Anxious Scrutiny and the Principle of Legality

Lord Sales[*]

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Introduction

1. In a blogpost by Professor Mark Elliott[1] about the judgment of the Supreme Court in *R (Spitalfields Historic Building Trust) v London Borough of Tower Hamlets* ("*Spitalfields*")[2] he suggests that there is an unjustified analytical gap in the judgment between its treatment of the principle of legality, as an approach to statutory interpretation, and the principle of anxious scrutiny (better termed heightened scrutiny), as an approach to rationality review. The approach in *Spitalfields* is criticised as inappropriately binary, and insufficiently nuanced. In that regard a contrast is drawn with Chamberlain J's nuanced approach to rationality review, including heightened scrutiny review, in his judgment in *R (KP) v Secretary of State for the Home Department* [2025] EWHC 370 (Admin).

2. According to Professor Elliott the approach in *Spitalfields* is inappropriately binary in three respects:

    (i) 'the drawing of a binary distinction between [the categories of heightened-scrutiny rationality review and the principle of legality] is in tension with the more nuanced approach that applies to questions of the normative of importance [sic] as they pertain *within* the field of heightened-scrutiny review' – we should instead acknowledge, as in *KP*, 'that the questions that arise are not binary but ones of degree, the normative importance of the value that is in play shaping the extent of the decision-maker's latitude and the corresponding rigour of judicial oversight';

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[*] I am grateful to my Judicial Assistant, Dana McGibbon, for her assistance in the preparation of this talk.

[1] Public Law for Everyone, 28 March 2025, 'The Principle of Legality and Heightened-Scrutiny Rationality Review", <https://publiclawforeveryone.com/2025/03/28/the-principle-of-legality-and-heightened-scrutiny-rationality-review-the-supreme-courts-judgment-in-the-spitalfields-case/> accessed 3 November 2025. And see now Professor Elliott's case-note [2025] CLJ 229.

[2] [2025] UKSC 11; [2025] 4 All ER 721.

(ii) The application of the principle of legality is excessively binary in that there is an unnecessarily rigid trigger condition, rather than a graduated recognition of points of normative concern;

(iii) The application of the principle of legality is excessively binary or monolithic in terms of the effect it produces on the meaning of the statute: either the statute is treated as modified ('radical interpretive surgery') or it isn't. 'It is … possible for a statutory limit to be read in that, rather than precluding any interference with the relevant right or principle, precludes only such interference as cannot be justified', comparing the approach to the royal prerogative in *Miller II*.

3. According to Professor Elliott, points (ii) and (iii) are 'both artificial and unnecessary'; 'The appropriate question, surely, is not whether a given right or principle is important enough to trigger an interpretive presumption of a single, preordained strength, but what degree of interpretive presumption, if any, should apply in the light of the normative importance of the value that is in play. The courts already consider themselves capable of adopting a comparably gradated approach in relation to heightened-scrutiny review, and there is no good reason why an equivalent approach could, and should, not apply in respect of the principle of legality.' Professor Elliott claims that this is 'not an argument … in favour of an instinctive, free-wheeling approach.'

4. The suggestion seems to be that there is a continuum between the principle of legality and heightened-scrutiny review, in terms of how executive action should be justified. When some fundamental right or principle is implicated by a decision, it seems however tangentially, if one cannot modify the meaning of a statute by reference to the principle of legality one is required to apply heightened scrutiny to any exercise of discretion under the relevant statutory power. This appears to mean that if a claimant's argument for a modified interpretation of the statutory power by application of the principle of legality fails, it is nonetheless likely to succeed, or at least will be capable of succeeding, as an argument based on the heightened scrutiny doctrine.

5. Against all this, I argue that there are good grounds for each of the points criticised at (i) to (iii) above. In particular, I contend that this continuum view of the principle of legality and heightened scrutiny (point (i) above) is not justified.

6. For doctrinal reasons there is indeed a significant gap between the operation of the principle of legality and of the doctrine of heightened scrutiny. To achieve an effect under the principle of legality to modify what is otherwise the ordinary interpretation of a statutory provision according to the natural meaning of the words used in it, a very powerful normative impulse is required. The question is, what legitimates a court in giving what is in substance an amended meaning to the words of a statute? Key points in assessing this are that (a) for basic constitutional reasons a court is required to respect the choices made by Parliament as expressed in the language chosen by it; (b) judges do not have authority to legislate as they see fit to regulate some topic; and (c) judges have to be conscious that what they do takes place under the public gaze, so that, in order to gain public acceptance for what they do and for their role in upholding the rule of law, they have to demonstrate clearly that they have applied objective and defensible criteria when finding that the principle of legality is engaged to modify the ordinary meaning of a statutory provision.

