HRA section 3 and the limits of purposive interpretation

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This is a paper on the interpretation of section 3 of the Human Rights Act. I am not going to spend much time interpreting the Act, however. Instead, the question I am trying to answer is what should the courts do when legislation is challenged on grounds of Convention rights under the Act, and section 3 is invoked. My argument is that under section 3 courts should do no more, and no less, than give a purposive interpretation of the statute that is challenged. Those two claims are discussed in the first two parts of this paper, while the third and final part will deal with some of the limits of adjudication under section 3.

A Section 3(1) requires no more than statutory interpretation

Section 3(1) of the Human Rights Act 1998 (HRA) reads as follows:

> 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

The term 'Convention rights' refers to those Articles of the European Convention on Human Rights and Fundamental Freedoms and its protocols which are incorporated in Schedule 1 to the HRA.[2]

The first part of my argument is that courts should do no more than give a purposive interpretation. This may seem like a trivial point: after all, the section is headed 'Interpretation of Legislation', and talks of legislation being 'read and given effect'. The Convention rights relate only to the 'way' in which the statutes should be read. Although any Convention right which is in issue in a case must also be interpreted, it

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[2] HRA s1(1).

is not the primary object of interpretation, but plays a secondary role in determining a standard of compatibility which interpreters must strive to satisfy. Thus Convention rights are not given direct effect of the kind recognised and accorded to EC law under the European Communities Act 1972 (ECA). The contrast between the ECA and the HRA in this regard is instructive. ECA s2(4) provides that 'any enactment passed or to be passed … shall be construed and have effect *subject to* the foregoing provisions of this section [which incorporate EC law]'.[3] This means that courts must treat both UK and EC law as primary objects of interpretation, with the latter prevailing due to the phrase 'subject to'.

If there was a question that courts should do otherwise under section 3 than interpret the statute before them, then surely the answer to that is found in section 4, which reads:

> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
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> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

To summarise, the bridge between these two provisions is the word 'possible': when a Convention compatible outcome is not 'possible' under section 3, the provision yields to section 4.

The courts, including the House of Lords, have repeatedly affirmed that section 3 authorises the interpretation, but not amendment, of ordinary statutes.[4] The fact that it was necessary to affirm this point suggests that there is pressure in cases under the Human Rights Act to do more than just interpret, to do something verging on amendment. There is indeed such pressure, and it stems from the widely held view that section 3 also plays a remedial role under the framework of the HRA. The sense

[3] Emphasis added.

in which section 3 is remedial is that it enables judges to protect Convention rights which would have otherwise been breached if the statute governing the case was interpreted according to ordinary principles of statutory interpretation.

Lord Steyn put the case for the remedial use of section 3 particularly strongly, arguing that

> Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort.[5]

Nonetheless, Lord Steyn too recognised that section 3 was confined to the interpretation of statutes, and that statutes which expressly or by necessarily implication breached Convention rights could not be remedied under this provision.[6]

In summary, then, the Convention rights protected by section 3 have not experienced a *Factortame*[7] moment. They have not received an enhanced constitutional status, whether temporary or permanent, as did the provisions of EC law in that case when they were enforced even at the cost of disapplying a UK Act of Parliament. This may be explained most simply by the difference in wording between the Human Rights Act and the European Communities Act. As an additional explanation, I would like to suggest that there are reasons relating to the separation of powers under the UK constitution which prevent the rights protected under section 3 from attaining even the level of protection which other jurisdictions give to constitutional rights by statutory interpretation. It is common in other jurisdictions to have doctrines of reading down, or the avoidance of constitutional invalidity, which hold that interpreting a statute consistently with the constitutional bill of rights is preferable to the harsher outcome in which a court strikes down the statute. Although section 3 of the HRA expresses a similar preference for rights-compatible interpretations, it is not fully analogous to an

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[4] See eg *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 [39] (Lord Nicholls); *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 [91] (Lord Hope); *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [112] (Lord Rodger).
[5] *Ghaidan* (n4) [47].
[6] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 at [59].
[7] *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

avoidance doctrine. After all, a rights-compatible interpretation given under section 3 does not avoid judicial invalidation; instead, it pre-empts the opportunity for Parliament to consider whether or not to amend the statute. This constitutional difference may provide yet another reason for the lack of a *Factortame* moment for section 3, since directly effective EC law enjoys supremacy of a kind that more closely resembles a constitutional bill of rights.

