

# Statutory Interpretation: A Collaboration between Democratic Legislatures and the Courts?

## Address to the Government Legal Service for Scotland 10 November 2021

1. It is a pleasure to have this opportunity to address you again as it has been several years since I last gave a lecture to Scottish Government lawyers in Victoria Quay. In recent times I have applied my mind in a number of lectures to the scope of judicial law-making in private law and in public law.<sup>1</sup> Two of those lectures were in Scotland this summer and some of you may have heard one of them. But I will not be covering that ground today. I have not, as yet, addressed statutory interpretation, which is a particular form of judicial law-making. This is my topic today.
2. I am of course aware that, when I address you on this topic, there is an elephant in the room in the form of the Supreme Court's judgment in the UNCRC Incorporation Bill case. It is not appropriate that I, as a member of the panel which heard that reference, should seek to defend it or explain it extra-judicially. But I hope that my discussion of the wider topic of statutory interpretation may set that judgment in its context.
3. It will not, I think, be disputed that statutory interpretation is a form of decision-making and has a creative element. If a statutory text were completely clear in its terms, there would be no need for an adjudication by the courts. It is because there is not that clarity that the courts have the unique role of giving an authoritative interpretation of the provisions which a democratic legislature has enacted.
4. The debates which have been conducted on the subject of statutory interpretation should, I believe, be understood against the background of some constitutional fundamentals, which are familiar but which provide the context for the specific roles of the legislature, the executive and the judiciary. The principles of the Rule of Law and the separation of powers underpin our liberal democracy. The former gives legitimacy to the courts' task and the latter gives discipline to the courts' performance of that task.
5. Both here in Edinburgh and in Westminster it is the executive branch of government that formulates policies and presents legislative proposals to the democratic legislature. It is the legislature which is the primary lawmaker in our society as it has the responsibility of making the choices which change our laws by the enactment of legislation, which can impose obligations or confer rights and other advantages on citizens and others in the relevant jurisdiction in the United Kingdom. It is the task of the democratic legislature to make those choices and to approve or amend the

words of a Bill which will usually have been drafted by skilled parliamentary counsel. Once the legislature's work is complete and the Bill has received Royal Assent the legislature has normally no further role in its interpretation, unless undertaking the task of amending the legislation to provide further clarity. Interpretation is the task of the courts and it is a critically important role in the preservation of the Rule of Law. I will shortly discuss the concept of the "intention of the legislature" and the debate which is being conducted as to the suitability of such a phrase. At this stage I will say, as neutrally as I can, that the courts' task is to analyse the language of the statute and, where necessary, the surrounding circumstances which the law has recognised as legitimate aids to interpretation, to ascertain the purpose of the legislative provision in question.

6. It is often not an easy task. It is well known that language is an imprecise means of conveying meaning. It does not and cannot have the precision of mathematical formulae. Thus, from its enactment an Act may not convey with clarity how the legal rules which it has created are to be applied in particular circumstances. This is so especially if legislation is drafted with a high degree of generality, setting out principles which it leaves the courts to apply in the circumstances of whatever case comes before them. A policy maker and a parliamentary drafter cannot foresee all of the circumstances to which a statutory provision will apply. The passage of time, technological change and changing social values will mean that a provision on the statute book may be applied in strikingly different circumstances from those which existed when the provision was initially enacted or which members of the legislature may have foreseen at that time. The courts have the task of ascertaining from the materials which they are allowed to look at, whether it was the purpose of the statutory provision that it should be applied in such changed circumstances.
7. Once upon a time, judges were able to consult the oracle. Lord Dyson, in his lecture "The Shifting Sands of Statutory Interpretation"<sup>2</sup> records how in 14<sup>th</sup> century England judges on occasion thought it appropriate to consult legislators in Parliament to ascertain the meaning of a statute and on occasion adopted an exorbitantly purposive interpretation of a statutory provision to make it mean what the consulted legislators assured them was their intention. That facility looks so strange to a modern lawyer who recalls that the expression in Parliament by a person who later becomes a judge of a view as to the meaning of a statutory provision may be a ground for recusal, as in *Davidson v Lord Advocate*.<sup>3</sup> The shortcut of consulting members of the legislature ceased to be available once the parliamentarians who passed a statute themselves passed away; and it ceased over time to be an acceptable approach to statutory interpretation. The approach then moved towards literalism but, by the middle of the 16<sup>th</sup> century, the courts often adopted a purposive approach which sought to ascertain the true intention of those who made the statute. The quality of parliamentary drafting was chequered at best up until the middle of the 19<sup>th</sup> century. Public law statutes were drafted by committees of the House of Commons who met in Middle Temple Hall, and were assisted by lawyers. Promoters of private bills often worked without that assistance. Even when there was legal input, it did not impress Jeremy Bentham who said of the legal draftsman

