

## Three challenges to the rule of law in the modern English legal system

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In this lecture I seek to highlight certain processes in relation to the English legal system which pose an increasing challenge to the concept of the rule of law, as that concept is to be understood at its most basic level. Those processes are, first, the subjection of domestic laws to international scrutiny by authoritative bodies outside the English legal system and, secondly, the adaptation of domestic law to that scrutiny. To these processes may be added a third, with marked similarities to the second - the process of interpretation of legislation by reference to a hierarchy of norms and values internal to domestic law, the so-called principle of legality.

The first process is predominantly governed by the treaties which have created and now regulate the operation of the European Union, and legislation created by the law-making institutions of the Union and by the European Convention on Human Rights. The EU treaties are authoritatively interpreted by the European Court of Justice, or, as it is now styled, the Court of Justice for the European Union, based in Luxembourg. The ECHR is authoritatively interpreted by the European Court of Human Rights, based in Strasbourg.

The second process is governed, so far as concerns EU law, by the principle of sympathetic construction laid down in EU law – for example in the *Marleasing* case<sup>1</sup> - and received into domestic law via the European Communities Act 1972. According to that principle, a national court construing domestic legislation which implements a rule of EU law is required to interpret that legislation so as to make it comply with that rule, so far as it is possible to do so. The second process is governed, so far as concerns the ECHR, by the similar reasoning process required by section 3(1) of the Human Rights Act, which creates an interpretive obligation for statutes to be construed compatibly with the Convention rights in the ECHR, “So far as it is possible to do so”.

The third process is the product of a home-grown development of principles of interpretation of legislation. Where important constitutional or other values can be identified as part of the background against which

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<sup>1</sup> *Marleasing SA v La Comercial Internacional de Alimentation SA (C-106/89)* [1990] ECR I-4135.

legislation is promulgated, the legislation may be treated as being “read down”, or in some cases additional words may be treated as being “read into” the legislation, so as to alter its meaning in some material respect from what the words of the relevant provision appear on the face of them to say. This process is given the rather odd label of the principle of legality (as it is called in, eg, the *Simms* case in the House of Lords and in *HM Treasury v Ahmed* in the Supreme Court<sup>2</sup>), but could perhaps be described more accurately as the principle of respect for constitutional rights and principles.

*What is the rule of law?*

There is an extensive literature which discusses the concept of the rule of law, ranging from approaches which give it a purely formal content to those which give it a significant substantive content, with intermediate positions along the spectrum.

This is not the time to examine these approaches in detail. Rather, in this lecture I want to highlight the way in which statutory rules come under question or attack through the processes I have referred to, so that they are bent and modified to take account of underlying values or norms which fall to be accorded particular respect under the domestic legal system. Those norms and values comprise rules of EU law, human rights as stipulated in the ECHR and constitutional rights and principles identified as inherent in the domestic legal order according to the principle of legality.

For the purpose of this lecture, I take the idea of the “rule of law” to involve “rule” - in the sense of something which governs practical outcomes in particular cases - by “law” - in the sense of a norm of general application laid down in advance. In the modern state, including in England, the primary form of law is statute. A statute provides a canonical formulation of the law which is to be applied in a given situation.

Taken in this sense, the three processes I have identified can be seen to pose challenges to the rule of law. The manner in which the English legal system reacts to and contains such processes within certain parameters says something important about the way in which values which come into conflict at a deep level in our jurisdiction fall to be reconciled, and about the way in which rule of law values are permitted to give way to a degree in the face of other values which are judged to be more compelling in certain contexts. Examination of the extent to which this occurs allows one an indirect way of gauging the weight given to

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<sup>2</sup> *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, at 130; *HM Treasury v Ahmed* [2010] UKSC 2 & 5, [45]-[47].

those other values – almost like observing the presence of black holes or other matter in the universe by drawing inferences indirectly from the behaviour of light.

