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A comparison of the principle of legality and section 3 of the Human Rights Act 1998

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Introduction

The subject of this lecture is the extent to which, and circumstances in which, the courts can by a process of construction modify the ordinary and natural meaning of the words of a statute to produce an interpretation at some distance from what the words used by Parliament appear on their face to say. The power of the courts to do this is no small thing, and has great constitutional significance. The predominant form of law in modern times is statute law, not the common law. But the special techniques available to the courts and lawyers for reading statutes and modifying what appears to be their natural meaning indicates that there still exists a form of that "artificial reason and judgment of law" which Sir Edward Coke told James I was the essence of the common law and could only be acquired by "long study and experience of the law", and was not to be confused with natural reason available to the king.[1]

[1] Coke, Twelfth Reports, *Prohibitions del Roy* (1607) 12 Co. Rep. 63, discussed in Martin Loughlin, *Sword & Scales: An Examination of the Relationship Between Law & Politics* (2000) at pp. 71-73. The issue for King James was the extent to which lawyers, through their special knowledge of the law, controlled and circumscribed other forms of power (particularly his own political power). Thomas Hobbes made a similar objection to the power accruing to lawyers through their specialised and arcane knowledge: *A Dialogue between a Philosopher and a Student of the Common Laws of England* [1681] Joseph Cropsey ed. (Chicago, 1971), 62. There is a modern version of this issue, which is associated with the discourse of human rights which has become so powerful since the Second World War and hence is relevant to both the principle of legality and the operation of section 3 of the Human Rights Act: "… the greater emphasis we put on rights, the more need we have of bureaucrats and lawyers – the experts in rights-discourse – to manage our world and lives for us" (Raymond Geuss, *History and Illusion in Politics* (2001), p. 152); also see Loughlin, *Sword & Scales*, esp. chs. 13-15.

Under the principle of legality, the interpretation of statutory provisions[2] is modified to take account of background rights or interests judged to be fundamental in some way, and which are not distinctly overridden by Parliament by the words used in the statute. The special learning of lawyers and the courts is employed to identify what those rights and interests might be, which are to provide the warrant for this particular and powerful approach to modify what seems to be the natural language of a statute.

Under section 3(1) of the Human Rights Act ("the HRA"), the interpretation of statutory provisions must be modified "So far as it is possible to do so", so that they are "read and given effect in a way which is compatible with the Convention rights".[3] The "Convention rights" are defined in section 1(1) to mean the rights and fundamental freedoms set out in a range of Articles in the "Convention" and certain of its Protocols; and in section 21(1) "the Convention" is defined to mean the European Convention on Human Rights[4] "as it has effect for the time being in relation to the United Kingdom". In this context, the special learning of lawyers and the courts is employed to identify what the content of the Convention rights might be, taking into account (as required under section 2(1)) the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights. This jurisprudence is very extensive, and provides guidance as to the particular application of the Convention rights in a great range of specific circumstances. The Articles of the Convention use very general wording, and the detail of what they are to be taken to mean and how they are to be read and applied can only be derived from this jurisprudence, which indicates the concrete extent of the Convention rights, what rights and obligations are to be spelled out of them by implication,[5] and how they are to be treated as developing over time in light of the doctrine which treats the Convention as a "living instrument" to be interpreted having regard to the converging laws and practices across the States which are members of the Council of Europe.[6] By reason of the gap between the general wording of the Convention Articles and the detailed conclusions about their meaning by the ECtHR, it is not an exaggeration to say that this jurisprudence represents a new, European-wide court-made common law of human rights.

In what follows, I will address four issues: (i) the nature of the principle of legality, and the basis it provides to legitimise a modifying approach to construction of the natural language of statutes; (ii) the nature of the interpretive obligation created by section 3 of the HRA, and the distinct basis it provides to warrant adoption of a modifying approach to construction of statutes; (iii) the practical differences and

[2] For simplicity, I will discuss statutory provisions, but the principle of legality also governs the interpretation of subordinate legislation (*R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115) as does section 3 of the Human Rights Act.

[3] Section 3(1) provides: "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."

[4] "the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 …"

[5] Eg *McCann v UK* (1996) 21 EHRR 97, [161]

[6] Eg *Tyrer v UK* (1978) 2 EHRR 1, [31]; *Marckx v Belgium* (1979) 2 EHRR 330, [41]; *MC v Bulgaria* (2005) 40 EHRR 20, [154]-[156].

similarities in the operation of the two rules, and the techniques of "reading down" general language, so as to disapply it in certain particular cases, and "reading in" words to apply provisions in cases to which on first reading they do not extend; and (iv) the way in which the principle of legality may operate in relation to construction of the HRA itself.

