

The effect of section 3 hra law constitutional administrative essay

[Law](#)



**ASSIGN
BUSTER**

Introduction In this essay I would first discuss the traditional approach judges used to interpret statutes, and then go on to discuss what is the effect of the Human Rights Act 1998 (HRA) in statutory interpretation. By analyzing some key cases, I would evaluate whether the HRA do revolutionise the way in which judges interpret statutes. Traditional approach to statutory interpretation before HRA 1998 The traditional approach of statutory interpretation is generally reflected by three main rules: the Literal Rule, the Golden Rule and the Mischief Rule. Under the Literal Rule, the words of the statute are to be given their plain, natural and ordinary dictionary meaning. Under the Golden Rule, the whole of the statute is taken together, placing the word or section in its context and giving the words their ordinary meaning unless this produces an absurdity or inconsistency, in which case the judge must try to give the words some other contextual meaning. And the Mischief Rule directs the judges to focus on the mischief and defect for which the previous common law before the enactment of the statute did not provide. The interpretation obligation imposed to the judges by Section 3 HRA 1998 This is the first time ever that the Parliament introduces a statute to impose a duty on statutory interpretation to the judiciary. Section 3(1) HRA stated " so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". The Government's White Paper that accompanied the Bill for the Act says as follows: ' The Bill provides for legislation — both Acts of Parliament and secondary legislation — to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the

Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. This "rule of construction" is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights. This gives the courts new and extended powers of interpretation. It does not matter whether the legislation to be interpreted was passed before or after the HRA. The court may be asked to interpret a provision that is at variance with the rights contained in the HRA and then it must be interpreted according to its wording. The effect of Section 3 HRA 1998 on statutory interpretation

With the introduction of the HRA 1998, judges in the UK now have an overriding obligation imposed upon them when they interpret and apply domestic legislation. Formerly, judges generally used the traditional approach to interpret statutes (i. e. the three rules of interpretation). They were free to use whichever rule they felt was most appropriate to the facts of the case. Under the HRA 1998, judges are still allowed to use the three rules; however, they must fulfill S. 3 HRA 1998, meaning that judicial attitude cannot be passive anymore. Under S. 3(1), the overriding aim of the interpretive process is to find a Convention-compatible meaning of the legislative provision 'so far as it is possible'. As per Lord Hope said, 'The requirement in S. 3(1) is to search for a "possible" reading. This may lead to conclusions which depart from the ordinary meaning of the words used, and would not be produced by the application of any of the

other usual canons of construction which were in the minds of the legislator...The first question is whether the words used can possibly be read in a way which is compatible with the Convention rights.' Francis Bennion stated that 'Parliament's original intention is no longer the sole deciding factor.' This means that even if Parliament's intention in passing a particular Act was clear, the courts must try to interpret the Act in a way which is compatible with the Convention, regardless of the intention of Parliament. Therefore when interpreting under S. 3, judges can detach legislative meaning from its original contextual setting. And the court reserves for itself the power to reach a different conclusion from the legislature if the legislature had attached insufficient importance to a person's Convention right. Lord Cooke suggested that 'S. 3(1) would require an approach to statutory interpretation very different from that to which United Kingdom courts are accustomed. Traditionally the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility.' This view was supplemented by Richard Clayton and Hugh Tomlinson that when interpreting under S. 3(1), one should note 'The conventional rule that when interpreting a statute, the courts are seeking to determine "the intention of the legislature" (i. e. what intention is either expressly or by implication conveyed by the language used). Then, in all cases in which Convention rights are at play, the effect of S. 3 is equivalent to requiring the courts to act on a presumption that the intention of the legislature was to enact a provision compatible with Convention rights.' Cases demonstrating how HRA changes the way in which judges interpret statutes. The interpretative provision of the HRA has had a