that he would “if he were not the most crafty, be the most inept and unintelligent, as well as unintelligible of scribblers”.

8. The establishment of the office of Parliamentary Counsel in 1869 was a very significant innovation which improved the quality of parliamentary drafting markedly. One can readily see the greater precision and uniformity of style in the public statutes of the final decades of the 19<sup>th</sup> century in comparison with earlier statutes. The emergence of professionally drafted legislation affected the judges’ approach to their task. It resulted in the courts paying more respect to the literal language of the statutory provision, while still seeking to reflect the intention of Parliament. Lord Halsbury encapsulated the approach in a judgment in 1898 when he stated:

“We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign [by which he meant extraneous] circumstances so far as they can justly be considered to throw light upon the subject.”<sup>4</sup>

We have not moved far from that position in over 120 years since then.

### **Whom are parliamentary drafters addressing?**

9. Before turning to the debate as to whether it is helpful for judges to say that they are seeking to ascertain the intention of the legislature, I wish to address what I think is an important question about the interpretation of the words which parliamentary drafters use. That question is: whom are the parliamentary drafters addressing?
10. In my view, it is wrong to think that the drafters of legislation are principally addressing the judges who will interpret their words in contested litigation. Parliamentary counsel have other priorities. First, they are addressing their words to the parliamentarians who are to consider and enact the legislation. MPs or MSPs are obviously necessary addressees of the parliamentary drafter’s texts as it is they who are charged with considering, approving or amending the proposed legislation. If they cannot understand the effect of the words in a Bill, there is a serious deficit in our democratic system. Secondly, and equally significantly for the Rule of Law, the addressees are the citizens and other people who become subject to new rules or obtain new entitlements on the enactment of the legislation. In a democratic society based on the Rule of Law they should, in most circumstances, be able to understand the effect of the legislation from the words of the legislative text, with the assistance of a non-specialist lawyer if necessary. Thirdly, the legislation addresses the public officials who are charged with its implementation. In addition, the courts must be an addressee of the legislation as they have the interpretative task to perform. But because in an ideal world, the words of a statute should be comprehensible and their application to the facts of a particular case should in most cases not be the

subject of legal dispute, the courts should in my view come lower in the pecking order of addressees. Thus, I would allocate them the fourth place.

