

## The jurisprudence of British Euroscepticism: A strange banquet of fish and vegetables<sup>\*</sup>

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A front page article in a fairly recent edition of the newsletter published by the United Kingdom Independence Party (UKIP), a small but vocal bulwark of uncompromising Euroscepticism (a term I will return to later), cited two landmark legal cases in support of the author's contention that 'Brussels rules Britannia.'<sup>1</sup>

One of these was the *Factortame* saga, involving the famous dispute over so-called 'quota hopping' by Spanish fishermen, in which the supremacy of European Community law over UK domestic statutes was confirmed by the European Court of Justice. The outcome of this case apparently came as a shock to those who had hitherto been unaware of, or were reluctant to admit, the extent to which the long-standing doctrine of parliamentary sovereignty (as formulated by writers like Professor Dicey in the late 19th century, and long regarded as almost unassailable constitutional wisdom) had been fundamentally compromised by the decision to join the Community. The principle that Community law enjoys supremacy over domestic law had been affirmed by the ECJ in the case of *Costa v. ENEL* in 1964, nine years before the UK joined the EC.<sup>2</sup> Fifteen years after *Costa*, *Factortame* provided a sharp reminder of the growing significance of the European Court of Justice in the UK's domestic legal system and of the growing willingness of the UK's own courts to enforce the supremacy of EC law over conflicting UK legislation.

The other case, of a very different kind, decided more than a decade after the most significant of the *Factortame* rulings, was the criminal conviction of greengrocer Steven Thoburn and other defendants for various offences relating (among other things) to a failure to use metric weights as a primary indicator of weight for the sale of loose items (in Thoburn's case, fruit and vegetables) from bulk stock. Here, as we will see later, the UK's Queen's Bench Divisional Court was called upon to consider whether the relevant provisions of a statute had impliedly repealed provisions of the European Communities Act 1972 that enabled primary legislation to be amended by the enactment of subordinate legislation in order to give effect to the UK's Community obligations (in this instance an EC directive on metrication). The Divisional Court held that

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1 Derek Norman, *UKIP News*, no. 4, January 2006. UKIP was founded in 1993. Its principal platform is a commitment to secure the withdrawal of the UK from the EU. It secured 16.8% of the votes in the 2004 European Parliament elections, winning 12 seats. It fielded 495 candidates in the 2005 General Election, but failed to win any seats in the Westminster Parliament.

2 Case 6/64, *Falminio Costa v. ENEL*, [1964] ECR 585, p. 593.

it had not. This case reminded anyone who had forgotten that EC/EU law is an integral part of UK law, enforceable not just by foreign judges sitting in Luxembourg, but also by British judges sitting in London and elsewhere in the UK. In the end, although the legal challenge failed, the opponents of metrication gained valuable publicity from this high-profile litigation and won a famous political victory.

What these cases have in common – quite apart from their substantive legal content – is their *symbolic* significance in the eyes of Eurosceptics. Both cases are symptomatic of the extent to which British engagement with the legal order of Europe has introduced juridical ingredients into the political culture that, a generation ago, were not apparent, particularly to non-lawyers. It should be noted that the ‘Europe’ that has brought this about is not just the European Union: the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, has yielded a string of high profile and controversial judgments. These two Europes have sometimes tended to become conflated in Eurosceptic discourse and are, in any case, linked by the continuous dialogue that takes place between the Luxembourg and Strasbourg courts. This paper focuses on the EU, but the combined effect of both strands of European jurisprudence has meant that, in the last twenty years or so the courts have become politically much more interesting entities – interesting both to politicians and to political commentators – and to some people, threatening ones. The *political* constitution that traditionally underpinned the British State has been markedly juridified into a *law-based* constitution. This is the theme of the latter part of this paper.

A lot of the parliamentary background to this subject has been usefully examined by Professor Danny Nicol, whose work will be discussed later.<sup>3</sup>

### **The mythology of Euroscepticism**

Those who have enjoyed the highly popular TV comedy programme *Yes Minister*, that originally ran in the 1980s, will probably remember a key episode in which a beleaguered government minister, Jim Hacker, restored his political fortunes – and indeed became prime minister – by vanquishing the ‘Brussels bureaucrats’ who had wanted to re-name the much-loved British sausage, as an ‘emulsified high-fat offal tube’. Part of the humour lay in the apparent credibility of this fictional scenario, which epitomised many people’s deepest fears about the threats supposedly posed to the British way of life by meddling ‘Eurocrats’.

A recent item in the *New York Times* demonstrates that this kind of urban mythology about Europe has acquired some transatlantic currency:

‘The European Union has long tried to dispel myths that its zealous bureaucrats are trying to impinge on national cultures in their bid to harmonize standards in the world’s biggest trading bloc. Such myths have included that cucumbers sold in the European Union must not arch more than 10 millimeters for every 10 millimeters of length; that it is against health rules to feed swans stale bread; and that Brussels had decided that shellfish must be given rest breaks and stress-relieving showers during boat journeys over 50 kilometers long.’<sup>4</sup>

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3 D. Nicol, *EC Membership and the Judicialization of British Politics*, 2001.

