Statutory Interpretation in Theory and Practice

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My topic this afternoon is statutory interpretation in theory and practice. As First Treasury Counsel (1997-2008) I experienced a period of significant development in the law of statutory interpretation. I would say that this has continued since I became a judge, and indeed I have participated in it. I want to reflect a little on both the theory and the practice of statutory interpretation over this period.

As a basic point I would emphasise that statutory interpretation is a form of applied constitutional law. The approach the courts adopt to the interpretation of statutes reflects presuppositions about the relationship between the courts and Parliament and the courts and the executive. Although at a basic level the philosophy of language has some implications for the approach which has to be adopted to the interpretive exercise – and I would say that it makes a contextual and purposive approach inevitable, as that is necessary to make sense of and give meaning to language – it does not commit us to anything more by way of specific details. Many methodological approaches to statutory interpretation are possible within that broad framework. The one we choose as the determinate methodology to be applied to arrive at particular meanings of statutory texts reflects constitutional presuppositions and commitments.

The most obvious of these is a commitment to parliamentary sovereignty. Parliament is the body which has authority to make law in the form of statutes and exercises agency in doing so. One can date the decisive move to this model back to Tudor times. Henry VIII and Thomas Cromwell used Parliament and legislation to give legitimacy to the Henrician break from Rome. As Chris Thornhill writes, during the English Reformation "the principle of rule by the king-in-parliament became a key legitimating device of royal government".[1] This meant that Parliament's own authority was enhanced, with the consequence that the courts began to treat the will of Parliament as expressed in the words it used in statutes as having special force. As Alan Cromartie explains in *The*

[1] Chris Thornhill, *A Sociology of Constitutions* (2011), p. 97.

Constitutionalist Revolution, "One sign that people were impressed by parliamentary power was that they placed increasing stress on parliament's historical intentions."[2]

This move has been reinforced in various ways since then, including in particular through the Glorious Revolution of 1688 and the political settlement it brought in and through the extension of the franchise and the increased emphasis given to democratic ideology from the nineteenth century onwards.

This means that the courts conceive of themselves as faithful agents of Parliament when giving effect to statutes. But this model conceals a lot as well. Interpretation involves much more than reading words on a page. They have to be placed in context, which includes having regard to the purpose for which they are being used. That gives rise to questions about how one derives that purpose. The purpose of legislation is not usually branded on its forehead, so judges inevitably have a role in determining what it is. That determination can affect the meaning to be given to the words used by Parliament.

In addition, no speech act – including a speech act interpreted by reading the text of the speech down in some way – takes place in a vacuum. Understanding speech involves a lot of presuppositions drawn from the context in which it is used. When the speech act is in the form of a formal statement of legal propositions in a statute, the presuppositions include a range of constitutional and legal predicates which Parliament is taken to have assumed to be in place without needing to state them.

As I wrote in an article in 2017:[3]

> "Statutes are legal instructions transmitted into an existing, highly developed framework of legal values and expectations. The existing law, modes of reasoning and established localised value systems provide the interpretive context in which a statute is read. Upon receipt of a statutory text, lawyers and the judiciary seek to knit it into the fabric of the law. The statute may represent a radical departure from what has gone before, in which case the existing law still provides the context for assessing how radical Parliament intended the change to be. On the other hand, the values inherent in the existing law – as recognised by judges and lawyers - may be assessed to be so strong as to exert a gravitational force on the text, pulling its meaning in their direction."

Some of these presuppositions derive from the common law – or at least, from values endorsed and given expression by common law judges - and the way in which judges conceive of Parliament as legislating ordinarily in a manner which reflects common law values. This is the case with the principle of legality. According to that principle of interpretation, the courts presume that Parliament legislates intending to respect a

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[2] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (2006), pp. 102-103.