### **“Ascertaining the intention of Parliament”**

11. In performing their role as interpreters of the language in statutes judges have often said that the aim of statutory interpretation is to ascertain and give effect to the intention of Parliament. In recent times there has been an interesting debate as to whether it is helpful to speak of a quest to identify the intention of Parliament. The debate has involved judges, including on the one hand Lord Sales<sup>5</sup> and Lord Dyson,<sup>6</sup> who have argued in favour of the concept of ascertaining the intention of the legislature, and on the other Lord Burrows<sup>7</sup> and Sir John Laws,<sup>8</sup> who have argued that that language is potentially misleading and therefore unhelpful. In the academic community there can be found a similar division of views, with professors such as Neil Duxbury, Richard Ekins, John Gardner and Joseph Raz broadly favouring the concept of a legislature’s intention and professors such as Ronald Dworkin, David Feldman and Jeremy Waldron taking a contrary view.<sup>9</sup>
12. There are powerful arguments which can be advanced against the expression “the intention of Parliament”. First, and fundamentally, it is not possible to identify the subjective intention of the legislature as a body. Parliament’s intention is a fiction because the legislature as a body has no conscious state of mind by which it proposes to act in particular way. As Sir John Laws said, a state of mind is “a characteristic of a single person, it cannot be possessed by a group or institution”.<sup>10</sup> Nor, secondly, is it possible to identify a common subjective intention among the people who have collaborated in the production of the legislation such as the bill team, the parliamentary drafter, the Minister, and the members of the legislature, which in Scotland would be the MSPs but in the UK Parliament would include both MPs and members of the House of Lords. Thirdly, it is argued that speaking of “intention” is potentially misleading because it masks what the courts are doing when they interpret a statute. Further, it can also mislead because it may appear to focus on the intention of the legislature on the date of the enactment of the legislation and underplay the fact that the courts have to interpret a statute with the benefit of hindsight in circumstances which the legislature may not have foreseen. Some critics of the concept of “parliamentary intention”, including Lord Burrows and Sir John Laws, prefer to speak of the purpose of the legislation.
13. It is undoubtedly true that a legislature as an institution does not have a subjective intention and that the members of the legislature or the majority of members who enacts the provision in question in most cases may not have a common intention. I recall many years ago asking Alick Buchanan-Smith, whose untimely death deprived Scotland of an honourable man and an excellent MP, how he, as an individual MP, carried out the nigh-impossible task of scrutinising the legislation which is introduced into Parliament. He replied, unsurprisingly, that an MP could take a detailed and informed interest only in a few areas of policy. He or she had to take advice from and rely on the judgment of trusted colleagues in deciding whether to support legislative proposals in other areas of policy. One might add that legislators who vote in favour

of a provision in a Bill may not have a shared understanding as to its effect. Some members of a legislature, weighed down by other commitments, may simply adopt the party line in supporting or opposing a legislative provision.

14. I accept that there is no such thing as a subjective intention of the legislature that the courts can ascertain. Nonetheless, I find myself on the side of those who see the well-established idea of legislative intention as a useful concept. I reach this view for several reasons which are derived in large measure from the lectures and articles which my colleague, Lord Sales, has delivered or published.
15. First, the concept of intention is an objective one. Defenders of the concept do not assert that they can ascertain the subjective intention of a legislative body which is a collective.
16. Secondly, the concept is constitutionally important because it focusses on the activity of the democratic legislature which is the primary law-making body in each of our democratic polities. The concept alerts the court to the need to avoid crossing the line between interpreting and legislating, the latter being the role of the democratic legislature. It is not the proper role of the judges to import into a statute normative content of which they approve where it is not plausible that the legislature would have accepted it. Lord Sales expressed the matter in this way:

“Legislation is a deliberate collective act by a legislature authorised to issue new law, chosen and voted upon by individual parliamentarians in light of their views about what the public in fact want or what parliamentarians take to be their collective interests. The legislative will is the will of the people, in refined and concretised form. ... The legislature clearly does exercise agency. It acts deliberately and on the basis of reasons to change the law in specific ways and to further specific objectives. ...[T]he notion of legislative intention is the concept which is appropriate to capture this constitutional and indeed factual reality.”<sup>11</sup>

17. Thirdly, the concept explains why, when a provision is ambiguous or its application to the specific facts of the case is unclear, judges have for many years looked to the materials which were made available to Parliament from which inferences can be drawn as to the likely intention of the legislature. Looking at materials made available to the legislature and disregarding materials which were not is consistent with the task of ascertaining the legislature’s intention in enacting the legislation.
18. Fourthly and similarly, the principle of legality, to which I will turn later in this talk, can readily be understood as a doctrine integrated into the concept of legislative intention.
19. Fifthly, where a court has to apply the words of a statute to a circumstance which may not have been foreseen when the provision was enacted, the concept allows the court to address the question of whether and if so how a reasonable legislature would have wished the enactment to apply, if it had had notice of that circumstance.

