

Statutory interpretation and human rights¹

Rt. Hon. Lady Justice Arden, DBE²

Introduction

I am greatly privileged to be asked to give this address to such a distinguished gathering of legislative counsel from around the world. I have been asked to speak about human rights and I will treat my title as extending to constitutional rights. I will concentrate my remarks on the statutory interpretation of human or constitutional rights. I do not simply mean the interpretation of statutes which legislate for human rights. I also mean those situations where it is said that a statute dealing with some other subject-matter violates a constitutional or human right.

For a judge to address this subject in this forum might be said to be like looking down the wrong end of a microscope and seeing the clinician or microbiologist or whomever is using the telescope. But that metaphor must not be taken too far. Specimens seen under a microscope are usually put on a slide and extracted from all other matter. In statutory interpretation words have to be examined in their context. To find the meaning of even such simple words as “the cat sat on the mat” requires some basic common understanding of the laws of gravity.

The determination of a question of statutory interpretation is in general an exercise in attributing a meaning where it is not obvious and has become a source of dispute between two or more parties. (I should explain that in the UK we do not have any system whereby the courts can give purely advisory opinions.) Yesterday you discussed the intention of Parliament. Speaking entirely for myself, I would be very cautious about describing the task for the judge as one of ascertaining the intention of Parliament, since I am not clear whose intention I would then be seeking or where I would find it if not in the words used. The evidence that is available to the judge is not in general that of the intention of Parliament but that of the Government or the promoters of the Bill or of law reform agencies and it does not follow that the intention of Parliament was their intention at all.

What then is the role of judges? Is their task the purely mechanical task of reading the words legislative counsel have drafted and Parliament has passed? The answer to that question is no, for many reasons. I could of course devote all my time to discussing that question. However, there is so much else that I want to cover so it is sufficient for the purposes of this address if I quote to you what is said about the role of judges in the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*.

These Principles were agreed by the Law Ministers of the Commonwealth and endorsed by the Commonwealth Heads of Government Meeting in Abuja, Nigeria, in December 2003. These Principles state:

Independence of the Judiciary

An honest, impartial and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country...

(c) Judicial Review

Best democratic principles require that the actions of government are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

¹ Paper presented to the Commonwealth Association of Legislative Counsel, 9 September 2005.

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So the time when judges come into contact with human rights and statute law together is when they are being asked to interpret a constitutional provision or human right or when they are being asked to decide whether some other statute actually violates those rights.

Diversity of constitutional and human rights

We should pause a moment at this stage to recall the wide variety of constitutional systems and the wide variety of human or constitutional rights. I am not familiar with by any means all the Commonwealth systems but it is sufficient to give some examples.

Our human rights in the UK are those set out in the European Convention on Human Rights (which I will call “the ECHR”). These include: the right to life, the right to liberty and security, the right to a fair trial, the right to respect for home and private life, the right to freedom of thought, the right to freedom of expression and so on. By and large the ECHR contains no socio-economic rights. There is moreover no self-standing right to equality in the ECHR. There is, however, a right to freedom from discrimination on any ground in the enjoyment of Convention rights.

By contrast, in South Africa, the constitution confers socio-economic rights, such as the right of access to healthcare facilities or to adequate housing. These are sometimes expressed in a qualified form so to impose only an obligation to take reasonable legislative or other measures within available resources to achieve the progressive realization of the right of access to housing. Rights in this form leave open the argument that they are susceptible only to a low level of judicial review. These two examples show that constitutional and human rights can have very different content and they can be drafted according to very different models.

Diversity of constitutional systems

There are also different models when it comes to making decisions about who should decide what violates human rights. Somebody has to have that power. In some countries this power is vested in the courts: the best known example is the US Supreme Court which has the power to strike down legislation which is unconstitutional. In the European Union (“the EU”), there are two levels of problems: first, is the legislation in accordance with EU law? Secondly, is the EU law in question consistent with constitutional rights conferred in the individual member states? The European Court of Justice (“the ECJ”) sitting in Luxembourg has the power to decide whether a law of a member state infringes European law or if a law of the EU is outside the competence of the EU. However, the German courts have a very interesting position on this. They take the view that, while the ECJ has the final say on EU matters, if there is also a question of whether an EU law contravenes the German constitution, that is a matter for the German Constitutional Court though that court would no doubt reach the same view as the ECJ in most cases. This problem reared its head this year when the German Constitutional Court decided that the EU arrest warrant, which would enable one member state to ask for a person present in another member state to be arrested in connection with an offence under the requesting member state’s laws, infringed the rights conferred by the German constitution to have questions of extradition considered by a German court.