A more appropriate parallel for the level of protection given to Convention rights under section 3 may well be the common law presumption in favour of fundamental rights. This presumption has developed to give different levels of protection to different rights, with arguably the strongest protection being given to the right of access to court.[8] It is beyond the scope of the present paper to undertake a comparative analysis of the two doctrines. Instead, this paper claims section 3 is not merely analogous to other doctrines of interpretation, but, somewhat more boldly, that it *is* in fact a form of purposive interpretation. I will try to explain that there is room to accommodate public law concepts such as proportionality review and judicial deference within this modified form of purposive interpretation. The introduction of these concepts does not await a constitutional moment of the kind which was recognised in *Factortame.*

B Section 3(1) and purposive interpretation

1 Overview of purposive interpretation

The claim which is being advanced in stating that adjudication under section 3(1) is a form of purposive interpretation is both normative and descriptive. I am claiming, normatively, that a purposive interpretation is a jurisprudentially sound model for adjudication under section 3(1), and, descriptively, that this is what the courts have done, concentrating on key cases in the House of Lords.[9] The descriptive claim may give rise to some immediate doubts. The purposive interpretation of statutes is a well

[8] See eg *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.
[9] I have made some of these arguments before in 'The New Purposive Approach to Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 MLR, 294.

established doctrine, but, unlike the purposive interpretation of constitutional rights it is not particularly associated with innovative judicial decisions that protect human rights. And yet some of the decisions given under section 3 have undoubtedly been innovative. The outcomes of some leading decisions could be loosely summarised as follows: rendering admissible certain critically relevant evidence under a law shielding rape victims,[10] replacing a legal burden with an evidentiary burden,[11] and extending the right to succeed to a statutory tenancy to same sex couples.[12] The decisions will be considered in more detail below. It is clear, however, that an argument needs to be made to show that purposive interpretation has enough innovative, or remedial, potential to achieve such results.

The purpose of the statute is not merely an interpretative aid that can be used to resolve issues on which a statute is ambiguous or vague. As soon as the context of a statute is considered, a court will form an initial view of the purpose of the statute, which in turn informs its final interpretation. Although English courts once endorsed a literal approach to the interpretation of statutes, avoiding references to the context except when needed to resolve an ambiguity, courts since the middle of the twentieth century have clarified that context is essential to any interpretation. Advances in the philosophy of language have made it clear that a contextual approach is in fact the only sound one, and that the literal approach was flawed.[13] There can be no such thing as an acontextual interpretation, since no reader can understand a written text without relying on other knowledge: about the language in which the text is written and about the world in general.[14]

The materials which constitute the context of a statute were discussed by the House of Lords in the *Prince of Hanover* case.[15] Viscount Simonds stated that, even in the absence of ambiguity, a judge was entitled to consider

[10] *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45.
[11] *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545.
[12] *Ghaidan* (n4).
[13] J Bell and G Engle (eds) *Cross on Statutory Interpretation* (3rd edn Butterworths London 1995) (hereafter '*Cross*'), 32; M Zander *The Law-Making Process* (6th edn CUP Cambridge 2004) 195. See also Lord Steyn 'Dynamic interpretation amidst an orgy of statutes' [2004] EHRLR 245, 250.
[14] See T Endicott *Vagueness in Law* (OUP Oxford 2000).
[15] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 (HL).

> … not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.[16]

In modern terminology, the purpose of a statute is the remedy which the legislature seeks to provide for a mischief. However, the old terminology of mischief and remedy, as used in *Heydon*'s case, is still useful, as it helps us to see the statute as a structure of means towards ends, the ends being the alleviation of some mischief or 'disease of the Commonwealth'. Jurisprudentially speaking, it is clear that a justified law must be one which is designed to serve a good end.[17] The working assumption of courts in statutory interpretation must therefore be that the task of interpretation includes uncovering a scheme of ends, and means to ends.

In recent years, purposive interpretation has come to be associated with the interpretative doctrines prevailing in particular subject matters, welfare legislation, sometimes tax and criminal law, statutes implementing EC directives, and arguably also the rectification of drafting errors, as well as updating construction.