On the approach I am adopting this evening, a law may be said to “rule” when the reason for a court - or government official or a citizen - to decide to act in a particular way in a particular situation is that the law says that they should so act, without them going back to examine underlying reasons of an unlimited nature why they should or should not act in that way. Where a law exists, there may be a range of background reasons of a general kind which provide the substantive justification for having the law, but the judge, official or citizen is not required to examine those underlying reasons for him- or herself. A law rules where an agent treats the existence of the law, in and of itself, as the reason for action.

This is the point emphasised by Frederick Schauer in his important book, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. As Schauer puts it: “The status of being a rule is one that may (or may not) be possessed by a general prescription vis-à-vis that prescription’s background justification or justifications. The instantiation of any justification is a rule just insofar as that instantiation is entrenched, supplying a reason for action qua instantiation. When the existence of an instantiation adds normative weight beyond that supplied by its underlying substantive justifications, the instantiation has the status of a rule.” This chimes with the accounts given by Joseph Raz in *Practical Reasons and Norms* and by HLA Hart in his *Essays on Bentham* that legal rules are authoritative because they offer reasons for action which eliminate the need for independent deliberation by relevant actors.

In the normal course, statutory rules have precisely this status within the legal system. A court will treat a statutory provision as a reason for action without having to go back to examine the background justification for it, and then treating that background justification as the actual reason for action.

There are two important reasons why this should be so, the first associated with democratic principle and the second drawn from values associated with the rule of law. First, in a representative democracy, a major part of the justification for having democratic institutions is to enable the demos to take effective, binding decisions about what should happen. That requires that democratic institutions (in particular, Parliament) can lay down binding rules to specify outcomes in particular classes of case. A statute is the mechanism allowing the will of the democratic institution to be imposed in a given case. It is the transmission

belt for the effective exercise of political, decision-making power by the body recognised as the legitimate holder of that power.

Secondly, a major part of the value of having society governed by general rules laid down in advance is both to allow for sensible direction and co-ordination of human activity by the state - to avoid chaos and massive inefficiency - and also to further moral principles of autonomy and control over a person's own life and affairs by allowing citizens and undertakings of all kinds to plan their actions with reasonable confidence as to how the state is likely to treat them and to require them to treat each other. This promotes economic prosperity - by encouraging investment against a backdrop of reasonably settled expectations - and general well-being for individuals, who can plan their lives. Statutes provide canonical formulations of legal rules which everyone can read for themselves and seek to some reasonable degree to understand.

One may draw out the importance of these reasons for treating statutes as law - in the sense of an independent reason for a court to act - by asking why we do not simply address a general injunction to the courts to "do the right thing". If that were the direction to the courts, it would leave it entirely to the individual judgment of a court in a given case, addressing the full range of underlying potential reasons for or against acting in a particular way, to decide what to do. Having a legal system which operated in this way would involve a massive transfer of effective decision-making power - that is, political power - away from the legislature to the courts and would greatly diminish the assurance which citizens could have in making judgments about how state institutions would be likely to react to particular fact situations in future. That would have the effect of greatly increasing the risk of capricious exercise of power, since the rule of law would in practical reality be replaced by the rule of men.

### *The three challenges to the rule of law*

The three processes identified at the beginning of this lecture tend to undermine the extent to which the formulation of a rule in canonical form in a statute can be treated as the last word for a court in deciding how to act in a given case. The processes thus tend to undermine the extent to which the law as expressed in the statute may be said to "rule", in the full sense of that term. This is because the three processes each tend to break down the extent to which the formulation of the rule in a statute can be treated as free-standing and distinct from the underlying justifications for it.

