

The Judicial Role in the Interpretation of Statutes

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- 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

See eg R. Ekins, “The Intention of Parliament” [2010] Public Law 709

- 2) The main factors to which a judge looks 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 (Government’s published proposals for changing the law) and – in very limited circumstances – statements in Parliament by the promoters of a Bill (*Pepper v Hart* [1993] AC 593)

On the true effect of *Pepper v Hart*, see eg P. Sales, “*Pepper v Hart*: A Footnote to Professor Vogenauer’s Reply to Lord Steyn” (2006) Oxford Journal of Legal Studies 585

- 4) The interpretation of an Act may be radically affected by judicial identification of background understandings about how legislation should be drafted, 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 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

See eg *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115
P. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 Law Quarterly Review 598

- 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 EC laws, so far as it is possible to do so.

Case C106-89 *Marleasing* [1990] ECR-I 4135 (ECJ)
Litster v Forth Dry Dock Engineering Co Ltd [1990] 1 AC 546
Clarke v Kato [1998] 1 WLR 1647, HL

- 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 is involved as a constitutional court, involved in the construction of legislative meaning in the light of international norms. It is, in a sense, a delegation of legislative authority; albeit one built into traditions of legislative interpretation. It is an approach to interpretation which involves some sacrifice of rule of law and democratic principles (ie reduction in the authority of the draftsman and the text of the statute, and increase in the interpretive powers of the courts) in the interests of compliance with human rights standards

Alec Stone Sweet *Governing with Judges* (2000)
Keller and Stone Sweet (eds), *A Europe of Rights* (2009)
P. Sales and R. Ekins, "Rights-Consistent Interpretation and the Human Rights Act 1998" (2011) 127 Law Quarterly Review 217.

- 7) “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?

P. Sales and B. Hooper, "Proportionality and the Form of Law" (2003) 119 Law Quarterly Review 426
P. Sales, "The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights", chapter 12 in Andenas and Fairgrieve (eds) *Tom Bingham and the Transformation of the Law, A Liber Amicorum* (2009).