4 [http://www.nytimes.com/2007/09/12/world/europe/12metric.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/09/12/world/europe/12metric.html?_r=1&hp&oref=slogin)

This story was prompted by a decision taken by the EU Commission to rescind its previous decision to require the UK to phase out its use of non-metric ('imperial') units of measurement.<sup>5</sup> The prospect of this happening formed the background to the 'metric martyrs' case (*Thoburn v. Sunderland City Council*) that will be discussed later. Meanwhile, here is another item, this time from an English mass-circulation tabloid newspaper, specifically about metrication and the martyrs:

'The British pint could be BANNED if greengrocer Steve Thoburn loses his fight to flog fruit and veg[etables] by the pound. . . The same Euro law that means market traders must use metric instead of imperial scales could outlaw the traditional booze measure too. That means pubs across the country would have to start selling ale by the litre.'<sup>6</sup>

This tabloid story is one of many such items highlighted and robustly rebutted on the Euromyths' web site.<sup>7</sup> It was juxtaposed on that site with another newspaper story, in the more weighty, but also generally Eurosceptic *Daily Telegraph*, to the effect that the Queen's Sandringham Estate may face prosecution for selling wood in imperial feet and inches rather than in metres. The rebuttal points out that the UK metrication programme began in 1965, seven years in advance of British membership of the EC. And it continues by explaining, with reference to the *Thoburn* case, above, that:

'From 1 January 2000, goods sold loose by weight (mainly fresh foods) are required to be sold in grams and kilograms. It is not a criminal offence to sell goods in imperial. Traders are allowed to display weights and prices in both imperial and metric but not in imperial only. Consumers can continue to express the quantity they wish to buy in pounds and ounces.'

Never mind the dubious veracity of stories such as these (and there are very many others, of similar flavour), there are a lot of people – some of whom should know better – who are only too willing to believe them and sometimes to disseminate them for propagandist purposes. It has to be conceded that many of these myths start off in a light-hearted spirit, having been invented as satire or as ways of filling newspaper columns at times when real news is in short supply – but later acquire a momentum of their own. However, certainly, when it comes to the rhetoric surrounding the debates about the European Union, hot myths are often every bit as important as cold facts.

One interesting feature of the scare-story cited above is that it refers to *judicial* proceedings. The *Thoburn* 'metric martyrs' prosecution has become one of the *causes célèbres* of Eurosceptical mythology. The *Factortame* saga, the early stages of which preceded *Thoburn* by more than a decade, generated at least as much political resonance. Much Euroscepticism, particularly in the run up to British entry into the EC in 1973, and for a decade or so afterwards, focused on what has been perceived as the cumbersome and corrupt 'Brussels bureaucracy' of the European Commission. Only comparatively recently have the courts – both the ECJ and

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5 The USA also uses non-metric units, and the prospect of damaging transatlantic trade by going metric has been one of the concerns about metrication in the UK.

6 *Daily Star*, 17 January 2001, p. 8.

7 [http://ec.europa.eu/unitedkingdom/press/euromyths/myth59\\_en.htm](http://ec.europa.eu/unitedkingdom/press/euromyths/myth59_en.htm)

the UK's own courts, giving effect to EC/EU law – become a major focus for Eurosceptical antagonism.

### **Euroscepticism – British Style**

Let us take a closer look at the phenomenon of Euroscepticism.

It is hardly a closely-guarded secret that, ever since Britain joined the EEC in January 1973, political opinions across the country about the pros and cons of membership and about the future development of the Community (now the Union) have been deeply divided. Among the EC membership Britain is of course not unique in having such mixed feelings, but Eurobarometer reports have fairly consistently shown it as being among the most Eurosceptical of the member states. The divisions of opinion are deep-seated though their nature and direction have frequently shifted during the 34 years of UK membership. They have many different dimensions, by no means coterminous with the boundaries of the political parties and they cannot be reduced simply to 'pro' versus 'anti' or 'enthusiastic' versus 'sceptical' positions. In the run-up to British entry, and for some time afterwards, Conservative Party leaders and supporters were generally in favour of UK membership of what was seen as an economically attractive free trade enterprise, while Labour Party supporters and trade unionists were deeply suspicious about the labour market implications and about possible constraints on policies of extended nationalization of private utilities and enterprises.

Since then, the parties themselves have undergone a sea-change and the politics of Euroscepticism has changed too. Thatcherite Conservatism in the 1980s initially continued to be cautiously friendly towards the EC, but became much less so as time went on, particularly after the passing of the Single European Act in 1986. Mrs Thatcher's famous 'Bruges speech', attacking the Commission and defending inter-governmentalism against the rise of a 'European superstate', was a notable milestone in signalling this transformation.<sup>8</sup>

The Labour Party, responding to its dismal election results, contrasted with the electoral successes of Thatcherism, relinquished most of its socialist agenda and moved some distance away from its historically symbiotic relationship with the trade unions. It has now reinvented itself as a party of free market neo-liberalism, allied with macro-economic discipline. Since 1997, the Blair-Brown governments (notwithstanding the controversies surrounding the Blair-Bush alliance in the 'war on terror') have, for the most part, been cautiously supportive of the EU.

But feelings remain very mixed. The more negative manifestation, nowadays labelled as Euroscepticism (in the early days of the Common Market, the counterparts of today's Eurosceptics were 'anti-marketeers') has many variants. But there is a common denominator in the anxieties about loss of 'sovereignty'. I have put this word in inverted commas to indicate the contestable nature of the concept. The sovereignty invoked by Eurosceptics has always had to do with concerns about the diminution of national autonomy and the erosion of parliament's monopoly as a law-making institution. Enthusiasts for the Union have tended (and this was certainly evident in the parliamentary debates that took place in the run-up to membership, and in the immediate aftermath) to proclaim the benefits of enhancing the UK's influence in the world as a leading member of a powerful political and economic unit.

