to Imperial measures which he didn't use and one (s.8) which doesn't but which he did use? The rule of construction is *expressio unius est exclusio alterius* (Craies, *op cit* at 259-60). The irresistible inference is that the s.8 power, which uses weak general words such as "any" was not intended to refer to Imperial measures. The *expressio unius* rule does not always apply but is very difficult to exclude on a strict construction when the effect of applying it is to narrow the scope of the enactment.

21. No doubt Mr. Howell would say that a purposive approach to construction should be adopted. He appears to be saying that the power in s.1(3) suggests that Parliament's purpose was to have a dual system for a temporary period, having regard to the community directive, with Imperial weights and measures being removed at the end of the derogation period under s.1(3). If that was Parliament's intention why didn't it say so and in particular why did it not make provision in the Act for Imperial weights and measures to be phased out at the end of the derogation period? The Act is not a temporary Act, it makes no reference to the directive and worse, from the point of view of the minister, there is an express reference to charging fees for performance of community obligation in s.76. Again, on the *expressio unius* principle, the implication is that in the remainder of the Act Parliament was not implementing community obligations.

22. In any event it is not permissible to apply a purposive construction to the Act as a whole or ss.1 and 8 (the Henry VIII powers) in particular. Dealing firstly with the Act as a whole, it is a consolidation act and as I explained in my first Opinion (paragraph 7) is presumed not to alter the law. It is not even as though the acts being consolidated were intended to bring in compulsory metrication. So far to the contrary the Weights and Measures Act 1963 pre-dated the UK's accession to the EEC and the Weights and Measures Act 1979 pre-

dated the main 1980 directive. There is a rebuttable presumption, which cannot prevail against the express words of an enactment, that Parliament intends to comply with our international obligation but even Mr. Howell admits (in the 12th paragraph of his article) that at the date of enactment there was no binding obligation on the UK to implement the Directive, the implementation of which had been postponed. It would not be permissible however to look at the directive, because resort may only be had to international instruments in the event of ambiguity (*Bloxam -v- Favre* (1883) 8 PD 101, *Burns Philp & Co -v- Nelson & Robertson Pty Ltd* [1958] 1 Lloyd's Rep. 342 (High Court of Australia), *Salomon -v- Customs and Excise Commissioners* [1967] 2 QB 116 (CA)), not this case. On the same basis resort may not be had to Hansard - even the doubtful modern relaxation of the rule against consulting Hansard, which in practice has resulted in the courts construing statutes according to the will of the executive rather than the will of Parliament, does not extend to over-riding clear words in an enactment. Even if it were permissible to adopt a purposive construction it would make no difference because the stated purpose of the 1985 Act was "to consolidate certain enactments relating to weights and measures," ie to continue the dual system largely as it had been since 1897.

23. The House of Lords held in *Pickstone & ors -v- Freemans plc* [1989] AC 66 that it was proper to give a purposive construction to the Equal Pay Act 1970, as amended by the Sex Discrimination Act 1975, so as to arrive at a result consistent with our community obligation, but that was a statute which was subject to the later 1972 Act, which plainly was enacted (as amended) to give effect to a community obligation and which was in any event a piece of reforming social legislation where a purposive construction is permissible. The 1985 Act is not subject to the 1972 Act and over-rides it, was not enacted to give effect to a community obligation which in any event only became an obligation many years later (eg on 1st January 2000 in relation to goods sold loose in bulk), is not ambiguous, must be construed if possible so as not to alter the existing law and whose alleged operative clauses (the Henry VIII clauses) must under the Law of the Constitution be construed strictly against the Executive (*The New Despotism*, Lord Hewart of Bury CJ (whose mastery of constitutional principle with respect knew no bounds), *passim*, *R -v- Secretary of State for Social Security ex p Britnell* [1991] 1 WLR 198, *Hyde Park Residence Ltd -v- Secretary of State for the Environment, Transport and the Regions & or*, *The Times*, 14th March 2000 (CA), citing Bennion, *op cit*, *Britnell* and *R -v- Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275).

7. Permissible Construction of the Henry VIII Clauses

24. Here we enter into unfamiliar territory for many modern lawyers, some of whom tend to view strict construction as though it were witchcraft, forgetting that the purposive rule itself is centuries old, was applied properly on many occasions prior to our joining the European Community but is constitutionally inappropriate in certain cases, including Henry VIII clauses.

25. What traps are there for the unwary draughtsman in ss.1 and 8 and how would a master of the art of strict construction such as Mr. Justice Wright (see *Re Athlumney ex p Wilson* [1898] 2 QB 547, which when compared with some modern attempts at strict, non-retroactive, construction is like comparing a Turner with a Tracey) set about pulling these Henry VIII powers apart? It must be remembered that the doctrine of strict construction when properly applied is one of the checks and balances in our Constitution, in this case preserving the Doctrine of the Separation of Powers. The minister's purpose in putting a Henry VIII power into a statute, like the eponymous King before him, is to take power away from Parliament and the people and give it to himself. We are concerned here to frustrate the minister's tyrannical purpose not implement it - the very opposite in fact of a purposive construction. The constitutional justification is the maintenance of the Balance of Power between the Legislature and the Executive, with the Judiciary taking the part of the Legislature, which has the remedy of using clear statutory language if it really wishes to delegate its power to amend primary legislation to the Executive.

26. The huge flaw in s.8(6), immediately apparent to any competent draughtsman (it is interesting to speculate that it may have been a poison pill slipped past the minister by good parliamentary counsel, disapproving of the attack on Parliament's privileges) is the repeated use of the general word "any." To the liberal constructionist "any" is a general word meaning everything but to the strict constructionist it is a vague word meaning nothing : to cite the great jurist (Bac.Max.,reg.10, see *Broom's Legal Maxims,* 10th ed., at 438): *verba generalia restringunter ad habilitatem rei vel personæ*. Having regard to the existing law and the status of the 1985 Act as a consolidation statute we could quite properly restrict the meaning of 'any' to 'any metric measurement,' a strict construction given considerable purchase by the express mention of Imperial measurements in the previous Henry VIII clause and the absence of any reference to Imperial measurements in this.

27. An equally permissible alternative would be to restrict the power in respect of Imperial measurements to a power to **add**, given that a number of Imperial weights and measures unaccountably are left out of Schedule 3, eg the stone, the hundredweight, the ton, the rood, the acre, the cable, the fathom (of timber), the league, the flagon and the firkin. Thus the minister has power under s.8(6) to add the firkin but not to interfere with the existing law by removing the gallon, for which he would have to go back to Parliament. Now the minister may cry 'but Parliament would never allow me to get away with that,' to which the reply would be : *quod erat demonstrandum.* That is why the courts strictly control the exercise by the executive of these thoroughly undemocratic and obnoxious powers, which were condemned and rightly so by the Donoughmore Committee on Minister' Powers in 1932 (Cmnd 4060) as "inconsistent with the principles of parliamentary government" (p. 59).