In a certain sense, of course, there will always be potential for the courts to look behind the words of a statute to the underlying

justifications for it, when they have to assess its meaning in hard or uncertain cases. Ordinary principles of construction require this – for example the principle that one interprets a statute in light of the mischief which it was promulgated to address, or in light of statements in white papers which clarify the purpose it was designed to promote. Indeed, this may be regarded as part of the usual process of understanding any act of communication, since the words used do not stand apart from the context in which they are uttered or written, but in large part take their meaning from that context. It is therefore relevant in assessing the meaning intended by the legislature in promulgating a statutory provision to have some regard to the underlying justifications which it may plausibly be supposed the legislature had in mind as reasons for expressing itself in the way that it did. But there is a limit to this process of interpretation. Often the words used will be clear and the cases to which a statute applies will not be difficult or marginal cases.

By contrast with this general interpretive framework, the three processes I have referred to involve a much more far-reaching questioning of statutory rules in light of possible underlying justifications for them, and by reference to a set of justifications and a process of reasoning framed by a given set of values which lie in a certain sense outside the statute itself, and which constitute a particular vantage point or points for interrogating the statute.

(i) *Review of domestic law against international standards*

By the first process, a rule of domestic law - typically in the form of a statutory provision - is made subject to review by reference to a legal regime external to the domestic legal system: EU treaty rules and legislation or the ECHR. Within those areas covered by EU treaty or legislation, a domestic rule will be subject to review against a range of underlying principles which are taken to be inherent in EU law, in particular the principle of equality, the principle of proportionality – that is, the requirement that any intrusion by EU or national law upon an interest protected by EU law, if permitted by general principles of EU law or under specific provisions in EU law allowing derogation from or interference with such interests, should be no more than is proportionate to the legitimate purpose for which such interference is allowed - the principle of legal certainty, the principle of protection of fundamental rights inherent in the legal order of the EU – which increasingly take their inspiration from the rights set out in the ECHR, but with the addition now of the rights set out in the Charter of Fundamental Rights - and the principle of effectiveness in relation to remedial protection for EU rights. These general principles of EU law involve reference back to underlying

justifications which may or may not exist to support the domestic law applicable in a given situation, judged against standards of acceptability supplied by EU law. This process gives rise to the possibility of challenges to domestic law, so that it does not stand unquestioned as a reason for action by a court.

If the domestic law is found to be defective when judged against the relevant EU standards, that opens up scope for various potential arguments as to what effect that might have in domestic law. The effects range from disapplication of a statute where it conflicts with directly applicable provisions of EU law on the basis of the *Factortame* principle<sup>3</sup> through an obligation to supply a conforming interpretation of the domestic law (by application of the *Marleasing* principle) to an entitlement to damages for breach of EU law awarded by the national courts on the basis of the *Francovich* principle.<sup>4</sup>

A similar process of review applies in relation to measures which intrude upon areas covered by the rights set out in the ECHR. A person affected by a domestic law which he says infringes such rights may make complaint direct to the European Court of Human Rights, which judges the effect of the law in the particular circumstances in question from a vantage point outside the domestic legal order, by reference to principles found by the Strasbourg Court to be express or implied in the rights set out in the ECHR. The Court of Human Rights will review the quality of the law applied by a state party, to ensure that it has a proper basis in domestic law, is accessible, is properly foreseeable in its effects and does not operate in an arbitrary fashion. If a domestic law does not comply with these standards, a breach of Convention rights may be found.

In addition, the principle of proportionality is central to the European Court of Human Rights' assessment in many cases. Questions of proportionality arise in assessing the legitimacy of interference with a range of rights set out in the ECHR, including most particularly the qualified rights in Article 8 (respect for family and private life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). The proportionality requirement is found to arise by implication from the requirement stipulated in these provisions that interferences with the rights in question can only be justified when they are "necessary in a democratic society" for one of a number of identified legitimate aims. Questions of proportionality also arise in relation to restrictions on the operation of other rights, such as the rights in Article 6 (fair trial, which includes an implied right of access to the courts, which may only be restricted by measures which are proportionate to some legitimate public

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<sup>3</sup> *R v Secretary of State for Transport, ex p. Factortame Ltd* [1990] 2 AC 85.