In Hong Kong the position is different again: the Court of Final Appeal in Hong Kong is empowered to strike down laws which offend the Basic Law, but on certain reserved matters the decision of the Court of Final Appeal can be re-interpreted by the Standing Committee of the Chinese National People’s Congress. This Committee may find that the Court’s interpretation is not in accordance with the intention of the People’s Congress when the legislation was passed.

The system in Hong Kong is just another way of doing things. It could not be followed in the UK because the ECHR provides that an independent and impartial tribunal established by law must determine all disputes as to rights and obligations. I will explain the UK solution in a moment. But the point I am making is that there should be no necessary assumption that the judicial arm of government can only strike down legislation which is in violation of human rights. The courts do not have that power in the UK so far as primary legislation is concerned. But our law does provide that it is the role of the judges to interpret statute law in conformity with rights protected by the Human Rights Act 1998 (“the 1998 Act”). Only if statute law cannot be interpreted so as to conform to the ECHR can the

courts make a declaration of incompatibility. I shall explain later, if such a declaration is made, only Parliament can change the law or declare it inapplicable.

Diversity of approach by the courts

Another point on which we should reflect is the diversity of approaches to statutory interpretation. Not every court approaches questions of interpretation in the same way. Some courts approach questions of statutory interpretation with a close attention to the wording. Some adopt a more purposive approach. Each approach has its advantages and disadvantages. Where the courts give close attention to the wording this is likely to help people predict the results more easily and plan transactions so as to take advantage of the law. If, however, the courts give more weight to the purpose behind legislation, then it is arguably more likely that the rights, which the legislature intended to confer on citizens, will be recognized by the courts and enforced. Much depends on the constitutional framework in which the courts in question operate and the understanding as to their role in the society in which they operate. There is no “one size fits all” here.

Relative importance of statute law

Then again in some systems statute law is more important than it is in others. In the UK it is becoming increasingly important. There are very few areas of common law which have not been affected by statute law of one kind or another. Of course, where statute law applies, it will, unless it otherwise provides, displace the common law. The study of statute law is inter-disciplinary. It is relevant to all areas of law, for example company law, contract law, environmental law, damages and so on. Many lawyers are not particularly interested in statute law. I think they are wrong not to think it deserves separate and careful study. Statute law may be adjectival law but to me it is very important. It raises technical and constitutional issues.

Diversity of subject matter

Yet again, not every question of interpretation is amenable to the same approach. This may be because of the nature of the subject. Courts across the world tend not to get involved with purely political issues: for example, in the recent *Belmarsh*³ case concerning the detention of terrorist suspects, where the House of Lords accepted the view of the executive that there was a state of emergency threatening the life of the nation. It may be that the approach to statutory interpretation in one case is different from that in another case because of the objectives of interpretation. In the case of human (or constitutional) rights, courts have to give effect to a living instrument. Unless as a matter of law the constitution is to be interpreted exactly in the light of social circumstances as existing at the date of the constitution, then constitutional rights have to be updated as social conditions change. The European Court of Human Rights (which I will call “the Strasbourg court”) adopts an approach of dynamic or evolutive interpretation: it interprets the ECHR according to its current rather than its historic meaning. As one judge put it, “the Convention is written in the present tense”.

The dynamic approach to the interpretation of Convention rights can be seen, for example, in the progressive recognition by the Strasbourg court of the rights of illegitimate children and transsexuals. Since the principle of evolutive interpretation is embedded in the jurisprudence of the Strasbourg court it will be easy for the English courts to adopt it in relation to Convention rights. Indeed it has been held on the highest authority that, even though the 1998 Act does not oblige the English courts to follow the jurisprudence of the Strasbourg court, in the absence of special circumstances the English courts should do so. In the interpretation of constitutional rights, dynamic interpretation is a common feature: as Justice Kirby of the High Court of Australia said extra-judicially in his Hamlyn lectures:

Construing a constitution with a catch cry about “legalism”, with nothing more than judicial casebooks and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it as their basic law, is a contemptible idea. As one sage put it: if you construe a constitution like a last will and testament, that is what it will become.