Purposive interpretation has a more fundamental and pervasive role, however. The pervasiveness of purposive interpretation was one of the themes of the work of Sir Rupert Cross. In his book *Statutory Interpretation*,[18] Sir Rupert Cross distilled a set of basic rules that were observed in UK statutory interpretation. There are three operative basic rules, which correspond more or less to increasing degrees of purposive interpretation. The first two basic rules are:

> 1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also

[16] *ibid* at 461.
[17] See eg Joseph Raz 'Intention in Interpretation' in RP George (ed) *The Autonomy of Law* (Clarendon Press Oxford 1996), Andrei Marmor *Interpretation and Legal Theory* (OUP Oxford 1992) chapter 8.
[18] *Cross* (n13).

> determine the extent of general words with reference to that context.
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> 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.[19]

Although purpose is not mentioned in the first of these rules, it is clear that is of great, if not controlling importance, since the first rule can be overridden by the second whenever a secondary meaning is available. Indeed, the first rule is very often satisfied by purposive interpretation:

> [P]urposive construction most frequently requires giving effect to the ordinary and primary meaning of the words used, since the drafter has chosen them with care to give effect to the purpose for which the legislation is passed.[20]

Secondary meanings are still meanings of the statutory language, albeit more strained or unusual. At the periphery, there are cases where is a 'matter of debate',[21] whether the facts fall within the meaning of the statutory language at all, but statutory interpretation does not end there. In addition, a judge has:

> a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd, or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.[22]

This is the third of the basic rules. It is also the highest degree of purposive interpretation. This statement of the rule does not mention the statutory purpose. However, an analysis of the case law shows that absurdity, and the other statutory ills

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[19] *ibid* at 49.
[20] *ibid* at 82
[21] *ibid* at 93.

mentioned, are to be tested with regard to the purpose of the statute. Sir Rupert Cross concluded:

> [I]t is only inconsistency with the purpose of the statute, understood in the light of other legal provisions and values, that justifies … departure and not a judge's more general views of what is an "absurd" result.[23]

Absurdity is thus a kind of mismatch between the means and the ends pursued by the legislature, ie the statutory purpose. In assessing whether there is a mismatch, courts naturally do not only refer to the purpose, but also to 'other legal provisions and values'. This makes sense, since the cogency of a statutory scheme must depend on logic and other considerations external to the statute. The purposive understanding of the absurdity standard is in fact deferential, as it shows that courts never disregard the way in which the legislature has exercised Parliamentary sovereignty. Courts will always implement the purpose of the statute, even if they make some small modification to the means, by way of introducing an exception or reading in additional words.

Purposive modification is a rare event, and most of the time the means indicated by the legislature, ie the ordinary meaning of the statute, is still enforced. There is no time only to discuss one of the most dramatic examples.

In *R v Registrar General, ex p Smith*,[24] the Court of Appeal was required to interpret section 51(1) of the Adoption Act 1976, which provided that 'the Registrar General shall on application made in the prescribed manner by an adopted person … supply to that person … such information as is necessary to enable that person to obtain a certified copy of the record of his birth.' The applicant in this case was a mental patient who had shown clear intentions to kill his mother, and had already killed a cellmate whom he believed to be his adoptive mother. The court held that

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[22] *ibid* at 49.
[23] *ibid* at 92.
[24] [1991] 2 QB 393 (CA).

notwithstanding the unambiguous meaning of the statutory provision, the applicant should be denied access to the records of his adoption on grounds of public policy.

It cannot be said that protecting the lives of parents was part of the meaning of the statute. The Court of Appeal did claim that there was a presumption that Parliament intended to prevent the commission of future crime; but the scope of that presumption was still being argued about by the judge who formulated it![25] The true state of affairs is that the protection of those lives was a distinct value which overrode the considerations, relating to the desirability of informing persons about their parentage, which underlay the purpose of Parliament.

The judicial use of purposive modification of statutes is rare, and subject to three major constraints. The first relates to the ability to determine the purpose of the statute. It is harder for courts to determine the social objectives of a statute at an abstract level, than it is to decide concretely what means are provided. This is a result of detailed drafting practices, and perhaps also the reluctance to refer to legislative history materials. The second constraint relates to finding a standard which the judiciary can use to scrutinise the linkage between means and purposes in the statutory scheme. Absurdity is a very high threshold. Thirdly, the same standard that is used to scrutinise the statutory scheme will also be used to devise the new means to serve the statutory purpose. In this regard, it is important that judges not be given too much choice, or at least choice between alternatives which is more appropriate for the legislature to make. The House of Lords overturned one of Lord Denning's earlier decisions in the Court of Appeal and in so doing warned against the use of 'guesswork'.[26] A particularly strict approach to this third constraint is taken in cases of drafting errors, where the solution to be adopted by the court's interpretation must be substantively unique, ie the only interpretation that will serve the purpose.[27]

2 The abstract purposive approach as a solution to section 3

[25] *ibid* at 404 (Staughton LJ).
[26] *Magor and St Mellons Rural District Council v Newport* [1952] AC 189, 191.
[27] See eg *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL).

