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IN THE SUPREME COURT OF JUDICATURE
HIGH COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N : -

STEVEN THOBURN

- and -

SUNDERLAND CITY COUNCIL

JULIAN HARMAN & JOHN DOVE

- and -

CORNWALL COUNTY COUNCIL

COLIN HUNT

- and -

LONDON BOROUGH OF HACKNEY

PETER COLLINS

- and -

LONDON BOROUGH OF SUTTON

S K E L E T O N A R G U M E N T

(A L L A P P E L L A N T S)

(C O N S T I T U T I O N A L & P U B L I C

I N T E R N A T I O N A L L A W I S S U E S

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A. INTRODUCTION – THE HISTORICAL CONTEXT

1. At just after midnight on 30th January 1986,[1] on a winter's morning whilst Britain and Europe slept, the great Weights and Measures Act 1985 came into force. Not even the hardiest constitutional lawyer stayed up to witness the event, but in retrospect this was perhaps the greatest moment in our Parliamentary history since another 30th January long ago, in 1649, when King Charles I was very properly executed on the authority of Parliament, having sought to place to the executive above both Parliament and the law. Exactly 337 years later, for the first time since the United Kingdom's bitterly controversial accession to the European Communities, Parliament placed on the statute book an Act that not did not just breach community law, but ran a coach and horses through a Commission Directive with spectacular effect, undermining a core European Community policy. Since the accession the European Commission had hoped to destroy Britain's ancient and much-envied Imperial system of weights and measures, which gave her unique synergies with the world's (and the UK's[2]) largest and most dynamic market, the North Atlantic Free Trade Area, underpinned the United Kingdom's rise to global technological supremacy in the Industrial Revolution of the 18th and 19th centuries and helped assure her technological supremacy over the metric Central and Axis aggressor powers in the great world wars of the 20th century.

2. With the benefit of hindsight it is not difficult to see how this clash between Parliament and the Commission came about. Unlike the European Convention on Human Rights and Fundamental Freedoms no attempt was made to alter Parliamentary procedures so as to require a compliance statement for every Bill presented to Parliament. There was no culture of compliance and Whitehall did not review draft legislation for compatibility with community law, nor indeed was it obliged to. Perhaps this was unsurprising – the decision to join the European Communities ushered in the greatest period of political controversy in Britain since the English Civil War and compliance statements might simply have re-ignited the smouldering resentment on the part of some Lords and Commons Members of Parliament, indeed the House of Lords voted in 1997 to discuss withdrawal.[3] The party that brought in the European Communities Bill split, was defeated and saw its leader replaced in a bitter internal power struggle that arguably continues. The new government agreed to a referendum on withdrawal. It won the referendum, but only by playing down the legal impact of EC membership.[4] The post-accession years were marked by a prolonged economic crisis, leading to the IMF rescue package in 1976. The following election saw our first lady Prime Minister, said by some to be not wholly sympathetic to the EEC. One of the new government's first acts was to do away with metrification and abolish the Metrication Board, an unloved quango that was judged to have outlived its usefulness.

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[1] In accordance with the rule in *Tomlinson v. Bullock* (1879) 4 QBD 230, see now s.4(b) Interpretation Act 1978, and s. 99(2) Weights and Measures Act 1985.

[2] UK exports to the United States 1999, the last year for which figures are available, amounted to £68.0 billion (source: HM Treasury, *UK Balance of Trade 1999 (The Pink Book)*), making it our largest single export market, the next largest being the Federal Republic of Germany with just £34.4bn.

[3] European Union (Amendment) Bill, which went to Committee.

[4] See below, page 42 *et. seq.*

3. The European Commission was not prepared to accept the decision of the elected Government and set about imposing compulsory metrification by Directive 80/181/EEC (Bundle Volume VII page 1912 (VII-1912), amended in 1989 by Directive 89/617/EEC (VII-1930). Whilst Brussels drew up a timetable for the destruction of the Imperial system Whitehall sensibly went about the business of consolidating our weights and measures law, following the 1979 policy decision to abandon metrification (work on the consolidation actually started in 1979[5]). The 1985 Act does not refer to the Metrication Directive, let alone consolidate it – the consolidation seems to have proceeded almost as though the UK was not a member of the EEC.[6] Possibly alarmed by the prospect of shopkeepers being dragged before the courts for selling in pounds and ounces the government asked for and was given a 10-year extension in 1989, postponing 'M-Day' to 1st January 2000.[7]

4. In the meantime Parliament passed another Act breaching community law, the famous Merchant Shipping Act 1988, Part 11 of which dealt with the predatory practice of quota-hopping by mainly Spanish fishing vessels. The Spanish-controlled companies, led by Factortame Ltd, attacked Parliament's right to legislate to control fishing in British waters and commenced judicial review proceedings which resulted in the Act purportedly being "disapplied," a wholly novel form of proceeding[8] entirely without precedent in all our long and glorious constitutional history, so novel in fact that it was with great respect unconstitutional. Counsel for the Spanish companies with the utmost respect did not draw the court's attention to the line of authority cited below,[9] which would have destroyed their case. The respondent Secretary of State, possibly mindful of the fact that the 1988 Act could only be enforced at sea, by the Royal Navy, and perhaps concerned at the possible negative impact on Anglo-European relations of naval boarding parties arresting the Factortame boats,[10] or engaging with main armament should they refuse to stop, with the consequent risk of another Anglo-Spanish War,[11] failed with respect to assert the Constitutional right of Parliament to legislate as it pleases. Whilst this legal soap opera (as some have referred to it – see the comments of District Judge (MC) Morgan in the *Thoburn* case at 27) proceeded through the courts over 12 years in an atmosphere of increasing unreality, the status and reputation of Parliament declined, to the point where not much more than half of the electorate voted at the last General Election. Indeed if the Respondents are right Parliament is no more than a puppet assembly, whose laws are subject to review by the judges, who cannot be dismissed by the electorate.[12]

5. All the while however the clock was ticking and M-Day was approaching. Emboldened by Parliament's supine response to *Factortame*, Ministers were found who were willing to use Henry VIII powers to amend the 1985 Act, displaying with respect a contempt for Parliament without precedent since Oliver Cromwell dismissed the Rump Parliament on 20th April 1653. However, unlike *Factortame Nos 1-5* the destruction of the Imperial system of weights and measures would require criminal prosecution. For the first time since accession the coercive power of the State would have to be brought to bear to enforce an EEC Directive contrary to the will of Parliament as expressed in statute. The government would be unable to control the defence or impose a choice of lawyers on the defendant, with the inevitable risk that counsel might be found who understood the laws of England and moreover were prepared to argue them. The prosecuting authorities went ahead and found that every market in England seemed to have its Hampden. Defendants were selected who were ordinary men without means or higher education but whose patriotism and courage put ministers to shame. The stage was set for a constitutional test case in which leading counsel for Sunderland was driven to assert that the United Kingdom was no longer a sovereign legal and political entity in the same way as she was in 1972 and the courts are now asked for the first time to criminalise good men in defiance of an Act of Parliament.

B WITHDRAWAL FROM THE EUROPEAN UNION

6. Leading Counsel also asserted before the Sunderland Magistrates Court that an acquittal would require the UK to leave the European Union. With respect that is not the right way of looking at it at all. The case is scarcely taking place in a political vacuum and like most constitutional test cases it has a political and historical context, briefly summarised above (I hope in a neutral way). It is a case with political consequences (either way) but it is not a political case, it is a legal case. The Appellants are not party politicians or even so far as I know members of any political party. They are simply market traders who wish to make their living in the way they have always done and in some cases as their parents did before them. They wish to do no more than respect the preferences of their customers, young and old, who do not like metric measurements (there is no reason why they should), do not wish to use them, and most certainly do not wish to be dictated to as to how they run their daily lives by a foreign power, not least when their elected Parliament has provided for the continued use of the much-loved Imperial system.

7. The case is not about whether the UK should be in the EU or out – that is a political and economic judgment for Parliament and which the courts are not competent to make. The UK plainly is a member of the EU, with respect to those who earnestly argue that Parliament was not competent to take us into what was then the EEC, that the European Communities Act 1972 was invalid and should not be respected. It is no part of the Appellant's case that the European Communities Act 1972 is not good law. The case is about what happens when Parliament **subsequently** enacts legislation contrary to community law. The Appellants' case is that what Parliament may do it can undo, in part or in whole. The Respondents' case is that Parliament may bind its successors and did so in 1972. The Appellants say the courts are duty bound to apply the statute and must bend the knee in homage to the Queen-in-Parliament. The Respondents (or at any rate Sunderland City Council) say the courts must defy the wishes of the Queen-in-Parliament, treat Her Majesty in Her Own Realm

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[5] Statement by Mr Badger of the DTI to the Joint Committee on Consolidated Bills, Fifth Report, Session 1984-85, p.9 (HL 215-II, HC 501-II)

[6] S.76 refers to fees for community obligations. That is the only reference to the EEC that I have been able to discover.

[7] 1989 Directive, Article 1.

[8] See eg Sir William Wade QC, *Sovereignty – Evolution or Revolution* (1996) 112 LQR 568 at 568

[9] page 62 *et. seq.*

[10] Unlike the USA, the UK does not have armed Coastguard cutters and fisheries enforcement is a Naval tasking, with support from RAF Strike Command's Nimrod Force when required.

[11] The last great naval battle between the Royal Navy and the Spanish Navy was the Battle of Cape Trafalgar in 1805, which of course resulted in the destruction of the Franco-Spanish combined fleet.

[12] Although they can be dismissed by Parliament.

as less than a Sovereign, bend the knee to the alien will and apply the Directive in preference to the Act (through the medium of mere regulations which admittedly seek to implement the Directive). The Appellants rely on the Law of England, the Respondents on community law. In reality the loss of this appeal or any subsequent appeal to the House of Lords (and Sunderland City Council would deny the Appellants even that[13]) might be more rather than less likely to lead to UK withdrawal, since it would remove a vital democratic safeguard, clear the way for the abolition of the last remaining Imperial measures (eg the pint of beer and road-signs in miles), undermine the assurances given by Ministers to Parliament[14] during the stormy passage of the European Communities Bill that a case such a this could never happen and such democratic legitimacy as was conferred (on EEC membership at any rate) by the 1975 referendum, which was conducted on the basis no erosion of essential national sovereignty and the Common Law being unaffected. The Respondents' arguments and the judgment of District Judge Morgan with respect are politically explosive. If they were correct it wouldn't matter – it is the duty of the courts to hand down decisions which are correct, no matter how explosive or damaging the political consequences. With respect they are not good law, for the reasons set out below.

8. So far as the UK's position in the EU is concerned the rejection by our courts of the *Factortame* doctrine need no more affect our status than its rejection by the German Federal Constitutional Court[15] and the Danish Supreme Court[16] affected the membership of Germany and Denmark. Member States breach community law all the time (every case brought against a Member State by the Commission necessarily involves some allegation of a breach of community law), two Member States (the Republic of Ireland and the Kingdom of Spain) have actually maintained territorial claims over British soil,[17] another, France, committed an Act of War some years ago by sending fisheries patrol vessels into British waters off Guernsey and for the people of Gibraltar their community law right of free movement is scarcely worth the paper it is printed upon. There is no express stipulation in the Treaty of Rome against violating the land or maritime frontier of another Member State, committing any other Act or War or for that matter declaring war, but it is scarcely what the draftsmen had in mind in 1957. The Treaty of Rome has probably been honoured more in the breach than the observance than any multilateral treaty and the notion that a State could be expelled for breach, when there is no provision for expulsion, is with respect to Sunderland rather far-fetched. If the Commission still wish to destroy the Imperial system they have their remedy and could take the UK to court if so advised. Equally the government could cure the breach by bringing in amending legislation (the possibility that the Chief Whip might need bottled oxygen when she is told that the government wish to rush through legislation designed to make it a criminal offence to sell a pound of bananas in order to please Brussels is not a matter which need trouble this Court, although it might trouble the Chief Whip). Equally there is no rule of law that prevents the European Commission from being statesmanlike and withdrawing the Metrication Directive – nothing in the Treaty of Rome compels an attack on the culture or system of measurement of a Member State and a single system of measurement is no more necessary for a single market[18] than a single climate.

C. SUMMARY OF THE APPEALS & DRAMATIS PERSONAE

9. The lead case is *Thoburn v. Sunderland City Council*. This was heard at first instance by District Judge (MC) Bruce Morgan in Sunderland Magistrates Court on 15th – 17th January, 28th February, 1st – 2nd March and 9th April 2001. Some not entirely accurate reporting based on an interview with a tearful Mrs. Thoburn seems to have led other local authorities to believe that there would be no appeal – at any rate there was a mini-spate of prosecutions as the authorities sought to bring the Imperial rebellion (as they saw it) under control. Colin Hunt was tried before District Judge (MC) Baldwin on 20th June 2001, following a directions hearing before a lay bench on 4th May (the directions hearing in Sunderland was on November 7th before a lay bench[19]), Peter Collin's appeal against the imposition of licence conditions requiring him to sell only in metric was heard by a lay bench at Sutton Magistrates Court on 18th - 20th July, whilst Julian Harman and John Dove were tried together before a lay bench in Bodmin on 17th August 2001, the directions hearing being in Bodmin on 13th June.

10. By agreement with the prosecution in each case and with the leave of the court, with a view to the saving of time and costs, the Defence reserved the constitutional and public international law points for argument in this court in all trials after *Thoburn*. The human rights argument was fully argued in *Collins* only, and we respectfully adopt the arguments of Mr. Richards on the freedom of commercial speech point. There is an auxiliary human rights point on costs following the prosecution tactic of selecting defendants where there would be an inequality of arms, when these test cases could equally well have been brought against supermarket chains selling milk in non-returnable containers by the pint, or by judicial review by way of declaration in order to clarify a point of law which every party to these appeals has stated at some time or other to be a point of law of national importance (although Sunderland now assert that these cases are unimportant and raise no issue of principle, if we understand their position correctly, although they were the only authority to engage leading counsel at first instance, which this Court might think to be an unusual feature in an unimportant and straightforward case raising no issue of principle) which we say engages Article 6. Effectively the courts in Hackney, Sutton and Bodmin were invited to treat themselves as bound by the District Judge Morgan's decision. For the avoidance of doubt this course was proposed in advance and leave given at the directions stage. Only in Bodmin was there a slight difficulty, where a differently constituted bench heard the trial and

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[13] Counsel for Sunderland City Council has confirmed that he is instructed to oppose our application for a certificate in the event (and that is a matter for this Honourable Court) that these appeals do not succeed.

[14] See below page 46 *et. seq.* All references to Hansard are *de bene esse* but are integrated into the Skeleton and Bundle pursuant to the indication of the Directions Judge (Scott-Baker J.) given at the consolidated Directions Hearing on 11th October.