³ *A v. Secretary of State for the Home Department* (2005) 2 AC 60.

The principle of evolutive interpretation is not confined to human rights. It may apply, for example, where Parliament has used words which involve a value judgment, as in the statutory requirement that company accounts show a “true and fair view”. What is true and fair is liable to change as the expectations of users of such documents change. There are statutes in many different fields which contain terms which require to be given a modern meaning even though they were enacted in the past. Such statutes have been described as “always speaking”.

The Commonwealth

One of the remarkable things about the Commonwealth is that the members of it display such diversity in their systems. Some Commonwealth systems are pure common law, like the English system, but others are based in whole or part on the civil law, for example the law of Quebec or Mauritius. Others again are in whole or part based on Roman-Dutch law such as South Africa and Sri Lanka. I am sure many other examples could be given. What is unique about an Association such as this is that it offers a forum where so many jurisdictions come together to discuss their approaches and broaden their own horizons. If we can pool ideas about how to solve problems and confront each other’s ideas we will in my view reach better solutions to our own problems in our jurisdictions when we return to our normal tasks again. As the last speaker in this conference I would like to think that you will go away with the conviction that the Commonwealth offers a useful and unique forum for the discussion of legal issues.

The position about human rights in the UK

In the UK, we have no written constitution. In 1950, the UK instead became a party to the ECHR, which is an international convention. For many years the UK did not incorporate the Convention into UK domestic law and so the domestic courts could not give effect to Convention rights. However, under the ECHR individuals are given the right to petition the Strasbourg court to determine whether there has been a violation. Prior to 1998, the only recourse open to a citizen of this country who asserted that his rights had been infringed was to petition the Strasbourg court. In 1998 Parliament passed the 1998 Act in order to give better protection to Convention rights in domestic law. I now turn to the relevant provisions of the 1998 Act.

Human Rights Act 1998

For my purposes the relevant provisions are sections 2, 3 and 4. In material part, these provide as follows:

2. (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. . .
3. (1) 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.
 - (2) This section—
 - (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation)

primary legislation prevents removal of the incompatibility.

4. (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
- (4) If the court is satisfied—
 - (a) that the provision is incompatible with a Convention right, and
 - (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,it may make a declaration of that incompatibility.
- (5) In this section ‘court’ means—
 - (a) the House of Lords;
 - (b) the Judicial Committee of the Privy Council;
 - (c) the Courts-Martial Appeal Court;
 - (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court of the Court of Session;
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.
- (6) A declaration under this section (“a declaration of incompatibility”)—
 - (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.

These provisions demonstrate that, when Parliament incorporated the ECHR into UK domestic law, it did so in a way that preserved parliamentary sovereignty. In other words, it was a term of the constitutional settlement then reached that the courts should not be able to strike down primary legislation passed by Parliament. They could, however, make a declaration of incompatibility. A declaration of incompatibility has no effect on the validity, continuing operation or enforcement of the provision in question and is not binding on the parties to the proceedings in which it is made. Thus, the statutory provisions in issue remain unaffected unless and until Parliament changes them. The courts are also bound by the interpretative obligation in section 3 to interpret legislation, so far as possible, in conformity with the rights conferred by the ECHR.

The general expectation, when the 1998 Act was passed, was that, when there was a final order of a court making a declaration of incompatibility, Parliament would respect the court’s decision and change the law. It was recognized that Parliament should choose the way in which the law should be amended. But there is no provision in the 1998 Act compelling Parliament to change the law and it is doubtful whether there is any constitutional convention to that effect. Thus it is a consequence of the constitutional settlement in the 1998 Act, which I have described above, that, following a decision by the courts that primary legislation is incompatible with the ECHR, Parliament could, at least in theory, decide that it did not wish to change the law to make it conform to the ECHR or indeed that it wished to amend or repeal the 1998 Act.