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8 See M. Thatcher, *Downing Street Years*, 1993, pp. 742-746.

## **The UK Courts and European Union law**

From the earliest days of UK membership of the European Communities, the British courts have recognised that, in Lord Denning's words, 'rights or obligations created by the Treaty are to be given legal effect'<sup>9</sup> and this principle – an inescapable consequence of EC membership – has regularly been reaffirmed in subsequent cases (notably in *Factortame*, below). It has been noted that, in the UK, issues of Community law 'arise in many different types of proceedings in diverse courts and tribunals including prosecutions in magistrates' courts and the Crown Court, in (...) proceedings for judicial review, in industrial tribunals and in civil actions for damages and other remedies against both public bodies and commercial organisations.'<sup>10</sup> The most familiar device for challenging non-compliance of public authorities with EC obligations is to apply for judicial review in the Administrative Court.<sup>11</sup> A Rule of the Supreme Court enables the civil and criminal courts to apply to the ECJ for preliminary rulings under Article 234 (formerly Article 177) of the Treaty.<sup>12</sup>

There is, indeed, an important set of issues about the behaviour of national courts in the latter context – the question when and when not to refer an issue to the ECJ. It has been noted, for instance, that UK courts have become more willing to make preliminary references (as happened, as we shall see, in *Factortame* – but not in the *Thoburn* case) and have eased the restrictive criteria for so doing that were originally laid down in 1974 by Lord Denning in the case of *Bulmer v. Bollinger*.<sup>13</sup> Craig has suggested several explanations for this, one being that 'the very fact of referral may enable the national court to have some input into the substantive doctrine which is being developed by the ECJ.'<sup>14</sup> It has also been suggested that the capacity of courts that are lower in the judicial hierarchy to make references can enable them 'to circumvent higher court jurisprudence', as well as earning their decisions a higher profile among legal commentators.<sup>15</sup>

### **The Factortame saga**

'EC "rewrites" British Constitution' thundered *The Independent* (20 June 1990); 'Landmark Ruling Gives EC Power over UK Law' murmured *The Times*. Both newspaper headlines signalled the shockwaves generated by the ruling of the European Court of Justice, and associated decisions of the House of Lords, in *Factortame Ltd v. Secretary of State for Transport (No. 2)*.<sup>16</sup> Many cases, at least as significant for the UK, have been decided by the ECJ since the UK joined the European Communities in January 1973, but the *Factortame* saga has a special place in the political history of Britain's love-hate relationship with the Community and the Union. The saga unfolded more or less exactly at the point that the tide of opinion in Mrs Thatcher's Conservative

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9 *H.P. Bulmer Ltd v. J. Bollinger SA*, [1974] Ch 401

10 A. Le Sueur & M. Sunkin, *Public Law*, 1997, p. 684

11 For an extensive discussion of the nature of judicial review as applied in relation to issues of EC law see R. Plender, 'European Union Law' in M. Supperstone *et al.* (eds.), *Judicial Review*, 2005, Chapter 14.

12 *Ibid.*, Para. 14.8.1.

13 See note 9, *supra*.

14 P.P. Craig, 'Report on the United Kingdom', in A-M Slaughter *et al.* (eds.), *The European Court and National Courts – Doctrine and Jurisprudence*, 1998, pp. 195-224, at p. 221.

15 K.J. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in Slaughter *et al.*, *supra* note 14, pp. 227-252, at p. 242. For further discussion of these and related issues see K.J. Alter, 'The EU's Legal System and Domestic Policy: Spillover or Backlash?', 2000 *International Organisation* 54, pp. 489-518; C.J. Carrubba, 'Legal Integration and the Use of the Preliminary Readings Procedure in the European Union', 2005 *International Organisation* 59, pp. 399-418.

16 Case C-213/89, [1991] 1 AC 603.

Government was turning strongly in a Eurosceptical direction. As will be explained later, the ECJ's decision, and the UK's court rulings that followed from it, was – to most lawyers at least – inevitable and unsurprising. But to many non-lawyers, it highlighted with hindsight the magnitude of the constitutional implications of the European Communities Act 1972, which had given statutory effect to the UK's decision to sign up to the European Treaty.

The legal and constitutional ramifications (particularly the 'parliamentary sovereignty' implications) of the *Factortame* litigation, and other cases related to it, have been subjected to exhaustive analysis elsewhere<sup>17</sup> and only an outline, with no more than a (non-lawyer's) sketch of the complex technicalities, will be offered here. Its background lies in the Common Fisheries Policy (CFP), initiated in 1970 by the six founding member states of the EC, nearly three years before Britain joined the Communities in January 1973.<sup>18</sup>

The British fishing industry is economically important and politically vocal, and its voice was heard in the background to the debates in the Westminster Parliament in the run-up to entry. (It has, incidentally, been noted that one of many grievances raised by anti-market MPs in those debates was the fact that British accession to the CFP was announced in Parliament in December 1971, two months *after* the House of Commons had debated and agreed in principle to join the Communities).<sup>19</sup>

In 1983 a new 'Total Allowable Catches' regime was introduced to conserve fish stocks through the imposition of national quotas. Spain, which joined the EC in 1986, did badly in the quota allocation, and a number of Spanish fishing companies – Spanish fishermen seem to have been every bit as politically vocal as their British counterparts – sought to obtain part of the British quota either by purchasing fishing boats already registered as British (under a statute of 1894) or by re-registering their own boats in Britain, establishing subsidiary companies in the UK for the latter purpose. The UK government (lobbied by disgruntled British fishermen) tried to prevent this 'quota hopping' by introducing new requirements of nationality and residency for the crews of British shipping vessels, together with a requirement that the vessels operated from British ports. These measures were challenged in the ECJ and proved, in any case, difficult to enforce. So the decision was taken to legislate against the subsidiary companies. Provisions were included in the Merchant Shipping Act 1988 to prevent the registration of vessels as British unless they were owned by resident British citizens or by companies, three-quarters of whose shareholders were resident citizens.