28. The power under s.1(3) may equally be cut down to a power to add only, both Henry VIII clauses giving the power to add as well as take away. It is more difficult in the case of s.1(3) because of the saving for the mile, foot and inch in s.1(4)(a) and the gallon or pint in s.1(4)(b) but those exceptions would be implied anyway. The expression of that which is implied works nothing and all that is required is a robust application of the maxim *expressio eorum quæ tacite insunt nihil operatur*, constitutionally appropriate in this case to keep the executive in check and Parliament in control of its own legislation.

29. In responding to Mr. Howell's challenge to develop my arguments on the Henry VIII point more fully, I have not I hope missed the wood for the trees : the power in s.1(3) is not relevant because it has not been used and the free-standing arguments about s.8(6) scarcely matter because the Units of Measurement Regulations were not brought in under the 1985 Act at all and as I explained in my first Opinion (paragraph 33) the Order so clearly rests on the invalid assumption that the Regulations existed that I am far from sure that any competent counsel would try to defend them, indeed any scheme of amendment which rested on the Amendment Order alone would be open to the objection that it was irrational (how could it be rational for a statutory instrument to say that it was lawful for a customer to ask for and a greengrocer to sell a pound of apples but unlawful for the trader to weigh them out when the law rightly prohibits short-selling?)

8. Relationship between EC and UK law

30. Mr. Howell uses the word 'legal' in an interesting way in his paragraph 12. He says it was "legal" to use Imperial units in 1985, but in such a way as to suggest that it would be not be legal once the derogation in the directive expired. With respect that is not the right way of looking at it at all. Whatever may be the position under community law, if Parliament says something is legal then it is legal, derogation or not. If a statute after 1972 conflicts with community law, like the 1985 Act (all pre-1972 statutes are expressly or impliedly repealed by the 1972 Act and are subject to community law) it is still a statute. As Stephen Brown J. (as he then was) said in *Farrall -v- Department of Transport* [1983] RTR 279 (at 291), where Mr Farrall was desirous of being allowed to drive a motor car on British roads without a licence as required by s.85 of the Road Traffic Act 1972:

> But when he seeks a declaration that section 85 should be regarded as being null and void as against nationals of member states of the Community who have successfully passed driving tests in a member state of the Community other than the United Kingdom, I think he is seeking a declaration which it would be impossible to grant. **It is a misunderstanding that any statute can be regarded as null and void because of the EEC Treaty.** What is required is that the member state shall introduce regulations or legislation which shall give effect to decisions which are binding because of the Treaty. That of course has now been done. (emphasis added)

31. That is a correct statement of the law by Stephen Brown J, as one would expect with respect. Had it been cited in any of the *Factortame* cases the courts would not have fallen into error, which of course is why we have a rule that decisions reached without argument are not authority (first Opinion paragraph 26). When the learned judge refers to amendment by regulation it should be understood that the Road Traffic Act 1972 (c.20) preceded the European Communities Act 1972 (c.68) and in accordance with the rule in Lord Brougham's Act was vulnerable to repeal both express and implied (the old rule was that acts came into force at the same time at the end of the session in which they were passed). Of course had the Road Traffic Act been held up in its passage through Parliament and passed after the European Communities Act it would take precedence and would need primary legislation to bring into line with community law.

32. It is the same with any international treaty. The Treaty of Rome is not the only treaty incorporated into our law (see eg the Diplomatic Privileges Act 1964, the Genocide Act 1969, the Asylum and Immigration Appeals Act 1993 and the Human Rights Act 1998), although it is unusual because of its direct effect provisions. As with any other dualist jurisdiction, where international law is not automatically part of municipal law, the international law must be incorporated - *The Parlement Belge* (1879) 4 PD 129, *Attorney-General for*

Canada -v- Attorney-General for Ontario [1937] AC 326 and *Maclaine Watson -v- International Tin Council* [1990] 2 AC 418. This fundamental rule cannot be got around by the sidewind of direct effect, which is simply a treaty rule, of no application in the United Kingdom unless Parliament says so. There are contrary statements in some of the texts (eg Dixon, *Textbook on International Law*, 2nd ed at 79-80) but these simply assume that *Factortame* is good law, in the example given without explaining how, save to say that the Treaty of Rome has a "special status," which it most emphatically does not, as Stephen Brown J. confirmed in *Farrall*. It is an international treaty like any other, concluded between sovereign states, governed by the Vienna Convention and the *jus cogens* and relying on an Act of Parliament in order to have any legal effect in the United Kingdom.

9. Non-Sovereign Status of the EC/EU

33. In the case of the Treaty of Rome the waters have of course been muddied with nonsensical talk of "pooling sovereignty," a legal impossibility. There was no revolution in 1972, HM Queen Elizabeth II was not thrown over as Head of State in favour of Mr. Roy Jenkins or any other President of the European Commission, nor was the Constitution destroyed nor the British State extinguished. The United Kingdom remained a Sovereign State in international law, free to enter into treaties with other Sovereign States, remaining a Permanent Member of the UN Security Council and NATO in her own right. I am aware that some in the EC would like to see the UK's seat on the Security Council given up in favour of the EU, but that is somewhat ambitious since only States Members of the United **Nations** (emphasis added) may sit on the Security Council (Article 23(1) of the UN Charter), the EU is not a Member of the United Nations, is not eligible for membership (Article 4(1) of the Charter) and the UK rightly has a veto on any amendment to the Charter (Articles 108 and 109(2)).

34. Although the Commonwealth of Nations, membership of which is also restricted to Sovereign States, was severely disadvantaged in terms of trade the United Kingdom remained a member state. I am not aware that any Ambassador was withdrawn or diplomatic mission to the United Kingdom downgraded on the basis that we were no longer a state, albeit that we enjoyed less international influence and prosperity as a consequence of EEC membership (broadly speaking economic growth declined by about one-third and we moved from a trade surplus with the EEC member states to a structural deficit, indeed so far from membership bringing increased prosperity we had to be bailed out by the International Monetary Fund within 3 years of joining).

35. The United Kingdom retained the power to wage war (which she would not have done had she given up her sovereignty) and did so in 1982 when one of her colonies was invaded and again in 1991 when a former British Protectorate was invaded. The other member states remained neutral in the Falklands War, whereas if sovereignty had been pooled they would have been deemed under international law to be belligerent powers. Correctly other EC member states were not consulted by the War Cabinet on the conduct of hostilities, for example when the decision was taken on 2nd May 1982 to permit an SSN attack on the enemy cruiser ARA *General Belgrano*. The waging of war in each case was an undoubted exercise of national sovereignty by a sovereign power and the Armed Forces of the Crown served (and served well) as such, an instrument of British not European Community power. British warships in the Falklands War flew the White Ensign, not the EC emblem, indeed they would have been in breach of the Hague Rules and the 1977 Geneva Protocol 1 (see eg Article 39) had they flown the EC emblem in preference to the White Ensign.