20. Sixthly, there is the matter of precedent. Parliamentarians in enacting legislation use the English language which, as Lord Justice Denning stated, “is not an instrument of mathematical precision”<sup>12</sup> and they will know that passages in a statute will often need to be interpreted and applied to specific facts by the courts when a dispute arises as to their meaning. Just as parliamentary counsel must treat the members of the legislature as one of their principal addressees in order to support representative democracy, so also there is an imperative on judges to give fair notice to the members of the legislature, and the lawyers advising them, of the way in which the courts may be expected to read the texts which they create. This involves giving proper notice of the general approach of the courts to statutory interpretation. That approach has long involved the concept of ascertaining the intention of the legislature and senior judges have explained clearly how the concept is to be applied.

21. I have no objection to the concept of the “purpose” of the legislation so long as it is synonym for the objective assessment of parliamentary intention as I have discussed it. In a famous description of the approach to statutory interpretation in the *Quintavalle* case<sup>13</sup> Lord Bingham stated:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed.”

He then warned against an excessive focus on and a literal approach to the provisions giving rise to the difficulty, which he said would encourage immense prolixity in drafting. He continued, equating the two concepts of intention and purpose:

“It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will. Because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute... The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the historical context of the situation which led to the enactment.” (Emphasis added)

22. The courts have made it clear that when they speak of the intention of a legislature they are not seeking to ascertain the subjective intention of the drafter, the majority of members of the legislature who supported the measure, or anyone else. As Lord Reid said in *Black-Clawson v Papierwerke*<sup>14</sup> in 1975, “We are seeking the meaning of the words which Parliament used.”

23. The position of the courts has been set out in the magisterial speeches in the *Spath Holme Ltd* case in 2000,<sup>15</sup> and in particular in the speech of Lord Nicholls. The case provides a useful summary of the judicial approach which deserves study. Lord Nicholls stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and

may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even the majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”<sup>16</sup>

I note that the concluding words of that quotation – the words cannot reasonably be taken as used by Parliament with that meaning – is an objective test and focuses on the meaning which a reasonable legislature as a body would have been seeking to convey in using the statutory words under consideration.

### **The approach to statutory interpretation**

24. The basic approach to statutory interpretation is not controversial. Lord Nicholls stated:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.”<sup>17</sup>

25. The courts look at the words in question and use principles of interpretation, which are often simply common sense, as guides. Established assumptions and presumptions, such as the presumption that the legislature intended there to be a mental element in a statutory offence unless it indicated a contrary intention, may have to be employed. Words or passages in a statute derive their meaning from their context. The passage must be read in the context of the section as a whole and the wider context of a relevant group of sections. Other provisions in the statute, and the Act as a whole, may provide relevant context and may assist in the interpretative process. These internal aids enjoy a particular status as they are the words which the legislature has chosen to convey meaning. Lord Nicholls recognised this as a matter of constitutional importance:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”<sup>18</sup>

26. Other external aids may provide the setting in which the legislation was enacted. But for the constitutional reason which Lord Nicholls mentioned, they must be used with circumspection. They play a secondary and subordinate role. Law Commission reports, reports of Royal Commissions and advisory committees, and Government

White Papers may disclose the background to the statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation. Explanatory notes, prepared under the authority of the legislature are a relevant external aid. I think that they might be used more effectively to explain complex statutory provisions than they sometimes are and wonder if they might not achieve the clarity which one often finds in the explanatory notes in subordinate legislation? But all external aids are secondary aids. They are not there to displace meanings conveyed by the words of the statute that are clear and unambiguous and which do not produce absurdity.