[15] *Manfred Brunner & ors v. The European Union Treaty* [1994] 1 CMLR 57 (III-917)

[16] *Hanne Norup Carlsen & ors v. Prime Minister Poul Nyrup Rasmussen* [1999] 3 CMLR 854 (V-1238)

[17] Spain still does, in respect of the Crown Colony of Gibraltar

[18] The world's most successful single market, NAFTA, operates with two systems of measurement and three policies – the United States uses the English system and has all but abandoned its half-hearted moves towards metrification, Canada is officially metric but abandoned compulsion after 1983, the year of the Winnipeg Air Disaster (when a wide-bodied Boeing 767 airliner ran out of fuel on a scheduled Air Canada service from Montreal to Edmonton at 39,930 feet after a conversion factor for pounds per litre was used instead of kilos per litre) and the United Mexican States are metric.

[19] Very sadly one of the magistrates has since been diagnosed with a terminal illness and is now very ill.

there was a change of clerk – it is not entirely clear with respect that the trial bench were fully aware of the complete agreement of their colleagues, after entirely proper consultation with their clerk, to the proposed course of action, at the hearing on 13th June. Had this convenient course not been adopted trial dates might not have been fixed before 2002.

11. The facts of each case are set out fully in the Cases, which are before the Court[20] and are not recited here. There are no disputes of fact and in *Thoburn*, *Dove* and *Harman* all material prosecution allegations of fact were dealt with by way of written admissions under s.10 of the Criminal Justice Act 1967. I am grateful to District Judge Morgan for his gracious tribute to the spirit of co-operation from the defence and indeed repay the tribute for his most gracious and courteous conduct of the trial. It is right that I should also pay tribute to the splendid co-operation from the court staff and clerks in all the hearing centres, with the result that these complex, highly-charged and widely separated trials proceeded smoothly[21] with no adjournments, the least possible disruption to ordinary court business and an impressive display of local justice in action, all in the glare of global media attention.

12. All the Appellants are market traders. Steven Thoburn operates a fruit and vegetable stall in Sunderland. His staff were observed by an undercover officer on 4th July 2000 using Imperial weighing scales to sell a bunch of bananas by the pound. The summonses in his case are under s.11 of the 1985 Act and are set out in the Case.

13. Colin Hunt has a stall in Ridley Road Market, in the Borough of Hackney, a business started by his parents in WW2. He is charged under the Prices Act 1974 with selling cassava, plantain and sweet potatoes by the pound. The ten summonses are set out in the Case. The short-selling matters give rise we say to an issue of abuse of process in the absence of any dishonesty or criminal intent. Interestingly, although it was submitted on behalf of Sunderland that it was not a criminal offence *per se* to sell a pound of bananas (at least that is our understanding of Sunderland's position) these summonses clearly show traders are liable to prosecution for selling by the pound. If the Respondents are right it is a criminal offence to sell a pound of bananas, indeed on ordinary principles it must also be a criminal offence, subject to *mens rea* to incite the offence by **asking for a pound of bananas**. Whether a trading standards officer would ever exhibit such zealotry as to prosecute a customer must be open to doubt, but only a few years ago many might have doubted that an undercover trading standards officer would ever be sent on a secret mission to a market stall to observe the sale of a bunch of bananas in order to ensure that they weren't being sold by the pound. If George Orwell had put it in one of his books the Court might think he would have been told by his publisher to take it out on the grounds that the imagination could only be stretched so far. The Court it is submitted has to deal with these cases on the basis that if a trader or shopkeeper is a criminal for selling a pound of bananas then so is his or her customer for advising, counselling or procuring the commission of the said crime. The State cannot invoke the criminal process without all that flows from it. If it was never intended to criminalise each party to the illegal transaction the ordinary rules as to aiders, abettors and accessories should have been excluded. They were not.

14. Peter Collins is a street trader in Sutton High Street. The facts of his case are again set out in the Case. This is a licence case, where the local authority wished to prevent him from earning his livelihood in the usual way by selling fruit and vegetables in pounds and ounces. They imposed a condition requiring him to sell in the SI/metric system only.

15. John Dove is a fishmonger. He is charged with selling a pound of mackerel and a pound of pollack. His co-defendant, Julian Harman, is charged with selling a pound of Granny Smith apples and a pound of Brussels Sprouts. Additionally each is charged under the 1985 Act with obstructing a trading standards officer by preventing the removal of Imperial price tickets, but it is common ground that if it is lawful to sell a pound of apples it is lawful to display a price ticket to that effect, indeed highly desirable so that the consumer might know the price of the apples without asking. It follows *a fortiori* that a trading standards officer would not be acting in the execution of his or her duty by interfering with a perfectly lawful price ticket, which would achieve no more than to prevent the consumer knowing the price.

16. It is right to say that considerable public anger was aroused in the West Country by these prosecutions (understandably, because if these men stand convicted it would arguably be the greatest national humiliation in peacetime since the disgraceful incident involving Captain Jenkins in 1731[22] and, it is submitted, the greatest humiliation our legal system had ever suffered) and there was some difficulty both in finding a courtroom large enough to contain the public and maintaining order, although I am sure the Respondent would agree the Defence did their best to defuse the tension. In one sense with great respect the prosecutions are the strangest since the Witchcraft Act was last used. (District Judge Morgan commented on a critical letter in the *Times* from "a lawyer," perhaps not appreciating that the lawyer concerned was a retired High Court judge.) Most test cases have humble origins – slavery was ended in England because one slave applied for Habeas Corpus and *Ashby v. White* turned on what would otherwise have been a forgotten by-election. History could (and we respectfully say should) be altered and most modern legal textbooks rewritten because in different parts of the country five market traders refused to be browbeaten into obeying orders from Brussels and placed their faith in the Law of England.

D. LIST OF ISSUES

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[20] That bundle has been delayed, indeed all the bundles were delayed through no fault of anybody's, least of all Mr. Butler of counsel, who has had the large task of co-ordinating their preparation. The time-table slippage was of course notified to the court and all counsel have sought to keep to a revised timetable, but this has meant delivering this skeleton without page references to the Cases.

[21] When the power didn't fail, as it did on Sunderland on the first day, necessitating a transfer of the trial to the Council Chamber.

[22] Which led eventually to war with Spain in October 1739 on the insistence of the House of Commons, and rightly so, having regard to the severity of the insult directed not only at Captain Jenkins but also his liege Sovereign King. The war eventually engulfed most of Europe and smashed the power of Spain, which was thereafter and remains a second-class European power. There were no further incidents of English sea captains being tortured and mutilated at the hands of the Spanish.

17. Each case turns on different facts but there are no material differences and we submit that they can all be dealt with together. It is submitted that the issues could be summarised in this way:-

(1) Is *Factortame (No 2)* binding?
(2) Was it correctly decided?
(3) Is the United Kingdom a Sovereign State?
(4) Is the United Kingdom a monist or dualist jurisdiction?
(5) If it is a sovereign dualist state how can the monist decision in *Factortame* be constitutional?
(6) Is the Treaty of Rome void in part for conflict with the *Jus Cogens*?
(7) How can Parliament bind its successors?
(8) How is a hierarchy of statutes possible in a state with a sovereign legislature?
(9) How can the *Costa* doctrine apply in the UK when Parliament was told it would not because it could not?
(10) Is the Price Marking Order 1999 valid?
(11) How can the Henry VIII power in the 1972 Act be applied in a way contrary to the Solicitor-General's assurance to Parliament?
(12) Are the Units of Measurement Regulations 1994 valid?
(13) If they fall, how can the interlocked 1994 Amendment Order stand?
(14) If the Order does not fall with the Regulations is it within the *vires* of the organic Henry VIII power?
(15) Is it lawful to sell a pound of fruit?
(16) If so how can it be lawful to interfere with a price ticket?
(17) Was it an abuse for Hackney to demand metric scales and then prosecute for honest miscalculation between metric and Imperial?

E. TIME ESTIMATE

18. The Appellants' time estimate is five days for argument, not allowing for the handing down of judgment, with half a day to a day to argue the auxiliary issues as to costs and a Certificate if the appeals fail. The Appellants if successful will not oppose the Respondents' application for a Certificate because we say (as they have said at various times) that this is a test case of national importance on points of Constitutional, Public International and Human Rights Law of general application. This is the first time since the accession of the United Kingdom to the European Communities that the relationship between United Kingdom and community law has been argued in a court of law (it was assumed without argument in *Factortame* that community law was superior). It took five full days spread across six weeks to argue in Sunderland before an experienced, trained lawyer who was supplied in advance with nearly all the material. The full enormity of what the House of Lords did (with great respect) in *Factortame* so far as we are aware has never been argued, probably because so much was (we say wrongly) assumed. For example no academic commentator (and the Respondents rely on a number of them) has appreciated the potential peril into which the judges were placed or even referred to the massive Reserve Powers at the command of Parliament. As with most constitutional crises the *Factortame* crisis has built slowly, not least because neither Parliament nor with respect the judiciary appreciated the extent to which the decision would undermine public confidence in our institutions and the very fabric of our Constitution, and if it was assumed that it would not matter because the EC would achieve steadily greater public acceptance and provide an alternative, federal, European constitution, such confidence may in the events which have happened have been misplaced. Most great constitutional crises in democracies build slowly – one American lawyer in private conversation about this case[23] reminded me of the time it took to resolve the federal/confederal issue in the US (from say 1776 to 1865). The crisis over the relationship between Parliament and the Monarchy (effectively the Executive) in the 17th century build slowly but steadily from the accession of King James 1, and was not finally resolved in Parliament's favour until 1689, after two civil wars,[24] a regicide, a republic, a dictatorship and a revolution. Any notion that the relationship between Parliament and the EC was resolved in *Factortame,* without consideration of a single authority on the British Constitution, no argument on implied repeal that anyone has yet been able to discover and no consideration of Hansard is firmly to be resisted, we say respectfully. We respectfully say that five days is realistic.

F. CHRONOLOGY

1955 Eden Government rejects United Kingdom membership of the EEC
1957 Treaty of Rome
1958 European Economic Community comes into being
1961 First UK application
1965 Written Answer on Metrication – voluntary conversion
1967 Supremacy of Parliament over community law arguably accepted by European Commission
1971 Treaty of Accession, first EEC Directive on weights and measures.
1972 Parliament told a future statute in conflict with community law will take precedence, European Communities Act enacted
1973 UK joins EEC
1975 Referendum on EEC membership, UK votes to remain a member
1979 Metrification abandoned in the UK, consolidation commenced
1980 Metrication Board abolished, EEC Metrication Directive
1982 UK wages Falklands War as Sovereign Belligerent
1985 Weights and Measures Act 1985, Metrication Directive over-ridden
1988 Merchant Shipping Act breaches community law

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[23] It has been front-page news in major American newspapers.

[24] Sometimes reckoned as one, with an uneasy truce.

1989 M-Day is postponed to 1st January 2000, 1988 Act is attacked in *Factortame* litigation (1989-2001)
1994 Ministers seek to amend 1985 Act by Henry VIII powers
2000 EU deadline for general abolition of the Imperial system
2000 Resistance to abolition grows, Steve Thoburn is prosecuted
2001 Steve Thoburn is tried for using the Imperial system, Sutton impose licence conditions and Hackney and Cornwall commence prosecutions, UK commences hostilities against Afghanistan as Sovereign Belligerent without EU sanction, other EU states remain neutral.

G. STATUS OF FACTORTAME AS AN AUTHORITY ON THE BRITISH CONSTITUTION

19. Under the Doctrine of *Stare Decisis* as it has been applied in England for 340 years a decision is not binding authority even as to a necessary step in reaching the decision which is part of the *ratio decidendi* if the point has not been argued. This was settled by the Court of King's Bench as long as 1661, in the leading case of *Rex v. Warner*:[25] "and an hundred precedents *sub silentio* are not material," "And the precedents ... *sub silentio* **without argument**, are of no moment" Some confusion may have been arisen by the failure with respect to refer to this important exception in *Young v. Bristol Aeroplane Co.*[26] The law is correctly stated, it is submitted, in the leading text, *Cross and Harris on Precedent in English Law* at 158-9 (VIII-2009). There is ample modern authority for the proposition, which since the start of the Thoburn case has been confirmed by the Court of Appeal. Two striking illustrations of the rule are *Baker v. The Queen*[27] where the majority of the Board of the Privy Council[28] correctly with respect held that they were not bound by the advice given in *Maloney-Gordon v. The Queen*,[29] even though this was a capital case and the majority advice led, it is submitted correctly, to sentence of death being passed. Any doubt about whether the rule applied to decisions of the House of Lords[30] is surely removed by Lord Browne-Wilkinson's decision, as a High Court judge, in *Re Hetherington decd.*[31] (III-709), when his Lordship correctly with respect declined to apply that part of the *ratio* of the decision of the House of Lords in *Bourne v. Keane*[32] on the ground that the point was not argued.