The principle of legality

The 'principle of legality' is the rather strange name given by Halsbury's Laws, and then adopted by Lord Steyn in *R v Secretary of State for the Home Department, ex p. Simms,*[7] to the doctrine that rights and constitutional principles recognised by the common law will not be treated as overridden by statute unless by express language or by clear and necessary implication. In particular, Lord Steyn in *Simms* focused upon what the common law recognises as fundamental or constitutional rights of individuals as the foundation for the principle, and in the same case Lord Hoffmann focused on what he called "fundamental principles of human rights".[8] The appropriateness of the name has been called in doubt by Bennion. In his view, "The true principle here is not 'legality' but that the courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out. There is nothing new in this: it is a well-established interpretative principle".[9] This seems right. The articulation of the principle of legality in *Simms* followed and applied the earlier examination of the same underlying concept in *R v Secretary of State for the Home Department, ex p. Pierson* by Lord Browne-Wilkinson and Lord Steyn.[10] In that case, both law lords drew upon well-established statements of principle in a range of textbooks. There was no suggestion by either of them that they were inventing any new doctrine.

As Bell and Engle explain in Cross on *Statutory Interpretation*, "[Statutes] are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules. … Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament."[11]

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[7] [2000] 2 AC 115, 130.

[8] Ibid., 131-132.

[9] Bennion, *Statutory Interpretation*, 5th ed., p. 823.

[10] [1998] AC 539, 573G-575D, 587C-590A. See eg *Maxwell on the Interpretation of Statutes*, 12th ed. by P. St. J. Langan, pp. 251ff ("Statutes Encroaching on Rights or Imposing Burdens").

[11] Cross, *Statutory Interpretation* (3rd ed.) ch. 7, "Presumptions", at p. 165. Cf "Footnote". See also *Black-Clawson Interntational Ltd v Papierwerke AG* [1975] AC 591, 629-630 per Lord Wilberforce ("The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated, so often indeed as to have become an incantation. If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs").

The doctrine of the sovereignty of Parliament is, for historical and normative reasons, so fundamental in English law[12] and the range of legislative legal regulation so wide that the interpretation of statutes has long been at the centre of legal argument and may be regarded as being a, if not the, primary function of the courts. It has for this reason long been the case that an important dimension of English constitutional law has existed in the interstices of statutory interpretation. Where constitutional principles or understandings can be established, or constitutional rights have been recognised, statutory interpretation will be moulded around them. They exist as a form of presumptive constitutional order, albeit one capable of being overridden by Parliament by clear language used in a statute.[13]

There are many examples of constitutional understandings which mould statutory interpretation in this way, many of which long pre-dated the identification of the principle of legality in *Simms* and *Pierson*. Five may be mentioned here to illustrate the point, and the structure of the reasoning in each case. First, it is an established principle of construction that general words in a statute do not serve to bind the Crown. The Crown will only be bound by express language applying a statute to the Crown or by clear, necessary implication.[14] This reflects an historic conception of the relationship between Parliament and the Crown and of the Crown's role in producing legislation. Conversely, reflecting the subordination of the Crown to Parliament in the seventeenth century in respect of supply of funds, clear and explicit authorisation will be required in a statute before it is interpreted as permitting the Crown to levy charges for provision of services.[15] General statutory language may be interpreted so as to preserve the important constitutional principle of exclusive Parliamentary control of supply of funds for the government.[16] The well-known *Carltona* doctrine,[17] whereby it is assumed by implication that reference in a statute to a Secretary of State or a Minister also authorises civil servants in his department to act on his behalf, reflects an acceptance of the practical constitutional reality that Ministers in the modern bureaucratic state cannot take every decision in person, but in a certain sense stand as representatives for the departments of state which they head. The ambit within which civil servants may be treated as authorised to act under the *Carltona* presumption is sensitive to the type and

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[12] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999), Martin Loughlin, "Constituent Power Subverted: From English Constitutional Argument to English Constitutional Practice" in Loughlin and Walker eds. *The Paradox of Constitutionalism: Constituent Power and Constituent* (2007).

[13] It is also interesting to note the absence of constitutional understandings in certain areas, which again reflects certain contours of the English constitution. For example, there is no presumption of non-interference by central government in the affairs of local government, reflecting what has been until recently the powerfully centralised nature of government in the United Kingdom.

[14] *Madras Electric Supply Corp. Ltd v Boarland (Inspector of Taxes)* [1955] AC 667; *Lord Advocate v Dumbarton DC* [1990] 2 AC 580; cf *R (Cherwell DC) v First Secretary of State* [2005] 1 WLR 1128 (CA). For the ambit of this principle, see eg *BBC v Johns* [1965] 1 Ch 32; *Re Telephone Apparatus Manufacturer's Application* [1963] 1 WLR 1.

[15] *AG v Wilts United Dairies Ltd* (1921) TLR 884, CA, at 894 (Atkin LJ) and 885 (Scrutton LJ); (1922) 38 TLR 781 (HL).

[16] *Steele Ford and Newton v Crown Prosecution Service (No. 2)* [1994] 1 AC 22, 33, 41 (Lord Bridge).

