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Interpretation and the
Human Rights Act
1998**

By

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and

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RIGHTS-CONSISTENT INTERPRETATION AND THE HUMAN RIGHTS ACT 1998

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“Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home”¹

Introduction

In this article we examine the concept of the intention of the legislature as expressed in statutes, when they are read in light of the rights set out in the European Convention on Human Rights (ECHR) as adopted into domestic law as Convention rights by the Human Rights Act 1998 (HRA). We address the tension between the operation of s.3(1) of the HRA and values inherent in the rule of law ideal and democratic principle. In the light of this discussion we attempt to articulate the proper approach for defining the boundary between the operation of s.3 of the HRA (which creates a mandatory obligation requiring an interpretation of statutory provisions which is compatible with Convention rights to be adopted “so far as it is possible to do so”) and s.4 of the HRA (which provides for the making of declarations of incompatibility by the courts where such an interpretation is not “possible”). In English law, it is this boundary which brings most acutely into focus the issue of the proper respective functions of the legislature and the courts, and the associated division between politics and law.

In examining these questions, we criticise the idea that the HRA is intended to create a “democratic dialogue” between courts and legislature, as suggested by some writers,² and criticise the distorting approach to the interaction of ss.3 and 4 of the HRA (and, indeed, to the more general operation of the HRA) to which such a notion gives rise. We suggest that in the context of the Convention rights set out in the HRA it is the concept of the margin of appreciation and its domestic analogue (the discretionary area of judgment³ or, if one must use the term, the concept of deference⁴) which mediates between decision-making by the legislature, as the

¹ From the White Paper, *Rights Brought Home: The Human Rights Bill* (HMSO, 1997) Cm.3782, at para.1.19.

² Most recently, by A.L. Young in *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009), Chs 5 and 6. Also see, e.g. R. Clayton, “Judicial Deference and ‘Democratic Dialogue’: the Legitimacy of Judicial Intervention under the Human Rights Act 1998” [2004] P.L. 33; T. Hickman, “Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998” [2005] P.L. 306; D. Nicol, “Law and Politics after the Human Rights Act” [2006] P.L. 722; cf. I. Leigh and R. Masterman, *Making Rights Real: the Human Rights Act in its First Decade* (Oxford: Hart, 2008), Ch. 5.

³ *R. v DPP, ex p. Kebelene* [2000] 2 A.C. 326 HL at 380–381 (Lord Hope of Craighead).

⁴ The term is not particularly apt, for the reasons given by Lord Hoffmann in *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 A.C. 185 at [75]–[76], but has gained a certain currency in academic

principal democratic institution, and decision-making by the courts. This reflects the position in international law under the ECHR. The notion of a “democratic dialogue” overlooks the primary function of the HRA, which is to provide a domestic remedial regime in relation to rights to which the United Kingdom is subject under international law by its adherence to the ECHR, which rights are authoritatively interpreted by the European Court of Human Rights (ECtHR).

Understanding the centrality of the international dimension to the scheme of the HRA helps clarify the intended scope and effect of ss.3 and 4. The HRA mandates rights-consistent interpretation but does not displace the traditional object of interpretation, which is to determine the intention of the enacting legislature. What s.3 achieves is to introduce an important new rule which bears sharply on how interpreters are to infer that intention. This article outlines how this rule operates and so how interpreters should understand their duty to infer the legal meaning of a statute. In order to illustrate our thesis, we also compare the approach to interpretation of statutes in the context of constitutional or human rights in Canada and New Zealand.

The rule of law and democracy

The HRA concerns the separation of powers, especially between courts and legislature and most particularly in relation to the operation of statutes. Parliament’s decision in enacting the HRA, and the allocation of authority it intended to introduce by way of ss.3 and 4, cannot be fully understood without reflecting on the rule of law, democratic principle and the object of interpretation, which is legislative intent. These constitutional fundamentals should inform how ss.3 and 4 are to be interpreted and applied within the overall scheme of the HRA.

Insight into the ideal of the rule of law may be found by reflecting on certain features of a legal order that is in good shape. The distinctive features of law as a form of order are clearly evident when the rule of law is in place. That is, public standards co-ordinate the life of the community with that precision and stability that lends itself to peaceful and profitable social life, in which members of the community may plan their lives free from arbitrary interference. Private power is constrained and limited by publicly enforced standards, and public power is exercised in accordance with and subject to the discipline of public standards. The members of the community enjoy a valuable form of life in which the rules by which they are jointly to live are transparent to all and in which each person’s duty to obey is grounded in the reciprocity of social arrangements that characterises mutual subjection of citizens and officials to a public scheme, adopted for the common good.

The aspects of the rule of law picked out by Finnis,⁵ Fuller,⁶ Raz,⁷ Summers⁸ and others each capture part of that character of the system, and the pattern of

debate. The relevant concept is not so much deference as that of the courts according due respect to the judgment of another body within the constitution on rational grounds based upon the appropriate separation of—or distribution of—public power in a particular context. This due respect for other institutions may be termed “comity”: T. Endicott, “Habeas Corpus and Guantanamo Bay: a View from Abroad” (2009) 54 *American Journal of Jurisprudence* 1.

⁵ J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at pp.270–271.

⁶ L. Fuller, *The Morality of Law*, revised edition (Yale University Press, 1969), at pp.33–94.

⁷ J. Raz, “The Rule of Law and its Virtue” (1977) 93 *L.Q.R.* 195.

⁸ R. Summers, “The Principles of the Rule of Law” (1999) 74 *Notre Dame L. Rev.* 1691; see also T. Bingham, *The Rule of Law* (London: Allen Lane, 2010).

choices and actions that is this system in action. The propositions of law that frame and direct all reasonable persons, and to which the unreasonable are compelled to conform, should have certain virtues. Namely, laws should be (i) prospective, (ii) capable of being obeyed, (iii) promulgated, (iv) clear, (v) coherent (not contradictory), (vi) stable (not changed arbitrarily), (vii) general (so that particular decisions are framed by general rules), and (viii) in fact directive of official action.

Legal change is consistent with the rule of law. However, the ideal suggests that the body authorised to change the law should be capable of promulgating clear, prospective laws that form a coherent whole. Judicial lawmaking is problematic because it is law made through adjudication, in which the court states the law that it then applies—retrospectively—to litigants. Of course, the court may clarify unclear law, resolving unstable or incoherent lines of authority, and may do so in a way that is continuous with much that was in the previous law. In this way, the judicial capacity to develop the common law, while not lending itself to promulgation or prospectivity in the central sense of those terms, is yet consistent with the virtues of the rule of law. And judicial lawmaking is exercised subject to legal discipline, in that the courts assert no general capacity to remake the law, but are instead obliged to follow settled authority on which members of the community rely.

The restraint on common law legal change is often articulated by reference to what judges are not, namely legislators. The legislature is the superior lawmaking body partly because it is an institution devoted precisely to lawmaking. It is structured to make law deliberately, by action for that end alone, and so need not make law in the course of deciding some dispute. It may and very often does change the law in comprehensive, far-reaching ways. The legislature's acts are public and assert straightforwardly an intention to change the law. The statutory text is a canonical formulation of the law the legislature acts to introduce.

Various aspects of the rule of law may at times be in tension.⁹ Moreover, rule of law values, whilst powerful, are not absolute. There may be competing values that lawmakers should take into account. The legislature may undermine aspects of the rule of law, enacting retrospective legislation, vague, incoherent or contradictory rules, or dispensing with official conformity to law (Acts of Immunity). But it is an institution structured to make law in a way consistent with the rule of law, just as the judiciary is an institution structured to decide disputes fairly in accordance with law.

It is imperative that officials who purport to apply the law conform to the law: hence item (viii) in the list above. An independent judiciary, authorised to decide disputes about the application of the law, and devoted by oath, professional training and ethos to following the discipline of law, is necessary to this end. The general separation of legislative and adjudicative authority—with the judiciary making law, when it does, in a way that eschews any general legislative function—is thus implied by the rule of law. Nonetheless, much legal change may be left to incremental common law development. The legislature often has good reason to adopt vague standards that require subsequent specification and it may sometimes

⁹ P. Sales, "The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights", in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford: OUP, 2009), Ch.12.

reasonably change the law with retrospective effect or overturn adjudicative decisions.