7. The ultimate justification for the principle of legality is that it is a tool for determining and properly following the intention of Parliament. This was aptly summarised by Lord Dyson MR in *AJA v Commissioner of Police for the Metropolis:* 'the principle of legality is an important tool of statutory interpretation. But it is no more than that. When an issue of statutory interpretation arises, ultimately the question for the court is always to decide what Parliament intended.'[3] It is a principle which is fundamentally directed at seeking to ascertain the true intention of Parliament, as the basis for the interpretation of legislation.[4] This imposes an important discipline on the courts. The principle of legality will only be engaged by a right or principle which is established and fundamental. The principle will not apply in relation to 'more marginal claims of right'.[5] The courts are not free

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3 [2013] EWCA Civ 1342; [2014] 1 All ER 882 per Lord Dyson MR at para 28.

4 See P Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act' (2009) 125 LQR 598.

5 See Lord Hodge at paras 33, 36 and 43 of *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, citing with approval the judgment of Laws J in *R (Lightfoot) v Lord Chancellor* [2000] QB 597, 609.

to impose new rights, values or principles as they see fit. Their task in determining and adhering to legislative intent is to identify rights, values and principles which are so well established that the inference can fairly be drawn that Parliament legislated with them in mind.[6]

8. For the principle of legality to apply four related conditions should be fulfilled: (a) the relevant presence of, and close normative vicinity of, a constitutional principle – which may be framed in terms of a fundamental or constitutional right requiring recognition, or some other constitutional principle of significance (of which there is a range);[7] (b) the constitutional principle must be one which is so clear as to be taken to be recognised by Parliament itself, so that it is plausible to maintain that Parliament legislated on the unspoken assumption that the statute was to be taken to be modified by the principle – which is the basic theory underlying the principle of legality; (c) the principle must be identified according to reasonably objective criteria to which courts can appeal to justify invoking the principle; and (d) the modification of the ordinary meaning of a statute – ie of the *text* of a statute – must be plausible and articulated in a way which demonstrates the court's recognition of the points in para 6 above.[8] Even where those conditions might otherwise be fulfilled, the expression of Parliament's will to override the interests protected by the principle might be so clearly expressed as to disqualify modification of the meaning of the provision by reference to it.[9]

9. By contrast, where a statutory power conferring a discretion on a public authority cannot be 'read down' under the principle of legality, an area of discretion is left intact. The focus then shifts from a constrained reading of the will of Parliament to an intention to confer a discretion on the public authority for it to choose how to act. Even if in some circumstances the extent of the discretion is reduced to some extent by reference to the same or similar constitutional principles, it still exists in a substantive sense, because Parliament intends that it should. The question for the court when the principle of legality is invoked is not whether the *exercise* of a particular statutory power was lawful in a given case (the question to which the

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6 P Sales, 'Rights and Fundamental Rights in English Law' [2016] 75 CLJ 86; also P Sales, 'A Comparison' (n 4).

7 See P Sales, 'A Comparison' (n 4).

8 For discussion of these points, see P Sales. 'Rights and Fundamental Rights' (n 6); P Sales, 'Modern Statutory Interpretation' (2017) 38 Statute Law Review 125.

9 *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131.

rationality test is directed), but rather whether the *scope* of the power itself is limited by the presumption that fundamental common law rights and principles cannot be overridden by general or ambiguous words. That is why we said in *Spitalfields* that the principle of legality involves a form of interpretive surgery in relation to the text of the statute.[10]

10. Also, heightened scrutiny is capable of coming into play in relation to practically any statutory (or, one may add, prerogative or common law) discretionary power, to introduce some constraint on the exercise of that discretion. There is thus no necessary or precise correlation between the range of powers which exist and the circumstances in which heightened scrutiny may be required in the exercise of such discretion. The same point can be made about the flip side of heightened scrutiny, where the range of lawful action under a discretionary power is taken to be especially wide, eg in sensitive areas of social or economic policy or the 'macro-political area' (what used sometimes to be referred to as super-*Wednesbury*[11]). Rationality review does operate on a spectrum. Heightened scrutiny is required in areas where, because of the impact on a constitutional right or principle or especially important interests recognised by the law, the court expects that rationality requires a high level of confidence that the decision is indeed justified, which may limit the range of rational decisions available and may impose particular demands regarding the quality of reasoning or evidence relied upon.