36. Now as those instructing me well know the Treaty of Rome provides for ever closer union and to that extent the ambition of the EC to become a state in international law is set out in the Treaties, including now of course the Treaty on European Union. The EU is not however a state in international law, nor does it hold itself out as one, despite conceits such as an anthem and a flag. Our Liege Sovereign Lady Queen Elizabeth II is still our Head of State. Her Majesty the Queen of the Netherlands is still the Head of State of her Kingdom and His Majesty the King of the Belgians remains the Belgian Head of State. *Aliter* if and when the EU transforms itself into a state. If the Dutch people so wished their Queen would then cease to be Head of State, in favour of an elected or appointed EU President, and there would no longer be a state called the Netherlands.

37. It is unimaginable of course that such a state of affairs would ever prevail in respect of the United Kingdom. If it did only then would an Act of Parliament cease to prevail over community law, not as a result of any rule of the Constitution of the United Kingdom because there would no longer be a Kingdom, United or otherwise and no longer a Constitution, although some internal rules and customs would continue to apply in so far as they did not conflict with federal law, but as the result of the constitution of the new European state howsoever defined, insofar as it could in practice impose its will in its British territories.

38. The only other circumstance in which an EC directive could prevail over an Act of Parliament post-dating 1972 would be in the event of war and the armed occupation of all or part of these islands. Fresh primary legislation would be unlikely and directives contrary to existing (ie post-1972) primary legislation would only take effect *de facto* where they could be imposed by force. They would not take effect *de jure*. In 1940 for example there were emergency plans for King George VI to go to Canada. Even if a puppet Parliament had continued to sit it could not have enacted primary legislation without His Assent.

39. Wild theories have been advanced down the years about HRH the Duke of Windsor being installed by the occupying power (there is no evidence for it) but he had given up his right to the Throne by means of primary legislation (His Majesty's Declaration of Abdication Act 1936, s.1(2)) and could not regain it without fresh legislation which would have required his brother's signature. No *de jure* legislation could have been passed by the occupying power.

40. It may be protested that we are a long way from weights and measures and so we are, but the above scenarios, which are admittedly improbable, serve to illustrate how disloyal and offensive it is to attempt to deny the right of Her Majesty Queen Elizabeth II in Parliament to legislate for the United Kingdom. Indeed it is a praemunire. There can be no lawful denial of the competence of Parliament to enact the Weights and Measures Act 1985 and no doubting the validity of the highest form of legislation known to our Constitution. As Bennion puts it (*op cit*, Draft Code Section 140):

> The one thing a sovereign legislature cannot do is truncate its own sovereignty by restricting its successors. A Parliament sovereign today must also be sovereign tomorrow ... *non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a qua constituuntur.*

10. Primary versus Secondary Legislation

41. Mr. Howell argues that there is some relevance to the date of 1994 Regulations and Order. With respect this is to mistake the difference between primary and secondary legislation. A Minister of the Crown is a member of the Executive and has no legislative power, except as may be delegated by the Legislature. The relevant date is that of the primary legislation (see eg *Yaffe*, cited above at paragraph 13). In order to see what power the minister had in 1994 we must look back to 1972, in so far as he relies on a 1972 statute. A minister could have no greater power to legislate under the 1972 Act in 1994 than he did in 1972.

11. Threefold Consent

42. Mr. Howell relies on the approval of the 1994 delegated legislation by the House of Commons and the House of Lords. This is not approval by Parliament, nor do the two Houses of Parliament have any legislative power by themselves. *Prince's Case* (1606) 8 Co.Rep.1a (see also Coke, 4 Co. Inst. 24) confirmed the doctrine of Threefold Consent (as it is described by Bennion, *op cit*, at Draft Code s.27), which was already three centuries old and had been established by the time of the enactment of the Revocatio Novarum Ordinationum in 1322. Mr. Howell is in good company however. No less a personage than the Governor of the Bank of England made the same mistake in 1913 when a Mr. Thomas Gibson Bowles was desirous of not paying income tax on the dividends on his Irish Land Stock, on the ground that the said deduction had only been authorised by a Resolution of the Commons Committee for Ways and Means. The problem was that this procedure had been followed since the Income Tax had been re-introduced the previous century and although the rate of tax was usually confirmed in the Finance Act the effect of Mr. Bowles' argument was that most of the income tax raised in England for upwards of fifty years had been levied unlawfully. He argued his case in person, citing *inter alia* Magna Carta. He was quite right of course - a resolution even of the whole House, even if proposed by the Government of the day, is not law and tax can only be levied by statute. Correctly Parker J. ruled that the Bank of England had acted unlawfully in seeking to deduct income tax (*Bowles -v- Bank of England* [1913] 1 Ch. 57).

43. Almost every *ultra vires* regulation has been approved either by negative or positive resolution in both Houses, one example helpfully being given by Mr. Malone, the Principal Trading Standards Officer for the Metropolitan Borough of Wirral in his letter to those instructing me dated 18th July 2000, the purported regulations being the Oral Snuff (Safety) Regulations 1989 (SI 1989 No 2347). Mr. Malone may of course have been unaware that he was demolishing a key plank in the argument being put by Mr. Howell in the same month. The alleged Oral Snuff (Safety) Regulations were purportedly made under ss.10 and 11(5)(a) of the Consumer Protection Act 1987. Their approval by both Houses under the negative resolution procedure (s.11(6)) did not alter matters and rightly so.

44. Many other examples are to be found in the books, eg purported regulation 8 of the Excise Warehousing (Etc) Regulations 1982, which were declared by Mustill LJ (as he then was) and Neill J (as he then was) in the Divisional Court to be *ultra vires*, null and void (*R -v- Customs and Excise Commissioners ex p Hedges and Butler Limited* [1986] 2 All ER 164). Certiorari was not of course needed as an *ultra vires* regulation is void and has no legal existence, so there is nothing to be quashed (see paragraphs 47-8 below). Another example of an *ultra vires* Customs regulation will be found in *Customs and Excise Commissioners -v- Cure and Deely Ltd* [1962] 1 QB 340. Immigration rules made under s.3 of the Immigration Act 1971 are subject to a negative resolution procedure (s.3(2) of the Act) but that has no bearing on their validity and Simon Brown J. (as he then was) correctly with respect struck down a severable part of the dependent family rules in *R -v- Immigration Appeal Tribunal ex p Manshoora Begum* [1986] Imm AR 385. Confirmation by a minister (eg under s.40 of the Housing Act 1925) similarly will not save a scheme (*Yaffe, supra, per* Viscount Dunedin at 503). For an example of a purported regulation struck down by the House of Lords as *ultra vires* after it had been laid before Parliament (under s.52(2) of the Prison Act 1952) see *Raymond -v- Honey* [1983] AC 1.