Another reason why the legislature is regarded as the superior lawmaking body is by virtue of its democratic credentials. There is, of course, a vast literature on the merits (and demerits) of democracy. For present purposes it is sufficient to note that democracy has become the dominant political ideology and source of legitimacy for government in modern states.¹⁰ Despite well-recognised dangers associated with majoritarian rule, there is a strong normative underpinning for this dominance, having regard to the rights of citizens (or, more realistically, their representatives) to participate in public decision-making in the interests of self-government and having a say in choices which affect them,¹¹ the desirability of having in place a practical mechanism (elections) for calling rulers to account, the desirability of providing a civic forum which allows for the effective pursuit of and compromise between private interests¹² and the importance of constructing (through the opportunity of equal participation in public decision-making) a common political realm focused on promoting the public good.¹³

Legislative intention

Legislation is the principal source of law in the modern legal system. The concept of legislative intention is central to legal reasoning in any system which seeks to give effect to the decisions of lawmaking authorities. In particular, it is at the heart of the legal doctrine which grows out of and gives effect to fundamental political principles in a representative democracy. In that context it is the intention of the representative legislature as expressed in statutes which is accorded the force of law.

The concept serves other functions as well. In the modern regulatory and welfare state it is primarily through statutory meanings which are readily identified and stable over time that the values associated with the rule of law are promoted. The citizen can read a statute, identify its meaning by reference to the intention of the legislature as expressed in it, know from that what he or she may and may not do, and then be in a position to plan his or her affairs and organise his or her life. State officials, including judges, can learn from statutes what their obligations and powers are, and the limits to both; and their decisions in acting under statutes may be subject to public scrutiny and legal review and correction by the courts by reference to those same statutory standards. Much of the law of judicial review of

¹⁰ See, e.g. J. Dunn (ed.), *Democracy: The Unfinished Journey 508 BC to AD 1993* (Oxford: OUP, 1992), esp. Ch.13.

¹¹ J. Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 O.J.L.S. 18; J. Waldron, *Law and Disagreement* (Oxford: OUP, 1999); J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: OUP, 1999); R. Bellamy, *Political Constitutionalism: a Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

¹² See, e.g. G.S. Wood, "Democracy and the American Revolution", in Dunn, *Democracy: The Unfinished Journey*, 1992, fn.10 above, Ch.6 at pp.102–105; and which thereby provides support for an effective, capitalist economy: see also Dunn, *Democracy: The Unfinished Journey*, at pp.250–254.

¹³ A theme which blends modern democratic thinking with older republican thought: C. Mouffe, *The Democratic Paradox* (Verso, 2000); Q. Skinner, "The Republican Ideal of Political Liberty", in G. Bock, Q. Skinner and M. Viroli (eds), *Machiavelli and Republicanism* (Cambridge: Cambridge University Press, 1990), Ch.15; and "The Italian City-Republics", in Dunn, *Democracy: The Unfinished Journey*, fn.10 above, Ch.4; Q. Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); M. Sandel, *Public Philosophy: Essays on Morality in Politics* (Harvard University Press, 2005); Bellamy, *Political Constitutionalism*, fn.11 above; T. Judt, *Ill Fares the Land* (London: Allen Lane, 2010), at pp.120–135.

administrative action turns on inferring, and responding appropriately to, the legislative intent in enacting the relevant statutory scheme.

The meaning to be given to a statute as the expression of legislative intention may not be straightforward. As with any act of communication, a statute has to be read against a background of assumptions which it is reasonable to suppose form the context in which the legislature's intention was framed and which therefore inform the intention it sought to convey in issuing the statute in the particular form in which it was adopted.

The object of statutory interpretation, then, is the meaning the legislature intended to convey in enacting the statutory text. Interpreters infer what Parliament intends by reflecting on what it is likely that a rational language user, legislating reasonably, would be likely to mean. This reflection aims to capture the lawmaking proposal that was open to legislators and adopted by them at the time of enactment.¹⁴ The various resources sometimes taken to replace inference about intent—context, convention and purpose—are instead relevant to statutory interpretation precisely because they inform this inference.

The context of the legislative act is highly relevant to how one infers what meaning was intended and to how the legislature makes its intentions known. Indeed, much of the context is framed by the legislature to this end. The context of legislation includes at least the scheme and content of the rest of the statute, the state of the previous law, the nature of the mischief to which the legislation is an answer, other relevant legislation or rules of common law and general principles of law. As in every instance of communication, rational authors (drafters, legislators) take careful account of how their readers (lawyers, judges, officials, citizens) are likely to understand any particular choice of language in this or that context. They may adopt alternative formulations, which partly modify the context, to convey their intended meaning more clearly. Legislators should, and very often do, strive to be transparent, to make their collective lawmaking decisions known to the community. This is not at all a defence of literalism. Drafters should speak clearly, but what meaning they intend to convey is not settled by semantics.¹⁵ Understanding another's act of language use always requires inference, even when what he or she intends to convey is precisely the literal meaning of what he or she says. Inferring what another intends to convey also very often requires evaluative reasoning—one considers what reasons the person has to act in this way in this context. Interpreting legislation according to this account is not “formalistic” or “mechanical”.

Presumptions aid interpreters in inferring what the legislature intends. The interpreter assumes that the legislature respects the value to which the particular presumption points unless the contrary intention appears.¹⁶ For instance, the interpreter takes there to be good reason for the legislature to legislate prospectively and not to seize property without compensation. The presumption

¹⁴ R. Ekins, “The Intention of Parliament” [2010] P.L. 709; R. Ekins, “The Relevance of the Rule of Recognition” (2006) 31 A.J.L.P. 95.

¹⁵ S. Neale, “Pragmatism and Binding”, in Z. Szabó (ed.), *Semantics versus Pragmatics* (Oxford: OUP, 2005), Ch.5 at pp.165 and 193; and K. Bach, “Minding the Gap”, in C. Bianchi (ed.), *The Semantics/Pragmatics Distinction* (Chicago University Press, 2004), Ch.3 at p.27.

¹⁶ J. Evans, *Statutory Interpretation: Problems of Communication* (Oxford: OUP, 1988), at p.299.

“may help resolve an ambiguity, help support or resist an ellipsis, an exception or an implication, or in some other way aid the process of interpretation.”¹⁷

For some scholars, presumptions are common law rules applied to statutes to make them conform to the common law. Trevor Allan, for example, assumes that legislators may share purposes, but that the legislative purpose and the literal meaning of the statutory text are integrated into the wider common law by applying “presumptions”.¹⁸ On this view, they are rules that the judges impose to receive statutes into the law. However, there is good reason to think that they really are genuine presumptions. The set of presumptions derive from what a reasonable legislator is likely to consider as relevant to conveying his or her meaning, for they pick out values that are salient to legislator and interpreter. Further, the values the presumptions affirm are relevant to the complex intention on which the legislature acts. The reasonable legislature does not crudely act for purposes—stipulated social objectives—to which other values are just obstacles. In truth, the reasonable legislature acts for a complex bundle of ends, which include respect for the nature of persons and their flourishing in various ways. It is therefore sound to presume that legislation is open to multiple goods in this way, and not just governed by a narrow means-end rationality. The presumptions are defeasible, not just because it is open to the legislature to act otherwise, but because the presumptions have to be weighed and assessed alongside other general values which the legislature may intend to specify in this or that Act, perhaps in a way that is controversial or experimental.

Interpretive presumptions mean that the legislature need not spell out certain aspects of its communicative intention, which might otherwise need to be overt. The conventions thus promote efficiency and clarity in communication. The set of presumptions and other institutional facts or peculiarities that pertain to understanding the intentions of a legislature constitute an interpretive regime.¹⁹ That regime informs rather than regiments the articulation of legislative choices. No known legal system employs an exhaustive set of conventions to stipulate meaning, and for good reason. Interpretation in all known systems is sensitive to argument about particular intentions.²⁰

Rule of law and democratic concerns about s.3 of the HRA

As interpreted by the courts, s.3 of the HRA reduces the transparency of the meaning of legislation by requiring a new approach to its interpretation which in many cases departs from what would otherwise be its natural meaning, assessed by reference to traditional canons of construction.²¹ This new approach to statutory interpretation tends to undermine the rule of law ideal. It accentuates and goes beyond the usual incremental development of norms by the courts in the form of changing rules of common law and interpreting statutes in light of developing

¹⁷ Evans, *Statutory Interpretation*, 1988, at p.299.

¹⁸ T.R.S. Allan, “Parliament’s Will and the Justice of the Common Law: the Human Rights Act in Constitutional Perspective” (2006) 59 C.L.P. 27 at 43–46.

¹⁹ The regime may settle whether reference to legislative history is permitted.

²⁰ N. MacCormick and R. Summers (eds.), *Interpreting Statutes: a Comparative Study* (Dartmouth Pub Co, 1991), Chs 12 and 13; N. MacCormick, *Rhetoric and the Rule of Law* (Oxford: OUP, 2005), Ch.7.