[3] P Sales, "Modern Statutory Interpretation" (2017) 38 Statute Law Review 125.

series of rights and principles of constitutional significance, unless it makes it very clear that it intends to override them. Accordingly, writing extra-judicially, I have called the constitutional or fundamental rights and principles derived from the common law's understanding of the constitution a form of presumptive constitutional order.[4] Aileen Kavanagh, in her recent book *The Collaborative Constitution*,[5] describes the principle of legality as "a new label for a centuries-old canon of construction enjoining courts to interpret legislation in light of constitutional norms", described by other scholars as "a common law Bill of Rights" or "common law constitutional rights". As she puts it, "[i]n contemporary times, scholars and judges have rediscovered the potency of the principle of legality as a way of upholding" these rights.[6] As Treasury Counsel I was confronted with this rediscovery, and often made submissions aimed at keeping it within proper bounds. As a judge, I have joined with others in thinking that this is an important endeavour, so that Parliament's intention is not distorted or undermined and the legitimacy of the interpretive role of the courts is upheld and not subverted.

Some of these presuppositions derive from a combination of statute and common law, where particular statutes are taken by the common law to have become embedded as a particularly important and enduring part of the constitutional landscape. This is the area of recognition of statutes as having constitutional significance, on a model first clearly articulated by Laws J in relation to the European Communities Act 1972 in the Metric Martyrs case.[7] The effect of this is that the usual rule about implied repeal of an earlier statute by a later one is switched off. Parliament is assumed to have intended that there should be no casual repeal of a constitutional statute. It can only be repealed by use of very clear language.

And some of the relevant presuppositions are stipulated by Parliament itself by statute. Such statutes necessarily have constitutional significance, because they govern the approach the courts must adopt to interpreting the laws laid down in Parliament. In principle I would include a statute like the Interpretation Act 1978 in this category. But the two major examples are section 2 of the European Communities Act 1972 and section 3 of the Human Rights Act 1998. Both had a major impact on statutory interpretation in my time in practice and as a judge. The first did so indirectly, by stipulating that EU law should have domestic legal effect and hence incorporating the strong *Marleasing*[8] interpretative obligation requiring a construction to be given to a domestic statute which gave it an effect which conformed with EU Directives and other instruments so long as it is "possible" to do so. The second did so directly by stipulating

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[4] P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598, 601.

[5] A Kavanagh, *The Collaborative Constitution* (2024), 217.

[6] Ibid, 217.

[7] *Thoburn v Sunderland City Council* [2003] QB 151.

[8] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89)[1990] ECR I-4135.

that primary legislation has to be read and given effect in a way which is compatible with Convention rights under the ECHR where it is "possible" to do so. Where one draws the boundary of what is "possible" in both cases itself has constitutional significance. It gives effect to parliamentary sovereignty on both sides of the boundary. On one side it involves an application of parliamentary sovereignty in that Parliament has given an interpretive instruction in relation to its own legislation which has to be complied with. Beyond that boundary the interpretive instruction no longer applies and respect for parliamentary sovereignty implies that one is back to giving effect to the ordinary meaning of the words Parliament has used.

Each of these features of statutory interpretation had important effects in my time as Treasury Counsel and as a judge.

I will discuss the principle of legality, constitutional statutes and the European Communities Act 1972 and the Human Rights Act in turn. I will then discuss purposive interpretation.

The principle of legality

The principle of legality has developed, or as Aileen Kavanagh puts it, its potency has been rediscovered, since the 1990s. In that period it has also expanded to supply a theoretical framework which tends to incorporate other pre-existing features of the methodology of statutory interpretation, such as the implied requirement that administrative powers which affect the interests of an individual should be exercised fairly[9] and the presumption against giving effect to ouster clauses as applied in the *Anisminic*[10] and *Privacy International*[11] cases.

As First Treasury Counsel I had to contend with a revival and revalorisation of the principle of legality.[12]

On traditional conceptions, English public law has been more concerned with wrongs than rights, being primarily focused on whether public authorities have breached the obligations imposed on them by legislation.[13] The intensive use of rights concepts in public law is a comparatively recent phenomenon. It is associated particularly with the

[9] *Ridge v Baldwin* [1964] AC 40; *R v Secretary of State for the Home Department, ex p Doody* [1994] AC 531.