45. The highest at which it can be put is that a court will have regard to the opinion of the Houses of Parliament if considering the reasonableness of a regulation, on the basis that neither the Commons nor the Lords would lightly approve an irrational regulation, but at the end of the day if the regulation is *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation* [1948] 1 KB 223) it is the court's duty to strike it down, as in *Manshoora Begum*. Where as here the regulations are illegal and unconstitutional confirmation by both Houses of Parliament is not a material consideration.

46. This rule reflects political reality, in that Parliamentary scrutiny of delegated legislation as a matter of practice is derisory, a point well made by Evans (*Legislative Drafting*, 3rd ed (1987) at 271). Not only is scarcely any Parliamentary time made available adequately to scrutinise the flood of regulations (now over 3,000 a year), but there is no power of amendment. It is precisely for these reasons of course that tyrannically inclined ministers prefer secondary to primary legislation.

12. Ultra Vires regulations are void

47. Mr. Howell's final mistake (with respect) is to rely on the so-called presumption of validity, a mistake made by a number of the senior local authority officers whose letters to those instructing me are enclosed with my instructions. There is a much misunderstood maxim *omnia praesumuntur rite et solemniter esse acta* the effect of which is to presume that official actions are lawful, but it carries little weight and is easily displaced. Voidability is a dangerous European concept which attaches a spurious legality to unlawful ministerial acts. Both the Divisional Court and the Court of Appeal (even Lord Denning, until he recanted - see Denning, *The Discipline of Law*, at 77) have flirted with it, making a series of wrong decisions which if they had not been overturned or over-ruled would have established, wholly contrary to the principle of our constitution, that *ultra vires* regulations have legal effect unless and until overturned on judicial review. Part of the danger rests with the discretionary nature of judicial review, which permits relief to be withheld even where illegal official conduct is established, so that some judges were in effect claiming the right to allow ministers to break the law. A series of important House of Lords decisions (*R -v- Immigration Appeal Tribunal ex p Bakhtaur Singh* [1986] Imm AR 352, *Chief Adjudication Officer -v- Foster* [1993] AC 754, *Director of Public Prosecutions -v- Hutchinson* [1990] 2 AC 783) has now put paid to the suggestion that you must first go to the Divisional Court to quash a regulation, a suggestion which with respect was thoroughly unconstitutional, struck at the heart of the Rule of Law and should never have been ventilated in an English court. You can of course go to the Divisional Court as one way of 'quashing' an illegal set of regulations, but even if you do you need declaratory relief only, because *ultra vires* regulations (like those we are concerned with here) have no legal existence - that is why experienced leading counsel for the applicants in the *Hedges and Butler* case (paragraph 44 *supra*) correctly sought a declaration only (the relief sought is set out at 165).

48. Lord Hailsham of St. Marylebone LC with respect stated the law correctly in *London & Clydeside Estates Ltd -v- Aberdeen District Council* [1980] 1 WLR 182 at 189 (HL). A person may choose to ignore a patently illegal official act or order and rely upon its illegality as a defence if necessary. I am sure Lord Hailsham would have no hesitation in describing a regulation which conflicted with clear words in primary legislation as patently illegal.

13. Observations on behalf of the Minister

49. I am shown a letter from the Director of Consumer Advice and Information at the DTI to the Assistant Director of LACOTS dated 24th January 2000, giving the Department's views on my Opinion. The first thing to be said is that the DTI appear to have been remarkably slow to obtain the opinion of Treasury Counsel, or, perhaps, to disclose it. Of course there is always the danger, from the point of view of the minister, that competent counsel might be familiar with the law, or possibly even look it up. The only argument put forward on the minister's behalf is the interesting suggestion that:

> the vast majority of lawyers believe so long as the Act is on the statute book it has the effect that Community law, and any legislation that implements Community law, prevails even over subsequent primary legislation.

50. With respect this is the last resort of the desperate civil servant. Did the DTI conduct a poll of lawyers? I have very real doubts that any sort of majority of common lawyers could be found to assert that secondary legislation could overturn primary legislation using a power under an old Act. Perhaps the ministry are referring to European lawyers, but even in Europe (eg in Denmark and Germany) doubts have been expressed about community law over-riding basic or fundamental law, indeed as a matter of Danish constitutional law we may assert with some confidence that the Eastern High Court (whose jurisdiction includes Copenhagen) and the Supreme Court retain the right to strike down any legal instrument of the European Community which "lies beyond the transfer of sovereignty according to the Act of Accession," ie is incompatible with the Constitution of the Kingdom of Denmark Act 1953, the ultimate legal instrument for the Kingdom of Denmark (*Hanne Norup Carlsen, Ingeborg Fangel, Nicolas Fischer & ors -v- Prime Minister Poul Nyrup Rasmussen*, Case No I 361/1997, 6th April 1998, Supreme Court of Denmark, Hornslet, Hermann, Andreasen, Pedersen, Sorensen,Melchior, Blok,Norgaard, Lorenzen, Dahl and Kristensen JJ.)(I was present in court for the judgment and I am relying on an English language transcript kindly made available by one of the attornies-at-law of record).

51. Should a common lawyer be found to present the facile argument (with respect to those who take the contrary view) that secondary legislation can overturn later primary legislation then I most respectfully venture to suggest that he or she will either be unfamiliar with constitutional law, too indolent to look it up or a supporter of the UK's membership of the European Community so lacking in integrity that he or she is unwilling to recognise a legal principle which is politically inconvenient. In describing such an argument as 'facile' I should not be thought of as criticising counsel in *Factortame*, for the simple reason that no argument on the point was presented. The judges with great respect ought to have stopped the case, but in fairness to them none could be described as a constitutional lawyer and huge mistakes often go uncorrected - indeed the failure to apply the settled doctrine that Parliament cannot bind its successors was not the only constitutional mistake made. The equally disastrous (with the utmost respect) ruling in *Factortame (No 1)* [1990] 2 AC 85 that a Minister of the Crown could not be restrained by injunction from acting unlawfully (which as Lord Templeman stated correctly with respect, at 395, reversed the result of the English Civil War) was not reversed until four years later, in *M -v- Home Office* [1994] 1 AC 377. It is unclear why Lord Templeman was not invited to sit in the *Factortame* cases, given his constitutional expertise. Since the subjugation of English common law and Parliament to European domination could fairly be said to have been a principal German war aim it could be said that in the *Factortame* cases the judges sought to reverse the outcome not only of the Civil War but the Second World War as well.

52. It is perhaps illustrative of the herd instinct that few lawyers could be found to argue for an injunction against a Minister for the Crown between *Factortame (No 1)* and *M*. I am pleased to say that I did seek such injunctions in immigration cases in the Divisional Court arguing (I would suggest correctly) that the House of Lords ruling was *obiter* (and therefore non-binding) because interim relief was eventually granted against the Secretary of State. Undertakings were swiftly offered (I was sufficiently associated with the point to be rung up by a most distinguished professor of constitutional law who assumed that *M* was my case - it wasn't). With respect to the DTI (it is not my practice to name civil servants when making critical comment, the responsibility being the minister's) I am not much taken with the argument that an unquantified majority of un-named lawyers do not agree with me.