²¹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557; *Sheldrake v DPP* [2004] UKHL 43; [2005] 1 A.C. 264 at [28] (Lord Bingham of Cornhill).

circumstances. It applies even in relation to the interpretation of legislation passed before the HRA (see s.3(2)(a)). It blurs the distinction between the function of the judiciary and of the legislature, since, as was judicially recognised early on, the HRA “will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary”.²² Section 3 of the HRA creates a far higher degree of uncertainty for citizens in knowing what the law is, since there is frequently a good deal of uncertainty regarding the true meaning and effect of Convention rights which is then compounded with significant uncertainty about whether a rights-compatible interpretation of any particular domestic statute is “possible” under s.3 (and, if so, what such interpretation might actually be).

The idea that the HRA tends to undermine aspects of the rule of law may seem odd, since rule of law values are themselves inherent in the ECHR.²³ But the substantial additional uncertainty introduced into the legal system by s.3 of the HRA is undeniable. In fact, however, the ECtHR has consistently interpreted the rule of law ideas inherent in the ECHR as being compatible with extensive re-interpretation of domestic laws in line with an expanding domestic protection of human rights.²⁴ It seems unlikely that the ECtHR would conclude that the uncertainty introduced into domestic law by the HRA with a view to securing compliance with rights under the ECHR would itself be incompatible with Convention rights. A significant degree of uncertainty in the application of legal norms is familiar to the ECtHR, and clearly acceptable, since the Convention rights themselves are often uncertain in their practical effect in any given context, because of the abstract and general way in which they are formulated. Moreover, at the level of the European public order, an equally powerful and equivalently destabilising interpretive requirement in respect of domestic legislation, to produce interpretations compatible with rights under EU law, was well established long before the HRA was passed.²⁵

Parliament, in passing the HRA, clearly did intend to adopt an interpretive rule that it reasonably foresaw would introduce this new and very wide-ranging degree of uncertainty into the legal system. Nonetheless, it seems reasonable to suppose that Parliament thought it right to depart from the rule of law ideal in this way only where very cogent reasons justified this.

Although rule of law and democratic values are often in tension,²⁶ it is striking that a similar point may be made by reference to the extent to which s.3 creates a

²² *R. v DPP Ex p. Kebeline* [2000] 2 A.C. 326 at 374–375 per Lord Hope.

²³ See in particular *Sunday Times v United Kingdom (A/30)* (1979) 2 E.H.R.R. 245 ECtHR at [49]; and authorities cited in Sales, “The General and the Particular”, in Andenas and Fairgrieve (eds), *Tom Bingham and the Transformation of the Law*, 2009, fn.9 above, Ch.12, at pp.168–170.

²⁴ *St v United Kingdom (A/355-B)* (1996) 21 E.H.R.R. 363 ECtHR at [36]; *Streletz v Germany* (34044/96) (2001) 33 E.H.R.R. 31 ECtHR.

²⁵ See, e.g. *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] E.C.R. I-4135 ECJ. The analogy between the operation of s.3 of the HRA and the *Marleasing* principle was drawn by Lord Steyn and Lord Rodger of Earlsferry in *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557 at [45] and [118] respectively.

²⁶ “...with modern democracy, we are dealing with a new political form of society whose specificity comes from the articulation between two different traditions. On the one side we have the liberal tradition constituted by the rule of law, the defence of human rights and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty. There is no necessary relation between these two distinct traditions but only a conjoined historical articulation”. Mouffe, *The Democratic Paradox*, 2000, fn.13 above, at pp.2–3. Also see, e.g. R. Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001), at p.3; I. Hont, “The Permanent Crisis of a Divided Mankind: ‘Contemporary Crisis of the Nation State’ in Historical Perspective”, in J. Dunn (ed.), *Contemporary Crisis of the Nation State* (Wiley-Blackwell, 1995); Sales, “The General and the Particular”, Ch.12 in Andenas and Fairgrieve (eds), *Tom Bingham and the Transformation of the Law*, 2009, fn.9 above.

practical power of law reform (in substance, a legislative power) for the judiciary, which—unlike the legislature—is not a democratically accountable institution. It seems reasonable to suppose that Parliament intended to create this expansion in the lawmaking powers of the judiciary, against the trend of democratic principle, only where cogent reasons justified such expansion. The congruence of pressure from both rule of law values and democratic values against this expansion of judicial power is strong. It indicates that Parliament should be taken to have intended the new interpretive power/obligation in s.3 of the HRA to apply only where clearly identifiable cogent reasons justifying such a departure from ordinary principles can be shown to exist.

What cogent reasons did Parliament decide should justify such departures from rule of law and democratic principles? It is our contention that Parliament's intention, inferred in conventional fashion from the text of the HRA,²⁷ in particular as read in the light of the White Paper *Rights Brought Home*,²⁸ was that the required clearly identifiable cogent reasons were given by the desirability of producing a domestic remedial regime in respect of the rights to which the United Kingdom was subject in international law under the ECHR.²⁹ Parliament sought in enacting the HRA to introduce mechanisms to make domestic law such that it would satisfy

²⁷ See the definition of "Convention rights" in s.1(1) and the definition of "Convention" in s.21(1) as the ECHR "as it has effect for the time being in relation to the United Kingdom". In addition, the requirement under s.2 for the courts to have regard to the Strasbourg case law is strongly indicative that it is intended that—subject to a power to depart from Strasbourg authority for exceptional reasons such as developing Strasbourg jurisprudence or a misunderstanding on the part of the ECtHR of the domestic context (*cf. R. v Spear* [2002] UKHL 31; [2003] 1 A.C. 734; *R. v Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47)—it is the Convention rights bearing their Strasbourg meaning which the domestic courts should apply where the HRA has effect both temporally (*cf. Re McKerr's Application for Judicial Review* [2004] UKHL 12; [2004] 1 W.L.R. 807) and geographically (*cf. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 A.C. 529; *R. (on the application of Barclay) v Secretary of State for Justice* [2009] UKSC 9; [2009] 3 W.L.R. 1270 at [100]–[111]).

²⁸ In the White Paper, the case was made for incorporation of rights under the European Convention on Human Rights into domestic law, to bring the United Kingdom into line with other European states which gave direct effect to the Convention in their domestic law (para.1.13), to reduce the scope for findings of violation by the ECtHR in Strasbourg (paras 1.14–1.16) and to allow individuals access to machinery for enforcement of their rights under the Convention at the domestic level without having to take the "long and hard" road to Strasbourg to achieve that end (paras 1.14 and 1.17–1.19). Each of these objectives focused on bringing domestic law into line with the law under the Convention. The White Paper also referred to the desirability of British judges being "enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe" (para.1.14)—this objective again implies that domestic courts are to interpret and apply the same Convention rights as the ECtHR, since if the ECtHR thought that domestic courts were applying rights with a different meaning and effect it would be unlikely to be impressed in developing the jurisprudence of human rights in Europe by the opinion of domestic courts on those different rights. See also Sir T. Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 L.Q.R. 390; and Lord Bingham's review of Bogdanor, *The New British Constitution*, at (2010) 126 L.Q.R. 131 at 132 ("[The HRA] conferred no rights on the British people which the United Kingdom was not already obliged in international law to secure to them, and provided for nothing to be decided by judges which was not already susceptible to judicial decision [i.e. by the ECtHR]").

²⁹ For the most part, domestic case law bears out this interpretation. It is very difficult to read the leading, unanimous judgment of the House of Lords in *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323 at [20], as allowing for any different approach; and see *R. (on the application of Al Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 A.C. 153; *R. (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 A.C. 719; *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332; *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296 esp. at [21]–[25] (Lord Hope). There are many cases in which the domestic courts have simply taken and applied Strasbourg authority without seeking to produce their own distinctive interpretation of Convention rights, even where it is clear the judges think there may have been strong reasons for coming to a different view if untrammelled by such authority (see *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2009] 3 W.L.R. 74 regarding use of confidential evidence and special advocates in relation to control order proceedings for a recent prominent example, esp. at [98]; and the comment on the decision by Lord Brown in *R. v Horncastle* [2009] UKSC 14; [2010] 2 W.L.R. 47 at [118]–[119]). The usual rules regarding binding precedent have been modified, to allow a change in an interpretation of Convention rights established at the level of the Court of Appeal where there is subsequent, clearly inconsistent jurisprudence of the ECtHR: *R. (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 A.C. 311.

the United Kingdom's international law obligation to conform to the ECHR. This observation is important for understanding both how the boundary between s.3 and s.4 of the HRA should be approached and the scope and interpretation of the Convention rights as defined in the HRA.³⁰

The “democratic dialogue” model

There are significant tensions between the defence of human rights, the rule of law and democratic values—tensions which come to the fore in the context of the interpretation of statutes.