<sup>4</sup> Joined Cases C-6 and 9/90 *Francovich v Italy* [1991] ECR I-5357.

policy objective), Article 12 (right to marry, which may be regulated by proportionate measures), Article 14 (prohibition of discrimination – differential treatment may be justified if it is proportionate to a legitimate public policy objective) and Article 1 of the First Protocol (protection of property – interference with property may be justified if proportionate to a legitimate objective in the public interest).

The principle of proportionality applied by the European Court of Human Rights involves the state in having to identify some legitimate public interest objective which its relevant law pursues - either one from a stipulated list, such as is set out in Articles 8 to 11, or taken from more general considerations, where the Court judges the legitimacy of the objective, as in the case of other provisions such as Article 14 - and then in persuading the court that the measures which interfere with the rights in question are proportionate to that objective and, in light of that objective, do not unduly interfere with those rights. In other words, assessed through the framework imposed by the legal structure of the ECHR, the state is required to explain and defend the law by reference to a certain type of underlying justificatory reasoning.

Another area where the form chosen by Parliament for domestic law is likely to be brought increasingly into question, so that justification by reference to underlying moral or policy reasons will have to be given in order to defend that law, is in relation to the developing area of indirect discrimination contrary to Article 14 of the ECHR as a wide general principle. The development of the law in this area began with *Thimmenos v Greece*<sup>5</sup>. It seems likely that the Strasbourg Court will develop principles to mirror those which apply in relation to direct discrimination claims, so as to ask (1) is a general rule or measure being applied to two or more relevant groups which are *not* on the face of it in a relevantly analogous position? And if so, (2) Was the similarity in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim? As the Court put it in *Hoogendijk v Netherlands*<sup>6</sup>: "... persons whose situations are significantly different must be treated differently ... An issue will arise under Article 14 ... when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different ...".

This is a doctrine which may have profound effects in providing scope to challenge simple legislative rules of general application across a range of situations. Article 14 does not set out exhaustively the grounds on which such discrimination might be unlawful, since it refers

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<sup>5</sup> (2001) 31 EHRR 15, [44]

<sup>6</sup> (2005) 40 EHRR SE22, 206-207

compendiously to discrimination on a range of specified grounds “or other status”. So, potentially, a claim of indirect discrimination contrary to Article 14 could be brought in a very wide variety of contexts and on a very wide variety of bases, by reference to a wide variety of essentially groups said to be prejudiced by the application of the general rule, those groups being defined by claimants in their own interests so as to produce the required disproportionate impact upon the particular group so defined. Where a prima facie case of disproportionate impact upon a group is made out, the state will be required to justify the rule it has put in place. Just as the principle of proportionality provides scope to attack a clear rule of legislation as overbroad in its effects and insufficiently sensitive to underlying justifications and factual circumstances, so the doctrine of indirect discrimination inherent in Article 14 provides scope to attack a rule of legislation which provides for equal treatment of a range of groups, on the grounds that it is overbroad in its effect and insufficiently sensitive to material differences between those groups. The thrust of such an argument is that the state owes an obligation to recast the rule to make special separate provision for any unduly affected group.

If domestic law is found wanting when judged against these standards, the European Court of Human Rights will grant appropriate relief. The remedies ordered by the Court are effective, even though they operate only at the level of international law. Their effectiveness is underwritten by the importance to the UK of membership of the Council of Europe (for which adherence to the ECHR is required) and of the EU (for which again, as a matter of political reality, adherence to the ECHR is also required).

Although review against both EU and ECHR standards involves examination to some degree of the underlying justification of a rule, in many cases there remains scope within the analysis required by both systems of law for acceptance that the rule adopted by the legislature should be accorded respect and simply applied. The principal mediating concept here is the margin of appreciation (as applied by the European Court of Human Rights) and the similar margin of discretion (as recognised in EU law) allowed to national authorities - in particular, national legislatures - in certain contexts. The margin of appreciation operates to accord respect to the judgment of the legislature in relation to those questions more apt for decision in a democracy by that body rather than by the courts. Accordingly, the ambit of the margin of appreciation may be wider depending on the sensitivity and complexity of the area governed by legislation, whether it relates to matters of social and economic policy, whether it is in an area of general policy in relation to which opinions may reasonably differ in a democracy, whether the legal approach calls for a balancing of interests and rights and the absence of a

clear common approach across Members of the Council of Europe. In EU law, the ambit of the margin of discretion may also reflect the operation of the principle of subsidiarity, in recognition of the proper division of powers between EU and national institutions.