The European Commission then brought an enforcement action against the UK in the ECJ, challenging the nationality requirement as an apparent breach of EC law.<sup>20</sup> But the more significant litigation in the context of the present discussion began with an application for judicial review brought by a number of Spanish companies, including *Factortame Ltd*, in the UK Queen's

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17 Every UK public law textbook or treatise published since the first *Factortame* judgments has included substantial discussion of the case (but coverage in political science textbooks has been very patchy and generally superficial, see below). There are also numerous case-notes in UK (and some overseas) legal journals. See in addition: Nicol, *supra* note 3; N.P. Gravells, 'Disapplying an Act of Parliament pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?', 1989 *Public Law*, pp. 568-586; D. Oliver, 'Fishing on the Incoming Tide', 1991 *The Modern Law Review* 54(3), pp. 442-251; P.P. Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*', 1991 *Yearbook of European Law* 11, pp. 221-255; Craig 1998, *supra* note 14; H.W.R. Wade, 'What has happened to the sovereignty of Parliament?', 1991 *Law Quarterly Review* 107, pp. 1-4; J. Drexler, 'Was Sir Francis Drake a Dutchman? – British Supremacy of Parliament after *Factortame*', 1993 *The American Journal of Comparative Law* 41(4), pp. 551-571; I. Loveland, 'Parliamentary Sovereignty and the European Community: The Unfinished Revolution?', 1996 *Parliamentary Affairs* 49(2), pp. 517-535; D. Morris, 'The Scope for Constitutional Challenge of Westminster Legislation', 1991 *Statute Law Review* 12(3), pp. 186-213; C. Harlow, 'Disposing of Dicey: from Legal Autonomy to Constitutional Discourse?', 2000 *Political Studies* 48, pp. 356-369.

18 For a comprehensive overview of the history and rationale of the CFP see M. Wise, *The Common Fisheries Policy of the European Community*, 1984.

19 Nicol, *supra* note 3, p. 80.

20 Case 246/89R.

Bench Divisional Court, claiming that the conditions laid down in the 1988 Act were in breach of various articles of the Treaty of Rome and thus infringed their rights under Community law. The UK government contended that the requirements of the Act were fully compatible with EC law and were merely intended to ensure that ships registered in Britain had a bona fide residency basis for being allowed to do so.

In March 1989, the Divisional Court then referred the issue to the ECJ under Article 177 of the Treaty, meanwhile granting the applicants an interim injunction, temporarily requiring the British government to allow the ships to remain on the register pending the ECJ's substantive ruling. The government successfully appealed against this injunction, the House of Lords holding that English courts could not grant interim relief that had the effect of disappling an Act of Parliament and that, in any event, according to s. 21 of the Crown Proceedings Act 1947, interim injunctions could not be granted against the Crown in civil proceedings.<sup>21</sup> However, their Lordships referred the matter to the ECJ.

In June 1990, the latter (ruling in advance of a substantive decision on the original reference by the Divisional Court) reaffirmed the by now well-established principle<sup>22</sup> that national courts are required to set aside any provisions of national law that prevents a directly applicable Community law from having full effect. The case then came back to the House of Lords, which now accepted that it was empowered to grant interim injunctions against ministers where an issue of Community law is involved.<sup>23</sup> In reaching this decision it made clear that it was exercising a jurisdiction expressly conferred on it by the UK Parliament under s. 3(1) of the European Communities Act 1972. So, whatever critics may have thought to the contrary, this was no revolutionary usurpation of parliamentary supremacy by an English court.<sup>24</sup> The UK Government issued an Order in Council to amend the relevant part of the 1988 Act. In July 1991 the ECJ ruled on the substantive issue, holding that the 1998 Act was indeed incompatible with Community law.<sup>25</sup>

This was by no means the end of the *Factortame* story, the political controversies surrounding which rumbled on through the 1990s, not least when a further ECJ ruling rubbed salt into the wound by confirming (by extension from its earlier decision in *Francovich v. Italy*)<sup>26</sup> that the UK must pay financial compensation to the Spanish companies which had been denied the right to fish.<sup>27</sup> Even as recently as 2002 the Court of Appeal heard a technical case relating to the payment of fees to a firm of forensic accountants who had prepared and submitted the earlier claims for damages.<sup>28</sup> And of course, the case remains as a black mark in the ledger of Eurosceptic grievances – marking the point at which the courts suddenly entered public and political consciousness as the allies of Brussels and the upholders of a new constitutional-legal order against the old order of unquestioned parliamentary sovereignty.

A number of commentators have discussed the *Factortame* cases in juxtaposition with the subsequent, and equally important, ruling of the House of Lords in *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission*.<sup>29</sup> In this case, which involved the

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21 *Factortame Ltd v. Secretary of State for Transport* [1990] 2 AC 85; [1989] 2 All ER 692.