[10] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[11] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[12] This part draws on P Sales, "Rights and Fundamental Rights in English Law" [2016] CLJ 86.

[13] See e.g. M. Taggart, "Proportionality, Deference, *Wednesbury*" [2008] NZ Law Rev 423; J. McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (2012), 238.

impetus given to the principle of legality in *R v Secretary of State for the Home Department, ex p. Pierson*[14] and the cases that followed it.[15] Although public law remains concerned primarily with wrongs committed by public authorities failing to follow their statutory obligations, the content of those obligations is now often informed directly by reference to fundamental rights.

The reasoning in *Pierson* was based on a long established approach to statutory interpretation, that there is a presumption that Parliament does not intend to abrogate rights established under the common law.[16] That is an approach which draws on the idea of rights as positive, institutionally recognised entitlements with specific and determinate content defined by the ordinary law. But *Pierson* used the approach with reference to a rather different type of right: a fundamental right of a comparatively abstract kind, one rather more like a principle, without clearly defined parameters.[17] This allows for a wider mobilisation of judicial power in interpreting statutes, authorising the reading in of words and reading down wide language to make the statute conform to the fundamental right identified by the court. Under the principle of legality, a fundamental right is treated as respected by a statutory provision unless abrogated by express language or clear necessary implication. The idea that the right is "fundamental" or "constitutional" appears to authorise a greater role for the court in adapting what Parliament has said when giving it formal meaning to determine a dispute.

[14] [1998] AC 539.

[15] P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 LQR 598.

[16] See e.g. *Maxwell on The Interpretation of Statutes*, 12th ed. (P. St. J. Langan, 1969), 116-123; *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 573G-575D (Lord Browne-Wilkinson); cf. Duxbury, *Elements of Legislation* (2012), 36-39.

[17] See, in particular, the influential speech of Lord Steyn in *Pierson*, at [1998] AC 539, 587C-590A, in which – referring to *Cross on Statutory Interpretation*, 3rd ed (Prof. John Bell and Sir George Engle QC), at 165-166 - he moved from the narrower common law rights-based formulation to a wider "principle of legality", referring not just to "well-recognised rules" but also "long-standing principles of constitutional and administrative law."

Prime examples of cases which adopted the *Pierson* type of approach are *Witham*[18] and *Simms*.[19] The classic and much cited formulation is that by Lord Hoffmann in *Simms*:[20]

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

In *Witham*, Laws J identified in the common law a fundamental right of access to the courts and employed that concept to read down a wide statutory rule-making power which had purportedly been exercised to impose legal fees to use the courts on persons without means. He identified the right by reasoning primarily based on English authorities, but also by reference to Strasbourg authorities.

The use of fundamental rights in this way ran in parallel with other developments, using appeals to Convention rights in the ECHR in a form of what Lord Rodger in the *Watkins* case called incorporation *avant la lettre* of the Convention rights.[21]

Although the theory of the principle of legality is that it respects Parliament's own intentions, there is a tendency for it to operate in tension with both parliamentary supremacy and the rule of law, understood as rule by predictable and determinate rules laid down in advance.

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[18] *R v Lord Chancellor, ex p Witham* [1998] QB 575.

[19] *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115.

[20] [2000] 2 AC 115, 131-132.

[21] *Watkins v Home Office* [2006] UKHL 17; [2006] 2 AC 395, at para 64.

To impose on top of a statutory text an additional interpretive framework by reference to fundamental rights which are themselves defined at a high level of abstraction and indeterminate is to create a risk of distorting positive legal norms into vague, uncertain and poorly articulated standards. It also involves a practical transfer of law-making power from legislature to the courts, as the decision-makers on the ground, operating this interpretive regime when applying the standards in the particular cases that come before them.[22] 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 the electorate they will achieve) will be undermined: the link between democratic will and law will be disrupted.

Also, if a citizen does not have a fair warning of what the words used in legislation mean, their ability to plan their affairs will to that extent be undermined. This is not to say that judicial development of the law to identify fundamental rights is improper; but development comes at a price and over-ambitious development may come at a price in terms of sacrifice of these other key values in our political and legal system which might be excessive.