Where a matter is found to fall within a Member State's margin of appreciation or discretion, it may be legitimate for that state to establish clear, "bright line" rules which require the courts and officials to apply simple rules according to their terms, without reserving discretionary powers to them. The wider the margin of appreciation, the greater will be the freedom of a state to lay down such rules. The margin of appreciation represents a response at the level of legal theory to pressures deriving from democratic principle to respect the will of the legislature and (in some contexts) to pressures deriving from rule of law values. So, for example, a state's choice in laying down clear and simple rules in the field of taxation or in defining welfare benefits, which are areas where democratic choice is particularly important, is recognised by the Strasbourg Court's acceptance of a wide margin of appreciation in cases such as *Stec v UK*<sup>7</sup> and *Burden v UK*.<sup>8</sup>

Similarly, a state may be allowed a wide margin of appreciation where it has to balance competing personal interests of individuals and seeks to lay down a regime which ensures they can understand clearly the choices they have to make and which, in the interest of respecting their autonomy, restricts the discretion which may be applied by decision-makers after the event. An interesting example of this type of reasoning is *Evans v UK*<sup>9</sup>, which involved consideration of the compatibility of the domestic rules regulating IVF treatment with Convention rights.

(ii) *The impact of review against international standards upon domestic law*

I turn from consideration of review of domestic law against international standards to the second process I have identified – the impact of such review upon the content of domestic laws. Here I focus on the operation of the *Marleasing* principle in relation to promoting compatibility of domestic laws with EU law and section 3(1) of the HRA in relation to promoting compatibility of domestic laws with the Convention rights drawn from the ECHR. These each require that a statutory provision should be read and given effect in a manner which is compatible with (respectively) EU rules or Convention rights, so far as it is "possible" to do so.

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<sup>7</sup> Grand Chamber, decision of 12 April 2006, [51]-[52].

<sup>8</sup> (2007) 44 EHRR 51, [60].

<sup>9</sup> (2008) 46 EHRR 34.

Where review of a statutory rule against EU or ECHR standards indicates that to give effect to that rule according to its clear terms and ordinary meaning would be incompatible with EU law or Convention rights, domestic courts and officials are required to give the rule a different, amended meaning if they possibly can. This may involve writing in a significant number of additional words to the statutory provision so as to change its meaning in material ways or it may involve “reading down” statutory provisions, so that they do not apply in cases in which, on the face of it, they would otherwise apply.

Where these processes of special interpretation of statutory provisions operate, the ordinary citizen lay-person is placed at a disadvantage so far as concerns being able to inform himself about the meaning and content of the legal rules which apply to him. He cannot clearly know, from reading the statute, what his rights and obligations are; nor can many lawyers make that assessment. The meaning of legislation has to be mediated through the esoteric expertise of lawyers with specialist knowledge of EU or ECHR law. The greater the force given to the special interpretive obligations under *Marleasing* and section 3 of the HRA, the greater the challenge to rule of law values associated with promotion of autonomy and the ability of individuals to plan their lives - and the cases make clear that the interpretive force in both cases is very considerable indeed, albeit not unlimited.

In the context of the present discussion, however, I wish to emphasise a distinct aspect of the challenge to the rule of law presented by the *Marleasing* principle and section 3 of the HRA. Where they apply, one cannot with confidence divorce the meaning of a legislative provision from the underlying justifications which may be offered for adopting that provision. This is because, at the first stage of analysis, the compatibility of the statutory provision with EU law or Convention rights falls to be assessed by reference to such law and rights, including by reference to doctrines such as the principle of proportionality. The *Marleasing* principle and section 3 of the HRA bring the interrogation of statutory rules by reference to international standards into the domestic courts, to be applied in the process of working out what those statutory rules are to be taken to mean.

