

# The way in which judges interpret statutes law constitutional administrative essa...

Law



Across broad areas, the details of English law are derived from the interpretation of statutes, and statutes have increased in importance as a source of English law. Statutes arise through domestic political processes or are transnational in origin. The largest transnational influence upon the English legal system has resulted from the United Kingdom joining the European Community/ European Union. Under the provisions of the European Communities Act (ECA) 1972, any United Kingdom enactment has effect subject to existing ' enforceable community rights'. Another source of transnational law is the incorporation of international treaties and conventions. In 2000 the Human Rights Act came into force, adding yet more complexity to the approach taken to the interpretation of statutes. Statutory interpretation means judges will only apply law which was made by the Act of Parliament, not to legislate them. Statutory interpretation as performed by the judiciary is a subset of constitutional practice. The first, from Blackstone, can be seen as a representative statement of the doctrine of parliamentary supremacy. The second from Pollock, may be seen as a more or less accurate description of the judicial mindset in Victorian times. While the common law could be presumed to be the repository of the community's collective wisdom as expressed through its judiciary, legislation was the imposition of a political will for reform. It remained the approach of English judges until sometime after the Second World War, yet Lord Blackburn's comments show that it is not correct to hold that one approach dominated. The protection of the rights and freedoms of citizens and others within their jurisdiction is a fundamental of the state. Under the United Kingdom's largely unwritten constitution, rights and freedoms have traditionally been protected

either by individual Acts of Parliament passed to meet a particular need or by the judges in developing the common law and the Human Rights Act. There are three principal rules or approaches of statutory interpretation viz. the Literal Rule, the Golden Rule and the Mischief Rule. Statutory interpretation has a very little to do with so-called 'rules' of interpretation. Whether or not these rules accurately reflect the approach of the courts in the past, they are largely irrelevant to the contemporary practice. " The first method used by the HRA to give 'further effect' to Convention rights relates to statutory interpretation. The 'new' interpretative obligation is imposed in respect of all legislation."<sup>[1]</sup>The interpretative provisions of the Human Rights Act have had a major impact in judicial interpretative practices. Our consideration of the new practices has to begin by looking at section 3 of the Act. First of all that the range of this provisions it applies to primary and secondary legislation 'whenever enacted' – before or after the Act. The effect of s. 3(2)b, however, is that the incompatibility of a piece of primary legislation with the HRA does not mean that this legislation is held to be void. In other words, parliamentary sovereignty is left in place.<sup>[2]</sup>We are thus concerned with the realignment of a judicial practice rather than its complete redefinition. How the courts will interpret legislation in the light of s. 3. The government White Paper, Rights Brought Home stated that s. 3 would go 'far beyond' the rules prior the HRA which had allowed the court to take into account the ECHR in interpreting legislation and clarifying ambiguity: 'The courts will be required to interpret legislation so as to uphold convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.'<sup>[3]</sup>While this clearly articulates a

rule of interpretation, it leaves a great deal of discretion in the hands of the interpreter to determine whether or not it is impossible to interpret legislation as compatible with the Convention. We are concerned once again with the constitutional boundaries of the judicial practice. We can begin to appreciate how the Human Rights Act makes for a potentially radical departure from conventional methods of interpretation. However, this does not extend to the idea that the court is now an equal partner with Parliament when it comes legislation. The fundamental requirement is that the courts should follow Parliamentary intention in interpreting an act. One of the first key authorities is *Wilson v First County Trust*. We should consider Lord Nicholls' argument. He addressed the idea that the courts are themselves public authorities, and therefore bound by the HRA. This would mean that as the courts are bound by the Act, they would be compelled to discount an Act of Parliament that was inconsistent with the Act. This would clearly be a very broad interpretation of the Human Rights Act. Indeed, it would effectively make the Human Rights Act itself sovereign, and bring to an end the sovereignty of Parliament. In interpreting a statute in the light of the HRA, it was necessary to abide by constitutional principles and give effect to the will of Parliament; however, the court could consider the 'proportionality of legislation'. In appointing the issue of proportionality, the court was fulfilling a reviewing role. Parliament retained the primary responsibility for deciding the appropriate form of legislation. The court would reach a different conclusion from the legislature only when it was apparent that the legislature had attached insufficient importance to a person's Convention right. In *R. v A*, the House of Lord considered whether s. 41 of the Youth