14. Venue and Jurisdiction

53. *DPP -v- Hutchinson* (*supra*) is authority for the proposition that a magistrates court may consider the *vires* of secondary legislation. In that case the Divisional Court with respect wrongly allowed an appeal by the DPP against the perfectly proper decision, with respect, of HH Judge Lait and two lay justices sitting in the Crown Court at Reading to set aside the conviction of two women, Jean Hutchinson and Georgina Smith.

Finding themselves unable to support the defence policy of the government of the day these indefatigable ladies together with several others camped outside the RAF aerodrome at Greenham Common, where they protested against cruise missiles, to the interest of the press and the annoyance of the ministry, who thereupon instituted a misconceived criminal prosecution based on regulations purportedly made under s.14(1) of the Military Lands Act 1892.

54. The problem was that as its names implies RAF Greenham Common was on a common and the Military Lands Act specifically protected the rights of commoners. The secondary legislation did not, it was in conflict with the primary legislation and therefore *ultra vires*. Since the regulations did not exist in law no prosecution could be founded upon them, the ladies were entitled to be acquitted and duly were, by the House of Lords. There is no suggestion in the speeches of any of their Lordships that the ladies would first have to go to the Divisional Court by way of an application for judicial review to quash the regulations, which might have been refused as they lacked *locus standi*, not being commoners. The decision has been criticised on the curious ground that as they were not commoners they should have been punished, under an unlawful instrument. Given that the bye-law had no legal existence how could they possibly be convicted? Everyone is entitled to the benefit of the law, peace protesters as well as commoners. The case is a classic example of the enormous dangers for the Rule of Law of the European voidability concept, which had it been applied in this high-profile case would have led to a monstrous injustice and made the country look like a police state.

55. Every magistrates court in England and Wales has jurisdiction to consider the constitutional implications which would be raised by a prosecution for selling in metric measures, and rightly so. I am aware that there are those in the law who despise lay magistrates (after six centuries of service they are now under threat of abolition) but I do not and I have every confidence that a bench of English magistrates will comprehend that it is their duty to apply an Act of Parliament and that a later Act of Parliament takes precedence over an earlier.

56. It will not be necessary to plead not guilty, as the informations will not disclose an offence known to the law and issue can be joined under the splendid old procedure of a demurrer, which should be in writing (*R -v- Cumberworth* (1989) 89 Cr.App.R.187). The procedure was used on only a handful of occasions in the 20th century.

15. Judicial Review

57. Mr. Malone of the Metropolitan Borough of Wirral asks in his letter to those instructing me on 18th July why they have not sought judicial review, to which the first response might be why has the Metropolitan Borough of Wirral equally not sought to clarify the law by way of judicial review? If any compelling argument could be found to support the regulations (none has been drawn to my attention) the Divisional Court would be able to grant declaratory relief. The second response, having regard to the equality of arms principle, might be to ask whether or not the council (or for that matter the DTI) are prepared to pay the costs. The third response might be, 'when are you going to prosecute?' On my instructions a variety of threats have been made to Imperial traders since 1st January but there has been a marked reluctance on the part of trading standards officers to take matters to court.

58. I have advised separately, with different instructing solicitors (to whom this Opinion should be shown as a courtesy), in a case involving the unlawful seizure of Imperial scales. There is a consideration so far as bringing actions for trespass in the ordinary courts is concerned arising out of the unconstitutional decision of the House of Lords (with the utmost respect) in *O'Reilly -v- Mackman* [1983] 2 AC 237, where Lord Diplock used recent changes to Order 53 on procedure on judicial review (themselves of questionable value) to justify restricting access to the Queen's courts and funnelling all public law issues into the Divisional Court. Had Dicey been alive he would doubtless have pointed out that this was nothing less than an attempt to model the public law of England on the French example, conspicuous by its failure throughout the 20th century to control the French state, not least during the Vichy period (I suspect Dicey would have been quick to spot the compatibility of the European legal model with Fascism).

59. The decision has been severely criticised, not least by the brilliant (with respect) Professor Sir William Wade QC LLD FBA (see eg the 6th ed of his *Administrative Law,* later editions being jointly edited, at 676 - 687, in particular the reference to "the evils of rigid demarcation" at 683). Subsequent events have proved the resilience of the British Constitution (it is after all the most brilliant ever devised and inspired the American Constitution, itself a key to America's success) and how difficult it is to Europeanise the Constitution by stealth. This is partly because decisions such as *Factortame* are worthless as authority unless the constitutional issues are fully argued and partly because the case by case tradition of the common law soon exposes the flaws in

decisions such as *O'Reilly -v- Mackman*. The House of Lords commenced the restoration of constitutional legitimacy within two years, confirming in *Wandsworth LBC -v- Winder* [1985] AC 461 that public law issues could be raised by way of defence in the County Court. There was then the excellent series of decisions referred to above (paragraph 47), starting with *Bakhtaur Singh*, which confirmed that statutory tribunals retained public law jurisdiction and the landmark decision in *Hutchinson*, confirming the public law jurisdiction of magistrates.

60. We do not of course have an administrative court in England in the European sense (notwithstanding the absurd renaming of the Crown Office List, which may alter the stationery but not the jurisdiction), because as Dicey so eloquently explained (*op. cit. passim*) the principles of English constitutional and administrative law are part of the ordinary law of the land, the glorious inheritance of the common people, to be enforced against the executive in every court in the land, high or low, lay or professional, in London or the provinces, in every case in which they are relevant, whether the executive like it or not. They do not in fact like it, any more than they like Habeas Corpus (it was in fact suggested by the executive after *Factortame* that Habeas Corpus no longer lay against a government minister - see *R -v- Secretary of State for the Home Department ex p Muboyayi* [1992] 1 QB 244) or Trial by Jury, but there it is.

61. The vestigial traces of *O'Reilly -v- Mackman* are sufficient to say that judicial review might be preferable to bringing tort proceedings in the ordinary courts, but the County Court would have jurisdiction if a local authority pleaded the *ultra vires* regulations by way of defence. There is no obligation on a litigant in England to give recognition to an unlawful act by the executive and the 1985 Act may be pleaded as it was placed on the statute book. Equally of course there is no obligation on a local authority to plead a plainly defective set of regulations.