27. A major innovation during my career at the Bar was the decision of the House of Lords in 1993 in *Pepper v Hart*,<sup>19</sup> which relaxed the rule that prohibited the use of the record of parliamentary proceedings as an external aid. It has since been applied to proceedings in the Scottish Parliament.<sup>20</sup> The case has proved controversial with judges. The House of Lords set three conditions on the use of such materials as an aid to interpretation. First, the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity. Secondly, the material must be or include one or more statements by a minister or other promoter of the Bill.<sup>21</sup> The third condition is that the statement must be clear and unequivocal on the point of interpretation which the court is considering. That third condition is a hurdle that parliamentary statements can rarely surmount. It is rare that the courts are assisted by *Pepper v Hart* material and many judges will discourage counsel from devoting extensive resources to research the proceedings and taking up the court's time by presenting political statements which fail to meet that condition. There is a serious question whether the product of such research, which, as an external aid and part of the legislative background, is at best a secondary source of guidance as to meaning, justifies the effort and expense. Lord Hoffmann has spoken of the "large spoil heap of material which has been mined in the course of research, without yielding anything worthy even of a submission".<sup>22</sup> There is also a danger that, when studying parliamentary proceedings, judges may speculate as to why certain things may or may not have happened in the progress of a Bill without knowing the political circumstances that pertained. Such speculation is not legitimate.
28. Further questions arise when parliamentary proceedings are considered in a challenge as to compatibility with the Human Rights Act 1998. The Supreme Court has recently discussed this matter in its decision in the case of *SC and CB*, in which Lord Reed, delivering the judgment of the court, warned of the need for considerable care in using parliamentary materials in connection with the Human Rights Act.<sup>23</sup>
29. Another development during my legal career has been the shift in the courts' approach to the interpretation of taxing statutes. This has occurred in large measure as a response to aggressive and artificial tax avoidance schemes. The courts, which in the past may have leaned towards a more literal approach in the interpretation of taxing statutes than was the practice in relation to other statutes, have in recent years adopted a much more purposive approach towards taxing statutes thereby



providing a rationale for the so-called “Ramsay approach” to tax avoidance schemes.<sup>24</sup>

30. A third development in the field of statutory interpretation in the 1990s and early years of this century has been the increased reliance which the courts have placed on the principle of legality, which is, or at least originated as, a presumption about legislative intention. It is a means of protecting common law rights and freedoms and is based on the assumption that Parliament would not intend to abrogate such rights. Applying that assumption to the interpretation of a statute, the principle of legality provides that a legislature must use clear, unambiguous and specific language if it is to curtail or abrogate fundamental common law rights; general words will not suffice. There is a question as to the proper scope of the principle of legality in this context. The uncertainty as to what is and what is not a fundamental common law right militates against legal certainty. I will return to this point shortly. The courts have also prayed in aid the principle of legality to require public authorities to provide a justification for their actions in what is analogous to a proportionality exercise if their acts restrict or abrogate fundamental common law rights, such as access to the courts or freedom of expression.<sup>25</sup>

### **Devolved legislation**

31. In the final part of this talk I turn to the interpretation of the legislation of the devolved legislatures. Because the devolved legislatures are creatures of statute and there are statutory limits placed on their powers, the devolution legislation had given the courts a role of constitutional review of primary legislation and in particular the role of interpreting the constitutional limits which have been enshrined in statute.
32. It is well established that the Scotland Act gives the Scottish Parliament, as a democratically elected legislature, plenary powers to determine its own policy goals. But as Lord Rodger observed in *Whaley v Watson*,<sup>26</sup> the Parliament operates within a legal, and therefore justiciable, framework. Thus, in the Scottish Legal Continuity Bill case, the Supreme Court stated:

“The powers of the Scottish Parliament, like those of Parliaments in many other constitutional democracies, are delimited by law. The Scottish Parliament is a democratically elected legislature with a mandate to make laws for people in Scotland. It has plenary powers within the limits of its legislative competence. But it does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and schedules 4 and 5 to the Scotland Act to which the courts must give effect. The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its

legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.”<sup>27</sup>

I agree with Aileen McHarg and Christopher McCorkindale that challenges must be grounded in “a careful analysis of the wording of the Scotland Act and of the purpose and effect of the impugned devolved legislation”<sup>28</sup> as the judges will make their assessment in that manner.