This constitutional settlement was recently tested. After 9/11, Parliament passed the Anti-terrorism, Crime and Security Act 2001 which among other provisions conferred the right on the Home Secretary to detain terrorist suspects. In the *Belmarsh* case, to which I have already referred, the House of Lords found that those detention provisions violated the Convention rights to liberty and to freedom from discrimination because the provisions discriminated as against aliens and were disproportionate. They did not apply to terrorist suspects who were British subjects. The House of Lords could not strike the provisions down. All the House of Lords could do was make a declaration of incompatibility. But that did not lead to the release of the detainees. They had to apply for bail on the grounds that, if they were not released voluntarily by the Home Secretary, they would apply to the Strasbourg court for their release and those applications were likely to be successful because of the decision of the House of Lords.

When the decision in the *Belmarsh* case was handed down, the Government did not take any immediate step to release the detainees, or to change the law. However, in due course it did introduce a Bill which became the Prevention of Terrorism Act 2005 (“the 2005 Act”). The 2005 Act provides for the courts or in some circumstances the Home Secretary to make “control orders” under which conditions are attached to a person’s liberty, for example, conditions as to a curfew or a prohibition on using the Internet or a mobile phone and so on. The detainees are no longer detained in a prison. In the main they are now subject to control orders limiting their freedom of movement under this Act. I will return to the 2005 Act in my remarks later.

As we have seen, however, in the 1998 Act Parliament gave the courts an enhanced power to interpret legislation. Lord Nicholls has said that this is not interpretation in the usual sense of the term.⁴ The courts are indeed empowered to adopt a strained meaning if this is required to make legislation compatible with human rights. Moreover the courts are enjoined to apply this interpretation to statutes whenever passed, not just statutes passed after the 1998 Act itself became law. So the courts may no longer be concerned with the meaning of the words used by Parliament at the time it passed the legislation. However, there must be some limits to what may properly be called interpretation because Parliament has devised the alternative route of a declaration of incompatibility as already explained. I give two examples below of cases in which section 3 of the 1998 Act has been applied. They are both decisions of the House of Lords.

Human rights and the use of legislative history

It should be noted that, while on questions of statutory interpretation the English courts do not in general admit legislative history, they may be able to do so more freely where the question is whether the legislation is compatible with the ECHR, or whether its provisions are proportionate to the legitimate ends to which the legislation is directed.

Human rights and the quality of legislation

The *Belmarsh* case also raises concerns about the quality of legislation. In the UK, statute law tends to be relatively prescriptive, and judges pay close attention to the actual words of the statute. Accordingly it is important that the legislative drafting should be of the highest quality. This is not always possible where the parliamentary process is accelerated. The Anti-terrorism, Crime and Security Act 2001 went through its parliamentary stages at speed. The position with the 2005 Act was even more striking: it was considered and passed by Parliament over only 18 days. When this happens, Parliament may require the legislation to be reviewed annually or impose a sunset clause. In addition, when a Bill is introduced into Parliament, the Minister responsible for it must make a statement to the effect that the provisions of the Bill are compatible with Convention rights.⁵

These measures are some acceptance of the problem but not a total solution. The existing statute may still need to be interpreted by the courts. Where legislation is passed at speed, it may be that Parliament did not give adequate consideration to human rights, and the courts may look at the statute with that possibility in mind.

Jurisprudence on section 3 of the Human Rights Act 1998

I now turn to give two examples of the way in which the House of Lords has interpreted legislation in reliance on section 3 of the 1998 Act. The first case is *R v A (No.2)*.⁶ In this case, the appeal was by a defendant to a criminal charge of rape and concerned the question of whether certain evidence concerning the sexual behaviour of the complainant would be admissible at trial. The defendant wanted to adduce evidence of the complainant’s sexual behaviour in the three weeks prior to the alleged rape. However, section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the admission of evidence as to the complainant’s sexual behaviour unless certain conditions were fulfilled. The conditions permit the admission of evidence of sexual behaviour on the issue of consent

⁴ Lord Nicholls “My Kingdom for a Horse: the Meaning of Words” (2005) 121 LQR 577, 590.

⁵ Human Rights Act 1998, section 19(1).