Under section 3, each of the three constraints just discussed has been relaxed to some extent. The result is an approach which might be termed 'abstract purposive interpretation'. This approach emerges from a series of key decisions of the House of Lords, but the 2004 decision of *Ghaidan v Godin-Mendoza*[28] should be singled out in particular. The judgments given by the House of Lords in *Ghaidan* contain both an in-depth discussion and a detailed exposition of the interpretative method under s3. Also, the case is particularly useful as an illustration of the difference that section 3 has made to statutory interpretation, since the statutory provision which was at issue had been interpreted by the House of Lords in a very similar case shortly before the advent of the HRA.

Both *Ghaidan* and its predecessor case, *Fitzpatrick v Sterling Housing Association*,[29] dealt with the rights of the surviving same-sex partner of a tenant who had held a statutory tenancy under the Rent Act 1977 (the Act). In each case the deceased tenant and his partner had cohabited and shared a close and stable relationship for many years. The question was whether the survivor was entitled to succeed to his partner's statutory tenancy. Paragraph 2(1) of the first Schedule to the Act granted a right of succession to the 'surviving spouse' of a tenant. The definition of 'surviving spouse' had extended in 1988 by the insertion of paragraph 2(2), which provided that

> a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.

Did the same-sex partner qualify under this provision? In *Fitzpatrick* the House of Lords unanimously answered it in the negative.[30] The same-sex partner's claim was blocked by two of the three constraints on highly purposive interpretation just discussed. First, the purpose of the statute could not be determined at a sufficiently abstract level to include his claim. Most of the judgments in the House of Lords emphasised that used the word 'or' to parse paragraph 2(2) into two gender-specific phrases: 'as his wife' or 'as her husband'. An extension to include same-sex partners

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[28] n4.
[29] [2001] 1 AC 27.
[30] *ibid* 34 (Lord Slynn), 43 (Lord Nicholls), 47 (Lord Clyde), 57 (Lord Hutton), 69 (Lord Hobhouse).

would not serve this purpose. Secondly, there no argument based on a legal right against discrimination was raised in *Fitzpatrick*. Thus the standard of scrutiny and alternative justification which would have been needed to support a modifying purposive interpretation was lacking.

In this respect, the position was different when *Ghaidan* came to be decided, since the Human Rights Act was applicable. The House of Lords held unanimously that denying a surviving same-sex partner the right to succeed to a statutory tenancy would be incompatible with the Convention, since that would breach the Article 14 right against discrimination, read with the Article 8 right to respect for a person's home. This conclusion followed quite swiftly from the finding that Article 8 was engaged. The denial of equal treatment to same-sex partners could only be justified if it was proportionate to a legitimate objective, and no legitimate objective was established. The House of Lords then proceeded to the next stage of their enquiry under section 3 namely whether a non-discriminatory interpretation was 'possible'.

On behalf of a majority of four, Lord Nicholls found that a non-discriminatory interpretation was possible. Only Lord Millett dissented. Lord Steyn and Lord Rodger delivered concurring judgments, both of which were joined by Baroness Hale. In his majority judgment, Lord Nicholls alluded to a tension between competing aspects of section 3, which was discussed at the start of this comment. On the one hand, section 3 would sometimes 'require a court to depart from the unambiguous meaning the legislation would otherwise bear'.[31] On the other hand, it was still the statute, and not the Convention rights directly, that had to be 'read and given effect' under section 3. Lord Nicholls sought a way of resolving this tension. The key question was 'how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative'.[32]

Faced with this choice, Lord Nicholls opted for the 'concept' expressed in a statute and argued that the language of the statute was of lesser importance:

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[31] *Ghaidan* (n4) at [30].
[32] *ibid* at [31].