[17] *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

importance of the decision to be taken,[18] and it is possible that the presumption may in certain limited and especially sensitive cases be cancelled out altogether so that the Minister is required to act personally.[19] There is a presumption that Parliament requires a matter as significant as commencement of primary legislation by a Secretary of State to be achieved by statutory instrument, rather than by mere administrative action.[20]

The relevant type of constitutional understanding may be based upon particular statutes, such as the Bill of Rights, which have a constitutional significance. In such cases, clear and explicit wording will be required to override previous constitutionally important statutory provisions; in other words, their constitutional significance and the presumption which attaches to that (ie that Parliament will not be taken to have intended to override them without giving a very clear indication to that effect) will be such as to exclude the ordinary rule of implied repeal of earlier legislation by later legislation. An important example of this reasoning process at work is provided by *Thoburn v Sunderland CC.*[21] In that case, the Divisional Court held that the European Communities Act 1972 was a statute which had such constitutional status, and was therefore exempt from implied repeal by later apparently inconsistent legislation. Rather, the general provisions in the later legislation were properly to be read down, and interpreted as subject to the 1972 Act. There is no simple test to identify which statutes (and which provisions within statutes) might attain this form of constitutional significance. It is not purely a matter of the views of judges and lawyers, but a matter of the courts having regard also to the probable understanding of a wider class of political actors associated with the parliamentary process, and even the public at large. Accordingly, in doubtful cases, it is possible that the courts will draw on a potentially wide range of indications of general acceptance of particular constitutional understandings.[22] One may, perhaps, forecast that at least some parts of the new constitutional landscape put into place since 1997, such as the devolution legislation and the Human Rights Act 1998, will be regarded by the courts as attaining this particular form of presumptive, limited entrenchment.

It is important to recall all these examples when one turns to the particular case of the operation of the principle of legality in respect of legislation which impinges more directly on individual rights and interests, which was the focus of the decisions in *Pierson* and *Simms*. This class of case is properly to be regarded as a subset of the wider class of interpretive presumptions based on settled constitutional expectations and

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[18] See discussion in *R v Secretary of State for the Home Department, ex p. Oladehinde* [1991] 1 AC 254, Wade and Forsyth, *Administrative Law*, 9th ed., pp. 318-322, and Sales, "The *Carltona* principle", in Supperstone, Goudie and Walker, *Judicial Review*, 3rd ed., section 13.8.

[19] Cf *R v Chiswick Police Station Superintendent, ex p. Sacksteder* [1918] 1 KB 578, 585-586 (Pickford LJ), 591 (Scrutton LJ); also see *Liversidge v Anderson* [1942] AC 206, 224 per Viscount Maugham; Wade and Forsyth, pp. 321-322.

[20] *R v R (Video Recording: Admissibility)* [2008] 1 WLR 2044 (CA).

[21] [2003] QB 151 (DC), the so-called 'metric martyrs' case.

[22] Cf the range of matters to which different members of the House of Lords had regard in *R (Jackson) v AG* [2006] 1 AC 262, in interpreting major constitutional legislation in the form of the Parliament Acts 1911 and 1949.

understandings. The basic reasoning process is the same in all these cases.[23] A few prominent and familiar examples may be given. There is a presumption against criminal penalisation of conduct, so clear language is required to create a criminal office.[24] There is a presumption against legislation being given retrospective effect.[25] There is a presumption against interference with, or deprivation of, property without compensation,[26] which, for example, operates against expansive interpretation of taxing statutes. In the UK, as a state subject to the rule of law, the courts have always emphasised a particularly strong presumption against depriving individuals of the right of access to the courts, and have accordingly interpreted ouster clauses very narrowly indeed.[27] *R v Lord Chancellor, ex p. Witham*[28] is a leading recent case applying principle of legality reasoning to give effect to this strong constitutional principle, finding that the general rule-making power conferred on the Lord Chancellor to impose court fees did not authorise imposition of fees which made it impossible for those on income support to go to court. The courts have identified protection of the secrecy of communications between lawyers and clients which are subject to legal professional privilege as fundamental or constitutional in the requisite sense, so that it cannot be overridden by general statutory language.[29] In *Simms*, the House of Lords identified freedom of expression as a right recognised as fundamental in English law, in the context of protection of freedom of access to justice in a broad sense (the ability of prisoners to have access to journalists to publicise their cases, to argue in the public domain that they had been wrongly convicted) which was found to engage this type of reasoning, so that general powers of the Secretary of State in relation to making rules regulating prisons had to be read subject to the requirement that reasonable accommodation of access of prisoners to journalists would be secured.[30] In *A v Secretary of State for the*

[23] See in particular *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, [58]-[61] (Lord Rodger).

[24] There remains, of course, plenty of scope for argument about how strongly the presumption operates, and to what extent it may be taken as qualifying what appears – by reference to other aids to interpretation - to be the intention of Parliament: see eg Cross, *Statutory Interpretation*, 3rd ed., p 174; Ashworth, "Interpreting Criminal Statutes: a Crisis of Legality?" (1991) 107 LQR 419.