20. Other illustrations of the rule are the decisions of the Court of Appeal in *National Enterprises Ltd. v. Racal Communications Ltd*[33] (I-236) and Warner J. in *Barrs v. Bethell*[34] (II-399). In *Kadhim v. The Housing Benefit Board London Borough of Brent*[35] (V-1424) the Court of Appeal was faced an otherwise binding previous decision in *Thamesdown Borough Council v. Goonery.*[36] *Davis v. Johnson*[37] was cited and the court correctly (with respect) held (V-1429) that observations in that case to the effect that the *Young v. Bristol Aeroplane* criteria were closed were wrong, as with respect they had to be, given the apparent failure to cite *Warner* to the Court of Appeal in *Young*, the earlier decision of the Court of Appeal in *Racal*, and (arguably) the House of Lords' approach in *Read v. Lyon & Co* in 1947. The Court of Appeal (V-1429) expressly approved Lord Browne-Wilkinson's decision in *Hetherington* and the Privy Council's decision in *Baker*. The court's judgment (handed down by that sound tribunal with respect Buxton LJ) is at once clearly expressed, elegantly reasoned and correct and binds this court, as indeed does the earlier Court of Appeal decision in *Racal* and yet another Court of Appeal decision, *R v. Home Secretary ex p. Ku,*[38] (IV-1034), where Sir Thomas Bingham MR as he then was, Hobhouse LJ as he then was and Morritt LJ as he then was all agreed that the Court was not bound by its previous decision in *R v. Chief Immigration Officer ex p. Chan.*[39] We find ourselves in good company with respect and in agreement with Lords Browne-Wilkinson, Diplock, Bingham, Morritt and Hobhouse but should the combined weight of their judgments not be sufficient for Sunderland to concede that an authority without argument is not binding we can also point to the recent Court of Appeal decision in *Secretary of State for the Home Department v. Isiko,*[40] (V-1451) where the court (Schiemann LJ, Tuckey LJ and Sir Swinton Thomas) correctly declined to follow the Court of Appeal decision in *B v. Secretary of State for the Home Department.*[41] I gratefully adopt as part of my own argument the submissions on the law of precedent of Mr. John Howell QC to the Court of Appeal *Isiko* at 296-7 (V-1454) and, equally successfully, to Thomas J. in *R v. Secretary of State for the Home Department ex p. Samaroo*[42] (V-1461) at 335 and 336 (V-1466 and 1467). I am not sure with respect that Mr. Howell had *Factortame* in mind when he made those submissions (indeed I am sure he did not) but if I may say so he is a good enough lawyer to know that good law in Court 4 on a Tuesday afternoon doesn't become bad law in Court 5 on Wednesday morning because it may lead to a less pleasing result.[43] *Samaroo* was appealed to the Court of Appeal,[44] but it does not seem

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[25] (1661) 1 Keb.66 (I-1)
[26] [1944] KB 718
[27] [1975] AC 774 (PC)(I-243)
[28] This is not a misprint – Lord Salmon gave rare dissenting advice.
[29] (1969) 15 WIR 359
[30] Cross and Harris suggest that the House of Lords followed the rule in *Read v. J. Lyons & Co.* [1947] AC 157, in its treatment of *Rainham Chemical Works Ltd v. Belvedere Fish Guano Ltd* [1921] 2 AC 465, which is certainly arguable.
[31] [1990] 1 Ch.1
[32] [1919] AC 815
[33] [1975] 1 Ch. 397
[34] [1982] 1 All ER 106
[35] [2001] 2 WLR 1674
[36] unrep., 13th February 1995, CA transcript 147 of 1995.
[37] [1979] AC 264
[38] [1995] QB 364
[39] [1992] 1 WLR 541
[40] [2001] Imm AR 291
[41] [2000] Imm AR 478
[42] [2001] Imm AR 324
[43] I do not mean to imply that Mr. John Howell considers *Factortame* to be good law; indeed I have a high enough opinion of him as a lawyer with respect to suspect that he spotted the fatal flaws in it long ago.
[44] [2001] EWCA Civ 1139 (The President, Thorpe and Dyson LJJ).

that the suggestion that a decision reached without argument is binding was persisted in. The transcript is now available and the Respondents are very welcome to a copy of it. If there is any note of disapproval of the actions of a puisne judge in not following the otherwise binding *ratio* of a very recent Court of Appeal decision I cannot detect it. Dyson LJ did say that Thomas J had delivered "a judgement of admirable clarity to which I would pay tribute," which it is submitted does not read like disapproval.

21. There are thus four recent Court of Appeal decisions, all binding on this Court, which say that a decision without argument is not binding. It is submitted that in each of these cases the law of precedent is correctly stated (and not just the law of precedent - with respect one could not wish to see a series of cases decided so eloquently and correctly), save for *obiter* in *Kadhim* at 1684-5 (V-1429), not found in the other three Court of Appeal cases cited, where the Court suggest that the principle should be applied with caution. It is submitted that either a point of law is argued or it is not. If it is argued then one expects to see all relevant authorities drawn to the court's attention. If no authority at all on the point is cited very plainly a point has not been argued, although it might perhaps ventilated or hinted at.[45] If it has not been argued no law is made. Not only does this well-established rule (no single authority doubting the correctness of *Rex. v. Warner* has been drawn to my attention and it is surely impressive that the Court of Appeal on four separate occasions can come to the same conclusion as the Court of King's Bench three centuries earlier without being made aware of it) not undermine the doctrine of precedent, it underpins it. If it were otherwise, the authority of centuries could be swept away in an afternoon by a court that was wholly unaware of it, binding or not. Law is not made in England by stealth but by argument. No judge worthy of the name would suppose that a judicial opinion expressed without hearing argument or being taken to the relevant authorities should be treated by any other court as binding, let alone to the prejudice of older, fully-argued precedents, at whatever level. We do not seek to undermine the authority of the House of Lords in asserting that *Factortame* is not binding – we seek merely to uphold more ancient precedents, that were not drawn to the attention of the House of Lords and which we say with the utmost respect clearly demonstrate that the decision in *Factortame* is not even arguably correct.

22. Quite aside from any other consideration *Factortame (No2)* was decided *per incuriam* by reason of the failure of counsel to cite the unanimous decision of the House of Lords in *Collco Dealing Ltd v. Inland Revenue Commissioners*[46] (I-127). For years it appears to have been assumed that the House of Lords had never dealt with a case involving implied repeal and that the famous Court of Appeal decision in *Ellen Street Estates Ltd v. Minister of Health*[47] (I-104) was the lead case. In fact the House (the great Viscount Simonds with respect, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Guest) was confronted in the *Collco* case not only with the question of which statute should take precedence when two conflicted, but with **a statute incorporating an international treaty.**[48] The House heard full argument, with the Revenue team being led by that great advocate Sir Reginald Manningham-Buller QC as he then was, ably assisted by Blanshard Stamp (as he then was) and Alan Orr (as he also then was). This Court may think that the chance of that team missing a good point[49] was not high and so it proved. Sir Reginald cited *Ellen Street Estates* (I-133), a very distinguished Appellate Committee applied its principles without referring to it expressly and unanimously applied the later Act. Viscount Simonds, in words which could equally well be applied to the Merchant Shipping Act 1988, stated (I-136) that "neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit … to save its own citizens from unjust discrimination in favour of foreigners." Manifestly this great case bound the House of Lords in *Factortame*, the Practice Statement (which did not alter the general rule that the House is bound by its own decisions) notwithstanding, and *Factortame* was decided *per incuriam*. There is of course a third basis for saying that this Court is not bound by *Factortame* because there are conflicting decisions at House of Lords level. We respectfully invite this Court to follow *Collco Dealings Ltd*, not least the lucid and inspiring speech of Viscount Simonds, a master of the art of interpreting statutes if we may so, whose reasoning may yet save the Law he served over so many years with such distinction.

23. The authority of the decision of the ECJ on the interpretation of the Treaty of Rome in *Factortame* is not disputed, however weak its reasoning (with respect). The arguments on the community law point of Mr. John Laws as he then was are to be preferred and they were perhaps unwisely rejected, but there it is. The ECJ with great respect scarcely enhanced its reputation by this decision, which we submit has had a corrosive effect on the court's reputation in this country. Throughout the whole of these proceedings no one has been able to identify a single occasion when Implied Repeal or the Sovereignty of Parliament was argued.

H. CORRECTNESS OF FACTORTAME (NO 2)

24. For the reasons which appear herein we mount a frontal challenge to the correctness of this decision. With the utmost possible respect we say that it was not only wrongly decided but was unconstitutional and amounted to a praemunire, that is to say an application within the jurisdiction of foreign law in preference to our own. No praemunire could possibly be committed by a judge who applied EC law to a pre-1972 statute, because as Sir John Laws correctly analysed with respect in his article in *Public Law,*[50](VIII-2103) community law in this jurisdiction is simply a form of delegated (that is to say inferior) legislation(VIII-2112).

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[45] This may have been the case in *Unison*, where there is a very slight suggestion in the law report that implied repeal although not mentioned by name was hinted at, but no relevant authority appears in the list of cases cited. In reality the suggestion below that counsel in that case was arguing that *Factortame* was wrongly decided was ambitious to say the very least, indeed counsel (Brian Langstaff QC) has confirmed to me that it was no part of his argument in *Unison* to argue that *Factortame(No2)* was wrongly decided. So far as I know I am alone in arguing in open court that *Factortame (No 2)* was wrongly decided - but then I was also the only counsel to my knowledge to respectfully attack *Factortame (No 1)* before it was reversed in *M v. Home Office* [1994] 1 AC 377.

[46] [1962] AC 1

[47] [1934] 1 KB 590

[48] The Double Taxation treaty with Eire

[49] It is not suggested that the very able and distinguished team for the Secretary of State in *Factortame* actually missed a good point, simply that they did not argue it in circumstances where the possible outcomes of enforcing the later statute ranged from an Anglo-European crisis to loss of human life, a new Anglo-Spanish war and Spanish departure from NATO.

[50] *Law and Democracy* [1995] PL 72

Entirely different considerations apply when a judge prefers community law to a post-1972 statute in conflict with it because then he is acting without the sanction of Parliament and is effectively judicially reviewing the laws of Parliament. That he or she cannot do. Any member of the judiciary who fails to apply the clear words of a statute is acting outside the scope of his or her judicial authority, indeed it could be described as a judicial coup, and the judge might find himself or herself liable to removal from office for constitutional misconduct. Whilst we do not say that the members of the Appellate Committee who decided *Factortame (No 2)* should have been removed (that was and remains a matter entirely for Parliament) the power to remove is undoubted.

25. There are further, awesome Reserve Powers at the command of Parliament, to be used in time of constitutional crisis and national emergency, but which if applied would allow Parliament to assert its authority in the most emphatic way. In this case for example, Parliament might have impeached the Minister who presumed to amend one of its statutes by a Henry VIII power. It could also have attainted the Minister for High Treason and capital praemunire, subjecting him to a State Trial (with the appropriate safeguards provided for in the attainder procedure[51]) providing if so advised (and that is entirely a matter for Parliament) for the supreme penalty. In theory these powers were also available in respect of the Appellate Committee which decided *Factortame* since membership of Parliament does not confer immunity from state execution by authority of Act of Attainder.[52] In practice these powers have never been used in respect of the judiciary[53] and removal from office would provide Parliament with an adequate remedy, together with loss of honours in a proper case (as to which we express no view). The prosecution rely on a number of academics (Vol. VIII), none of whom seem to be able to agree on the basis for the decision,[54] which since it was wrong (with great respect) is scarcely surprising. The Reserve Powers available to Parliament are one omission from the academic commentaries. Parliament simply did not use the Reserve Powers available to it under the Constitution but had it done so it is not credible to suggest that the decision could have survived. A second common omission is the apparent assumption that the Secretary of State actually obeyed the purported injunction. He had no more business setting aside an Act of Parliament than the courts did (with great respect). The true analysis of what happened, it is respectfully submitted, is that the Secretary of State deferred to the European Court of Justice, as indeed did the House of Lords, and was willing to accept its ruling.[55] Had there been a change of government or Secretary of State, another Minister might have stood by Parliament and the 1988 Act, which would have accelerated the crisis and might have led to a full-scale constitutional clash between Parliament and the courts, in which there could have been only one winner, not least as the confrontation would most probably have taken place under conditions of national emergency, as the Spanish boats sought to exercise their Treaty rights as newly defined (with respect) by the ECJ in waters controlled by the Royal Navy, under skies controlled by the Royal Air Force, well outside the effective fighter range of the untried Spanish Air Force.[56] The concept of a government minister defending the fishing communities of a democracy is not as strange as it may seem, and only a few short years after *Factortame* a fishing dispute between Canada and Spain nearly led to war.[57] The Secretary of State plainly was not bound by the injunction and, since no British court can set aside or fail to obey an Act of Parliament, it was issued with the utmost respect in error and was a nullity.

I. SOVEREIGNTY OF THE UNITED KINGDOM

26. The starting point for any consideration as to whether the United Kingdom Constitution was thrown over or undermined in 1972 must surely be the status of the UK in international law. It was submitted below and accepted, at least in part, by District Judge Morgan that the UK was longer sovereign as she was prior to accession. With respect this is plainly wrong and contrary to authority, this court in *R v. Secretary of State for Foreign & Commonwealth Affairs ex p. Lord Rees-Mogg*[58] (IV-1002), having adopted Lord Donaldson of Lymington's with respect manifestly correct *dictum* in *R v. HM Treasury ex parte Smedley*,[59] to the effect that the courts should be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament, went on (it is submitted correctly) at IV-1007 to reject Mr. David Pannick's argument based on the premise that community law was "the fundamental law of the United Kingdom." The Court (Lloyd LJ as he then was, the late (and if I may say so much-missed) Mann LJ and Auld J as then was) held (at IV-1009) that the UK retained the right to denounce the European Union Treaty or fail to comply with it. This is a dualist decision, which can only be explained on the basis that the Divisional Court treated the UK as sovereign.

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[51] Erskine May, *Parliamentary Practice*, 20th ed., at 69. These powers are rightly described in Erskine May as the "highest form of Parliamentary judicature."

[52] The Duke of Monmouth eg was attainted for High Treason and very properly executed on 15th July 1685, having engaged in armed rebellion against the authority of the Crown.

[53] Sir Thomas More was the last holder of judicial office to be executed (and rightly so, for he denied the authority of the King in Parliament), in 1535, but he was tried by the Court of Star Chamber, not Parliament, and his crime against the State did not arise out of the conduct by him of judicial proceedings. (It is submitted that the verdict of guilty was supported by the evidence and the sentence was correct in principle, having regard to its deterrent effect).

[54] The most lucid analysis we say is that by Sir William Wade QC in his LQR article at VIII-2173.

[55] In fact the 1988 Act was not set aside by the minister because no-one had thought to include a Henry VIII power in the Act and the resultant order (SI 1989/2006), invalidly made under the 1972 power, was plainly *ultra vires* – it is one of the curiosities of *Factortame* that there was no effective repeal of Part II of the 1988 Act until the Merchant Shipping Act (Registration etc.) Act 1993. No one seems to have thought to tell the ECJ that its order had not been carried out.

[56] Aside from the Civil War, where air power was mostly provided by the USSR, Germany and Italy, there has been no Spanish involvement in air combat, nor has the Spanish Navy been engaged in a serious sea battle since its famous defeat in the Battle of Manila Bay by the US Navy.

[57] The role of the Royal Canadian Navy and in particular its submarine arm remains classified, but the facts are that the Spanish sent a small squadron to enforce access to Canadian fishing grounds and then withdrew it. I discussed the incident with Canadian naval officers when invited aboard one of their guided missile destroyers some months later (I am Honorary Constitutional Adviser to a UK fishing organisation and maintain a close interest in fisheries enforcement, indeed I observed it at first hand in the Eastern Atlantic in November 1997 aboard a UK demersal sea-going trawler).

[58] [1994] 1 All ER 457

[59] [1985] QB 657

27. Either a country is sovereign or it is not. Power is not to be confused with sovereignty – the Republic of Chile is much less powerful than the United States of America, but is just as sovereign in international law, which proceeds on the assumption of the sovereign equality of all nations.[60] Nations can co-operate but they cannot share sovereignty – as Sir John Laws correctly (with respect) argues in his article in *Public Law* power transferred to supranational bodies is only delegated. It is not organic. The only powers the European Commission has are those derived from the sovereign member States under the Treaties. The principle of sovereign equality underpins both of the great constitutional test cases in Europe following the Treaty of Maastricht (*Rees-Mogg* was the British case, but went no further). In the first, *Brunner*(III-917), the Federal German Constitutional Court reviewed the Maastricht treaty for compliance with Germany's Basic Law. According to EC law this should not and could not have happened – community legal theory holds that national law, including national constitutional provisions must be compliant with the community law, not the other way around. That is theory however and bears no relation to constitutional realities – had the Federal Constitutional Court ruled the Maastricht Treaty non-compliant it could not have been ratified by the Federal Republic of Germany and the Commission would simply have been a helpless spectator, because the structure of the community is multi-**national** and the agreement of each state is required before an amending treaty takes effect.