33. An important provision in the Scotland Act is section 101(2) which provides that any provision of an Act of the Scottish Parliament or a Bill for such an Act “is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly”. This provision encourages the courts in approaching questions of legislative competence to respect the political legitimacy of the Scottish Parliament. It has proved useful in preventing legislation from being struck down as invalid. For example in *Henderson v HM Advocate*,<sup>29</sup> the High Court read the relevant provision narrowly so as not to extend the requirement to make a lifelong restriction order to offences under the Firearms Act 1968 which is a reserved statute.
34. The former Lord Advocate and distinguished jurist, James Wolffe QC, in his Renton Lecture in 2020<sup>30</sup> described the effect of section 101 on the drafting and interpretation of parliamentary provisions in these terms:

“It is not necessary to say explicitly on the face of every Act of the Scottish Parliament that, for example, the provisions apply only as regards Scotland, or are subject to Convention rights. It follows that, when reading a generally worded power in an Act of the Scottish Parliament (including a power to make subordinate legislation) or indeed the provisions of a Scottish Statutory Instrument, the limits on the legislative competence of the Scottish Parliament should be kept in mind, and, if necessary, the provision may require to be read down.”

In my view, there is no doubt that section 101(2) of the Scotland Act can apply in many circumstances, such as in relation to the geographical application of a legislative provision and its compliance with Convention rights, and in cases such as *Henderson v HM Advocate* in which one could readily read a provision as not applying in relation to a reserved matter. But there are limits on what section 101 can do if we are not to undermine legal certainty.

35. I have already given my views on whom parliamentary drafters are addressing when they prepare the text of a Bill of the United Kingdom Parliament. In relation to the legislation of devolved legislatures there are in my view additional addressees. They are those officials, including those in your Legal Service, who carry out the pre-legislative constitutional vetting procedures which are designed to enable the responsible Minister to affirm the legislative competence of a Bill at its introduction<sup>31</sup> and to inform the Presiding Officer in his decision whether to issue a positive or negative statement at that introduction.<sup>32</sup> The responsible Minister and

the Presiding Officer are addressees as are the Lord Advocate and the United Kingdom Law Officers who may refer a Bill to the Supreme Court in the four-week period beginning with the passing of the Bill.<sup>33</sup> These officers have the primary responsibility for the constitutional review of the Parliament's Bills. They need to be able to perform their tasks properly. The parliamentary and legal vetting procedures are important safeguards of the legality of the Parliament's legislative provisions and the words of a Bill must be addressed to those who perform these roles. Parliamentary counsel and the officials who assist them must surely ask themselves whether the drafting of the relevant provisions enables those officers to carry out the tasks which have been assigned to them by the Scotland Act.

36. Judges also must ask themselves questions. The interpretative duty under section 3 of the Human Rights Act 1998, as interpreted by the House of Lords in *Ghaidan v Godin-Mendoza*,<sup>34</sup> has given the courts a power to depart from an unambiguous meaning of a statutory provision in order to make it Convention-compliant and thereby avoid having to make a declaration of incompatibility. It remains a matter of debate as to how far this "muscular approach" to statutory interpretation should go. Similarly, there is a need for judges to show caution in the formulation of fundamental rights or principles to which the legality principle is applied. My colleague, Lord Sales put it well when he stated:

"If Parliament does not have fair warning of what the words it uses will be taken to mean, its ability to function as an institution which amends the law in accordance with what the elected representatives intend (and may have promised to achieve) will be undermined: the link between democratic will and law will be disrupted. If a citizen does not have a fair warning of what the words used in legislation mean, his ability to plan his affairs will to that extent be undermined."<sup>35</sup>

## Conclusion

37. The Rule of Law is a precious inheritance. People working in each branch of government need to protect it and seek to maintain the respect of the public for the law.

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<sup>1</sup> "Judicial Law-Making in a Changing Constitution" (2015) 26 Stellenbosch Law Review 471; "The Scope of Judicial Law-Making in the Common Law Tradition" (2020) 84 *Rabels Zeitschrift* 211; "The Scope of Judicial Law-Making in Constitutional Law and Public Law" (forthcoming in *Judicial Review*), accessible at <https://www.supremecourt.uk/docs/judicial-law-making-in-constitutional-law-and-public-law-paper.pdf>.

<sup>2</sup> Lord Dyson, "The Shifting Sands of Statutory Interpretation" (Statute Law Society Lecture, 9 October 2010), found in Chapter 7 of Lord Dyson, *Justice: Continuity and Change* (Hart Publishing, 2018).