22 See in particular the *Simmmenthal* case, Case 106/77, [1978] ECR 629.

23 *R. v. Secretary of State for Transport, ex p. Factortame Ltd* [1991] 1 AC 603.

24 See Adam Tomkins, *Public Law*, 2003, p. 117.

25 [1991] 3 All ER 769.

26 [1993] 2 CMLR 66.

27 Conjoined cases, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex p. Factortame* [1996] ECR I-4845. See also *R. v. Secretary of State ex p. Factortame Ltd (No. 5)* [2000] 1 AC 524.

28 *Factortame v. Secretary of State for the Environment, Transport and the Regions (No. 2)* [2002] 4 All ER 97.

29 [1995] AC 1.

employment rights of part-time workers under the Equal Pay Directive, the House of Lords felt quite confident about disapplying provisions of a UK statute with first referring the matter to the ECJ. Danny Nicol, who describes this case as ‘the natural follow up to *Factortame*’<sup>30</sup> observes that, ‘no longer did the United Kingdom’s highest court feel compelled to refer statutory provisions to the ECJ whenever it believed them to be incompatible with Community law. Now it was prepared to override them itself.’<sup>31</sup> He quotes a *Times* editorial (5 March 1994) as saying that, ‘by its methods in the EOC case the House of Lords has given Britain its first taste of a constitutional court.’ The newspaper anticipated a heated debate in Parliament, though in the event, as Nicol discovered, the case received only tangential parliamentary attention. The House of Lords also made clear that its ruling of incompatibility was directly effective without the need for any amendment of the legislation.

### The metric martyrs

As indicated earlier, metrication is one of those symbolic issues that seem to arouse an astonishing degree of nationalistic sentiment among British citizens, much of it seemingly out of proportion to the subject’s substantive importance. As we saw in an earlier section of this paper, it is a subject that features prominently in the long catalogue of Eurosceptical myths about the supposed threats to the British way of life that are posed by the arrogance of ‘Brussels bureaucrats’. The adjective ‘imperial’, attached to traditional UK weights and measures, is itself evocative of nostalgic images of Britain’s past history as a major world power. But the debate about metrication in Britain long predates the establishment of the European Communities (there were numerous official reports and parliamentary debates on the subject throughout the 19th century) and a decision in principle to move towards the replacement of imperial units of measurement by metric ones was taken by Harold Wilson’s Labour Government in the 1960s, several years before the enactment of the European Communities Act 1972.<sup>32</sup>

The ‘*metric martyrs*’ case that so agitated the Eurosceptic sentiments of UKIP (see above) concerned four food retailers, in different parts of the country, who had fallen foul of UK weights and measures legislation that had given effect to an EU metrication directive ((80/181/EEC). An important feature of this legislation was to require traders who continued to use imperial measures to display the metric equivalents as well. The defendant whose case attracted the most attention then, and has continued to do so since, was Steven Thoburn, a greengrocer from the city of Sunderland in the north of England, who was determined to continue to display his goods marked only with imperial weights and to use only weighing machines calibrated accordingly. Three of the cases (including Thoburn’s) had involved successful criminal prosecutions; the fourth case arose from magistrates’ rejection of an appeal against conditions that had been attached by a local authority to the renewal of a trading licence. The four cases were conjoined in appeals by way of case stated (technically not quite the same as a judicial review) from magistrates’ courts to the Queen’s Bench Divisional Court.

The main substantive issue in the case was whether legislation passed after the enactment of the European Communities Act 1972 could be said to have impliedly repealed s. 2(2) of the 1972 Act. The latter had conferred a so-called Henry VIII power<sup>33</sup> to enable primary legislation

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30 Nicol, *supra* note 3, p. 196.

31 *Ibid.*, p. 198.

32 Early in his academic career, the writer of this paper outlined the history of the subject in a short report, ‘Metrication: An Interim Review’, 1976 *Political Quarterly* 47(3), pp. 332-7.

33 A term used with reference to the 16th century monarch’s autocratic reputation for legislating by royal decree.

to be amended by means of subordinate legislation for the purpose of implementing any Community obligation in the UK. The Weights and Measures Act 1985 had been amended by this means to give effect to the metrication directive. The appellants argued that this Henry VIII power could only be used in respect of legislation already on the Statute Book at the time the 1972 Act had been passed and that the amendments to the 1985 Act, which were the basis of the appellants' convictions, were unlawful.

The details of the case can be found in an immensely detailed and learned judgment by Lord Justice Laws, who ruled against the appellants.<sup>34</sup> The essence of his finding was that there can be no limitation on the use of a Henry VIII clause. The principle of parliamentary sovereignty means that no Parliament can bind its successors, and this means that Parliament cannot dictate the form of future legislation. He also ruled that there was a distinct category of *constitutional* statute – of which the European Communities Act is one important instance – to which the principle of implied repeal (overriding previous statutory provisions merely by contradicting those provisions in a subsequent Act of Parliament) did not apply. A constitutional statute can only be repealed in express terms. This echoes Craig's comment in the late 1990s on the significance of *Factortame* that, at the very least, it 'means that the concept of implied repeal (...) will no longer apply to clashes concerning Community and national law.'<sup>35</sup> The relevant passage in Lord Justice Laws' judgment is as follows:

'We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA [European Communities Act 1972] clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.'<sup>36</sup>

This passage encapsulates the same kind of message that came as such a shock to those observers of the *Factortame* case whose heads had been buried in the sand about the extent of the constitutional revolution consequent upon UK membership of the EC. The idea of there being a sub-species of 'constitutional statute', treated as something distinctive by the courts, as identified by Lord Justice Laws, would have been unthinkable in the pre-EC era, a generation or so ago.<sup>37</sup> The absence of a codified British Constitution has meant that we in the UK – lawyers and non-

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34 *Thoburn v. Sunderland City Council* [2002] 4 All ER 156.