In her recent book, *Parliamentary Sovereignty and the Human Rights Act*,³¹ Alison Young provides a useful summary of the principal theoretical positions and value judgments which underlie the tension between democratic values and liberal values in the modern liberal democratic state.³² A balance falls to be struck between the protection of fundamental rights and democracy, reflecting judgments about the proper respective roles for courts and legislatures. She seeks to explain the proper boundary between ss.3 and 4 of the HRA in the light of the balance which she says should be struck. She points to the phenomenon of the contestability of constitutional or fundamental rights (such that it is frequently possible for the unelected judiciary to hold one reasonable view regarding the content of such rights or their application and for the democratically accountable legislature to hold a different reasonable view) and points out that the choice of whose view should prevail depends upon a theory of authority as to who is best or properly placed to make that judgment.³³

Young then proceeds to review arguments for and against the courts, on the one hand, and the legislature, on the other, having the determining decision on such issues. She argues that the most attractive resolution of this age-old and much debated conundrum is a form of “democratic dialogue”, recognising that the respective institutional characteristics of courts and legislature provide arguments for assuming that each institution is better suited to resolving different issues concerning fundamental rights.³⁴ A balance is to be struck between decisions by courts and the legislature regarding rights and the content of legislation. Where courts are best placed to rule upon rights they should do so according to their own views, but the legislature is provided with opportunities to respond to that assessment and, if it thinks it right to do so, to override those views and substitute its own. Young suggests that this model

³⁰ For example, it makes it difficult to accept, as was suggested obiter (and, it appears, without reference to these arguments) by some members of the Appellate Committee of the House of Lords in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173, that Parliament intended that the extraordinary power for the courts granted by s.3 of the HRA should be available on the basis of the domestic courts' own idiosyncratic interpretation of Convention rights, divorced from the interpretation given those rights by the ECtHR. Cf. P. Sales, “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 L.Q.R. 598 at 612–614.

³¹ fn.2 above, especially at Ch.4.

³² For an interesting historical review of the developing strands in democratic thought, see C.S. Maier, “Democracy since the French Revolution”, in Dunn (ed.), *Democracy: The Unfinished Journey*, 1992, fn.10 above, Ch.8.

³³ Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), fn.2 above, Ch.8 at pp.106–107, following Waldron, *Law and Disagreement*, 1999, fn.11 above, at pp.224–231, and M. Perry, “Protecting Human Rights in a Democracy: What Role for the Courts?” (2003) 38 Wake Forest L. Rev. 635 at 645–651.

³⁴ Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), fn.2 above, Ch.8 at p.26.

“arguably compensates for the claim that a constitutional protection of rights is anti-democratic by providing the legislature with opportunities to respond to the assessment of rights by the courts.”³⁵

She draws on commentary regarding the “democratic dialogue” on this model which is possible under the Canadian Charter of Fundamental Rights and Freedoms and argues that a modified form of such dialogue is also available under the HRA.³⁶

The principal weaknesses of courts as decision-makers in relation to fundamental rights are that they are undemocratic (this is, of course, from some perspectives and in some contexts, also a strength) and have limited capacity, in the course of deciding fragmented and disparate issues which arise in litigation, to make general assessments of how legal regimes should be reformed.³⁷ The principal weakness of a legislature is the danger of majoritarian tyranny, i.e. the risk that a democratic majority may fail to respect fundamental rights (to which may perhaps be added the danger of rule by the ill-informed masses, rather than the construction of policy around knowledge,³⁸ and the danger of faction and private interest predominating over disinterested debate about and assessment of the public interest³⁹). By contrast,

“Courts are able to correct the legislature from passing broad legislative measures that inadvertently harm the rights of specific individuals and from enacting legislation that ignores long-standing legal or constitutional principles or that disadvantages minority groups whose rights may be insufficiently protected through the majoritarian focus of democratic law-making institutions.”⁴⁰

By means of her review of the respective weaknesses and strengths of courts and legislature in relation to the content of fundamental rights and statutory provisions, Young produces a theory of authority which then informs her proposals as to the proper approach to the boundary between ss.3 and 4 of the HRA:

“First, courts should use section 4 when faced with contestable rights, given that it is unreasonable to assume that the courts are performing a correcting function when faced with contestable rights. It is at least equally possible that the courts and the legislature, if they do disagree about rights issues, do so because they are adopting different, reasonable interpretations of a contestable right.

When faced with a non-contestable rights issue, courts should use section 3, unless faced with one of the following scenarios: (i) a Convention-compatible interpretation would contradict a fundamental feature of the legislation in question; (ii) a Convention-compatible interpretation would require the court to radically rewrite legislative provisions, or to develop

³⁵ Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), fn.2 above, Ch.8 at p.112, also at p.128.

³⁶ Young, *Parliamentary Sovereignty and the Human Rights Act* (2009), fn.2 above, Ch.8 at pp.26–28, 112–114 and Ch.5.

³⁷ Cf. L. Fuller, “The Forms and Limits of Adjudication”, reprinted in K. Winston (ed.), *The Principles of Social Order* (Oxford: Hart, 2001), at pp.101–141; and the arguments in favour of an incremental, minimalist judicial approach when deciding cases set out in C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999).

³⁸ Cf. Maier, “Democracy since the French Revolution”, in Dunn (ed.), *Democracy: the Unfinished Journey*, 1992, Ch.8, fn.32 above, at pp.136–141, reviewing the recurring populist and technocratic critiques of democracy.

³⁹ Cf. P. Pettit, “Depoliticizing Democracy” (2004) 17 *Ratio Juris* 52.

⁴⁰ Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, at p.26.

further procedural mechanisms that would have large practical ramifications for other areas of the law or (iii) a Convention-compatible interpretation would require the court to choose from a range of possible contestable Convention-compatible interpretations. The first restriction is necessary to preserve the dialogic model of rights protections, enabling the legislature to respond to a section 3 interpretation of that court. The second and third restrictions recognise limits placed on the remedial power of the court.”⁴¹

Young goes on to consider the approach which should be adopted to ideas of deference owed by the courts to decisions of Parliament in the light of her discussion. She suggests that her “democratic dialogue” model provides an alternative to deference in terms of restricting “the criticism that a strong protection of rights damages democracy”.⁴² This leads her to propose that the role for ideas of deference in adjudication should be curtailed, since otherwise there will be a sort of double counting of democratic values against rights-based values, which would disrupt the proper balance which ought to exist between the two.⁴³ Under her “democratic dialogue” model, “There is no need for [courts] to exercise deference when faced, for example, with complex issues of social or moral policy”.⁴⁴

A critique of the “democratic dialogue” model in the context of the HRA

With respect to Young, this account of the operation of the HRA is misconceived. It produces major distortions in the proper account of the operation of the Act. It manages to be both too weak in relation to its account of the operation of s.3 (and where the boundary with s.4 lies) and too strong in terms of inviting courts to disregard or curtail the application of ideas of deference (i.e. the operation of the concepts of the margin of appreciation or the discretionary area of judgment⁴⁵) when ruling upon Convention rights. Since Young’s proposed “democratic dialogue” model is inapposite to describe the operation of the HRA, the logic of her own argument drives one back to the discretionary area of judgment (margin of appreciation) in the application of Convention rights as a primary conceptual mechanism for mediating, as appropriate, between rights-based values and democratic values. Correct analysis of the operation of the HRA and the jurisprudence of the ECtHR leads one to the same conclusion.

The root of the problem with Young’s approach lies in her failure to identify what is in fact a fundamental feature of the HRA, namely that it is concerned to provide domestic remedies for rights drawn from international law.⁴⁶ Whatever

⁴¹ Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, at pp.27, 139–143 and Ch. 6.

⁴² Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, at p.117.

⁴³ Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, at pp.154–159. See also Nicol, “Law and Politics after the Human Rights Act” [2006] P.L. 722, who at 742 *et seq.* advocates a vision for dialogue between courts and politicians under the HRA, with the courts as a political faction, pressing for uncompromising interpretations of Convention rights with less judicial emphasis on the stability of the state, and with politicians conversely being prepared to disagree with the judges’ interpretation of Convention rights. Contrast Leigh and Masterman, *Making Rights Real*, 2008, fn.2 above, who do bring the international dimension into consideration, esp. at pp.6, 15–16, 51, 90–91, and 118; but they do not fully follow through the important implications of the international dimension of the HRA in tending to undermine the dialogic model they refer to at pp.117–118.