[25] For an extended discussion of the nature of this presumption, see the speech of Lord Rodger in *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816.

[26] Eg *Westminster Bank Ltd v Beverley BC* [1971] AC 508; *Maxwell on The Interpretation of Statutes*, 12th ed., at pp. 253ff.. This presumption has a particularly Lockean flavour to it. It is debateable just how strongly it operates in modern times: for example, the right to protection of property contained in Article 1 of Protocol 1 to the ECHR is one of the weaker Convention rights under the ECHR scheme, and is readily overridden. There also seems to be a modern tendency in favour of a much more strongly purposive approach to interpretation of taxing statutes.

[27] See eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Boddington v British Transport Police* [1999] 2 AC 143.

[28] [1998] QB 575. Also see *R v Secretary of State for the Home Department, ex p. Saleem* [2000] 4 All ER 814 (CA), in promulgating procedural rules, any infringement of the right of access to the courts must be clearly provided for.

[29] *R (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563; *R (Kelly) v Warley Magistrates' Court* [2008] 1 WLR 2001 (DC).

[30] [2000] 2 AC 115, esp. 125-126 (Lord Steyn).

Home Department (No. 2) the House of Lords held that general rule-making powers did not permit the making of procedural rules which could allow reception of evidence obtained by torture.[31] On the other hand, in other cases attempts to invoke alleged constitutional rights to modify the interpretation of legislation have failed, because the existence of such a right has not been established.[32] In some cases, what appears to be an individual right bestowed by statute may be "read down" by reference to other basic considerations assumed to have been in the mind of Parliament, such as that a person should not benefit from his own crime.[33]

The nature of the reasoning in the cases involving individual rights or interests is the same as in the cases involving constitutional principles or understandings. Before the interpretation of a statutory provision will be taken to be modified by reference to the principle of legality, it is necessary first to identify a right, interest or principle which is sufficiently concrete, sufficiently well-recognised and of sufficient weight that it can plausibly be assumed that Parliament must have intended that the statutory provision should be read as subject to it, rather than as overriding it as the simple terms of the provision might *prima facie* suggest. The principle of legality is concerned to ensure that legislation that overrides fundamental common law principles or rights can clearly be appreciated as such at the time of its passage, so that Parliament's intention to achieve that result is properly established.[34] It is a principle of interpretation, to assist in understanding what Parliament's true intention was in promulgating a statutory provision. But it has no application "if the necessary contextual backcloth of a relevant basic common law principle is absent".[35] Despite the wide reference by Lord Hoffmann in *Simms* to fundamental human rights, it is necessary to identify some right or interest recognised within the English polity (in the common law and, in particular, by Parliament itself) as fundamental before this mode of reasoning applies.

Two particular issues associated with the principle of legality have been debated in the cases. First, the question arises when and how fundamental constitutional rights and principles are to be identified. Then, where they are identified, the question arises how readily the presumptions they give rise to may be overridden by Parliament.

As to the first issue, it is submitted that the principle of legality operates within narrow parameters, for powerful constitutional reasons. Since the effect of the application of the principle is to change what appears to be the natural meaning of a legislative provision, it is only when there is an established, well-recognised and fundamental principle or right which can be clearly identified as being applicable at the time the legislation is passed, that it can be said that Parliament cannot be taken to have intended to infringe that principle or right by the use of general language in a statutory provision (contrary to the ordinary sense of the words used as a matter of

[31] [2006] 2 AC 221, [51].

[32] *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539; *R v Secretary of State for the Home Department, ex p. Stafford* [1999] 2 AC 38; *R v Lord Chancellor, ex p. Lightfoot* [2000] QB 597.

[33] *R v Secretary of State for the Home Department, ex p. Puttick* [1981] QB 767.

[34] See *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131E-G (Lord Hoffmann).

[35] *R v Secretary of State for the Home Department*, *ex p. Stafford* [1999] 2 AC 38, 47G-49F (Lord Steyn)

language). But if Parliament cannot be taken to have been squarely on notice of the existence of such a principle or right, then the process of "reading down" or modifying the natural meaning of the words used would undermine rather than promote Parliament's intention as expressed in the legislation. This point is forcefully made by Laws J in *R v Lord Chancellor, ex p. Lightfoot.*[36] It is a point which has distinct echoes of the firm line taken by the House of Lords in *Duport Steels Ltd v Sirs,*[37] in the context of interpretation of controversial industrial relations legislation, when warning that "Where the meaning of the statutory words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral … Under our constitution, it is Parliament's opinion on these matters that is paramount". Accordingly, it is not for the courts to invent constitutional rights or principles, thereby affecting the ordinary interpretation of statutes; their function is to determine whether such rights or principles are so well-established that Parliament must be taken to have legislated with them in mind. Having regard to what is at stake, in terms of affecting the meaning of legislation, they are not to be identified lightly. The danger is always one of the judges importing their own values and concerns, which Parliament did not and would not have endorsed, to add to or reduce provisions which Parliament intended to be binding according to their own terms.[38] Further, the general approach of the courts has been to treat parliamentary intervention in an area as a reason for restraint in the development of the common law; that is particularly so in relation to the enactment of the HRA, which sets out what is in effect a statutory table of fundamental rights, with its own remedial structure (including section 3).[39] It seems likely that it will be section 3 of the HRA which will be the leading statutory principle in the future concerning interpretation of statutes in the light of fundamental human rights.