35 P.P. Craig, *Administrative Law*, 1999, p. 302.

36 *Thoburn v. Sunderland City Council* [2002] 4 All ER 156, 185.

37 Though, by convention, the House of Commons has tended to treat constitutionally significant Bills, such as the European Communities Bill, in a particularly formal and inclusive way – e.g. by holding the committee stage, where the Bill is considered in detail, clause by clause, on the floor of the House rather than in a much smaller standing committee.

lawyers alike – have had to climb a very steep learning curve to get to grips with new ways of talking and thinking about constitutional matters.<sup>38</sup>

The Divisional Court refused the appellants leave to appeal to the House of Lords, but certified that a point of law of general public importance was involved; the House of Lords itself subsequently refused leave to appeal. A campaign was launched to secure a free pardon for Mr Thoburn, and an application, backed by the civil liberties pressure group, Liberty, was subsequently lodged with the applications committee of the European Court of Human Rights; but in February 2004 the committee declared the application inadmissible.<sup>39</sup> A few days after learning about this decision, Mr Thoburn died of a heart attack, but his ‘martyrdom’ has been immortalised on numerous campaigning web sites.<sup>40</sup> Eventually he, posthumously, and his supporters were to be vindicated. In September 2007 the Commission announced that it was reversing its policy and that the UK would not be required to go metric by 2009. Commissioner Verheugen told the BBC that: ‘I organised a huge consultation, and the result was that industry told us there was no problem with the existing system. I want to bring to an end a bitter, bitter battle that has lasted for decades and which in my view is completely pointless. We’re bringing this battle to an end.’<sup>41</sup> So an apparent defeat in the courts had given a lot of additional momentum to a political campaign – one that eventually proved successful.

It should be noted, moreover, that the courts in which this battle was fought were not the ECJ in Luxembourg but the UK’s own domestic courts. Luxembourg’s jurisprudence has empowered the UK courts, and the latter have had no hesitation in accepting their role as upholders of European Law, without the need for constant external prompting by their ECJ colleagues. This provides further food for Eurosceptic thought.

### ‘Juridification’ – the Nicol analysis

Interesting light has been shed on the development of a more strongly law-based constitution in the UK since Britain joined the EC by Professor Danny Nicol,<sup>42</sup> who has examined not only the relevant case law but also the parliamentary debates since the 1960s relating to the Community and Britain’s membership of it. He takes as one of his starting points a famous and much discussed passage in the judgment of Lord Bridge in the House of Lords decision on *Factortame (No. 2)*:

‘If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well-established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.’<sup>43</sup>

Questioning the use of the phrase ‘entirely voluntary’, which assumes the exercise of informed judgment, Nicol’s careful examination of the parliamentary debates of the 1960s and ’70s, casts

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38 But see the cautionary comment on the implications of Sir John Laws’ judgment in an editorial note in 2007 *The Statute Law Review* 28(2), pp. iii-v.

39 Application no. 30614/02 *Thoburn v. the United Kingdom*.

40 See for instance, the metric martyrs’ own web site, <http://www.metricmartyrs.co.uk/>; and the web site of the British Weights and Measures Association, <http://www.bwmaonline.com/>

41 <http://news.bbc.co.uk/1/low/uk/6988521.stm>

42 Nicol, *supra* note 3.

43 *R v. Secretary of State for Transport ex parte Factortame (No. 2)* [1991] AC 603, at 658.

serious doubt on whether many MPs (or even ministers) appreciated the constitutional implications of membership. In particular, very little appreciation or interest was shown in the pivotal role of the ECJ (MPs were much more worried about the *legislative* functions of the Commission and the Council of Ministers, and the threat that they might usurp the law-making sovereignty of the Westminster Parliament). And only very gradually did it seem to dawn on them, after *Factortame* and the EOC case, and in the run-up to ratification of the Maastricht Treaty, that the UK courts themselves, empowered by key rulings of the ECJ, would regard it as part of their function to enforce EC law, even in the face of primary Westminster legislation.

Having examined the debates in 1971 on the principle of entry, Nicol suggests the following explanation for MPs' remarkable lack of awareness of the constitutional implications:

'Perhaps the most convincing explanation is the constitutional milieu in which parliamentarians functioned. During the preceding sixty years the courts had not only respected the doctrine of parliamentary sovereignty but had (at least until the late 1960s) adopted a restrained attitude to judicial review. The fact that the judiciary had for so long operated only on the fringes of the political arena meant that for parliamentarians the world of public law was alien territory. They were accustomed to working within a politics-based constitution largely untouched by legal concerns. Their inability to appreciate the likelihood that Community membership would entail a shift in power from Parliament to the judges stemmed in no small measure from their unfamiliarity with having to grapple with legal doctrines.'<sup>44</sup>

And, in the concluding section of his book he reiterates the point that politicians in those early days were simply not accustomed to the idea of courts playing such an important constitutional role:

'MPs were so unfamiliar with a prominent judicial role that they were in no position to debate it until they had experienced it. Even those MPs who were previously barristers or solicitors seemingly divested themselves of their legal baggage once they entered the political arena.'<sup>45</sup>

Thus the crucial metamorphosis – the 'juridification' – of a 'politics-based' constitution, in which the courts were willing to accept without question the sovereign prerogatives of Parliament, into a 'law-based' constitution, in which legislators find themselves circumscribed by a higher level of constitutional norms which the courts are ready and willing to apply, even in the face of primary legislation, seems to have happened without Parliament realising what it was signing up to.