⁴⁴ Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, at p.158.

⁴⁵ *R. v DPP, ex p. Kebeline* [2000] 2 A.C. 326 at 380–381 (Lord Hope).

⁴⁶ Young makes no attempt to address the international law dimension which underlies the HRA, nor its implications for her “democratic dialogue” model of adjudication under the HRA. The model of dialogue advocated by Nicol in

the (potentially considerable) attractions of a “democratic dialogue” model might be for courts applying a purely domestic set of constitutional rights within a self-contained polity (as in Canada), the model is not properly applicable to the HRA, which is directed to giving domestic effect to rights which are not purely domestic, but are derived from international law and are applicable across a range of states.

By entering into its obligations under the ECHR, the United Kingdom has chosen to identify an authoritative body for interpreting the meaning and effect of Convention rights, namely the ECtHR. Under the scheme of the ECHR there is no further need for, and no space for, identifying a different theory of authority for determining the content of Convention rights. The ECtHR produces authoritative rulings for all 46 states which are members of the Council of Europe. It does not perceive itself to be participating in any form of democratic dialogue with the legislatures in those very disparate states, nor could it sensibly do so. As an international order the ECHR, and as an international court the ECtHR, stand outside the internal constitutional arrangements of each of those states and provide an external vantage point of judgment upon the actions of those states’ institutions.

Where the content and application of Convention rights are contestable in any particular case (as they frequently are), the ECtHR provides the means for final resolution of the argument. The ECtHR has to accommodate the tension between rights-based values and democratic values (which are also fundamental to the ECHR and the Council of Europe) at the level of the legal concepts which it has developed in its jurisprudence. There is no other institution to resort to in order to achieve that accommodation. The concept of the margin of appreciation is central to the mediation required between these values.⁴⁷

As explained above, the HRA is directed to giving effect to Convention rights within the domestic legal system. In determining the content of Convention rights in any particular situation, the domestic courts seek to replicate what they understand the ECtHR would decide in that situation.⁴⁸ There is therefore no scope for a “democratic dialogue” between courts and Parliament about the content of Convention rights. Moreover, in terms of respective institutional advantage in performing the task of judging what the ECtHR would decide, the courts are better equipped than Parliament to scrutinise and interpret the jurisprudence of the ECtHR.⁴⁹ In doing so, the courts are required to apply the discretionary area of judgment (margin of appreciation) which is a feature of that jurisprudence.

“Law and Politics after the Human Rights Act” [2006] P.L. 722, similarly gives insufficient recognition to this international law dimension. He says that declarations of incompatibility by domestic courts “cannot be authoritative, because the meaning of the Convention rights cannot be off-limits for Parliament” (at p.745); but declarations of incompatibility are authoritative interpretations by the domestic courts of what the ECtHR would (authoritatively) decide the position to be in respect of Convention rights.

⁴⁷ See Sales, “The General and the Particular”, Ch.12 in Andenas and Fairgrieve (eds), *Tom Bingham and the Transformation of the Law*, 2009, fn.9 above, esp. at pp.176–178.

⁴⁸ To be sure, there may be considerable uncertainty in arriving at a conclusion on this, given the abstract nature of the text of the ECHR, the elaborate but also rather indeterminate jurisprudence of the ECtHR, the operation of the living instrument doctrine (so that the content of rights may change over time, thus weakening the guidance to be derived from past decisions) and the absence of a reference procedure (which is a significant difference from the operation of the *Marleasing* principle in relation to EU law). But the fact remains that in principle a conclusive answer may be or become available from the ECtHR and that the domestic courts are institutionally best placed to predict what that answer is.

⁴⁹ This explanation provides another reason why the obiter suggestion in *In re G (Adoption: Unmarried Couple)* [2009] 1 A.C. 173, that the HRA permits the domestic courts to make their own determination of the content of Convention rights at variance from that given by the ECtHR, may be doubted. For the reasons given by Young, absent

A fundamental aspect of the HRA, therefore, is the Strasbourg dimension. Under the HRA, within the limits given by s.3, domestic law is made to conform to a particular (external) body of international law. Unlike a purely domestic constitutional instrument, the HRA does not create a regime in which it is simply for domestic judges to work out what they think human rights mean. It creates a regime in which they have to assess what an international court has stipulated (or would stipulate) rights to mean under the ECHR. If the meaning of Convention rights is to be taken from the jurisprudence of the ECtHR in any debate in the courts about their content, the Waldron objection that judges have no privileged knowledge of human rights becomes weaker.⁵⁰

Accordingly, under the scheme of the HRA, when determining compatibility of a statute on its natural interpretation with Convention rights at the stage of deciding whether it is necessary to resort to the special interpretive power in s.3,⁵¹ it is for the domestic courts to decide for themselves (having regard to the jurisprudence of the ECtHR, including as appropriate the margin of appreciation) what is the content and application of Convention rights in relation to that statute. Once that exercise has been carried out, the court has to determine whether it is “possible” to read the statute in a manner which complies with the requirements of Convention rights as so established: there is no basis for limiting the operation of s.3 because of any difficulty in analysing the Convention rights position, or because of the contestability of Convention rights, at the earlier stage.⁵²

The structure of the HRA allows for an exchange of a completely different kind between the courts and Parliament. If the domestic courts determine that a statutory provision is incompatible with Convention rights and that it is not possible under s.3 to read it in a way that makes it compatible with those rights, a declaration of incompatibility is issued which allows the legislature to reconsider the matter, informed by the courts’ views about those rights. The legislature may choose to keep the legislation in place or to amend it in line with the courts’ views. But it

resort to the authority of the ECtHR regarding the content of Convention rights, there is no reason to think that the courts are better placed than Parliament to determine the proper content of contestable rights, and no reason to think that Parliament intended to give them the power to modify legislation under s.3 of the HRA on the basis of their determination.

⁵⁰ Not philosophically—there is no reason to think international judges are particularly better than domestic judges in epistemological terms so far as identifying the content of human rights is concerned—but within the formal context of the legal system, since in fact an informed and reasonably accurate assessment can sensibly be made by domestic courts as to what the authoritative decision of the ECtHR regarding the content of Convention rights in any given situation would be likely to be.

⁵¹ *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48 at [75]; *Wilson v First County Trust (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816 at [111]; A. Kavanagh, “The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998” (2004) 24 O.J.L.S. 259 at 274; C. Gearty, “Reconciling Parliamentary Democracy and Human Rights” (2002) 118 L.Q.R. 248 at 252.

⁵² Difficulty in analysing the application of Convention rights may be relevant at the second stage, in assessing what is “possible” under s.3. At the time when Parliament legislates there may be considerable doubt about where the jurisprudence of the ECtHR stands and what the content and application of Convention rights in the particular context might be. The Government or, as necessary, Parliament will have access to legal advice, and typically will seek to produce legislation which is compatible with Convention rights and in respect of which a statement to that effect under s.19 of the HRA can be given. Where it is clear that this is what has been done, if the courts later take a different view about the true content and application of Convention rights it will not be legitimate for them to proceed from the fact that a statement of compatibility under s.19 was made at the time the legislation was passed to the conclusion that it must be legitimate to use s.3 of the HRA to modify the natural meaning of the legislation. The making of the statement under s.19 is simply explicable by the maker having reasonably held a different view of what the Convention rights require, against a background of uncertainty (i.e. contestability) about the position which might be adopted by the ECtHR, from that which the courts later come to. It cannot be concluded from this that the scheme of the legislation actually adopted by Parliament should not be regarded as fundamental for the purposes of the question whether an interpretation under s.3 is permissible or not, *pace* Lord Steyn in *R. v A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45 at [45].

would be odd to characterise this as a dialogue. Since under the scheme of the HRA the courts are identified as the body which can authoritatively determine the content of Convention—or human—rights, and do not have to accept the views of Parliament on that issue, the exchange is rather one-sided.⁵³

The practical effect of this, coupled with the rhetorical force associated with the giving of a ruling that legislation violates human rights, is to create major political pressure for government and Parliament to amend statutes to accommodate the courts' views. It would take exceptional circumstances for government and Parliament to proceed to say that legislation is to stand even though it has been found to violate human rights.⁵⁴ This means that the HRA has created a system which is closer to a constitution in which the courts have the power to strike down legislation than is often supposed. With such great power goes the great responsibility that it not be pressed too far, undermining democratic values. This is a further reason why the courts should (as in fact they do) take the concept of the discretionary area of judgment (margin of appreciation) very seriously.