As to the second issue, regarding the operation of the principle of legality, there was a suggestion by Laws J in *Witham* that a fundamental right could only be overridden by express statutory language, and not by implication.[40] That was doubted by Lord

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[36] [2000] QB 597, 608D-609E; no relevant constitutional right was found in that case, and his judgment was upheld on this point in the Court of Appeal: see 623C-624G (per Simon Brown LJ)

[37] [1980] 1 WLR 142, 157 (Lord Diplock). See discussion in Cross, *Statutory Interpretation*, 3rd ed., pp. 29-31 and 194-195.

[38] This is not by any means an issue which is unique to the United Kingdom, but is more or less inherent in any democratic state. There is a very considerable and lively literature on the issue as it arises in the USA: see eg David Crump, "How Do The Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy" 19 Harv. J. L. & Pub. Pol'y 795 (1995-1996); Richard H. Fallon, "Legitimacy and the Constitution" (2005) Harv. LR 118; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1991), esp. at pp. 241-242, citing J. Ely, *Democracy and Distrust* (1980), 58-59. For an interesting comparison of approaches in different jurisdictions, see Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* (2006), esp. chap. 7.

[39] see eg *Johnson v Unisys Ltd* [2003] 1 AC 518 at [56]-[59]; *Wainwright v Home Office* [2004] 2 AC 406, [34] (Lord Hoffmann); *In re McKerr* [2004] 1 WLR 807, [32] (Lord Nicholls), [51] (Lord Steyn), [71] (Lord Hoffmann), [91] (Lord Brown); *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763, HL, [75]-[84], esp at [75] and [82] (Lord Millett).

[40] [1998] QB 575, 586.

Browne-Wilkinson in *Pierson*, who considered that fundamental rights could be overridden by necessary implication from the statutory scheme.[41] Lord Reid, in relation to the fundamental right of property, had earlier expressed the same view in *Westminster Bank Ltd v Beverley BC*.[42] In *R (Gillan) v Metropolitan Police Commissioner*[43] the House of Lords held that the principle of legality had no application to alter the interpretation of provisions which were detailed, specific and unambiguous in character. It is submitted that the true position is that the principle of legality (if that is the name we are to use for this doctrine[44]) operates as one aid to construction alongside others, and that – in common with most canons of construction – it operates flexibly and with greater force the more important the interest at issue and the more directly the legislation to be construed touches upon that interest. In an unwritten constitution, without a clearly stated and fixed table of rights or principles by reference to which the doctrine could operate, it is difficult to see how the position could be otherwise.[45] On that approach, it will be possible for common law fundamental rights to be overridden by necessary implication, as well as by express words. It is notable that that is the position which has been adopted in relation to the operation of section 3 of the HRA.[46]

Section 3 of the Human Rights Act

The basis for the strong interpretive obligation contained in section 3 of the HRA is distinct from that underlying the principle of legality. The principle of legality is directed at seeking to ascertain the true intention of Parliament, as the basis for the interpretation of legislation. Section 3 of the HRA creates a principle of construction based on a direction to the courts (and lawyers, public authorities and the public at large) contained in statute requiring them to seek an interpretation of legislation which accords, so far as possible, with human rights as expressed in the ECHR, rather than with the true intention of Parliament derived from the language it has used. As Lester and Pannick put it, "the role of the court is not (as in traditional statutory interpretation) to find the true meaning of the provision, but to find (if possible) the meaning which best accords with Convention rights".[47] This is particularly clear in relation to the application of section 3 to legislation passed before the HRA came into effect, since it then supplants ordinary application of the canons of construction known at the time the

[41] [1998] AC 539, 575.
[42] [1971] AC 508, 529.
[43] [2006] 2 AC 307.
[44] My own preference would be to give the doctrine a more appropriate name, such as the principle of respect for constitutional rights and principles or of respect for the constitutional order - less snappy, but perhaps more accurate.
[45] Cf the discussion in *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, [26] (Lord Bingham), [58]-[61] (Lord Rodger).
[46] See eg *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [117] (Lord Rodger, agreeing with an earlier opinion of Lord Hope on this issue).
[47] *Human Rights Law and Practice*, 2nd ed., p. 34.