28. The second great case, *Carlsen*, (V-1238) followed the second Danish referendum on Maastricht. The Court will recall that the Maastricht treaty was rejected in a popular referendum. Controversially it was suggested that Denmark had negotiated new "opt-outs" from the Treaty[61] and almost within hours of the 'Yes' result in the second referendum writs were served on the Prime Minister. The case was lodged in the Eastern High Court in Copenhagen, which initially ruled that the Danish Courts could not review a statute of the Folketing, although Denmark has a written constitution[62] and the Folketing plainly must act within it. That decision was overturned by the Supreme Court in a celebrated ruling, which sadly has not been reported in English, and it paved the way for *Carlssen (No 2)*. Again it went to the Supreme Court[63] which found that the treaty was compliant with the Danish Constitution, but held that the Danish Courts had the right, indeed the duty, to review proposed transfers of power for constitutional compliance. It is submitted that the highest courts in two EC countries have regarded themselves, correctly, as organs of a sovereign state, able to review and if necessary strike down, non-compliant community law. This Court is in the same position: it may, indeed it is duty bound to ensure that community law, which is alien, only takes effect in this jurisdiction in accordance with our internal legal norms, which most certainly do not permit the amendment of a later Act by a Henry VIII power.

29. The conduct of other states and international organisations post-1972 clearly demonstrates, it is submitted, that the UK remained sovereign. The UK remained a member not just of the United Nations, but also a permanent member of the Security Council, which would not have been possible if we had surrendered our sovereignty as Sunderland argued and District Judge Morgan accepted. Membership of the UN is only open as its name applies to sovereign states. There has been talk of the EU taking a seat on the Security Council, but in order to do that it must complete the transformation into a federal state, which very plainly it has not.

30. No single state withdrew its ambassador from London after accession, which was right – accession did not alter the UK's sovereign status. The ultimate test of whether we were sovereign or not came with war. If we were not sovereign we could not conduct armed hostilities (Sunderland's arguments, it is submitted, cast doubt on the legality of HMG's actions in engaging in hostilities against the Islamic Emirate of Afghanistan) without the express sanction of the EU, nor would EU member states be neutral in the event of war. When war came in 1982, after the Argentine invasion of the Falklands, the UK responded almost as though she were not a member of the EU, and the EU almost behaved as though the UK was not a member. Some fairly feeble sanctions were enforced (some would say half-heartedly) and that was it. No EU state joined in hostilities against Argentina and Ireland and all the European member states of the EU remained neutral, an impossible state of affairs had any of these states merged their sovereignty into a new state called (then) the EC.

31. The most emphatic exercise of British sovereignty since accession came at 1457 hours South Atlantic Time on 2nd May 2001 when the nuclear submarine HMS *Conqueror* launched her famous 21-inch torpedo attack on the enemy cruiser ARA *General Belgrano*,[64] sending her to the bottom with heavy loss of life. The moral superiority gained over the enemy by the Royal Navy lasted until the Argentine defeat and helped to maintain control of the seas. Not only were the EC not involved, it is manifestly clear that Brussels was never consulted, nor indeed was there any obligation to consult the Commission or any member state or any other neutral. This was a sovereign power waging war against an enemy as it saw fit and rightly so. Similarly the UK waged war in its own right in the 2nd Gulf War and is now waging the 4th Afghan War (or howsoever it is to be called) as an independent sovereign state, wholly unrestrained by any obligation to consult with its community partners, a state of affairs accepted not just by the UK but by her enemies. There was no loss of sovereignty as such on accession, merely the acceptance of international treaty obligations, albeit of an unusually extensive kind, with limited self-execution, provided that there was no conflict with internal norms.

J. PUBLIC INTERNATIONAL LAW

32. It is respectfully submitted that three mistakes were made in the *Factortame* litigation in relation to public international law, each of which undermines the reasoning, in particular with great respect of Lord Bridge: (1) it seems to have been assumed that there was no reciprocity and that the UK was admitted to membership without notice of its constitutional norms (2) the Treaty of Rome was looked at is isolation, whereas it merely forms part of an interlocking series of treaty and general international law

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[60] Declaration on Principles of International Law of 1970 (VII-1820)

[61] In fact the Treaty was never amended and the text put before the Danish people in the second referendum was identical to the first.

[62] The Constitution of the Kingdom of Denmark Act 1953 – England and Denmark were of course one kingdom in the reign of King Canute and there is much of interest to the British constitutional lawyer in Danish constitutional practice.

[63] Although this time the formidable and quite brilliant (with respect) Chief Justice, Pontipidan CJ, did not preside.

[64] Formerly the USS *Phoenix*, armed with 15 6-inch guns and 8 5-inch. This was the most southerly engagement in the Royal Navy's history and the first torpedo attack since the sinking of the IJN *Haguro* in May 1945.

obligations owed between the member states and (3) it was assumed that the Treaty of Rome could over-ride the constitutional traditions of the member states without any consideration being given to their *jus cogens* rights.

33. Under Article 46 of the Vienna Convention on the Law of Treaties[65] (VII-1826) a State may assert an internal law regarding its competence to conclude treaties if it is "manifest" and an "internal law of fundamental importance," so that it is not then bound by that treaty. Now when Parliament over-rode the Metrication Directive[66] it was not rejecting the Treaty of Rome, just tearing up a Directive, through the simple expedient of enacting primary legislation inconsistent with it. Article 46 however assumes (and is cogent evidence of) a general rule of public international law that **a state party to a treaty may be taken to know those internal norms of every other contracting party concerning the ratification of international treaties which are (1) manifest and (2) of fundamental importance.** This Honourable Court is respectfully invited to adopt that proposition, which we say is inherent in Article 46. The test is objective (Article 46(2)). It follows *a fortiori* that the Six must be taken to have known in 1971 that they were admitting into membership of the EEC **a dualist state with an all-powerful, sovereign, democratic legislature of unlimited competence that could never be bound by any treaty entered into by the executive and would remain forever free to violate community law at will.** Why such an extraordinary decision should only have implications for the UK and no impact at all on community law is wholly unclear. The ECJ was just a spectator in the accession negotiations. The decision to admit was taken by the sovereign governments of the Six, who thereby of necessity must be taken to have altered community law to accommodate the UK's manifest and fundamental norms. They knew full well that neither the Executive nor even Parliament could alter the fundamental norm of the British Constitution that no Parliament could bind its successors and could not thereafter be heard to complain when the Parliaments of 1985 and 1988 legislated in a manner which was inconsistent with our treaty obligation.[67] It was predictable that a clash would come, it was predicted and the Six took their chances, no doubt calculating that the economic benefits of access to UK markets[68] outweighed the downside. There was absolutely no obligation on the EEC to let us in, indeed two previous UK applications had very properly been vetoed by President de Gaulle, a statesman who knew us well, would probably have predicted a fiasco should anyone actually try and force the British to use French measurements[69] and whose reasoning for rejecting the first and second UK applications was lucid and commands respect.

34. It is not in fact necessary to fix the Six with constructive knowledge of our Constitutional rule that no Parliament may bind its successors, since they knew all along. This Court may think that the notion that none of the foreign ministries involved in the negotiations possessed a textbook on international law, or had ever heard of Parliament or how it worked is fanciful. It is after all only the Mother of Parliaments and the most famous in all the world. Few if any foreign ministry lawyers can have spent much time in 1970-71 searching for a copy of a UK Constitution to see what restraints it placed on Parliament. Oliver suggests[70] that the Commission did in fact know, which must surely be right. There is nothing in our attack on *Factortame (No2)* which could surely take any competent constitutional or international lawyer in Europe by surprise.

35. The second mistake as to international law which we respectfully say was made in *Factortame* was the failure to take into account all of the other treaty obligations owed by the Member States. Of these the most important we submit was the obligation not to interfere in the internal affairs of another state, contained in the UN Charter and the authoritative 1970 statement on Principles of International Law (VII-1820). There is also we say an established international norm, developed since the end of the Second World War, against the subjection of peoples to alien subjugation and domination, which was held (and rightly so) by the General Assembly of the

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[65] Which we say is essentially a codification and is largely based on pre-existing state practice and rules of public international law – strictly it applies to only the Single European Act, the later accession treaties, Maastricht and Amsterdam. The Treaty of Nice is a dead letter of course, following its perfectly proper rejection by the Republic of Ireland in June.

[66] Only Sunderland (as far as I am aware- I do not know Sutton's position on this) assert that the Weights and Measures Act was a compulsory metrication statute as originally drafted and as such was compatible with community law. It is if I may respectfully say so a curious and illogical position since it is a consolidation statute and the principal act it consolidated (the Weights and Measures Act 1963) not only-predated EEC membership by 9 years, but continued a then 66-year-old UK policy of permitting dual systems. In reality, as will be argued below, Sunderland's position assumes that the Act can be 'read down' in a manner which is wholly unconstitutional.

[67] The same applies in other democracies. The US Congress is not bound to approve treaties signed by the President, indeed only in 1999 it threw out the Comprehensive Test Ban Treaty – I was present in the Dirksen and Hart Senate buildings in Washington on the day the treaty was rejected, observing democracy in action from close quarters, indeed very close quarters. What was particularly impressive was the way crucial votes were switched away from the Treaty, not by pork-barrel politics or threats, but by sheer force of argument and concern for the security of the West.

[68] The UK is the world's fourth largest economy and the only serious oil-producer in the EU. The UK is also the largest single export market for the Eurozone countries, the accumulated trade deficit in favour of the rest of the EU since accession being something of the order of £200bn. The UK also of course makes substantial payments to the EU budget and has consistently provided administrators of high-quality to an administrative machine which it would be fair to say has not attracted universal admiration.

[69] As the White Paper (Cmnd 4880)(IX-2405) the metric system was designed by French revolutionary scientists. What it doesn't say is that it was designed to be as different as possible, almost no metric measurement is readily convertible into Imperial, indeed some cannot be accurately converted at all, and the metre was miscalculated, indeed the SI metre could properly be described as the short metre.

[70] *The Changing Constitution*, 3rd ed., at 92-94, cited in Sunderland. Professor Oliver refers to the Commission opinion of 1967, which uses great delicacy of language. She also cites Lord Diplock as stating in the debates on the European Communities Bill that the courts would have to a give effect to a later statute which conflicted with community law, entirely consistent (as one expect of Lord Diplock, with respect) with his opinion as quoted to the Commons by the Solicitor-General and relied upon below at page 50.

United Nations to amount to "a denial of fundamental rights"[71] (VII-1806). Where an alien cultural norm, such as metrication, is brought in by democratic decision of a country's legislature, that is one thing, but entirely different considerations arise when it is imposed. Importing EC law by democratic decision such as that reached in 1972 again is one thing – importing it by violating the constitutional norms of the UK and doing it undemocratically by over-riding the decision of Parliament to retain both systems is a different thing altogether. All Europeans are aliens, save for the loyal people of Gibraltar, who are European and British at the same time,[72] and citizens of the Republic of Ireland, to the extent that they consider themselves Europeans. As aliens they must take care not to impose their cultural norms, nor interfere in the internal affairs of the United Kingdom, nor violate its sovereign dignity, nor violate its inalienable right to national self-determination, a right so fundamental it was a war aim of the United Kingdom and the United Nations in the Second World War, incorporated as the Third Article of the Atlantic Charter.[73] (VII-1798)

36. When we signed up to the Treaty of Rome we were entitled to expect that the other signatories would continue to observe their other obligations under international law and would so conduct themselves that these fundamental principles would not be violated. The offensive concept of supremacy of community law violates these fundamental principles and in so far as it is aimed at undermining the norms of democracies arguably amounts to a threat to international peace and security contrary to the principles agreed to by all the State Parties to the Treaty of Rome in Article 1 of the Charter of the United Nations (VII-1800). The seriousness of what was done in *Factortame* has not perhaps been fully understood. Here was a group of aliens, apparently supported by their government and the European Commission, who sought to treat with the National Flag of the United Kingdom contrary to the express wishes of Her Parliament, in order to extract the natural resources of the waters around these islands, to the prejudice of Her Majesty's subjects, and who in order to achieve their entirely unlawful aim (so far as our laws were concerned) acted in concert to attack and undermine the Constitution. Not content with attacking our much-loved and centuries old Constitution, the origins of which may be traced back to the Heptarchy of the first millennium, which the Court may agree is the greatest Constitution in the world and under which the British people have lived and died for over a thousand years, the said aliens insisted on violating the maritime frontier of the United Kingdom and flying the Red Ensign in defiance of Parliament, which this Honourable Court may feel was a calculated insult not only to this country and our beloved liege Sovereign Lady Queen Elizabeth but also to the Mercantile Marine, upon whose sacrifice and devotion to duty the survival of this ancient kingdom in large part depended in two world wars. Her Majesty's Government would have been quite entitled under general international law to issue an ultimatum to the King of Spain and any nation supporting him and in default of satisfactory assurances that the maritime frontier of the United Kingdom and Her National Flag would be respected declare a state of general hostilities. There are those who would say (perhaps not this Court) that the failure at least to take firm and appropriate naval measures to exclude the Factortame boats amounted to a stain upon the national conscience. Once Parliament democratically had taken the registration of fishing vessels out of the ambit of community law by primary legislation, that should have been an end to all arguments based on the Treaty, to adopt Lord Denning's now famous *dictum* in the *Felixstowe* case[74] (I-255 at 260, paragraph 32).

37. It appears to have been assumed in the *Factortame* litigation (and in the other cases following *Costa v. ENEL*) that Article 189 of the Treaty of Rome was valid and enforceable against a sovereign state, but when basic principles of public international law are applied this extraordinary assumption (with respect) may be shown to be flawed. Once it is accepted (as it must be) that the EU is founded upon a treaty between sovereign states and is not a state, how can it be seriously argued that a mere treaty may be used to dismantle the constitutions of sovereign states? The supreme courts of Germany and Denmark plainly do not agree that the basic norms of those states could be undermined. With respect they are right, but it is possible to go further, in this way. The right of a sovereign state to national self-determination and freedom from interference in its internal affairs is inalienable, paramount and part of the *jus cogens* – it is a right in respect of which total war may be waged and has been waged by this country, both to ensure its own national survival and the rights of nations such as Belgium (in 1914) and Poland (in 1939). A *jus cogens* right may not be over-ridden by a treaty, indeed any treaty concluded in violation of the *jus cogens* is void and rightly so (Article 53, Vienna Convention on the Law of Treaties (VII-1827-8) and *Pinochet(No3)*[75](V-1247)). There is no reason why a void article could not be severed and it is submitted that Article 189 (old numbering) is bad for conflict with peremptory international norms. It is for the national court to determine compliance, since the ECJ could not insist on exclusive jurisdiction without a secondary violation of the principle of self-determination. The rights of sovereign states must be protected and respected. With the greatest of respect they have not been by the ECJ.