Legislative intention in the light of ss.3 and 4 of the HRA

We turn now to the question of how to understand the scope of s.3 of the HRA and the line that divides it from s.4. Thus far the courts have said that there is a distinction to be drawn in the application of s.3(1) of the HRA between interpretation (which involves a legitimate application of s.3(1) in construing a statute) and amendment or legislation by a court when giving meaning to a statute (which goes beyond what is permissible under s.3(1)).⁵⁵ But to say that there is a distinction between these processes falls short of explaining where the boundary between them lies. Moreover, useful as it is as shorthand for underlying ideas, this formulation misrepresents the true position in certain respects.

It is important to bear in mind that s.3 applies both in relation to statutes passed after the HRA came into force and in relation to statutes passed before then. The conceptual position is distinct in the two cases.

In the former, as we explain in more detail below, s.3 creates a new presumption which informs the true meaning intended by the legislature. However, this analysis does not apply in relation to legislation passed before the HRA came into effect. In relation to legislation in this category, it makes more sense to think of s.3 as a provision which operates by way of implied amendment of previous statutory

⁵³ Nicol, "Law and Politics after the Human Rights Act" [2006] P.L. 722, makes a similar point at 742; and see Leigh and Masterman, *Making Rights Real*, 2008, fn.2 above, Ch.5. The senior judiciary were sceptical from the outset that a "dialogue" between courts, legislature and executive was the correct concept: Leigh and Masterman, at pp.17–18.

⁵⁴ An indication of the force of this pressure was the Government's response to *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (the so-called *Belmarsh* case), which was to introduce an elaborate control order regime for terrorist suspects rather than seek to maintain the detention regime ruled incompatible with Convention rights in that case. Quite aside from the rhetorical force of such a judgment, once such a highly respected court as the House of Lords (now the Supreme Court) has ruled that legislation violates human rights, the calculation is likely to be that the ECtHR will follow suit (as in fact it did in *A v United Kingdom* (3455/05) (2009) 49 E.H.R.R. 625 ECtHR). Cf. Leigh and Masterman, *Making Rights Real*, 2008, fn.2 above, at pp.112–118 and Sales, "The General and the Particular", Ch.12 in Andenas and Fairgrieve (eds), *Tom Bingham and the Transformation of the Law*, 2009, fn.9 above, at pp.177–178 on the practical impact of a declaration of incompatibility.

⁵⁵ See, e.g. *R v A (No.2)* [2002] 1 A.C. 45 at [108] (Lord Hope); *Re S (Minors)* (*Care Order: Implementation of Care Plan*) [2002] UKHL 10; [2002] 2 A.C. 291 at [38]–[41] (Lord Nicholls of Birkenhead); *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 A.C. 467 at [67] (Lord Hope); *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837 at [30] (Lord Bingham) and [59] (Lord Steyn).

provisions, to accommodate Convention rights by means of a decision process which is operated by the domestic judiciary assessing what the ECtHR has decided or would decide in a particular context. It is not, then, a question of interpretation of Parliament's intention in the strict sense, since before the passage of the HRA Parliament was not on notice that any such powerful interpretive approach would apply; indeed, the enacting legislature may have acted before the ECHR came into existence. The test in s.3 is what amended interpretation is "possible", even though in general what interpretations are possible (when is it possible to read and give effect to an instance of language use in a certain way?) turns on what one has reason to judge the legislature (as the relevant communicator in the case of a statute) intended to convey. So in relation to this category of legislation, the word "possible" is used in a special sense, as a direction to those interpreting statutes to read them as if they had been enacted by Parliament in light of s.3 and the Convention rights. The section requires that one reads past statutes to identify what they mean when one deems the enacting legislature to have formed its intentions in light not just of all the other relevant considerations applicable at the time it passed them into law, but also in light of the current importance attached to compliance with the ECHR. This is an unusual and radical way to amend the statute book, which creates uncertainty because it does so on a wholesale basis, without providing any detailed, canonical statutory text amending the text of existing statutes one by one.

For statutes passed after the coming into force of the HRA, a proper understanding of the effect of s.3 involves an appreciation that, for all the considerable force of the interpretive power it contains, the exercise remains one of interpretation aimed at identifying the intention of Parliament, as it is to be taken to be in light of the important new constitutional setting created by s.3 itself. Section 3 only creates a power of interpretation, and that implies important limits to what it authorises. The true position here is less radical than proposed by some other commentators, who treat s.3 as a power almost amounting to a Henry VIII provision. Aileen Kavanagh, for example, argues⁵⁶ that s.3 authorises interpreters to depart from the meaning that they judge the legislature intended to convey and instead to adopt some other meaning, a "possible" meaning, that they judge consistent with rights. This is not the same as an interpreter aiming to identify what the legislature intended to enact and reasoning in part from a strong presumption that the legislature does not intend to breach rights. Her approach suggests that interpretation is the imposition of a remedy for some defect in the existing law, rather than the identification of the law that the competent lawmaker acted to make. She says:

"the type of judicial rectification employed by the courts ... is not dissimilar to techniques of legislative amendment. There is no denying that section 3(1) gives the courts immense power to modify the effect of primary legislation and depart from legislative intent."⁵⁷

⁵⁶ A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), at pp.88–90. See also Lord Lester, D. Pannick and J. Herberg, *Human Rights Law and Practice*, 3rd edn, (London: LexisNexis, 2009), at p.43 ("the role of the court is not ... to find the true meaning of the provision, but to find (if possible) the meaning which best accords with Convention rights").

⁵⁷ Kavanagh, *Constitutional Review under the UK Human Rights Act*, 2009, at p.114.

However, Kavanagh argues that this interpretive approach is in line with central features of pre-HRA interpretive practice, namely that prior to the HRA it was open to judges to appeal to legislative purpose or to “presumptions” (in truth, constitutional values independent of legislative intent) to justify rectifying the linguistic meaning of the statute.

This account of “presumptions”, as the basis for the argument that there is continuity between the radical approach and pre-HRA practice, is similar to that of Allan. It is inconsistent with our analysis above. Moreover, there is good reason to suppose that Parliament did not intend s.3 to operate in a manner analogous to a Henry VIII clause, because such a rule would depart so very sharply from the rule of law, gravely undermining the stability of all statutes and making it almost impossible for successive Parliaments to make decisions that will be secure against judicial amendment.⁵⁸ Such a radical view of s.3 is also inconsistent with authority.⁵⁹

On a proper view, general presumptions inform the assessment of what Parliament intended, rather than operating to correct that intention in some way. In the context of legislation passed after the HRA came into effect, s.3 operates in the same way, but with sharper and more powerful effect.⁶⁰ The effect tends to be sharper, because s.3 only operates where an incompatibility with Convention rights would otherwise arise—it does not fade in or out of focus as the values underlying more conventional presumptions may do. It is more powerful, because s.3 introduces and declares an interpretive presumption of particular force. The s.3 presumption is defeasible, in that the legislature may still indicate (by clear language or necessary implication from the statutory scheme) some intention which may be found by a court to be incompatible with a Convention right, and which has legal force overriding the Convention right. However, the strength of the statutory presumption in s.3 sets the threshold of defeasibility at a high level.

The point of enacting s.3 was to introduce a new interpretive direction that would improve the likelihood that legislation would be interpreted to conform to the ECHR. The way to make it more likely that legislation is interpreted in a certain way is to give interpreters a good reason to understand it to be likely that legislation was intended to be read in a certain way. The direction in s.3 trades on the nature of interpretation, which involves inferring legislative intent; it does not authorise outright amendment, as a simple Henry VIII clause would. The direction is intended to inform the inference about, rather than displace, the object of interpretive inquiry, namely the intention of the enacting legislature. The presumption of rights-consistency informs but does not displace what it is plausible to think that the enacting legislature decided. A sound interpretation of the legislature’s act should explain why it is plausible to conclude that a reasonable legislator would utter this statutory text in this context to convey that meaning. The presumption

⁵⁸ R. Ekins, “Rights, Interpretation and the Rule of Law” in R. Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington, LexisNexis, 2011, forthcoming).

⁵⁹ See, in particular, the references in fn.55 above.

⁶⁰ See the important speech of Lord Hoffmann in *R. (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30; [2006] 1 All E.R. 529 at [17]–[19] (all other members of the Appellate Committee agreeing with him on this point), making general points about the operation of s.3, albeit in the context of its application to pre-HRA legislation; and for a comparative assessment of the sharper and more powerful effect of the new presumption created by s.3, see Sales, “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 L.Q.R. 598.

informs how one infers what the legislature decided, but it does not license inferences that are implausible.