⁶ (2002) 1 AC 45.

if the prior sexual behaviour was so similar to sexual behaviour of the complainant that the similarity cannot be explained as a coincidence. But further conditions are attached to this exception, including a condition that the behaviour should have taken place as part of the event or at or about the same time as the alleged rape.⁷ The House of Lords held that an accused's Convention right to a fair trial might be violated if relevant evidence of the kind sought to be addressed by the appellant was excluded. The question then arose whether section 41 could be construed so as to prevent any violation of the defendant's rights. On this, their Lordships expressed different views.

First, Lord Steyn made some general observations about section 3:

44. On the other hand, the interpretative obligation of section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p.373F; and my judgment at 366B ... In accordance with the will of Parliament as reflected in section 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 expressed 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. If a *clear* limitation on Convention rights is stated in terms, such an impossibility will arise: *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 132A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

45. In my view, section 3 requires the court to subordinate the niceties of the language of section 41(3)(c) and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c) as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c) ...

Lord Hope of Craighead took a different view. He considered that the question whether section 41 was incompatible with the Convention could not be finally determined at the pre-trial stage. Accordingly, he considered it was neither necessary nor appropriate to resort to the interpretative obligation in section 3 of the 1998 Act. Lord Hope added:

108. I should like to add, however, that I would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read into section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify any ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. This is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as a legislators ...

109. In the present case it seems to me that the entire structure of section 41 contradicts the idea that it is possible to read into it a new provision which would enable the courts to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of this section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge. A deliberate decision was taken not to follow the examples which were to be found elsewhere, such as in section 275 of the Criminal Procedure (Scotland) Act 1995, of provisions which give an overriding discretion to the trial judge to allow the evidence or questioning where it would be contrary to the interests of justice to exclude it. Section 41(2) forbids the exercise of such discretion unless the court is satisfied as to the matters which that section identifies. It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read

⁷ Section 41(3)(c).

in a provision which would enable the court to exercise a wider discretion than that permitted by section 41(2).

110. I would not have the same difficulty with a solution which read down the provisions of sections (3) or (5), as the case may be, in order to render them compatible with the Convention right but if that were to be done it would be necessary to identify precisely (a) the words used by the legislature which would otherwise be incompatible with the Convention right and (b) how those words were to be construed, according to the rule which section 3 lays down to make them compatible. That, it seems to me, is what the rule of construction requires. The court's task is to read and give effect to the legislation which it is asked to construe ...

The other members of the House in substance agreed with Lord Steyn's approach. Lord Slynn held:

It seems to me that your Lordships cannot say that it is not possible to read section 41(3)(c) together with article 6 of the Convention rights in a way which will result in a fair hearing. In my view, section 41(3)(c) is to be read as permitting the admission of evidence or questioning which relates to a relevant issue in the case and which the trial judge considers is necessary to make the trial a fair one.⁸

Lord Clyde held:

If a case occurred where the evidence of the complainant's sexual behaviour was relevant and important for the defence to make good a case of consent, then it seems to me that the language would have to be strained to avoid the injustice to the accused of excluding them from a full and proper presentation of the defence.⁹

Lord Hutton held:

... pursuant to the obligation imposed by section 3(1) that section 41 must be read and given effect in a way which is compatible with article 6, I consider that section 41(3)(c) should be read as including evidence of such previous behaviour by the complainant because the defendant claims that her sexual behaviour on previous occasions was similar, and the similarity was not a coincidence because there was a causal connection which was her affection for, and feelings of attraction towards, the defendant.¹⁰

R v A (No 2) was one of the first cases where section 3 of the 1998 Act was considered. The House of Lords' approach has been developed in a number of other cases involving section 3, of which the most important is the recent case of *Ghaidan v Godin-Mendoza*.¹¹ In that case the statute in question confers rights of succession in respect of a tenancy on a person who had lived with the deceased original tenant "as his or her wife or husband". The issue was whether this provision applied to same sex couples. If it did not do so, then it discriminated against them in violation of article 14 of the ECHR read with article 8.

The House of Lords held that the statute in question had to apply to the survivor of a same sex relationship as much as it did to a surviving spouse. In the course of reaching that conclusion the courts gave authoritative guidance as to the limits of section 3.