If the statutory provision - according to its natural, ordinary construction - is found to be *prima facie* incompatible, the domestic court is required to consider whether it is “possible” to modify its meaning so as to render it compatible with EU law or Convention rights as the case may be.

According to this process of analysis, the domestic court is frequently required to consider the underlying justification for the legislative rule and then to apply the powerful interpretive power - and

obligation - under *Marleasing* or section 3 of the HRA to bring the rule into conformity with that underlying justification, so as to avoid any unwarranted over-inclusion or under-inclusion of the rule, when judged against its underlying rationale. The tendency, therefore, is for rule and underlying justification or rationale to be made to correspond, rather than for the rule to stand on its own two feet as an independent canonical statement of the legal standard to be applied in that situation. In some cases the correspondence required between the rule and its underlying rationale may be complete, depending upon the force of the EU law or Convention right, the absence or narrowness of any margin of appreciation, and the force of the interpretive obligation and its application in the particular context. In other cases, depending on a different alignment of the same factors, the correspondence required between rule and rationale may only be approximate or sometimes may not be required at all.

The tendency I have referred to may also be regarded as a tendency for reasoning about rules in statutory provisions to become more like the reasoning about rules of the common law, where there is typically a greater focus on the reasons for imposing particular rules - the application of the rules being developed case by case - as distinct from a focus on canonical statements of them. The uncertainty of the law, its inaccessibility to the ordinary citizen and the need for costly litigation to resolve that uncertainty are the price to be paid for this process of alignment of domestic law with EU and ECHR legal standards.

Looking at the position more widely, the elaborate reasoning associated with this process of alignment may be thought to have a particular fit with an important strand in current legal theory, which tends to emphasise the importance and legitimacy of judicial law-making and reasoning as against the creation of law by statute. Although it remains important not to over-emphasise the phenomenon, the more the courts are furnished with the tools to question and break down statutory rules by a process of judicial reasoning by reference to their underlying justifications, the more important judicial reasoning in a particular area becomes by comparison with the judgment of the legislature. This is a process which may particularly be welcomed by those who subscribe to that strand of legal theory, and may occasion a degree of unease for those who are more sceptical about it.

(iii) *The principle of legality*

The principle of legality lies part way between the *Marleasing* and section 3 approach to the interpretation of legislation and the general interpretive framework given by reference to the mischief at which the

legislation is aimed. According to the principle of legality, 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.

There is a wide range of such rights and principles which may be the subject for application of the principle of legality so as to modify the meaning and effect of what appears to be the ordinary language of a statutory provision. These include the principle that general words in a statute do not bind the Crown, the *Carltona* doctrine (according to which references to a Minister or Secretary of State are taken to include references to civil servants in their department) and various presumptions associated with rights of individuals - such as the requirement that clear language be used to create a criminal offence, the presumption against legislation being given retrospective effect, the presumption against exclusion of access to the courts and the presumption against interference with or deprivation of property without compensation.

Similar presumptions may be applied in relation to statutes of particular constitutional significance. Notwithstanding the doctrine of implied repeal of earlier statutes by later statutes which are inconsistent with them, an earlier statute which is regarded as having particular constitutional significance will not be affected by a later statute unless repealed or modified expressly or by clear necessary implication by that statute – that is to say, there is a strong presumption that Parliament does not intend to modify a statute of special constitutional significance by a sidewind in later legislation, as was held in the *Thoburn* case of the so-called metric matryrs in relation to the European Communities Act 1972.<sup>10</sup>