In view of its powerful effect, as explained in the authorities, s.3 differs from many ordinary presumptions. The section is analogous to a special subset of presumptions which are sometimes called qualifying rules. Qualifying rules are default rules which automatically qualify the text of a statute unless the legislature indicates an intention that they should not apply. A general qualifying rule is “a doctrine that standardly makes an exception to a range of other rules”.⁶¹ The doctrine that statutes do not bind the Crown, which now has statutory force in New Zealand,⁶² is one example. Others include the default rules that statutes do not apply outside the jurisdiction, that diplomatic immunity applies and that persons may waive statutory procedural protections. The effect of the relevant qualifying rule is to carve out exceptions to what would otherwise seem to be the rule as expressed in the language of the statute. These default rules are, for good reason, all fairly precise, so that legislators and interpreters may safely assume they apply (and may know what legal effect they have) where there is no suggestion to the contrary.

Section 3 introduces a new qualifying rule that legislation does not apply in a way which violates (or is intended to apply in a way which is consistent with and gives effect to⁶³) Convention rights. For post-HRA statutes, the legislature acts in light of a default rule that its legislation conforms to the Convention rights save where the contrary intention is made clear. It is important to note that departure from the default rule does not require an intention to breach rights. Instead, it only requires that Parliament manifests a clear intention to change the law in this or that particular way, which domestic courts or the ECtHR conclude violates Convention rights. The section does not authorise judicial amendment of a non-compliant statute, but does have the effect of creating a strong framework for reasoning and drawing inferences about what Parliament has done.

Thus, an interpreter should ask of any given statutory provision passed after the HRA which falls to be interpreted by reference to s.3: what proposition was Parliament intending to enact in that provision (this particular legislative act)? The answer is to be sought in reading the provision as a presumptively rational act taken within a complex interpretive regime that includes a qualifying rule that statutes are taken to conform in their application with the Convention rights except where there is good reason to conclude that Parliament intended to enact a proposition that is inconsistent with the operation of that rule. Such “good reason” will include the importance of continuing to uphold rule of law values and democratic decision-making to a significant degree.

An obvious problem which arises from the creation of the new qualifying rule contained in s.3 of the HRA is that the Convention rights are expressed in very general, abstract terms and so are uncertain in their meaning and effect. Section 3 read with the Convention rights does not have the same precise and settled effect as other qualifying rules. Therefore, the content of the default rule operating by virtue of s.3 will often be unclear, which means that it will not be open to legislators

⁶¹ J. Evans, “Questioning the Dogmas of Realism” in R. Bigwood (ed.), *Legal Method in New Zealand* (Auckland, NZ: LexisNexis, 2001) at pp.283, 293.

⁶² Interpretation Act 1999 (NZ), s.27.

⁶³ The effect of the ECHR is not solely negative. Convention rights often have a positive aspect, and may well require legislation to have a certain positive content if they are to be complied with.

to know with precision what they are enacting, and it will be correspondingly difficult for interpreters to judge clearly what was intended. The difficulty of knowing the precise content of human rights requirements in specific fact situations is a general one, which means that this problem arises wherever a rights-consistent qualifying rule is brought into existence. In the HRA context, there is a partial solution to the problem. The ECtHR has developed a body of case law that specifies the content of the Convention rights in far greater detail than is set out in the ECHR itself. That content is controversial and revisable, but on various points there are settled decisions that specify what that court authoritatively has held that the ECHR requires. Where the Convention jurisprudence is settled, it may be relatively easy to determine the content of the qualifying rule and hence to determine the intention of the legislature in enacting post-HRA legislation in the light of it. Where the relevant case law is unsettled, however, both steps in the reasoning are likely to be more difficult.

These are not easy questions, and the answer in any given case is likely to be highly dependent upon the particular context. In addressing these issues, the extent to which Parliament had the relevant Convention right and Strasbourg jurisprudence before it when it promulgated a legislative provision may be important. For example, the clarity or otherwise with which the Strasbourg jurisprudence has articulated the meaning and effect of the Convention rights in the particular context at the time the provision is promulgated by Parliament (in the case of post-HRA statutes) is relevant to determining Parliament's intention in light of the existence of the interpretive power in s.3. Where a Convention right (as interpreted by the ECtHR) is stable and clear then it may be easier to judge that a particular legislative act was or was not intended to be read and given effect in a way that conforms to that right: the right is better delineated, so that it is more clearly salient to the legislature which forms its intention about what is to be enacted with that right, and the qualifying rule given by s.3 that it shall not be infringed, clearly before it. This will often suggest, for example, that general statutory terms are intended to be read as implicitly subject to Convention limits.⁶⁴ On the other hand, in some contexts the clarity of the Convention rights before Parliament when it legislates may make it easier to conclude that Parliament intended to enact a rule that was inconsistent with those rights (or a certain likely or possible judicial reading of them), where it has used language which was clearly inconsistent (and hence plainly intended to be inconsistent) with such rights. In such a case, there will be good reason to conclude that if Parliament had intended a particular proposition that was consistent with that reading of Convention rights it would have spoken otherwise.

Conversely, if Parliament did not have the relevant and specific meaning of Convention rights clearly before it when it legislated (e.g. in a pre-HRA legislation case or in a post-HRA legislation case where the Convention rights have been clarified or developed in subsequent Strasbourg jurisprudence), it may be harder to conclude that Parliament had arrived at a specific intention that the law should be changed in a way that requires the default application of the Convention rights

⁶⁴ This has similarities with the approach of reading down general statutory provisions against a background of underlying interests or common law rights (sometimes called the principle of legality) which was already well established in the approach to statutory construction before the enactment of the HRA: cf. Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 L.Q.R. 598.

to be set aside, and hence may be easier to interpret the legislation in a modified sense by virtue of application of s.3. Particularly in a post-HRA legislation case, where Parliament legislates with notice of the s.3 interpretive rule and with notice of the way in which the Strasbourg jurisprudence is capable of developing, such an inference may readily be drawn.⁶⁵ It may not be so easy to do so in a pre-HRA legislation case. In all these cases there may still, of course, be other clear indicators from the statute to be interpreted (from its language or general scheme, read in the light of the objective it was promulgated to promote) of a specific and settled intention of Parliament inconsistent with the Convention rights (as they are later interpreted by the courts) applicable in that case.⁶⁶ Where this is so, a modified interpretation of the statute under s.3 will not be “possible” in the relevant sense, and a declaration of incompatibility would be issued under s.4 of the HRA.⁶⁷

The courts are right to be concerned to avoid reading a statute in a way that departs from what one would otherwise conclude to be a fundamental feature of that statute. The language of “fundamental features” should point one towards analysis of the reasoning and decision of Parliament, on which the interpreter must reflect to judge how the apparent lawmaking intention manifested in the choice of this statutory text is to bear on the default rule that the Convention rights apply unless Parliament’s choice displaces it. In making that assessment, the institutional limits that militate against the courts embarking upon far-reaching legal reform are important, not because they condition what is otherwise an open power of judicial amendment (as the radical approach suggests), but because they are relevant to the determination of whether the legislature’s decision in enacting the particular provision requires that the default application of the Convention rights be set aside. If the default application would leave a void that calls for complex legislative action to fill it, this will rightly be taken to suggest that the legislature’s lawmaking intention is inconsistent with the operation of the qualifying rule in that case. Further, the institutional limits upon the competence of the courts affect their capacity to infer the choice that Parliament should be taken to have made (other than by simple reference to the purpose, language and scheme of the statute) and make it difficult to determine that the default application of the Convention rights would be consistent with that choice. When this is in real doubt, e.g. because the legislative scheme is highly complex, technical and elaborate, there may again be good reason to conclude that no rights-consistent reading is “possible”. Rule of law values will tend to point to the same conclusion, having regard to the importance which should be taken to be attached to having a clear, stable and coherent system in place in such a context.

⁶⁵ Cf. the more general position regarding statutes which give effect to treaty obligations in domestic law, where the usual expectation is that the content of the statutory rule changes in line with changes in the content of the international obligation: see P. Sales and J. Clement, “International Law in Domestic Courts: the Developing Framework” (2008) 124 L.Q.R. 388 at 401, fn.63 and the authorities there cited.

⁶⁶ See, e.g. *R. (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 A.C. 837.

⁶⁷ The proposed interpretation informed by s.3 of the HRA would then go against the grain of the legislation, using the metaphor employed in *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557 at [121]–[122] (Lord Rodger). Cf. Sales, “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 L.Q.R. 598 at 609.