To contain these disruptive effects, the courts have sought to explain that the principle of legality has a narrow application and is not applicable as an approach to statutory construction in the absence of a relevant established fundamental right or legal principle. For example, in the case of *ex parte Stafford* concerning the treatment of prisoners, Lord Steyn held that the principle of legality had no application, and the relevant wide discretionary power conferred on the Secretary of State could not be read down, because there was "no relevant and applicable principle which could be said to have been the assumption upon which Parliament entrusted the … discretion" to him. [23] In a number of other decisions the courts have likewise been at pains to rebut arguments that relevant common law fundamental rights exist which can then justify judges in reading down statutes. For example, in the *Moohan* case, the Supreme Court rejected a suggestion that there was a common law right to vote in elections which somehow existed prior to, and hence could modify the interpretation of, statutes which regulate elections – in that case, to the Scottish Parliament.[24]

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[22] Duxbury, *Elements of Legislation*, 226 ("… the authority of a legislative assembly to make directives which are binding on the citizenry is undermined if its intentions to change the law in specific ways can be overridden by courts in receipt of its statutes").

[23] *R v Secretary of State for the Home Department, ex p Stafford* [1999] 2 AC 38, 49 per Lord Steyn.

[24] *Moohan v Lord Advocate* [2014] UKSC 67.

In the *Lightfoot* case,[25] Laws J warned that "[i]f the courts were to hold that more marginal claims of right should enjoy the protection of a rigorous rule of statutory construction not applied in contexts save that of the protection of fundamental rights and freedoms, they would impermissibly confine the powers of the elected legislature." This holding reflected a submission which I had made as Treasury Counsel. This statement by Laws J has now been endorsed by the Supreme Court in the case of *O v Secretary of State for the Home Department*.[26] By treating the principle of legality with caution and keeping it within narrow bounds, the courts have made a choice to protect the general constitutional principle of democratic choice subject only to limited presumptive constitutional constraints. Respect for democratic legitimacy imposes an obligation on the courts to try to be clear-eyed about what background understandings really are so commonly and powerfully held as to inform statutory interpretation in this way, by application of the principle of legality; otherwise they may put their own legitimacy as impartial, non-political decision-makers in jeopardy in the eyes of the public

There is a distinct tendency in recent jurisprudence of the Supreme Court to seek to fashion legal reasoning around domestic fundamental rights in preference to over-hasty and over-elaborate resort to Convention rights.[27] It is not unreasonable to think that one reason for this is the prevailing political environment in which, after years of hostile criticism of European human rights decisions in certain sections of the press and media,[28] the future of the Human Rights Act had been placed in serious doubt by the position adopted by the Conservative Party. If the Human Rights Act is repealed, the role of domestic fundamental rights may become more important. The tendency to emphasise domestic fundamental rights makes more urgent the task of spelling out acceptable criteria to identify them and their limits, which do not open the judiciary to

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[25] *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 609.

[26] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, para 43.

[27] See e.g. *R (Osborn) v Parole Board* [2013] UKSC 61 (domestic fairness principles used for analysis in preference to Article 5 ECHR in judicial review of administration of probation rehabilitation programmes); *Bank Mellat v HM Treasury (Nos. 1 and 2)* [2013] UKSC 38; [2013] UKSC 39 (relief founded on domestic fairness principles, in preference to Convention rights); *Kennedy v The Charity Commission* [2014] UKSC 20, paras 45-47, 133; *A v BBC* [2014] UKSC 25; [2014] 2 WLR 1243, para 57; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591; and in *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, at para 29, Lord Reed discusses the possibility of naturalisation of human rights standards into ordinary domestic law.

[28] See S. Marks, "Backlash: The Undeclared War against Human Rights" (2014) EHRLR 319.

the charge of making them up on a whim, in an illegitimate exercise of practical legislative power.[29] The judiciary need to be able to offer justification for their intervention in the typical kind of case where precisely the legitimacy of that is in issue, namely where the alleged right is being relied upon to override what may appear to be a clear expression of legislative intention in a statute or to strike down executive action where the executive has taken steps to pursue some public interest which it maintains is important, and the existence or ambit of the alleged right is in question.