11. It is orthodox to say that the *Wednesbury* rationality standard is not monolithic, but rather encapsulates a 'sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake'.[12] Dicta to that effect abound. In *R v Ministry of Defence ex p Smith,*[13] Sir Thomas Bingham MR succinctly stated that 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is rational'; in *R (A) v Lord Savile of Newdigate*[14] Lord Woolf MR explained that where a fundamental right is at stake, or where a significant impact on other relevant interests is threatened, then the options available to the reasonable decision-maker

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10 *Spitalfields*, para 72.

11 Typically, when discussing *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 594-598.

12 *R (Begbie) v Department for Education and Employment* [2000] 1 WLR 115, at 1130 per Laws LJ.

13 [1996] QB 517, 554-556.

14 [2000] 1 WLR 1855.

are curtailed because it would be unreasonable to reach a decision which contravenes or could contravene the relevant consideration, unless there are sufficiently significant countervailing considerations;[15] in *R (King) v Secretary of State for Justice*[16] Lord Reed stated that 'the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests'; in *Pham v Secretary of State for the Home Department*[17] Lord Sumption stated: 'It is for the court to assess how broad the range of rational decision sits in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which … the court is competent to reassess the balance which the decision-maker was called on to make given the subject matter'; and see *Spitalfields*, para 54. The principle of legality, by contrast, is focused very precisely on the meaning of a specific statutory text.

12. There are further important differences. First, the principle of legality is a type of constraint on what Parliament can do. It operates as a type of manner and form constraint: if Parliament wishes to legislate contrary to a constitutional right or principle, it must do so in clear terms. The principle of heightened scrutiny is a constraint on what the executive (or other public authorities) can do. A basic application of principles of the separation of powers under the UK's constitution suggests that the latter will be much easier to justify normatively than the former. That normative difference itself suggests that there should be a significant normative gap between the two doctrines and their effect. The authority of a court to identify constraints on executive action is well recognised and justified in administrative law. It is not at all the same thing for a court to introduce constraints upon valid parliamentary action. Under rationality review, it is the public authority's reasons for acting which are scrutinised. Under the principle of legality, it is Parliament's reasons for acting (ie legislating in these terms) which are in issue. A court does not have authority to disqualify Parliament's reasons; it only has

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15 at paras 34-37.

16 [2015] UKSC 54; [2016] AC 384 at para 126.

17 *Pham v SSHD* [2015] UKSC 19; [2015] 1 WLR 1591 at para 107. See also *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010; [2021] 1 WLR 472, particularly at para 155; and P Sales, 'Rationality, proportionality and the development of the law' (2013) 129 LQR 223, 226: 'depending on what is at stake (for both the interests of any individual affected by a decision and for the public interest), the margin of discretion, evaluative judgment or appreciation allowed to a public authority under both [the rationality and the proportionality] standards may be treated as narrowed or widened'.

authority to interpret what it has said, including by taking account of background assumptions it has made.

13. Secondly, the principle of legality has to take account of the typical form of the exercise of authority by Parliament in legislating. The typical form of legislation is by way of bright-line rules, unless Parliament expressly specifies otherwise and qualifies a rule by open-textured language – such as 'reasonable' – which necessarily confers a degree of discretionary authority on a court which is asked to apply that rule; or confers a discretion on an identified decision-maker, such as a Minister. The mode of legislation is important, because it is by bright-line rules that Parliament transmits its authority and secures outcomes which it intends to achieve.[18] Any modification of a statutory provision which a court can plausibly achieve by application of the principle of legality, having regard to the points in para 6 above, will tend therefore to be relatively bright-line in effect, to avoid the impression that the court is just making something up.[19] It is not often plausible to take a bright-line statutory provision and then construe it as only applying if the relevant party (say, the executive) can justify its application. Either it applies or, because of the operation of the principle of legality, it doesn't.

14. The criticisms at (ii) and (iii) are related. A strict trigger point for the principle of legality is required in order to be sure that its application corresponds with (and can be demonstrated by the court to correspond with) the intention of Parliament, and does not involve the courts in improperly usurping a legislative power. The operation of the principle of legality should reflect the strong normative imperative to read a statutory provision in a particular way, which is ordinarily to disapply general words rather than to change them into a rule which is not bright-line in form.[20] Unspoken assumptions as to the meaning intended by Parliament do not plausibly take the form that words such as 'you may do this' or 'you may not do

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18 Cf A Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 University of Chicago Law Review 1175: Scalia argues for the US Supreme Court to lay down bright-line rules in doctrine, rather than standards which operate on an 'all things considered' basis, as the best way to transmit the decision-making authority of the Supreme Court throughout the legal system.