Comparison with Canada and New Zealand

The “democratic dialogue” model referred to by commentators in the context of the HRA draws on academic commentary on Canada’s Charter of Fundamental Rights and Freedoms.⁶⁸ However, the constitutional context in Canada is very different from that in the United Kingdom in relation to the HRA. The Charter creates a domestic set of fundamental rights, by reference to which the courts can strike down legislation, but also includes within its scheme a power in s.33 for the legislature to enact legislation notwithstanding the provisions of the Charter. This regime creates different roles for courts and legislature than under the HRA. The Canadian courts do not seek to enforce rights derived from international law and subject to authoritative determination by an institution external to the Canadian polity (there is no equivalent to the ECtHR). There is therefore far greater scope for debate about the proper institutional divide between the (domestic) courts and the legislature in terms of resolving contestable rights issues, for the comparative institutional reasons referred to by Young. Moreover, the possibility for such debate is contemplated by the scheme of the Charter, and the right which it creates under s.33 for enactment on the basis of the legislature’s own assessment of rights in cases involving contestable rights, which does not correspond to any feature in the primary rights-creating instrument in relation to the United Kingdom (namely the ECHR, from which the rights set out in the HRA are taken).⁶⁹ The attempt to transplant a Canadian “democratic dialogue” model to the United Kingdom using the vehicle of the HRA is misplaced.

In New Zealand, s.6 of the New Zealand Bill of Rights Act 1990 (NZBORA) uses language similar to s.3(1) of the HRA, but the New Zealand Court of Appeal has declined to follow English authority on the potency of the interpretive obligation contained in s.3 of the HRA when applying s.6.⁷⁰ The difference in approach is justified in principle, because of the absence in the case of NZBORA of the international law dimension which is fundamental to the HRA. NZBORA creates a purely domestic set of constitutional rights, and the clear power of the courts to supply authoritative resolutions of contested rights issues which exists for domestic courts in the United Kingdom under the HRA (by reference to the Strasbourg jurisprudence) is absent. Therefore, as in Canada, there is greater scope for a debate between domestic institutions (courts and legislature) regarding the proper meaning and effect of contestable rights. Since the courts are not in such a clear position as the courts in the United Kingdom to deliver authoritative judgments about the meaning and effect of the relevant constitutional rights, and since there is no equivalent imperative to provide for rights-consistent interpretation of statutes to avoid the liability of the state before an international court, it is reasonable to infer that, despite the similarity of the wording of s.6 and s.3 of the HRA, the New

⁶⁸ See Young, *Parliamentary Sovereignty and the Human Rights Act*, 2009, fn.2 above, pp.112–113, and 115 and the citations there, and Ch.5 generally.

⁶⁹ Also relevant is s.1 of the Charter, which states that the rights and freedoms which it guarantees are “subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The scope which this provision allows for balancing the interest of the general community against individual rights as set out in the Charter means that the Canadian courts are free to adopt a far more stringent interpretation of those rights than would be proper under the ECHR and the HRA (under which the relevant balance is inherent in the rights themselves: cf. *Brown v Stott* [2003] 1 A.C. 681 PC (Scotland) at 704), so that Canadian authority as to the meaning of rights set out in the Charter has not been followed in cases involving Convention rights: see, e.g. *R. v DPP Ex p. Kebeline* [2000] 2 A.C. 326 at 385–386.

⁷⁰ *R. v Hansen* [2007] 3 N.Z.L.R. 1.

Zealand legislature intended to strike a different balance between the courts' law-modifying powers under s.6 to promote protection of human rights and the countervailing rule of law values and democratic principle. That balance, as determined in *R. v Hansen*, allows for lesser judicial powers to modify legislation by the special interpretive process authorised by s.6 than under the HRA. This is justified, because the factors in support of the more powerful approach under the HRA, displacing usual (and very powerful) considerations of the rule of law and democratic decision-making, are that much weaker in the context of NZBORA.

The imperative of conformity to Strasbourg case law is absent in New Zealand, which means that there are no grounds to understand s.6 as establishing a qualifying rule that gives default priority to some equivalent to that case law. Taking s.6 to have the full strength of a qualifying rule would gravely undermine interpretive reasoning, because New Zealand lacks what is present in relation to the HRA, namely an authoritative source of information about the detailed content of Convention rights in the form of the case law of the ECtHR. In the New Zealand context, s.6 is better understood as a presumption that gives one reason to think that what the legislature was likely to mean is consistent with the rights affirmed in the NZBORA, subject to reasonable limits as allowed by s.5. Precisely how the content of such rights should be identified is controversial, and Parliament may often decide to specify them in ways that the courts would not themselves have chosen. The section warrants presuming that Parliament intends not to breach the rights as reasonably specified, but again the proposed interpretation must be one that it is plausible to judge Parliament intended.

The Supreme Court in *R. v Hansen* in effect adopted this approach. The judges unanimously rejected a proposed modified interpretation of the phrase "until the contrary is proved" in s.6(6) of the Misuse of Drugs Act 1975, declining to follow *R. v Lambert*⁷¹ on the grounds that the relevant phrase could not plausibly be read in this way. Blanchard J. noted the understanding that was open to legislators in 1975,⁷² and while he referred to the composite intention of Parliament then and in 1990, it appears that where the former is clear, that ends the matter.⁷³ Tipping J. observed that it was entirely clear how Parliament in 1975 and 2005 had understood the phrase,⁷⁴ and that a proposed interpretation must be rejected if it cannot be reconciled with what Parliament clearly meant.⁷⁵ McGrath J. understood s.6 not to displace the usual focus on the text or the significance of the statutory purpose, scheme and context,⁷⁶ but instead to supplement those criteria.⁷⁷ Whatever interpretations were adopted, he insisted, had to be reasonably available in the way that s.5 of the Interpretation Act (NZ) suggested.

Conclusion

The international dimension of the HRA is critical to understanding the operation of s.3 of the Act, to locating the boundary between s.3 and s.4 and to the adoption

⁷¹ [2001] UKHL 37; [2002] 2 A.C. 545.

⁷² *R. v Hansen* [2007] 3 N.Z.L.R. 1 at [53].

⁷³ *Hansen* [2007] 3 N.Z.L.R. 1 at [61].

⁷⁴ *Hansen* [2007] 3 N.Z.L.R. 1 at [99].

⁷⁵ *Hansen* [2007] 3 N.Z.L.R. 1 at [166].

⁷⁶ *Hansen* [2007] 3 N.Z.L.R. 1 at [237].

⁷⁷ *Hansen* [2007] 3 N.Z.L.R. 1 at [252].

of a proper approach to the determination of the meaning and effect of Convention rights by the domestic courts. This dimension is ignored in theories of “democratic dialogue” between courts and legislature under the HRA. The idea of such a dialogue is misplaced in the context of the HRA. Section 3 of the HRA creates new and substantial uncertainty regarding the interpretation of legislation. This involves a degree of departure from the rule of law ideal. Since it also introduces considerable judicial discretion to qualify, at times sharply, what would otherwise be the meaning of legislation, it involves a degree of departure from ordinary democratic principle. These are profound effects on the legal system which should be carefully considered by the courts when deciding whether and when it is right to employ the interpretive power in s.3.⁷⁸ The significance of s.3 should not obscure, however, that it operates by bearing on what inferences may properly be drawn about legislative intent, albeit (in relation to pre-HRA statutes) by way of an unusual form of amendment and (in relation to post-HRA statutes) with the introduction of a significant degree of indeterminacy as to the content of the Convention rights which may qualify the meaning of any statutory text and regarding the extent to which a particular legislative provision requires the default application of the Convention rights to be set aside. Section 3 of the HRA introduces a major change to the constitutional context in which legislation falls to be interpreted, but it is important to remember that it still operates to promote conformity with the Convention rights by a process of interpretation of particular statutes, which requires continued judicial attention to the legislative intent in enacting those statutes. [Ⓞ]

⁷⁸ Ultimately, it may be suggested, it is the perceived benefit to the United Kingdom of being party to the ECHR, the Council of Europe and the European Union, and of encouraging other neighbouring states to adopt constitutional values similar to its own in order to promote peace between states (to avoid the sort of conflict of constitutional values which contributed to World War II: see M. Mazower, *Dark Continent: Europe's Twentieth Century* (London: Allen Lane, 1998), Ch.1; cf. P. Bobbitt, *The Shield of Achilles* (London: Allen Lane, 2002), Ch.17 and at pp.776–777) and respect for human rights across Europe and elsewhere in the world, which leads through the ECHR and the HRA to—and justifies—the sacrifice, to a degree, of rule of law and democratic values involved in the adoption of s.3 of the HRA.

[Ⓞ] Canada; Democracy; Human rights; Legislative intention; New Zealand; Rule of law; Statutory interpretation