### **The United Kingdom: An unjuridified polity – until now<sup>46</sup>**

The *Factortame* and *Thoburn* cases belong to that vast and ever-growing catalogue of important EC/EU cases that adorn the pages and the footnotes of lawyers' textbooks and journals. This

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44 Nicol, *supra* note 3, p. 75.

45 *Ibid.*, p. 254.

46 This section is derived in part from G. Drewry, 'Law and Public Management – The Human Rights Challenge' (editorial essay, written as guest editor of a special issue), 2001 *Public Money and Management* 21(3), pp. 3-4.

paper has touched upon some of the legal and constitutional implications, but one particularly important point to be noted is that the political and parliamentary implications are every bit as important as the legal ones. Both cases, in their different ways, were concerned with important areas of national and European public policy, and with legislation that is a product of political processes. Both of them were a focus of pressure group activity – representing in one case, the fishing industries of Britain and Spain, in the other, a group of people opposed in principle to metrication, angry about what they saw as Brussels’ interference with a cherished feature of the British way of life, and then united round the ‘martyrdom’ of one of their number who had made use of the courts to make his point.

Quite apart from the merits of the substantive arguments he puts forward, Nicol’s analysis demonstrates that constitutional analysis that focuses exclusively on case law will always run the risk of being too one-sided. Even though the courts themselves, when deciding cases, may be very cautious about making use of parliamentary records to throw light on legislative intentions,<sup>47</sup> that is no reason for the academic analyst to adopt a similar self-denying ordinance and so deprive him/herself of the opportunity to look at related questions from two complementary perspectives.

This paper underlines the point that, if ever there was a justification for downplaying the links between law, on the one hand, and politics and public administration/policy on the other, that justification is now defunct – substantially for the Europe-related reasons discussed here. In any case, the links are surely so self-evident that the tardy and still somewhat patchy recognition of them – certainly by most UK political scientists – seems intellectually perverse. In case the obvious needs spelling out, there follow some of the arguments for forging close links between law and public administration.

Woodrow Wilson’s famous essay on ‘The Study of Administration’ first published in 1887 (when Wilson was in the pre-presidential phase of his career, at Princeton University), propounded a simple working definition of public administration as ‘detailed and systematic execution of public law.’<sup>48</sup>

Even if we may think this definition a little simplistic, surely there can be no room for serious dispute that the study and practice of public management and the organisation of public services – and indeed the character of the state itself – in all developed societies are grounded in law. As this writer has noted elsewhere:

‘The state itself is quintessentially a *legal* construction. Law is a defining ingredient in the classical Weberian conception of states as entities having a monopoly of the legitimate use of force. The literature, both ancient and modern, on theories of government and the state is replete with legal concepts and terminologies - such as rights, justice, legitimacy and (of course) the seminal conception of state formation by way of social contract. Contract, in a less abstract, sense - though not always with the lawyer’s strict connotation of a binding agreement, enforceable in the courts - has become an important mechanism for organising the delivery of public services in the [New Public Management] era. Law is an instrument of social regulation and control; it is also one of the most visible products of state activity. In many countries politicians and political parties compete to offer ever more ambitious

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47 The restrictive ground rules for this were established by the House of Lords in the landmark case of *Pepper v. Hart* [1993] AC 593.

48 Woodrow Wilson, ‘The Study of Administration’, 1887 *Political Science Quarterly* 2, pp. 197-222.

legislative programmes. They often do this in the same breath that they court popular support by decrying the growth of state regulation.<sup>49</sup>

Yet in the UK the traditional perception of public administration, and of its offspring, public management, has traditionally been based - in contrast to administrative systems elsewhere in Europe - very much on a non-legalistic, even an anti-legalistic, model. Professional training in law is not a prerequisite of bureaucratic service. Thus we find the following passage in a respected 1950s textbook, well-remembered from this writer's undergraduate days:

‘in all the countries of Western Europe except Britain it has been the tradition for centuries that the most important posts in central administration should be filled by men (*sic*) trained in the Law Faculties of the Universities...[and, some exceptions notwithstanding] a fair contrast can be drawn between the position of lawyers in British bureaucracy and in that of Western Europe. In the former they are advisers to the administration, in the latter they are the administration itself.’<sup>50</sup>

The continental administrator is, in general, as C.H. Sisson wrote at about the same date, ‘a lawyer, specialising in that branch of law – namely administrative law – which is mostly concerned with the functions of government.’<sup>51</sup> The British administrator, manifestly – and notwithstanding some of the important developments discussed in this paper – is not.

A traditional antipathy towards *legalism* in public administration and public management (heavy reliance upon and deference to formal administrative codes and legal rules, requiring legal expertise to understand and operate them) has been complemented by a suspicion of *juridification* (substantial reliance on the courts to resolve administrative difficulties and disputes). When it comes to British attitudes towards constitutional issues, it has been observed, by way of partial explanation of the generally limited and ill-informed nature of debate about the European Treaties over the last few decades, that ‘political culture in the UK places little stress on formal documents’<sup>52</sup>; and that constitutions (including the EU Constitutional Treaty) ‘are often perceived to be a reflection of national failure.’<sup>53</sup>

There have been many suggested explanations for this historically lukewarm attitude towards juridification and formal constitutional documents, in many of which the name of Professor A.V. Dicey, who at the end of the nineteenth century proclaimed the merits of parliamentary sovereignty and preached against the importation of anything resembling the French *droit administratif* into English law, features prominently. What Dicey would make of the European Union, of the ECJ, and indeed of the Human Rights Act 1998 does not bear thinking about.