legislation was promulgated.[48] It is also true of legislation passed since the HRA came into effect. In both cases, the approach to construction adopted by the courts is to determine the ordinary meaning of the legislation, according to established common law canons of interpretation, and then to check whether that ordinary meaning is incompatible with Convention rights. If it is, the court then looks to see if it is "possible" to produce an interpretation which is compatible with Convention rights.[49] It is only if the ordinary interpretation of the statute produces a *prima facie* incompatibility with Convention rights that the courts are given the warrant, under the HRA, to seek to modify its meaning. Despite a certain analogy with the principle of legality,[50] this conceptual approach has more in common with the approach to construction of legislation which implements rules of EU law, under the doctrine of EU law set out in *Marleasing.*[51] That approach is not directed at identifying the "true" intention of Parliament, but rather at identifying an interpretation of a statute which complies, if possible, with an external rule or standard (Convention rights in the one case, EU rights in the other). The analogy with the *Marleasing* doctrine was noted by Lord Steyn and Lord Rodger in *Ghaidan v Godin-Mendoza*.[52] The legal warrant for adoption of this approach is that Parliament has itself enacted the relevant interpretive obligation in section 3 of the HRA, rather than (as with the principle of legality) that it is inherent in the concept of Parliament's meaning and intention as expressed in legislation.

In the case of both EU law and the HRA, the strength of the interpretive obligation and the appeal it makes to an external legal rule with its own distinct language and identifiable and determinate content (derived in part from the jurisprudence of the ECJ and the ECtHR respectively), provides the courts with considerable freedom to "read in" words into legislation (ie to expand its potential field of application) in order to produce conformity with that external rule, as well as "reading down" (ie to narrow its potential field of application).[53] In both cases, the limit of the interpretive obligation is whether it is "possible" to construe the domestic legislation compatibly with the EU legislation or Convention rights respectively. It will not be "possible" to construe domestic legislation in this way if to do so would distort or undermine some important feature of the legislation.[54] Parliamentary sovereignty is

[48] See s. 3(2)(a) of the HRA: "This section applies to primary legislation and subordinate legislation whenever enacted".

[49] See eg *Poplar HARCA Ltd v Donoghue* [2002] QB 48, [75].

[50] Noted by Lord Hoffmann in *Simms* at 131-132.

[51] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

[52] [2004] 2 AC 557, [45], [118].

[53] See eg, for EU law, *Litster v Forth Dry Dock Engineering Co. Ltd* [1990] 1 AC 546; and for the HRA, *R (Baiai) v Secretary of State for the Home Department* [2008] 3 WLR 549, HL.

[54] For an example involving EU law, see *Clarke v Kato*[1998] 1 WLR 1647, HL. The leading case on the proper approach under s. 3 of the HRA is *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, in particular at [121]-[122] (Lord Rodger: implication which goes "with the grain of the legislation" is permitted, indeed required, under s. 3; but "using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions" is not) ; see also *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291; *Bellinger v Bellinger* [2003] 2 AC 467; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

thus preserved, but in a somewhat attenuated sense. Some level of compromise with other, extrinsic constitutional values in the form of the Convention rights is mandated by section 3 of the HRA. The application of the relevant test calls for a value judgment on the part of the court, to assess whether Parliament has expressed some sort of fundamental intention in the legislation which it must be presumed from the scheme of the legislation and the language it has used it would not have been willing to sacrifice if confronted at the time with objections based on EU law or Convention rights. Since the court is required not to confine itself to determining the intention of Parliament simply from the words used and the usual canons of construction, but has to try to assess whether the intention derived from the words of the legislation is of an essential character or not, this is not a straightforward exercise. In effect, the courts have to examine whether some departure from what has hitherto been regarded as the natural meaning of the statute is justified, having regard to the general objective of producing compatibility with Convention rights set by section 3 of the HRA, but balancing that objective against the general long-stop preservation of parliamentary sovereignty inherent in the HRA: can a compatible construction be produced without generating excessive friction or dissonance in terms of the parliamentary intent to be derived from the words of the legislation to be construed?

Comparison of the application of the principle of legality and s. 3 of the HRA

There is an obvious similarity between the application of the principle of legality and section 3 of the HRA, but also a number of significant differences which flow from the different conceptual basis for each of them. The similarity, noted in particular by Lord Hoffmann in *Simms*, is that both require Parliament to express itself particularly clearly if its intention is to override some common law constitutional right or principle or a Convention right. Otherwise, the legislation will be liable to be read subject to the right or principle or the Convention right in question.

The differences, touched on above, are, first, that section 3 of the HRA overrides to some degree what would ordinarily be taken to be the meaning Parliament intended (by reference to the usual guides to interpretation) a statute to have, while the principle of legality seeks to give effect to that meaning.