Justice and Criminal Evidence Act 1999 amounted to a breach of the defendant's right to a fair trial. We need to start from the assertion that Article 6 lays down a fundamental set of guarantees to enable a fair trial to take place. The only way in which this right can be restricted is by reference to Article 6 itself. Lord Steyn summarized this as determining a balance between the interests of the accused, the victim and society.[4]Applying this set of considerations to the test of proportionality requires reference to Lord Clyde's guidelines in the key authority *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*. The purposive interpretation cannot 'cure' the breadth of the section. The judge must therefore make use of the 'interpretative obligation'. Section 3 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 statutory language. The 'duty' placed on the court by s. 3 requires the court to 'strive' to make the statute coherent with the Convention. Normally a court can 'depart from the language of the statute to avoid absurd consequences', but s. 3 is a far more 'radical ... general principle': interpretation must make Act and Convention 'compatible'.[5]Following *Pepper v. Hart*, this could amount to an interpretation 'against the executive'. It may be that Parliament expresses a 'clear limitation on Convention rights'. (*R. v. Secretary of State for the Home Department, ex parte Simms*) However, this not one of those cases. In Lord Steyn's opinion, this requires an interpretation of the statute informed by 'common sense', and by a supposition that Parliament itself would not have intended that the Act would prevent an accused making a full defense, so long as it made use

of 'truly probative material'. Words can thus be read into the statute: an 'implied provision' that evidence which is probative and is necessary to a fair trial cannot be excluded. It is up to the trial judge to determine when evidence is probative, and when it is merely irrelevant or insulting to the victim of rape. Following this line of argument, it is not necessary to issue a declaration of incompatibility. The Court of Appeal had used s. 3 of the ECHR and interpreted the Children Act 1989 in order to make it Convention compliant. The House of Lords held that this use of s. 3 overstepped the power given to judges by the HRA. This restates a fundamental constitutional principle. It is clear that the HRA is meant to preserve the distinction between interpretation and enactment of statutes. Particularly creative acts of interpretation depart from fundamental principles of an Act, and also bring matters to court are ill-suited to the forensic process. The interpretation of the Children's Act by the Court of Appeal did just this. A good example of a case where a broad interpretation of an Act leads to an acceptable piece of judicial law making is *Ghaidan v Godin-Mendoza*. The case saw the House of Lords dealing with a question of property law that related to succession to a tenancy under paragraph 2 of schedule 1 to the Rent Act 1977. The Court of Appeal had held that the Act amounted to an infringement of the defendant's rights under Articles 8 and 14 of the Convention. The Court of Appeal had used s. 3 of the HRA to read the Act in a broad way, thus allowing the defendant to take over the tenancy of the flat. The House of Lords dismissed the appeal against this ruling, and confirmed the approach of the Court of Appeal. It was thus not necessary to issue a declaration of incompatibility, as the Act could be read in such a way

as to make it Convention complaint. 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 favor of Convention-complaint interpretations. Normally the court would have to determine the intention of Parliament by using the language in the Act. However, s. 3 means that the court may have to 'depart from the intention of the enacting Parliament'. Lord Nicholls argues that the determinative factor cannot be the word of the Act, since the HRA allows them to be interpreted against their obvious sense. It would be possible, therefore, for a court to read words into Act. This would be consistent with the fact that s. 3 'requires' courts read in words to make an Act compliant with the Convention. There is a limit to this process (Re S). Although the court can read in words, Parliament could never have intended that 'the courts should adopt a meaning inconsistent with a fundamental feature of legislation'. This would cross the line, and show the courts interfering with the sovereign rights of parliament. The traditional approach to precedent and statutory interpretation has been modified by the Human Rights Act 1998. The Act requires the courts to ensure that statutes and case law are complaint with the provisions of the European Convention on Human Rights. This new obligation has changed the approach of the courts in some important recent cases. Statutory interpretation is a pragmatic practice within constitutional limits. For us the development of the practice is itself bound up with three important recent developments: the ruling in Pepper v. Hart, the impact of European interpretative methods, and the powers of interpretation created by the Human Rights Act.