K. COMMUNITY LAW

38. There is no dispute about community law. The dispute is about the extent to which it can be applied in the face of unambiguous primary legislation post-dating the 1972 Act. The Respondents rely on the well-known line of authority starting with *Costa v. ENEL*. These decisions throw up some curious facts, not least *Simmenthal*. From our reading of that case the Republic of Italy actually failed to incorporate the Treaty of Rome into its constitution, a remarkable failing for the custodian of the treaty! The *Costa* doctrine was very obviously controversial and it is noteworthy that the Netherlands government strongly and rightly opposed it. It does not appear in the Treaty, except in the case of Regulations, and even then it is far from clear that the framers of the Treaty of Rome ever envisaged that a Regulation could over-ride a national constitution – since each state had to ratify in accordance with its own constitution it may have been assumed by the framers that the Regulations would take effect as a form of delegated legislation (cf Sir John Laws' correct, with respect, analysis of the true, secondary nature of community law) and that the treaty would be fully incorporated in each member state. It is no fault of the framers that that did not happen – today, 28 years after accession, the Danish Constitution still makes no reference to the European Union. Part of the problem is the difficulty of amending the European written constitutions – Denmark

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[71] General Assembly Resolution 1514 (XV Session)

[72] And have stood by us in our hour of need (as I am sure my learned friend the Chief Minister of Gibraltar would wish me to point out).

[73] Annexed to Cmd.6388, signed aboard the *King George V* class battleship HMS *Prince of Wales*, Placentia Bay, Dominion of Newfoundland, 14th August 1941, by Prime Minister Winston S. Churchill and President Franklin D. Roosevelt (VII-1797).

[74] *Felixstowe Dock & Railway Co. v. British Transport Docks Board* [1976] 2 CMLR 655.

[75] *R v. Bow Street Metropolitan Stipendiary Magistrate ex p. General Pinochet Ugarte (No3)* [2000] 1 AC 147

requires a referendum to be held in Greenland and the Faeroes for example.[76] In general it is arguable that the constitutional implications of EU membership have not been fully spelt out, which may explain why took over three decades for the superior relationship of German Basic Law to community law to be worked out.

39. It is right that since the 1985 Act two further EC treaties have been ratified by the UK and incorporated by Parliament, but neither Maastricht nor Amsterdam dealt with weights and measures and they take the matter no further. It is right that Parliament has not taken us out of the EU but it is no part of the Appellants' case that over-riding one directive amounts to a fundamental breach of the treaty, indeed we would argue strongly against importing English contract law concepts into international treaty law. In reality an amendment to either amending act to make it a criminal offence to sell a pound of bananas might well have proved fatal, indeed it might have brought down the Government (which barely survived the Maastricht ratification process). If we may say so it is curious, with respect to the prosecution, to see the Maastricht ratification relied upon as proof of Parliament's whole-hearted commitment to the EC, when only part (admittedly the larger part) of the treaty was put before Parliament and approval was only obtained after the UK had negotiated an opt-out from a core provision of the treaty – if anything the Maastricht ratification, taken together with the collapse of the ERM and subsequent divergence of the UK economy, emphasised and accelerated the Anglo-European fracture. It is our case that the *Costa/Factortame* doctrine does not apply in the UK, but that cannot affect the UK's membership, not least when the EEC Member States were on notice prior to the Act of Accession that it could not apply having regard to our internal constitutional rules of fundamental importance and normative force concerning the Sovereignty of Parliament and Implied Repeal, and it has already been rejected by two Member States without affecting their membership or access to the so-called 'single market.'[77] The Act of Accession does refer to metrication, but whatever was done in 1972 has to give way to the 1985 Act.

40. There is also agreement on the vulnerability of the pint and mile for road-signs, although the prosecution might put it less neutrally (with respect to them). At the moment community law provides for limited derogations, in particular in relation to road-signs,[78] the returnable pint milk bottle and the pint of beer or cider, but not of shandy (it seems that Commission may have overlooked the requirements of those driving motor vehicles who might want to water their pint down, as it were, with a half of lemonade). As it stands it is a criminal offence for a publican to sell a half-pint or pint of shandy, at any rate according to the European Commission and the Respondents. If these appeals are rejected every public house in the United Kingdom, if they wish to stay within the law, will need to purchase half-litre or litre glasses, or at any rate metric glasses, in which to serve shandy. It was common ground in Sunderland that these derogations could be swept away over the wishes of the UK, because since the Metrication Directive in 1980 the enabling power in the Treaty[79] has become subject to Qualified Majority Voting. If these appeals fail, the pint and the mile will be at the EU's mercy and there would be nothing that any British government or Parliament committed to EU membership could do about it, whatever might be the state of public opinion. It would indeed be a classic illustration of the powerlessness of puppet governments and legislatures, which is the reality of what is asserted by the Respondents.

L. THE 1975 REFERENDUM

41. The referendum result has been prayed in aid by both Sunderland and Sutton, but we are not sure why, with great respect. As the Court will know the new government in 1974 promised a consultative referendum on EEC membership, which was held in 1975. In Sutton it was apparently submitted that the British people had approved EEC membership prior to accession, which of course is not right – there was no popular vote before we went in, nor indeed was the 1970 General Election fought on the issue of Common Market membership. A referendum result is limited to the question put and does not bind Parliament, since it is not bound by anything done by a previous Parliament – indeed the enabling Act is a classic illustration of the principle, since if the 1972 Parliament had bound its successors there couldn't have been a referendum on withdrawal anyway. Less than three years into membership the Parliament of the UK contemplated withdrawal for the first time,[80] very obviously since this was the UK and not the USSR no one knew in advance what the referendum result would be (or at any rate if they did it would suggest some voting irregularity had taken place!). It was a curious episode in many ways.

42. Before arriving at any conclusion based on the result, it is surely necessary to go back and look at how the question was presented to the electorate. Where they told that the impact of Common Market membership amounted to a giving up of national sovereignty, as District Judge Morgan held,[81] so that the 1972 Act in effect became an instrument of conditional national surrender (the closest parallel in international law perhaps being the surrender of the Third French Republic in 1940 to Germany and Italy[82]) or were they told that there no implications for essential national sovereignty? Although it would not normally be right to look at

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[76] Article 88. Greenland and the Faeroes enjoy Home Rule but are part of the Kingdom of Denmark. Had Denmark voted Yes in the recent euro referendum it might have faced a challenge to the constitutionality of the referendum, in part because the euro was to replace the Kroner in Greenland, but the referendum was confined to metropolitan Denmark.

[77] It is submitted that there is a difference between legal theory and economic reality. The Court is respectfully invited to be neutral and express no view as to whether the 'single market' actually functions as such.

[78] It is illegal for any official sign on a public highway in the UK to give prominence to metric measures, although it is a curious feature of the metrication crisis that the same zealotry that has been applied to market-stall holders has not been applied to the many local and highway authorities which display illegal metric road signs, indeed the low railway bride by Thames Magistrates Court was prominently signed in metric!

[79] then Article 100

[80] The issue of withdrawal has only been debated by the House of Lords since 1975, the House voting 52 to 51 in favour of discussing withdrawal from the European Union at the 2nd reading stage of the European Union (Amendment) Bill 1997.

[81] Judgment, page 37 of revised transcript (the revisions were suggested by prosecuting counsel, quite properly since they concerned obvious errors such as typing, were agreed with myself and submitted to the District Judge for his approval, with the clerk being fully informed throughout.)

[82] The Kingdom of Italy entered the Second World War 10th June 1940, its troops crossing the French frontier on that morning. The surrender was conditional in that part of France continued to be nominally independent, retaining its armed

a party political manifesto, the two campaigns were not party political and were regulated by statute. Only the "Yes" case is put before the court (by the Appellants, not the Respondents), since that is the case that found approval with the electorate. There was nothing in it about surrendering national sovereignty. The case was that "Our traditions are safe" (IX-2431), that the Common Market was about working together without friends and neighbours (*ibid.*) and that "All decisions of any importance must be agreed to by every member," (*ibid.*) a novel interpretation of community law even then. There was emphasis on "jobs and prosperity" and "world peace" (IX-2430). Of critical importance to any understanding of the degree of democratic legitimacy conferred on the *Costa* doctrine by the 1975 referendum, it is submitted, is the statement in bold at 2431 that "**English Common Law is not affected.**" We agree with and adopt that statement, which wholly undermines with respect much of the reasoning below. The Government also sent a pamphlet through every letterbox in the kingdom, with a section devoted to the question "Will Parliament lose its power?"(IX-2439). The Common Market was compared with membership of NATO, the UN and the IMF, none of which remotely ties the hand of Parliament or affects national sovereignty.[83] The nation was also told in the same section that membership would not deprive us of "our national identity," a statement which the court will understand may ring rather hollow to men criminalised for weighing a pound of bananas and selling a pound of Granny Smiths. There is a carefully crafted statement about retaining the "final right of repeal" but no mention whatsoever of Parliament losing any powers, let alone the power to legislate contrary to community law. At 2440 there is a statement referring to democratically elected legislatures in other Member States, who would **"not want to weaken their Parliaments any more than we would."** It is submitted that we need not get into the difficult territory about how the powers of a sovereign parliament can be cut down by a popular referendum, let alone by the vote of a minority of the electorate[84] because it is clear beyond a peradventure that membership of the Common Market was put before the electorate on the basis that there would be no erosion of essential national sovereignty, no weakening of the power of Parliament and no impact on the Common Law. On any view it is impossible to treat this referendum as legitimising puppet government or the transformation of Parliament into a puppet legislature bound to conform to the alien will, or the Courts into puppet courts bound to apply alien law in preference to our own, all of which are now urged upon this Court by the Respondents or some of them, although they may choose to use different, softer, language, to lessen the massive constitutional impact of their submissions.

43. It is impossible to leave the referendum documents without commenting on the extraordinary error of law presented in the government statement as "Fact no 2" at 2439. Leading Counsel for Sunderland is if we may respectfully say so this country's most respected community lawyer. She will have no difficulty in spotting the error but considerable difficulty in finding any treaty provision stating that "no important new policy can be decided in Brussels ... without the consent of a British minister answerable to ... Parliament." That appears to be a reference to the Luxembourg Compromise, to which the United Kingdom was never a party, which was in any event a non-binding political agreement never ratified by any community institution nor incorporated into community law and which is nowhere referred to in the Treaty of Accession. This Court will understand, as District Judge Morgan recognised,[85] that these appeals and indeed the trial verdicts, have aroused widespread public anxiety,[86] unsurprisingly since millions of people shop in supermarkets selling milk by the pint and if the Respondents are right many will be party to an illegal transaction, indeed the number of criminal transactions since these prosecutions began probably numbers in the tens of millions.[87] It seems that some members of the public continue to labour under the misapprehension, possibly induced by this statement by the government, that there is a "British veto" and that we not bound by community law to accept an important new policy we do not wish to. It is likely to be common ground that that is not the case, at any rate so far as the law of the European is concerned. We are only exempted from the impact of community law where **after** accession the Queen in Parliament assembled approves primary legislation conflicting with community law.

M. THE IMPACT OF PEPPER v. HART

44. *Factortame (No 2)* was decided under the old rule, where the courts could not refer to Parliamentary debates. This was a sound rule and with respect the reasoning of Lord Mackay of Clashfern in *Pepper v. Hart*[88] (111-882 at 892) is to be preferred. This court is however bound by that decision and may refer to Hansard. It was the Respondent in *Thoburn* which first went down the Hansard route, in relation to the 1985 Act, although with respect they may now be sounding the retreat, because we have now served our own *Pepper v. Hart* notice and seek to rely on the debates in 1971/2. Further to the Directions hearing the skeleton arguments and bundles are integrated and the Hansard arguments are treated as organic, but strictly *de bene esse*. So far as the 1985 Act is concerned Sunderland wish to demonstrate that it is a consolidation statute. That is indeed what it is. It says so and we have not the slightest reason to doubt it. It accurately consolidates all pre-existing UK primary enactments relating to Weights and Measures (**but not the Metrication Directive nor indeed any alien instrument**). A consolidation Bill follows different Parliamentary procedures, with limited debate on the floor on the House of Commons. That is entirely a matter for Parliament however and the Bill of Rights prohibits

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forces and in particular the French Navy (leading almost inevitably to the first capital ship engagement between the Royal Navy and the French Navy since Trafalgar, at Oran).

[83] A nation state does not lose sovereignty by being part of a military or security alliance, let alone one it can leave at any time. NATO no more affects sovereignty than the Entente Cordiale or the alliance with Turkey and France against Russia in the Crimea. The UN not only does not require nation states to surrender their sovereignty in order to join, but the preservation of national freedom and sovereignty is a core value of the UN and one of its principles and purposes.

[84] There significant abstentions and less than 50% of the electorate voted Yes, with a much smaller number of course voting No.

[85] Sadly it seems that some members of the public chose to write directly to him, with strong comment on the prosecution. The Defence did in fact appeal for restraint and with the court's leave asked the public through the media not to communicate directly with the Court.

[86] Some professional opinion polling has been done, and the results could no doubt be made available to the Court, but we rest our case on the Law of England, not ICM Research.

[87] Technically any member of the Court should perhaps disclose if he shops at Tescos or Sainsburys, since each chain sells milk by the pint in non-returnable containers. Sunderland do not assert that this is a criminal offence, but that is the natural consequence of the Hackney and Cornwall prosecutions.

[88] [1993] AC 593

an inquiry by this Court into the internal procedures of Parliament. What matters is not how a Bill is debated, but what it says if and when it becomes an Act.