16. The Price Marking Orders

62. I may deal deal shortly with these as the draughtsman in each case was plainly labouring under the same delusion as the draughtsman of the 1994 Order and Regulations, making the same asinine assumption (with respect) that an entrenching mechanism is known to the law of England whereby an earlier Act of Parliament takes precedence over a later. The 1991, 1994, 1995 and 1999 Orders are all purportedly made under s.4 of the Prices Act 1974, which is of course governed by the Weights and Measures Act 1985. There is no reason not to have unit pricing, but plainly a scheme under secondary legislation relying on a pre-1985 Act of Parliament is unlawful in so far as it fails to provide for unit pricing in Imperial measures. That is because the scheme as drafted attempts to get around the sanction of Imperial trading by primary legislation by the sidewind of outlawing Imperial pricing. It is lawful to trade in Imperial therefore it is lawful to price in Imperial. In so far as they assert the contrary (parts of the Orders may be severable) these pretended Orders are all *ultra vires*, null and void and of no legal effect whatsoever.

17. The Weighing Equipment Regulations 1988

It is perhaps a measure of the desperation of some trading standards officers that these regulations should be prayed in aid at all. Correctly they refer expressly to Imperial weights and measures (see eg Regulations 2(2) and 14). These regulations are lawful and traders should comply with them, so that any Imperial non-automatic weighing machine first passed as fit for use for trade after 1st November 1988 should be graduated in multiples of 1/8,1/4,1/2,1,2,4 or 8 ounces and 1/4 or 1/2 pound and give a weighing result which complies with the principle of simple juxtaposition (reg.14(1)(b)) unless it is a semi-self-indicating machine with a mechanical weight indicating device which has a range of self-indication of 2lb, etc (reg.14(2)). (No doubt the minister when confronted with this regulation said "seems self-evident enough to me," or words to like effect).

64. These are dual system regulations. They have no bearing on the issue of whether it is the primary or the secondary legislation which is invalid, and merely regulate Imperial trading, which is a different thing from outlawing it. Nobody says Imperial traders should not use clear and accurate scales or sell short.

18. Imperial Testing

65. The suggestion (on my instructions) from some trading standards officers that they can no longer test Imperial scales because they have thrown away their equipment amounts to no more than an insolent defiance of Parliament's authority. Trading standards departments are under a duty imposed by law to enforce the law on weights and measures and unless and until Parliament says otherwise that means Imperial

as well as metric. Equipment thrown away should be replaced and councillors surcharged for the additional burden on ratepayers where they have approved the disposal of equipment still in working order and fit for its purpose.

19. Compensation

66. I remain inclined to the view that traders who have been misled as to the law should be compensated, but this will require a compensation scheme. Ordinarily there is no remedy for a misrepresentation as to the law, absent bad faith, on the basis that everyone (even a minister) is presumed to know the law. The recourse here is to Parliament rather than the courts and traders should consult with their Members of Parliament or with Peers who are prepared to take up their case. Entirely different considerations arise where traders have been assaulted or their property seized, in which event ordinary actions will lie for assault, battery and trespass to goods, with the jury being invited to award massive aggravated and exemplary damages. Given the constitutional implications of such actions, the blow struck at responsible government and the defiance of the elected Parliament, a jury would be appropriate in all cases, unless quantum can be agreed.

67. I assume in any event that Parliament is on the alert for legislation by stealth, eg by a seemingly innocuous amendment buried deep in a Schedule of Repeals - the day when ministers might be presumed not treat Parliament with contempt has long gone, indeed sadly we live in an era where treachery, deceit and bad faith increasingly appear to be the stock-in-trade of ministers and officials.

20. The *vires* of the Directives

68. It has been suggested that directives 80/181/EEC and 89/617/EEC might not meet the community law tests of subsidiarity and proportionality. I do not agree. The tests, which now appear in Protocol 30 to the revised Treaty on European Union, are heavily qualified and in particular made subject in paragraph (2) of the Protocol to the over-riding Treaty objective of ever-closer union. The limitation in Article 6(3) of the TEU, concerning respect for the national identities of member states, has in practice proved worthless. The same might be said of the subsidiarity test, which is probably excluded in this case by either paragraph (2) (*acquis communautaire*) or (3) exclusive competence. I am not aware that it has ever been used to strike down a directive.

69. The prospect of the ECJ striking down the key directive, 80/181, on proportionality grounds, is negligible. The DTI might agree to an ECJ reference but only in order to stall for time, which in my view is not a proper use of the reference procedure, with which I am very familiar (I have used it myself). The danger to avoid here is interpreting the treaty and directive in the way that an English lawyer might, overlooking the political and federalising dynamic of the Luxembourg Court.

70. If I might be forgiven an anecdotal reference, I well remember one English silk telling me my community law point in *Webb -v- EMO Air Cargo Ltd* (C-32/93) [1993] 1 CMLR 259 [1993] ICR 175 [1994] 2 CMLR 729 [1994] ICR 770 (ECJ, House of Lords) was unarguable. The mistake he made, in company with respect with the Industrial Tribunal (where I was sole counsel), the Employment Appeal Tribunal (where I was junior counsel) and the Court of Appeal (where I settled the grounds of appeal and advised an extension of Legal Aid) was to apply a textual construction where a purposive construction was appropriate. The construction favoured by the ECJ was almost identical to that urged by myself on the Industrial Tribunal, some years earlier (my final involvement with the case, appearing before the Industrial Tribunal on quantum, was over 10 years after I first advised). Having regard to the purpose of the Treaties establishing the European Community and the Treaty on European Union I advise that the subsidiarity test has no application to either directive, which are part of the *acquis communautaire* and protected by paragraph 2 of Protocol 30, or in the alternative paragraph 3 (exclusive competence), or in the further alternative the substantive test of subsidiarity is met having regard to the restrictions on intra-community trade flowing from having two systems of measurement in use in the single market. The proportionality test is plainly met for that reason also and I see nothing disproportionate in the enforcement provisions.

71. In my opinion neither community law point is properly arguable and I would not wish to see the time of the ECJ taken up with them. I should not be thought of as saying that the purposive approach as applied by the ECJ (which tends to build on the texts rather than interpret them) is laudable or desirable, or appropriate in a democratic context. It is one thing for a treaty tribunal in an undemocratic supra-national organisation interpreting texts which are largely the product of officials, where the parliament plays a consultative role only, to add words in and effectively re-write the text under the guise of interpretation, but quite another for a court in a democracy, particularly one with a supreme parliament, to depart from the clear meaning of an instrument or

give it a strained construction in order to arrive at what the court considers to be a politically desirable result. Any objective observer of the EU would have to be concerned at the absence of consent and the tensions generated by federalising from the centre (the court and the bureaucracy) without a clear democratic mandate from the member states and their electorates, indeed it is possible to predict that unless the consent gap is closed the organisation will collapse, or at the very least spin off non-core member states (such as the UK, the Kingdoms of Sweden and Denmark and the Finnish Republic).