Apart from any political rhetorical reason, there is a theoretical justification for starting the analysis with domestic law fundamental rights rather than the Convention rights set out in the Human Rights Act. As explained in my judgment in *R(Z) v Hackney LBC*[30] the correct theoretical approach to application of section 3 of the Human Rights Act is first to construe a statute according to ordinary domestic principles of construction, then test it against what is required by the ECHR – and if there is no incompatibility at that stage, stop there. It is only if there is incompatibility that one goes further and asks if some conforming interpretation is "possible". So on this ordering, one ought to be applying the principle of legality and domestic constitutional rights before one directly applies the Convention rights.

However, since the Convention rights are expressed in positive terms in statute, there is a strong temptation as counsel and judge to cut to the chase and debate matters in terms of the Convention rights rather than being drawn into the trickier area of identifying and seeking to define the ambit of domestic constitutional rights. One also gets into what I think of as the *Johnson v Unisys* problem,[31] that it may be difficult for the common law to develop if Parliament has made express provision to deal with the very area in dispute. Also, as noted in relation to the reasoning in *Witham*, there is scope for reference to Convention rights when trying to define the ambit of common law

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[29] Cf J. Ely, *Democracy and Distrust* (1980), 58-59 ("Experience suggests that … there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favour of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn"); R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990), ch. 11; Sir Max Hastings, review of Anthony King, *Who Governs Britain?* in *The Sunday Times*, 19 April 2015: "It is a moot point whether [the senior judges] deserve censure for their dogged reluctance, when reaching decisions, to consider the expressed will of parliament and society. Some of us think that this is a reflection of a collective and often malign judicial conceit."

[30] *R (Z) v Hackney LBC* [2020] UKSC 40, para 114.

[31] *Johnson v Unisys Ltd* [2003] AC 518.

constitutional rights. So the precise relationship between those domestic rights and the Convention rights remains somewhat hazy.

The principle of legality can be seen as a method, at the doctrinal level, for domestic law to reconcile two distinct philosophical traditions, the liberal and the democratic, which underpin the liberal democracy regime which has become established in the United Kingdom.[32] But this observation does not carry one further forward in the task of establishing criteria to identify fundamental rights in cases where there is doubt about their ambit. There is no natural, *a priori* basis for reconciliation of the traditions. They fall to be reconciled by way of practical accommodations specific to the political environment of each individual polity.[33] There is a lot to be said for Aileen Kavanagh's view that the courts and Parliament operate to some extent as collaborative partners to flesh out the determinate reality of where this balance should be struck in our political-legal environment.

Constitutional Statutes

In his influential judgment in *Thoburn* Laws J treated certain statutes as having constitutional status and therefore requiring respect in the interpretation of later legislation in much the same way as by reference to fundamental rights under the principle of legality.[34] The particular issue in that case was whether an aspect of EU law as incorporated pursuant to the European Communities Act 1972 had been impliedly repealed by later legislation which did not refer to it. On a classical approach to parliamentary sovereignty, the doctrine of implied repeal would have applied. But by treating the European Communities Act 1972 as a statute with constitutional status, Laws J avoided that result.

The difficulty in this area is that we do not have clear criteria to identify what counts as a constitutional statute. Parliament does not label statutes as being constitutional or not

[32] See R. Geuss, *History and Illusion in Politics* (2001), ch. 3; C. Mouffe, *The Return of the Political* (1993), chs. 7-9; B. Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (1988); and at the level of legal doctrine, see A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 10th ed. (E.C.S. Wade, 1959), Ch. 13; A. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009). Cf the importance of the doctrine of the margin of appreciation to achieve a practical reconciliation of these two distinct traditions in the law of the ECHR: see P. Sales, "Law and Democracy in a Human Rights Framework", ch. 15 in D. Feldman (ed.), *Law in Politics, Politics in Law* (2013).