> [O]nce it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. [33]

What is the 'concept' expressed in a statute? It seems that Lord Nicholls had in mind the purpose of the statute, assessed at a relatively abstract level. This is borne out by how he analysed the Rent Act in this case. Lord Nicholls observed that 'the social policy underlying the 1988 extension … is equally applicable to the survivor of homosexual couples living together in a close and stable relationship'.[34] This 'social policy' was that Parliament in 1988 extended succession rights beyond married couples to other couples who had made their home together. Lord Nicholls halted his enquiry into the purpose of the statute at this level of abstraction.[35] His judgment effectively offers a new, or at least modified, means of serving this purpose, by extending the protection to surviving same-sex partners. Not only may judges interpret the language of the statute 'restrictively or expansively', but they may also 'read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant'.[36]

It is submitted that 'abstract purposive interpretation' is an appropriate description of the method Lord Nicholls develops under section 3. Each of the three constraints on highly purposive interpretation has noticeably been relaxed. First, the purpose is determined at a relatively abstract level. One reason why the courts may be more willing to do this, is that an abstract understanding of the purpose is required in order to test whether it pursues one of the legitimate objectives that may justify restricting a Convention right, eg national security, or the rights and reputation of others. Secondly, the linkage between the purpose and the means provided in the statute is

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[33] *ibid* at [31].
[34] *ibid* at [35].
[35] For further examples of judges asserting that a section 3 interpretation is compatible with the underlying purpose of a statute, see A. Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179 at 192-194.

scrutinised with a test which is far less deferential than absurdity. Courts will consider whether the means are proportionate to the legitimate objective when they are determining whether or not the statute is compatible with the Convention. The same standard therefore has to be used when constructing a modified means-end scheme which is designed to achieve Convention compatibility under section 3. Thirdly, courts appear to enjoy considerably greater latitude in deciding on the modified means which will serve the abstract purpose of the statute, even when this involves reading the statute in a restricted or expanded sense, or reading in words.

C Limits on purposive interpretation under section 3

The abstract purposive method of interpretation which has been ushered in under section 3 poses at least two challenges for the respective roles of the judiciary and the legislature in statutory interpretation. First, there is the risk that the courts will completely unravel the scheme of means and ends devised by Parliament. The more abstractly courts are willing to define the purpose of the statute, the more this risk increases. Ultimately, although this would of course never happen, a court might simply proceed from the starting point that the purpose of a statute is to promote the common good, and then offer a new statutory scheme entirely of its own making.

The second challenge is that, even if courts do not escalate to very abstract levels when determining the purpose of the statute, they will make decisions, at the level of detail, which are better suited for the legislature to make. This challenge is connected with the second and third constraints traditionally imposed on highly purposive interpretation, ie the standard of scrutiny which courts use to assess the linkage between statutory purpose and means, and the extent to which they are able to devise new means. As just explained, the courts now use a standard of proportionality whenever Convention rights are engaged. Proportionality is a much more complicated question than absurdity, involving several steps of enquiry into the linkage between means and purpose, the impact upon the Convention rights, and the availability of alternative means. It is well recognised that courts should sometimes

[36] *Ghaidan* (n4) at [32].

defer to the legislature while carrying out their judicial responsibility of determining proportionality. That is, the courts should make allowances for the fact that the legislature may be better able to assess, either as a matter of expertise or because of its democratic standing in the constitution, whether the linkage between means and purpose is effective, what impact there is on Convention rights and the availability of alternative means. Deference has mostly been recognised in the context of courts determining whether administrative action, or indeed primary legislation, is compatible with the Convention. But an even greater degree of deference may be called for when the courts are using the proportionality standard to devise a modified means of serving the statutory purpose. After all, this is a more delicate enquiry, not just diagnosing disproportionality, but devising a proportionate solution. The challenge brings into play further differences between the law-making ability of the legislature and the ability of the courts to regulate this and future cases by precedent.

The courts have developed limitation doctrines to address each of these two challenges. They are, respectively, the doctrine of respecting the fundamental features of a statute, and of avoiding decision on issues calling for legislative deliberation.