Secondly, since there is no fixed and determinate statement of constitutional rights and principles to which the principle of legality refers, and they may come into play with differing shades of intensity depending on the circumstances, the operation of the principle is modulated to a significant extent by other aids to construction of a statute. Also, since constitutional principles are immanent within the English unwritten constitution, they will be liable to some modification over time in light of what Parliament itself chooses to do, which may come to undermine previous understandings of constitutional propriety and establish new ones. By contrast, section 3 of the HRA makes reference to a distinct code in which the Convention rights are given fixed and determinate expression in an authoritative document, and (via section 2 of the HRA) to a highly developed body of jurisprudence of the Strasbourg organs expounding the detailed meaning and interpretation of those rights. If, on ordinary principles of

construction, a statute appears to be incompatible with those defined rights as so interpreted, then section 3 of the HRA does not allow for the same type of modulation and balancing with other aids to construction, but requires more powerful effect to be given to Convention rights subject only to the distinct form of fundamental Parliamentary intent referred to above.

Thirdly, and related to the points above, section 3 of the HRA (by analogy with the *Marleasing* principle in EU law) requires and authorises a more wide-ranging approach to "reading in" language to a statute, as distinct from "reading down". That is because section 3 of the HRA requires legislation to be measured against a clear external body of law, with its own determinate content, and made to conform (if possible) to that law. By contrast, whilst "reading down" of general language is the usual interpretive technique employed when the principle of legality applies, it is more difficult to justify "reading in" additional words under that principle. That is because, within the constitution as it has developed based on the sovereignty of Parliament, legislative intent is taken to be derived from the actual language used by Parliament, and for a court to read in additional words to extend the application of a statute (as distinct from modifying its application within its ostensible field of application, by "reading down") will usually appear to conflict with the limited interpretive role which the courts enjoy outside the EU and HRA contexts. Partly for this reason, partly because in the sphere of individual rights it is likely that the courts will take the expression given to them in the HRA as having a particular democratic, parliamentary authority, and partly in the interest of simplifying and giving clear structure to the legal examination of the meaning of statutes, it seems likely that analysis under section 3 of the HRA will to a considerable extent now eclipse reasoning based on the principle of legality. It is perhaps significant that the heyday of application of the principle of legality in relation to individual human rights was in the period just before the coming into force of the HRA, and that the leading cases (in particular *Simms* and *Witham*) both made express reference to Convention rights as sources to provide determinate content for what were identified as domestic constitutional rights for individuals. But in the wider context for application of the principle of legality, outside individual rights, the principle remains an important guide to the meaning which Parliament is taken to have intended legislation to bear.

Finally, it has been held that the operation of section 3 of the HRA, as a distinct and powerful interpretative obligation, is capable of producing two distinct interpretations of a single statutory provision, depending upon whether in its application it happens to interfere with a Convention right or not. Again, the analogy has been drawn in that respect with the position in relation to the operation of the *Marleasing* principle in EU law.[55] It seems less likely that the principle of legality would produce such stark results.

The principle of legality in relation to interpretation of the HRA

[55] See *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [52].

Like any statute, the HRA was not enacted in a legal vacuum. Parliament is taken to have legislated against the background of usual constitutional understandings. Hence, there is scope for the principle of legality to be applied in relation to the HRA. One aspect of the principle of legality has already been applied in relation to it, regarding the position arrived at by the courts that the presumption against retroactive effect applies to the HRA.[56] The application of presumptions as to the territorial ambit of statutes in relation to the HRA was the subject of debate in *R (Al-Skeini) v Secretary of State for Defence*.[57]

Two other important areas where the principle of legality may have a significant impact in relation to interpretation of the HRA merit attention. First, it appears possible that a divide may be opening up between the approach of the ECtHR in being prepared to examine the quality of debates in Parliament as part of its analysis of the ambit of the margin of appreciation to be afforded to the UK in relation to measures contained in primary legislation,[58] and that of domestic courts, for whom such an analysis is forbidden by Article IX of the Bill of Rights, the common law and long constitutional tradition.[59] Is the common law rule and the Bill of Rights to be treated as overridden by the terms of the HRA? Or is this a case of the kind contemplated by Lord Hoffmann in *Alconbury*,[60] where the obligation to follow Strasbourg jurisprudence gives way to fundamental domestic constitutional understandings? Given the strength of the constitutional rule in question, it seems likely that – if a clear conflict were identified[61] – the courts would apply the principle of legality and the approach in *Thoburn* so as to read down the effect of the HRA in this respect.

Secondly, there is no constitutional principle more fundamental than the sovereignty of Parliament. It has been recognised that the HRA itself is drafted specifically so as to preserve that principle.[62] This means that, within the UK's own constitutional order, it is for Parliament to make fundamental policy and legislative

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[56] See in particular *R v Lambert* [2002] 2 AC 545, at [6] (and [10]-[12]) (Lord Slynn), [115] (Lord Hope), [143] (Lord Clyde) and [169] (Lord Hutton); *R v Kansal (No. 2)* [2002] 2 AC 69, at [84] (Lord Hope); *Wilson v First County Trust (No. 2)* [2004] 1 AC 816, per Lord Rodger at [186]ff, esp. at [212]. Also see *In re McKerr* [2004] 1 WLR 807, HL; *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

[57] [2008] 1 AC 153.

