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SHORTER ARTICLE

JUDGES AND LEGISLATURE: VALUES INTO LAW

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ABSTRACT. *The legislature gives effect to the values of democracy and compromise in a pluralist society, but the legislation it produces is mediated in its application by the values inherent in the legal culture into which it is received. The judges complete the law promulgated by Parliament by applying it. In articulating the common law also, the judges act within the bounds of objective standards supplied by legal and political traditions, with a limited legislative role. The legislative role of the judges in applying statutes has been enhanced by the interpretive obligations applicable in areas where EU and ECHR law operates.*

KEYWORDS: *Parliament; Judges; Legislation; Statutory Interpretation*

In this essay I propose to consider the ways in which the legislature, on the one hand, and judges, on the other, give expression to political and moral values by adoption of laws and the formulation of legal rules.

The simple picture is that the legislature adopts laws, to replace or supplement existing statutory and common law, while the judges interpret and apply those laws. The legislature is a body established precisely to make law. It is constituted so as to give effect to democratic principle and to afford representation for the people. It uses procedures designed to give careful consideration to a wide range of interests and representations. Judges, by contrast, represent no-one. The ambit of the issues they confront is narrower and in a certain sense arbitrary, framed by the particular cases which come before them and which they have to resolve. The scope of argument they hear and accept in resolving those cases is far narrower – constrained by authority and the rules which they are duty bound to apply.[1]

But we all know that the picture is more complicated than this. The democratic basis for the legislature's operation is a strength,

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[1] J. Waldron, "Judges as Moral Reasoners" [2009] International Journal of Constitutional Law 2.

reflecting very important political and moral values. But it is also, under certain conditions, possible to regard it as a weakness. Political life can seem – particularly from the ivory towers of academia and the law courts – unduly subject to moral panics, disproportionate and over-hasty decision-making, and a sphere giving scope for demagoguery and dangerous populism. There appears to be a major dissonance between the idealised view of the legislature as the forum for considered debate on fundamental issues affecting society[2] and the usual nitty gritty of political trading and compromise, which seems to involve the abandonment of principle.[3]

When one is disenchanted with these aspects of democratic politics, the relative insulation of the courts from popular political pressure seems attractive. The courts can appear as the bearers and protectors of foundational political and moral principles which they should protect against incursions by the legislature. They have scope to be able to do this, albeit in a limited way, because no rule fully governs its own application[4] and statutory rules have to be interpreted and applied in novel or complex and uncertain situations. That is the function of the courts. Furthermore, they are the bodies which produce authoritative formulations of common law rules, and operate as mini-legislators in doing so and in moulding and developing the common law to adapt it to new situations and a changing society with changing needs and requirements.[5]

It is, I think, possible to over-emphasise the objections to democratic decision-making based on its aspect of compromise and trading of interests. The underlying function of any political system is to secure order, preferably on the basis of legitimacy acknowledged by the

[2] J. Waldron, *Law and Disagreement* (Oxford 1999); ibid., "Judges as Moral Reasoners", note 1 above. A favourite example of Waldron to illustrate the potential quality of debate and moral reasoning on the part of legislators is the debates in Parliament on the Abortion Act 1967. But not all parliamentary debates are so impressive.

[3] Bismarck is supposed to have said, "Laws are like sausages. It is better not to see them being made". But a consciousness of how they are made is also capable of underwriting the respect due to the outcome of the process: see e.g. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York 2004), 236–239; also see P. Sales, "The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights" in M. Andenas and D. Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law* (Oxford 2009), 180 ("there is a certain attraction in the idea that, if respect is to be accorded to the judgment made by a body other than the court (in this case, Parliament), it should be demonstrated that the body has given serious consideration to the issue in question"); T. Poole, "The Reformation of English Administrative Law" [2009] C.L.J. 142, 158–164.

[4] L. Wittgenstein, *Philosophical Investigations*, eds. G.E.M. Anscombe and R. Rhees, trans. G.E.M. Anscombe (Oxford 1958); P. Johnston, *Wittgenstein and Moral Philosophy* (London 1989), e.g. at pp. 8, 20, 91, 108–109; P. Johnston, *The Contradictions of Modern Moral Philosophy: Ethics after Wittgenstein* (London 1999), esp. at pp. 58–59 ("… the content of an individual's principles is not separable from their application …") and p. 69 ("The principle 'always act in such a way that human dignity is respected' does not generate judgements; rather, by our specific judgements we show what we mean by it").