<sup>3</sup> [2004] UKHL 34; 2005 1 SC (HL) 7.

<sup>4</sup> *Eastman Photographic Material Co Ltd v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571, 575.

<sup>5</sup> Lord Sales, "In Defence of Legislative Intention" (Denning Society Lecture 2019) accessible at: <https://www.supremecourt.uk/docs/speech-191119.pdf>

<sup>6</sup> Lord Dyson, "The Shifting Sands of Statutory Interpretation" (Statute Law Society lecture, 9 October 2010), found in Chapter 7 of Lord Dyson, *Justice: Continuity and Change* (Hart Publishing, 2018).

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- <sup>7</sup> A. Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (The Hamlyn Lectures, 2017) (Cambridge University Press, 2018).
- <sup>8</sup> Sir John Laws, “Statutory Interpretation – the Myth of Parliamentary Intent” (Renton Lecture 2017), accessible at <http://www.statutelawsociety.co.uk/wp-content/uploads/2017/11/The-Myth-of-Parliamentary-Intent-text.pdf>.
- <sup>9</sup> N. Duxbury, *Elements of Legislation* (Cambridge University Press, 2013), R. Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012), J. Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009), R. Dworkin, *Law’s Empire* (Belknap Press, 1986), D. Feldman, “Statutory Interpretation and Constitutional Legislation” (2014) LQR 143, J. Waldron, *Law and Disagreement* (Oxford University Press, 1999).
- <sup>10</sup> Sir John Laws, “Statutory Interpretation – the Myth of Parliamentary Intent”, p 5.
- <sup>11</sup> Lord Sales, “In Defence of Legislative Intention”, pp 7-8.
- <sup>12</sup> *Seaford Court Estates v Asher* [1949] 2 KB 481, 499.
- <sup>13</sup> *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, para 8.
- <sup>14</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, 613.
- <sup>15</sup> *R (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349.
- <sup>16</sup> *Spath Holme Ltd*, 397.
- <sup>17</sup> *Spath Holme Ltd*, 397.
- <sup>18</sup> *Spath Holme Ltd*, 398.
- <sup>19</sup> [1993] AC 593.
- <sup>20</sup> *Martin v HM Advocate* [2010] UKSC 10, 2010 SC (UKSC) 40, para 25.
- <sup>21</sup> There may also be admitted such other parliamentary material as is necessary to understand such statements and their effect: see the speech of Lord Browne-Wilkinson at p 640.
- <sup>22</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, para 40.
- <sup>23</sup> *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2021] 3 WLR 428, paras 163-185.
- <sup>24</sup> *Barclays Mercantile Business Financial Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684; *UBS AG v HMRC; DB Group Services (UK) Ltd v HMRC* [2016] UKSC 13, [2015] 1 WLR 1005.
- <sup>25</sup> “The Scope of Judicial Law-Making in Constitutional Law and Public Law” (forthcoming in *Judicial Review*), accessible at <https://www.supremecourt.uk/docs/judicial-law-making-in-constitutional-law-and-public-law-paper.pdf>
- <sup>26</sup> 2000 SC 340, 349.
- <sup>27</sup> *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, 2019 SC (UKSC) 13, para 12.
- <sup>28</sup> A. McHarg, C. McCorkindale, “The Supreme Court and devolution: the Scottish Continuity Bill Reference” (2019) 2 *Jur. Rev.* 190, 193.
- <sup>29</sup> [2010] HCJAC 107, 2010 SCCR 909.
- <sup>30</sup> W.J. Wolffe, “The Renton Lecture 2020: Devolution and the Statute Book” (2021) 42(2) *Statute Law Review* 121.
- <sup>31</sup> Scotland Act 1998, section 31(1).
- <sup>32</sup> Scotland Act 1998, section 31(2) and (2A).
- <sup>33</sup> Scotland Act 1998, section 33.
- <sup>34</sup> [2004] UKHL 30, [2004] 2 AC 557.
- <sup>35</sup> P. Sales, “Rights and fundamental rights in English law” (2016) 75(1) *CLJ* 86.