major impact in judicial interpretative practices. In *R v A*, the House of Lords considered whether S. 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) was breaching the defendant's Article 6 right to a fair trial. That section prohibits the questioning of a complaint of rape about previous sexual behavior, except in certain limited circumstances, aiming at preventing irrelevant evidence being put in court and avoiding the defence counsel humiliating the claimant. However, the courts were aware that S. 41 might be contrary to Article 6 if an accused was not permitted to put evidence before the court about consensual sexual relations. Depriving the accused of this right could be a breach of a right to a fair trial, as it could shadow the overall fairness of the proceedings by excluding relevant evidence. The House of Lords made use of S. 3 HRA to allow S. 41 YJCEA to be read as allowing the admission of evidence or questioning related to a relevant issue in the case where it was considered necessary by the trial judge to make the trial fair. With reference to Lord Clyde's guidelines to the test of proportionality in the key authority *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*. They lead a court to decide whether a limitation on a right is acceptable, or 'arbitrary or excessive'. The guidelines allow the court to decide whether the objective of the legislation is 'sufficiently important'; then the court has to determine if the actual restrictions imposed satisfied that. Applied to *R v A*, the court must therefore be sure that the restrictions of the accused's right to give evidence of consensual sexual experience set by S. 41 YJCEA are 'proportionate' to the aim of limiting fair trial rights: preventing irrelevant evidence being put in court and the claimant being humiliated. In Lord

Steyn's adjudication, the proportionality test suggests 'legislative overkill', and the 'ordinary methods of purposive construction cannot cure the excessive breadth of S. 41'. The judge must therefore make use of the 'interpretative obligation in S. 3', which applies even where 'there is no ambiguity' in the Act; it does not just mean, therefore, that the Court must take the Convention into account in interpreting ambiguous statutory language. 'S. 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights.' This takes us beyond ordinary methods of interpretation. Normally a court 'may depart from the language of the statute to avoid absurd consequences', but 'S. 3 goes much further to be more radical in its effect' to make statutes Convention compatible. Lord Steyn observed that in the HRA, Parliament had specifically rejected the legislative model of requiring a 'reasonable' interpretation: 'In accordance with the will of Parliament as reflected in S. 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.' Following that approach, an implied provision could be read into S. 41 that 'evidence or questioning which is required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible.' In *R v Lambert*, the court had to decide whether the legal, rather than evidential, burden of proof placed on the defendant under Sections 5 and 28 of the Misuse of Drugs Act 1971 was in breach of the Article 6 right to a fair trial. The court first determined that, when read in

the ordinary way, Section 28 ' demonstrates that what Parliament chose to do' was to impose a legal burden of proof. Then the court considered the test of proportionality. All the judges agreed that the goal of the statute was legitimate, but that imposing a legal burden of proof on all defendants was a disproportionate way of achieving that goal. It would have been sufficient to impose an evidential burden on the accused. Consequently, their Lordships held that it was ' possible' under S. 3(1) to read the words ' prove' as meaning ' giving sufficient evidence'. Thus, even though the natural meaning of the provision was that it imposed a legal burden of proof, S. 3(1) enabled the court to read it so that it only imposed an evidential burden of proof. In *Ghaidan v Godin-Mendoza*, the defendant argued that the Rent Act 1977 was discriminating against him as a homosexual by depriving him of rights over the flat of his deceased partner. The Court of Appeal held that the Act had infringed the defendant's rights under Articles 8 and 14. The Court of Appeal then used S. 3 HRA to read the Act in a broad way, allowing the defendant to take over the tenancy of the flat. And this ruling was affirmed by the House of Lord. In this case, Lord Nicholls pointed out that there are a number of ways of reading S. 3 as there is a certain degree of ambiguity in the word ' possible'. A narrow reading would hold that S. 3 only allowed courts to resolve ambiguities in statutory language in favour of Convention-compliant interpretations. A much broader interpretation of the section has been preferred, which allows the courts to give a different meaning to the language of the statute in order to ' eliminate the discriminatory effect' of the Act and make its meaning consistent with the Convention. This could involve reading in words, as in *R v A*. There is no need for the language of

the Act to be ambiguous for the Court to take this course of action. Lord Nicholls further suggested that ' in the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.'

Conclusion

An examination of key cases shows that the traditional approach to statutory interpretation has been greatly modified by the HRA. And these changes are so significant that could be described as revolutionary. Therefore I would conclude that the statement " The Human Rights Act has revolutionised the way in which judges interpret statutes" is valid, to the extent that the case under question involves a provision of an Act that may violate any of the Convention rights.