[5] See e.g. Lord Reid, "The Judge as Law Maker" [1972] Journal of the Society of the Public Teachers of Law 22.

people subject to rule under that system. Democratic systems secure order and achieve legitimacy in large part because they give scope for everyone to have a voice in saying how things should be arranged, and that provides some level of assurance that their interests will at least be taken into account, even if not followed on particular occasions. Democracy is capable of fostering a spirit of compromise, and compromise and tolerance are vital political virtues underpinning a well functioning polity, in which people can live together without resort to violence and oppression and can co-operate to advance the common good.[6]

The legislature can be regarded as a site for compromise, part of whose role is to contain social tensions. The building of an acceptance within society of the authority of Parliament and the legislation passed by it (as preferable to resort to violence and political disorder and oppression) may be thought of as an important achievement.[7] I suggest that the importance of the virtues of compromise and tolerance has grown with the development of a society which is increasingly culturally fractured and pluralistic. Where there is not a common set of understandings on basic issues (such as was supplied for a long time by a strong Protestant tradition in Britain[8] and by common cultural understandings about the proper exercise of political power[9]), the need for widely accepted and acceptable communal decision-making processes increases. So does the need for formal legal rules, as distinct from informal cultural understandings, to govern social interaction.[10] Basic

[6] John Gray, *Two Faces of Liberalism* (Cambridge 2000); Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London 1999): John Dunn, *The Cunning of Unreason: Making Sense of Politics* (London 2000); Frank Furedi, *On Tolerance: The Life Style Wars: A Defence of Moral Independence* (London 2011).

[7] Cf. Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* (1949, trans. 1952, London), 7–12 ("… we owe our respect to a collectivity, of whatever kind – country, family or any other – not for itself, but because it is food for a certain number of human souls … The first of the soul's needs … is order; that is to say, a texture of social relationships such that no one is compelled to violate imperative obligations in order to carry out other ones …"); J. Dunn, *The Cunning of Unreason*, note 6 above, pp. 361–363; *The History of Political Theory and other essays* (Cambridge 1996), ch. 5, "Trust"; C. Mouffe, *The Return of the Political* (London 1993), esp. pp. 6, 146, 151. On the importance of subjecting brute power to a system of authority, see Bernard Williams, *Truth and Truthfulness* (Princeton 2002), 7–12.

[8] Cf. Linda Colley, *Britons: Forging the Nation 1707–1837* (Bath 1992), esp. ch. 1; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999), 93.

[9] Kramer, *The People Themselves*, note 3 above, ch. 1 "The Customary Constitution", describing the way in which exercise of political power was constrained by common social understandings in the seventeenth and eighteenth centuries about the boundaries of the constitution, before the advent of a theory of judicial review.

[10] P. Dasgupta, *Economics: A Very Short Introduction* (Dasgupta 2007), ch. 2 "Trust", esp. p. 35, comparing and contrasting the operation of the rule of law and social norms; Kramer, *The People Themselves*, note 3 above, pp. 184–189, on the development of a theory appealing to court rulings to settle points of constitutional controversy as common constitutional understandings broke down; but also see pp. 234ff for Kramer's sceptical comment about the shift to judicial supremacy in relation to ruling on the meaning and effect of the U.S. Constitution; also compare A.W.B. Simpson, "The Common Law and Legal Theory" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (Oxford 1973), at p. 98 ("When … cohesion has begun to break down, and a failure to achieve a consensus becomes a commoner phenomenon, interest will begin

adherence to these processes underpins confidence in and respect for the laws which result from them.

Democratic politics also fosters the ability of the law to change and adapt to meet modern conditions. The greater the pace of change, and the greater the complexity of change and of its ramifications (e.g. industrialisation, economic growth and transformation and climate change), the greater is the need for decision-making processes which can take account of and adapt to such change when making laws. The courts are not well-equipped for doing this.[11] Also, the greater the scale of a social problem, the greater the need for wide co-ordination in society to deal with it (e.g. clean air and other environmental legislation and, now, attempts to devise a coherent response to climate change), which means there is a greater need for formally specified rules articulated as a general scheme understood in advance of action by individual actors. These are the hall-marks of a situation which calls for legislation.