1 Respecting the fundamental features of a statute

The idea that section 3 interpretations should respect the 'fundamental features' of a statute was first mentioned in the case of *Re S*.[37] The House of Lords in that case overturned a section 3 interpretation of the Children Act 1989 given by the Court of Appeal. The Court of Appeal had interpreted the Act as allowing extensive judicial supervision of care orders, which ensured that regular access to court was possible to review the case of any child in care. However, the House of Lords found that this interpretation was at odds with a series of provisions in the Act that restricted judicial supervision of care orders and granted exclusive responsibility to the local authority to

[37] *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291.

supervise most aspects of a care order. These restrictions on judicial intervention constituted a 'fundamental feature' of the Children Act, the House of Lords held.[38]

The concept of fundamental features is a difficult one, since it suggests that some features of a statute might be more important than others for purposes of enforcement. However, the doctrine has developed in such a way as to protect the scheme of means and ends to which Parliament is committed. It is submitted that if a section 3 interpretation is to respect the fundamental features of a statute, three requirements must be satisfied: first, the section 3 interpretation must be grounded in a provision or provisions of the statute; second, it must not render any of the existing provisions in the statute redundant, and third, it must not contradict any of the existing provisions.

The first requirement was evident in *Re S*, when the House of Lords remarked that it was important for any interpretation under section 3, to identify 'the particular statutory provision or provisions' that it was interpreting.[39] The practical effect of this requirement is to guard against interpretations that are simply devised to give effect to an abstract purpose of the statute.

The second requirement is that the section 3 interpretation should not render any of the provisions in the statute redundant. This is of course a familiar principle of statutory interpretation. It was given particularly vivid expression in the case of *R(Anderson) v Home Secretary*. [40] Section 29 of the Crime (Sentences) Act 1997 gave the Home Secretary a power to refer the cases of prisoners sentenced to a mandatory life sentence for murder to the Parole Board. The Convention point was that it was incompatible with Article 6 for the Home Secretary, and not the sentencing judge, to determine the tariff of years that these prisoners had to serve before being considered for parole. There was a practice of judges setting such tariffs. A proposed interpretation under section 3 would have bound the Home Secretary to exercise this power by referring the case at the expiry of the tariff period. However, the House of Lords unanimously rejected this, holding that it would be 'judicial

[38] *ibid* at [23]-[25].
[39] *ibid* at [41].
[40] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837.

vandalism'. The underlying reason seems to be that the role of the Home Secretary would have been made redundant.

Lastly, non-contradiction of the provisions of the statute deserves to be recognised as an additional limit. This is because the process of reading a provision expansively or restrictively, or reading words in, can change its meaning, but it would surely be at odds with the law-making role of Parliament to arrive at the opposite meaning. In practice, the demands of non-contradiction are not simply determined by statutory language.[41] But it is fair to say that precise statutory language will help to establish a fundamental feature, since it is harder to avoid contradicting a more precisely worded statute. This was illustrated in the case of *Wilkinson*,[42] a tax appeal in which a widower unsuccessfully claimed a tax benefit which was granted specifically to widows.

Where does the decision in *Ghaidan* leave the fundamental features doctrine? This was in fact one of the areas of disagreement between the majority and Lord Millett, dissenting. Lord Millett shared the majority's approach to section 3, including their recognition of a fundamental features doctrine, but disagreed on its application. This turned on the interpretation which his Lordship gave to the statute. Lord Millett held that it was a fundamental feature of the Rent Act that succession to a statutory tenancy required an 'openly acknowledged relationship',[43] which depended upon 'status not merit'.[44] Applying the test of status versus merit to the social facts, Lord Millett argued that same-sex relationships were recognised as a merit-based relationship, based on intimacy, but not as a status arising simply from the fact of open cohabition. Marriage was clearly a matter of status, and opposite-sex cohabitation could also be, his Lordship suggested, when a man and a woman lived 'as husband and wife'. The important point for present purposes is not the social accuracy of this test, but the fact that Lord Millett took a different view of the fundamental features of the statute. This stemmed from his Lordship interpreting the purpose of the statute at a less abstract

[41] Cf *R v A (No 2)* (n10), the so-called 'rape shield' case, Lord Steyn held that section 3 'requires the court to subordinate the niceties of the language of section 41(3)(c) [of the Youth Justice and Criminal Evidence Act 1999] and in particular the touchstone of coincidence, to broader considerations of relevance' (at [46]).
[42] *R(Wilkinson) v IRC* [2005] UKHL 30; [2005] 1 WLR 1718.
[43] *Ghaidan* (n4) at [78].
[44] *ibid* at [100].

level, compared to Lord Nicholls' idea of protecting all home-making couples. The purpose of protecting only couples whose relationship rested on openly acknowledged status, and not only on intimacy, was more concrete. As a fundamental feature of the statute, this could not be contradicted by a section 3 interpretation that extended succession rights to same-sex couples.