Dicey would also be somewhat disconcerted by other aspects of the juridification phenomenon, including the huge changes that have taken place in the UK's legal infrastructure. Not only are judges taking on new responsibilities in the enforcement of European law, they are doing so in a radically changed institutional setting. Who would have imagined, even a decade ago, that

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49 G. Drewry, ‘Public-Private Partnerships: Rethinking the Boundary between Public and Private Law’, in S.P. Osborne (ed.), *Public-Private Partnerships: Theory and Practice in International Perspective*, 2000, pp. 57-69, at p. 58.

50 W.J.M. Mackenzie & J.W. Grove, *Central Administration in Britain*, 1957, p. 96.

51 C.H. Sisson, *The Spirit of British Administration*, 1959, p. 39.

52 C. Church & D. Phinnemore, *The Penguin Guide to the European Treaties*, 2002, p. 22. See also C. Church, ‘The United Kingdom: A Tragic-Comedy in Three Acts’, in A. Anneli & J. Ziller (eds.), *The European Constitution and national constitutions: ratification and beyond*, 2007, pp. 127-136.

53 *Ibid.*, p. 23.

the UK would have an Administrative Court, a Ministry of Justice, an independent Judicial Appointments Commission and (from late in 2009) a Supreme Court that is to take over the appellate functions of the House of Lords? It is no coincidence that all these changes have coincided with the phenomenon of juridification – with the growing political impact of judicial decisions (EU law, human rights and judicial review). Judges have become key actors in and around the core functions of government. The British government itself has become increasingly aware of the impact of the courts on the administrative process – as reflected in its cautionary handbook for administrators, *The Judge Over Your Shoulder*, the first edition of which appeared during the Thatcher years and the most recent (the fourth), in 2006, now updated to take account of the Human Rights Act 1998 and (to a lesser extent) EU law.<sup>54</sup>

And the significance of this shift in the political salience of the judicial role has been recognized by the radical modernization of the machinery of the administration of justice and by tightening up the rules and procedures that are designed to maintain both the appearance and the reality of judicial independence. One interesting by-product of this is that the newly empowered judges have become much more vocal than in the past in defending their territory against political encroachments by the executive, and the dialogue between government and judiciary (e.g. in respect of human rights decisions against ministers) has sometimes been quite heated.

It has been noted that the ECJ has recently come in for renewed interest among European political scientists, ‘who long ignored the Court as a technical and largely irrelevant institution.’<sup>55</sup> This writer has long lamented the fact that most UK political scientists and public administration academics have failed to take due account of the public law aspects of their subject. Even today, standard student textbooks on UK politics and government make very little reference to EU law and the ECJ and any references to big cases like *Factortame* tend to be cursory and simplistic (though some coverage of high-profile Human Rights Act cases is beginning to appear). Notwithstanding the ‘renewed interest’ among political scientists, noted above, a similar demarcation between the academic disciplines can also be found elsewhere in Europe.

If there was once perhaps some slight excuse for this rigid demarcation between the study of law and the study of public administration thirty years or so ago when this writer first began to complain about it, the excuse has worn increasingly thin as time has gone on. And Europe – both in its Council of Europe (the European Convention on Human Rights) and European Union manifestations, as discussed in the body of this paper – has played a huge part in effecting a significant juridification of the UK’s hitherto largely unjuridified polity. Political scientists, please take note.

Meanwhile, having noted the juridification (some might prefer the term judicialisation) of British politics, what conclusions might we reach about the merits of this phenomenon? If we accept that power has been shifting away from the elected legislature towards the courts and non-elected judges, should we be glad or sorry? In general, people seem to want it both ways – the reassurance of having a device that ensures limited government, some pleasure perhaps at seeing ministers embarrassed in judicial proceedings, but much more negative feelings when ‘undemocratic’ judges arrive at conclusions that the observer in question happens to disapprove of. And Eurosceptics must surely have particular concerns about the growing activism and self-confidence of courts that are – as in the cases we have looked at – so unequivocally committed to the enforcement of European law.

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<sup>54</sup> <http://www.tsol.gov.uk/Publications/judge.pdf>

<sup>55</sup> W Mattli & A-M Slaughter, ‘The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints’, in Slaughter *et al.*, *supra*, note 14, pp. 253-276, at p. 253.

The phenomenon of juridification (or judicialisation) has been evident across Europe,<sup>56</sup> as the role and importance of constitutional courts have grown. Juridification is an ongoing process – to use an old cliché, a journey rather than a destination – but for many countries it has been a journey across a fairly familiar landscape, in which the political impact of the courts (at least in administrative law) has been manifest. For the UK, lacking a codified constitution and with its historic traditions of judicial subordination to a sovereign Parliament, the journey has begun – but the landscape is less familiar and the destination less certain.

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<sup>56</sup> See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, 2000; Z. Kühn, 'The Judicialisation of European Politics', in Paul M. Heywood *et al.*, *Developments in European Politics*, 2006, Chapter 12.