The cardinal virtue of democracy, of course, is that it provides a practical mechanism of control of the rulers by the ruled (elections, and the need of those vying for political power to secure election), and hence a safeguard against tyranny and arbitrary rule and a motive for the rulers to seek to promote and respect the interests of the ruled. Democratic law-making can also be an effective way in which the power of entrenched elites can be challenged and in which public support can be mobilised to recognise and protect individual rights which had hitherto been overlooked or ignored.[12]

Democracy is not perfect. One should recognise that a choice of democratic decision-making procedures is a choice to give priority of certain political and moral values over others. Also, there is a wide range of different forms of democratic decision-making procedures and scope for balancing and integrating them with other decision-making procedures and bodies which give expression to different values, in blends which can be adjusted to some degree to counteract weaknesses which can arise from more pure forms of democracy.[13] One thinks here of the role of a civil service inculcated with an ethic of independence, expertise and public service and of the role of an independent

to develop in the formulation of tests as to how the correctness of legal propositions can be demonstrated, and in the formulation of rules as to the use of authorities …"); Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven 1921), 24.

[11] Lon Fuller, "The Forms and Limits of Adjudication", reprinted in K. Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (revised ed., Oxford 2001).

[12] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge 2007); cf. Johnston, *Wittgenstein and Moral Philosophy*, note 4 above, pp. 204–210, on the forms which moral argument may take, using a range of techniques well beyond legal forms of argument to try to make others see and come to accept a moral position – "*Oliver Twist* or *David Copperfield* can be seen as an attempt at moral persuasion just as valid as any other"; also *The Contradictions of Modern Moral Philosophy*, note 4 above, at pp. 62–63.

[13] J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge 2010), 10–13.

judiciary. There will always be scope for argument about whether the particular balance of powers and decision-making within a polity is right, or sacrifices too much of one set of values in seeking to prioritise another set. Circumstances will change and affect the terms of debate.[14]

One area where some focus on the procedures adopted within the legislature for making law is appropriate is in appreciating the care that is taken to try to take account of the range of considerations which might have a bearing on the content and form of a law which it is proposed should be made.[15] The greater the care, the greater the confidence which one might feel in the appropriateness and legitimacy of the law which is the product of that process.[16] Individuals have to make their own judgments about what set of arrangements they prefer, and where they are prepared to make a commitment to give their political support to a constitutional setup.

Judges, however, when acting in their capacity as such, do not have the same freedom in this regard that an individual has. They are duty bound to apply the law, namely a formally and publicly identified set of social rules and principles. They have only a very limited power of autonomous decision-making. In relation to interpretation of statutory provisions, they are constrained by rules of language and more or less well-identified background presumptions which condition the way in which it is presumed that Parliament intended a statute to be read.[17] In relation to the development of the common law, they are not unconstrained legislators.[18] They have a very limited power to develop the law in accordance with reasonably well-understood underlying principles, adapting it to new circumstances or improving formulations of the common law in a process of giving those principles better expression in a process of the law "working itself pure", in Lord Mansfield's phrase.[19]

[14] See e.g. Joseph M. Jacob, *The Republican Crown* (Aldershot 1996), ch. 5 on the erosion of respect for the civil service; Benjamin Barber, *Strong Democracy* (Berkeley 1984); Paul Hirst, *Representative Democracy and its Limits* (Cambridge 1990); Cardozo, *The Nature of the Judicial Process*, note 10 above, at p. 28 ("We leave more to legislatures today, and less perhaps to judges. Yet even now there is change from decade to decade …") and p. 60.

[15] See the exploration of this process in modern practice in a series of video interviews with politicians, statutory draftsmen, government lawyers, parliamentary officials and others produced by the Statute Law Society. The series is entitled "Making Legislation" and is available on YouTube and on the iTunesU website via the Society's website, www.statutelawsociety.org.

[16] Cf. Sales, "The General and the Particular", note 3 above, p. 167 (footnote 16) and pp. 178–180.

[17] P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 L.Q.R. 598; Goldsworthy, note 13 above, ch. 9 "Parliamentary sovereignty and statutory interpretation".

[18] See the commentary on Lord Steyn's speech in *R (Jackson) v HM Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262 in Lord Neuberger of Abbotsbury, "Who Are the Masters Now?" (The Second Lord Alexander of Weedon Lecture, 6 April 2011) and Goldsworthy, note 13 above, ch. 2 "The myth of the common law constitution".