21. Sanctions Against the United Kingdom

72. I am asked to comment on observations by officials of the European Community, who are said to have threatened non-forcible sanctions against the United Kingdom, in the wake of the perfectly proper decision of the UK's leading chain of supermarkets to offer its customers the choice of Imperial or metric (as a matter of law there is no reason why supermarkets could not go Imperial only, for pre-packaged items, loose goods and petrol). I will not comment on what was said on the radio (although I am grateful to the BBC for supplying me with a tape) without an agreed transcript, having regard to the implications in international law of making a threat of non-forcible measures against a Sovereign State. As a matter of community law there is an obligation on the United Kingdom government to force compulsory metrication on her civilian population, but I cannot think that the absence of democratic consent is without consequence in international law.

73. As I advised in December (paragraph 31) there is a rule of public international law, reflected in Article 46(1) of the Vienna Convention on the Law of Treaties (UKTS No 58(1980) Cmnd.7964) whereby a state party to a treaty may be taken to know the internal rules of fundamental importance of other state parties. In my opinion, necessarily expressed tentatively because we are moving through uncharted waters, a supranational organisation may not take non-forcible measures against a state party where an internal rule of fundamental importance prevents that party from complying with a treaty obligation. Put shortly the United Kingdom might have a defence in international law, in which event sanctions such as fines (provided for in principle under community law) would be wholly inappropriate. I have regard not only to the Vienna Convention on the Law of Treaties, but also to the Charter of the United Nations, which refers expressly to the rights of nations in the Preamble and to the over-riding principle of self-determination in Article 1(2). I further have regard to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States (Annex to General Assembly Resolution 2625 (XXV)). The Declaration, assented to by each of the state parties to the Treaty of Rome and the TEU, refers expressly to the principle of non-intervention in internal affairs and holds that such intervention "violates the letter and spirit of the Charter (and)... leads to the creation of situations which threaten international peace and security". It should be borne in mind that unless the 1985 Act is repealed there would be no mechanism for voluntary payment of any fine levied by the ECJ, because of internal rules governing the use of the Consolidated Fund of the United Kingdom. I assume that the European Commission are aware of that and accept that collection of any fine would require seizure of UK non-state assets under community jurisdiction, a procedure which whilst it might be lawful under community law (on a purposive construction) seems to me to be questionable under general international law to say the very least.

74. A threat by the European Commission to enforce directive 80/181/EEC would if made (I shall assume in favour of the commission in the absence of a transcript that no such threat was made or intended in the public comments in this jurisdiction of officials of the Commission) raise potentially fundamental and far-reaching points of public international law arising out of the interface between community and general international law. It should be remembered that because of the non-sovereign (and therefore inferior) status of the European Community in international law it would not be relying on internal rules (such as the rule that no Parliament may bind its successor) but treaty law (including the directive which derives its effect from Article 249) and the **European Community cannot invoke an international treaty to interfere in the internal affairs of the United Kingdom in violation of general international law**. Put shortly Brussels cannot have its gateaux and eat it - if it wishes to rely on an international instrument it must also have regard to the international status of the United Kingdom as a Sovereign State and respect the rules of international law, which protects sovereigns from interference in their internal affairs. Having regard to the fundamental importance of the principle that Parliament cannot bind its successors and further having regard to the sovereign will of the British people as expressed in primary legislation of their elected Parliament I advise that any threat to invoke non-forcible measures or sanctions against the United Kingdom in respect of Imperial trading whilst the Weights and Measures Act 1985 is on the statute book would amount to an unlawful interference in the internal affairs of the United Kingdom contrary to the principles and purposes of the United Nations and the 1970 Declaration of Principles on International Law.

75. So far as remedies are concerned recourse to the ECJ plainly would not be effective, nor as a treaty

tribunal could it fairly decide as between the UK and the European Commission on an issue as sensitive as this, nor following *Factortame* could the UK reasonably be expected with respect to have any confidence in the impartiality of the court or its willingness to respect the UK's sovereign status. Recourse to the International Court of Justice in the Hague is generally taken to be precluded by Article 292, although I entertain reservations about the relationship of this article to the UN Charter, including Article 95 and the Statute of the International Court of Justice, but that would not exclude conciliation by the Conciliation Commission (see the Annex to the Vienna Convention), which would require the consent of the opposing party and the Commission. Having regard to the possibility of a threat to international peace and security intervention by the UN Security Council would be an appropriate response to enforcement action against the United Kingdom, a Permanent Member of the Council, by the European Commission, but effective action might be hampered through use of the French veto. A further alternative, if the Commission did not back down, would be to treat enforcement action directed at forcing Parliament to change its mind as a *casus belli* justifying an armed response, either limited (eg by way of SSN blockade of EC ports) or general hostilities. Of course there are timid souls, like the minister with respect, who would enforce metric weights and measures on their own people rather than go that far just as there were timid souls in this country who were not prepared to go to the aid of the Belgian people in 1914 or the Polish people in 1939, but timidity is not a characteristic usually associated with the British people, as opposed to their governments, and the lesson of history is that timid governments usually collapse quickly in a crisis (as in May 1940), to be replaced by a British Government worthy of the name. I would respectfully advise the European Commission against trying to force the British people to abandon our dearly loved weights and measures, so much a part of our national history and character, in favour of the generally detested metric system, all the more detested now that it has become a powerful symbol of European domination through the clumsy attempt to ram it through against the wishes of Parliament.

22. Compliance of the Rome Treaty with the *Jus Cogens*

76. Considerations arising from general public international law give rise to serious concern about the international compliance of European Community law, in two ways. Firstly the rule of community law (which I have referred to as the *Factortame* doctrine, although there are earlier cases) which requires the fundamental or basic laws of Member States to give way amounts to a serious interference in the internal affairs of the Member States in violation of the UN Charter and the 1970 Declaration of Principles, having regard also to the presumptive norm against subjugation to alien domination and exploitation (see Article 1 of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (UN General Assembly Resolution 1514 (XV)). Whilst it may be that direct effect instruments are compliant where regulations and directives do not purport to over-ride the basic and fundamental laws of the democratic societies whose democracy the basic laws are there to uphold, once that threshold is crossed it seems to me that the interference in the internal affairs of Member States is so violent as to amount to a denial of self-determination. No constitutional lawyer reading the judgment of the Danish Supreme Court in *Carlsen & ors* could fail to sense the unease and disquiet of the Court at the claims being made for community law over the Danish Constitution, nor could they fail to be moved by the evident adherence of the distinguished members of the Court to Her Danish Majesty or the Kingdom of Denmark Constitution Act, itself passed in the wake of much loss of young Danish life in the Resistance Movement, former members of which I had the privilege of meeting when I went to Denmark to hear the judgment. Secondly the metrication directive interferes with local customs established since time immemorial and the British way of life to such a degree as to amount to an unlawful denial of self-determination (that is to say these are matters for the UK to decide, not Europe). This works both ways : no-one in the UK would suggest that we could or should impose Imperial weights and measures on European states. People in areas under British military occupation (eg the British Zone in what became West Germany and the British Sector in West Berlin) were not forced to adopt the Imperial system, with which they would have been no more comfortable than we are with SI/metric.