45. Particular care needs to be taken with consolidation bills if a clash with community law is to be avoided, if the consolidation takes place in a field occupied by community law. It is not difficult to miss a Directive, particularly where as here Parliament is consolidating pre-1972 and post-1972 statutes and the consolidation falls between the coming into force of the Directive and its operative period[89]. Had Parliament not consolidated the Appellants would have been advised that they were each guilty of a criminal offence, because the Weights and Measures Act 1963 was plainly caught by community law, subject only to the argument below about the proper scope of the Henry VIII power to amend existing primary legislation (a Regulation would certainly have impliedly repealed the 1963 Act because it takes effect without more, but Directives leave some margin of appreciation to the national authorities and if the scope of the Henry VIII power was as limited as Parliament was told it was, it would have been inappropriate to use it to amend major legislation such the 1963 Act). Once Parliament consolidates that is it – delegated community legislation, not least a mere Directive, gives way to primary legislation. Individual members of Parliament may or may not spot what is being done to the Directive by the crushing normative force of an Act of Parliament, but it doesn't matter. The Court may think it is difficult to avoid the conclusion at least some of very brilliant lawyers in Parliament (not least in the Lords) actually spotted what was going on and chose to remain silent, possibly even taking the secret to their grave. There is not the slightest obligation on a Government MP or peer, let alone an Opposition MP or peer, or cross-bencher, to alert some hapless minister to the fact the Bill he is promoting drives a coach and four through some aspect of government policy. It is not difficult to avoid the conclusion that at least one Lord of Appeal in Ordinary had heard of the Metrication Directive, noted the omission from the 1985 Bill of any reference to it, understood what the Minister was doing even if the Minister didn't (with respect) and made sure he had alibi for the crucial vote. Equally it is possible that nobody in Parliament had ever heard of the Metrication Directive or had forgotten that it existed. It doesn't matter, it is submitted, and speculation is perhaps idle. What's done is done. What we were told in 1972 would never happen happened and we now have on the statute book, in all its glory, a statute conflicting with a Directive, with the 1985 Parliament making complete nonsense of the policy of the 1972 Parliament, just as the 1975 Parliament did before it by setting in train the mechanism of UK withdrawal from the Treaty of Rome.

46. In *Pepper v. Hart* the Attorney-General (III-888) correctly submitted that it would be rare for counsel to come across a "crock of gold" in Parliamentary debates (an informed submission if we may say so). In this case we have unearthed not so much a crock of gold as the entire annual output of Consolidated Goldfields. The very issue the Court is considering – how can Parliament bind it successors – was considered in the debates on the European Communities Bill. The Solicitor-General assured the House of Commons that if a subsequent statute conflicted with community law the statute would prevail. The Government was careful to limit the effect of s.2 to a rule of construction: "...designed to provide, **so far as it can constitutionally be achieved**, for Community law to prevail over conflicting provisions of future Acts of Parliament." (IX-2451)(emphasis added). It is submitted that there is not much sign in that critical passage of the Respondents' 'Year Zero' legal revolution argument, so that all that had gone before could be swept away as 'old' or "gone off," to use District Judge Morgan's vivid analogy with claret.[90] There is then express reference to *Van Gend en Loos* and supremacy of community law,[91] but the Solicitor-General was careful to confine the concept in its application in the UK to **existing law**. The late Mr. Enoch Powell MP, who very evidently had been paying careful attention to the Solicitor-General, then intervenes, with the question "Existing law?"[92] The Solicitor-General then embarks on a political exposition of the importance of uniformity, inaccurately asserting with respect that the concept of supremacy was accepted in every Member State.[93] At col.1321 (IX-2452) the Solicitor-General, having dealt with Express Repeal, refers to the situation of an Act of Parliament "which inadvertently, to a greater or lesser extent, may be in conflict with Community law," which to a greater or lesser extent, is Implied Repeal, going on, however reluctantly to acknowledge the undoubted legal fact of "the inescapable and enduring sovereignty of Parliament." Significantly, at col. 1322, the Solicitor-General, choosing his words with evident care, finally acknowledges the possibility of conflict in the future and states that this would be a matter for "the Government and Parliament of the day." Correctly, in his statements to the House, the Solicitor confined the courts to their proper constitutional role, of interpreting legislation. There is nothing to suggest that the Government would ever acquiesce in the setting aside by the courts of primary legislation.

47. At col. 626 (IX-2454) the Solicitor categorically rejected the assertion of "Her Majesty's judges being dragged away from their oaths of loyalty to the Sovereign." That is important, because it reflects the government's view that the judges would continue to be bound to apply the Law of England in accordance with their oaths. Very plainly there is no scope within the existing oath for a judge to apply community law in preference to our own. In the following column the Solicitor emphasises that nothing Parliament could do could undermine the sovereignty of Parliament – fatally undermining the reasoning of District Judge Morgan with respect – and just in case Parliament was left in doubt about the categorical nature of the government's assurance to Parliament that a later statue inconsistent with community law would take precedence over it the Solicitor quotes firstly Lord Gardiner LC (as he then was), stating in 1967 that there was "no constitutional means available to us to make it certain that no future Parliament would enact legislation in conflict with Community law." That left no room for reasonable doubt but Sir Geoffrey (as he then was) went on to remove even unreasonable doubt by citing no less an authority on public law than Lord Diplock, who, speaking 17 years before *Factortame*, publicly repudiated it in advance, stating that "If the Queen in Parliament were to make laws which were in conflict with

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[89] That is to say the period after the last date for implementation, when the Directive may be relied upon against emanations of the state, in this case initially 1st January 1990, and then 1st January 2000.

[90] Revised judgment, p.24

[91] Col.1317, at 2451.

[92] *Ibid*, one-third of the way down the column – it is perhaps the most famous and significant intervention in Parliamentary history.

[93] The Federal Republic of West Germany had not then and still has not made the necessary amendments to its Basic Law, as the *Brunner* case confirms. Community law must conform to the Basic Laws before it can take legal effect in any part of Federal territory. The *Simmenthal* case also appears to suggest, if I read the submissions of the Republic of Italy correctly, that in 1972 the Italian Constitution still had not been amended to take account of *Van Gend en Loos*, or indeed permit the self-execution of Regulations.

this country's obligations under the Treaty of Rome, those laws, **and not the conflicting provisions of the Treaty, would be given effect to as the domestic law of the United Kingdom.**" (col.629, IX-2455). We respectfully adopt those solemn and carefully worded statements to Parliament by a Law Officer of the Crown as a correct statement of the constitutional position. We respectfully invite this Honourable Court to do the same. We also respectfully adopt as correct the statements of Lord Gardiner LC and Lord Diplock and again respectfully invite the Court to adopt them as correct, which would be an end to *Factortame* (save as to the point of construction of community law) and the Respondents' position in these appeals, which in truth depends utterly on the thin thread of legal reasoning (with respect) in *Factortame*, reasoning not shared by Lord Howe, Lord Gardiner and Lord Diplock (nor indeed at all times by Lord Denning, who with respect correctly stated the position in the *Felixstowe* case,[94] nor by Sir Stephen Brown P, whose *obiter dictum* with respect in the *Farrall* case is another classically correct statement of the relationship between primary legislation and community law[95]).

48. Normally counsel who is able to support his argument with express statements by Viscount Simonds and Lord Reid (speaking of incorporated treaty law generally[96]), who further finds himself able to adopt an argument of Sir Reginald Manningham-Buller QC as he then was, and then finds himself in agreement with the opinion of Lords Gardiner, Howe, Diplock and Denning and Sir Stephen Brown P on the very point he is arguing, would be accused of gilding the lily by citing the opinion of yet another Lord Chancellor. At the risk of being accused of seeking not only to defeat but demolish the Respondents' case, I will also rely on the express statement of the late, great Lord Hailsham of St. Marylebone LC to the House of Lords that should a case such as this ever arise it would be the duty of the courts to give effect to the statute. Having confirmed the constitutional importance of the rule that a later Act of Parliament takes precedence over an earlier[97] and it having been suggested, perhaps unkindly, that the Lord Chancellor had muddied the waters, Lord Hailsham stated in terms that the United Kingdom would remain a sovereign nation "recognised as such by every other nation in the world, by every other international agency in the world that I am aware of[98]," and on 7th August 1972 that "this legislation does not impair the sovereignty of Parliament and there is no doubt, **whatever might be true of the consequences of what we did,** which of the two doctrines [supremacy of community law or implied repeal] the courts would then have to apply, because **the courts are obviously caught, as is every institution within this country, by the terms of our Constitution, written or unwritten.**"[99] The words in square brackets are inserted, but there is clear reference in col. 812 to the rule whereby a later statute takes pre-eminence in English law over an earlier, and inadvertent breach. At col. 913 Lord Hailsham LC stated that it was "abundantly obvious, not merely that this Bill **does nothing to qualify the sovereignty of Parliament but that it could not do so.**" That is surely right with respect and dispenses with arguments based on s.2(2) or (4), neither of which was capable of binding subsequent parliaments.

49. The true position, it is submitted, is that the government, not least its most able Lord Chancellor, recognised and Parliament was told that there was nothing the courts could do if a later Act over-rode community law inadvertently. It was hoped that such a breach could soon be cured, by the only means possible – fresh primary legislation. The Respondents' remedy, if they wish to criminalise the sale of a pound of bananas, is to go to Parliament and obtain an Act which says so. If their reluctance to do so is influenced by fears that there would be much political controversy and that Parliament might throw the Bill out, then that would be even less reason for the courts to act unconstitutionally and sit as a court of appeal from Parliament.

N. DUALIST NATURE OF THE UNITED KNGDOM

50. The United Kingdom, it is submitted, is and always has been a dualist jurisdiction. She shares this feature with all of the world's great democracies, certainly all those strong enough to have resisted fascism. The great weakness of monist jurisdictions, where treaties take effect as part of municipal law automatically, is that treaties are negotiated by governments and effective democratic control of the executive becomes almost impossible. The government becomes in effect a source of law through the sidewind of agreement with other governments (which might well be tyrannies) and can destroy the laws of an elected legislature overnight. In truth, monist legal theory is incompatible with democracy, which is why it is so difficult to name a successful monist state. Monist states are also vulnerable to infection by tyranny because although all states are equal not all states are democracies, and much treaty law is generated by or agreed to by totalitarian states, whose motive in promoting a treaty or protocol may be disguised – which is why democracies have to be constantly on guard.

51. This very important question came before the new Probate, Divorce and Admiralty Division in 1879, when Sir Robert Phillimore held in terms that a steam packet crewed by the Belgian Navy could not rely on immunity from suit conferred by international treaty to defeat the common law claims of the plaintiffs.[100] We respectfully adopt the arguments of the powerful Treasury team, led by Sir Hardinge Giffard QC, as he then was, the Admiralty Advocate (Dr. Deane QC) and Bowen, as he then was, set out at I-26 *et seq.* The Court held that treaty law could not take effect unless enacted, which must be right. The decision was never appealed, presumably because it was so obviously correct with respect to Sir Robert. Appropriately enough for a great maritime power the next test cases of significance also concerned the sea. In the famous case of *Mortensen v. Peters*[101] the Full Bench of the High Court of Justiciary (The Lord Justice-General, The Lord Justice-Clerk, Lords McLaren, Kyllachy, Stormouth-Darling, Low, Pearson, Ardwall, Dundas, Johnston, Salvesen and Mackenzie) rejected the claims of the master of a fishing vessel registered in the new Kingdom of Norway that he was not subject to the jurisdiction of the Dornoch Sherriff Court, the preliminary objection being based on a conflict between the Sea Fisheries Regulation (Scotland) Act 1895 and international law. Very properly the Sherriff repelled the objection and was merciful enough to fine the captain only £50, decerning him to be imprisoned for the short term of 15 days in default.

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[94] Only the defeat of the Bill in the House of Lords prevented the courts from resolving the question now before this court.
[95] *Farrall v. Department of Transport* [1983] RTR 279 (II-407). The statement was obiter because the Road Traffic Act preceded the ECA.
[96] In the *Collco Dealings* case.
[97] 25th July 1972, col. 1230, IX-2459
[98] col.202, IX-2463.
[99] Cols 812-3, IX-2470-71
[100] *The Parlement Belge* (1879) 4 PD 129 (I-20).
[101] (1906) 14 SLT 227 (I-40)

The captain's arguments with great respect were as misconceived as those of the Respondents in this case, resting on some supposed inability of Parliament to breach international law.

52. Two rather spectacular shipwrecks, including that of the White Star liner *Celtic*, wrecked off Queenstown on 10th December 1928, formed the background of the next case, *Ellerman Lines v. Murray.*[102] The dispute, about an undoubted conflict between an ILO Convention and the Merchant Shipping (International Labour Conventions) Act 1925, reached the House of Lords, which held unanimously (Lord Blanesburgh *diss.*, but not on the point in issue) that an Act of Parliament took precedence over a treaty. All of these are dualist decisions, and with great respect the monist approach of the House of Lords in *Factortame (No 2)* stands alone (save for lower court decisions which have assumed it to be right without hearing argument) and is contrary to the principle of our Constitution. There are more recent dualist decisions as well, including *Salomon v. Commissioners of Customs & Excise*[103] and the splendid decision of that very sound tribunal (with respect) Mr. Justice Ungoed-Thomas, in *Cheney v. Conn.*[104]

53. It is not right to say that the House of Lords since *Factortame* has followed a monist approach. So far to the contrary there were three great dualist decisions in the half-decade or so following 1989, which it is submitted show the House restoring constitutional legitimacy and emphasising the sovereignty of Parliament. The first was *International Tin Council,*[105] which took 26 days to argue before the House of Lords, with 14 silks, and was famously described by one of them as "of quite straightforward simplicity."[106] In his magnificent speech (with respect) Lord Templeman disposes of *Factortame (Nos 2-5)*, albeit not by name[107]:

..the appellants put forward alternative submissions which are unsustainable. Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament. The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation[108] in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

The word "correct" with respect scarcely begins to describe this magnificent and powerful passage, which shatters the arguments of the Respondents as surely as the Imperial main batteries of HMS *King George V* and HMS *Rodney* shattered the metric armour of the KM *Bismarck*. All of the arguments based on treaty law in *Factortame* and below simply fall to the ground, nor can these keynote statements of constitutional principle properly be dismissed as *obiter* – they are part of the *ratio* and it is submitted bind this court. Perhaps it matters not, because with respect I cannot think of any reason why any common lawyer who valued the famous traditions and mighty principles of the Common Law of England would wish to do other than apply Lord Templeman's great speech.

54. *International Tin Council* was followed by another great dualist decision, this time dismissing arguments founded on the European Convention of Human Rights, *R v. Secretary of State for the Home Department ex p. Brind & ors.*[109] Powerful dualist statements are to be found, eg in the speech of another fine lawyer (with respect) Lord Ackner, at 760 (III-815). The third case is *Equal Opportunities Commission.*[110] This case was put forward by Sunderland as an example of the House of Lords applying *Factortame* but it is submitted when correctly analysed it is nothing of the sort. That fine human rights advocate, Lord Lester of Herne Hill QC (with respect), expressly disavowed any suggestion that the court should disapply the offending statute. All that he sought, quite correctly, was a declaration that the statute contravened community law and so it did. There is nothing inherently difficult about a court granting declaratory relief to the effect that a statute breaches some provision of a treaty and so far from attacking this decision or the conduct of the Equal Opportunities Commission, we say that they showed a proper respect for Parliamentary sovereignty and did what the Factortame fishermen and the Respondents here should have done, namely obtain declaratory relief that an Act is non-compliant, and then go to Parliament and ask that it be made compliant. This is a dualist, not a monist decision, entirely consistent with our constitutional tradition, with the courts playing their proper role of declaring the law, not inventing it, (respectfully adopting Lord Templeman's language).