[19] *Omychund v Barker* (1744) 1 A. and K. 22, 23; 26 E.R. 15, 24; and see Lord Goff of Chieveley, "The Search for Principle" (1983) 59 Proc. Brit. Acad. 169; Sir Terence Etherton, "Liberty, the

In both cases it can accurately be said that the courts have a power of legislation, but it is a severely circumscribed power.[20] In the case of interpretation of statutes, it is the power to spell out how the statute should apply when confronted with the particular case. The judges operate in a sort of partnership with Parliament, to carry through the intention of Parliament as identified by them to the outcome of the particular case which Parliament may not have had directly in mind when it legislated. The judges complete the law promulgated by Parliament by applying it.

In the case of the development of the common law, the position is broadly similar, but the task of the judge is defined by reference to identifying and applying in particular cases the underlying common law principles, distilled from previous judicial statements and formulations. In this context the judge is working within an established tradition, where society implicitly accepts that a cadre of judges and lawyers should have authority to work through and develop the principles which comprise the tradition, but do not have authority of their own to depart from it.[21] The fostering of a tradition maintained within a legal culture allows for appeals to reasonably objective standards maintained within the tradition to resolve disagreement.[22] Here, the values of the legal culture in which the judges and lawyers are inducted

Archetype and Diversity: A Philosophy of Judging" (2010) Public Law 727; Lord Neuberger, note 18 above.

[20] Cardozo, *Nature of the Judicial Process*, note 10 above, at pp. 68ff, citing Mr Justice Holmes in *Southern Pacific Co. v Jensen* 244 U.S. 205, 221, "I recognize without hesitation that judges must and do legislate, but they do so only interstitially …"; Lord Reid, note 5 above, pp. 25–26.

[21] See A.W.B. Simpson, note 10 above, at p. 94 ("… it seems to me that the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession …"). Also see Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge 2006) for an account of how legal and constitutional thought grew out of the culture of the Inns of Court, but over-reached itself by culminating in the political claims made by Sir Edward Coke based on the "artificial" reason of the common law, based "essentially on the wisdom of a guild" (p. 215); Alexis de Toqueville, *Democracy in America* (12th ed. [1848], Everyman ed., London 1994), vol. 1, 272–280, analysing the role of the legal profession, with its love for stability and conservative values, in mitigating the tyranny of the majority; and Jansen Nils, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (Oxford 2010), for a description of a similar process by which legal authority has been bestowed by the use and understanding by lawyers of non-legislative codifications of law (such as the U.S. Restatements) within a specific legal culture and how even the effect given to statutory texts may be modified by their reception within a legal culture (such as in the Prussian, civilian legal system in the nineteenth century: see pp. 45–49). Compare Johnston, *Wittgenstein and Moral Philosophy*, note 4 above, pp. 108–109, and *The Contradictions of Modern Moral Philosophy*, note 4 above, pp. 58–59 and 69.

[22] See the discussion about the concept of a tradition employed by Alasdair MacIntyre in *After Virtue* (London 1981) in Johnston, *The Contradictions of Modern Moral Philosophy*, note 4 above, at pp. 48–49 ("… the real aim [of a tradition] is finding a social solution to the problems of disagreement … this part of MacIntyre's account has the … objective of finding an alternative to 'subjective' ways of judging human action. Not surprisingly, what this leads to are socially agreed ways of judging …"). Where the tradition exists appeal can be made to objective standards to resolve disagreement, even though there may be strong and potentially irresolvable moral disagreement in society at large: see *ibid*., ch. 2 "Believing in Right and Wrong".

and which they are committed to upholding have been found over time to be acceptable to the polity as a whole, so that this measure of authority is reserved to them.[23] But in part, the legitimacy of this delegation of decision-making authority to the caste of judges and lawyers is based upon the modesty of the claims which it makes for itself.

Another dimension which we should consider is the fashionable topic of the rule of law. I suggest that respect for law in large part depends upon respect for the processes by which law is made. Where there is a tension between the law-making role of the legislature and that of the judges, the sense of legitimacy which the judges may feel in asserting their own role may reflect the strength or weaknesses of the processes within the political arena for making law.[24] Here again, the processes by which laws are made through the legislature need to be understood and constantly kept under review by the legislature and government. I suggest that lawyers' understanding of these processes is generally rather poor.[25] I also suggest that an important part of the understanding of these processes which was formerly secured within the court system overall by the incorporation of the highest court into the legislature, with its members being in certain respects active members of the House of Lords, will – with the creation of the separate Supreme Court – not now be available. As a result, it may be necessary for more active steps to be taken by lawyers and judges to seek to gain at least a basic understanding of what is involved in making the laws which they have to apply – and which the courts may be called upon, in substance, to overrule if making a declaration of incompatibility.[26]