In many respects, there is nothing new about the interpretation of legislation in the light of background assumptions about the way the state is constitutionally organised and having regard to certain values or interests which are regarded as particularly fundamental, nor about the reasoning by which the meaning of the statute is derived in this way. What may be regarded as new, however, is the emphasis upon the principle of legality for the interpretation of statutes in the context of individual rights. The leading authorities here are *ex p. Pierson* (regarding the fixing of the penal element in a prison sentence),<sup>11</sup> *ex p. Simms* (regarding the access of prisoners to visits by journalists),<sup>12</sup> *R v Lord Chancellor, ex p. Witham* (regarding regulations imposing court fees which had the practical effect of preventing access to the courts by individuals on welfare benefits),<sup>13</sup> *A v Secretary of State for the Home*

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<sup>10</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195; [2003] QB 151.

<sup>11</sup> [1998] AC 539.

<sup>12</sup> [2000] 2 AC 115.

<sup>13</sup> [1998] QB 575.

*Department (No. 2)* (general rule-making powers do not permit the making of rules which would allow the reception of evidence obtained by torture)<sup>14</sup> and, very recently, *HM Treasury v Ahmed* (concerning regulations freezing the assets of suspected terrorists).<sup>15</sup>

These authorities and others in the same vein treat the principle of legality in relation to individual rights as having an interpretive effect closely similar to that created by statute by section 3 of the HRA. The similarity was noted by Lord Hoffmann in *ex p. Simms*, where he also observed:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ...”

It is not, I think, an accident that the authorities which gave renewed impetus to the principle of legality in the context of fundamental human rights developed in the period leading up to the making and coming into effect of the HRA on 2 October 2000. It was a period in which the English courts were becoming increasingly receptive to the idea of fundamental human rights - particularly as inspired by the ECHR and the jurisprudence of the European Court of Human Rights - operating as some form of constraint upon parliamentary and executive power and increasingly inventive in their development of domestic law to enable them to give effect in some shape or form to Convention rights – a partial and creeping incorporation of the ECHR *avant la lettre* of the HRA.

Although as Lord Hoffmann suggested in *Simms* the passing of the HRA represents almost a form of codification of the principle of legality, as a statutory text setting out defined fundamental rights, *HM Treasury v Ahmed* makes it clear that the principle of legality – operating by reference to fundamental rights - is not fully eclipsed by the HRA and continues to be potentially a vital force affecting the interpretation of statutes.

The challenge to the rule of law - in the sense I am using the term - posed by this particular aspect of the principle of legality is similar to that posed by the operation of section 3 of the HRA. By reason of the support the courts seek, in identifying rights which are to be regarded as

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<sup>14</sup> [2005] UKHL 71; [2006] 2 AC 221, at [51].

<sup>15</sup> [2010] UKSC 2 & 5.

fundamental, from the ECHR or other international instruments whose operation involves the doctrine of proportionality, there is similar scope for the principle of legality to be used to question and break down what appear to be clear statutory rules.

This effect of the principle of legality, however, is likely to be less acute and less powerful than that achieved by the *Marleasing* principle and section 3 of the HRA. Absent the clear authority provided by those interpretive rules, the courts are likely to be more reticent in using the principle of legality to modify statutory rules.

### *A broader perspective*

I conclude this lecture by taking a look at the problem from a broader perspective. The ability to lay down a rule within a society which is required to be followed simply because it is the rule – so as to achieve the rule of law in the sense I am using the concept – is intimately linked with the way in which the ruler in that society is empowered to issue norms and to have them obeyed. With the rise of the modern state as an institution distinct from individual rulers and with the development of democratic thinking as the dominant ideology to legitimise rule within the state (particularly in Europe), the creation of law came to be regarded as a primary function of national legislatures. Modern emphasis upon the rule of law as a value draws strongly upon the ideas underpinning the modern state - as a neutral arbiter between or framework for competing interests in a given territorial society - and ideas underpinning democratic institutions. As Jeremy Waldron notes in his book *Law and Disagreement*, "... [The circumstances of politics] are essential for understanding many of the distinctively political virtues, such as civility, the toleration of dissent, the practice of loyal opposition and – not least – the rule of law". Democratic institutions presuppose some defined political community - the constituency to vote and be represented – which is typically provided by the nation state. The rule of law gives effect to rules laid down by institutions which are legitimised as part of the state and as democratic.