The leading speech is that of Lord Nicholls. He held that the effect of section 3 was that the court might be required to depart from the unambiguous meaning of a statute. The question of difficulty was how far the courts should go. He held that the answer to this question did not depend on the actual wording used by Parliament. He continued:

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention compliant. In other words, the intention of Parliament in enacting section 3 was that,

⁸ Paragraph 13.

⁹ Paragraph 136.

¹⁰ Paragraph 163.

¹¹ (2004) 2 AC 557.

to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, “go with the grain of the legislation”. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

Lord Rodger also considered the boundaries of section 3 and gave further helpful guidance. He held that in deciding how to interpret the legislation the courts should not produce a meaning which departed substantially from a fundamental feature or cardinal principle of the legislation. Likewise the courts should be less ready to interpret legislation so as to be compatible with Convention rights where there would be important practical repercussions which the courts are not equipped to evaluate.

The decision in the *Ghaidan* case is a powerful statement of the court’s preparedness to interpret legislation so that it is compatible with human rights. The speeches, all of which repay careful study, contain extremely valuable guidelines. The House of Lords has recognized the force of the mandatory obligation in section 3. However, the words “in a way which is compatible with the Convention rights” make it clear that the courts have the choice as to how to interpret the legislation to achieve the objective in section 3, namely that, where possible, the legislation should be compatible with human rights.

The courts are not bound to give effect to Convention rights in exactly the same way as the Strasbourg court. As Lord Irvine LC put it in Parliament during the passage of the Bill, they can use the jurisprudence of the Strasbourg court as a floor rather than a ceiling.

Moreover, the House of Lords has made it clear that the courts do not have slavishly to follow a textual approach to achieve a compatible interpretation.

Where section 3 can be applied to part only of a statute, it is possible that words may mean one thing in the section subject to interpretation under section 3, and another in some other section of the statute which is interpreted in the ordinary way.

In his most illuminating speech Lord Rodger counsels against using jurisprudence of the Judicial Committee of the Privy Council since it is usually concerned with overriding constitutional provisions, rather than provisions such as section 3 which preserve parliamentary sovereignty. These are of course wise words. Nonetheless, it is still a point worth making that, with the exception of such experience as judges have obtained in the Judicial Committee of the Privy Council, the English courts have comparatively little experience in constitutional interpretation. The UK has no single statute containing a constitution, although it now has a number of statutes which deal with some of the matters that would be dealt with in a normal written constitution. Those statutes include the Parliament Acts 1911 and 1949 and the various statutes dealing with devolution and discrimination. It must be borne in mind that section 3 of the 1998 Act does not apply to all statutes of a constitutional nature. It applies only to those which have to be interpreted so as to conform to the ECHR. So, even after the 1998 Act, it is still true to say that the UK has no special doctrine of interpretation applying to constitutional statutes in general.

The position that English law has reached on section 3, while clearly right, may only be the beginning of the road. It still leaves some unanswered questions. For example, on the basis that the ECHR is a floor and not a ceiling, there must inevitably be a space between the floor and the ceiling which leaves the judges considerable room for the exercise of judgment. Is there any principle of interpretation which applies here? Likewise, is there any principle of interpretation which applies when the Court has to sort out conflicts between different rights, such as the right to freedom of expression as against someone else’s right to respect for his private life? We may have a long way yet to go in this field.

We are likely to need different sorts of guidelines for different sorts of cases. For example, it may be that Kirby J's quotation from the sage who said that constitutions must not be interpreted like wills should not be taken too far. Even in the field of constitutional rights, there may be occasions when a relatively technical approach will be needed, for instance in constitutional provisions setting out money-raising powers, or setting out the description of a group who are to enjoy particular privileges or protection under a constitution. In addition there will be some occasions when a historical approach is relevant.

Conclusions

The UK is a relative newcomer in the field of statutory interpretation and human rights. But it is clear, even from domestic law developments thus far, that human rights require a fresh approach to some of the established ideas and concepts of statutory interpretation. Moreover, there is plenty of scope for the courts to develop further the approach to the interpretation of legislation where human rights are involved.