The role of the courts in relation to the interpretation of legislation is significantly strengthened when there is a background of EU law or the legislation operates in a context in which Convention rights under

[23] There may be considerable advantage for society in terms of promoting rule of law values – in particular, by enhancing predictability of outcomes of cases – by leaving resolution of certain disputes to reference to traditional modes of approach within a cohesive legal community to which members of society may have recourse for advice. For a disturbing discussion of proposals for popular justice to seek to avoid using the form of the judicial system and the moral ideology of decision-making by reference to neutral rules associated with it, see M. Foucault, "On Popular Justice: A Discussion with Maoists", ch. 1 in M. Foucault (C. Gordon ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Brighton 1980).

[24] Cf. Cardozo, *The Nature of the Judicial Process*, note 10 above, at p. 60 ("In these days … we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules should be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation. Judges do not feel the same need of putting the *imprimatur* of law upon customs of recent growth, knocking for entrance into the legal system, and viewed askance because of some novel aspect of form or feature, as they would if legislatures were not in frequent session, capable of establishing a title that will be unimpeached and unimpeachable"); J. Waldron, "Can there be a democratic jurisprudence?" (2009) 58 Emory LJ 675.

[25] This was part of the motivation for the Statute Law Society for producing the "Making Legislation" videos, note 15 above.

[26] P. Sales and R. Ekins, "Rights-Consistent Interpretation and the Human Rights Act 1998" (2011) 127 L.Q.R. 217, 229–230; Sales, "The General and the Particular", note 3 above, pp. 177–178; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge 2009).

the European Convention on Human Rights and the Human Rights Act 1998 are implicated. In both cases, the courts have a duty to interpret legislation "so far as possible" to accord with EU law and Convention rights.[27] These obligations go well beyond conventional domestic law modes of interpretation.[28] They may mean that the same statutory provision has different meanings in different contexts.[29] But the exercise for the courts still remains one of interpretation of the statutory provision in question, albeit reading it in the light of a particularly strong form of presumption as to its intended effect.[30]

Some basic points, then, may be made in the light of this discussion:

1) Parliament operates as a multi-member body. MPs vote for different reasons, which they may not declare. There is no obligation on anyone in Parliament to state reasons for adopting legislation, and no-one is empowered to do so definitively and authoritatively. The courts are involved in interpretation of legislation by the construction of a picture of unified intention on the part of Parliament, drawing on established traditions of interpretation.[31]
2) The main factors to which a judge looks in interpreting an Act of Parliament are the language used, the scheme of the Act and the purpose the Act is designed to achieve (the mischief it is aimed at). These all blend into each other. On a difficult point of interpretation, an overall evaluative judgment by the court will be required.
3) In order to identify the purpose which an Act is designed to achieve, a judge may look at the pre-existing law, White Papers (i.e. the Government's published proposals for changing the law) and – in very limited circumstances – statements in Parliament by the promoters of a Bill.[32]
4) The interpretation of an Act may be radically affected by judicial identification of background understandings about how legislation should be drafted, which are thought to be shared by the courts and Parliament – the so-called 'principle of legality' (interpretation by reference to respect for underlying constitutional principles). Unless such principles are excluded by clear

[27] See, respectively, Case C-106/89 *Marleasing S.A. v La Comercial Internacional de Alimentation S.A.* [1990] E.C.R. I-4135 and section 3(1) of the Human Rights Act 1998.
[28] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557.
[29] See *R. (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 A.C. 189.
[30] Sales and Ekins, "Rights-Consistent Interpretation", note 25 above.
[31] See e.g. R. Ekins, "The Intention of Parliament" [2010] Public Law 709.
[32] *Pepper v Hart* [1993] A.C. 593. On the true effect of *Pepper v Hart*, see S. Vogenauer, "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25 Oxford Journal of Legal Studies 629; P. Sales, "*Pepper v Hart*: A Footnote to Professor Vogenauer's Reply to Lord Steyn" (2006) Oxford Journal of Legal Studies 585.

language or necessary implication, a statutory provision may be "read down", to limit its effect by reference to such constitutional understandings; or words may be "read in" to a provision to ensure that the Act will be read in conformity with such understandings. In order for the draftsman to know precisely what effect he will achieve by drafting in a particular way, he needs to have a good understanding of what those understandings are and how the courts will react to them. But the criteria are not always clear, and there is an element of judicial inventiveness in identifying relevant principles of construction.[33]