The challenges to the rule of law I have discussed in this lecture – and the pressures they impose upon the rules laid down by Parliament in statute – may be seen as reflecting to a degree the challenges to the state in the modern world. There is a lively literature which calls attention to the way in which the authority of the traditional territorial nation state has suffered a haemorrhage of its authority upwards and outwards, to international institutions - of which, for the UK, the EU and the Council of Europe are the prime examples - and to large multi-national corporations which are able with relative ease to choose where to locate

and invest around the world - and, at the same time, downwards, by cession of power to regional entities within it (for the UK, by devolution of powers to Scotland, Wales and Northern Ireland).

The first two challenges to the rule of law I have discussed this evening are examples of the way in which the simple power of the UK Parliament to lay down clear rules to be followed by all is challenged, at the level of legal doctrine, by processes of integration of the UK state within wider structures of international governance. The same is true, albeit more mutedly, in the case of the third challenge (the principle of legality), since in its recent form it draws so strongly on international instruments to identify and inform the definition of the fundamental rights to which it gives effect.

I should add that the devolution of law-making powers to the Scottish, Welsh and Northern Irish representative institutions also involves, in a rather different way, a breaking up of simple legal rules laid down in UK statutes, since now, where law-making powers have been devolved, one finds a legal patchwork of different rules. But that is a rather different point, since the laws created by the devolved institutions do themselves, within their regions, fall to be applied as rules and hence do not undermine the rule of law in the sense I am using the concept. However, it should be noted that section 3 of the HRA and the *Marleasing* principle again apply in their interpretation, so the same rule of law issues I have discussed this evening arise in relation to them as well. Moreover, since the law-making powers of the devolved institutions are circumscribed by EU law and Convention rights in a way that the law-making powers of the UK Parliament are not, the challenge to the rule of laws as passed by the devolved institutions posed by EU standards and the ECHR is far greater than in the case of rules promulgated by the UK Parliament.

Nonetheless, returning now to UK statutes, as I have pointed out, the three challenges do not involve the complete erosion of the legislative power of the UK Parliament nor a complete undermining of the rule of law based on statutory rules passed by it – far from it. The extent to which the three challenges to the rule of law are resisted in legal doctrine is in a certain way a measure of the manner in which the democratic nation state continues to have authority despite the centrifugal forces to which it is subject. The state continues to be the principal locus of legitimacy in the modern world and it provides the basis for the creation and defence of very basic values of security, protection and responsiveness to human need.

As John Dunn says in his book *The Cunning of Unreason: Making Sense of Politics*: “... We owe [the modern state form selected, refined and diffused by capitalism] no veneration and we cannot reasonably

expect to enjoy its ministrations over time. But we do owe it our loyalty, and perhaps some of our limited stock of patience. Human beings have done many more fetching and elegant things than invent and routinize the modern democratic republic. But, in the face of their endlessly importunate, ludicrously indiscreet, inherently chaotic and always potentially murderous onrush of needs and longings, they have, even now, done very few things as solidly to their advantage. ...” ).<sup>16</sup> Paul Hirst puts the point this way in his *War and Power in the 21<sup>st</sup> Century*: “... The core defence of the modern territorial state ... has been that it is inclusive in the way that no other body is, that it upholds the rule of law, and that it protects the private freedoms of the citizens who are its compulsory members. ... the prospect of the state being displaced threatens most citizens with less accountable, more exclusive, and more capriciously coercive forms of power. Such governance is exercised neither by them nor on their behalf ...”<sup>17</sup>

In the light of these considerations, I suggest that the modern state, and the rule of the law it creates, remain of huge importance and are likely to retain that importance for the foreseeable future.

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<sup>16</sup> pp. 361-363

<sup>17</sup> pp. 114-115.