[33] Sales, "Law and Democracy" (n 32), 217.

[34] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151.

constitutional when it passes them. The difficulty reflects a point made long ago by Maitland about our constitutional law: we do not have a written constitution as a reference point, and what counts as constitutional law is really a matter of labelling convenience.[35] The reality is that the courts have a super-added interpretive role here, in terms of whether and when to recognise a statute as having constitutional significance so as to protect it from implied repeal casual modification in this way. The general criterion seems to be whether it plays a major role in structuring the state or the exercise of legislative functions. This again may get as close as Maitland did to defining the scope of constitutional law.[36]

It is possible to employ the concept of a constitutional statute to delimit the effect of another constitutional statute. That was the context for its use in the *HS2* case in the Supreme Court.[37] Article 9 of the Bill of Rights was treated as a constitutional statute of such embedded and profound significance in our constitutional order as to limit the effect of the European Communities Act 1972, which did not expressly overrule it.

Section 2 of the European Communities Act 1972

In the decade or so before my time as Treasury Counsel the biggest topic in constitutional law was probably the way in which the domestic legal order had to accommodate the legal order of the European Communities, which became the European Union. The effect of section 2 of the European Communities Act 1972 was held to be that developments in the law of the EU as established in the jurisprudence of the European Court of Justice (later the Court of Justice of the European Union) had to be accommodated in domestic law.

The three big developments were the direct effect of forms of EU law, which meant that domestic legislation had to be disapplied (as was recognized domestically, not without difficulty, in the *Factortame* litigation[38]); the grant of damages for breach of EU law pursuant to the *Francovich* principle, and the application of the doctrine of sympathetic interpretation of domestic legislation pursuant to the *Marleasing* principle.[39] Under the third of these, the courts had to develop techniques of reading in and reading down. The

[35] FW Maitland, *Constitutional History* (1908), 526-539.

[36] Ibid, 535.

[37] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324; and see P. Craig, "Constitutionalising Constitutional Law: HS2" (2014) Public Law 373.

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

[39] [1990] ECR I-4135

great example of reading in is *Litster v Forth Dry Dock & Engineering*,[40] in which a significant amount of text was added to legislation by a "reading in" interpretation in order to make it compatible with the requirements of an underlying EU Directive. Since the *Marleasing* principle was limited by asking the question whether reading in was "possible" as a form of interpretive exercise, the courts also began to explore the boundary of what would qualify as possible for these purposes. They were thus brought closer to examination of profound questions of the exercise of parliamentary sovereignty in the face of EU norms.

Section 3 of the Human Rights Act

I appeared as counsel for the First Secretary of State as intervenor in the leading case of *Ghaidan v Godin-Mendoza*.[41] It was a rare case where the Government wished me to argue for a relatively wide effect of the Human Rights Act in relation to statutory interpretation under section 3. The First Secretary of State had policy responsibility for the Human Rights Act and wished to ensure that the courts gave section 3 the wide effect which had been the policy intent of the government in introducing it. I made submissions emphasising the linguistic and structural analogies with the pre-existing *Marleasing* interpretive obligation. Linguistic, because both the formulation of the EU principle of sympathetic interpretation and section 3 spoke of an obligation to adopt a conforming interpretation where that was "possible". Structural, because in substance both interpretive obligations are framed by reference to a form of external law with a designated priority status – EU law and Convention rights respectively. I also argued that the interpretative obligation was framed more strongly than that in the conventional canon of construction to avoid incompatibility with international law, which is framed by reference to a test of ambiguity in the domestic statute, a contrast which was drawn in the White Paper *Rights Brought Home*.[42]

The House of Lords accepted the substance of these submissions, which led to the recognition of the considerable force of the interpretative power and obligation contained in section 3. Again, identifying the boundary of what was "possible" was and remains problematic. Lord Nicholls and Lord Rodger tried to capture the relevant idea by talking about whether a conforming interpretation would cut across a cardinal feature of the legislation, or whether it would run with the grain of the legislation. It is by asking these questions that, in the context of application of section 3, the courts have to strike in a determinate way the same balance between parliamentary sovereignty and individual rights as they do in relation to the principle of legality.