5) EU law – By operation of the European Communities Act 1972, the courts will "read down" legislation and "read in words" to ensure compatibility of domestic implementing legislation with EU laws, so far as it is possible to do so.[34]
6) Section 3 of the Human Rights Act 1998 requires a court to read and give effect to legislation in a way which is compatible with Convention rights, so far as it is possible to do so. Here, as with the *Marleasing* principle, the court operates as a constitutional court, involved in the construction of legislative meaning in the light of international norms. There is, in a sense, a delegation of legislative authority, albeit one built into existing traditions of legislative interpretation. It is an approach to interpretation which involves some sacrifice of rule of law and democratic principles (i.e. a reduction in the authority of the draftsman and the text of the statute and an increase in the interpretive powers of the courts) in the interests of compliance with human rights standards.[35]

In the light of the Human Rights Act in particular, something should also be said about "bright line" rules. There is a particular challenge for the modern draftsman in navigating the legal minefield of strong interpretive rules applicable by the courts, where the object is to produce clear, easy-to-understand and easy-to-apply rules, capable of application by many officials across a range of situations. When can "bright line" rules, which eliminate discretion at the point of judging, be justified in light of proportionality principles? The scope for Parliament to legislate using "bright line" rules is itself an important issue affecting the balance of practical decision-making power as

[33] See e.g. *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 A.C. 115; Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998", note 17 above.
[34] Case C-106-89 *Marleasing* [1990] E.C.R.-I 4135 (ECJ); *Litster v Forth Dry Dock Engineering Co. Ltd.* [1990] 1 A.C. 546; *Clarke v Kato* [1998] 1 W.L.R. 1647, HL.
[35] Alec Stone Sweet *Governing with Judges* (Oxford 2000); H. Keller and A. Stone Sweet (eds.), *A Europe of Rights* (Oxford 2009); Sales and Ekins, "Rights-Consistent Interpretation", note 25 above.

between the courts and Parliament. If, in light of Convention or EU rights, it is said to be disproportionate to operate a simple bright line rule laid down in advance, and that it is necessary to operate instead a highly particularised decision-making process directed to the specific circumstances of the individual case, then the practical effect is that laws have to be formulated in a way that gives the courts greater decision-making powers. Suffice it to say here that proportionality principles tend to create a strong pressure in this direction. This pressure tends to emphasise the partnership of courts and legislature which is increasingly required for the construction of the law which is applied to particular cases on the ground.[36]

In conclusion, there is – particularly with the operation of the Human Rights Act and the impetus given to the principle of legality in recent years – a new emphasis upon a partnership between courts and the legislature in constructing the ultimate meaning to be given to a statutory provision. It is an enhancement, in new circumstances, of a function of the courts which has always been present.[37] With section 3(1) of the Human Rights Act, the courts have been given a function – specifically mandated by Parliament – to import so far as possible the values inherent in the European Convention on Human Rights and the Human Rights Act when constructing the meaning of a statutory provision. This enhanced role for the courts makes considerable sense in this area. The courts are well-placed to make the legal evaluation of what Convention rights require in a particular context – and it should be emphasised that it *is* a legal evaluation, involving interpretation of authoritative judgments of the European Court of Human Rights.[38] Given that Parliament wishes its legislation to operate, so far as possible, compatibly with those rights, with the values underlying a particular piece of legislation being given effect by being moulded around and in conformity with Convention rights, partnership with the courts in the consideration of the detailed meaning of legislation offers a practical method to secure that outcome.[39]

[36] P. Sales and B. Hooper, "Proportionality and the Form of Law" (2003) 119 L.Q.R. 426; Sales, "The General and the Particular", note 3 above.

[37] Cardozo, *The Nature of the Judicial Process*, note 10 above, at pp. 14–18.

[38] Sales and Ekins, "Rights-Consistent Interpretation", note 25 above; P. Sales, "Strasbourg Jurisprudence and the Human Rights Act" [2012] Public Law 253.

[39] There are dangers associated with this approach as well, stemming from a certain relaxation of the responsibility of the Government and Parliament to draft accurately, since the courts will revise the wording of a statute as necessary: see the criticism by Lord Bingham of the legislation under review in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (the so-called *Belmarsh* case) at [33]. Parliament needs always to bear in mind the strong responsibility lying on it to promote rule of law values by endeavouring to produce well-drafted and accurate legislation, which can be interpreted on its face in a manner compatible with Convention rights without distortion of the ordinary and apparent meaning of the text.