[58] *Hirst v UK (No. 2)* (2004) 38 EHRR 40 [GC], [79]; *Dickson v UK*, ECtHR [GC], judgment of 14 December 2007, [79].

[59] See *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332; *Hamilton v Al Fayed* [2001] 1 AC 395, 402F-403F; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, [61]-[67] (Lord Nicholls), [115]-[118] (Lord Hope), [140]-[143] (Lord Hobhouse), [173] (Lord Scott), [178] (Lord Rodger); *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 at [51] (Lord Nicholls); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [113]-[114] (Laws LJ).

[60] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [76], indicating that he would hesitate to conclude that s. 2 of the HRA would require the courts to follow Strasbourg jurisprudence which gave rise to "a conclusion fundamentally at odds with the distribution of powers under the British constitution".

[61] Cf *R (Wilson) v Wychavon DC* [2007] QB 801, [32]-[36], [38], [107].

[62] See eg *R v DPP, ex p. Kebiline* [2000] 2 AC 326, 367 (Lord Steyn); *Wilson v First County Trust (No. 2)*, [120] (Lord Rodger).

choices, which the courts have to accept and apply. Against that background, it is perhaps appropriate to enter a note of caution about a recent decision of the House of Lords under the HRA on appeal from Northern Ireland: *In re G (Adoption: Unmarried Couple)*.[63] The case concerned the compatibility with Convention rights of a rule in legislation[64] which excluded unmarried couples from being eligible to adopt children. There was uncertainty whether, on the current state of the Strasbourg jurisprudence, the continued application of such a rule would be compatible with Convention rights as interpreted by the ECtHR, or whether it would be held to fall within the margin of appreciation of the UK. The majority in the House of Lords concluded that the Strasbourg jurisprudence under the ECHR had developed to the point that, if the case were heard in Strasbourg, it would be held that the rule violated the Convention. However, a majority also indicated, in what would seem to be *obiter* but strongly expressed comments, their view that even if as a matter of international law the adoption of such a rule did not violate the rights contained in the ECHR, by reason of application of a margin of appreciation, still it would be open to the domestic courts to hold that the rule *did* violate the domestic version of the Convention rights as contained in the HRA, on the basis that the domestic courts were not obliged when interpreting those domestic rights under the HRA to afford the same margin of appreciation to the legislature as the ECtHR would afford to the UK as a state. As a matter of application of the ECHR in international law, it is plainly right that the margin of appreciation may, compatibly with the Convention, allow for decision-making by the courts (or, indeed, other public officials) rather than Parliament. In this respect international law treats the state as a single entity, without regard to the internal distribution of decision-making powers within it. However, where a margin of appreciation is applicable, the fundamental question for a domestic court is how domestic constitutional law and the HRA distribute decision-making powers between Parliament and the courts on the question of the content of a legal rule adopted in legislation. Leaving aside aspects of the drafting and structure of the HRA which might be taken to point against this obiter approach to interpretation of Convention rights,[65] it is respectfully suggested that it could be argued with force that, having regard to the fundamental nature of parliamentary sovereignty in the domestic constitution, the principle of legality should operate so as to narrow the concept of "Convention right" in the HRA to those rights recognised by the ECtHR under international law (in relation to which the fact of legislation by Parliament would afford no defence) rather than interpreting the concept in an expanded sense to confer upon the domestic courts a right to modify legislation under section 3 of the HRA where the domestic court disagrees with Parliament (but the

[63] [2008] 3 WLR 76.

[64] The rule was contained in the Adoption (Northern Ireland) Order 1987, but the reasoning of the House of Lords would also be applicable to such a rule contained in primary legislation of the UK Parliament.

[65] Eg the obligation under s. 2 of the HRA to have regard to the Strasbourg jurisprudence in interpreting Convention rights; the definition of Convention rights in s. 1(1) by reference to the concept of the "Convention" defined in s. 21(1) as the ECHR "as it has effect for the time being in relation to the United Kingdom [the state]"; the preservation of the principle of parliamentary sovereignty in the drafting of the HRA itself.

ECtHR itself would accept the choice made by Parliament as legitimate). It is respectfully suggested that this is a development of the law in the interpretation of the HRA which should perhaps be looked at carefully again by the House of Lords.

Conclusion

Despite certain similarities between the principle of legality and section 3 of the HRA, they have a different conceptual basis and operate in different ways. The two cannot simply be treated as assimilated for all purposes. In relation to individual human rights, the HRA provides the better defined and stronger protection and is likely in practice largely to eclipse the principle of legality. The principle of legality will, however, remain important as a guide to the interpretation of legislation which impinges on other areas where there are settled constitutional understandings. It is capable of providing guidance as to the interpretation of the HRA itself.