[40] *Litster v Forth Dry Dock & Engineering* [1990] 1 AC 546.

[41] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

[42] CM 3782 (1997), para 2.7.

Richard Ekins and I wrote an article in the Law Quarterly Review in which we tried to explore this issue.[43] The relevant interpretive exercise is to ask whether, by the language it has used, Parliament has made it clear that, even though it has not expressly referred to the Convention rights in order to say they are disapplied, it must be taken to have intended to do that in a sort of counterfactual world in which it is taken to have been on notice of those rights. Lord Hoffmann's speech in *IRC v Wilkinson*[44] points towards this approach, as do the speeches in *Ghaidan v Godin-Mendoza*.

Section 3 gave rise to a series of puzzles which have had to be addressed. I would highlight three more.

First, section 3 applies to legislation passed before the Human Rights Act, as well as that passed after it. Its application in the latter class of case is easier, in that the contrast between the reality of the legislative context and the counterfactual element is less strong. In relation to that class, Parliament has by the Human Rights Act pre-declared the interpretative approach to be applied to the legislation which it then proceeds to promulgate. It is clearly on notice of the Convention rights and one can be more confident that the language it has employed is formulated in the light of that knowledge, and so can be treated as a surer guide as to Parliament's intentions with respect to overriding those rights or not. But the same exercise has to be carried out in relation to legislation passed before the Human Rights Act came into effect. That does involve a counterfactual form of inquiry: if the enacting Parliament had been aware (contrary to the world in which it was operating) that a court would later ask whether it intended to respect or to override Convention rights by legislating as it did, did it make its intention sufficiently plain that the purpose it was pursuing when legislating apparently incompatibly with those rights was of such importance as to lead to the conclusion that it is not "possible" to find a reading of the legislation which does anything other than override them. Ultimately the question may be much the same, but one feels less confidence in answering it.

Second, the coming into effect of section 3 gave rise to a spate of cases in which the retrospectivity of its effect was in issue. Clearly, it applied to legislation which predated the Human Rights Act. But did the interpretive effect it produced apply only to cases involving the application of the law to fact situations arising after 2 October 2000? The law was uncertain for a period, but eventually settled down on the position that section 3 only produced interpretive effects going back to 2 October 2000, not to the application of the law to fact situations before that.[45]

Third, another aspect of the effect of section 3 was how widely it applied, in relation to cases which did not themselves involve any incompatibility with Convention rights. I

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[43] P Sales and R Ekins, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 LQR 217.

[44] *R v IRC, ex p Wilkinson* [2005] 1 WLR 1718, paras 18-19.

[45] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

was again involved in arguing these cases. In *Hurst v North London Coroner* the House of Lords accepted submissions I had drafted to the effect that the interpretive impact of section 3 was confined to cases where Convention rights were actually in issue.

Sitting in the Supreme Court I had occasion to reiterate this conclusion in *Z v Hackney LBC* at para 114:

> "The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention rights under the HRA or some provision of EU law as applied to their case. Only then do the special interpretive obligations under section 3(1) of the HRA or under the *Marleasing* principle come into play to authorise the court to search for a conforming interpretation at variance with the ordinary meaning of the legislation. This means that the same legislative provision might be given a different interpretation in different cases, depending on whether Convention rights or EU law are applicable in the case or not. Although at first glance this might seem odd, in fact it is not. It simply reflects the fact that in the one case circumstances are such that an additional interpretive obligation has to be taken into account, but in the other case no such obligation is in play: see *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, para 1 (Lord Bingham of Cornhill), paras 9 and 12-15 (Lord Rodger) and para 52 (Lord Brown of Eaton-under-Heywood); and *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685; [2002] 1 CMLR 20, paras 41-47 per Arden LJ (as she then was). If the position were otherwise, Convention rights and rights under EU law would be given disproportionate effect in domestic law, and statutory interpretation would become an exercise in the imaginative construction of theoretical cases in which such rights might be in issue in order to change the interpretation of legislation in cases where they are not."