77. The inalienable right of a nation and people to self-determination is a peremptory norm of general international law and part of the *jus cogens*, its importance being reflected in the Preamble to the UN Charter, in Articles 21(1) and (3) of the Universal Declaration of Human Rights (with which the *Factortame* doctrine is plainly inconsistent, seeking as it does to assert a supranational will over the elected legislature of this realm), Article 1(1) of the International Covenant on Human Rights and Article 1(1) of the International Covenant on Civil and Political Rights. I respectfully adopt the following passage from the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor -v- Furundzija* (unreported, Case No IT-95-17/1-T 10, 10th December 1998), expressly approved by the House of Lords in *R -v- Bow Street Metropolitan Stipendiary Magistrate & ors ex p General Augusto Pinochet Ugarte* [2000] 1 AC 147, *per* Lord Browne-Wilkinson at 198 :

> Because of the importance of the values it protects ... has evolved into a peremptory norm or jus cogens, that is, **a norm that enjoys a higher rank in the international hierarchy than treaty law** and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that **the principle at issue cannot be derogated from by states through international treaties** or local or special customs or even general customary rules not endowed with the same normative force (emphasis added).

78. The *Pinochet* and ICT judgments reflect Article 53 of the Vienna Convention on the Law of Treaties, which confirms that treaty provisions in violation of the *jus cogens* are **void.** Article 71(1)(a) sensibly appears to accept the possibility that void provisions may be severed, which must be right, saving the valid part of the treaty. Article 2(1)(a) is broad enough on a purposive construction to embrace directives as separate international agreements (the word 'treaty' is not a term of art and simply means an international agreement), so that a directive may be void as violating the peremptory norm of self-determination without necessarily infecting the Treaties establishing the European Union and Community.

79. In the premises I formally advise that re-numbered Article 249 of the Consolidated Treaty Establishing the European Community is void in so far it purports to over-ride the fundamental or basic laws of the Member States of the European Community, in the case of the United Kingdom of Great Britain and Northern Ireland primary legislation enacted with the over-arching constitutional authority of Our Liege Sovereign Lady the Queen in Parliament assembled, on the ground of violation of the peremptory norm of general international law in favour of the self-determination of nations and peoples. No regulation or directive, whether having direct effect or not, may over-ride an Act of Parliament, or conflict with the constitutional or basic law of any Member State, each of which including the Grand Duchy of Luxembourg is a Sovereign State under international law and may claim the inalienable right of self-determination.

80. I further advise that Directive 80/181/EEC as amended by Directive 89/617/EEC is void as against the United Kingdom of Great Britain and Northern Ireland (and most probably the Republic of Ireland) as being in conflict with the said peremptory norm of general public international law in so far as it purports to impose the International System of Measurement and throw over the Imperial system of weights and measures by law and custom established. This is a further ground for saying that the Units of Measurement Regulations are *ultra vires*, null and void. The Amendment Order clearly assumes that the said Directives are valid and have binding effect (Explanatory Note, paragraph 1) and this is a further ground on which to strike down the Order in Council.

23. Conclusion

81. I am aware that there will be those who think this Opinion insufficiently *communautaire* or perhaps not supine enough for political comfort, but I cannot help that. (Some may also suggest that I have used too much Latin, to which I say *mea culpa*). The obligation on counsel is to advise on the law as he or she conceives it to be, having taken the trouble of looking it up. I take the law as I find it, in the books. It may be objected that I have relied on old authorities, but it is a great mistake to hold that a legal principle which has stood the test of time and is supported by centuries of authority, such as the principle that Parliament may not bind its successors, is less valid than one which was invented last week. It is an even greater mistake to throw over the principles of the Constitution to arrive at a result that is politically convenient in the short term. That was done in the 17th century, when the judges failed to uphold the principles of liberty and the Constitution against the King, with the almost inevitable consequence that the country was plunged into the Civil War.

82. It is I am sure an uncomfortable legal fact for those who support Britain's membership of the European Community that the European Communities Act 1972 has no greater status than the Dangerous Dogs Act 1991, but that is the law. Thankfully, the European Communities Act is no more entrenched than the Dangerous Dogs Act and no good can come of pretending otherwise. The answer to the minister's apparent dilemna is to put forward new primary legislation. If the reason he is unwilling to do that is because the Chief Whip has taken fright and thinks it will not go down well with the back bench, or the government's business managers in the Upper House fear a bruising confrontation, or focus groups suggest it will cost the government ten points in the polls, there is even less reason for the courts to bail the executive out by upholding plainly invalid secondary legislation.

83. It is a very strong thing for a court in this country deliberately to go against an Act of Parliament - even in the 17th century the courts did not go that far. It is impossible to predict the damage that would be done to the fabric of the Constitution, but on any view it would be very great. In the 17th century the damage eventually

was repaired but only after civil war, regicide, dictatorship, great loss of human life and damage to property. It is doubtful if the national economy recovered much before the end of the century. However such a decision was presented the reality would be that the courts had allied themselves with the executive against the legislature and both the judiciary and the executive would be open to the accusation that they were acting as puppets of the European Union, inviting odious comparison with Vichy.

84. I do not say that a judge is not entitled to support membership of the European Community. A judge is entitled to his or her own view, however eccentric it might be. Economic or political literacy is not a requirement for judicial office (although knowledge of the law is helpful) and a judge is as entitled to support the single currency as he or she is entitled to believe in Esperanto. What a judge must never do however is to allow his or her political opinion to influence his or her judgement - in the case at hand because upholding the Constitution might cause difficulties for ministers in Brussels. As Chief Justice Tindal said in *Warburton -v- Loveland* (1832) 2 D & Cl 480 at 489 :

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

85. I can only advise of course and I cannot warrant the decision of any court. *Darnel's Case* and *Factortame* with great respect are proof enough that the courts may fall into error, even disastrous error. My advice however is clear and I adhere to the opinion I expressed in December : the Units of Measurement Regulations and the Amendment Order are *ultra vires*, null and void and the Weights and Measures Act 1985 remains in force in full measure, unamended, guaranteeing for so long as it remains on the statute book the liberties of Englishmen and women to deal in pounds and ounces, gallons and pints and feet and inches as under an Almighty and Merciful Providence they have always done. The Law of Nations, so far from oppressing the British people, who fought so hard and sacrificed so much in the last century for the rights of nations and to whom so many peoples, including European peoples, owe their freedom, guarantees their inalienable right to self-determination. Precisely because a peremptory norm of general international law is inalienable the priceless right of national freedom was not bartered away by the weak and feeble ministry which signed the Treaty of Accession to the Treaty of Rome. There it is. I advise accordingly.

.....
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Dated this 7th day of August
in the Year of Our Lord 2000

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