Lord Rodger responded to this point in his concurring judgment. He held that the restriction to heterosexual relationships was not a 'cardinal principle' of the Act, but added:

> The position might well have been different if Parliament had not enacted para 2(2) and had continued to confine the right to succeed to the husband or wife of the original tenant. But that bridge was crossed in 1988.[45]

Lord Rodger's hypothetical represents a partial concession to Lord Millett. If succession to statutory tenancy had still been available only to married couples, then the court might have had a reason to recognise marriage as a fundamental feature of the statute. If such a statute was incompatible the Convention rights, the fundamental feature would then have precluded judges from expanding succession rights by interpretation under section 3; they could at most have issued a section 4 declaration of incompatibility.

2 Avoidance of issues calling for legislative deliberation

The avoidance of issues calling for legislative deliberation has already been identified as necessary for judges to operate the proportionality standard with due regard to the functional and constitutional differences between the courts and the legislature. Alison Young has analysed this is a form of (prospective) judicial deference to the law-making function of Parliament.[46] She distinguishes two instances of such deference. The first is 'procedural legislator deference', which is based on the fact that only Parliament can devise the detailed statutory frameworks and procedures that

[45] *ibid* at [128].
[46] '*Ghaidan v Godin-Mendoza*: avoiding the deference trap' [2005] PL 23, 31.

may be essential for regulating a large and varied subject matter, such as the child care system in *Re S*.[47] 'Substantive legislator deference', the second kind described by Young, may be appropriate when a court cannot choose between several different potential section 3 interpretations without deciding 'issues of social policy' that are more suited to determination by Parliament.[48]

When courts exercise substantive legislator deference they are reflecting on the possibility that the precedent set by a section 3 interpretation would determine the content of a Convention right for cases other than the one currently before the court. In some cases, this would be undesirable, and for the better resolution of those cases in future the court would then decline a section 3 interpretation in the present case. The leading example here is the case of *Bellinger v Bellinger*,[49] where a fully post-operative transsexual argued that she should be recognised as 'female' under the Matrimonial Causes Act. The House of Lords declined to do so, not because the wording of the statute would not extend so far, but because a precedent might be set that would decide a whole host of other issues, including perhaps the question of same-sex marriage, and more certainly the status of transsexuals in legal areas other than marriage.

The other reason to defer to Parliament, by declining a section 3 interpretation, is that Parliament may be better able to regulate the case with a detailed and precise framework of rules. The question is whether such detailed regulation is necessary, and this varies between different subject matter areas and different Convention rights. In some areas, like tax law, precision is obviously desirable. So the court in *Wilkinson* might have refused a section 3 interpretation even if the statute was vaguely worded. Precision was also needed, for unusual reasons, on the issue that arose squarely for decision in *Bellinger*, ie the eligibility of transsexuals for same-sex marriage. If a ruling was vague on the number of surgical and other interventions that would qualify for the recognition of change gender, there was a risk of influencing individuals in their personal decisions to undergo surgery.[50] On the other hand, there are areas where precision is not of paramount importance, and the flexibility achieved

[47] *ibid* at 31-32.
[48] *ibid* at 32.
[49] [2003] UKHL 21; [2003] 2 AC 467.

by judicial precedent is particularly valuable. Rules of evidence are an example, and this consideration may help to explain the decision in *R v A (No2)*,[51] allowing the admissibility of sexual history evidence which was critically relevant to a fair trial, via a provision that appeared at first glance to exclude it.

The Convention jurisprudence, and Strasbourg case law, reflects the need for greater precision, or greater flexibility, in different rights, for example in assessing what measures qualify as a justified limitation of the right.[52] When judges consider questions in deciding whether to adopt a new interpretation of a statute under section 3 of the Human Rights Act, they are engaged in classic public law reasoning much like the constitutional review of legislation. I hope I have shown that this kind of reasoning can be accommodated under the purposive approach to statutory interpretation.

ENDS.

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[50] See *ibid* at [45]-[48].
[51] n10.
[52] See P. Sales and B. Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 427, 441-450 discussing the degree of flexibility required by different Convention rights. For a discussion of incremental judicial law-making by interpretation under section 3, see A. Kavanagh 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 OJLS 259, 279-282.