19 See P Sales, 'Legislative Intention, Interpretation and the Principle of Legality' (2019) 40 Statute Law Review 53.

20 This limitation is inherent in the idea that a particular constitutional right or principle should be of such salience as to be obvious to Parliament when it legislates: see P Sales, 'A Comparison' (n 4), 605-606; P Sales, 'Legislative Intention' (n 19), 62. Also see P Sales, 'Crown Powers, the Royal Prerogative and Fundamental Rights', ch 14 in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015), at 385-386.

that' are to be read as if they said 'you may do this only if x condition of justification is satisfied' or 'you may not do that unless x condition of justification is satisfied'. Accordingly, on this view, the principle of legality does not operate according to a spectrum in the same way as the rationality standard, with a graduated force of application matched by a graduated range of effect on a smooth slope.

15. Thus I argue, against Professor Elliott's vision, that for the principle of legality to apply it *is* important to identify an interpretive presumption of 'preordained strength', since it is only on that basis that a court can plausibly maintain that Parliament must have legislated on the assumption that what it said was to be read as subject to the putative constitutional right or principle. I also contend that in order to produce a plausible modification in the meaning of a statute, the textual amendment should be clear and should be capable of being seen as something other than the court thinking the amendment is a good idea. This tends towards fairly bright-line forms of modification, because Parliament legislates in bright-line terms (or clearly indicates when it chooses not to do so). It seems to me that, despite his protestations, Professor Elliott's vision *is* a plea for an 'instinctive, free-wheeling approach' by the courts to interpretation of particular statutes. For example, to read into a clear statutory power that it can only be exercised to the extent that it is justified to do so (eg according to a principle of proportionality, as in *Miller II*[21] in relation to a prerogative power) looks very close to the court making up a constraint as it goes along, because it happens to think it's a good idea.[22] In *Miller II*, the court was not faced with interpretation of a legislative text, but with a different exercise, properly within its ordinary remit to uphold the law, concerning the identification and interpretation of a soft-edged or open-textured constitutional principle.

16. In fact, even for heightened rationality review the graduated slope of application is not so smooth as Professor Elliott suggests. Although the contest is one between the court's view and that of the executive (rather than a contest with Parliament's apparent intention on an ordinary language reading of the statutory text), the executive is still the primary decision-maker as authorised by Parliament (and, as is often the case, will usually have a degree of democratic authority which is stronger than the court's) and the court has to be able to justify on objective grounds its

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21 *R (Miller) v Prime Minister* [2019] UKSC 41.

22 For a warning against this form of slippage, see J Varuhas, 'The Principle of Legality' [2020] CLJ 578.

intervention to strike down their action as irrational and unlawful. To do that, if the heightened scrutiny approach is to be applied, the court has to be able to point to a clearly identifiable underlying constitutional right or principle or other powerful interest recognised by the law which is being infringed by the executive action in question, in order to explain why it is normatively acceptable to apply something other than the standard rationality approach. The standard rationality approach is an expression of the ambit of the discretion which Parliament – other things being equal - intended should be conferred on the decision-maker. It operates as a well-established default rule which Parliament understands, and Parliament legislates in the light of it and implicitly endorses it.[23] To justify a departure from the regular application of that standard according to its usual *Wednesbury* formulation, a normative justification has to be identified according to objective criteria. That is so whether the effect is to expand the degree of discretion inherent in the rationality standard, on a super-*Wednesbury* basis, or to narrow it on a heightened scrutiny basis. This means there needs to be a reasonably determinate trigger in this area as well to justify the operation of the heightened scrutiny principle. The normative impulse does not need to be so strong as under the principle of legality, because the normative effect is less powerful (since the text of the statutory rule is not being changed), but it still has to have force beyond an identifiable threshold to justify departure from the ordinary rationality standard.

17. The contours for application of heightened scrutiny under the rationality standard are similar to the contours for application of the principle of legality, since they tend to follow the same constitutional rights and principles as justifications for departing from the generally applicable normative standard in each case (the usual rationality standard and the natural meaning of the statutory text, respectively). But, for the reasons explained, they do so with a large gap between the two lines, representing the intended zone of discretion for a decision-maker in the former case.