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[102] [1931] AC 127 (I-59)
[103] [1967] 2 QB 116 (I-173)
[104] [1968] 1 WLR 242 (I-193)
[105] *Rayner v. Department of trade and Industry* [1990] 2 AC 418 (III-716)
[106] Gordon Pollock QC, at III-733. He was right with respect, but for the wrong reasons.
[107] If there is another case involving specific performance of a treaty obligation I am unaware of it. This speech was delivered as the *Factortame* fiasco with respect was unfolding – any notion that Lord Templeman was unaware of it would not be soundly based, it is submitted. Lord Templeman of course disposed of *No 1* with an equally brilliant speech (with respect) in *M v. Home Office*.
[108] This is arguably a repudiation by Lord Templeman of *Litster v.Forth Dry Dock*. With respect this is one of the great statements on the modern Constitution, and will justly be celebrated for centuries to come. In 21 lines it 'takes out' 4 of the 5 *Factortame* decisions, *Litster* and much doubtful recent jurisprudence on the Human Rights Act.
[109] [1991] 1 AC 696 (III-783)
[110] [1995] 1 AC 1 (IV-1015)

55. As counsel in the case, both before the Industrial Tribunal and Employment Appeal Tribunal, and nearly a decade later, back before the Employment Tribunal on the assessment of quantum, I assert with some confidence that *Webb v. EMO Air Cargo (UK) Ltd*[111] was not about setting aside primary legislation, or not applying it, but rather interpreting it. The construction adopted by the ECJ was perfectly proper both as regards community law and by analogy with the Sex Discrimination Act 1975, which was intended to apply the 1976 Directive. The novel feature of *Webb*, was that Parliament applied the *travaux* rather than wait for the directive, but there is no reason in principle why an ambiguity in an Act of Parliament should not be resolved in favour of an international legal instrument which is put before Parliament in draft form and perfected after the UK legislation. Provided the final draft is not materially different from the earlier version before Parliament there is no reason at all why it should not be an aid to construction. On the construction point all that the House of Lords did was to apply a perfectly proper purposive construction to a piece of reforming legislation and end the law's fruitless search for the hypothetical pregnant man.

O. THE SOVEREIGNTY OF PARLIAMENT

56. It is submitted that the Law of England is correctly stated by Sir Edward Coke and this Court is respectfully invited to adopt the passage appearing at page 1977 of the bundles (vol.VII):

Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.

The Court is also invited to adopt the magisterial statements by Sir William Blackstone at 1943 and 1944. Parliament has:
Sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of law, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal.

Blackstone also goes on to say **"what the Parliament does, no authority on earth can undo."**

57. The approach of these masters of the Common Law was followed by those two great modern authorities on the British Constitution, the Rt. Hon. Sir William Anson[112] and the immortal Professor Albert Vere Dicey QC, extracts from Chapter 1 of whose great work, *The Law of the Constitution* are set out in the bundles at VII-2014-2023. Parliament, as Dicey demonstrates, has repealed in part the Act of Union with Scotland (which if the heretical and utterly unconstitutional concept of hierarchy of statutes held sway, which Thank Providence for our democracy it does not, would surely be a higher ranking statute), the Act of Union with Ireland and the Septennial Act. Each statute is as valid as any other and any conflict is resolved by strict order of enactment. Thus the European Communities Act has no greater legal validity or effect than the Dangerous Dogs Act and if there were a Dangerous Dogs Directive it would have to give way to the Act. That is the legal order of the United Kingdom, under which generations have lived or died, the liberty of the subject established, nations set free and great democracies established, tyranny overthrown both here and abroad and freedom flourished. The European Union comes late upon a scene redolent with history and a Constitution fashioned by the genius of the British people in age after age, by their kings and queens, their leaders and statesmen and women, great judges and jurists such as Bracton, Coke, Blackstone and Dicey, the greatest Constitution in all the world and the inspiration for the United States Constitution, a mighty legal fortress in the moat of which the Metrication Directive sinks without trace and the so-called supremacy of community law with it.

58. Throughout our legal history the courts have been favoured with arguments such as those of the Respondents, by those with some grievance or other against an Act of Parliament. Canon Selwyn was aggrieved by the Irish Church Act, and sought mandamus against Parliament, a search without result.[113] His case is known to history as "*ex parte Canon Selwyn*" presumably because no one could identify a proper respondent. He was doubtless a fine cleric, with respect, but no lawyer. Mr. Norman was desirous of not paying his income tax, and had persuaded himself that the Finance Act was *ultra vires* (it was a matter for him), because the Parliament Act 1911 had been amended. Lord Greene MR, that most eloquent tribunal with respect, as ever had no trouble finding the right phrase: Parliament may do as it pleases.[114] Indeed it may, and just as it pleased Parliament to incorporate a huge body of foreign law in the 1972 Act, so it pleased Parliament to negate some if it in the 1985 Act. In 1967 a Mr. Jordan was very unhappy with the Race Relations Act, which he argued correctly interfered with his right of free speech. Since Parliament (for good reason) had decided to restrict the right in the general interest it didn't matter.[115] The one thing a sovereign Parliament may not do of course is fetter its own successors, because then they would not be sovereign.[116] "Parliament is omnipotent in all save the power to destroy its own omnipotence," as Sir Robert Megarry V-C held in a justly celebrated *dictum* in *Manuel v. Attorney-General.*[117] The Parliament of 1985 was as omnipotent as the Parliament of 1972, as Lord Hailsham and Lord Diplock had understood would be the case, as the European Communities Bill was making its stormy and heated passage through the Commons and Lords.

59. The Parliament of the United Kingdom is a legislature of unlimited competence and global jurisdiction. It may make and unmake, and has made and unmade, laws for every corner of the globe. Should Sierra Leone decide (and that is a matter entirely for Sierra Leone) that under emergency conditions it wished the UK to resume sovereign authority until the foreign-backed incursion was brought to end and order and good government restored, it could repeal the Sierra Leone Independence Act 1961. It may make law retrospectively and has done so. It may repeal the European Communities Act 1972 and the Human Rights Act 1998 and any other piece of legislation either expressly or impliedly. After accession to the EEC Parliament was not and could not be bound by the Treaty of Rome, as Lords Howe and Hailsham recognised. It could legislate at will to over-ride community law and did so

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[111] [1993] 1 WLR 49 (III-910)
[112] *The Law and Custom of the Constitution*, 1922, VII-1933.
[113] *Ex parte canon Selwyn* (1872) JP 54 (I-18)
[114] *Norman v. Golder (Inspector of Taxes)* (9144) 171 LT 369 (I-124)
[115] *R v. Jordan* [1967] Crim. LR 483 (I-192)
[116] Anson, *op cit*, at VII-1934-5.
[117] [1983] 1 Ch. 77 (II-415 at 421)

on at least two occasions, in 1985 and 1988. The 1988 statute was not repealed until Parliament said so, in 1993. Since there is no power on Earth which is a rival for Parliament, it could have chosen to reverse the *Factortame* decision, arrest the judges of the ECJ, order any person in the jurisdiction through whose hands damages had passed to repay them, and/or instruct the Royal Navy to arrest or sink the Factortame boats, granting complete immunity to any naval officer engaged in such an enterprise. Parliament may declare war and has done so, on Spain, in 1739, launching what became a global war, in which the Royal Navy gloriously destroyed the power of Spain, one English Captain alone seizing so much treasure that it took half a day for it to be paraded in triumph through the City of London. It may take over operational command of the Armed Forces from the executive and when its authority was challenged by the executive of the day it raised an army, waged war on the executive and smashed it completely. Parliament has ordered its enemies to be put to death, in a proper case, always exercising that power with restraint and only against the most powerful in the land, never against the poor. It retains the power of life and death over all in the land, by means of Act of Attainder, and may dismiss or try the executive at will. Its legal power is no less than in the day of Coke and in 1985, in an a display of immense and awesome legislative power, it swatted aside a directive of the EEC as though it didn't matter, which in law it didn't.

P. IMPLIED REPEAL

60. The law of England, it is submitted, is accurately stated in the maxim *leges posteriores priores contrarias abrogant.* With respect I adopt Lord Hailsham's exposition of the rule to the House of Lords in 1972. Express words of repeal are not only not necessary, but in most cases are otiose, since the courts must give effect to the latest expression of the will of Parliament.[118] When Parliament legislates in part of a field occupied by an existing statute it carves out a contingent exception, leaving the rest of the earlier statute unaffected.[119] It is submitted that when Parliament retook the weights and measures field previously occupied by community law, it left the rest of community law untouched.

61. It matters not that there are words preventing repeal in an earlier Act, as there are in the 1972 Act. As the Solicitor-General and Lord Chancellor explained in 1972 such clauses are ineffective and scarcely worth the vellum they are printed on. The courts have already dealt with such clauses, as one was included in the Housing Act 1919. As always there is room for doubt as to whether Parliament really intended to bind its successors (just as there is in relation to s.2), but the better view is that on its face (and Parliament speaks to us through the language of its statutes - what it understood the clause or the law to mean is not a material consideration[120]) s.7 of the1919 Act bound future Parliaments. At any rate that was the view of the majority of a most distinguished Court of Appeal in *Ellen Street Estates* and with respect this court is bound by that view, as indeed it is bound by the decision (applied by the House of Lords, as a matter, it is submitted, of necessary implication in *Collco*) to hold that the 1985 Act impliedly repealed the 1972 Act. The consolidation point is a bad one, it is submitted. There are no inferior classes of primary legislation – a consolidation act is as much capable of working an implied repeal as any other primary legislation. To emphasise the point the very statute in issue in the *Ellen Street* case was the Housing Act 1925 – a consolidation statute.[121]

63. It is submitted that the doctrine of Implied Repeal is straightforward to apply in this case. Extracts from *Craies*, Bennion[122] and *Maxwell* are included in the bundle, but the principle is well understood and centuries old. As Lord Hailsham stated it is of constitutional importance, although that does not prevent its being misunderstood from time to time with respect. It is nothing whatsoever to do with the rule in *Wood v Riley,*[123] whereby the later of two incompatible provisions in an Act of Parliament is preferred if neither is dominant, because each becomes law at the same time. There is no rule, as appears to have been assumed with respect in *Re Marr (A bankrupt)*[124]that an Act of Parliament is rolled out, as it were, and later sections come into force a scintilla later than earlier. If an Act comes into force at a minute past midnight, it is not half in force at five minutes past, with the rest of the statute catching up by ten past. It does not seem with respect that this error was picked up in the leading New Zealand human rights case of *The Queen v. Teina Pora.*[125] The answer in that case, it is submitted, is that Implied Repeal had no application because the amendment had been inserted into earlier legislation. In the absence of a contrary indication, Parliament[126] may safely be taken to have intended that an amendment inserted into old legislation was intended to be governed by later legislation. Thus the 1975 amendments to the Equal Pay Act 1970 must surely be governed by community law, since they were inserted without comment into a pre-72 statute.

64. There are many authorities on Implied Repeal, but to save time only three others are included. *R. v. Davis*[127] is a powerful example of the rule operating, where all the judges agreed that there had been an implied repeal. *The Dart*[128] is a Court of Appeal decision and with respect binds this court. *Ex parte Burke* is a powerful illustration of the dangers of tampering with the Constitution, not least with the constitutionally illiterate proposal of a hierarchy of statutes. Mr. Burke argued that we had just such a hierarchy. He suggested, not unreasonably, that the Bill of Rights 1689 should be included in the first tier of 'super-statutes.' The High Court (Popplewell J) and Court of Appeal (V-1243) rejected any notion of a hierarchy of statutes and rightly so, holding *inter alia* that the Firearms (Amendment) Act 1997 impliedly repealed the Bill of Rights. Since the Bill of Rights applies to Northern Ireland and

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[118] *Goodwin v. Phillips* (1908) 7 CLR 1 (High Court of Australia)(I-49). This case is included because of the sheer quality of the judgments with respect and the strength of the court.
[119] *Ibid.*
[120] *Birmingham Corporation v. West Midlands Baptist Trust* [1970] AC 874 (I-197).
[121] *Minister of Health v. The King ex p. Yaffe* [1931] AC 494 (I-72)
[122] VIII-1967
[123] (1867) LR 3 CP 26
[124] [1990] Ch. 773
[125] [2001] 2 NZLR 31 (V-1430)
[126] The New Zealand Parliament is not as powerful as the Imperial or Westminster Parliament – I daresay objection might be taken were it to bring in a Bill of Attainder for example. Since it is unicameral this perhaps just as well – the bicameral nature of our Parliament is a vital safeguard.
[127] (1783) 1 Leach 271 (I-3)
[128] [1893] P 33 (I-37)

guarantees, subject to law, the right of Protestants to bear arms, the dangers of entrenchment will be seen. No doubt it made sense in 1689 to arm Protestants, at any rate to Protestants. It would not, it is submitted, make sense to permit Protestants to arm at the present day in Northern Ireland, indeed it might lead to a bloodbath. The Human Rights Act 1998 is no more entrenched than the European Communities Act 1972, a point emphasised in s.3 of the Act itself. Of course in the event of a conflict (and Mr. Richards will be suggesting just such a conflict in his skeleton) the 1998 Act takes precedence over the 1972 Act in the usual way, although untangling the international order of priorities might not be so simple. The human rights argument of course is that the 1985 Act is complaint – it is the Directive and regulations implementing it that are non-compliant.

Q. THE PRICE MARKING ORDER

65. Applying the principles adumbrated above, it is submitted that answering the questions posed by the courts below becomes straightforward, indeed nothing could be simpler. Secondary legislation cannot conflict with primary legislation,[129] and the Prices Act 1974, which was nothing to do with metrification in any event, is as much subject to the 1985 Act as the 1972 Act. The PMO99 is hopelessly *ultra vires*, it is respectfully submitted. That disposes of the summonses for selling by the pound (*Hunt*, *Dove* and *Harman*).

R. THE CONSTRUCTION POINT

66. With great respect to Sunderland much intellectual energy was expended below endeavouring to persuade (with some success, it must be admitted) the court that s.1(1) of the 1985 Act did not mean what it said. Manifestly s.1 does more than define the pound and the yard. It permits the pound to be used to measure mass throughout the United Kingdom. Effect must be given to each word in an Act of Parliament. The court cannot read down an Act of Parliament, if by that expression (which has come into vogue as non-constitutional lawyers persuade themselves that the HRA98 has opened up a new field of judicial review of Parliament, which it couldn't and hasn't) is meant ignoring or failing to give effect to clear words in a statute. In so far as *Litster* suggested the contrary (it was of course concerned with secondary legislation) it was with respect wrongly decided. As the House of Lords held in *Duke v. GEC Reliance Ltd*[130] the court's role is limited to resolving any ambiguity in favour of community law if it can. The Treaty of Rome is only an aid to construction, indeed the *Duke* approach is on all fours with the effect of incorporation as presented to Parliament and is not easy to reconcile with the *Factortame* judicial review of statute approach. It is submitted that *Duke* was rightly decided.