Purposive interpretation

Finally, I will deal briefly with the difficult question of purposive interpretation: what exactly it means and how one identifies relevant purposes in order to carry it into effect.[46]

It is a commonplace now for judges to say that the proper approach to interpretation of statutes is purposive. There are reasons to do with the philosophy of language which support this. Given the open-textured nature of language, the determinate meaning of a speech act depends on context and the purpose of the speaker in using that language.

[46] I am currently working on another lecture to explore these issues further: see my Renton lecture for the Statute Law Society to be delivered on 6 June 2025.

In the *PACCAR* case I said, "The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it". [47]

However, since legislative purpose has this significance as a possible determining factor in working out the meaning of a statutory word or phrase, it gives rise to difficult questions about how exactly the courts should identify the purpose or purposes for which a legislative text is used. How widely should one interpret a purpose to be? At what level of abstraction should it be formulated? From what evidence should it be inferred? Reference to intention is both necessary but also problematic.

A leading recent statement is that by Lord Hodge in *O v Secretary of State for the Home Department*.[48] Certain external aids to interpretation are accepted as providing evidence about the legislative purpose, in addition to the text of the statute itself: formal reports, White Papers, explanatory notes, statements by promoters of Bills in accordance with the guidance in *Pepper v Hart*.[49]

However, caution should be exercised, for three reasons. First, as explained by Lord Hodge, Parliament has chosen the language of the statutory text and this should be the primary guide to what it intended to say.

Secondly, it is a fundamental constitutional principle that legislation should be capable of being understood by those who are subject to it. So it is only legitimate for the courts to refer to aids to interpretation which are in the public domain and are accessible to ordinary citizens.[50]

Thirdly, the range of materials for inferring purpose should be kept within narrow bounds to try to minimise the range of possible purposes which could be identified. This is because the greater the range of potential candidates as relevant purposes the greater the scope for uncertainty about what purposes are relevant and how they feed into the interpretation of statutory language, creating unpredictability in the law. Recourse to a wide range of references to provoke arguments about the statutory purpose is therefore contrary to important rule of law values. So far as possible the courts should promote a stable, clear and bounded methodology for identifying the purpose of legislation.

A further issue which the courts have to confront is that there may be a range of potentially conflicting purposes underlying any given statutory text. The text may itself represent a compromise or balance between purposes. For example, it is a general

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[47] *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, para 41.

[48] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, paras 29-30. See also *PACCAR*, paras 40ff.

[49] *Pepper v Hart* [1993] AC 593.

[50] See *R (Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin), para 55; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 278.

feature of law that purposes directed to achieving particular substantive results have to be balanced against purposes directed to providing certain procedural protections.[51] The statute itself may not indicate a clear way of reconciling conflicting purposes.

In such cases the courts function as partners of the legislature by specifying in a determinate way in a particular case before them how a coherent balance is achieved between the conflicting purposes. This function is justified by and reflects the rule of law, external perspective of the citizen subject to the law. Citizens subject to the law expect the legislator to legislate for a coherent, not an arbitrary regime. So they expect the courts to interpret statutes to produce coherent results.

The need for the courts to do this implies quite an active role for the judiciary in making the legislation work in a coherent way in circumstances which may well not have been foreseen by Parliament or the drafters.[52] The courts have to identify the relevant purposes, the relative normative force associated with each of them, and the ranking or order of priority they should be given in the focused exercise of determining the meaning to be given to the legislative text as it applies to the particular facts. As a judge, this interpretive exercise feels very similar to the forms of reasoning employed in cases involving the application of the common law, where the courts have to determine the effect of and outcome given by common law principles in a particular case.

[51] See, eg, *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company* [2024] UKSC 27.

[52] See P Sales, "Judges and Legislature: Values into Law" [2012] CLJ 287; A Kavanagh, *The Collaborative Constitution*, ch 7 "Judge as Partner".