18. Strictly, in the case of rationality review, it might be better to speak of recognition of the contours of constitutional *values*, rather than rights, to convey the idea that in general terms they are defeasible in the sense that the decision-maker retains a discretion (albeit one which is more constrained than in other circumstances) to put

23 P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223.

other factors into the balance against them.[24] This captures the fact that by this stage of the analysis one has excluded the possibility that the text of the statute itself has to be read down by reference to the principle of legality, because the normative force of the constitutional value is not so strong as to constitute something amounting to a constitutional right or principle with power to affect the meaning of the statute or because Parliament has deliberately legislated to override such a right or principle and to confer a discretion on the decision-maker. I would characterise my approach, by contrast with Professor Elliott's, as one which involves 'Taking Statutes Seriously'.

Spitalfields **and the Supreme Court's approach to heightened scrutiny and the principle of legality**

19. The *Spitalfields* case concerned a claim by the Spitalfields Historic Building Trust for judicial review of the local Council's decision to grant planning permission for the redevelopment of an old brewery.

20. The planning application initially came before the Council's development committee at a meeting in April 2021. Five committee members were present at that meeting. They voted unanimously to defer consideration of the proposal. The proposal was then reconsidered at a later meeting in September 2021.

21. By the time of the September 2021 meeting, the composition of the committee had changed, such that only three of the original five members remained.

22. The Council's Standing Orders, made pursuant to powers in the Local Government Act 1972, provided that where a planning application is deferred, only members present at the previous meeting are able to vote on it at the subsequent meeting. Therefore, according to the Standing Orders, at the September 2021 meeting only three committee members were able to vote. By a 2-1 majority, the Committee resolved to grant planning permission.

23. The Trust applied for judicial review of the grant of planning permission, on the ground that it had been unlawful to exclude Committee members from voting at the September meeting if they had not been present at the April meeting. The Trust's

[24] As Chamberlain J found had occurred in the *KP* decision, in an acceptable manner, at paras 78, 83 and 94-95.

judicial review claim was refused by the High Court, and its appeal against that refusal was dismissed by the Court of Appeal.

24. Before the Supreme Court, the Trust's principal argument was that a councillor's 'right to vote' is of such importance that it can be restricted only by clear words in primary legislation, and that the general language used in the relevant provisions of the Local Government Act 1972 was insufficiently clear to restrict such a right. The case therefore ultimately turned on a narrow issue of statutory construction.[25]

25. The Supreme Court unanimously dismissed the Trust's appeal. We held that the principle of legality was *not* engaged, because the councillors' right to vote on business of the local authority is not an established right recognised by the common law outside the statutory regime of which it forms part, but only comes into being as part of that regime and cannot be regarded as having normative life apart from that regime, so that the principle of legality was not triggered and the existence of the right fell to be analysed according to the ordinary interpretation of the statute itself.[26] The relevant provisions of the Local Government Act 1972 had to be construed according to their natural meaning. The ordinary meaning of the provisions is that the power to make standing orders to regulate the proceedings of committees includes the power to regulate the entitlement to vote.[27]

26. In the course of the judgment, we noted that this broad statutory power to make standing orders is not unrestricted: it is subject to ordinary public law requirements that the power must be used rationally and for a proper purpose. In particular, we noted that the context would require the application of an 'anxious scrutiny' or heightened scrutiny standard of rationality review. In so doing, we accepted that the principle of democracy is a constitutional value in this context which is capable of grounding the engagement of the heightened scrutiny requirement, even where no specific individual right is engaged.[28]

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25 Para 26. It was accepted by the Trust throughout the proceedings that if the restrictive voting rule set out in the relevant standing orders was within the scope of the power in the Paragraph 42 of Schedule 12 to the Local Government Act 1972, upon the proper construction of that provision, then there was no other public law ground on which they could be challenged: it was therefore accepted that if the power existed, its exercise by the Council in making the relevant standing orders was rational and for a proper purpose.

26 Para 70.

27 Paras 63-66.

28 Para 55.

27. We therefore (1) accepted that the standard of rationality review is highly context-specific, and in the circumstances of this case was one involving heightened scrutiny, while also (2) maintaining that the engagement of the principle of legality will not apply in the absence of the direct engagement of a relevant common law right or principle.

28. Professor Elliott questions the compatibility of those two propositions. The point of this paper has been to try to explain why they are well capable of living alongside each other.