67. There are (limited) Henry VIII powers in the 1985 Act, including in s.1, but they do not extend to s1(1), leading to the irresistible inference that the pound and the yard were protected. That was why resort had to be had to the 1972 Act – as Hackney and Cornwall very properly concede the 1985 Act was not a metrification statute. It provides for dual system of measurements, as one would expect in a consolidation statute consolidating dual-system statutes, including the 1963 Act.

S. THE 1994 ORDER AND REGULATIONS

68. The Units of Measurement Regulations (VI-1753) try to amend a 1985 statute using a Henry VIII power from a 1972 statute. For the reasons given above it is submitted that that was unconstitutional, indeed beyond even the ambition of the old King himself. They fall. It is not even necessary to go back to the Solicitor-General's statement to the Commons in 1972 that these powers would only be used for "consequential changes of a small, minor and insignificant kind,"[131](IX-2450) a statement not cited in the *Unison* case. With every respect to Sunderland how can it seriously be argued that where a complex interlocking scheme of amendment is adopted (rightly described with respect by District Judge Morgan as Byzantine[132]) using two different Henry VIII powers, each dependent on the other and timed to come into force on the same day, that one can survive if the other falls? There is no authority in point, because no one has treated Parliament with such contempt since Oliver Cromwell and the whole scheme is unprecedented, but it must be right that if one goes, the other falls with it, if only on the basis of error of law by the minister. If the Order survives it would make it an offence to weigh a pound of bananas, but legal to sell them, so that the trader would have to guess at the weight, and this in the field of 'consumer protection.' That is so absurd it would reduce our system of law to an international laughing stock, it is respectfully submitted. The Order and the Regulations each fail.

T. THE 1985 HENRY VIII POWERS

69. Only one Henry VIII power, in s.8(6), was used. This section gives no power to amend s1(1), which protects the pound and the yard. Henry VIII powers are inconsistent with the principle of Parliamentary government. They must be 'read down,' using that expression in its limited, constitutional sense of construing strictly against the minister – *Spath Holme*,[133] *Hyde Park Residence Ltd*[134] and *Britnell*.[135] The weakness in the drafting is the use of the vague, general word "any." Plainly the power in s.8(6) could be construed quite properly as a power to add minor new Imperial measures only (a number were not included in the original Act) and take away minor metric ones – that would be consistent with the policy of the statute, which is to keep both systems alive, consistent with earlier legislation, including the 1976 Act, which was never intended to do away with Imperial measures and predated the crucial Directive by four years. The Court's task, it is submitted, when faced with a Henry VIII power, is to construe it as tightly as possible against the minister, against the strong, indeed overwhelming constitutional presumption that such powers are only to be used for "small, minor amendments," to adopt the words of the Solicitor-General. How can it argued with respect to Sunderland (who so far as I know are

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[129] *Yaffe*, the *JCWI case* (IV-1163)
[130] [1988] AC 618 (II-529)
[131] HC Deb. 13 June 1972, col. 1313.
[132] Page 4
[133] [2000] 3 WLR 141 (V-1340)
[134] [2000] EGCS 14 (V-1321)(this report is in headnote form only, but the headnote is accurate)
[135] [1991] 1 AC 603 (III-819)

the only Respondent to take this point) that the country's entire main system of weights and measures could be swept away in a morning, without any proper Parliamentary debate, by a **minister**, with scant reference to Parliament (the safeguards on Henry VIII powers are derisory and not much stronger than when they were very properly blasted by the Lord Chief Justice in his famous book, *The New Despotism*[136])? If this Henry VIII Order was upheld it would sweep away the strict construction rule and encourage ministers to treat Parliament with further contempt, opening up a new era of enabling Acts, unless Parliament retaliated by trying the former President of the Board of Trade, which it would be fully entitled to do, indeed it could be argued that unless Parliament made an example of a minister using Henry VIII powers in this way, it would find the balance of power fundamentally altered in favour of the executive. The difficulty of course is that in practice the death penalty, whilst arguably constitutionally appropriate in a case such as this, of gross misuse of power (with respect to the ex-minister), is the only sentencing option actually used in Acts of Attainder, which are a fairly blunt instrument. With respect, the constitutional irresponsibility and disregard for the basic principles of democratic self-government in Sunderland's position surely gives cause for concern. It is submitted that the Donoughmore Committee would have had difficulty in crediting that a British minister could be so cavalier in his treatment of Parliament, or that a local authority would dare to submit that such a use of Henry VIII powers be upheld. .

U. MISCALCULATION AND OBSTRUCTION

70. The obstruction summonses (Cornwall only), it is submitted, fall with the Price Marking Order summonses, since plainly if is lawful to sell a pound of Granny Smiths the trading standards officer was scarcely acting within her powers in seeking to remove the ticket. All the traders were doing was carrying out the wishes of Parliament, using a measure (the Imperial pound) which had the express sanction of Parliament.

71. The miscalculation summonses, it is submitted, must be an abuse of process, given the admitted pressure on Mr. Hunt from the London Borough of Hackney to dispose of his Imperial scales. How can a trading standards department be heard to complain of an honest trader making an honest mistake in the weighing out of his fruit and vegetables when they have forced him on threat of prosecution to dispose of his accurate and trusted weighing scales? Of course there were going to be mistakes, both by customers and staff, in struggling with the new, alien, unfamiliar measurements. There was no hiding the price or the weight from the customers – the unwanted new metric scales on the undisputed evidence showed the weight to the customer as well as the stall assistant. Neither the staff nor the customers had much idea of what a kilogram was, indeed the government, perhaps anxious not to advertise its with respect supine and unconstitutional surrender to Brussels of powers in an area which continued to be regulated by statute, did very little if anything to prepare people for M-Day on 1st January 2000. If an airline pilot and ground staff can have such difficulty with the changeover to metric that they allow an airliner to take off with only 4,916 litres of additional fuel (this is a notorious and well-documented incident and the most spectacular Canadian air incident since the Toronto Air Disaster[137] and it is submitted that judicial notice may be taken of it) instead of 20,163 litres, because they have used an Imperial conversion factor, so that a brand-new wide-bodied passenger airliner runs out of fuel at 39,930 feet,[138] barely halfway towards its intended destination, how can a 17 year old girl selling fruit and veg. be expected to do quick mental calculations all day long and get every one right, from a weight she knows well and grew up with, to an alien measure designed by someone in the middle of the French Revolution, driven by a 'Pol Pot Year Zero mentality,' to be as different as possible? To criminalise her honest employer, doing his best in a ludicrous situation not of his making, should it is submitted shock the conscience of the court and cross the abuse of process threshold howsoever described, indeed as regards those summonses there should be a directed acquittal in any event.

V. COSTS IN SUNDERLAND

72. I do not deal here with the costs of these appeals, which are a matter for this Court in the first instance at the conclusion of this matter (there is an Article 6 equality of arms issue since the prosecuting authorities deliberately chose[139] to proceed against small businesses unable to bear the costs when they had the option of prosecuting say a supermarket chain). Scott-Baker J however amended District Judge Morgan's case (it was a matter for him, with respect) so as to permit Sunderland to ventilate a challenge, presumably of principle, to his perfectly proper decision not to award costs to the local authority. Since costs are entirely in the discretion of the court below, this Court does not interfere with those decisions[140] in the absence of illegality, irrationality or procedural impropriety and since Sunderland did not actually apply for costs, with the greatest of respect I am not sure what that challenge might be.

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[136] (VIII-2029). I am aware that its publication caused anxiety in Whitehall, but the Lord Chief Justice was entitled, if not duty bound, to warn the nation of the dangers. The price of liberty is eternal vigilance. I am not sure that Lord Hewart CJ is forgiven by Whitehall even to this day, but he was right and if I may say so a finer Lord Chief Justice than many would give him credit for. He was a principal legal adviser to the British delegation to the Versailles Peace talks. A great judge and a great Lancastrian, with respect.

[137] 5th July 1970, at 0809L, Air Canada Super DC-8-63 – the co-pilot deployed spoilers over the threshold of runway 32 at Toronto International Airport, destroying first lift and then the aircraft, all 109 aboard dying (*Aviation Disasters*, Gero, 2nd ed., 1996, p.95) The Winnipeg 'metric' crash is documented by Hoffer and Mona, *Freefall, A True Story*, New York, 1989, St. Martins Press and *Flight 143: This is a Mayday*, *Winnipeg Free Press*, 24th November 1983, p.7

[138] Strictly the Boeing 767 ran out of fuel at 26,000 feet, when her number 2 engine failed – as the airliner dived towards the ground some fuel moved forward in the tanks, keeping one engine going a few minutes longer. At 26,000 feet (FL260) the aircraft lost all electrical power and instrumentation. Only superb flying by Captain Robert Pearson and First Officer Maurice Quintal and the back-up Ram Air Turbine providing emergency electrical power saved the lives of the souls aboard and possibly those of many on the ground in the City of Winnipeg. The aircraft was severely damaged in an emergency landing on the disused RCAF airbase at Gimli. It is scarcely surprising that prosecutions such as these would not happen in Canada.

[139] We assume the prosecutions were not accidental.

[140] *Slaughter v. Sunderland Corporation* (1891) JP 519 (I-34).

73. How it could be said that a District Judge has gone wrong on costs when the party complaining of his decision neglected to apply for them I do not know. It is right that Sunderland decided to hold back, in an admitted and we say wholly improper exercise in intimidation, in order to deter Mr. Thoburn form exercising his right to apply to the District Judge to state a case for the opinion of this Court – and this in a test case of national importance, watched by nearly every local authority in the country, LACOTS, the Ministry, not to mention the national and international press, with satellite vans parked outside relaying events to the English-speaking world, and all but acknowledged as such by the District Judge in his lucid (but with respect wrong) 50-page judgment? No party to any proceeding, let alone a criminal prosecution, should it is submitted use costs as a weapon in this way.

74. The right time to apply for costs is at the conclusion of the proceedings, and the right venue, it is submitted, is the court in which they are heard, not some other court. If they thought or feared that District Judge Morgan might not be generous in his award of costs, or might not award them at all, that with respect is even less reason for this Court to set an exceedingly dangerous precedent and encourage parties to hearings before Magistrates Court to come to it for costs. District Judge Morgan is entitled to control his own court – and if we may say so, in a highly charged prosecution, with a packed courtroom, under intense media scrutiny, he controlled it superbly, displaying humanity, courtesy, humour, firmness and fairness in his conduct of the proceedings. Costs were a matter entirely for him. With respect we can understand the exposed position in which Sunderland found themselves – as indeed would any party obliged to make the bold submission to a court in England (or for that matter anywhere in the English-speaking world), with the utmost respect to that particular Appellate Committee, that *Factortame (No 2)* was rightly decided. The Court may think that might explain Sunderland's conduct but it does not excuse it. Entirely different considerations apply if a party in civil proceedings obtains an order and chooses not to enforce it, or negotiates on the strength of it, provided that the court is not dragged into party and party negotiations.

W. CONCLUSION

75. Never in all our history had a court of law thought it right to set itself up as a court of appeal from Parliament, itself the Highest Court in the land, and set aside its statutes, prior to *Factortame*, where the point in issue was not argued. This case is all about the judicial review of a statute, the Weights and Measures Act 1985. The one party which so far disputes its meaning does so on the basis of two with respect utterly unconstitutional arguments, firstly that a statute can be read down in a way which effectively involves amending it by deleting those bits which stand in the way of prosecuting a man for weighing out or having scales in his possession for the purpose of weighing out a pound of perfectly good bananas,[141] and secondly that ministers are now above Parliament and can introduce wrecking amendments under a Henry VIII power, an argument which invites this court to give the widest construction ever to a Henry VIII power since the late King invented them – and he had the excuse of a dispute with Rome. If the Respondents succeed the damage which will be done to the fabric of the Constitution will be awesome and the *Factortame* constitutional crisis will deepen, with the courts and the executive pitted against Parliament. Reserving express repeal will not do, because it would still breach community law and once the courts embark on the business of ignoring statute law on the pretext with respect of obeying community law there is no reason they should stop at Implied Repeal. More MPs will be going back to the last edition of Erskine May and looking up the section on the judicial powers of the High Court of Parliament. Not every MP or peer is as supine as their colleagues were with respect in the early years of the crisis. The loss of public confidence in Parliament, reflected in the collapse in the numbers of electors bothering to vote at the last General Election, has not gone un-noticed in Westminster. The case is not about the merits of the European Communities Act 1972 any more than it is about the merits of the Weights and Measures Act 1985. The courts (speaking generally and respectfully) are not equipped to make the complex political, constitutional, military, strategic, social, fiscal and economic judgment about the merits or otherwise of UK membership of the European Community or indeed which system of weights and measures should be lawful for use for trade in the United Kingdom. The courts must take the law and in particular the statutes of Parliament as they find them. That is all this Court is invited to do – to apply the clear and unambiguous words of an Act of Parliament to agreed facts, leaving it to Parliament to change the law if so advised and the Executive to negotiate on the international plane if so advised. One member of the court (as indicated by Scott-Baker J) has expressed in public views, indeed with great respect controversial views, on the merits of some of the questions of law raised herein (the Rt. Hon. Sir John Laws). Both Appellants and Respondents rely in part on Sir John's extra-judicial comment. In these unusual circumstances, without suggesting that Sir John should recuse himself, because we trust with great respect in his fairness and ability to deal with legal argument on its merits, should he feel it right to stand down, he could not be criticised. It is a matter entirely for Sir John and we say no more than that. The bringing of these appeals, the court may feel, is an act of faith on the part of the Appellants in the judiciary as a whole – many lawyers and politicians in private conversation appear to have assumed that the political consequences to the government and the EU are such that the appeals are bound to fail regardless of their legal merits. As this Honourable Court knows, that is not the way courts of law work, at any rate not in this country.[142] All a man or woman needs to succeed in an English court of law is a good argument, based on the Law of England (in this case on a statute which has not been repealed, the opinion of our greatest writers on the Constitution and the judgments of powerfully-constituted courts and famous judges down the centuries). As one of the greatest of our judges said when freeing a slave by Writ of Habeas Corpus: *fiat justitia ruat coelum* – let Justice be done though the heavens fall. The Court is respectfully invited to allow these appeals. May God Defend the Right.

MICHAEL SHRIMPTON

Dated this 5th day of November in the Year of Our Lord 2001

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[141] So far as we know the exhibit was eaten, presumably by someone in the trading standards department, without complaint (they had after all been paid for and would otherwise have gone to waste). At any rate the bananas were not exhibited (nor was there any reason to exhibit them since the facts were agreed).

[142] See eg *Warburton v. Loveland* (1832) 2 Dow & Clark 480 (I-6), at I-10 for a particularly clear statement of the role of the courts.